

**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**

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

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

**APPEARANCES:**

**On behalf of the Investigating Authority**

John D. McInerney, Esq., Michele D. Lynch, Esq. and Mykhaylo A. Gryzlov, Esq.,  
Office of the Chief Counsel for Import Administration, U.S. Department of Commerce

**On behalf of ThyssenKrupp Mexinox S.A. de C.V. and Mexinox USA, Inc.**

Craig A. Lewis, Esq., Hogan & Hartson, LLP

**On behalf of AK Steel Corporation, Allegheny Ludlum Corporation and North American Stainless**

Mary T. Staley, Esq., Kelley Drye & Warren LLP

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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**

### **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, timely briefs were filed by all participants, including Commerce.

Oral argument was held in Washington, D.C., on September 10, 2009. By a timely order entered by this Panel, the time to issue the decision in this matter was initially extended from December 10, 2009, till February 10, 2010. Thereafter, by a timely order issued by this Panel, the time to issue the decision was further extended till March 12, 2010. Additionally, pursuant to a joint motion filed by all parties to this case seeking a stay of proceedings, this panel issued an order on February 18, 2010, staying all proceedings in this case until February 28, 2010, to

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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).

permit the parties to pursue settlement discussions, except with respect to filing of a stipulation between the parties regarding certain propriety, protected information and other ancillary relief pertaining to that stipulation. Thereafter, by Order entered on February 26, 2010, the Panel approved the parties' stipulation that "any and all business proprietary information contained in the transcript of the September 10, 2009 hearing will no longer be considered proprietary." Also, by Order entered on March 1, 2010, the Panel, coupled with other, incidental relief, further stayed proceedings in this case till and including March 30, 2010, while the parties continue to pursue settlement discussion and concomitantly extended the time for this Panel to issue a decision until 14 days after the foregoing stay of proceedings or such further extension of the stay, as may be ordered by this Panel.

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

This Panel's authority derives from Chapter 19 of NAFTA. In undertaking our review of the decision under consideration here, we are informed by Article 1904.1 of NAFTA that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." Here we are reviewing the final results of an antidumping review conducted by Commerce under section 751 of the Tariff Act, 19 U.S.C. § 1675. Such a review is included with the definition of "final determination[s]" set forth in Annex 1911 of the NAFTA ("Annex 1911").

In conducting our review, we apply:

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>[3]</sup>

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<sup>3</sup> NAFTA, Art. 1904.2.

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>4</sup> “General legal principles,” as used there, are stated in Annex 1911 to include “principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies.”

Article 1904.3 of the NAFTA requires this Panel to apply the “standard of review and general legal principles” that a U.S. court would apply in 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>5</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 substantial evidence.”<sup>6</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

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<sup>4</sup> *Id.* at Art. 1904.3.

<sup>5</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).

<sup>6</sup> *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-620 (1966).

different choice had the matter been before it de novo.”<sup>7</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>8</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>9</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>10</sup>

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

Mexinox in its Rule 57(1) Brief expounds upon the issues raised in its complaint in three separate issues. The Domestic Industry in its Rule 57(1) Brief develops three separate issues.<sup>11</sup> However, during the oral argument held in this case on September 10, 2009, the Domestic

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<sup>7</sup> *Universal Camera*, 340 U.S. at 488.

<sup>8</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>9</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>10</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*.

<sup>11</sup> As correctly noted by Mexinox, in its Rule 57(2) Brief, at 4, the Domestic Industry did not include any argument in their Rule 57(1) Brief concerning Mexinox’s profit sharing expense. Therefore this claim is abandoned. *See, e.g., Yohey v. Collins*, 985 F. 2d 222, 224-25 (5<sup>th</sup> Cir. 1993).

Industry expressly conceded its second issue concerning Commerce’s use of a separate indirect selling expense ratio for Mexinox’s home market sales.<sup>12</sup>

The Panel will rule on each of the pending issues, as was framed in the briefs of Mexinox and the Domestic Industry.

**A. Whether Commerce’s Application of Zeroing is Not Supported by Substantial Evidence and/or is Not in Accordance with Law.**<sup>13</sup>

**(1) Mexinox’s position**

Mexinox argues that Commerce’s (hereinafter also referred to as “DOC”) application of zeroing is not in accordance with American law. Its position is grounded on two assertions. Initially it maintains that no provision of US law directs the DOC to apply zeroing in calculating dumping margins. Furthermore, Mexinox argues that if the law were to be interpreted that there was a question on zeroing, the *Charming Betsy*<sup>14</sup> doctrine compels an interpretation of the relevant statute, which is consistent with international obligations, where it is possible to do so.

Mexinox argues that recent events bolster its position. Mexinox points to WTO Appellate Body Reports, which found that the United States was in violation of its obligations in its application of the zeroing methodology. Mexinox also draws our attention to the fact that the US has publicly stated that it would comply with its obligations in respect to the WTO zeroing challenge brought by Japan.<sup>15</sup> It stresses that the United States Trade Representative (“USTR”)

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<sup>12</sup> See Transcript of September 10, 2009 Oral Argument (“Tr.”), at 43-44.

<sup>13</sup> Panelists Lichtenstein and Liebman dissent on this issue. See dissenting opinion following the Panel’s remand order, below, p. 53.

<sup>14</sup> *Murray v. Charming Betsy*, 6 US 64, 118 (1804) (“*Charming Betsy*”).

<sup>15</sup> Mexinox Rule 57(1) Brief, referring to US-Laws, Regulations and Methodology for Calculating Dumping Margins (WT/DS322/AB/R, Jan. 9, 2007).

has agreed to halt the practice of zeroing and that the DOC has also recently accepted court rulings that cast doubt on the application of zeroing.<sup>16</sup>

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

The DOC argues that its practice of zeroing is in accordance with American law. It contends that *Chevron*<sup>17</sup> calls for deference from reviewing bodies on issues of interpretation and its zeroing methodology has been consistently upheld by the courts. It asserts that zeroing is necessary to combat masked dumping and that the *Charming Betsy* canon of construction is inapplicable in this case.<sup>18</sup>

## **(3) Analysis**

Article 1902: Retention of Domestic Antidumping Law and Countervailing Duty Law then states, in relevant part:

2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping duty or countervailing duty statute:

2.(d) such amendment, as applicable to that other Party, is not inconsistent with

- (i) the General Agreement on Tariffs and Trade (GATT), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Antidumping Code) or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs (the Subsidies Code), or any Successor agreement to which all the original signatories to the Agreement are party, or
- (ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while

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<sup>16</sup> 71 Fed.Reg.77722-3 (Dec 26, 2006).

<sup>17</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

<sup>18</sup> Commerce's Rule 57(2) Brief, at 13-25.

maintaining effective and fair disciplines on unfair trade practices, such as the object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.

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”. As such, this Panel is tasked with determining whether the DOC's interpretation of 19 U.S.C. § 1677(35) is permissible under American antidumping duty law. In undertaking its review, this Panel will apply the “general legal principles” that a court of the importing Party otherwise would apply to the review of a determination of the competent investigating authority. General legal principles include the principles of standing, due process, **rules of statutory construction**, mootness and exhaustion of administrative remedies.<sup>19</sup>

In reviewing the DOC’s interpretation of the statute, this Panel is mindful of its duties pursuant to the NAFTA. Article 1901 states, in relevant part:

1. Article 1904 applies only with respect to goods that the competent Investigating authority of the importing Party, applying the importing Party’s antidumping or countervailing duty law to the facts of a specific Case, determines are goods of another Party.
2. For purposes of Articles 1903 and 1904, panels shall be established in accordance with the provisions of Annex 1901.2.

Mexinox frames its argument in terms of statutory construction. It contends this case is not about implementing a WTO dispute settlement finding or recommendation. Rather, it argues that this is a case of statutory construction for which the applicable canons of construction are

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<sup>19</sup> NAFTA, Article 1904.3.

clear. It contends that such a construction would compel a result which would overturn the use of zeroing in this case.<sup>20</sup>

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In undertaking its review, this Panel will apply the "general legal principles" that a court of the importing Party otherwise would apply to the review of a determination of the competent investigating authority. General legal principles include the principles of standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies.<sup>21</sup>

#### **(I) The Statute**

The zeroing methodology is not mandated by, included in, or referred to by the statute. Rather, the DOC has applied a purported zeroing methodology based on its construction of the statute. Under this construction, the DOC 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.

The DOC relies on the word "exceeds" in order to zero non-dumped sales. It states that the antidumping statute defines the "dumping margin" as the amount by which normal value

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<sup>20</sup> Craig Lewis, Counsel to Mexinox, Tr., at 133-134.

<sup>21</sup> NAFTA, Article 1904.3.

“exceeds” the export or constructed price. Its interpretation of the statute then dictates that its methodology to determine the dumping margin will, by definition, not include any sales, which are not dumped. In other words, such sales are “zeroed” for the purpose of determining “aggregate dumping margin” that the statute specifies as the numerator in the “weighted average dumping margin”. The DOC maintains that sales at, or above, normal value need only be reflected in the denominator of the ratio, which consists of the “aggregate export price.”<sup>22</sup>

Hence, the question is whether the weighted dumping margin called for in 19 U.S.C. § 1677 (35) has been reached. A plain reading of the statute directs that all sales should be included in the analysis. Notwithstanding, this ostensibly clear direction, 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. The justification claimed by the DOC’s interpretation of the word “exceeds” to exclude non-dumped sales, is best understood in the context of the statute as a whole.

The United States antidumping law is contained in 19 U.S.C. § 1677, where the relevant definitions read as follows:

(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.

(B) Weighted average dumping margin

The term “weighted average dumping margin” is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

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<sup>22</sup> Commerce’s Rule 57(2) Brief, at 13-14.

The meaning of “dumping margin” is clear. It is that percentage of the entire production shipped, which includes” the ‘aggregate’ sum of the dumping margins below and the ‘aggregate’ margins above dumping in the entire production sold. The meaning of margin becomes clearer when read in conjunction with the term “weighted average dumping margin” which is defined as a percentage of the aggregate sum of the entire production determined by dividing the aggregate dumping margin determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.<sup>23</sup> The word “aggregate” in this context can only mean all and nothing less.<sup>24</sup>

A plain reading of the statute requires that all sales be analyzed in the dumping analysis as dumping refers to an aggregate concept. In directing the DOC to analyze aggregate amounts and compare average sales, the statute does not countenance a methodology, which permits the DOC to select some sales over others in the calculation of dumping margins. The wording of the statute requires that the DOC employ a methodology which analyzes all sales. **Simply stated, the exclusion of positive value sales cannot be supported by the definition of aggregated amounts.**

This reading of the statute is further bolstered by the expressed aim of the antidumping statute to accurately determine dumping margins. Ignoring non-dumped sales clearly distorts dumping margins by eliminating sales, which would, by definition, reduce the dumping averages. It is precisely this distorting of dumping margins that forces the DOC’s interpretation of the statute to run afoul of the Antidumping Agreement.

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<sup>23</sup> 19 USC § 1677 (35)(B).

<sup>24</sup> The majority in *Wire Rod*, USA-CDA-2006-1904-04 (“*Wire Rod*”), came to the same conclusion.

Several WTO decisions have now held that the use of zeroing is inconsistent with US obligations under the WTO Agreement.<sup>25</sup> While not binding on American courts, these decisions serve as authoritative interpretations available to clarify the obligations of members under the Agreement.<sup>26</sup> As such, they serve as useful tools in fashioning interpretations of domestic statutes which would not contravene the international obligations.

Because the construction of the statute is not the only issue raised before this Panel, we shall not hesitate to address the other issue prior to our remand. The DOC has raised other arguments, which go directly to this Panel's jurisdiction to decide the issue. These arguments are premised on the inapplicability of the *Charming Betsy* canon of statutory construction. As such, this Panel shall, as preliminary matters, address the DOC's assertions that *Chevron* usurps the *Charming Betsy* doctrine, that the Uruguay Round Agreements Act<sup>27</sup> precludes reliance on WTO Appellate Body Reports and that the Federal Circuit has spoken to the issue of zeroing in a way that binds this Panel from remanding to the DOC.

### **(II) *Chevron* And *Charming Betsy* Are Not Mutually Exclusive**

*Chevron* and *Charming Betsy* are both pronouncements of the Supreme Court. They are vital components of US law and this Panel finds no reason to believe that the Supreme Court has ever intended that one yield to the other. *Chevron* is a Supreme Court pronouncement, which

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<sup>25</sup> Bed Linen, US-Zeroing (Japan), United States-Laws, Regulations and Methodologies for Calculating Dumping Margin ("Zeroing"). WT/DS294/17 (May 15, 2006).

<sup>26</sup> DSB Article 3: General Provisions:

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading System. The Members recognize that it serves to preserve the rights and obligations of the members under the covered Agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

<sup>27</sup> 19 U.S.C. §§ 3533 and 3538.

confers deference on agency interpretations when construing domestic administrative law. Under this standard, the courts will engage in a two-part analysis. Firstly, the courts will look to see if Congress has spoken directly to the question at issue. If so, the agency's interpretation will be upheld only if the agency followed the expressed intent of Congress. If Congress has not spoken directly to the question at issue, then the agency's interpretation will be upheld only if it is a permissible construction of the statute.<sup>28</sup>

The deference required by *Chevron* is not unlimited. The agency may not, under the guise of lawful discretion, contravene or ignore the intent of Congress.<sup>29</sup> The *Chevron* court noted:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent.<sup>30</sup>

The degree of deference, which is to be accorded to the agency, is contingent, *inter-alia* on the thoroughness evident in its consideration.<sup>31</sup> Courts have been loathe to simply rubber stamp administrative constructions and have stressed the sufficiency of analysis. While the sufficiency of analysis is determined by the facts of a particular case, it is settled that "relatively brief" analyses are insufficient to uphold a determination and warrant remand.<sup>32</sup> Courts have also made it clear that when the agency's use of methodology is improper, or contravenes the will of

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<sup>28</sup> *Chevron; Koyo Seiko Co., Ltd v. United States*, 551 F.3d 1286, 1291 (Fed. Cir. 2008).

<sup>29</sup> *Cabot Corp. v. United States*, 694 F.Supp.949, 953 (Ct. Int'l Trade1988)

<sup>30</sup> *Chevron*.

<sup>31</sup> *Ceramica Regiomontana*, 636 F. Supp. at 965 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140(1944)), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

<sup>32</sup> *Usinor v. United States*, 2002 Ct. Intl. Trade LEXIS 98 (Ct. Int'l Trade July 19, 2002).

Congress, then any of the findings, which flow from it would not be supported by substantial evidence.<sup>33</sup>

Our review does not end with the *Chevron* analysis. An interpretation, which comports with the *Chevron* test, is still subject to the *Charming Betsy* canon of interpretation. That is, an otherwise permissible interpretation that passes the *Chevron* test, may nonetheless be contrary to law if it conflicts with the US's international obligations.<sup>34</sup>

Established jurisprudence reads *Chevron* and *Charming Betsy* in a complementary fashion. This jurisprudence not only requires that the DOC's interpretation be permissible under the standard of deference articulated in *Chevron*, but it also requires that the interpretation be sustainable under the *Charming Betsy* canon of statutory construction. The Supreme Court, in *Charming Betsy*, held:

...[A]n act of Congress ought never to be construed to violate the laws of nations if any other construction remains...<sup>[35]</sup>

In reading *Chevron* and *Charming Betsy* as complimentary, this Panel is mindful of the Court of International Trade's admonition:

The *Charming Betsy* doctrine may conflict in certain circumstances with the deference that courts owe to interpretations of statutory law by agencies...However, courts have held that *Chevron* must be applied in concert with the *Charming Betsy* doctrine when the latter is implicated.<sup>[36]</sup>

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<sup>33</sup> *Gifford-Hill Cement Co. v. United States*, 615 F. Supp.557, 582 (Ct. Int'l Trade 1985).

<sup>34</sup> See *Debartolo Corp. v. Florida Gulf Coast Bldg and Constr. Trades Council*, 485 US 568, 574-75, 108 S. Ct. 1392 (1988).

<sup>35</sup> *Charming Betsy*.

<sup>36</sup> *SNR Roulements v US*, 341 F.Supp.2d 1334 (Ct. Int'l Trade 2004), at 1342.

This long-standing doctrine has not been overruled by the Supreme Court. In fact, in recent history, the Supreme Court has reaffirmed the validity of the doctrine by describing *Charming Betsy's* relevance as “beyond debate.”<sup>37</sup> In specifically addressing the on going development of *Charming Betsy*, the Supreme Court declined the opportunity to limit the reaches of this doctrine.

This Panel is not persuaded that *Charming Betsy* is inapplicable in the circumstances. This Panel rejects, as too narrow a reading of established jurisprudence, the arguments attempting to distinguish or limit *Charming Betsy*, in the context of trade cases, non-self executing treaties or in cases where the United States is a party to the litigation.<sup>38</sup> Furthermore, the question of whether *Charming Betsy* is discredited in the eyes of the Supreme Court, as presently constituted, is an unwarranted exercise in conjecture on an issue not presently before this Panel.

One of the predicates for invoking the *Charming Betsy* doctrine is that US Agency action is in conflict with an international legal obligation of the US. The Federal Circuit has confirmed that statutes must be interpreted consistently with international obligations, absent contrary indications in the statutory language or its legislative history.<sup>39</sup> The Federal Circuit has also confirmed that trade laws are not exempt from the *Charming Betsy* principle.<sup>40</sup> The relevant international obligation of the United States, in the instant case, is the obligation of the US under the Antidumping Agreement to make “fair comparisons” in determining dumping margins. This

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<sup>37</sup> *Debartolo Corp. v. Florida Gulf Coast Bldg and Constr. Trades Council*, 485 US 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988).

