

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

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| <b>In the Matter Of:</b>                        | : |                             |
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| <b>Stainless Steel Sheet and Strip In Coils</b> | : | <b>Secretariat File No:</b> |
| <b>From Mexico: Final Results of 2004/2005</b>  | : | <b>USA-MEX-2007-1904-01</b> |
| <b>Antidumping Review</b>                       | : |                             |
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**DECISION OF THE PANEL ON REMAND**

**PANEL MEMBERS:<sup>1</sup>**

Joseph I. Liebman, Chair  
Luis Felipe Aguilar  
Gisela Bolívar  
Cynthia C. Lichtenstein  
Dale P. Tursi

**APPEARANCES:**

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<sup>1</sup> The Panelists wish to express their appreciation for the support received from Panel Assistants Fiamma Rizzo, Ricardo J. Peraza, Amalia B. Chamorro and Nick Ranieri

## **PANEL DETERMINATION ON REMAND**

### **NAFTA CHAPTER 19 STAINLESS STEEL STRIPS AND COIL FROM MEXICO USA-MEX-2007-1904-01**

#### **I. PROCEDURAL HISTORY**

This Panel was constituted under Article 1904(2) of the North American Free Trade Agreement (“NAFTA”)<sup>1</sup> and Section 516(A) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(a)(g)) (“Tariff Act”) following a Request for Panel Review issued by ThyssenKrupp Mexinox S.A. de C.V. and Mexinox USA, Inc. (“Mexinox”) (respondents in the administrative proceedings) in respect of a Final Administrative Review pertaining to *Stainless Steel Sheet and Strip in Coils from Mexico*<sup>2</sup> issued by the Administrating Authority, the United States Department of Commerce (“Commerce”). Both Mexinox and AK Steel Corporation, Allegheny Ludlum Corporation and North American Stainless (“Domestic Industry”) (petitioners in the administrative proceedings) filed timely complaints on February 21, 2007. Thereafter, a decision was issued by this Panel on April 14, 2010 (original decision),<sup>3</sup> remanding to Commerce to: 1) to recalculate Mexinox’s dumping margins without zeroing,<sup>4</sup> and 2) to recalculate the indirect selling expense ratio (ISE) in a manner not inconsistent with the Panel’s opinion and affirming Commerce’s determinations on all other issues being contested. Familiarity with the Panel’s decision is presumed here.

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<sup>1</sup> North American Free Trade Agreement, Dec. 17, 1992, United States-Canada-Mexico, Chapter 19, 32 I.L.M. 289 (entered into force Jan. 1, 1994).

<sup>2</sup> 71 Fed. Reg. 76978 (Dec. 22, 2006).

<sup>3</sup> The decision may be found at <http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312>.

<sup>4</sup> Panelists Lichtenstein and Liebman dissented on this issue.

The original decision provided for the remand results to be filed within forty-five days of April 14, 2010, but, following motions for reconsideration filed by Commerce and the Domestic Industry, and several extensions of time granted by the Panel, that time was extended till August 27, 2010.

Commerce filed its Remand Determination on August 27, 2010. On September 16, 2010, Mexinox filed a timely “Written Submission,” pursuant to NAFTA Rules of Procedures 73(2)(b),<sup>5</sup> challenging whether Commerce a) ignored the Panel’s direction to eliminate zeroing, b) improperly changed the assessment methodology, c) unlawfully refused to recalculate the cash deposit rate and d) has flaws in its revised indirect selling expense calculation.<sup>6</sup> Both Commerce<sup>7</sup> and the Domestic Industry,<sup>8</sup> on October 6, 2010, filed timely responses, pursuant to Rule 73(2)(c).

Thereafter, pursuant to two separate Orders of the Panel,<sup>9</sup> the parties were requested to respond to several questions issued by the Panel on behalf of one or more panelists. The last response<sup>10</sup> to the questions was filed on February 9, 2010.

## **II. PANEL JURISDICTION AND THE STANDARD OF REVIEW**

With respect to this Panel’s authority here, just as was the case with our initial decision, in conducting our review, we apply:

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<sup>5</sup> Mexinox Rule 73(2)(b) Written Submission.

<sup>6</sup> *Id.* pp 1-5.

<sup>7</sup> Commerce Rule 73(2)(c) Response.

<sup>8</sup> Domestic Industry Rule 73(2)(c) Response.

<sup>9</sup> The Orders were issued on October 27, 2010, and December 23, 2010.

<sup>10</sup> Reply by Mexinox to Commerce’s Responses to the Panel’s December 23, 2010 questions.

the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.<sup>[11]</sup>

Additionally, we are to apply the “general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.”<sup>12</sup> “General legal principles,” as used there, are stated in Article 1911 to include “principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies.”

Article 1904.3 of NAFTA requires this Panel to apply the “standard of review and general legal principles” that a U.S. court would apply in its review of Commerce’s determinations. The applicable standard is set out in Section 516A(b)(1)(B) of the Tariff Act, 19 U.S.C. § 1516a(b)(1), and requires a reviewing authority to “hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.”

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>13</sup> The reviewing authority must take into account evidence that supports as well as fairly detracts from the weight of the evidence relied on by the agency in reaching its conclusions.

But it is well settled that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by

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<sup>11</sup> NAFTA, Art. 1904.2.

<sup>12</sup> NAFTA Art. 1904.3.

<sup>13</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (“*Universal Camera*”); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

substantial evidence.”<sup>14</sup> The reviewing authority therefore may not “displace the [agency’s] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo.”<sup>15</sup> In reviewing an agency interpretation of a statute, the reviewing authority must employ the traditional tools of statutory construction to determine first whether Congress has directly spoken to the precise question at issue. If Congress’ intent is clear, that is the end of the matter.<sup>16</sup>

However, if the reviewing authority determines that the statute is silent or ambiguous with respect to the specific issue before it, a second question arises as to whether the agency’s construction of the statute is reasonable given the express terms of the relevant statutory provision and the objectives of the scheme as a whole.<sup>17</sup> Deference applies to the agency’s statutory construction and a reviewing authority must defer to a reasonable interpretation of the statute even if it would have preferred another.<sup>18</sup>

### **III. DISCUSSION OF THE ISSUES**

Mexinox in its Rule 73(2)(b) Written Submission essentially raises three broad issues which are as follows (p. i):

#### 1. Commerce Failed to Follow the Panel’s Instructions to Recalculate the Assessment Rate Without Zeroing, and Commerce’s

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<sup>14</sup> *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-620 (1966).

<sup>15</sup> *Universal Camera*, 340 U.S. at 488.

<sup>16</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”); *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9).

<sup>17</sup> *Chevron*, 467 U.S. at 843; *Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp. 2d 807, 813 (Ct. Int’l Trade 1998); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

<sup>18</sup> *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir.1992); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994); *Mitsubishi Heavy Indus., Ltd. v. United States*, *supra*.

Adoption of a New Entry Assessment Methodology to Collect the Margin of Dumping is Not in Accordance with Law.

2. Commerce Improperly Refused to Recalculate the Cash Deposit Rate without Zeroing.

3. Commerce's Recalculation of the U.S. Indirect Selling Ratio is Unreasonable and is Not Consistent with the Panel's Decision.

The Panel will rule on each of these issues in the discussion that follows.

**A. Whether Commerce complied with the Panel's direction to recalculate Mexinox's dumping margins without the application of zeroing.**<sup>19</sup>

**(1) Background**

The Department of Commerce ("Commerce") issued its remand determination on August 27, 2010 ("Remand Determination") in response to this Panel's decision, dated April 14, 2010 ("Panel Decision"). The Panel Decision upheld Commerce on several counts, but remanded back to Commerce, inter-alia, the issue of zeroing. Specifically, this Panel remanded the issue back to Commerce as follows:

...this Panel remands this matter back to the DOC to re-calculate Mexinox's dumping margins without zeroing...<sup>[20]</sup>

In response to this Panel's remand instructions, Commerce issued its Remand Determination. On the issue of zeroing, Commerce, once again, articulated at great length its disagreement with the Panel and noted that it filed the remand determination under protest.<sup>21</sup> It

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<sup>19</sup> Panelists Lichtenstein and Liebman dissent on this issue. See dissenting opinion following the Panel's remand order, below, p. 33.

<sup>20</sup> Panel Decision, at 24.

<sup>21</sup> Commerce's Remand Determination, at 3.

also discussed, at some length, that it had the right to explain its disagreement with remand orders in general and with this remand in particular.<sup>22</sup>

This Panel notes that the Federal Circuits' reasoning on the issue of zeroing continues to evolve. In both *Dongbu Steel Co., Ltd. v. United States*<sup>23</sup> and *JTEKT Corporation v. United States*,<sup>24</sup> the court found that Commerce's interpretation of the relevant statutory provision was unreasonable and remanded the matters in order for Commerce to provide its reasoning. In *Dongbu*, the court found that any deference owed to Commerce must yield when Commerce attempts to assert the deference it is owed in place of reasoned articulation of its methodologies. Specifically, the court held that deference did not excuse Commerce from explaining why it should be permitted to apply two different definitions with respect to the use of zeroing in investigations and administrative reviews. Similarly, in *JTEKT*, the court vacated and remanded the case in order for Commerce to provide a clear explanation for interpreting the same statutory provision inconsistently in the application of zeroing in administrative reviews and not in investigations. The court indicated that if Commerce in the trial court proceedings could not provide an adequate explanation for the differing methodologies, then the different interpretations for the two separate kinds of determinations would be unreasonable and arbitrary.

This Panel will not entertain the relitigation of issues pertaining to zeroing. The issues of zeroing were addressed and concluded in our previous opinion. This Panel determination will only address the issue of whether Commerce followed the Panel's instructions. That is, did Commerce follow the Panel's Remand Order not to zero or should it be remanded accordingly.

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<sup>22</sup> *Id.* pp 9-11.

<sup>23</sup> 635 F.3d 1363 (Fed. Cir. 2011).

<sup>24</sup> \_\_F.3d\_\_, 2011 U.S. App. LEXIS 13252 (Fed. Cir. June 29, 2011).

The Remand Determination employs a new methodology which Commerce contends is both compliant with the remand and comports with the antidumping statute. The Remand Determination claims that Commerce did not use zeroing in recalculating Mexinox's dumping margins. It argues that zeroing occurs at the aggregation stage when Commerce calculates a rate for cash deposit purposes or a rate for assessment purposes. Commerce reasons that absent the aggregation of dumping margins, it is conceptually impossible to zero.<sup>25</sup>

The Remand Determination contends that this methodology is consistent with the antidumping statute. It holds that the antidumping statute defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise". 19 U.S.C. 1677(35)(A). It notes that this term is distinct from the definition of the "weighted-average dumping margin" under 19 U.S.C. 1677(35)(B). In keeping with the definition of dumping margin, the Remand Determination explains that it calculated dumping margins pursuant to 19 U.S.C. 1677(35)(A) by comparing normal value ("NV") with constructed export price ("CEP"). Where NV was not greater than CEP, Commerce did not assess antidumping duties. For U.S. sales, where NV was greater than CEP, Commerce calculated the duty owing on each sale as the absolute dollar amount by which the CEP of the U.S. sale was lower than NV.<sup>26</sup> Since there was no aggregation of comparisons, the Remand Determination states that, by definition, there could not be zeroing. Rather, it merely examined individual sales separately and determined the duty for each sale. *See* Commerce's Remand Determination at 20-21.

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<sup>25</sup> Commerce's Remand Determination, at 16.

<sup>26</sup> *Id.* pp 16-17.

The Remand Determination goes to great lengths to liken this methodology to the prospective normal value system operated by Canada and other WTO members. It also notes that this is the same methodology for calculating dumping margins that the Treasury Department used in the past before zeroing was in use.

The Remand Determination maintains that Commerce is not required to calculate an importer specific assessment rate, but has the discretion to use a sale-by-sale assessment. It cites the pertinent regulation, "...the Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review." 19 C.F.R. 351.212(b)(1). It reads the word "normally" as imbuing Commerce with the discretion to use other methods, as required under the circumstances.<sup>27</sup> It maintains that as the Panel did not instruct Commerce to use a specific methodology, it was open to Commerce to pick the appropriate methodology.

It maintains that its changed methodology is justified by the Panel's remand instruction that it does not use its normal methodology. *See* Commerce's Remand Determination at 22-23. Again, it recounted the Panel's reasoning that led to what Commerce believes to be the Panel's erroneous conclusion. Commerce also attempts to justify its departure from longstanding methodology on the basis that it believes that this assessment methodology is comparable to the assessment methodologies of other WTO members.<sup>28</sup>

It then addressed its previously stated policy reasons against the "master list" method. The Remand Determination concedes that Commerce has previously opposed the use of this method on policy grounds. However, in now adopting this method, it cites its present ability to

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<sup>27</sup> *Id.* at 22.

<sup>28</sup> *Id.* at 24.

link specific sales to specific entries, advances in computer technology which overcome previous practical considerations and case specific factors.<sup>29</sup>

## **(2) Mexinox's position**

Mexinox asks that this Panel remand the zeroing issue back to Commerce. It argues that Commerce ignored the Panel's direction to eliminate zeroing and that Commerce improperly changed the assessment methodology.

Mexinox argues that Commerce ignored the Panel's remand order to eliminate zeroing from its dumping margins calculations. Mexinox argues that rather than simply eliminating zeroing from the calculation, as it was instructed to do, Commerce engaged in a results-oriented methodology designed to frustrate this Panel's remand instruction. Mexinox argues that Commerce should simply have eliminated a couple of programming lines in its dumping program. Instead, it argues that Commerce deployed a new entry specific methodology which continues to zero.

Mexinox argues that Commerce's explanation that it did not zero is not credible. Commerce maintains that it has not zeroed because it did not aggregate specific transaction margins. Mexinox argues that by confusing the margin calculation and the assessment methodology, Commerce is using semantics rather than substance to address the Panel's remand instruction. It contends that even though Commerce did not aggregate specific transaction margins, the effect of removing transactions which yielded zero or negative margins is to in effect remove from the margin any non positive margins which reduce the margin and in effect zero.

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<sup>29</sup> *Id.* pp 24-25.

Mexinox notes that Commerce's proposed methodology assesses duties on a sales specific basis. Mexinox contends that Commerce essentially compares the constructed export price of individual US sales to corresponding weighted average normal value. In so doing, Mexinox argues that Commerce excludes sales that occurred prior to the period of review and transactions with a negative comparison result-where CEP is higher than NV. On the basis of comparisons with positive differences between NV and CEP, which are a fraction of all of the transactions, Mexinox states that Commerce proposes to assess a duty which is the individual differences between NV and CEP on specific sales. Mexinox points out that Commerce treats the majority of negative transactions as zero rather than negative. Mexinox maintains that, essentially, Commerce once again ignores all transactions where the CEP is equal to or exceeded zero and thereby calculated a dumping margin which, for all intents and purposes, zeroed.

Mexinox also contends that Commerce has impermissibly changed its methodology. It maintains that Commerce has abandoned its long standing methodology in favor of entry specific matching. Mexinox argues that this new methodology could not be introduced at this stage because it was not argued by the parties during the proceedings and not requested by this Panel in its remand instruction.

Mexinox argues that Commerce has not justified the use of the new methodology. Mexinox argues that when Commerce abandons a long standing methodology, it must justify the new one on a reasonableness standard. It maintains that Commerce's assertion that the methodology is similar to other countries is both irrelevant and unjustified.<sup>30</sup>

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<sup>30</sup> Mexinox Rule 73(2)(b) Written Submission, pp 1-4.

### **(3) Commerce's position**

Commerce argues that the Remand Determination fully complies with the Panel's remand instructions and is in accordance with law. It maintains that it has recalculated Mexinox's dumping margins without zeroing. It also maintains that it has done so through the use of a methodology which is fully compliant with the antidumping statute and similar to the methodology employed by other WTO member countries.

It argues that Mexinox's contentions simply reflect its disagreement with Commerce's methodological choice. Commerce asserts that it made a reasonable choice with respect to the selection of methodology. Commerce points out that under the standard of review, its methodological choice need only be reasonable and not be the most reasonable, or even the one the Panel may have selected if it was reviewing the matter, much less the one preferred by Mexinox.

Commerce argues that it did not zero in the remand. It asserts that under U.S. law, zeroing only exists when dumping margins are aggregated. It reiterates that the Remand Determination employed a methodology that does not aggregate dumping margins determined pursuant to 19 U.S.C. 1677(35)(A). It stresses that Commerce did not propose to assess antidumping duties on any U.S. sale where normal value was not greater than the export price or constructed export price. It maintains that where normal value was greater than the export price or constructed export price, Commerce calculated the duty on each sale as the absolute dollar amount by which constructed export price of the sale was lower than normal value. It reasons that absent the aggregation of dumping margins there is, by definition, no zeroing. It stresses that this is not semantics, but the law.<sup>31</sup>

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<sup>31</sup> Commerce Rule 73(2)(c) Response, pp 6-7.

Commerce argues that its methodology is fully compliant with the antidumping statute. It argues that the antidumping statute defines the “dumping margin” as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” (19 U.S.C. 1677(35)(A)). It maintains that this is distinct from the definition of weighted – averaged dumping margin under 19 U.S.C. 1677(35)(B).

