

ARTICLE 1904  
BINATIONAL PANEL REVIEW  
UNDER THE  
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF  
OIL COUNTRY TUBULAR GOODS FROM MEXICO  
FINAL RESULTS OF SUNSET REVIEW OF ANTIDUMPING DUTY ORDER  
FILE NO. USA-MEX-2001-1904-03

**DECISION OF THE PANEL**

February 11, 2005

Mr. Daniel A. Pinkus, Chair  
Mr. Hernán García Corral  
Mr. Jorge Miranda  
Prof. Daniel G. Partan  
Prof. Ruperto Patiño Manffer

**Appearances:**

Gregory J. Spak, Richard J. Burke, David P. Houlihan, White & Case, LLP, on behalf of Tubos de Acero de México, S.A.

William J. Kovatch, Jr., Elizabeth C. Seastrum, John D. McInerney, on behalf of the United States Department of Commerce.

Roger B. Shagrin, Shagrin Associates, on behalf of Maverick Tube Corporation, Ipsco Steel, Inc., Koppel Steel Corporation, Lone Star Steel Company, Newport Steel Corporation and Bellville Corporation.

Robert E. Lighthizer, John J. Mangan, Ellen J. Schneider, Meagher & Flom, LLP on behalf of United States Steel, LLC.

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## **I. INTRODUCTION**

This Panel was constituted pursuant to the North American Free Trade Agreement (“NAFTA”) to hear a request for review filed on April 6, 2001 by Tubos de Acero de México, S.A. (“TAMSA”). The determination at issue is the final results of the five-year review (“sunset review”) by the Department of Commerce (“Commerce”, “the Department”, or “the Investigating Authority”) of the antidumping duty order on Oil Country Tubular Goods (“OCTG”) from Mexico. This determination, *Oil Country Tubular Goods (“OCTG”) From Mexico; Final Results of Sunset Review of Antidumping Duty Order*, was published on March 9, 2001 in 66 *Federal Register* 14131. The Investigating Authority determined that “...the revocation of the antidumping order on OCTG from Mexico would be likely to lead to continuation or recurrence of dumping” at the margin of 21.70 percent *ad valorem*.

The Department initiated its investigation on July 20, 1994,<sup>1</sup> and published its final determination of sales at less than fair value on June 28, 1995.<sup>2</sup> Commerce found a weighted-

<sup>1</sup> *Initiation of Antidumping Duty Investigations; Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain*, 59 Fed. Reg. 37962 (July 20, 1994).

average margin of 23.79 percent *ad valorem*. The 23.79% margin was calculated with the use of the “best information available” (“BIA”) based upon the Department’s use of financial statements which TAMSA felt did not accurately reflect its costs. TAMSA challenged Commerce’s use of these figures before a NAFTA Binational Panel, which sustained the Department’s determination.<sup>3</sup> However, as a result of the Panel’s remand to the Department on other issues, the dumping margin was reduced from 23.79 percent to 21.70 percent *ad valorem*.

During the first year following the finding of sales at less than fair value TAMSA did not ship OCTG to the United States. However, thereafter TAMSA did ship OCTG and requested an administrative review for the second period (August 1, 1996-July 31, 1997), which resulted in a zero percent dumping margin.<sup>4</sup> Administrative reviews for the two subsequent years led to the same result for TAMSA: *i.e.*, a zero percent margin.<sup>5</sup>

The Investigating Authority commenced its five-year automatic sunset review, the determination at issue in this Panel Review, on June 16, 2000.<sup>6</sup> Following Preliminary Results of the Review on October 30, 2000, it published its Notice of Final Results on March 9, 2001.<sup>7</sup> Commerce found that the revocation of the antidumping order would be likely to lead to the continuation or recurrence of dumping at the rate of 21.70 percent. The Notice incorporated by reference a Decision Memorandum dated February 26, 2001 from Jeffrey A. May, Director, Office of Policy, Import Administration, to Bernard Carreau, fulfilling the duties of Assistant

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<sup>2</sup> *Final Determination of Sales at Less Than Fair Value; Oil Country Tubular Goods from Mexico*, 60 Fed. Reg. 33567 (June 28, 1995).

<sup>3</sup> *In the Matter of oil Country Tubular Goods from Mexico*, NAFTA Binational Panel, USA-95-1904-04 (July 31, 1996).

<sup>4</sup> *Oil Country Tubular Goods from Mexico: Final Results of Antidumping Administrative Review*, 64 Fed. Reg. 13962 (March 23, 1999). This review also found a zero percent rate for the other exporter from Mexico of OTCG, Hylsa S.A. de C.V. (“Hylsa”).

<sup>5</sup> *Oil Country Tubular Goods from Mexico: Final Results of Antidumping Review*, 65 Fed. Reg. 1593 (January 11, 2000), and 66 Fed. Reg. 15832 (March 21, 2001). Hylsa was not reviewed in the first of these reviews, and was assigned a rate of 0.79 percent for the second.

<sup>6</sup> *Notice of Initiation of Five-Year (“Sunset”) Reviews*, 65 Fed. Reg. 41053 (July 3, 2000).

<sup>7</sup> *Oil Country Tubular Goods (“OCTG”) from Mexico; Final Results of Sunset Review of Antidumping Order*, 66 Fed. Reg. 14131 (March 9, 2001).

Secretary for Import Administration, Department of Commerce contains the Department's rationale for the Final Results.<sup>8</sup>

The principal issues presented by TAMSAs concern the Department's interpretation and application of certain sunset review provisions of the *Tariff Act of 1930*, as amended, in its determination that revocation of the antidumping order would be likely to lead to the continuation or recurrence of dumping. These include the Department's interpretation and application of the term "likely", the Department's decision not to consider factors other than pre- and post-order margins and volumes in making its determination, and the automatic initiation by the Department of the sunset review procedure.