<sup>38</sup> See, for example, *Federal Mogul Corp. v United States*, 63 F.3d 1572 (Fed. Cir. 1995) (“*Federal Mogul*”) noting that trade laws are not exempt from the *Charming Betsy* principle.

<sup>39</sup> See *Luigi Bormioli Corp. v United States*, 304 F.3rd 1362, 1368 (Fed. Cir. 2002) (“*Luigi Bormioli*”).

<sup>40</sup> See *Federal Mogul*.

obligation stems not from any single DSB Reports, but from the Treaty itself. The courts have confirmed that the mandatory provisions of the Antidumping Agreement constitute international law obligations of the United States.<sup>41</sup>

Specifically, the Federal Circuit has found the WTO Agreements to be international legal obligations for the purposes of the *Charming Betsy* doctrine.<sup>42</sup> The presumption that Congress intends its laws to comply with international law is even stronger in the context of WTO obligations. The Statement of Administrative Action accompanying the URAA underscores the Congressional intent that US antidumping law be consistent with WTO obligations. “[The URAA was] intended to bring US law fully into compliance with US obligations under the [WTO] agreements.”<sup>43</sup> The Statement of Administrative Action “is an authoritative expression of the United States concerning the interpretation and application of [the WTO Agreements and the implementing statutes] in any judicial proceeding.”<sup>44</sup>

The DSU, which the US has signed, makes explicit the members understanding of the dispute settlement system. It states:

Article 3: General Provisions:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading System. **The Members recognize that it serves to preserve the rights and obligations of the members under the covered Agreements, and to clarify the existing provisions of those agreements** in accordance with customary rules of interpretation of public international law.

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<sup>41</sup> *Federal Mogul; Luigi Bormioli and The Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed.Cir.2004) (“*Timken*”).

<sup>42</sup> See, *Federal Mogul and Luigi Bormioli*.

<sup>43</sup> SAA at 669, H.R. Doc. No.103-316 (1994).

<sup>44</sup> 19 USC § 3512(d).

Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.<sup>[45]</sup>

### **(III) US Legislation Does Not Prevent the Application of *Charming Betsy***

The DOC argues that Congress has legislatively circumscribed the applicability of the *Charming Betsy* doctrine in these circumstances. The DOC relies on the provisions of the Uruguay Round Implementing Act to argue that WTO reports do not change domestic law until specified statutory schemes are followed.<sup>46</sup> Under this statutory scheme, only Congress and the administration can decide whether to implement a WTO Panel Recommendation and, if so, how to implement it. The DOC further argues that the WTO agreements themselves countenance that States may choose not to follow reports by opting to pay compensation or permitting trade retaliation.

The DOC argues that these sections provide a clear statutory scheme that precludes WTO decisions from influencing US legislation absent congressional consultation and review. 19 U.S.C. § 3512(a) states that:

... no provision of any Uruguay Round Agreements nor the application of any such provision or circumstance that is inconsistent with any law of the US shall have effect.<sup>[47]</sup>

The Uruguay Round Agreement Act, 19 U.S.C. § 3512(c)(1)(b), goes on to state that nobody:

...may challenge, in any action brought under any provision of law, any action or inaction by any department, agency or instrumentality of the United States...on ground that such action or inaction is inconsistent with [a WTO] agreement.<sup>[48]</sup>

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<sup>45</sup> DSU, Article 3(2).

<sup>46</sup> See sections 123 and 129 of the URAA.

<sup>47</sup> 19 USC § 3512(a).

<sup>48</sup> 19 USC § 3512(c)(1)(b).

These sections of the Uruguay Round Agreements Act do not preclude this Panel from applying the *Charming Betsy* doctrine. 19 U.S.C. § 3512(c)(1)(b) functions to preclude the ventilation of privately enforceable rights, based on WTO consistency, in American courts. It does not alter the judicial review of agencies and the application of the *Charming Betsy* doctrine. This doctrine continues to obligate this Panel, as well as American courts, to assess agency actions, in light of American international obligations.

Similarly, this Panel notes that 19 U.S.C. § 3512(a) is inapplicable in this case because its application is limited to statutes. In referencing the laws of the United States, this section applies to “legislation” and “statutory provisions”. As zeroing is not mandated by statute, this provision is inapplicable to our analysis, absent a statutory directive. The threshold question is whether “law” includes zeroing and, in the absence of a court decision construing this section to specifically call for zeroing, this Panel is of the view that “law” has the meaning of statute law. Since no statute requires zeroing, the application of the *Charming Betsy* doctrine could not change the words of the statute and is not, therefore, “inconsistent with any law of the US.”<sup>49</sup>

The DOC argues that the courts have acknowledged the existence of such a directive, in sections 123 and 129 of the URAA.<sup>50</sup> These sections establish a statutory scheme for dealing with WTO determinations. Section 123 (19 U.S.C. § 3533) creates a statutory scheme for amending agency practice or regulations to implement WTO reports. It requires that the USTR consult with Congress and that the modification is published in the Federal Register. However, as discussed in the following section, zeroing is neither a regulation nor practice. Zeroing is not

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<sup>49</sup> *WireRod*, at 33.

<sup>50</sup> *Corus v DOC*, 395 F.3d 1343, at 1349 (Fed. Cir.) and *Corus v. US*, Docket No. 2006-1652 (Fed. Cir. Sept. 21, 2007).

mandated by any regulation and cannot fairly be said to be a “practice” because a practice must, at a minimum, emanate from the guidance found in a written policy of general applicability.<sup>51</sup>

Section 129 (19 U.S.C. § 3538) provides another statutorily mandated scheme for implementing WTO reports into domestic law. It is applicable in those cases where WTO reports call for specific agency action to come into conformity with WTO obligations. It calls for consultations between USTR and the relevant stakeholders before a determination is made on implementing a WTO report. Mexinox concedes that the US has not initiated Section 129 procedures to implement the WTO reports, as they relate to administrative reviews.<sup>52</sup> However, Mexinox argues that, as the US has signaled its intention to comply with the report, only the manner of compliance is left to be determined.<sup>53</sup>

As the issue of implementation winds itself to an end, the US has 3 different options available under the DSU. It might bring its practices into compliance with the Recommendations of the DSB. It could also choose to pay compensation in lieu of bringing its measures into compliance. As well, it could choose to do nothing and let the affected parties retaliate. Specifically, the DSU reads, in relevant part:

... A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other

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<sup>51</sup> Statement of Administrative Action, Uruguay Round Agreements Act, H.Doc.No.103-316, Vol.1 (1994), at 352.

<sup>52</sup> Zeroing -Japan WT/DS322/AB/R-January 9, 2007.

<sup>53</sup> Mexinox Rule 57(1) Brief, at 15-16.

obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.<sup>[54]</sup>

In signing the DSU, the United States has explicitly indicated its preference to remove measures found to be inconsistent with the covered agreement. As explicit, is its commitment to making compensation and retaliation remedies the less preferred measures to be undertaken only on a temporary basis and then only to be undertaken when it would be impractical to do otherwise.

Our reading of American preference in this regard is bolstered by The Statement of Administrative Action (“SAA”). The SAA clearly signals congressional intention that the URAA bring US law fully into compliance with US obligations under the WTO Agreements.<sup>55</sup>

Further resolve of the US commitment to uphold its international trade obligations is found in the NAFTA. The NAFTA admonishes the Parties to respect their GATT obligations when dealing with the development of trade law. Article 1902 states, in relevant part:

2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party’s antidumping duty or countervailing duty statute:

2.(d) such amendment, as applicable to that other Party, is not inconsistent with

- (i) the General Agreement on Tariffs and Trade (GATT), the Agreement on Implementation of Article VI of the General Agreement on tariffs and Trade (the Antidumping Code) or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs (the Subsidies Code), or any Successor agreement to which all the original signatories to the Agreement are party, or
- (ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such as the object and purpose to be ascertained from the provisions

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<sup>54</sup> DSU, Article 3 (7).

<sup>55</sup> See SAA, at 669.

of this Agreement, its preamble and objectives, and the practices of the Parties.

**(IV) *Timken And Corus Do Not Preclude A Remand***

The DOC argues no court has ever disapproved of its methodology. To the contrary, courts have found that it is a reasonable interpretation of the statute. In particular, it argues that the Federal Circuit, in upholding its methodology, has created precedent, which binds this Panel. It argues that, notwithstanding WTO Reports, which have found zeroing to be illegal, Federal Circuit decisions, which confirmed the DOC's ability to zero, continue to be applied by the Court of International Trade because these cases have not been overruled by the Supreme Court, nor the Federal Circuit sitting *en banc*.<sup>56</sup>

The DOC refers this Panel to decisions of the Federal Circuit. They argue that the leading case on zeroing is the *Timken* decision.<sup>57</sup> The reasoning found in the *Timken* decision was relied upon by the Federal Circuit when it decided *Corus (I)*<sup>58</sup> and *Corus (II)*.<sup>59</sup> The DOC maintains that these decisions bind this panel on the issue of zeroing in a way that precludes a remand.

The issue regarding the relevance of international decisions on American judicial review is not novel. In fact, it appears to be at the heart of two competing lines of cases at the Court of International Trade and at the Federal Circuit. In one line of cases, the Court of International Trade recognized the relevance of WTO jurisprudence to judicial review. It noted the difficulties in reconciling American international obligations with the deference normally afforded to

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<sup>56</sup> Commerce Rule 57(2) Brief, at 14.

<sup>57</sup> *Timken*.

<sup>58</sup> *Corus Staal Bv. v. Dept. of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (“Corus (I)”).

<sup>59</sup> *Corus Staal Bv. v. United States* (Fed. Cir.2007) (“Corus (II)”).

agencies in judicial reviews. However, while recognizing the supremacy of American law, it held that:

...WTO decisions may however, shed light on whether an agency's practices and policies are in accordance with US international obligations.<sup>[60]</sup>

The Federal Circuit went further in *Allegheny*.<sup>61</sup> It held that WTO Appellate Body decisions were a factor in finding that the DOC's calculations violated the law. It stated:

Section 1677(5)(F) must be interpreted to be consistent with [international] obligations, absent contrary indications in the statutory language or legislative history... This two-century-old canon of statutory construction originated with *Murray v. Charming Betsy*, where the Supreme Court explained:

...an Act of Congress ought never be construed to violate the laws of nations if any other possible construction remains...<sup>[62]</sup>

The Court in *Allegheny* overturned the DOC's choice of methodology, in part, because it found that it contravened the US's international obligations. These international obligations were based on a WTO Appellate Body Report, which stated that the methodology was inconsistent with the provisions of the Uruguay Round Agreement. The court found that neither the statute, nor legislative history supported the choice of methodology employed by the DOC and noted, as additional support for its holding, the desire to construe statutes consistently with WTO Appellate Body rulings.<sup>63</sup> While the court recognized that WTO rulings do not bind courts in their construction of local law, it nonetheless relied on WTO jurisprudence, as a factor, in the review of the agency determination.

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<sup>60</sup> *SNR Roulements v United States*, 341 F.Supp.2d 1334 (Ct. Int'l Trade 2004), at 1342.

<sup>61</sup> *Allegheny Ludlum Corp. v United States*, 367 F.3d 1339 (Fed. Cir. 2004) ("*Allegheny*").

<sup>62</sup> *Id.* 1348.

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

A competing line of cases, at the Court of International Trade and the Federal Circuit, have also evolved. These cases appear to have signaled a retrenchment on the part of these courts to rely on the reasoning of international tribunals in the process of judicial review. In *Timken*, the Federal Circuit found that “the statute does not plainly require consideration of only those dumping margins with a positive value.”<sup>64</sup> While the court acknowledged the problems inherent in the application of zeroing and even went so far as to chastise the DOC for erroneously placing too much emphasis on the potential of masked dumping, it nonetheless deferred to the DOC's methodology, in the circumstances of that case.<sup>65</sup> A subsequent decision in *Corus* declined to follow a WTO decision, which chided the US practice of zeroing as neither necessary nor permissible under the WTO to combat targeted dumping.<sup>66</sup>

It is open to this Panel to follow either of the competing line of authorities. Having reviewed these cases, this Panel finds that the broader question of whether international jurisprudence is relevant, in American judicial review, is not presently reconciled at the Federal Circuit. As this Panel is, therefore, not precluded from looking to international jurisprudence for guidance, this Panel will look at WTO determinations and consider any reasoning, which it may find persuasive.

This Panel finds that the *Timken* line of cases do not preclude a remand. On the narrower issue of whether this Panel is bound by the reasoning of the Federal Circuit on the zeroing methodology, this Panel finds that this is a matter of first impression. Precedent is binding only to the extent that it addresses the same factual issues and legal questions that were considered by

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<sup>64</sup> See *Timken* at 1741.

<sup>65</sup> 926 F. Supp. at 1150

<sup>66</sup> Zeroing -Japan WT/DS322/AB/R-January 9, 2007.

the court that decided it. After careful consideration, this Panel finds that the *Timken* line of cases is distinguishable from the present circumstances.

The *Timken* court was faced with a challenge to zeroing, based on the WTO DSB EC-Bed Linen decision. However, unlike the facts in this case, the WTO Bed Linen decision did not involve the United States as a party and, importantly, a US measure was not the subject of the decision. The legal questions present in this review further distinguish it from *Timken*. While the accuracy of the dumping calculation is at the core of this litigation, the *Timken* court did not consider the question of whether the practice of zeroing, without regard to the evidence of masked dumping, affects the goal of accuracy in determining dumping calculations.

Further, the *Timken* case did not address the SAA definition of “practice.” The *Timken* court premised its refusal to consider international jurisprudence on the basis of a statutory scheme, which attempts to preserve agency regulations or practice. As the DOC proceeds with its zeroing methodology, on a case-by-case basis, without reference to a written policy of general application, zeroing cannot be said to be a practice. Given the SAA’s definition of practice, congressional review is not required to change the methodology for reviews.<sup>67</sup>

The *Corus* cases are similarly distinguishable from the present. Factually, in *Corus* ( I ), the Federal Circuit addressed zeroing in the context of investigations. *Corus* (I) reaffirmed *Timken*’s holding that “WTO decisions are not binding on the United States, much less this court.”<sup>68</sup> In so doing, it reiterated *Timken*’s concerns that the statutory scheme precluded judicial interference in Congressional matters. It refused to “overturn Commerce’s zeroing practice,

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<sup>67</sup> SAA, at 352; see *Wire Rod*, at 32-33.

<sup>68</sup> *Corus* (I), citing to *Timken*, 354 F.3d at 1344.

based on any ruling by the WTO or other international body, unless and until such ruling has been adopted pursuant to the statutory scheme.”<sup>69</sup>

Again, as the zeroing methodology is not based on a practice as defined by the SAA practice, Congressional review is not required to change the methodology for reviews.<sup>70</sup>

*Corus* (II) was not based on a challenge of decisions upholding zeroing. Rather, the reasoning in this decision related to a narrow holding that new developments, as had transpired up to the Fall of 2007, did not warrant retrospective application.<sup>71</sup>

#### **(4) Conclusion**

Having reviewed the wording of the statute, applied *Chevron* and the *Charming Betsy* in a complementary fashion, finding that sections 123 and 129 are inapplicable in the circumstances and finding that the jurisprudence does not preclude a remand, this Panel remands this matter back to the DOC to recalculate Mexinox’s dumping margins without zeroing.

#### **B. Whether Commerce’s Adjustments to the U.S. Indirect Selling Expense Ratio are Not in Accordance with Law.**

Mexinox, USA, Inc. a wholly-owned affiliated importer and reseller, conducted sales, administration, accounting, and logistics activities for itself and two subsidiaries, TKNNA in Germany and TKAST USA in Italy, during the period of review.<sup>72</sup> Mexinox USA charged both subsidiaries service fees under negotiated contracts for the activities undertaken on behalf of these entities.

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<sup>69</sup> *Corus v DOC*, 395 F.3d 1343, at 1349 (Fed. Cir.) and *Corus v. US*, Docket No. 2006-1652 (Fed. Cir. Sept 21, 2007), at 7.

<sup>70</sup> *WireRod*, at 32-33.

<sup>71</sup> *Corus (II)*, Docket No. 2006-1652 (Fed. Cir. Sept. 21, 2007), at 3.

<sup>72</sup> Rule 57(1) Brief, at 17-18.

Mexinox calculated an ISE ratio for Mexinox USA that included all indirect selling, general, and administrative expenses incurred by all three companies during this period. Mexinox offset the total expenses by the amount of services fee income received from TKNNA and TKAST.<sup>73</sup>

In this case, Commerce rejected the offset for services income reported by Mexinox and recalculated the U.S. ISEs.<sup>74</sup> Commerce stated that:

Mexinox USA was unable to identify which expenses {of the total indirect selling expenses that it incurred during the POR} were incurred as a result of providing services to TKNNA and TKAST USA and which were incurred in selling its own merchandise. It is not appropriate to offset Mexinox USA's ISEs for revenue from the affiliates TKNNA and TKAST USA because there is no evidence on the record to demonstrate that this revenue represents the actual expenses incurred by Mexinox USA.<sup>[75]</sup>

Accordingly, Commerce recalculated the U.S. indirect selling ratio by excluding the offset for service fees received from TKNNA and TKAST USA in the numerator of the ISE ratio (*i.e.*, Commerce added the expenses associated with TKNNA and TKAST USA back into the pool).<sup>76</sup> Then, Commerce added the total amount of the service fees paid to Mexinox USA into the denominator (representing the reportable U.S. sales revenue) of the ISE ratio.

