

ARTICLE 1904 BINATIONAL PANEL REVIEW  
pursuant to the  
NORTH AMERICAN FREE TRADE AGREEMENT

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In the Matter of:	)	
	)	PUBLIC DOCUMENT
	)	
Oil Country Tubular Goods From Mexico:	)	Secretariat File No.
Final Results of Sunset Review of Antidumping	)	USA-MEX-01-1904-03
Duty Order	)	

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RULE 57(2) RESPONSE BRIEF OF THE  
INVESTIGATING AUTHORITY

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## STATEMENT OF THE CASE

### I. Administrative Determination to be Reviewed

This brief is filed on behalf of the United States Department of Commerce (“Commerce,” “the Department”), pursuant to Rule 57(2) of the North American Free Trade Agreement (“NAFTA”) Article 1904 Rules of Procedure for Binational Panel Reviews. Thereby, Commerce responds to issues raised by Tubos de Acero de Mexico, S.A. (“TAMSA”) with respect to the final results in the Five-Year Review (“Sunset Review”) of the antidumping duty order on oil country tubular goods (“OCTG”) from Mexico. This determination was published in the Federal Register as Oil Country Tubular Goods (“OCTG”) From Mexico: Final Results of Sunset Review of Antidumping Duty Order, 66 Fed. Reg. 14131 (March 9, 2001) (“Final Results”).

### II. Statement of the Facts

#### A. Sunset Review Background

Each of the questions to be decided by this Panel involves a decision by Commerce made in the course of conducting a Sunset Review. By statute, five years after the date of the publication of an antidumping duty order, Commerce and the International Trade Commission (“ITC”) must conduct a Sunset Review in order to determine whether the revocation of the antidumping duty order would likely lead to the continuation or recurrence of dumping and of material injury. 19 U.S.C. § 1675(c)(1). Commerce’s role is first to examine the factors set forth in the statute in order to determine whether the revocation of the order would likely lead to a continuation or recurrence of dumping. 19 U.S.C. § 1675a(c)(1). Commerce must also report to the ITC the magnitude of the margin of dumping likely to prevail if the order is revoked. 19

U.S.C. § 1675a(c)(3).

B. General Background

On July 20, 1994, Commerce initiated an antidumping duty investigation of OCTG from Mexico. Initiation of Antidumping Duty Investigations: Oil Country Tubular Goods From Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain, 59 Fed. Reg. 37962 (July 26, 1994). Commerce published its Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Mexico, 60 Fed. Reg. 33567, 33572 (June 28, 1995) (“LTFV”), finding a weighted-average margin of 23.79 percent for TAMSA.

During the investigation, Commerce requested that TAMSA submit its 1994 financial statements. These financial statements were not available at the beginning of the investigation, but became available during the course of the investigation. Although the 1994 financial statements were unaudited, TAMSA filed them with the Mexican Securities Exchange. TAMSA failed to provide these financial statements to Commerce when they became available, despite a specific request for the information at verification. Because TAMSA withheld information specifically requested by the Department, Commerce used the financial statements for the first two quarters of 1994 as best information available (“BIA”) in order to calculate interest expense. LTFV, 60 Fed. Reg. at 33572.

TAMSA challenged the decision to use BIA to calculate its interest expense before a NAFTA binational panel. The panel sustained Commerce’s decision to use the financial data from the first two quarters of 1994 as BIA. In the Matter of: Oil Country Tubular Goods from Mexico; Final Determination of Sales at Less Than Fair Value, USA-95-1904-04 at 65 (July 31, 1996) (“OCTG Panel Decision”). TAMSA had argued before the binational panel that the result

of using BIA was punitive. The Panel responded that any adverse effect of the use of BIA was due to the failure of TAMSA to provide the information as requested by Commerce:

Despite the mandate of the statute and the breadth of discretion, that the courts have sanctioned, it is common for respondents to argue, as TAMSA has argued, that the Department's use and selection of BIA leads to inaccurate results and is "punitive." However, arguments that a particular BIA rate was punitive (or arbitrary, inaccurate, not the "best," etc.) have fared poorly in the courts. Undoubtedly, there is a natural tension between the goal of calculating accurate dumping margins, and the use of the BIA rule as "an investigative tool, which [ITA] may wield as an informal club over recalcitrant parties" to induce noncomplying respondents to provide the agency with data needed to calculate accurate dumping margins. **The way to have accurate dumping margins, however, is for respondents to comply with the Department's requests and to provide information which is both accurate and complete. Absent a respondent's having done so, the Department has no choice but to rely on what is, by direct implication, less than accurate information.**

Id. at 71-72 (footnotes omitted) (emphasis added).

The panel remanded the matter at the request of Commerce on unrelated issues. Id. at 55. The remand resulted in a reduction of TAMSA's margin from 23.79 percent to 21.70 percent. Oil Country Tubular Goods from Mexico: Notice of Panel Decision, Amended Order and Final Determination of Antidumping Duty Investigation in Accordance With Decision Upon Remand, 62 Fed. Reg. 5612, 5613 (Feb. 6, 1997).

TAMSA did not export subject merchandise to the United States during the first period of review ("POR"). Oil Country Tubular Goods From Mexico; Notice of Termination of Antidumping Duty Administrative Review, 62 Fed. Reg. 19309, 19309 (April 21, 1997).

TAMSA first requested an administrative review for exports of the subject merchandise for the second POR, August 1, 1996 through July 31, 1997. Commerce assigned both TAMSA and another respondent, Hylsa S.A. de C.V. ("Hylsa"), a zero percent margin. Oil Country Tubular Goods From Mexico: Final Results of Antidumping Duty Administrative Review, 64 Fed. Reg.

