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

(WT/DS282)

SECOND WRITTEN SUBMISSION

OF THE

UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The story underlying this dispute is simple. The United States imposed an antidumping order on imports of OCTG from Mexico. After imposition of the order, Mexican producers dramatically reduced their shipments to the United States and, in the case of Hylsa, continued to dump in the fourth period of review ("POR"). Two of these producers, during the annual assessment review for the fourth POR, sought revocation of the order - but each sought revocation only with respect to itself. Neither sought revocation of the entire order. In support of their requests for revocation reviews, Commerce required them to submit certifications that they had shipped in commercial quantities and had not dumped for three consecutive years. These companies were unable to sustain the claims made in these certifications, and Commerce denied the request for revocation reviews.

2. Commerce did conduct an order-wide revocation review pursuant to its sunset review procedures. Based on the record evidence, Commerce concluded that continuation or recurrence of dumping was likely. Similarly, the ITC conducted a sunset review with respect to injury. The ITC found that imports of casing and tubing from Mexico were likely to compete with subject imports of casing and tubing from other countries and with the domestic like product, and therefore exercised its discretion to cumulate all subject imports. Based on the record evidence, the ITC concluded that continuation or recurrence of injury was likely if the orders were revoked.

3. Mexico has proffered, but not substantiated, a variety of claims regarding the sunset review of OCTG, as well as the fourth administrative review of TAMSA and Hylsa. The United States more fully rebutted these claims in its first written submission, the first meeting, and answers to questions. In this submission, the United States will limit its remarks to exposing further several basic flaws in Mexico's arguments.

II. ISSUES RELATING TO MEXICO'S SUNSET REVIEW CLAIMS

4. Mexico has advanced various claims regarding the U.S. conduct of sunset reviews. Having already addressed Mexico's claims in detail in its first submission, the United States will limit its discussion in this submission to the most basic flaws in those claims, first with respect to Commerce's determination, and then with respect to the ITC's determination.

A. Commerce's Conduct of Sunset Reviews

5. Mexico has essentially argued that the *Sunset Policy Bulletin* is a measure that mandates that Commerce accord decisive weight to dumping margins and lower import volumes. Mexico has offered an exhibit containing Commerce's sunset reviews in an effort to demonstrate this claim, as well as a supposedly "consistent practice." However, a proper legal analysis of Mexico's claims, as well as a review of the evidentiary support for them, reveals that Mexico has not met its burden of proving those claims.

1. Legal Framework for Assessing whether the Sunset Policy Bulletin is a Measure that Mandates a Breach

6. Mexico seeks to establish that the *Sunset Policy Bulletin* is a measure and mandates a breach by citing the results of full and expedited sunset reviews. As the United States stated at the first meeting of the parties, this approach is not legally correct. Neither the question of whether the *Sunset Policy Bulletin* is a measure nor the question of whether it mandates a result can properly be resolved by simply listing the reviews conducted to date and adding up the results of those reviews. Mexico has not met its burden of demonstrating that the *Sunset Policy Bulletin* is a measure that mandates a breach.

7. Proper legal analysis of the question of whether the *Sunset Policy Bulletin* is a measure that mandates a breach requires a two-step approach. First, the Panel should examine whether the *Sunset Policy Bulletin* is a measure. Second, if the *Sunset Policy Bulletin* were a measure, the Panel would then examine whether it mandates a breach.

8. The question of whether the *Sunset Policy Bulletin* is a measure depends on whether it "does" something. As the United States described in its first written submission and its responses to Panel Questions 29 and 41, the *Sunset Policy Bulletin* does not "do" anything.[1] It cannot, under U.S. law, require Commerce to act or refrain from acting. It cannot require Commerce to assess facts or apply the law in a particular way. Regardless of the terms of the *Sunset Policy Bulletin*, or the number of times it is cited in reviews, the *Sunset Policy Bulletin* has no legal effect. It is not a measure.

9. In addition, the *Sunset Policy Bulletin* does not mandate a breach of any WTO provisions. As noted above, as a matter of U.S. law the *Sunset Policy Bulletin* cannot "mandate" that Commerce do anything. It certainly cannot mandate a breach.[2] Indeed, by its very terms, the *Sunset Policy Bulletin* does not require a particular finding but instead indicates what Commerce "normally" will do given certain factual situations.[3] Mexico has argued that the breach in question is an "irrefutable" presumption of likelihood and a failure to make a fresh determination. However, as discussed in the U.S. answers to the Panel's questions, the *Sunset Policy Bulletin* simply provides guidance as to general factual situations, and the outcome of a particular case will depend on the specific facts of that case.[4] Whether Commerce has made a fresh determination depends on the substance of each of the reviews, not a summary of the outcome of those reviews.

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[1] *See* U.S. First Written Submission, paras. 111-112, and U.S. Answers to Panel Questions, paras. 12-15 and 49.

[2] U.S. First Written Submission, para. 115.

[3] U.S. First Written Submission, para. 102.

[4] *See* U.S. Answers to Panel Questions, para. 50.

10. Mexico has the burden of proving that the *Sunset Policy Bulletin* is a measure that mandates a breach. Mexico has not met, and cannot meet, that burden.

2. Mexico Fails to Substantiate its Claim that the *Sunset Policy Bulletin* Mandates that Commerce Give "Decisive Weight" to Dumping Margins and Import Volumes When Making the Likelihood of Dumping Determination in a Sunset Review

11. Mexico bears the burden of substantiating its claim that the *Sunset Policy Bulletin* mandates an affirmative likelihood of dumping finding where evidence of dumping margins or depressed imports exists in a sunset review, notwithstanding other record evidence. Mexico offers its Exhibit MEX-62 as "evidence" that the *Sunset Policy Bulletin* mandates an affirmative likelihood determination whenever there is evidence of dumping margins and depressed import volumes, to the exclusion of any other evidence, in a sunset review. As a matter of U.S. municipal law – that is, as a matter of fact – this is simply incorrect. A document like the *Sunset Policy Bulletin* which does nothing more than explain to the public Commerce's thinking with regard to a variety of issues does not become binding – as a matter of U.S. law – simply because Mexico submits a misleading statistical analysis of past results in sunset reviews. The meaning of the Sunset Policy Bulletin can only be determined as a result of an examination of U.S. law, and Mexico has failed to explain how its statistical analysis is part of, or changes, U.S. municipal law.

12. Moreover, even on its own terms, Exhibit MEX-62 demonstrates that Commerce made reasoned and reasonable likelihood determinations in each of the sunset reviews contained in the exhibit and has provided an explanation on each affirmative determination. To set the record straight, it should be noted that Mexico is not consistent in its characterization of its claims or the evidence in support thereof. Mexico alternatively argues that the *Sunset Policy Bulletin* has resulted in an affirmative finding in "all sunset reviews"[5] or "227 sunset reviews."[6] But these two propositions are not the same. Of the 301 sunset reviews listed in Exhibit MEX-62, 74 end in revocation of the order. Thus, there was not an affirmative finding in "all sunset reviews." Mexico would have the Panel come away with the impression that Commerce has made an affirmative finding in every sunset review; but that is not the case.

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[5] *See, e.g.,* First Written Submission of Mexico, para. 113 ("Exhibit MEX-62 demonstrates that the Department follows the instruction of the statute, the SAA, and the SPB in every sunset review, and every time it finds that at least one of the three criteria of the SPB is satisfied, the Department makes an affirmative finding of likely dumping without considering additional factors . . . ."); Closing Statement of Mexico, at 1.

