SWEETENER USERS ASSOCIATION

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January 23, 2020

The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce
Attn: Enforcement and Compliance
PO/Dockets Unit, Room 18022
1401 Constitution Avenue, NW
Washington, DC 20230

RE: Sugar from Mexico, Case No. C-201-846

Dear Mr. Secretary:

These comments are submitted pursuant to the five-year sunset review of the agreement suspending the countervailing duty (CVD) investigation of sugar from Mexico. The Sweetener Users Association (SUA) respectfully submits these comments for consideration by the Department of Commerce. Although SUA is not an interested party in the strict sense of the term, our members' interests are profoundly affected by the suspension agreements. The companies that use caloric sweeteners in making foods and beverages constitute the end users of most sugar in the domestic market, including sugar imported from Mexico.

Overview

A number of the subsidy programs that were found to be countervailable in the Department of Commerce's final affirmative countervailing duty determination[1] were non-recurring and no longer exist, and by Commerce's own calculations, their benefits have been fully allocated over the average useful life (AUL) of renewable physical assets used in sugar production, as outlined

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[1] International Trade Administration. Sugar From Mexico: Final Affirmative Countervailing Duty Determination, 80 Federal Register 184 (September 23, 2015).

in the issue and decision memorandum that accompanied the final determination.[2] Moreover, the sugar mills that were owned by the government of Mexico when the case was initiated have since been privatized at fair market value. We address each of these points below.

Review Procedures

The procedures for conducting a five-year review of a CVD order or suspension agreement are explained in the Statement of Administrative Action accompanying the Uruguay Round Agreements Act[3] and in a policy bulletin issued by the Department of Commerce and published in the Federal Register on April 16, 1998.[4] These documents are based on the Department's regulations for the reviews.[5]

Non-Recurring Subsidies

The decision memorandum states that for non-recurring subsidies with a value of 0.5 percent of the relevant sales value or greater, benefits will be allocated over an 18-year AUL. Under Commerce's regulations, the AUL is calculated beginning in the year the subsidy is received.[6]

In determining whether revocation of the suspension agreement "would be likely to lead to continuation or recurrence of a countervailable subsidy," one of the factors that Commerce is to consider is "whether any change in the program that gave rise to the net countervailable subsidy … has occurred that is likely to affect that net countervailable subsidy."[7] If a subsidy no longer exists, that should easily qualify as such a "change in the program" that "is likely to affect" the subsidy, inasmuch as the latter no longer exists.

It is true that the benefits of non-recurring subsidies are allocated over time, not just in the year of receipt. But once the full AUL has elapsed, the continuing benefit of the subsidy should be zero – again, certainly a circumstance that "is likely to affect" the previously calculated subsidy.

It is also true that the policy bulletin states that Commerce "normally will determine that a countervailable subsidy will continue to exist when the benefit stream, as defined by the Department, will continue *beyond the end of the sunset review* …"[8] But in the case of several

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[2] Marsh C. Issue and decision memorandum for the final affirmative determination in the countervailing duty investigation of sugar from Mexico (September 26, 2015).
[3] Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administration Action, and Required Supporting Statements, House Document 103-316, Vol. 1 (September 27, 1994).
[4] International Trade Administration. Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 Federal Register 73 (April 16, 1998).
[5] 19 CFR 351.
[6] 19 CFR 351.524(d)(1).
[7] Policy bulletin, III.A.1.
[8] Policy bulletin, III.4 (*emphasis added*).

subsidies cited in the Mexico case, the benefit stream has in fact already ceased, by Commerce's own calculations.

Among the subsidies found countervailable are the following:

- **Inventory Support Subsidy:** Benefits were provided in 1998 and 1999. An 18-year AUL means the benefit streams ceased in 2016 and 2017, respectively.
- "**Special Fund" Grant:** Benefits were provided in 2001 and 2002. An 18-year AUL means the benefit stream from 2001 ceased in 2019, and the stream from the 2002 grant will cease in 2020.
- **Annual Budget Allocations:** The decision memorandum found that at least some Mexican mills received subsidies in some but not all years between 2002 and 2013. Although the benefit streams from the later years are continuing under Commerce's methodology, the benefit from the 2002 subsidy will have been fully exhausted this year.
- **Forgiveness of FINA Debt:** Commerce found benefits to groups of mills in 2006 and 2001, respectively. Again, the benefit stream for the 2001 subsidies would have ceased in 2019 under Commerce's methodology.[9]

The Statement of Administrative Action states Commerce's duty to "consider the net countervailable subsidies in effect after the issuance of the order and whether the relevant subsidy programs have been continued, modified, or eliminated."[10] SUA urges Commerce to consider the programs listed above since there has been no allegation on the record that they have recurred (and all were, in fact, deemed by Commerce to be non-recurring at the time of the final determination).

Sale of FEESA Mills

A further factor that Commerce should consider is that the sugar mills previously grouped as Fondo de Empresas Expropiadas del Sector Azucarero (FEESA) have all been sold to the private sector at fair market value and are no longer owned by the government of Mexico. In the World Trade Organization case *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,*[11] the Appellate Body "upheld the [WTO] Panel's finding that the USDOC should not have presumed that the non-recurring subsidy given to a state-owned enterprise (BSC in this case) would have 'passed through' to subsequent companies (UES and BSplc/GKN) when that state-owned enterprise (BSC) has been privatized." The case involved companies that had purchased the assets of the former state-owned British Steel Corporation.

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[9] Issue and decision memorandum, pp. 10-22.
[10] SAA at p. 888.
[11] WT/DS183/AB/R, AB-2000-1 (10 May 2000).

There are striking similarities to the Mexico sugar case, with respect to any assumption by Commerce that subsidies to FEESA (which no longer exists) continue. In both instances, some subsidies are non-recurring. In both instances, a state-owned enterprise was privatized at fair market value (note: the government of Mexico sold its remaining sugar mills in a very public and transparent tender process with sealed bids). SUA urges Commerce to take the Appellate Body's ruling into account in determining whether subsidies are likely to continue in the absence of the suspension agreements.

Conclusion

In a number of the subsidies that Commerce found to be countervailable, their benefits streams have either ceased or will cease this year. In addition, WTO precedent strongly suggests that Commerce would be on shaky ground in assuming that any non-recurring subsidies conferred on FEESA pass through to current mill ownership.

SUA respectfully requests that Commerce, instead of simply presuming that previous subsidy levels would continue, take these and other relevant factors into account as it makes its determinations in this five-year review.

Sincerely,

Richard Pasco
President