UNITED STATES – ANTI-DUMPING MEASURES ON
OIL COUNTRY TUBULAR GOODS (OCTG) FROM MEXICO

(WT/DS282)

FIRST WRITTEN SUBMISSION

OF THE

UNITED STATES OF AMERICA

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Table of Contents

I. INTRODUCTION 1

II. PROCEDURAL BACKGROUND 1

III. FACTUAL BACKGROUND 2
A. Sunset Reviews Under U.S. Law 2
1. The Statute 2
a. Statutory Provisions Related to Commerce's Determination 3
b. Statutory Provisions Related to the ITC's Determination 4
2. The Regulations 5
a. Commerce Regulations 5
b. ITC Regulations 6
B. Reviews And Revocation Under U.S. Law 6
1. Revocation Based on "Changed Circumstances" 7
2. Revocation Based on Administrative Reviews Establishing The Absence of Dumping for Three Consecutive Years 7
C. Oil Country Tubular Goods from Mexico 8
1. The Antidumping Duty Investigation and Order 8
2. Administrative Reviews 10
a. The First Three Periods of Review 10
b. Fourth Administrative Review 11
3. The Sunset Review and Determination 12
a. Commerce's Determination of Likelihood of Continuation or Recurrence of Dumping 12
b. The ITC's Determination of Likelihood of Continuation or Recurrence of Injury 15
4. Notice of Continuation of the Order 20

IV. GENERAL LEGAL PRINCIPLES 20
A. Scope and Standard of Review 20
B. Burden of Proof: Mexico Bears the Burden of Proving Its Claims 21

V. LEGAL ARGUMENT 21
A. The Panel Should Reject Mexico's Challenge to Commerce's Sunset Determination Including Claims Concerning an Alleged "Presumption" and Its Alleged Inconsistency with Article 11.3 of the AD Agreement 22
1. The Alleged "WTO-inconsistent Presumption" Does Not Exist 24
2. Even Assuming, *Arguendo*, that a Commerce "Presumption"Were to Exist, the *Sunset Policy Bulletin* and Commerce "Practice," As Such, Cannot Be Found to Be Inconsistent with Article 11.3 of the AD Agreement 29

B. Commerce Fully Complied with its Obligations under the AD Agreement in Making the Affirmative Likelihood Determination In the Sunset Review Of OCTG From Mexico 31
1. Commerce Properly Determined that Dumping Was Likely to Continue or Recur in the Sunset Review of OCTG from Mexico 32
2. Commerce Fully Considered All Record Information in Making the Final Sunset Determination 34
3. Mexico's Claims Regarding Commerce's Identification of the Margins Likely to Prevail In the Event of Revocation Are Equally Erroneous . . . 36
C. TAMSA and Hylsa's Requests for Company-Specific Revocation Have No Basis in Articles 11.1 and 11.2 of the AD Agreement 37
D. The Panel Should Reject Mexico's Claim that Commerce's Determination Not to Revoke TAMSA from the Antidumping Duty Order Was Inconsistent with Articles 11.1 and 11.2 of the AD Agreement 41
1. Article 11.2 allows investigating authorities to establish when revocation reviews are warranted 41
2. Commerce's application of its revocation regulation in the Fourth Review was fully consistent with Article 11.2 42
a. Commerce's "commercial quantities" requirement is a reasonable interpretation of the Article 11.2 requirement that interested parties provide positive information substantiating the need to review whether a duty should be terminated 43
b. In the *Final Results of the Fourth Review*, Commerce did not ignore positive information but instead evaluated the facts and applied its commercial quantities requirement to TAMSA in an unbiased and objective manner, ultimately determining that TAMSA had failed to substantiate the need for a revocation review 46
(i) Commerce properly determined that TAMSA had not sold in commercial quantities and thus failed to substantiate the need for a revocation review 46
(ii) Commerce did not apply an irrefutable presumption to TAMSA when it applied its commercial quantities requirement 48
c. Commerce did not apply the wrong revocation standard to TAMSA 49
E. Commerce's "Imposition of Conditions" for Revocation was not Inconsistent with Article X:2 of the GATT 1994 50
F. The Margin Calculation Methodology in the Fourth Review Was Consistent with the AD Agreement Both As Such and As Applied to Hylsa 52
G. The United States Applied its Antidumping Laws, Regulations, Decisions and Rulings with Respect to Commerce's Sunset Reviews in a Uniform and Impartial Manner, in Accordance with Article X.3(a) of the GATT 1994 57
H. The ITC Applied the Correct Standard for Determining Whether Termination of the Antidumping Duty Orders Would Be Likely to Lead to Continuation or

Recurrence of Injury, and the ITC's Determination of Likelihood in the Sunset Review of OCTG from Mexico Was Consistent With Article 11. 3 and Article 3.1 of the AD Agreement 59
I. The ITC's Determination Was Consistent with Article 11.3 Because the Establishment of the Facts Was Proper and the Evaluation of the Facts Was Unbiased and Objective 61
J. Article 3 Does Not Apply to Sunset Reviews 62
K. The ITC's Sunset Determination Was Consistent with Article 11.3 66
1. Article 3.1 Does Not Apply to Sunset Reviews 66
2. The ITC's Sunset Determination Was Based on an Unbiased and Objective Evaluation of the Relevant Facts Gathered During the Review 68
a. The ITC's Findings on the Likely Volume of Imports 68
b. The ITC's Findings on the Likely Price Effects of Imports 75
c. The ITC's Findings on the Likely Impact of Imports 79
L. The ITC Sunset Determination on OCTG from Mexico Is Not Inconsistent with Article 3.4 of the AD Agreement 80
M. The ITC Sunset Determination on OCTG from Mexico Is Not Inconsistent with Article 3.5 of the AD Agreement 83
N. The Time Frame in Which Injury Would Be Likely to Continue or Recur 86
1. The U.S. Statutory Provisions as to the Time Frame in Which Injury Would Be Likely to Continue or Recur Are Not Inconsistent With Articles 11.3 and 3 of the AD Agreement 86
2. The ITC's Application of the Statutory Provisions as to the Time Frame in Which Injury Would Be Likely to Continue or Recur Was Not Inconsistent With Articles 11.3 and 3 of the AD Agreement 87
O. The ITC Did Not Act Inconsistently with Any Provision of the AD Agreement by Conducting a Cumulative Analysis in the OCTG Sunset Review 88
1. The AD Agreement Does Not Prohibit Cumulation in Sunset Reviews . 88
2. The ITC Did Not Act Inconsistently with Article 3.3 of the AD Agreement Because Article 3.3 Does Not Apply to Sunset Reviews 90
P. The Decisions of Commerce and the Commission Complied with Article VI of the GATT 1994, Articles 1, 18.1, and 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement 93
Q. The Specific Remedy Sought by Mexico Is Inconsistent With Established Panel Practice and the DSU 93

VI. CONCLUSION 96

I. INTRODUCTION

1. This proceeding involves Mexico's challenge to the findings of the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("ITC") in the sunset review determinations and Commerce's fourth administrative review of the antidumping duty order on oil country tubular goods ("OCTG") from Mexico.

2. Mexico disagrees with the conclusions drawn by Commerce and the ITC in the sunset and fourth review determinations. However, the fact that Mexico disagrees with those conclusions does not render them inconsistent with U.S. obligations under the AD Agreement. Mexico asserts obligations that in many cases do not exist, and its claims to have identified breaches by the United States are meritless.

3. Regarding the sunset review determination by Commerce and the ITC, Mexico argues that Commerce misapplied Article 11.3 of the AD Agreement by applying an alleged presumption in favor of maintaining the antidumping duties. The United States will demonstrate that, in fact, no such presumption exists, and that the U.S. sunset provision, both as such and as applied in this case, is consistent with Article 11.3.

4. With respect to the fourth administrative review, Mexico contends that Commerce's final determination was inconsistent with U.S. obligations under the AD Agreement, primarily Article 11.2, because Mexico alleges the order should have been revoked after a respondent demonstrated it did not dump during three consecutive years. Mexico's claim, however, is based on a flawed interpretation of Article 11.2 and, therefore, must fail.

5. As demonstrated in this First Written Submission of the United States, Mexico has failed to meet its burden to establish a *prima facie* case of a violation and the Panel, therefore, should reject Mexico's claims.

6. In terms of structure, the U.S. First Written Submission first presents in Section II the procedural background of the dispute, followed by the factual background in Section III, which includes a description of the U.S. sunset and administrative review system and of the determinations made with respect to OCTG from Mexico. In Section IV, the United States sets forth the scope and standard of review. Finally, in Section V, the United States responds to Mexico's legal arguments.

II. PROCEDURAL BACKGROUND

7. On February 18, 2003, Mexico requested consultations with the United States with respect to: (1) the Commerce and ITC sunset review determinations, and (2) Commerce's fourth administrative review of the antidumping duty order on oil country tubular goods ("OCTG") from Mexico. Mexico indicated that it considered Commerce's and the ITC's determinations to be contrary to the obligations of the United States under the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"), including, but not limited to, obligations

under Articles 1, 2, 3, 6, 11, and 18 of the AD Agreement; Articles VI and X of the GATT 1994, and Article XVI:4 of the WTO Agreement.[1] Consultations were held on April 4, 2003.

8. On July 29, 2003, Mexico communicated a request to establish a dispute settlement panel.[2] Mexico indicated that it considered the sunset determinations by Commerce and ITC, Commerce's final results of the fourth administrative review of the antidumping duty order, and relevant provisions of U.S. legislation and regulations, to be inconsistent with U.S. obligations under the GATT 1994, the AD Agreement, and Article XVI:4 of the WTO Agreement.[3]

9. On February 11, 2004, the Dispute Settlement Body ("DSB") established a panel with standard terms of reference.

III. FACTUAL BACKGROUND

10. Mexico's claims relate to certain procedural aspects of the U.S. sunset review system, as well as the specific sunset review determination by Commerce and the ITC regarding OCTG products from Mexico. Mexico also challenges Commerce's fourth administrative review determination. In order to facilitate the Panel's understanding of the issues raised by Mexico, the United States first will provide an overview of the U.S. sunset review system and Commerce's administrative review system, followed by a discussion of the specific agency determinations at issue.

A. Sunset Reviews Under U.S. Law

1. The Statute

11. Article 11.3 of the AD Agreement provides for the termination of any definitive antidumping duty after five years, unless the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Pursuant to the Uruguay Round Agreements Act, the United States amended its antidumping duty statute in 1995 to include provisions for such five-year reviews, or so-called "sunset reviews" of antidumping duty measures, including antidumping duty orders.[4] Pursuant to the law as amended, Commerce

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[1] WT/DS282/1 (Feb. 26, 2003).

[2] WT/DS282/2 (Aug. 8, 2003).

[3] WT/DS282/2 (Aug. 8, 2003).

[4] The U.S. antidumping duty and countervailing duty statute is found in title VII of the Tariff Act of 1930, as amended ("the Act"), 19 U.S.C. 1671 *et seq.* Title II of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994), amended title VII in order to bring it into conformity with U.S. obligations under and the AD Agreement and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Concurrent with the passage of the URAA, Congress approved and published a "Statement of Administrative Action" (or "SAA"). H.R. Doc. No. 316, 103d Cong., 2d Sess., Vol. 1 (1994) (Exhibit MEX-26). The SAA is a type of legislative history which, under U.S. law, provides authoritative interpretative guidance in respect of the statute. *See United States - Measures Treating Export Restraints as Subsidies* ("*U.S. Export Restraints*"),

and the ITC each conduct sunset reviews pursuant to sections 751(c) and 752 of the Act.[5] Commerce has the responsibility for determining whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of dumping.[6] The ITC conducts a review to determine whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of material injury.[7]

12. Pursuant to section 751(d)(2) of the Act, an antidumping duty order must be revoked after five years unless Commerce and the ITC make affirmative determinations that dumping and injury would be likely to continue or recur.[8]

a. Statutory Provisions Related to Commerce's Determination

13. Under the statute, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of an antidumping duty order.[9] Thereafter, a review can follow one of three basic paths.

14. First, if no domestic interested party responds to the notice of initiation, Commerce will revoke the order within 90 days after the initiation of the review.[10]

15. Second, if the response to the notice of initiation is inadequate, Commerce will conduct an expedited sunset review and issue its final determination within 120 days after the initiation of the review.[11] Commerce normally will consider the response to the notice of initiation to be adequate if it receives complete responses from a domestic interested party and respondent interested parties accounting on average for more than 50 percent of the total exports of subject merchandise.[12]

WT/DS194/R, Report of the Panel, adopted August 23, 2001, paras. 8.99-100 (discussing the status in U.S. law of the SAA). The United States also notes that the term "antidumping duty order" is the U.S. law equivalent of the term "definitive duty" in the AD Agreement.

[5] Sections 751(c) and 752 of the Act; 19 U.S.C. §§ 1675(c) and 1675a (Exhibit MEX-24).

[6] Under the U.S. antidumping duty law, the term "revocation" is equivalent to the concept of "termination" and "expiry of the duty" as used in Article 11.3 of the AD Agreement.

[7] Under the U.S. antidumping duty law, the term "revocation" is equivalent to the concept of "expiry of the duty" as used in Article 11.3 of the AD Agreement.

[8] Section 751(d)(2) of the Act; 19 U.S.C. § 1675(d)(2) (Exhibit MEX-24).

[9] Section 751(c)(1) and (2) of the Act; 19 U.S.C. § 1675(c)(1) and (2) (Exhibit MEX-24); *see also* 19 C.F.R. § 318.218(c)(1) (Exhibit MEX-25).

[10] Section 751(c)(3)(A) of the Act; 19 U.S.C. § 1675(c)(3)(A) (Exhibit MEX-24). The term "domestic interested parties" is a shorthand expression for the interested parties defined in section 771(9)(C)-(G) of the Act. These are the types of interested parties who are eligible to file a petition for the imposition of antidumping duties.

[11] Section 751(c)(3)(B) of the Act; 19 U.S.C. § 1675(c)(3)(B) (Exhibit MEX-24).

[12] 19 C.F.R. § 351.218(e)(1) (Exhibit MEX-25). The term "respondent interested parties" is a shorthand expression for the interested parties defined in section 771(9)(A)-(B) of the Act. These parties typically consist of foreign manufacturers, producers or exporters, or the U.S. importer of subject merchandise, or an association of such persons.

16. Third, if the response to the notice of initiation is adequate, Commerce will conduct a full sunset review and issue its final determination within 240 days after the initiation of the review.[13]

17. In both expedited and full sunset reviews, respondent interested parties may elect to waive participation in the sunset review conducted by Commerce, without prejudice to their participation in the sunset review conducted by the ITC.[14] The purpose of this procedure is to avoid forcing respondent interested parties to incur the time and expense of participating in the Commerce side of a sunset review when they wish only to contest the likelihood of continuation or recurrence of injury on the ITC side.

18. As mentioned above, Commerce has the responsibility of determining whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of dumping. If Commerce's determination is negative – *i.e.*, if Commerce finds that there is not such likelihood – Commerce must revoke the order.[15] If Commerce's determination is affirmative, however, Commerce transmits its determination to the ITC, along with a determination regarding the magnitude of the margin of dumping that is likely to prevail if the order is revoked.[16]

b. Statutory Provisions Related to the ITC's Determination

19. Section 751(c) of the Act requires the ITC to conduct a review no later than five years after issuance of an order of the suspension of an investigation, or a prior review, and to determine whether revocation of the order or termination of the suspended investigation would likely lead to the continuation or recurrence of material injury.[17] Section 752(a)(1) of the Act specifically addresses the ITC's determination in a section 751(c) review. This provision states that "the ITC shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time."[18] More generally, section 752(a) of the Act specifies several factors for the ITC's consideration in making determinations in five-year reviews, including the likely volume, likely price effects, and likely impact of subject imports on the domestic industry if the antidumping duty order is revoked.

20. Section 752(a)(7) grants the ITC discretion to engage in a cumulative analysis if: (1) reviews are initiated on the same day; and (2) imports would be likely to compete with one another and with the domestic like product in the United States market. It further provides that

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[13] Section 751(c)(5)(A) of the Act; 19 U.S.C. § 1675(c)(5)(A) (Exhibit MEX-24).
[14] Section 751(c)(4)(A) of the Act; 19 U.S.C. § 1675(c)(4)(A) (Exhibit MEX-24).
[15] Section 751(d)(2) of the Act; 19 U.S.C. § 1675(d)(2) (Exhibit MEX-24).
[16] Section 752(c) of the Act; 19 U.S.C. § 1675a(c) (Exhibit MEX-24).
[17] Section 751(c)(5)(A) of the Act; 19 U.S.C. § 1675(c)(5)(A) (Exhibit MEX-24).
[18] Section 752(a)(1) of the Act; 19 U.S.C. § 1675a(a)(1) (Exhibit MEX-24).

the ITC shall not cumulate imports from a country if those imports are likely to have no discernible adverse impact.

2. The Regulations

a. Commerce Regulations

21. Following completion of the Uruguay Round and enactment of the URAA, Commerce revised its antidumping ("AD") and countervailing duty ("CVD") regulations so as to bring them into conformity with the URAA on May 19, 1997.[19] These regulations, however, contained minimal guidance with respect to sunset reviews, essentially setting forth only the time frame for initiation and completion of such reviews.[20] Thus, in March 1998, in anticipation of the over 300 pre-URAA orders (referred to as "transition orders")[21] eligible for revocation by January 1, 2000, Commerce issued additional regulations addressing in greater detail the procedures for participation in, and conduct of, sunset reviews.[22] These *Sunset Regulations* created a framework both to implement statutory requirements and to provide a clear, transparent process.[23] *Inter alia*, they specified the information to be provided by parties participating in a sunset review[24] and the deadlines for required submissions.[25]

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[19] Where, as in the case of the U.S. antidumping duty law, Congress entrusts an administrative agency with the administration of a statute, it is common for the agency to promulgate regulations that elaborate on, or clarify, the statute. While regulations are subordinate to the statute, they typically have the force of law if validly promulgated and consistent with the statute. *See Antidumping Duties; Countervailing Duties; Final Rule* ("*AD/CVD Final Rule*"), 62 Fed. Reg. 27,296 (May 19, 1997) (Exhibit US-1) (codified at 19 C.F.R. § 351.218) (Exhibit MEX-25).

[20] *AD/CVD Final Rule*, 62 Fed. Reg. at 27,397 (Exhibit US-1).

[21] Section 751(c)(6)(C) of the Act; 19 U.S.C. §§ 1675(c)(6)(C) (Exhibit MEX-24).

[22] *Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders* ("*Sunset Regulations*"), 63 Fed. Reg. 13,516 (March 20, 1998) (codified at 19 C.F.R. part 351) (Exhibit US-2).

[23] To continue its procedural transparency, in April 1998, Commerce issued a policy bulletin related to sunset reviews. Commerce issued the policy bulletin to apprize interested parties of its anticipated methodologies and to assist Commerce staff in their conduct of sunset reviews. As described in the *Sunset Policy Bulletin*, Commerce will normally determine that revocation of an antidumping order is likely to lead to continuation or recurrence of dumping where: (1) dumping continued at any level above *de minimis* after the issuance of the order; (2) imports of the subject merchandise ceased after issuance of the order; or (3) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly. The *SunsetPolicy Bulletin* provides guidance as to how to determine the magnitude of the dumping margin that would be likely to prevail if the antidumping order were revoked. For example, the *Policy Bulletin* offers an illustration of what Commerce, given certain factual scenarios, will "normally" do. It establishes how Commerce anticipates acting on a regular, standard or ordinary basis. The *Sunset Policy Bulletin* does not suggest that Commerce will *always* find a likelihood of continuation or recurrence given the factual scenarios above. *See Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders*, 63 Fed. Reg. 18,871 (April 16, 1998) ("*Sunset Policy Bulletin")* (Exhibit MEX-32)

[24] 19 C.F.R. § 351.218(d)(3) (Exhibit MEX-25).

[25] 19 C.F.R. § 351.218(d)(3)-(4) (Exhibit MEX-25).

22. The *Sunset Regulations* describe specifically the information required to be provided by all interested parties in a sunset review.[26] In addition, the regulations invite parties to submit, with the required information, "any other relevant information or argument that the party would like [Commerce] to consider."[27] These regulations constitute the standard request for information in sunset reviews and function as the standard questionnaire.

23. With respect to deadlines for required submissions, the *Sunset Regulations* provide that substantive responses to a notice of initiation are due 30 days after its date of publication in the *Federal Register*.[28] Rebuttals to substantive responses are due five days after the date the substantive response is filed.[29] The regulations also state that Commerce normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired.[30]

b. ITC Regulations

24. The ITC has regulations pertaining to its injury determination in the sunset reviews, which are set forth at 19 C.F.R. 207.60-69.[31] With respect to institution of a sunset review, under its regulations, the ITC initially determines whether to conduct a full review (which would generally include a public hearing, the issuance of questionnaires, and other procedures) or an expedited review. First, the ITC determines whether individual responses to the notice of institution are adequate. Second, based on those responses deemed individually adequate, the ITC determines whether the collective responses submitted by two groups of interested parties – domestic interested parties (producers, unions, trade associations, or worker groups), and respondent interested parties (importers, exporters, foreign producers, trade associations, or country governments) – demonstrate a sufficient willingness among each group to participate and provide information requested in a full review.[32] In its sunset review on OCTG, the ITC conducted a full review.

B. Reviews And Revocation Under U.S. Law

25. Article 11.1 of the AD Agreement provides that "[a]n antidumping duty shall remain in force only as long as and the extent necessary to counteract dumping which is causing injury." In furtherance of this general rule, Article 11.2 requires investigating authorities, in certain circumstances, to "examine whether the continued imposition of the duty is necessary to offset dumping" or "whether injury would be likely to continue or recur." Together Articles 11.1 and

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[26] 19 C.F.R. § 351.218(d)(1)-(4) (Exhibit MEX-25).
[27] 19 C.F.R. § 351.218(d)(3)(iv)(B) (Exhibit MEX-25).
[28] 19 C.F.R. § 351.218(d)(3)(i) (Exhibit MEX-25).
[29] 19 C.F.R. § 351.218(d)(4) (Exhibit MEX-25).
[30] 19 C.F.R. § 351.218(d)(4) (Exhibit MEX-25).
[31] 19 C.F.R. §§ 207.60-69 (Exhibit US-3).
[32] 19 C.F.R. § 207.62(a) (Exhibit US-3).

11.2 of the AD Agreement ensure that the exporter's legitimate interests are safeguarded if a change occurs that warrants reduction or elimination of the anti-dumping duty.[33]

26. Pursuant to section 751(d) of the Act, Commerce may revoke, in whole or in part, an antidumping duty order upon the completion of a review.[34] One type of revocation review is the five-year sunset review under section 751(c), which is described above. In addition, Commerce may revoke an order based on the results of a "changed circumstances" review under section 751(b) of the Act, or the result of an administrative review under section 751(a) of the Act.[35] Consistent with Article 11.2 of the AD Agreement, the statute and the regulatory framework discussed below, affords Commerce discretion to revoke an antidumping duty order whenever it is no longer necessary to offset dumping.[36]

1. Revocation Based on "Changed Circumstances"

27. Pursuant to section 751(b) of the Act, Commerce may revoke an anti-dumping duty order whenever there are changed circumstances sufficient to warrant review. In a changed circumstances review the party seeking revocation of an antidumping order has the burden of persuasion with respect to the sufficiency of changed circumstances to warrant such a review and revocation.[37] Section 351.222(g) of Commerce's regulations establish further procedural guidelines for revocation based on changed circumstances.[38] Under the regulation, Commerce may revoke an order if there is a lack of interest in the order or if other changed circumstances exist that warrant a revocation.[39]

2. Revocation Based on Administrative Reviews Establishing The Absence of Dumping for Three Consecutive Years

28. In addition to Commerce's broad authority to revoke an order whenever changed circumstances warrant, under section 351.222(b) Commerce may revoke, in full or in part, an antidumping duty order if, based on the results of administrative reviews, Commerce determines that there was an absence of dumping for at least three consecutive years, and that continued

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[33] *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil,* WT/DS219/AB/R, Report of the Appellate Body, adopted August 18, 2003 *("EC Pipe Fittings")*, para. 81 para. 81.

[34] Section 751(d) of the Act; 19 U.S.C. § 1675(d) (Exhibit MEX-24).

[35] Section 751(a)-(c) of the Act; 19 U.S.C. § 1675(a)-(c) (Exhibit MEX-24).

[36] 19 C.F.R. § 351.222(b) (Exhibit US-4).

[37] Section 751(b) of the Act; 19 U.S.C. § 1675(b) (Exhibit MEX-24).

[38] 19 C.F.R. § 351.222(g) (Exhibit US-4).

[39] Section 351.222(h) of Commerce's regulations provide guidelines for revocation based on injury reconsideration in accordance with section 751(b)(2) of the Act. This regulation, however, is not at issue in this dispute.

application of the antidumping order is not otherwise necessary to offset dumping.[40] Under section 351.222(b)(2), Commerce may partially revoke an antidumping duty order with respect to a specific exporter or producer. Commerce will determine whether the antidumping duty is no longer warranted as to a specific exporter or producer reviewed, if the company has sold subject merchandise at not less than normal value and in commercial quantities during the previous three consecutive years.[41] Under section 351.222(e), an exporter or producer may request Commerce to revoke an order under section 351.222(b) during the third and subsequent annual anniversary month of the antidumping order.[42]

C. Oil Country Tubular Goods from Mexico

1. The Antidumping Duty Investigation and Order

29. In July of 1994, Commerce initiated the investigation which resulted in the antidumping duty order contested before this Panel.[43] Commerce established the period of investigation ("POI") for this case as January 1, 1994 though June 30, 1994.[44] After also surveying three other potential respondent companies, including Hylsa, about the volume of their sales during the POI, Commerce determined to conduct a full investigation only of TAMSA, which accounted for at least 60 percent of the exports to the United States during the POI.[45]

30. In early November of 1994, based on information in TAMSA's questionnaire responses, Commerce determined that TAMSA's sales of OCTG in the Mexican market were not a "viable" comparison because they represented less than five percent of the amount of OCTG TAMSA sold to third countries. Thus, Commerce decided to base what is now termed "normal value" (then "foreign market value") on TAMSA's OCTG sales to a third country, Saudi Arabia.[46] Later that month, petitioners alleged that TAMSA was selling below cost in the Saudi Arabian market, and Commerce began an investigation into this matter. Because TAMSA's cost questionnaire responses were not yet available, Commerce made its preliminary determination based on a comparison of TAMSA's prices for OCTG sold to Saudi Arabia to TAMSA's prices for OCTG

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[40] 19 C.F.R. § 351.222(b) (Exhibit US-4). Although this is the current language of the regulation, the regulation was amended to include "otherwise necessary to offset dumping" pursuant to implementation of the *United States - Antidumping Duty on DRAMs from Korea* panel report (WT/DS99/R).

[41] 19 C.F.R. § 351.222(e)(1) (Exhibit US-4)).

[42] 19 C.F.R. § 351.222(e) and (b) (Exhibit US-4)).

[43] *Initiation of Antidumping Duty Investigations: Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain,* 59 Fed. Reg. 37,962 (July 26, 1994) (Exhibit US-5).

[44] *Preliminary Determination of Sales at Not Less Than Fair Value: Oil Country Tubular Goods from Mexico*, 60 Fed. Reg. 6,510, 6,511 (February 2, 1995)("*Original Preliminary Determination*")(Exhibit MEX-3).

[45] *Original Preliminary Determination*, 60 Fed. Reg. at 6,510 (Exhibit MEX-3).

[46] *Original Preliminary Determination*, 60 Fed. Reg. at 6,511 (Exhibit MEX-3).

sold to the United States.[47] Based on this calculation, Commerce found that TAMSA had not dumped during the POI (*i.e.*, that TAMSA had not sold to the United States at less than it sold to Saudi Arabia); Commerce also assigned a zero margin to the "all others" companies, including Hylsa.[48]

31. When TAMSA provided its data on the cost of producing OCTG ("COP data") in February of 1995, Commerce accepted and used these data with three exceptions.[49] The most important of these exceptions, and the one Mexico appears to continue to view as relevant to the revocation decision contested before this Panel,[50] involved which financial statements should be used to calculate TAMSA's financial expense rate for the January-June 1994 POI.[51] TAMSA argued that Commerce should use data from its 1993 financial statements, and failed to provide available 1994 financial data despite Commerce's direct request for this at verification. Petitioners then placed on the record 1994 financial data that TAMSA had filed with the Mexican Securities Exchange. Given the 1994 POI, Commerce determined it more appropriate to use the 1994 data for the 1994 calculations.