Commerce claims that the Remand Determination, consistent with the statutory definition of dumping margins, compared normal value with constructed export price. It states that for sales where normal value was not greater than constructed export price, Commerce did not assess antidumping duties. For sales where normal value was greater than export or constructed export price, Commerce explains that duty was assessed on each sale as the absolute dollar amount by which the export price or constructed export price was lower than normal value. It argues that in so doing, Commerce has reviewed and determined the amount of any antidumping duty under 19 U.S.C. 1675(a)(1)(B) and the dumping margin under 19 U.S.C. 1675(a)(2)(A)(ii) and that determination is the basis for the assessment of antidumping duties on each entry of subject merchandise that is covered by the determination pursuant to 19 U.S.C. 1675(2)(C).

It stresses that the plain language of 19 U.S.C. 1675(a)(2)(A)(ii) indicates that the statutory term “dumping margin” may be applied to individual entries or transactions. *See* Commerce Rule 73(2)(c) Response, pp 10-11, citing *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (Fed. Cir. 2003). It argues that Mexinox is deliberately confusing clear US statutory terminology with WTO terminology. It maintains that the relevant language is “dumping margin” under 19 U.S.C. 1677(35)(A) and not Mexinox’s preferred terms of “intermediate comparisons” or “absolute margins” as found in WTO Agreements. *See*

Commerce Rule 73(2)(c) Response, pp 11-12. It maintains that Mexinox’s argument that the term “dumping margin” in 19 U.S.C. 1677(35)(A) does not mean dumping margins for individual transactions and requires aggregation is contrary to both the plain statutory language and Federal Circuit precedent. In the statute, Congress drew an express distinction between a “dumping margin” defined in 19 U.S.C. 1677(35)(A) and a “weighted average dumping margin” defined separately under 19 U.S.C. 1677(35)(B).<sup>32</sup>

Commerce maintains that the Remand Determination’s use of a different methodology was justified. It argues that given the Panel’s instruction not to use zeroing, Commerce properly adopted a different methodology. It further argues that this methodology is within the scope of the remand and consistent with the statute. It further submits that this methodology is justified because it is consistent with both how the US administered its antidumping duty laws prior to adopting its assessment rate approach and with the antidumping duty regimes of other WTO members, particularly Canada. *See* Commerce Rule 73(2)(c) Response at 9 and pp 33-38.

Commerce rejects any assertion that it cannot rely on this methodology in the remand. Commerce argues that it has great discretion in the application of methodologies and that they are presumptively correct.<sup>33</sup> It argues that the remand instruction did not and that, indeed, this Panel could not, dictate Commerce’s methodological application. It asserts that the statutory framework and the regulations imbue the agency with great discretion as to its use of methodologies. Commerce maintains that the use of the word “normally” in the regulation specifically acknowledges that the agency may do otherwise. It then cites several judicial

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<sup>32</sup> *Id.* at 13.

<sup>33</sup> *Id.* at 25, citing *Thai Pineapple*, 187 F. 3d at 1365).

precedents for the proposition that Commerce is the master of antidumping law and must be accorded great deference in its selection and development of methodologies.

#### **(4) Analysis**

This Panel finds that Commerce did not follow its instructions with respect to zeroing. Therefore, this Panel remands to Commerce its Remand Determination to comply with its instructions.

The Remand Determination did not simply eliminate zeroing from its methodology. Rather, it switched to a completely new methodology which compares specific sales to specific entries. That is, its long standing assessment rate methodology has been abandoned in favor of a specific rate or “master list methodology.”

Mexinox has raised various objections to this new methodology. It argues that Commerce went beyond the remand instructions, exceeded its authority and zeroed. Its objections can be broken down into two main arguments. It argues that this new methodology goes beyond the remand instruction and ignores the Panel’s remand instruction because it essentially uses semantics to once again, in effect, zero. It further argues that this methodology is not in accordance with law.

The Panel’s remand instruction to the investigating authority was as simple as it was clear. The Panel stated:

...this Panel remands this matter back to the DOC to re-calculate Mexinox’s margins without zeroing...

The Panel did not instruct Commerce to change its methodology. It simply remanded back to Commerce to not zero in its calculation of the dumping margin. Commerce argues that because the Panel instructed it not to use its normal methodology, the Panel in effect instructed it

to use a new methodology. However, the Panel instruction did not order Commerce to abandon the assessment rate methodology, the instruction only precluded Commerce from using zeroing. This Panel sees no reason precluding Commerce from employing its assessment rate methodology without zeroing.

The Remand Determination calculated an antidumping duty which is not accurate. The remand order from the Panel asked Commerce to recalculate the dumping duty because the one calculated was not accurate. In order to more accurately calculate the antidumping duty, the remand specifically instructed Commerce to not rely on zeroing. In recalculating the dumping margin, Commerce claims not to have zeroed. The fact is that Commerce ignored the overwhelming number of transactions, including all transactions where the CEP did not exceed normal value. Given that, in the majority of the transactions, CEP exceeded normal value and therefore those transactions were excluded from the comparison, the fact remains that the dumping analysis was limited to only a fraction of the universe of transactions. Leaving aside for the moment the question of whether this is a result-oriented methodology, this Panel finds that this methodology, based on a fraction of available transactions, could not be accurate. The Panel sees no reason to delve into whether the new results were exactly the same as the old results as urged by Mexinox or whether the results were somewhat different as urged by Commerce. The fact remains that the results are not accurate.

As to whether Commerce's methodology is consistent with law, Commerce's selection must be not only a permissible construction under law, but in cases where Commerce seeks to change a long standing methodology, **it must justify the departure**. While Commerce enjoys discretion in selecting the methodology, this discretion is not unfettered. The methodology must

be reasonable and where there is a departure from established methodology, there must be a reasonable explanation for the departure. Commerce must explain why the change is appropriate and necessary in the circumstances. (*Sanyo Elec. Co. v United States*, 9 F.Supp.2d 688 (Ct. Int'l Trade 1988).

Commerce argues that the statutory language permits a specific entry or master list approach. Even if the law permitted such an approach, the law also requires that Commerce justify abandoning a long standing methodology. In this case, Commerce's task of justifying its change is heightened given Commerce's previous comments relating to the shortcomings of the very methodology it now seeks to utilize. In fact, Commerce has previously noted its opposition to the master list approach on policy grounds. It cited technical difficulties in linking specific entries to specific sales. It has also noted practical difficulties in creating and using master lists in certain large cases. As well, there lie risks of distortions inherent in switching from one methodology to the other.

In *SFK USA Inc v. United States*,<sup>34</sup> the Federal Circuit held that Commerce failed to adequately explain its decision to change its methodology "[w]hen an agency changes its practice, it is obligated to provide an adequate explanation for the change."<sup>35</sup> This Panel finds that Commerce did not adequately explain its departure from an assessment rate methodology to the master list methodology. In accordance with these well established court decisions, this Panel requires that Commerce adequately justify its departure from a long standing methodology and adequately explain its new reliance on a methodology that it has previously publicly

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<sup>34</sup> Case No. 2010-1128 (C.A. Fed., Jan. 7, 2011).

<sup>35</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 42, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

disavowed. Commerce's discretion is not absolute and the extent of the justification required to permit changes in the application of methodology is commensurate with the circumstances.

We find no merit in Commerce's assertion that its departure from its long standing assessment rate methodology was necessitated by this Panel's remand. The Panel's remand simply and succinctly instructed Commerce to more accurately recalculate the margins without zeroing. Consideration of all the transactions is likely to enhance the accuracy in the dumping margin. Reliance on a methodology that has fallen into disuse is likely to cast more doubt on the process. As Commerce has noted (emphasis added):

Historically, [Commerce] (and, before it, the Department of Treasury) used the so-called "master list" (entry-by-entry) assessment method. Under the master list method, [Commerce] would list the appropriate amount of duties to assess for each entry of subject merchandise separately in its instructions to the Customs Services. However, in recent years, the master list method has fallen into disuse for two principal reasons. First, in most cases, respondents have not been able to link specific entries to specific sales, particularly in CEP situations in which there is a delay between the importation of merchandise and its resale to an unaffiliated customer. Absent an ability to link entries to sales, [Commerce] cannot apply the master list method. Second, even when respondents are able to link entries to sales, there are practical difficulties in creating and using a master list if the number of entries covered by a review is large. Preparing a master list that covers hundreds or thousands of entries is a time-consuming process, and one that is prone to errors by [Commerce] and/or Customs Service staff....<sup>[36]</sup>

Fair and accurate antidumping duty rates are fundamental tenets of U.S. law. The Federal Circuit has described the "overarching purpose of the antidumping" as being a "fair comparison."<sup>37</sup> In the words of the Court of International Trade, "it is axiomatic that fair and

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<sup>36</sup> Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,314 (May 19, 1997).

<sup>37</sup> *Micron Tech, Inc. v. United States*, 243 F. 3d 1301, 1313 (Fed. Cir. 2001). See also e.g. *Koyo Seiko Co. Ltd. v. United States*, 36 F. 3d 1565, 1573 (Fed. Cir. 1994) (the purpose of the antidumping law "is to calculate antidumping duties on a fair and equitable basis"); *Rhone Poulenc, Inc v. United States*, 899 F. 2d 1185, 1191 (Fed. Cir. 1990) ("the basic purpose of the statute: determining current margins as accurately as possible"); *Shakesproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 102 F. Supp. 2d 486, 495 (Ct. Int'l Trade 2000)

accurate determinations are fundamental to the proper administration of our dumping laws.”<sup>38</sup>

Commerce public opposition to the master list approach and disuse of this methodology belies its frailties and calls into question the proper application of antidumping laws. In these circumstances, Commerce has not discharged its obligation to justify the abandonment of its long standing methodology.

Under these circumstances, Commerce has not provided a reasonable explanation for its change in methodology. Under the Remand Determination, Commerce states that it was compelled to use this new methodology as a result of the remand instruction. As discussed, the Panel did not instruct Commerce to abandon its methodology; it only instructed it not to use zeroing in the assessment rate methodology that it has continually used.

Commerce’s justification that other countries use a similar methodology and that the United States previously used a similar methodology is not compelling. Such justification is confusing and underscores Commerce’s misunderstanding of the Panel’s remand. The confusion emanates from Commerce’s assertion that other countries use a similar methodology. While most other countries have adopted a prospective system, there are many variations in the application of the systems. There is, in fact, no single unitary antidumping duty collection system used by other WTO member countries. Prospective systems fall into three general categories—prospective ad valorem systems, prospective per unit systems and prospective normal value systems. In fact, many incorporate a mixture of systems. Given the variation in the

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(“any given methodology must always seek to effectuate the statutory purpose—calculating accurate dumping margins”).

<sup>38</sup> *Koyo Seiko Co. v. United States*, 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990) (discussing the fundamental goal of US law in the context of correcting clerical errors to achieve an accurate result).

application of these systems, references to the prospective system utilized by other WTO member countries is more likely to engender confusion than serve as useful reference points.

Importantly, the Panel did not remand on the basis of WTO jurisprudence. The Panel remanded strictly on the basis that the application of the original methodology was contrary to U.S. law. As such, to now suggest that this new methodology is comparable to that used by other WTO countries is not responsive to the Panel's concerns. The fact that Commerce made much of the fact that Canada is one such country is equally not compelling. Similarly, the fact that the United States used a similar methodology some time ago does not justify the departure.

The Panel remains concerned that the dumping margin is not accurate. The Panel is mindful of the statute's direction that as accurate a dumping margin as possible be calculated. This new methodology ignores the bulk of the transactions and sets a dumping margin on the basis of a fraction of the transactions.

Based on the foregoing and after review and consideration of all arguments raised by the participants, this Panel finds that Commerce failed to follow the Panel's remand order to re-calculate Mexinox's dumping margins without zeroing, since such re-calculation excluded positive value sales.

## **B. Whether Commerce was Correct in Determining that it was Not Required to Re-Calculate Mexinox's Cash Deposit Rate.**

### **Positions of the Parties:**<sup>39</sup>

#### **Mexinox:**

Mexinox, in its comments filed with Commerce on August 18, 2010, in response to Commerce's draft determination on remand,<sup>40</sup> asserted that Commerce was "instructed by the Panel to recalculate the margins of dumping without zeroing," language that is not the same as that used by the Panel in its Order.<sup>41</sup> Mexinox went on in the letter to assert that it disagrees with Commerce's statement in the "Draft Remand at 6"<sup>42</sup> that "[s]ince the cash deposit rate calculated in the 2004-2005 Final Results is no longer in effect, the only task before the Department is to determine the amount of any antidumping duty for Mexinox's entries during the period of review (POR)" (italics in original).<sup>43</sup> Specifically, Mexinox said that the "Department appears to be arguing that the error in using zeroing to determine the cash deposit rate is moot."<sup>44</sup>

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<sup>39</sup> Essentially, the arguments presented by the parties administratively to comment on the draft remand results are repeated in the papers filed before this Panel in this remand review, although the arguments are now directed towards the Remand Determination Commerce filed before the Panel on August 27, 2010. Consequently, we will summarize and cite to the arguments made during the administrative stage, and we will only discuss or cite to the papers the parties filed before the Panel when different, necessary or helpful to a fuller understanding of the position of any of the parties here. In that regard, Mexinox filed a Rule 73(2)(b) Written Submission, see n. 7, and on October 6, 2010, the Domestic Industry and Commerce each filed their own Rule 73(2)(c) Response to Mexinox's Rule 73(2)(b) Statement.

<sup>40</sup> The Domestic Industry also filed comments on the same date, and Mexinox and the Domestic Industry both filed rebuttal comments on August 29, 2010. See Remand Determination, p. 2.

<sup>41</sup> See Letter of August 18, 2010, from Craig Lewis, counsel for Mexinox, "Stainless ... Comments on Draft Remand Determination ("Mexinox August 18, 2010 Letter"), at 8. However, the Panel's Remand Order says: "the Panel remands this matter back to Commerce to re-calculate Mexinox's dumping margins without zeroing." Panel Decision, at 54. We note the difference in phraseology without further comment.

<sup>42</sup> The "Draft Remand" was provided to Mexinox and the Domestic Industry on August 12, 2010, in a Memorandum of the same date, "...Draft Remand Determination . . ." ("Draft Remand"), however the language which is the basis for Mexinox's assertion appears on p. 2, rather than p.6, as was stated in the Mexinox August 18, 2010 Letter, at 8.

<sup>43</sup> Draft Remand, at 1-2.

<sup>44</sup> Mexinox August 18, 2010 Letter, at 8.

Mexinox went on to argue that the cash deposit rate (“CDR”) is not moot because it continues to have legal effects regarding the revocation request made under 19 C.F. R. § 351.222(b) with respect to the period of 2005-2006, particularly because that revocation request is currently before another NAFTA panel, USA-MEX-2008-1904-01, and has legal effects with respect to five-year sunset reviews before Commerce and the United States International Trade Commission and that the absence of a recalculated cash deposit prevents Mexinox from complying with 19 C.F.R. § 351.222(c)(3)(iii)A.<sup>45</sup>

Mexinox proceeded to argue that certain decisions where judicial review was found not to be moot, and the actions were not subject to dismissal based upon final liquidations, demonstrate that the CRD claim here is not moot<sup>46</sup> Mexinox did acknowledge that the “cash deposit rate no longer governs the amount of deposits required on entries of subject merchandise....”<sup>47</sup>

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<sup>45</sup> Mexinox August 18, 2010 Letter, p. 9.

<sup>46</sup> Mexinox August 18, 2010 Letter, at 8-9. In support of its contentions, Mexinox cited *Gerdau Ameristeel Corporation v. United States*, 519 F.3d 1336, 1341-42 (Fed. Cir. 2008) (“*Gerdau*”), *Hylsa, S.A. de C.V. v. United States*, 469 F. Supp. 2d 1341 (Ct. Int’l Trade 2007) (“*Hylsa*”) and *Ashai Seiko Co. Ltd. v. United States*, 33 CIT \_\_\_, Ct. Intl. Trade LEXIS 137; SLIP OP. 2009-13 (Ct. Int’l Trade 2009) (“*Ashai I*”). We note that, although Mexinox continued to rely upon these three cases in a filing made before this Panel on September 16, 2010, “...Mexinox Rule 73(2)(b) Written Submission . . .” (“*Mexinox Rule 73(b)(2) Submission*”), pp.29-30, it has not brought to our attention the subsequent order of dismissal entered by the USCIT, based upon an opinion and judgment in favor of Commerce. *Ashai Seiko Co., Ltd. v. United States*, 751 F. Supp. 2d 1335 (Ct. Int’l Trade 2010) (dismissed for failure to exhaust administrative remedies) (*Ashai II*).

No appeal was filed by Ashai; therefore the decision in *Ashai I* is *dicta*. Commerce was not an aggrieved party who could perfect an appeal from the final decision in *Ashai II*. Therefore, the interlocutory opinion and order in *Ashai I*, which Mexinox has relied upon, is not even *stare decisis* between the parties to that case. Moreover, apart from the fact that the decision there is not binding on this Panel, even the persuasiveness of *Ashai I* is diminished because the final decision was on other grounds. To the extent needed, we discuss these three cases or Mexinox’s reliance upon the issues addressed in them later.