[6] *See, e.g.,* First Written Submission of Mexico, para. 57 ("[T]here have been 227 sunset reviews conducted by the Department where the domestic industry has participated. In 100 percent of these proceedings, the Department determined that dumping would be likely to continue or recur.") (emphasis supplied).

13. Therefore, Mexico's claim concerns a subset of sunset reviews. Notwithstanding the revocations discussed above, Mexico's assertion in this dispute is that the remaining 227[7] cases in Exhibit MEX-62 are evidence that Commerce makes an affirmative likelihood determination in every review simply because dumping margins or depressed import volumes are present and the *Sunset Policy Bulletin* "mandates" that Commerce so find without reviewing other evidence. As discussed below, Exhibit MEX-62 does nothing of the sort.

14. The question is whether the results in the 227 reviews in question are "mandated" by the *Sunset Policy Bulletin.* Mexico appears to assert that the fact that no respondent has been able to overcome the so-called "decisive weight" of dumping margins and depressed import volumes, as described in the *Sunset Policy Bulletin*, proves that the *Sunset Policy Bulletin* mandates an affirmative likelihood finding in every case. This is nothing more than circular reasoning, because it assumes that the *Sunset Policy Bulletin* mandates that "decisive weight" must necessarily be given to dumping margins and import volumes to the exclusion of any other record evidence. As discussed above, the *Sunset Policy Bulletin* cannot mandate results, as a matter of U.S. law.

15. Even assuming *arguendo* that the *Sunset Policy Bulletin* could mandate results, Exhibit MEX-62 does not prove that the *Sunset Policy Bulletin* is what generated the results in question. The *Sunset Policy Bulletin* merely reflects logical principles. For example, if dumping continued over the life of the order, there is reason to be concerned that dumping will continue once the discipline of the order is removed. The Appellate Body agrees.[8] Therefore, if dumping continues over the life of the order, and Commerce concludes that continuation or recurrence of dumping is likely, then Commerce has so concluded because of logic – not the *Sunset Policy Bulletin*.[9]

16. A closer examination of the reviews in Exhibit MEX-62 reveals that Mexico's characterization of the 227 reviews is erroneous. The determinations in Exhibit MEX-62, which are reasoned and take all record evidence into account, demonstrate that Mexico's claim that Commerce merely looks at the existence of dumping margins and depressed import volumes without more is wrong. These reviews may be divided into three general categories. First, there

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[7] The *Federal Register* notice provided at Tab 55 for *Certain Iron Construction Castings from the People's Republic of China* is incorrect.

[8] *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. 177.

[9] We also note that, with regard to Mexico's claim that Exhibit MEX-62 proves that Commerce has never made an affirmative sunset determination without referring to the guidance provided in the *Sunset Policy Bulletin*, this assertion is incorrect as a factual matter. As we discussed in our answer to question 26 from the Panel in this case, Commerce did not rely on historical data when making the final affirmative sunset determination in the full sunset review of *Canada-Sugar*, but rather calculated a predicted future dumping margin based on information submitted by both the domestic and respondent interested parties. Exhibit MEX-62, Tab 261.

were 187 cases in which respondent interested parties did not participate.[10] The Appellate Body in *Japan Sunset* recognized the importance of respondent participation in sunset reviews – "the *Anti-Dumping Agreement* assigns a prominent role to interested parties . . . and contemplates that they will be a primary source of information in all proceedings conducted under that agreement."[11] Thus, in these 187 sunset reviews, a domestic interested party placed evidence on the record that dumping was likely to continue or recur, and no respondent interested party provided evidence to rebut that claim.[12] The record evidence in those cases supported a finding of likelihood because that was what the evidence indicated – not because Commerce failed to take other evidence into account or because the *Sunset Policy Bulletin* so required.

17. Even in those cases in which respondents did participate, they chose not to take advantage of the provision in *Sunset Regulations* authorizing them to submit any additional information that party wishes Commerce to consider.[13] In cases where additional information has been submitted, Commerce has addressed this evidence in making the likelihood determination.[14]

18. Of the reviews in which respondents did participate, 15 of them involved cases in which the foreign interested parties responding to the notice of initiation accounted for significantly less than 50 percent of imports entered during the five-year period preceding the sunset review.[15] Therefore, the primary exporters did not participate and provided no evidence about their "likely" behavior. In 12 of these reviews, Commerce had found dumping in one or more administrative reviews covering periods during the five-year period prior to the sunset reviews.[16] In at least two of these reviews, the respondent interested party did not address the fact that dumping had

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[10] The cases break down as follows: (1) in 169 cases, no respondent interested party submitted a response to Commerce's notice of initiation (including two cases where, in each case, the submission was incomplete; *see* Exhibit MEX 62, Tabs 82 & 227); and (2) in 17 cases, respondent interested parties submitted an affirmative waiver of participation; other than the waiver notice, no other submissions were made by any of the respondent interested parties in these 17 "waiver" cases.

[11] *Japan Sunset AB,* para. 199.

[12] Among the reviews in which respondent interested parties failed to place evidence on the record is *Industrial Cellulose from Yugoslavia*, cited in paras. 115-116 of Mexico's First Submission. Mexico claims that Commerce's affirmative finding in that review reveals its "mechanistic application of presumptions." Mexico suggests that Commerce should have come to a different conclusion because the ITC in its separate determination, with a separate record, found that the sole Yugoslavian producer/exporter was no longer capable of exporting to the United States. However, Mexico's argument is misleading, inasmuch as an importer did not place that evidence on the Commerce record, but placed it on the ITC record. That Mexico relies on such tenuous evidence reveals the weakness of its claim.

[13] *See e.g.,* Exhibit MEX-62, Tab 35, 42, 124, & 125.

[14] Commerce has addressed additional "other factors" information in at least five of the full sunset reviews. *See* Exhibit MEX-62, Tab 13, 32, 75, 99 & 261.

[15] Three of the 15 "expedited" sunset reviews also had one or more respondent interested parties submit a formal notice of waiver of participation. *See* Exhibit MEX-62, Tabs 8, 9, & 252.

[16] *See* Exhibit MEX-62, Tabs 5, 8, 9, 12, 15, 82, 105, 114, 116, 208, 250, & 252.

continued over the life of the order.[17] In nearly all of the 15 expedited sunset reviews, respondents failed to provide evidence or factual information in support of the arguments.[18] Consequently, Commerce made affirmative likelihood determinations based on prior findings of dumping, or a combination of dumping margins and depressed import volumes, based on the record evidence. In each of these 15 reviews, Commerce explained the bases for the affirmative likelihood determination and addressed the limited number and scope of arguments raised by the respondent interested parties. Given these circumstances, Commerce reasonably found a likelihood of dumping in each of these sunset reviews.

19. This leaves only 26 sunset reviews involving participation by respondents accounting for a majority (or nearly a majority) of the exports in question. Each of these reviews also reflects that Commerce took all record evidence into account. For each of these reviews, Commerce has provided a complete explanation of the bases for the affirmative likelihood determination, has addressed the arguments of the interested parties, and has addressed all the additional factual information submitted by the interested parties in the final sunset determinations. For example, in *Porcelain-on-Steel Cooking Ware from Mexico*, Commerce disagreed with a domestic interested party, siding with respondents that dumping was not likely to recur due to lowered import volumes. However, Commerce ultimately made an affirmative determination because dumping continued over the life of the order, and respondents did not argue that could sell their merchandise in the United States without dumping (in fact, they argued that could sell their merchandise without "high" dumping margins).[19] Therefore, Commerce considered respondents' arguments, as evidenced by the fact that Commerce in fact agreed with some of those arguments. However, in this review, as in others, the record evidence supported an affirmative finding.