13962 (March 23, 1999). An administrative review of the third POR also resulted in a zero percent margin for TAMSA. Oil Country Tubular Goods From Mexico: Final Results of Antidumping Duty Administrative Review, 65 Fed. Reg. 1593 (January 11, 2000). Commerce did not review exports from Hylsa during the third POR. After the publication of the Final Results, the fourth administrative review was completed. This administrative review resulted in a zero percent margin for TAMSA and a 0.79 percent margin for Hylsa. Oil Country Tubular Goods From Mexico: Final Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 15832 (March 21, 2001).

Commerce initiated its Sunset Review of OCTG from Mexico on July 3, 2000. Notice of Initiation of Five-Year (“Sunset”) Reviews, 65 Fed. Reg. 41053 (July 3, 2000). After receiving timely interested party submissions from TAMSA and Hylsa, and from domestic interested parties, Commerce issued its preliminary results in this review. Oil Country Tubular Goods (“OCTG”) From Mexico; Preliminary Results of Sunset Review of Antidumping Duty Order, 65 Fed. Reg. 64667 (October 30, 2000). Following the preliminary determination, TAMSA, Hylsa and domestic interested parties submitted case and rebuttal briefs. Commerce then published the Final Results on March 9, 2001, adopting therein the analysis in its “Issues and Decision Memorandum” (“Decision Memo”) of March 9, 2001.

In conducting this Sunset Review, and in reaching its Final Results, Commerce made these determinations:

1. Due to the significant decline in imports of the subject merchandise after the issuance of the order, Commerce determined that a recurrence of dumping of OCTG from Mexico was likely if the order were revoked. Decision Memo at Comment 1.

2. Because the rate determined during the investigation reflected the behavior of exporters without the discipline of the order, Commerce determined that the dumping margin likely to prevail if the order were revoked was 21.70 percent.

TAMSA then filed this action, contesting the Final Results. Further factual information is provided in the issue-specific sections below.

### STATEMENT OF THE ISSUES

Pursuant to Rule 59(1) of the NAFTA Article 1904 Panel Rules, the Department of Commerce provides below a statement and summary of the issues in this proceeding:

#### 1. Likely Recurrence of Dumping

Under 19 U.S.C. § 1675a(c), the Statement of Administrative Action, (URAA), H.R. Doc. No. 103-316, Vol. 1 (1994), reprinted in 1994 U.S.C.C.A.N. 3773 (“SAA”), the legislative history of the Uruguay Round Agreements Act (“URAA”), and Commerce’s announced policy, should Commerce’s determination that dumping is likely to recur if the order is revoked be affirmed as consistent with law and supported by substantial evidence when dumping was eliminated but imports of the subject merchandise from Mexico decreased significantly after the issuance of the order?

#### 2. Factors Considered

(a) Under the exhaustion doctrine, should the Panel decline to address TAMSA’s argument concerning the stability of the Mexican peso as it affects the analysis of whether dumping was likely to recur when TAMSA failed to raise this issue before the Department?

(b) Under 19 U.S.C. § 1675a(c), the SAA, the legislative history of the URAA, and Commerce’s announced policy, should Commerce’s determination of the likely recurrence of

dumping be affirmed when Commerce considered all statutorily relevant factors presented to it during the course of the Sunset Review?

### 3. Applicability of the World Trade Organization (“WTO”) Agreements

Should the Panel reject as non-justiciable TAMSA’s argument that U.S. law is inconsistent with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“WTO Antidumping Agreement”), when the clear terms of Article 1904 of the NAFTA obligate the panel to apply U.S. law?

#### SUMMARY OF ARGUMENT

The Panel should uphold the Department’s contested determination as to all issues, because these determinations are reasonable, supported by substantial evidence on the record, and otherwise in accordance with law.

First, Commerce properly determined that dumping was likely to recur if the order were revoked. The statute, SAA, and legislative history all establish which factors Commerce must consider in determining whether dumping is likely to recur. These factors are consolidated in a Commerce Policy Bulletin. Specifically, the Policy Bulletin states that Commerce will normally consider dumping likely to recur when dumping has been eliminated but imports of the subject merchandise decreased significantly. This is exactly the factual situation presented by this case. Regardless of whether “likely” is interpreted to mean “probable,” Commerce must still consider the weighted average dumping margins established during the investigation and subsequent reviews, and the volume of imports of the subject merchandise before and after the issuance of the order. This is, of necessity, a predictive exercise where the past behavior of the respondents is relevant to determine a likely future event.

Second, Commerce properly considered the relevant statutory factors presented to it in the administrative proceeding. TAMSA failed to exhaust its administrative remedies because it did not argue whether “good cause” existed for Commerce to consider factors other than the weighted-average margins and import volumes. Only now, before this Panel, does TAMSA belatedly argue that the stabilization of the Mexican peso provided a basis for Commerce to consider other factors. Commerce did, however, address TAMSA’s argument that the 21.70 percent deposit rate impressed upon it a “prudent business decision” not to export significant quantities of the subject merchandise until the cash deposit rate was decreased. In considering this factor, Commerce determined that this “prudent business decision” was probative of TAMSA’s inability to sell the subject merchandise in the U.S. market without dumping. Furthermore, TAMSA cannot rely on changes in the law due to the passage of the URAA to excuse its clear import patterns. These changes applied to all antidumping and countervailing duty cases, and any alleged uncertainty was mitigated by the explanations of the law provided in the SAA.

Finally, TAMSA’s claim that U.S. statutory law is inconsistent with the WTO Antidumping Agreement is not an issue justiciable by this Panel. By the clear terms of Article 1904 of the NAFTA, this Panel is obligated to apply U.S. law. U.S. law unambiguously instructs the Department to self-initiate sunset reviews in all cases.

