



A-201-845
Investigation
Public Document
E&C/Office VII: DL

DATE: September 16, 2015

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh *CM*
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative
Determination in the Less than Fair Value Investigation of Sugar
from Mexico

I. SUMMARY

In this final determination, the Department of Commerce (Department) finds that sugar from Mexico is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is January 1, 2013, through December 31, 2013.

We analyzed the comments of the interested parties in this investigation. As a result of this analysis, and based on our findings at verification, we made changes to the margin calculations for the respondents in this case, FEESA¹ and the GAM Group.² In addition, we have updated the scope of the investigation. We recommend that you approve the positions we developed in the “Discussion of the Issues” section of this memorandum.

Below is the complete list of the issues in this investigation on which we received comments from parties.

1. Imperial and AmCane’s Standing to Request Continuation of the Investigation
2. Use of Revised Scope for Final Determination
3. Selection of FEESA as a Mandatory Respondent

¹ Fondo de Empresas Expropiadas del Sector Azucarero (FEESA) consists of FEESA and the following sugar mills: Fideicomiso Ingenio El Modelo, Fideicomiso Ingenio San Cristobal, Fideicomiso Ingenio Plan De San Luis, Fideicomiso Ingenio San Miguelito, Fideicomiso Ingenio La Providencia, Fideicomiso Ingenio Atencingo, Fideicomiso Ingenio Casasano, Fideicomiso Ingenio El Potrero, and Fideicomiso Ingenio Emiliano Zapata.

² The GAM Group consists of the following sugar mills: Ingenio Tala S.A. de C.V. (Tala); Ingenio El Dorado S.A. de C.V. (El Dorado); and Ingenio Lazaro Cardenas S.A. de C.V (Lazaro).

4. Treatment of Certain FEESA Employee Expenses
5. FEESA's G&A and Financial Expenses Denominator
6. FEESA's Sales and Cost Verification Minor Corrections
7. FEESA Cost Changes Based on Verification Information
8. FEESA's Depreciation Expenses
9. Calculation of the GAM Group's Electricity Expenses
10. Offsets for Sugar Mills' Interest Income
11. Exclusion of Seedling Costs from ITLC's Cost of Production
12. The GAM Group's Final Sugar Cane Prices
13. Adjustments to Administrative Services Provided by ESOSA
14. Adjusting the GAM Group's G&A for Certain Affiliated Company Costs

II. BACKGROUND

On November 3, 2014, the Department published the *Preliminary Determination* in the LTFV investigation of sugar from Mexico.³ The Department conducted the sales verifications of FEESA and the GAM Group December 10 through 16, 2014, and the cost verifications between December 3 and 9, 2014.⁴

The Department issued a draft suspension agreement on October 27, 2014 and received comments from interested parties on November 18, 2014. On December 19, 2014, the Department and a representative of the producers/exporters accounting for substantially all imports of sugar from Mexico, the Camara Nacional de Las Industrias Azucarera y Alcoholera (Mexican Sugar Chamber), signed the *AD Suspension Agreement*.⁵

On January 8, 2015, Imperial Sugar (Imperial) and AmCane Sugar LLC (AmCane) each notified the Department that they had petitioned the International Trade Commission (ITC) to conduct a review in accordance with section 734(h) of the Act to determine whether the injurious effects of the imports of the subject merchandise are eliminated completely by the *AD Suspension Agreement*.⁶ Based on Imperial's and AmCane's requests, the ITC initiated a section 734(h) review of the *AD Suspension Agreement* and published notice of its review in the *Federal Register* on January 26, 2015.⁷

³ See *Sugar From Mexico: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 65189 (November 3, 2014) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.

⁴ See FEESA AD and CVD Verification Report (FEESA SVR); see also GAM AD and CVD Verification Report; FEESA Cost Verification Report (FEESA CVR); GAM Cost Verification Report (GAM CVR).

⁵ See *Sugar From Mexico: Suspension of Antidumping Investigation*, 79 FR 78039 (December 29, 2014) (*AD Suspension Agreement*).

⁶ See Letter to the Department from Imperial regarding "Sugar from Mexico – Notice of Filing of Petition for Review of Suspension Agreements to Eliminate the Injurious Effect of Subject Imports," dated January 8, 2015.

⁷ See *Sugar from Mexico; Institution of Reviews of Agreements Suspending Antidumping Duty and Countervailing Duty Investigations*, 80 FR 3977 (January 26, 2015).

Additionally, on January 16, 2015, Imperial and AmCane filed timely requests for the Department to continue the LTFV investigation of sugar from Mexico.⁸ Between January 20 and March 2, 2015, American Sugar Coalition and its members (collectively, Petitioners),⁹ the Mexican Sugar Chamber, Imperial and AmCane filed comments with the Department regarding Imperial and AmCane's requests for continuation. In the comments, Imperial and AmCane's standing to request the continuation of the LTFV investigation was challenged.¹⁰

On March 19, 2015, the ITC found that the *AD Suspension Agreement* eliminated completely the injurious effects of imports of sugar from Mexico.¹¹ On the same day, the Department announced that it would issue a decision regarding continuation of the investigations promptly after the ITC made its views and findings available.¹² The ITC notified the Department of its determination on March 24, 2015 and, subsequently, on March 27, 2015 the ITC published a notice of its determination that the *AD Suspension Agreement* eliminated completely the injurious effects of imports of sugar from Mexico in the *Federal Register*.¹³ Finally, on April 10, 2015, the ITC provided a report of its views and findings to the Department.¹⁴ As a result of the ITC's affirmative determination in its section 734(h) review, the *AD Suspension Agreement* remained in force.¹⁵

Following the ITC's affirmative determination, the Department reviewed the comments regarding Imperial and AmCane's standing to request continuation and, on April 24, 2015, determined that the two entities had standing to request continuation of the LTFV investigation.¹⁶ Accordingly, the Department announced that, in accordance with section 734(g) of the Act, we would continue the LTFV investigation, with the final determination due 135 days from the date of publication of the *Continuation Notice*.¹⁷

⁸ See Letter to the Department from Imperial regarding "Sugar from Mexico, Inv. Nos. A-201-845 and C-201-846 – Request for Continuation of Investigations," dated January 16, 2015; see also letter to the Department from AmCane regarding "Sugar from Mexico: Request for Continuation of Investigations," dated January 16, 2015.

⁹ The members of the American Sugar Coalition include: American Sugar Cane League, American Sugar Refining, Inc., American Sugarbeet Growers Association, Florida Sugar Cane League, Hawaiian Commercial and Sugar Company, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and United States Beet Sugar Association.

¹⁰ See, e.g., Letter to the Department from Petitioners regarding "Sugar from Mexico: Opposition to Standing of Imperial Sugar Company and AmCane Sugar LLC to Request Continuation of Suspended Investigations," dated January 20, 2015; see also Letter to the Department from the Mexican Sugar Chamber regarding "Opposition to Standing of Imperial Sugar Company and AmCane Sugar LLC," dated February 10, 2015.

¹¹ See *Sugar From Mexico: Continuation of Antidumping and Countervailing Duty Investigations*, 80 FR 25278, 25279 (May 4, 2015) (*Continuation Notice*).

¹² See Memorandum to the Files regarding, "Requests to Continue the Antidumping and Countervailing Duty Investigations on Sugar from Mexico," dated March 19, 2015.

¹³ See *Continuation Notice*, 80 FR at 25280.

¹⁴ *Id.*

¹⁵ See *Sugar from Mexico; Determinations*, 80 FR 16426 (March 27, 2015).

¹⁶ See Memorandum for the Files regarding "Standing of Imperial Sugar and AmCane Sugar to Request Continuation of the AD and CVD Investigations on Sugar from Mexico," dated April 24, 2015 (Standing Memorandum).

¹⁷ See *Continuation Notice*.

The Department invited parties to comment on the *Preliminary Determination* and, between May 29 and June 12, 2014, we received case and rebuttal briefs from Petitioners, FEESA, the GAM Group, Imperial, and AmCane.¹⁸ Based on our analysis of the comments received, as well as our findings at verification, we made certain changes to the weighted-average dumping margin program from that presented in the *Preliminary Determination*. These changes are briefly explained below in “Margin Calculations.”

III. SCOPE COMMENTS

Prior to the *Preliminary Determination*, several interested parties commented on the scope of this investigation.¹⁹ The Department reviewed these comments and, on October 30, 2014, proposed certain changes.²⁰ At the Department’s request, several parties submitted additional comments on the proposed modifications.²¹ On December 19, 2014, the Department and a representative of the producers/exporters accounting for substantially all imports of sugar from Mexico, the Mexican Sugar Chamber, signed the *AD Suspension Agreement*. Specifically, the comments submitted by parties following the October 30, 2014 proposed scope related to (1) sugar content levels subject to the scope, (2) sugar imported under the U.S. Department of Agriculture re-export program, (3) sugar from third countries and substantial transformation, (4) beverage mixes, and (5) inedible molasses. Based on these comments, the Department adjusted the scope, where deemed appropriate, to provide greater clarity on the products that fall within the scope as well as those that are specifically excluded from the scope. These revisions to the scope of the investigation were then included in the *AD Suspension Agreement*.²² As explained below in Issue 2, the Department finds that it is appropriate to adopt the scope language in the *AD Suspension Agreement* as the scope of the investigation. Accordingly, the scope language in the “Scope of the Investigation” section of this memorandum is identical to the scope language in the “Product Coverage” section of the *AD Suspension Agreement*.