### **Commerce Revised Calculation of U.S. Indirect Selling Expenses for Mexinox USA**

#### Calculation of Numerator

Mexinox USA Indirect Selling Expenses per Commerce's Preliminary Determination + (*i.e.*, to reverse Mexinox's offset)  
Income Received from TKNNA +  
Income Received from TKAST USA =

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<sup>73</sup> *Id.* at 20.

<sup>74</sup> *Id.* at 23.

<sup>75</sup> Rule 57(2), Brief at 28.

<sup>76</sup> Tr., at 38.

## Revised Indirect Selling Expenses Numerator

### Calculation of Denominator

Net Finished Goods Sales for Mexinox USA +  
Income Received from TKNNA +  
Income Received from TKAST USA =  
Net Finished Goods Sales and Revenue for Mexinox USA

Revised INDIRSU ratio = numerator/denominator

Mexinox argues that Commerce should have accepted the ISEs as they were reported, net of the service fees paid by TKNNA and TKAST USA. In Mexinox's view the services income provided Commerce with a reasonable estimate of the expenses incurred by Mexinox USA to support finished good sales by TKNNA and TKAST USA.<sup>77</sup> Mexinox also asserts that Commerce's adjustments to the U.S. ISE ratio effectively double-counted ISEs incurred on behalf of TKNNA and TKAST USA.<sup>78</sup>

Mexinox maintains that extensive information was provided on the record explaining precisely how the service fee amounts were calculated and why these fees accurately reflect the expenses incurred by Mexinox to provide the selling services.<sup>79</sup> Mexinox also states that Commerce was provided with complete copies of the agreements and extensive accounting detail demonstrating how the fees were calculated and charged in the normal course of business, and reflected in the financial accounts and statements of each company.<sup>80</sup>

Mexinox questions the reasonableness of Commerce's methodology and points to a companion investigation of stainless steel sheet and strip in coils from Germany, in which

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<sup>77</sup> Rule 57(3) Brief, at 26.

<sup>78</sup> Rule 57(1) Brief, at 28.

<sup>79</sup> *Id.* at 26.

<sup>80</sup> *Id.* at 27.

Commerce accepted the same fee amounts in the calculation of the ISE ratio for Mexinox's affiliate TKNNA.<sup>81</sup>

Mexinox further asserts that although there is no separate administrative review for stainless steel and strip in coils from Italy, the issue of double-counting with respect to TKAST USA is conceptually the same as that for TKNNA, and maintains that Commerce should be consistent with respect to its treatment of these fees for both companies.<sup>82</sup>

With respect to the issues raised by Mexinox on indirect selling expenses:

**Whether Commerce's Rejection of the Services Income Offset is Not Supported by Substantial Evidence on the Record**

This Panel believes that in a review of the record to determine whether or not the record has sufficient information to explain how the service fee amounts were calculated and why these amounts accurately reflect the indirect selling expenses, the burden is on Mexinox to show how the service fees accurately reflect the indirect selling expenses. This Panel does not find that Mexinox has carried its burden but views the question as moot in view of the acceptance by Mexinox in oral argument on the alternative method of calculation. See below.

**Whether Commerce's Recalculation of the ISE Ratio Unreasonably Double-Counted Expenses and Distorted the Results**

This Panel agrees with Mexinox that it is contradictory for Commerce to have rejected the fee revenue as an offset to the selling expenses, yet to use the same rejected fee amounts as an allocation factor.<sup>83</sup> Indeed, Commerce attributed the selling expenses for TKNNA and TKAST USA simultaneously to both Mexinox USA's sales and the sales of TKNNA and TKAST USA.

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<sup>81</sup> *Id.* at 22.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 29.

Accordingly, this panel finds that Commerce's methodology resulted in double-counting the selling expenses for TKNNA and TKAST USA.

Thus, neither Mexinox's original calculation nor Commerce's recalculation is acceptable. However, in its brief Mexinox suggested an alternative calculation and stated in oral argument that it would accept this alternative calculation.<sup>84</sup> This alternative method of calculation is as follows.

**Alternative calculation of U.S. Indirect Selling Expenses for Mexinox USA**

Calculation of Numerator

Total Pool of U.S. Indirect Selling Expenses on Sales of Finished Goods (all 3 companies)

Calculation of Denominator

Net Sales of Finished Goods for Mexinox USA +  
Net Sales of Finished Goods for TKNNA +  
Net Sales of Finished Goods for TKAST USA =  
Net Sales of Finished Goods for All Three Companies Combined

Accordingly, after review and consideration of all the arguments raised by the participants in their briefs and during oral argument on September 10, 2009, this Panel remands to Commerce to recalculate the indirect selling expense ratio in a manner not inconsistent with this Panel's opinion.

**C. Whether Commerce's Adjustments to the Net Financial Expenses Ratio are Not Supported by Substantial Evidence and/or are Not in Accordance with Law.**

In its Final Determination, Commerce made three adjustments to the financial expense ratio calculations: (1) Commerce rejected Mexinox's claimed reduction to interest expenses for "other interest income," (2) Commerce included expenses described as "miscellaneous net financial expenses" in the calculation of the financial expense ratio, and (3) Commerce used

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<sup>84</sup> Tr., at 41.

packing costs and cost of sales data to estimate the amount of packing expenses included in the cost of sales denominator in order to calculate the financial expense ratio.<sup>85</sup>

**(1) Commerce’s rejection of the Requested Offset for Interest Income**

Mexinox argues that amounts reported under the account “other interest and similar income” and reflected in the consolidated financial accounts of its ultimate corporate parent company, ThyssenKrupp AG (“TKAG”), are a proper offset to its parent company’s interest expenses, since such reported amounts relate to operating assets that are “short-term” and that these amounts are specifically differentiated from interest income derived from long-term securities.<sup>86</sup>

Mexinox further asserts that the amounts reported as “other interest and similar income” are short-term nature, and such nature and its relationship to working capital was specifically evidenced by the description provided in the TKAG’s official Group internal accounting manual.<sup>87</sup>

Mexinox states that there was no basis for Commerce to exclude these income amounts from the net interest expense calculation because there is no evidence on the record indicating that the income amounts recorded under the account description “other interest and similar income” relate to long-term interest incomes as assumed by Commerce.<sup>88</sup>

Commerce states that Mexinox failed to adequately substantiate the requested offset since, even though it is Commerce’s normal practice to offset interest expense by short-term

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<sup>85</sup> *Issues and Decision Memorandum*, at 15-16 (Comment 8) (PR 58).

<sup>86</sup> Mexinox’s Rule 57(1) Brief, at 34-35.

<sup>87</sup> *Id.* at 34.

<sup>88</sup> *Id.* at 35.

interest income generated from a company's investment of working capital, the burden of proof in substantiating the legitimacy of an offset lies with the party claiming an offset.<sup>89</sup>

This Panel agrees with Commerce that Mexinox, as the party claiming the adjustment and having control over the relevant information, failed to demonstrate that such income consisted of short-term interest from the investment of working capital. Mexinox failed to meet its burden of producing the relevant information. Section 351.401(b) (1) of the Department of Commerce's regulations states that the interested party in possession of the relevant information has the burden of establishing the nature of a particular adjustment.<sup>90</sup>

Mexinox only provided a short excerpt from an accounting manual and simply asked Commerce to make a series of inferences from a generic description in such manual. As Commerce has previously noted that the burden of proof requirement is especially true where, as in this case, the adjustment requested by the respondent confers a benefit on the same respondent.<sup>91</sup> Therefore, this Panel agrees with Commerce that Mexinox did not satisfy its burden to substantiate the requested adjustment.

This Panel finds that Commerce's rejection of the requested offset for interest income is in accordance with the applicable legislation, with Commerce's normal administrative practice, and is supported by substantial evidence; consequently, this Panel affirms Commerce's determination.

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<sup>89</sup> Commerce's Rule 57(2) Brief, at 40.

<sup>90</sup> 19 C.F. R. § 351.401(b) (1).

<sup>91</sup> *Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Canned Pineapple Fruit From Thailand: July 1, 2004, through June 30, 2005*, 71 Fed Reg. 70,948 (Dec. 7, 2006) (Comment 1).

## **(2) Commerce’s inclusion of “Miscellaneous Net Financial Expenses” in the Financial Expense Calculation**

Mexinox states that when Commerce recalculated the financial expense ratio, it added an amount related to gains and losses on disposal of securitized receivables for “miscellaneous net financial expenses” listed in TKAG’s FY 2005 consolidated audited financial statements and that it provided a breakdown of these miscellaneous net financial expenses in its responses to the questionnaire that shows that the amount included interest expense and income on non-qualifying interest ratio derivatives, gains and losses on disposal of securitized receivables, and exchange gains and losses on financial transactions.<sup>92</sup>

Mexinox contends that this amount related to gains and losses on disposal of securitized accounts receivable should be excluded from the financial expense ratio calculation because it does not reflect the operations of Mexinox, precisely because Mexinox does not itself factor accounts receivable.<sup>93</sup>

Commerce argues that it properly included “miscellaneous financial expenses” in the financial expense calculations, since it is its standard practice to calculate the financial expense ratio using the financial statements at the highest level of consolidation; therefore, Commerce relied upon the financial expenses of TKAG which represent the highest level of consolidation and, in this case, it concluded that the gains and losses on the disposal of TKAG’s securitized account receivables were financial activities, thus, were properly included in the financial expense calculation.<sup>94</sup>

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<sup>92</sup> Mexinox’s Rule 57(1) Brief, at 35-36.

<sup>93</sup> *Id.* at 36.

<sup>94</sup> Commerce’s Rule 57(2) Brief, at 43.

This Panel agrees with Commerce’s inclusion of such gains and losses in the financial expense calculation since, as stated by Commerce, whether Mexinox itself factored receivables is irrelevant, because other consolidated entities in the TKAG group, which represents the highest available level of consolidation, factored receivables.<sup>95</sup>

This Panel finds that Commerce properly included “Miscellaneous Net Financial Expenses” in the Financial Expense Calculation and it is in accordance with the applicable legislation, with Commerce’s normal administrative practice, and is supported by substantial evidence; consequently, this Panel affirms Commerce’s determination.

### **(3) Commerce’s Estimation of Packing Expenses**

Mexinox agrees that Commerce should exclude packing expenses from its financial expense rate calculation; however, it disagrees with how Commerce estimates such expense.<sup>96</sup>

Mexinox claims that the problem with Commerce’s methodology is that, even when the adjustment to the net financial expenses factor to exclude packing expenses from cost of goods sold (“COGS”) denominator was made to attain symmetry in the calculation, the manner in which the adjustment was made, was not appropriate, because it assumes that the ratio of packing expenses to COGS experienced by Mexinox bears a fair relationship to the ratio of packing expenses to COGS at the consolidated TKAG level.<sup>97</sup>

Mexinox argues that the consolidated TKAG entity is a very diverse group that is comprised of nearly 900 companies involved in many different industries and each of these

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<sup>95</sup> *Id.* at 43.

<sup>96</sup> Mexinox’s Rule 57(1) Brief, at 38.

<sup>97</sup> *Id.*

industries is handling different products and different associated packing expenses; therefore, it is unreasonable for Commerce to assume that Mexinox's unique experience as a flat-rolled stainless steel producer is in any way comparable to the consolidated packing cost of TKAG.<sup>98</sup>

Mexinox argues that Commerce should have calculated an interest with a different methodology that according to Mexinox, would have completely avoided the "distortions" purportedly inherent in Commerce's methodology.<sup>99</sup>

It is Commerce's normal practice to use the actual packing expense; however, if such actual expenses are not available as in Mexinox case, Commerce may either estimate such expenses or deny packing-expense adjustment. Commerce decided, as Mexinox did not provide TKAG's consolidated packing expense, to use a ratio of Mexinox's packing costs to its cost of sales and applied this ratio to estimate TKAG's actual packing cost, same methodology that Commerce has utilized before.<sup>100</sup>

As Mexinox did not provide Commerce with TKAG's actual packing costs, and Commerce applied an accepted common methodology, this Panel agrees that Commerce estimated packing-expenses in accordance with law. This Panel does not have either the information or the authority to determine if other methodology is a more accurate measure of such costs; therefore, this Panel accords deference to Commerce's selection of a proper methodology.

This Panel finds that Commerce reasonably estimated packing expenses and it is in accordance with the applicable legislation, with Commerce's normal administrative practice, and

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<sup>98</sup> *Id.* at 38-39.

<sup>99</sup> *Id.* at 39.

<sup>100</sup> *Stainless Steel and Sheet in Strip in Coils from Mexico*, 70 Fed. Reg. 73,444 (Dec. 12, 2005).

is supported by substantial evidence; consequently, this Panel affirms Commerce's determination.

Accordingly, after considering all the arguments presented by the participants in their respective briefs and at oral argument, this Panel affirms Commerce's Adjustments to the Net Financial Expenses Ratio.

**D. Whether Commerce's Level of Trade ("LOT") Analysis Was Supported by Substantial Evidence and Was in Accordance with Law.**

The issue submitted to this Panel with respect to Commerce's level of trade ("LOT") analysis is whether such analysis was supported by substantial evidence and was in accordance with law.

**Allegations of the Parties**

The Domestic Industry argues that the Commerce's level of trade analysis is contradicted by the record, which does not support granting a Constructed Export Price ("CEP") offset adjustment.

The Domestic Industry argues that Commerce must conclude that the available data do not provide an appropriate basis to determine the amount of a level of trade adjustment pursuant to 19U.S.C. § 1677b(a)(7); 19 C.F.R. § 351.412(f).<sup>101</sup> They argue that Commerce will find that a home market sale is at a more advanced LOT than a U.S. sale if a respondent undertakes more selling activities in connection with its sales to its home market customers than it takes with respect to its sales to unaffiliated customers in the U.S.,<sup>102</sup> pursuant to 19 C.F.R. § 351.412(c)(2).

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<sup>101</sup> See Domestic Industry Rule 57(1) Brief, at 5.

<sup>102</sup> See *id.* at 5.

According to Commerce's *Issues and Decision Memorandum*,<sup>103</sup> the Domestic Industry claimed during the administrative review that "there was no evidence in the record demonstrating significant differences in Mexinox's level of trade (LOT) between the home and U.S markets."<sup>104</sup>

The Domestic Industry argues that contrary to Commerce's conclusion, selling activities undertaken by Mexinox in support of downstream sales by Mexinox USA must be accounted for in the LOT analysis.

Finally, the Domestic Industry argues that Commerce's finding that selling functions performed by Mexinox for home market customers are performed at a higher degree of intensity, is not supported by substantial evidence.

Commerce asserts that its LOT analysis is supported by substantial evidence; is in accordance with law and is in accordance with Commerce's normal practice<sup>105</sup> and therefore requests this panel's affirmation of Commerce's determination.<sup>106</sup>

Commerce asserts that the Domestic Industry offered no legal authority for their claim that Commerce was required to include in step two of its level of trade analysis selling activities in support of downstream sales by Mexinox.<sup>107</sup> Commerce asserts the reasonableness of its LOT

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<sup>103</sup> *Issues and Decision Memorandum for the 2004-2005 Administrative Review of Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*. See Administrative file, document number A-201-822. PR 58 ("Decision Memo").

<sup>104</sup> See *id.* at 4. PR 58.

<sup>105</sup> See Commerce Rule 57(2) Brief, at 49 -58.

<sup>106</sup> Citing *Torrington Co. v. United States*, 146 F. Supp.2d 845, 875, 876, 874-878 (Ct. Int'l Trade 2001) ("Torrington"); *Carbon and Certain Steel Alloy Wire Rod from Trinidad and Tobago*, 70 Fed. Reg. 69, 512 (Nov. 16, 2005) ("*Carbon and Certain Steel Alloy Wire*"); *Nippon Steel v. United States*, 458 F. 3d 1343, 1352 (Fed. Cir. 2006).

<sup>107</sup> See Commerce Rule 57(2) Brief, at 52 -55.

methodology, has been explained and affirmed by the Federal Circuit and the Court of International Trade.<sup>108</sup>

Commerce asserts that its finding that the home market LOT is more advanced than the constructed export price level of trade is supported by substantial evidence,<sup>109</sup> referring to all specific responses to the questionnaire submitted by Mexinox within the correspondent information.<sup>110</sup>

Mexinox agrees with Commerce's decision to grant a CEP offset adjustment and argues that the decision is supported by substantial evidence and in accordance with law pursuant to 19U.S.C. § 1677b(a)(7)(B) and 19 C.F.R. § 351.412,<sup>111</sup> referring to its responses to the questionnaire during the administrative review<sup>112</sup> and citing Commerce's explanation of its determination.<sup>113</sup>

Mexinox argues that the CEP level of trade relates to the transaction between the exporter and its affiliated importer.<sup>114</sup>

Mexinox argues<sup>115</sup> that "this Panel should be mindful of the deference that is owed to Commerce in interpreting its authority in this area," provided that such interpretation is a reasonable one.<sup>116</sup>

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<sup>108</sup> Citing *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1313, 1316 (Fed. Cir. 1997) ("*Micron*"); *Torrington*, 146 F. Supp.2d at 874-878; *Carbon and Certain Steel Alloy Wire Rod*.

<sup>109</sup> Citing *Stainless Steel Sheet and Strip in Coils from Mexico*, 68 Fed. Reg. 6,889 (Feb. 11, 2003).

<sup>110</sup> See Administrative file, CR 1; PR 9; CR7; PR 22; CR12; PR 32.

<sup>111</sup> See Mexinox Rule 57 (2) Brief, at 9 -30.

<sup>112</sup> See Administrative file, PR 9 and PR 22.

<sup>113</sup> See Decision Memo, *supra*, n.2.