#### STANDARD OF REVIEW

The standard of review to be applied by binational panels under the North American Free Trade Agreement (“NAFTA”), Dec. 17, 1992, United States-Canada-Mexico, 31 I.L.M. 289 (entered into force Jan. 1, 1994) in their review of Commerce’s determination is specified in

Articles 1904(2)-(3) and Annex 1911 of the NAFTA. These provisions, in turn, require that the applicable standard of review is that set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a(b)(1)(B)). This standard of review requires that a Panel “hold unlawful any determination, finding, or conclusion not supported by substantial evidence on the record, or otherwise not in accordance with **law**.” 19 U.S.C. § 1516a(b)(1)(B) (emphasis added). The law at issue in this case is U.S. law. See NAFTA, Art. 1904(2).

There are several elements to this standard of review. First, the requirement that the review be “on the record” means a Panel’s review must be limited to only “information presented to or obtained by [Commerce] . . . during the course of the administrative proceeding . . .” 19 U.S.C. § 1516a(b)(2)(A)(i). Material that is extraneous to the record may not be considered by the Panel, and any inquiry beyond the record constitutes an impermissible substitution of the Panel’s judgment for that of the agency.<sup>1</sup>

Second, the requirement that a determination be supported by “substantial evidence” does **not** mean that a determination must be supported by the weight of the evidence. Instead, “[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consolidated Edison Co. v. N.L.R.B., 305 U.S. 206, 229 (1938). The U.S. Supreme Court has reaffirmed that under the substantial evidence standard “[a] court reviewing an agency’s adjudicative action should accept the **agency’s** factual finding if those findings are supported by substantial evidence on the record as a whole . . . The court should not supplant the agency’s findings merely by identifying alternative findings that could be supported by substantial evidence.” Arkansas v. Oklahoma,

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<sup>1</sup> See, e.g., Beker Industries Corp. v. United States, 7 CIT 313, 316-17 (1984).

503 U.S. 91, 113 (1992)(emphasis in original; citation omitted). The court must accept those findings, even if the court would have reached a different conclusion if it had been the ultimate trier of fact. Shandong Huarong Gen. Corp. v. United States, Consol. Court No. 00-08-00393, Slip Op. 2001-88, 2001 Ct. Intl. Trade LEXIS 93 at \*22 (Ct. Int'l Trade July 23, 2001).

Third, on issues of statutory interpretation, where the “not in accordance with law” aspect of the standard of review of section 1516a is involved, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Where Congress has explicitly left a gap for the agency to fill, or legislative delegation is implied, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” Id. at 844. An implied delegation may be apparent from the agency’s generally conferred authority. United States v. Mead Corp., 121 S.Ct. 2164, 2172 (2001). In applying Mead, the Federal Circuit has held that an interpretation of the antidumping law made by Commerce during an administrative determination is entitled to Chevron deference. See Pesquera Mares Australes Ltda. v. United States, 2001 U.S. App. LEXIS 20914 at \*17-\*28 (Fed. Cir. 2001); American Silicon Technologies v. United States, 2001 U.S. App. LEXIS 18518 at \*15-\*16 (Fed. Cir. 2001).

“Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law.” National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992). Various decisions of the Supreme Court “mandate that when a court is reviewing an agency decision based on a statutory interpretation,

‘if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.’” Id., quoting from Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). The Supreme Court has also stated that “the resolution of ambiguity in a statutory text is often more a question of policy than of law,” and “[w]hen Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency’s policy determinations is limited.” Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991). It is sufficient that an agency’s interpretation of a statute “is plausible, if not preferable” in order to be sustained. National R.R. Passenger Corp., 503 U.S. at 419. In other words, the agency’s decision need only be a reasonable interpretation of the statute. It need not be “the **only** reasonable interpretation or the one which the court views as the most reasonable.” Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984). The Federal Circuit has consistently adhered to the principle of deference articulated in Chevron. See, e.g., Pesquera Mares Australes, 2001 U.S. App. LEXIS 20914 (Fed. Cir. 2001); American Silicon, 2001 U.S. App. LEXIS 18518 (Fed. Cir. 2001); Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986). Panels must apply this general legal principle of deference pursuant to Articles 1904(2) and 1904(3) of the NAFTA.

In addition, in determining Congressional intent, courts should look not only to the words of the URAA, but to the SAA that accompanied the statute. See, e.g., AK Steel Corp. v. United States, 226 F.3d 1361, 1372-74 (2000). The statute itself states that the SAA is “an authoritative expression by the United States concerning the interpretation and application of the Uruguay

Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application.” 19 U.S.C. § 3512(d) (1994).

Finally, decisions of the U.S. Supreme Court and of the U.S. Court of Appeals for the Federal Circuit are binding on Article 1904 Binational panels. NAFTA Article 1904(2)-(3).

### ARGUMENT

A. Commerce’s Determination that Dumping Would Likely Recur if the Antidumping Order Were Revoked is Consistent with U.S. Law and Supported by Substantial Evidence.

In determining that revocation of the antidumping duty order would likely lead to the continuation or recurrence of dumping, Commerce properly followed its statutory mandate. Its decision is supported by substantial evidence from the record.

TAMSA argues that Commerce misinterpreted the law because it failed to read the word “likely” as it appears in the statute to mean “probable.” However, the plain words of the statute are unambiguous. The statute requires Commerce to determine whether the revocation of an antidumping order “would be **likely** to lead to a continuation or recurrence” of dumping. 19 U.S.C. § 1675a(c)(1) (emphasis added). Had Congress meant to use the word “probable,” it would have written it into the statute.

Furthermore, the statute unambiguously instructs Commerce on which factors to consider in determining whether dumping is likely to continue or recur:

In a review conducted under section 1675(c) of this title, the administering authority shall determine whether revocation of an antidumping duty order or termination of a suspended investigation under section 1673c of this title would be likely to lead to a continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider –

- (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and
- (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.

