



Ottawa, Thursday, April 4, 1996

Public Interest Investigation No.: PB-95-002

TRIBUNAL'S CONSIDERATION OF THE PUBLIC INTEREST QUESTION

IMPOSITION OF ANTI-DUMPING DUTIES ON IMPORTS OF REFINED SUGAR, REFINED FROM SUGAR CANE OR SUGAR BEETS, IN GRANULATED, LIQUID AND POWDERED FORM, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA, DENMARK, THE FEDERAL REPUBLIC OF GERMANY, THE NETHERLANDS AND THE UNITED KINGDOM, AND IMPOSITION OF COUNTERVAILING DUTIES ON IMPORTS OF REFINED SUGAR, REFINED FROM SUGAR CANE OR SUGAR BEETS, IN GRANULATED, LIQUID AND POWDERED FORM, ORIGINATING IN OR EXPORTED FROM THE EUROPEAN UNION

BACKGROUND

On November 6, 1995, the Canadian International Trade Tribunal (the Tribunal) found, pursuant to section 43 of the *Special Import Measures Act*¹ (SIMA), that the dumping in Canada of refined sugar, refined from sugar cane or sugar beets, in granulated, liquid and powdered form, originating in or exported from the United States of America, Denmark, the Federal Republic of Germany, the Netherlands and the United Kingdom, and the subsidizing of the aforementioned goods originating in or exported from the European Union were threatening to cause material injury to the domestic industry. At that time, the Tribunal invited representations on the question of whether the Tribunal should initiate a public interest investigation under section 45 of SIMA.

Seven parties made representations to the Tribunal that there was a public interest question worthy of further investigation, while two parties were of the view that there was no public interest question worthy of further consideration.

On January 8, 1996, the Tribunal initiated a public interest investigation under section 45 of SIMA. Section 45 provides that, where the Tribunal is of the opinion that the imposition of anti-dumping or countervailing duties, or the imposition of such duties in the full amount, would not or might not be in the public interest, it shall report to the Minister of Finance that it is of that opinion and provide him with a statement of facts and reasons that caused it to be of that opinion. When the investigation was initiated, the Tribunal stated that, if it concluded that there was not a public interest concern warranting the reduction or elimination of the anti-dumping or countervailing duties, it would give its reasons.

As part of this public interest investigation, the Tribunal sent questionnaires to Canadian manufacturers, importers and users of refined sugar. Many respondents updated information provided to the Tribunal in the context of its recently completed injury inquiry conducted under section 42 of SIMA and provided pertinent information concerning possible public interest concerns. Based on replies to the questionnaires, submissions from interested parties and other available information, the Tribunal's research staff prepared public and protected pre-hearing staff reports.

1. R.S.C. 1985, c. S-15, as amended by S.C. 1994, c. 47.

Several parties requesting the elimination or reduction of the duties were represented by counsel during the Tribunal's hearing into this matter. These parties included the Canadian Industrial Sweetener Users (CISU), the National Dairy Council of Canada (the Dairy Council), the Bakery Council of Canada (the Bakery Council), Effem Foods Ltd. (Effem), Good Humor-Breyers, Div. of ULC Inc. (Good Humor), Canadian Blending & Processing, Inc. (CBP), E.D. & F. Man (Sugar) Ltd. (Man) and United Sugars Corporation (United). The Director of Investigation and Research, Bureau of Competition Policy, Department of Industry (the Director), was also a party to this investigation and was represented by counsel. In addition, the Canadian Honey Council (CHC) and the Consumers' Association of Canada (CAC) were parties to the investigation, but were not represented by counsel. The Canadian Sugar Institute (CSI), representing the three Canadian sugar refiners, and the Canadian Sugar Beet Producers' Association Inc. (the Association) opposed the elimination or reduction of the duties and were represented by counsel.

The Tribunal held public and in camera hearings in Ottawa, Ontario, from February 27 to March 1, 1996. During the hearing, counsel for the Bakery Council made a motion to convert the investigation under section 45 of SIMA into a review under section 76 of SIMA of the Tribunal's November 6, 1995, findings concerning the threat of material injury to the domestic industry. Counsel submitted that there had been significant fundamental changes in the structure of the refined sugar market in Canada since the findings were made. The motion was supported by counsel for the CISU and the Dairy Council, for United, for Effem and for CBP and opposed by counsel for the CSI and for the Association. The Tribunal denied the motion. The Tribunal notes that a request for a review under section 76 of SIMA has since been received from United.

The record of this investigation consists of all Tribunal exhibits, including the public and protected replies to questionnaires, all exhibits filed by parties at the hearing, the transcript of the proceedings and the entire record of the Tribunal's recently completed injury inquiry concerning refined sugar in Inquiry No. NQ-95-002. All public exhibits were made available to the parties. Protected exhibits were made available only to independent counsel who had filed a declaration and confidentiality undertaking with the Tribunal.

Appendices 1, 2 and 3, respectively, list the Tribunal members and staff involved with this investigation, the participants in the investigation, including those that made written submissions, and the witnesses who appeared during the public hearing.

PUBLIC INTEREST ISSUES

The term "public interest" in subsection 45(1) of SIMA is not defined either in SIMA or in the *Special Import Measures Regulations*² (the Regulations).

In its decision in *National Corn Growers*,³ the Supreme Court of Canada indicated that, in construing SIMA, resort could be had to the international agreements⁴ which SIMA was enacted to

2. SOR/84-927, November 22, 1984, *Canada Gazette* Part II, Vol. 118, No. 25 at 4286.

3. *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.

4. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the GATT Anti-Dumping Code), Geneva, March 1980, GATT BISD, 26th Supp. at 171, and the *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* (the GATT Subsidies Code), Geneva, March 1980, GATT BISD, 26th Supp. at 56.

implement. However, neither those agreements nor the relevant World Trade Organization (WTO) agreements⁵ specifically mention or define the term “public interest.” The provisions of the GATT and WTO agreements⁶ do indicate that it is “desirable” that the imposition of duties be permissive and that duties imposed be less than the full margin of dumping and/or amount of subsidy, if such lesser duties are adequate to remove the injury⁷ to the domestic industry. Contrary to the submissions of certain parties, the Tribunal is not required under Canadian law to employ a “lesser duty” approach in considering the public interest under section 45 of SIMA. The Tribunal is of the view, however, that the relevant provisions of the GATT and WTO agreements provide a useful backdrop against which to consider the balancing of the various interests affected by the imposition of the anti-dumping and countervailing duties.

There is a dearth of helpful Canadian jurisprudence on the meaning of the words “public interest,” but it does suggest that, in any given case, the meaning to be attributed to those words, or words having the same general meaning, should be determined by “reference to the context and to the objects and purposes” of the relevant statute.⁸

SIMA establishes a scheme pursuant to which the Deputy Minister of National Revenue (the Deputy Minister) may investigate and determine whether dumped or subsidized goods are being imported into Canada. Both SIMA and the Regulations set out, in extensive detail, the manner in which the Deputy Minister is to calculate normal values, export prices and the amount of subsidy. They also set out, in detail, the procedure to be followed by the Deputy Minister in conducting dumping and subsidizing investigations.

If the Deputy Minister determines on a preliminary basis that dumped or subsidized goods are being imported into Canada, then pursuant to section 42 of SIMA, the Tribunal is required to inquire as to whether the dumping or subsidizing of such goods has caused injury or retardation or is threatening to cause injury. Again, SIMA and the Regulations contain provisions regarding the conduct of the Tribunal’s inquiry and the factors that the Tribunal may consider in determining whether injury, retardation or threat of injury exist.

If the Deputy Minister ultimately determines that dumped or subsidized goods are being imported into Canada and the Tribunal finds that the dumping or subsidizing has caused injury or retardation or threatens to cause injury, then in the normal course of events, anti-dumping and countervailing duties, in the full amount of the margin of dumping or amount of subsidy, will be imposed on the subject imports. Within

5. *WTO Agreement on Implementation of Article VI of GATT 1994* (the WTO Anti-dumping Agreement) and the *WTO Agreement on Subsidies and Countervailing Measures* (the WTO Subsidies Agreement), signed at Marrakesh on April 15, 1994.

6. Paragraphs 8.1 and 4.1 of the GATT Anti-Dumping Code and the GATT Subsidies Code, respectively, and paragraphs 9.1 and 19.2 of the WTO Anti-dumping Agreement and the WTO Subsidies Agreement, respectively.

7. The term “injury” as referred to in the WTO Anti-dumping Agreement and the WTO Subsidies Agreement is defined as “material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry,” as provided by footnotes 9 and 45 of the WTO Anti-dumping Agreement and the WTO Subsidies Agreement, respectively.

8. See, for example, *Memorial Gardens Association (Canada) Limited v. Colwood Cemetery Company*, [1958] S.C.R. 353.

this detailed scheme exists section 45 of SIMA, a single provision pursuant to which the Tribunal may “recommend” to the Minister of Finance that anti-dumping and countervailing duties be reduced or eliminated.

In the Tribunal’s view, when the scheme established by SIMA and the Regulations is examined, it is clear that the central or primary object of SIMA is the protection of a domestic industry from unfairly traded imports.⁹ This view has been expressed by the Tribunal in previous decisions.¹⁰

The Tribunal and its predecessor, the Canadian Import Tribunal (the CIT), have conducted only two investigations under section 45 of SIMA which have resulted in reports to the Minister of Finance recommending a reduction in the amount of duty to be imposed, namely, *Grain Corn*¹¹ and *Beer*.¹² Although the Tribunal did not issue a report to the Minister of Finance in *Fibreglass Pipe Insulation*,¹³ it did consider the meaning of the public interest in section 45 of SIMA in its reasons for not initiating a further investigation. The Tribunal, in this case, is of course not bound by the views expressed by it and the CIT in those earlier cases; however, the Tribunal does consider some of these views to be helpful in considering the question of public interest.

In *Grain Corn*, the CIT stated that SIMA provides a mechanism for the application of duties on dumped and subsidized imports which are found to be materially injurious to domestically produced like goods. The CIT found that, because SIMA as a whole was enacted by Parliament in the public good, it followed that section 45, being a specific provision within SIMA, should “be applied on an exceptional basis.”¹⁴ Similarly, the Tribunal in *Fibreglass Pipe Insulation* expressed the view that, in order for the Tribunal to come to an “opinion” that the imposition of the duties, in whole or in part, would or might not be in the public interest, it “must first be satisfied, on the particular facts of the case, that there is a sufficiently

9. Specifically, dumped and subsidized imports that have caused or are threatening to cause material injury to the domestic industry.

10. See, for example, *Malt Beverages, Commonly Known as Beer, of an Alcoholic Strength by Volume of not less than 1.0 Percent and not more than 6.0 Percent, Packaged in Bottles or Cans not Exceeding 1,180 mL (40 oz.), Originating in or Exported from the United States of America by or on Behalf of Pabst Brewing Company, G. Heileman Brewing Company Inc. and The Stroh Brewery Company, their Successors and Assigns, for Use or Consumption in the Province of British Columbia*, Review No. RR-94-001, Order and Statement of Reasons, December 2, 1994.

11. Canadian Import Tribunal, Report on Public Interest - Grain Corn, October 20, 1987.

12. *Malt Beverages, Commonly Known as Beer, of an Alcoholic Strength by Volume of not less than 1.0 Percent and not more than 6.0 Percent, Packaged in Bottles or Cans not Exceeding 1,180mL (40 oz.), Originating in or Exported from the United States of America by or on Behalf of Pabst Brewing Company, G. Heileman Brewing Company Inc. and The Stroh Brewery Company, their Successors and Assigns, for Use or Consumption in the Province of British Columbia*, Canadian International Trade Tribunal, Opinion No. PI-91-001, November 25, 1991.

13. *Preformed Fibreglass Pipe Insulation with a Vapour Barrier, Originating in or Exported from the United States of America*, PB-93-001, Tribunal’s Consideration of the Public Interest Question, January 28, 1994.

14. *Supra*, note 11 at 2.

compelling public interest issue to warrant a departure from the primary object of SIMA.¹⁵” The Tribunal, in this case, agrees with these views.

The Tribunal also agrees with the view expressed by the CIT in *Grain Corn* and with its view expressed in *Fibreglass Pipe Insulation* that it is not enough that prices increase somewhat subsequent to a finding of injury, as this is a natural consequence of the imposition of anti-dumping and countervailing duties. This is particularly true in the present case where the Tribunal found in its injury inquiry that the domestic industry had suffered refining margin depression as a consequence of dumped and subsidized imports of refined sugar and that the domestic industry could not remain viable if these depressed levels of refining margins continued.