<sup>114</sup> Citing *Extruded Rubber Thread from Malaysia*, 64 Fed. Reg. 12,967 (March 16, 1999) (final results of administrative review); *Gray Portland Cement and Clinker from Mexico*, 70 Fed. Reg. 54, 103 (Sep. 13, 2005) (preliminary results of administrative review) ("*Cement from Mexico*").

Mexinox argues<sup>117</sup> that Commerce's interpretation of the level of trade provision as requiring the LOT analysis to focus on the constructed export price between the exporter and affiliated importer, after deduction of all selling expenses, has been approved by the Court of International Trade.<sup>118</sup>

Mexinox agrees with Commerce's finding that the home market LOT is more advanced than the constructed export price level of trade and that it is supported by substantial evidence; referring to the information submitted to Commerce through its responses to the administrative questionnaire.<sup>119</sup>

### **Final Results of Antidumping Duty Administrative Review**

As result of the administrative review in issue, Commerce determined that Mexinox is entitled to a CEP offset with respect to all sales in the United States. To make this determination Commerce reviewed factors such as selling functions or services, classes of customer, and the level of selling expenses for each type of sale.<sup>120</sup> Commerce found that there is only one LOT in the home market. Commerce found no evidence on the record demonstrating any significant differences between the services provided to Mexinox Trading as opposed to those provided to

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<sup>115</sup> Citing *PPG Industries, Inc. v. United States*, 928 F.2d 1568, 1571 (Fed. Cir. 1991) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *K-Mart v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Gray Portland Cement and Clinker from Mexico*, USA-MEX-97-1904-01 (June 18, 1999), Slip Op. at 18 (quoting *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)).

<sup>116</sup> See Mexinox Rule 57(2) Brief, at 14-15.

<sup>117</sup> Citing *Torrington*, 146 F. Supp.2d 845, 875, 876, 874-878; *NSK Ltd. v. United States*, 217 F Supp. 2d 1291, 1330 (Ct. Int'l Trade 2002).

<sup>118</sup> See Mexinox Rule 57(2) Brief, at 17 -21.

<sup>119</sup> See Administrative file, PR 9, PR 22, PR 32.

<sup>120</sup> See Decision Memo, at 6.

other home market customers and determined there is only one LOT in the home market, the normal value level of trade “NV LOT.”<sup>121</sup>

Then Commerce compared the normal value level of trade to the constructed export price level of trade and concluded that the NV level of trade is at a more advanced stage than the constructed export price LOT.<sup>122</sup> Commerce determined that home market sales are at a different LOT than the CEP sales and that the difference in level of trade between normal value and constructed export price affects price comparability. Because there was no information available to compensate for this difference in level of trade between normal value and constructed export price sales, Commerce made a CEP offset adjustment to normal value for comparison purposes pursuant to section 773(a)(7)(B) of the Tariff Act.<sup>123</sup>

### **Applicable Legislation**

The Statute establishes level of trade provisions. It defines normal value as well as level of trade and the correspondent adjustments.<sup>124</sup>

The Statute defines constructed export price as well as covers various expenses that are to be deducted from both Export Price (EP) and Constructed Export Price; it covers various expenses incurred between importation and resale, and profit allocated to the expenses that are to be deducted from CEP only.<sup>125</sup>

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<sup>121</sup> See *id.* at 7.

<sup>122</sup> See *id.* at 7-8.

<sup>123</sup> See *id.* at 8.

<sup>124</sup> See 19 U.S.C. § 1677b (a)(1)(B)(i) (1994) and 19 U.S.C. § 1677b(a)(7)(A) (1994).

<sup>125</sup> See 19 U.S.C. § 1677a (b), (c) and (d) (1994).

The Statute provides that, if in reviewing price information in the home market Commerce is not able to quantify price differences between the CEP LOT and the LOT of the comparison sales, and if NV is established at a more advanced stage of distribution than the constructed export price LOT, then Commerce must make a CEP offset pursuant to 19 U.S.C. § 1677b (a)(7)(B) (1994).

The Code of Federal Regulations (C.F.R.) provides for a CEP offset when normal value is compared to constructed export price; when NV is established at a level of trade that constitutes a more advanced stage of distribution than the LOT of the CEP, but the data available does not provide for appropriate basis to determine whether the difference in level of trade affects price comparability.<sup>126</sup>

#### **Analysis on Level of Trade Determination Issued by Commerce**

##### **1. Commerce's Level of Trade Analysis is consistent with the Antidumping Statute.**

The Statute establishes in 19 U.S.C. § 1677a, subsection (d): additional adjustments to apply to constructed export price:

For purposes of this section, the price used to establish constructed export price shall also be reduced by—

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—

(A) Commissions for selling the subject merchandise in the United States;

(B) Expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) Any selling expenses that the seller pays on behalf of the purchaser; and

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<sup>126</sup> See 19 C.F.R. § 351.412(f).

(D) Any selling expenses not deducted under subparagraph (A), (B), or (C);

In conformity to what is established in the provision referred to above, Commerce begins its analysis with the starting price to the first unaffiliated purchaser and deducts the expenses incurred between importation and resale.

Applying the second step in the level of trade explained by the CIT in *Torrington* to determine whether different levels of trade existed in the two markets, Commerce examined “selling functions remaining in the CEP transaction data after deduction of subsection (d) expenses and examined the data on the NV side for evidence of similar selling functions.”<sup>127</sup>

Commerce granted a CEP offset applying the methodology described in 19 U.S.C. § 1677 b(a)(7)(A); 19 C.F.R. § 351.412 (b) and (d) and; in 19 C.F.R. § 351.412(d) and (f): in comparing the NV level of trade to the CEP Commerce determined that: “the CEP level of trade was based upon the selling activities associated with the transactions between Mexinox and its affiliated importer, Mexinox USA, whereas the NV level of trade was based upon the selling activities associated with the transactions between Mexinox and its customers in the home market.”<sup>128</sup> Commerce applied a “CEP Offset” after analyzing Mexinox’s level of selling expenses and concluded that: “home market sales were at a different level of trade than the CEP sales and that the difference in the level of trade between NV and CEP affected price comparability.”<sup>129</sup>

According to 19 U.S.C. § 1677 a(d) the CEP level of trade must be constructed by deducting U.S. selling activities relating to the downstream sale to the U.S. customer before making a level of trade comparison. This methodology has been accepted as reasonable by both

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<sup>127</sup> See Commerce Rule 57(2) Brief, at 50-51.

<sup>128</sup> See Decision Memo at 7. Also, see Commerce Rule 57(2) Brief, at 51-52.

<sup>129</sup> See *id.* at 52.

the Federal Circuit and the Court of International Trade<sup>130</sup> and it was the methodology applied by Commerce in this case at issue.

The Domestic Industry did not establish that there was no evidence in the record demonstrating significant differences in Mexinox's LOT between the home and U.S markets. The Domestic Industry did not establish that the normal value level of trade was not at a more advanced stage than the constructed export price LOT and that Commerce should not have included selling activities in support of downstream sales.

On the contrary, under the basis of the information submitted by Mexinox, Commerce made its analysis, applying the methodology resulting from the legislation and Commerce's administrative practice that has been formalized in law and confirmed by the Federal Circuit and the Court of International Trade, granting consequently a CEP offset.

## **2. The Department's Administrative Practice**

Commerce has formalized its practice of "beginning with the starting price to the first unaffiliated purchaser and then deducting from it the expenses incurred between importation and resale," in a regulation that provides, that "Commerce will identify the level of trade based on: ...in the case of constructed export price, the starting price as adjusted under section 772(d) of the Act."<sup>131</sup>

In support of its administrative practice, Commerce refers to the analysis made by the CIT in *Torrington*, where the Court of International Trade explained that "the deduction from the CEP starting price of the expenses associated with economic activities in the United States, that

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<sup>130</sup> *Micron*, 243 F. 3d1at 1313, 1316 and *Torrington*.

<sup>131</sup> See Commerce Rule 57(2) Brief, at 50, referring to provisions 19 U.S.C. § 1677a(d) and 19 C.F.R. § 351.412 (c)(1).

is, subsection (d) deductions, results in the construction of a hypothetical transaction price that would likely have been charged to the first purchaser in the United States had that purchaser been unaffiliated to the exporter.”

Continuing, citing the CIT analysis in *Torrington*, Commerce explained that the second step in the level of trade analysis: “[I]s the determination of whether there are sales in the home market at the same level of trade as the adjusted CEP sales.”<sup>132</sup> Applying that methodology, Commerce examines selling functions and determines if the functions performed in the CEP transaction are similar to the data on the Normal Value side.

The Domestic Industry claims that what Commerce was required to include in step two of its LOT analysis selling activities in support of downstream sales by Mexinox USA is not supported by law or by Commerce’s administrative practice. The Court of Appeals for the Federal Circuit and the Court of International Trade have already accepted Commerce methodology to deduct the downstream selling expenses from the starting CEP price before making a level of trade comparison.<sup>133</sup>

In its practice and according to the law, Commerce grants a CEP offset where there is a consistent pattern of price differences or, when comparing Normal Value to Constructed Export Price, Normal Value is determined at more advanced level of trade of the CEP and the data do not provide an appropriate basis of a pattern of consistent price differences in the Normal Value market.

Besides the fact that Commerce has already included this practice in law, it applies that methodology in several cases that have been cited by Commerce in the administrative review

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<sup>132</sup> *Torrington*.

<sup>133</sup> See *Torrington*, 146 F.Supp.2d at 874-878 and *Micron*, 243 F.3d at 1313.

proceeding at issue here,<sup>134</sup> as well as in its brief submitted before this panel.<sup>135</sup> Particularly, consistently with all previous administrative reviews of this case, Commerce found there is only one LOT in the home market.

### **3. Substantial Evidence of Commerce's Level of Trade Analysis**

The analysis made by Commerce was based on the information submitted by Mexinox in its responses to the questionnaire.<sup>136</sup>

According to what is stated in the Decision Memo (cited above) to make its LOT analysis, Commerce reviewed factors such as selling functions or services, classes of customer, and the level of selling expenses for each sale.<sup>137</sup>

Based upon the information submitted by Mexinox and consistent with all previous reviews in this case, Commerce found there is only one LOT in the home market. Commerce analyzed the channels of distribution used by Mexinox to make sales to affiliated and unaffiliated distributors/retailers and end-users.<sup>138</sup>

Commerce reviewed the performance intensity of all selling functions with respect to channel of distribution and customer category. Commerce found that few reported functions exhibited differences between channel and customer, but none of them were significant differences between the services provided to Mexinox Trading as opposed to those provided to

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<sup>134</sup> See Decision Memo, at 6, 7.

<sup>135</sup> See Commerce Rule 57(2) Brief, at 51.

<sup>136</sup> See Administrative file, PR 9 and PR 22.

<sup>137</sup> See Decision Memo, at 6.

<sup>138</sup> See Administrative file Mexinox's Section A Questionnaire Response, dated September 29, 2005 at A-3 and A-22 through A-23. PR 9 / CR 1. See Decision Memo, at 7.

other home market customers and therefore, Commerce concluded there is only one LOT in the home market, the normal value level of trade.<sup>139</sup>

With respect to the U.S. market, Commerce compared, based upon the information submitted, the selling activities performed in each channel. Then Commerce determined that the selling functions performed for home market customers are either performed at a higher degree of intensity, or are in addition to selling functions Mexinox performs for Mexinox USA.<sup>140</sup>

There is no evidence in the record that supports the Domestic Industry's claims regarding technical assistance, sample analysis, customer communication, inventory maintenance, and freight services, in the sense that Commerce was required to include in step two of its LOT analysis those selling activities in support of downstream sales by Mexinox USA. Because there is evidence in the record that shows performance in the sense that those selling activities occur in support of the downstream sales by Mexinox USA, Commerce concluded<sup>141</sup> that Mexinox performed additional selling activities in the home market that were not part of the CEP transactions and therefore, the normal value level of trade is at a more advanced stage than the constructed export price LOT.<sup>142</sup>

### **Panel's Decision on LOT Determination Issued by Commerce**

Based upon the applicable legislation, the information contained in the administrative record, Commerce's normal administrative practice and legislative history, this Panel finds that

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<sup>139</sup> See Decision Memo, at 7.

<sup>140</sup> See *id.* at 7.

<sup>141</sup> See *id.* at 7,8.

<sup>142</sup> See Administrative file Mexinox's Section A Questionnaire Response, dated September 29, 2005 at A-31 through A-35 and Attachments A-4-A through A-4-C. PR 9 / CR 1. See Mexinox's SQR1 at Attachment A-18. PR 22 / CR 7. See document number A-201-822 at 8. PR 58 Decision Memo.

Commerce's level of trade analysis is in accordance with the applicable legislation, as well as is in accordance with Commerce's normal administrative practice and is supported by substantial evidence, and consequently affirms Commerce's determination on Level of Trade.

**E. Whether Commerce's Treatment of Mexinox's Inventory Carrying Costs for Certain of its U.S. Inventory (Channel 3) as Indirect Selling Expenses Is Not Supported by Substantial Evidence.**

Mexinox sells through four primary channels of distribution in the U.S. market. One of those ("Channel 3") consists of indirect sales to unaffiliated customers.<sup>143</sup> Channel 3 sales involve merchandise sold by Mexinox USA out of inventories held at warehouses located in the United States.<sup>144</sup> In this case, Commerce determined that the inventory carrying costs for the Channel 3 sales were indirect selling expenses.<sup>145</sup> Commerce stated in the decision memorandum that:

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

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<sup>143</sup> See September 29, 2005 QR at A-23 (CR 1; PR 9) Documents in the administrative record are denominated as: Confidential Record ("CR") and Public Record ("PR").

<sup>144</sup> *Id.* at A-24.

<sup>145</sup> See *Issues and Decision Memo*, at 12 (PR 58).

expenses is consistent with the previous reviews of this case and overall Department practice. See Micron Technology, Inc. v. United States, 243 F.3d 1301, 1314 (Fed. Cir. 2001).<sup>[146]</sup>

### **The Domestic Industry's Arguments**

The Domestic Industry maintains that Commerce's decision to not treat these sales as "direct" U.S. selling expenses was wrong and the decision to treat them as "indirect" U.S. selling expenses was not supported by substantial evidence.

At the outset, the Domestic Industry maintains in its Rule 57(1) Brief<sup>147</sup> that Commerce has misread the decision in *Micron Technology, Inc. v. United States*,<sup>148</sup> by asserting that the inventory carrying costs involved in that case there were all incurred in the country of exportation and not in the United States.

The Domestic Industry argues that the inventory costs here were not incurred in Mexico and do not relate to Mexinox's sales worldwide. Instead they relate to merchandise manufactured to the detailed specifications of specific U.S. Customers and therefore are directly related to specific U.S. sales and specific U.S. customers, and should therefore be treated as direct expenses. Additionally, the Domestic Industry argues that these sales cannot be regarded as "buffer stock to ensure timely availability to the customer," as was contended by Mexinox during the review.<sup>149</sup>

The Domestic Industry maintains that the Channel 3 sales are "consignment inventories which are to be distinguished from buffer stock of off-the shelf (commodity) products that may

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<sup>146</sup> *Id.* (Underscoring in original).

<sup>147</sup> Rule 57(1) Brief, at 19-20.

<sup>148</sup> 243 F.3d 1301 (Fed. Cir. 2001) ("*Micron*").

<sup>149</sup> Rule 57(1) Brief, at 20-21.

be held for a customer's convenience; such products can easily be redirected to meet another customer's needs."<sup>150</sup>

Although Mexinox has stated that it retains legal title to the Channel 3 merchandise and only invoices the customer after the customer has removed the product from inventory, the Domestic Industry maintains that Mexinox's failure to represent that it is free under the commercial arrangement to sell the inventoried products to other customers means the merchandise cannot be considered "buffer stock" which would qualify for treatment as an indirect selling expense as was the case in *Brass Sheet and Strip From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review* ("Brass Sheet").<sup>151</sup> In its reply brief, the Domestic Industry cites to several determinations for the proposition that Commerce has in the past treated pre-sale inventory carrying costs as direct selling expenses in some cases and as indirect expenses in others, depending on the nature of the inventories in question. It also cites to several other determinations made by Commerce which it maintains are inconsistent with the decision in issue here, including one involving made to measure merchandise.<sup>152</sup>

Both Commerce and Mexinox maintain that Commerce's treatment of the inventory carrying costs of the Channel 3 sales is supported by substantial evidence and consistent with prior practice.

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<sup>150</sup> Rule 57(1) Brief, at 21.

<sup>151</sup> 56 Fed. Reg. 60,087, 60,088 (Nov. 27, 1991).

<sup>152</sup> Rule 57(3) Brief, at 8-10.

## Commerce's Arguments

Commerce responded to the Domestic Industry's arguments by asserting<sup>153</sup> that Commerce has considerable discretion in determining how to treat indirect selling expenses, as the antidumping statute does not outline a particular methodology for their calculation. *Heveafil SDH. BHD. v. Unites States*.<sup>154</sup> The same is true with respect to the treatment of inventory carrying costs. *Paul Muller Industrie GMBH & Co. v. United States*.<sup>155</sup>

Commerce asserts<sup>156</sup> that Mexinox's inventory carrying costs are pre-sale expenses that are incurred regardless of whether the merchandise is sold, pointing out the record demonstrates that the merchandise remains the property and inventory of Mexinox USA, regardless of where it is stored.<sup>157</sup> Mexinox bears the risk of loss until the time of invoicing and the price is not finally determined until invoicing, at which time the product is sold.<sup>158</sup>

After citing to the SAA<sup>159</sup> and prior published determinations in support of the treatment

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<sup>153</sup> Rule 57(2) Brief, at 61-62.

<sup>154</sup> 25 CIT 147 (Ct. Int'l Trade 2001) ("*Heveafil*").