20. In sum, a review of Exhibit MEX-62 reveals the following:

- in almost a quarter of the reviews found in Exhibit MEX-62, the order was revoked;
- in over 80 percent of the remaining reviews , domestic interested parties placed evidence on the record indicating that dumping was likely to continue or recur, but respondents placed no evidence on the record at all;
- in all of these reviews, and the remaining ones, Commerce evaluated all the evidence on the record and presented a reasoned conclusion that dumping was likely to continue or recur.

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[17] *See* Exhibit MEX-62, Tabs 208 (*Final Results of Expedited Sunset Review: Roller Chain, Other Than Bicycle Chain, From Japan*, 63 Fed. Reg. 63026, 63028 (Nov. 10, 1998)); & 252 (*Final Results of Expedited Sunset Review: Stainless Steel Plate from Sweden*, 63 Fed. Reg. 67658, 67660 (Dec. 8, 1998)).

[18] *See e.g.,* Exhibit MEX-62, Tabs 5, 8, 9, 12, 15, 105, 174, 208, 250 & 252.

[19] *See* Exhibit MEX-62, Tab 194 (*Preliminary Results of Sunset Review: Porcelain-on-Steel Cookware from Mexico,* 64 Fed. Reg. 46651, 46653-54 (August 26, 1999)).

21. This is hardly evidence that, in any of those reviews, Commerce attached "decisive" weight to dumping margins and import volumes without considering more. Even if an examination of past sunset reviews were somehow relevant to the question of whether the *Sunset Policy Bulletin*, as a matter of U.S. law, mandates anything at all – and it is not relevant to that question – that examination instead reveals that in the vast majority of these reviews, the order was either revoked, or the respondents did not put evidence on the record. Commerce would have come to the same conclusion whether or not there had been a *Sunset Policy Bulletin*.

3. Mexico's Claim Regarding an Alleged "Consistent Practice" is Beyond the Terms of Reference of This Panel

22. In Question 12, the Panel specifically asked Mexico to identify "where, in the request for establishment," Mexico set forth its claim regarding Commerce's alleged "consistent practice." Allegedly this consistent practice requires Commerce to accord decisive weight to dumping margins and import volumes in a manner inconsistent with Article 11.3. Tellingly, Mexico responded to the Panel's question first by identifying its first submission – not the panel request – and only subsequently referring to a section of its panel request that is entitled "Department's Sunset Review Determination."[20] Moreover, the cited section fails to reference this allegedly consistent "practice." By contrast, Mexico did expressly refer to "practice" in Section D of its panel request (a claim concerning GATT Article X.3(a), not Article 11.3). Thus, when Mexico wished to include a claim concerning practice in its panel request, it knew how to do so. With respect to a claim in connection with Article 11.3, it did not do so. The Panel should therefore reject Mexico's claim as not being within the terms of reference of this dispute.

23. In any event, Mexico's claim – though beyond the terms of reference – is also without merit. Mexico argues that the "evidence" in Exhibit 62 establishes that Commerce "practice" mandates a breach of Article 11.3. As a matter of United States municipal law – that is, as a matter of fact – this is simply incorrect. Commerce "practice" is not a measure; it is no more than short-hand to refer to recent Commerce precedent. Commerce is free to depart from the methodologies it has employed in the past, as long as it provides an explanation; they are not binding, and therefore cannot be said to mandate anything at all. As the panel in *India Steel Plate* concluded, Commerce "practice" is not within the scope of measures that may be challenged under Article 18.4 of the AD agreement, and mere repetition cannot turn such a

[20] Mexico Answers to Panel Questions, para. 46.

"practice" into a procedure and thus a measure.[21] In particular, repetition does not mean that Commerce's past applications of a law are binding as something called "practice."

B. Issues Relating to the Likelihood of Continuation or Recurrence of Injury in a Sunset Review

1. Cumulation of imports from more than one subject country is permitted under Article 11.3

24. Mexico contends that cumulation is prohibited in sunset reviews,[22] notwithstanding the silence of the Agreement on this issue. As we explained in our first submission,[23] Mexico turns the rules of treaty interpretation on their head by suggesting that silence indicates an intention to prohibit a practice. To the contrary, the Appellate Body has recognized that silence in an Agreement must have some meaning.[24] Members are free to do that which is not prohibited. In this situation, where nothing in the text of the AD Agreement prohibits cumulation and Article 11.3 is silent on the subject, the only logical conclusion to be drawn is that cumulation is permitted.

25. Given the absence of any textual support for the proposition that cumulation in sunset reviews is prohibited, Mexico attempts to pin its argument on the use of the word duty rather than duties in Article 11.3, as well as in Articles 11.1 and 11.2. Reliance on the reference to the singular word "duty" is unavailing. It ignores that Article VI:6 of GATT 1994, in requiring an injury evaluation for purposes of an original investigation, likewise refers to the levying of an anti-dumping (or countervailing) duty. Specifically, Article VI:6 states that

> No contracting party shall levy any anti-dumping or countervailing *duty* on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten to cause material injury to an established domestic

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[21] *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*"). For a more detailed discussion, *see* U.S. First Written Submission, para. 113. That Mexico devoted eight paragraphs in its answers to Panel questions (paras. 46-53) without even referring to *India Steel Plate* is indicative of the feeble nature of this claim. Mexico instead elected to rely on question posed by the Appellate Body in *Japan Sunset* – "does the type of instrument itself – be it a law, regulation, procedure, practice, or something else – govern whether it may be subject to WTO dispute settlement?" Nowhere did the Appellate Body conclude that Commerce's "practice" may be challenged.

[22] Mexico's Answers to Panel Questions, paras. 54-56.

[23] U.S. First Written Submission, paras. 241-242.

[24] *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*"), paras. 64-65.

> industry, or is such as to retard materially the establishment of a domestic industry. (Emphasis supplied).

26. As the United States explained in its first substantive submission, cumulation in antidumping investigations was widespread among GATT contracting parties under Article VI, even prior to the adoption of Articles 3.3 and 11.3 of the AD Agreement in the Uruguay Round.[25] Mexico has not disputed this point. It makes no sense for Mexico to be arguing that reference to the same word in Article 11.3 somehow indicates an intention to prohibit cumulation in sunset reviews.

27. Mexico also argues that permitting cumulation in sunset reviews would allow Members to cumulate imports that were not present or even likely to recur with imports that were likely to continue or recur if the order were revoked.[26] Mexico's argument ignores the requirement that, in fulfilling their Agreement obligations related to fact-finding, the authorities' evaluation of the facts must be "unbiased and objective."[27] In the hypothetical situation given by Mexico, which does not apply to this case, cumulation of imports from all countries in that situation might not be reasonable or objective.