That being said, Parliament did see fit to include section 45 in SIMA, and it must be presumed that Parliament did contemplate that, notwithstanding a finding of injury or threat of injury, there would be cases where it would be in the public interest to reduce anti-dumping and countervailing duties, in some instances, perhaps in “the full amount.”

In the Tribunal’s view, section 45 of SIMA requires it to balance the various interests which would be affected by the imposition (or non-imposition) of anti-dumping and countervailing duties, while remaining mindful of the primary object of SIMA. In considering whether it would be in the public interest for the anti-dumping and countervailing duties to be reduced or eliminated in this case, the Tribunal has weighed the benefit accruing to the domestic industry and the sugar beet producers from the imposition of those duties against the burden which such duties would place upon, among others, industrial users and consumers of refined sugar.

The next section of the Tribunal’s consideration of the public interest summarizes the submissions of parties and interested persons. Then, it will discuss the nature of the anti-dumping and countervailing duties imposed pursuant to the Tribunal’s findings of threat of injury, as well as provide an overview of the refined sugar market. Finally, it will discuss the initial and potential future effects of the application of the duties on, among others, the domestic industry, sugar beet growers, industrial users and consumers, with a view to subsequently balancing the various interests.

SUBMISSIONS REGARDING THE REDUCTION OR ELIMINATION OF THE DUTIES

Parties Favouring a Reduction of Duties

Canadian Industrial Sweetener Users and National Dairy Council of Canada

Counsel for the CISU and the Dairy Council submitted that it is in the public interest to reduce the duties on refined sugar and that, in reducing the duties, the Tribunal ought to determine a non-injurious cap on refining margins which would ensure the continued supply of domestic refined sugar, while at the same time allowing for real poised competition. Counsel referred to certain facts that it considered to be relevant for such a determination: the refining margins in the foreseeable future will be lower than those found by the Tribunal to be non-injurious and the Tribunal did not find injury, but rather a threat of injury. Counsel further

15. *Supra*, note 13 at 3.

submitted that what is considered “injurious” is affected by the fundamentally new structure of the domestic industry.

Counsel for the CISU and the Dairy Council suggested that it is the refiners that initiated low pricing and not his clients and that, in his view, once the current price war settles, competition will not continue in the long term. Counsel submitted that imports were not a viable option for his clients and that his clients could not pass on price increases to their customers. Counsel also submitted that higher sugar costs affect his clients’ international competitiveness, particularly in view of the U.S. sugar rebate program. He further submitted that his clients cannot get duty drawbacks on non-NAFTA origin sugar imports.

Counsel proposed that the Tribunal establish a base margin for Contract No. 11 raw sugar on the New York Coffee, Sugar and Cocoa Exchange (NY No. 11), to which additional costs would be added.

Bakery Council of Canada

Counsel for the Bakery Council submitted that it is not in the public interest that duties be imposed on the industrial segment of the market for refined sugar in Canada and that end-use certificates could be used to ensure that people do not import bulk sugar and then package it in Canada for re-sale.

Counsel for the Bakery Council submitted that section 45 of SIMA was meant to provide relief where duties adversely affect the public interest, such as in the case at hand. In such cases, the Tribunal must balance the benefits accruing to the domestic industry from the imposition of the duties against the burden imposed on others. Counsel submitted that the exceptional circumstances in this case are the high dumping margins which allow for potentially huge increases in the domestic price for refined sugar and, at the same time, prevent subject imports from entering and the fact that the Tribunal’s findings were in respect of threat of injury and not actual injury.

Counsel for the Bakery Council argued that a 30 percent increase in the price of sugar would seriously harm the Canadian baking industry and other industrial users and that, even though the price had not increased by that amount, it could increase beyond that level. Counsel cited the expansion of Redpath Sugars, A Division of Redpath Industries Ltd. (Redpath) as the reason for prices not having increased significantly. Nevertheless, counsel submitted that Redpath’s projections of future margins prior to the findings provide an indication of where the margins will be in a few years. Counsel further submitted that the duties can be reduced without adversely affecting the Canadian industry, given the price war among the refiners and the significant decrease in costs resulting from Redpath’s capacity expansion.

In considering the benefits of the findings to the domestic industry, counsel for the Bakery Council submitted that, while the primary benefit was in ensuring that the margins would not be at materially injurious levels, the current level of protection was not needed to ensure this. Counsel further submitted that Canada’s international obligations require the Tribunal to eliminate any superfluous duties. In respect of the burden on others, counsel submitted that sugar was the only source of cost advantage for Canadian food processors in the North American context and that this advantage would be eroded because of the duties. Moreover, duties will affect the price stability of sugar, which is important for industrial users. Counsel submitted that industrial users needed low-cost, world-priced sugar and that the only effective check on Canadian refiners would be potential imports.

Counsel for the Bakery Council also submitted that it was not in the public interest that SIMA be used as a sword, as it has been used by one refiner, in order to gain a competitive advantage over another.

Effem Foods Ltd.

Counsel for Effem submitted that it is in the public interest to reduce the duties and cited as exceptional circumstances that the duties were unrealistically high, that there had been a structural change in the industry and that subject imports were completely blocked from entering the Canadian market because of the duties. Counsel submitted that the public interest in this case was competition and that, because of the small number of domestic refiners, this competition had to come from U.S. imports. In counsel's view, the high anti-dumping duties on U.S. imports are unrealistic, in that they take into account the high U.S. support price. Counsel submitted that sugar was an essential commodity and that a fair price was necessary for international competitiveness. Further, it was submitted that recent developments in the Canadian market had made the duty irrelevant because the sudden over-capacity in the market had driven prices below their previous levels.

Counsel for Effem submitted that his client's experience with price quotes from the domestic refiners since the Tribunal's findings suggested that, once the price war ends, refining margins will soar. Counsel further submitted that large industrial users cannot operate efficiently if the price of sugar is unpredictable.

In recommending a reduction in the duties, counsel for Effem suggested a pricing formula which would take into account the NY No. 11 price and other costs, in addition to a reasonable refining margin as determined by the Tribunal. Counsel suggested that such a margin might be \$120 per tonne.

Good Humor-Breyers, Div. of ULC Inc.

In a written submission filed with the Tribunal, counsel for Good Humor stated that it was of the view that duties in any amount would not be in the public interest. Counsel submitted that, because of the absence of imports, the domestic industry would not be subject to competitive pressures. Accordingly, there would be no impetus on domestic refiners to maintain prices in line with world levels, and Good Humor would have to absorb the increases in price.

Canadian Blending & Processing, Inc. and E.D. & F. Man (Sugar) Ltd.

Counsel for CBP and Man submitted that it is in the public interest to eliminate the duties entirely. Counsel adopted the issues, facts and law as set out by counsel for the Bakery Council and the negative impact of the duties on the Canadian economy, as described by counsel for the CISU and the Dairy Council. Counsel for CBP and Man also suggested that two other points are relevant in balancing the benefits of the findings to the refiners against the burden on others. First, the fundamental change to the market since the findings has removed the threat of material injury and, accordingly, there is no interest in maintaining the duties in any amount because the protection is not necessary. Second, CBP is dependent on a commercially viable source of sugar to maintain its operations and, because of the duties, it has no such viable source. Consequently, it will be forced out of business. In counsel's view, this result demonstrates the serious adverse consequences of the duties.

Counsel for CBP and Man submitted two pricing formulas for consideration by the Tribunal, should it decide to recommend a reduction in the duties, one based on the price for Contract No. 5 refined sugar on the London Futures and Options Exchange and the other in the nature of a SIMA duty-free quota.

Director of Investigation and Research

Counsel for the Director indicated that his participation in the proceedings is narrower than that of the other parties and that his primary focus is competition. Although counsel acknowledged that there has been a change in the state of competition in the domestic market as a result of Redpath's expansion, he submitted that the Tribunal ought to take into account the testimony of Dr. Halldor Palsson that, given the market structure in Canada, it is unlikely that competition will run long term.

Counsel for the Director submitted that, no matter how big a buyer is, it has no countervailing power unless there is a reasonable alternative source of supply and that no such supply currently exists. Counsel also submitted that there is a real risk that, if sugar prices rise too high, some of the downstream users will relocate to the United States.

Although counsel for the Director was of the view that the duties should be eliminated, he submitted that, should the Tribunal take the view that some level of protection is necessary, the Director cannot support a duty formula based on the concept of a reference price. This would amount to a rate of return regulation, and the Tribunal does not have the appropriate guidelines and safeguards that one would usually find in a regulatory situation. Counsel went on to submit that, as an alternative, the Tribunal could choose a fixed level of duty of less than \$100 per tonne.

United Sugars Corporation

Counsel for United submitted that the duties should be eliminated and, in support of this view, referred, in part, to Article 11 of the WTO Anti-dumping Agreement, which provides that anti-dumping duties should remain in force only and to the extent necessary to counteract the dumping which is causing material injury. Counsel submitted that, since the Tribunal only found a threat of injury and not actual injury, taking Article 11 into account, the Tribunal's focus in protecting the domestic industry should be on ensuring that imports do not create a worse situation than that which existed prior to the Tribunal's findings, and counsel discussed refining margins in this regard.

Consumers' Association of Canada

The CAC filed a written submission with the Tribunal. The CAC is of the view that the duties will adversely affect the consumer price for sugar and, indirectly, consumer prices for many other foods. The CAC submitted that, in considering the public interest, the Tribunal must consider whether any potential adverse effects in eliminating the duties can be offset by other means, such as the shifting of production to other crops by the sugar beet growers. The CAC also submitted that the Tribunal must consider the adverse effects of the duties on employment and investment in the sugar-using industry and give greater weight to the public interest in this case, since only a threat of injury, and not actual injury, was found to exist.

Canadian Honey Council

The CHC submitted that sugar is used as a food for bees and that it constitutes a major expenditure for beekeepers. In arguing that it wants access to sugar at world prices through a competitive market, the CHC focussed on the negative impact of an increase in sugar costs on its members' income, on pollination services provided by the bees and on the ability of the honey-producing industry to compete in the export market.

Parties Opposing a Reduction of Duties

Canadian Sugar Institute

Counsel for the CSI submitted that the effects of the duties have not been exceptional and that the evidence demonstrates that they will not be exceptional over the next five years while the findings are in place. Counsel were of the view that the evidence shows overwhelmingly that the commercial interests of the users and consumers are well protected, that the viability of the domestic industry has been enhanced, that the domestic industry is going to become even more competitive and that the beet growers will now have an opportunity to make investments and obtain some decent returns.

Counsel for the CSI submitted that Redpath's capacity expansion has, and will, change the structure of the Canadian industry. It has already driven changes in contracting practices, in the duration of contracts, in alterations of contractual terms, in competitive intensity and in the geographic scope of the markets, which, in counsel's view, will continue once the long-term contracts expire. Counsel also referred to the ability of those involved in negotiating contracts with the refiners to extract price concessions from them.

Counsel for the CSI submitted that it is a matter of fact that margins have improved. Moreover, Redpath's capacity expansion will substantially reduce its unit costs and make it more competitive. Counsel attributed this reduction in costs to the Tribunal's findings of threat of injury. Counsel further submitted that witnesses for Lantic Sugar Limited (Lantic) and Rogers Sugar Ltd. (Rogers) had indicated that they will engage in the same kind of process.

Counsel for the CSI reviewed the performance of the industry since the preliminary determination and noted that the margins had improved moderately, but not exceptionally, through to mid-December. Since mid-December, when Redpath announced its expansion, there were consequent impacts on contracting practices and the terms and duration of contracts, all of which resulted in more competitive margins. Counsel submitted that, over the next two or three years, Lantic and Rogers will respond in kind to the margins already established by Redpath. Counsel referred to Lantic's stated intention to win back its market share as an indication of the vigorous competition that will persist in the industry. They also referred to evidence of buyer expectations and the ability on the part of users to leverage, in part because of the return of non-subject imports into the B.C. market.

With respect to the balance of the five-year period, counsel for the CSI again pointed to Lantic's stated intention to win back its market share as evidence of the likely nature of the market at that time. They also referred to the facts that the price gap which has historically made Canadian sugar users competitive in the U.S. market remains and that margins are very reasonable in the domestic market as further indicators of

the nature of the market during that time period. Counsel submitted that the impact of the U.S. Sugar Re-Export Program on the import-sensitive market is not for the Tribunal to remedy.