## II. THE PANEL'S STANDARD OF REVIEW

The authority of the Panel flows from NAFTA Chapter 19. Article 1904.1 provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." Article 1904.2 requires that a panel apply the "statutes, legislative history, regulations, administrative practice and judicial precedents" upon which a court of the importing country (in this case, the United States) would rely in reviewing a final determination of the investigating authority. The standard of review to be applied by such a court (in this case, the U.S. Court of International Trade ("CIT")) is set forth in §516a(b)(1)(B)(i) of the *Tariff Act of 1930*,<sup>9</sup> as amended, codified at 19 U.S. Code §1516a(b)(1)(B)(i), which requires that the reviewing court "shall hold unlawful any determination, finding, or conclusion, found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law". Under this standard, the court (in this case, the Panel) does not engage in *de novo* review, and restricts its review to the administrative record.

In reviewing the interpretation of statutes, the Panel follows the two-stage approach set forth by the Supreme Court in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council Inc.*,

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<sup>8</sup> *Issues and Decision Memorandum for the Full Sunset Review of the Antidumping Duty Order on Oil Country Tubular Goods ("OCTG") from Mexico; Final Results*, 66 Fed. Reg. 14131 (March 9, 2001).

<sup>9</sup> Hereinafter references to provisions of the *Tariff Act of 1930*, as amended, are cited to the codification of the statutory provisions in Title 19 of the United States Code.

467 U.S. 837 (1984). When reviewing an agency's construction of a statute that the agency administers, the panel is confronted with two questions:

First, ... whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the [panel], as well as the agency must give effect to the unambiguously expressed intent of Congress. If, however, the [panel] determines that Congress has not directly addressed the precise question at issue, the [panel] does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to a specific issue, the question for the [panel] is whether the agency's interpretation is based upon a permissible construction of the statute. [*Id.* at 842-43.]

An agency's statutory interpretation is to be upheld if it is "sufficiently reasonable" even if it is not "the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986).

The U. S. Court of Appeals for the Federal Circuit has held that Commerce's statutory interpretations enunciated in an administrative determination are "entitled to deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). And the Department's regulations, adopted pursuant to notice and comment rulemaking are also entitled to a high level of deference. *See Koyo Seiko Co. v. United States*, 258 F. 3d 1340, 1347 (Fed. Cir. 2001).

Nonetheless, a panel must "assure that the agency has given reasoned consideration to all the material facts and issues" and that Commerce has explained how its legal conclusions follow from the facts in the record. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made". *Avesta AB v. United States*, 724 F.Supp. 974, 978 (CIT 1989) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)), *aff'd*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 403 U.S. 1308 (1991).

In addition, when an agency does need to fill in gaps in a statute, it must act consistently with the underlying purpose of the law it is charged with administering. A reviewing panel must “reject administrative constructions, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement.” *Hoescht Aktiengesellschaft v. Quigg*, 917 F.2d 522 (Fed. Cir. 1990) (quoting *Ethicon Inc. v. Quigg*, 849 U.S. 1422, 1425 (Fed. Cir. 1988), and *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)).

### **III. THE STATUTORY FRAMEWORK AND SUNSET REVIEW REGULATIONS**

We begin with a brief review of the statutory framework and the Department’s Regulations relating to sunset reviews insofar as relevant to the issues presented in this case. The Department’s sunset review was undertaken pursuant to **Title 19 U.S. Code §1675(c)**, entitled “**Five-year review**”. The statute provides, in relevant part, that five years after the publication of an antidumping order,

#### **(1) In general**

... [T]he administering authority [the Department of Commerce] ... shall 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 a recurrence of dumping....

Further, **Title 19 U.S. Code §1675(d)(2)** provides in part:

In the case of a review conducted under subsection (c) of this section, the administering authority shall revoke ... an antidumping duty order or finding ... unless --

(A) the administering authority makes a determination that dumping ... would be likely to continue or recur....

**Title 19 U.S. Code §1675a(c)**, entitled “**Determination of likelihood of continuation or recurrence of dumping**”, provides in relevant part:

**(1) In general**

In a review conducted under section 1675(c) of this title, the administering authority shall determine whether revocation of an antidumping order ... would be likely to lead to 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 order....

**(2) Consideration of other factors**

If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.

...

**(4) Special rule**

(A) *Treatment of zero or de minimis margins.* A dumping margin described in paragraph (1)(A) that is zero or *de minimis* shall not by itself require the administering authority to determine that revocation of an antidumping duty order ... would not be likely to lead to continuance or recurrence of sales at less than fair value.

The sunset review provisions of Title 19 U.S. Code §1675a(c), quoted above, prescribes four standards, of which three are particularly relevant for the present appeal. In each of these provisions, Congress directed the administering authority (here the Department of Commerce), to conduct sunset reviews in accordance with a specific statutory standard. In other words, each of the four standards in effect expresses the specific intent of Congress with respect to an aspect of the sunset review process. In accordance with the *Chevron* standard, both the Panel and the Department must give effect to the clearly expressed intent of Congress.

First, in determining whether dumping is “likely” to continue or recur when an antidumping order is revoked, the Department must consider two stated factors: “weighted average dumping margins” and “volume of imports”. 19 U.S. Code §1675a(c)(1)(A) & (1)(B). Second, the Department must also consider “other price, cost, market or economic factors” that it “deems relevant” “[i]f good cause is shown”. 19 U.S. Code §1675a(c)(2). Third, a zero margin does not by itself require the Department to determine that revocation of an antidumping duty

order “would *not* be likely to lead to continuance or recurrence of dumping”. 19 U.S. Code §1675a(c)(4) (emphasis supplied). And, fourth, the Department must “revoke” an antidumping order “unless” the Department determines that dumping “would be likely to continue or recur”. 19 U.S. Code §1675(d)(2).