<sup>47</sup> Mexinox August 18, 2010 Letter, at 10. Furthermore, based upon responses from all parties, it is clear that Mexinox, in the event the final assessed rate entitles Mexinox to any refunds of duties on entries where the estimated duties paid or cash deposit rate is higher than the final assessed rate, upon liquidation of the entries, will be entitled to statutory interest on any excess monies refunded. Here the liquidation of entries involved has been suspended, pursuant to Mexinox’s request, pending the final determination of duties upon liquidation, once

**Domestic Industry:**

The Domestic Industry asserted that this Panel did not order Commerce “to determine a cash deposit rate” and simply stated in the majority opinion that Commerce should “recalculate Mexinox’s dumping margins without zeroing. Panel Report [Decision] at 24.”<sup>48</sup> Continuing, the Domestic Industry argued that any sunset review proceedings are outside the scope of this Panel’s jurisdiction, and Mexinox will be able to raise such an issue in other administrative proceedings by referencing the significance of any new dumping margin determination made by Commerce as a result of this Panel’s review. The Domestic Industry went on to point out that any CDR calculation being sought by Mexinox here would not be relevant to a regular three-year revocation proceeding or any sunset proceeding because a CDR is just an interim measure until an actual assessment rate is determined and the interim CDR rate here has been superseded by subsequent administrative reviews that have determined the actual assessment rate for the entries involved in those reviews. Consequently, Commerce would not rely upon a CDR for this POR to evaluate whether a respondent has engaged in dumping during the period under review and the CDR issue was, thus, moot.<sup>49</sup>

**Commerce’s Remand Determination:**

In its Remand Determination, Commerce, after summarizing the respective positions of Mexinox and the Domestic Industry, rejected Mexinox’s claims, finding that the cash deposit requirements currently in effect are those that stem from a 2007-2008 administrative

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Commerce enters a new final determination pursuant to the final determination of this Panel. See “Mexinox’s Response to the Panel’s December 23, 2010 Order,” filed January 12, 2011, pp. 8-17.

<sup>48</sup> Petitioners [Domestic Industry] “...Rebuttal Comments on NAFTA Remand . . .,” filed August 19, 2010 (“Domestic Industry Remand Comments”), at 4.

<sup>49</sup> *Id.* pp. 4-5.

proceeding;<sup>50</sup> the Panel did not instruct Commerce to determine a new cash deposit rate; there is no revocation proceeding to which the CDR involved here (old or new) could be relevant because Mexinox did not make a revocation request covering the POR here (2004-2005); as Mexinox only had a revocation request with respect to 2003-2004 and Mexinox did not appeal Commerce's determination against Mexinox with regard to that period to either a U.S. court or a binational NAFTA panel, that revocation determination is final and conclusive.<sup>51</sup>

Additionally there is no revocation proceeding pursuant to 19 C.F.R. § 351.222(b)(2)(i) that is implicated in Commerce's determinations in the administrative review in this case. Therefore, this is not an issue before this Panel.<sup>52</sup> Moreover, as to any subsequently brought sunset review Commerce stated:

[T]he antidumping statute does not preclude the Department from considering the dumping margins calculated in this remand to determine whether dumping is likely to continue to recur if the dumping duty order is revoked.<sup>[53]</sup>

Finally, Commerce distinguished *Gerdaу, Hylsa* and *Ashat*<sup>54</sup> which were limited to the situations where, despite the liquidation of entries, which meant that the assessment

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<sup>50</sup> *Stainless Steel Sheet and Strip in Coils from Mexico*, 75 Fed. Reg. 17,122 (April 5, 2010) (amended final results of an administrative review). Commerce also stated that the CDR involved in this case has not been applied by Customs to entries at the border since February 11, 2008, referencing *Stainless Steel Sheet and Strip in Coils from Mexico*, 73 Fed. Reg. 7710 (Feb. 11, 2008).

<sup>51</sup> See Remand Determination, pp. 29-30.

<sup>52</sup> *Id.* p. 30.

<sup>53</sup> *Id.* at 31. Concomitantly, Mexinox argues that determination of a weighted average dumping margin is required on remand, but Commerce points out that that in a sunset review Commerce considers many factors and Mexinox's reliance upon 19 C.F.R. § 351.218(d)3(iii) is misplaced since the regulation, although it requires respondents to submit certain information in a sunset review, does not impose any substantive or procedural requirements on Commerce, and respondents' obligations are qualified by the term "as applicable." Thus, Mexinox would **not** be required to report a weighted-average dumping margin from the Remand when no such margin was calculated. See Remand Determination, pp. 31-32 and Commerce Rule 73(2)(b) Response, pp. 42-44.

<sup>54</sup> See n.46.

of duties had become final, the USCIT found that it should not dismiss these actions because doing so would deprive the importer of the opportunity to obtain a sunset review, which Commerce asserts would not be the case here.

**Analysis:**

After consideration of the respective positions of the parties presented in these proceedings, including, but not limited to, the challenge by the respondents, Mexinox, to Commerce's initial final dumping determination and the proceedings before this Panel challenging that determination; as well as the administrative proceedings pursuant the remand ordered by this Panel and the proceedings and papers filed here in these remand proceedings, whether highlighted in the foregoing summary, including, but not limited to, the written statements (briefs or memoranda of law) and answers provided by the parties to several Orders of this Panel directing questions to be responded to by the parties, we hold that Commerce's determination to **not** issue a recalculated cash deposit rate should be affirmed and that Mexinox's arguments and claims to the contrary, for the reasons expressed below, as well as on other grounds,<sup>55</sup> should be overruled.

In order to have a better understanding of our conclusion with respect to the CDR claim, it is necessary to look back to the original proceedings in this case. We begin with a look at the Complaint,<sup>56</sup> filed by Mexinox. While the Complaint contains 10 pages, the only reference to the cash deposit rate is as follows:

14. In the Final Results, Commerce calculated the overall margin of dumping (for both assessment and revised cash deposit

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<sup>55</sup> It is not necessary for us to summarize or comment upon every point and argument presented by Mexinox. We have carefully considered all its arguments.

<sup>56</sup> Mexinox's "Complaint," pursuant to NAFTA Rules of Procedure, Rule 39, was filed on February 21, 2007.

purposes) by setting to zero or disregarding intermediate price comparison results where the export price was at, or above, the corresponding normal value. *Id.* at 18-21 (comment 10).<sup>1571</sup>

The Prayer for Relief, which was included at the end of the Complaint, makes no reference to either the assessment rate or revised cash deposit.<sup>58</sup> Thereafter, Mexinox, in its initial Brief,<sup>59</sup> essentially repeats the language of allegation 14 of the Complaint, above, and the Brief contains a similar, in all material respects, request for relief, again not making any reference to a revised cash deposit rate.<sup>60</sup>

On the one hand the reference to the dumping margin in allegation 14 of the Complaint arguably could suggest that Mexinox was contemplating relief not only relating to the dumping margin, which would result in a new assessment rate, but to the

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<sup>57</sup> *Id.* at 4. The reference in the allegation to “comment 10” pertains to the Memorandum to the File: Final Results of the Antidumping Duty . . . (January 19, 2007), a copy of which was filed in these proceedings on March 23, 2007, along with a copy of the Final Determination published in the Federal Register and specifically incorporating the Memorandum to the File.

<sup>58</sup> See *id.* at 10. For completeness we set forth the complete “Prayer for Relief” which reads as follows:

- (1) hold unlawful, void and of no effect Commerce’s finding in the Final Results, that Mexinox dumped during the period of review;
- (2) hold those actions of Commerce described above, unlawful, void and no effect;
- (3) remand this matter to Commerce for disposition consistent with the Panel’s determination; and
- (4) grant such additional and further relief as the Panel deems just and proper.

<sup>59</sup> The Brief was filed on June 22, 2007, pursuant to NAFTA Rules of Procedure, Rule 56(1)(a)(iii) (“Mexinox Rule 56(1)(a)(iii) Brief”). See Mexinox Rule 56(1)(a)(iii) Brief, p. 8.

<sup>60</sup> See Mexinox Rule 56(1)(a)(iii) Brief, p. 40. There, Mexinox makes the following requests:

- (1) find that Commerce’s decisions to apply the zeroing methodology, to adjust the reported U.S. ISE ratio in the manner described, and to adjust the net financial expenses ratio in the manner described, are not supported by substantial evidence on the record, are not in accordance with the law, or both;
- (2) remand the Final Results to Commerce for further action not inconsistent with the Panel’s decision;
- (3) grant such other and further relief as the Panel deems just and appropriate.

CDR. On the other hand, the reference to methodology (“zeroing”) being used to calculate both here has no bearing on the actual issuance of instructions to Customs to collect the cash deposit in the future. Under the decision and Order pertaining to zeroing of this Panel, Commerce is plainly not permitted in this case to use zeroing for purposes of calculating a dumping margin.<sup>61</sup> Moreover, Mexinox has not identified any evidence of Commerce having a prior or existing practice of actually computing (determining a new CDR) and then directing Customs to implement such a rate when the old CDR is no longer in effect, as it has been superseded by another CDR from a subsequent administrative review.

At no time during the pendency of the proceedings challenging the initial determination, including other written filings made by Mexinox, or during its arguments at the oral hearing before the Panel held on September 10, 2009, did Mexinox bring to the attention of the Panel that the cash deposit that was in effect as a result of the original Final Determination by Commerce in this case was no longer in effect (being applied by Customs at the border), or that such rate had not been in effect since February 11, 2008.<sup>62</sup> Mexinox, even though it was perfectly aware from its participation in administrative reviews after the 2004-2005 POR that a new cash deposit rate might go into effect as a result, pending the completion of subsequent administrative reviews, and although it must

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<sup>61</sup> *Cf., Torrington Co. v. Unites States*, 44 F.3d 1572 (Fed. Cir. 1995) (“*Torrington Co.*”). The issue here is not the same as the one in *Torrington*. Commerce hasn’t argued that it may still use zeroing, despite the Panel’s decision in the initial stages of the case to compute a dumping margin for the purposes of computing a CDR if such a calculation were necessary. Rather, the issue which Commerce and the Domestic Industry assert is moot here, which we discuss later, is whether Commerce is required to actually calculate a new CDR, which would only be needed to issue instructions to Customs to collect duties at the border on new, ongoing, entries of dumped merchandise.

<sup>62</sup> See “Stainless Steel Sheet and Strip in Coils from Mexico,” 73 Fed. Reg. 7710 (Feb. 11, 2008), referenced in n.50.

have known that a new CDR actually went into effect as of February 11, 2008, did **not** at any time since the institution of the proceedings challenging the initial Final Determination involved here, seek expedited proceedings to potentially obtain a decision by this Panel prior to the implementation of the new February 11, 2008, CDR, or inform the Panel of the need for relief that included requiring Commerce to calculate a new CDR which would be needed for instructions to issue to Customs for duty collection purposes on new entries of dumped merchandise.<sup>63</sup> Also, Mexinox did not take advantage of the opportunity it had, pursuant to NAFTA Rules of Procedure, Rule 76, to have this Panel amend its Order of Remand to specifically address the matter of calculating a new CDR.<sup>64</sup>

From these events and all the actions taken and not taken by Mexinox, we draw the inference that Mexinox had no interest or expectation with respect to the subject of the cash deposit rate until sometime after the April 14, 2010 Panel Decision was issued or until the seeds of new legal theory regarding revocation proceedings relating to a different POR and/or sunset reviews were planted by ideas coalescing at the time

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<sup>63</sup> Thus, this case does not present the circumstances, where the methodology question that was involved in the *Torrington Co.* case, see n.61, created justification for the Federal Circuit to find that an exception to the “mootness doctrine,” so that the courts would retain jurisdiction to consider the correctness of the methodology used to determine a CDR, regardless of whether the actual calculations of a new CDR was mooted by a superseding CDR. Here Commerce, regardless of whether there is a dispute over whether it complied with the Panel’s Order to not use “zeroing” by adopting a new methodology, does not claim that it may still use zeroing as a methodology in this case with respect to CDR.

<sup>64</sup> In this regard, Mexinox, pursuant to the Order of this Panel, filed on May 13, 2010 its consolidated opposition to the separate motions filed by the Commerce and the Domestic Industry, pursuant to NAFTA Rule 76, for re-examination or reconsideration (the relief was denied by this Panel in an Order entered on May 24, 2010) and made no mention there that the Panel’s Remand Order needed modification to specifically address the need for a new CDR calculation and any instructions to Customs.

Mexinox first saw the Draft Remand determination as it was circulated by Commerce in August, 2010.<sup>65</sup>

The foregoing alone provides sufficient basis for this Panel to hold that Mexinox is raising a new claim in these proceedings and seeking relief that it did not raise or pursue in the prior proceedings, and as such the claim and relief being sought should be overruled/denied.<sup>66</sup> In any event, there are additional reasons to deny Mexinox's claim, which we now discuss.

Commerce's determination that the claim and relief with regard to CDR that Mexinox seeks is futile and unnecessary is reasonable. We have already, above, discussed the pertinent facts concerning this claim. We accept Commerce's explanation that it is totally unnecessary for Commerce to calculate and issue a new CDR because such action serves no necessary purpose, to do so would be futile and is moot. The rate applicable to the POR is no longer in effect and any new CDR will not implicate any prior revocation proceedings as there are none under review. Moreover, with respect to any potential sunset review proceedings, Commerce has provided a reasonable explanation of why it is not necessary to have a new CDR. We must presume that Commerce will not fail to fulfill its statement, set forth earlier in this decision (see p.23) that the antidumping statute does not "preclude the Department [Commerce] from

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<sup>65</sup> It is not reasonable to infer that Mexinox, until it was apprised of the Draft Remand indicating that only a new assessment rate for the purpose of issuing liquidation instructions would be determined by Commerce, was always contemplating, from the time Mexinox initiated binational Panel review here, that Commerce would calculate a revised CDR in this case, even though Commerce later issued instructions to Customs to collect duties on entries made after February 11, 2008, based upon a new CDR from that subsequent administrative review. It would have been unreasonable for Mexinox to have such expectations since there is no evidence that Commerce has a practice or even history of doing so when the existing CDR being reviewed has been superseded by a different CDR determined as a result of a subsequent administrative review for a different POR.

<sup>66</sup> Claims not pressed are abandoned or waived. *See, e.g., Yohey v. Collins*, 985 F. 2d 222, 224-25 (5th Cir. 1993), which this Panel relied upon in conjunction with denying a claim of the Petitioners (Domestic Industry), Panel Decision, p. 11.

considering the dumping margins calculated in [a new] remand to determine whether dumping is likely to continue to recur if the dumping duty order is revoked.”

Should Commerce, without appropriate justification and unreasonably in such a review, decline to abide by this statement and deny relief to Mexinox solely on the basis of there not being a new CDR then, after considering our decision on this aspect of the case we presume a reviewing tribunal will consider the appropriate relief to allow in the matter before it at that time.

With respect to Mexinox’s reliance upon several cases, cited earlier, that Mexinox presented as support for why the claim here is not moot and should not evade Panel review, the lack of occasion for reliance on those cases is not even a defense being asserted by Commerce, (see also our discussion at p. 21, n.46). As articulated by Commerce in its Remand Determination:

In this remand, the Department has determined that, if the remand results are affirmed and become final and conclusive, a weighted-average margin of dumping will *not* be part of the final determination for this administrative review. The issue here is not whether Mexinox's litigation is moot and should be dismissed by the Panel — there is no such claim here as the entries at issue remain unliquidated. Rather, the issue is whether the antidumping statute requires the Department to calculate a weighted-average dumping margin in this remand. The antidumping statute does not require the Department to calculate weighted-average margins in administrative reviews. In administrative reviews, the Department calculates weighted-average margins as a matter of discretion to determine the cash deposit requirements for deposits of estimated antidumping duties at the border. As we explained earlier, the new cash deposit requirements are already in place and, thus, recalculation of the cash deposit rate is unnecessary.<sup>[67]</sup>

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<sup>67</sup> Remand Determination, at 32-33.

Moreover, as we discussed above, the rationale of the *Gerdau, Hylsa, Ashai I and II*, and *Torrington Co.* cases,<sup>68</sup> implementing, despite final liquidations, an exception to the mootness doctrine, in any event does not come into play here. Commerce's determination that computing a new CDR is futile and unnecessary because the amount of duties Customs is to collect at the border on ongoing entries was superseded by the results of a subsequent administrative review that was implemented on February 11, 2008, is reasonable.

**Conclusion:**

In sum, based upon all the foregoing, we hold that Mexinox's claims that Commerce erred in not calculating a new CDR are overruled and Commerce's determination with respect thereto is affirmed.

**C. Whether Commerce's Adjustments to the U.S. Indirect Selling Expense Ratio Are Consistent with the Panel's Decision.**

On April 14, 2010, this panel issued a decision remanding to the Department of Commerce ("Commerce") to recalculate the indirect selling expense ratio in a manner not inconsistent with the Panel's opinion.<sup>69</sup>

On August 27, 2010 Commerce pursuant to Rule 73(2)(a) of the NAFTA Rules of Procedure for Article 1904 Binational Panel Review ("NAFTA Rules") filed its Remand Determination.

In the Remand Determination, Commerce allocated the total pool of U.S. indirect selling expenses for sales of finished goods for 3 companies (Mexinox, USA, Inc. a wholly-owned

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<sup>68</sup> See n. 465.

<sup>69</sup> Panel Decision, p. 28.

affiliated importer and reseller, and its two subsidiaries, TKNA in Germany and TKAST USA in Italy) over the net sales of finished goods for all the three companies combined.<sup>70</sup>

According to the Analysis of Data for the Draft Remand Redetermination Pursuant to NAFTA Panel, Doc Number 1622 (“Analysis”),<sup>71</sup> Commerce reviewed Mexinox’s U.S. indirect selling expense ratio to reflect the total ISE’s incurred by Mexinox USA, Inc. and its affiliates TKNA and TKAST USA and the total sales of the three companies.