19 U.S.C. § 1675a(c)(1). Thus, the statute not only uses the word “likely,” but also explicitly provides how Commerce is to proceed with its analysis.

Moreover, the Statement of Administrative Action (“SAA”) and legislative history give Commerce specific guidance on how it should interpret the factors it considers in conducting a Sunset Review:

[D]eclining 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.

SAA at 889; H.R. Rep. No. 103-826, vol. 1, at 63 (1994) (“House Report”); S. Rep. No. 103-412, at 52 (1994) (“Senate Report”). The SAA and House Report continue:

[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. If companies continue to dump with the discipline of the order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that exporters could not sell in the United States without dumping and that, to reenter the U.S. market, they would have to resume dumping.

SAA at 890; House Report at 63-64.

After reviewing the language of the SAA, the House Report, and the Senate Report, Commerce announced its policy concerning how it would interpret the factors listed in 19 U.S.C. § 1675a(c)(1):

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

Policies Regarding the Conduct of Five-year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 Fed. Reg. 18871, 18872 (April 16, 1998) (“Policy Bulletin”) (emphasis added).

Commerce has a similar rule with respect to revocation determinations in other situations. The reasoning behind that rule equally supports Commerce’s announced policy in Sunset Reviews that it would normally determine that the revocation of an order would likely lead to a recurrence of dumping. Specifically, when an exporter or producer requests a revocation on the basis of an absence of dumping for three consecutive years, the regulations require a certification that the subject merchandise was sold during this time period in commercial quantities. 19 C.F.R. § 351.222(e)(1)(ii). In the preamble to the regulations, Commerce explained the rationale behind this requirement:

The underlying assumption behind a revocation based on the absence of dumping or countervailable subsidization is that a respondent, by engaging in fair trade for a specified period of time, has demonstrated that it will not resume its unfair trade practice following the revocation of the order. If the respondent is not selling in commercial quantities of that company or industry for the duration of the specified period, this assumption becomes weaker.

Antidumping Duties; Countervailing Duties: Final Rule, 62 Fed. Reg. 27296, 27326 (May 19, 1997). Thus, even when a producer or exporter achieves a zero percent margin, if that producer or exporter cannot sell subject merchandise at fairly traded prices in the U.S. market in quantities commensurate with its pre-order quantities, it is logical to conclude that without the discipline of

the order the producer or exporter will resume dumping.

Consistent with the statute, the legislative history and its Policy Bulletin, Commerce considered both the dumping margins from subsequent reviews and the volume of imports before and after the issuance of the order. While it is true that in the second, third and fourth reviews zero percent dumping margins were calculated for TAMSA,<sup>2</sup> Commerce also “determined that imports of the subject merchandise declined significantly from 1994-1995 (the year preceding the August 11, 1995 order) to 1999.” Decision Memo at Comment 1.<sup>3</sup> Commerce stated, “Because we continue to find that Mexican export volumes in the post-order period were significantly lower than pre-order levels, we also continue to find that recurrence of dumping of OCTG from Mexico is likely if the order were to be revoked.” Id. This is the exact situation addressed by Commerce in its Policy Bulletin. That is, despite the fact that TAMSA achieved zero percent margins, its import volumes decreased significantly. Therefore, as announced in its Policy Bulletin, Commerce determined that if the order were revoked, dumping was likely to resume. Thus, not only did Commerce properly apply the law, its decision was supported by substantial evidence.

The interpretation of the word “likely” in the statute to mean “probable,” as TAMSA urges, will have absolutely no impact on the analysis with which Commerce is charged.<sup>4</sup>

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<sup>2</sup> Moreover, Commerce announced in its Policy Bulletin, that consistent with the SAA at 879 and the House Report at 56, the determination of the likelihood of dumping would be made on an order-wide basis. 63 Fed. Reg. at 18872. While the fourth review was completed after these Final Results, TAMSA does refer to the fourth review in its brief. TAMSA Br. at 4. In the fourth review, Commerce did calculate a margin for HYLSA of 0.79 percent, which is not *de minimis*. Oil Country Tubular Goods From Mexico: Final Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 15832 (March 21, 2001).

<sup>3</sup> The volume of TAMSA’s exports of subject merchandise are set forth in Exhibit 2 of TAMSA’s August 2, 2000 submission (Prop. Doc. # 2).

<sup>4</sup> TAMSA argues that Commerce’s interpretation of “likely” as used in 19 U.S.C. § 1675a(c)(1) should be governed by the WTO panel decision, United States - Anti-Dumping Duty on Dynamic

Congress has given Commerce clear instructions on which factors to consider in making its determination, and how those factors should be interpreted. Commerce announced the inferences it would make, based on the instructions from Congress, in its Policy Bulletin. In this case, Commerce followed the statute, SAA and legislative history, considered the appropriate factors, and applied the appropriate inference as announced in the Policy Bulletin.

The SAA recognized that determining whether dumping is likely to continue or recur is by its nature a predictive exercise:

The determination called for in these types of reviews is inherently predictive and speculative. There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsidies, or injury, is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case. In such situations, the order or suspended investigation will be continued.

SAA at 883. Commerce must look at the past practice of the exporter or manufacturer in order to engage in this exercise. How the exporter or manufacturer behaves with and without the discipline of the antidumping order are predictive evidence upon which Commerce should rely in making its determination. Logically, if imports of the subject merchandise decline significantly

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Random Access Memory Semiconductors (DRAMs) of One Megabyte or Above from Korea, WT/DS99/R, Report of the Panel (Jan. 29, 1999) (“DRAMs from Korea”). Article 1904 (2) of the NAFTA establishes that binational panels are obligated to apply U.S. law. WTO Panel reports are not binding precedential authority under U.S. law. Hyundai Elec. Co., Ltd. v. United States, 53 F. Supp.2d 1334, 1343 (Ct. Int’l Trade 1999).