<sup>155</sup> 502 F. Supp. 2d 1271 (2007 Ct. Int'l Trade), *aff'd*, 283 Fed Appx.789, 2008 App. LEXIS 14560 (Fed. Cir. 2008) ("*Paul Muller*").

<sup>156</sup> Rule 57(2) Brief, at 63.

<sup>157</sup> May 23, 2006, Letter from Hogan & Hartson to U.S. Department of Commerce, Case No. A-2010822 ("May 23, 2006, SQR4"), at 2-4 (CR 12; PR 32).

<sup>158</sup> *Id.*

<sup>159</sup> The SAA, at 184, defines indirect selling expenses as follows:

Indirect selling expenses which do not meet the criteria of "resulting from and bearing a direct relationship to" the sale of the subject merchandise, do not qualify as assumptions, and are not commissions. Such expenses would be made by the seller regardless of whether the particular sales in question are made, but reasonably may be attributed (at least in part) to such sales.

of inventory carrying costs as indirect expenses, Commerce explains why the Domestic Industry's reading of the *Micron* decision is both factually and legally flawed.<sup>160</sup>

### **Mexinox's Arguments**

Like Commerce, Mexinox argues in its Rule 57(2) Brief<sup>161</sup> that Commerce's findings are supported by substantial evidence. As explained in Mexinox's supplemental questionnaire, whether held at a Mexinox USA distribution center or at the customer's premises, the Channel 3 merchandise remains the property and inventory of Mexinox USA for which Mexinox USA bears the entire risk of loss until it is invoiced to the customer. "The price and final quantity purchased, moreover, is not finally determined until invoicing, at which time the product may be considered 'sold.'"<sup>162</sup>

Mexinox maintains that the Domestic Industry fails to acknowledge that inventory carrying costs are consistently treated by Commerce as indirect selling expenses, citing to *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*,<sup>163</sup> and *General Cephalixin Capsules from Canada*.<sup>164</sup> (Commerce rejected the claim that the "ability to calculate inventory carrying costs for specific sales does not mean that these costs are directly

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<sup>160</sup> Rule 57(2) Brief, at 62-64.

<sup>161</sup> Rule 57(2) Brief, at 39.

<sup>162</sup> See SQR4 (PR 32), at 2-4.

<sup>163</sup> 58 Fed. Reg. 39,729 (July 26, 1993).

<sup>164</sup> 54 Fed. Reg. 26,820 (June 26, 1989).

related to those sales. These costs are incurred regardless of whether the merchandise is sold and are therefore, properly treated as indirect expenses.”<sup>165</sup>).<sup>166</sup>

### **Analysis**

This Panel’s analysis begins with our agreement that, as was recognized in the *Heveafil* case, Commerce has considerable discretion in determining how to treat indirect selling expenses and the same is true, as seen from the *Paul Muller* case, with respect to inventory carrying costs, which Commerce defines as indirect selling expenses.

Regardless of whether the Domestic Industry is correct as to its speculation that the inventory carrying costs in the *Micron* case were incurred in Korea, rather than in the United States, the Federal Circuit, far from resting its conclusions upon any particular location, in explaining what expenses are deductible under 19 U.S.C. § 1677a(d)(1)(D), found that “Commerce has not imposed any geographic limitation on those expenses under subsection D.”<sup>167</sup> The Federal Circuit went on to state that “Rather, these expenses - sales office rents in Korea, salesmen’s salaries in Korea, and certain inventory carrying costs - are incurred by LG Semicon regardless of whether it uses an affiliated distributor in the United States to market its products. In short, these indirect selling expenses are no more of an expense related to the use of affiliated United States entities than the raw material costs incurred during the production of the merchandise.”<sup>168</sup> This view is consistent with the SAA that explains that indirect selling

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<sup>165</sup> See SQR4 (PR 32), at 2-4.

<sup>166</sup> Rule 57(2) Brief, at 39-40.

<sup>167</sup> *Micron*, 243 F.3d at 1313 (citing 19 C.F.R. § 351.402(b)).

<sup>168</sup> *Id.* at 1314.

expenses would be incurred by the seller regardless of whether the particular sales are made, but they may be reasonably attributed (at least in part) to such sale.<sup>169</sup>

Consequently, we agree with Commerce that the treatment of the inventory carrying expenses here is consistent with the SAA and *Micron*. Mexinox would incur such costs regardless of whether a particular sale is made and regardless of where it warehouses the merchandise. Commerce followed its normal practice which considers such pre-sale expenses as indirect selling expenses.<sup>170</sup> In its reply brief, Rule 57(3) Brief, the Domestic Industry points to a number of determinations made by Commerce which it maintains are inconsistent with the decision in issue here. Whether the Domestic Industry's assertions are correct, is not something we need to decide here given the fact that during the oral argument counsel for the Domestic Industry narrowed the issue to be decided here as follows: "So our view is not that we do not disagree with the general principle that if it's truly an inventorying carrying cost, that it is an indirect selling expense. We agree with that general principle."<sup>171</sup> Therefore, if there is substantial evidence here to support Commerce's treatment of the inventory carrying expenses with respect to the Channel 3 merchandise, as indirect expenses, we must affirm Commerce's decision.

Now, we turn to the question of whether there is substantial evidence to support Commerce's finding that the inventory carrying expenses with respect to the Channel 3 merchandise were incurred pre-sale. It appears that the Domestic Industry does not dispute or refute the evidence that demonstrates that: the merchandise remains the property and inventory

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<sup>169</sup> See SAA, at 184.

<sup>170</sup> See, e.g., *Brass Sheet* (Comment 10) (Commerce held that pre-sale warehousing expenses are indirect).

<sup>171</sup> Tr., at 44.

of Mexinox USA, regardless of where it is stored.<sup>172</sup> Mexinox bears the risk of loss until the time of invoicing and the price is not finally determined until invoicing, at which time the product is sold.<sup>173</sup>

Indeed, during the oral argument in this matter held on September 10, 2009, counsel for the Domestic Industry acknowledged that at the time of warehousing “title had not transferred.” While an order for particular specifications has been placed, “the merchandise has not been sold.”<sup>174</sup> Thus, regardless of the likelihood that a sale may eventually take place, at the time the merchandise is warehoused, it is inventory, as there has been no sale of the merchandise. Title has not been transferred, the specific price for the merchandise has not been set and Mexinox bears the risk of loss and the possibility that a sale will not take place.

In light of the foregoing, it is patent that there is substantial evidence to support Commerce’s conclusion that the inventory carrying expenses with respect to the Channel 3 merchandise were pre-sale and, it was reasonable for Commerce to treat the inventory carrying costs as indirect selling expenses.

Accordingly, after considering all the arguments raised by the participants in their respective briefs and during the oral argument in this case, we affirm Commerce’s treatment of Mexinox’s inventory carrying costs for its Channel 3 merchandise as indirect selling expenses.

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

On the issue of the permissibility of zeroing, the Panel remands this matter back to Commerce to re-calculate Mexinox’s dumping margins without zeroing.

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<sup>172</sup> May 23, 2006 SQR4 at 2-4 (CR 12; PR 32).

<sup>173</sup> *Id.*

<sup>174</sup> Tr., at 46-47.

On the issue of whether Commerce’s adjustments to the U.S. indirect selling expense ratio are not in accordance with law the Panel remands this matter back to Commerce to recalculate the indirect selling expense ratio in a manner not inconsistent with the panel’s opinion.

Commerce is further directed to issue its Final Re-determination on Remand within forty-five 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 Decision to Apply Zeroing.**

### **Mexinox’s Initial Arguments**

In its opening brief, Mexinox framed its subsidiary arguments by asserting as its central premise that “Commerce’s Application of Zeroing is Not in Accordance with U.S. Law.”<sup>175</sup> It then asserted that “U.S. Law Does Not Require Zeroing.”<sup>176</sup> Thereafter it argued that the Supreme Court’s decision in *Charming Betsy*<sup>177</sup> precludes the application of *Chevron* deference to Commerce’s interpretation of the United States antidumping statute and that the WTO Appellate Body decision in *US-Zeroing Japan* applies in light of binding international law embodied in the WTO Anti-Dumping Agreement.<sup>178</sup> Finally, Mexinox argued that since the U.S. has announced its intention to comply with its WTO obligations, even though the manner in which the U.S. will implement its WTO obligations has not been decided by the executive after the consultations as mandated by U.S. law, the Federal Circuit’s decision in *Corus Staal*, to not accord any deference to WTO Appellate Body decisions, is no longer controlling precedent.<sup>179</sup>

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<sup>175</sup> Rule 57(1) Brief, at 8-9.

<sup>176</sup> *Id.* at 9-11.

<sup>177</sup> *Murray v. The Schooner Charming Betsy*, 2 Cranch 64, 6 U.S 64 (1804) (“*Charming Betsy*”).

<sup>178</sup> Rule 57(1) Brief at 11-14.

<sup>179</sup> *Id.* at 14-17.

Mexinox, in its reply, Rule 57(3), brief, concluded by stating that:

As described above, the threshold legal question presented to this Panel is whether the Charming Betsy doctrine is applicable in this case. If it is applicable then Mexinox's argument prevails and the U.S. zeroing methodology applied in this case must be reversed consistent with the United States' international obligations as confirmed by multiple WTO dispute settlement panels.<sup>[180]</sup>

Thus, it follows that if the *Charming Betsy* doctrine is not applicable here, or even if it is, the domestic application of the United States' international obligations is to be defined by the United States' implementation of the relevant treaties, the decision of Commerce regarding zeroing should be affirmed.

Earlier in that brief, Mexinox conceded that:

Mexinox agrees that Federal Circuit "precedents" are binding on lower courts and are therefore also binding on this panel by virtue of the standard of review set forth in NAFTA Articles 1904(2) and (3). However, this begs the question of whether Timken and Corus are, in fact, "binding precedents" (i.e., "stare decisis") in the matter before this panel.<sup>[181]</sup>

### **Commerce's Arguments**

For its part, Commerce argued in its Rule 57(2) Brief that the Federal Circuit's decisions in *Timken* and *Corus Staal*, and other like cases, have never been overruled by the United States Supreme Court or the Federal Circuit sitting *en banc* and are binding precedent that this Panel must follow and apply. Additionally, Commerce argued that, as held in *Corus Staal*, "[this Panel must] refuse to overturn Commerce's practice [of

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<sup>180</sup> Rule 57(3) Brief, at 12.

<sup>181</sup> *Id.* at 4.

zeroing] based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.”<sup>182</sup>

Commerce asserted that 19 U.S.C. § 3512 provides that “[n]o provision of any of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect.”<sup>183</sup> Additionally, Commerce asserted that since neither procedures of section 123 of the URAA, 19 U.S.C. § 3533, nor the procedures of section 129 of the URAA, 19 U.S.C. § 3538, have been completed so as to implement a WTO determination in administrative reviews as part of United States domestic law, it would not violate the WTO Agreements or any other “law of nations” to accord *Chevron* deference to Commerce’s practice of zeroing under the domestic antidumping statute.<sup>184</sup> Consequently, the *Charming Betsy* doctrine is not applicable in the context of this case.<sup>185</sup> Moreover, dispute settlement reports do not constitute the “law of nations,” as they have no precedential value and are not binding.<sup>186</sup> Finally until the Executive Branch of the United States government actually implements a WTO decision in an administrative review, that decision cannot be considered part of United States law nor binding upon the United States, regardless of any speculation as to how the decision may be implemented.<sup>187</sup>

### **Mexinox’s Revised Argument**

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<sup>182</sup> Rule 57(2) Brief, at 15-16 (underscoring in original).

<sup>183</sup> *Id.* at 17.

<sup>184</sup> *Id.* at 19-20.

<sup>185</sup> *Id.* at 20-22.

<sup>186</sup> *Id.* at 21.

<sup>187</sup> *Id.* at 24-26.

Less than a week before oral argument was held in this case, Mexinox brought to the attention of the panel, under Rule 68(1), Notice of Additional Authorities (“Notice”),<sup>188</sup> the decision of another NAFTA Binational panel, *In the Matter of: Carbon and Certain Alloy Steel Wire Rod from Canada* (“*Wire Rod*”).<sup>189</sup> Mexinox asserted in the Notice, at 2, that the *Wire Rod* panel “concluded correctly” that:

NAFTA Article 1904.2’s specification of a ‘court’ of the [United States] . . . means neither the CIT nor the Federal Circuit. Perforce it means a generic or virtual United States court reviewing the final Commerce determinations, as described in NAFTA Chapter 19. This generic or virtual court is not situated with the regime of, or bound by, decisions of the CIT or the Federal Circuit.

*Steel Wire Rod* at 11.<sup>[190]</sup>

## **Discussion**

The determination of the majority of this Panel (“Panel Determination”) begins with the recitation of the standard of review of an agency determination set by the leading case, *Chevron*, to the effect that if, following traditional tools of statutory construction, the reviewer finds that Congress has spoken directly to the issue, that is the end of the matter. If, however, the statute is found by the reviewer to be “silent or ambiguous with respect to the specific issue before it,” then the question arises as to the deference to be given to the agency determination. Panel Determination, p. 4.

The Panel Determination then declares the statute under which it says that Commerce (called “DOC” in the majority portion of this determination) adopts its zeroing is 19 U.S.C. § 1677(35) (Panel Determination, p. 7). The majority then goes on

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<sup>188</sup> September 4, 2009.

<sup>189</sup> 2007 WL 440351 (November 28, 2007).

<sup>190</sup> Notice at 2 (Mexinox referred to the *Wire Rod* case in its Notice as the “*Steel Wire Rod*”).

to assert (without any U.S. court authority cited) that that statute is clear. “A plain reading of the statute directs that all sales should be included in the analysis.” Panel Determination, p. 9.

It must be assumed from this conclusion of the majority that the statute is clear (without citing any U.S. court holding to that effect) that the majority found the foregoing conclusion of the Panel in *Wire Rod* holding that the Panel was not bound by decisions of the United States Court of Appeals for the Federal Circuit, to be persuasive. In this dissent (Panel Determination, pp. 81, 84-88), we discuss in detail the decisions of the United States Court of Appeals for the Federal Circuit and lower courts that have declared the relevant statute to be ambiguous, thus permitting Commerce to use zeroing as its methodology in any particular determination that has not been rejected by the political authorities after an adverse WTO ruling in the particular case and a subsequent proceeding under section 129, 19 U.S.C. § 3538, of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (“URAA”). (We further discuss this section of the U.S. law incorporating the WTO treaties into U.S. law at Panel Determination, pp. 62-63, 80-90).

For the remainder of its reasoning justifying a remand to Commerce to re-calculate Mexinox’s dumping margins without zeroing, the majority does appear to be accepting decisions of the federal courts as applicable precedent. They assert that the applicable federal “... jurisprudence not only requires that the DOC’s interpretation be permissible under the standard of deference articulated in *Chevron*, but it also requires that the interpretation be sustainable under the *Charming Betsy* canon of statutory

construction.” See Panel Determination, p.13. However, the cases that the majority believes support their reasoning, upon examination turn out either to be the use of WTO reports to support Commerce’s decision in the case appealed, and/or not a case under the ADA or the U.S. anti-dumping statute.<sup>191</sup> These cases are also discussed in this dissent at Panel Determination, p. 58 and pp. 76-77. We, the dissent here, do agree that the core issue in this case, once one accepts that the statute itself is ambiguous and that therefore the reviewing court or Panel must find Commerce’s reasoning in interpreting the statute to permit it to use the zeroing methodology in administrative reviews “reasonable,” is the extent to which Commerce’s reasonableness must be judged by the canon of interpretation originally enunciated in the Supreme Court’s decision in the *Charming Betsy*. However, we must point out at the outset that the holding of the *Charming Betsy* as quoted by the majority (Panel Determination, p. 13) does not include the full sentence from the Supreme Court’s opinion. The full sentence is: “It has also been observed that an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as **understood in this country.**”<sup>192</sup> (emphasis added).

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<sup>191</sup> A good example is *Luigi Bormioli Corp, Inc. v U.S.*, 304 F.3d 1362 (Fed. Cir. 2002) (“*Luigi Bormioli*”), cited by the majority in notes 39, 41, and 42. *Luigi Bormioli* is the case of a challenge by plaintiff to a ruling of Commerce’s for customs purposes, a ruling that was drafted by Commerce to implement a GATT decision and that the court indicated used just the GATT language. The court said (304 F. 3d at 1368) in upholding Commerce’s ruling: “...we think that the statute must be interpreted to be consistent with GATT obligations, absent contrary indications in the statutory language or its legislative history.” in order to find for Commerce and against the complainant. In short, *Luigi Bormioli* is the exact opposite of the case before us, where Mexinox wishes to strike down Commerce’s interpretation of a domestic statute on the grounds that WTO Panels and Appellate Board have declared zeroing to be contrary to the Anti-Dumping Agreement.

<sup>192</sup> *Charming Betsy*, 2 Cranch at 118.

Even more egregious is the majority's use of a Supreme Court decision, *Debartolo Corp. v. Florida Gulf Coast Bldg and Constr. Trades Council*, 485 U.S. 568, 108 S. Ct.1392, 99 L.Ed. 2d 645 (1988) ("*Debartolo*") to claim that the Supreme Court has, "in recent history...reaffirmed the validity of the doctrine by describing *Charming Betsy*'s relevance as 'beyond debate'." Panel Determination, p. 14. *Debartolo* is a case of a challenge to an order of the National Labor Relations Board to a union to stop peacefully (and without picketing) handing out handbills. The case in no way involved international law of any sort, implemented or unimplemented. The canon of construction which the Court said was "beyond debate" was the "cardinal principle...where an otherwise acceptable construction of a statute would raise constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."<sup>193</sup> The Court did indeed say that that principle has its roots in the *Charming Betsy*, but the court was referring to the constitutional issue in the classic case and its impact on statutory construction and not to the "canon" involving the "law of nations as understood in this country."