32. Despite this, in recognition of the dramatic devaluation in Mexican currency that took place in December 1994, Commerce based the financial expense rate only on TAMSA's financial records for the first two quarters of 1994 (*i.e.*, the POI), noting that this amount was already substantially higher than the 1993 value Mexico had proffered.[52]

33. After determining TAMSA's POI cost of producing OCTG, Commerce then compared these costs to TAMSA's POI sales of OCTG to Saudi Arabia. Because more than 90 percent of TAMSA's sales to that country were made at below-cost prices, all such sales were disregarded, and no Saudi Arabian prices remained for comparison purposes.[53] Thus, Commerce based the margin for the final determination, instead, on a comparison of the prices at which TAMSA sold OCTG to the United States during the POI to the constructed value of those sales, which was based on TAMSA's POI costs. This resulted in a calculated final margin of 23.79 percent for both TAMSA and the "all others" companies.[54]

34. On August 2, 1995, the ITC notified Commerce of its final affirmative determination that imports of OCTG other than drill pipe from Mexico were materially injuring the U.S. domestic industry and that imports of drill pipe from Mexico were threatening to cause material injury to

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[47] *Original Preliminary Determination*, 60 Fed. Reg. at 6,511-12 (Exhibit MEX-3); *Original Determination of Sales At Less Than Fair Value: Oil Country Tubular Goods from Mexico*, 60 Fed. Reg. 33,567, 33,568 (June 28, 1995) ("*Original Determination*")(Exhibit MEX-1).

[48] *Original Preliminary Determination*, 60 Fed. Reg. at 6,512 (Exhibit MEX-3).

[49] *Original Determination*, 60 Fed. Reg. at 33,568 (Exhibit MEX-1).

[50] Mexico First Written Submission, paras. 312-13.

[51] *Original Determination*, 60 Fed. Reg. at 33,568, 33,572 (Exhibit MEX-1).

[52] *Original Determination*, 60 Fed. Reg. at 33,568, 33,572 (Exhibit MEX-1).

[53] *Original Determination*, 60 Fed. Reg. at 33,569 (Exhibit MEX-1).

[54] *Original Determination*, 60 Fed. Reg. at 33575 (Exhibit MEX-1).

the U.S. domestic industry.[55] On August 11, 1995, Commerce issued the antidumping duty order on OCTG products from Mexico.[56]

35. Both TAMSA and the U.S. Petitioner challenged aspects of the final determination before a NAFTA Binational Panel. In the course of the Panel proceedings, the United States sought voluntary remand to use a neutral, rather than an adverse, adjustment factor for a contested allocation. The Panel granted that request, and upheld Commerce as to the other contested issues.[57] On February 6, 1997, Commerce issued an amended final determination with a margin of 21.70 percent, reflecting the results of the voluntary remand change.[58]

2. Administrative Reviews

a. The First Three Periods of Review

36. In September of 1996, Commerce initiated reviews of three Mexican producers of OCTG, including Hylsa and TAMSA. None of the reviewed companies had exported OCTG to the United States during the first period of review (POR), which ended on July 31, 1996; thus, Commerce terminated the review.[59]

37. In August of 1997, both TAMSA and Hylsa requested review for entries made during the second POR, covering August 1, 1996 through July 31, 1997.[60] Commerce conducted the requested review, in which both TAMSA and Hylsa obtained a zero margin.[61] This zero margin became the new deposit rate when the final determination was published in March of 1999.[62]

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[55] *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 2911, Inv. No. 731-TA-717 (Aug. 1995) (Exhibit US-6).

[56] *Antidumping Duty Order: Oil Country Tubular Goods from Mexico*, 60 Fed. Reg. 41,056 (August 11, 1995) ("*Antidumping Duty Order*") (Exhibit US-7).

[57] Decision of the Panel, In the Matter of: Oil Country Tubular Goods from Mexico; Final Determination of Sales at Less than Fair Value, USA-95-1904-04 (July 31, 1996), at 60, 66-67 (remanding for further explanation), 74-75, 82 (remanding for the allocation adjustment), 85; Redetermination on Remand, Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Mexico (A-201-817)(Public Version), at 7; Final Panel Order, In the Matter of: Oil Country Tubular Goods from Mexico; Final Determination of Sales at Less than Fair Value, USA-95-1904-04 (December 2, 1996)(affirming Commerce's remand determination) (Exhibit US-8).

[58] *Notice of Panel Decision; Amended Order and Final Determination: Oil Country Tubular Goods from Mexico*, 62 Fed. Reg. 5,612 (February 6, 1997) ("*Amended Determination*")(Exhibit MEX-2).

[59] *Oil Country Tubular Goods from Mexico; Notice of Termination of Antidumping Duty Administrative Review*, 62 Fed. Reg. 19,309, 19,309 (April 21, 1997) (Exhibit US-9).

[60] *Oil Country Tubular Goods from Mexico: Preliminary Results of Antidumping Duty Administrative Review* ("*Second Review Preliminary Determination*"), 63 Fed. Reg. 48,699, 48,699 (Exhibit MEX-4).

[61] *Oil Country Tubular Goods from Mexico: Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 13,962 (March 23, 1999) (Exhibit MEX-5).

[62] *Oil Country Tubular Goods from Mexico: Final Results of Antidumping Duty Administrative Review* ("*Second Review Final Results*"), 64 Fed. Reg. 13,969 (March 23, 1999) (Exhibit MEX-5).

38. In August of 1998, Hylsa and TAMSA both requested review for sales made during the third POR, which covered August 1, 1997 through July 31, 1998.[63] However, although Hylsa had posted cash deposits for its OCTG at its previous post-NAFTA deposit rate (21.70 percent), and it would have ultimately obtained a complete refund of those duties if found not to have been dumping during the third POI, Hylsa withdrew its request for review in November of 1998, and Commerce terminated that review as to Hylsa.[64] TAMSA responded to the questionnaires, and received a zero margin with respect to its third POR entries.[65]

b. Fourth Administrative Review

39. The United States initiated an administrative review for the period of August 1, 1998, through July 31, 1999, on September 24, 1999, in response to timely requests by TAMSA and Hylsa.[66]

40. In accordance with section 351.222(e) of Commerce's regulations, TAMSA and Hylsa requested that Commerce revoke the antidumping duty order on OCTG from Mexico with respect to each company pursuant to section 351.222(b)(2) of Commerce's regulations.[67] Each requested a review for a company-specific revocation of the antidumping duty order, not a review for an order-wide revocation under section 351.222(g) of Commerce's regulations.

41. On September 12, 2000, Commerce published the preliminary determination of its administrative review of the antidumping duty order on OCTG from Mexico.[68] Commerce preliminarily determined a zero margin for TAMSA, and a margin of 1.47 percent for Hylsa in the preliminary results for that review. Although TAMSA received a zero margin, Commerce found that TAMSA did not qualify for consideration for revocation because Commerce found that TAMSA did not sell subject merchandise for three years in commercial quantities within the meaning of section 351.222(e) of its regulations. Because Hylsa received a weighted-average

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[63] *Oil Country Tubular Goods from Mexico: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review* ("*Third Review Preliminary Results*"), 64 Fed. Reg. 48,983, 48,983 (September 9, 1999) (Exhibit MEX-6).

[64] *Third Review Preliminary Results*, 64 Fed. Reg. 48,983, 48,983 (September 9, 1999) (Exhibit MEX-6).

[65] *Oil Country Tubular Goods from Mexico: Final Results of Antidumping Duty Administrative Review* ("*Third Review Final Results*"), 65 Fed. Reg. 1,593 (January 11, 2000) (Exhibit MEX-7).

[66] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 64 Fed. Reg. 53,318 (October 1, 1999) (Exhibit US-10).

[67] TAMSA's Request for the Fourth Administrative Review and Revocation, at 2 (Exhibit MEX-10); Hylsa's Request for the Fourth Administrative Review and Revocation, at 2 (Exhibit MEX-11).

[68] *Oil Country Tubular Goods from Mexico: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke in Part*, 65 Fed. Reg. 54,998 (September 12, 2000) ("*Preliminary Results of Fourth Review*") (Exhibit US-11). Commerce also conducted a changed circumstances administrative review on May 8, 1998, and determined that there was insufficient industry support for partial revocation of the order with regard to drill pipe. *Oil Country Tubular Goods from Mexico: Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review*, 64 Fed. Reg. 14,213 (March 24, 1999) (Exhibit US-12).

margin of 1.47 percent, Commerce found that Hylsa did not qualify for revocation from the order under section 351.222(b)(2) of Commerce's regulations.

42. Both TAMSA and Hylsa submitted in case briefs and rebuttal comments on the preliminary results. TAMSA and Hylsa both contended that Commerce's preliminary determination was contrary to past practice, was inconsistent with the applicable law and regulations, and ignored the facts of the case. In addition, Hylsa challenged several parts of the margin calculation.

43. On March 21, 2001, Commerce published its final determination of the administrative review.[69] Based on Commerce's analysis of comments received, the margin calculation for Hylsa changed to 0.79 percent, and the margin for TAMSA remained unchanged. Commerce determined that TAMSA did not meet the threshold criterion outlined in 19 C.F.R. § 351.222 that requires sales in commercial quantities in each of the three years forming the basis for the revocation request. Specifically, Commerce found that because TAMSA sales for each of the three years cited were not made in commercial quantities, these sales failed to provide a reasonable basis for determining that the order as applied to TAMSA was no longer necessary. Accordingly, Commerce found that TAMSA did not qualify for revocation of the order on OCTG under 19 C.F.R. § 351.222(e)(1)(ii) and 19 C.F.R. § 351.222(d)(1). Commerce also found that Hylsa did not qualify for revocation because it did not have three consecutive years of sales at not less than normal value.

3. The Sunset Review and Determination

a. Commerce's Determination of Likelihood of Continuation or Recurrence of Dumping

44. On July 3, 2000, Commerce published its notice of initiation of the sunset review of the antidumping duty order on OCTG from Mexico pursuant to section 751(c) of the Act.[70] Based on the substantive responses filed by domestic and interested parties, Commerce conducted a full sunset review.[71]

45. On August 22, 2000, pursuant to section 351.218(e)(2) of Commerce's regulations, Commerce determined to conduct a full sunset review based on its receipt of a complete

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[69] *Oil Country Tubular Goods from Mexico: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 66 Fed. Reg. 15,832 (March 21, 2001) ("*Final Results of Fourth Review*") (Exhibit MEX-9) and the accompanying *Issues and Decision Memorandum for the 1998-1999 Administrative Review of Oil Country Tubular Goods from Mexico: Final Results of Antidumping Duty Administrative Review* ("*Issues and Decision Memorandum: Final Results of Fourth Review*") (Exhibit MEX-9).

[70] *Notice of Initiation of Five Year ("Sunset") Reviews*, 65 Fed. Reg. 41,053 (July 3, 2000) ("*Sunset Initiation*") (Exhibit MEX-15).

[71] *Oil Country Tubular Goods from Mexico: Preliminary Results of Sunset Review of Antidumping Duty Order*, 65 Fed. Reg. 64,667 (October 30, 2000) ("*Commerce Sunset Preliminary*") (Exhibit US-13).

substantive response from TAMSA and Hylsa, which accounted for a significant portion of Mexican exports to the United States.[72]

46. On October 30, 2000, Commerce published its preliminary sunset determination finding likelihood of continuation or recurrence of dumping.[73] In analyzing likelihood, Commerce considered the existence of dumping throughout the history of the order as well as the volume of imports before and after issuance of the order.[74]

47. Commerce considered the two administrative reviews of the order on OCTG products from Mexico that had been conducted and completed prior to the sunset review. In those two administrative reviews, Commerce found that although dumping of subject merchandise was eliminated during those review periods, the import volumes of subject merchandise was significantly less than pre-order imports. In the first completed administrative review, Commerce assigned a zero margin to TAMSA and Hylsa.[75] In the second completed administrative review, TAMSA, the only company reviewed, received a zero margin.[76] Commerce also initiated an administrative review for both TAMSA and Hylsa for the period of August 1, 1998, through July 31, 1999, and found a zero margin for TAMSA, but a margin of 1.47 percent for Hylsa in the preliminary results for that review.[77]

48. After consideration of all evidence on the record and based on its findings that imports of subject merchandise from Mexico declined significantly following the issuance of the order, and continued to remain at significantly lower levels, Commerce preliminarily determined there was likelihood of continuation or recurrence of dumping.[78] The facts indicated that the existence of the dumping order had constrained exporters' ability to sell, and that, to the extent exporters could sell, they could only do so in significantly limited volumes. This lead to the reasonable conclusion that if the discipline of the dumping order were removed, exporters could only increase their sales by dumping.

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[72] *Commerce Sunset Preliminary*, 65 Fed. Reg. at 64,667 n. 1 (Exhibit CS-9 (Prelim DOC Sunset)); *see also* 19 CFR § 351.218(e) (Exhibit MEX-25).

[73] *Commerce Sunset Preliminary*, 65 Fed. Reg. 16,169 (March 27, 2000) and accompanying "Issues and Decision Memorandum for the Full Sunset Review for the Antidumping Duty Order on Oil Country Tubular Goods ("OCTG") from Mexico; Preliminary Results," dated October 23, 2000 ("*Commerce Sunset Preliminary Decision Memorandum*") (Exhibit US-14).

[74] *Commerce Sunset Preliminary Decision Memorandum*, p. 5-8 (Exhibit US-14).

[75] *Second Review Final Results*, 64 Fed. Reg. 13,962 (Exhibit MEX-5).

[76] *Third Review Final Results*, 65 Fed. Reg. 1,593 (Exhibit MEX-7).

[77] *Final Results of the Fourth Review*, 65 Fed. Reg. 54,998 (September 12, 2000) (Exhibit MEX-9). Commerce also conducted a changed circumstances administrative review on May 8, 1998, and determined that there was insufficient industry support for partial revocation of the order with regard to drill pipe. *Oil Country Tubular Goods from Mexico: Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review*, 64 Fed. Reg. 14,213 (March 24, 1999) (Exhibit US-12).

[78] *Commerce Sunset Preliminary Decision Memorandum*, p. 5-8 (Exhibit US-14).

49. As required under U.S. law, Commerce also reported to the ITC the magnitude of the margin of dumping likely to prevail if the order were revoked.[79] In deciding the magnitude of the margin likely to prevail to report to the ITC, Commerce considered the fact that imports of subject merchandise from Mexico have not "remained steady or increased;" rather, such imports declined significantly following the issuance of the order and continued to remain at significantly lower levels. Thus, Commerce preliminarily determined that a more recent rate was not appropriate and reported to the ITC margins of 21.70 percent for TAMSA, Hylsa, and "all others" as calculated in the original investigation and adjusted in the amended order, because that was the only calculated margin indicative of exporter behavior without the discipline of an order in place.[80]

50. In December 2000, TAMSA and Hylsa filed their respective case briefs with Commerce. In its brief, TAMSA argued that there were no facts on the record to support Commerce's conclusion that dumping was likely to recur and thus, Commerce's decision failed to satisfy the standard established in U.S. law and the relevant international agreements.[81] Both TAMSA and Hylsa alleged that Commerce's determination relied on an analysis of pre- and post-order export volumes in concluding that dumping was likely to recur if the order were revoked.[82] Although import volumes did decrease significantly shortly after imposition of the order, Hylsa explained that this decline was symptomatic of the overall volume of imports of OCTG from Mexico and should be considered by Commerce on a basis specific to Hylsa's experience in its likelihood analysis.[83] In addition, TAMSA stated that the margin likely to prevail if the order were maintained should be a margin determined in the most recently completed administrative review.[84]

51. On March 9, 2001, Commerce published its final sunset determination, finding that continuation or recurrence of dumping was likely.[85] Commerce addressed the parties' arguments, *e.g.*, advanced in their case briefs and rebuttals, but did not change the basis for its likelihood determination from its preliminary determination, nor did it change its decision regarding what to report to the ITC as the magnitude of the dumping margins likely to prevail. In addition, Commerce determined that revocation of the order is likely to lead to continuation or recurrence of dumping where the volume of imports declined significantly after the issuance of the order and dumping was eliminated.

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[79] *Id.*, p. 7-8 (Exhibit US-14); Section 752(c)(3) of the Act (Exhibit MEX-24).

[80] *Commerce Sunset Preliminary Decision Memorandum*, p. 6 (Exhibit US-14).

[81] *TAMSA* Case Brief in Sunset Review (Dec. 11, 2000), p. 2-3 (Exhibit MEX-39).

[82] *TAMSA* Case Brief in Sunset Review, at 3-6 (Exhibit MEX-39); *Hylsa* Case Brief in Sunset Review (Attachments excluded), (Dec. 18, 2000), p. 2-3 (Exhibit US-15).

[83] *Hylsa* Case Brief in Sunset Review, p. 3-4 (Exhibit US-15).

[84] *TAMSA* Case Brief in Sunset Review, p. 6-8 (Exhibit MEX-39).

[85] *Oil Country Tubular Goods from Mexico; Final Results of Sunset Review of Antidumping Duty Order* ("*Commerce Sunset Final*"), 66 Fed. Reg. 14,131 (Mar. 9, 2001) (Exhibit MEX-19), and accompanying Issues and Decision Memorandum ("*Commerce Sunset Final Decision Memorandum*") (Exhibit MEX-19).

b. The ITC's Determination of Likelihood of Continuation or Recurrence of Injury

52. In its final determination in the original investigation, the ITC made separate injury determinations for the two types of OCTG (casing and tubing, on the one hand and drill pipe, on the other), because it found these to be separate domestic like products.[86]

53. On June 3, 2000, the ITC instituted sunset reviews,[87] and on October 25, 2000, decided to conduct full reviews to determine whether revocation of the antidumping and countervailing orders on casing and tubing from Argentina, Italy, Japan, Korea, and Mexico, and on drill pipe from Argentina, Italy and Mexico would likely lead to continuation or recurrence of material injury.[88]

54. On July 10, 2001, the ITC published notice of its final determination in the sunset review, and issued its full opinion in a separate publication.[89] The ITC determined that revocation of the order on drill pipe from Japan was likely to lead to continuation of material injury within a reasonably foreseeable time, but that revocation of the orders on drill pipe from Mexico and Argentina was not likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. As a result, the antidumping duty orders on drill pipe from Mexico and Argentina were revoked.

55. With respect to casing and tubing, the ITC determined to evaluate the effects of subject casing and tubing imports from Mexico, Argentina, Italy, Japan and Korea on a cumulated basis.[90]

56. The ITC identified a number of conditions of competition as relevant to its sunset review, including (as most relevant to this dispute) that:

- The United States is the largest OCTG market in the world.[91]
- Based in part on rising oil and gas prices, which appeared to be driven by long-term factors, the ITC found demand for casing and tubing to be currently strong and to be projected to remain strong in the reasonably foreseeable future. The ITC

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[86] *See* Exhibit US-6.
[87] *See* Exhibit MEX-18.
[88] 65 Fed. Reg. 63,889 (Exhibit US-16).
[89] The ITC's notice was published at 66 Fed. Reg. 35997 (Exhibit US-17), and its full opinion was published as *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) (Exhibit MEX-20) ("ITC Report").
[90] ITC Report at 10-14.
[91] ITC Report at 15.

noted, however, that the volatility of the forces affecting oil and gas supply and demand globally made such forecasts difficult.[92]

- Production facilities in subject countries and in the United States produced a variety of products in addition to OCTG. The ITC found that producers could easily shift production away from other tubular products toward production of OCTG and vice versa. The ITC also found that OCTG commanded among the highest prices among tubular products, giving producers an incentive to make as much OCTG as possible in relation to other products.[93]

- The ITC noted the consolidation of five foreign producers of seamless casing and tubing (four of which were located in subject countries) into the Tenaris Alliance. Tenaris operated as a unit, submitting a single bid for OCTG contracts, and its customer base included large multi-national oil and gas companies that had operations in the United States.[94]

57. Against that background, the ITC considered the evidence gathered in the reviews. It noted that during the original period of investigation, subject imports of casing and tubing rose from 1992 to 1994. The ITC explained that after the orders went into effect subject imports decreased but remained a factor in the U.S. market. The ITC concluded that the current import volume and market share of subject imports were substantially below the levels of the original investigation, but that this likely reflected the restraining effects of the orders.[95]

58. The ITC explained that the volume of subject imports would likely increase significantly if the orders were revoked. Because it found that foreign casing and tubing producers could shift with relative ease between production of casing and tubing and production of other pipe and tube products, the ITC considered foreign producers' operations with respect to casing and tubing and with respect to all pipe and tube products produced on the same machinery and equipment as casing and tubing.[96]

59. The ITC concluded that there was substantial available capacity in the subject countries for increasing exports of casing and tubing to the United States. The ITC explained that producers had incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the U.S. market. The ITC considered Tenaris' assertion that its preference to sell directly to end-users would limit its participation in the U.S. market if the orders were revoked. The ITC explained that Tenaris was the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions, except the

[92] ITC Report at 15.
[93] ITC Report at 16.
[94] ITC Report at 16.
[95] ITC Report at 17.
[96] ITC Report at 17.

United States. It noted that Tenaris sought worldwide contracts with oil and gas companies, and that many of Tenaris' existing customers were global oil and gas companies with operations in the United States. While the Tenaris companies sought to downplay the importance of the U.S. market, they acknowledged that it was the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, the ITC found "it likely would have a strong incentive to have a significant presence in the U.S. market, including the supply of its global customers' OCTG requirements in the U.S. market."[97]

60. The ITC explained a second incentive for producers of the subject merchandise to devote more capacity to producing casing and tubing for the U.S. market. Casing and tubing were among the highest valued pipe and tube products, generating among the highest profit margins. Accordingly, producers generally had an incentive, where possible, to shift production in favor of these products from other pipe and tube products that were manufactured on the same production lines.[98]

61. A third incentive identified by the ITC was that prices for casing and tubing on the world market were significantly lower than prices in the United States. The ITC considered respondents' arguments that the domestic industry's claims of price differences were exaggerated, but it concluded that there was on average a difference sufficient to create an incentive for subject producers to seek to increase their sales of casing and tubing to the United States.[99]

62. The fourth incentive was that producers and exporters in the subject countries faced import barriers in other countries and on other pipe products (produced in the same facilities) in the United States. Finally, the ITC found that industries in at least some of the subject countries depended on exports for the majority of their sales. Japan and Korea, in particular, had very small home markets and depended nearly exclusively on exports.[100]

63. On these bases, the ITC concluded that, in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the U.S. market, would be significant.[101]

64. In evaluating potential price effects, the ITC first reviewed the price effects findings it made in the original investigation, which reflected conditions before the orders were imposed. It found that the domestic and imported products were generally substitutable and that price was one of the most important factors in purchasing decisions. It concluded that, despite mixed

[97] ITC Report at 18-19.
[98] ITC Report at 19.
[99] ITC Report at 19-20.
[100] ITC Report at 20.
[101] ITC Report at 20.

evidence as to instances of underselling and overselling, underselling by subject imports was significant.[102]

65. The ITC also found in the original investigations that cumulated subject imports suppressed domestic prices to a significant degree, despite the unclear trend in domestic and import prices. The ITC found that the significant volumes of casing and tubing available from the cumulated subject countries effectively prevented domestic producers from raising prices, even though they were experiencing high manufacturing costs. Because imported and domestic casing and tubing were relatively close substitutes, changes in relative prices were likely to cause purchasers to shift among supply sources. As the ITC noted, purchasers repeatedly stated that subject imports exerted downward pressure on domestic prices.[103]

66. Turning to the evidence gathered in the reviews, the ITC found that the trend in prices of U.S.-made casing and tubing since 1995 had varied by product. It noted that for most products domestic prices peaked in 1998, fell significantly in 1999, then rebounded in 2000. The ITC also found that direct selling comparisons were limited, because the subject producers had a limited presence in the U.S. market during the period of review. Nevertheless, it found that the few direct comparisons that could be made indicated that subject casing and tubing generally undersold the domestic like product, especially in 1999 and 2000.[104]

67. The ITC also noted that subject imports were highly substitutable for domestic casing and tubing, and that price was a very important factor in purchasing decisions. Accordingly, the ITC found that the increases in subject import sales volume that were likely to occur would be achieved through lower prices.[105]

68. The ITC found that in the absence of the orders, casing and tubing from Mexico, Argentina, Italy, Japan and Korea likely would compete on the basis of price in order to gain additional market share. The ITC concluded that "such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product."[106]

69. The ITC reviewed its impact findings from the original investigation, which reflected conditions prior to the imposition of the orders. The adverse impact of the cumulated subject imports in the original determinations was reflected in the poor operating performance of the domestic industry (despite a sharp increase in U.S. consumption) and in the decline in market share.[107]

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[102] ITC Report at 20-21.
[103] ITC Report at 21.
[104] ITC Report at 21.
[105] ITC Report at 21.
[106] ITC Report at 21.
[107] ITC Report at 20-21.

70. The ITC further found that the large volumes of cumulated subject imports, which purchasers generally viewed as good substitutes for the domestic product, were inhibiting the domestic industry from increasing market share and from raising prices. The ITC thus found in the original investigations that suppliers had to compete for market share and that the lowest price would generally prevail. In addition, the ITC determined that the adverse impact of cumulated subject imports was reflected in the inability of the domestic industry to raise prices sufficiently to cover costs between 1992 and 1994.[108]

71. With regard to the evidence gathered during the reviews, the ITC noted that the current condition of the domestic industry was positive, that the industry had recovered after the orders were imposed, and that it appeared to have benefitted from the discipline imposed by the orders. The ITC also noted that the industry's performance indicators rose and fell with the volatile swings in demand. It found that, on balance, the domestic industry's condition had improved since the orders went into effect, as reflected in most indicators over the period reviewed, and it did not find the industry to be currently vulnerable.[109]

72. The ITC further found, however, for the reasons previously given, that revocation of the orders likely would lead to a significant increase in the volume of subject imports, which likely would undersell the domestic like product and significantly depress or suppress the domestic industry's prices. With regard to demand, the ITC noted that in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992. In these reviews, it found that, despite strong demand conditions in the near term, a significant increase in subject imports would likely have negative effects on both the price and volume of the domestic producers' shipments. The ITC found further that these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. As the ITC also found, this reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in the erosion of the domestic industry's profitability, as well as its ability to raise capital and make and maintain necessary capital investments.[110]

73. On this basis, the ITC determined that revocation of the antidumping and countervailing duty orders on imports of casing and tubing from Mexico, Argentina, Italy, Korea and Japan would be likely to lead to the continuation or recurrence of material injury to the domestic industry in the reasonably foreseeable future.[111]

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[108] ITC Report at 21-22.
[109] ITC Report at 22.
[110] ITC Report at 22.
[111] ITC Report at 22-23.

4. Notice of Continuation of the Order

74. On July 25, 2001, the United States published notice of the continuation of the antidumping duty order on OCTG other than drill pipe from Mexico based on the decisions by Commerce and the ITC finding likelihood of continuation or recurrence of dumping and injury.[112]

IV. GENERAL LEGAL PRINCIPLES

A. Scope and Standard of Review

75. Articles 17.5 and 17.6 of the AD Agreement set forth standards concerning the scope and standard of review in disputes involving antidumping measures. With respect to the "scope" of review, Article 17.5(ii) of the AD Agreement directs a panel to limit its review to the facts that were before the investigating authority when it made its determination. With respect to the sunset review on OCTG from Mexico made by Commerce and the ITC, this means the evidence contained in the administrative records of Commerce and the ITC, respectively.[113] This approach is consistent with the fact that where a panel is reviewing the WTO-consistency of an action taken by an administrative agency, a panel is not to act as a trier-of-fact in the first instance or to otherwise engage in a *de novo* review of the evidence before the agencies.

76. With respect to the standard of review, Article 17.6(i) of the AD Agreement addresses a panel's review of the facts, providing as follows:

> in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, *even though the panel might have reached a different conclusion, the evaluation shall not be overturned*. (Emphasis added.)

77. In other words, panels are not to conduct their own *de novo* evaluation of the facts if the domestic investigating authority's establishment of the facts was proper and if its evaluation of the facts was unbiased and objective. This applies even if the panel – had it stood in the shoes of that authority originally – might have decided the matter differently.

78. Finally, with respect to the standard of review and a panel's review of interpretative issues, Article 17.6(ii) provides as follows:

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[112] *Continuation of Countervailing and Antidumping Duty Orders on Oil Country Tubular Goods from Argentina, Italy, Japan, Korea and Mexico, and Partial Revocation of Those Orders From Argentina and Mexico With Respect to Drill Pipe*, 66 Fed. Reg. 38,630 (July 25, 2001) (Exhibit MEX-22).

[113] *See, e.g., Mexico - HFCS*, para. 7.43 ("[W]e are required to consider this dispute on the basis of the facts before the investigating authority, pursuant to Article 17.5(ii) of the AD Agreement.").

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

79. This means, for example, that if dictionary definitions reveal that a treaty term has more than one ordinary meaning, an authority's measure that is based on one of those meanings could be permissible and in conformity with the AD Agreement.[114]

B. Burden of Proof: Mexico Bears the Burden of Proving Its Claims

80. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation.[115] If the balance of evidence and argument is inconclusive with respect to a particular claim, the Panel must find that the complaining party, in this case Mexico, failed to establish that claim.[116]

81. For the reasons discussed below, Mexico has failed to meet its burden to establish a *prima facie* case. In the event the Panel should find to the contrary, however, Mexico's claims are also rebutted below.