Commerce explained that Mexinox’s total U.S. indirect sales expenses included all reported expenses as well as the offsets for the income Mexinox USA, Inc. received for rendering selling and administrative services on behalf of TKNA and TKAST USA. This information was obtained from the information submitted by Mexinox in its March 8, 2006 supplemental questionnaire response and its corresponding Attachment. Commerce further explained that to this amount they added TKNA’s and TKAST USA’s total ISE’s respectively. Both companies reported ISEs that included the amounts paid to Mexinox USA, Inc. for services it performed on behalf of each company. Then Commerce deducted the expenses attributable to raw material transfers to obtain the revised ISE numerator.

As for the revised denominator Commerce included TKNA’s and TKAST USA’s POR net sales in the denominator of the ISE ratio, based on the information submitted by Mexinox in its supplemental questionnaire response, dated July 9, 2010 and its corresponding attachments. Then Commerce also retained Mexinox USA’s related net sales value, adjusted for raw materials transfers in the denominator. The inclusion of TKNA’s and TKAST USA’s sales revenue resulted in a revised ISE denominator.

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<sup>70</sup> Remand Determination, pp. 35, 37 and 38 and Commerce Rule 73(2)(c) Response to Mexinox Rule 73(2)(b) written submission concerning August 27, 2010 Determination on Remand, p. 46.

<sup>71</sup> Analysis, pp. 2 and 3.

Mexinox argued that the new error introduced into calculation by Commerce's remand calculation is that it allocates to Mexinox an amount of selling and administrative expenses that have nothing to do with sales of Mexinox's own products.<sup>72</sup>

The Panel determined that Mexinox did not prove with sufficient information how the service fees accurately reflect the indirect selling expenses and referred to the acceptance by Mexinox in oral argument of the alternative method of calculation.<sup>73</sup> Mexinox recognized this Panel's decision.<sup>74</sup>

This Panel suggested that Commerce apply an alternative method of calculation not inconsistent with the Panel's opinion, based on the information provided by Mexinox.

Accordingly, Commerce in the Remand Determination has applied a methodology that this Panel acknowledges as an alternative method of calculation not inconsistent with the Panel's opinion, based on the inclusion of all expenses included in selling Mexican steel and all expenses incurred in selling Italian and German steel in both the numerator and the denominator.

Based on the information provided by Commerce in its Remand Determination as well as in its Response to the Panel's questions referring to the ISE calculation, this Panel finds that Commerce's methodology does not result in double-counting the selling expenses for TKNA and TCAST USA.

Mexinox wants Commerce to take into account only some expenses incurred by the three companies (Mexinox, TKNA and TCAST USA), in selling Mexican, Italian and German steel, considering only the subject merchandise, but Mexinox does not properly account for all ISE's.

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<sup>72</sup> Mexinox Rule 73(2)(b) Written Submission, p. 35.

<sup>73</sup> Panel Decision, p. 27.

<sup>74</sup> Mexinox Rule 73(2)(b) Written Submission, p. 32.

In addition to that, Mexinox's example provided to the Panel summarizes its proposal, which distorts the ratio between the numerator and the denominator.<sup>75</sup>

After review and consideration of all arguments raised by the participants as well as the data and calculation examples and methodologies presented in their written submissions before this Panel, along with the submissions presented before the investigating authority in relation to the Draft of the Remand Determination and to the Remand Determination, this Panel affirms Commerce's methodology applied in the recalculation of the indirect selling expense ratio as a methodology consistent with this Panel's decision.

#### **IV. REMAND ORDER**

On the issue of whether Commerce failed to follow the Panel's order remanding to Commerce to recalculate Mexinox's dumping margins without zeroing, the Panel remands this matter back to Commerce to again recalculate Mexinox's dumping margins without zeroing in a manner that does not ignore the bulk of the transactions and where all sales are included in the calculation.

Commerce is further directed to issue its Final Re-determination on this Second Remand within thirty (30) days from the date of this Panel Decision.

#### **V. Dissenting Views of Panelists Lichtenstein and Liebman Concerning the Majority Opinion to Remand to Commerce Its Remand Determination.**

##### **Introduction:**

For the reasons discussed below we dissent from the majority of this Panel's decision to remand once again to Commerce Commerce's Remand Determination on the issue of whether

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<sup>75</sup> *Id.* p. 32 and Mexinox's Response to Questions of the Panel of October 27, 2010, Regarding Commerce's Remand Determination, Proprietary Version, Exhibit 2.

Commerce complied with the Panel's direction of recalculating the dumping margin without zeroing.

**Background:**

By way of background, we also dissented from the majority of this Panel with respect to the decision to remand Commerce's Final Determination<sup>76</sup> back to Commerce for it to "recalculate Mexinox's dumping margins without zeroing."<sup>77</sup> Familiarity with our dissent is presumed.<sup>78</sup> Since the focus of *this* dissent is to address the issues pertaining to whether Commerce has complied with the remand Order of this Panel with respect to the zeroing issue in the case, we endeavor to refrain from rearguing why the majority was wrong to disagree with Commerce's initial use of zeroing.

Nevertheless, we feel it necessary to point out that since the issuance of Panel Decision, there have been a number of decisions of the United States Court of International Trade ("USCIT") and the United States Court of Appeals for the Federal Circuit ("Federal Circuit") which persuasively support the use of zeroing by Commerce in the same material circumstances as are involved here. Implicitly, the majority of this Panel does not dispute the fundamental tenet that Federal Circuit decisions are binding on NAFTA panels.<sup>79</sup> Even if there were any merit to

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<sup>76</sup> 71 Fed. Reg. 76978 (December 22, 2006).

<sup>77</sup> See Panel Decision of April 14, 2010 ("Panel Decision"), Remand Order, pp. 52-53.

<sup>78</sup> *Id.* pp. 54-90.

<sup>79</sup> This principle has been reiterated by several other NAFTA panel decisions issued subsequent to the initial decision of this Panel. See *In The Matter Of: Certain Welded Large Diameter Pipe From Mexico*, USA-MEX-2007-1904-03, Panel Determination, at p. 19 (January 18, 2011); *In The Matter Of: Light-Walled Rectangular Pipe and Tube from Mexico; Final Determination of Sales at Less Than Fair Value*, USA-MEX-2008-1904-03, Panel Determination, at p. 24 (July 20, 2010) ("*Light-Walled Rectangular Pipe*") (A member of the Panel there was Luis Felipe Aguilar Rico, a member of the majority in both phases of this case. While he issued a concurring opinion in the referenced case, he did not take exception to the Panel's unanimous opinion stating the principle regarding the binding nature of controlling Federal Circuit decisions.).

the earlier assertion in Panel Decision by the majority there that the Federal Circuit had set forth two competing lines of authority that justified the majority's rejection of the cases Commerce and the Domestic Industry relied upon as binding precedent<sup>80</sup> and, therefore, that the majority was free to follow the *dictum* in *Allegheny* that United States law must be interpreted to be consistent with decisions of the Appellate Body ("AB") of the World Trade Organization ("WTO"), the subsequent decisions of the Federal Circuit must be read as rejecting the existence of any such two distinct paths. There is no question that a panel of the Federal Circuit is bound to follow the precedent of prior panels, unless and until prior precedent is overruled *en banc*.<sup>81</sup>

We now describe these Federal Court decisions. Since the time of Panel Decision, the USCIT and the Federal Circuit, in circumstances indistinguishable from the controlling facts here, *viz.*, where Commerce applied the zeroing methodology in final determinations in administrative reviews despite any decisions of the AB finding that methodology to be contrary to the Antidumping Agreement in the WTO Agreements,<sup>82</sup> have continued to affirm Commerce's use of the zeroing methodology in administrative reviews.

Subsequent to the issuance of the Panel Decision here, the Federal Circuit issued a new decision addressing the legality of "zeroing" in the face of decisions by the WTO dispute resolution bodies that were relied upon by the majority of this Panel as part of Panel Decision.<sup>83</sup>

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<sup>80</sup> See the majority's discussion of *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339 (Fed. Cir. 2004) ("*Allegheny*"), Panel Decision, pp. 21-23 and our prior refutation, Panel Decision, pp. 78 n.234, 81 n.246, and 81-83.

<sup>81</sup> See, *e.g.*, *Hometown Fin. Inc. v. United States*, 409 F. 3d 1360, 1365 (Fed. Cir. 2005); *Kimberly Clark Corp. v. Ft. Howard Paper Co.*, 772 F. 2d 860, 863 (Fed. Cir. 1985).

<sup>82</sup> Agreement on Implementation of Article VI of the General Agreement On Tariffs and Trade 1994 (Anti-dumping), Apr. 15, 1994 WTO Agreement, Annex IA, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) ("*ADA*").

<sup>83</sup> *SKF USA v. United States*, 630 F.3d 1365 (Fed. Cir. 2011) ("*SKF*").

The decision of this Panel was brought to the Federal Circuit's specific attention in the reply brief<sup>84</sup> filed by the appellant, importer SKF, in that case.<sup>85</sup> The Federal Circuit, despite having the opportunity to be persuaded by the decision of this Panel (majority opinion), emphatically and with unambiguous clarity, pronounced that:

Finally, SKF argues that Commerce improperly used zeroing in calculating its weighted-average dumping margin because it is prohibited by the World Trade Organization ("WTO"). Commerce changed its practice for original investigations and no longer uses zeroing for calculation of weighted average dumping margins, but it continues to use zeroing during administrative reviews. *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Final Modification*, 71 Fed. Reg. 77722, 77724 (Dec. 27, 2006). In *Timken Co. v. United States*, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004), the court held that its governing statute did not forbid the use of zeroing. In *U.S. Steel Corp. v. United States*, 621 F.3d 1351 (Fed. Cir. 2010), we upheld Commerce's application of its new policy not to use zeroing in original investigations. Even after Commerce changed its policy with respect to original investigations, we have held that Commerce's application of zeroing to administrative reviews is not inconsistent with the statute. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007). Moreover, we have held that WTO decisions do not change United States law unless implemented pursuant to an express statutory scheme. *See, e.g., NSK Ltd. v. United States*, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007); *Corus Staal BV*, 395 F.3d at 1349. The WTO decisions cited by SKF have not been so implemented.<sup>[86]</sup>

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<sup>84</sup> Reply Brief of SKF USA ("SKF Reply Br."), 2010\_WL\_2416207.

<sup>85</sup> The court was informed that ( SKF Reply Br., pp. 17-18):

SKF's initial brief articulates its view that zeroing is contrary to law and remains an open issue pending an administrative or judicial decision to the contrary. Accordingly, SKF reiterates its arguments presented in its opening brief. See SKF Br. at 32-40. In addition, since that brief was filed, a NAFTA Binational Panel found in an April 14, 2010 decision on zeroing that "{a} plain reading of {19U.S.C. § 1677(35)} directs that all sales should be included in the analysis" but "the DOC has interpreted this provision so as to choose to ignore, or zero, certain sales, which are not dumped. In so doing, it ignores its obligation to determine the total aggregated values of the subject merchandise." *Stainless Steel Sheet and Strip In Coils From Mexico: Final Results of 2004/2005 Antidumping Review*, Secretariat File No: USA-MEX-2007-1904-01, Article 1904 binational panel review pursuant to NAFTA, at 9 (April 14, 2010) (JA-16,009).

While a NAFTA Panel decision clearly is not controlling in any way on this Court, if upheld, the Panel will direct Commerce to take action contrary to the decisions of this Court. This in turn will put Commerce in a different position than it is with regard to WTO panel decisions.

<sup>86</sup> SKF at 1375.

The holding of the Federal Circuit is that, regardless of whether AB decisions inform us that zeroing is contrary to international law, United States law remains unchanged until implemented through the express statutory scheme. See below<sup>87</sup> for further discussion of this statutory scheme for implementation of WTO dispute resolution bodies' determinations which is contained in the Uruguay Rounds Agreement Act ("URAA").<sup>88</sup> Inasmuch as the implementation process (proceedings under Section 129 of the URAA (19 U.S.C. § 3538)) with respect to the Commerce determination involved in this case has never been begun,<sup>89</sup> there has been no change in United States law for this case. It is the United States law that controls here. NAFTA Article 1904(2) obliges this Panel "to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party." This clear legal process, which is mandated by Congress as part of U.S. law, trumps any general maxim that ambiguities in statutes should be construed consistent with international agreements.

Moreover, as the Federal Circuit panel that decided the *SKF* case was expressly made aware of Panel Decision, the Federal Circuit has, therefore, implicitly rejected the majority's reliance upon the path the majority says is allowed by *Allegheny*. Only a decision by an *en banc* panel<sup>90</sup> of the Federal Circuit overruling *SKF* can nullify this decision as being a binding

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<sup>87</sup> N.101 and pp. 68-69.

<sup>88</sup> Pub. L. No. 103-465, 108 Stat. 4809 (1994) ("URAA").

<sup>89</sup> See *Issues and Decision Memorandum*, Stainless Steel Sheet and Strip in Coils (Final), available at <http://ia.ita.doc.gov/download/section129/full-129-index.html>, which is incorporated by reference in *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*.256. 74 Fed. Reg. 19,527 (April 29, 2009).

<sup>90</sup> In this regard, in another precedential and binding decision, although issued before the decision of this Panel, the Federal Circuit in *Koyo Seiko Co., Ltd v. United States* 551 F.3d 1286, 1291 (Fed. Cir. 2008), *Rehearing denied by the Federal Circuit, en banc*, 2009 U.S. App. LEXIS 13856 (Fed. Cir. Apr. 23, 2009) (*Seiko*), did not find any conflict or divergent path to follow based upon the *Allegheny* decision although given the opportunity, the entire court, all fifteen judges of Federal Circuit, declined to grant a petition to rehear the case. Moreover, although a

precedent for other panels of the Federal Circuit and for NAFTA panels applying, as is the case here, United States law.<sup>91</sup>

During the period of review (“POR”) in this case<sup>92</sup> and at the time of publication of the Final Determination (*i.e.*, December 22, 2006), Commerce under its then applicable regulations had consistently applied zeroing in both initial dumping investigations and administrative reviews.<sup>93</sup> Even though Commerce has recently announced that it is inviting public comments<sup>94</sup> on a proposed amendment to its regulations to eliminate the use of zeroing in administrative reviews, that amendment, even if adopted, will not be applicable to this case.<sup>95</sup>

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subsequent panel of the Federal Circuit which we discuss later, in *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) (“*Dongbu*”), found a time line distinction between the application by Commerce of the zeroing methodology in original investigations and final administrative reviews which did not exist in *Seiko* and otherwise controlling precedents, it appears the *Dongbu* panel would otherwise have considered itself bound by the decision in *Seiko* and the other precedents which affirmed Commerce’s use of zeroing, even in the face of the arguments that U.S. law had to be interpreted to be consistent with so called “international law” precedents (*i.e.*, AB decisions of the WTO). *See, Dongbu*, 635 F.3d at 1371.

<sup>91</sup> See n.81.

<sup>92</sup> July 1, 2004 through June 30, 2005.

<sup>93</sup> It was not until December 26, 2006, that Commerce amended its regulations so as to discontinue the use of zeroing in initial dumping investigations. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006).

<sup>94</sup> The period of public comments, pursuant to an extension allowed by Commerce, 76 Fed. Reg. 5518 (Feb. 1, 2011), closed on February 18, 2011. As of this writing, there has been no further action announced by Commerce on the proposal.

<sup>95</sup> See *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 Fed. Reg. 81533 (Dec. 28, 2010) (“75 Fed. Reg. 81533, Dec 28, 2010”). The Federal Register notice specifies that (at 81535): “Any changes in methodology will be applicable in any determinations made pursuant to section 129 of the URAA (19 U.S.C. 3538) in connection with the above-referenced WTO disputes, and in all reviews pending before the Department for which a preliminary results is issued more than 60 business days after the date of publication of the Department's Final Rule and Final Modification.” Because there has been no determination under section 129 of the URAA applicable to this case, and because the preliminary results in our administrative review long antedated the proposed regulation, even if it is adopted, it will not apply here. The proposed change to its regulations is being issued by Commerce after the consultations mandated by §123 of the URAA (19 U.S.C. §3533) and will apply only to administrative reviews commenced after the date of issuance of the proposed regulation. See above. The proposal is specific that when and if issued, the new section will not apply retroactively.

Similarly, the recent decision of the Federal Circuit in *Dongbu*,<sup>96</sup> which vacated and remanded the decision in *Dongbu Steel Co., Ltd. v. United States*,<sup>97</sup> with instructions to conduct further proceedings so that Commerce is given the opportunity to “explain its reasoning to justify using opposite interpretations of 19 U.S.C. § 1677(35) in investigations and in administrative reviews. . . . [or] choose a single consistent interpretation of the statutory language,”<sup>98</sup> is of no consequence here.<sup>99</sup> In *Dongbu*, the distinguishing factor found necessary to **not** follow prior binding Federal Circuit precedents sustaining Commerce’s use of the zeroing methodology regardless of any determinations by the AB of the WTO rejecting the use of zeroing in administrative reviews was that the administrative review in question resulted in a final determination **after** the publication of the change in Commerce’s regulations with respect to initial investigations.<sup>100</sup>

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<sup>96</sup> See n.90.