Nonetheless, TAMSAs err in arguing the applicability of DRAMs from Korea. First, DRAMs from Korea did not involve a sunset review; it involved a revocation pursuant to 19 U.S.C. § 1675(d) and 19 C.F.R. § 353.25(a)(2)(ii) (1996), wherein the Department did not revoke an order because it did not find that the recurrence of dumping was “not likely.” Sunset reviews of antidumping duty orders, however, are covered by 19 U.S.C. § 1675(c). Furthermore, the Department has never taken the position that the standard for sunset reviews should be “not likely,” and the statute does not use these words. Moreover, the Panel did not rule that the word “likely” should be interpreted to mean “probable,” but merely replaced the word “likely” with the word “probable” when giving an example. DRAMs from Korea, at para. 6.46. Thus, the DRAMs from Korea case is entirely inapposite.

after the imposition of the antidumping order, even if the dumping margins decline or are eliminated, this is evidence which can reasonably be interpreted as showing that an exporter or manufacturer cannot sell in the U.S. market without dumping. Relying on the parties' margin and the pre- and post-order import volumes, therefore, is not only prescribed by statute, but also a logical application of a predictive exercise.

B. In Making its Determination, Commerce Considered All the Statutorily Required Factors Presented to It.

Commerce addressed all statutorily required factors presented to it during the sunset proceeding, and properly concluded that, without the discipline of the order, dumping would likely recur. TAMSA, however, argues that Commerce should have considered factors other than margins and import volumes required under the statute (19 U.S.C. § 1675a(c)(1)(A) & (B)).

1. TAMSA Failed to Raise the Issue of "Good Cause" Shown During the Administrative Proceeding.

The statute requires that in certain situations Commerce consider factors other than the dumping margins and import volumes. "If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant." 19 U.S.C. § 1675a(c)(2). However, in this case, TAMSA failed to show such "good cause." In fact, TAMSA failed to raise the question at all, and is therefore barred by the doctrine of exhaustion of administrative remedies from raising it before this Panel.

U.S. statutory law requires that, where appropriate, a party must exhaust its administrative remedies before raising an issue for judicial review. 28 U.S.C. § 2637(d). "Under the exhaustion doctrine, a party must present a claim for the relevant administrative agency's consideration prior to raising it before the Court." Viraj Group v. United States, Court

No. 00-06-00291, Slip Op. 01-104 at 10 (Ct. Int'l Trade August 15, 2001) (citing Fabrique de Fer de Charleroi S.A. v. United States, 2001 WL 753810 at \*2 (Ct. Int'l Trade July 3, 2001)).

Otherwise, the agency and the parties will be deprived of the opportunity to fully address and consider the claim, including developing the appropriate factual information on the record. See Fabrique de Fer de Charleroi S.A., 2001 WL 753810 at \*2 (citing Timken Co. v. United States, 630 F.Supp. 1327, 1334 (Ct. Int'l Trade 1986)). During the administrative proceeding, TAMSA failed to raise the issue of whether “good cause” existed. The administrative record demonstrates that nowhere in either its August 2, 2000 submission, or its December 11, 2000 case brief does TAMSA address whether there is “good cause” to consider other factors. (See Pub. Doc. # 15; Pub. Doc. # 32). The first time TAMSA has raised this issue is here before the Panel. Therefore, having failed to raise the issue of “good cause” at the administrative level, TAMSA may not raise it belatedly here.

2. TAMSA Failed to Raise the Issue of How a Stable Mexican Peso Affects the Analysis of Whether Dumping Was Likely to Recur.

TAMSA further seeks to avoid its failure at the administrative level by belatedly presenting to the Panel an argument concerning the effect of the stability of the Mexican peso on the analysis of whether dumping was likely to recur. While TAMSA’s argument is not clear from its brief, it appears to be arguing that because the Mexican peso exchange rate is now stable, TAMSA does not have to resort to dumping in order to sell in the U.S. market.

First, TAMSA never raised before the Department the issue of how the exchange rate of the Mexican peso affects the analysis of whether dumping was likely to recur. In its brief before the Panel, TAMSA attempts to confuse this issue with the separate and distinct issue of which dumping margin Commerce should report to the ITC as the margin likely to prevail if the order

were revoked. TAMSA does so by citing to page seven of its administrative case brief. TAMSA Br. at 19-20, n. 57. A review of TAMSA's December 11, 2000 case brief, however, demonstrates that TAMSA only raised the issue of the stability of the Mexican peso with respect to the argument that Commerce should not report to the ITC the 21.70 percent margin calculated in the investigation as the margin likely to prevail. This is confirmed by TAMSA's August 2, 2000 submission, wherein TAMSA only refers to the stability of the Mexican peso with respect to the margin likely to prevail. (TAMSA August 2, 2000 Submission, p. 5 (Pub. Doc. # 15)). As demonstrated, *infra*, Commerce properly reported this margin to the ITC as the margin likely to prevail if the order were revoked. In addressing the initial issue of whether dumping was likely to recur, however, TAMSA only presented arguments concerning its business decision not to export the subject merchandise in significant quantities to the United States after the issuance of the order, the alleged uncertainty due to changes in the law because of the URAA, and the fact that the 21.70 percent rate was calculated based on BIA. (TAMSA December 11, 2000 Case Brief, pp. 4-6 (Pub. Doc. # 32)). Because TAMSA failed to raise the issue of how the stability of the Mexican peso exchange rate affects the analysis of whether dumping was likely to recur, TAMSA cannot raise the issue now. *See Viraj Group*, Court No. 00-06-00291, Slip Op. 01-104 at 10.