28. Furthermore, the United States reiterates that U.S. law does not give the Commission unfettered discretion to cumulate imports in a sunset review. That is, the Commission may engage in a cumulative analysis only if: (1) reviews are initiated on the same day; (2) imports would be likely to compete with one another and with the domestic like product in the United States market; and (3) with respect to each country, the imports are not likely to have no discernible adverse impact.[28]

2. Nothing in the Agreement makes the provisions of Article 3 applicable to Article 11.3 sunset reviews

a. The provisions of Article 3 cannot be applied to sunset reviews in a way that gives Article 11.3 meaning and effect

29. As the United States has noted, there are many examples of how Article 3 cannot be applied in a sunset review.[29] This is a strong textual indication that Article 3 was not intended to apply to sunset reviews. Mexico has sought to counter that argument by devising scenarios in which it might be possible to apply the provisions of Article 3 to a sunset review. This argument is not persuasive. Article 11.3 must be interpreted in a way that allows it be applied to all sunset

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[25] *See* The GATT Uruguay Round, A Negotiating History (1986-1992), (T. Stewart, Ed.) at 1475-1478, 1594, and 1598 (Exhibit US-27).

[26] Mexico's Response to Panel Questions, para. 56.

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

[28] Section 752(a)(7) of the Act; 19 U.S.C. § 1675a(a)(7) (Exhibit MEX-24).

[29] *See, e.g.,* U.S. First Written Submission, paras. 312-313, and 319-322.

reviews in order to give it meaning and effect. "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[30]

30. Mexico has not explained how the specific provisions of Articles 3.2, 3.4 and 3.5 of the AD Agreement could be applied to all sunset reviews. One reasonably expected reaction to the imposition of an antidumping order would be the exit of the subject imports from the domestic market. Yet Mexico has not demonstrated how the investigating authority could, for example, apply the requirements of Article 3.5 in such a situation. That Article provides that "[i]t 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" and that the authorities shall "examine any known factors other than dumped imports which at the same time are injuring the domestic industry." (Emphasis supplied). If the imports are no longer in the market, how could the investigating authority demonstrate that the imports are causing injury, let alone examine other factors that are injuring the domestic industry at the same time?

31. Mexico's response to this obvious incongruity is to state that "WTO Members intended the sunset analysis to be difficult and rigorous." (emphasis in original).[31] This answer is non-responsive. The fact is that the provisions simply cannot be applied – no matter how rigorous the efforts of the investigating authority – if there were no imports during that period.

32. That Mexico has expressed concern about standards it believes should be imposed under Article 11.3 reflects the dichotomy between what it wishes the AD Agreement requires and what the AD Agreement actually does require. Mexico may be concerned that Article 11 reviews do not contain specific disciplines such as those contained in Articles 2 and 3; but as the Appellate Body has found, Article 2 does not *per se* apply in Article 11.3 reviews, and by analogy nor does Article 3.

33. To the extent Mexico has concerns about the absence of specific criteria in Article 11.3, those concerns are not properly raised in the context of this dispute. As the Dispute Settlement Understanding makes clear, "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[32]

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[30] *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, Report of the Appellate Body, adopted February 1, 2002, para. 338; *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body, adopted May 20, 1996, at 21.

[31] Mexico's Response to Panel Questions, para. 39.

[32] Article 3.2. *See also* Article 19.2 ("in their findings and recommendations, the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.")

b. The absence of cross referencing between Articles 3 and 11 reinforces the fact that Article 3 does not apply to sunset reviews

34. Article 5, unlike Article 11, cross-references Article 3 in several respects. In particular, Article 5.2 requires that the application filed by the domestic industry shall include evidence of, *inter alia*, "injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement." This language echos that of Article 3.1 which refers to "a determination of injury for purposes of Article VI of GATT 1994," and footnote 9 of Article 3, which instructs that the term "injury," unless otherwise specified "shall be interpreted in accordance with the terms of this Agreement." Whereas it is clear from the language of the Agreement that injury for purposes of Article 5 shall be interpreted in accordance with footnote 9, the Agreement provides no similar connection between the likely "continuation or recurrence of injury" for purposes of Article 11.3 and the injury determination contemplated by Article 3.

35. In addition, the cumulation provision contained in Article 3 cross-references Article 5 in two ways. First, Article 3.3 explicitly references the *de minimis* and negligibility provision contained in paragraph 8 of Article 5. Second, Article 3.3 uses the term "anti-dumping investigations"– the same term that is used in Article 5.[33] This cross-reference in an integral provision of Article 3 indicates that Article 3 and Article 5 are linked. Article 5 sets out the procedural aspects for the original determinations of both dumping and injury.[34] Article 3 provides the substantive requirements for original injury determinations. There simply is no similar linkage between Article 11.3 and Article 3.

c. The Language of the Agreement and the Distinct Nature and Purpose of Sunset Reviews Indicate that the Substantive Standards Applicable to Original Investigations do Not Apply to Reviews

36. Mexico suggests that there are two types of injury "investigations" – a so-called "Article 5 injury investigation" and a so-called "Article 11.3 injury investigation."[35] The argument advanced by Mexico conflicts with the Appellate Body's report in *German Sunset*, notwithstanding Mexico's assertion that its views are "completely consistent" with the Appellate

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[33] *See United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R (*"Japan Sunset Panel"*), paras. 7.97, 7.102. To the extent Mexico has relied on the Panel report in *Japan Sunset* for the proposition that the provisions of Article 3 other than paragraph 3 apply to sunset reviews, that reliance is misplaced and unfounded. The Panel in *Japan Sunset* explicitly stated that it was reaching no injury issues other than the question of whether the negligibility provision of Article 3.3 applied to sunset reviews. *Japan Sunset*, Panel Report, para 7.101. In any event, the reference to "investigations" in Article 3.3 reinforces that Article 3 as a whole applies to *investigations*, rather than indicating that only one paragraph of Article 3 is limited to original investigations.

[34] *See German Sunset*, para. 67.

[35] Mexico's Response to Panel Questions, paras. 89, 90.

Body's statements. In *German Sunset*, the Appellate Body distinguished the "investigation phase" contemplated by Article 11.9 of the SCM Agreement (which parallels Article 5.8 of the AD Agreement) from reviews "that may follow the imposition of a countervailing duty order."[36]

37. The Appellate Body's observation that "original investigations and sunset reviews are distinct processes with different purposes,"[37] is not, as Mexico suggests, less applicable to injury determinations than to dumping determinations.[38] Article 11.3 of the AD Agreement (and Article 21.3 of the SCM Agreement) make no mention or reference to an investigation of either dumping or injury. In contrast, Article 5 of the AD Agreement is entitled "*Initiation and Subsequent Investigation*, and sets rules mainly of a procedural and evidentiary nature relating to the authorities' initiation and conduct of an antidumping duty investigation.[39] With respect to both the dumping and injury determinations, the Agreement distinguishes between original investigations and reviews that may follow imposition of an antidumping duty order.

38. Of course, as the Appellate Body stated in *Japan Sunset*, "the role of the authorities in a sunset review includes both investigatory and adjudicatory aspects."[40] The "investigatory" aspect of a sunset review requires that the authorities take an active role in the decision-making process, and "seek out relevant information and . . . evaluate it in an objective manner."[41] The U.S. statutory scheme clearly provides for the Commission to undertake an examination that meets these criteria; Mexico does not suggest otherwise. Further, the Commission, in complying with its statutory mandate in the *OCTG* sunset reviews more than met the standard articulated by the Appellate Body. In particular, the Commission comprehensively gathered and considered new data for the sunset review and allowed the parties to provide their views of the facts and law in questionnaire responses, briefs and at a hearing.[42]

39. That Article 11.3 contemplates basic evaluation and objectivity standards – the "investigatory" aspect – does not, however, translate into a wholesale incorporation of the step-by-step Article 3 analysis required for purposes of an original investigation. As the United States has demonstrated, nothing in either of those articles indicates that the substantive requirements of Article 3 were intended to be incorporated into Article 11.3 reviews. Just as the Appellate Body declined to equate obligations of an investigatory nature with a wholesale incorporation of Article 2, there is likewise no incorporation of Article 3.