In addition to the provisions of Title 19, the Panel must give effect to the terms of the Statement of Administrative Action (SAA).<sup>10</sup> The SAA gives Commerce specific guidance on how it should interpret the factors which, under the statute, it must consider in conducting a sunset review. According to the *Uruguay Round Agreements Act* (URAA),<sup>11</sup> which adopted amendments to the then existing U.S. trade legislation and specifically “approved” the SAA, the provisions of the SAA are congressionally approved interpretations of the statute. The *Uruguay Round Agreements Act*; URAA §102(d), 19 U.S. Code §3512(d), provides that the SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of [both] the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” Accordingly, the Panel and the Department must interpret and apply the relevant provisions of the statute in light of the authoritative interpretations expressed in the SAA.

Relevant to sunset reviews, the SAA states:

[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.<sup>12</sup>

Further, the SAA adds:

The Administration believes that the existence 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

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<sup>10</sup> Both House Report No. 103-826 and the Statement of Administrative Action are published in 1994 U.S. Code Cong. & Adm. News, part 6, pp. 3773 and 4040, *et seq.* The SAA also appears in H.R. Doc. No. 103-316, vol. 1, at pp. 656 *et seq.* (1994). Provisions of the SAA are hereinafter cited to their publication in H.R. Doc. No. 103-316, vol. 1.

<sup>11</sup> Pub. L. 103-465, 108 Stat. 4809 (1994), codified in Title 19, U.S. Code. See 19 U.S. Code §3501.

<sup>12</sup> SAA, H.R. Doc. No. 103-316, vol. 1, at 889 (1994); 1994 U.S. Code Cong. & Adm. News, part 6, p. 4213. See also H.R. Rep. No. 103-826, vol. 1, at 63, and S. Rep. No. 103-412, at 52 (1994).



discipline of an 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 the exporters could not sell in the US without dumping and that, to reenter the U.S. market, they would have to resume dumping.

New section 752(c)(2) [19 U.S. Code §1675a(c)(2)] provides that, for good cause shown, Commerce also will consider other information regarding price, cost, market or economic factors it deems relevant. Such factors might include the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates ...; [and] any history of sales below cost of production [*inter alia*]. In practice this will permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping. The list of factors is illustrative, and the Administration intends that Commerce will analyze such information on a case-by-case basis.

Under new section 752(c)(4) [19 U.S. Code §1675a(c)(4)], the existence of zero or *de minimis* dumping margins at any time while the dumping order was in effect shall not in itself require Commerce to determine that there is no likelihood of continuation or recurrence of dumping. Exporters may have ceased dumping because of the existence of an order .... Therefore, the present absence of dumping is not necessarily indicative of how exporters would behave in the absence of the order ....<sup>13</sup>

Considered together, the SAA and the statute provide specific directions for the conduct of sunset reviews. With respect to the two principal statutory factors quoted above, “weighted average dumping margins” and “volume of imports”, the SAA explains that if dumping continues or imports cease after an antidumping order, “it is reasonable to assume that the exporters could not sell in the US without dumping”. However, such an assumption is no more than a presumption; it is not to be considered as conclusive.

Further, with respect to “other factors” that the Department must also consider, when relevant, the SAA states that such factors “might include ... changes in exchange rates ... [and] any history of sales below cost of production.” By virtue of this provision of the SAA, the factors specified may be “relevant” and thus must be considered by the Department.

<sup>13</sup> SAA, H.R. Doc. No. 103-316, vol. 1, at 890 (1994); 1994 U.S. Code Cong. & Adm. News, part 6, p. 4214. See also H.R. Rep. No. 103-826, vol. 1, at 63; and S. Rep. No. 103-412, at 52 (1994).

However, the SAA also specifies that the Department must proceed on a case-by-case basis: “Commerce will analyze [other relevant factor] information” provided by interested parties “on a case-by-case basis.” Finally, the SAA does not specify the extent to which the Department’s consideration of such “other factors” must involve investigation or fact-gathering that goes beyond an analysis of the specific information provided by interested parties. In this regard, the combination of the statute and the SAA falls short of expressing the specific intent of Congress.

The SAA thus makes clear that the Department’s sunset review is not to be confined to the principal statutory factors, that is, “weighted average dumping margins” and “volume of imports”. And, according to the SAA, the broad scope of the “other factor” information referred to in the statute is intended to “permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping.”

To quote the Supreme Court’s *Chevron* decision<sup>14</sup> as applied to sunset reviews, to the extent that the combination of the statute and the SAA provide the “unambiguously expressed intent of Congress”, “that is the end of the matter”; both the Panel and the Department must give effect to the intent of Congress. Thus, when we turn to TAMSA’s “other factor” arguments, both the Panel and the Department will be governed by the “unambiguous[] intent” of Congress as expressed in the above-quoted provisions. Where there is ambiguity, the Panel must ensure that the Department’s actions are consistent with the underlying purposes of the law.

The Department’s Sunset Review Regulations, 19 C.F.R. §351.218, specify in considerable detail the procedures to be followed in a sunset review. However, with the exception of provisions that govern an interested party’s “substantive response to a notice of initiation” of a sunset review, the Sunset Review Regulations are not relevant to the issues presented in this appeal. The “substantive response” provisions, 19 C.F.R. §351.218(d)(3), set out in detail the information required from “interested parties” (subparagraphs (ii) and (iii)); they also permit “interested parties” to file additional “information or evidence to show good cause”

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<sup>14</sup> *Chevron, U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-43 (1984).