Counsel for the CSI submitted that the analysis of Dr. Palsson in respect of future margins and competition in the industry was flawed, in part because he did not address Redpath's expansion and also because he was at a disadvantage in not having access to the confidential record.

With respect to the minimum import reference price proposals made by users and analyzed in the staff report, counsel for the CSI submitted that, in their view, they were deficient and would affect the marketplace in unintended ways to the detriment not only of the domestic industry but potentially of the users as well. Counsel further submitted that there is little evidence before the Tribunal about how such mechanisms would operate or about what is meant by a "reasonable" margin, particularly given the vast differences in the Canadian market and cross-subsidization from the consumer/retail segment of the marketplace to industrial users. Counsel also indicated that, in their view, the Bakery Council's request for an exclusion is not an appropriate consideration in this proceeding.

Canadian Sugar Beet Producers' Association Inc.

Counsel for the Association reviewed certain principles underlying the Tribunal's consideration of the public interest under section 45 of SIMA. Counsel submitted that, in considering the benefits of the duties, the Tribunal must also take into account upstream industries, such as the beet growers.

Counsel for the Association emphasized that the paramount obligation under SIMA is to remove material injury and that, where findings of threat of injury are made, this obligation requires that the threat be removed. Counsel went on to argue that the Tribunal must be satisfied that there is a sufficiently compelling public interest issue to warrant a departure from the primary object of SIMA in forming an opinion that a reduction in the duties is in the public interest. Counsel submitted that the appropriate time frame for considering the effects of the duties on margins and prices is, in this case, the foreseeable future.

Counsel for the Association submitted that the margins have not increased beyond a level that would be expected as a consequence of the findings. Moreover, competition in the market is vigorous. Counsel further submitted that parties' allegations that prices will increase significantly is not supported by the evidence. In their view, parties in favour of a reduction of duties have not shown that there has been, or will be, an adverse impact on them if the duties remain at their current level. Counsel further submitted that, when contracts come up for renewal, the level of competition will likely be the same. Moreover, major buyers, in their view, can influence sugar prices and have done so.

Counsel for the Association submitted that, although witnesses for parties in favour of reducing the duties expressed the view that the duties were exorbitant, they could not indicate what level of protection would be adequate to remove the threat. In counsel's view, if the duties were reduced to a level which would allow U.S. beet sugar to re-enter the Canadian market, the domestic industry would be harmed.

Counsel for the Association submitted that the public interest includes protecting the 12,000 jobs generated by the growing of sugar beets and that beet growers need the confidence provided by the findings in order to make investment decisions.

Other Submissions

Written submissions were also received from the following companies and commission which indicated their support for the reduction or elimination of the duties: Gilbey Canada Inc., International Sugars Inc., Kirkland & Rose Ltd., the Canadian Dairy Commission and Hudon et Deaudelin Ltée. The views expressed focussed on the need for access to quality, competitively priced and reliable sources of refined sugar.

The Government of Manitoba also filed a written submission with the Tribunal. It submitted that the full amount of the duties is necessary to secure the existence of the employment created by the production and processing of sugar from sugar beets in that province. It further submitted that the public interest is served by maintaining the existing duties, given the significant price competition evident in the Manitoba market.

ANTI-DUMPING AND COUNTERVAILING DUTIES

As a result of the Tribunal's findings of threat of material injury, imports of refined sugar from the United States, Denmark, the Federal Republic of Germany, the Netherlands and the United Kingdom are subject to anti-dumping duties, while imports from the European Union became subject to countervailing duties. The Tribunal has reviewed the final determination of the Department of National Revenue (Revenue Canada) to estimate the level of protection that the duties provide to domestic producers of refined sugar.

Table 1		
MARGINS OF DUMPING AND AMOUNT OF SUBSIDY		
Margins of Dumping for Refined Sugar		
Country	Company	Margin of Dumping Expressed as a Percentage of Normal Value
United States	Domino Sugar Corporation	46
	United Sugars Corporation	41
	Savannah Foods & Industries, Inc.	44
	Refined Sugars, Inc.	46
	All Other U.S. Exporters	44
European Union	E.D. & F. Man (Sugar) Ltd.	64
	Tate & Lyle Industries Limited	44
	August Topfer Co. GmbH	44
	VAN TOL B.V.	44
Amount of Subsidy for Refined Sugar		
All EU Members: 50.79 ECUs/100 kg		

Source: Department of National Revenue, Final Determinations of Dumping and Subsidizing, October 5, 1995, Statement of Reasons, Tribunal Exhibit NQ-95-002-4, Administrative Record, Vol. 1 at 218.

Revenue Canada's determination of dumping and calculation of anti-dumping duties were based on an investigation of exports from the subject countries between January 1, 1994, and February 28, 1995. Its determination of subsidizing and calculation of countervailing duties were based on an investigation of exports from the European Union during 1993 and 1994. The weighted average margins of dumping and amount of subsidy are displayed in Table 1. Tribunal estimates of the amount of duties payable are shown in Table 2.¹⁶ The estimates assume the same average export price and normal value for all subject imports from both the United States and the European Union.¹⁷

Anti-Dumping Duties

All margins of dumping were based on Revenue Canada's investigation of sales of refined sugar to Canada by four exporters in the United States: Savannah Foods & Industries, Inc., Domino Sugar Corporation, United and Refined Sugars, Inc. Their exports accounted for nearly all sales to Canada of refined sugar from the United States and a very large proportion of imports from all subject sources during Revenue Canada's period of investigation. The weighted average "normal value" for sales by these firms was \$856 per tonne. The normal value generally represents the price at which the goods are sold in the domestic market of the exporting country.¹⁸ The weighted average export price was \$478 per tonne. The difference between the weighted average normal value and the weighted average export price was a weighted average margin of dumping of \$378, or 44 percent of the normal value. Sales by these four firms of refined sugar for which Revenue Canada did not determine a specific normal value are subject to an advance of 79 percent over the export price, which is equivalent to the weighted average margin of dumping of 44 percent. Shipments by all other exporters in the United States are assessed anti-dumping duties at the same average advance over the export price.

Revenue Canada did not request information from exporters in the European Union other than from Man in Denmark, the Federal Republic of Germany, the Netherlands and the United Kingdom. Sales by exporters other than Man are assessed anti-dumping duties at the same advance over the export price established for exporters in the United States. Because Man did not respond completely to its request for information, Revenue Canada could not establish normal values. On the basis of the information that it had, Revenue Canada determined that, consistent with the provisions of SIMA, the margin of dumping of exports by Man was equal to the highest margin of dumping found for refined sugar for which Revenue Canada had determined a normal value. This margin was 64 percent. Exports to Canada of refined sugar by Man are thus subject to a fixed advance of 178 percent over the export price. If it is assumed that the average export price was \$478 per tonne, the same as that calculated for the United States, the average anti-dumping duty for exports by Man would have been \$849 per tonne. The duty-paid price would have been \$1,327 per tonne.

16. Tribunal Exhibit PB-95-002-36, Administrative Record, Vol. 1A at 134.

17. The estimates use the weighted average export price and weighted average normal value calculated from Revenue Canada's Final Determination. These values represent the weighted average values for all imports of the subject goods examined by Revenue Canada regardless of product type or package size.

18. The normal values were based on the actual selling price in the United States or a price derived from a constructed cost approach which involves calculating the cost of production plus an amount for general selling and administrative expenses and a reasonable amount for profit.

Countervailing Duties

Revenue Canada determined the amount of subsidy on the basis of information provided by the European Commission. It calculated the weighted average countervailable subsidy to be 50.79 ECUs/100 kg, of which the export subsidy represented 46.39 ECUs/100 kg. Using average exchange rates for 1993 and 1994,¹⁹ the countervailing duty in Canadian dollars would have been \$792 per tonne, which is equal to the countervailable subsidies. On the basis of the average export price of \$478 per tonne found during Revenue Canada's investigation, the duty-paid price would have been \$1,270 per tonne.

Origin of Exports	Export Price	Anti-Dumping Duties	Countervailing Duties	Combined Anti-Dumping and Countervailing Duties	Export Price Plus Duties
United States	478	378	N/A	N/A	856
Europe					
Man	478	125	792	917	1,395
Others	478	N/A	792	N/A	1,270

N/A = Not applicable.

Anti-Dumping and Countervailing Duties

Where imports are subject to both anti-dumping and countervailing duties, Revenue Canada's calculation of duties takes into account the relative magnitude of each kind of duty.²⁰ If the anti-dumping duty is less than the export subsidy portion of the countervailing duty, imports are assessed only the countervailing duty. For exporters subject to a dumping margin of 44 percent, duties payable on the basis of the average export price of \$478 per tonne in the United States would have been \$378 per tonne, which is less than the export subsidy of \$724 per tonne. Applying only the countervailing duty of \$792 per tonne results in a duty-paid price of \$1,270 per tonne.

19. Bank of Canada, 1 ECU= \$1.56.

20. Section 10 of SIMA provides that, in cases where both anti-dumping and countervailing duties are payable, and (a) where the whole of the margin of dumping is attributable to the export subsidy, no anti-dumping duty is levied; and (b) where only a portion of the margin of dumping is attributable to the export subsidy, an anti-dumping duty is levied in an amount equal to that portion of the margin of dumping that is not attributable to the export subsidy. It is important to note that this provision applies to the export subsidy portion of the total countervailable subsidy.

If the anti-dumping duty exceeds the export subsidy portion of the countervailing duty, imports are assessed anti-dumping duties less the amount of the export subsidy, plus the full amount of the countervailing duty. Exports by Man are subject to combined anti-dumping and countervailing duties. On the basis of an average export price of \$478 per tonne, the anti-dumping duty is \$125 per tonne, which is the difference between the export advance of \$849 per tonne and \$724 per tonne, the amount of the export subsidy. The countervailing duty of \$792 per tonne is then added to the anti-dumping duty of \$125 per tonne. Total duties payable would have been \$917 per tonne and the duty-paid price equal to \$1,395 per tonne.

OVERVIEW OF THE REFINED SUGAR MARKET

Production of Refined Sugar

In Canada, refined sugar is produced from both raw cane sugar and sugar beets. There are four Canadian cane sugar refineries which are located in Saint John, New Brunswick, Montréal, Quebec, Toronto, Ontario, and Vancouver, British Columbia. These refineries directly employ approximately 1,000 people.

There are two Canadian sugar beet factories which are located in Winnipeg, Manitoba, and Taber, Alberta, close to major centres of beet production. These factories directly employ approximately 270 people, processing sugar beets grown by approximately 750 growers. These growers generally grow sugar beets in rotation with other crops on mixed farms.

During the early 1990s, domestic shipments of refined sugar ranged from 869,000 tonnes in 1990 to 971,000 tonnes in 1994.^{21,22} Approximately 10 to 15 percent of the domestic production of refined sugar is produced from sugar beets, with the remainder produced from raw cane sugar. Exports of refined sugar during that period averaged approximately 60,000 tonnes. The Tribunal notes that exports in 1995 declined substantially and are likely to remain at this lower level due to border measures introduced by the United States, the primary export market for Canadian sugar. These measures limit all imports into that market, including any exports from Canada, to 22,000 tonnes per year.

21. Domestic shipments excluding exports. Statistics Canada Catalogue No. 32-013, "The Sugar Situation."

22. The Tribunal's research staff, using confidential replies to questionnaires, calculated slightly different production statistics for goods reported to be like the refined sugar meeting the product definition contained in Revenue Canada's Statement of Reasons for the Preliminary Determination. Due to the small number of refiners reporting production, these statistics, on which the Tribunal relied in its threat of material injury findings, are confidential. The Statistics Canada data give a general indication of the magnitude of domestic production and the direction of volume changes.

Imports of Sugar

Rates of Import Duty

- Raw Sugar

Canadian sugar refiners purchase raw sugar from several offshore sources, in the past primarily from Australia and Cuba.²³ Australian raw sugar is subject to the British Preferential Tariff (BPT), under which raw sugar is imported tariff-free, while Cuban sugar, until January 1, 1996, was subject to the Most Favoured Nation (MFN) Tariff, under which the current rates for raw sugar range from \$22.05 to \$24.69 per tonne. On January 1, 1996, raw sugar was added to the list of products that can be imported from developing countries under the General Preferential Tariff, which allows for tariff-free entry into Canada. This change will potentially enable the Canadian refiners to purchase tariff-free raw sugar from sources closer to Canada than Australia.

- Refined Sugar

Refined sugar enters Canada under a variety of tariff classifications. The applicable tariff rates for refined sugar imports under tariff item No. 1701.99.00, the tariff item under which the greatest proportion of refined sugar is imported into Canada, range from \$6.17 per tonne for imports from the United States to \$22.05 per tonne for imports from countries that are eligible for the BPT, up to \$30.86 per tonne for imports from MFN countries and from Mexico (imports from Mexico are subject to the MFN tariff rate). Under NAFTA, imports of refined sugar from the United States, that qualify for NAFTA-origin status, will enter Canada tariff-free effective January 1, 1998.

Import Volumes of Refined Sugar

During the Tribunal's inquiry period for its injury inquiry, imports of refined sugar ranged from 98,000 tonnes in 1990 to a high of 158,000 tonnes in 1993 and 146,000 tonnes in 1994.^{24,25}

Domestic Refined Sugar Market

The total market for refined sugar in Canada, as determined by adding total domestic shipments to total imports, ranged from 967,000 tonnes in 1990 to 1.1 million tonnes in 1994. During this period,

23. Due to the Helms-Burton bill in the United States, which contains strict anti-Cuban trade restrictions, Redpath has stated that it will not be able to continue to purchase raw sugar from Cuba. ("Canadian Firms in Cuba Advised to Lay Low," the Globe and Mail, Thursday, March 7, 1996, at B7.)

24. Statistics Canada import data for goods entered under subheading Nos. 1701.91, 1701.99 and 1702.90.

25. The Tribunal's research staff, using confidential replies to questionnaires, calculated slightly different import statistics for goods reported to be refined sugar meeting the product definition contained in Revenue Canada's Statement of Reasons for the Preliminary Determination. Due to the small number of respondents reporting imports from the various countries, these statistics, on which the Tribunal relied in its threat of material injury findings, are confidential. The Statistics Canada data give a general indication of the magnitude of imports and the direction of overall volume changes.

domestic production accounted for between 87 and 90 percent of the total market, with imports accounting for the remaining 10 to 13 percent of the total refined sugar market in Canada.

There are two primary sub-markets for refined sugar: the industrial users, which largely comprise food and beverage manufacturers, and re-sellers, which sell refined sugar products for final consumption (i.e. retail and foodservice operations that service the final consumer).

Industrial Users

In 1994, industrial users accounted for approximately 74 percent of the total Canadian refined sugar market.²⁶ Food processors, which include the biscuit, cereal and canning industries, accounted for the largest overall share of refined sugar use. Soft drink manufacturers represented the single largest industrial users of refined sugar, accounting for approximately 22 percent of total industrial sales in 1994, as indicated in Table 3. Confectionery manufacturers were the second largest industrial users, representing just under 15 percent of refined sugar use in 1994. Other industrial users include a wide range of other industries such as wineries, pet food manufacturers and pharmaceuticals.

	1991	1992	1993	1994
Food Processors	31.8	38.0	32.7	32.3
Soft Drink Manufacturers	19.6	19.0	19.9	21.6
Other	14.4	13.1	17.2	17.0
Confectionery Manufacturers	16.4	15.4	15.8	14.9
Bakery Industry	10.6	9.2	9.6	9.1
Dairy Industry	7.0	5.4	4.8	5.2
TOTAL	100.0	100.0	100.0	100.0

Source: Public Pre-Hearing Staff Report, revised September 29, 1995, Tribunal Exhibit NQ-95-002-6B, Table 9, Administrative Record, Vol. 1A.
Note: Totals may not add up due to rounding.

Re-sellers

The remaining 26 percent of the Canadian market for refined sugar is comprised of the retail and hotels, restaurants and institutions sub-markets.²⁷ Refined sugar in the re-seller sub-market is sold predominately for final consumption, with sales generally made directly to large retail outlets, wholesalers or buying groups for various retail outlets.

26. Protected Pre-Hearing Staff Report, revised September 29, 1995, Tribunal Exhibit NQ-95-002-7B (protected), Table 7, Administrative Record, Vol. 2 at 273.

27. *Ibid.*

Price Determination in the Canadian Market

The domestic refiners of sugar establish their selling prices based on the raw sugar price of NY No. 11.²⁸ This commodity price is referenced daily, and the refiners use that price to calculate a target bulk selling price. To the NY No. 11 price, the refiners add transportation and other costs to get the raw sugar to their refineries, plus a target refining margin which covers all the refining, selling and other costs of producing and selling the refined sugar, plus an amount for profit. The transportation component is usually referenced to the Caribbean-U.K. Freight Rate. The resulting target bulk price for white granulated sugar changes frequently, often daily. From the target bulk price, customers deduct the specific discount that they have negotiated with their supplier. Customer discounts vary by product type, market segment, customer size, customer location and general competitive conditions in the sugar and customer end-use markets.

In recent years, many industrial customers have moved away from the “discount” type of price negotiation and instead negotiate a fixed bulk refining margin which they will pay over and above the refiner’s landed cost of raw sugar. This type of contract is often referred to as a “points-over” or “add-on” type of contract. These contracts are analogous to a tolling arrangement whereby the refiners are paid to process a customer’s raw sugar into refined sugar. In the refining margin type of contract, the refiners purchase the raw sugar, while the refining margin is set by the contract with the customer. In this way, the customer is protected from increases in the refining margin, but is still subject to changes in raw sugar prices, while the refiner is protected from changes in the cost of raw sugar, but cannot vary its refining margin. Prices for contracts for future deliveries are calculated using the applicable forward price of raw sugar on the New York Commodity Exchange. The appropriate forward price is determined by the schedule of deliveries for the contract being negotiated, and the entire contract may encompass many delivery periods. Purchasers can obtain certainty in their sugar costs by negotiating a margin with their supplier and contracting, either directly or through their supplier, for future raw sugar purchases.

Industrial users purchase sugar on either the discount-from-target-price basis or the points-over basis, while re-sellers generally purchase refined sugar on a discount-from-target-price basis. Using either type of contract (discount or points-over) results in a base price for bulk sugar. To calculate the price for sugar products in other than bulk granulated white sugar form (i.e. in pre-packaged quantities, liquid or specialty products), a “product differential” is added to the base price for bulk sugar. The differentials range in value from \$10 per tonne for extra fine bulk granulated sugar to well in excess of \$1,000 per tonne for 4-g individual service envelopes.²⁹ The product differentials change much less frequently than the target bulk price, on average once a year, but they may change more frequently. Thus, a purchaser can calculate the actual price that it will have to pay for a particular package configuration of refined sugar on any particular day by contacting the refiner and obtaining the daily target bulk price, subtracting its appropriate product discount and then adding the appropriate product differential. Similarly, customers using a points-over type of contract can calculate their cost of refined sugar by referencing the appropriate NY No. 11 raw sugar price and the contract formula for calculating their particular purchase price.

28. The price for the closest future delivery month is used as the spot price. The exchange also lists prices for raw sugar deliveries in a variety of future months. The spot price is used to calculate the “spot” or current refined sugar target price, while futures prices are used to calculate prices for quotations for future deliveries.

29. Tribunal Exhibit NQ-95-002-10.2, Administrative Record, Vol. 3 at 146-52.

ASSESSMENT OF THE INITIAL AND FUTURE EFFECTS OF THE APPLICATION OF THE DUTIES

Imports from Subject Countries

The Tribunal examined the effects of the anti-dumping and countervailing duties on the volume of imports from the United States and the European Union. Statistics in Table 4 show that, after the imposition of provisional duties in early July 1995, imports of refined sugar dropped from a monthly average of just over 12,000 tonnes in the first two quarters of 1995 to 2,253 tonnes during the next four months. In November and December 1995, monthly imports averaged almost 3,700 tonnes. In January 1996, the volume of imports was in the same range as during the six months following the application of provisional duties.³⁰ Since the imposition of provisional duties, most imports have originated in the United States. According to testimony, many of these may have been for use in the production of high sugar content products³¹ for export to the United States. They were eligible for the drawback of anti-dumping duties under NAFTA.³²

Table 4

IMPORTS OF REFINED SUGAR

Monthly Averages 1994-95

(tonnes)

Origin	1994		1995		Before Preliminary Determination				Provisional Period		After Findings	
	1994	%	1995	%	Jan.-March		Apr.-June		July-Oct.		Nov.-Dec.	
					1995	%	1995	%	1995	%	1995	%
United States	10,467	85	7,271	89	11,780	92	12,004	92	2,175	76	3,604	79
Denmark	594	5	93	1	256	2	116	1	0	0	0	0
Netherlands	214	2	7	0	10	0	7	0	2	0	16	0
Federal Republic of Germany	255	2	42	1	134	1	21	0	5	0	9	0
United Kingdom	129	1	142	2	108	1	378	3	57	2	13	0
Other EU Countries	60	0	24	0	24	0	32	0	15	1	32	1
Total Subject Countries	11719	95	7,580	93	12,311	96	12,557	97	2,253	79	3,673	81
Republic of Korea	313	0	62	0	130	0	114	0	2	0	2	0
Other	262	0	508	1	329	1	315	1	610	5	865	10
Total Non-Subject Countries	574	0	570	1	458	1	429	1	612	5	866	10
TOTAL IMPORTS	12,293	100	8,150	100	12,770	100	12,986	100	2,865	100	4,539	100

Source: Statistics Canada.
Note: Totals may not add up due to rounding.

30. Protected Pre-Hearing Staff Report, February 14, 1996, Tribunal Exhibit PB-95-002-4 (protected), Administrative Record, Vol. 2 at 532.

31. These products have a sugar content that can reach as high as 80 or 90 percent. In the Tribunal's subsequent consideration of the effects of the duties, it distinguishes between these products and other food products whose sugar content is much lower, ranging from a few percentage points up to about 40 percent as a share of production costs.

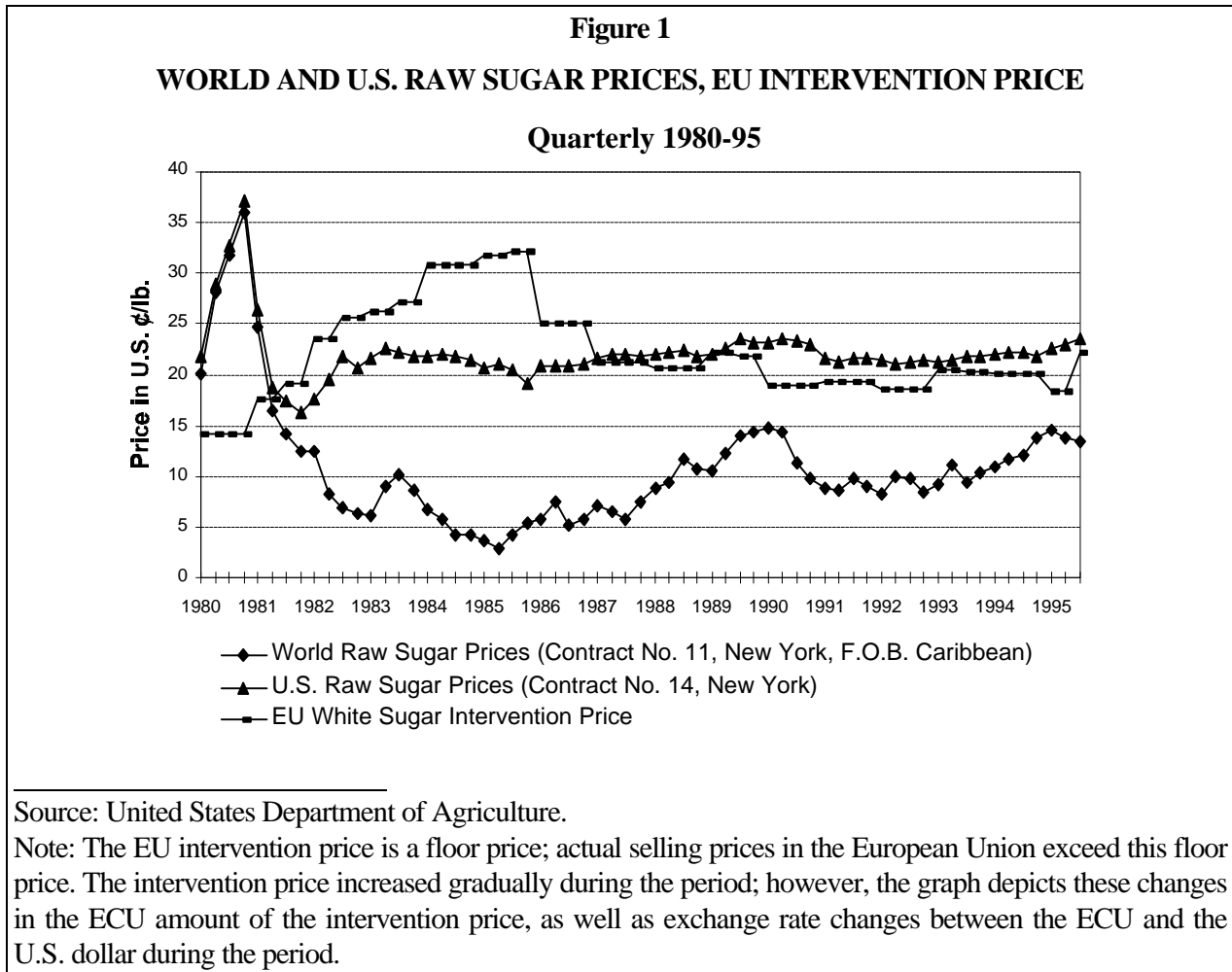
32. Public Pre-Hearing Staff Report, February 14, 1996, Tribunal Exhibit PB-95-002-3, Administrative Record, Vol. 1 at 169.