<sup>97</sup> 677 F. Supp. 2d 1353 (Ct Int’l Trade 2010) (“*Dongbu Steel CIT*”).

<sup>98</sup> *Dongbu*, at 1373.

<sup>99</sup> As of this writing, there have not been docket filings in the USCIT indicating that the USCIT has conducted any proceedings, if needed, in furtherance of the remand from the Federal Circuit, and no new determination has been issued. Following the same reasoning as involved in *Dongbu*, the Federal Circuit recently affirmed the USCIT in part, as we note later, but remanded the USCIT’s decision affirming Commerce’s use of zeroing for Commerce to explain what the Federal Circuit found to be inconsistencies in the interpretation between not zeroing in investigations but continuing to do so in administrative reviews. See *JTEKT Corporation v. United States*, \_\_\_F.3d\_\_\_, 2011 U.S. App. LEXIS 13252 (Fed. Cir. June 29, 2011) (“*JTEKT*”).

<sup>100</sup> See n.90. The *Dongbu* opinion makes this clear in several places, including the following summarization of the distinguishing factor, where the Federal Circuit says (at 1371):

Although we have considered Commerce's zeroing policy in administrative reviews on numerous occasions--see, e.g., *Timken*, *Koyo Seiko*, *SKF II*, *NSK*, and *Corus II*--we agree with Union that this court has never addressed the reasonableness of Commerce's interpretation of 19 U.S.C. § 1677(35) with respect to administrative reviews now that Commerce is no longer using a consistent interpretation. Accordingly, we are not bound by the prior cases and apply the *Chevron* step two analysis anew.

See, also, *Dongbu*, pp 1365 and 1367.

We recognize that *Dongbu* has created the speculative possibility that United States courts may hold, despite any newer, clearer, explanation from Commerce as to why, at the time of the publication of the final determination in the administrative review in *Dongbu*, it continued to interpret U.S. law so as to apply the zeroing methodology in administrative reviews when it had previously altered its regulations so as to not apply the zeroing methodology in initial investigations in 2006, see n.93, that Commerce in so doing was acting contrary to United States law. Such a decision in *Dongbu*, however, based upon the distinguishing characteristic found controlling in *Dongbu* with respect to the time line of the divergence between investigations and administrative reviews, will **not** have any controlling or material effect on this case. Here the final (original) administrative determination was published before there was a departure from using the zeroing methodology in initial investigations. At the time this administrative review was initiated and Commerce's Determination made there was no inconsistency between the methodology used by<sup>101</sup> Commerce in original investigations and that used in administrative reviews.<sup>102</sup> Thus the decision in *Dongbu* is not applicable to our case.

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<sup>101</sup> It is premature and not germane to this case to express an opinion on the efficacy of the possible explanation Commerce may give in the *Dongbu* case, but it is possible that Commerce has a legal justification for not applying zeroing in original investigations while continuing to zero for the time being in administrative reviews. This justification may be based upon the procedures established and required by Congress in the statute (Pub. L. No. 103-465, 103d Cong., 2d Sess., 108 Stat. 4809), the URAA, implementing the Uruguay Round Agreements and in particular the Understanding on Rules and Procedures Governing the Settlement of Disputes for bringing the United States dumping decisions into alignment with determinations of dispute resolution panels and the AB of the WTO. As we discuss in detail at pp. 68-69, the URAA added two separate sections to the 19 U.S.C. sections involving antidumping and countervailing duty laws in response to Congress' concern about domestic implementation of what WTO dispute resolution panels and the AB might determine to be United States obligations under the Uruguay Round Agreements. (See Part IV(D). Legislative History of the Rule 57(4) Appendix of Authorities, Secretariat Docket No. 31, which submits as D(1) long excerpts from the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("SAA"), H. Doc. No. 103-316, Vol. 1 (1994) "Understanding on Rules and Procedures Governing The Settlement of Disputes.").

These new statutory sections are §123 of the URAA (19 USC 3533) and §129 (19 USC 3538). A Federal Circuit case, *United States Steel Corp. v. United States*, 621 F.3d 1351 (Fed. Cir. 2010), *certiorari applied for, Nucor Steel v. United States*, No. 10-1049, ("*United States Steel Corp*") quotes both §123 and §129 in full text. The procedures mandated differ in some detail depending upon whether what was taken to Geneva was a particular determination of Commerce in a proceeding (such as an administrative review which are taken to Geneva one by one and not all of

Although, based upon controlling precedent of the Federal Circuit discussed in our original dissent and strengthened by new binding, applicable decisions of the Federal Circuit mentioned above, we agree with Commerce's renewed assertion in these remand proceedings that the Panel should reconsider and vacate its original decision to remand the zeroing question

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them are) or a Geneva challenge made to a Commerce regulation. §123 sets out the procedures for changing regulations in response to an adverse panel or AB ruling. §129 sets out the procedures for making a new determination in a particular case, such as an administrative review, where an adverse ruling has been made in Geneva. The §123 procedures were followed with respect to zeroing in initial investigations, resulting in the 2006 change in Commerce's regulations (see n.93). However, while Commerce has recently issued a proposed §123 Determination for the methodology revision in the case of administrative reviews (as opposed to new determinations for administrative review cases lost in Geneva under §129) (see 75 Fed. Reg. 81533, Dec 28, 2010), that change in Commerce's regulations has not as yet been issued on a final basis. Thus Commerce's explanation for the difference in methodology in initial investigations and in administrative reviews may be simply that the U.S. Trade Representative who pursues the statutorily mandated process of compliance with the United States' obligations with respect to AB decisions has ordered it to put out the new regulation with respect to initial investigations but that the process with respect to administrative reviews is moving much more slowly.

Changes in regulations in accordance with the §123 statutorily mandated procedure do not involve, *per se*, agency interpretations [gap filling] of gaps based upon ambiguities in the original U.S. antidumping provisions definitional section, 19 U.S.C. § 1677(35). Instead the changes in regulations simply represent Commerce obeying the statute implementing the treaties agreed to at the conclusion of the Uruguay Round in 1994. If, on remand in *Dongbu*, Commerce explains that it changed its methodology in initial investigations in 2006 pursuant to the procedures mandated by the domestic implementation of the treaties agreed to (the URAA) and thus was simply following the political bodies' instructions and that it is proposing, since December 2010, to do the same for administrative reviews, but that these changes in the regulations are not retrospective, the USCIT [and if that decision is appealed, the Federal Circuit] may find this a sufficient explanation of the different treatment at the time of the administrative review under consideration in *Dongbu*.

Therefore, the courts may ultimately conclude that there is no inconsistency in interpretations of the same statute, an inconsistency troubling to the court in *Dongbu*. In a sense, at this time, in one context (administrative reviews) there is an interpretation by the agency (gap filling) and in another (original investigations) the agency is just responding to the procedures set out by Congress in the URAA to amend U.S. antidumping laws to say how the United States and the agencies concerned are to respond to decisions of the WTO dispute resolution bodies. See the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("SAA"), H. Doc. No. 103-316, Vol. 1 (1994), pp. 1008-1016 "Understanding on Rules and Procedures Governing The Settlement of Disputes."

<sup>102</sup> See discussion later in this dissent regarding the restraint a reviewing court or NAFTA panel must exercise because such bodies cannot substitute their judgment for that of the executive agency (*viz.*, Commerce). Those bodies are not free to choose between any legally acceptable inconsistencies, even though the reviewing body would, in the first instance, if it were making the original decision, prefer to not have an inconsistency.

Plainly, even if there is some unfairness in the law as a result of the discretion accorded to the agency charged with its enforcement or the agency following Congress' instructions in the URAA on the one hand and gap filling on the other and there is a need to remove an ambiguity in the law, that is a matter for the Congress and not the court [panel] as a reviewing body to remedy. *Cf.*, *Studiengesellschaft Kohle mbH v. Northern Petrochemical Company*, 784 F.2d 351, 357 (Fed Cir. 1986) ("If the law as it has been written by Congress creates anomalous situations, then it is for Congress to decide whether to change the law." (Citation Omitted)).

and should affirm Commerce’s decision to use the zeroing methodology in this case, because the majority of this Panel has declined to accept that option,<sup>103</sup> we focus our efforts below on explicating just why we would affirm Commerce’s Remand Determination on the zeroing issue presented in this phase of the case and Commerce’s recalculation of the duties applicable to Mexinox’s entries during the POR (“Commerce’s recalculation”). We would affirm the Remand Determination on the zeroing issue on the grounds that Commerce has followed the Panel’s Order<sup>104</sup> to “recalculate without zeroing,” that Commerce’s decision on remand on this issue is legally correct, is a proper exercise of its discretion, judgment and expertise in interpreting and/or applying the statute, and that Commerce’s decision to use the method of calculation it has used in the Remand Determination is supported by substantial evidence.

Because the majority also finds that nothing in its remand decision instructed Commerce to not use a “weighted average predicated upon zeroing” methodology in reaching its decision on remand, we believe that the majority implicitly recognized that it did not have the authority under NAFTA Article 1904, Section 8 (which provides in pertinent part that “[t]he panel may uphold a final determination, or remand it for action not inconsistent with the panel’s decision”) to order Commerce to use a particular methodology. The Panel did not instruct Commerce to

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<sup>103</sup> While the majority of this Panel justified its reason for not following Federal Circuit panel decisions consistently upholding Commerce’s use of zeroing by claiming that the *Allegheny* case (discussed earlier, above), provided an acceptable alternative approach, and, therefore, there was no binding precedent to control applicable to the Panel in this case, the Federal Circuit’s decisions in zeroing cases subsequent to the issuance of *Allegheny* make such a justification by the majority legally indefensible.

Even if there were two paths at the time of this Panel’s initial decision, it is fundamental that a NAFTA panel, applying United States law, based upon an intervening change in controlling U.S. law, should reconsider and vacate its prior decision, in pertinent part, because the “law of the case doctrine” recognizes that when a controlling authority has made a decision changing the law applicable to the issues, that such a change in the law or clarification of the law is among other reasons, a major reason for doing so. *See Ormco Corp. v. Align Technology*, 498 F.3d 1307, 1319; 2007 U.S. App. LEXIS 20185 (2007), *reh’g en banc den.* (Fed. Cir. 2007); *Ford Motor Company v. United States*, 30 Ct. Int’l Trade 1587, 1588; 2006 Ct. Intl. Trade LEXIS 147 (2006).

<sup>104</sup> See n.77.

follow a particular methodology once it had found the existing methodology to be incorrect. If the majority of the Panel viewed the use of a weighted average without inclusion of zeroing to be acceptable, then what it should have done is to have directed Commerce, as precedent from the USCIT demonstrates,<sup>105</sup> to determine Mexinox’s margin of dumping continuing to use a weighted average without zeroing. Because the entire Panel, including the two dissenting panelists, took responsibility for framing the appropriate language of the Remand Order, regardless of the reasons which prompted panelists Lichtenstein and Liebman to dissent, it was plainly understood that a remand order directing Commerce to use a weighted average would be improper. Consequently, the remand order the Panel issued left Commerce free to select an appropriate methodology.

In this regard, at the Oral Hearing held on September 10, 2009 (“Transcript”), panelist Bolívar asked a question and received the answer from counsel for the Domestic Industry as

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<sup>105</sup> As an example see *Carpenter Technology Corp v. United States*, 662 F. Supp. 2d 1337 (Ct. Int’l Trade 2009) (“*Carpenter*”). The USCIT judge in *Carpenter* made it clear that the methodology Commerce was required to use was still a weighted average, as seen from the following (emphasis added, in part):

**The court next considers the question of an appropriate remand order Commerce having already calculated individual weighted-average dumping margins for two exporters/producers** (*i.e.*, Bhansali and Venus), the situation existing upon remand is that no individual examinations were performed of the six non-selected respondents. In the ordinary instance, *i.e.*, in the absence of any exception invoked under 19 U.S.C. § 1677f-1, Commerce is required to examine the individual sales of, and determine a weighted average dumping margin for, each of these six respondents. *See* 19 U.S.C. §§ 1675(a)(2), 1677f-1(c)(1).

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**ORDERED** that Commerce, in an interim remand redetermination, shall inform the court whether it will conduct individual examinations of, and calculate individual weighted-average dumping margins for, Isibars Limited, Grand Foundry, Ltd., Sindia Steels Limited, Snowdrop Trading Pvt. Ltd., Facor Steels, Ltd., and/or Mukand Ltd. and, if Commerce will proceed to do so, also shall inform the court of the time period that Commerce will require to complete such examinations **and issue an amended final determination of the results of the administrative review that sets forth weighted-average dumping margins for the individually-examined respondents.** . . .

662 F. Supp. at 1344 and 1347.

follows:

Panelist Bolivar: . . . I just want to make sure if there is another possibility. On the grounds of your experience, would you think that it's possible to apply another methodology for administrative reviews besides zeroing?

Ms. Staley: We have examined this question quite at length and there was another methodology that was used many years ago. It was based on the master list.<sup>[106]</sup>

This plainly shows that at least one panelist (apart from the two who dissent now) in questioning, seemed to view “zeroing” as the methodology being employed by Commerce and when Commerce was later told **not** to use zeroing in the Panel’s Remand Order it was clear Commerce had the discretion to select another methodology that did not encompass all the elements, including a weighted average, that are intertwined with zeroing and synonymous with it. Without zeroing, using a weighted average alone was not within U.S. law.<sup>107</sup>

Although Mr. Lewis, counsel for Mexinox was at the time speaking about a different issue and methodology that was also in dispute in this case, other than zeroing, he made the following, candid admission:

In contrast, the methodology Commerce used -- and I don't disagree in a general sense Commerce has discretion to use methodologies or to choose methodologies, but Commerce doesn't have unlimited discretion to choose whatever methodology it wants if it's an unreasonable one.<sup>[108]</sup>

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<sup>106</sup> Transcript at 113.

<sup>107</sup> While Ms. Staley later opined that the Customs Service might not think a return to such a methodology was reasonable because of the burdens it would place on the Customs Service, she is neither qualified to speak for Customs or Commerce and her personal opinion is not relevant to this review. Ms. Staley expressed that concern by stating that: “You wouldn't be zeroing because every single entry that came in, you'd be assessing a duty on. But is that a reasonable methodology? Well, I think if you had some Customs officials here, they would probably say that is not reasonable.” (Transcript at 114-115).

<sup>108</sup> Transcript at 54.

Given the foregoing, there cannot be any real question as to the legitimacy of Commerce's actions on remand and the choice of a methodology it made. When confronted with the Remand Order bridling it from using a procedure (zeroing) that the panel rejected, it chose, realizing that amount of entries involved was not onerous, and therefore would not implicate in this case the possibility of excessive burdens on the Customs Service and was not going to have errors, the old standby, alternative methodology, the "Master List."<sup>109</sup>

Indeed, once the Panel's Remand Order was announced, Mexinox, although it had the opportunity to do so did not move under NAFTA Rules of Procedure, Rule 76, to amend the Remand Order and therefore it cannot complain now that Commerce did not comply with the

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<sup>109</sup> See Remand Determination, pp. 24-26. Commerce explained there that changes in computer technology have eliminated the problems which sometimes resulted in calculations present in the Master List methodology. Here as is explained later, above, there are no mathematical errors present in the calculations. There is only a philosophical preference on the part of the Majority for offsets. Commerce has examined every entry, determined whether dumping duties are to be collected on every entry and instructed Customs as to which entries are to be assessed dumping duties and which are not.

Indeed, even when Commerce shifted to a weighted average zeroing methodology, in 1997, it pointed out in the Final Notice 62 FR 27295-27424 ( May 19, 1997) implementing that and other changes not pertinent here, that although it would generally [this does not mean exclusively] use the new methodology, when appropriate, it would continue to use the Master List. Specifically Commerce said 62 FR. 27295 at 27314 (emphasis added):

Historically, the Department (and, before it, the Department of the Treasury) used the so-called "master list" (entry-by-entry) assessment method. Under the master list method, the Department would list the appropriate amount of duties to assess for each entry of subject merchandise separately in its instructions to the Customs Service. However, in recent years, the master list method has fallen into disuse for two principal reasons. First, in most cases, respondents have not been able to link specific entries to specific sales, particularly in CEP situations in which there is a delay between the importation of merchandise and its resale to an unaffiliated customer. Absent an ability to link entries to sales, the Department cannot apply the master list method. Second, even when respondents are able to link entries to sales, there are practical difficulties in creating and using a master list if the number of entries covered by a review is large. Preparing a master list that covers hundreds or thousands of entries is a time-consuming process, and one that is prone to errors by Department and/or Customs Service staff. **Therefore, as the Department explained in the AD Proposed Regulations, 61 FR at 7317, the Department would consider using the master list method of assessment only in situations where there are few entries during a review period and the Department can tie those entries to particular sales.**

Thus, Commerce never completely abandoned or rejected the Master List methodology entirely.

Panel's Order.

In any event, we now proceed to show that Commerce acted within the law in making its determination on remand without zeroing.

In this dissent, we, Chairman Joseph Liebman and Panelist Cynthia Lichtenstein, do not repeat here the recitation of the arguments of the Parties as we generally<sup>110</sup> accept the recitation of those arguments in the majority opinion. Instead, we here set out why we are dissenting from the majority decision giving the majority's reasons for remanding once again to Commerce for recalculation a second time and set out *our* reasons for why we would affirm the Remand Determination's response to the Order on the zeroing issue in Panel Decision<sup>111</sup> issued on April 14, 2010.