(subparagraph (iv)) for the Department to consider the “other factors” referred to in 19 U.S. Code §1675a(c)(2), quoted above. TAMSAs’s “substantive response” filings, and the application of the Sunset Review Regulation provisions, are discussed below.

#### **IV. THE DEPARTMENT’S SUNSET POLICY BULLETIN**

In 1998 the Department of Commerce issued a “Policy Bulletin”, in which the Department proposed “policies regarding the conduct of five-year (‘sunset’) reviews” of antidumping and countervailing duty orders.<sup>15</sup> The Department’s Sunset Policy Bulletin quotes the statutory standards from 19 U.S. Code §1675a(c) and the provisions of the SAA quoted above. The Bulletin adds, in pertinent part:

[T]he Department normally will determine that revocation of an antidumping order ... 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 ...;
- (b) imports of the subject merchandise ceased after issuance of the order ...; or
- (c) dumping was eliminated after the issuance of the order ..., and import volumes for the subject merchandise declined significantly.<sup>16</sup>

With respect to relevant “other factors” that the Department must also consider “if the Department determines that good cause is shown”, the Sunset Policy Bulletin states:

[T]he Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question.<sup>17</sup>

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<sup>15</sup> DOC International Trade Administration, “Policies Regarding the Conduct of Five-year (‘Sunset’) Reviews of Antidumping and Countervailing Duty Orders”, 63 Fed. Reg. 18871-77 (April 16, 1998) (hereinafter cited as “Sunset Policy Bulletin”).

<sup>16</sup> Sunset Policy Bulletin, 63 Fed. Reg. at 18872.

<sup>17</sup> *Id.* at 18874.

The Sunset Policy Bulletin was published in the Federal Register “for comment”. The Department’s filing stated: “The proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.” The text published in 1998 remains in effect today.<sup>18</sup>

The Sunset Policy Bulletin sets out three primary factors that reflect the concern of the statute and the SAA with respect to import volumes in the period following the issuance of an antidumping order. According to the Bulletin, a finding of one or more of these three factors will “normally” lead the Department to determine that “revocation of an antidumping order is likely to lead to continuation or recurrence of dumping”.

The three factors are: (a) that dumping continues, (b) that imports cease, or (c) that import volumes decline significantly. The Sunset Policy Bulletin also acknowledges that, where the Department “determines that good cause” exists, the Department will consider other factors, but states that the interested parties have “[t]he burden ... to provide information or evidence that would warrant consideration” of such other factors.

The latter provision raises issues – burdens of production and of persuasion – that have not been directly addressed by Congress. With respect to such an issue, *Chevron* instructs that “the question for the court [here the Panel] is whether the agency’s interpretation is based upon a permissible construction of the statute.”<sup>19</sup> Issues relating to burdens of production and of persuasion are addressed in part VI, *infra*.

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<sup>18</sup> At the Panel Hearing counsel for the Department affirmed that the Department has made no response to any comments received, and has not altered the 1998 text of the Sunset Policy Bulletin. Hearing Transcript at 122. The policies stated in the Bulletin are applied in the Department’s decision-making process, but the Bulletin does not have the formal status of a Department regulation.

<sup>19</sup> *Chevron, U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 43 (1984).

## V. AUTOMATIC INITIATION OF SUNSET REVIEWS AND THE STATUTE'S "LIKELIHOOD" STANDARD

We begin with two threshold issues that can be addressed in short compass. First, TAMSA asserted that the Department's automatic self-initiation of sunset reviews was inconsistent with U.S. international obligations under the WTO's Anti-Dumping Agreement.<sup>20</sup> Second, TAMSA argued that the Department misconstrued the statutory term "likely" in its determination that revocation of the antidumping duty order would be "likely to lead to continuation or recurrence of dumping".<sup>21</sup>

With respect to the Department's automatic self-initiation of five-year sunset reviews, TAMSA initially argued that automatic self-initiation is inconsistent with the WTO Anti-dumping Agreement because the WTO Agreement creates a presumption that an antidumping order will terminate after a five-year period. In contrast, according to TAMSA, the U.S. practice of automatic review places the burden on the exporter to prove why the order should be terminated. However, TAMSA later abandoned this argument at the Panel Hearing, explaining that the WTO Appellate Body had decided that automatic self-initiation is not inconsistent with the WTO Antidumping Agreement.<sup>22</sup>

Furthermore, the United States statute, 19 U.S. Code §1675(c)(1), provides simply that the Department "shall conduct" such reviews at five-year intervals. And the Statement of Administrative Action is even more explicit. The SAA states that the quoted section of the statute "provides for automatic initiation of five-year reviews by Commerce".<sup>23</sup> In view of these provisions, which embody the explicit intent of Congress, the Panel must dismiss TAMSA's

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<sup>20</sup> World Trade Organization, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter "Antidumping Agreement").

<sup>21</sup> This provision of 19 U.S. Code §1675a(c)(1) is hereinafter referred to as the Department's "'likelihood' determination".

<sup>22</sup> Hearing Transcript at 46-47; *see* WTO Appellate Body Report, United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R (adopted Dec. 19, 2002).

<sup>23</sup> SAA, H.R. Doc. No. 103-316, vol. 1, at 879 (1994) (paragraph b.(1) entitled "Automatic Reviews").

self-initiation argument and affirm the Department's action. *See* the Supreme Court's decision in *Chevron*, cited in our discussion of the Panel's Standard of Review, part II, *supra*.