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[36] *German Sunset*, para. 68. *See also id*. at paras. 72, 85.

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

[38] Mexico's Response to Panel Questions, para. 90.

[39] *See German Sunset*, para. 67 (discussing Article 11 of the SCM Agreement).

[40] *Japan Sunset AB*, paras. 111, 199.

[41] *Japan Sunset AB,* paras. 111, 199.

[42] In this respect, the Commission, under its statute, conducts "a fresh determination, based on credible evidence," in order to determine whether the continuation of the countervailing or antidumping duty is warranted. *See German Sunset*, para. 88.

40. To the extent Mexico's use of the term "investigation" with respect to both Article 5 and Article 11 is really a veiled attempt to suggest that Article 3 applies to both, we note again that Article 3 refers to "a determination of injury for purposes of Article VI of GATT 1994."[43] The determination of injury referred to in Article VI of GATT 1994 did not include a determination of likelihood of continuation or recurrence of injury.[44]

III. ISSUES RELATING TO THE FOURTH ADMINISTRATIVE REVIEW

41. Mexico believes that TAMSA's and Hylsa's requests for reviews trigger obligations under Article 11.2. As the United States has argued, Article 11.2 does not require company-specific revocation reviews.[45] TAMSA and Hylsa requested reviews under the laws and regulations covering company-specific reviews. Therefore, Article 11.2 imposes no obligations with respect to the requested reviews.

42. Mexico has also advanced various arguments regarding the application of the commercial quantities requirement in this particular review. These arguments fail as well. Although Article 11.2 does not require company-specific reviews, the commercial quantities requirement is nevertheless not inconsistent with Article 11.2; in particular, Article 11.2 provides that authorities may require an interested party to submit positive information substantiating the need for the review. Finally, Commerce's determination that TAMSA did not meet the commercial quantities requirement was unbiased, objective, and based on the record evidence.

A. Overview of Revocation Options

43. As indicated in Exhibit US-28, U.S. law provides for three separate revocation procedures. A company seeking revocation for itself ("revocation in part") during an annual assessment review will make a revocation request pursuant to section 351.222(b)(2) of the regulations. In practical terms, Commerce will use that review to establish the company's assessment rate for the review period (and establish the deposit rate for future imports), as well as to decide whether to conduct a revocation review, and Commerce thus did not inquire into the status of all Mexican producers and exporters of OCTG. TAMSA and Hylsa requested revocation reviews under this procedure.

44. If the company in question seeks revocation of the entire order during its annual assessment review, then the company needs to request a review under section 351.222(b)(1). In

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[43] AD Agreement, Article 3.1. In this regard, we note that the Appellate Body in *German Sunset* did not find, as the EC suggests, that the Article 3 injury definition applies for the purposes of the Agreement. *See* EC's response to questions from the Panel, para. 9. In fact, the Appellate Body, in both *German Sunset* and *Japan Sunset*, noted that the appeals did not raise any injury issues. *German Sunset*, An.82; *Japan Sunset AB*, n.115.

[44] *Cf. German Sunset*, para. 69. (Noting that the introduction of a "sunset" provision in the SCM Agreement was "regarded as [an] important addition[ ] to the Tokyo Round Subsidies Code.")

[45] U.S. First Written Submission, paras. 136-151.

that proceeding, Commerce will consider whether all exporters and producers have not dumped for three consecutive years. TAMSA and Hylsa did not request revocation reviews under this procedure.

45. Apart from these two revocation procedures, the United States also provides respondents the opportunity to seek revocation, either in whole or in part, through a "changed circumstances" review. This review provides a mechanism for interested parties to request revocation of the antidumping duty order because circumstances have changed – *i.e.*, those circumstances that led to dumping no longer exist. This provision is found in the regulations at section 351.222(g). Commerce may revoke the order in whole (*i.e.*, order-wide) or in part (company-specific). Neither TAMSA nor Hylsa requested a "changed circumstances" review.

46. In practice, a foreign producer or exporter in a country with multiple exporters normally does not request revocation of the order as a whole. As discussed in the answers to Panel Questions, a company requesting revocation has a business incentive to request revocation with respect only to itself, rather than the entire order, because revocation in part would put that company at a competitive advantage vis-a-vis other producers and exporters that remain subject to the order.[46]

47. In this light, Mexico's argument that TAMSA and Hylsa were the only known Mexican producers when Commerce conducted the fourth review, and that the company-specific revocation review in this proceeding was really the same as an order-wide review under Article 11.2, rings hollow.[47] First, as the United States explained in its answers to Mexico's questions, there were several indications throughout the duration of this proceeding indicating that TAMSA and Hylsa were not the only known producers of OCTG in Mexico.[48] Second, each company had reason to seek revocation for itself alone and not for its competitor or competitors. Had TAMSA and Hylsa wanted an order-wide revocation review, they could have sought one. They did not.

48. In any event, the company-specific revocation procedure is of benefit to foreign exporters and producers. If this revocation procedure were not available to respondents, the United States would still meet its Article 11.2 obligations through order-wide review procedures. The fact that the United States provides additional procedures, which benefit foreign producers, does not mean those procedures are subject to Article 11.2. To conclude as much would create a disincentive for Members to provide procedures beyond those required to fulfill specific obligations.

B. Article 11.2 Requires Only Order-Wide Revocation Reviews

49. Mexico has argued that Article 11.2 requires company-specific revocation procedures. The text of Article 11.2 does not support Mexico's view.

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[46] U.S. Answers to Panel Questions, para. 2.
[47] Mexico's Answers to Panel Questions, para. 11.
[48] U.S. Answers to Mexico's Questions, para. 33.

50. First, the text of Article 11.2 requires a review of the continuing need for "the duty." As the Appellate Body found in connection with a similar phrase in Article 11.3, "the duty" refers to the antidumping duty order as a whole, not as applied to individual companies.[49]

51. Second, the text of Article 11.2 states that "any interested party," domestic or respondent, may request a review by submitting positive information to substantiate the need for the review. This simply means that the request of one interested party alone is sufficient to trigger the review, *i.e.*, interested parties need not collectively request the review. It does not mean that the review itself must evaluate the continuing need for the duty with respect to each interested party. If that were the intent, then, as the Appellate Body noted in its examination of the same phrase in Article 11.3, Article 11.2 could have stated that authorities shall review the need for the continued imposition of the duty with respect to "each known exporter or producer concerned"[50] or that the authorities shall review "the amount of the duty."[5152] Article 11.2 instead merely references the interested party's right to request a review of the duty. Similarly, the reference to "interested parties" in Article 11.2 addresses the right of such parties to make a request, not what the authorities are reviewing – "the duty." There is no textual or logical reason why it should be impermissible to interpret "the duty" to mean the same thing in Article 11.2 as it means in Article 11.3.