We will use the remainder of this dissent to set out just what we consider to be the impact on the case before us of the latter "canon" as so stated and why we consider that Commerce's interpretation of the statute at this point in time should be upheld utilizing both *Chevron* and *Charming Betsy* as properly understood. But first we wish to note that for other issues in this case, such as the question of precedent for this Panel, we find the reasoning set forth in the "joint" and additional dissenting view sections of the *Wire Rod*

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<sup>193</sup> *Debartolo*, at 9.

determination<sup>194</sup> more persuasive than the views of the *Wire Rod* majority. Accordingly we adopt the dissenting views set forth in *Wire Rod* and incorporate them here by reference.<sup>195</sup>

We also note here that the cases upon which we rely in the subsequent discussion are decisions of the U.S. Supreme Court, so that the reasoning we use should apply to the decision of this Panel without regard to whether we stand in the shoes of the CIT with the Federal Circuit defining its binding precedents or in the shoes of a “virtual” court as the *Wire Rod* panel majority declared itself to be.

Because neither the Panel Determination nor the dissenting views in the *Wire Rod* matter addressed the controversial<sup>196</sup> use of the *Charming Betsy* canon to upset an agency determination in great detail, we will address here our view as to why the canon is not, or should not be, applicable to this case in the way argued for by the majority. If it is not applicable, the *Timken* and *Corus Staal* lines of cases are controlling, binding precedent and must be followed by the Panel here. In any event, even if this Panel is not required to follow the precedents of the Federal Circuit, as was held by the majority in *Wire Rod*, those precedents are more persuasive than the decisions relied upon by the majority of this Panel. Alternatively, the additional decisions and other authorities discussed here are

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<sup>194</sup> See *Wire Rod*, at 29-36.

<sup>195</sup> We note that the minority’s views also address some points that are not germane here, such as the respondent’s argument there regarding an alleged violation of the Administrative Procedures Act. Consequently, points not relevant here may be disregarded. Also, Joseph I Liebman, who dissents here, is the same panelist who participated in the joint and separate dissents in the *Wire Rod* panel determination.

<sup>196</sup> See the article by an English law professor, Davies, *Connecting or Compartmentalizing the WTO and United States Legal Systems? The Role of the Charming Betsy Canon*, 10 J. OF INT ECONOMIC LAW 117 (2007) in which the author reviews in detail both the cases and prior articles saying (at 117): “Some of the cases are arguably irreconcilable while academic opinion is similarly polarized by concerns about both the extent of judicial deference to agency interpretations, and about the slightest possibility of a more inquisitive approach.”

more persuasive than those relied upon by the majority of this Panel. Therefore, Commerce's determination to apply zeroing should be affirmed.

The Panel Determination, above, insists, Panel Determination, p.13, that: "...an otherwise permissible interpretation [by Commerce] that passes the *Chevron* test, [sic] may nonetheless be contrary to law if it conflicts with the U.S.'s international obligations," citing the case we discuss above at n. 193, *Debartolo*, which turns purely on the question whether an agency interpretation (in that case the NLRB) might be unconstitutional. This quotation from the Panel Determination is taken from a section of the Panel Determination headed "II. Chevron and Charming Betsy Are Not Mutually Exclusive" (Panel Determination, p. 11). We certainly could agree with the heading in that when the U.S. courts have considered Commerce's determinations or rulings at the instance of a contestant, they have utilized WTO treaty provisions or Panel or Appellate Body reports to support their findings of the reasonableness of Commerce's actions. However, none of the cases cited by the majority in this section of the Determination utilize the alleged international trade obligations of the U.S. to either overrule Commerce's position or find that Commerce's ruling considered in the particular case "conflicts with the U.S.'s international obligations." This section of the Determination also insists, without citing any authority (p. 14) that "The relevant international obligation of the United States, in the instant case, is the obligation of the US under the Antidumping Agreement to make 'fair comparisons' in determining dumping margins." and goes on to say that the obligation "stems...from the Treaty itself ." (Panel Determination, p. 15). We, in this dissent, take the view that when there is a clear conflict between a treaty and Congress' implementation of that treaty (see our discussion of the *Whitney* case in the text below at notes 202-211), the contemporaneous or subsequent

legislation rules.

In that connection, the next section of the Panel Determination, headed “III. US Legislation Does Not Prevent the Application of *Charming Betsy*” (Panel Determination, pp 16-20) does not seem to us to have answered Commerce’s contention (as paraphrased by the majority, at p.16) that “Congress has legislatively circumscribed the applicability of the *Charming Betsy* doctrine in these circumstances.” The majority does acknowledge (Panel Determination, p. 17) that “These sections [sections 123 and 129 of the URAA] establish a statutory scheme for dealing with WTO determinations.” However, their argument is mainly directed to section 123 which as they point out (Panel Determination, p.17) creates a statutory scheme for amending agency practice or regulations to implement WTO reports. They also, in our opinion quite correctly, describe section 129 (at p. 18): “Section 129 (19 U.S.C. § 3538) provides another statutorily mandated scheme for implementing WTO reports into domestic law. It is applicable in those cases where WTO reports call for specific agency action to come into conformity with WTO obligations. It calls for consultations between USTR and the relevant stakeholders before a determination is made on implementing a WTO report.” The majority argument then completely ignores that the Commerce determination that we are reviewing falls into this second category; we are being asked to review (among other challenges to Commerce’s determination) the use by Commerce in a particular administrative review of its calculation of the anti-dumping duties during the period of the review applicable to imports from Mexinox by a particular zeroing methodology, no more and no less. Indeed, the remand order on this issue directs Commerce “to re-calculate Mexinox’s dumping margins without zeroing” (Panel Determination, p. 52.). Thus the review of Commerce’s actions by this Panel is of

“specific agency action” which the majority itself states is subject to the statutory provisions of section 129 and not section 123 of the URAA. Any arguments directed to the U.S.’s “international obligations” vis a vis WTO dispute resolution reports must be in terms of the statutorily required process required under section 129. As the majority agree (Panel Determination, p.18): “Mexinox concedes that the US has not initiated Section 129 procedures to implement the WTO reports, as they relate to administrative reviews.” In our opinion, this is why what is claimed to be the Charming Betsy doctrine may not and should not be applied in this case.

The Panel Determination also states (p. 11), without citing any authority therefor, that the WTO Panel and Appellate Body reports concerning the United States practice of zeroing “...serve as authoritative interpretations available to clarify the obligations of [WTO] members under the [WTO] Agreement[s].” To be fair, the majority adds that the reports are “...not binding on American courts,” but then treats the reports as if they are binding on the Department of Commerce, the federal agency to whom administration of the anti-dumping statute is confided by Congress. This dissent rejects both of these views as a misunderstanding of the implications of the *Charming Betsy* for reviewing the actions of Commerce for their conformity to U.S. law, including in that law the U.S.’s international obligations as such obligations have been incorporated into U.S. law by the Congress. However, we believe that the arguments the majority puts forward in the whole of Panel Determination should be addressed as well and shall now proceed to do so.

At this point, to put things in a proper context, it is necessary to quote in full the mandate

given to NAFTA dispute resolution panels by the NAFTA Treaty.<sup>197</sup> Article 1904.2. states:

2. An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of 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. Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.

Article 1904.3 states:

3. The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

Thus, for this Panel, the applicable law of what are the United States' international obligations under the WTO Anti-Dumping Agreement<sup>198</sup> is what United States law says are its obligations, not what a WTO Panel or the Appellate Body says are United States obligations. In the Treaty, as in all ratified treaties, the United States has promised its treaty partners, the other nation signatories to the Anti-Dumping Agreement, that it will abide by the provisions of the Agreement. The content of that promise is governed, for international law purposes, by the provisions of the Vienna Convention on

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<sup>197</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>198</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, reprinted in H. Doc. 103-316, Vol. 1, 103d Cong., 2d. Sess. (1994) ("Anti-Dumping Agreement").

Treaties<sup>199</sup> that have entered into customary international law. Once again, as noted below, that customary international law of treaties only applies domestically to the extent that United States municipal law recognizes it as applicable.

However, in the case of treaties that United States law considers to be non-self-executing, the obligations of such a treaty are exactly what the Congress in passing the legislation to “execute” the treaty (that is, to incorporate the treaty’s obligations into domestic law) says they are in the implementing statute or statutes. In the case of United States anti-dumping legislation, Congress has delegated to the agency, the Department of Commerce, the task of interpreting the relevant statute as to the methodology of determining the margin of dumping. All<sup>200</sup> are agreed (other than the majority of this Panel which seems to believe that it has the authority to decide itself what 19 U.S.C. § 1677(35) means without regard to what federal courts have said about the statute, (Panel Determination, pp. 9-10) that the relevant statute neither prescribes nor forbids zeroing.

Under these circumstances, it is up to the agency of the executive power, to which negotiation of international agreements is confided by the U.S. Constitution, to choose its methodology, provided always that the method chosen is not in violation of Congress’s direction. In these circumstances (the circumstances of a non-self-executing treaty), it is Congress’s legislation that is determinative of the content of United States’ obligations under the treaty in question. It must be remembered that the original formulation of the

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<sup>199</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331. Note that the United States is not a signatory to the Convention and that therefore the Convention’s provisions only apply to the United States to the extent that United States law agrees that such provisions have entered into customary international law as applied in the United States’ legal system.

<sup>200</sup> See the cases discussed at n. 251, below.

canon in the *Charming Betsy* is worded in full as follows: “It has also been observed that an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations **as understood in this country.**”<sup>201</sup> (emphasis added). We have quoted before the full sentence in the *Charming Betsy* that has been taken as the “canon of interpretation” (see Panel Determination, p. 58, above) and have repeated it again here for emphasis. Thus the canon itself in its original formulation is referring to the United States’ understanding of the “law of nations”, or to put it another way, to international obligations of the United States as such obligations are incorporated into United States law.

Now, entire casebooks, *see, e.g.*, Franck and Glennon, FOREIGN RELATIONS AND NATIONAL SECURITY LAW, 2d (American Casebook Series) and treatises, *e.g.*, Henkin, Foreign Affairs and the United States Constitution, 2d, have been written on the U.S. Constitution and foreign relations. There continues to be controversy over the extent to which customary international law is incorporated into federal law, but that issue is not before us in this case as we are dealing with a treaty, and not only a treaty, a non-self-executing treaty. In the case of treaties, another ruling Supreme Court case is implicated: *Whitney v Robertson*.<sup>202</sup> *Whitney* concerns two trade treaties,<sup>203</sup> one with San Domingo,

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<sup>201</sup> *Charming Betsy*, 2 Cranch at 118.

<sup>202</sup> *Whitney v. Robertson*, 124 U.S. 190, 8 S. Ct. 456, 31 L. Ed.386 (1888) (“*Whitney*”).

<sup>203</sup> Although the Court did not so state, trade treaties, whether bi-lateral or multi-lateral, have always been treated as non-self-executing in their entirety. The reason is explained in the international trade casebooks: as such treaties concerned from the earliest times tariff duties, or “revenue” and the U.S. Constitution provides that revenue statutes must originate in the House of Representatives (“House”), trade treaties have always been incorporated into domestic law by legislation passed by both the House and the Senate, rather than the agreement signed by the President being “ratified” by the “advice and consent” of two-thirds of the Senate, the process provided for by Art.

which contained a Most Favored Nation clause (“MFN”) and the other with the Hawaiian Islands which exempted Hawaiian sugar from duties. (The Hawaiian treaty had been implemented by “...the act of Congress, passed to carry the treaty into effect.”) The importers of the San Domingo sugars sued to obtain the return of the duties imposed upon the imported sugar, claiming in effect that the imposition of the duties violated the MFN clause of the treaty with San Domingo. The United States Supreme Court upheld the imposition of the duties (although it agreed that the San Domingo sugars were “like articles” to the Hawaiian sugar which was exempted from duty), saying of the MFN clause: “[It] is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any other country,”<sup>204</sup> but the Supreme Court refused to read the MFN clause so as to preclude the government from making special arrangements with other countries.

Then, however, the Court went on to find another reason to not give the plaintiffs a remedy:

The act of Congress under which the duties were collected authorized their exaction. ... It was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations [of the treaty] are not self-executing they can only be

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II, Section 2 of the U.S. Constitution. When an international agreement signed by the President is so ratified, which portions of it are “self-executing” and which portions are not becomes a matter for the courts to decide upon. The United States Supreme Court, by a divided majority, has very recently spoken to this issue in a case concerning the domestic law effect of the UN Charter, the Statute of the International Court of Justice and the Optional Protocol of the Vienna Convention on Consular Relations, *Medellin v. Texas*, 552 U.S. 491, 128 S.Ct 1346, 170 L.Ed.2d 190 (2008) (“*Medellin*”). See the discussion of *Medellin* below, Panel Determination, pp. 73-76.

<sup>204</sup> *Whitney*, 124 U.S. at 192.

enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. **The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance** (emphasis supplied).<sup>[205]</sup>

The Supreme Court in *Whitney* went on to paraphrase in detail an earlier circuit decision,<sup>206</sup> *Taylor v. Morton*, 2 Curtis 454, 459, written by Justice Curtis of the Supreme Court, determining that issues of compliance with treaty obligation by either the domestic sovereign or the foreign sovereign were not issues for a court. The paraphrase continued on to say:

[These issues] were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws.<sup>[207]</sup>

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<sup>205</sup> *Id.* at 194.

<sup>206</sup> 2 Curtis 454 (CC Mass.1985).

<sup>207</sup> *Whitney*, 124 U.S. at 195.

The Court in *Whitney* concluded by saying: “In these views we fully concur.” and quoting from *Head Money Cases*,<sup>208</sup> “...it was objected to an act of Congress that it violated provisions contained in treaties with foreign nations....’so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.”<sup>209</sup>

*Whitney* has never been overruled, and indeed, it was cited a number of times with approval by the Supreme Court as recently as 2008 in *Medellin*.<sup>210</sup> Its relevance to the case here is clear: in judging the appropriateness of a methodology used by Commerce to implement a statute passed (or amended) by Congress to “execute” an international trade agreement, in our case, the Anti-Dumping Agreement,<sup>211</sup> reports of a dispute resolution body set up by another of the package of Uruguay Round Agreements have no say. Another way to put this is to say that the *Charming Betsy* decision was rendered in 1801, did not concern the implementation of a treaty (only a dispute over confiscation of a vessel) and U.S. courts (and by derivation, this Panel) are instructed by *Whitney* to look, in the case of a non-self-executing treaty, only at the statute that the legislative bodies have enacted, and the President has signed, to incorporate the particular treaty into United States law. If the statute is one where its interpretation has been entrusted by the legislature to an agency, and the statute is unclear or lends itself to different

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<sup>208</sup> 112 U.S. 580, 5 S. Ct. 247, 28 L.Ed. 798 (1884).

<sup>209</sup> *Whitney*, 124 U.S. at 459.

<sup>210</sup> *Medellin*, *supra*, n. 203.

<sup>211</sup> *Supra*, n. 198.

interpretations, then that agency’s interpretation, if challenged, must be examined for its reasonableness as an interpretation of the statute. While we might agree that in considering the reasonableness of Commerce’s interpretation, the thoughts of foreign panels interpreting the original treaty “executed” by the statute in question could be of use, *Whitney* instructs us that the general “law of nations” canon derived from the *Charming Betsy* in no way obliges the agency to follow those reports.

Quite apart from *Whitney*, both commentators<sup>212</sup> and the Congress itself have declared that reports of WTO panels and the Appellate Body do not state the U.S.’s international law obligations under the Uruguay Round Agreements. Congress in the Uruguay Round Agreements Act<sup>213</sup> provided in Section 3512(d)<sup>214</sup> that “The statement of administrative action [SAA<sup>215</sup>] approved by Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” The SAA then tells us that reports of WTO panels and the Appellate Body “have no binding effect under the law of the United States and do not represent an expression of the US foreign or trade policy.”<sup>216</sup> The SAA also states: “Only Congress and

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<sup>212</sup> See, e.g., Greenwald, *After Corus Staal—Is There Any Role, and Should There Be—For WTO Jurisprudence in the Review of U.S. Trade Measures By U.S. Courts*, 39 GEORGETOWN J. OF INT’L L. 199 (2007) (“Greenwald”) discussed in the text below at n. 240.

<sup>213</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (“URAA”).

<sup>214</sup> URAA, 19 U.S.C. §. 3512(d) (1994).

<sup>215</sup> H.R. Rep. 103-316, 1994 U.S.C.C.A.N. 4040 (1994).

<sup>216</sup> *Id.* at 4318.

the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.”<sup>217</sup>

It is true that an interesting colloquy took place shortly after U.S. accession to the WTO Agreements between two leading figures in the development of those treaties, Judith Hippler Bello and John H. Jackson, both presenting their views as to the effect of WTO Panel and Appellate Body reports in separate Editorial Comments in the *American Journal of International Law*.<sup>218</sup> Professor Jackson takes issue with a statement of Ms. Bello in her Comment that he believes leads to the wrong conclusion on the “broader question of the legal effect of a final ruling of the dispute settlement process (that is, a report of a dispute settlement panel, or of the appellate panel that judges an appeal from the first-level dispute settlement report).”<sup>219</sup> Jackson goes on to say:

There is some controversy about the legal status of such a report when adopted (as it will almost automatically be under the new WTO procedures). The specific question here is whether the international law obligation deriving from such a report gives the option either to compensate with trade or other measures, or to fulfill the recommendation of the report mandating that the member bring its practices or law into consistency with the texts of the annexes to the WTO Agreement. In other words, does it give the choice to "compensate" or obey? There has been some confusion about this, and some important leaders of major trading entities in the WTO have made statements that indicate this confusion or are misleading, and in some cases flatly wrong.