With respect to the statutory "likelihood" determination, the statute directs the Department to determine "whether revocation of the ... antidumping duty order ... would be *likely* to lead to continuation or a recurrence of dumping." 19 U.S. Code §1675(c)(1) (emphasis supplied); *see also* §1675a(c)(1). In the present case the Department determined that recurrence of dumping of TAMSA's oil country tubular goods would be "likely" if the order were to be revoked because export volumes were significantly lower in the post-order period than in the pre-order period. The Department concluded that even though TAMSA's dumping margins fell to zero percent in the second, third, and fourth administrative reviews, the fact that imports declined significantly from the year preceding the order (1994-1995) to 1999 indicated a likelihood of recurrence of dumping upon revocation of the order. In the Department's view, even when a producer or exporter achieves a zero percent margin in annual administrative reviews, if that producer or exporter cannot sell subject merchandise at fairly traded prices in quantities commensurate with its pre-order exports, it is logical to conclude that without the discipline of the dumping order the producer or exporter will resume dumping.<sup>24</sup> This position is supported by the provisions of the statute and the SAA quoted above.

TAMSA's argument that the Department's likelihood determination was contrary to law originally revolved around the meaning of the statutory term "likely". TAMSA argued that the term has an ordinary or plain-meaning definition: the term "likely" means "probable" or "more probable than not." The Department argued that, as used in the statute, the term "likely" does not have such a "plain meaning", but instead must be read in conjunction with its entire context, namely together with the remainder of the sunset provisions of the statute. The Department then construed the statutory term "likely" to mean "possible" instead of "probable".

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<sup>24</sup> As quoted above, 19 U.S. Code §1675a(c)(4) provides that a zero dumping margin does not by itself require a "likelihood" finding, and the SAA provides that "the present absence of dumping is not necessarily indicative of how exporters would behave in the absence of the order". SAA, H.R. Doc. No. 103-316, vol. 1, at 890 (1994). The Department's reasoning in the present case thus appears to broaden the position taken in the SAA. The Department's analysis turns on the fact that TAMSA's zero dumping margins were achieved in administrative reviews at post-order volumes that were considerably lower than the pre-order export volumes.

The parties' differing interpretations of "likely" have been repeatedly litigated at the CIT and in the WTO.<sup>25</sup> However, at the Panel Hearing in this case, counsel for the Department said that the question whether "likely" means "probable" "is nothing but a red herring." Counsel stated that "[I]t doesn't matter what adjective is used" to define "likely". Citing a commonly used basic English-language dictionary, Department counsel observed that one dictionary meaning of "probable" is "relatively likely, but not certain, plausible."<sup>26</sup>

TAMSA takes this statement to be a concession to the plain meaning interpretation, that is, the Department's statement shows that all parties now concede that likely means probable.<sup>27</sup> We agree. Therefore the Panel need not address the issue of the precise meaning to be ascribed to the term "likely". That issue has been resolved between the litigants, and the Department has expressly stated that the issue "is nothing but a red herring."<sup>28</sup>

## **VI. THE DEPARTMENT'S FAILURE TO CONSIDER "OTHER FACTORS"**

As noted above with respect to a showing of "other factors", both the statute (19 U.S. Code §1675a(c)(2)) and the SAA speak only of "good cause shown". Neither the SAA nor the statute addresses the issue in terms of burdens of proof, or of burdens of production or of persuasion. However, the SAA does refer to the opportunity that the statutory "other factors" clause gives to interested parties "to provide information" concerning the bearing that such "other factors" may have on the likelihood that dumping will continue or recur.

In contrast, the Sunset Policy Bulletin explicitly places on interested parties the "burden ... to provide *information or evidence*" (emphasis supplied) of potentially relevant "other

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<sup>25</sup> See, e.g., *Siderca, S.A.I.C. v. U.S.*, No.01-00603, 2004 WL 2414840 (CIT Oct. 27, 2004); United States – Sunset Reviews of Anti-Dumping Measures On Oil Country Tubular Goods from Argentina, WT/DS268/AB/R (adopted Nov. 29, 2004); United States – Sunset Review of Anti-Dumping Duties On Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (adopted Jan. 9, 2004); and United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea, WT/DS99/R (adopted Jan. 29, 1999).

<sup>26</sup> The reference was to the New American Heritage Dictionary. See Hearing Transcript at 72.

<sup>27</sup> Hearing Transcript at 111.

<sup>28</sup> Hearing Transcript at 72.

factors”. Considering the limited reference in the SAA to an opportunity “to provide information”, we construe the reference in the Bulletin to a burden “to provide information or evidence” as at most a burden analogous to a burden of production, rather than to a burden of persuasion. Unlike a burden of persuasion, which would require a party to present evidence sufficient to establish a proposition, a burden of production would require a party to present evidence sufficient to make a *prima facie* showing of the proposition, thereby shifting the burden of persuasion to the opposing party. And, in the sunset review context, the SAA specifies only a burden to “provide information” of “other factors”. In this sense, the Sunset Policy Bulletin provision does not address the burden of proof; it is analogous to a burden of production, and requires only the provision of information sufficient to trigger the Department’s duty to consider the referenced “other factors”.<sup>29</sup>

Insofar as the Bulletin’s use of the term “evidence” refers to “evidence” as a form of “information”, the Panel is satisfied that it is reasonable for the Department to infer from the statute’s reference to “good cause shown” that the burden of coming forward with “information or evidence” concerning such “other factors” and their relevance may be placed on interested parties. In other words, where an interested party fails to provide information sufficient to bring a particular “other factor” to the Department’s attention, the Department has no statutory obligation to consider such a factor in its “likelihood” determination. Understood in this sense, an interested party that provides “information or evidence” of a potentially relevant “other factor” has satisfied its burden of production under the Sunset Policy Bulletin. In consequence, the Department must then consider two issues: (1) whether the “other factors” presented are relevant, and (2) whether they warrant the determination that revocation of the antidumping duty would not be “likely” to result in continuation or recurrence of dumping.