The majority assert two main reasons for remanding the Remand Determination on the zeroing issue to Commerce to recalculate once again. First, although they do not cite any authority therefore and do not discuss the most recent applicable court decisions that we have discussed above, they assert that "The Panel remanded strictly on the basis that the application of the original methodology was contrary to U.S. law."<sup>112</sup> Thus they reject Commerce's argumentation that the methodology used in the Remand Determination is similar to that used in

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<sup>110</sup> Consequently, we will only point out any variations, if necessary.

<sup>111</sup> See n.77 above. It should be noted that the length of time between the issuance of Panel Decision and the Remand Determination also included Commerce's collection of additional information from Mexinox with respect to the relevant entries and Mexinox's submission of that information. (Commerce issued a supplemental questionnaire to Mexinox on June 18, 2010 to complete the Remand Determination and received Mexinox's supplemental questionnaire response on July 9, 2010.) We assume that Commerce requested the additional information because the method of calculation Commerce used in the Remand Determination demanded figures other than those used in the original determination and Commerce wanted to insure the accuracy of Commerce's recalculation. We note that no party, including Mexinox, has protested the accuracy of the figures used in Commerce's recalculation.

<sup>112</sup> See p. 19.

other countries whose methodology has not been challenged in Geneva (that is to say, whose methodology has not been found to be inconsistent with the ADA).<sup>113</sup> They then reject the recalculation on the grounds that it is not “accurate,”<sup>114</sup> claiming that their Order to Commerce instructed Commerce as follows:

The Remand Determination calculated an antidumping duty which is not accurate. The remand order from the Panel asked Commerce to recalculate the dumping duty because the one calculated was not accurate. In order to more accurately calculate the antidumping duty, the remand specifically instructed Commerce to not rely on zeroing. In recalculating the dumping margin, Commerce claims not to have zeroed. The fact is that Commerce ignored the overwhelming number of transactions, including all transactions where the CEP did not exceed normal value. Given that, in the majority of the transactions, CEP exceeded normal value and therefore those transactions were excluded from the comparison, the fact remains that the dumping analysis was limited to only a fraction of the universe of transactions. Leaving aside for the moment the question of whether this is a result-oriented methodology, this Panel finds that this methodology, based on a fraction of available transactions, could not be accurate.

In this context, we do not discuss the majority’s assertion that Commerce MUST use a methodology that is “accurate” which by the majority’s definition of accuracy must include the universe of transactions because we believe that a NAFTA Panel’s duty is to ascertain whether a methodology chosen by the agency is in accordance with U.S. law.

We do, however, feel it necessary to rebut the majority’s claim that the Remand Determination cannot be affirmed because it is “not accurate.” It must be remembered that the methodology used by Commerce in its original Determination, an indivisible methodology which involves applying a weighted average formula that does not include as offsets entries that were

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<sup>113</sup> See n.82.

<sup>114</sup> See p.15.

sold above normal value, only achieves the balance Commerce concluded met the statutory intent of Congress under U.S. law of protecting American producers<sup>115</sup> while taking into account the interests of exporters and importers. This conclusion of Commerce's was based upon such a method being reasonable if sales above normal value were treated as having a value of zero. (Thus the shorthand term, "zeroing," that was adopted for that entire methodology came into existence.) We need not repeat here all the many decisions of the Federal Circuit, as well as the USCIT, that upheld that methodology as reasonable, within Commerce's discretion and thus lawful, all decided under the doctrine of Commerce's authority to interpret its authorizing statute when an ambiguity exists. This is, of course, the fundamental doctrine enunciated by the U.S. Supreme Court in *Chevron*.<sup>116</sup> The majority in Panel Decision felt free to ignore those decisions because it believed that Commerce must construe ambiguities in U.S. dumping law in accordance with the interpretations given by the AB of the WTO under international agreements. To the extent that the original Panel decision is binding in this case, in light of the majority's decision not to grant reconsideration, it is not relevant whether that aspect of the majority decision is correct with respect to this phase of the case. There are no statutory ambiguities<sup>117</sup> that Commerce construed as a necessary part of its Remand Decision. As we show below, Commerce's recalculation is correct as a matter of law, and, as we will show in addition, the mathematical calculations Commerce made, regardless of its choice of methodology, are

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<sup>115</sup> See *Agro Dutch Indust. Ltd. v. United States*, 508 F.3d 1024, 1027 (Fed. Cir. 2007) ("The purpose of the antidumping statute is to prevent foreign goods from being sold at unfairly low prices in the United States to the injury of existing or potential United States producers."). The purpose of these antidumping duties is to "remedy disparities in the value of imported and domestic merchandise created by impermissible international trade practices." *Bethlehem Steel Corp. v. United States*, 162 F. Supp. 2d 639, 643 (Ct. Int'l Trade 2001).

<sup>116</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

<sup>117</sup> We show below, n.122, that the recalculation methodology that Commerce used in the Remand Determination fits exactly into the statutory commands of 19 USC §1675.

presumptively correct and at the very least supported by substantial evidence.<sup>118</sup> The burden is upon Mexinox to show that there were mathematical errors in the methodology, and it did not make such a showing. As was stated by Commerce, while Mexinox “expressed its methodological disagreement, it does not allege that Commerce made errors in the calculation itself.”<sup>119</sup> Thus, there is no evidence, let alone substantial evidence, to support the majority’s assertion that the recalculation of Mexinox’s dumping margins is not fair because it is not accurate. The only “inaccuracy” (that is, using a methodology of calculation of dumping margins that does not involve calculating weighted average dumping margins) that the majority points to insist that Commerce must use the majority’s choice of a methodology (using weighted averaging with offsetting for positive margins) is one that, as we show below, is true to the statutes and which Congress in the SAA has said is appropriate for cases of this kind.<sup>120</sup> To the contrary, the methodology the majority wishes to force Commerce to use on its second remand is one which is not protective of domestic industry and labor and which favors the interests, it would seem, of producers and exporters. Moreover, the very recent decision of the Federal Circuit in the *JTEKT*<sup>121</sup> case, where the court in *de novo* consideration of appellants’ arguments that a new methodology employed by Commerce to determine the imported goods’ “normal value” for comparison purposes was “less accurate” is particularly appropriate here. The Federal Circuit in rejecting appellants’ arguments that Commerce did not have substantial evidence for

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<sup>118</sup> Cf., *The Thai Pineapple Public Co., Ltd v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999), *rehearing denied and suggestion for rehearing en banc declined* (1999), *cert. denied* (2000).

<sup>119</sup> Commerce Rule 73(2)(c) Response at 37. Mexinox has never refuted or rebutted this statement in any of its remand filings either administratively or before this Panel.

<sup>120</sup> See text at pp 65-66.

<sup>121</sup> See n.99.

its new methodology and upholding, as had the USCIT, Commerce's changed methodology as "reasonable" also opined that appellants' arguments reflected a misunderstanding of the appropriate standard of review. The court went on to hold that (LEXIS 13252\*8): "We can not review Commerce's methods for relative accuracy, only for reasonableness. *SKF II*, 537 F.3d at 1380. As we stated in *SKF II*, Commerce has provided ample justification for the use of this method and it is therefore reasonable."

Here, Mexinox, as sustained by the majority of this Panel, at best could only claim that the methodology selected was not "accurate" because "offsets" to individual transactions were not applied in the form of using a weighted average calculated using margins from all transactions instead of exactly what the U.S. law allows (requires), computation under 19 U.S.C. § 1677, which provides, in pertinent part that:

(35) Dumping margin; weighted average dumping margin.

(A) Dumping margin. The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

In administrative reviews, which is what our case is, 19 U.S.C. § 1675 in pertinent part provides that:

**(a) Periodic review of amount of duty**

**(1) In general**

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net countervailable subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of

any net countervailable subsidy or dumping margin involved in the agreement, and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

**(2) Determination of antidumping duties**

**(A) In general**

For the purpose of paragraph (1)(B), the administering authority shall determine—

(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and

(ii) the dumping margin for each such entry

Thus, there is **no** “weighted average”<sup>122</sup> component of the statutory provision applicable to administrative reviews. In the absence of discretion on the part of Commerce to utilize zeroing, there is no basis under U.S. law to use a weighted average methodology. It appears the majority may be considering a different statutory provision, which is not applicable in this case, 19 U.S.C. § 1675 (B), which provides that:

**(B) Determination of antidumping or countervailing duties for new exporters and producers**

(i) In general If the administering authority receives a request from an exporter or producer of the subject merchandise establishing that—

(I) such exporter or producer did not export the merchandise that was the subject of an antidumping duty or countervailing duty order to the United

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<sup>122</sup> In enacting section 1675 of the antidumping statute, Congress was well aware that Commerce and its predecessor, the Department of Treasury, historically used a Master-List assessment method and thus, did not intend to eliminate the agency’s discretion and judgment in selecting reasonable methods for assessment and cash deposit purposes in administrative reviews. Congress knew how to require Commerce to calculate weighted average dumping margins but did not do so in the context of administrative reviews. This is further evidence that Commerce acted appropriately here and that it applied U.S. law as intended by Congress. Its choice of methodologies is without reproach. In this regard, what the Federal Circuit held in *Daewoo Electronics Co., Ltd v. United States*, 6 F.3d 1511 1993) is consistent with our analysis here and the actions taken by Commerce. The court stated that (footnotes omitted):

A consideration of subsequent legislative activity confirms this analysis. In *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1106 (Fed. Cir. 1990), we stated that “additional deference may be given to an agency interpretation when a statutory provision remains unchanged after Congress has considered an amendment, particularly one that plainly would have reversed established agency practice on this issue.” Although Congress both knew of the ITA’s interpretation of the statute <sup>11</sup> and revisited the antidumping statute both in 1984 and 1988,<sup>12</sup> it took no action to modify the practice of the ITA.

States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation, and

(II) such exporter or producer is not affiliated (within the meaning of section 1677 (33) of this title) with any exporter or producer who exported the subject merchandise to the United States (or in the case of a regional industry, who exported the subject merchandise for sale in the region concerned) during that period, the administering authority shall conduct a review under this subsection to establish an individual weighted average dumping margin or an individual countervailing duty rate (as the case may be) for such exporter or producer.

The majority has not cited either a specific relevant holding that the original methodology used in this case was contrary to U.S. law or exactly how Commerce's recalculation, in an attempt to comply with the Panel's Order to "re-calculate without zeroing," violates the relevant statutory sections. While cases are cited for the general proposition that the purpose of antidumping law is to be fair and accurate, no single case on any federal level is cited for the proposition that Commerce's original methodology was unlawful because it was "inaccurate" or that the methodology which was used by Commerce prior to its adoption of the averaging methodology was not "accurate."

In the majority decision here, the majority, pp. 17-18, n.37 and n.38, cites several cases for the general proposition that fair and accurate determinations are expected in dumping determinations. We discuss those cases below. However, before doing so, as explained later, above, we must comment that such generalized statements do not support the majority's claim that there are mathematical errors in this case or that the choice of methodology applied by Commerce is inaccurate and must be rejected based upon the majority's belief that applying offsets in a weighted average calculation avoids distortions that exist when Commerce proceeds on a transaction by transaction basis rather than a weighted average of all sales. The method

applied by Commerce on remand examined each transaction and those involving sales below fair market value had dumping duties assessed and those that were sold above normal value had no dumping duties assessed. Thus, Commerce did not fail to examine and apply dumping duties, when appropriate, to all those entries that also had corresponding sales in the POR.

It is not sufficient for the majority in effect to just give lip service to the very high, see discussion later, degree of deference to Commerce's selection of a methodology and to say or imply that they are following the standard of review set forth in NAFTA Article 1904, Sections 2 and 3, as set forth earlier in this Panel Decision. It is not sufficient for the majority to say or imply that it is not substituting its judgment for that of the agency (Commerce) or giving appropriate deference to the agency (Commerce). As the well known saying goes: "you must not only talk the talk, but walk the walk." Unfortunately, the majority misapprehends the significance of the appropriate standards of review and misapplies cases that are specific to those cases' own facts and thus not really germane to the issues being addressed in this remand.

In any event, if one looks at *Koyo Seiko Co. Ltd. v. United States*,<sup>123</sup> which the majority cites in n.37, it appears the Federal Circuit reversed the USCIT's decision adverse to Commerce, based upon the following rationale:

In a situation where Congress has not provided clear guidance on an issue, Chevron requires us to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable. We cannot say that Commerce's method of applying sections 1677a(e)(2) and 1677b(a)(4) in calculating antidumping duties for an exporter's sales price transaction is unreasonable. To the extent the Court of International Trade concluded otherwise, it committed reversible error.

We begin by noting that one of the purposes of the antidumping laws is to calculate antidumping duties on a fair and equitable basis. See *Smith-Corona*, 713 F.2d at 1578, 1 Fed. Cir. (T) at 140 ("One of the goals

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<sup>123</sup> 36 F. 3d 1573, 1573 (Fed. Circ. 1994) ("*Koyo Seiko 1994*").

of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis -- comparing apples with apples."); *Consumer Prods.*, 753 F.2d at 1037, 3 Fed. Cir. (T) at 87 ("one of the goals of the statute [is to achieve] a fair comparison between foreign and domestic market prices or values."). To this end, as long as Commerce's application of the adjustment provisions at issue are not arbitrary or illogical, we must uphold its construction even if the approach supported by the Court of International Trade is even more fair or logical. *Consumer Prods.*, 753 F.2d 1039, 3 Fed. Cir. (T) at 90.

Thus, based upon the reasoning of the Federal Circuit in *Koyo Seiko 1994*, it is the methodology chosen here by Commerce that must be upheld. Commerce is simply applying the statutory law and it does not matter, as was said by the Federal Circuit, if the approach taken by the majority is more equitable to the producers and exporters compared to the approach taken by Commerce which may be fairer to domestic producers. When this Panel asked the parties to explain whether Commerce's application of the [Master List], "transaction by transaction methodology has ever been regarded as a punitive measure under U.S. law" and to provide citations to statutes, regulations or administrative practice, Mexinox avoided answering the question asked directly by saying "no," which is implicit in its answers, which start out by avoiding the direct question, and saying instead that Mexinox does not know of any instance where Commerce has applied the transaction by transaction methodology since Commerce changed its regulations as a result of the ADA in 1994. Mexinox, however, does, later, acknowledge that "Mexinox does **not** view this methodology as per se punitive . . . ."<sup>124</sup>

As would be expected of an advocate for its position, Mexinox then continues to argue that it ends up being punitive and unlawful because it allows for collection of antidumping duties in excess of the amount that would be due using a methodology which it prefers: a methodology

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<sup>124</sup> Mexinox's Response to the Panel's December 23, 2010 Order, at 26.

allowing offsets which reduce the dumping margin on sales made at less than normal value by deducting sales made above normal value in a weighted average methodology not using zeroing. Plainly Mexinox just uses circular reasoning to justify its flawed position, which is contrary to the U.S. law being applied by Commerce. The majority, following the path built by Mexinox, adopts the same reasoning, does not identify how it reaches its result under specific sections of U.S. law and substitutes its judgment for that of the agency and in effect achieving the result it preferred under the guise of interpreting U.S. law to be consistent with international law, even though the majority recognizes in this phase of the case that it cannot build justification for such an approach as it did in the first phase of this case, prior to the remand.

The majority also cites the case of *Micron Tech. Inc. v. United States*,<sup>125</sup> essentially for the same proposition for which the *Koyo Seiko 1994* case (referenced earlier in this dissent)<sup>126</sup> was cited. Again the majority misapprehends and misapplies the general language of the Federal Circuit. There the Federal Circuit articulated that:

Indeed, it is Micron's interpretation that makes no sense in terms of the statutory purpose. As discussed above, the overarching purpose of the antidumping statute is to permit a "fair, 'apples-to-apples' comparison between foreign market value and United States price. . . ." *Torrington Co.*, 68 F.3d at 1347; see also 19 U.S.C. § 1677b(a) (providing that "a fair comparison shall be made between the export price or constructed export price and normal value"). Commerce makes this "fair comparison" by adjusting CEP so that [it] is at the same level of trade as EP and then making a comparison to normal value.

Again, based upon the rationale of the Federal Circuit in *Micron Tech.*, it is clear that Commerce's decision here was consistent with the statutory purpose and Commerce in this case made a fair comparison in computing the dumping margin using the transaction by transaction

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<sup>125</sup> 243 F. 1301, 1313 (Fed. Cir. 2001) ("*Micron Tech*").

<sup>126</sup> See p. 53.

method. This is not a case where Commerce was inconsistent in evaluating the fair market comparisons in the home market and in the United States, which was the basis for the conclusion reached in *Micron Tech*.

While the majority of the Panel cites the USCIT decision in *Shakesproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*,<sup>127</sup> they omit any citation and, perhaps, consideration of the decision of the Federal Circuit which affirmed the USCIT.<sup>128</sup> Just as before, the courts that sustained Commerce's decision find that:

In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible. Commerce argues that the actual price paid for inputs imported from a market economy in meaningful quantities is the best available information and promotes accuracy in the dumping calculation.