52. Mexico has argued that the fact that the United States amended its company-specific revocation regulations after *DRAMS from Korea*[53] demonstrates that company-specific revocation reviews are subject to Article 11.2.[54] However, the question of whether company-specific revocation reviews are required by Article 11.2 was not directly before the panel in *DRAMS from Korea*. Rather, the issue before that panel was whether the "not likely" standard –

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

[50] *Japan Sunset AB*, para. 149.

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

[52] The United States notes that the Appellate Body in *Japan Sunset* distinguished between Article 11.2, which references "interested parties," and Article 11.3, which does not. First, the basis for the Appellate Body's conclusion that Article 11.3 permits order-wide sunset reviews rests on its assessment of the term "duty," which refers to the duty on the order as a whole (as opposed to the "amount of the duty" assessed to each exporter or producer); this conclusion does not hinge on the presence or absence of the phrase "interested parties." Second, in Article 11.3, it is the domestic industry that makes the request for a sunset review. In Article 11.2, by contrast, any interested party can request the review. Therefore, the reference to "interested party" or "interested parties" in an Article 11.2 review simply indicates a procedural difference in who may request the review, not that the review must be conducted on a company-specific basis.

[53] Mexico's Answers to Panel Questions, paras. 12-15 and 17-19.

[54] 19 C.F.R. § 351.222(b) (Exhibit US-4). This regulation was amended to include the phrase "otherwise necessary to offset dumping" pursuant to implementation of the recommendations and rulings adopted by the DSB in *DRAMs from Korea*.

which was in both the company-specific and order-wide U.S. regulations at the time – was consistent with Article 11.2.[55]

53. More importantly, whether company-specific reviews are subject to Article 11.2 is a question of treaty interpretation, not whether a Member emphasized a particular argument in previous dispute settlement proceedings or how that Member later amended its regulations. The Appellate Body's findings in *Japan Sunset* regarding the definition of the phrase "the duty" (found in both Article 11.2 and Article 11.3) confirm that Article 11.2 does not impose requirements with respect to company-specific reviews.[56]

C. Mexico's Characterization of the Commercial Quantities Element of the "Three Years without Dumping" Requirement is Erroneous

54. Mexico has argued that Commerce's application in OCTG from Mexico of the requirement that sales have been made in commercial quantities during the three sequential years of no dumping is inconsistent with Article 11.2. As discussed above, Article 11.2 does not apply to company-specific revocation procedures; nevertheless, Commerce's application of the commercial quantities requirement was not inconsistent with Article 11.2.

55. Article 11.2 states that a Member is obligated to review the continuing need for an antidumping duty upon request by an interested party "which submits positive information substantiating the need for a review." It also states that a Member shall terminate the duty if, as a result of the review, the authorities determine that the duty is "no longer warranted."

56. Under section 351.222(b), in determining whether the duty is "warranted," the United States evaluates whether the exporter or producer in question has been able to maintain a meaningful presence in the U.S. market after imposition of the order. Failure to do so is evidence that the exporter or producer needs to dump in order to meaningfully participate in the U.S. market and that, absent the order, dumping will continue or recur. Requiring the exporter or producer under section 351.222(e) to provide evidence that it has met the commercial quantities requirement is thus in harmony with the provision of Article 11.2 requiring a Member to conduct

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[55] *United States - Antidumping Duty on Dynamic Random Access Memory Semiconductors from Korea*, WT/DS99/R, adopted March 19, 1999, paras. 6.24 - 6.53 (*"DRAMS from Korea"*). The *DRAMS* panel acknowledged that the United States provided several procedural options for revocation; however, the panel also noted that the United States had asserted that all of those options required a determination as to whether dumping was "not likely." *See* n. 496. As a result, the panel concluded that there was no WTO-consistent avenue for seeking revocation as required by Article 11.2. Therefore, to implement the panel's decision, the United States could have simply changed the "not likely" standard in the order-wide regulations and not the company-wide regulations, thus creating a WTO-consistent avenue for revocation under Article 11.2. The United States chose, however, to amend all of the regulations – including those pertaining to countervailing duty orders, which were not part of the *DRAMS* terms of reference – to remove the "not likely" standard. *See* 64 Fed. Reg. 51236 (September 22, 1999).

[56] *DRAMS from Korea*, para. 6.51 n.496.

a review thereunder only if the exporter or producer provides "positive information" sufficient to warrant the review.

57. Mexico acknowledges in its responses to the Panel's questions that "positive information" is required by Article 11.2, and even admits that a permissible prerequisite is "a request supported by 'positive evidence,'" but argues that Commerce's application of the U.S. commercial quantities requirement is not a reasonable prerequisite.[57] Further, in Paragraph 28 of its answers to the Panel's questions, Mexico reiterates its arguments regarding the alleged problems with the commercial quantities requirement. Yet in doing so, Mexico ignores the U.S.' First Written Submission, which explained why Mexico's arguments were erroneous.[58] Mexico has failed to rebut these points and has given no indication that it intends to do so.

58. The commercial quantities element of Commerce's requirements for revocation review does not mandate that an importer maintain the same pre- and post-order import volumes. Both Mexico and the Panel have noted that it is natural that, following the imposition of an antidumping measure, the volumes sold by the affected exporters would decline. The United States agrees that this is often the case, although some exporters have been able to raise their prices to avoid dumping and sell at well above pre-order volumes.[59]

59. More importantly, Mexico's claim that the commercial quantities requirement "arises from a presumption that volume declines means [*sic*] that the order is necessary"[60] is simply wrong. A drop in volumes does not necessarily result in a finding that the commercial quantities

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[57] Mexico's Responses to Panel Questions Following the First Meeting, paras. 14-16, 23.

[58] U.S. First Submission, paras. 187-194.

[59] *See, e.g.*, *Certain Welded Stainless Steel Pipe From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order in Part,* 64 FR 71728, 71733 (December 22, 1999)(Petitioners contested the Ta Chen's request for revocation, citing "soaring" imports; Ta Chen was revoked in the Final Determination), Exhibit US-35; *Notice of Preliminary Results and Preliminary Determination to Revoke Order in Part: Canned Pineapple Fruit from Thailand,* 69 FR 18524, 18530 (April 8, 2004), and Memorandum re: "Preliminary Determination to Revoke in Part the Antidumping Duty Order on Canned Pineapple Fruit from Thailand" (April 1, 2004) ("2002-03 Pineapple Revocation Memorandum"), at 3 (U.S. sales of both Dole and Kuiburi for the last three periods of review were greater than the volumes shipped during the 12-month period preceding the imposition of the order), Exhibit US-38. *See also Notice of Final Results of Antidumping Duty Administrative Review, Final Determination to Revoke the Order in Part, and Partial Rescission of Antidumping Duty Review: Fresh Atlantic Salmon From Chile,* 68 FR 6878 (February 11, 2003) ("Salmon 2000-2001 Final"), at Comment 7 (one of the seven firms found to have three consecutive years of commercial quantities argued that the demand for salmon was increasing in the U.S. market, and that an increasing demand would absorb an increasing supply without adversely affecting prices), Exhibit US-32.

[60] Mexico's Responses to Panel Questions, paras. 28, 30.

threshold has not been met.[61] Indeed, Commerce has considered sales of 32 percent of annualized POI sales to have been made in commercial quantities and revoked on that basis.[62]

60. In determining whether an exporter has sold in commercial quantities within the meaning of the revocation provisions of U.S. law, Commerce has also demonstrated the flexibility to take into account changes in market conditions other than those associated with dumping. In a case involving electric tools from Japan, for example, Commerce noted that producer/exporter Makita's export volumes to the United States had decreased substantially since the imposition of the antidumping order. In making its commercial quantities determination, however, Commerce took into consideration that Makita had made a substantial investment in a U.S. manufacturing facility and had shifted production of its high-volume low priced product lines to the American facility (and thus no longer exported those high-volume products). At the same time, it continued to export significant quantities[63] of high price, low-volume "speciality models" that were not manufactured at its U.S. facility, making "thousands of sales to hundreds of different customers." Thus, the establishment of Makita's U.S. manufacturing facility created a new

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[61] *See, e.g.*, Salmon 2000-2001 Final at Comment 6 (finding commercial quantities for Eicosal, even though its shipments during each of the basis PORs were lower than during the POI), Exhibit US-32; Pineapple Revocation Memorandum, at 3 ("TIPCO's post-order shipments, although less than pre-order, remained substantial and relatively consistent"; thus, Commerce made a preliminary finding that TIPCO had sold in commercial quantities for those three years), Exhibit US-38; *Notice of Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review and Intent to Revoke Antidumping Duty Order in Part: Certain Pasta from Italy,* 65 FR 48467, 48472 (August 8, 2000) ("Although both the quantity and number of De Cecco's shipments to the United States of subject merchandise have decreased since the imposition of the antidumping duty order, they have remained at sufficiently high levels to be considered commercial quantities." Based on these sales, De Cecco was revoked in Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review, 65 FR 77852, 77852 (December 13, 2000)), Exhibit US-34; *Professional Electric Cutting Tools From Japan: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order, in Part,* 64 FR 43346, 43351 (August 10, 1999)(although petitioner complained that Makita had avoided dumping by "drastically reducing its import volumes," Commerce found that "although Makita Japan's sales to the United States have decreased substantially since the imposition of the antidumping order, its exports to the United States remain significant." Makita was revoked from the order in the final determination, discussed further below), Exhibit US-36.

[62] Commerce revoked RIMA from the order in 2002 based in part on a finding of commercial quantities for the 1998-1999, 1999-2000, and 2000-2001 PORs. *Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Revocation of Order in Part,* 67 FR 77225 (December 17, 2002). That notice does not include specific information on RIMA's volumes for any of the basis years, but the fact that its sales in the 1998-1999 POR were 32 percent of its annualized POI sales is included in *Silicon Metal From Brazil: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Order in Part,* 66 FR 40980, 40982 (August 6, 2001). *Cf.* Exhibit US-33 (Final and Preliminary Notices for 2002-2001 review) *with* Exhibit US-37 (Final and Preliminary Notices for 1999-2000 review).

[63] Makita pointed to sales of specialty tools over a five year period after the order ranging from 38.39 percent of pre-order sales of such tools to 50.86 percent of such pre-order sales. *Professional Electric Cutting Tools from Japan: Final Results of the Fifth Antidumping Duty Administrative Review and Revocation of the Antidumping Duty Order, in Part,* 64 FR 71411, 71416, n. 1 (December 21, 1999), Exhibit US-36 ("Professional Cutting Tools").

paradigm of Makita's "normal commercial experience" in the more limited speciality tool market.[64]

D. Commerce's Application of the Commercial Quantities Requirement in OCTG from Mexico was Unbiased, Objective, and Based on the Record Evidence

61. As discussed above, Commerce's commercial quantities determinations are based on the facts of each case. The information presented by TAMSA in support of its commercial quantities claim, however, was not persuasive. First, TAMSA sold OCTG to the United States, when it sold at all, in only token volumes after the order was issued. Specifically, TAMSA's year-long volumes for the three basis years were only 0.5 percent, 0.6 percent, and 0.2 percent of the annualized sales volumes present in the period of investigation.[65] Because TAMSA made only token sales during the basis period, its zero margins in the reviews of those periods were inadequate to "substantiate" TAMSA's claim that it can compete normally in the U.S. market without dumping.

62. Mexico has argued that the United States considered only the drop in volumes, and ignored other evidence relating to the commercial quantities determination.[66] Mexico is incorrect. It is self-evident that an examination of whether TAMSA sold in commercial quantities must look primarily to the quantities in which such sales were made.[67] However, as demonstrated in the prior section of this submission, information regarding such sales is evaluated on a case-by-case basis that permits Commerce to take specific facts regarding the evolving nature of the market into consideration.

63. In this respect, TAMSA made two arguments, each of which Commerce considered and addressed in the final determination. First, TAMSA argued that the comparatively high cash

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[64] *See generally* Professional Cutting Tools, 64 FR at 71414-71418, including Comments 1-3. A case involving brass from the Netherlands provides both a parallel and a contrast. In that case, Commerce preliminarily found sales in commercial quantities by benchmarking sales in the three "basis years" against sales made after producer OBV's acquired a U.S. affiliate, and began selling only niche products to the U.S. market. Commerce deemed this acquisition to have caused a permanent change in what was "normal" for OBV in that market. In the final results, however, Commerce returned to the pre-order benchmark, after further information demonstrated that the U.S. subsidiary planned to reshift production of subject merchandise to OBV and to concentrate on other products. *Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent To Revoke Order: Brass Sheet and Strip from the Netherlands,* 64 FR 48760 (September 8, 1999); *Notice of Final Results of Antidumping Duty Administrative Review and Intent Not To Revoke Order: Brass Sheet and Strip from the Netherlands, 65* FR 742, 742-43 and Comment 5 (January 6, 2000), Exhibit US-39.

[65] *See Fourth Review Issues and Decision Memorandum*, at Comment 1. Exhibit MEX-9.

[66] *See, e.g.*, Mexico's Responses to Panel Questions Following the First Meeting, para. 25.

[67] Commerce also examined TAMSA's commercial quantities in terms of value, noting that compared to an annualized POI value of over 15 million dollars at dumped prices, TAMSA's sales in the second, third and fourth reviews were only valued at approximately $140,000, $180,000, and $82,000, respectively. *See* U.S. First Written Submission at para. 173, n. 187 and sources cited therein.

deposit rate from the investigation hindered its ability to sell. Yet TAMSA did not make sales to lower the rate for the fully refundable cash deposit until the second review period, and its sales did not improve when, during the fourth review period, the cash deposit rate dropped to zero.

64. Second, TAMSA argued that there was a lower demand for oil during the fourth review period, resulting in overall smaller sales of OCTG during that review. Given that the oil industry is inherently cyclical, low sales volumes in response to the increased price competition that normally marks a temporarily contracting market also cannot affirmatively demonstrate the need to remove the disciplines of an antidumping duty order. Commerce's final results addressed this argument, and reasonably found it insufficient to provide a basis for finding that TAMSA's extremely small sales were probative of its ability to maintain normal market participation without dumping.[68]

65. Mexico bears the burden of proving that, in fulfilling its obligations under Article 11.2, Commerce did not properly establish the facts or did not evaluate those facts in an unbiased and objective manner. Mexico has simply demonstrated that TAMSA and Hylsa presented facts and arguments; there is no evidence that Commerce did not evaluate those facts in an unbiased and objective manner. Mexico's claim fails.[69]

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

[69] Mexico has also tried to argue that the United States conducted a full revocation review for TAMSA and Hylsa, rather than an evaluation of the revocation requests. This argument is unavailing. U.S. regulations make clear that the commercial quantities requirement is a prerequisite for a request to conduct a revocation review. Section 351.222(e)(i) of the regulations provides that a company may only request revocation if it certifies, *inter alia*, that it has sold the subject merchandise in commercial quantities for three consecutive years. In verifying that certification, Commerce concluded that TAMSA had not sold the subject merchandise in commercial quantities and therefore did not qualify for a revocation review. With respect to Hylsa, Commerce noted that Hylsa had failed to obtain a *de minimis* margin in the fourth review. It stands to reason that if a company does not meet the threshold requirement for seeking revocation, then revocation will not occur. Mexico's reference to the title of the notice as providing evidence that a full revocation review in fact occurred is sophistic. (*See,* e.g., Mexico's Written Answers to Panel Questions, para. 11.)