The application of the exhaustion doctrine is appropriate in this instance specifically because of the lack of development of a factual record concerning the effect of the fluctuations of the Mexican peso exchange rate on the analysis of whether dumping would be likely to recur. For example, there is no information on the record concerning the duration of the Mexican peso crisis. Nor is there any information on the record addressing how a stabilized exchange rate has

affected the volume of exports. Because the relevance of the stability of the Mexican peso exchange rate is not merely a question of law, but requires the development of a factual record, this is not a situation where an exception to the exhaustion doctrine applies. See Fabrique de Fer de Charleroi S.A., 2001 WL 753810 at \*2 (citing Timken Co. v. United States, 630 F.Supp. 1327, 1334 (Ct. Int'l Trade 1986)).

Nonetheless, TAMSA's argument concerning the stability of the Mexican peso lacks merit. TAMSA's reliance on the Department's Preliminary Results of Full Sunset Review: Brass Sheet and Strip From the Netherlands, 64 Fed. Reg. 46637, 46639-40 (August 26, 1999) ("Brass Sheet and Strip: Preliminary Results"), is misplaced. In this announcement of Commerce's preliminary results, the Department preliminarily determined that relevant information other than the margins and import volumes demonstrated that the respondent was unlikely to resume dumping if the order were revoked. Brass Sheet and Strip: Preliminary Results, 64 Fed. Reg. at 46641. In the final results, after a full development of the record and briefing by the parties, Commerce rejected this information and determined that it did not provide a sufficient reason to negate its presumption that "the elimination of dumping coupled with a significant decrease in the volume of imports," demonstrates a likelihood of a recurrence of dumping should the order be revoked. Final Results of Full Sunset Review: Brass Sheet and Strip From the Netherlands, 65 Fed. Reg. 735, 738 (January 6, 2000) ("Brass Sheet and Strip: Final Results"). Thus, TAMSA's reliance on a preliminary result that was rejected and modified in the final results is inapposite.

Moreover, the factual situation of the Brass Sheet and Strip case is completely different from the instant case. There, the respondent had acquired a U.S. company, American Brass,

which it contended could supply brass sheet and strip in the United States. Therefore, the respondent argued that it could supply the U.S. market through American Brass, which it alleged had more than enough capacity to meet U.S. demand. Thus, the respondent contended that its acquisition of American Brass meant that it no longer needed to dump in order to supply the U.S. market. Brass Sheet and Strip: Preliminary Results, 64 Fed. Reg. at 46641. In the Brass Sheet and Strip: Final Results, Commerce determined that the respondent was actually going to take over American Brass' entire production of radiator strip, and export that subject merchandise to the United States from the Netherlands. 65 Fed. Reg. at 737. Therefore, in its final results, Commerce changed its position regarding the likelihood of dumping. Id. at 737-38.

This case does not present a situation where TAMSA acquired a U.S. company, unlike Brass Sheet and Strip. If TAMSA had acquired a U.S. company, that could explain a decline in export volumes, because TAMSA would be able to sell in the U.S. market through that U.S. company, and without actually exporting. Instead of an acquisition, TAMSA appears to argue that a stable currency exchange rate explains why TAMSA experienced a significant decline in export volumes. Yet, TAMSA does not explain why. Moreover, even though TAMSA alleges that the Mexican peso has stabilized, the volume of TAMSA's exports to the United States are still at significantly lower levels than prior to the order. That is, the pattern demonstrating a significant decline in exports to the U.S. market occurred after the Mexican peso crisis ended. Thus, even after the volatility of the Mexican peso had allegedly passed, TAMSA was still only able to eliminate its dumping margins by selling a significantly lower volume of subject merchandise in the United States. Accordingly, the alleged stability of the Mexican peso in this case is not an adequate reason to depart from Commerce's normal practice of finding dumping

likely to recur where dumping was eliminated, but the import volumes of the subject merchandise declined significantly.

3. Commerce Did Address Factors Concerning the Weighted Average Margins Determined in the Investigation and Subsequent Reviews.

At the administrative level, TAMSA did present arguments concerning the weighted average dumping margins calculated in the investigation and subsequent administrative reviews. In its case brief filed with Commerce, TAMSA argued that until its deposit rate was reduced from 21.70 percent it was unreasonable to expect TAMSA to export in significant quantities to the United States. (TAMSA December 11, 2000 Case Brief, p. 4 (Pub. Doc. # 32)). TAMSA also made reference to the zero or *de minimis* dumping margins calculated in the second, third and fourth reviews. (TAMSA December 11, 2000 Case Brief, p. 5 (Pub. Doc. # 32)).

Commerce addressed these factors and found them unpersuasive:

The premise that the decline in TAMSA's export levels after the issuance of the order was a 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 more fairly traded prices 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 exporters to maintain the same business strategy.

Decision Memo at Comment 1.

First, TAMSA counters that it was commercially unreasonable to export significant quantities to the United States because the 21.70 deposit rate remained in effect for most of the time period analyzed in the Sunset Review. TAMSA Br. at 18. TAMSA contends this deposit rate served as a significant disincentive to export more subject merchandise into the U.S. market. TAMSA Br. at 18. That this deposit rate remained in effect for so long, however, is due to

TAMSA's own conduct. TAMSA did not export subject merchandise to the United States during the first POR. Oil Country Tubular Goods From Mexico; Notice of Termination of Antidumping Duty Administrative Review, 62 Fed. Reg. 19309, 19309 (April 21, 1997).

Accordingly, the Department terminated this administrative review. Id. at 19311. If TAMSA were capable of selling in the U.S. market without dumping, or at a lower dumping margin, during the first POR, an administrative review would have resulted in a lower deposit rate. See 19 U.S.C. § 1675(a)(2)(C). However, without entries of subject merchandise during the POR, the Department could not conduct an administrative review, and thus the cash deposit rate of 21.70 percent remained in effect.