Because Commerce used the “best available information” in its determination, there was no fundamental unfairness. The criteria looked at by the courts in *Shakesproof* goes to the question of whether Commerce acted appropriately in utilizing the “best available information,” and not a choice between competing [philosophies] methodologies. It is the latter choice that is the basis for decision for the majority, here substituting their own judgment as to the worth of a methodology for that of Commerce under the inaccurate labeling that Commerce's decision has clerical errors and is not valid since it is neither equitable nor fair. Thus the majority misapprehends or misapplies the appropriate standard of review under U.S. law, despite articulation of the proper standards earlier in the Panel's opinion.

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<sup>127</sup> 102 F. Supp. 2d 486, 495 (Ct. Int'l Trade 2000).

<sup>128</sup> See 268 F.3d 1376, 1382 (Fed. Cir. 2001) (“*Shakesproof*”).

Finally, in n.38 the majority, in effect, wraps itself in the “flag” of self justification for its holding by citing *Koyo Seiko Co. v. United States*,<sup>129</sup> because the court there pronounced that correcting clerical errors to achieve accuracy is a fundamental part of the dumping laws. The case, however, does nothing more than address the question of whether a remand to Commerce was justified to correct certain transcription errors. While this is a fundamental approach taken by the courts, the proposition by itself adds no support for what the majority does here with a misaligned application to the facts and legal issues involved in this proceeding.

In our analysis that follows, we shall say no more about the majority’s reasoning and simply set out why we vote to affirm Commerce’s remand determination on the issue of zeroing.

**1. COMMERCE HAS FOLLOWED THE PANEL’S ORDER TO “RE-CALCULATE MEXINOX’S DUMPING MARGINS WITHOUT ZEROING.”**

For the reasons already explained above and expanded upon here, we would vote to affirm on the zeroing point of the Remand Determination because we consider that Commerce’s Remand Determination fully complies with the Order in Panel Decision with respect to zeroing, is lawful, and, in the alternative, if the Remand Determination methodology is considered a statutory interpretation, is reasonable. Again, that Order directed “the DOC to re-calculate Mexinox’s margins without zeroing...” [p. 5]. It should be noted the word used is “margins,” plural. It should also be noted that the Order says nothing about correcting the lack of “accuracy” that the majority now claims on the basis of which to have rejected the original Determination. Finally, it should also be noted that the Order does not (and of course could not because NAFTA Panels have no

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<sup>129</sup> 746 F. Supp 1108, 1110 (1990).

jurisdiction to prescribe to Commerce what methodologies Commerce should use<sup>130</sup>) order Commerce to recalculate Mexinox’s dumping margins including all transactions during the POR and thus in the calculations not increasing the “weighted average dumping margin” (19 U.S.C. §1677 (35) (B)) by the negative figures reduced to zero.

So what is meant by “to re-calculate Mexinox’s dumping margins without zeroing”? In every single court case in the United States and in all the cases before the dispute resolution bodies in Geneva, the term “zeroing” either has been defined as or is clearly being used to mean a practice by Commerce associated with a particular methodology of calculation of antidumping duties: “Rather, it was the Department’s practice to set the value of negative margins at zero for the purposes of calculating the weighted-average dumping margin. This practice was appropriately referred to as ‘zeroing.’”<sup>131</sup>

We emphasize here that the above definition of “zeroing” refers to the calculation of the “weighted-average dumping margin.” What is this “weighted-average dumping

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<sup>130</sup> See p. 42.

<sup>131</sup> This quotation is from the Panel Decision in *In the Matter of: Light-Walled Rectangular Pipe and Tube from Mexico; Final Determination of Sales at Less Than Fair Value*, USA-Mex-2008-1904-03, at 28, a decision in which a Panelist was Luis Felipe Aguilar Rico, a member of the majority in this case. This Panel also held, at 33 “The relevant courts have concluded – and we concur – that the language of 19 U.S.C. §1677 (35) mandates no particular methodology (or administrative practice) to determine whether ‘normal value exceeds export price.’” We the dissenters here recognize that other NAFTA Panel decisions are not precedent for any other Panel but only persuasive, but one would be hard put to find any USCIT or Federal Circuit decision that contradicted these statements from the Panel in *Light-Walled Rectangular Pipe*. It should be noted that this quotation refers to Commerce’s “practice,” the term used in most cases and Panel decisions to refer to weighted-average calculations employing “zeroing.” In the initial round of this case, the majority in its original Decision remanding the Final Determination to Commerce for recalculation insisted that the term “practice” may not be applied to dumping calculation methodology (see p. 23) because under the SAA a “practice” is written. It appears to us a claim that zeroing is not a “practice” is problematical because so many of the relevant court decisions refer to Commerce’s practice of zeroing. However, the issue is moot as in our view, Commerce did not “zero” in the Remand Determination although it did indeed change its methodology of calculation and assessment of dumping duties for Mexinox’s entries of stainless steel during the period of review. We shall refer to “zeroing” as a practice or a procedure involved in the calculation of the weighted-average margin indiscriminately hereafter.

margin” and does the U.S. antidumping law *require* that such a margin be calculated by Commerce? To this question the answer is an emphatic “NO.”<sup>132</sup> All of the relevant USCIT and Federal Circuit cases emphasize that the U.S. antidumping law, 19 U.S.C. §1673 *et seq*, does not require Commerce to use any particular methodology of determination as to whether imported goods are being sold in the United States at less than fair value.<sup>133</sup>

At this point, it seems to us useful to insert a very long quotation from a particular case, the Court of International Trade decision by Judge Ridgway in *Dongbu Steel CIT*.<sup>134</sup> Judge Ridgway’s decision in this case has been vacated and the case remanded for additional explanation by Commerce as to why it has continued to use zeroing in administrative reviews even though it now uses in initial investigations a method of calculation of weighted-average dumping margins that offsets negative margins,<sup>135</sup> but Judge Ridgway’s “Background” section of her initial decision strikes us as the clearest possible explanation of Commerce’s present method (outside of our particular case on remand) of implementing the U.S. antidumping laws for administrative reviews (as

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<sup>132</sup> Commerce is not required to use any particular methodology, as long as the methodology it chooses is reasonable. It is well established that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994). See also, *Chevron* 467 U.S. at 843 n.11. See also the quotation from *Light-Walled Rectangular Pipe* above at n.131.

<sup>133</sup> We discuss later, above p. 67, what U.S. law does require of Commerce in its chosen methodology of calculation: that, if the method does not track the relevant section of the statutes clearly, the method chosen be a reasonable one and that, if in a particular case Commerce has changed its methodology of calculation, Commerce explain why it has done so. This latter requirement is, in effect, the holding of *Dongbu Steel* above n.90. In the Remand Determination, Commerce has adhered to both of these requirements.

<sup>134</sup> N.97.

<sup>135</sup> See n.90.

controlled by 19 USC §1675) and when and how it still continues to “zero.”<sup>136</sup> We therefore quote from the decision here.

### **I. Background**

Dumping takes place when goods are imported into the United States and sold at a price lower than their normal value. See 19 U.S.C. §§ 1673, 1677(34). Under the antidumping laws, Commerce is required to impose antidumping duties on dumped merchandise, to offset the effects of dumping. Antidumping duty investigations (referred to herein as “original” investigations) are initiated to determine in the first instance “whether the elements necessary for the imposition of [an antidumping] duty . . . exist.” 19 U.S.C. § 1673a. In addition, the statute provides for periodic (annual) administrative reviews of antidumping duty orders (at the request of an interested party), to update the applicable antidumping duty rate. See 19 U.S.C. § 1675. The instant case challenges the results of such an administrative review remanded to Commerce with instructions. In an administrative review, Commerce determines the antidumping duties to be imposed by first calculating the “dumping margin” for each of a foreign producer/exporter’s individual U.S. transactions (i.e., entries), which is the amount by which the normal value of the imported subject merchandise exceeds the “export price” or the “constructed export price” of that merchandise. See 19 U.S.C. §§ 1673, 1677(35)(A). Next, Commerce calculates the “weighted-average dumping margin,” by “dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” 19 U.S.C. § 1677(35)(B).

Commerce uses the “zeroing” methodology when calculating the weighted-average dumping margin (discussed above). See *NSK Ltd. v. United States*, 510 F.3d 1375, 1379 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370, 1372 (Fed. Cir. 2007) (“*Corus Staal II*”); *Timken Co. v. United States*, 354 F.3d 1334, 1338 (Fed. Cir. 2004). Specifically, Commerce “zeros” negative dumping margins (dumping margins with a value less than zero) by replacing the negative figure with a value of zero prior to inputting the data into the weighted-average dumping margin calculation. See *NSK*, 510 F.3d at 1379; *Corus Staal II*, 502 F.3d at 1372; *Timken*, 354 F.3d at 1338. In other words, if the export price or constructed export price for a particular transaction is higher than normal value, Commerce assigns a margin of zero – rather than a negative margin – to that transaction.

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<sup>136</sup> We discussed at n.101 why we believe it proper under U.S. law for Commerce to continue to “zero” in administrative reviews until it has completed the required administrative process to change its regulations and issue a final version of its proposed new regulation for administrative reviews, see n.95.

As a result, “only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) [are] aggregated, and negative margins (i.e., margins for sales of merchandise sold at nondumped prices) [are] given a value of zero.” *Corus Staal BV v. United States*, 395 F.3d 1343, 1345-46 (Fed. Cir. 2005) (“*Corus Staal I*”). Use of Commerce’s zeroing methodology thus prevents negative dumping margins from reducing the overall sum of the dumping margins. See *NSK*, 510 F.3d at 1379; *Corus Staal II*, 502 F.3d at 1372 (“when Commerce calculates the weighted average dumping margin, the dumping margins for sales below normal value are not offset by ‘negative dumping margins’ for those sales made above normal value”). In short, zeroing – in effect – increases a producer/exporter’s dumping margin (resulting in higher antidumping duties), or results in a finding of dumping where (absent the use of zeroing) dumping would not be found.”<sup>137]</sup>

This description of Commerce’s present methodology for implementing the U.S. antidumping law in administrative reviews (pursuant to 19 USC §1675) makes perfectly clear that Commerce ONLY “zeros” in connection with the calculation of the “weighted-average dumping margin” for any particular exporter.<sup>138</sup> If no “weighted-average dumping margin” is calculated, by definition there can be no zeroing. In the Remand Determination, Commerce **has not calculated a weighted-average dumping margin for Mexinox**. Therefore, by definition, Commerce has not zeroed.

To make this point even clearer, we turn now to the Definitions section of the U.S. antidumping statutes, 19 USC §1677, subsection (35) which defines “Dumping margin; weighted average dumping margin,” a provision we quoted and examined

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<sup>137</sup> 677 F. Supp. 2d at 1355-1356 (footnotes omitted).

<sup>138</sup> We note here that the Panel majority in the initial Panel Decision understood perfectly well that “zeroing” occurs only at the aggregation stage of Commerce’s calculation of the duties to be imposed on an exporter’s entries. According to the Panel Decision, Commerce (or DOC as Panel Decision terms the agency) “...determines a dumping margin for sales to the United States of a product by obtaining the percentage transaction prices of the entire shipment. It then determines the monthly **weighted average** or normal value of the product. The DOC then **aggregates** the dumping margin for below normal value sales, ignoring reference to positive value sales.” (emphasis added). Panel Decision at 9. The Panel Decision continues on to say that “...sales are ‘zeroed’ for the purpose of determining ‘aggregate dumping margin’ that the statute specifies as the numerator in the ‘weighted average dumping margin’.”

before.<sup>139</sup> We note initially that the “chapeau” or heading of subsection (35) uses a semicolon between the two terms (“dumping margin” and “weighted average dumping margin”) suggesting that the two terms are separate. Secondly, the term “Dumping margin” is listed under (35) as (A); the term “Weighted average dumping margin” is listed as (B), strongly suggesting that they are independent terms. Certainly these definitions are stated in the statutory definitions in such way so as to permit Commerce in its discretion to calculate “dumping margins” under the definition in 19 USC §1677 (35) (A) without aggregating so as to create a “weighted-average dumping margin” under (B). To this point we would add that the section of the antidumping law that concerns administrative reviews, 19 USC §1675, as we have noted before,<sup>140</sup> says in (a)(1)(B) that Commerce, under the prescribed circumstances, shall “review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty....” Paragraph (2) “Determination of antidumping duties” then provides in (A) “For the purpose of paragraph (1)(B), the administering authority shall determine – ... (ii) the dumping margin for each such entry.”

The text of 19 USC §1675 does not use the term “weighted-average dumping margin” at all, even though Commerce has been calculating such margins both for initial investigations and for administrative reviews between May 19, 1997, when it issued its notice of change (in the normal case) for the methodology to be used in determining dumping duties,<sup>141</sup> and, in the case of initial investigations, Dec. 27, 2006 when it issued

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<sup>139</sup> See p. 60 above.

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

<sup>141</sup> Antidumping Duties; Countervailing Duties, 62 F.R. 27296 (May 19, 1997).

its §123 Determination<sup>142</sup> under Congress' instructions for United States implementation of WTO decisions contained in §123 of the URAA (19 USC §3533). As for administrative reviews, Commerce has been calculating weighted-average dumping margins since May 19, 1997 until now (except in the case of the Remand Determination this Panel is considering) as the §123 Determination process for administrative reviews is not yet complete.<sup>143</sup> Before Commerce changed, for the normal case, its methodology that tracked the language in 19 USC §1675, language referring only to “dumping margin” and **not** mentioning “weighted-average dumping margin,” it **calculated in administrative reviews the dumping margin for each entry** in accordance with the language in 19 USC §1675. Thus prior to 1997, Commerce DID NOT ZERO because it calculated for administrative reviews only dumping margins in accordance with 19 USC §1675 and did not calculate weighted-average dumping margins.<sup>144</sup> Because in the

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<sup>142</sup> Section 123 Determination, Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Final Modification, 71 Fed. Reg. 77, 722 (Dec. 27, 2006).

<sup>143</sup> See the discussion at pp. 68-69 and the discussion in n.101.

<sup>144</sup> This earlier methodology is often referred to as the “transaction by transaction methodology.” See Transcript of Hearing in this case where Panelist Bolívar enquired if there was any methodology which did not use zeroing quoted above at p. 44. See also the treatise by Professor Andreas Lowenfeld, INTERNATIONAL ECONOMIC LAW, 2d Ed (“Economic Law”), in his discussion of “Averaging,” p. 276 *et seq.*, where he states that normal value was always determined by averaging the domestic prices of a product over a given period of time, but that in determining whether export prices were below “normal value,” this was done on a transaction by transaction basis. As reported by Lowenfeld (Economic Law at 277), the 1994 Anti-Dumping Agreement prohibited this practice. As Lowenfeld explains (*Id.* at 277): “Subsequently, the European Communities, supported by the United States, adopted the method of ‘zeroing’, whereby all export sales of the product under investigation at prices less than home market or normal value were averaged to establish a margin of dumping, but export sales at prices greater than normal value were assigned a value of zero, and were thus excluded from the calculation of the margin of dumping on which the anti-dumping duty was based.”

As we noted above, this earlier methodology is sometimes described as the “transaction-to-transaction” or the transaction by transaction methodology. Commerce’s answers to the Panel’s questions of December 23, 2010, United States Response to Panel’s Question (U.S. Secretariat Docket No.106) p.11 suggests, properly, that a more accurate description of a “transaction by transaction methodology is ‘assessing duties on an entry-by-entry basis’” and this is what Commerce has done in the Remand Determination. The real point for this Dissent is that whatever

Remand Determination Commerce has returned to the transaction by transaction method of comparison and has not calculated any “weighted-average dumping margins,” Commerce has complied with this Panel’s Order to “re-calculate Mexinox’s dumping margins without zeroing.”

## 2. THE METHODOLOGY TO CALCULATE MEXINOX’S DUMPING MARGINS USED BY COMMERCE IN ITS REMAND DETERMINATION IS LAWFUL.

We have just shown above that Commerce in order to follow the Panel’s Order with respect to the zeroing issue, after requesting and receiving from Mexinox additional information,<sup>145</sup> calculated Mexinox’s dumping margins for items of merchandise that were both entered and sold in the United States during the POR by assessing duty only on those items where normal value exceeded the export price or the constructed export price. The Draft Liquidation Instructions from Commerce to Customs which underlie the Remand Determination states that Commerce will not instruct the United States Customs and Border Protection Bureau (“Customs”) to collect any duties on any other entries.<sup>146</sup>

We have also discussed above that this methodology is that used prior to the issuance by Commerce in 1997 of its Federal Register notice cited in n.141, the so-called “transaction by transaction” methodology. That this methodology is lawful is beyond doubt. We now refer to a recent Federal Circuit case, *United States Steel Corp.*, which has examined intensively each section of U.S. antidumping statutes’ instructions to Commerce with respect to investigations for

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the methodology used in the Remand Determination is called, the methodology does not use any aggregation and therefore does not zero.

<sup>145</sup> See n.111.

<sup>146</sup> See Attachment 1 to August 12, 2010 Memorandum to File, referenced at p. 2, Memo w/ Attachment(s), Document #12, Index to Supplementary Remand Record, August 27, 2010.