The Panel need go no further on the burdens issue: no party has argued that the reference to “evidence” in the Sunset Policy Bulletin means that an interested party has the burden of

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<sup>29</sup> See *AG der Dillinger Hüttenwerke v. United States*, 193 F.Supp.2d 1339, 1346 (CIT 2002), where, addressing the “likelihood” determination more broadly in a case concerning sunset review of a countervailing duty order, CIT Judge Restani observed that the statute “does not charge any interested party with the ultimate burden of persuasion”.



persuasion.<sup>30</sup> The Sunset Policy Bulletin’s burden “to provide information or evidence” of other relevant factors is at most analogous to a burden of production. It requires only the provision of sufficient information or evidence to bring the claimed “other factor” to the attention of the Department. As such, we find that the provision of the Sunset Policy Bulletin is a reasonable and permissible construction of the statute and the SAA, and is entitled to deference from the Panel.

However, there is a further issue. The Panel’s finding as to the reasonableness of the interested party’s burden of providing information does not address the extent to which the Department must do more than analyze the specific information provided. The question is: must the Department also investigate or gather facts concerning the “other factors” that are raised by the party’s “information or evidence”?

In the present case, TAMSA claims that the Department failed to take certain information or evidence of “other factors” into consideration in the sunset review process. TAMSA argues that its filings showed “good cause” for the Department to consider relevant factors other than pre- and post-order import volumes. Specifically, TAMSA claims to have raised two “related factors”:

1. the impact of the convergence of massive peso devaluation and TAMSA’s substantial long-term dollar-denominated debt on TAMSA’s financing expense and costs of production; and
2. the fact that those circumstances never recurred in the subsequent administrative reviews, and, for the reasons stated by TAMSA, are not likely to recur in the foreseeable future.

TAMSA supports its argument by citing its substantive responses relating to TAMSA’s OCTG exports that were submitted pursuant to the Department’s notice of “Initiation of the Five-Year (‘Sunset’) Reviews”.<sup>31</sup> The framework for the “substantive response” is set out in 19

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<sup>30</sup> It is worth noting that, unlike the sunset review provisions, in a “changed circumstances” review under 19 U.S. Code §1675(b)(3)(A), the statute provides that the party seeking revocation of an antidumping order “shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant such revocation”. The materially different language in the sunset review provisions of the same statute would normally have a different meaning.

C.F.R. §351.218(d)(3)(ii), (iii), and (iv), as part of the Department's Sunset Regulations. TAMSA specifically relied upon its responses to Sunset Regulation paragraphs 218(d)(3)(ii)(G) and (iv)(A).<sup>32</sup> Paragraph (ii) sets out "[r]equired information to be filed by all interested parties in substantive response to a notice of initiation." Paragraph (iv) calls for "[o]ptional information" from interested parties.

Sunset Regulation paragraph (ii)(G) requires the interested party to submit *inter alia* the following information:

Factual information, argument, and reason[s] concerning the dumping margin ... that is likely to prevail if the Secretary revokes the order ... [and] that the Department should select for a particular interested party(s).

In its response to paragraph (ii)(G), TAMSA stated that "no antidumping duty rate is likely to prevail". TAMSA's "substantive response" gave the following explanation:

In the original investigation, ... the Department considered TAMSA's foreign currency translation losses related to its then-significant U.S. dollar-denominated debt as a financial expense in the period [the POI]. The effect was to increase dramatically TAMSA's COP [Costs of Production]. The large impact on Tamsa's COP reflected both TAMSA's unusually large dollar-denominated debt at the time, and the significance of the peso devaluation.

In this sunset review, the Department must consider the objective facts that demonstrate the inapplicability of the rate calculated using 1994 financial data: 1) TAMSA has much less debt (in fact, it had no long-term debt as of December 31, 1999), and therefore cannot experience the type of foreign exchange losses the Department used to calculate the BIA rate (see TAMSA's 1999 financial statement attached as Exhibit 1); and 2) the Mexican peso has stabilized, and sudden devaluations of the type experienced in 1994 are unlikely.<sup>33</sup>

In essence, TAMSA's position was that it no longer had dollar-denominated debt and that the 1990s peso devaluation would not recur. Thus there would no longer be a difference

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<sup>31</sup> 65 Fed. Reg. 41053 (July 3, 2000).

<sup>32</sup> TAMSA Aug. 2, 2000 Substantive Response (Pub. Doc. #15) ("Substantive Response").

<sup>33</sup> *Id.* at 5. The "BIA rate" refers to the determination made by the Department in the original investigation in 1995 that TAMSA had "withheld certain information regarding the effect of the Mexican peso devaluation (60 Fed. Reg. 33567, 33572 (June 28, 1995))." *Ibid.*

between its domestic and export prices. TAMSA's paragraph (ii)(G) conclusion was that therefore in the future there would be no dumping.

Sunset Regulation paragraph (iv)(A) offers to interested parties the opportunity to provide "[o]ptional information" "[s]howing good cause":

An interested party may submit information or evidence to show good cause for the Secretary to consider other factors under ... section 752(c)(2) (AD) of the Act [19 U.S. Code §1675a(c)(2)] ....

TAMSA's response under paragraph (iv)(A) was as follows:

As described above, there is good cause for the Department to consider the facts that: 1) TAMSA's financial position has changed dramatically since the original investigation, such that the high interest expense attributed to TAMSA in the original investigation has no probative value of the circumstances that might occur following revocation; and 2) TAMSA has demonstrated through the preliminary determination in the investigation and in successive administrative reviews that it can export to the United States without dumping.<sup>34</sup>

TAMSA argued that, through its filings under Sunset Regulations paragraphs (ii)(G) and (iv)(A), it had submitted the information required to show "good cause" for the Department to consider "other factors" under 19 U.S. Code §1675a(c)(2). The Department responded that although TAMSA raised the cited factors in its response to paragraph (ii)(G), it did so as TAMSA's argument concerning the magnitude of the potential dumping margin, and not under paragraph (iv)(A) as related to "other factors" relevant to the "likelihood" determination. Hence, according to the Department, while TAMSA may have raised the claimed factors in its substantive response to the notification of the sunset review, it did so in response to the wrong question.<sup>35</sup>

TAMSA's argument was that the Panel should reject the Department's position because it would raise form over substance, thereby leading to an unfair result for hyper-technical reasons. We agree. The Department's argument is not persuasive. Paragraph (iv)(A) calls for an

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<sup>34</sup> *Id.* at 8-9.

<sup>35</sup> *See* Hearing Transcript at 64-66.

interested party to submit “information or evidence” to show “good cause” for the Department to consider “other factors” under 19 U.S. Code §1675a(c)(2). TAMSA’s response to paragraph (iv)(A) refers to, and in effect incorporates by reference, its response to paragraph (ii)(G). Thus TAMSA’s paragraph (iv)(A) response argues that the factors raised in response to paragraph (ii)(G), together with the dramatic change in the company’s financial position and current ability to export without dumping cited in its response to paragraph (iv)(A), show the “good cause” required for the Department to consider such factors in its “likelihood of recurrence of dumping” determination.

TAMSA’s “information or evidence” could have been more explicit or detailed in defining the “other factors” to be considered. These factors were only summarily stated in TAMSA’s substantive response to the notice of initiation of sunset review. But, based on TAMSA’s substantive response, the Department could not reasonably conclude that TAMSA had failed to produce “information or evidence” to show “good cause” for the Department to consider “other factors” under 19 U.S. Code §1675a(c)(2).

TAMSA’s filing effectively identified the factors that TAMSA asked the Department to consider in its “likelihood” determination. TAMSA has thereby satisfied its burden to produce “information or evidence” of “other factors” for consideration by the Department. Therefore the Department must now both determine whether the factors raised by TAMSA are “relevant”, and consider whether the cited factors warrant a negative “likelihood” determination.<sup>36</sup>

With respect to the Department’s determination of relevance, the SAA has given the statute’s reference to “relevant” factors more specific content. Title 19 U.S. Code §1675(c)(2), quoted above, refers generally to “price, cost, market, or economic factors” that the Department “deems relevant.” The SAA, also quoted above, states that “[s]uch factors might include [*inter alia*] ... changes in exchange rates ... [and] any history of sales below cost of production”. The Panel considers that, in combination, the quoted provisions of the statute and of the SAA leave

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<sup>36</sup> The Department argued that during the sunset review proceeding TAMSA had failed to show good cause for the consideration of the “other factors” cited, and that TAMSA is now barred from raising these factors by the doctrine of exhaustion of administrative remedies. Since the Panel rules that TAMSA’s filing adequately raised the “other factors”, the exhaustion doctrine has no application.

the decision on relevance with the Department, but require the Department to provide a reasoned explanation in any case in which it rejects the relevance of a factor specified in the SAA. In such a case, we believe that a reasoned explanation is needed to give effect to the terms of the SAA and thereby carry out the will of Congress. Accordingly the Department is directed to determine whether the “other factors” raised by TAMSA are “relevant” to its “likelihood” determination. Furthermore, if the Department considers that TAMSA’s factors are not relevant, the Department is directed to explain the reasons leading to that decision.

Finally, the Panel must address the process for the Department’s consideration on remand of whether the cited factors warrant a negative “likelihood” determination. Although the Department has the authority, and bears the responsibility, for determining sunset review procedures, the parties have expressed sharply differing views of the Department’s role. Both the objective of expeditious resolution of disputes under NAFTA Chapter 19,<sup>37</sup> and the principles of judicial economy, require the Panel to address at the present stage the process to be followed by the Department on remand.

First, it is clear that the Department will need to reopen the record on remand for the limited purpose of investigating the bearing of TAMSA’s “other factors” on the Department’s “likelihood” determination. The record does not now contain adequate information on the effect of TAMSA’s “other factors”. For example, the Department stated that TAMSA had failed to explain how the devaluation of the Mexican peso and the restructuring of TAMSA’s U.S. dollar denominated-debt had affected the analysis of whether dumping would be likely to recur.<sup>38</sup> Investigation and fact-finding will be needed for the Department to consider both the relevance and the effect of TAMSA’s “other factors” in making the Department’s “likelihood” determination.

Second, although the Department has the authority to request further information in the context of administrative reviews, the Department’s stated at the Panel Hearing that it has no

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<sup>37</sup> The Rules of Procedure for NAFTA Article 1904 Binational Panel Reviews provide that their purpose is “to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904.”

<sup>38</sup> Hearing Transcript at 66-71.

obligation under the statute to request further information regarding TAMSA's "other factors".<sup>39</sup> Furthermore, the Department observed that TAMSA had an opportunity to provide such information in its substantive response to the notification of sunset review.<sup>40</sup> As indicated in the Panel's analysis of the parties' opportunity to "provide information or evidence" in its "substantive response", however, the relevant statutory and SAA provisions require only the provision of sufficient information or evidence to bring the claimed "other factor" to the attention of the Department. It then becomes the statutory duty of the Department to consider whether, when relevant, such "other factors" "would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value." 19 U.S. Code §1675a(c)(1)&(2). The Panel considers that it would be inconsistent with the statute, and frustrate the policy of Congress, were the Department to decline to investigate the relevance and effect of "other factors" that are effectively brought to the Department's attention through "substantive responses" filed by interested parties.

The Panel's view is supported by existing case precedents. In *AG der Dillinger Hüttenwerke*, the Court of International Trade held that the Department has a fact-gathering obligation.<sup>41</sup> The Court ruled that whereas the "interested party" bears the burden to raise the issue "with sufficient clarity to put Commerce reasonably on notice" of the information that it needs to consider, in a full sunset review<sup>42</sup> the Department must then both adequately consider the evidence on the record and seek additional evidence that may be necessary to make its "likelihood" determination.<sup>43</sup> The Court found that the Department had not fulfilled its

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<sup>39</sup> *Id.* at 67-68. The Department's position is that that the cases consistently hold that, in an administrative review, the burden is on the party that possesses the information to develop the record.

<sup>40</sup> *Id.* at 68.

<sup>41</sup> *AG der Dillinger Hüttenwerke v. United States*, 193 F.Supp.2d 1339 (CIT 2002), hereinafter cited as "Dillinger I".

<sup>42</sup> The SAA distinguishes between a "full sunset review" and an "expedited" review, which is based on "facts available". The SAA explains that "when there is sufficient willingness to participate and adequate indication that parties will submit information requested throughout the proceeding, the agencies will conduct a full review." SAA, H.R. Doc. No. 103-316, vol. 1, at 880 (1994). The TAMSA review is a "full sunset review".

<sup>43</sup> *Dillinger I*, 193 F.Supp.2d at 1348-50.

obligations in a full sunset review both because it had failed adequately to consider evidence on the record, and had failed to seek additional evidence necessary to make its determination. The Court stressed that in a sunset review, the Department's obligation is to determine as accurately as possible whether dumping would be likely to continue or recur.<sup>44</sup>

In reviewing the sunset proceeding in *Pure Magnesium from Canada*,<sup>45</sup> a NAFTA panel decided that the Department had acted contrary to law in failing to consider factors other than the decline in post-order exports in evaluating the likelihood of future dumping.<sup>46</sup> The Department had argued that a dramatic reduction in post-order export volumes gave it grounds to conclude that it was unnecessary to entertain "good cause" arguments with respect to certain "other factors".<sup>47</sup> But the *Magnesium* Panel concluded that the Department's refusal to consider such information solely because of declining export volumes was clearly inconsistent with the "good cause" provision as interpreted by the SAA.<sup>48</sup> The Panel considered that the Department's refusal to find "good cause" amounted to:

an un rebuttable presumption that declining or zero margins and significant declines in imports are sufficient – without more – to support a finding of likelihood of continuation or recurrence of dumping. ... This presumption is inconsistent with the word "normally" in the Sunset Policy Bulletin because the use of this word obviously means there will be cases where the normal rule will not be applied.<sup>49</sup>

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<sup>44</sup> In *Dillinger I*, 93 F.Supp.2d at 1357, the Court addressed sunset reviews in the context of determinations made by the International Trade Commission with respect to countervailable subsidies, but noted that "there is no reason why the prospective nature of sunset review should not hold true for reviews by Commerce." *Id.* at 1357, n. 30.

<sup>45</sup> The panel's decision in *Pure Magnesium from Canada*, USA-CDA-2000-1904-06 at 33 (April 28, 2003) (hereinafter cited *Magnesium I*), was reviewed by an Extraordinary Challenge Committee (ECC) convened pursuant to NAFTA Article 1904.13, which was critical of the decision in certain respects. See *Pure Magnesium from Canada*, ECC-2003-1904-01USA (decided Oct. 7, 2004). The ECC made no criticism of the aspects of that decision cited here.

<sup>46</sup> Although a NAFTA panel opinion does not represent a "judicial precedent" to which the Panel must defer, the panel's reasoning may be instructive in considering the issues currently before this Panel. See NAFTA Article 1904(2).

<sup>47</sup> *Id.* at 26.

<sup>48</sup> *Id.* at 27, citing the SAA, H.R. Doc. No. 103-316, vol. 1, at 890 (1994).

<sup>49</sup> *Id.* at 27-28.

In the instant case, TAMSA submitted a timely substantive response at the commencement of the sunset review. It thereby put the Department on notice of “other factors” that TAMSA claimed were both relevant and would affect the Department’s “likelihood” determination. The Panel considers that the Department’s failure to consider TAMSA’s “other factors” conflicts with the mandate of the SAA and the statute that the Department conduct a thorough investigation to determine as accurately as possible whether upon revocation of the antidumping order, dumping would be likely to continue or recur. The Panel therefore directs the Department to reopen the record to obtain the additional information needed to determine whether the “other factors” raised in TAMSA’s substantive response are relevant and, if so, how those factors would affect the Department’s “likelihood” determination.

## **VII. THE PANEL’S REMAND ORDERS**

1. The Department is directed to determine whether the “other factors” raised by TAMSA in its “substantive response” to the initiation of the sunset review are “relevant” to the Department’s “likelihood” determination. If the Department considers that TAMSA’s “other factors” are not relevant, the Department is directed to explain the reasons leading to that decision.

2. As needed to consider its “likelihood” determination, the Department is directed to reopen the record for the limited purpose of investigating and fact-finding concerning the relevance and bearing of TAMSA’s “other factors” on the Department’s determination of whether revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping.

3. The Department is further directed to complete its investigation and fact-finding of TAMSA’s “other factors”, to determine their relevance and their effect on the Department’s “likelihood” determination, and to issue the Department’s “likelihood” determination within thirty days from the date of this Panel decision.



Daniel A. Pinkus

Hernán García Corral

Jorge Miranda

Daniel G. Partan

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