The request for an administrative review does not depend on importation of a significant quantity of subject merchandise. An administrative review could have been triggered by a single sale in the U.S. market. Indeed, the administrative review concerning the second POR involved but a single sale in the U.S. market by TAMSA. See Oil Country Tubular Goods from Mexico: Final Results of Antidumping Duty Administrative Review, 64 Fed. Reg. 13962, 13964-65 (March 23, 1999). Because TAMSA did not export subject merchandise during the first POR, its own conduct resulted in the continued application of a 21.70 percent deposit rate until the completion of the administrative review for the second POR. At that point, and for the succeeding reviews, TAMSA benefitted from a zero percent cash deposit rate.

At various time throughout its brief, TAMSA refers to this investigation rate of 21.70 percent as a "punitive" margin. TAMSA Br. at 2, 4, 6, 7, 19. TAMSA ignores the fact that its own failure to provide Commerce with 1994 financial statements, as requested throughout the investigation, resulted in the use of BIA to calculate interest expense. LTFV, 60 Fed. Reg. at

33572. This use of BIA was upheld in a prior Binational panel Decision, which noted that any inaccuracies in the resulting dumping margin was due to TAMSA's failure to provide the requested information. OCTG Panel Decision, at 55, 65-75.

4. Changes in the Antidumping Law Resulting from the URAA Cannot Be Used to Explain TAMSA's Significant Decline in Import Volumes.

Finally, TAMSA argues that the uncertainty of the U.S. antidumping law due to changes resulting from the URAA justified shipments of less quantity of subject merchandise after the issuance of the antidumping order. Specifically, TAMSA argues that because issues such as level of trade, CEP profit, CEP offset, and warehousing were evolving, TAMSA was justified in taking "a more modest approach." TAMSA Br. at 18-19.

First, due to judicial review and an agency's inherent authority to interpret the law which it is charged with the authority to administer, U.S. antidumping law in general is always evolving. See, e.g., Rust v. Sullivan, 500 U.S. 173, 187 (1991); British Steel PLC v. United States, 127 F.3d 1471, 1475 (Fed. Cir. 1997); Allegheny Ludlum Corp. v. United States, 112 F. Supp. 2d 1141, 1147 (Ct. Int'l Trade 2000) (stating "[I]t is well-established that Commerce may depart from a prior practice so long as it provides a 'reasoned analysis' for its change").

Therefore, the potential for the Department's rules to change cannot serve as a basis to ignore clear import patterns. Additionally, the changes in the law resulting from the URAA apply to all antidumping and countervailing duty cases. Therefore, there is nothing extraordinary about TAMSA's situation that would justify deviating from Commerce's normal practice of finding dumping likely to recur when dumping was eliminated, but import volumes decreased significantly. Moreover, any alleged uncertainty due to the passage of the URAA was diminished by the publication of the SAA, which explains how the changes made to the law were

to be implemented. Thus, TAMSA's argument that the passage of the URAA somehow justified its decision to export fewer quantities of subject merchandise is without merit.

5. Commerce Reported the Proper Margin to the ITC as the Margin Likely to Prevail.

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As stated above, TAMSA has attempted to rescue its failure at the administrative level to raise the issue of how the Mexican peso exchange rate affects the analysis of whether dumping was likely to recur by confusing this issue with the issue of which margin is reported to the ITC. Commerce properly reported the margin calculated in the original investigation to the ITC as the dumping margin likely to prevail if the order were revoked. While TAMSA has not directly raised this issue before this Panel, we address it because it is in this context that Commerce considered the impact of the Mexican peso exchange rate.

The statute charges Commerce with providing to the ITC "the magnitude of the margin of dumping that is likely to prevail if the order is revoked or the suspended investigation is terminated." 19 U.S.C. § 1675a(c)(3). The statute further states that Commerce shall normally choose a margin determined in the investigation or a subsequent administrative review. *Id.* The statute, therefore, leaves the choice of the margin likely to prevail to the discretion of Commerce. The SAA gives Commerce guidance on how it should exercise this discretion:

The Administration intends that Commerce normally will select the rate from the investigation, because that is the only calculated rate that reflects the behavior of exporters and foreign governments without the discipline of an order or suspension agreement in place. In certain instances, a more recently calculated rate may be more appropriate. For example, if dumping margins have declined over the life of an order and imports have remained steady or increased, Commerce may conclude that exporters are likely to continue dumping at the lower rates found in a more recent review.

SAA at 890-91.

In its Policy Bulletin, consistent with the SAA, Commerce announced its general policy to report the margin calculated in the final determination of the original investigation as the margin likely to prevail if the order were revoked. Policy Bulletin, 63 Fed. Reg. at 18873. However, Commerce would report a margin calculated in a more recent review if “dumping margins declined or dumping was eliminated after the issuance of the order or suspension agreement, as applicable, **and import volumes remained steady or increased.**” Id. (emphasis added).

In this case, unlike the situation alluded to in the SAA, imports did not remain steady or even increase over the life of the order. Rather, while the dumping margins decreased in the second, third and fourth reviews, the volume of imports also decreased significantly after the issuance of the order. This evidence suggests that TAMSA could not sell in the U.S. market in significant quantities without dumping. In such a situation, it would be inappropriate for Commerce to use a margin calculated in a more recent review.