Moreover, Mexico's quotation of the *Issues and Decision Memorandum* is misleading. (Mexico's Written Answers to Panel Questions, paras. 12-13.) In arguing that it met the commercial quantities requirement, TAMSA tried to justify the significant drop in sales. The passage quoted from the *Issues and Decision Memorandum* simply represents Commerce's response to TAMSA's argument that it met the commercial quantities requirement. This is confirmed by the paragraph following that which Mexico has quoted, in which Commerce stated that the "commercial quantities standard is evaluated on a case-by-case basis." (Issues and Decision Memorandum at 8 (Exhibit MEX-9)).

Finally, the United States notes that Mexico includes a quotation from the Issues and Decision Memorandum as "evidence" that the United States conducted a substantive review: "'[W]e find that TAMSA does not qualify for revocation of the order on OCTG under 351.222(e)(1)(ii) . . . ." Section 351.222(e) of the regulations is the commercial quantities certification requirement and thus expressly refers to a procedural, rather than a substantive decision.

E. The Margin Calculation Methodology for Hylsa in the Fourth Review was Consistent with the AD Agreement

66. Mexico's allegations that the United States calculated the dumping margin for respondent Hylsa in a manner inconsistent with Article 11.2 and 2 of the AD Agreement are without foundation and should be rejected by this Panel.

67. First, Mexico has failed to advance any claim that the United States acted in a manner inconsistent with Article 11.2 in its establishment of the margins of dumping in the fourth administrative review. As discussed during the First Substantive Panel Meeting, and further emphasized in the United States' Answers to the Panel's First Questions, the calculation of margins of dumping in an administrative review under the United States' system is performed pursuant to Article 9.3.1 of the AD Agreement. Mexico did not reference Article 9.3.1 in its Request for a Panel and there are no Article 9.3.1 claims before this Panel.

68. Second, with respect to Mexico's Article 2 claims, the analysis of each export transaction in the fourth administrative review was based on a comparison with a normal value for identical or similar home market transactions. In each case, due allowance was made for any differences affecting price comparability, consistent with Article 2.4. Mexico has not established that Article 2.4 requires anything more. Mexico does not dispute that the United States correctly found that certain transactions were sold at less than normal value, nor has Mexico alleged that the United States' assessment of antidumping duties was inconsistent with those findings. Mexico has offered no textual support for a finding that, once an antidumping measure is in place, Members may not impose antidumping duties based on the amount by which sales have been dumped. Similarly, Mexico has offered no textual basis for finding that Members must offset or reduce that amount of dumping based on the extent to which distinct comparisons have involved export prices which were greater than normal value.

69. In addition, Mexico has failed to establish that the AD Agreement contains any obligations as to how an administering authority is to determine an overall rate of dumping, or even *whether* an administering authority must determine an overall rate of dumping in a review. In the absence of such demonstrations, Mexico has failed to make even a *prima facie* case that the United States acted inconsistent with Article 2.4 of the AD Agreement in the fourth administrative review.

70. Third, to the extent that Mexico seeks to rely on Article 2.4.2 for its offset claim, Mexico is pursuing contradictory legal arguments. On the one hand, Mexico suggests that the term "investigation phase" in Article 2.4.2 of the AD Agreement means any time an administering authority undertakes a process that is *investigative* in nature. On the other hand, Mexico interprets the term "investigations" in Article 3.3 of the AD Agreement as limited to only

original investigations.[70] Not only does Mexico fail to offer any textual support for its disparate use of these terms, Mexico also fails to recognize that its interpretation of the phrase "investigation phase" in Article 2.4.2 would deprive that term of any meaning. Although the ordinary meaning of "investigation phase" would appear to be limiting the application of the first sentence of Article 2.4.2, Mexico interprets the phrase as making the sentence applicable "each time an investigating authority calculates a dumping margin."[71] Interpreting this phrase so as to deny it any meaning is inconsistent with the customary rules of interpretation of international agreements.[72]

IV. CONCLUSION

71. Based on the foregoing, the United States respectfully requests that the Panel reject Mexico's claims in their entirety.

[70] Mexico's Answers to the Panel Questions, paras. 66-68.

[71] Mexico's Answers to the Panel Questions, para. 67.

[72] *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted May 20, 1996, para. 23.

List of Exhibits

US-32 *Notice of Final Results of Antidumping Duty Administrative Review, Final Determination to Revoke the Order in Part, and Partial Rescission of Antidumping Duty Review: Fresh Atlantic Salmon From Chile,* 68 FR 6878 (February 11, 2003) ("Salmon 2000-2001 Final")

US-33 *Silicon Metal From Brazil: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Revoke Order in Part,* 67 FR 51539 (August 8, 2002). *Silicon Metal From Brazil: Final Results of Antidumping Duty Administrative Review and Revocation of Order in Part,* 67 FR 77225 (December 17, 2002)

US-34 *Notice of Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review and Intent to Revoke Antidumping Duty Order in Part: Certain Pasta from Italy,* 65 FR 48467 (August 8, 2000); *Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852 (December 13, 2000)

US-35 *Certain Welded Stainless Steel Pipe From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order in Part,* 64 FR 71728 (December 22, 1999); *Certain Welded Stainless Steel Pipe From Taiwan: Final Results of Antidumping Duty Administrative Review and Intent to Revoke Order in Part,* 64 FR 39367 (June 26, 2000)

US-36 *Professional Electric Cutting Tools From Japan: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order, in Part,* 64 FR 43346, 43351 (August 10, 1999) *Professional Electric Cutting Tools from Japan: Final Results of the Fifth Antidumping Duty Administrative Review and Revocation of the Antidumping Duty Order, in Part,* 64 FR 71411 (December 21, 1999), ("Professional Cutting Tools")

US-37 *Silicon Metal From Brazil: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Order in Part,* 66 FR 40980, 40982 (August 6, 2001). *Silicon Metal From Brazil: Final Results of Antidumping Duty Administrative Review,* 66 FR 6488 (February 12, 2002)

US-38 *Notice of Preliminary Results and Preliminary Determination to Revoke Order in Part: Canned Pineapple Fruit from Thailand,* 69 FR 18524, 18530 (April 8, 2004), and Memorandum re: "Preliminary Determination to Revoke in Part the Antidumping Duty Order on Canned Pineapple Fruit from Thailand" (April 1, 2004) ("2002-03 Pineapple Revocation Memorandum")

US-39 *Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent To Revoke Order: Brass Sheet and Strip from the Netherlands,* 64 FR 48760 (September 8, 1999). *Notice of Final Results of Antidumping Duty Administrative*

Review and Intent Not To Revoke Order: Brass Sheet and Strip from the Netherlands, *65* FR 742, 742-43 and Comment 5 (January 6, 2000)