V. LEGAL ARGUMENT

82. First, Mexico claims that the United States breaches the obligations contained in Article 11.3 of the AD Agreement because U.S. law and practice mandate the application of a presumption in favor of maintaining the antidumping duty in sunset reviews. Mexico claims that, in applying this alleged presumption, Commerce failed to conduct properly the sunset review of OCTG from Mexico in a manner inconsistent with Article 11.3. As demonstrated below, as a matter of fact and law, no such presumption exists. The U.S. sunset provision, both as such and as applied in this case, is consistent with Article 11.3 of the AD Agreement.

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[114] *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, Report of the Panel adopted 19 May 2003, paras. 7.337-7.343 (Argentina did not act inconsistently with Article 4.1 of the AD Agreement where its action was consistent with one, if not all, dictionary definitions of the phrase "major proportion.").

[115] *See, e.g., United States - Measures Affecting Imports of Woven Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, page 14; *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104; and *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, Report of the Panel, as modified by the Appellate Body, adopted 12 January 2000, para. 7.24.

[116] *See, e.g., India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, Report of the Panel, as affirmed by the Appellate Body, adopted 22 September 1999, para. 5.120.

83. Mexico also claims that the United States violated Article 11.2 of the AD Agreement and Article X:2 of the GATT when, in the Fourth Review, Commerce refused to revoke the antidumping order on OCTG from Mexico as applied to TAMSA and Hylsa. However, as discussed fully below, Mexico's arguments should be rejected by this Panel because Mexico misunderstands U.S. obligations under the WTO Agreements as well as the facts of the Fourth Review. Instead, Commerce's determination to deny the revocation requests of TAMSA and Hylsa was fully consistent with the WTO Agreements and based on an unbiased and objective review of the facts of the Fourth Review. Mexico's argument with respect to Article X:3 – that Commerce applies its law in an manner that is not impartial or reasonable – is equally unfounded.

84. Finally, Mexico claims that the ITC's sunset review determination was inconsistent with the AD Agreement. Mexico argues, *inter alia*, that the ITC did not employ the correct standard for evaluating whether injury would be likely to continue or recur and that the ITC did not conduct an "objective examination of the record." Mexico also advances various arguments concerning the specifics of the ITC's analysis. As demonstrated below, Mexico's claims fail, and the ITC's determination and the statute upon which it was based are not inconsistent with the AD Agreement.

A. The Panel Should Reject Mexico's Challenge to Commerce's Sunset Determination Including Claims Concerning an Alleged "Presumption" and Its Alleged Inconsistency with Article 11.3 of the AD Agreement

85. Article 11.3 establishes the requirement that an investigating authority either terminate the duty after five years or conduct a review to determine whether termination of that order "would be likely to lead to continuation or recurrence of dumping and injury."

86. Article 11.3 provides as follows:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead

> to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.
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> [22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

87. The panel in *Japan Sunset* observed that Article 11.3 does not provide for a particular methodology that applies to the substantive determinations to be made in these reviews.[117] Similarly, the Appellate Body endorsed the interpretation that "Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review."[118] Where, as here, an investigating authority employs a methodology that is not inconsistent with its WTO obligations, properly establishes the facts, and evaluates those facts in an unbiased and objective manner, the authority's decision cannot be overturned.

88. In Section VII.A of its First Written Submission, Mexico essentially asserts that Commerce does not conduct a "review" or make a "determination" in a sunset review. According to Mexico, U.S. law and practice require that Commerce find an affirmative likelihood of dumping, in each sunset review in which a domestic interested party participates. Mexico claims that Commerce applies a "presumption" that dumping is likely in sunset reviews where the evidence supports certain scenarios described in the Sunset Policy Bulletin because this evidence, to the exclusion of all other evidence, is given "decisive weight" when Commerce makes the likelihood determination.[119] Based on this assertion, Mexico claims that: (1) the instruments on which the "presumption allegedly is based are inconsistent, as such, with Article 11.3 of the AD Agreement;[120] (2) the "consistent practice" on which the presumption allegedly is based is inconsistent, as such, with Article 11.3 of the AD Agreement;[121] and (3) the Commerce determination in the sunset review involving OCTG from Mexico is inconsistent with Article 11.3 to the extent that it applied the alleged practice/presumption.[122]

89. As demonstrated below, Mexico's claims fail because: (1) the alleged "WTO-inconsistent presumption" does not exist; (2) the instruments that allegedly give rise to this presumption do not constitute challengeable measures for purposes of the DSU; and (3) even if the instruments

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[117] *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R (*"Japan Sunset Panel"*), para. 7.302.

[118] *See United-States Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan,* WT/DS244/AB/R, adopted January 9, 2004 *("Japan Sunset AB")*, para. 123.

[119] Mexico First Submission, paras. 101-104.

[120] In its First Submission, para. 100, Mexico asserts that "the text of the statute, the SAA, and the SPB are sufficiently clear to demonstrate a violation of Article 11.3 of the AD Agreement . . . ."

[121] In its First Submission, para. 120, Mexico asserts that " the Department's consistent practice of employing WTO-inconsistent presumptions of likely dumping violates Article 11.3 as such."

[122] *See* Mexico First Submission, paras. 121, 121-149.

and practices were subject to challenge, two of them – the *Sunset Policy Sunset Policy Bulletin* and Commerce practice – are not "mandatory" within the meaning of the mandatory/discretionary distinction, *i.e.,* they do not mandate a breach of a WTO obligation.

90. Before turning to Mexico's claims, however, it is important to recognize the limited extent to which the AD Agreement actually addresses sunset reviews. Indeed, the sole provision of the AD Agreement creating an obligation to conduct sunset reviews is Article 11.3.

91. As discussed above, Article 11.3 requires that five years after an antidumping duty order is imposed, an investigating authority either must terminate the order or it must conduct a review to determine whether termination of that order "would be likely to lead to continuation or recurrence of dumping and injury." Outside of this standard and the requirement to initiate a review or revoke the order, the text of Article 11.3 contains no provisions governing the conduct of sunset reviews, the type of evidence sufficient to satisfy the "likelihood test," or the methodologies or modes of analysis to be used in reaching a sunset determination. As articulated succinctly by the panel in *Japan Sunset*:

> Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review in a sunset review. [123]

1. The Alleged "WTO-inconsistent Presumption" Does Not Exist

92. Mexico's entire sunset claim hinges upon the existence of an alleged Commerce "presumption" in sunset reviews that the continuation or recurrence of dumping is likely. As the party asserting this fact, Mexico bears the burden of proving it. Mexico failure to satisfy this burden is not surprising because no such presumption exists.

93. Significantly, Mexico cannot point to any legal provision that establishes the "presumption." Mexico cites 19 U.S.C. 1675a(c)(1), noting that this statutory provision requires Commerce to consider dumping margins and import volumes in sunset reviews. Nevertheless, this provision only requires that Commerce consider dumping margins and import volumes in making its likelihood determination and does not restrict Commerce in its consideration of any other relevant information submitted in a sunset review. Consequently, Mexico does not and cannot allege that any U.S. statutory provision establishes the presumption. Instead, Mexico relies on three items: The SAA, the *Sunset Policy Bulletin*, and an alleged Commerce "consistent practice." Let us examine each of these items in turn.

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[123] *See Japan Sunset AB*, para 149; and *Japan Sunset Panel*, para. 7.166 (That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member's investigating authority in making such a "likelihood" determination.).

94. With respect to the SAA, Mexico quotes the following passage as evidence of its alleged "presumption":[124]

> [19 U.S.C. § 1675a(c)] establishes standards for determining the likelihood of continuation or recurrence of dumping. Under [§ 1675(c)(1)], Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For example, declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes.
>
> . . . .
>
> [E]xistence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping.

95. Mexico claims that his passage demonstrates that Commerce must give "decisive weight" to dumping margins and import data, to the exclusion of all other evidence, when making a likelihood determination. Contrary to Mexico's assertion, the phrases in the above-quoted passage like "For example," "may provide a strong indication," and "highly probative" are not indicative of a presumption that cannot be refuted or disproved, assuming they give rise to a presumption at all. Thus, this passage from the SAA – the only passage on which Mexico relies – cannot be the source of the alleged "WTO-inconsistent presumption."

96. Another item cited by Mexico as a potential source for the alleged "WTO-inconsistent presumption" is the *Sunset Policy Bulletin*, from which Mexico quotes the following:[125]

> [T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where—
>
> (a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;

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[124] Mexico First Submission, para. 92, quoting from the SAA at 889-90 (underscoring added).

[125] Mexico First Submission, para. 94, quoting from the *Sunset Policy Bulletin* at 18,872 (underscoring added) (MEX-32). Note that the term "suspension agreement" used in the quoted passage is the U.S. term for an "undertaking" within the meaning of Article 8 of the AD Agreement.

> (b) imports of the subject merchandise ceased after issuance of the order or suspension agreement, as applicable; or
>
> (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.

97. Mexico asserts that the three criteria identified in the quoted passage require Commerce to give "decisive weight" to dumping margins and import volumes when making a likelihood determination in a sunset review.[126] The implication is that because these consequences *always* will follow the imposition of an antidumping measure, Commerce's consideration of them gives rise to the "presumption;" *i.e.*, because one or more of these consequences always will be present, there can be no refutation of the presumption of likelihood. Inherent in Mexico's argument is the assumption that these three outcomes are the only possible ones and that as a result Commerce will always make an affirmative finding.

98. There are at least three problems with this argument. First, as described below, the Sunset Policy Bulletin imposes no requirements on how Commerce conducts sunset reviews. It is a transparency tool and guide as to how Commerce may interpret and apply the statute and its regulations in individual cases. Second, even on its own terms, the quoted passage does not indicate that Commerce must make an affirmative finding in any of these circumstances. The passage merely indicates that Commerce "normally" will do so.

99. Third, if firms are capable of competing fairly, they may eliminate dumping and increase import volumes.

100. The circumstances described in the *Sunset Policy Bulletin* are only indicia of the consequences of the imposition of an antidumping measure with respect to firms that must dump in order to maintain a meaningful presence in the U.S. market.[127] In other words, if firms are simply not capable of competing in the U.S. market without dumping, then they will either continue dumping, stop shipping, or stop dumping but export significantly less merchandise.

101. In fact, Commerce in the *Sunset Policy Bulletin* explains that it is possible for some firms to compete in the U.S. market without dumping:[128]

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[126] *Id.*, para. 95. Mexico also cites Section II.C. of the SPB which references the "good cause" provision of the antidumping statute. 19 U.S.C. 1675a(c)(2) (section 752(c)(2) of the Act). Mexico, however, does not discuss the "good cause" provision in its first written submission, nor does it make any claims or arguments with respect to the application of this provision in sunset reviews conducted by Commerce.

[127] The United States says "indicia" because as demonstrated by the use of the word "normally," the criteria in the quoted passage are not dispositive.

[128] *Id.*

> [T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is not likely to lead to continuation or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased.

102. Although this statement appears on the same page and in the same column of the *Federal Register* as the passage quoted by Mexico, Mexico makes reference to it only for the purposes of stating that this scenario furthers its proposition that dumping margins and import volumes are given "decisive weight." To the contrary, what this passage actually demonstrates is that the *Sunset Policy Bulletin* does nothing more than describe what Commerce "normally" will do when presented with different factual scenarios. Based on certain facts, Commerce "normally" will determine likelihood, and based on other facts, it "normally" will not. The outcome depends on the factual record established in each sunset review. This is hardly evidence of a "presumption" of likelihood. Moreover, Mexico offers no evidence – let alone demonstrates – that it is impossible in all cases for firms subject to an antidumping measure to maintain or increase their presence in the U.S. market without dumping.

103. Mexico also refers to the Appellate Body report in *Japan Sunset* stating that the Appellate Body "did not believe that either factor (dumping margins or import volumes) could always constitute sufficient evidence of likely dumping."[129] It is instructive, however, to examine what the Appellate Body actually stated:

> We would have difficulty accepting that dumping margins and import volumes are always "highly probative" in a sunset review by USDOC if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the duty would be likely to lead to continuation or recurrence of dumping.[130]

104. A plain reading of the this section of the Appellate Body's report makes clear that the Appellate Body considered it insufficient to rely on dumping margins and import volumes, to the exclusion of other record evidence, in every sunset review – without regard to whether the domestic industry participates – as the basis for an affirmative likelihood determination. Notably, the Appellate Body found in favor of Commerce's affirmative likelihood finding, in that case, which was based solely on dumping margins and depressed import volumes.[131] Thus, while the Appellate Body was concerned a "presumption" based exclusive on dumping margins and import volumes in every case might be inconsistent with Article 11.3, the United States does not employ such a presumption.

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[129] Mexico First Submission, para. 106 (underscoring included).
[130] *Japan Sunset AB*, para. 111.
[131] *Japan Sunset AB*, para. 212(d)(ii).

105. The final piece of "evidence" offered by Mexico is its exhibit MEX-62, which purports to exhaustively analyze Commerce's practice in sunset reviews and demonstrate the existence of the "presumption" allegedly inherent in Commerce' sunset determinations.[132] In fact, Exhibit MEX-62 does nothing of the sort.

106. What Exhibit MEX-62 actually shows is that the overwhelming majority of Commerce sunset reviews are uncontested by one side or the other. Of the 301 sunset reviews discussed in Exhibit MEX-62, 74 were reviews in which no domestic industry party participated and in which Commerce revoked the antidumping order in question. In addition, a close examination of Exhibit MEX-62 reveals that there were 188 cases in which respondent interested parties chose not to participate either by not responding to Commerce's notice of initiation, submitting an affirmative waiver in response to the notice of initiation, or a combination of the two.[133] Thus, of the 301 sunset reviews discussed in Exhibit MEX-62, 88 percent of those reviews were uncontested. Even if one limits oneself to the 227 reviews in which at least one domestic interested party expressed an interest, 83 percent of those reviews were uncontested by respondent interested parties.

107. By the U.S. count, this leaves 35 cases (only 12 percent) in which respondent interested parties may have contested the existence of likelihood to some extent. In these cases, Commerce found likelihood, but that fact does not establish the existence of a "presumption" of the likelihood that dumping will continue or recur. Mexico appears to assert that the fact that no respondent was able to overcome the alleged "presumption" proves that these results establish the existence of such a presumption. This is nothing more than circular reasoning. It assumes the existence in these determinations of a "presumption" and uses that assumption to support a conclusion that the assumed presumption exists. As demonstrated above, however, these cases do not prove the existence of any such "presumption."

108. In each of those 35 cases, the evidence presented a scenario that satisfied one or more of the criteria that the *Sunset Policy Bulletin* identifies as indicia of likelihood. Thus, Commerce's review of the record evidence nevertheless resulted in the conclusion that dumping was likely to continue or recur.

109. In summary, Mexico has failed to meet its burden of proof; *i.e.*, it has failed to establish the existence of the alleged "WTO-inconsistent presumption." As a result, its claims in Section VII.B of its First Written Submission must fail.

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[132] This issue of Commerce's practice in sunset reviews cannot be challenged and will be discussed in greater detail below.

[133] The cases break down as follows: (1) in 170 cases, no respondent interested party submitted a response to Commerce's notice of initiation; (2) in 5 cases, respondent interested parties submitted an affirmative waiver of participation; and (3) in 13 cases, there was a combination of no responses and affirmative waivers from the respondent interested parties.

2. Even Assuming, *Arguendo*, that a Commerce "Presumption"Were to Exist, the *Sunset Policy Bulletin* and Commerce "Practice," As Such, Cannot Be Found to Be Inconsistent with Article 11.3 of the AD Agreement

110. Even if one assumed, *arguendo*, that a Commerce "presumption" of likelihood were to exist, the *Sunset Policy Bulletin* and Commerce's practice, as such, still could not be found to be inconsistent with Article 11.3 of the AD Agreement. Neither the *Sunset Policy Bulletin* nor Commerce practice constitutes a "measure," and even if they were considered measures, neither measure mandates WTO-inconsistent action or precludes WTO-consistent action.

111. In order for something to be a "measure" within the meaning of the DSU, it must "constitute an instrument with a functional life of its own" – *i.e.*, it must "do something concrete, independently of any other instruments."[134] Neither the *Sunset Policy Bulletin* nor Commerce practice constitutes a legal instrument with a functional life of its own under U.S. law. Whatever authority Commerce has to act comes from the statute and its regulations. Neither the *Sunset Policy Bulletin* nor Commerce practice authorizes Commerce to do anything nor are they rules that bind the agency.

112. Under U.S. law, the *Sunset Policy Bulletin* is a non-binding statement, providing evidence of Commerce's understanding of sunset-related issues not explicitly addressed by the statute and regulations.[135] In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent. As with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.[136] The *Sunset Policy Bulletin* does nothing more than to increase transparency by providing Commerce and the public with a guide as to how Commerce may interpret and apply the statute and its regulations in individual cases. Absent application in a particular case or change its policy, and in conjunction with U.S. sunset laws and regulations, the *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO Agreements.

113. The same principles apply with respect to Commerce practice. It is well-established that Commerce is not bound by its own administrative practice, but instead may depart from it or

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[134] *Export Restraints*, para. 8.85 (italics in original).

[135] *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing *guidance* on methodological or analytical issues not explicitly addressed by the statute and regulations.") (emphasis added) (Exhibit MEX-32).

[136] As a matter of U.S. administrative law, Commerce practice cannot be binding because Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

change it as long as it explains its reasons for doing so.[137] Therefore, it is not surprising that prior panels have found that Commerce's administrative practice does not constitute a measure for purposes of the WTO. As explained by the panel in the *India Steel Plate* dispute:[138]

> The practice India has challenged is not, on its face, within the scope of the measures that may be challenged under Article 18.4 of the AD Agreement. In particular, we do not agree with the notion that the practice is an "administrative procedure" in the sense of Article 18.4 of the Agreement. It is not a pre-established rule for the conduct of anti-dumping investigations. Rather, ... a practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC . . . . India argues that at some point, repetition turns the practice into a "procedure", and hence into a measure. We do not agree. That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.

114. The United States notes the Appellate Body's observations in *Japan Sunset* regarding whether non-mandatory measures can, in principle, be challenged as measures subject to WTO dispute settlement.[139] Stating that "instruments of a Member containing rules or norms could constitute a measure,"[140] the Appellate Body nevertheless did not state that the *Sunset Policy Bulletin* is a measure. Instead, the Appellate Body simply overturned the Panel's conclusion that the *Sunset Policy Bulletin* was not a measure because the panel had not fully considered the relevant arguments.[141] In particular, the panel had failed to consider the relevance of prior sunset determinations to the question of whether the *Sunset Policy Bulletin* is a measure. As discussed above, a consideration of those determinations does not affect the conclusion that, as a matter of U.S. law, the *Sunset Policy Bulletin* has no independent legal status – it is not an instrument containing rules or norms. Rather, it is a transparency tool to describe Commerce's current

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[137] *See, e.g.*, *Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1253 (CIT 2002), in which Commerce's reviewing court, the U.S. Court of International Trade, stated as follows: "As long as Commerce properly explains its reasons, and its practice is reasonable and permitted by the statute, Commerce's practice can and should continue to change and evolve."

[138] *United States - Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, Report of the Panel adopted 29 July 2002, para. 7.22 (citation omitted) ("*US - India Plate*").

[139] *Japan Sunset AB*, para. 88.

[140] *Japan Sunset AB,* para. 82. (emphasis added)

[141] *Id.*, paras. 93, 99.

thinking on how it might exercise its statutory and regulatory authority. It is those statutes and regulations that set forth rules and norms. The *Sunset Policy Bulletin* is not a measure.

115. Even if the *Sunset Policy Bulletin* and Commerce's practice could be regarded as measures, they nonetheless could not be considered WTO-inconsistent because neither "measure" is "mandatory;" *i.e.*, neither requires WTO-inconsistent action or precludes WTO-consistent action.[142] The Appellate Body and several panels have explained the distinction between mandatory and discretionary measures.[143] A Member may challenge, and a WTO panel may find against, a measure "as such" only if the measure "mandates" action that is inconsistent with WTO obligations, or "precludes" action that is WTO-consistent.[144] In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that any challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.[145]

116. Mexico has not provided any evidence whatsoever that Commerce is bound by either the *Sunset Policy Bulletin* or its administrative practice. This is not surprising, because, as demonstrated above, as a matter of U.S. law, Commerce is not so bound. If Commerce is not bound by these instruments, they cannot be said to mandate any action by Commerce, let alone WTO-inconsistent action. Consequently, Mexico's claims must fail.

B. Commerce Fully Complied with its Obligations under the AD Agreement in Making the Affirmative Likelihood Determination In the Sunset Review Of OCTG From Mexico

117. As demonstrated above, Commerce's sunset review provisions are not inconsistent, as such, with U.S. obligations under the AD Agreement. Mexico likewise fails to demonstrate that the United States applied these provisions in a manner inconsistent with the AD Agreement provisions that it cites.

118. Mexico's second assertion is that Commerce ignored current information and relevant evidence in making the affirmative likelihood determination and, thereby, violated the obligations of Article 11.3 to make a fresh determination in a sunset review. Commerce, however, addressed all information and relevant evidence presented by the interested parties in the sunset review. Mexico's complaint here amounts to its disagreement with Commerce's

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[142] *Export Restraints*, paras. 8.126-8.132.

[143] The Appellate Body has not "pronounce[d] generally upon the continuing relevance or significance of the mandatory/discretionary distinction." *Japan Sunset AB*, para. 93.

[144] *United States - Anti-Dumping Act of 1916* ("*1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, paras. 88-89; *United States - Section 211 Omnibus Appropriations Act of 1998,* WT/DS176/AB/R, Report of the Appellate Body adopted 2 February 2002, para. 259; *see also Export Restraints*, paras. 8.77-8.79; *US - Section 129*, para. 6.22.

[145] *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW//2, Report of the Panel, adopted 23 August 2001, paras. 5.49-5.50.

weighing of the evidence and with the affirmative outcome of the sunset review of OCTG from Mexico.

119. Finally, Mexico asserts that Commerce impermissibly "relied" on dumping margins calculated in the original investigation of OCTG from Mexico in making the likelihood determination in violation of the obligations contained in Article 11.3 and Article 2 of the AD Agreement. In this regard, Mexico is both factually and legally incorrect because Commerce did not rely on any margin of dumping in making the likelihood determination and there is no obligation in the AD Agreement to report or consider a "margin likely to prevail" for use in the likelihood of injury determination.

1. Commerce Properly Determined that Dumping Was Likely to Continue or Recur in the Sunset Review of OCTG from Mexico

120. Mexico argues that Commerce determined likelihood of continuation of dumping in a manner that violated Article 11.3. According to Mexico, Commerce's approach does not permit a prospective determination but rather establishes a "presumption" that dumping is likely to continue or recur because Commerce improperly gives "decisive weight" to evidence concerning historical dumping margins and import volumes.[146] Mexico is wrong, however, because no such "presumption" exists and Commerce properly applied the likelihood standard in the sunset review in this case.

121. Customary rules of treaty interpretation dictate that the words of a treaty form the starting point for the process of interpretation. The text of Article 11.3 provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The focus of a sunset review under Article 11.3 is on future behavior, *i.e.*, whether dumping and injury are likely to continue or recur in the event of expiry of the duty, not whether or to what extent dumping or injury currently exists.

122. As the starting point for making its likelihood determination in this sunset review, Commerce considered the findings concerning dumping made in the original investigation. The rationale for this approach is that the findings in the original investigation provide the only evidence of the behavior of the respondents without the discipline of an antidumping order in place.[147] Commerce then examined any subsequent evidence, such as the final results of administrative reviews.

123. Commerce normally will find that dumping would be likely to continue or recur based on evidence of significantly depressed import volumes after imposition of the duty even where there

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[146] Mexico's First Submission, paras. 140-45.

[147] *Commerce Sunset Preliminary Decision Memorandum*, p. 5-6 (Exhibit US-14).

is also evidence that dumping has been eliminated during the five-year period preceding the sunset review. If there is evidence that no dumping has existed since the order was imposed but import volumes have been adversely affected to a significant degree, Commerce may make an affirmative sunset determination because, if these conditions are found, Commerce may reasonably conclude that dumping would continue were the discipline of the duty removed. This conclusion is not a presumption that dumping is likely to continue or recur in every case until proven otherwise; it is simply an exercise in logic, a reasonable determination that these conditions are indicative of future behavior in the absence of an order based on evidence of past behavior both before and after the order was put in place.[148]

124. Parties are permitted to place any information they choose on the administrative record of the sunset review, including information to demonstrate that the existence of dumping and reduced or depressed import volumes does not indicate that dumping is likely to continue or recur in the particular case. Commerce will also consider "other factors," such as price, cost, market, or other economic factors in determining the likelihood of continuation or recurrence of dumping.[149]

125. In the sunset review, Commerce examined information submitted by the interested parties and the final results from the administrative reviews. Although the Mexican producer TAMSA had not been dumping OCTG from Mexico in the United States in two completed annual reviews covering periods prior to the sunset review, and Hylsa had a zero margin calculated in one prior

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[148] Underlying Mexico's claims is Mexico's suggestion that Article 11.3 of the AD Agreement requires the investigating authority to take some "action" in order to "determine" likelihood, and to collect data and base its "fresh determination" on this "creditable evidence", in an apparent attempt to discredit Commerce's reliance on evidence from previous determinations or on historical data. Mexico First Submission, para. 131. Nothing in the text of Article 11.3, however, provides for such an obligation. Nevertheless, Commerce afforded interested parties, including TAMSA and Hylsa, opportunities to supply whatever comment, argument, or information they wished in defense of their interests in the sunset review of OCTG from Mexico in accordance with sections 351.218(d)(3)(ii)(G) and 351.218(d)(3)(iv)(B) of Commerce's *Sunset Regulations*. Indeed, Commerce's sunset questionnaire explicitly requests that interested parties, which would include TAMSA and Hylsa, provide "[a] statement regarding the likely effects of revocation of the order . . . , which must include any factual information, argument, and reason to support such statement." Commerce requested information from TAMSA and Hylsa and the fact that they failed or chose not to answer the questions in a more thorough manner is not an error that can be ascribed to Commerce. Commerce reasonably can and, in this case, did make a determination of likelihood based on existing evidence, fully consistent with Article 11.3.

[149] *Sunset Policy Bulletin*, 63 FR at 18874 (Exhibit MEX-32). The SAA also provides that such other factors may include:

> the market share of foreign producers subject to the dumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilization; any history of sales below cost of production; changes in manufacturing technology in the industry; and prevailing prices in the relevant markets.

SAA at 890 (Exhibit MEX-26). The SAA provides that this list is merely illustrative and that Commerce should analyze such information on a case-by-case basis. *Id.*

administrative review, Commerce concluded, based on this review, that Mexican producers and exporters, including TAMSA and Hylsa, had not been able to export OCTG in significant quantities (*i.e.*, pre-order levels) during the five-year period preceding the sunset review. Based on this finding, Commerce reasonably concluded it was likely that dumping by the Mexican producers and exporters would continue or recur in the event the order were revoked because the evidence indicated that they could not export pre-order quantities of OCTG without doing so.[150]

126. Mexico argues that Commerce's focus on evidence of historical data concerning depressed import volumes is insufficient to support Commerce's finding here that Mexican exporters would again dump OCTG in the United States if the order were revoked.[151] Mexico's claim is, once more, unfounded. Article 11.3 requires that the authorities determine whether dumping is likely to continue or *recur* in the absence of the duty. In fact, historical data regarding the inability to ship subject merchandise with the discipline of the order can be highly probative of the behavior of exporters without the discipline.

127. Commerce's final sunset determination is supported by the evidence on the record of the sunset review. Commerce found that import volumes of OCTG were significantly depressed from pre-order levels throughout the five-year period prior to the sunset review.[152] Consequently, in accordance with the obligations of Article 11.3, Commerce drew a reasonable and logical inference that this evidence was indicative of likely continuation or recurrence of dumping in the absence of a duty. That a different conclusion may have been available is not sufficient under Article 17.6(i) to invalidate Commerce's determination.

2. Commerce Fully Considered All Record Information in Making the Final Sunset Determination

128. Mexico claims that Commerce failed to address all the record information in the sunset review of OCTG from Mexico and, thereby, failed to determine likelihood in accordance with the obligations of Article 11.3. Specifically, Mexico asserts that Commerce failed to address TAMSA's explanations for the depressed state of OCTG imports from Mexico for the period following imposition of the order. In addition, Mexico alleges that Commerce failed to consider, in making the likelihood determination, information regarding the dumping margin calculated for TAMSA in the original investigation. As we demonstrate below, Mexico is wrong because Commerce addressed TAMSA's import volume explanation and Commerce did not rely upon the dumping margin from the original investigation (or any dumping margin) in making the affirmative likelihood determination in the sunset review.

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[150] *Commerce Sunset Preliminary Decision Memorandum*, p. 5-6 (Exhibit US-14); *Commerce Sunset Final Decision Memorandum*, p. 4-6 (Exhibit MEX-19).

[151] Mexico First Submission, para. 124.

[152] *Commerce Sunset Final Decision Memorandum*, p. 4-6 (MEX-19).

129. Mexico argues that Commerce "ignored" certain information, addressing reasons for the depressed import volumes, and that Commerce's failure to address this information was improper. During the sunset review, TAMSA asserted that the decline in its OCTG exports to the United States during the five-year period preceding the sunset review was a deliberate business decision.[153] Mexico asserts that Commerce impermissibly "ignored" TAMSA's information, which alleged other reasons for the depressed import volumes not related to the dumping order on OCTG from Mexico.[154] Specifically, TAMSA stated that it was "commercially unreasonable" for TAMSA to ship significant quantities of OCTG to the United States because the deposit rate of 21.70 percent was a disincentive "to a more significant commitment to the U.S. market." Mexico claims Commerce ignored this "evidence."

130. Rather than ignore TAMSA's explanation, Commerce addressed it in the *Final Decision Memorandum* stating:

> The premise that the decline in TAMSA's export levels after the issuance of the order was the result of a prudent and necessary business strategy, and the fact that TAMSA was able to sell small amounts of OCTG without dumping in no way conflict with the Department's inference. If it became "prudent and necessary" to make fewer sales at a more fairly traded priced while the discipline of the order was in place, it is reasonable to infer that dumping would be likely to resume if such disciplines ceased to exist and it was no longer "necessary" for TAMSA and other Mexican exporter to maintain the same business strategy.

131. In addition, TAMSA did not provide evidence during the sunset review demonstrating that increased shipments would be "commercially unreasonable" or that the cash deposits were impediments to expanding their trade with customers in the United States. Instead, TAMSA made a business decision, based on its own analysis of its pricing practices, and chose not to ship significant quantities of OCTG to the United States. Indeed, although TAMSA contended that it was not reasonable to export significant amounts until after March 1999 when its cash deposit rate was reduced, it did not resume shipments of OCTG to the United States even after that reduction. Commerce reasonably inferred from the behavior of TAMSA and Hylsa, and the

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[153] TAMSA Case Brief, p. 3-8 (Exhibit MEX-39).

[154] Mexico also claims that Hylsa, the other Mexican producer participating in the sunset review, provided information to Commerce that Hylsa "was not dumping and was not likely to dump in the future." Mexico First Submission, para.141. During the sunset review, Hylsa claimed it had never dumped and it had post-order shipments consistent with a history of sporadic, small quantity sales to the U.S. market. Consequently, Hylsa argued during the sunset review that it should receive a company-specific revocation from the OCTG order. Commerce makes its likelihood determination on an order-wide basis and, therefore, Hylsa's company-specific shipment history was not relevant to the inquiry. *Commerce Final Sunset Decision Memorandum*, p. 4 (MEX-19).

behavior of the other Mexican exporters, that, on an order-wide basis, Mexican OCTG producers would be likely to dump if the order on OCTG from Mexico were terminated.

132. Mexico also argues that Commerce failed to consider information regarding the "market and economic circumstances" that existed during the original investigation.[155] Mexico claims that Commerce impermissibly relied on the 21.70 percent margin calculated in the original investigation for TAMSA in making the likelihood determination for several reasons.[156] Mexico's claim is without factual basis because Commerce never relied on the 21.70 percent margin from the original investigation in making the affirmative likelihood determination in the sunset review of OCTG from Mexico. Commerce based its affirmative likelihood determination solely on the depressed state of import volumes for OCTG from Mexico.[157]

133. Instead, Commerce addressed TAMSA's comments concerning the 21.70 percent margin in the context of reporting a "margin likely to prevail" to the ITC.[158] Given that the "margin likely to prevail" has no relevance to Commerce's likelihood determination, Mexico's claim that Commerce did not address all current information and relevant evidence must fail.

3. Mexico's Claims Regarding Commerce's Identification of the Margins Likely to Prevail In the Event of Revocation Are Equally Erroneous

134. Under U.S. law, Commerce is required to determine whether the expiry of the duty is likely to lead to continuation or recurrence of dumping. If Commerce's likelihood determination is affirmative, it must report to the ITC the magnitude of the margin likely to prevail.[159] In making the sunset injury determination, the ITC "may consider the magnitude of the margin of

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[155] Mexico First Submission, para. 132.

[156] TAMSA claimed that the 21.70 margin no longer had relevance because (1) it was based on 1994 financial data severely affected by a devaluation of the Mexican peso; and (2) it was a best information available (BIA) rate. These bases are not relevant to this portion of the dispute because Commerce did not use any dumping margin in making the affirmative likelihood determination.

[157] *Commerce Final Sunset Determination Memorandum*, p. 5 (Exhibit MEX-19); *see also*, Mexico First Submission, paras. 123-128: Mexico claims that Commerce's affirmative likelihood determination may not be based solely upon historical data concerning import volumes.

[158] Commerce stated:

> The Department continues to find that the margin rates from the original investigation are the appropriate rates to report to the Commission. ...the investigation rate, reflecting the behavior of exporters without the discipline of an order in place, is the appropriate rate to report regardless of whether it is based on a company's own information or on best information available (i.e. facts available).[footnote omitted]

Commerce Final Sunset Decision Memorandum, at 7 (Exhibit MEX-19).

[159] 19 U.S.C. 1675a(c)(3); Section 752(c)(3) (Exhibit MEX-24).

dumping."[160] The fact that Commerce reports a margin to the ITC is a construct of U.S. law and not an obligation imposed by the AD Agreement.

135. Mexico maintains that, pursuant to Article 2 and Article 11.3, as applied in the instant case, the margins reported to the ITC as the rates of dumping likely to prevail in the event of revocation were improperly identified by Commerce.[161] Mexico is wrong, because there simply is no obligation under the AD Agreement to consider the magnitude of the margin likely to prevail in determining likelihood of continuation or recurrence of injury in a sunset review under Article 11.3. In addition, as a factual matter, Commerce did not "rely" on the margins from the original investigation in making the likelihood determination in OCTG from Mexico as asserted by Mexico.[162] Mexico acknowledges as much in making its arguments before this panel.[163] Rather, Commerce relied solely on the depressed state of OCTG imports from Mexico to make its affirmative determination that dumping was likely to continue or recur and simply reported the "margins likely to prevail" to the ITC. For these reasons, the Panel should not and need not consider Mexico's arguments concerning the manner in which Commerce identified the margins that it reported to the ITC.

C. TAMSA and Hylsa's Requests for Company-Specific Revocation Have No Basis in Articles 11.1 and 11.2 of the AD Agreement

136. Mexico's second principal claim is that, in not revoking the order on OCTG from Mexico based on the results of the fourth administrative review, the United States breached its obligations under the AD Agreement and GATT 1994. The heart of Mexico's claim rests on the obligations in Article 11.2 of the AD Agreement. An examination of the text of that Article, in context and in light of its object and purpose, demonstrates that Mexico's claims are unfounded.

137. Like Article 11.3, Article 11.2 addresses the duration of an antidumping duty and review mechanisms required to ensure that an antidumping duty remains in place only as long as and to the extent necessary to offset injurious dumping. The general rule in Article 11.1 informs Article 11.2 but, as the Appellate Body has confirmed, it does not establish any independent or additional obligations.[164]

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[160] 19 U.S.C. 1675a(a)(6); Section 752(a)(6) (Exhibit MEX-24).

[161] Mexico First Submission, paras. 153-155.

[162] *Commerce Final Sunset Decision Memorandum*, p. 4-6 (Exhibit MEX-19).

[163] Mexico First Submission, paras. 123-128, 153.

[164] *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil,* WT/DS219/R, Report of the Panel, adopted August 18, 2003, para. 7.113 (Panel stating that "Article 11.1 does not set out an independent or additional obligation for Members."); *EC Pipe Fittings*, para. 81 (Appellate Body affirmed the Panel's interpretation of Article 11).

138. Mexico claims that, by not revoking the antidumping duty order in the fourth administrative review with respect to TAMSA and Hylsa, the United States breached the obligation to terminate an antidumping duty that was no longer warranted.

139. Article 11.2 provides

> The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[21] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.
>
> [21] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not itself constitute a review within the meaning of this Article.

140. Article 11.2 requires that, "where warranted," a Member must review "the need for continued imposition of the duty." Moreover,"[i]f, as a result of the review under [Article 11.2], the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately."

141. Because procedures for review and termination of duties are also the subject of Article 11.3, Article 11.3 also provides relevant context for interpretation of the obligations in Article 11.2. There are both similarities and differences with respect to the obligations imposed by Article 11.2 and Article 11.3.

142. As discussed in the preceding section on Article 11.3, that provision requires termination of an antidumping duty after five years, unless the authorities determine in a review that the expiry of the duty would be likely to lead to the continuation or recurrence of dumping and injury. Article 11.3, therefore, requires some action (termination or a review) once a duty has been in force for five years. This obligation is triggered solely by the passage of time. Article 11.3 does not impose any obligation to terminate a duty within the initial, or subsequent, five year period for any reason.

143. Unlike Article 11.3, Article 11.2 contains a continuing obligation, once a "reasonable period of time has elapsed since the imposition of the duty,"[165] to review the need for the duty whenever the conditions for such a review are met. Thus, taken together, Articles 11.2 and 11.3 provide the mechanisms to ensure that an antidumping duty remains in place only as long as necessary. Consistent with that obligation, U.S. law provides for revocation of an antidumping duty whenever circumstances sufficient to warrant revocation exist.

144. The United States implements its obligations under Articles 11.1 and 11.2 most directly through its legal provisions for revocation under section 751(d) of the Act and changed circumstances review under section 751(b) of the Act. As explained above, the United States may revoke an antidumping duty order under section 751(d) after a completion of any of three types of reviews - sunset, changed circumstances, and administrative. The changed circumstances review provision under section 751(b) of the Act provides for a review of the antidumping duty order upon a showing of changed circumstances sufficient to warrant review.[166] In a changed circumstances review, an interested party may request both that Commerce review the antidumping determination. This is consistent with the language in Article 11.2 of the AD Agreement.[167] Accordingly, section 751(b) and 751(d) of the Act is the relevant provision of U.S. legislation implementing the U.S. obligations under Article 11.2 of the AD Agreement.[168]

145. Commerce's regulations, at 19 C.F.R. 351.222(b)(1) likewise provide for revocation of the order when all exporters and producers covered by the order at the time of revocation have sold the subject merchandise at non-dumped prices for at least three consecutive years and Commerce determines that the continued application of the antidumping duty order is otherwise necessary to offset dumping. Similarly, Commerce's regulations, at 19 C.F.R. 351.222(g) provide for revocation of the order based on a determination that producers accounting for substantially all of the production of the domestic like product have expressed a lack of interest in the order, or that there are other changed circumstances sufficient to warrant revocation.

146. Although the section 751(b) changed circumstances review mechanism and the section 351.222(b)(1) and 351.222(g) mechanisms fulfill U.S. obligations under Article 11.1 and 11.2 obligations, U.S. law also provides for an additional review mechanism, an administrative review on a company-specific basis, which goes beyond the WTO obligations of the United States. These additional determinations with respect to revocation, particularly the company-specific revocation determinations under sections 751(d) and 751(a) of the Act and section 19 C.F.R.

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[165] The "reasonable period of time" provision of Article 11.2 is not at issue in the case before this Panel.

[166] Section 751(b)(1)(A) of the Act (or 19 U.S.C. § 1675(b)(1)(A)) (Exhibit MEX-24).

[167] Sections 751(b)(1) and (2)(A) of the Act (Exhibit MEX-24).

[168] *See U.S.-Preliminary Determination with Respect to Certain Softwood Lumber From Canada,* WT/DS236/R, Report of the Panel, adopted November 1, 2002, para. 7.152 (Panel concluded that section 751(b) implements U.S. obligations under Article 21.2 of the SCM Agreement, the language which is identical to Article 11.2 of the AD Agreement).

351.222(b)(2)(revocation in part, *i.e.,* on a company-specific basis, based on absence of dumping") of Commerce's regulations, are also consistent with Articles 11.1 and 11.2 of the AD Agreement.

147. Article 11.2 requires a review of the continuing need for "the duty." "The duty," read in the context described above, refers to the antidumping duty order as a whole, not as applied to individual companies. As the Appellate Body stated in *Japan Sunset*, "the duty" referenced in Article 11.3 is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis.[169]

148. As noted above, Article 11.2 operates together with Article 11.3 to ensure that "the duty" is terminated when it is determined that it is no longer necessary to offset injurious dumping. Thus, like Article 11.3, Article 11.2 deals with review of the need for "the duty" as a whole, *i.e.*, the need for the antidumping duty order. Thus, Article 11.2 does not address, and does not require, termination on a company-specific basis. All that is required is that, whenever warranted, a Member will review the continuing need for "the duty," *i.e.*, the order as a whole. Therefore, to the extent that Mexico's claim rests on an alleged obligation to revoke the antidumping duty order on OCTG with respect to TAMSA and/or Hylsa, that claim must fail. There is no obligation in Article 11.2 to terminate a duty on a company-specific basis.

149. It is important to note that Mexico has not challenged the results of the fourth administrative review under Article 9 of the AD Agreement. Instead, their claim focuses on the determination of the United States not to revoke the antidumping duty order on OCTG from Mexico, either in its entirety or with respect to TAMSA and Hylsa.

150. During the fourth administrative review, TAMSA and Hylsa each sought company-specific revocation from the OCTG order, pursuant to section 351.222(b)(2) of Commerce's regulations.[170] They did not seek total revocation of "the duty" pursuant to section 351.222(b)(1) or section 351.222(g) of Commerce's regulations.[171]

151. As demonstrated above, Article 11.2 contains no obligation for Members to provide company-specific revocations. For this reason, and because neither TAMSA nor Hylsa sought to present information substantiating the need for the overall revocation of "the duty" during the fourth administrative review, Mexico's revocation claims based on the fourth administrative review must fail.

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[169] *Japan Sunset AB*, para. 150.

[170] Letter from White & Case LLP to U.S. Dep't of Commerce (August 31, 1999)(TAMSA's request for review and revocation)(requesting revocation "with respect to TAMSA")(Exhibit MEX-10); Letter from Shearman & Sterling to U.S. Dep't of Commerce (Aug. 31, 1999)(Hylsa's request for review and revocation)(requesting revocation "with respect to Hylsa")(Exhibit MEX-11).

[171] This is not surprising, given that TAMSA and Hylsa are business competitors; the same would be true of other Mexican exporters of OCTG.

D. The Panel Should Reject Mexico's Claim that Commerce's Determination Not to Revoke TAMSA from the Antidumping Duty Order Was Inconsistent with Articles 11.1 and 11.2 of the AD Agreement

152. Even assuming *arguendo* that this Panel were to find that Article 11.2 applies to company-specific opportunities for revocation, the terms of Article 11.2 would not compel the revocations TAMSA and Hylsa sought in the fourth administrative review, as Mexico argues. Instead, and as discussed fully below, Article 11.2 allows reviewing authorities to determine when a revocation is warranted. Commerce has developed reasonable criteria for determining when a revocation is warranted and applied this criteria in an unbiased and objective manner in the fourth review. As such, Commerce acted consistently with Article 11.2 and this Panel should reject Mexico's arguments to the contrary.

1. Article 11.2 allows investigating authorities to establish when revocation reviews are warranted

153. Article 11.2 provides that authorities shall review the need for the continued imposition of a duty only "where warranted." A determination that a review is warranted may either be made at the initiative of the reviewing authority or when an interested party submits "positive information substantiating the need for a review."

154. Something is "warranted" when it is " justified" by (appeal to authority or) evidence.[172] Similarly, information "substantiating" the need for review is information "proving the truth of, demonstrating, or verifying by evidence" the need for such review.[173] Thus, review of the need for the continued imposition of the duty is required only when such a review is justified, based on information sufficient to demonstrate that such a review is necessary.

155. Importantly, Article 11.2 places the decision with respect to whether review of the challenged duty is "warranted" and whether an interested party has "submitted positive evidence substantiating the need for a review" squarely within the purview of the reviewing authorities because neither of these concepts is defined in the AD Agreement. Moreover, as the Appellate Body has recognized, under the provisions of the AD Agreement, a broad framework of rights and obligations has been created which regulates the determination of dumping and the application of remedial antidumping duties. Within this framework, WTO Members are free to adopt national standards governing the determination of dumping and the application of antidumping duties, as long as such measures rest upon a "permissible" interpretation of the agreement.[174] Therefore, the United States is free to develop its own criteria for establishing

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[172] *See, The New Shorter Oxford English Dictionary*, p. 3627 (definitions of "warrant", "warranted").

[173] *See The New Shorter Oxford English Dictionary*, p. 3124 where "substantiate" is defined for purposes of substantiating a claim as "Prove the truth of; demonstrate or verify by evidence, give good grounds for."

[174] *See Japan Sunset AB*, para. 158.

when, under Article 11.2, a revocation review is warranted and when an interested party has substantiated the need for such a review.

156. Mexico claims before this Panel that, in determining whether a revocation review was warranted, the United States applied a standard that was overly-restrictive.[175] However, as Article 11.2 does not establish an exact standard for when a revocation review is warranted or when an interested party has submitted positive information substantiating the need for a review, Mexico has no textual basis for arguing that Commerce's standards are overly-restrictive.

157. Nothing in Mexico's first submission has addressed, much less overcome, this basic textual impediment to its fourth review claim. Accordingly, Mexico has failed to meet its burden of producing evidence establishing a breach of Article 11.2 of AD Agreement. Rather than meeting its burden, Mexico attempts to shift that burden to the United States by arguing that Commerce failed to demonstrate the "appropriate degree of diligence" during the fourth review.[176]

158. As discussed fully below, in the fourth administrative review, Commerce examined all the factual information on the record that constituted positive information purporting to substantiate the need for a revocation determination as to TAMSA and Hylsa. After examining this evidence in an unbiased and objective manner, Commerce determined under the permissible criteria established in U.S. law, that a revocation review was not warranted for either company. Thus, the United States acted consistently with Article 11.2 in determining that a revocation review was not warranted for either TAMSA or Hylsa. This Panel should reject Mexico's arguments to the contrary, arguments that have no textual basis in the AD Agreement.

2. Commerce's application of its revocation regulation in the Fourth Review was fully consistent with Article 11.2

159. As discussed above, Article 11.2 of the AD Agreement provides that a reviewing authority must conduct a revocation review "where warranted" and where an interested party requests a review in order to determine whether continued imposition of an antidumping duty is necessary. However, Article 11.2 expressly limits this right to instances in which the interested party is able to ". . . submit positive information substantiating the need for a review."

160. In the Fourth Administrative Review, TAMSA attempted to substantiate the need for a review of its antidumping duty in order to determine whether the duty should be terminated. As discussed below and consistent with Article 11.2, Commerce properly rejected TAMSA's revocation request because TAMSA failed to substantiate the need for such a review. Thus, this Panel should reject Mexico's argument to the contrary and instead find that Commerce's

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[175] Mexico First Written Submission, para. 278.

[176] *Japan Sunset AB,* para. 113; Mexico First Written Submission, paras. 279-287.

rejection of TAMSA's request for a revocation was fully consistent with U.S. obligations under the AD Agreement.

a. Commerce's "commercial quantities" requirement is a reasonable interpretation of the Article 11.2 requirement that interested parties provide positive information substantiating the need to review whether a duty should be terminated

161. Under U.S. law and consistent with Article 11.2, Commerce will examine the need for revocation at the request of an interested party only if the interested party provides positive information substantiating the need for a review. This positive information includes, *inter alia*, that (1) the requesting party has meaningfully participated in the U.S. market for at least three years and (2) the requesting party has not dumped subject merchandise during that three year period.[177]

162. Meaningful participation in the market is necessary because without it there is no evidentiary basis for determining whether continued imposition of the duty is necessary.[178] The decision as to the level of information that would be sufficient to "substantiate" a need for a review, furthermore, is closely related to the nature of the review sought. Because TAMSA was seeking revocation, the claim that had to be substantiated was that the discipline of the order would no longer be necessary. For a review based on some other type of changed circumstances, *e.g.*, a revocation based on a lack of interest on the part of the domestic industry, a different sort of positive information might be needed.

163. More specifically, if an exporter's sales are unusually small, these sales provide little indication as to how that exporter will behave if the duty were revoked as to that exporter. For example, the fact that a pencil exporter that has previously been found to injuriously dump is able to sell *one* pencil without dumping probably does not evidence that the exporter will sell *multiple* pencils in commercially significant quantities without dumping if its duty is revoked. Thus, absent some evidence that the sales are, in fact, predictive of the interested party's normal selling behavior if its duty were revoked, extremely small, non-dumped sales do not substantiate the need for revocation.

164. Moreover, if a company cannot meaningfully participate in the market without dumping, it is a reasonable conclusion that the discipline of the duty remains necessary to prevent such dumping. Furthermore, as Commerce explained in the *Final Results of the Fourth Review*, the period of investigation is a logical benchmark for when a company meaningfully participated in the market, "because it is the only time period for which we have evidence concerning the

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[177] *See* 19 CFR 351.222(e) stating the threshold requirements which an interested party must certify in order to qualify for consideration for revocation under this section of Commerce's regulations. (Exhibit MEX-61).

[178] *See Fourth Review Issues and Decision Memorandum* at Comment 1. (Exhibit MEX-9).

company's normal commercial behavior with respect to exports to the United States without the discipline of the antidumping order."[179]

165. For these reason, Commerce considers the extent to which a party requesting revocation has participated in the market in a meaningful manner under its "commercial quantities" analysis. Under this analysis, Commerce examines the sales volumes during the periods in which the exporter did not dump both in absolute terms and in comparison with the period of investigation and/or other review periods.[180] If the sales volumes during the non-dumped periods represent an extremely small portion of the sales during the period of investigation and/or other review periods, Commerce infers that these sales are an insufficient evidentiary basis for the need to examine whether the order continues to be necessary.[181]

166. The interested party, however, is able to rebut this inference provided that it can show that the commercially insignificant sales are, in fact, predictive of its future behavior if its dumping duty were revoked.[182] For instance, if an interested party were able to provide evidence that the severely reduced sales volume was due to some unusual occurrence, independent of the discipline of the order, Commerce may find that the extremely small sales constitute information sufficient to substantiate the need to review the duty.[183] If the interested party is unable to rebut this inference, Commerce will deny the request for an examination of whether the order continues to be necessary because, consistent with Article 11.2, the interested party has failed to provide positive information that substantiates the need to review whether the duty is necessary.

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[179] *See Fourth Review Issues and Decision Memorandum* at Comment 1 (stating ". . .{Commerce} must be satisfied that the respondent's participation in the U.S. market was meaningful. Sales during the POR which, in the aggregate, represent a very limited quantity do not provide a reasonable basis for establishing the rebuttable presumption that the discipline of the order is no longer necessary to offset dumping.") (Exhibit MEX-9).

[180] *See Fourth Review Issues and Decision Memorandum* at Comment 1 stating that under its commercial quantities analysis Commerce examined TAMSA's sales in both absolute terms and in comparison with the period of investigation. (Exhibit MEX-9).

[181] *See e.g.*, *Pure Magnesium From Canada; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 64 Fed. Reg. 12,977, 12,979 stating that "'sales during the POR which, in the aggregate, are an abnormally small quantity do not provide a reasonable basis for determining that the discipline of the order is not longer necessary to offset dumping' . . . If sales are not reflective of a company's normal commercial activities, they can offer no basis upon which to make a revocation determination . . ." (Exhibit US-18) citing to *Canadian CTL*, 64 Fed. Reg. 2,173 2175 (Exhibit MEX-56).

[182] *See Amended Regulations Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 64 Fed. Reg. 51,236, 51,239 (Dep't of Commerce, Sept. 22, 1999) (Exhibit MEX-61). During the course of Commerce's rulemaking process for its revocation regulation one commenter raised concern that Commerce's commercial quantity requirement presumes that decreased imports after the imposition of an order is evidence of an exporter's inability to sell in the U.S. market without dumping. In response, Commerce explained that under the revocation regulation this inference exists if imports decline significantly. However, Commerce explained that it would examine this inference on a "case-by case basis" and in each case the decline in imports would be analyzed based on evidence "developed on the record of each proceeding." (Exhibit MEX-61).

[183] *See Fourth Review Issues and Decision Memorandum* at Comment 1analyzing whether TAMSA's purported reasons for extremely small sales constituted some unusual occurrence unrelated to the discipline of the order. (Exhibit MEX-9).

167. As the Appellate Body and previous panels have recognized, and consistent with normal rules of treaty interpretation, the provisions of Article 11 should be read as a whole and an interpretation of one portion of the Article should not render other provisions a nullity.[184] Thus, Article 11.2 should be read in conjunction with the other provisions found in Article 11, as well as with the other provisions of the AD Agreement.

168. In addition to the specific obligation found in Article 11.2 that the requesting party substantiate the need for a revocation, Commerce's commercial quantities requirement is supported by the other provisions of Article 11. First, footnote 22 of the AD Agreement states that a finding of an absence of dumping will not, by itself, require the termination of a duty. Therefore, investigating authorities are justified in requiring interested parties to provide evidence beyond an absence of dumping before conducting revocation.[185]

169. Similarly, the text of Article 11.3 expressly provides that during sunset reviews, if an investigating authority finds that the recurrence of dumping is likely, the duty may be maintained. Thus, Article 11.3 also supports requirements beyond an absence of dumping before terminating an order under Article 11.2 because Article 11.3 expressly envisions an order continuing when an absence of dumping has been found.[186]

170. As such, Article 11, read in its entirety, expressly allows an investigating authority to consider evidence in addition to an absence of dumping in order to determine whether termination is necessary. Consistent with Article 11 generally, as well as the evidentiary burden in Article 11.2 specifically, Commerce can require an interested party to provide evidence beyond an absence of dumping before determining whether the order remains necessary. Commerce's commercial quantities analysis is such a requirement.

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[184] *See e.g.*, *DRAMS from Korea*, para 6.21 stating "In interpreting Article 11.2 of the AD Agreement, we bear in mind that Article 3.2 of the DSU requires panels to interpret 'covered agreements', including the AD Agreement, 'in accordance with customary rules of interpretation of public international law'. We recall that the rules of treaty interpretation set forth in Article 31 of the Vienna Convention have 'attained the status of a rule of customary or general international law.' We note that Article 31.2 of the Vienna Convention expressly defines the context of the treaty to include the text of the treaty. Thus, the entire text of the AD Agreement may be relevant to the proper interpretation of any particular provision thereof." (internal citations omitted) *and* paras. 6.6.29 - 6.32 where the Panel interpreted Article 11.2 in light of Article 11.3; *see also e.g.*, *Japan Sunset AB,* para. 149 where the Appellate Body interpreted Article 11.3 with reference to Article 11.2; *and Pipe and Tube from Brazil*, para. 7.113 stating "[Article 11.1] furnishes the basis for review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article. On this basis, we examine Brazil's claim under Articles 11.1 and 11.2."

[185] *See e.g.*, *Pipe and Tube from Brazil*, n. 132, finding that an argument that Articles 11.1 or 11.2 necessarily require the withholding of imposition of measures and/or the self-initiation of an immediate review where there is an absence of dumping irreconcilable with note 22 of the AD Agreement.

[186] *See e.g.*, *DRAMS from Korea*. paras. 6.31 - 6.34 rejecting the argument that an absence of dumping necessarily required the revocation of a duty under 11.2 because of, *inter alia*, the text of Article 11.3 and footnote 22.

b. In the *Final Results of the Fourth Review*, Commerce did not ignore positive information but instead evaluated the facts and applied its commercial quantities requirement to TAMSA in an unbiased and objective manner, ultimately determining that TAMSA had failed to substantiate the need for a revocation review

(i) Commerce properly determined that TAMSA had not sold in commercial quantities and thus failed to substantiate the need for a revocation review

171. As discussed above and consistent with Article 11.2, Commerce requires interested parties to demonstrate that they have sold subject merchandise in the United States without dumping and in commercial quantities before examining whether the order continues to be necessary. During the Fourth Administrative Review, TAMSA argued that it had sold OCTG in commercial quantities during the Second, Third and Fourth Reviews. As discussed fully below, Commerce analyzed TAMSA's request and determined that TAMSA's sales during the Second, Third, and Fourth Reviews were made at volumes that constituted an extremely small portion of the sales TAMSA made during the POI. In addition, TAMSA failed to show how these extremely small sales were predictive of its future selling activities if Commerce were to remove the discipline of the duty. Thus, consistent with Article 11.2, Commerce determined that TAMSA had failed to sell in commercial quantities during the periods in which an absence of dumping existed and denied TAMSA's request that it be considered for revocation.

172. In requesting a review of the need for revocation during the Fourth Administrative Review, TAMSA certified that it had sold OCTG from Mexico in the United States at not less than fair value for three consecutive years (*i.e.*, the second, third, and fourth administrative review periods) and that during these periods it had sold Mexican OCTG in commercial quantities. In order to determine whether TAMSA had sold OCTG in commercial quantities, Commerce compared its sales during the period of investigation to its sales of OCTG during the three consecutive years of non-dumped sales. For each of these years, it is uncontested that TAMSA sold OCTG in volumes and values that represented an extremely small portion of the sales that TAMSA had made during the period of investigation.

173. Specifically, TAMSA's sales in the second, third, and fourth review periods ranged from a fifth of a percent to one percent of its annualized sales volume and value during the period of investigation.[187] Thus, Commerce inferred that TAMSA had failed to meaningfully participate in

[187] *See Fourth Review Issues and Decision Memorandum* at Comment 1 stating "During the initial investigation, which covered only six months, TAMSA's sales of subject merchandise to the United States were approximately 11,000 MT with a value of approximately $7,900,000. On an annualized basis this is equivalent to 22,000 MT and $15,800,000, respectively. TAMSA's U.S. sales volumes for the second, third, and fourth review

the market during these years absent a showing that unusual circumstances provided a rationale for these extremely small sales.

174. TAMSA attempted to refute this analysis with two explanations. First, TAMSA argued that the high cash deposit rates established during the investigation retarded its ability to sell in normal quantities during in the second, third, and fourth administrative review periods. The existence of a cash deposit is not an usual occurrence.[188] Furthermore, cash deposits are temporary in nature because, under the U.S. retrospective system, cash deposits are fully refunded with interest if the exporter demonstrates, upon review that the sales were not dumped. Department rejected this rationale because, logically, the fact that the discipline of the duty prevented TAMSA from selling in pre-order quantities could not demonstrate that TAMSA would not dump if its duty were revoked.

175. Second, TAMSA argued that a lower demand for oil during the fourth administrative review period resulted in a lower demand for OCTG, which forced TAMSA to sell in extremely small quantities.[189] Commerce rejected this rationale because it found that the oil industry was inherently cyclical and that, therefore, because lower demand cycles could also be expected to recur after a revocation of TAMSA's order, lower demand did not constitute an unusual occurrence.[190]

176. Thus, Commerce properly determined that, while TAMSA's extremely small sales were not dumped during three consecutive years, during these same periods TAMSA was unable to sell in the United State in commercial quantities. Consistent with this commercial quantities analysis, Commerce determined that TAMSA had not participated meaningfully in the OCTG market in the U.S. during these period. For this reason and consistent with Article 11.2, Commerce refused TAMSA's request for revocation.

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periods were approximately 110 MT, 130 MT and 51 MT respectively. *Id.* In other words, TAMSA's sales in the second and third reviews were only 0.5 percent and 0.6 percent and 0.2 percent, respectively, of its annualized sales volume during the period covered by the investigation. The value of TAMSA's shipments in the second, third and fourth reviews was approximately $140,000, $180,000 and $82,000. *Id.* Thus, TAMSA's sales were not made in significant amounts during these review periods. (Exhibit MEX-9) (internal citations omitted).

[188] *See Fourth Review Issues and Decision Memorandum* at Comment 1 (Exhibit MEX-9).

[189] *See Fourth Review Issues and Decision Memorandum* at Comment 1 stating that TAMSA argued before Commerce that ". .. oil prices during the final administrative review period were extremely low putting a damper on commercial activity in this product area in general." (Exhibit MEX-9).

[190] *See Fourth Review Issues and Decision Memorandum* at Comment 1 finding that consistent with its administrative practice Commerce did not consider business cycles and fluctuation of prices to provide a sufficient basis for determining that extremely small sales were probative. (Exhibit MEX-9).

(ii) Commerce did not apply an irrefutable presumption to TAMSA when it applied its commercial quantities requirement

177. Mexico argues that, in applying its commercial quantities analysis to TAMSA, Commerce impermissibly ignored evidence and instead relied upon an irrefutable presumption that low volumes ". . . demonstrate[d] conclusively an inability to ship without dumping."[191] Mexico misconstrues Commerce's commercial quantity analysis, which employs a refutable inference. Most importantly, Mexico's argument ignores the facts of the final results of the fourth review where instead of applying an irrefutable presumption, Commerce clearly considered TAMSA's arguments. Thus, this Panel should reject Mexico's claims.

178. As discussed above, when analyzing an interested party's request for a consideration for revocation, Commerce infers that sales made in extremely low volumes cannot substantiate the need for such consideration. Commerce expressly stated in both the preamble to its revocation regulations and in the fourth review that it would consider what constitutes commercial quantities on a case-by-case basis.[192] As such, a party may demonstrate why its participation in the market, although extremely low, still satisfies the evidentiary requirements for a determination as to whether the order remains necessary. Thus, contrary to Mexico's argument, Commerce's inference regarding the probative value of extremely low sales volumes is reasonable and, in fact, refutable.

179. Contrary to Mexico's argument, Commerce's commercial quantities analysis is entirely consistent with the Appellate Body's findings in *Japan Sunset*.[193] In that report, the Appellate Body expressly endorsed the use of sales volumes as one of the evidentiary bases for determining whether dumping would be likely to continue or recur if the duty was terminated under Article 11.3.[194] Moreover, consistent with Commerce's commercial quantities analysis, the Appellate Body agreed that volume of sales should be analyzed on a "case-specific" manner.[195] As discussed above, in applying its commercial quantities analysis Commerce provides parties with an opportunity to explain why, irrespective of their extremely small sales, they have meaningfully participated in the market. Thus, rather than establishing a *per se* volume test, Commerce's commercial quantities analysis provides for a "case-specific" analysis of volumes in line with the Appellate Body's reasoning in *Japan Sunset*.

180. Most importantly, Mexico's argument must fail because Commerce, in fact, allowed TAMSA an opportunity to refute the inference that its extremely small sales failed to substantiate the need for an examination of whether the order remained necessary. As discussed fully above,

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[191] Mexico First Written Submission, para. 306.
[192] *See* fn 192 *supra*.
[193] Mexico First Written Submission, para. 309-310.
[194] *See e.g.,Japan Sunset AB*, para. 175.
[195] *Japan Sunset AB*, para. 177.

TAMSA argued that its extremely small sales were probative because the small sales were caused by both the dumping order on OCTG from Mexico as well as a cyclical downturn in the oil industry.[196] After considering these arguments, Commerce rejected them, fully explaining why in the final results of the fourth review.[197]

181. Thus, the facts simply do not support Mexico's contention that Commerce applied an irrefutable presumption. Instead, consistent with Article 11.2 Commerce applied its commercial quantities analysis to TAMSA on a case-by-case basis.

c. Commerce did not apply the wrong revocation standard to TAMSA

182. Mexico argues that, in reviewing the necessity of the OCTG order in the *Final Results of Fourth Review*, Commerce improperly applied a "not likely" standard to TAMSA. In making this argument Mexico misunderstands Commerce's revocation analysis in the *Final Results of Fourth Review*. In the final determination, Commerce analyzed whether TAMSA's revocation request provided a sufficient evidentiary basis for consideration for revocation. Commerce found that, as an evidentiary matter, the request was insufficient. Because Commerce thus did not reach the question of whether the continued imposition of the duty remained necessary to offset dumping, Mexico's arguments that Commerce improperly applied a "not likely" standard in resolving that question should be rejected by this Panel.

183. In the *Final Results of Fourth Review*, consistent with Article 11.2 and the commercial quantities analysis explained above, Commerce analyzed TAMSA's revocation request in order to determine whether TAMSA had substantiated the need for consideration for revocation. Commerce found that, during the period in which there was an absence of dumping, TAMSA had failed to ship in commercial quantities. Therefore, Commerce determined that TAMSA had failed to meaningfully participate in the market. In other words:

> TAMSA's overall record of sales to the United States during these three years, when viewed in terms of volume and value, do not provide a reasonable basis for determining that the discipline of the order is no longer necessary to offset dumping.[198]

Thus, Commerce never conducted an analysis of whether the duty was necessary.

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[196] *See e.g.,* discussion *supra*. *See also*, *Fourth Review Issues and Decision Memorandum* at Comment 1 stating that TAMSA argued before Commerce that ". .. oil prices during the final administrative review period were extremely low putting a damper on commercial activity in this product area in general." (Exhibit MEX-9).

[197] *See Fourth Review Issues and Decision Memorandum* at Comment 1 (Exhibit MEX-9).

[198] Id..

184. Mexico's argument is based largely on one statement in the *Final Results of Fourth Review* where Commerce used the term "unlikely."[199] However, consistent with the fact that Commerce never conducted a full analysis of whether the duty was necessary, Commerce's use of the term "unlikely" related to whether TAMSA had met the evidentiary requirements for requesting such an analysis consistent with Article 11.2 and not whether TAMSA had to meet an alleged "unlikely standard" before its duty would be revoked.

185. Moreover, the legal standard for determining whether to revoke a duty under Commerce's regulations is consistent with Article 11.2 – indeed, Commerce has adopted the exact standard found in Article 11.2 into its regulations. Specifically, under 19 C.F.R. 351.222(b)(1)(i), Commerce will revoke a duty unless it is ". . . necessary to offset dumping." Thus, if Commerce had conducted an analysis of whether the duty was necessary, under U.S. law it would have had to apply the exact standard found in Article 11.2.

186. In summary, this Panel should reject Mexico's arguments related to Commerce's analysis of whether the OCTG order was necessary to offset dumping, because Commerce never conducted such an analysis. Instead, Commerce rejected TAMSA's request for revocation because TAMSA failed to provide evidence substantiating the need for this review.

E. Commerce's "Imposition of Conditions" for Revocation was not Inconsistent with Article X:2 of the GATT 1994

187. Through a misleading characterization of the facts, Mexico has attempted to argue that Commerce imposed a commercial quantities requirement in the *Final Results of the Fourth Review* without official publication "in advance of its application," in breach of Article X:2 of the GATT.[200] There are two significant flaws with Mexico's argument, either sufficient for it to fail.

188. First, although Mexico implies that the commercial quantities requirement was imposed through a change in practice in 1999, that requirement was set forth in the regulations published in 1997, in section 351.222(e)(1) of Commerce's regulations, a section of the regulations Mexico studiously deemphasizes.[201] This regulation was effective for all administrative reviews initiated

[199] Mexico First Written Submission, paras. 301-302.

[200] Mexico First Written Submission, para. 321.

[201] *See* 19 C.F.R. 351.222(e)(1) *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,400 (Exhibit US-1). That section reads: (e) *Request for revocation or termination.* (1) *Antidumping proceeding.* During the third and subsequent annual anniversary months of the publication of an antidumping order or suspension

on the basis of requests for reviews made on or after July 1, 1997.[202] Thus, the effective date of the regulations preceded the date of request for the second, third, and fourth OCTG administrative reviews and Commerce properly applied the regulation to TAMSA's request for revocation.[203]

189. Mexico seeks to mislead the Panel by arguing that Commerce did not enforce this provision until 1999. In doing so, Mexico cites Commerce's failure to apply the requirement in the *Steel Wire Rope from Korea* administrative review. Mexico neglects to note that the cited administrative review was requested prior to the effective date of the sunset review regulations and, therefore, the effective date of the commercial quantities requirement.[204] Therefore, Mexico is in fact arguing that Commerce should have applied its regulations prior to their effective date in order to be able to apply them after their effective date as well. Under this logic, it is unclear how Members could ever implement any regulations without running afoul of Article X:2.

190. Mexico compounds the obfuscation by citing to an administrative review in 1999 in which Commerce did apply the commercial quantities requirement as found in the regulations. Yet that review was first requested on August 12, 1997,[205] more than a month after the effective date of the commercial quantities requirement. Mexico's quotation from the Issues and Decision Memorandum in that case does nothing more than confirm that the requirement existed in 1997: The internal citation to the paragraph in question is to the 1997 regulation itself. The "new requirement" to which that passage refers is the 1997 requirement found in the regulations, not a fictitious requirement effected by an alleged change in practice in 1999.

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of an antidumping investigation, an exporter or producer may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (b) of this section with regard to that person if the person submits with the request:

(i) The person's certification that the person sold the subject merchandise at not less than normal value during the period of review described in § 351.213(e)(1), and that in the future the person will not sell the merchandise at less than normal value;

(ii) the person's certification that, during each of the consecutive years referred to in paragraph (b) of this section, the person sold the subject merchandise to the United States in commercial quantities; and

(iii) If applicable, the agreement regarding reinstatement in the order or suspended investigation described in paragraph (b)(2)(iii) of this section.

[202] *See* 19 C.F.R. 351.701 *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,417 (Exhibit US-1).

[203] *See Preliminary Results of Fourth Review*, 65 Fed. Reg. at 54998 (fourth administrative review requested on August 31, 1999) (Exhibit US-11); *Third Review Preliminary Results*, 64 Fed. Reg. at 48983 (third administrative review requested in August 1998) (Exhibit MEX-6); *Second Review Preliminary Results*, 63 Fed. Reg. at 48699 (second administrative review requested in August 1997) (Exhibit MEX-4).

[204] *Steel Wire Rope from the Republic of Korea; Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Antidumping Duty Order in Part,* 62 Fed. Reg. 64,354, 64,355 (Exhibit US-19)

[205] *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada: Preliminary Results of Antidumping Duty Administrative Reviews and Intent to Revoke in-Part,* 63 Fed. Reg. 37,320, 37,321 (Exhibit US-20).

191. Second, in challenging an alleged change in Commerce "practice," TAMSA's claim under Article X:2 must fail because, as discussed fully below, Article X:2(a) is limited in scope to measures of general application, not to changes in how Commerce exercises its discretion on a case-by-case basis – its so-called practice. Therefore, to the extent that Mexico is challenging Commerce's application of the commercial quantities requirement under GATT Article X:2 as a change in "practice," this Panel should reject it.

192. Mexico has acknowledged that the revocation regulations published in 1997 include a "commercial quantities" requirement.[206] Mexico does not claim that the regulations themselves violate Article X:2. Instead, Mexico claims that Commerce's *practice* with regard to the revocation regulations has changed; specifically, that Commerce has changed its *practice* with regard to commercial quantities. For example, Mexico states that "the use of the commercial quantities threshold requirement . . . constitutes a change in Commerce's practice and administration . . . in violation of Article X:2 . . . ."[207]

193. As discussed extensively above, prior panels have found that Commerce's exercise of its administrative discretion in particular cases – its administrative practice – does not constitute a measure for purposes of WTO dispute resolution. As a matter of U.S. administrative law, Commerce practice is not binding because Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. It is not a measure, let alone a "measure of general application."

194. In short, Mexico has not demonstrated that Commerce's commercial quantities requirement is inconsistent with Article X:2.

F. The Margin Calculation Methodology in the Fourth Review Was Consistent with the AD Agreement Both As Such and As Applied to Hylsa

195. Mexico claims in its first written submission that the United States calculated dumping margins for OCTG with respect to Hylsa in a manner inconsistent with Articles 11.2 and 2 of the AD Agreement. Relying primarily on the Appellate Body reports in *EC–Bed Linen*[208] and *Japan Sunset*[209] Mexico asserts that the U.S. methodology for calculating Hylsa's overall weighted average dumping margin was inconsistent with Article 2.4 of the AD Agreement.[210] Mexico further argues that, because Hylsa's fourth review margin is allegedly calculated in violation of

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[206] Mexico First Written Submission, para. 335.

[207] Mexico First Written Submission, para. 320.

[208] *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, Report of the Appellate Body, adopted March 12, 2001 ("*EC–Bed Linen*").

[209] *Japan Sunset*, WT/DS244/AB/R, para. 113; *see also* Mexico First Written Submission, paras. 289-300.

[210] Mexico First Written Submission, paras. 289-297.

Article 2.4 of the AD Agreement, Commerce's determination not to revoke an antidumping duty violates obligations under Article 11.2 of the AD Agreement.[211]

196. As stated previously, Article 11.2 of the AD Agreement does not require company-specific revocation. As an initial matter, the Panel should reach this issue only if it finds that the United States was required to conduct a company-specific revocation analysis. Moreover, as described below, the Panel should find that Mexico has failed to establish a *prima facie* violation of Article 2.4.

197. As described below, Commerce conducted the revocation analysis for Hylsa consistent with Article 11.2 of the AD Agreement, and Mexico's complaints regarding the Commerce's margin calculation for Hylsa are misplaced.

198. The *Final Results of the Fourth Review* demonstrate that Commerce's establishment of the facts with respect to Hylsa's request for revocation was proper and that its evaluation of those facts was unbiased and objective.

199. In accordance with Article 11.2, Commerce considered Hylsa's request for revocation in the context of the fourth administrative review.[212] As a result of an impartial and unbiased administrative review, Commerce determined that Hylsa did not qualify for consideration for revocation because it had not met Commerce's requirement of three consecutive years of sales at not less than normal value.[213] Article 11.2 of the AD Agreement requires nothing more.

200. Because the revocation inquiry conducted in accordance with Article 11.2 failed to demonstrate that the antidumping duty was no longer necessary to offset injurious dumping, no obligation arose under Article 11.1 for Commerce to revoke the order as to Hylsa. In the fourth review, one of the three consecutive years Hylsa needed to qualify for revocation, Commerce calculated a weighted-average margin of 0.79 percent for Hylsa.[214] Therefore, Hylsa did not qualify for revocation.

201. Mexico's Article 11 claims concerning Hylsa suffer from the same flaws as its Article 11 claims regarding TAMSA.[215] Mexico claims that Commerce was obliged to find a zero dumping margin for Hylsa by offsetting the amount by which Hylsa dumped 2 3/8 inch product by the amount that Hylsa sold 2 7/8 inch product above normal value. Based on its assertion that such

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[211] Mexico First Written Submission, paras. 298-300.

[212] *See Final Results of the Fourth Review*, 65 Fed. Reg. at 54,998 (Exhibit US-11); *Final Results of the Fourth Review*, 66 Fed. Reg. 15,832 and accompanying *Fourth Review Issues and Decision Memorandum*, Comment 7 (Exhibit MEX-9).

[213] *Fourth Review Issues and Decision Memorandum*, at Comment 7 (Exhibit MEX-9).

[214] *Fourth Review Issues and Decision Memorandum*, at Comment 7 (Exhibit MEX-9).

[215] Mexico First Written Submission, paras. 293-300.

an offset was required and would have resulted in a zero margin for Hylsa, Mexico asserts that Hylsa should have qualified for revocation.

202. First, even if Hylsa had been assigned a weighted-average margin of zero percent for the fourth review, this alone would not have been sufficient for the order to have been revoked with respect to Hylsa.[216] As it did for TAMSA, Commerce would have permissibly analyzed whether Hylsa made sales to the United States in commercial quantities during the three years upon which the revocation claim was based.

203. Thus, quite apart from the question of which methodology Commerce used to calculate Hylsa's overall margin in the fourth administrative review, the United States was not required to revoke the order with respect to Hylsa even if it had received a margin of zero percent in the fourth review.

204. In any event, Commerce correctly determined that Hylsa dumped OCTG during the fourth review period at a rate above a *de minimis* margin.[217] Moreover, where a margin falls just below or above the *de minimis* threshold, a change in any number of specific methodological choices could impact the result, but this does not render the result inherently unfair or biased.

205. Mexico alleges that the United States used a methodology inconsistent with Article 2.4 of the AD Agreement when calculating the overall weighted average dumping margins for Mexican producers of OCTG. As the United States describes below, the methodology used in this case is not inconsistent with Article 2.4 because this article does not establish obligations as to the calculation of the overall dumping margin. An analysis of this claim necessarily begins with a discussion of the text of the cited article.[218]

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[216] *DRAMs from Korea*, para. 6.34 (Panel "reject[ed] the claim that Article 11.2 requires revocation as soon as an exporter is found to have ceased dumping, and that the continuation of an antidumping duty is precluded *a priori* in any circumstances other than where there is present dumping.").

[217] *Final Results of Fourth Review,* 66 Fed. Reg. 15,832 (Exhibit MEX-9).

[218] *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, WT/DS213/AB/R, Report of the Appellate Body, adopted Dec. 19, 2002 (*"German Sunset*"), para. 62. The text of Article 2.4 of the AD Agreement:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden

206. Article 2.4 establishes the obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. In particular, Article 2.4 provides that comparisons are to be made at the same level of trade and in respect of sales made as nearly as possible at the same time.

207. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*, (a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities. In light of these possible distinctions, Article 2.4 provides that, in order to ensure a fair comparison, export transactions are to be compared to normal values established at the same level of trade. Similarly, it is often necessary and appropriate to distinguish among distinct models of the like product and to distinguish among sales of each of these models at each level of trade and to make model-specific, level-of-trade-specific comparisons between normal value and export price.[219]

208. In an investigation, once the comparisons have been identified pursuant to Article 2.4 of the AD Agreement, Article 2.4.2 of the AD Agreement further establishes the three permissible methods for comparing normal value to export price. Regardless of which method is selected in a given investigation, the investigating authorities will normally have to make multiple comparisons between normal value and export price. Significantly, while Article 2.4.2 of the ADA contains methodologies applicable explicitly in the investigation phase, the ADA does not contain any comparable methodological obligations with respect to reviews and Mexico fails to establish otherwise.

209. In seeking to have this Panel establish obligations where none exist, Mexico would have this Panel create obligations to which the Members have not agreed. The Panel may not interpret the AD Agreement in such a manner that adds to or diminishes the rights and obligations provided in that Agreement.[220] It is not the role of panels to make new commitments, but to clarify existing provisions in accordance with customary rules of interpretation of public international law.[221]

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of proof on those parties.

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[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[219] *See United States–Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea*, WT/DS179/R, Report of the Panel, adopted Feb. 1, 2001 ("*U.S.–Steel Sheet/Strip*"), para. 6.120, and n.121 (Panel noted that the parties to the dispute agreed that multiple averages were justified pursuant to Articles 2.4.2 and 2.4 of the AD Agreement based on differences in level of trade and differences in physical characteristics).

[220] DSU, Articles 3.2 and 19.2.

[221] DSU, Article 3.2.

210. Mexico merely justifies its position with respect to "zeroing" largely by relying on the reasoning in the Appellate Body Reports in *EC–Bed Linen* and *Japan Sunset*.[222] That reliance, however, is misplaced.

211. The United States was not a party to the *EC–Bed Linen* case, and the concept of *stare decisis* is not applicable to WTO disputes. Article IX:2 of the *WTO Agreement* provides the only explicit basis for establishing authoritative interpretations of the Agreements: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." By contrast, the Appellate Body has found that dispute settlement reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute."[223]

212. While the Appellate Body also said that adopted reports "should be taken into account where they are relevant to any dispute,"[224] *EC–Bed Linen* is not relevant to this dispute. *EC– Bed Linen* is not relevant to this dispute because the finding in that case was based on a provision that is explicitly limited to the investigation phase (Article 2.4.2) and because it examined a calculation methodology distinct from that which is before this Panel. Mexico has failed to reconcile any of these differences in its arguments to this Panel.

213. Mexico's reliance on the Appellate Body report in *Japan Sunset* is equally inapposite.[225] In *Japan Sunset*, the Appellate Body found that it was unable to make findings on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the ADA by relying on dumping margins from administrative reviews in making its likelihood determination in a sunset review.[226] Consequently, there were no findings in that report relevant to this dispute.

214. Additionally, to the extent that Mexico seeks to rely upon certain statements made by the Appellate Body in the *Japan Sunset* report, the United States again notes that those statements should only be considered by this Panel to the extent that they are relevant. However, because the Appellate Body made no findings on this issue in *Japan Sunset*, it also undertook no serious legal analysis of the question, and the Appellate Body's casual statements on the topic reflect this fact.

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[222] *European Communities, Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen*"), WT/DS141/AB/R, Report of the Appellate Body, adopted March 12, 2001.

[223] *Japan–Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, at 14, adopted Nov. 1, 1996 ("*Japan–Alcoholic Beverages")* (footnote omitted); *see also,* Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW, adopted Nov. 21, 2001 para. 107-09 (extending the reasoning of *Japan–Alcoholic Beverages* to Appellate Body reports); *Argentina-Poultry*, para. 7.41(not bound by rulings contained in adopted WTO panel reports).

[224] *Japan–Alcoholic Beverages*, at 14.

[225] Mexico First Written Submission, paras. 293-294.

[226] *Japan Sunset AB*, para. 138.

215. For all of the above reasons, the Panel should find that the U.S. dumping margin calculation methodology with respect to Hylsa was consistent with the obligations found in Article 2.4 of the AD Agreement. The 0.79 percent margin for Hylsa properly reflects the sales below normal value which Hylsa made to the United States during the fourth period of review.

G. The United States Applied its Antidumping Laws, Regulations, Decisions and Rulings with Respect to Commerce's Sunset Reviews in a Uniform and Impartial Manner, in Accordance with Article X.3(a) of the GATT 1994

216. Having failed to demonstrate that the U.S. law and the application of that law are contrary to the AD Agreement, in Section X of its First Submission, Mexico attempts to revisit its claims by turning to Article X:3(a) of the GATT 1994 in the alternative.[227] Mexico appears to allege that, even if the Panel finds that none of the claims regarding the WTO-inconsistent presumption established by U.S. law, or that Commerce's practice violates as such U.S. WTO obligations, then the Panel nonetheless should find that the United States failed to administer in an impartial and reasonable manner U.S. antidumping laws, regulations, decisions and rulings with respect to Commerce's sunset reviews of antidumping duty orders, in violation of Article X:3(a) of the GATT 1994.[228]

217. Mexico fails to demonstrate in its First Submission that Commerce has not administered U.S. sunset review laws and regulations in a uniform, impartial and reasonable manner.

218. Focusing on the plain meaning of Article X:3(a)'s terms, "uniform" is defined as "[o]f one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times."[229] Interpreting the same provision in a challenge to Argentina's administration of its customs laws, a panel explained that the term "uniform" means that the:

> laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably ... . This is a requirement of uniform administration of ... laws and procedures between individual shippers and even with respect to the same person at different times and different places.[230]

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[227] Mexico First Written Submission, para. 350.

[228] Mexico First Written Submission, paras. 351-374.

[229] *New Shorter Oxford English Dictionary* 3488 (1993).

[230] *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather ("Argentina - Bovine Hides")*, WT/DS155/R, Report of the Panel, adopted February 16, 2001, para. 11.83.

219. "Impartial" means "[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased; fair."[231] Treatment in an unbiased and fair manner is distinguishable from identical treatment. For example, the panel in *Japan Sunset* rejected Japan's contention that requiring foreign producers/exporters to provide more information than domestic produces in Commerce's sunset review resulted in the partial administration of U.S. sunset laws.[232] The panel explained that because "foreign exporters will be the main source of information regarding dumping, or likelihood of continuation or recurrence of dumping," the quantity of information required from foreign exporters will necessarily differ.[233]

220. "Reasonable" means "[i]n accordance with reason; not irrational or absurd."[234] In *Argentina – Bovine Hides*, the panel found the administration of Argentine customs law unreasonable because there was "no reason" for allowing Argentinean hide buyers to see documents containing their customers' business confidential information.[235]

221. Taken together the terms of Article X:3(a) require that, in administering U.S. sunset review laws and regulations, Commerce must act in a manner that is consistent, unbiased and not irrational or absurd. Mexico does not appear to be arguing that U.S. administration of its laws is not consistent, focusing instead on an alleged lack of impartiality and reasonableness.

222. However, Mexico has provided no evidence of bias or that Commerce has administered U.S. laws and regulations in an irrational or absurd manner, instead merely asserting the conclusion that the record in sunset reviews demonstrates bias. As demonstrated above, Mexico's "clear systematic bias" does not exist, and a deconstruction of Mexico's "analysis" of 301 Commerce sunset reviews shows that in 88 percent of the cases, the issue of likelihood of dumping simply was not contested. With respect to the 12 percent of the cases where likelihood was contested, Mexico provides no evidence – let alone proves – that those cases were not decided in an impartial and unreasonable manner.[236]

223. In sum, Commerce administers the U.S. antidumping laws and regulations regarding sunset reviews in a uniform, impartial, and reasonable manner that is consistent with Article X:3(a) of the GATT 1994. Accordingly, the Panel must reject Mexico's arguments that allege inconsistency by the United States with Article X:3(a) of GATT 1994.

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[231] *New Shorter Oxford English Dictionary* 1318 (1993).

[232] *Sunset Review of Steel from Japan Panel*, WT/DS244/R, para. 7.306.

[233] *Id; see also Argentina – Bovine Hides* WT/DS155/R, paras 11.99-.101 (finding that in providing private parties access to confidential business information of parties with conflicting commercial interests constituted a partial administration of Argentine customs laws).

[234] *New Shorter Oxford English Dictionary* 2496 (1993).

[235] *Argentina – Bovine Hides*, WT/DS155/R, paras. 11.87, 11.91-.92.

[236] Mexico First Written Submission, nn. 288 & 96 & Exhibit MEX-62.

H. The ITC Applied the Correct Standard for Determining Whether Termination of the Antidumping Duty Orders Would Be Likely to Lead to Continuation or Recurrence of Injury, and the ITC's Determination of Likelihood in the Sunset Review of OCTG from Mexico Was Consistent With Article 11. 3 and Article 3.1 of the AD Agreement

224. Much of Mexico's first submission is based on the incorrect and unproven premise that the Commission's application of the "likely" standard was inconsistent with Article 11.3 of the Agreement.[237] Mexico argues that the U.S. statute as such imposes a WTO-inconsistent standard, and that the Commission's application of the "likely" test in the OCTG review was inconsistent with the Agreement.

225. The Commission does not, as Mexico states, take the position in this dispute that "likely" means "possible."[238] Rather, the United States agrees that the term "likely" as used in Article 11.3 can be equated with "probable" in the manner that the U.S. courts understand the meaning of "probable" and as "probable" has been explained by the Appellate Body.[239]

226. In arguing that the Commission applied an improper standard in the OCTG review, Mexico points to statements that the Commission made more than two years ago (in February 2002) in a submission to a NAFTA Binational Panel Review arising from the same sunset review as that underlying this dispute.[240] The description in the NAFTA Panel brief concerning the approach taken by some ITC Commissioners was based on their understanding at that time that the term "probable" connoted near certainty. As became apparent from subsequent opinions of the U.S. domestic court, however, there are different connotations associated with the word "probable."

227. Since the filing of the NAFTA brief, the meaning of the term "likely" has been discussed extensively in several cases before the U.S. Court of International Trade ("CIT"). Through the course of the decisions of that court and remand determinations by the Commission in response to those decisions, it became apparent that, to the extent the Commission had in domestic litigation (including the NAFTA Panel OCTG case) taken the position that "likely" is not synonymous with "probable," this position reflected a perception by some Commissioners that imposition of a "probable" standard required the Commission to satisfy a high level of certainty

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[237] Mexico's First Submission, paras. 159-190, 199-200.

[238] *See* Mexico's First Submission, paras. 168, 173, 174.

[239] *Japan Sunset AB*, para. 111.

[240] Mexico's First Submission, para. 171. As the NAFTA Panel has not yet been composed, there has been no supplemental briefing, argument, or decision in the NAFTA case.

in its sunset determinations. It is important to understand that this misunderstanding has been resolved.[241]

228. Subsequent to the filing of the NAFTA brief, at least two judges of the U.S. Court of International Trade explained that the term "probable" does not indicate a requirement for any particular level of certainty, let alone a high level of certainty.[242] This guidance from the Court was not available to the Commission when the brief to the NAFTA panel was drafted. Once the domestic court clarified what it meant by the statement that the term "probable" was synonymous with "likely," it became apparent that the views of the individual Commissioners as to the standard they had applied in sunset reviews (including the OCTG sunset review) was either identical to the "probable" test articulated by the court or indistinguishable from it. The U.S. court recognized this point in affirming the Commission's unchanged affirmative remand determination in *Usinor*. For these reasons, the views of the participating Commissioners in the OCTG sunset review remain consistent with the "likely" standard as that term has been defined by the U.S. courts and the WTO Appellate Body.

229. In citing to the Commission's brief in the NAFTA case, Mexico also fails to note that the Commission argued in the alternative that its OCTG sunset determination satisfied even the more stringent standard of certainty.[243] As discussed below in the arguments addressing the factual predicate for the Commission's determination, that determination meets the WTO (as well as statutory) "likely" standard no matter how that standard is interpreted.

230. In arguing that the U.S. statute as such is inconsistent with Article 11.3, Mexico ignores that, with respect to this question, the U.S. statute on its face employs the same language and imposes the identical standard as that imposed under the Agreement, *i.e.*, whether revocation of the order "would be likely to lead to continuation or recurrence"of injury.[244]

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[241] Two of the Commissioners (Vice Chairman Hillman and Commissioner Koplan, who both participated in the OCTG sunset reviews) consistently have said that the approach they employ comports with a "probable" standard since the commencement of the first U.S. sunset reviews. *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. AA-1921-197 (Remand), 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Remand), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Remand), USITC Pub. 3526 (July 2002) ("*Usinor* I Remand Determination") at *Separate Views of Vice Chairman Jennifer A. Hillman Regarding the Interpretation of the Term "Likely,"* and *Dissenting Views of Commissioner Stephen Koplan Regarding the Interpretation of the Term "Likely."* (Exhibit US-21.)

[242] *Usinor Industeel v. United States*, 26 CIT __, Slip Op. 02-152 at 6 n.6 (Dec. 20, 2002) ("the court has not interpreted 'likely' to imply any particular degree of certainty") (Exhibit MEX-35); *Indorama Chemicals (Thailand) Ltd. et al v. United States International Trade Commission*, 26 CIT ___, Slip Op. 02-105 at 20-21 (Sept. 4, 2002) ("standard is based on a 'likelihood' of continuation or recurrence of injury, not a certainty") (Exhibit US-22).

[243] Brief of Investigating Authority the U.S. International Trade Commission to the NAFTA Panel in *Oil Country Tubular Goods from Mexico*, USA-MEX-2001-1904-06, February 8, 2002 (non-proprietary version), at page 46 (Exhibit MEX-47).

[244] 19 U.S.C. 1675a(a)(1); AD Agreement, Article 11.3.

231. Mexico's citation[245] to language in the SAA that a sunset determination is by its very nature (inherently) predictive and speculative merely recognizes the reality of this type of analysis. As the Appellate Body has stated "t]he likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated."[246]

232. Further, Mexico's assertion that the U.S. statute is as such inconsistent with Article 11.3 with respect to the "likely" standard is belied by the U.S. court decisions discussed above. As noted, the U.S. courts have interpreted the "likely" standard as used in the U.S. statute consistently with the interpretation the Appellate Body had applied to the "likely" standard as used in Article 11.3 of the AD Agreement.

233. Under the U.S. legal system, the U.S. courts are charged with reviewing the interpretation of U.S. statutes. They have interpreted the meaning of "likely" as used in the U.S. statute, giving due regard to the SAA, in a manner completely consistent with the meaning ascribed to "likely" in Article 11.3. Accordingly, there is no basis for Mexico to assert that the U.S. statute is inconsistent as such with Article 11.3. Mexico plainly has failed to meet its burden on this claim.

I. The ITC's Determination Was Consistent with Article 11.3 Because the Establishment of the Facts Was Proper and the Evaluation of the Facts Was Unbiased and Objective

234. The United States recognizes that an authority's establishment of the facts in a sunset review must be "proper," that the evaluation of those facts must be "unbiased and objective."[247]

235. Mexico argues that the ITC failed to conduct an "objective examination" based on "positive evidence" in accordance with Article 3.1. As explained below, Article 3.1 does not apply to sunset reviews. Nonetheless, the ITC's sunset determination was based on a proper establishment of the relevant facts and an unbiased and objective evaluation of those facts and, accordingly, would satisfy the requirements of Article 3.1, were that provision applicable.

236. The Appellate Body has explained that an objective examination is one that is made in "an unbiased manner, without favoring the interests of any interested party, or group of interested parties."[248] The "quality of the evidence" must be "of an affirmative, objective and verifiable character, and that it must be credible."[249] As discussed below, the ITC carefully reviewed an extensive array of factors and evidence relative to the likely volume, price effect and impact of

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[245] Mexico's First Submission, para. 167.
[246] *Japan Sunset AB*, para. 105.
[247] AD Agreement, Article 17.6(i).
[248] *US - Hot-Rolled Steel*, para. 193; *EC Pipe Fittings*, para. 132.
[249] *US – Hot-Rolled Steel,* para. 192; *EC Pipe Fittings*, para. 132.

dumped imports on the domestic industry. Mexico has failed to show that the ITC's determination was biased in favor of any interested party or that the quality of the evidence considered was compromised in any way.[250] In other words, the ITC's review meets the requirements of Article 3.1.

237. That the ITC may have given a different weight or meaning to record evidence than the Mexican respondent would have preferred does not go to whether the ITC conducted an "objective" examination of the facts gathered during the review.[251] As Article 17.6(i) makes clear, however, the fact that another conclusion might have been drawn is insufficient to find that the decision reached is inconsistent with the AD Agreement.

J. Article 3 Does Not Apply to Sunset Reviews

238. Mexico asserts that Article 3 of the AD Agreement applies in its entirety to sunset reviews conducted under Article 11.3.[252] Mexico also claims that in its sunset review in the OCTG case, the ITC acted inconsistently with specific paragraphs of Article 3.

239. This series of claims by Mexico is premised on the notion that the requirements of Article 3 apply not only to original investigations, but also to sunset reviews under Article 11.3. In this section, the United States explains why this premise is wrong, and that Article 3 does *not* apply to sunset reviews. In subsequent sections, the United States will address Mexico's claims concerning specific paragraphs of Article 3.

240. The Appellate Body observed in *German Sunset* that "original investigations and sunset reviews are distinct processes with different purposes."[253] It explains that "[t]he nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation."[254] In *German Sunset*, the Appellate Body contrasted original investigations and sunset reviews in the context of the SCM Agreement. In *Japan Sunset*, the Appellate Body noted that the parallel sunset provision in the AD Agreement is nearly identical to that of the SCM Agreement, and adopted its previous comparative analysis *mutatis mutandi*.[255] In other words, the Appellate Body's analysis applies equally to both the SCM and AD Agreements.

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[250] Indeed, the ITC made a negative likelihood determination with respect to drill pipe, resulting in the partial revocation of the antidumping duty order on OCTG from Mexico.

[251] *Cf. EC Pipe Fittings*, para. 128 (stating, in the context of whether the panel made an "objective" and "unbiased" review pursuant to AD Agreement Article 17.6(i), that it is "not sufficient for [the complaining party] simply to disagree with the Panel's weighing of the evidence" and that a panel does not err in declining "to accord the evidence the weight that one of the parties sought to have accorded to it") (internal quotations and footnotes omitted).

[252] Mexico's First Submission, para. 191.

[253] *German Sunset*, para. 87 (emphasis added).

[254] *US - German Sunset*, AB Report, para. 87 (emphasis added).

[255] *Japan Sunset AB*, para. 104, footnote 114.

241. As explained below, nothing in Article 3 indicates that its requirements are intended to extend to sunset reviews, nor does Article 11.3 indicate that sunset reviews are governed by the requirements of Article 3. In accordance with customary rules of treaty interpretation embodied in the Vienna Convention, the panel must give meaning to the text of the AD Agreement. As the Appellate Body has observed, that the Agreement may be silent with respect to a particular issue "must have some meaning."[256] In the absence of a textual exposition of an obligation in regard to a particular issue, Members may take any reasonable action in that respect.[257]

242. Addressing the analogous provisions of the SCM Agreement, the Appellate Body has observed that the sunset review provision (Article 21.3) of the SCM Agreement is silent as to whether a Member must apply the *de minimis* threshold to countervailing duty calculations in sunset reviews. The Appellate Body declined to read the *de minimis* standard into the sunset review, explaining that, as noted in Article 19.2 of DSU, it "cannot add to or diminish the rights and obligations provided in the covered agreements."[258] It also explained that, absent a textual basis, to impose obligations governing original investigations to sunset reviews "would upset the delicate balance of rights and obligations attained by the parties to the negotiation."[259] These principles apply equally to this dispute.

243. The inapplicability of Article 3 to sunset reviews under Article 11.3 is clear based on an analysis of the text of these treaty provisions. First, Article 3 addresses a "determination of injury," whereas Article 11.3 calls for a determination of, *inter alia*, "recurrence of injury." The nature of the two determinations is entirely different, as explained below.[260]

244. Mexico relies on footnote 9 to Article 3 to support its position that Article 3 applies to sunset reviews.[261] The language of footnote 9 proves just the opposite. Footnote 9 states:

> Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

245. The text of footnote 9 to Article 3 existed in its present form in the Tokyo Round Anti-

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[256] *US - German Sunset*, para. 65.

[257] *See Japan Sunset AB*, para. 123 (Appellate Body indicating that, given that Article 11.3 does not prescribe any particular method for making a sunset review determination of likely dumping, the Article imposes no obligation to calculate or rely on dumping margins in a sunset review).

[258] *US - German Sunset*, para. 91.

[259] *US - German Sunset*, para. 91.

[260] *Cf. Japan Sunset AB*, paras. 105-107 (stating that a sunset determination under Article 11.3 is prospective and that it differs in essential respects from a determination in an original investigation referenced in Article 2).

[261] Mexico's First Submission, para. 191.

Dumping Code prior to the adoption of the Article 11.3 provision for sunset reviews at the conclusion of the Uruguay Round, with the only exception that the prior text referred to the "Code," whereas footnote 9 refers to the "Agreement."[262] Further, footnote 9, like its precursor in the Antidumping Code, is simply a drafting device that avoids unnecessary repetitions of the principle that actionable injury can take any of three distinct forms: present injury, threat of material injury, or material retardation of the establishment of an industry.

246. It is clear that (i) "material injury," (ii) "threat of material injury," (iii) "material retardation of the establishment of a domestic industry," and (iv) the likelihood of "continuation or recurrence of . . . injury" are each separate conditions, with separate elements, some of which are specified in the AD Agreement and some of which are implied. The drafters of the AD Agreement had the option of including the "likelihood of continuation or recurrence of injury" condition in footnote 9, but chose not to do so.

247. Applying the definition of "injury" in footnote 9 to the determination of "recurrence of injury" in Article 11.3 – as Mexico would have it – would lead to absurd results. It would mean that the inquiry in a sunset review would become whether expiry of the duty would be likely to lead to continuation or recurrence of material injury to a domestic industry, continuation or recurrence of threat of material injury to a domestic industry, or continuation or recurrence of material retardation of the establishment of such an industry. Article 11.3 does not contemplate determinations of a continuation or recurrence of threat or material retardation as a basis for continuing to apply an antidumping duty after a sunset review.

248. Another textual indication that footnote 9 does not apply to sunset reviews is the phrase "unless otherwise specified" in the footnote. Article 11.3 does specify otherwise: it states that in a sunset review investigating authorities are to determine the likelihood of a continuation or recurrence of injury, rather than engage in a "determination of injury" within the meaning of footnote 9 to Article 3.

249. In addition, footnote 9 is attached to the heading of Article 3, which is "Determination of Injury," and Article 3.1 speaks of – presumably – the same "injury" as a "determination of injury for purposes of Article VI of GATT 1994." Article VI of GATT 1994 does not mention sunset reviews, and a sunset review does not entail a "determination of injury."

250. In support of its arguments with respect to footnote 9, Mexico highlights irrelevant statements from past panel reports in the text of its submission, while relegating critical qualifying statements to footnotes. For example, Mexico quotes a statement from the panel report in *Japan Sunset* that, as presented by Mexico, seems to show that the panel made findings on the applicability of Article 3 to Article 11.[263] Mexico's presentation of the panel's conclusion

[262] In the AD Code, the footnote was footnote 2 to Article 3.
[263] Mexico's First Submission, para. 193.

is misleading, however, because the panel expressly indicated that the statement was on a matter beyond the scope of the issues before that panel. Only belatedly, in a footnote appended to a following paragraph, does Mexico reveal that the panel expressly indicated that the application of Article 3 to Article 11 is "an issue we need not and do not decide."[264] Contrary to the impression that Mexico would try to create, therefore, the panel statement is of no consequence. Indeed, Mexico even fails to supply a citation to the panel opinion in support of that quotation (which appears at paragraph 7.99).[265]

251. Moreover, Mexico conspicuously fails to mention the Appellate Body report with respect to this issue, perhaps because key provisions of that report undermine the argument that Article 3 applies to Article 11. For example, the Appellate Body specified that Article 11 "does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11 identify any particular factors that authorities must take into account in making such a determination ."[266] Based on the analysis, the Appellate Body concluded that "the disciplines of Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review."[267] In this context, Mexico's selective quotations are particularly suspect.

252. The inapplicability of Article 3 to sunset reviews under Article 11.3 is further underscored by the absence of any cross-references in Article 11.3 to Article 3. The existence of cross-references in paragraphs 4 and 5 of Article 11 to other articles of the AD Agreement indicate that the drafters would have been explicit had they intended to make the disciplines of Article 3 applicable to sunset reviews.[268]

253. The fact that Article 3 does not apply to sunset reviews is clear not only from the text of the AD Agreement, but also in view of the nature of a sunset review. As mentioned in our discussion of previous Article 3 claims, the focus of a review under Article 11.3 differs from that of an original investigation under Article 3. As the Appellate Body observed in the context of sunset reviews under the SCM Agreement: "original investigations and sunset reviews are distinct processes with different purposes."[269] The difference between the nature and practicalities of the inquiry in an original investigation and of the inquiry in a sunset review demonstrates that the tests for each cannot be identical.

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[264] Mexico's First Submission, para. 195, footnote 166.

[265] Mexico's First Submission, para. 193.

[266] *Japan Sunset Panel,* para. 123.

[267] *Japan Sunset Panel,* para. 128.

[268] *Cf. Japan Sunset AB*, para. 125 and *Japan Sunset Panel* para. 7.166 (stating that the existence of cross-references in Articles 11.4 and 11.5 to other articles of the AD Agreement, and the absence of such a cross-reference in Article 11.3 to Article 2, may indicate that the disciplines of Article 2 are not applicable to sunset reviews); and *German Sunset,* para. 69 (stating that the existence of cross-references in the SCM Agreement suggests that when the negotiators of the Agreement intended the disciplines of one provision to apply to another, they expressly provided for such application).

[269] *German Sunset*, para. 87.

254. In an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports that are competing without remedial measures in place. In doing so, the authorities must examine the volume, price effects and impact of the unrestrained imports on a domestic industry that may be indicative of present injury or threat of material injury.

255. Five years later, in an Article 11.3 sunset review, the investigating authorities must determine whether "expiry of the duty would be likely to lead to continuation or recurrence of . . . injury." Under U.S. law, the ITC examines the likely volume of imports in the future that have been restrained for the last five years by the antidumping duty order, the likely price effects in the future of such imports, and the likely impact of the imports in the future on the domestic industry that has been operating in a market where the remedial order has been in place.

256. As a result of the order, dumped imports may have decreased or exited the market altogether or, if they have maintained their presence in the market, they may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties. With the presence of the order, it would not be surprising that no injury or causal link presently exist, a fact recognized by the standard of "continuation or recurrence of injury."

257. Thus, the inquiry contemplated by Article 11.3 is counterfactual in nature, and entails the application of a decidedly different analysis with respect to the volume, price and impact. Indeed, there may no longer be either any subject imports or material injury once an antidumping order has been in effect for five years. The authority must then decide the likely impact of a prospective change in the status quo; *i.e.,* the revocation of the antidumping duty order and the elimination of its restraining effects on volumes and prices of imports. The differences in the nature and practicalities of the inquiry in an original investigation and in a sunset review demonstrate that the requirements for the two inquiries cannot be identical.

258. Although Article 3 does not apply to sunset reviews, the United States recognizes that some of the provisions of Article 3 may provide guidance as to the type of information that may be relevant to the examination in a sunset review of whether material injury is likely to continue or recur.

K. The ITC's Sunset Determination Was Consistent with Article 11.3

1. Article 3.1 Does Not Apply to Sunset Reviews

259. Mexico's claims concerning Article 3.1 are premised on the notion that Article 3.1 applies to sunset reviews. Article 3.1 provides as follows:

> A determination of injury for purposes of Article VI of the GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the

> volume of dumped imports and the effect of dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

260. As explained above, the provisions of Article 3 are not applicable to sunset reviews. In addition to the reasons given above, there are further textual indications in Article 3.1 as to why it specifically is not applicable to sunset reviews. In a sunset review, authorities are required to evaluate the likelihood in the future of a continuation or recurrence of injury if the dumping order is lifted. Imports may not even be present in the market at the time of the sunset review, and they may not be sold at dumped prices. Even if they are sold at dumped prices, the effects of the dumping are offset, at least in part, by the antidumping duty. As a result, an examination of "the volume of dumped imports and the effect of dumped imports on prices" is not meaningful in the context of an Article 11.3 review. The requirements of Article 3.1 do not apply to sunset reviews because the dictates of Article 3.1 are potentially incompatible with the nature of the inquiry in a sunset review.

261. The panel and Appellate Body reports that Mexico relies on are not relevant to the question of whether Article 3.1 applies to sunset reviews. Mexico quotes from the Appellate Body report in *Hot-Rolled Steel from Japan*.[270] That report, however, does not address the question of the applicability of the provisions of Article 3 to Article 11 (nor could it as the dispute did not involve a sunset review).

262. Likewise, Mexico's reliance on *HFCS* and *H-Beams* is unavailing to support its assertion that "[t]he standards set out in Article 3.1 apply to determinations in sunset reviews."[271] Neither *HFCS* nor *H-Beams* involved a sunset review. Accordingly, the purported applicability of Article 3.1 to Article 11.3 was not an issue in those disputes. Moreover, even accepted at face value, each of the excerpts quoted by Mexico pertains solely to Article 3.1 itself, or to the relationship among the various paragraphs of Article 3. None is relevant to Mexico's assertion that Article 3.1 applies to sunset reviews.

263. While Article 3.1 does not *per se* apply to Article 11.3 reviews, the United States recognizes that an authority's establishment of the facts in a sunset review must be "proper," that the evaluation of those facts must be "unbiased and objective."[272]

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[270] Mexico First Submission, para. 197, quoting from *U.S. – Hot-Rolled Steel from Japan*.

[271] Mexico First Submission, para. 198, discussing Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted February 24, 2000; Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted November 21, 2001; and Appellate Body Report, *Thailand – Anti–Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/ABR, adopted April 5, 2001.

[272] AD Agreement, Article 17.6(i).

2. The ITC's Sunset Determination Was Based on an Unbiased and Objective Evaluation of the Relevant Facts Gathered During the Review

264. Mexico argues that the ITC failed to conduct an "objective examination" based on "positive evidence" in accordance with Article 3.1. As explained above, Article 3.1 does not apply to sunset reviews. Nonetheless, the ITC's sunset determination was based on a proper establishment of the relevant facts and an unbiased and objective evaluation of those facts, was based on evidence gathered during the review, and, accordingly, would satisfy the requirements of Article 3.1, were that provision applicable.

265. The Appellate Body has explained that an objective examination is one that is made in "an unbiased manner, without favoring the interests of any interested party, or group of interested parties"[273] and that the "quality of the evidence" must be "of an affirmative, objective and verifiable character, and . . . it must be credible."[274] As discussed below, the ITC carefully reviewed an extensive array of factors and evidence relative to the likely volume, price effect and impact of dumped imports on the domestic industry. Mexico has failed to show that the ITC's determination was biased in favor of any interested party or that the quality of the evidence considered was compromised in any way.

266. That the ITC may have given a different weight or meaning to record evidence than the Mexican respondent would have preferred, does not go to whether the ITC conducted an "objective" examination based on "positive" evidence.[275] To the contrary, if the ITC's establishment of the facts was proper and its evaluation was unbiased and objective, then its evaluation shall not be overturned "even though the panel might have reached a different conclusion."[276]

267. Mexico's claims with regard to the likely volume of imports, likely price effects of imports, and likely adverse impact of imports are discussed in turn below.

a. The ITC's Findings on the Likely Volume of Imports

268. Mexico challenges the ITC's finding that the volume of imports of OCTG casing and

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[273] *US - Hot-Rolled Steel*, para. 193; *EC Pipe Fittings*, para. 132.

[274] *US – Hot-Rolled Steel,* para. 192; *EC Pipe Fittings*, para. 132.

[275] *Cf. EC Pipe Fittings*, para. 128 (stating, in the context of whether the panel made an "objective" and "unbiased" review pursuant to AD Agreement Article 17.6(i), that it is "not sufficient for [the complaining party] simply to disagree with the Panel's weighing of the evidence" and that a panel does not err in declining "to accord the evidence the weight that one of the parties sought to have accorded to it") (internal quotations and footnotes omitted).

[276] Article 17.6(i).

tubing would be likely to increase significantly in the event of revocation of the order. Before addressing Mexico's specific arguments, we describe the facts and reasoning underlying the ITC's finding.

269. The ITC first reviewed its findings as to the volume of imports in its original injury determination. This is the most recent time period during which subject imports entered the U.S. market free from the price disciplines of the order. In that earlier determination, the ITC found that the rate of increase in the volume of cumulated subject imports was far greater than the overall increase in consumption between 1992 and 1994. The ITC also found that the market share of subject imports by both volume and value rose significantly, nearly doubling from 1992 to 1994, and that domestic producers' market share declined substantially.

270. The ITC noted that after the antidumping duty orders went into effect, subject imports decreased, but remained a factor in the U.S. market. The ITC found that while current import volume and market share of subject imports was substantially below the levels of the original investigation, current levels likely reflected the restraining effects of the orders.

271. The ITC considered foreign producers' operations not just with respect to OCTG casing and tubing, but with respect to all pipe and tube products produced on the same machinery and equipment as casing and tubing.[277] It did so because it had found that pipe and tube producers in the subject countries produced a variety of other tubular products in addition to OCTG (such as standard, line, and pressure pipe, mechanical tubing, pressure tubing, and structural pipe and tubing) on the same equipment in the same production facilities. These producers thus could easily shift production away from other tubular products toward production of OCTG and vice versa. The ITC also found that of all the tubular products that could be produced in these facilities, OCTG commanded among the highest prices in the market, and producers thus had an incentive to make as much OCTG as possible in relation to other products.[278]

272. The ITC found there to be substantial available capacity in the subject countries for increasing exports of casing and tubing to the United States.

273. With respect to producers in Japan, the ITC noted that in the original investigations, the import volume, market share, and production capacity of casing and tubing from Japan were the largest of the subject countries. During the original investigation, Japanese producers had reported excess capacity. Only one of the four Japanese producers identified in the original investigation participated in the sunset review. (The ITC noted that another of the four original producers, Nippon, may have closed its OCTG plant). The participating producer, NKK, apparently represented a lesser share of total Japanese production. The ITC noted the reported capacity of NKK, and taking into account the fact that other Japanese producers chose not to

[277] ITC Report at 17.
[278] ITC Report at 16.

provide the ITC with data, concluded that there was significant available capacity among other Japanese producers.[279]

274. With respect to producers in Korea, the ITC took note of their unused capacity and compared it in size to total U.S. consumption.[280]

275. With respect to producers in the other subject countries (Argentina, Italy and Mexico), the ITC recognized that their "recent . . . capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States."[281]

276. Despite the apparently high capacity utilization rates of producers in Argentina, Italy and Mexico, the ITC found that these producers, and the producers in Japan and Korea, would have incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the U.S. market, for the following reasons.

277. First, as the ITC found and the Mexican respondent conceded, the U.S. market for OCTG was the largest in the world, and would be attractive to major foreign producers.[282] The ITC found that the alliance of five foreign producers known as Tenaris[283] would be likely to have a strong incentive to expand its presence in the United States if the orders were revoked. The ITC's analysis of this issue is worth quoting (footnotes omitted):[284]

> Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States. Tenaris states that it is the only entity that can serve oil and gas companies on a global basis, and that it seeks worldwide contracts with such companies. Many of Tenaris' existing customers are global oil and gas companies with operations in the United States. While the Tenaris companies seek to downplay the importance of the U.S. market relative to the rest of the world, they acknowledge that it is the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, it likely would have a strong incentive to have a significant presence in the U.S. market, including the supply of its global customers' OCTG requirements in the U.S. market.

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[279] ITC Report at 18.

[280] ITC Report at 19.

[281] ITC Report at 19.

[282] ITC Report at 15 & at 19 footnote 125.

[283] The members of Tenaris are: TAMSA in Mexico, Siderca in Argentina, Dalmine in Italy, NKK in Japan, and Algoma in Canada. The ITC found that the Tenaris companies operate as a unit, submitting a single bid for contracts to supply OCTG products and related services; and that Tenaris' customer base includes large multi-national oil and gas companies, many of which have operations in the United States. ITC Report at 16.

[284] ITC Report at 19.

278. The second reason that the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the U.S. market is that casing and tubing were among the highest valued pipe and tube products, generating among the highest profit margins.[285] Third, the ITC explained that prices for casing and tubing on the world market were significantly lower than prices in the United States.[286]

279. Fourth, the ITC found that subject country producers also faced import barriers in other countries, or on related products in the United States. Specifically, Argentine, Japanese, and Mexican producers were subject to antidumping duty orders in the United States on seamless standard, line, and pressure pipe (which are produced in the same production facilities as OCTG); Korean producers were subject to import quotas on welded line pipe shipped to the United States and U.S. antidumping duty orders on circular, welded, non-alloy steel pipes; and Korean producers were subject to an antidumping duty of 67 percent on casing in Canada.[287]

280. The fifth reason that the ITC found that the subject producers would have an incentive to devote more of their capacity to shipping casing and tubing to the U.S. market was that industries in at least some of the subject countries were heavily export-dependent. The ITC noted that Japan and Korea in particular had very small home markets and depended nearly exclusively on exports.[288]

281. Mexico argues that the ITC's analysis of the likely volume of imports is flawed. None of Mexico's arguments stands up to scrutiny.