The alternative interpretation is that an adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice to make it consistent with the rules of the WTO Agreement and its annexes. In this view, the "compensation" (or retaliation) approach is only a fallback in the event of noncompliance.

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<sup>217</sup> *Id.* at 4042. See also the discussion and the quotation from the SAA in the text below at n. 245.

<sup>218</sup> Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 *AJIL* 416 (1996); John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings On The Nature of Legal Obligation*, 91 *AJIL* 60 (1997) (“Jackson”).

<sup>219</sup> *Jackson*, 91 *AJIL*, at 60.

This latter approach to the question I have posed above, I believe, is correct.<sup>[220]</sup>

Professor Jackson admits in his Comment that:

... the language of the DSU does not solidly "nail down" this issue. For example and contrast, Article 94 of the United Nations Charter states: 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.' Similarly, the Statute of the International Court of Justice, in Article 59, implies such an obligation, stating: "The decision of the Court has no binding force except between the parties and in respect of that particular case."<sup>[221]</sup>

Professor Jackson then goes on to list every bit of language that he can find in the Dispute Settlement Understanding ("DSU") that will, nevertheless, lead to his desired conclusion:

...that the overall gist of those clauses, in the light of the practice of GATT, and perhaps supplemented by the preparatory work of the negotiators (unfortunately not well documented), strongly suggests that the legal effect of an adopted panel report is the international law obligation to perform the recommendation of the panel report.<sup>[222]</sup>

What is notable about this colloquy, however, is that neither Bello nor Jackson, while arguing over whether a Dispute Settlement Body Panel report creates an "international law obligation to perform the recommendation of the panel report" delves into the even more interesting question, for our purposes, of whether that obligation must be applied **in the domestic legal system** against an adverse position of the agency whose interpretation of the domestic statute occasioned the resort by the exporting country to the WTO dispute resolution system and the Panel and

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 61.

<sup>222</sup> *Id.* at 62-63.

Appellate Body reports, or whether the report determinations are, in the words of the *Charming Betsy*, “the law of nations as understood in this country.”<sup>223</sup>

It is pertinent here to discuss the most recent word of the United States Supreme Court on the applicability in the U.S. legal system of a judgment of an international decision maker, specifically the United Nations International Court of Justice (“ICJ”). The ICJ is established under the Charter of the United Nations and, as pointed out by Professor Jackson above, Article 94 of the United Nations Charter states: “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” It is exactly this clause of the United Nations Charter that was at issue in *Medellin*. Mr. Medellin (now executed by the State of Texas) was a Mexican national who was tried and convicted and sentenced to death by the State of Texas for a particularly nasty murder. He confessed to the crime about three hours after arrest, but there was no evidence at any moment in the case that the confession was coerced. At the time of his arrest and trial, he was never informed of his rights under the Vienna Convention on Consular Relations (“Convention”) to which the United States is a signatory.<sup>224</sup> After conviction, Medellin applied under Texas law for *habeas corpus* on the grounds of violation of his Convention rights, but was rejected on the grounds that under Texas procedural rules, he needed to have raised his rights under the Convention at trial. Similarly, his appeals to the Federal courts were rejected as the Supreme Court had held in *Sanchez-Llamas v. Oregon*<sup>225</sup> that state procedural rules trumped any rights under the Convention for the purpose of federal *habeas corpus*.

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<sup>223</sup> *Charming Betsy*, 2 Cranch at 118.

<sup>224</sup> Vienna Convention on Consular Relations, Apr 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No 6820.

<sup>225</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006).

In the meantime, however, Mexico had taken the United States to the ICJ under the Optional Protocol of the Convention (those state parties to the Convention who agree to submit to compulsory jurisdiction of the ICJ for resolution of disputes under the Convention sign the Optional Protocol) with respect to 51 Mexican nationals (including Medellín) who had been convicted by U.S. state courts without being given their rights under the Convention. The ICJ decided in favor of Mexico<sup>226</sup> and, in the words of Chief Justice Roberts, the author of the majority opinion in *Medellin*:

The ICJ held that the United States had violated Article 36(1)(b) of the Vienna Convention by failing to inform the 51 named Mexican nationals, including Medellín, of their Vienna Convention rights. 2004 I.C. J., at 53-55. In the ICJ's determination, the United States was obligated 'to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals.' *Id.*, at 72. The ICJ indicated that such review was required without regard to state procedural default rules. *Id.*, at 56-57.<sup>[227]</sup>

Medellin's death penalty lawyers immediately seized on the ICJ decision and Art. 94 of the UN Charter to argue that the United States had an international obligation to require the State of Texas to review and reconsider Medellín's conviction to determine whether the grant of his Convention rights would have changed the result. Thus, the Supreme Court, when the case reached it, was faced with just the same question that this Panel faces: what effect to give under domestic law to decisions of international decision makers making determinations in a dispute resolution system set up by a treaty to which the U. S. has adhered.<sup>228</sup> The majority in *Medellin* began by saying:

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<sup>226</sup> Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.) ("*Avena*"), 2004 I.C.J. 12.

<sup>227</sup> *Medellin*, 128 S.Ct. at 1355.

<sup>228</sup> The *Medellin* case involves an additional issue of what effect to give to the issuance by the Executive of a Memorandum described by the Court ( 128 S. Ct. 1355 ): "Before we heard oral argument, however, President George W. Bush issued his Memorandum to the United States Attorney General, providing:

No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.<sup>[229]</sup> (Emphasis by the Court.)

The Supreme Court in *Medellin*, after citing the *Whitney* and other Supreme Court decisions, went on to describe the difference between self-executing treaties and non-self-executing treaties in terms of their legal effect. Self-executing treaties are the “Law of the Land” under Art. VI of the Constitution and non-self-executing have only the domestic effect of the statutes that Congress enacts to “execute” the treaty. The Court then by close examination of the text of Art 94 of the UN Charter, the Optional Protocol and the ICJ Statute determined that the Senate had never intended when ratifying those instruments to have them be self-executing. The Court declared:<sup>230</sup>

The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions. Article 94(1) provides that “[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party.” 59 Stat. 1051 (emphasis added). The Executive Branch contends that the phrase ‘undertakes to comply’ is not

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I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.”

We do not discuss the issue here, however, as in our case, the Executive is represented by Commerce and Commerce is arguing strongly against utilization of DSU Panel and Appellate Body reports to force change upon its determination.

<sup>229</sup> *Medellin*, 128 S.Ct. at 1356.

<sup>230</sup> *Medellin*, 128 S.Ct. at 1357.

‘an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. members,’ but rather ‘a *commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision.’ Brief for United States as *Amicus Curiae* in *Medellín I*, O.T.2004, No. 04-5928, p. 34.

We agree with this construction of Article 94. The Article is not a directive to domestic courts. It does not provide that the United States “shall” or “must” comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts.

Following the *Medellin* reasoning, which is binding upon this Panel because by definition, the Anti-Dumping Agreement and the other Uruguay Round agreements are non-self-executing treaties, dispute resolution reports under the DSU interpreting the treaties do not have domestic legal effect and do not constitute international obligations subject to the *Charming Betsy* canon. While such reports do indeed set out what the international obligations of the United States are in respect of the particular case before the WTO Panel or Appellate Body, the reports are not only not binding on U.S. courts, they can in domestic law be no more than interpretative guides to uphold the decisions of the agency charged under the “executing” statutes with applying and interpreting those statutes.

Indeed, that was the very limited extent to which the Federal Circuit in the case of *Federal Mogul Corporation v. United States*,<sup>231</sup> looked at a GATT obligation. The majority (Panel Determination, p. 15) mistakenly relies upon the reference in *Federal Mogul* to the *Charming Betsy* doctrine, elevating it to being controlling.<sup>232</sup> The decision in the case makes it clear that the court was considering international decisions for the limited purpose of reinforcing

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<sup>231</sup> 63 F.3d 1572 (Fed. Cir. 1995) (“*Federal Mogul*”).

<sup>232</sup> The majority’s opinion is rife with citations to decision of the Federal Circuit and other courts, which upon examination either do not sustain the proposition supported or which are based upon *dictum*. *Dictum* consists, inter alia, of statements in judicial opinions upon a point or points not necessary to the decision of the case and is not precedential. Additionally, it cannot even serve guidance to form the basis for rejecting binding precedent. See *In Re Stephen P. McGrew*, 120 F.3d 1236 (Fed. Cir. 1997).

its conclusion that Commerce's interpretation of the statute it was charged with enforcing was reasonable. This is seen from the following excerpt from the majority decision which held that (63 F3d at 1581-1582):

Trade policy is an increasingly important aspect of foreign policy, an area in which the executive branch is traditionally accorded considerable deference. This is not to say that Commerce has unlimited discretion over antidumping margin determinations, or that courts will unthinkingly defer to the Government's view of Congressional enactments. Antidumping duties are not simply tools to be deployed or withheld in the conduct of domestic or foreign policy. In particular, the independent status of the International Trade Commission was intended to insulate the Government's decision to impose antidumping duties from narrowly political concerns.

In this case, however, the Act presented Commerce with a choice between methodologies for calculating dumping margins that are tax neutral, on the one hand, and methodologies that are not tax-neutral, on the other. Tax-neutral methodologies clearly accord with international economic understandings, negotiated by this country, regarding fair trade policy. Plaintiffs argue, and the Court of International Trade held, that Commerce had a duty to choose the methodology that violates those understandings. Commerce is due judicial deference in part because of its established expertise in administration of the Act, and in part because of "the foreign policy repercussions of a dumping determination." *Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States*, 713 F.2d 1568, 1571, 1 Fed. Cir. (T) 130, 131 (1983), *cert. denied*, 465 U.S. 1022, 79 L. Ed. 2d 679, 104 S. Ct. 1274 (1984). For the Court of International Trade to read a GATT violation into the statute, over Commerce's objection, may commingle powers best kept separate.

This same reasoning to keep *Charming Betsy* in dry dock was utilized by the Court of Appeals for the Ninth Circuit in the case of *Arc Ecology v. United States Air Force*, 411 F. 3d 1092 (9<sup>th</sup> Cir. 2005), where the court stated:

First, as this court has observed, "the Supreme Court has never invoked *Charming Betsy* against the United States in a suit in which it was a party." *United States v. Corey*, 232 F.3d 1166, 1179 (9th Cir. 2000). The concerns that underlie the canon are "obviously much less serious where the interpretation arguably violating international law is urged upon [the court] by the Executive Branch of our government." *Id.* When the

Executive Branch is the party advancing a construction of a statute with potential foreign policy implications, we presume that "the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." *Id.*

411 F.3d at 1102.

Because Commerce is the representative of the political bodies<sup>233</sup> who have discretion to carry out the international obligations of the United States as understood by the Congress, this Panel must accept Commerce's interpretation unless it is patently forbidden by the relevant United States domestic statute, which it is not.<sup>234</sup> See also, *Norsk Hydro Canada, Inc. v. United States*<sup>235</sup>; *Defenders of Wildlife v. Hogarth*.<sup>236</sup>

Moreover, as we have discussed above in the text at pp. 62-63, U.S. statutes relevant to this case set out very clearly what domestic effect is to be given to WTO Panel and Appellate Body Reports. As counsel for Mexinox reminded this Panel at the Oral Hearing (Transcript of Oral Argument ("Tr."), at 28), the Statement of Administrative Action<sup>237</sup> ("SAA") accompanying the Uruguay Round Agreements Act,<sup>238</sup> the statute "executing" into U.S. law the WTO Agreements, is Congress's definitive interpretation of the statute which it accompanies.<sup>239</sup>

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<sup>233</sup> *Arc Ecology v. United States Air Force*, 411 F. 3d 1092 (9<sup>th</sup> Cir. 2005).

<sup>234</sup> We note here that the *Allegheny* case relied upon by majority in this Panel did not overturn Commerce's determination on the basis of the *Charming Betsy* canon, but instead held that the determination was not consistent with the relevant statute. For further discussion of why the *Allegheny* case bears no relevance to this case, see also n. 246, below and Panel Determination, pp.81-82.

<sup>235</sup> 472 F.3d 1347, 1360 n.21 (Fed. Cir. 2006).

<sup>236</sup> 330 F.3d 1358, 1362 (Fed. Cir. 2003).

<sup>237</sup> Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040.

<sup>238</sup> *Op. cit* above at n. 215.

<sup>239</sup> See the quotation above of URAA, 19 U.S.C. § 3512(d), in the text at n. 214.

The following excerpt from the SAA is taken from the Greenwald article<sup>240</sup>, referred to above, p. 70 to support Greenwald’s assertion that “[H]owever, Charming Betsy runs into a problem with the status of WTO dispute settlement decisions under U.S. trade law. WTO panel and Appellate Body decisions are *not* (emphasis in original) international obligations of the United States in the sense that the United States is under any obligation to follow them.”<sup>241</sup> (citing the SAA).

The cited portion of the SAA is as follows:

It is important to note that the new WTO dispute settlement system does not give panels any power to order the United States or other countries to change their laws. If a panel finds that a country has not lived up to its commitments, all a panel may do is recommend that the country begin observing its obligations. It is then up to the disputing countries to decide how they will settle their differences. The defending country may choose to make a change in its law or it may decide instead to offer trade ‘compensation’—such as lower tariffs . . . . Alternatively, a country may decide to do nothing. In that case, the country that lodged the complaint may retaliate . . . . [Also,] reports issued by panels or the Appellate Body under DSU have no building effect under the law of the United States and do not represent an expression of U.S. or foreign trade policy . . . . Furthermore, neither federal agencies nor state governments are bound by any finding or recommendation included in such reports.<sup>[242]</sup>

Once again we refer to the discussion between Panelist Lichtenstein and the attorney for Mexinox over whether Commerce’s “practice” of zeroing is a “practice” within the SAA as that term is presented in the definitional sections of the SAA. Mr. Lewis, the Attorney for Mexinox, submitted (Tr., at 14) that “The Statement of Administrative Action is an authoritative interpretation of those provisions, clearly states that the only practices that are subject to Section 123 or 129 are written policy statements and guidance, and the zeroing practice doesn’t fall into that category.” Counsel for Mexinox was using this definitional provision of the SAA to argue

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<sup>240</sup> 39 GEORGETOWN J. OF INT’L L. 199.

<sup>241</sup> *Id.* at 204-5.

<sup>242</sup> Uruguay Round Agreements Act, Statement of Administrative Action, *op. cit.*, n. 215, above, at 4300.

that the implementation procedures mandated by sections 123 and 129 of the URAA for adverse determinations of the WTO dispute resolution bodies do not apply to Commerce's practice of zeroing. He was making the latter argument to support his contention that *Corus Staal* and its progeny are wrong to think that cessation of zeroing by Commerce would be contrary to U.S. law.

Mexinox's argument simply does not track. The issue in this case is not whether Commerce can (or may) in its discretion zero or cease zeroing, but whether United States' international obligations under the Anti-Dumping Agreement as interpreted by the WTO dispute settlement system (not as interpreted by U.S. courts)<sup>243</sup> require Commerce to cease zeroing and thus, this Panel to remand to Commerce the determination in this case to do so. The statement from the SAA could not be clearer: Professor Jackson's conviction<sup>244</sup> that the effect of the DSU's Panel and Appellate Body reports is to create an international obligation upon the respondent sovereign to comply with the report **is not** Congress's understanding of what those reports mean under the Agreements for United States law. Congress, and counsel for Mexinox agrees, has told us that the SAA is authoritative legislative history. The SAA tells us that the only result of an adverse report is that "The defending country may choose to make a change in its law or it may decide instead to offer trade 'compensation'—such as lower tariffs . . . . Alternatively, a country may decide to do nothing."<sup>245</sup>

Because the Uruguay Round Agreements are non-self-executing treaties and the URAA is the incorporation into U.S. law of whatever are the U.S.'s international obligations under those

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<sup>243</sup> As for what instructions are given to WTO panels and the Appellate Body as to their methodology of interpretation of the Anti-Dumping Agreement, see n. 247 below.

<sup>244</sup> See text at n. 220, above.

<sup>245</sup> H.R. Rep. 103-316, at 231.

treaties and the SAA is an authoritative legislative history expression of Congress's meaning in that Act, to attempt to use the *Charming Betsy* to assert that this Panel must remand to Commerce its determination in the administrative review under consideration for decision without zeroing because the Appellate Body of the DSU has declared zeroing to be illegal is simply a complete misunderstanding of the requirements of United States law. Accordingly, as there is no basis for the Mexinox's arguments to the contrary nor any basis in U.S. law for the Panel to substitute its judgment for that of Commerce nor to reject the controlling precedents of the Federal Circuit dealing with zeroing and discussed in the dissents in *Wire Rod* and here, we affirm Commerce's use of zeroing in this case.

As a separate rationale for avoiding following the *Timken* and *Corus Staal* line of cases, the majority of this Panel, Panel Determination, above, p. 21, asserts that it finds more persuasive the reasoning in the Federal Circuit used in the *Allegheny*<sup>246</sup> case. Firstly, that case, which did not involve zeroing,<sup>247</sup> is easily distinguishable. The *Allegheny* case involved the domestic countervailing duty statute. We demonstrate in the body of this opinion, above, that the case does not stand for the proposition for which the majority cite it, to the contrary, it recognizes in *dicta* that the WTO decisions could only

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<sup>246</sup> *Allegheny*, 367 F.3d at 1343.

<sup>247</sup> As Professor Andreas Lowenfeld has pointed out in his magisterial treatise on international economic law and in particular, on the history of trade law since the second World War (Lowenfeld, *INTERNATIONAL ECONOMIC LAW*, 2d ed., Oxford University Press (2008) Section 10.11 *Dispute Settlement*, at 315): "Article 17.6 of the Anti-Dumping Agreement, insisted upon by the United States and accepted reluctantly as the Uruguay Round was coming to a make-or-break close, provides a special standard of review of both factual and legal determinations by national authorities, not applicable to any other agreement, not even the Agreement on Subsidies and Countervailing Measures, which in most other procedural matters is parallel to the Anti-Dumping Agreement." Lowenfeld then goes on to quote in full Articles 17.5 and 17.6 of the Anti-Dumping Agreement, to discuss them in detail, to cite some commentary as to their meaning and concludes "It is clear, however, that the intent of Article 17.6 is to call for greater deference to the decisions of national authorities than prevails in other parts of the WTO system." *Id.* at 317. Therefore the *Allegheny* case interpreting the domestic countervailing duty statute and using the Agreement on Subsidies and Countervailing Measures and its interpretation by WTO reports in so doing is not authority for our case whatsoever.

be a guide to interpretation of the domestic countervailing duty statute. Under the Anti-Dumping Agreement itself, it is not clear that WTO Panel or Appellate Body reports should even serve as a guide to interpretation of the U.S. antidumping statute. There, the court determined that “[b]ecause Congress has spoken directly to the issue of whether Commerce may treat sales of stock differently from sales of assets, this court need not defer to Commerce's interpretation.”<sup>248</sup> Based upon the two part test to be applied based upon *Chevron*, the court first held the statute was not ambiguous. Therefore, the court did not consider the second part of the *Chevron* test and determine whether Commerce’s interpretation of the statute was reasonable and entitled to deference.<sup>249</sup>

Secondly, the court went on, regardless of its consideration of a WTO determination as a “guide” to understanding the meaning of the statutory language in issue there, to expressly restrict the use or applicability of WTO determinations by stating that:

Accordingly, where neither the statute nor the legislative history supports the same-person methodology under domestic countervailing duty law, this court finds additional support for construing 19 U.S.C. § 1677(5)(F) as consistent with the determination of the WTO appellate panel. In so doing, this court recognizes that the *Charming Betsy* doctrine is only a guide; the WTO's appellate report does not bind this court in construing domestic countervailing duty law.<sup>[250]</sup>

Clearly, in a case such as is involved here, where multiple panels of the Federal Circuit have consistently determined that Congress has not spoken to the correct interpretation of 19 U.S.C. § 1677, there is no justifiable basis for the majority to express a preference for applying a

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<sup>248</sup> *Allegheny*, 367 F. 3d at 1343.

<sup>249</sup> *Id.* Indeed, “a court [panel] must defer to an agency's reasonable interpretation of a statute even if the court [panel] might have preferred another.” *Timken*, 354 F.3d at 1342 (*quoting* *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (*citing* *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978) (internal quotation marks omitted).

<sup>250</sup> *Id.* at 1348.

WTO determination over the interpretation the agency charged with interpreting the United States dumping statute has given to the statute.

It is clear from reading the decisions of the Federal Circuit, as well as the many decisions of several judges of the United States Court of International Trade (cited in the dissents in *Wire Rod* or discussed above and later) which have addressed the permissibility of zeroing both before and after the *Timken* and *Corus Staal* decisions, that, apart from the doctrine of *stare decisis*, numerous Federal judges, at both the reviewing (appellate) level and the initial court of decision level (United States Court of International Trade) have independently examined the text of the statute and found that Commerce was justified to interpret the dumping statute as it relates to the determination of dumping duties because the statute is ambiguous. Therefore, the permissive determination made by Commerce that it may apply zeroing is appropriate and must be sustained when reasonable.

Contrary to what is suggested by the majority (see Panel Determination, pp. 22-23), there is nothing in the dumping statute involved here that limits the permissive nature of that determination based upon whether masked dumping is present. The holding of all those courts that the statute is ambiguous has absolutely nothing to do with whether masked dumping is present. When the United States Court of Appeals for the Federal Circuit, applying the first part of the *Chevron* two prong tests, held that the dumping statute was ambiguous, it did so regardless of whether the court would later go on to also find the agency's decision was reasonable or unreasonable under the second prong. The ambiguity in the dumping statute exists regardless of whether masked dumping supports a finding that under the second prong of *Chevron* that the agency's interpretation is reasonable. Thus, the holding of "ambiguity" is an essential holding of

the case, which is not *dictum*. This holding is precedential and binding, even if the factual circumstances of a second case make it sufficiently distinguishable so that *stare decisis* does not apply to other portions of the decision. Consequently, there is absolutely no justification for this Panel to start anew, as if those decisions did not exist, and make a *de novo* determination that the statute is clear and unambiguous. Furthermore, there is nothing that supports the majority's conclusion here that zeroing is not permissible except possibly when masked dumping is present.

The majority, without any legitimate justification, substitutes its judgment and reasoning for that of Commerce, coupled with their failure to properly apply the principles of NAFTA Articles 1904.2 and 1904.3, *supra*. Such action contravenes this Panel's jurisdiction and authority under NAFTA.

Additionally, the majority of this Panel, Panel Determination, above, p. 18, despite noting that Mexinox has conceded that the United States has only acknowledged its intention to comply with section 129 of the URAA, concludes that, because "only the manner of compliance is left to be determined," it is appropriate for this Panel to in effect deem WTO determinations to be part of the United States domestic law. However, the Court of Appeals for the Federal Circuit in *Koyo Seiko Co., Ltd v. United States*,<sup>251</sup> has recently spoken on this very point and rejected it for the same reasons expressed in *NSK Ltd. v. United States*.<sup>252</sup> See also, *SKF USA Inc. v. United States*.<sup>253</sup> The court in *Seiko* summed up by emphatically holding that:

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<sup>251</sup> 551 F.3d 1286, 1291 (Fed. Cir. 2008), *Rehearing denied by, Rehearing, en banc*, 2009 U.S. App. LEXIS 13856 (Fed. Cir. Apr. 23, 2009) (*Seiko*).

<sup>252</sup> 510 F.3d 1375 (Fed. Cir. 2007) ("*NSK*").

<sup>253</sup> 611 F. Supp. 1351 (Ct. Int'l Trade 2009).

The determination whether, when, and how to comply with the WTO's decision on "zeroing," involves delicate and subtle political judgments that are within the authority of the Executive and not the Judicial Branch.<sup>[254]</sup>

Because such determinations are not within the province of the Judicial Branch they are equally not within the province of this Panel.

In *NSK*, the Federal Circuit, in discussing the same type of situation relied upon by Mexinox and the majority of the panel here, see Panel Determination, above, p. 38, rejected such an approach by stating that:

Recently, however, the Government of Japan initiated a World Trade Organization ("WTO") challenge of Commerce's zeroing practice. On January 9, 2007, the WTO Appellate Body issued a decision in which it found that Commerce's zeroing practice, as applied to the administrative review at issue in this case, is inconsistent with the United States' international obligations. See Appellate Body Report, United States-- Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007). The WTO Dispute Resolution Body adopted this decision on January 23, 2007. In response, on February 20, 2007, the United States issued a statement that "it intends to comply in this dispute with its WTO obligations and will be considering carefully how to do so." See Press Release, U.S. Mission to the United Nations in Geneva, U.S. Statements at the WTO Dispute Settlement Body, Delivered by David P. Shark, Deputy Chief of Mission, U.S. Mission to the WTO (Feb. 20, 2007).

In light of this statement, *NSK*, *NTN*, and *Koyo* seek to have this case remanded to Commerce to allow the agency to implement the WTO decision. Commerce, however, opposes such a remand. Although Commerce has stated that it intends to comply with its WTO obligations, it contends that it only plans to discontinue zeroing in investigations, not in administrative reviews such as this one.

As stated by this court in *Corus Staal*, 'we . . . refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.' 395 F.3d at 1349; cf. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992) ("While we acknowledge Congress's interest in complying with U.S. responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact

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<sup>254</sup> *Seiko* at 1291.

did."'). In this case, despite Commerce's public statement that it intended to comply with its WTO obligations, the WTO decision rejecting zeroing has not yet been implemented by Commerce. Moreover, the manner in which the WTO decision will be implemented by Commerce is far from clear, as illustrated by the parties' disagreement over whether Commerce will (or should) apply the WTO decision to administrative reviews such as this one. Situations such as this are just one example of the reasons this court refrains from commenting on international body decisions unless and until they have been adopted pursuant to the specified statutory scheme. Unless and until that happens, this court has nothing to review.<sup>[255]</sup>

Thus, as held by the Court of Appeals for the Federal Circuit, until the actual implementation of the WTO decision pursuant to section 129 of the URAA, 19 U.S.C. § 3538, has occurred, the WTO decision has not become part of the United States law. There is no legitimate basis for the majority of this Panel to not be bound by and not abide by the decisions in *Seiko* and *NSK*.

Similarly, with respect to Mexico and steel coils, there has not been a change by Commerce with respect to administrative reviews. Despite the majority's speculation to the contrary, there has not been a material, relevant change in Commerce's practice of zeroing in administrative review proceedings. See Tr. at 95-96 (discussing: *Issues and Decision Memorandum*, 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.*<sup>256</sup>).<sup>257</sup>

Although Mexinox provided this Panel with a copy of the Federal Register Notice as part of its Supplemental Authorities Filing several days prior to the oral argument, it did not furnish us with a copy of the incorporated *Issues and Decision Memorandum*. Our own examination of

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<sup>255</sup> *NSK*, 551 F3d at 1379-1380.

<sup>256</sup> 74 Fed. Reg. 19,527 (April 29, 2009).

<sup>257</sup> Notice, *supra*, n. 188.

that memorandum reveals that Commerce determined that the eight administrative reviews involving stainless steel sheet and coil from Mexico were outside the scope of the 129 proceeding as they were not involved in the WTO determination that was the subject of the proceeding. Therefore, as a result, the determinations in those reviews remain standing.<sup>258</sup> Thus, in the case here, the WTO reports referred to by the majority have not been adopted pursuant to the specified statutory scheme and therefore cannot be used by this Panel to “correct” Commerce’s determination under the *Charming Betsy* doctrine. Those reports do not constitute “the law of nations as understood in this country.”

Consequently, following the decision of the Federal Circuit in *Corus Staal BV v. Department of Commerce*,<sup>259</sup> “[w]e conclude that the events to which Corus [Mexinox] points do not require a different result in this case and that Commerce has made amply clear that its new policy regarding zeroing would not apply to the administrative review at issue here.”<sup>260</sup>

In a very recent decision, in the case of *Andaman Seafood Co., Ltd v. United States*,<sup>261</sup> the court throughout makes reference to “U. S. law,” distinguishing it from U. S. obligations under WTO Panel and Appellate Body reports. The court quotes extensively from the URAA and its accompanying SAA to lay out the court's understanding of how U. S. law directs compliance with WTO decisions and says:<sup>262</sup>

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<sup>258</sup> See *Issues and Decision Memorandum*, Stainless Steel Sheet and Strip in Coils (Final), found at <http://ia.ita.doc.gov/download/section129/full-129-index.html>.

<sup>259</sup> 502 F.3d 1370 (Fed. Cir. 2007). Also, see, *Dongbu Steel Co., Ltd. v. United States*, \_\_\_F. Supp. 2d \_\_\_, 2010 Ct. Int’l Trade LEXIS 12; Slip Op. 2010-13 (Ct. Int’l Trade February 4, 2010); *Union Steel Corp. v. United States*, 645 F. Supp. 2d 1298 (Ct. Int’l Trade 2009); *United States Steel Corp. v. United States*, 627 F. Supp. 2d 1374, 2009 Ct. Int’l. Trade LEXIS 50; Slip Op. 2009-45 (Ct. Int’l Trade May 18, 2009).

<sup>260</sup> See *Id.* at 1372-1374.

<sup>261</sup> \_\_\_F. Supp.2d\_\_\_, 2010 Ct. Intl. Trade LEXIS 10; Slip Op. 2010-12 (Ct. Int’l Trade February 2, 2010).

<sup>262</sup> *Id.* at 8.

As already noted, however, the clear intent of Congress in adopting Section 129 of the URAA was “to allow the United States to take full advantage of its remedial options before the WTO.” [citation omitted]. The URAA was accordingly expressly designed so as to preserve the independence of U. S. law from adverse decisions of the DSB until such time as the political branches decide that, of the options available to the United States under the WTO Agreements, a change in U. S. law and/or policy or methodology is most appropriate.

The majority of this Panel instead of following the law enacted by Congress, substitutes its vision for what it would like the law to be. This is not proper for a NAFTA panel. “Panels must understand their limited role and simply apply established law. Panels must be mindful of changes in the law, but not create them. Panels may not articulate the prevailing law and then depart from it in a clandestine [or even transparent] attempt to change the law.”<sup>263</sup>

As a final note, although counsel for Mexinox argued that Commerce’s practice of zeroing is “unwritten, informal practice,”<sup>264</sup> as was recognized by the Federal Circuit in *Pesquera Mares Australes Ltda v. United States*,<sup>265</sup> *Chevron* deference applies to such determinations as they are [written] published in Federal Register Notices [and incorporated Issues and Decision Memoranda], in relatively formal adjudicatory proceedings.

Additionally, although the panel in *Wire Rod* relied upon the SAA to limit the definition of a “practice” so as to exclude zeroing from the scope of the statutory provisions which establish the mechanism, such as section 123, for the United States to implement as it deems appropriate WTO determinations, there was no basis for the panel in *Wire Rod* or for the Panel here to rely upon the SAA to create an ambiguity in otherwise transparent, clear statutory

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<sup>263</sup> *In the Matter of Live Swine from Canada*, ECC-93-1904-01 USA April 8, 1993, slip op. at 16.

<sup>264</sup> *See Tr.*, at 16 and 139.

<sup>265</sup> 266 F.3d 1372 (Fed. Cir. 2001).

language.<sup>266</sup> It is fundamental that, although there is no rule of law that forbids consideration of “authoritative” legislative history, in the absence of ambiguity there is no reason to use such legislative history to contravene the plain meaning of the terms of the statute. *See, e.g., Connecticut National Bank v. Germain*;<sup>267</sup> *CBS Inc. v. Prime Time 24*.<sup>268</sup>

With regards to sections 123 and 129 of the URAA, the meaning of the term “practice” is patently clear on its face. The panel in the *Wire Rod* case did not even consider the plain meaning of the statutory term nor does the majority in this Panel as required by this fundamental doctrine of statutory construction before using legislative history to improperly trump the plain language of the statute. Zeroing has been a practice that has been uniformly and consistently applied by Commerce, as well as upheld by the courts, since the mid nineteen eighties. Thus the written practice has been in effect for over 25 years. *See, Pam S.p.A. v. United States Department of Commerce*,<sup>269</sup> and cases involving zeroing cited there.

Moreover, the Commerce Department, who has been charged with the responsibility of enforcing the anti-dumping laws, has interpreted and applied section 129 to include its practice of zeroing as being within the scope of that provision. Such an interpretation, as recognized by the United States Supreme Court, is entitled to great weight. *See Zenith v. United States*.<sup>270</sup>

Given the plain statutory language, coupled with the long-standing interpretation of that

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<sup>266</sup> Unlike section 123, section 129 does not have any corresponding reference in the SAA even suggesting that the term “practice” is not to have its ordinary common meaning, and is only limited to policy guidance of “general applicability.”

<sup>267</sup> 503 U.S. 249; 112 S. Ct. 1146; 117 L. Ed. 2d 391; 1992 U.S. LEXIS 1531 (1992).

<sup>268</sup> 245 F.3d 1217 (11<sup>th</sup> Cir. 2001).

<sup>269</sup> 265 F. Supp. 2d 1362, 1370 (Ct Int’l Trade 2003). The Federal Register notice involved in the case of *Serampore Industries Pvt. Ltd*, 675 F. Supp. 1354 (Ct. Int’l Trade 1987) was published in 1986, *see. Certain Iron Construction Castings From India; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 9486 (Mar. 19, 1986).

<sup>270</sup> 437 U.S. 443, 450; 98 S. Ct. 2441, 2445; 57 L. Ed. 2d 337, 344 (1978).

provision by the agency charged with its enforcement, it is fundamentally improper for a NAFTA panel to substitute its judgment for that of the agency as to the scope of section 129 and the meaning of its terms, regardless of the thin suggestion to the contrary in the SAA's description of what constitutes a practice.<sup>271</sup>

## **Conclusion**

Based upon the foregoing, and after considering all the arguments and authorities advanced by Mexinox in its briefs, additional authorities and at oral argument, as well as those advanced by Commerce and the Domestic Industry, the decision of Commerce to apply zeroing should be affirmed.

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<sup>271</sup> As noted by the majority (Panel Determination, p. 18 n. 51), while the SAA, at 352, suggests that the term "practice" may have a narrower meaning than its common meaning with respect to section 123 of the URRA, there is no similar definition in the SAA with respect to section 129. Plainly, the differences in language, scope and purpose of these two sections explains why Congress, perhaps, intended a narrow construction of the term "practice" with respect to section 123, but clearly did not intend a special meaning, instead of "common meaning," with respect to section 129.

**IT IS SO ORDERED:**

ISSUED ON APRIL 14, 2010

SIGNED IN THE ORIGINAL BY

Joseph I. Liebman  
Joseph I. Liebman, Chairperson

Luis Felive Aguilar  
Luis Felipe Aguilar

Gisela Bolívar  
Gisela Bolívar

Cynthia C. Lichtenstein  
Cynthia C. Lichtenstein

Dale P. Tursi  
Dale P. Tursi