¹⁸ See Petitioners’ Case Brief; see also FEESA’s Case Brief; The GAM Group’s Case Brief; AmCane’s Case Brief; Petitioners’ Rebuttal Brief; FEESA’s Rebuttal Brief; The GAM Group’s Rebuttal Brief; Imperial’s Rebuttal Brief.

¹⁹ See Letter from CSC Sugar LLC, “*Sugar from Mexico – CSC Sugar LLC Comments on Scope*,” May 7, 2014; see also Letter from Batory Foods Inc., “*Investigation of Sugar from Mexico: Scope Comments*,” May 7, 2014; Letter from the Government of Mexico (GOM), “Brief Submission of the Government of Mexico,” May 7, 2014; Letter from Petitioners, “Sugar from Mexico: Petitioners’ Rebuttal Scope Comments,” May 14, 2014; Letter from Glinso Foods, LLC, “Sugar from Mexico: Scope Clarification Request of Glinso Foods,” August 5, 2014.

²⁰ See Memorandum to the File, “Antidumping and Countervailing Duty Investigations of Sugar from Mexico: Proposed Scope Clarification,” October 30, 2014, at 5.

²¹ See Letter from Glinso Foods, LLC, “Sugar from Mexico: Comments of Glinso Foods on the Department’s Proposed Scope Clarification, Issued on October 30, 2014,” November 18, 2014; see also Letter from CSC Sugar LLC, “*Sugar from Mexico – CSC Sugar LLC Comments on Draft Suspension Agreements and Scope Clarification*,” November 18, 2014; Letter from Petitioners, “Sugar from Mexico: Petitioners’ Comments Regarding Proposed Scope Clarification,” November 18, 2014; Letter from Batory Foods Inc., “*Investigation of Sugar from Mexico: Scope Comments*,” November 18, 2014; Letter from Sweetener Users Association, “Sugar from Mexico – Comments of the Sweetener Users Association on Proposed Scope Clarifications,” November 18, 2014.

²² See *AD Suspension Agreement*, 79 FR at 78040-41 (Section I, “Product Coverage”).

IV. SCOPE OF THE INVESTIGATION

The product covered by this investigation is raw and refined sugar of all polarimeter readings derived from sugar cane or sugar beets. The chemical sucrose gives sugar its essential character. Sucrose is a nonreducing disaccharide composed of glucose and fructose linked by a glycosidic bond via their anomeric carbons. The molecular formula for sucrose is $C_{12}H_{22}O_{11}$; the International Union of Pure and Applied Chemistry (IUPAC) International Chemical Identifier (InChI) for sucrose is 1S/C12H22O11/c13-1-4-6(16)8(18)9(19)11(21-4)23-12(3-15)10(20)7(17)5(2-14)22-12/h4-11,13-20H,1-3H2/t4-,5-,6-,7-,8+,9-,10+,11-,12+/m1/s1; the InChI Key for sucrose is CZMRCDWAGMRECN-UGDNZRGBSA-N; the U.S. National Institutes of Health PubChem Compound Identifier (CID) for sucrose is 5988; and the Chemical Abstracts Service (CAS) Number of sucrose is 57-50-1.

Sugar described in the previous paragraph includes products of all polarimeter readings described in various forms, such as raw sugar, estandar or standard sugar, high polarity or semi-refined sugar, special white sugar, refined sugar, brown sugar, edible molasses, desugaring molasses, organic raw sugar, and organic refined sugar. Other sugar products, such as powdered sugar, colored sugar, flavored sugar, and liquids and syrups that contain 95 percent or more sugar by dry weight are also within the scope of this investigation.

The scope of the investigation does not include (1) sugar imported under the Refined Sugar Re-Export Programs of the U.S. Department of Agriculture;²³ (2) sugar products produced in Mexico that contain 95 percent or more sugar by dry weight that originated outside of Mexico; (3) inedible molasses (other than inedible desugaring molasses noted above); (4) beverages; (5) candy; (6) certain specialty sugars; and (7) processed food products that contain sugar (*e.g.*, cereals). Specialty sugars excluded from the scope of this investigation are limited to the following: caramelized slab sugar candy, pearl sugar, rock candy, dragees for cooking and baking, fondant, golden syrup, and sugar decorations.

Merchandise covered by this investigation is typically imported under the following headings of the HTSUS: 1701.12.1000, 1701.12.5000, 1701.13.1000, 1701.13.5000, 1701.14.1000, 1701.14.5000, 1701.91.1000, 1701.91.3000, 1701.99.1010, 1701.99.1025, 1701.99.1050, 1701.99.5010, 1701.99.5025, 1701.99.5050, 1702.90.4000 and 1703.10.3000. The tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this investigation is dispositive.

V. MARGIN CALCULATIONS

We calculated export price and normal value using the same methodology stated in the *Preliminary Determination*, except with respect to certain adjustments to the cost-related data, all of which are addressed in the “Discussion of the Issues” section below. All our calculations for this final determination are included in the GAM Final Analysis Memorandum, FEESA Final

²³ This exclusion applies to sugar imported under the Refined Sugar Re-Export Program, the Sugar-Containing Products Re-Export Program, and the Polyhydric Alcohol Program administered by the U.S. Department of Agriculture.

Analysis Memorandum, GAM Final Cost Memorandum and the FEESA Final Cost Memorandum.²⁴

VI. DISCUSSION OF THE ISSUES

General Issues

Issue 1: Imperial and AmCane's Standing to Request Continuation of the Investigation

FEESA and the GAM Group's Comments

- Imperial and AmCane do not qualify as parties to the investigation and thus, did not have standing to request continuation of the investigation.
- Because Imperial and AmCane did not have standing to request continuation of the investigation, the Department's continuation of this investigation was erroneous.²⁵

Imperial's Rebuttal

- FEESA and the GAM Group have incorporated by reference their arguments submitted in the proceeding when the Department was considering Imperial and AmCane's standing.
- The Department has already considered respondents' arguments that Imperial and AmCane are not parties to the investigation and, on April 24, 2015, determined that Imperial and AmCane were parties to the investigation.
- The Department reviewed these comments and determined that Imperial and AmCane's comments on the proposed suspension agreement were sufficient to support a decision that the companies had standing to request the continuance of this investigation.
- There is no basis for the Department to reconsider its position on Imperial and AmCane's standing and neither FEESA nor the GAM Group articulate why the Department should reconsider its determination.

Petitioners' Rebuttal

- Petitioners agree with FEESA and the GAM Group that the Department improperly continued this investigation.
- Section 734(g) of the Act explicitly states that a person requesting continuation of the investigation must be an "interested party" under section 771(9)(C)-(G) of the Act, and a "party to the investigation."

²⁴ See Memorandum to the File "Antidumping Duty Investigation of Sugar from Mexico: GAM Group Final Determination Analysis"; see also Memorandum to the File "Antidumping Duty Investigation of Sugar from Mexico: FEESA Final Determination Analysis" (FEESA Final Analysis Memorandum); Memorandum to Neal M. Halper, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – the GAM Group" (GAM Final Cost Memorandum); Memorandum to Neal M. Halper, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Fondo de Empresas Expropiadas del Sector Azucarero," (FEESA Final Cost Memorandum), all dated concurrently with this memorandum.

²⁵ See FEESA's Case Brief at 9-10 (*citing* Petitioners' Letters dated January 20, 2015, January 29, 2015, February 20, 2015, and February 18, 2015; Letters from the Mexican Sugar Chamber dated January 22, 2015 and February 10, 2015); The GAM Group's Case Brief at 11-12 (*citing* Petitioners' Letters dated January 20, 2015, January 29, 2015, February 20, 2015, and February 18, 2015; Letters from the Mexican Sugar Chamber dated January 22, 2015 and February 10, 2015).

- 19 CFR 351.102(a)(36) defines a “party to the proceeding” as an interested party that “actively participates through written submissions of factual information or written argument, in a segment of a proceeding. . . .”
- A “party to the investigation” is a party that has actively participated in the investigation and segment of the proceeding to which the Department has an obligation to notify about the proposed suspension of the investigation under section 734(e)(1) of the Act.
- Section 734(e)(3) of the Act vests the ability to comment in interested parties.
- Imperial and AmCane are not parties to the investigation because neither actively participated because they never commented upon questionnaire responses; they only entered appearances after the Department notified parties of the proposed suspension agreement.
- Because Imperial and AmCane were not parties to the investigation with standing to request continuation, the Department violated the plain language of the Act by accepting their continuation requests.