282. With respect to the Tenaris alliance, Mexico asserts that Tenaris's capacity was committed to existing long-term contracts, and that such contracts would have to be broken in order to increase shipments of subject merchandise to the United States.[289] Mexico's argument is simply not borne out by the record. A Tenaris witness, who represented that he was responsible for exports of OCTG from all Tenaris companies, testified under oath before the Commission that long-term agreements account for only about 55 percent of Tenaris' sales of OCTG.[290] Furthermore, Tenaris describes itself as the only entity that could serve oil and gas companies on a global basis, and stated that it sought worldwide contracts with such companies.[291] In fact, the Tenaris producers already had contracts with global oil and gas companies that covered all operations outside the United States.[292] Tenaris's own desire for worldwide contracts with its

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[285] ITC Report at 19.
[286] ITC Report at 19-20.
[287] ITC Report at 20.
[288] ITC Report at 20.
[289] First Submission of Mexico, para. 205.
[290] ITC Hearing Tr., paras. 200 and 205 (Exhibit US-24).
[291] ITC Report at 19.
[292] The president and chief executive officer of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "[m]any of these end users already have single source deals for international supply and they very much want to extend these arrangements to the United States." Hearing Tr. at 59 (Mr. Ketchum, Red

existing customers – which could be satisfied only by contracts that covered the world's largest market for OCTG – constituted a very strong incentive to increase U.S. shipments.[293] While Mexico claims that the ability of the subject producers to increase shipments was limited by contracts, many of those contracts were with the very end users most eager to see subject imports enter the U.S. market.[294] Indeed, testimony at the hearing indicated that customers already buying OCTG from the subject producers would immediately import the subject product if these orders were revoked.[295]

283. As discussed above, the ITC found – and Mexico does not dispute – that "Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States."[296] As the only major market not already dominated by Tenaris, the United States represented the best growth opportunity for the Tenaris producers. Given that the United States was by far the largest market for OCTG,[297] Tenaris had a strong incentive to increase its share of the U.S. market.[298]

284. Perhaps most importantly, the record in the ITC's review showed that "prices for casing and tubing on the world market are significantly lower than prices in the United States."[299] Indeed, one major distributor testified that Tenaris "could dramatically undersell the going price in the United States and still get greater returns than they currently do from their international

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Man Pipe and Supply) (Exhibit US-24).

[293] The director of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "[t]hey [the Tenaris companies] are already positioning themselves to serve as global suppliers to the major end users and they know that you just cannot do that if you are not in this market."). Hearing Tr. at 55 (Mr. Stewart, Hunting Vinson) (Exhibit US-24).

[294] This director testified that "[m]ost of the major end users already purchase from these subject producers internationally and the end users are unwavering in their desire to see the extremely low priced OCTG that they get internationally extended to the U.S. market." *Id.* (Exhibit US-24).

[295] The president and chief executive officer of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "I recently spoke with a major end use[r] who told me that he could get a far lower price from his international supplier which happened to be one of the foreign producers subject to the orders here. He also said that if these orders were revoked, he would immediately switch to the same foreign producer to supply his needs." Hearing Tr. at 58 (Mr. Ketchum, Red Man Pipe and Supply) (Exhibit US-24).

[296] ITC Report at 19 (emphasis added).

[297] *Id.* The director of one of the largest distributors of OCTG in the United States testified at the ITC hearing that: "[t]he United States is half the world for the purposes of OCTG and I can guarantee you that none of these producers has overlooked that fact." Transcript of U.S. International Trade Commission Hearing (May 8, 2001) ("Hearing Tr.") at 55 (Mr. Stewart, Hunting Vinson) (Exhibit US-24).

[298] The chief executive officer of one of the world's largest distributors of OCTG stated at the ITC hearing: "I know that [Tenaris] had been pushing for more North American business and is especially eager to get into Alaska. It is simply not imaginable that [Tenaris] or the other subject companies would stay out of the United States which buys as much OCTG as the rest of the world combined and has the highest prices." Hearing Tr. at 56 (Mr. Chaddick, Sooner, Inc.)) (Exhibit US-24).

[299] ITC Report at 19 (emphasis added).

sales."[300] This price gap represents a very strong incentive not only to increase shipments to the United States, but to shift sales from other markets to serve U.S. customers.

285. Mexico also asserts that Tenaris would have no incentive to increase shipments to the United States because "some of the companies" are outside of the antidumping duty orders under review. That assertion is factually incorrect because only one of the Tenaris companies – Algoma in Canada – is not covered by the orders.[301] Moreover, Mexico fails to explain why Algoma's falling outside the order would somehow prevent the other Tenaris companies from having a strong incentive to increase imports, given the detailed record findings discussed above. If Mexico's theory is that all desired shipments by Tenaris could simply flow through Algoma, it ignores that the covered Tenaris producers had production capacity well in excess of Algoma's. Moreover, Mexico neglects to mention that the Mexican respondent Tubos de Acero de Mexico, S.A. ("TAMSA") (which is a Tenaris member), affirmatively represented to the Commission during the review that Algoma had no intention of exporting more than an insignificant quantity of subject merchandise to the United States.[302]

286. Second, Mexico challenges the Commission's finding that because "casing and tubing are among the highest valued pipe and tube products, . . . producers generally have an incentive, where possible, to shift production in favor of these products from other pipe and tube products that are manufactured on the same production lines." Notably, Mexico never disputes the finding as a factual matter.[303] To the contrary, the relatively high value (and profit margins) of casing and tubing was established during the ITC's sunset reviews.[304] It stands to reason that pipe and tube producers – as profit-maximizing entities – would seek to maximize their production of products with higher profit margins. Mexico's attempts to dismiss this factor are unpersuasive.

287. Instead of addressing the merits, Mexico simply asserts that this general incentive would not alone establish the likely behavior of producers of the subject merchandise.[305] Mexico ignores that this factor was only one of several relied on by the Commission. It is not correct to suggest it was the sole basis for the Commission's determination. Mexico also suggests that the Commission's finding was restricted to Tenaris only.[306] Again, this is not reflective of the Commission's determination, which related to all producers of the subject merchandise, not just Tenaris.

288. Mexico also contests the ITC's finding that foreign producers had an incentive to

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[300] Hearing Tr. at 56 (Mr. Chaddick)) (Exhibit US-24).
[301] ITC Report at 16.
[302] Post Hearing Brief of Tubos de Acero de Mexico, SA (May 18, 2001) (public version) at 8 (Exhibit US-25).
[303] Mexico's First Submission, para. 206.
[304] ITC Report at 16.
[305] *See* Mexico's First Submission, para. 206.
[306] Mexico's First Submission, para. 206.

export OCTG casing and tubing to the United States because prices in the United States were significantly higher than in other markets. Specifically, Mexico contends that the ITC's finding of a price differential was based on "anecdotal and contested evidence."[307] It also suggests that the evidence relied on by the ITC was supplied only by the U.S. producers.[308]

289. Mexico has misstated the ITC's analysis of this issue. The purportedly "anecdotal" reports in question were sworn statements by some of the largest OCTG distributors in the world, not solely U.S. producers.[309] One such distributor explained that his company regularly handled the OCTG needs of some of the world's major oil companies.[310] He testified that his company regularly asked for and received bids from OCTG producers, both U.S. and foreign.[311] The witness testimony received by the Commission was consistent with the reports of virtually all responding purchasers, who indicated that despite the discipline imposed by the orders, subject imports are never more expensive than the domestic like product and often are less expensive.[312] As to Mexico's preferred reading of the evidence, the ITC specifically stated that it considered – but was not persuaded by – the arguments of foreign producers that these price differences were exaggerated.[313] In short, the ITC conducted an independent investigation of this issue by considering the relevant evidence submitted by many parties, and that this evidence demonstrated the existence of a substantial price gap between the United States and the rest of the world.

290. Together, the evidence concerning the import volume trends in the original investigation, the importance of the U.S. market, Tenaris's desire for global contracts, the desire of its end users to purchase imports in this market, the evidence of import barriers on OCTG and related products, and the price gap between world markets and the United States strongly supports the ITC's finding that subject producers had strong incentives to shift into this market and that the subject imports were likely to increase in volume. Mexico's arguments to the contrary are without merit.

291. Fourth, Mexico argues that the ITC could point to only one trade barrier in third

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[307] Mexico's First Submission, para. 207.

[308] Mexico's First Submission, para. 207.

[309] *See, e.g.*, Hearing Tr. at 54 (Mr. Stewart) ("International prices are significantly below those prevailing in the United States; in most cases 20 to 25 percent below.") (Exhibit US-24); *id*. at 56 (Mr. Chaddick) ("{Tenaris's} prices in international {markets} have been as much as 40 percent lower than United States prices.").

[310] Hearing Tr. at 56 (Exhibit US-24).

[311] Hearing Tr. at 56 (Exhibit US-24).

[312] ITC Report at 19-20.

[313] ITC Report at 20. As noted above, the "positive evidence" standard does not preclude the existence of any evidence that runs counter to an investigating authority's conclusion. If it did, the standard of review for panels in Article 17.6(i) of the AD Agreement would be superfluous. Article 12.2 requires the investigation authority to address "issues of fact and law considered material by the investigating authority." The ITC fulfilled that obligation in the review, the Mexico has not asserted otherwise.

country markets, the 67 percent dumping duty in Canada against imports from Korea.[314] Mexico appears to overlook the fact that the ITC examined import barriers that the producers of casing and tubing faced in other countries and on related products (lower-priced products that were produced in the same facilities as casing and tubing) in the United States. The ITC took into consideration that OCTG producers in four of the five countries subject to the sunset review at issue (Mexico, Argentina, Japan, and Korea) faced import restrictions in the United States on a variety of other pipe and tube products.[315] Moreover, the ITC reasonably took into account the Canadian antidumping duty on casing from Korea, given that the Korean industry is heavily export-dependent,[316] Canada is the second-largest regional market in the world, and the Canadian duty was relatively high. The Commission's conclusion that increased exports would be likely to enter the U.S. market is properly based on "positive evidence" concerning the existence of import barriers.

292. Finally, Mexico disputes the ITC's finding that the industries of the subject countries are "dependent on exports for the majority of their sales." Significantly, Mexico does not challenge the finding as a factual matter.[317] Mexico does not, for example, address the ITC's finding that Japan and Korea in particular have "very small home markets and depend nearly exclusively on exports."[318] Nor does Mexico dispute that these producers entered the U.S. market in significant quantities in the original investigation, which was the most recent period during which there were no orders in effect.[319] Mexico misrepresents the ITC's conclusion as based "simply [on] the observation that certain companies have been successful in exporting," and fails to address the actual basis of the ITC's finding, which was made in consideration of all of the record facts discussed above.

293. In sum, the ITC's findings on the likely volume of imports are based on an unbiased and objective evaluation of the relevant facts and was supported by positive evidence.

b. The ITC's Findings on the Likely Price Effects of Imports

294. Mexico challenges the ITC's finding that revocation of the orders would likely result in negative price effects.[320] Before addressing Mexico's specific arguments, it may be useful to review the basis for the ITC's finding.

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[314] Mexico's First Submission, para. 208.

[315] ITC Report page 20.

[316] The United States directs the Panel's attention to Figure II-1on page II-5 of the ITC Report, which shows that the percentage of worldwide rig counts in 2000 was as follows: United States – 47.91 percent, Canada – 17.99 percent, Latin America – 11.87 percent, Middle East – 8.16 percent, Far East – 7.32 percent, and Europe and Africa – 6.75 percent.

[317] Mexico's First Submission, para. 209.

[318] ITC Report page 20.

[319] ITC Report page 20.

[320] Mexico First Submission, paras. 211-216.

295. The ITC determined that "in the absence of the orders, casing and tubing from Argentina, Italy, Japan, Korea, and Mexico likely would compete on the basis of price in order to gain additional market share."[321] The ITC further determined that "such price-based competition by subject imports likely would have significant depressing or suppressing effects on the prices of the domestic like product."[322] These conclusions rested on a number of findings, including:

- the likely significant volume of imports;
- the high level of substitutability between the subject imports and the domestic like product;
- the importance of price in purchasing decisions;
- the volatile nature of U.S. demand;
- the underselling by the subject imports in the original investigations and the current review period.[323]

296. The United States notes that Mexico has not seriously challenged any of these findings. As explained above, Mexico's contentions concerning the likely volume of imports are without merit. Mexico has not challenged the ITC's findings with respect to substitutability. Mexico's remaining arguments are groundless as explained below.

297. Contrary to Mexico's characterization, the ITC never indicated that underselling by subject merchandise was the "key" to its analysis and that other factors were "ancillary."[324] Rather, the various factors identified by the ITC each contributed to the ITC's likely price effects findings. As stated by the ITC:

> Given the likely significant volume of subject imports, the high level of substitutability between the subject imports and domestic like product, the importance of price in purchasing decisions, the volatile nature of U.S. demand, and the underselling by the subject imports in the original investigations and during the current review period, we find that in the absence of the orders, casing and tubing form Argentina, Italy, Japan, Korea, and Mexico likely would compete on the basis of price in order to gain additional market share. We find that such price-based competition by subject imports likely would have significant depressing or suppressing effects on prices of the domestic like product.[325]

Obviously, there are no "key" or "ancillary" factors in this analysis.

298. Moreover, the ITC's finding concerning price underselling is fully supported by the

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[321] ITC Report at 21.
[322] *Id.*
[323] *Id.*
[324] Mexico First Submission, paras. 211, 213, 216.
[325] ITC Report at 21 (footnote omitted).

evidence. Mexico does not dispute the Commission's finding that there was significant underselling in the original investigation prior to the imposition of the orders.[326] Likewise, Mexico does not dispute the Commission's finding that limited price comparisons during the review period also showed price underselling.[327] Nor does Mexico dispute that, consistent with observed price underselling during the review period, virtually all responding purchasers indicated that subject imports were never more expensive than the domestic like product and often were less expensive.[328] Moreover, Mexico completely ignores in its submission that underselling by subject imports during the original investigations drove down U.S. prices.[329] This evidence, which Mexico has not refuted or even challenged, strongly supports the ITC's finding on likely price effects, for it shows the effect of subject imports on U.S. prices in the absence of antidumping and countervailing duty orders.

299. The ITC recognized and expressly acknowledged that price comparisons during the review period were limited in number, a result of the lower volume of subject imports after the disciplining effects of the orders.[330] While Mexico asserts that the ITC "downplayed" underselling observed in the review period, the point is instead that these price comparisons were consistent with price comparisons pre-dating the orders. The price comparisons were also consistent with the reports of virtually all responding purchasers with respect to prices. Moreover, as noted, underselling was only one of the factors that led the ITC to conclude that subject imports likely would have significant depressing or suppressing effect on prices for the domestic like product.[331]

300. With respect to the significance of price in purchasing decisions, Mexico contends that "{p}rice is an important, although not determinative, factor to purchasers."[332] The ITC, however, never found that price was a "determinative" factor; it simply held that "price is a very important factor in purchasing decisions."[333] Given that Mexico concedes that price is an "important" factor,[334] it would appear that Mexico has no basis to complain about this finding.

301. In any event, the record plainly showed that purchasers identified "price" as the most important factor in purchasing decisions far more often than any other factor except for "quality," and that price far outstripped quality among purchasers ranking their second and third most

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[326] ITC Report at 20-21.
[327] ITC Report at 21.
[328] ITC Report at 19-20.
[329] *Id.* at 20-21.
[330] ITC Report at 21.
[331] Mexico's decision to feature the remarks of an individual ITC commissioner is puzzling given that no other commissioner joined her remarks, and given that the ITC's determination was by a vote of six to zero. Mexico's First Submission, para. 212.
[332] Mexico's First Submission, para. 215.
[333] ITC Report at 21.
[334] Mexico's First Submission, para. 215.

important factors.[335] Furthermore, given that all parties agreed that subject casing and tubing was interchangeable with the domestic like product,[336] and that customers would accept any high-quality, API-certified product regardless of origin,[337] the record demonstrates that quality would be less of an issue in purchasing decisions, increasing the importance of price. These facts clearly support the ITC's finding on the importance of price.

302. Mexico's assertion that purchasers ranked "product availability as their primary purchasing criterion just as frequently as price" is belied by the record.[338] In fact, the very page of the staff report cited by Mexico indicates that no purchaser ranked product availability as the most important factor in their purchasing decisions, whereas nine purchasers ranked price as the most important factor in their purchasing decisions.[339] Similarly inaccurate is Mexico's assertion that Commission staff reported no clear trend "in response to the question."[340] Because the discussion immediately preceding Mexico's assertion deals with purchasers only, the inference is created that purchasers indicated no clear trend.[341] In fact, Commission staff reported that importers did not clearly indicate whether price or non-price factors were more significant in comparisons. In any regard, the importers' responses generally are consistent with the reports of purchasers that price, as well as quality, is an important factor in purchasing decisions.

303. Mexico's notation that purchasers rated the importance of several factors such as quality fractionally higher than or equal to price misses the point.[342] The data are consistent with the ITC's finding that price is a very important factor. Those data are reflected in a rating by 18 purchasers on the importance of various factors.[343] On the rating, the number "2" indicates the factor is "very important," a "1" indicates that the factor is "important," and "0" means "not important."[344] On this scale, "Lowest price" received an average score of 1.8, very close to the highest possible score for importance. Similarly, "Discounts offered," a factor directly relating to price, also received an average rating of 1.8. Both these ratings are consistent with the ITC's finding, which Mexico has conceded in its first submission, that price is a very important factor in purchasing decisions. That some other factors also scored high on this scale does not somehow disprove the importance of price.

304. Mexico apparently concedes that U.S. demand for OCTG is volatile. Mexico's sole

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[335] *Id.* at II-17.
[336] *Id.* at 12.
[337] *Id.*
[338] Mexico's First Submission, para. 215.
[339] ITC Report at II-17.
[340] Mexico's First Submission, para. 215.
[341] *See* Mexico's First Submission, para. 215.
[342] Mexico's First Submission, para. 215.
[343] Mexico's First Submission at 215, citing ITC Report at II-19.
[344] ITC Report at II-19.

contentions with respect to demand is that the ITC failed to explain why this factor was significant.[345] Mexico's contention is wrong. The ITC explained that certain forecasts showed that demand for OCTG was likely to remain strong in the near future.[346] Nevertheless, all forecasts are by their nature imprecise and such forecasts are inherently suspect given the volatility of the forces affecting oil and gas supply and demand globally.[347] Thus, as it considered the likely effect of revoking these orders, the ITC could not assume that strong levels of demand would insulate domestic producers from the negative price effects of subject imports.[348]

305. In conclusion, Mexico's criticisms of the ITC's findings with respect to price effects are without merit. Assuming *arguendo* that Article 3 applies to sunset reviews under Article 11.3, the ITC's findings on this point should be found to be consistent with the requirements of Article 3.

c. The ITC's Findings on the Likely Impact of Imports

306. Mexico challenges the ITC's finding that revocation of the orders would likely result in an adverse impact on the domestic industry.[349]

307. The ITC found that the condition of the domestic industry had improved since the antidumping duty orders had been imposed, and that the current condition of the domestic industry was "positive."[350] Mexico asserts that indicia of this positive state of the domestic industry constitute evidence that injury would not be likely if the orders were revoked.[351] Mexico does not dispute, however, the Commission's finding that "the industry recovered after the orders were imposed and appears to have benefitted from the discipline imposed by the orders."[352] Morever, as the ITC explained, conditions would change significantly upon revocation of the orders. As the ITC documented extensively, if the orders were revoked, there would likely be a significant increase in the volume of subject imports, which would likely compete for increased market share with the domestic like product on the basis of price, and have significant depressing or suppressing effects on prices for the domestic like product, leading to a significant adverse

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[345] Mexico's First Submission, para. 214.

[346] ITC Report at 15.

[347] *Id*.

[348] It should also be noted that there was no need for the ITC to demonstrate that the OCTG market had been "unusually volatile"; the ITC made clear in its discussion of the point that OCTG market is always volatile. Id.

[349] Mexico's First Submission, paras. 217-220.

[350] ITC Report at 22. The ITC noted that domestic producers' shipments fluctuated dramatically during the period of review, declining from 1,410,088 short tons in 1998 to 1,055,770 short tons in 1999, and rising again to 2,005,644 short tons in 2000. ITC Report at 22. Financial results were similarly volatile: from 1995 to 1997 operating income increased from a loss of $0.6 million to a profit of $174 million, before declining to a loss of $129 million in 1999, and then rising to a profit of $130 million in 2000. *Id.*

[351] Mexico's First Submission, paras. 219-220.

[352] ITC Report at 22.

impact on the domestic industry. Thus, the current state of the industry is not, as Mexico asserts, evidence somehow disproving the Commission's likely adverse impact finding.

308. Mexico suggests that the only evidence relied on by the Commission in its adverse impact analysis was information from the original investigation.[353] Indeed, the impact of subject imports on the domestic industry prior to the entry of the orders is important because it represents the most recent period during which subject imports competed in the U.S. market free of the disciplining effects of the orders. Mexico's suggestion that those data may not be considered is contrary to the purpose of Article 11.3; that is to determine whether injury is likely to continue or recur if the restraining effects of the order are lifted. Moreover, Mexico is incorrect in stating that data from the original investigation was the sole or primary basis for the ITC's analysis. The ITC conducted a full review and relied extensively on information from the years between the entry of the orders and the completion of the review in reaching its sunset decisions. That the Commission also considered evidence from the time period prior to the entry of the orders is in no way improper.[354]

309. Mexico also argues essentially that the ITC's findings as to the likely impact of imports on the domestic industry are flawed because of the alleged deficiencies in the findings regarding the likely volume and price effects of imports, on which the ITC's impact finding rests. Mexico's arguments concerning volume and price effects are without any merit, for the reasons discussed above, and its claim regarding the adverse impact finding should be rejected for the same reasons.

L. The ITC Sunset Determination on OCTG from Mexico Is Not Inconsistent with Article 3.4 of the AD Agreement

310. Mexico claims that the ITC acted inconsistently with Article 3.4 of the AD Agreement by failing to evaluate all of the economic factors enumerated therein in its OCTG sunset determination.[355] Article 3.4 provides:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or

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[353] Mexico's First Submission, para. 218.

[354] If it is Mexico's intention to suggest that consideration of information from the original determination automatically results in a determination that revocation of the orders would be likely to lead to the continuation or recurrence of injury, it should be recalled that in the companion review of the orders covering drill pipe, in which the Commission also considered information from the original investigations, the Commission determined that revocation of the order on drill pipe from Mexico and Argentina would not be likely to lead to the continuation or recurrence of injury. ITC Report at 1.

[355] Mexico First Submission, paras. 221-238.

> utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

(Emphasis added).

311. As explained above, the provisions of Article 3 do not govern sunset reviews. Therefore, the ITC sunset determination in OCTG from Mexico cannot be found to be inconsistent with Article 3.4.

312. In addition to the reasons given above regarding Article 3 in general, there are further textual indications in Article 3.4 as to why it specifically is not applicable to sunset reviews. There may be no "dumped imports" at the time of a sunset review, and consequently there may be no "impact" for the investigating authority to examine. There also may not be any "actual and potential" declines evident or reflected in the information before the investigating authority at the time of the sunset review, by virtue of the absence of imports. In short, the obligations described in Article 3.4 cannot practicably be applied to all sunset reviews, and certainly could not be applied to sunset reviews in the same systematic and comprehensive manner that has been required in original dumping investigations.

313. Mexico fails to address the textual indications demonstrating that Article 3.4 does not apply to sunset reviews. Mexico quotes from several panel and Appellate Body reports, none of which involved a sunset review.[356] The issue of whether Article 3.4 applied to an Article 11.3 review was not before those panels or the Appellate Body. Mexico simply has failed to cite any relevant authority in support of its counter-textual interpretation of the Agreement.

314. Moreover, even if Article 3.4 did apply, while all enumerated factors must be evaluated, not all are necessarily material in any particular case. As the *HFCS* panel explained, "consideration" of the factors is required in every case, although such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry and therefore is not relevant to the particular determination.[357] Investigating

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[356] Mexico's First Submission, paras. 221, 223–225, and 230, citing Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted February 24, 2000; Appellate Body Report, *Thailand – Anti–Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/ABR, adopted April 5, 2001; Panel Report, *Thailand – Anti–Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted April 5, 2001; Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted August 18, 2003; Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted on May 19, 2003.

[357] Panel report on *Mexico - Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, para. 7.128.

authorities are not required in each case to make a specific finding on each enumerated factor in Article 3.4.[358] If, upon evaluation, the authority determines that a particular factor is not material to the investigation, the authority is not required to discuss that factor in its notice or report.

315. In this review, the Commission's staff report clearly addresses each of the factors enumerated in Article 3.4. The report, and the data therein pertaining to each of the relevant factors constitutes "positive evidence" demonstrating that the Commission evaluated each of the enumerated factors.[359] The ITC considered, cited extensively to, and appended to its published determination the report of the ITC staff in the OCTG sunset review, which presents detailed information concerning each of the Article 3.4 factors, as follows:

[358] *See EC Pipe Fittings*, para. 161.
[359] *See EC-Pipe Fittings*, AB Report, para. 132.

Factor (* indicates that the ITC discussed this factor specifically)	**Location in ITC Report**
Declines (actual or potential) in	
Sales *	p. III-6, Table III-9
Profits *	p. III-6, Table III-9
Output *	p. III-1, Table III-1
Market Share *	p. IV-3, Table IV-1
Productivity	p. III-4, Table III-7
Return on Investments	p. III-6, Table III-9
Capacity Utilization *	p. III-1, Table III-1
Factors Affecting Domestic Prices	Part V
Margin of Dumping	p. V-1
Actual or Potential Negative Effects on:	
Cash Flow	p. III-6, Table III-9
Inventories	p. III-4, Table III-5
Employment	p. III-4, Table III-7
Wages	p. III-4, Table III-7
Growth	p. III-6, Table III-9
Ability to Raise Capital or Investments *	p. III-13, Table III-32

316. Mexico's assertion that the ITC considered the wrong dumping margin pertains to the Commerce determination, not to the ITC's. Mexico's assertion is addressed at Section B.3.

M. The ITC Sunset Determination on OCTG from Mexico Is Not Inconsistent with Article 3.5 of the AD Agreement

317. Mexico makes several assertions attempting to demonstrate that the ITC's determination was not consistent with Article 3.5. Article 3.5 provides:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

(Emphasis added).

318. As explained above, the provisions of Article 3 are not applicable to sunset reviews. In addition to the reasons given above, there are further textual indications in Article 3.5 that it specifically is not applicable to sunset reviews.

319. First, Article 3.5 refers to the "dumped imports and speaks of such imports in the present tense as "causing injury." However, in a sunset review there may be no dumped imports. As a result of the order, such imports may have decreased or exited the market altogether, or if they have maintained their presence in the market, they may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties.

320. Second, Article 3.5 refers to existing "injury" and describes an existing causal link between dumped imports and that injury. However, in a sunset review, with an antidumping order in place, there may be no current injury or causal link; indeed, it would be surprising if there were given the remedial effect of an antidumping duty order. This is implicit in the reference in Article 11.3 to the "continuation or recurrence of injury."

321. Third, under Article 3.5, investigating authorities are obliged only to "examine any known factors other than the dumped imports which are at the same time injuring the domestic industry" and ensure that the injurious effects caused by those factors are not attributed to the dumped imports (emphasis added).[360] As the panel found in *Thai Steel*, the obligation to

[360] The ordinary meaning of the term *known* connotes a great degree of certainty as to the truth of certain facts. For example, the *New Shorter Oxford English Dictionary* (1993) defines the term as "learned, apprehended mentally; familiar, . . . generally known or recognized." Another source defines "known" as "proved, satisfactorily specific, or completely understood." Webster's II New Riverside University Dictionary (1984). A third source defines "know" as "to perceive or understand as fact or truth; to apprehend clearly and with certainty." The Random

examine such factors does not oblige investigating authorities to seek out and examine in each case, on their own initiative, the effects of all possible factors other than the dumped imports that may be causing injury to the domestic industry under investigation.[361] If a particular factor is not known to the investigating authorities, or if that factor is not "at the same time injuring the domestic industry," then the investigating authorities are under no obligation to examine that factor in the course of their causality analysis.

322. In sum, it is clear from the text of Article 3.5 that the obligations contained in that article do not extend to sunset reviews. But even if it did apply Mexico has not demonstrated a violation of that Article.

323. Mexico asserts that the ITC's determination is inconsistent with Article 3.5 because the performance of the domestic industry was positive during the review period, while the orders under review were in place.[362] Mexico made a similar assertions with respect to Article 3.1 (analysis of likely adverse impact) and Article 3.4. Positive indicators of industry health while the orders are in effect do not preclude a finding that revocation of the orders would be likely to lead to continuation or recurrence of injury. Mexico ignores that Article 11.3 expressly contemplates an examination of the likelihood of a "recurrence" of injury. Such an examination plainly recognizes that an industry that was injured prior to the entry of the orders may not experience injury during the pendency of the orders, yet injury may be likely to recur if the orders are revoked. Indeed, the imposition of the orders in the first instance may be responsible for the industry's improved performance.

324. In Mexico's view, the ITC failed to comply with the obligations of Article 3.5 because the ITC evaluated the subject imports on a cumulative basis.[363] But Mexico offers no argument in support of its assertion. Mexico does provide argument, however, with respect to its contention that the ITC's cumulative evaluation constitutes a violation of Article 3.3. The United States addresses that argument later in this submission, and respectfully refers the panel to that discussion.