Congress' intention. The plaintiffs in this case were U.S. producers challenging Commerce's *Section 123 Determination, Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006) that declared that after publication, Commerce would no longer "zero" in average-average comparisons in initial investigations. The plaintiffs tried to find in Congress' language enacted after the Uruguay Rounds Congress' intention that Commerce, in its methodology for calculating weighted-average dumping margins, **should** zero and so asked the court to declare the change in methodology contrary to the law and the failure to zero in the particular investigation that Commerce had changed under a §129 proceeding unreasonable and contrary to law. The plaintiffs were unsuccessful, with the court holding (621 F. 3d at 1360-1361): "Rather the statute is silent as to the methodology to be employed in situations of negative dumping margins.... Congress has given Commerce discretion in forming its methodology in antidumping investigations, and where the statutory language does not address the methodology at issue, we decline to conclude that Congress has manifested its unambiguous intent." *U.S. Steel* is particularly interesting for our purposes here because in n. 3 on p.1359 the court says: "The Statement of Administrative Action that accompanied the Uruguay Round Agreements Act explained that individual-to-individual transactions comparisons were intended for situations in which 'there are very few sales and the merchandise sold in each market is identical....' Statement of Administrative Action Accompanying the URAA, H.R. Rep. No. 403-316, 842, reprinted in 1994 U.S.C.C.A.N. 4040, 4178."

As we just noted in n.144, "individual-to-individual transactions comparisons" is the methodology used by Commerce in the Remand Determination in order to comply with the

Panel's Order with respect to not zeroing. Since Mexinox was able to respond to Commerce's additional questionnaire after Panel Decision just because there were not a large number of sales during the POR and the merchandise sold in each market was identical, the methodology used by Commerce is one that has specifically been approved by the U.S. Congress for this exact situation in Congress' Statement of Administrative Action accompanying Congress' changes to the antidumping laws to implement into United States law the WTO Treaties. In these circumstances, it simply cannot be argued that the methodology is unlawful. The use of this methodology in these circumstances is not Commerce's interpretation of the statutes; this methodology in these particular circumstances is that specifically prescribed by Congress after the United States adhered to the Uruguay Round treaties and Congress implemented those treaties into United States law by the URAA and so acknowledged as such by the Federal Circuit.<sup>147</sup> Thus we do not need to spend any time on the question of the reasonableness of Commerce's use of the transaction to transaction methodology in the circumstances of this case.<sup>148</sup> Because Commerce was following Congress' specific instructions for the particular

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<sup>147</sup> We recall the Supreme Court case we discussed at length in our original dissent (in text at ns.202-211), *Whitney v. Robertson*, 124 U.S.190, 8 S. Ct.456, 31 L. Ed.386 (1888) ("*Whitney*"). That case is always thought to stand for the proposition that either a later treaty or a later statute may overrule a prior statute or treaty, the so-called later-in-time doctrine. Thus the URAA, to the extent it changes prior antidumping law, is the latest in time and Congress' statements in the SAA are an authentic guide to the URAA.

<sup>148</sup> While we take the view that on remand Commerce has **not** interpreted the statute and has simply followed the letter of the statute (19 USC §1675), a view confirmed by Congress in the SAA, in the alternative we would note that Commerce has adequately supported the reasonableness of its use of the transaction by transaction methodology which has not been shown to have any mathematical errors. See n.150, below. Again, as we explained above, the errors which the majority claims are mathematical are really economic philosophical differences that cause the majority to reject what Commerce has done on Remand with respect to complying with the Remand Order on the zeroing issue. In any event, to the extent that there is still any further question regarding the appropriateness of the methodology that Commerce used in its Remand Determination, the Federal Circuit, based in part upon a decision of the United States Supreme Court, in *Fujitsu General Limited v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) has clearly and forcefully said that (emphasis added):

This court has recognized that the antidumping statute "reveals tremendous deference to the expertise of the Secretary of Commerce in administering the antidumping law."  
*Smith-Corona Group v. United States*, 713 F.2d 1568, 1571, 1582 (Fed Cir. 1983), *cert.*

circumstances of this calculation, it was not making its own interpretative choice and thus its choice need not be demonstrated to be reasonable.

However, we do acknowledge the requirement that, having changed the methodology previously used in the Final Determination to calculate Mexinox's duties during the POR Commerce must adequately explain its reasons for that change.<sup>149</sup> As we observe in n.148, Commerce considers that it has adequately explained its reasons for the change in methodology in the Remand Determination and we agree.<sup>150</sup> However, in dissenting in this case, we would

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*denied*, 465 U.S. 1022, 79 L. Ed. 2d 679, 104 S. Ct. 1274 (1984). Antidumping and countervailing duty determinations involve complex economic and accounting decisions of a technical nature, for which agencies possess far greater expertise than courts. *United States v. Zenith Radio Corp.*, 64 C.C.P.A. 130, 562 F.2d 1209, 1216 (CCPA 1977), *aff'd*, 437 U.S. 443, 57 L. Ed. 2d 337, 98 S. Ct. 2441 (1978) (countervailing duty case involving subsidies). **This deference is both greater than and distinct from that accorded the agency in interpreting the statutes it administers, because it is based on Commerce's technical expertise in identifying, selecting and applying methodologies to implement the dictates set forth in the governing statute, as opposed to interpreting the meaning of the statute itself where ambiguous.**<sup>3</sup>

<sup>3</sup> Often, our cases refer to the *Chevron* doctrine in according deference to interpretations of the trade statutes by Commerce and methodologies used in their application. *See, e.g., Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995); *Torrington Co. v. United States*, 82 F.3d1039, 1046 (Fed. Cir. 1996), and cases cited therein. Nothing we do today affects the vitality of those decisions, where they apply.

This special, very high degree of deference has been frequently reiterated in many other decisions of the Federal Circuit. *See, e.g., Ningbo Dafa Chemical Fiber Co., Ltd. v. United States*, 580 F.3d 1247 (Fed. Cir. 2009), rehearing denied by rehearing *en banc* (Fed. Cir. 2009).

<sup>149</sup> We do accept the majority's claim (on p. 16 citing *Sanyo Elec. Co. v United States*, 9 F.Supp.2d 688 (Ct. Int'l Trade 1988)) that Commerce is required to explain adequately in the Remand Determination why it has used the transaction by transaction methodology. We also accept the statement of this requirement in both the USCIT decision in *SKF* and in the Federal Circuit's review of *SKF* where the Federal Circuit also looked to see if Commerce had provided a reasonable explanation for its changed methodology. Our difference with the majority is that we find that Commerce has adequately explained the change of methodology in the Remand Determination and in its answers to the Panel's Questions. See Commerce's Response to the Panel's October 27, 2010 Questions (U.S. Secretariat Docket No 94, p. 4 "[T]agency's explanation for its remand methodology is in the Remand Determination 7-8, 16-26."

<sup>150</sup> See Remand Determination 7-8 and 16-26. To briefly summarize, among the reasons given, Commerce expressed that: the remand methodology comports with the dumping statute since the methodology determines the dumping margin which is the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise for each entry during the POR. While not controlling, this methodology is consistent with that of other WTO members, such as Canada, who use the prospective normal value system. In

like to express our view that the change in methodology was forced by the conflict between Panel Decision's Order with respect to zeroing and Congress' explicit instructions in the **statute** implementing into U.S. law the WTO Agreements, the URAA, explicit instructions with respect to treatment by the agency of adverse decisions of the WTO dispute resolution bodies.

We return here once again to the very clear statement of the background to the recent plethora of zeroing cases in Judge Ridgway's decision in *Dongbu Steel CIT*. Once again we offer a long quote from that case:

... the situation abroad [is] quite a different story. The World Trade Organization ("WTO") Dispute Settlement Body has repeatedly ruled that Commerce's use of zeroing – in both original investigations and administrative reviews – is inconsistent with the United States' obligations under the WTO antidumping agreements. See generally, e.g., *NSK*, 510 F.3d at 1379 (discussing WTO rulings); *U.S. Steel Corp. v. United States*, 33 CIT \_\_\_\_, \_\_\_\_, 637 F. Supp. 2d 1199, 1206-07 (2009) (discussing additional WTO rulings), appeal docketed, No. 2009-1572 (Fed. Cir. Sept. 16, 2009). In accordance with Sections 123 and 129 of the Uruguay Round Agreements Act ("URAA"), Commerce has implemented aspects of these adverse WTO rulings.<sup>6</sup> Of particular relevance here, in its "Section 123 Determination" promulgated in response to one of the WTO rulings, Commerce announced its decision to discontinue the use of zeroing in certain original antidumping investigations. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006) ("Section 123 Determination").<sup>7</sup> In that same Section 123 Determination, however, Commerce expressly declined to cease the use of zeroing in any other context – including antidumping administrative reviews, such as the administrative review at issue in this action. See *Section 123 Determination*, 71 Fed. Reg. at 77,724.

Since the Section 123 Determination issued, courts have sustained Commerce's continued use of zeroing in administrative reviews while ceasing the practice in certain original antidumping investigations. See, e.g., *Corus Staal II*, 502 F.3d at 1373-74; *JTEKT Corp. v. United States*, 33 CIT \_\_\_\_, \_\_\_\_, 2009 WL 4897287 at \* 3-6 (2009); *Union Steel v.*

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situations where problems that arose suggested that another methodology may be preferable, where technological advances have eliminated those problems, Commerce has before returned to a formerly less preferred methodology because of those advances and that is the situation here. Computer advances have minimized the computational errors that may have existed before.

United States, 33 CIT \_\_\_\_, \_\_\_\_, 645 F. Supp. 2d 1298, 1305-09 (2009); Fujian Lianfu Forestry Co. v. United States, 33 CIT \_\_\_\_, \_\_\_\_, 638 F. Supp. 2d 1325, 1356-57 (2009); Corus Staal BV v. United States, 32 CIT \_\_\_\_, \_\_\_\_, 593 F. Supp. 2d 1373, 1382-87 (2008) (“Corus Staal-CIT 2008”), appeal docketed, No. 2009-1425 (Fed. Cir. July 1, 2009).<sup>151]</sup>

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<sup>6</sup> Sections 123 and 129 of the URAA set forth the procedures used to bring agency regulations and practices into compliance with WTO rulings. A determination pursuant to Section 123 amends, rescinds, or modifies an agency regulation or practice found to be inconsistent with any of the Uruguay Round Agreements. See 19 U.S.C. § 3533(g). A Section 129 determination amends, rescinds or modifies the application of an agency regulation or practice in a specific agency proceeding that is found to be inconsistent with the United States’ WTO obligations. See 19 U.S.C. § 3538; see generally *U.S. Steel*, 33 CIT at \_\_\_\_, 637 F. Supp. 2d at 1205-06 (discussing Section 123 procedures and Section 129 procedures).

This second long quotation from *Dongbu Steel CIT* gives Judge Ridgway’s description (in her footnote 6) of Sections 123 and 129 of the URAA, the statutory implementation by the United States of the Uruguay Round Agreements (the WTO Agreements). Under the United States implementation of the WTO Agreements, the U.S. Congress has instructed the U.S. agency assigned the task of administering the U.S. antidumping laws just how it is to go about implementing U.S. obligations under those agreements, including the ADA. The agency has not been instructed that it is to interpret the relevant U.S. statutes in accordance with decisions of the dispute resolution bodies in Geneva. It has been told it is to go through a particular process of consultations with stakeholders before changing its regulations or a particular determination under the U.S. antidumping laws. Note that these sections provide specific procedures not only for changing Commerce’s regulations, but §129 provides a specific procedure for changing a particular determination.<sup>152</sup>

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<sup>151</sup> 677 F. Supp.2d at 1357-1358 (footnote 7 omitted).

<sup>152</sup> The Federal Circuit in *U.S. Steel* quotes both §123 and §129 in full text.

Now the majority opinion in this second remand to Commerce may insist that “The Panel remanded strictly on the basis that the application of the original methodology was contrary to U.S. law” but that is not an accurate statement of the majority reasoning (p. 19). The majority at p.10 of Panel Decision insisted that the term “dumping” refers to an aggregate concept and that “[T]he meaning of ‘dumping margin’ is clear,” but Counsel for Mexinox was so perplexed about this portion of the Panel Decision that he declared it to be “*dictum*.”<sup>153</sup> The remainder of the majority’s Panel Decision found the Final Determination to be contrary to U.S. law on the basis that the WTO decisions cited above in the second quotation from Judge Ridgway required Commerce to interpret the U.S. antidumping legislation in accordance with those decisions, that is to say, without zeroing. In short, Panel Decision and its Order was ordering Commerce to change its Final Determination in the administrative review here at issue to accord with the WTO decisions on zeroing. Clearly, if the Panel obeyed the Order in the way the majority insists it meant it to be obeyed by keeping its methodology of determining weighted-average dumping margins, but giving credit for positive margins (off-setting), it would be changing the Final Determination to accord with WTO decisions, but without following Congress’ very specific instructions in the URAA, instructions which include consultations with the congressional committees involved and a decision by the U.S. Trade Representative that Commerce should make a revised Determination.<sup>154</sup>

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<sup>153</sup> Mexinox’s Response to Panel’s May 3, 2010 Order, at 11 (U.S. Secretariat Docket No 74).

<sup>154</sup> We recognize that in this case, the Final Determination was never appealed to Geneva, so in fact there could not be a §129 determination in the case. Nevertheless, it seems to us obvious from the explicitness of the URAA sections concerning changing both regulations and determinations only after full consultations with the relevant stakeholders mandated by the statute that Congress did not contemplate any orders from a NAFTA Panel requiring the revision of a determination without any consultation with any of the domestic stakeholders.

Also see pp. 4311 – 4314 of Part IV, Legislative History of the Rule 57(4) Appendix of Authorities supplied by the parties in this case. These pages set out the provisions of the SAA, Vol. 1, concerning “Response to Panel Reports

It appears to us that Commerce's shift to the procedure used in the Remand Determination to calculate Mexinox's dumping margins is completely explained and justified by the necessity for Commerce simultaneously to obey the Panel's order and to not change the Final Determination in a way that would violate Congress' intent in the enactment of §§123 and 129 of the URAA. Congress intended in enacting those sections to have certain consultations made before Commerce responded in a new determination to views of the Geneva dispute resolution bodies concerning its methodology. In the vernacular, the Panel's Order put Commerce "between a rock and a hard place." As we have explained at considerable length in this Dissent—and the majority would not dispute this, Commerce is required to follow Congress' statutory directions. Where those directions (the antidumping statutes) are not clear, Commerce has considerable discretion to choose its own methodology, providing always that it must keep in mind that both exporters and importers will have one view of the system and the U.S. industry another and each side will be willing to challenge determinations by litigation in USCIT or, if nationals of Mexico or Canada, alternatively, before NAFTA Binational Panels. In determining upon a methodology of implementation of the antidumping and countervailing statutes, Commerce will no doubt read and observe very carefully decisions of the USCIT, particularly those affirmed by the Federal Circuit. As for NAFTA Chapter 19 Panels, they also are instructed by the Treaty to apply U.S. law. However, very occasionally, as in *Wire Rod*, USA-CDA-2006-1904-04 (*Wire Rod*) and in our case, a Panel will come up with a novel idea for which there is no

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under...Antidumping ...Agreements". A statement in the SAA (on p. 4314) under the rubric "(5) Judicial Review" is particularly interesting. The statement notes that "Since implemented determinations under section 129 may be appealed, it is possible that Commerce or the ITC may be in the position of simultaneously defending determinations in which the agency reached different conclusions. In such situations, the Administration expects that courts and binational panels will be sensitive to the fact that under the applicable standard of review, as set forth in statute and case law, multiple permissible interpretations of the law and the facts may be legally permissible in any particular case, and the issuance of a different determination under Section 129 does not signify that the initial determination was unlawful."

precedent in the applicable jurisprudence.<sup>155</sup> (*Wire Rod* did not raise a dilemma for Commerce; the case was settled before a determination on remand.) However, in the case of a NAFTA Panel decision, there is no appeal provided for by the Treaty and Commerce must do its best to obey the Order in a lawful and reasonable fashion even though it is absolutely convinced that the Order and its accompanying Decision reasoning are completely contrary to U.S. law as laid out in the applicable jurisprudence. In our view, the best reason for Commerce to have changed in this case (and on the specific facts of this case) its methodology of imposing the antidumping duties required by law in administrative reviews (19 U.S.C. §1675) is that this change allowed it simultaneously to comply with the Panel's Order because it did not zero and to comply with the specific wording of the applicable statute as well as the suggestion in the SAA<sup>156</sup> that the facts of this case fit the case for use of the transaction to transaction methodology.

## **Conclusion**

Based upon the foregoing and after considering all the arguments and authorities advanced by Mexinox as well as those advanced by Commerce and the Domestic Industry, the decision of Commerce with respect to whether it has complied with the Panel's Remand to recalculate Mexinox's margins of dumping without zeroing should be affirmed.

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<sup>155</sup> This of course is written from the point of view of we who dissented from the Panel Decision. The majority of the Panel, of course, asserts that there is a separate "line of cases" flowing from *Allegheny*. We have stated in our original dissent what we think of these cases as authority. In any case, the issue of precedent for the Panel Decision is not relevant to what Commerce should do about the Panel's Order: it must obey it.

<sup>156</sup> See text at pp. 64-65 and the quotation from *U.S. Steel*.

**IT IS SO ORDERED:**

ISSUED ON August 17, 2011

SIGNED IN THE ORIGINAL BY

Joseph I. Liebman  
Joseph I. Liebman, Chairperson

Luis Felipe Aguilar  
Luis Felipe Aguilar

Gisela Bolívar  
Gisela Bolívar

Cynthia C. Lichtenstein  
Cynthia C. Lichtenstein

Dale P. Tursi  
Dale P. Tursi