Department’s Position: The Department disagrees with FEESA, the GAM Group and Petitioners, and continues to find that Imperial and AmCane had standing to request continuation of the investigation. FEESA, the GAM Group, and Petitioners have incorporated by reference or reiterated arguments that the Department addressed in its April 24, 2015 memorandum.²⁶ For instance, the Department addressed the claim that Imperial and AmCane did not participate in the investigation segment of the proceeding – even though these parties filed comments on the proposed suspension agreement on November 18, 2014.²⁷ As the Department explained:

suspension agreements and the negotiations that give rise to them are not distinct from investigations. That being the case, participating in suspension agreement negotiations (*e.g.*, but submitting comments on a draft suspension agreement) constitutes participating in the investigation. This view has been confirmed by the Court of International Trade, which has stated that “the negotiations leading up to the suspension of the investigation . . . actually were part of (*i.e.*, were subsumed in) the resumed antidumping investigation.”²⁸

The Department also addressed the claim that Imperial and AmCane do not qualify as “parties to the investigation” because a party to the investigation purportedly must be a party that the Department is required to notify of the proposed suspension agreement 30 days in advance of signing.²⁹ The Department explained that it had found no support in the statute, regulations, or Department practice, for the argument that the 30-day notice of the proposed suspension agreement to the interested parties acted as a cut-off date for becoming a party to the investigation.³⁰ The Department also noted that a distinct suspension agreement segment of the proceeding can only begin on the date that the agreement is formally signed.³¹ As such, when

²⁶ See Standing Memorandum.

²⁷ *Id.* at 6-7.

²⁸ *Id.* at 7 (citing *San Vicente Camalu SPR DE RI v. United States*, 491 F. Supp. 2d 1186, 1205 (CIT 2007)).

²⁹ *Id.* at 7-9.

³⁰ *Id.* at 8.

³¹ *Id.* at 9-10.

Imperial and AmCane submitted their comments on the proposed suspension agreement, they necessarily were participating in the investigation, not in the new segment that could only begin once the suspension agreement was signed.³²

Further, we note that Petitioners' claim that Imperial and AmCane did not file case briefs in this investigation is incorrect. AmCane filed its case brief on May 29, 2015, and Imperial filed its rebuttal brief on June 12, 2015.³³

Because the parties have made no new arguments regarding Imperial's and AmCane's standing to request continuation of the investigation, the Department finds that there is no basis to reconsider its April 24, 2015 standing determination.

Issue 2: Use of Revised Scope for Final Determination

AmCane Comments

- The scope used in the *Preliminary Determination* included “donut hole” language suggesting that sugars of polarities between 99.6 and 99.9 are outside the scope of the investigation.
- During the investigation, the Department received interested party input on the scope language and identified necessary changes that were reflected in the *AD Suspension Agreement* signed by the Department.
- The Department should rely on the scope used in the *AD Suspension Agreement* for the purposes of the final determination in case it should ever serve as the basis for an antidumping duty order on the subject merchandise.

Department's Position: The Department agrees with AmCane that it is appropriate to rely on the scope used in *AD Suspension Agreement* for purposes of the final determination. As discussed in the “Scope Comments” section above, the Department made some adjustments to the scope subsequent to the *Preliminary Determination*. Accordingly, the scope used in the *AD Suspension Agreement* reflects the Department's final scope adjustments.³⁴ Therefore, we have included the same scope language used in the “Product Coverage” section of the *AD Suspension Agreement* in the “Scope of the Investigation” section above.

FEESA Issues

Issue 3: Selection of FEESA as a Mandatory Respondent

FEESA's Comments

- FEESA is not a producer or exporter of sugar and therefore was erroneously selected as a mandatory respondent in this investigation.

³² *Id.*

³³ See AmCane's Case Brief; Imperial's Rebuttal Brief.

³⁴ See *supra* n.19 & n.21.

- FEESA’s selection by aggregating import volumes of nine mills contradicts the Department’s established practice of selecting mandatory respondents based on volumes as they appear in the Customs and Border Protection (CBP) entry data.
- The Department has never before relied on foreign law to determine an exporter’s legal status for the purposes of respondent selection.
- The Department incorrectly interpreted the 2001 expropriation decree; it did not combine the assets of the individual mills as a matter of Mexican law but instead only nationalized the assets of the sugar mills and directed certain government agencies to take necessary actions to manage those expropriated assets.
- The record demonstrates that FEESA does not directly manage, own or control the expropriated mills.
- The mills are separate legal entities and each of the nine mills maintains its own accounting records and separate financial statements.

Petitioners’ Rebuttal

- The Department properly relied on information contained in the Petition,³⁵ the CBP entry data, and publicly-available information to determine that the FEESA mills should be treated as one entity for the purposes of respondent selection.
- By aggregating the FEESA mills, the Department acted in accordance with section 777A(c)(2)(B) of the Act by selecting those exporters and producers accounting for the largest volume of the subject merchandise.
- FEESA, Nacional Financiera (NAFIN) and Promotora Azucarera (PROASA) all exercise control over or provide support to the sugar mills which indicates that it was appropriate to select FEESA as a mandatory respondent.

Department’s Position: The Department finds that it properly selected FEESA as a mandatory respondent in this investigation. FEESA’s primary arguments are that the Department (1) misinterpreted record information, and thus mistakenly concluded that FEESA and the mills operate as a single entity, and (2) violated its standard practice of not combining import volumes based on alleged affiliation for purposes of respondent selection.

As an initial matter, we disagree with FEESA’s argument that the Department misinterpreted the expropriation decree in finding that the decree, as a matter of Mexican law, combined the expropriated sugar mill assets into a single producer-exporter, FEESA.³⁶ According to the terms of the decree, the capital or partnership interests of the sugar mills would be “expropriated by the nation on the grounds of the public interest.”³⁷ The GOM’s expropriation included “the industrial units called sugar mills, with all machinery and equipment { *etc.* }, the sugar contained in them, and all other personal and real property.”³⁸ The decree also provided for the

³⁵ See “Petition for the Imposition of Antidumping Duties on Imports of Sugar from Mexico,” dated March 28, 2014 (Petition)

³⁶ See FEESA’s Case Brief at 3; *see also* Memorandum to Christian Marsh regarding “Antidumping Duty Investigation of Sugar from Mexico: Respondent Selection,” dated June 11, 2014 (Respondent Selection Memorandum) at 6.

³⁷ See Petition Exhibit III-12.

³⁸ *Id.*

appointment of “individuals to administer the assets expropriated ... who will have the authority to take the necessary measures in the interest of the optimal operation of said units”³⁹

A generally-accepted definition of government expropriation means that the government is taking private property out of the owner’s hands and placing it into the hands of the government.⁴⁰ In this particular situation, while the expropriation decree did not specify that the sugar mill assets were to be combined in a single legal entity, the act of expropriating the separate, privately-owned mills had the practical effect of combining the assets of those mills and placing their combined assets into the hands of a single owner – the GOM – through a legal declaration. Accordingly, we find that we appropriately considered the record information available at the time of our respondent selection determination, and properly concluded that the assets of the mills were combined into a single producer-exporter via the 2001 GOM expropriation decree.

Furthermore, as FEESA notes, the 2001 expropriation decree established the GOM’s ability to appoint an administrator of these assets. FEESA is the entity that was ultimately established for this purpose.⁴¹ FEESA maintains that, because the mills are administered through PROASA and NAFIN, with FEESA’s oversight, FEESA cannot be considered a producer or exporter of subject merchandise and, as such, should not have been selected as a mandatory respondent. Nevertheless, the FEESA organization manual, an official GOM document submitted as an exhibit in the Petition, specifically states that “by means of respective financial, fiduciary and, in general, legal vehicles created in order to run the administration of the expropriated sugar mills, FEESA maintains that responsibility with the following sugar mills”⁴² Accordingly, while FEESA may rely on the use of different legal vehicles and structures to manage these mill assets, that fact is immaterial. To find otherwise would mean placing undue emphasis on form over function. As noted in the Respondent Selection Memorandum, we focused not on FEESA’s ownership or legal structure but instead on the fact that the expropriation decree ultimately resulted in the establishment of FEESA for the purpose of overseeing the administration of the expropriated assets.⁴³ While FEESA has established a variety of vehicles to ensure proper administration of the assets, the fact remains that FEESA is still ultimately responsible for these assets. Consequently, this analysis resulted in the Department determining that it was appropriate to select FEESA as a mandatory respondent in this investigation.