325. Mexico also argues that, even if a cumulative analysis is permitted, the ITC failed to establish a causal link between the cumulated subject imports and likely injury to the domestic industry. In particular, Mexico asserts that the ITC failed to consider "other characteristics of the market (*e.g.*, expected changes in demand)" in the section of its decision discussing the likely impact of revocation on the domestic industry.[364] Even if Article 3.5 were applicable, however, Mexico has not identified any "other causal factors" the ITC failed to consider.

House Dictionary of the English Language, Second Edition, Unabridged (1987).

[361] *See* Report of the Panel in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from* Poland, WT/DS122/R, April 5, 2001, para. 7.273 ("*Thai Steel*").

[362] Mexico First Submission, para. 241.

[363] Mexico First Submission, paras. 239-244.

[364] Mexico First Submission, para. 243.

326. The ITC described a number of conditions of competition that informed its analysis in the sunset review.[365] In particular, these included a review of forecasts of future demand, which suggested that demand would remain strong.[366] Strong demand would be expected to help an industry's performance, and would not be considered another factor that is causing injury, as Mexico's argument appears to suggest.

327. The ITC explained that notwithstanding projections of strong demand, revocation of the orders was likely to lead to the continuation or recurrence of injury. In addition to the detailed explanation of the likely volume, price effects, and impact of dumped imports upon revocation of the orders, the ITC noted that the dumped imports captured market share from the domestic industry and caused price effects despite a significant increase in apparent domestic consumption (which reflects demand) in 1993 and 1994 as compared to 1992.[367]

328. Mexico's final assertion with respect to Article 3.5 – that the ITC failed to base its determination on the effects of dumping – is merely repetitious of its other contentions.[368] As discussed in respect to Articles 3.3 and 11.3 below, Article 11.3 does not prohibit a cumulative analysis in sunset reviews. As addressed previously in respect to Article 3.1, the ITC's analysis was based on an objective evaluation of the evidence of record.

N. The Time Frame in Which Injury Would Be Likely to Continue or Recur

1. The U.S. Statutory Provisions as to the Time Frame in Which Injury Would Be Likely to Continue or Recur Are Not Inconsistent With Articles 11.3 and 3 of the AD Agreement

329. Mexico claims that the U.S. statutory requirements contained in sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as amended, are inconsistent "as such" with AD Agreement Articles 11.3 and 3.[369] Sections 752(a)(1) and 752(a)(5) instruct the ITC in a sunset review to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and to "consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."[370]

330. Mexico misconstrues Article 11.3. Article 11.3 does not specify the time frame relevant to a sunset inquiry. Article 11.3 only requires a determination of whether revocation "would be

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[365] ITC Report, pages 14-16.

[366] ITC Report, pages 15-16.

[367] ITC Report, page 22.

[368] Mexico First Submission, para. 244.

[369] Mexico First Submission, paras. 265-270. Sections 752(a)(1) and (a)(5) are codified at 19 U.S.C. § 1675a(a)(1) and (5). In the heading preceding paragraph 265 of its submission (heading "G') and in the Executive Summary of its claims (para. 57), Mexico asserts that these U.S. statutory provisions are also inconsistent with AD Agreement Article 11.1.

[370] 19 U.S.C. §§ 1675a(a)(1), 1675a(a)(5) (Exhibit MEX-24).

likely to lead to continuation or recurrence of injury." The words "to lead to" affirmatively indicate that the Agreement contemplates the passage of some period of time between the revocation of the order and the continuation or recurrence of injury. This word choice indicates that there may be several steps that will occur sequentially over a period of time between revocation of the order and the resultant effects of such revocation on the domestic industry. The deliberate choice of this language is apparent by contrasting it to the use of the present tense in Article 3.5 and the reference to "imminent" injury in Article 3.7. Article 11.3 reflects that an order will have been in place for at least five years (and more for a transition order), and that the consequences of revocation of that order may not be immediate.

331. In the absence of any specific provision in Article 11.3, Members remain free to determine under their own laws and procedures the time frame relevant in sunset inquiries. It is inherently reasonable for the United States to consider the likelihood of continuation or recurrence "within a reasonably foreseeable time" and that the "effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

332. Mexico attempts to inject the "imminent" and "special care" terms from Articles 3.7 and 3.8 into an Article 11.3 sunset review. As previously explained, Article 3 does not apply to Article 11.3 sunset reviews. In particular, Articles 3.7 and 3.8 by their terms pertain to original threat determinations, not to sunset reviews (notwithstanding Mexico's attempt to extend the application of these provisions to all "cases involving future injury").[371]

333. In sum, the AD Agreement is silent on the question of the relevant time frame within which injury would be likely to continue or recur. This is left to the discretion of Members, and the standard adopted in U.S. law is reasonable. As such, it cannot be found to be inconsistent with Article 11.3 or any provision of Article 3 (assuming *arguendo* that Article 3 applies to sunset reviews).

2. The ITC's Application of the Statutory Provisions as to the Time Frame in Which Injury Would Be Likely to Continue or Recur Was Not Inconsistent With Articles 11.3 and 3 of the AD Agreement

334. Mexico claims that the ITC's application of the U.S. statutory requirements contained in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as amended, in the sunset review on OCTG from Mexico was inconsistent with AD Agreement Articles 11.3 and 3.[372]

335. As explained in the preceding section, Article 11.3 is silent on the time frame relevant to a sunset review and imposes no obligations in this respect. Accordingly, the ITC cannot be

[371] Mexico First Submission, paras. 245-49, 268-269.
[372] Mexico First Submission, paras. 245-49, 271-272.

found to have acted inconsistently with Article 11.3 or Article 3 by failing to specify the precise period that it considered relevant.

O. The ITC Did Not Act Inconsistently with Any Provision of the AD Agreement by Conducting a Cumulative Analysis in the OCTG Sunset Review

1. The AD Agreement Does Not Prohibit Cumulation in Sunset Reviews

336. Mexico argues that because cumulation is not expressly permitted in Article 11.3, the ITC is prohibited from engaging in a cumulative analysis in a sunset review.[373] Mexico's position turns elementary principles of treaty interpretation on their head. The treaty interpreter is to interpret the ordinary meaning of the terms of the treaty in their context and in light of the treaty's object and purpose.[374] Accordingly, the genesis of any obligation or right arising under the WTO Agreement is the text of the relevant provision.[375] Absent a textual basis, the rights of Members cannot be circumscribed.

337. Moreover, Mexico's proposed prohibition would be illogical and run counter to an overall object and purpose of the AD Agreement (*i.e.*, to provide a remedy to protect domestic industries from injury caused by dumped imports). The Appellate Body explained the rationale behind the practice of cumulation in investigations in its recent report in *EC - Pipe Fittings*:

> A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not individually be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury.[376]

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[373] Mexico's First Submission, paras. 250-260.

[374] *Vienna Convention on the Law of Treaties*, art. 31(1); *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, Sec. III.B.

[375] *See United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body adopted 6 November 1998, para. 114; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 1 November 1996, Sec. G.

[376] *EC Pipe Fittings*, para. 116.

338. In light of the recognition that imports from a group of countries may cumulatively cause injury even though imports from individual countries in this group do not, it would be illogical to require that sunset reviews be conducted only on a country-specific basis. Such a requirement would permit antidumping duties to expire even though the expiry of the duty would be likely to lead to continuation or recurrence of injury.

339. Mexico's arguments in support of its contention that cumulation is prohibited in sunset reviews are unpersuasive.[377] The one reference in the text of Article 11.3 to "the duty" in the singular is not convincing.[378] The reference to "any definitive anti-dumping duty" is not necessarily to the singular.[379] Moreover, the reference in Article 11.3 to "the duty" is merely descriptive and is not evidence that the drafters intended to prohibit cumulation. To the contrary, cumulation in antidumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Articles 3.3 and 11.3 in the Uruguay Round.[380]

340. Mexico claims that cumulation is inconsistent with "the object and purpose of the sunset provision," which Mexico suggests is the expiry of dumping duties.[381] As a preliminary matter, we note that the relevant principle of treaty interpretation goes to the object and purpose of the treaty, and not particular treaty provisions.[382] To the extent that the purpose of Article 11.3 is relevant, Mexico simply misconstrues it. If that purpose were simply a ministerial rescission of antidumping duties, there would be no need to inquire as to whether expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Article 11.3 is clear that expiry of such duties is only appropriate where it is not likely that revocation would lead to the continuation or recurrence of dumping and injury.

341. Mexico seeks to bolster its argument that cumulation is not permitted in sunset reviews by noting that there is no explicit cross-reference to cumulation or to Article 3.3 in the context of Article 11.[383] This argument has no merit. A cross-reference to an obligation is necessary where the drafters seek to assert a broader obligation. However, there is no need to cross-reference to a permissive authority where a right exists absent its limitation in the Agreement.

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[377] Citing paragraph 162 of the U.S. First Written Submission to the panel in *US - Japan Sunset*, Mexico argues that the United States engaged in a textual analysis that supports Mexico's position. In fact, however, paragraph 162 merely describes U.S. law: it does not engage in the textual analysis of Article 11.3 alleged by Mexico. Mexico's First Submission, para. 254 footnote 220; United States First Written Submission in *US – Steel from Japan*, para. 162.

[378] Contrary to Mexico's assertion in paragraph 254 of its First Submission, Article 11.3 does not refer to "an antidumping duty." Nor does Article 11.3 equate a "duty" with a "measure."

[379] *The New Shorter Oxford English Dictionary* (p. 91) defines "any" as having singular or plural meanings. (Exhibit US-26).

[380] *See, e.g.*, THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1986-1992), (T. Stewart, Ed.) at 1475-1478, 1594, and 1598 (Exhibit US-27).

[381] First Submission of Mexico, para. 253.

[382] *Vienna Convention on the Law of Treaties*, Art. 31(1).

[383] Mexico First Submission, para. 256.

342. The discussion and references by Mexico to *German Sunset* and the Appellate Body's analysis of the 1.0 percent *de minimis* standard and Article 21.3 of the SCM Agreement support the U.S. interpretation rather than the Mexican interpretation. The Appellate Body found that the 1.0 percent *de minimis* standard set out Article 11.9 of the SCM Agreement is not implied in Article 21.3 sunset reviews. Accordingly, the Appellate Body found the U.S. application of the 0.5 *de minimis* standard in sunset reviews was not a violation of Article 21.3.[384] Likewise, here, while the limits on cumulation in Article 3.3 do not apply to Article 11.3 sunset reviews, cumulation is permitted nevertheless, just as the use of a *de minimis* threshold was permitted in *German Sunset*, even if it is not the one found in Article 11.9. Moreover, the question of whether cumulation was permitted in sunset reviews was not before the Appellate Body. That dispute related entirely to the Commerce role in sunset reviews.

343. Finally, Mexico again overlooks the fact that cumulation in antidumping investigations was a widespread practice among GATT contracting parties prior to the adoption of Article 3.3 in the Uruguay Round, even though the Tokyo Round Antidumping Code was silent on the subject.[385]

344. In sum, because Article 11.3 is silent on the subject of cumulation, a prohibition on cumulation in sunset reviews should not be read into Article 11.3.

2. The ITC Did Not Act Inconsistently with Article 3.3 of the AD Agreement Because Article 3.3 Does Not Apply to Sunset Reviews

345. Mexico argues that Article 3.3 restricts cumulation solely to original investigations, and prohibits cumulation in Article 11.3 sunset reviews.[386] Mexico also argues that if Articles 3.3 and 11.3 do not preclude cumulation in sunset reviews, then the obligations of Article 3.3 apply so as to render the ITC's cumulative analysis in the Mexico OCTG case inconsistent with the terms of that provision.[387] Mexico's attempts to read the requirements of Article 3.3 into Article 11.3 should be rejected.

346. As explained above, the provisions of Article 3 are not applicable to sunset reviews. Moreover, Mexico's position is directly at odds with recent panel and Appellate Body reports construing the meaning of Article 3.3.

347. Article 3.3 provides that:

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[384] *US – German Sunset*, para. 97.

[385] *See, e.g.*, THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1986-1992), (T. Stewart, Ed.) at 1475-1478, 1594, and 1598 (Exhibit US-27).

[386] *See* Mexico First Submission, para. 255.

[387] Mexico First Submission, paras. 261-264.

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

348. As the panel in *Japan Sunset* concluded, while AD Agreement Article 3.3 establishes certain prerequisites for the conduct of a cumulative injury analysis in antidumping investigations, it does not apply to Article 11.3 reviews.[388] In the words of the panel: "We are of the view that Article 3.3, by its own terms, is limited in application to investigations and does not apply to sunset reviews."[389] Mexico's suggestion that, if cumulation is permitted in sunset reviews, the limitations of Article 3.3 apply, is also in conflict with an Appellate Body report. In *German Sunset*, the Appellate Body found that, in the SCM Agreement, the *de minimis* standard found in Article 11.9, the parallel provision to Article 5.8 of the AD Agreement, does not apply to Article 21.3 sunset reviews or, by logical extension, to Article 11.3 reviews under the AD Agreement.

349. Contrary to Mexico's assertion,[390] whether Article 3.3 applies to Article 11.3 is not an issue of first impression. As noted above, the panel in *Japan Sunset* stated that Article 3.3 is limited by its own terms to investigations, and does not apply to sunset reviews.[391]

350. In any regard, by the plain meaning of Article 3.3's text – "subject to anti-dumping *investigations*" – the limitations on cumulation there imposed apply only to investigations.[392] Article 11 contains no cross-reference to Article 3 that would render it applicable to Article 11 reviews. Moreover, Article 3 does not cross-reference Article 11. The lack of similar cross-references with respect to Articles 3 and 11 provide contextual support that Article 3's negligibility requirement is inapplicable to Article 11 reviews.[393]

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[388] *Japan Sunset Panel*, para. 7.102.

[389] *Japan Sunset Panel*, para. 7.102.

[390] Mexico First Submission, para. 259.

[391] *Japan Sunset Panel*, para. 7.102. We also note that Argentina raised this issue in its challenge to the U.S. OCT sunset review. DS268. The panel report in that dispute has not yet been issued.

[392] *See Japan Sunset Panel,* paras. 7.97-7.98.

[393] *See Japan Sunset Panel*, paras. 7.95, 7.98; *cf.*, *id.*. paras. 7.27, 7.68, 7.71 (noting that the lack of cross-reference in AD Agreement Article 11 to the provisions of Article 5 indicate that the drafters did not intend for the provision of Article 5 to apply to sunset reviews); *German Sunset*, paras. 81 and 105 (noting the same with respect to the parallel provisions in the SCM Agreement).

351. The reference in Article 3.3 to Article 5.8 likewise makes clear that the requirements of Article 3.3 are inapplicable to Article 11 reviews. The text of Article 5.8 limits its application to antidumping investigations.[394] As the panel recently stated in *Japan Sunset*: "There is . . . no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews. Nor is there any such suggestion or requirement in the other provisions of Article 5."[395]

352. Moreover, there is no reference in Article 11.3 to Article 5 (in contrast to Article 11's reference to Articles 6 and 8). In reversing a panel's determination that the *de minimis* threshold applicable to countervailing duty investigations applied to sunset reviews, the Appellate Body stated:

> [T]he technique of cross-referencing is frequently used in the *SCM Agreement*. ... These cross-references suggest to us that, when the negotiators of the *SCM Agreement* intended that the disciplines set forth in one provision be applied in another context, they did so expressly. In light of the many express cross-references made in the *SCM Agreement*, we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9 [of the SCM Agreement].[396]

353. More recently, the panel in *Japan Sunset* rejected Japan's contention that the negligibility standard of Article 5.8 applies to Article 11.3 reviews:

> [A] textual interpretation of Article 3.3 allows an examination consistent with our examination relating to the alleged application to sunset reviews of the *de minimis* standard in Article 5.8. That is, on the basis of our textual analysis of Article 5 made in reaching our finding that the *de minimis* standard of Article 5.8 does not apply to sunset reviews (*supra,* para. 7.70), we consider that the text of Article 5 similarly fails to support the proposition that the negligibility standard of Article 5.8 applies to sunset reviews.[397]

354. Japan did not appeal this finding.

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[394] AD Agreement, Art. 5.8 ("An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible.") (underline added).

[395] *Japan Sunset Panel*, paras. 7.70, 7.103.

[396] *German Sunset,* para. 69.

[397] *Japan Sunset Panel,* Panel Report, para. 7.103.

355. In addition, the application of Article 5.8's negligibility thresholds would be unworkable in the context of sunset reviews. In sunset reviews, the investigating authorities are tasked with determining *likely* import volumes not only at some point in the future, but also under different conditions, namely a market without the discipline of an antidumping order. Precise numerical thresholds appropriate for characterization of current import volumes in investigations of current injury, or immediate threat thereof, are simply not workable for characterizing likely volumes of dumped imports in determinations of whether injury will continue or recur in the future and under different conditions. The predictive nature of sunset reviews suggests a need for a flexible standard for cumulation, rather than the strict numerical negligibility threshold applied in the investigative phase.

356. In sum, because of the express language of both Articles 3.3 and 5.8, the lack of any cross-reference in Article 11.3 to either Articles 3.3 or 5.8, findings in recent panel and Appellate Body reports, and the impracticability of applying a strict numerical threshold to likely future import volumes, any restrictions on cumulation contained in Articles 3.3 and 5.8 do not extend to sunset reviews.

P. The Decisions of Commerce and the Commission Complied with Article VI of the GATT 1994, Articles 1, 18.1, and 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement

357. In Section XI of its First Submission, Mexico claims that the measures identified by Mexico in its panel request are inconsistent with Article VI of the GATT 1994, Articles 1, 18.1 and 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement.[398] These claims are consequential claims in that they depend upon a finding that some other provisions of the AD Agreement or GATT 1994 have been breached.[399] None of the "measures" identified by Mexico, however, is inconsistent any other provision of the WTO Agreement. They are therefore not inconsistent with Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement.

Q. The Specific Remedy Sought by Mexico Is Inconsistent With Established Panel Practice and the DSU

358. Finally, Mexico has requested this Panel to recommend that the DSB request the United States to immediately revoke the antidumping duty on OCTG imports from Mexico.[400] In so doing, Mexico has requested a specific remedy that is inconsistent with established GATT/WTO

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[398] Specifically, Mexico refers to "[t]he Department's Sunset determination, the Commission's Sunset Determination, the Department's Fourth Administrative Review Determination Not to Revoke, the Department's Determination to Continue the Order, and 19 U.S.C. §§ 1675a(a)(1) and (5), 19 U.S.C. § 1675a(c)(1), the SAA (pages 889-890), the SPB (Section II.A.3) ...." Mexico First Submission, para. 367.

[399] *See Japan Sunset Panel,* para. 8.1.

[400] Mexico First Submission, para. 377.

practice and the DSU. Therefore, should the Panel agree with Mexico on the merits, the Panel nonetheless should reject the requested remedy, and instead should make a recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its antidumping measure into conformity with its obligations under the AD Agreement.

359. In the first place, the text of DSU Article 19.1 is absolutely clear on the recommendation that a panel is to make in such a case: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." (Emphasis added.) In short, specific remedies – such as the ones that Mexico seeks here – are not authorized by the text of the DSU.

360. The specific remedy[401] of revocation requested by Mexico goes far beyond the type of remedies recommended by the overwhelming preponderance of prior GATT 1947 and WTO panels. In virtually every case in which a panel has found a measure to be inconsistent with a GATT obligation, panels have issued the general recommendation that the country "bring its measures . . . into conformity with GATT."[402] This is true not only for GATT disputes, in general, but for disputes involving the imposition of antidumping (and countervailing duty) measures, in particular.[403]

361. The requirement that panels make general recommendations reflects the purpose and role of dispute settlement in the WTO, and, before it, under GATT 1947. Article 3.4 of the DSU provides that "[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter," and Article 3.7 provides that "[a] solution mutually acceptable to the parties to a dispute . . . is clearly to be preferred." To this end, Article 11 of the DSU directs panels to "consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution." Ideally, a mutually agreed solution will be achieved before a panel issues its report. If this does not occur, however, a general panel recommendation that directs a party to conform with its obligations still leaves parties with the necessary room to cooperate in arriving at a mutually agreed solution.

362. Indeed, a Member generally has many options available to it to bring a measure into conformity with its WTO obligations. A panel cannot, and should not, prejudge by its

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[401] By "specific" remedy, the United States means a remedy that requires a party to take a particular, specific action in order to cure a WTO-inconsistency found by a panel.

[402] *See, e.g., Canada - Measures Affecting Exports of Unprocessed Herring and Salmon,* L/6268, Report of the Panel, adopted 22 March 1988, BISD 35S/98, 115, para. 5.1. The United States will refrain from a lengthy citation of all other panel reports in which panels have made recommendations using similar language; the number of such reports is well in excess of 100.

[403] *See, e.g.*, *Canadian Countervailing Duties on Grain Corn from the United States*, SCM/140 and Corr. 1, Report of the Panel, adopted 28 April 1992, BISD 39S/411, 432, para. 6.2; *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, ADP/92, 40S/205, adopted 27 April 1993, para. 302.

recommendation the solution to be arrived at by the parties to the dispute after the DSB adopts the panel's report.

363. In addition, the requirement that panels issue general recommendations comports with the nature of a panel's expertise, which lies in the interpretation of covered agreements. Panels generally lack expertise in the domestic law of a defending party. Thus, while it is appropriate for a panel to determine in a particular case that a Member's legislation was applied in a manner inconsistent with that country's obligations under a WTO agreement, it is not appropriate for a panel to dictate which of the available options a party must take to bring its actions into conformity with its international obligations.

364. Mexico's proposed remedy is particularly inappropriate in view of the arguments that it makes in this case. Although Mexico contests certain aspects of Commerce's final sunset and fourth review determinations, Commerce could reach the same conclusion in these determinations even if Mexico were to prevail on several of its claims. Likewise, as has been seen, Mexico does not contend that the USITC could not reach an affirmative determination on the evidence before it, but rather that certain findings in reaching an affirmative likelihood determination were erroneous. Thus, even on Mexico's own arguments, it would be possible for the U.S. authorities to reach revised determinations in response to an adverse panel decision that would not necessitate terminating the antidumping order. Especially in this case, it should be for the WTO Member and its investigating authorities to decide how to conform their measures to any adverse panel findings.[404]

365. As the WTO panel in *Korea Stainless Steel*[405] noted:

> [T]he *AD Agreement* is comprised of eighteen separate articles and innumerable obligations. Thus, violations of the *AD Agreement* may take many different forms and have different implications for the anti-dumping measure in question. In our view, Korea's contention that Article 1 of the *AD Agreement* dictates that any violation of the *AD Agreement*, irrespective of its nature and severity, requires the revocation of an anti-dumping measure is unsustainable. Although we do not agree that such an interpretation would render Article 19.1 of the *DSU* a nullity in the strictly legal sense, we do believe that, had the drafters intended to deviate from the general rule of Article 19.1 and *require* revocation of anti-dumping measures in all cases of violation, they would have manifested that intention through a special or

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[404] *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 27 April 1994, para. 596 (panel under Tokyo Round AD Code declined to recommend revocation because "it could not be presumed that a methodology of calculating dumping margins consistent with the Panel's findings on these aspects would necessarily result in a determination that no dumping existed [.]")

[405] *United Stats - Anti-Dumping Measures on Stainless Steel Plate from Korea*, WT/DS179/R, Report of the Panel, adopted February 1, 2001, para. 7.9 (emphasis in original).

additional dispute settlement provision of Article 17 of the *AD Agreement*. (Footnote omitted.)

366. The compliance process under the DSU makes the precise manner of implementation a matter to be determined in the first instance by the Member concerned, subject to limited rights to compensation or retaliation by parties that have successfully invoked the dispute settlement procedures. In Article 19 of the DSU, the drafters precluded a panel from prejudging the outcome of this process in their recommendations.

367. In sum, specific remedies are at odds with the expressed terms of the DSU and established GATT and WTO practice. Therefore, regardless of how the merits of this case are decided, Mexico's request for specific remedies should be rejected.

VI. CONCLUSION

368. Based on the foregoing, the United States respectfully requests that the Panel reject Mexico's claims in their entirety.

List of Exhibits

US-1 *Antidumping Duties; Countervailing Duties; Final Rule* ("*AD/CVD Final Rule*"), 62 Fed. Reg. 27,296 (May 19, 1997)

US-2 *Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders* ("*Sunset Regulations*"), 63 Fed. Reg. 13,516 (March 20, 1998) (codified at 19 C.F.R. part 351)

US-3 19 C.F.R. § 207.60-69

US-4 19 C.F.R. § 351.222

US-5 *Initiation of Antidumping Duty Investigations: Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain,* 59 Fed. Reg. 37,962 (July 26, 1994)

US-6 *Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain*, USITC Pub. 2911, Invs. Nos. 701-TA-363 and 364 (Final) and Invs. Nos. 731-TA-711-717 (Aug. 1995)

US-7 *Antidumping Duty Order: Oil Country Tubular Goods from Mexico*, 60 Fed. Reg. 41,056 (Aug. 11, 1995) ("*Antidumping Duty Order*")

US-8 Decision of the Panel, *In the Matter of: Oil Country Tubular Goods from Mexico*; Final Determination of Sales at Less than Fair Value, USA-95-1904-04 (July 31, 1996); Redetermination on Remand, Final Determination of Sales at Less Than Fair Value: *Oil Country Tubular Goods from Mexico* (A-201-817)(Public Version); Final Panel Order, *In the Matter of: Oil Country Tubular Goods from Mexico*; Final Determination of Sales at Less than Fair Value, USA-95-1904-04 (Dec. 2, 1996)

US-9 *Oil Country Tubular Goods from Mexico; Notice of Termination of Antidumping Duty Administrative Review*, 62 Fed. Reg. 19,309 (Apr. 21, 1997)

US-10 *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 64 Fed. Reg. 53,318 (Oct. 1, 1999)

US-11 *Oil Country Tubular Goods from Mexico; Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke in Part*, 65 Fed. Reg. 54,998 (Sept. 12, 2000) ("*Preliminary Results of Fourth Review*")

US-12 *Oil Country Tubular Goods from Mexico; Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review*, 64 Fed. Reg. 14,213 (March 24, 1999)

US-13 *Oil Country Tubular Goods from Mexico; Preliminary Results of Sunset Review of Antidumping Duty Order*, 65 Fed. Reg. 64,667 (Oct. 30, 2000) ("*Commerce Sunset Preliminary*")

US-14 "Issues and Decision Memorandum of the Full Sunset Review for the Antidumping Duty Order on Oil Country Tubular Goods ("OCTG") from Mexico; Preliminary Results", dated Oct. 30, 2000 ("*Commerce Sunset Preliminary Decision Memorandum*")

US-15 *Hylsa* Case Brief in Sunset Review for the Antidumping Duty Order on Oil Country Tubular Goods From Mexico, (Dec. 11, 2000)

US-16 65 Fed. Reg. 63,889 (Oct. 25, 2000), ITC Notice of Determinations to Conduct Full Sunset Reviews

US-17 65 Fed. Reg. 35,997 (July 10, 2001), ITC Notice of Sunset Review Determinations

US-18 *Pure Magnesium From Canada; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 64 Fed. Reg. 12,977 (March 16, 1999)

US-19 *Steel Wire Rope from the Republic of Korea; Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Antidumping Duty Order in Part,* 62 Fed. Reg. 64,354 (Dec. 5, 1997)

US-20 *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada: Preliminary Results of Antidumping Duty Administrative Reviews and Intent to Revoke in-Part,* 63 Fed. Reg. 37,320 (July 10, 1998)

US-21 *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. AA-1921-197 (Remand), 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Remand), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Remand), USITC Pub. 3526 (July 2002) ("*Usinor* I Remand Determination"): *Separate Views of Vice Chairman Jennifer A. Hillman Regarding the Interpretation of the Term "Likely,"* and *Dissenting Views of Commissioner Stephen Koplan Regarding the Interpretation of the Term "Likely."*

US-22 *Indorama Chemicals (Thailand) Ltd. et al. v. United States International Trade Commission*, Slip Op. 02-105 (U.S. Court of International Trade) (Sept. 4, 2002)

US-23 Brief of Investigating Authority, the U.S. International Trade Commission, to the NAFTA Panel in *Oil Country Tubular Goods from Mexico*, USA-MEX-2001-1904-06, Feb. 8, 2002 (non-proprietary version) (page 46)

US-24 Transcript of May 8, 2001 Hearing Before the U.S. International Trade Commission in *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, Inv. Nos. 701-TA-364 (Review) and 731-TA-711, 713-716 (Review) (Pages 53-59, 200, 205)

US-25 Post Hearing Brief of Tubos de Acero de Mexico, SA, submitted to the ITC in connection with *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, Inv. Nos. 701-TA-364 (Review) and 731-TA-711, 713-716 (Reviews) (May 18, 2001) (public version) (page 8)

US-26 *New Shorter Oxford English Dictionary* (1993) (Pages 91 and 1504)

US-27 THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1986-1992), (T. Stewart, Ed.) (Pages 1475-1478, 1592, 1594, 1598)