The application of anti-dumping and countervailing duties has resulted in the virtual elimination of imports of refined sugar from the subject countries. Had imports from the United States been offered for sale at the same average export price as during Revenue Canada's period of investigation, they would have faced average anti-dumping duties of \$378 per tonne. Imports from the European Union would have faced anti-dumping and countervailing duties at more than two and a half times that level, reaching \$917 per tonne (Table 2).

One or a combination of two developments would likely have to occur before imports of refined sugar from the subject countries could be competitive in the Canadian market. The first would be an increase in domestic prices to levels approaching the levels of normal values in the exporting countries. The second would be significant declines in the domestic prices of refined sugar in the United States and the European Union, leading to a review by Revenue Canada that would significantly reduce or eliminate the duties.

Potential increases in the price of domestically produced refined sugar is one of the fundamental questions facing the Tribunal. However, it is worth noting at this point that the gap between domestic prices and undumped and unsubsidized import prices is very large. Assuming the same average export price as during Revenue Canada's period of investigation, Canadian prices would have to increase by \$378 per tonne or more before they approached normal values for exports from the United States, for example. This could only happen with large increases in the NY No. 11 price of raw sugar or large increases in domestic refining margins, or some combination of increases in these two components of the domestic refined sugar price, assuming that the NY No. 14 price did not rise proportionately with increases in the NY No. 11 price.

The Tribunal deals extensively with trends in refining margins in this consideration of the public interest. There was testimony at the hearing on world sugar prices, but there was no agreement on the direction of price movements, even into 1997. While there is no certainty about what future trends in world raw sugar prices are likely to be in the medium term, data in Figure 1 suggest that raw sugar prices can vary significantly, and the possibility of large increases can never be totally excluded. They also show that, since 1981, the world price of raw sugar has remained well below raw sugar prices in both the United States and the European Union.



On the basis of testimony and evidence before the Tribunal, and assuming no large increase in the world price of raw sugar, there is no immediate likelihood of changes in the domestic pricing of sugar in the exporting countries that might lead to a significant decline in the duties calculated by Revenue Canada. The Tribunal considers that changes, if any, in the U.S. sugar program in the near future are unlikely to lead to a significant decline in the high level of domestic refined sugar prices. Accordingly, those prices are likely to remain close to the normal values calculated by Revenue Canada. Similarly, there are no indications that the European sugar regime will change significantly in the near future.³³ Therefore, sugar prices in the European Union are also likely to remain well above world prices; thus, exports of surplus production are likely to be dumped and subsidized. The replacement by the European Union of variable levies on imports of sugar by tariff rate quotas to implement the WTO agreements is likely to ensure that sugar prices in the European Union remain at current levels. While the European Union has made a commitment under the WTO to reduce subsidies and the volume of subsidized exports of refined sugar, there is still significant scope for the sale of large volumes of exports of surplus refined sugar with large subsidies.

33. Official Journal of the European Communities, 24 April 1995, Council Regulation (EC) No. 1101/95 of 24 April 1995 amending Regulation (EEC) No. 1785/81 on the common organization of the market in the sugar sector.

Price of Refined Sugar in the Canadian Market

In considering the question of public interest, the Tribunal looked at prices for refined sugar in the Canadian market and the impact that the imposition of duties has had and will have on those prices. In particular, it examined the main components of refined sugar prices: raw sugar prices and refining margins.

Refined Sugar Prices to Specific Users

During the public interest investigation, the Tribunal heard from various users of refined sugar about their need for predictability of prices for their input materials, including refined sugar. The industrial users stated that access to low-cost sweetener inputs was essential to their continued viability. The Tribunal examined pricing information submitted by the domestic refiners in response to Tribunal questionnaires issued for the inquiry under section 42 and for the investigation under section 45 of SIMA. This information contained prices charged for specific products to the refiners' largest customers in the industrial user and re-seller sub-markets between 1991 and 1995 inclusive.

The sales information, in total, contained data concerning sales of 85 specific products to 32 individual industrial users and 50 sales of specific products to 16 re-sellers. The sales to the industrial users represented approximately 38 percent of the total market in 1994, while the sales to the re-sellers represented approximately 11 percent of the total market, for a total of just under 50 percent of the refined sugar sold in the Canadian market during 1994.

For industrial users, the weighted average price change between 1991 and December 1995,³⁴ for products/customers for which there were comparable data in 1991 and December 1995, was an increase of 5 percent.³⁵ The volume involved in these sales represented 34 percent of the total Canadian market in 1994 (or approximately 46 percent of the industrial user sub-market).

The weighted average price change to re-sellers between 1991 and December 1995 was an increase of 39 percent, most of which is explained by increases in the cost of raw sugar of 37 percent over the same period. The products sold to the 16 accounts for which there were comparable data for both time periods represented approximately 11 percent of the total Canadian market in 1994 (or approximately 42 percent of the re-seller sub-market).

The Tribunal also examined price changes that occurred between the fourth quarter of 1994 and the fourth quarter of 1995. The analysis showed that, for industrial users included in the sample of customers provided by the refiners, prices increased by 5 percent, while prices to re-sellers increased by 2 percent. The Tribunal recognizes that the validity of this latter analysis is limited by the fact that the product mix can change from period to period and that contract sales will not be affected by price changes within the contract term, which, prior to 1996, was usually one year.

34. If December 1995 information was not available, information for the fourth calendar quarter of 1995 was used in this calculation.

35. By comparison, the consumer price index for total food increased by 4 percent over this period.

Table 5 and Table 6 show indices of the weighted average prices³⁶ charged by the refiners to the 32 industrial users for three specific product configurations (40-kg bags of granulated sugar, bulk granulated sugar and liquid sugar) and to the 16 re-sellers for two specific product configurations (2-kg and 10-kg bags of granulated sugar).

Table 5					
SELECTED PRODUCT CONFIGURATIONS SOLD TO INDUSTRIAL USERS					
Selling Price Indices (1991 = 100)					
	1991	1992	1993	1994	1995
40-kg Bag Granulated Sugar	100	96	98	105	110
Bulk Granulated Sugar	100	80	91	99	108
Liquid Sugar	100	86	93	95	104
	Q4 1994	Q1 1995	Q2 1995	Q3 1995	Q4 1995
40-kg Bag Granulated Sugar	107	110	106	110	113
Bulk Granulated Sugar	102	110	108	104	107
Liquid Sugar	97	105	110	99	101

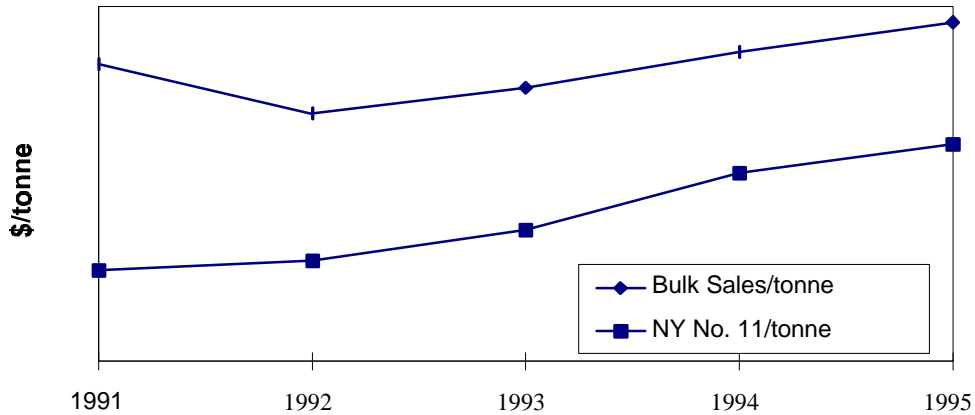
Table 6					
SELECTED PRODUCT CONFIGURATIONS SOLD TO RE-SELLERS					
Selling Price Indices (1991 = 100)					
	1991	1992	1993	1994	1995
2-kg Bag Granulated Sugar	100	103	127	139	142
10-kg Bag Granulated Sugar	100	98	110	122	121
	Q4 1994	Q1 1995	Q2 1995	Q3 1995	Q4 1995
2-kg Bag Granulated Sugar	144	144	134	140	152
10-kg Bag Granulated Sugar	137	132	114	117	125

Effects of Raw Sugar Prices on Refined Sugar Prices

During the 1991-95 period, the NY No. 11 spot price for raw sugar increased by almost 37 percent, from 8.9 U.S. ¢/lb. to 12.4 U.S. ¢/lb. Figure 2 shows a graph of the average selling price for the domestic refiners' sales of bulk granulated sugar and the average price of raw sugar, as represented by the NY No. 11 price (converted to Canadian dollars per tonne).

36. It should be noted that these tables present the average cost to users, that is, average selling prices for refined sugar, not the refining margins which are the net returns to the refiners.

Figure 2
BULK SELLING PRICE AND RAW SUGAR PRICE
1991 to 1995



Note: To protect the confidentiality of the average bulk sugar selling price, the graph does not indicate the dollar amounts and the Y axis does not start at zero.

The Tribunal notes that, with the exception of the 1991-92 period, the refiners' average selling price of bulk granulated sugar followed the same trend as the NY No. 11 price for raw sugar. Between 1991 and 1992, while the price of raw sugar was increasing, the average selling price charged by the domestic refiners decreased. It is also interesting to note that the gap between the selling price for bulk refined sugar and the prices for raw sugar narrowed during each year from 1991, that is, the refining margin per tonne continually decreased over the time period, until the 1994-95 period, when the gap increased slightly.

It is clear to the Tribunal that prices for refined sugar in Canada have been heavily influenced by the direction and magnitude of changes in the cost of raw sugar. Moreover, there is no reason to believe that this influence will not continue in the future. The users of refined sugar will continue to be exposed to the possibility of large swings in the cost of refined sugar due to changes in the cost of raw sugar.

Effects of Refining Margins on Refined Sugar Prices

The Tribunal noted in its statement of reasons for the threat of injury findings that, due to factors such as variable raw sugar prices, discounts and product differentials, net refining margins were a better indication of changes in "price levels" or the return to the refiners than the overall price of refined sugar. The refining margin is the amount of the selling price, over and above the refiners' landed costs of raw sugar, that is available to cover their refining, selling and administrative costs, as well as to provide a profit on the sale. While purchasers are ultimately concerned with the overall cost of the refined sugar, they are also concerned with the margin between the cost of raw sugar and their ultimate cost of refined sugar. This is the component of refined sugar costs over which they can exert some influence, through pressure on the domestic refiners.

During the Tribunal's injury inquiry, the domestic refiners presented information to the Tribunal indicating that the refining margins that they had been able to achieve had been decreasing. This information formed the basis for the Tribunal's threat of injury findings. As it stated in its statement of reasons for those findings, the Tribunal found that imports of dumped and subsidized refined sugar had had a substantial detrimental impact on the net margins earned by domestic refiners. While the Tribunal found that the margin depression suffered up to the time of the preliminary determination was not sufficient to support a finding of material injury, it was convinced that the domestic refiners could not remain viable if those depressed levels of net margins continued. Consequently, it found that the imposition of anti-dumping and countervailing duties was necessary to prevent the resumption of downward pressures on net margins by imports of dumped and subsidized refined sugar. Thus, the Tribunal expected that net margins would increase with the imposition of duties and, indeed, felt that these increases were necessary to prevent material injury.

During the public interest investigation, the Tribunal heard a great deal about the level of margins that the domestic refiners had been able to achieve since the imposition of provisional duties and about the level that these margins might reach in the future. The domestic refiners submitted numerous examples of net margins negotiated with a variety of customers, as well as projections of net margins during the next two years.

The evidence submitted indicates that refining margins did indeed increase in the latter part of 1995. The price of raw sugar declined during 1995 from 1994 levels, while, as mentioned earlier, the selling prices of refined sugar remained stable or increased in 1995 over 1994 prices. Thus, the difference between the price of refined sugar and the cost of raw sugar, the refining margin, increased.

Despite this increase in margins in the last part of 1995, the Tribunal was convinced by the evidence presented by the domestic refiners during the public interest investigation that refining margins will remain relatively stable, at least into 1998.³⁷ In some cases, margins negotiated for 1996 had actually decreased as a result of competitive activity.³⁸ However, overall, the net margins increased or were projected to increase to levels above those earned in late 1994 and early 1995. The domestic refiners submitted that, through capacity expansion, cost-cutting or a combination of both, they were lowering their unit costs and would be able to remain viable, even at margin levels below those earned in the early 1990s. The Tribunal also notes that the volume of sugar previously supplied by subject imports will be available to the domestic refiners, thereby enabling them to increase throughput and achieve economies of scale.

Redpath submitted numerous examples of large- and medium-volume accounts that had negotiated two- or three-year term contracts with stable or even reducing refining margins over the term of the contract.³⁹ Lantic and Rogers also provided forecast information regarding their expected net margins for 1996 and 1997.⁴⁰ This information covered both the industrial user and re-seller⁴¹ sub-markets and

37. Tribunal Exhibits PB-95-002-7.1, 7.2 and 7.3 (protected), Administrative Record, Vol. 4 at 78, and Vol. 4B at 63 and 160.

38. Manufacturer's Exhibit PB-95-002-A-10 (protected), Tab 4, Administrative Record, Vol. 12.

39. *Ibid.*

40. Manufacturer's Exhibits PB-95-002-A-6 and A-8 (protected), Administrative Record, Vol. 12; and Tribunal Exhibits PB-95-002-7.2 and 7.3 (protected), Administrative Record, Vol. 4B at 63 and 160.

indicates that these two refiners do not anticipate substantial margin increases over the next two years. Further, information adduced during the investigation indicates that many large users and re-sellers of refined sugar have negotiated two-year or, in some cases, three-year contracts which specify the refining margin that they will pay in each of the years covered by the contract. Thus, for a significant portion of the refined sugar market, the refining margin has been effectively locked in for all or a portion of the next few years (depending on the length of individual contracts).⁴²

Evidence given during the Tribunal's injury inquiry showed that, as refined sugar prices increased, the return to sugar beet producers also increased.⁴³ Thus, as either the raw sugar or refining margin component of refined sugar selling prices increases, so does the return to sugar beet growers. Consequently, the increased refining margins have benefited, and will continue to benefit, the sugar beet growers in Canada.

Combined Effects of Raw Sugar Prices and Refining Margins

The Tribunal found that there are conflicting views as to the future direction of raw sugar prices. The futures market currently indicates that the NY No. 11 price for raw sugar will be lower through to October 1997. However, other market participants expect raw sugar prices to increase from their current levels. The Tribunal notes that, regardless of the direction of raw sugar price changes, purchasers of refined sugar will still be subject to the fluctuations in this commodity price, as their costs will fluctuate up and down with the raw sugar market.

The evidence presented in the public interest investigation also indicated that refining margins have not increased substantially since the imposition of duties. Other evidence indicated that these margins are not likely to increase substantially in the next two to three years. Moreover, the Tribunal notes that the recent changes to longer-term contracting practices between the refiners and industrial users and re-sellers will increase the predictability of at least the refining margin portion of refined sugar prices.

Factors Affecting Refining Margins

The Tribunal heard testimony on the factors affecting domestic refining margins. The testimony referred to the post-finding period (up to the hearing on public interest) and to the future period. The Tribunal views the two time periods as separate but interdependent. They are separate in that the former covers actual events, while the latter covers what might happen in the future. They are interdependent in that changes and events which have occurred regarding, for example, refining margins and the length of contracts for refined sugar may have an influence for some time into the future.

The Tribunal is of the view that the testimony and evidence on the factors affecting the refining margin portion of the domestic price for refined sugar can be grouped under domestic competition,

41. Tribunal Exhibits PB-95-002-7.1, 7.2 and 7.3 (protected), Administrative Record, Vol. 4 at 78, and Vol. 4B at 63 and 160; and Transcript of In Camera Hearing, PB-95-002, Vol. 2, February 28, 1996, at 351-53, and Vol. 3, February 29, 1996, at 591-93.

42. Transcript of In Camera Hearing, PB-95-002, Vol. 1, February 27, 1996, at 47 and 148-49, Vol. 2, February 28, 1996, at 295, and Vol. 3, February 29, 1996, at 404, 606 and 641; and Manufacturer's Exhibit PB-95-002-A-10 (protected), Tabs 1 and 4, Administrative Record, Vol. 12.

43. Tribunal Exhibit NQ-95-002-10.3 (protected), Administrative Record, Vol. 4C at 72-100.

countervailing power of buyers, substitutability with high-fructose corn syrup (HFCS) and the availability of refined sugar from non-subject countries.

Domestic competition

Evidence submitted by Professor James A. Brander in the Tribunal's injury inquiry indicated that the domestic sugar refining industry is highly concentrated, is characterized by high fixed costs and generally requires "a reasonably high mark-up over variable costs⁴⁴" to recover the high fixed costs and to provide a reasonable return to shareholders. Also, "the high mark-ups over the variable cost that the industry requires and that the industry obtains are higher than would be the case in a competitive industry."⁴⁵

The actual markups over variable costs generally reflect a variety of decisions by the firm. The markups may vary with the size of order or shipment of refined sugar, with the degree of competition in a particular sub-market or with ongoing general competition in the market. The evidence submitted in the inquiry indicated that the industry was able to segment and to price discriminate among its different markets.

The cost of producing refined sugar is mainly determined by the scale of the refining operation and the capacity utilization of the facility. The evidence from the inquiry was that sugar refiners strive to maximize throughput to lower or maintain unit cost levels. To the extent that the anti-dumping and countervailing duties have reduced imports from the subject countries into the domestic market, there is additional production volume available to the domestic industry to achieve increased levels of capacity utilization, lower average costs and, potentially, increased margins.

Both refiners and users testified that there was an increase in the degree of domestic competition by refiners in recent months. Witnesses for all three refiners and for some users used the term "price war" to describe the degree of domestic competition in the current period. The Tribunal heard testimony that the increase in the degree of domestic competition took various forms: refiner offers of contracts with a longer term and lower margins than existing contracts; refiner offers of new contracts with provisions to reduce the effective margins for the remaining term of existing contracts; and aggressive offers from more than one refiner for a user's business.

The Tribunal heard testimony that the period of increase in the degree of domestic competition began with a strategy by Redpath to sign multi-year contracts to guarantee production volume for its proposed additional plant capacity. This strategy was initiated by a series of rapid signings of certain key accounts to multi-year contracts beginning in the late summer and intensifying through the fall of 1995. The Tribunal heard evidence that, after learning of Redpath's strategy, Lantic and Rogers responded by aggressively bidding against Redpath for new contracts, as well as renegotiating the remaining portion of some existing contracts at lower margins. The Tribunal heard testimony that the refiners were aggressively bidding for both industrial user and re-seller accounts. The Tribunal also heard testimony that Redpath had secured a contract with a re-seller in Western Canada.

In the Tribunal's view, there was an increase in the degree of competition between the refiners. The increased competition occurred for both industrial user and re-seller accounts. The sale by Redpath to a

44. Transcript of Public Hearing, NQ-95-002, Vol. 9, October 13, 1995, at 1762.

45. *Ibid.* at 1761.

re-seller in Western Canada and sales by Rogers in the Ontario market suggest that this type of competition is feasible and, if it grows in intensity, will add further to the overall degree of competition.

The Tribunal heard different views on how long the price war might last into the future. Testimony from refiners indicated that the intense competition would last into the foreseeable future. Redpath testified that it needed to obtain additional orders to ensure an increase in production to enable its expanded facility to run at optimal capacity. Lantic testified that it needed to regain its lost customers in order to enable it to operate its refineries at its desired level of utilization.

The Tribunal heard testimony from some users that the price war could end as quickly as it began, due to the market power of the domestic refining industry. Other users indicated their expectations that the price war would be ongoing when they renewed their existing contracts.

The Tribunal is of the view that industrial users that have not yet renegotiated their contracts during the period of increased price competition will be making strong efforts to negotiate margins which are at least comparable to those being paid by their competitors. These efforts will contribute to a stretching out of the period of competition into 1998, although the expected degree of intensity of this competition is difficult to assess.

Countervailing Power

In contrast to the small number of refiners selling refined sugar, there are many firms of various sizes that buy refined sugar in Canada. There are large firms with a significant volume of annual purchases of refined sugar; there is centralized buying for groups of firms; and there is a substantial number of independent medium- and small-sized firms that buy directly from the refiners. This range of size of buyers is found in both the industrial user and re-seller sub-markets for refined sugar.

Countervailing power occurs when the power held by one group can be balanced or neutralized by the power held by an opposing group, leading to a more equitable economic relationship. In the case of the market for refined sugar in Canada, countervailing power refers to the degree of purchasing power held by buyers of refined sugar which can be used to offset the selling power of the three refiners. The Tribunal is of the view that the countervailing power of buyers is greatest for the buyers representing large, or critical-sized, accounts. This power generally decreases as the size of the account decreases.

The Tribunal heard testimony that buyers require ready access to imports of refined sugar in order to use their countervailing power. Buyers claimed that they require the existence of a price offer below the domestic price in order to use their power to force the domestic refiners to lower their price to match a better offer. Without the offer from the importer, some buyers claimed that they did not have countervailing power to use against the domestic refiners.

The Tribunal also heard testimony from users that they would use a price offer from one refiner in negotiation with another refiner in an effort to secure a lower price. Under cross-examination, some users admitted that they would use an offer very aggressively in negotiations with another refiner. Some of the users further admitted that their efforts had resulted in a lower contract price than they were initially offered.

The Tribunal is of the view that some buyers of refined sugar have countervailing power which they used in negotiations with refiners in the period after the Tribunal's injury findings. These buyers tended to represent significant accounts in terms of volume of refined sugar. The use of countervailing power by the users during a period with an increased degree of price competition amongst the refiners has produced favourable margins for many buyers of refined sugar in Canada since the injury findings.

In the future, the Tribunal is of the view that the countervailing power of buyers will result in more favourable prices to buyers when the market is more competitive than when the market is less competitive. If sellers are aggressively seeking sales, then buyers are likely to be able to effectively use their size of order to obtain a better offer from another aggressive seller. If sellers are not seeking to expand their market share through aggressive pricing, however, then the possibility of switching a large order may not draw a better price offer in negotiations with the domestic refiners.

Substitutability with HFCS

The price and substitutability of HFCS for liquid sugar is a third factor which can influence the domestic price for refined sugar. Some industrial users of liquid sugar, especially for soft drinks, can readily switch between liquid sugar and HFCS in their production process. For other industrial users, product limitations and possible perceived taste differences may restrict their ability to switch to alternative sweeteners. Still other industrial users of liquid sugar are constrained in their use of HFCS for other reasons, including the cost of changes to ingredient labelling. Data presented in the Tribunal's staff economics report for the inquiry included an estimate of the potential displacement of liquid sugar by HFCS in 1992.⁴⁶ The estimate was 232,000 tonnes, or roughly one third of total industrial demand for refined sugar.

If the price of HFCS rises relative to the price of liquid sugar, then the demand for domestic liquid sugar normally increases. If the price of liquid sugar rises relative to the price of HFCS, then the demand for liquid sugar normally decreases. The magnitude of the shifting from one sweetener to the other would be influenced by the magnitude of the change in relative prices, by technical limitations and by perceived taste differences of the substitute product.

The Tribunal heard evidence that at least one domestic refiner is actively pursuing existing HFCS business to help maintain refinery throughput.⁴⁷ While the Tribunal did not have information on recent and current prices for HFCS, it notes that, to the extent that HFCS producers respond with lower prices to protect their existing domestic customers from lower price offers by the domestic sugar refiners, there will be increased price competition in the liquid sugar segment of the domestic market. This potential price competition may, however, be constrained by the availability of higher selling prices for HFCS in the United States than in Canada. This price differential might lead the domestic producer of HFCS to decide that it would be more profitable to sell HFCS in the U.S. market than to provide aggressive price competition against liquid sugar in the Canadian market.

46. Public Pre-Hearing Staff Economics Report, August 30, 1995, Tribunal Exhibit NQ-95-002-29, Administrative Record, Vol. 1A.1 at 26.

47. Refining margins for liquid sugar are generally the lowest of all industrial segment margins. To the extent that sales of liquid sugar account for a larger share of total sales, the average margin would be lower, assuming no other changes.

For the future period, the Tribunal heard evidence that one domestic refiner expects an increase in the U.S. production of HFCS to be on the market by next year, which would normally lead to lower prices for HFCS. To the extent that U.S. prices for HFCS put downward pressure on Canadian prices for HFCS, the Tribunal is of the view that there would be downward pressure on the price of domestic liquid sugar in order to protect the domestic market share for liquid sugar.

Imports from Non-Subject Countries

Imports of refined sugar from non-subject countries may provide competition for refined sugar in the domestic market, provided the imports are price-competitive and provided the imported sugar is available with the desired market characteristics. In order for import competition to affect the domestic price for refined sugar, the price of imports would need to be less than the domestic price, assuming similar qualities in the refined sugar from the two sources. In this case, the domestic industry would be faced with a decision involving the lowering of its price below the import price to defend its market share or maintaining its price with some loss in market share, or some combination of these strategies. At the very least, imports of refined sugar from non-subject countries at a price below the Canadian price would probably result in a decline in actual domestic prices or act as a ceiling on domestic price increases, as established by the domestic refining industry.

The Tribunal heard testimony from industrial users on the availability of refined sugar from non-subject countries with the desired market characteristics. Industrial users testified that they had not received offers of refined sugar from non-subject countries and that they had not actively sought this source of sugar due to the negative effect that it would have on their production costs. Counsel for the users argued that refined sugar from non-subject countries did not meet three basic availability requirements: assured delivery, just-in-time delivery and the cost advantages of close-at-hand supplies. Counsel went on to argue that these disadvantages mean that refined sugar from non-subject countries could not provide competition in the domestic market and that the record in the three-month period after the injury findings indicated that imports from these sources have been very small and no larger than in the first quarter of 1995.

The Tribunal received submissions from the domestic industry that supplies of refined sugar from non-subject sources were available and represented poised competition to the domestic industry. The submissions included the cost of landing refined sugar from five non-subject countries.⁴⁸ Counsel for the domestic refiners argued that the relatively small quantities of imports of refined sugar from non-subject countries in the period after the injury findings reflect the time lag required to establish new supply networks and the lack of competitiveness of these imports with the low margins that the domestic industry is now charging industrial users.

Although some refined sugar from the Republic of Korea is being purchased by a re-seller in Western Canada, in the Tribunal's view, non-subject imports of refined sugar have generally not represented an economically viable alternative to domestic refined sugar in the period from the injury findings to the time of the public interest investigation. The price and delivery advantages, together with the product characteristics of the refined sugar from the domestic industry, have made domestic sugar the preferred source for the industrial users.

48. Manufacturer's Exhibit PB-95-002-A-4 (protected), Administrative Record, Vol. 12.

For the future period into 1998, if an increase in the domestic refining margins caused the domestic price for refined sugar to rise, such as to make the landed price for refined sugar from non-subject sources competitive, then imports from non-subject countries may become a viable alternative source for industrial users and re-sellers. This would likely happen in the re-seller sub-market more quickly than in the industrial user sub-market, as seen in the sale of Korean refined sugar to one re-seller in Western Canada. In the Tribunal's view, the domestic industry is likely to set its margins such that the domestic price for refined sugar is more attractive to domestic users than is the landed price from non-subject countries. In this way, the refiners would avoid losing any significant portion of the domestic market to non-subject imports.

Refining Margins and the Competitiveness of Industrial Users

Industrial users of refined sugar submitted that the domestic industry would take advantage of the anti-dumping and countervailing duties to increase significantly their refining margins. Furthermore, higher margins would allow refined sugar prices to reach levels approaching those in the United States, which, before the application of the duties, were more than \$370 per tonne⁴⁹ higher than in Canada. Industrial users submitted that they could not pass on their higher sugar costs to their customers and would, therefore, suffer financial harm. They were particularly concerned about maintaining their competitiveness in Canada and abroad.

The Tribunal has found that the imposition of duties has not resulted in large increases in the refining margins that industrial users pay for refined sugar. Indeed, the evidence suggests that, at least into 1998, refining margins are unlikely to increase significantly from current levels. The magnitude of the increases is not sufficiently large to have a major impact on industrial users of refined sugar as a whole.

The Tribunal does, however, recognize the unique situation of CBP, a Canadian producer of liquid sugar, which submitted that, with the duties in place, it cannot get access to competitively priced refined sugar and will be forced out of business. The Tribunal notes that this producer, owned by one of the world's largest sugar trading firms, was set up primarily to sell blended sugar products into the United States. Unable to obtain access to the U.S. market for blended sugar products, CBP started producing liquid sugar for the Canadian market using dumped and subsidized imports of refined sugar from the subject countries. However, the adverse effects of the duties on CBP, together with the effects on other users, are not such as to lead the Tribunal to modify its view that the increase in refining margins has not had a major overall impact on industrial users.

While the Tribunal does not expect refining margins to increase significantly beyond current levels over the next two or three years, the possibility cannot be ruled out. Accordingly, the Tribunal has examined what the financial implications of large increases in sugar costs might be for industrial users. It has also considered the capacity of industrial users to pass on these higher costs and how higher sugar costs might affect their international competitiveness. The analysis focuses primarily on the effects of refining margins on industrial users' costs of refined sugar rather than on the effects of movements in raw sugar prices.

49. See Table 2.

The Basic Facts About Industrial Users of Refined Sugar

Industrial users produce various bakery, canned, confectionery, dairy and other food products, as well as a broad range of beverages. Data in Table 7 show that, in 1994, industrial users sold over \$21 billion of food products. According to the CISU, these industries employed more than 108,000 people in 1993.

Table 7
INDUSTRIAL USERS' EXPORTS AND SHIPMENTS
(\$ million)

Sector	Exports				Shipments			
	1991	1992	1993	1994	1991	1992	1993	1994
Dairy Products	203	207	177	204	7,576	7,462	7,319	7,292
Biscuits	23	34	70	95	510	523	570	631
Bread and Other	152	192	221	262	1,861	2,014	2,029	2,032
Misc. Food Products	906	1,165	1,365	1,622	7,599	8,140	8,049	8,703
Soft Drinks	98	121	125	210	1,645	2,252	2,361	2,375
TOTAL	1,382	1,719	1,958	2,393	19,191	20,391	20,328	21,033

Source: Statistics Canada, International Trade Division.

Despite an increase of \$1 billion from 1991 to 1994, the value of Canadian food product exports remained relatively small, in terms of total shipments, at \$2.4 billion in 1994, compared with shipments of \$21 billion in the same year. Data in Table 8 show that imports of food products also increased strongly, rising by \$2.2 billion, from \$3.6 billion in 1991 to \$5.8 billion in 1994. On balance, the food processing industries appear to be facing growing competition in the Canadian market, but have considerable scope for expanding exports. In this regard, the Tribunal notes the strong growth in exports of food products since 1991.

Table 8
IMPORT AND MARKET DATA FOR FIVE FOOD PRODUCT CATEGORIES
(\$ million)

Sector	Imports				Market			
	1991	1992	1993	1994	1991	1992	1993	1994
Dairy Products	168	190	211	217	7,541	7,444	7,353	7,305
Biscuits	123	146	158	169	609	634	658	706
Bread and Other	88	120	145	175	1,798	1,942	1,952	1,946
Misc. Food Products	3,205	3,691	4,184	5,179	9,898	10,667	10,868	12,259
Soft Drinks	36	31	47	49	1,584	2,162	2,283	2,214
TOTAL	3,620	4,178	4,745	5,789	21,430	22,849	23,114	24,430

Source: Statistics Canada, International Trade Division.

Refined sugar is one of many ingredients used in the manufacture of food products. Its relative share in costs of production ranges from a few percentage points up to over 40 percent. Some products, such as drink mixes, have a much higher sugar content, exceeding 50 percent and going as high as 80 to 90 percent. Clearly, these products are extremely sensitive to changes in refined sugar prices. On the other hand, they account for a relatively small share of refined sugar sold in Canada.

Implications for Industrial Users of Large Increases in Refined Sugar Costs

- Effects on Production Costs

Witnesses for the Bakery Council submitted estimates of the likely effects of a 30 percent increase in refined sugar costs. They estimated that their production costs would increase from 2 to 3 percent to as much as 5 percent or more for higher sugar content products.⁵⁰ The Tribunal's staff also analyzed the sensitivity of costs of production and gross margins to refined sugar price increases.⁵¹ The analysis used financial information provided by 22 firms accounting for over 20 percent of industrial refined sugar consumption in Canada. Respondents represented all the major food processing sectors, except for soft drinks. Refined sugar costs accounted for an average of 8.4 percent of total production costs.

The staff calculation assumed a 10 percent increase in the cost of refined sugar. The results shown in Table 9 are assumed to be linear. For example, the effect of a 5 percent increase would be half those stated in the table, while the effect of a 30 percent increase would be triple. The Tribunal notes that the results of the analysis performed by the staff are generally consistent with the submissions of the Bakery Council.

Sector	Effect on Production Costs	Effect on Gross Margins
Bakery	1.5	(2.1)
Canning	1.1	(2.5)
Confectionery	0.7	(0.8)
Dairy	0.7	(2.3)
TOTAL SURVEY	0.8	(1.4)

Source: Replies to Tribunal questionnaires.

50. Purchaser's Exhibits PB-95-002-E-2, E-4 and E-6 (protected), Administrative Record, Vol. 14.

51. Public Pre-Hearing Staff Report, February 14, 1996, Tribunal Exhibit PB-95-002-3, Administrative Record, Vol. 1 at 181; and Protected Pre-Hearing Staff Report, February 14, 1996, Tribunal Exhibit PB-95-002-4 (protected), Administrative Record, Vol. 2 at 121.

Overall, a 10 percent increase in sugar costs raises total costs by an average of 0.8 percent for industrial users that responded to the Tribunal's questionnaire. Increases ranged from 0.7 percent for confectionery products and dairy products containing sugar to 1.5 percent for bakery products. Assuming that they could not be passed on to customers in higher prices, the higher costs would result in a 1.4 percent decrease in gross margins.⁵²

The average 0.8 percent increase would translate into additional production costs of \$11.5 million for the sample of users. The net effect would be \$56.5 million for all industrial users. On the other hand, the increases in sugar costs that users have faced as a result of higher refining margins since the application of provisional duties have been much less than 10.0 percent. Assuming a raw sugar cost of \$400 per tonne and a refining margin of \$100⁵³ for bulk sugar, the refining margin would have to increase by 50 percent to increase users' sugar costs by 10.0 percent. Other refined sugar products, which account for over two thirds of industrial users' purchases are sold at higher costs, reflecting product differentials added to the bulk refining margin. For these products, the basic bulk refining component of the price would have to increase by more than 50 percent to result in a 10.0 percent increase in sugar costs.

- Passing on Increased Refined Sugar Costs to Buyers of Food Products

The Tribunal heard extensive testimony about industrial users' attempts to pass on higher costs to buyers by increasing prices. They cited many examples of failed attempts to increase prices to pass on higher costs. There was considerable resistance to price increases of any kind, even when buyers knew that the price increase was due to higher commodity costs beyond the control of the food processor. The witness for Cadbury Chocolate Canada Ltd. testified that the price of a chocolate bar has not essentially changed since the early 1990s, despite significant increases in costs of many ingredients.⁵⁴

This testimony largely substantiated the findings of the staff's survey of industrial users' experience with cost increases.⁵⁵ According to the findings, industrial users have been largely unsuccessful in passing on increased costs. In some cases, some small portion, but not the totality of cost increases, could be passed on. Respondents identified several factors that limited their capacity to pass on cost increases. These included the soliciting of bids from competitors, particularly where branded products were competing with private labels. Other respondents reported that price increases typically caused a decline in demand, negating any gains from higher prices. Industrial users also submitted that their products had to remain competitive with other snack foods. The Tribunal is of the view that, in recent years, industrial users have had a very limited capacity to pass on increased costs.

52. Certain companies did not provide information concerning the net income earned on sales of sugar-containing products. Consequently, the staff calculated the gross margins earned on sales of these products for this analysis.

53. This bulk margin is an approximation based on a range of actual margins referred to in public testimony and in argument.

54. Transcript of Public Hearing, PB-95-002, Vol. 1, February 27, 1996, at 79.

55. Public Pre-Hearing Staff Report, February 14, 1996, Tribunal Exhibit PB-95-002-3, Administrative Record, Vol. 1 at 179.

- International Competitiveness of Industrial Users

There were two sides to industrial users' concern about the effects of higher refining margins on their international competitiveness. One was their capacity to compete with food products imported primarily from the United States, where world-priced sugar may be available through the U.S. Sugar Re-Export Program for exports of food products.⁵⁶ The other side was the ability to compete with food producers in export markets, including the United States, that have access to other ingredients besides refined sugar at lower prices than in Canada. Witnesses told the Tribunal that the availability of world-priced sugar in Canada had, until now, offset the disadvantages of higher costs of other ingredients and smaller plant operations.⁵⁷ Witnesses testified that Canadian plants of multinational firms had to compete with plants located in the United States. The price of refined sugar played a key role in decisions to produce or continue to produce in Canada.⁵⁸

The cost of refined sugar is but one of many cost factors that affect the international competitive position of Canadian industrial users. For most users, these other costs play a much greater role in determining their competitiveness. However, in this investigation, the key question was how high refining margins could go before the increased cost of sugar would impair the industrial users' competitiveness and viability. According to the evidence, the levels of refining margins that industrial users have been paying in recent years and are likely to be paying into 1998 cannot be considered to be a major impairment to their international competitiveness. However, if large increases in refining margins occurred, they could prove to be detrimental, especially for the production of foods in which refined sugar accounts for a relatively high proportion of production costs. Ultimately, industrial users would face difficulties in passing on costs in both the Canadian and export markets.

The Tribunal has considered the industrial users' submission that, in addition to the advantages that food product exporters in the United States have because of lower cost ingredients and economies of scale, they also have access to world-priced refined sugar through the U.S. Sugar Re-export Program. The evidence suggests that U.S. exporters of sugar-containing food products have had access to this program for many years. Witnesses referred to the "sugar rebate" and a witness explained how a plant in the United States took advantage of the program for exports to Mexico.⁵⁹ According to testimony, this access was to have ended on January 1, 1996, under the provisions of NAFTA.⁶⁰

56. According to information contained in excerpts of the United State's Code of Federal Regulations (CFR), Title 7, Part 1530, Subpart B, U.S. food manufacturers may use the Sugar Re-Export Program to obtain world-priced imported refined sugar for the production of sugar-containing products for export. However, Article 303 of NAFTA calls for the phasing out of drawback and duty deferral programs starting on January 1, 1996. While there is an exclusion from the restriction of drawback and duty deferral programs for raw sugar imported for use in the production of refined sugar to be exported to Canada (Annex 303.6), the exclusion does not appear to cover the re-export of sugar incorporated in sugar-containing products.

57. Transcript of Public Hearing, PB-95-002, Vol. 1, February 27, 1996, at 91.

58. *Ibid.* at 129-30.

59. Transcript of Public Hearing, PB-95-002, Vol. 1, February 27, 1996, at 88.

60. *Ibid.* at 90; and Transcript of In Camera Hearing, PB-95-002, Vol. 3, February 29, 1996, at 564-65.

Had the program been terminated, there would have been a significant improvement in Canadian industrial users' competitive position against imports of food products from the United States. U.S. exporters could face increases in refined sugar costs from \$500 to as much as \$900 a tonne for bulk sugar, an 80 percent increase. Using the same kind of sensitivity analysis used by staff, an 80 percent increase in sugar costs would translate into 6.7 percent in additional costs, assuming the same average share of sugar in production costs as in Canada. Taking into account the increasingly large presence in the Canadian market of imports of food products from the United States, the elimination of the sugar cost advantage that U.S. producers now have for exports could have a significant impact on the competitive situation of Canadian industrial users of refined sugar.

The Tribunal also notes testimony about the availability of duty drawbacks for ingredients used in production for export.⁶¹ According to testimony, firms with plans to expand exports to the United States have access to the drawback of anti-dumping duties on NAFTA-origin refined sugar. This availability of lower-priced sugar will no doubt be taken into account in price negotiations between industrial users and domestic sugar refiners, thus moderating any margin increases that the domestic refiners may attempt to achieve.

High Sugar Content Food Products

In considering the effects of the duties on industrial users, the Tribunal distinguished between food products for which sugar as a share of production costs was in the range of 40 percent or less and products with a very high sugar content, such as crystal drink mixes and jelly powders. Two manufacturers of drink mixes appeared before the Tribunal and expressed their concerns about higher sugar costs making them less competitive with imports from the United States.

The Tribunal considers the situation of these producers to be unusual, in that a significant part of their capacity was established for exports to the United States. With access to refined sugar at prices close to world levels, Canadian producers of these products have had a significant competitive advantage in the U.S. market. Exports increased rapidly during the 1990s. A recent report by the United States Department of Agriculture noted that "Canadian exports of tea mixes and jelly powder to the United States had risen from 24,000 tons in 1990/91 to 84,000 tons in 1993/94." However, on January 1, 1995, the United States applied a quota of 64,709 tonnes on exports from Canada.⁶²

In the Tribunal's view, the elimination or reduction of anti-dumping duties would do very little to assist these producers to find markets to replace sales lost as a result of U.S. border measures. Canadian producers of high sugar content products will either have to find new export markets for this production or close down some production capacity.

61. Transcript of In Camera Hearing, PB-95-002, Vol. 2, February 28, 1996, at 290.

62. Department of Foreign Affairs and International Trade: "Canada-U.S. Trade Issues Update," August 8, 1995.

Consumers

Consumers purchase refined sugar directly in bags or boxes and indirectly through products containing sugar. In approximate terms, one quarter of the refined sugar produced in Canada is consumed directly as refined sugar and three quarters is consumed indirectly through sugar-containing products. The consumer price for sugar consumed directly is the selling price determined between the refiner and the re-seller plus the re-seller's margin. For sugar-containing products, the consumer price is the selling price between the industrial user and the re-seller plus the re-seller's margin. The CAC submitted that the duties will adversely affect the consumer price for sugar and, indirectly, consumer prices for many other foods.

The Tribunal is of the view that the duties have not led to a significant increase in the margins for refiners' sales to industrial users and re-sellers. For sugar-containing products, by far the largest component of sugar consumption by consumers, the Tribunal heard extensive testimony from industrial users on their inability to pass on higher costs to buyers such as the re-sellers. The Tribunal is of the view that the duties have not led to a significant increase in the price that consumers pay for refined sugar or sugar-containing products. Over the next two years, the Tribunal is of the view that competition among the refiners, the countervailing power of the re-sellers and the availability of refined sugar from non-subject countries will combine to restrict further increases in domestic refining margins. Based on the historical evidence for the flow of imports, the Tribunal is of the view that refined sugar from non-subject countries is relatively easy for re-sellers to import, especially when it is competitively priced. Korean sugar has recently become available again to consumers through one re-seller in Western Canada.

CONCLUSION

As already stated above, the Tribunal is of the view that section 45 of SIMA requires it to balance the various interests that would be affected by the imposition of the duties, while taking into account the primary objective of SIMA. There is no obligation in Canadian law to employ a lesser duty approach in an investigation under section 45 of SIMA, as suggested by counsel. However, as noted earlier, the relevant provisions of the GATT and WTO agreements provide a useful backdrop against which to consider the balancing of the various interests affected by the imposition of the anti-dumping and countervailing duties. In its consideration of the public interest, the objective of the Tribunal was to weigh the benefits accruing to the domestic industry and to sugar beet growers against any burden that the duties created on industrial users, re-sellers and consumers of refined sugar. In so doing, the Tribunal has taken into account the primary objective of SIMA, that being the protection of the domestic industry from dumped and/or subsidized imports that have caused or are threatening to cause material injury.

The Tribunal had to assess how the application of the duties had affected the interests concerned. Since the imposition of the duties, imports of refined sugar from the subject countries have virtually disappeared from the Canadian market. The domestic industry has been able to increase its refining margins since the imposition of provisional duties and, in addition, has benefited from increased volumes, as it replaced imported refined sugar in the Canadian market. However, due to competition in the industrial user sub-market, the magnitude of margin increases has not been large for industrial users of refined sugar. Although margin increases on sales to re-sellers were larger than on sales to industrial users, competition in the re-seller sub-market has also had a moderating effect on margin increases.

The Tribunal is of the view that there has not been a significant adverse effect flowing from the imposition of the anti-dumping and countervailing duties. Moreover, the Tribunal is of the view that domestic refining margins will not likely increase significantly into 1998 and, thus, the margin increases will not likely have a significant adverse effect on industrial users, re-sellers and consumers over this period. The imposition of anti-dumping and countervailing duties normally provides scope for the domestic industry to increase its prices or, in this particular case, increase its refining margins. In weighing the benefits of the duties to the domestic industry and the sugar beet growers against the burden on the industrial users, re-sellers and consumers, the Tribunal has reached the opinion that there is no public interest issue which warrants the reduction or elimination of the duties in this case.

If the market forces now in play in the domestic market for refined sugar turn out to be short-lived and the domestic refiners try to use their substantial market power to impose a large increase in refining margins for industrial users in the future, the users will have several lines of defence. They could, for example, over time, alter their production processes and create the storage facilities needed to accommodate the use of refined sugar from non-subject sources. Those industrial users of refined sugar that export food products, particularly to the United States, also have access to duty drawback schemes which can be used to strengthen their negotiating position with the refiners.

The Tribunal notes that the U.S. price of raw sugar over the last 15 years has been substantially above the world price of raw sugar for reasons indicated above. As long as this significant differential remains, the Tribunal agrees with the industrial users that it would not be in the public interest if Canadian refined sugar prices were to rise to U.S. levels. However, the Tribunal is not convinced that this is likely to happen, at least through to 1998. Even after the imposition of anti-dumping and countervailing duties, a significant gap continues to exist between the price of refined sugar in Canada and in the United States and the European Union, to the benefit of Canadian refined sugar users. The possibility of imports from non-subject countries is one moderating discipline on the refiners' ability to increase their margins. Moreover, the Tribunal is of the view that the domestic refiners and industrial users realize that their relationship is one of implicit partnership. The refiners need the production volume purchased by the industrial users, including the multitude of small- and medium-sized food processors that purchase a significant part of the refiners' output. The industrial users also need the domestic refiners because of assured quality and proximity of supply. The refiners would not gain if their margins became so high as to cause industrial users to close down their Canadian operations. Industrial users will also not gain if the domestic refiners cannot earn reasonable returns on their businesses. Together, the challenge for the refiners and the industrial users is to become more cost-competitive in order to maintain and expand their markets.

The industrial users proposed instituting a minimum import reference price system or placing a cap on the duties to ensure that Canadian refined sugar prices would not rise to U.S. levels. Had the Tribunal reached the opinion that there was an imminent risk of this happening, such a system might have had merit. While the Tribunal agrees with the view of the refiners and the Director that such a regime would present many practical problems in relation to both its design and administration, these problems might not be insurmountable. However, the Tribunal is concerned that the implementation of such a scheme, at the present juncture, might have the unintended result of pegging prices at a higher level than is likely from the play of market forces within the current regime.

In conclusion, the Tribunal is of the view that the public interest does not warrant the reduction or elimination of the duties and, therefore, it shall not report to the Minister of Finance under section 45 of SIMA.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Anthony T. Eyton

Anthony T. Eyton
Member

Lyle M. Russell

Lyle M. Russell
Member

Appendix 1

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	February 27 to March 1, 1996
Date of Tribunal's Consideration:	April 4, 1996
Tribunal Members:	Arthur B. Trudeau, Presiding Member Anthony T. Eyton, Member Lyle M. Russell, Member
Directors of Research:	Dennis Featherstone Peter Welsh
Lead Researcher:	John O'Neill
Researcher:	Marcie Doran
Economist:	Simon Glance
Statistical Officers:	Margaret Saumweber Po-Yee Lee Craig Dillabaugh Jeremy Weinstein
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