FEESA also argues that information on the record, such as separate financial statements and separate accounting records, are proof that the mills operate as separate entities. While it may be the case that each mill maintains separate financial records, this fact alone does not mean that the mills are separate producer-exporters. We note that it is common for separate plants or divisions within a company to maintain separate accounting records and financial information while still belonging to the same company. In this case, FEESA’s organization manual states that FEESA’s

³⁹ *Id.*

⁴⁰ *See, e.g.,* Black’s Law Dictionary (10th ed. 2014) (defining “expropriation” as “{a} governmental taking or modification of an individual’s property rights, esp. by eminent domain.”).

⁴¹ *See* FEESA Case Brief at 3.

⁴² *See* Petition at Exhibit III-62.

⁴³ *See* Respondent Selection Memorandum at 6-7.

“primary object . . . consists of administrating and operating the expropriated assets, as well as commercializing the products and byproducts arising thereof, by means of financial, fiduciary and, in general, legal vehicles deemed necessary in order to obtain optimum utilization and . . . efficiency and effectiveness . . .”⁴⁴ Thus, FEESA’s own statement demonstrates that the mills are regarded as collectively operated by FEESA rather than separately-operating entities.

Moreover, while each of the nine mills is held in a separate trust, this is simply a result of the structure that has emerged from the expropriation process rather than an attempt to create functionally separate entities that act independently of one another. Rather, the expropriation process was intended to place assets temporarily within the custodial care of the GOM, through FEESA. FEESA’s organization manual highlights this by noting that its legal department, among other duties, “participate{s} in the decision of the legal schemes, by means of the financial, fiduciary and, in general, legal vehicles for an eventual reincorporation of the Expropriated Sugar Mills into the private sector.”⁴⁵ By establishing separate trusts for each expropriated mill, FEESA upholds its fiduciary responsibilities while maintaining the assets of each mill in a manner that would facilitate their eventual reincorporation on a mill-by-mill basis, as it has already done for some of the other originally-expropriated mills.⁴⁶ Therefore, we find that the creation of several trusts (and the maintenance of several sets of books) is not an indication of how the mills are used in practice but instead a function of FEESA’s fiduciary responsibilities in light of the fact that the GOM intends to privatize the mills in the future.

We have reviewed the record of the proceeding to analyze this comment and we have found no information submitted prior or subsequent to our respondent selection determination that contradicts our conclusion that FEESA and the mills are a single producer-exporter. Indeed, information collected following respondent selection provides additional support to our determination that FEESA was the appropriately selected respondent. While some of this information is proprietary in nature and cannot all be addressed in detail in this public memorandum, we note the following as examples. First, FEESA’s verification, which included verification of the nine mills, was conducted at a single, central location in Mexico City that oversees the administration of the nine mills. The Department was able to access all the accounting, sales and inventory records of all the mills at this central location, just like PROASA and the other administrating entities.⁴⁷ While the mills may maintain separate accounting records (and, by extension, prepare separate financial statements), they all enter their separate information into the same accounting program, which is centrally supervised by PROASA and Fideicomiso Administrador y Financiero. Additionally, the mill’s financial information is ultimately consolidated into financial statements prepared by FEESA.⁴⁸

As another example, PROASA is responsible for selecting the technical committee members responsible for overseeing the operations of each of the mills. The technical committee selects the mill’s general manager and ensures that each mill reports to PROASA which, in turn reports

⁴⁴ See Petition at Exhibit III-62.

⁴⁵ *Id.*

⁴⁶ See, e.g., Petition at Exhibit III-62.

⁴⁷ See FEESA SVR at 4.

⁴⁸ *Id.* at 3.

to FEESA.⁴⁹ Furthermore, PROASA is in charge of managing the entire sales and production process, from price negotiation to assigning production to each mill to serving as an intermediary between sugarcane growers and the mills.⁵⁰ This indicates that, contrary to FEESA's argument that each mill operates as a separate, independent entity, PROASA is actually in charge of the operations and administration of all the mills. This also aligns with the statement in FEESA's organization manual, as discussed above, that FEESA is responsible for the commercialization of all products and byproducts generated by the expropriated assets. As a final example, when the GOM provided annual budget grants to cover operating expenses, it provided those funds to FEESA, not to the nine mills themselves, and entrusted FEESA with the responsibility of allocating those grants among its nine constituent mills.⁵¹ Thus the record gathered over the course of this investigation affirms the Department's interpretation of the decree and our treatment of the nine FEESA mills as a single producer-exporter for respondent-selection purposes.

After the Department determined that the nine FEESA mills were a single producer-exporter, we then aggregated the entries of those nine mills as they appeared in the CBP entry data placed on the record of the proceeding.⁵² Contrary to FEESA's claim, the Department's action was not inconsistent with its respondent selection practice of not aggregating entry data based on a collapsing, cross-ownership, or affiliation analysis. To be clear, the Department did not conduct a collapsing, cross-ownership, or affiliation analysis. Instead, we simply aggregated the entry volumes of a single producer-exporter based on the 2001 expropriation decree.⁵³ As such, there was no need for the Department to conduct a collapsing, cross-ownership, or affiliation analysis and therefore, we did not do so.⁵⁴

When we aggregated the CBP entry data for the nine FEESA mills, we did so only to ensure we had correctly calculated the total shipment volume for the producer-exporter, FEESA. We noted in the Respondent Selection Memorandum that, had we not aggregated the FEESA entry data, we would have acted inconsistently with section 777A(c)(2)(B) of the Act.⁵⁵ Specifically, this section establishes that, when it is not practicable for the Department to make individual weighted average dumping margin determinations for each known exporter and producer of the subject merchandise because of the large number of exporters and producers involved in the investigation, the Department may limit its examination to a reasonable number of exporters or producers by limiting its examination to either (1) a sample of exporters and/or producers that is statistically valid or (2) exporters and/or producers accounting for the largest volume of the subject merchandise. Because we chose to investigate the exporters and/or producers with the

⁴⁹ *Id.*

⁵⁰ *Id.* at 6-7; *see also* FEESA's June 25, 2014 Section A Affiliation Response at 3.

⁵¹ *See* FEESA SVR at 17.

⁵² *See* Respondent Selection Memorandum at 6.

⁵³ *Id.* We note that the Department does routinely accounts for minor variations in company names and aggregates CBP entry data related to the same company (*e.g.*, Company X versus Company X Ltd.) but this does not relate to any collapsing, cross-ownership or affiliation analyses. *See, e.g.*, Respondent Selection Memorandum at 5.

⁵⁴ *See* Respondent Selection Memorandum at 6-7.

⁵⁵ *Id.* at 6.

largest volumes, we could not reasonably ignore information on the record indicating the nine mills were one and the same producer-exporter.⁵⁶

Issue 4: Treatment of Certain FEESA Employee Expenses

FEESA's Comments

- In the *Preliminary Determination*, the Department included certain business proprietary information for expenses for certain mill employees as part of FEESA's general and administrative (G&A) expenses.⁵⁷
- The Department should exclude these expenses from cost of production (COP) because these expenses are not directly related to the production of sugar.
- Assigning these expenses to sugar production overstates indirect costs assigned to sugar.
- Under its longstanding practice, the Department may exclude extraordinary expenses from its cost calculations.
- The Department should treat the expenses at issue as extraordinary expenses that are not incurred in the normal course of business.
- An event is considered "extraordinary" if it is unusual in nature (*i.e.*, highly abnormal, unrelated, or incidentally related to the ordinary and typical activities) and infrequent in occurrence (*i.e.*, not reasonably expected to recur in the foreseeable future).⁵⁸
- The employee expenses in question are both unusual in nature and infrequent in occurrence.

Petitioners' Comments and Rebuttals

- There is no indication that these expenses are extraordinary.
- At verification, the Department found that the employee expenses at issue relate directly to the general FEESA mills operations.
- The Department should continue to include them in the G&A expense ratios for the final determination.
- The Department should use in its G&A calculations the revised expense amounts for the Atencingo and El Potrero mills that were identified in the FEESA CVR.

Department's Position: We disagree with FEESA that the business proprietary employee expenses at issue are extraordinary items that should be excluded from COP. Generally accepted accounting principles (GAAP) define "extraordinary expenses" as those that are both unusual in nature and infrequent in occurrence.⁵⁹ To qualify as unusual in nature, GAAP prescribes that the

⁵⁶ *Id.*

⁵⁷ See FEESA's Case Brief 5, *citing* Memorandum to Neal M. Halper, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – Fondo de Empresas Expropiadas del Sector Azucarero," dated October 24, 2014 at 1-2.

⁵⁸ See FEESA's Case Brief at 6, *citing* *Floral Trade Council of Davis, VA v. United States*, 16 CIT 1014, 1016 (CIT 1992) (*Floral Trade*), *Hornos Electricos de Venezuela v. United States*, 285 F. Supp. 2d. 1353, 1365-66 (CIT 2003), and *Certain Pasta From Italy: Notice of Final Results of the Fourteenth Antidumping Duty Administrative Review*, 76 FR 76937, December 9, 2011 and accompanying Issues and Decision Memorandum at Comment 3.

⁵⁹ See, *e.g.*, *Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review*, 75 FR 6352 (February 9, 2010) accompanying Issues and Decision Memorandum (Pasta from Italy IDM) at Comment 9 ("in order for an event to be considered extraordinary it must be 'unusual in nature and infrequent in occurrence.'")

underlying event or transaction giving rise to the expense should possess a high degree of abnormality and be of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the reporting entity, taking into account the environment in which it operates.⁶⁰ Further, for an expense to be considered infrequent, the underlying event or transaction should be of a type that would not reasonably be expected to recur in the foreseeable future, again taking into account the environment in which the reporting entity operates.⁶¹

It is the Department's long-standing practice to treat items as extraordinary and exclude them from COP only in cases where both these criteria are met.⁶² We do not agree with FEESA that the employee expenses at issue are unusual in nature. There is nothing on the record to establish that they are unrelated to or only incidentally related to the ordinary activities of the FEESA mills. Rather, based on FEESA's description of these expenses, they relate instead to the ongoing, general operations of the FEESA mills. As such, they are properly included as G&A expenses.⁶³ We also disagree with FEESA that the employee expenses in question are infrequent in occurrence. There is no indication that the circumstances giving rise to these expenses would not be expected to recur in future reporting periods. On the contrary, based on the nature of the circumstances under which these expenses were incurred, it appears reasonably likely that the FEESA mills will continue to incur these costs as part of their normal operations. In addition, although the classification of expenses in a company's financial statements as "extraordinary" is not by itself sufficient to establish that those items should be excluded from COP for our purposes,⁶⁴ we note that the employee expenses at issue were not classified as such in the financial statements of the FEESA mills.

Therefore, for the final determination we have continued to include these items as part of G&A expenses, as they are typical of general expenses incurred in the normal course of business. As much of the information relating to these expenses is business proprietary in nature, please refer to the FEESA Final Cost Memorandum for further discussion.⁶⁵ Additionally, we agree with Petitioners regarding FEESA's Atencingo and El Potrero mills G&A calculations, and have adjusted the G&A calculations for these mills to reflect the revised expense amounts related to these employees as identified in the FEESA CVR.⁶⁶

(citing *Floral Trade*, 16 CIT at 1016 ("To be considered an 'extraordinary' event giving rise to extraordinary treatment under U.S. GAAP, the event must be unusual in nature and infrequent in occurrence.")).

⁶⁰ See, e.g., *Pasta from Italy* IDM Comment 9 (citing *Floral Trade*, 16 CIT at 1016).

⁶¹ *Id.*

⁶² *Id.*

⁶³ See *Narrow Woven Ribbons With Woven Selvedge From Taiwan; Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 19635 (April 13, 2015) and accompanying Issues and Decision Memorandum at Comment 8.

⁶⁴ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Taiwan*, 63 FR 40461, 40468 (July 29, 1998).

⁶⁵ See FEESA Final Cost Memorandum at 2-3.

⁶⁶ See Issue 7 below.

Issue 5: FEESA's G&A and Financial Expenses Denominator

FEESA's Comments

- In the FEESA CVR, the Department explained that FEESA's cost database calculated the total cost of manufacturing (TOTCOM) in such a way that packing and packaging costs were excluded from the cost file.
- The Department stated that it may be appropriate to revise the calculation for the final determination to include these costs.⁶⁷
- Should the Department make this adjustment for the final determination, it should also revise the cost of sales denominator of the G&A and financial expense ratios to ensure that the ratios and the values to which they are applied are on the same basis.

Department's Position: For the final determination, we have recalculated TOTCOM to include packing and packaging costs. However, we disagree with FEESA that an adjustment to the cost of sales denominator of the G&A and financial expense ratios is warranted. In the normal course of business, the FEESA mills record packing costs as part of the cost of manufacturing (COM) (*i.e.*, as either labor, other materials, or variable overhead), and these expenses then flow through to the cost of sales.⁶⁸ To calculate the reported G&A and financial expense ratios FEESA relied on the cost of sales from the income statements of the FEESA mills (or from the consolidated income statement in the case of financial expenses), and thus packing and packaging costs are already included in the denominators.⁶⁹ As such, the ratios and the values to which they are applied are on the same basis.

Issue 6: FEESA's Sales and Cost Verification Minor Corrections

FEESA's Comments

- For the final determination, the Department should rely on the indirect selling expense ratios as revised in the minor corrections presented at the sales verification.
- The COM for the Atencingo mill should be revised to reflect the corrections to the production quantity presented at the cost verification.
- The COM for the El Potrero and San Cristobal mills should also be revised.

Department's Position: We agree with FEESA that the Department should rely on the updated indirect selling expense ratios and COM amounts accepted as minor corrections during verification. Following verification, FEESA submitted updated sales databases with the revised indirect selling expense ratios. Accordingly, for the final determination, we have relied on the updated databases for our calculations.⁷⁰ With respect to the minor corrections for the cost verification, we have relied on FEESA's revised "fiscop04.sas7bdat" cost database submitted on October 29, 2014. We note that the revisions include the minor corrections presented at the cost

⁶⁷ See FEESA's Case Brief at 7, *citing* FEESA CVR at 3.

⁶⁸ *Id.* at 17.

⁶⁹ See FEESA CVR at 24-27.

⁷⁰ See FEESA Final Analysis Memorandum.

verification and, as such, reflect the correct COM for the Atencingo, El Potrero and San Cristobal mills.⁷¹

Issue 7: FEESA Cost Changes Based on Verification Information

Petitioners' Comments

- As outlined in the FEESA CVR, the Department should revise FEESA's raw material costs by relying on the final settlement price for sugar for November and December of 2013, as opposed to the provisional settlement price for those months that FEESA reported.
- The Department should revise the reported expenses related to certain employees for Atencingo and El Potrero to reflect the correct amounts for these mills.⁷²
- The Department should use the financial expense ratio identified in the FEESA CVR that incorporates both the adjustments made at the *Preliminary Determination* to the cost of sales denominator and the verification correction presented by FEESA.

Department's Position: We agree with Petitioners that the Department should adjust FEESA's reported costs based on its findings from the cost verification. In reporting its raw material costs to the Department, FEESA relied on the provisional settlement price for sugar announced in June 2014 to value the sugarcane consumed during November and December 2013.⁷³ However, on October 30, 2014, the final settlement price for sugar applicable to the 2013-2014 crop year was published by the GOM.⁷⁴ Therefore, for the final determination, we have revised FEESA's reported direct material costs to reflect the final settlement price for sugar applicable to those months.⁷⁵ Further, in calculating the reported direct labor cost, FEESA deducted expenses related to certain employees from total factory labor costs.⁷⁶ In the minor corrections presented during the cost verification, FEESA revised these expense amounts for the Atencingo and El Potrero mills.⁷⁷ As such, for the final determination, we have revised the per-unit labor cost calculation for the Atencingo and El Potrero mills to reflect the revised expense amounts related to certain employees as identified in the FEESA CVR.⁷⁸ In addition, as explained in Issue 4, we have continued to include these expenses in the G&A expenses of the mills as they are typical of general expenses incurred in the normal course of business.⁷⁹ Finally, for the final determination, we have revised the financial expense ratio to incorporate any adjustments made in the *Preliminary Determination* and to reflect the corrections presented by FEESA at the cost verification.⁸⁰

⁷¹ See FEESA CVR at 4-5; see also FEESA Final Cost Memorandum.

⁷² See Issue 4 for a related discussion regarding these expenses.

⁷³ See FEESA CVR at 2-3, 18-19.

⁷⁴ *Id.*

⁷⁵ See FEESA Final Cost Memorandum.

⁷⁶ See FEESA CVR at 4-5, 21-22.

⁷⁷ *Id.*

⁷⁸ *Id.*; see also FEESA Final Cost Memorandum.

⁷⁹ See Issue 4 for a related discussion regarding these expenses.

⁸⁰ See FEESA CVR at 27; see also FEESA Final Cost Memorandum.

Issue 8: FEESA's Depreciation Expenses

Petitioners' Comments

- FEESA's reported imputed depreciation expense is unreasonable when compared to the depreciation of another sugar producer.⁸¹
- The Department should therefore adjust the reported total depreciation expense, based on information from the other company, to make it reasonable and bring it in line with commercial reality.

FEESA's Rebuttals

- In accordance with section 773(f)(1)(A) of the Act, the Department's preference is to use the actual costs as recorded in a company's books, but when no actual cost is available, using a proxy based on a company's own information is a reasonable alternative.
- The reported imputed depreciation expense for the mills was based on each mill's internal accounting records and in accordance with Mexican GAAP.
- The methodology and supporting information was fully verified by the Department as being accurate and reasonable.
- Petitioners' proposal to disregard the reported depreciation expense and instead rely on the depreciation of another company is unreasonable.
- International accounting standards establish that depreciation expense is captured and recorded in a company's books and records at the time the asset is available for use, meaning that each company's individual experience and the life-cycle of its machinery and production equipment are unique commercial realities.⁸²
- Nothing on the record indicates that the surrogate company referenced by Petitioners has similar depreciation expenses and, in fact, information on the record supports a finding that the company is quite different from the FEESA mills.
- As the surrogate company does not reflect FEESA's commercial reality, it would be inappropriate to use its operations when calculating FEESA's depreciation expenses.
- The Department should continue to rely on its reported imputed depreciation expense for the final determination.

Department's Position: We disagree with Petitioners. When the Department must evaluate a respondent's submitted costs, section 773(f)(1)(A) of the Act states that "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." For reporting to the Department, FEESA calculated imputed depreciation for all the FEESA mills based on internal records and fixed asset ledgers that are kept in the normal course of business. FEESA calculated imputed depreciation expenses on assets acquired prior to September 2005 based on the acquisition value recorded in the books

⁸¹ Petitioners treated the name of the other company as business proprietary. In addition, the details regarding why FEESA reported imputed rather than actual depreciation are business proprietary in nature and are discussed further in the FEESA Final Cost Memorandum.

⁸² See FEESA's Rebuttal Brief at 3, *citing* International Accounting Standard 16, "Property, Plant and Equipment," 853-88 (2004).

and records of the FEESA mills. For assets acquired after that time, the imputed depreciation was based on the acquisition values of the assets as maintained in the detailed fixed asset ledgers.⁸³ Because the imputed depreciation expense reported by FEESA is calculated based on the records of the FEESA mills and reasonably reflects the depreciation cost associated with the production of sugar, for the final determination, we have continued to rely on the imputed depreciation reported by FEESA. However, during verification we found that FEESA had not included imputed depreciation on certain classes of assets (*e.g.*, computer equipment, office equipment) in the reported costs.⁸⁴ As such, we have included imputed depreciation expenses on these assets as G&A expenses and have revised the G&A expense ratios for each of the FEESA mills accordingly. Because certain information related to FEESA's imputed depreciation is business proprietary in nature, please refer to the FEESA Final Cost Memorandum for additional details.

GAM Group Issues

Issue 9: Calculation of the GAM Group's Electricity Expenses

The GAM Group's Comments

- All three GAM Group mills (Tala, El Dorado and Lazaro) produce electricity from bagasse waste generated during the production of sugar, subsequently reintroducing that generated electricity back into the sugar production process.
- El Dorado and Lazaro consume all of the electricity they produce while Tala has excess electricity that it sells back to the electrical grid; Tala being the most efficient producer of the three.
- Tala Electric S.A. de C.V. (Tala Electric) should not be treated as an affiliated supplier. Due to Mexican regulations on selling electricity, Tala Electric was created but Tala continues to own all of the electrical-generating equipment and Tala Electric's financial statements are consolidated with Tala's financial statements; Tala Electric should not be treated as a separate affiliated supplier.
- The Department is not required to apply the transactions disregarded and major input rules (sections 773(f)(2) and (3) of the Act) and, in fact, is permitted to make exceptions for certain situations.
- The Department should make such an exception in this case and not apply the transactions disregarded and major input rules.⁸⁵
- By applying the major input rule and adjusting Tala's electricity costs, the result is a higher COP than the COP that would result if Tala were to simply waste the excess electricity.
- If the Department continues to adjust for the major input rule, no adjustment is necessary because the rates charged by Tala Electric are consistent with market pricing and the cost of producing electricity.

⁸³ See FEESA CVR at 22-24.

⁸⁴ *Id.* at 3.

⁸⁵ See The GAM Group's Case Brief at 4.

- The Department should rely on “normal consumption” rates rather than normal consumption rates plus penalties (*i.e.*, for using too much or too little electricity) because it is not representative of market pricing.
- Finally, if the Department continues to apply the major input rule to the GAM Group’s purchases of electricity and thus, apply the alternative methodology mentioned in the GAM CVR,⁸⁶ it should ensure that interest expenses are not overstated.

Petitioners’ Rebuttal

- The GAM Group’s arguments must fail under the statute and Department practice because Tala Electric is a separate affiliated company and the Department includes all elements of a price that would be charged by an unaffiliated party when applying the transactions disregarded and major input rules.
- The GAM Group provided no evidence that the Department has not applied the transactions disregarded rule where there is evidence that the transfer price does not reasonably reflect the price charged by an affiliated party.
- While Tala Electric was correctly found to be affiliated with Tala, Tala Electric should not be eligible to be collapsed with Tala under 19 CFR 351.401(f) because Tala Electric does not produce similar or identical merchandise.
- The major input rule is applicable because electricity is the second largest input in Tala’s production process.
- The Department correctly followed section 773(f)(3) of the Act by selecting the unaffiliated transaction price to value electricity under the major input rule, a decision that has previously been upheld by the Court of International Trade (CIT).⁸⁷
- The transactions disregarded rule exists in order to address issues like that of Tala Electric’s where certain costs are not passed on by affiliates that normally would be passed on to an unaffiliated party, as evidenced by information collected during the GAM Group’s verification.⁸⁸
- Petitioners agree with the GAM Group that, if the Department relies on Tala Electric’s COP for purposes of the major input rule, the Department should not include financial expenses in the COP as these expenses are properly accounted for in the application of the consolidated financial expenses to the COM of sugar.

Department’s Position: We agree with the Petitioners that Tala’s purchases of electricity from Tala Electric are subject to the transactions disregarded and major input rules. As such, we compared the reported weighted-average transfer price to the weighted-average price paid by Tala to an unaffiliated supplier that included certain penalties (market price) and Tala Electric’s POI COP exclusive of financial expenses. Consistent with the *Preliminary Determination*, we

⁸⁶ *Id.* at 8, citing GAM CVR at 2.

⁸⁷ See Petitioners’ Rebuttal Brief at 8, citing *Mannesmann v. United States*, 77 F. Supp. 2d 1302 (CIT 1999) (*Mannesmann*) and *Huvis Corp. v. United States*, 32 CIT 845, 845 (CIT 2008).

⁸⁸ *Id.*, citing *Stainless Notice of Final Determination of Sales at Less Than Fair Value: Steel Round Wire from Canada*, 64 FR 17324, 17335 (April 9, 1999) (*Stainless Wire from Canada*) and *Citric Acid and Certain Citrate Salts from Canada: Final Results of Antidumping Duty Administrative Review*, 76 FR 34044 (June 10, 2011) and accompanying Issues and Decision Memorandum at Comment 3.

have increased Tala's reported transfer price of electricity purchased from Tala Electric to reflect the market price because the market price exceeds the transfer price and COP.⁸⁹

The transactions disregarded rule, *i.e.*, section 773(f)(2) of the Act, provides that a "transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." The major input rule, *i.e.*, section 773(f)(3) of the Act, which applies to transactions involving a significant input of the merchandise between affiliated parties, mandates that in such instances where the Department has "reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, {the Department} may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under {the transaction disregarded rule}." Pursuant to 19 CFR 351.407(b), for any major input purchased from affiliated parties, the Department values the input based on the higher of the transfer price (the price paid by the exporter or producer to the affiliated person for the major input), the market price, or the cost to the affiliated person of producing the major input, and in accordance with section 773(f)(3) of the Act, adjusts the reported costs to reflect the highest of these three amounts.⁹⁰

The GAM Group argues that it is appropriate for the Department to exercise its discretion and not apply the transactions disregarded and major input rules because Tala Electric should not be treated as a separate affiliated supplier. We disagree with the GAM Group that Tala Electric should be considered part of Tala. In accordance with 19 CFR 351.401(f), the Department only treats affiliated companies as a single entity (*i.e.*, "collapses" the companies) when the companies have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Department concludes that there is a significant potential for the manipulation of price or production. Here, Tala Electric does not meet the requirements for collapsing (*i.e.*, treating Tala and Tala Electric as a single entity for purposes of this proceeding). Tala Electric is not a producer of sugar, nor is Tala Electric's electric facility similar to Tala's sugar producing facilities. Further, the GAM Group has identified no other Department practice under which it would be appropriate to treat Tala and Tala Electric as a single entity. Therefore, we have continued to treat Tala and Tala Electric as affiliated parties. As discussed in *Stainless Wire from Canada* the intent of sections 773(f)(2) and (3) of the Act "and the related regulations is to account for the possibility of shifting costs to an affiliated party. This possibility arises when an input passes to the responding company through the hands of an affiliated supplier."⁹¹ The Department finds that, regardless of why Tala Electric was established, the possibility of shifting

⁸⁹ See GAM Final Cost Memorandum at 2.

⁹⁰ See, *e.g.*, *Chlorinated Isocyanurates From Japan: Final Determination of Sales at Less Than Fair Value*, 79 FR 56059 (September 18, 2014) and accompanying Issued and Decision Memorandum at Comment 3; *Notice of Final Determination of Sales at Not Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin from Taiwan*, 70 FR 13454 (March 21, 2005) accompanying Issued and Decision Memorandum at Comment 8.

⁹¹ See *Stainless Wire from Canada*, 64 FR at 17335; see also *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 22971 (April 24, 2015) and accompanying Issued and Decision Memorandum at Comment 3.

costs between Tala and Tala Electric exists because they are affiliated parties with transactions occurring between them.⁹² Therefore, we determine that it is appropriate to apply that the transactions disregarded and major input provisions of the statute to the transactions between Tala and Tala Electric.

We also disagree with the GAM Group's allegation that the usual market price, adjusted to exclude distribution costs, is the same as the reported transfer price. Although the GAM Group contends in its case brief that distribution costs are included in the market price of electricity, it does not cite any record evidence to support its claim,⁹³ nor is there any record evidence to support this claim.⁹⁴ Therefore, without any record evidence to the contrary, we find it reasonable to conclude that the GAM Group's reported transfer price and market price are comparable.

The GAM Group also argues that the Department should rely on the market price for normal electricity consumption and not on the market price that includes certain penalties unrelated to the cost of electricity. We disagree with the GAM Group's contention that the penalties charged by the unaffiliated supplier are unique contractual penalties rather than related to the cost of electricity. As noted by the Department in the GAM CVR, the penalties incurred relate to the volume of electricity purchased by Tala from the unaffiliated supplier during the month.⁹⁵ Because these penalties relate to the quantity of electricity consumed, we find it reasonable to associate the penalties with the consumption cost of electricity. Moreover, the record evidence shows that these penalties are not unique.⁹⁶ The penalties in question were incurred on a recurring, consistent basis and, as such, we find it reasonable to consider these penalties as routine costs of obtaining electricity from market sources.⁹⁷

We agree with the parties that financial expenses should be excluded from the calculation of Tala Electric COP. Tala Electric is a consolidated entity within Cultiba's consolidated financial statements. Therefore, because Tala Electric's financing expenses are included in Cultiba's consolidated financial expenses, we find it reasonable to assume that any financial expenses incurred by Tala Electric would already be accounted for in the consolidated financial expenses applied to the final product. As such, for purposes of the major input analysis, we have excluded financial expenses from our calculation of the COP of electricity.⁹⁸

⁹² See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador*, 69 FR 76913 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 21.

⁹³ See The GAM Group's Case Brief at 6.

⁹⁴ See GAM's August 5, 2014 section D questionnaire response; see also GAM's September 18, 2014 supplemental section D questionnaire response (where such electricity distribution costs were not mentioned); GAM CVR at 28 (discussing the cost components of the market price with GAM officials and no discussion of distribution costs occurred) and accompanying cost verification exhibit (GAM CVE) 11 (where invoices from market supplier(s) do not show distribution costs).

⁹⁵ See GAM CVR at 27-28.

⁹⁶ See GAM CVE 11.

⁹⁷ *Id.*

⁹⁸ We also excluded financial expenses from the COP of sugar cane for purposes of the major input rule. See GAM Final Cost Memorandum at 2 (COP calculations for electricity and sugar cane).

Based on our analysis of Tala’s reported electricity cost, in accordance with the transactions disregarded and major input rules, we have continued to adjust Tala’s reported transfer price to reflect the market price because the market price exceeds both the reported transfer price and the affiliated supplier’s COP.⁹⁹

Issue 10: Offsets for Sugar Mills’ Interest Income

The GAM Group’s Comments

- Section 773(f)(1)(A) of the Act states that costs shall normally be calculated based on records of the exporter or producer, if GAAP is used and if reasonably reflective of the costs of production and sale of the merchandise.
- The Department’s practice is to rely on the interest expenses and interest income of the ultimate consolidated parent company rather than interest expenses and income of subsidiary respondents.¹⁰⁰
- In the *Preliminary Determination*, the Department disallowed the GAM Group’s offset to TOTCOM for the interest income realized by the sugar mills.¹⁰¹
- The GAM Group provides loans to sugar cane growers and collects interest on the loans. This interest income is recorded as an offset to the sugar mill’s cost of sales in the normal course of business and is ultimately consolidated in Cultiba’s financial statements as an offset to the cost of sales.
- This treatment of the interest income on loans to sugar cane growers is consistent with Mexican GAAP and reflects the cost of producing sugar.
- The GAM Group interest income offset should be allowed in the final determination because such an offset is directly related to the group’s operations rather than its financing activities.

Petitioners’ Rebuttal

- The GAM Group’s requested offset is not supported by the Department’s precedent, which has consistently treated interest income as an offset to a consolidated parent company’s financing expenses.¹⁰²
- In the GAM Group’s Section D questionnaire responses, the respondent included interest income as an offset to financial expenses rather than an offset to costs of manufacturing.
- Because the record evidence does not distinguish the GAM Group’s loans to its sugar cane producers as anything other than interest-bearing short-term loans, the Department should not treat the interest income on loans to sugar cane growers as an offset to cost.¹⁰³

⁹⁹ See GAM Final Cost Memorandum at 1-2.

¹⁰⁰ See The GAM Group’s Case Brief at 9, *citing* Memorandum to Neal M. Halper, “Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – the GAM Group,” dated October 24, 2014 at 2.

¹⁰¹ *Id.*

¹⁰² See Petitioners’ Rebuttal Brief at 10, *citing Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 77 FR 63291 (October 16, 2012) and accompanying Issues and Decision Memorandum (Orange Juice from Brazil IDM) at Comment 15 and *Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia*, 70 FR 13456 (March 21, 2005) and accompanying Issues and Decision Memorandum at Comment 16.

¹⁰³ *Id.*, *citing* the GAM Group’s supplemental D response at Exhibits DS-9.2, and DS-24.b.

Department's Position: For this final determination we have continued to deny the GAM Group's reported offset to COM for the interest income earned on loans to sugar cane growers because we consider these costs to be related to financing activities. We have also continued to deny an offset to the GAM Group's consolidated financial expenses for the interest earned on these loans because the record evidence shows that loans were not short term in nature.

In accordance with section 773(b)(3)(B) of the Act, the Department includes net financial expenses in its calculation of a respondent's COP. In calculating these net financial expenses, it is the Department's practice to allow a respondent to offset financial expenses with short-term interest income generated from working capital.¹⁰⁴ The Department recognizes that a certain amount of working capital is required to conduct normal production activities. As such, a company must maintain working capital to meet daily requirements (*e.g.*, material purchases, payroll, supplies, *etc.*) and a company normally maintains this working capital in interest-bearing accounts.¹⁰⁵ Accordingly, we allow the interest income earned on working capital to offset the financial expenses that we include in the COP. Because interest-bearing, short-term assets are ready for use in a company's current operations, and are thus readily available for day-to-day cash requirements, the Department permits a respondent to use the interest income earned on them to offset financial expenses.¹⁰⁶ When the record evidence does not demonstrate that the interest income received is related to a company's working capital, the Department excludes the interest income earned from that item from the financial expense calculation.¹⁰⁷ The Department does not permit offsets to financial expenses for interest earned on long-term assets because those accounts cannot relate to a company's working capital, given that the funds in those accounts are not readily available and cannot be used for a company's day-to-day cash requirements.¹⁰⁸ The Court of Appeals for the Federal Circuit has previously affirmed this practice.¹⁰⁹

In the instant case, the interest income in question was received by the GAM Group on loans the GAM Group provided to certain sugar cane growers. These loans were for overpayments,

¹⁰⁴ See, *e.g.*, *Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review, Partial Rescission, and Final No Shipment Determination*, 76 FR 41203 (July 13, 2011) and accompanying Issues and Decision Memorandum at Comment 4; see also *Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 2511 (January 15, 2009) and accompanying Issues and Decision Memorandum at Comment 5; *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47551 (September 16, 2009) and accompanying Issues and Decision Memorandum at Comment 7; *Chlorinated Isocyanurates from Spain: Notice of Final Determination of Sales at Less Than Fair Value*, 70 FR 24506 (May 10, 2005) and accompanying Issues and Decision Memorandum (Isos from Spain IDM) at Comment 10.

¹⁰⁵ See *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada*, 70 FR 12181 (March 11, 2005) and accompanying Issues and Decision Memorandum at Comment 2; see also *Silicon Metal from Brazil: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 66 FR 11256 (February 23, 2001) and accompanying Issues and Decision Memorandum at Comment 8 (Silicon Metal from Brazil IDM).

¹⁰⁶ See *Orange Juice from Brazil IDM* at Comment 11.

¹⁰⁷ See, *e.g.*, *Isos from Spain IDM* at Comment 10.

¹⁰⁸ See, *e.g.*, *Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 65 FR 68976 (November 15, 2000) and accompanying Issues and Decision Memorandum at Comment 7; and *Silicon Metal from Brazil IDM* at Comment 8.

¹⁰⁹ See *Pakfood v. United States*, 453 Fed. Appx. 986, 990 (Fed. Cir. 2011).

equipment, and replacement parts.¹¹⁰ In regard to the overpayments for sugar cane for the 2012/2013 harvest season, we note that the amounts owed to the GAM Group by the sugar cane growers was considered in the final cost of sugar cane included in the GAM Group's reported COM.¹¹¹ We disagree with the GAM Group that interest on these loans relates to the GAM Group's operating activities and that an offset to the COM of sugar is appropriate. The Department considers loaning monies to be a financing activity. Because we consider the interest on those loans to be related to financing, consistent with our practice, we looked to Cultiba's consolidated interest income offsets. As noted in the GAM CVR, the interest the GAM Group earned on the loans in question was recorded on a consolidated basis as an offset to the consolidated cost of sales. In considering whether to grant an offset to Cultiba's interest expenses for the interest income on the loans, we examined the nature of the loans made by the GAM Group. Because record evidence indicates that the loans are not short term in nature, we denied the offset to the consolidated financial expenses in accordance with our practice.¹¹²

Issue 11: Exclusion of Seedling Costs from ITLC's Cost of Production

The GAM Group Comments

- The cost of sugar cane seedlings were double counted in the GAM Group's COP because these costs were reported in the GAM Group's COP and again in ITLC Agricola Central, S.A. de C.V. (ITLC)'s COP.
- To eliminate this double counting, the Department should exclude seedling costs from ITLC's COP for the final determination.

Department's Position: We agree with the GAM Group. To avoid double counting seedling expenses, we have revised ITLC's COP to exclude the seedling expenses incurred and accounted for by the GAM Group.¹¹³

Issue 12: The GAM Group's Final Sugar Cane Prices

Petitioners' Comments

- In the *Preliminary Determination*, the Department relied on provision sugar cane prices to calculate the GAM Group's sugar cane costs.
- The October 2014 final settlement cane price provided during verification should be used when calculating the GAM Group's sugar cane costs because this price reflects the actual cost of sugar cane during the last two months of the POI.

Department's Position: We agree with Petitioners and have relied on the final sugar price for the 2013/2014 harvest season for purposes of the final determination.¹¹⁴

¹¹⁰ See GAM CVR at 16.

¹¹¹ *Id.* at 8.

¹¹² *Id.*

¹¹³ See GAM Final Cost Memorandum at 2.

¹¹⁴ See GAM CVR at 4; see also GAM Final Cost Memorandum at 1.

Issue 13: Adjustments to Administrative Services Provided by ESOSA

Petitioners' Comments

- The GAM Group incorrectly excluded profit from its G&A expenses included in the transfer prices of administrative services provided by affiliated company Empresas y Servicios Organizados S.A. de C.V (ESOSA).¹¹⁵
- Section 773(f)(2) of the Act does not allow for this adjustment because excluding profit for these transactions means ESOSA is not being compensated for services rendered at a fair market price.
- The Department should disallow this adjustment to ESOSA's administrative expenses, thus applying the transactions disregarded rule and modifying the changes to the GAM Group's G&A expenses.

The GAM Group's Rebuttal

- The Department's normal practice is to treat administrative expenses incurred by any affiliated party on behalf of the respondent on the basis of the actual expenses incurred regardless of whether such expenses were billed.¹¹⁶
- Consistent with the Department's Section D questionnaire, the GAM Group properly reported its G&A expenses by including the actual administrative costs incurred by ESOSA and excluding any overbilling by ESOSA; administrative expenses incurred by the GAM Group's parent company Cultiva were allocated in this same manner.
- It would be inappropriate to apply section 773(f)(2) of the Act to the GAM Group in these circumstances and the Department should not make any adjustments to the way ESOSA expenses are calculated in the GAM Group's G&A expenses.

Department's Position: We agree with Petitioners that the transactions between the GAM Group and its affiliate ESOSA are subject to section 773(f)(2) of the Act, the transactions disregarded rule. Therefore, for the final determination we adjusted the GAM Group's reported G&A expenses to reflect the transfer price for the services provided by ESOSA as the transfer price exceeded the market price of these services. Because a market price for the services provided by ESOSA is not available on the record of this proceeding, we used ESOSA's COP for the services provided as a reasonable estimate of market price.

The GAM Group's arguments regarding the services provided to the GAM Group by ESOSA muddles two distinct concepts: transactions between affiliated parties and the Department's practice of allocating a parent's or other affiliated party's G&A expenses to a respondent when the parent or affiliated party incurs G&A expenses on the respondent's behalf. The transactions disregarded rule applies to transactions that occur directly or indirectly between affiliated persons.¹¹⁷ In such instances, the transaction disregarded rule provides that the Department may adjust a respondent's reported transfer price in those instances where the transfer price does not

¹¹⁵ See GAM CVR at 31.

¹¹⁶ See The GAM Group's Rebuttal Brief at 7, citing *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany: Final Results of Antidumping Duty Administrative Review*, 66 FR 11557 (February 26, 2001) and accompanying Issues and Decision Memorandum at Comment 8.

¹¹⁷ See section 773(f)(2) of the Act.

reflect market price in the market under consideration.¹¹⁸ The Department has consistently applied the transactions disregarded rule in instances where services (administrative as well as production services) are provided to a respondent by an affiliated party and transactions between the respondent and affiliated party have occurred.¹¹⁹ Alternatively, our practice in regard to a parent's or other party's G&A expenses incurred on a respondent's behalf applies to those instances where transactions do not occur between the respondent and the affiliated party (*i.e.*, the affiliated party absorbs the cost of the services provided).¹²⁰

In this proceeding, ESOSA provided administrative services to the GAM Group and billed the GAM Group for those services. However, for reporting purposes, the GAM Group included ESOSA's cost of its services to the GAM Group rather than the transfer price between the GAM Group and ESOSA.¹²¹ Because transactions occurred between the GAM Group and ESOSA for these services, the Department finds it appropriate to apply the transactions disregarded rule, pursuant to section 773(f)(2) of the Act, and compare the transfer price between the GAM Group and ESOSA to the market price of the services provided. In this proceeding market price is not available for the services provided by ESOSA. The Department's practice in instances where market price is not available is to rely on the affiliated party's COP.¹²² Therefore, we have relied on ESOSA's COP of the services in lieu of market price.¹²³ Based on our analysis, we find that the transfer price exceeds market price. As such, we revised the GAM Group's G&A expenses to reflect the transfer price of the services provided by ESOSA.¹²⁴ With respect to the G&A expenses incurred by Cultiba on the GAM Group's behalf, we find that the GAM Group included these expenses in its reported G&A expenses consistent with the Department's practice.¹²⁵ For the final determination, we revised the value of these expenses for findings made at verification.¹²⁶

Issue 14: Adjusting the GAM Group's G&A for Certain Affiliated Company Costs

Petitioners' Comments

- During verification, the Department discussed administrative expenses incurred by certain GAM Group affiliates on behalf of the GAM Group.

¹¹⁸ *Id.*

¹¹⁹ *See, e.g., Certain Steel Nails From Taiwan: Final Determination of Sales at Less Than Fair Value*, 80 FR 28959 (May 20, 2015) and accompanying Issues and Decision Memorandum at Comment 11 (tolling services); *Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 FR 65082 (November 7, 2006) (*Rebar from Turkey*) and accompanying Issues and Decision Memorandum at Comment 8 (administrative services).

¹²⁰ *See Rebar from Turkey* at Comment 8.

¹²¹ *See* GAM CVR at 30.

¹²² *See, e.g., Certain Oil Country Tubular Goods From the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014) and accompanying Issues and Decision Memorandum at Comment 10; *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Canada*, 67 FR 55782 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 24.

¹²³ *See* GAM Final Cost Memorandum at 4.

¹²⁴ *Id.*

¹²⁵ *See* GAM CVR at 30.

¹²⁶ *Id.* at 2-3, 30-31.

- The GAM Group did not allocate certain expense related to these affiliates to all of the mills in the same manner as other administrative costs.
- The Department should revise the G&A expenses for each GAM Group mill to include these additional costs.

Department's Position: We agree with Petitioners and have accordingly revised the G&A expense ratios for Tala, El Dorado, and Lazaro to account for the full cost of the administrative costs incurred by certain GAM Group affiliates on behalf of the sugar mills. Due to the proprietary nature of the costs and the affiliated company in question, the Department has provided additional detail related to this comment in the GAM Final Cost Memorandum.¹²⁷

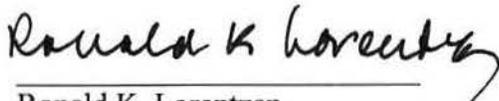
VII. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the *Federal Register*.

✓

Agree

Disagree



Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

September 16, 2015
(Date)

¹²⁷ See GAM Final Cost Memorandum at 4.