The fact that the margin calculated in the investigation phase was based on BIA does not disqualify that margin as being the one that Commerce reports to the ITC.<sup>5</sup> The Policy Bulletin plainly states, “[T]he Department normally will provide the company-specific margin from the investigation for each company **regardless of whether the margin was calculated using the company’s own information or based on best information available or facts available.**” 63

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<sup>5</sup> In its brief, TAMSA claims that “[t]he only non-de minimis margin determined in the history of this order” was the 21.70 percent rate calculated in the original investigation. Factually, this is not true. In the fourth POR, Commerce calculated the margin for another respondent, Hylsa, to be 0.79 percent. See Oil Country Tubular Goods From Mexico: Final Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 15832 (March 12, 2001). Under 19 C.F.R. § 351.106(c)(1), a dumping margin calculated in an administrative review is *de minimis* if it less than 0.5 percent *ad valorem*. Clearly, then, this 0.79 percent rate for Hylsa is above *de minimis*.

Fed. Reg. at 18873. Thus, Commerce placed the trade community on notice that a margin would not be disqualified from being reported to the ITC merely due to the fact that it was based on BIA or facts available.

Indeed, the threat of the use of BIA was meant as an incentive to induce respondents to supply Commerce with the information required to calculate accurate dumping margins. See Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984). When a respondent, fails to supply information requested by Commerce, that respondent must accept the consequences of non-cooperation.

If the 21.70 margin is in any way inaccurate, TAMSA need only look to its own conduct during the investigation. The fact that this margin was based on BIA only demonstrates that TAMSA failed to supply information specifically requested by Commerce. While TAMSA may have disputed this claim, the fact remains that a binational panel sustained Commerce's use of BIA based on TAMSA's failure to supply the requested information. See OCTG Panel Decision, at 55, 65-75. This issue has already been resolved against TAMSA.

TAMSA argues that the situation that gave rise to the use of BIA was the "unique circumstances" that existed during the investigation – namely the devaluation of the Mexican peso. TAMSA Br. at 19-20. Commerce, however, did not apply BIA because of the devaluation of the Mexican peso. Commerce applied BIA because TAMSA withheld its 1994 financial statements, despite repeated requests for this information, even after the financial statements had been reported to the Mexican Securities Exchange. LTFV, 60 Fed. Reg. at 33572.

TAMSA further argues that after the investigation it reduced its long term debt, thereby reducing its financial expense. TAMSA Br. at 19-20. This, however, would not justify using a

margin from a subsequent administrative review as the margin likely to prevail. Despite these changes in its financial conditions, TAMSA still experienced a significant decline in exports. After eliminating dumping, TAMSA's export volumes have not remained steady or increased. Therefore, even with these financial changes, subsequent reviews do not reflect TAMSA's behavior without the discipline of an order.

Commerce properly reported the 21.70 percent margin as the margin likely to prevail if the antidumping order were revoked. In doing so, Commerce followed the statute, the SAA and its own Policy Bulletin. The fact that the margin was based on BIA did not disqualify the margin from being reported to the ITC. Furthermore, the application of BIA during the investigation was necessary due to TAMSA's failure to supply its financial statements, despite Commerce's repeated requests. TAMSA must now bear the consequences of its own failure to cooperate during the investigation.

C. TAMSA's Arguments Concerning Whether U.S. Statutory Law Is Consistent With WTO Obligations Is Not Justiciable by This Panel.

TAMSA argues that U.S. law is inconsistent with Article 11.3 of the WTO Antidumping Agreement because the statute establishes an automatic self-initiation of Sunset Reviews in every case. TAMSA further argues that the self-initiation was unlawful under the WTO Antidumping Agreement because Commerce lacked sufficient evidence upon which to base its initiation.

Article 1904 (2) of the NAFTA establishes that binational panels are obligated to apply U.S. law:

An involved Party may request that a panel review, based upon the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party **to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.** Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made part of this Agreement.

(Emphasis added). Thus, when a NAFTA panel reviews a determination by the Department, it stands in the place of the U.S. court, and must apply U.S. law.

U.S. law unambiguously instructs Commerce to “conduct a review to determine, in accordance with section 1675a of this title, whether revocation of the . . . antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping” five years after the date of publication of the antidumping order. 19 U.S.C. § 1675(c)(1). Thus, pursuant to the plain language of this statute, Sunset Reviews are automatically self-initiated in all cases. This is

supported by the SAA and legislative history, which states that the statute “provides for automatic initiation of five-year reviews by Commerce.” SAA at 879; House Report, at 56; Senate Report at 45.

U.S. law, as implemented through the URAA, is fully consistent with its WTO obligations. See SAA at 669. Nonetheless, even if a provision of a WTO agreement were to conflict with an unambiguous U.S. statute, under U.S. law the statute prevails. See 19 U.S.C. § 3512(a)(1); Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995); Suramerica De Aleaciones Laminadas v. United States, 966 F. 2d 660, 668 (Fed. Cir. 1992); Hyundai Elec. Co., Ltd. v. United States, 53 F. Supp. 2d 1334, 1343-44 (Ct. Int’l Trade 1999). The United States maintains that the statute governing Sunset Reviews is fully consistent with its WTO obligations. However, because the appropriate forum to address whether a U.S. statute is consistent with the WTO agreements is a WTO panel, and not a NAFTA panel, the United States declines to elaborate any further on this point.

#### RELIEF REQUESTED

In accordance with Rule 59(1) of the NAFTA Article 1904 Panel Rules, the Department of Commerce respectfully requests that the Panel grant the following relief:

(1) Determine that the Department’s determination that dumping would be likely to recur if the order were revoked was supported by substantial evidence on the record, and otherwise in accordance with law;

(2) Decline to consider TAMSA’s argument concerning the effect of the stability of the Mexican peso on the analysis of whether dumping was likely to prevail because TAMSA failed to exhaust its administrative remedies with respect to this argument;

(3) Determine that the Department considered all statutorily relevant factors presented to it in determining whether dumping was likely to recur, and

(4) Decline to reach, as non-justiciable, the question of whether U.S. law regarding the initiation of Sunset Reviews is inconsistent with the WTO Antidumping Agreement.

Respectfully submitted,

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Dated: