



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Dumping and Subsidizing

## ORDERS AND REASONS

Expiry Review No. RR-2009-003

Refined Sugar

*Orders issued  
Monday, November 1, 2010*

*Reasons issued  
Monday, November 15, 2010*

*Corrigendum issued  
Monday, November 22, 2010*

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IN THE MATTER OF an expiry review, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, of the orders made by the Canadian International Trade Tribunal on November 2, 2005, in Expiry Review No. RR-2004-007, continuing, with amendment, its orders made on November 3, 2000, in Review No. RR-99-006, continuing, with amendment, its findings made on November 6, 1995, in Inquiry No. NQ-95-002, concerning:

**THE DUMPING 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 REFINED SUGAR, REFINED FROM SUGAR CANE OR SUGAR BEETS, IN GRANULATED, LIQUID AND POWDERED FORM, ORIGINATING IN OR EXPORTED FROM THE EUROPEAN UNION**

**ORDERS**

On February 17, 2010, the Canadian International Trade Tribunal gave notice that, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, it would initiate an expiry review of the above-mentioned orders.

Pursuant to paragraph 76.03(12)(b) and subsection 76.04(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby continues its order in respect of the dumping of refined sugar originating in or exported from the United States of America.

Pursuant to subparagraph 76.03(12)(a)(ii) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby rescinds its order in respect of the dumping of refined sugar originating in or exported from Denmark, the Federal Republic of Germany, the Netherlands and the United Kingdom, and the subsidizing of refined sugar originating in or exported from the European Union.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Member

Jason W. Downey  
Jason W. Downey  
Member

Dominique Laporte  
Dominique Laporte  
Secretary

The statement of reasons will be issued shortly.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	September 7 to 10, 2010
Tribunal Members:	Pasquale Michael Saroli, Member Jason W. Downey, Member
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**PARTICIPANTS:****Domestic Producers**

Canadian Sugar Institute

Alberta Sugar Beet Growers Association

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Gerry H. Stobo  
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P. John Landry  
J. Christopher ThomasRichard G. Dearden  
Wendy J. Wagner  
Ryan Kennedy**Importers/Exporters/Others**

Food Processors of Canada

United States Beet Sugar Association

Delegation of the European Union to Canada

**Counsel/Representatives**Peter Clark  
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CFO and Secretary  
Lantic Inc.

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Peter Toppazzini  
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G. Nabi Chaudhary  
Senior Economic Analyst—Crops Economic Unit  
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Lantic Inc.

Mario Cedrone  
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David McLaren  
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## STATEMENT OF REASONS

### BACKGROUND

1. This is an expiry review, pursuant to subsection 76.03(3) of the *Special Import Measures Act*,<sup>1</sup> of the orders made by the Canadian International Trade Tribunal (the Tribunal) on November 2, 2005, in Expiry Review No. RR-2004-007, continuing, with amendment, its orders made on November 3, 2000, in Review No. RR-99-006, continuing, with amendment, its findings made on November 6, 1995, in Inquiry No. NQ-95-002, concerning the dumping 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 (Germany), the Netherlands and the United Kingdom, and the subsidizing of refined sugar, refined from sugar cane or sugar beets, in granulated, liquid and powdered form, originating in or exported from the European Union (the subject goods).
2. On February 17, 2010, the Tribunal initiated an expiry review to determine, pursuant to subsection 76.03(10) of *SIMA*, whether the expiry of the orders was likely to result in injury or retardation and sent a notice of expiry review to known interested parties.<sup>2</sup>
3. The Tribunal also sent letters to Canadian producers, importers, foreign producers and exporters, requesting that they complete expiry review questionnaires.
4. The Tribunal requested that, if the Canada Border Services Agency (CBSA) found a likelihood of continued or resumed dumping and/or subsidizing, domestic producers, importers, foreign producers and exporters update their responses to questionnaires submitted to the CBSA to include data for the first quarters of 2009 and 2010 and that domestic producers complete Part G of the expiry review questionnaire for producers.
5. On February 18, 2010, the CBSA initiated an investigation to determine whether the expiry of the orders in respect of the subject goods was likely to result in the continuation or resumption of dumping and/or subsidizing.
6. On June 17, 2010, the CBSA determined that, pursuant to paragraph 76.03(7)(a) of *SIMA*, the expiry of the orders would likely result in the continuation or resumption of dumping and subsidizing of the subject goods.
7. On June 18, 2010, following the CBSA's determination, the Tribunal began its expiry review to determine if the expiry of the orders was likely to cause injury or retardation to the domestic industry. As part of these proceedings, the Tribunal sent short-form questionnaires to importers of refined sugar.
8. The Tribunal held a hearing in Ottawa, Ontario, from September 7 to 10, 2010, which included both public and *in camera* testimony.
9. The Canadian Sugar Institute (CSI) submitted evidence and made arguments in support of the continuation of the orders. The CSI was represented by counsel and presented Ms. Sandra L. Marsden, President of the CSI, as a witness. It also presented the following witnesses from Lantic Inc. (Lantic): Mr. Edward Makin, President and CEO; Mr. Bob Copeland, General Manager, Lantic Blending; and

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1. R.S.C. 1985, c. S-15 [*SIMA*].

2. C. Gaz. 2010.I.286.

Mr. Dan Lafrance, Senior Vice-President of Finance and Procurement, CFO and Secretary. It also presented the following witnesses from Redpath Sugar Ltd. (Redpath): Mr. Jonathan Bamberger, President; Mr. Peter Toppazzini, Director of Sales; and Mr. David McLaren, Director of Finance.

10. In addition, the CSI retained, as its own expert witness, Mr. Martin Todd, Managing Director, LMC International (LMC), who submitted a report entitled “The Outlook for the World, US and EU Sugar markets”, dated August 2010, and testified at the hearing.

11. Also submitting evidence and making arguments in support of a continuation of the orders was the Alberta Sugar Beet Growers Association (ASBGA), which was represented by counsel and presented the following witnesses at the hearing: Mr. Rob Boras, President, ASBGA; and Mr. G. Nabi Chaudhary, Senior Economic Analyst, Alberta Agriculture and Food.

12. Food Processors of Canada (FPC) and the United States Beet Sugar Association (USBSA) submitted evidence and made arguments in support of a rescission of the orders.<sup>3</sup> FPC and the USBSA were represented by counsel, but did not present any witnesses at the hearing.

13. The Delegation of the European Union to Canada (EU Delegation) submitted evidence and made arguments in support of a rescission of the orders, but was not represented by counsel and did not present any witnesses.

14. The Tribunal retained Mr. Kevin Combs, Partner and Sweetener Specialist, McKeany-Flavell, as an expert witness to prepare a report and to testify at the hearing. Mr. Combs submitted a report entitled “World Sugar Outlook, A Market Overview” to the Tribunal on July 26, 2010.

15. In addition, Mr. Wayne Roberts, Associate Director, Energy & Biofuel Foods, Kraft Foods (Kraft), and Mr. Mario Cedrone, Vice-President, Sweet Source Sugar (Sweet Source), appeared as Tribunal witnesses in response to subpoenas issued by the Tribunal.

16. Wilton Industries Canada and Dawn Food Products Canada, Ltd., two importers of the subject goods, submitted product exclusion requests to the Tribunal. However, the Tribunal did not accept these requests because they were filed after the August 6, 2010, deadline stipulated in the notice of expiry review.

17. The record of these proceedings consists of all relevant documents filed or accepted for filing by the Tribunal, including the following: the CBSA’s protected expiry review report, statement of reasons, index of background information and related documents; the protected and public replies to the expiry review questionnaires; the public and protected pre-hearing staff reports prepared for this expiry review; requests for information and replies thereto; witness statements and other exhibits; the Tribunal’s findings and notice of expiry review; the transcript of the hearing; the exhibit list along with the public and protected pre-hearing staff reports prepared for Inquiry No. NQ-95-002, Review No. RR-99-006 and Expiry Review No. RR-2004-007.

18. Protected exhibits were provided only to counsel who had filed a declaration and undertaking with the Tribunal in respect of confidential information.

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3. Although the Ontario Sugarbeet Growers’ Association originally filed a notice of participation with the Tribunal, on August 6, 2010, it informed the Tribunal of its decision to withdraw from the expiry review process.

19. On October 1, 2010, Mr. André F. Scott, who, as presiding member for this expiry review, had chaired the hearing and participated in subsequent panel proceedings, was appointed a Judge of the Federal Court. As of that date, and in accordance with subsection 9(3) of the *Canadian International Trade Tribunal Act*,<sup>4</sup> the two remaining Members, with the authorization of the acting Chairperson, were able to complete the remaining work and dispose of the matter.

## PRODUCT

### Product Definition and Description

20. The product that is the subject of this review is described as refined sugar, refined from sugar cane or sugar beets, in granulated, liquid and powdered form.

21. Refined sugar is sold as white granulated, liquid and specialty sugars. Granulated sugar comes in a range of grain fractions (e.g. medium, fine and extra fine). Liquid sugar includes invert sugar. Specialty sugars include soft yellow sugar, brown sugar, icing sugar, demerara sugar and others. Specialty sugars may be in granulated, liquid or powdered form.

22. Refined sugar is sold to customers in a broad range of shipping and packaging configurations. These include 2-, 4-, 10-, 20- and 40-kg bags, and in bulk by rail-car, truckload or one-metric-tonne intermediate bulk containers (tote bags). Liquid sugar is sold by rail-car, truckload, drum and pail.

23. In the original inquiry and subsequent reviews, the Tribunal excluded from the findings and orders a number of specialty and generic sugar products. The excluded products are listed in the appendix to these reasons.

### Production Process

24. The production processes for making sugar from raw cane sugar and making sugar from sugar beets differ. A brief description of these production processes is presented below.

#### Cane Sugar

25. The production of refined cane sugar typically involves two steps: the production of raw sugar (partially refined) from the sugar cane; and the refining of the raw sugar to the required level of purity. Raw cane sugar is defined as sugar conforming to an established colour standard, containing less than 99.5 percent pure sucrose.

26. The refining process involves the separation of pure sucrose from raw sugar by affination,<sup>5</sup> clarification and filtration, decolourization, evaporation/boiling, centrifugation/drying and conditioning. The end product of this process is white granulated sugar. In the initial refining stages, some of the colour- and flavour-producing substances are separated from the raw sugar to make specialty soft sugars such as brown, yellow and demerara style sugars.

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4. R.S.C. 1985 (4th Supp.), c. 47.

5. Affination is the process of removing the molasses film from the raw sugar crystals by mixing the crystals with a sugar syrup, then separating the molasses and sugar crystals using centrifugal machines.



### Beet Sugar

27. The manufacture of refined sugar from sugar beets starts with the slicing of the beets into thin strips called “cossettes”, followed by the extraction of the sugar by diffusion with water and the purification of the resulting juice. The subsequent crystallization, drying and packaging processes are similar to those used in the cane sugar refining industry. The end product is also white granulated sugar.

### Further Processing

28. White granulated sugar produced by cane sugar refineries and sugar beet processing plants can be further processed to produce liquid sugar, sugar cubes and icing sugar for certain applications.

29. Liquid sugars include liquid sucrose and liquid invert sugar. Liquid sucrose is refined granulated sugar dissolved in water with a 66 to 68 percent concentration of solids. Liquid invert sugar can be made at concentrations of 77 percent solids.

30. Sugar cubes are produced by remoistening granulated sugar, which is then moulded into cubes in a rotating drum, dried with hot air and packed into boxes. Icing sugar is made by pulverizing granulated sugar and adding up to 3 percent starch to prevent caking.

### **Marketing and Distribution**

31. The domestic producers sell refined sugar directly through their own sales force to two main customer groups: resellers and industrial users. Resellers are generally in the grocery, foodservice and bakery distribution businesses. Industrial customers are typically manufacturers that use sugar as a raw material input in the production of sugar-containing products (SCP).

32. With respect to distributors of imported refined sugar, there are no apparent differences in the marketing and channels of distribution of domestically produced refined sugar and imported refined sugar.

### **DOMESTIC PRODUCERS**

33. Since the last expiry review, the composition and ownership of the domestic industry has changed. In 2005, three refiners in Canada operated four production facilities. The Canadian industry was comprised of Rogers Sugar Ltd. (Rogers), Lantic Sugar Limited (LSL) and Tate & Lyle Canada Ltd. (Tate & Lyle).

34. Today, the Canadian industry is comprised of the following two major producers: Lantic and Redpath. These two domestic producers are the sole members of the CSI.

### **Lantic**

35. On June 30, 2008, LSL and Rogers merged into a new operating entity to form Lantic, a wholly owned subsidiary of Rogers Sugar Income Fund.<sup>6</sup> Rogers Sugar Income Fund is an open-ended, limited-purpose trust that holds all the common shares of Lantic.

36. In Eastern Canada, Lantic operates a cane sugar refinery in Montréal, Quebec, a distribution centre in Toronto, Ontario, and a blending facility in Scarborough, Ontario. In Western Canada, Lantic operates a cane sugar refinery in Vancouver, British Columbia, and a sugar beet processing plant in Taber, Alberta.

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6. Manufacturer's Exhibit RR-2009-003-A-17A, appendix 35 at para. 40, Administrative Record, Vol. 11A.

**Redpath**

37. In 2005, Redpath, formerly a division of Tate and Lyle North American Sugars Ltd., became Tate & Lyle, a wholly owned subsidiary of Tate and Lyle PLC. In 2007, Redpath's assets were acquired by American Sugar Refining, Inc. (ASR) of Yonkers, New York, and Redpath became a wholly owned subsidiary of that company, all the while retaining the corporate name of Redpath Sugars.

38. Redpath operates a cane sugar refinery in Toronto. It also has a processing facility in Niagara Falls, Ontario, which specializes in custom blending and packaging of SCP for markets in the United States, Canada and Mexico.

**Sucor Limited**

39. In October 2008, Sucor Limited (Sucor), a small domestic cane sugar refinery closed its plant in Saint-John, New Brunswick, due to financial difficulties. Sucor, which was established by CanSugar Inc. in July 2002, produced refined white sugar, brown sugar and icing sugar for both the retail and industrial markets.<sup>7</sup> Lantic purchased the fixed assets of Sucor early in 2010.

**IMPORTERS AND EXPORTERS**

40. Expiry review questionnaires were sent to 39 importers, of which only one responded to the CBSA's portion of the questionnaire, one indicated that it imported non-subject sugar, and another indicated that it was not an importer of refined sugar.

41. In view of the low response rate, the Tribunal sent a short-form importers' questionnaire to 27 importers, requesting data for the period from 2007 to the first quarter of 2010. Nineteen responses were received. Of these respondents, 7 provided complete questionnaire responses and the remaining 12 indicated that they did not import refined sugar during the period of review or that they imported non-subject goods.

42. Expiry review questionnaires were sent to 35 potential foreign producers/exporters. The Tribunal received two partial responses; one from ASR, a major U.S. sugar producer, and the other from Starbucks Coffee Company.

**ASR**

43. ASR is owned by Florida Crystals Corporation and the Sugar Cane Growers Cooperative of Florida. It has a large number of associated companies which are involved in the supply, production and/or marketing of raw or refined sugar. ASR owns the Domino and C&H sugar brands. It also owns Redpath.

**SUMMARY OF PREVIOUS FINDINGS AND ORDERS****Inquiry No. NQ-95-002**

44. On November 6, 1995, the Tribunal found that the dumping in Canada of refined sugar from sugar cane or sugar beets, in granulated, liquid or powdered form, originating in or exported from the United States, Denmark, Germany, the Netherlands and the United Kingdom, and the subsidizing of such goods originating in or exported from the European Union, threatened to cause material injury to the domestic industry.

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7. Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3 at para. 32.

45. At the same time, the Tribunal found that the dumping in Canada of refined sugar originating in or exported from the Republic of Korea (Korea) had not caused and did not threaten to cause material injury to the domestic industry.

46. The Tribunal then concluded that, in the absence of anti-dumping and countervailing duties, price pressure from imports from the named sources would continue and intensify, bringing the net margins realized by the domestic industry down to at least the levels experienced in late 1994 and early 1995.

47. In the Tribunal's view, the domestic refiners would quickly lose substantial sales to dumped and subsidized imports, leading to reduced production, smaller market share for domestic refiners and inadequate returns. At these reduced net margins, the industry would not remain viable, and at least one cane sugar refinery, as well as the two sugar beet processing plants, would be in jeopardy.

48. The Tribunal found no reason to believe that the small volume of imports of refined sugar from Korea, which amounted to less than 3 percent of total Canadian sugar imports, was threatening to cause material injury to the domestic industry.

#### **Public Interest Investigation No. PB-95-002**

49. Following the Tribunal's finding of threat of injury in the original inquiry, it invited submissions with respect to public interest. On January 8, 1996, the Tribunal initiated a public interest investigation. The participants at the hearing into this matter included industrial users, the Consumers' Association of Canada, the Director of Investigation and Research, Bureau of Competition Policy, the CSI and the Canadian Sugar Beet Producers' Association Inc.

50. The Tribunal considered the benefit to the domestic industry and to domestic sugar beet growers of the application of duties under *SIMA* against the disadvantages of these same duties to industrial users, resellers and consumers. In this regard, the Tribunal decided not to report to the Minister of Finance on this matter, having reached the opinion that the imposition of the duties raised no significant issues for the latter group.

#### **Review No. RR-99-006**

51. On November 3, 2000, the Tribunal continued its findings, with amendment. In this regard, the Tribunal was not persuaded that non-price factors, such as quality concerns, just-in-time delivery requirements, service and support needs, and the existence of long-term supply arrangements, would limit the market share of imports, noting that, in the original inquiry, the subject imports had captured about 15 percent of the market and that, in 1999, the Canadian market was even more attractive to EU and U.S. exporters.

52. Among the considerations underlying the Tribunal's orders was the fact that both the European Union and the United States had larger exportable surpluses and fewer alternative markets where these surpluses could be sold. In addition, refining margins in Canada were better in 1999 than they had been during the period covered by the original inquiry.

53. With prices in Canada above world prices, EU exports could earn a higher margin in certain segments of the Canadian market than in other foreign markets that buy refined sugar based on the No. 5 white sugar price. In these segments, EU exports could enter the Canadian market at prices that were much lower than Canadian prices.

54. The Canadian market would also be an attractive and easily accessible outlet for surplus U.S. production, since Canadian prices were lower than U.S. prices but well above world prices, with U.S. refiners being able to dispose of surplus quantities at prices that covered their variable costs and a portion of their fixed costs of production.

55. Evidence before the Tribunal indicated that, despite the use of long-term contracts and supply arrangements in the industrial market segment, such pricing could have exerted downward pressure and spread quickly through the market. In this regard, domestic refiners felt compelled to respond to competitive pricing due to the significance of economies of scale in the production of refined sugar and in order to avoid being squeezed in terms of both costs and prices.

56. The Tribunal was therefore convinced that significant volumes of dumped and subsidized imports would quickly penetrate the Canadian market if the findings were rescinded, thereby substantially reducing domestic refiners' margins.

57. In comparing the various estimates of lost earnings submitted by parties, the Tribunal noted that a loss of earnings by the domestic refining industry by even the smallest of the estimated losses constituted material injury.

58. For these reasons, the Tribunal concluded that the dumping and subsidizing by the subject countries were likely to materially injure the domestic industry, if the findings were rescinded.

#### **Expiry Review No. RR-2004-007**

59. On November 2, 2005, the Tribunal continued its orders, again with certain amendments. The three domestic producers, Rogers, LSL and Tate & Lyle accounted for the majority of refined sugar produced in Canada.

60. During the Tribunal's period of review, global demand was not sufficient to absorb surplus sugar produced in the United States and the European Union. Given the high capital costs and the need for a high level of throughput, producers in the United States and the European Union had an incentive to produce surplus sugar and to export it at low world prices to countries such as Canada, where domestic sugar prices were above world price levels.

61. In addition, the large multinational manufacturers of SCP in Canada with head offices in the United States and the European Union facilitated the importing of refined sugar into Canada from those countries.

62. In the Tribunal's view, the oversupply situation in the European Union would not likely have been corrected in the near term, and the pressure to increase exports of refined sugar from the European Union would have been felt in the Canadian market.

63. The Tribunal noted that the United States had continued to export non-subject refined sugar to major producers of SCP in Canada via the U.S. Refined Sugar Re-export Program. This sugar could have supplied all the needs of the SCP industry in Canada. These imports from the United States already exerted downward pressure on prices paid by the SCP industry.

64. The Tribunal therefore believed that this would be the case for all sugar used by the SCP industry should the orders be rescinded, noting that, even in a tight market, the volume of surplus sugar in the United States ranged from 0.5 to 1.2 times the size of the Canadian market.

## PRELIMINARY MATTERS

65. At the outset of the hearing, a motion was filed by the ASBGA requesting that the Tribunal strike from the record the witness statements of Mr. James Johnson, President of the USBSA, Mr. Jerry Coleman, Vice-President for Sales and Marketing of the Michigan Sugar Company (Michigan Sugar), and Dr. Christopher Petersen, which were filed as part of the USBSA's submissions in support of a rescission of the orders.

66. The motion was based on the fact that counsel for the USBSA had announced that these witnesses would not be called to testify at the hearing and, therefore, would not be available for cross-examination. In the event that the Tribunal decided not to strike the witness statements from the record, the ASBGA requested that the Tribunal rule that it would give no weight to these witness statements. The motion was supported by the CSI and opposed by both the USBSA and the FPC.

67. In a summary ruling delivered from the bench,<sup>8</sup> the Tribunal dismissed the motion and decided that the witness statements would be given the weight that they deserved in the circumstances, with particular regard to the fact that the statements would be untested as a result of the witnesses not being subjected to cross-examination. The following are both arguments made in support of and in opposition to the motion and the Tribunal's reasons for its decision.

68. In support of the motion, the ASBGA noted that it was only after the Tribunal requested, on August 25, 2010, that the USBSA confirm its intentions with respect to its witnesses, that the Tribunal and the parties were informed that the witnesses would not be appearing at the hearing. The ASBGA submitted that, in these circumstances, the Tribunal should exercise its discretion to strike these witness statements from the record and that, by doing so, it would send a message to parties that the filing of witness statements that could not be tested through cross-examination at the hearing would not be tolerated. It further submitted that the Tribunal should follow the principle of law that was enunciated by the Federal Court of Canada in *Bayer AG v. Apotex Inc.*,<sup>9</sup> where it stated that "... as a general rule, affidavits will be struck if the deponent does not appear for cross-examination ...". In the alternative, and relying on the Tribunal's decision in *Certain Hot-rolled Carbon Steel Plate*,<sup>10</sup> the ASBGA submitted that the Tribunal should rule that the witness statements would be given no weight.

69. The CSI, in support of the ASBGA's motion, submitted that the witness statements in question consisted of opinion evidence unsupported by the record. In this regard, it contended that the statements were prejudicial to the CSI's position and that, in being denied the opportunity to cross-examine said witnesses, it had no way of responding to them.

70. The USBSA, in opposition to the motion, argued that the Federal Court's decision in *Bayer* was distinguishable on the facts and that the Tribunal should simply follow its ruling in *Carbon Steel Plate* and give the witness statements the weight that they deserved. It also submitted that, while cross-examination may be a useful tool for testing evidence, there were other means of challenging statements made by witnesses. In this regard, it noted that the CSI and the ASBGA could present their own witnesses or tender documentary evidence to counter those statements.

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8. *Transcript of Public Hearing*, Vol. 2, 8 September 2010, at 231.

9. 1998 CanLII 8327 (F.C.) [*Bayer*].

10. (27 June 2000), NQ-99-004 (CITT) [*Carbon Steel Plate*].

71. Also in opposition to the motion, the FPC submitted that Article 6 of the World Trade Organization (WTO) *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*<sup>11</sup> allowed parties to present information in writing and that the Tribunal has traditionally given such evidence the weight that it deserves. It added that the Tribunal does not normally strike documents from the record and that, as a court which makes its own rules, the Tribunal could maintain its existing policy without jeopardizing any parties' interests.

72. It is a well-settled principle of common law that administrative tribunals are masters of their own procedures and are not bound by the rules of evidence, provided they follow the rules of natural justice.<sup>12</sup>

73. This principle is reflected in section 35 of the *Canadian International Trade Tribunal Act*,<sup>13</sup> which provides that "[h]earings before the Tribunal shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit."

74. Therefore, while the Tribunal acknowledges the Federal Court's decision in *Bayer*, it does not consider itself bound by the general rule stated therein. The Tribunal's normal practice has been to admit evidence liberally, but to only give each item of evidence the weight that it deserves.<sup>14</sup> The Tribunal sees no reason to depart from this practice in this case.

75. In *Carbon Steel Plate*, the Tribunal discussed the importance of cross-examination as a tool to test evidence, stating as follows:

The Tribunal indicated to counsel that it will give any untested facts or evidence, however they may be introduced, the weight that they deserve.

The Tribunal is of the view that there should be some means to test evidence and believes that one of the most effective ways to achieve this is through cross-examination. The Tribunal notes that cross-examination by parties greatly assists the Tribunal in assessing the evidence and coming to its conclusions. . . . As it stated previously, the Tribunal can only give evidence provided by a party, unsupported by oral testimony, the weight that it considers appropriate in the circumstances.

[Footnote omitted]

76. The Tribunal regrets that the witnesses for the USBSA did not appear at the hearing, as their unavailability deprived parties of the opportunity to effectively test the evidence contained in their witness statements, thereby hindering the Tribunal's ability to assess its reliability. Although the Tribunal has refused to strike the witness statements from the record and has refused to rule that no weight would be ascribed to those statements, it can only accord them minimal weight in the circumstances.

77. During final argument at the conclusion of the hearing, the ASBGA reiterated its view that no weight should be given to the witness statements. However, this time, it argued that the Tribunal should come to this conclusion by drawing adverse inferences from the fact that the witnesses did not appear at the

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11. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)>.

12. *Canadian National Railways Co. v. Bell Telephone Co. of Canada*, [1939] S.C.R. 308.

13. R.S.C. 1985 (4th Supp.), c. 47.

14. See, for example, *Certain Whole Potatoes* (10 September 2010), RR-2009-002 (CITT) at paras. 59-63; *Certain Fasteners* (6 January 2010), RR-2009-001 (CITT) at paras. 61-63; *Certain Corrosion-resistant Steel Sheet Products* (27 July 2004), RR-2003-003 (CITT) at paras. 58-60 [*Corrosion-resistant Steel Sheet Products*]; *Carbon Steel Plate* at 15-16.

hearing. In this regard, it referred to the Federal Court's decision in *Ma v. Canada (Citizenship and Immigration)*,<sup>15</sup> where the Federal Court stated that an adverse inference could be drawn when a person is given an opportunity to testify but does not do so.

78. The Tribunal, in the past, has refused to draw adverse inferences as a result of a party's failure to call a witness. In *Corrosion-resistant Steel Sheet Products*, the Tribunal stated as follows:

59. ... While *SIMA* provides interested parties the right to participate in expiry review proceedings, it does not oblige them to call witnesses. Nor does *SIMA* contemplate any negative implications from a party's failure to provide witnesses.

60. This view is consistent with the Tribunal's past practice. It is also consistent with Article 6.2 of the World Trade Organization *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (applicable to expiry reviews by reference of Article 11.4), which states that, during a dumping investigation, "[t]here shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case." Therefore, the Tribunal has not drawn any negative inferences from the failure of some foreign parties to call witnesses. However, as the Tribunal has stated previously, it can give evidence provided by a party, unsupported by oral testimony, only the weight that it considers appropriate in the circumstances.

[Footnotes omitted]

79. The Tribunal is not persuaded that it should, in this case, depart from this approach or that this approach conflicts with established principles of fairness. Although it is clear from the above that the Tribunal does not normally draw adverse inferences from a party's failure to call witnesses, the fact remains that it can only give a witness statement, unsupported by oral testimony, the weight that it deserves in the circumstances.

80. In the Tribunal's view, when considering untested evidence that has been put into question or countered with tested evidence provided by other parties to the proceedings, as has been the case here, the inevitable result is that little or no weight will be given to that evidence.

81. Although the ascribing of minimal weight to a witness statement is technically different from the drawing of an adverse inference from the fact that the witness was not made available for cross-examination, the Tribunal is of the view that, as a practical matter, the end result as to the consideration that will be given to the evidence in question is essentially the same in the present circumstances.

## ANALYSIS

82. On June 17, 2010, the CBSA determined, pursuant to paragraph 76.03(7)(a) of *SIMA*, that the expiry of the orders was likely to result in the continuation or resumption of dumping and subsidizing of the subject goods. Consequently, the Tribunal is required, pursuant to subsection 76.03(10), to determine whether the expiry of the orders is likely to result in injury or retardation, as the case may be, to the domestic industry.<sup>16</sup>

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15. 2010 FC 509 (CanLII).

16. Subsection 2(1) of *SIMA* defines "injury" as "... material injury to a domestic industry" and "retardation" as "... material retardation of the *establishment* of a domestic industry" [emphasis added]. Given that there is currently an established domestic industry, the issue of whether the expiry of the orders is likely to result in retardation does not arise in this expiry review.

83. The Tribunal is also required, pursuant to subsection 76.03(12) of *SIMA*, to make an order for each of the orders issued in 2005, either rescinding the orders if it determines that their expiration is unlikely to result in injury, or continuing them, with or without amendment, if it determines that their expiration is likely to result in injury.

84. Before proceeding with its analysis concerning the likelihood of injury, the Tribunal will first determine (1) what domestically produced goods are “like goods” in relation to the subject goods, (2) what constitutes the “domestic industry” for the purposes of its injury analysis, and (3) whether the analysis must be done separately for each subject country or cumulatively for all countries.

### **Like Goods**

85. Subsection 2(1) of *SIMA* defines “like goods” in relation to any other goods as follows: “. . . (a) goods that are identical in all respects to the other goods, or (b) in the absence of any [such] goods, . . . goods the uses and other characteristics of which closely resemble those of the other goods”.

86. In considering the issue of like goods, the Tribunal typically looks at a number of factors, including the physical characteristics of the goods (such as composition and appearance), their market characteristics (such as substitutability, pricing, distribution channels and end uses) and whether the domestic goods fulfill the same customer needs as the subject goods.

87. In its statement of reasons in the original inquiry, the Tribunal stated the following:

Counsel and parties to the inquiry were unanimous in asserting that refined sugar from the subject countries, whether in granulated, liquid or powdered form, is fungible with domestically produced sugar. As such, refined sugar produced by the domestic industry and the subject goods have the same end uses and compete with and, in many applications, can be substituted for one another. Therefore, the Tribunal is of the view that domestically produced refined sugar is like the subject goods.<sup>17</sup>

[Footnote omitted]

88. The Tribunal notes that these conclusions were maintained in Review No. RR-99-006 and in Review No. RR-2004-007 and that, in the current expiry review, it heard no evidence or argument that warrants departing from them. Accordingly, the Tribunal is of the view that the refined sugar produced by the domestic producers constitutes like goods in relation to the subject goods.

### **Domestic Industry**

89. Subsection 2(1) of *SIMA* defines “domestic industry” as follows: “. . . the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods . . . .”

90. Redpath and Lantic together account for 100 percent of total known domestic production of like goods<sup>18</sup> and, therefore, constitute the domestic industry for the purposes of this expiry review.

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17. *Refined Sugar* (6 November 1995), NQ-95-002 (CITT) at 13.

18. *Staff Report* (public), Tribunal Exhibit RR-2009-003-05, Administrative Record, Vol. 1.1 at 32.



## Cumulation

91. In accordance with subsection 76.03(11) of *SIMA*, the Tribunal must make an assessment of the cumulative effect of the dumping or subsidizing of goods from more than one country if it is satisfied that such an assessment would be appropriate, taking into account the conditions of competition between the goods imported from any of the countries and the goods from any other of those countries, or the like goods of domestic producers.

92. If the Tribunal is not satisfied that cumulation would be appropriate, then it must assess the effects of dumping and subsidizing for each country separately.

93. In considering the conditions of competition between goods, the Tribunal typically takes into account the following factors: the degree to which the goods from each subject country are interchangeable with the subject goods from the other subject countries or with the like goods; the presence or absence of sales of imports from different subject countries and of the like goods into the same geographical markets, or the presence or absence of offers to sell such goods; the existence of common or similar channels of distribution; and differences in the timing of the arrival of imports from a subject country and of those from the other subject countries, and of the availability of like goods supplied by the domestic industry.

94. However, the Tribunal has recognized that other factors may be considered and that no single factor is necessarily determinative.<sup>19</sup>

95. In the context of expiry reviews, the Tribunal has also stated that the effect of continued or resumed dumping must be looked at prospectively and that, therefore, its assessment of the conditions of competition must be prospective.<sup>20</sup>

96. Moreover, as noted in *Certain Carbon Steel Welded Pipe*, when the Tribunal makes a prospective assessment of the conditions of competition in expiry reviews, “[i]t is obvious that any examination of conditions of competition presupposes that competition will actually exist, i.e. that goods from competing producers will be in the same market at the same time.”<sup>21</sup>

97. Consequently, in order to examine the conditions of competition and determine whether it is appropriate to assess the cumulative effects of the dumping and subsidizing of refined sugar from the subject countries, the Tribunal must first be persuaded that goods from the European Union and the United States would likely be present, and compete, in the Canadian market if the orders were rescinded.

98. In Review No. RR-2004-007,<sup>22</sup> the Tribunal stated the following regarding the conditions of competition between the subject goods and the like goods:

56. The evidence indicates that refined sugar is a commodity and that price is a key driving factor in capturing sales, regardless of the source of the product. Refined sugar of any given quality imported from each subject country is interchangeable, and the evidence indicates that the quality of refined sugar from the various subject countries is similar. In addition, modes of transportation and channels of distribution are similar. The evidence does not indicate that these conditions of competition are likely to change in the near to medium term.

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19. See, for example, *Laminate Flooring* (16 June 2005), NQ-2004-006 (CITT) at para. 80.

20. See *Certain Carbon Steel Welded Pipe* (24 July 2001), RR-2000-002 (CITT) at 6-7.

21. *Certain Carbon Steel Welded Pipe* (24 July 2001), RR-2000-002 (CITT) at 7.

22. *Refined Sugar* (2 November 2005) (CITT).

99. However, the Tribunal's decision in that expiry review was notably predicated on the conclusion that refined sugar from the European Union and the United States would be present and would compete in the Canadian market. In fact, when the Tribunal examined the likely volumes of dumped and subsidized goods, it found it likely that the volume of dumped and subsidized goods from the European Union and the United States would be significant if the orders were rescinded. That is not the case in the current expiry review.

100. On the basis of the information on the record, and as will be further explained below, the Tribunal is of the view that the expiry of the order in respect of the European Union is not likely to result in the reappearance or the reappearance of more than a negligible quantity of refined sugar from the European Union in the Canadian market in the near to medium term and that, for reasons relating to freight costs, supplemental packaging and handling charges, and the general risks associated with distance shipping, EU refined sugar would not compete significantly with refined sugar from the United States or with the like goods.

101. Accordingly, the Tribunal is not satisfied that it would be appropriate to cumulatively assess the effects of the dumping and subsidizing of refined sugar from the European Union and the effects of the dumping of refined sugar from the United States in its analysis of likelihood of injury. It will therefore consider them separately.

102. However, in its separate consideration of refined sugar from the European Union, the Tribunal will continue to cumulatively assess the effects of the dumping of refined sugar from Denmark, Germany, the Netherlands and the United Kingdom and the effects of the subsidizing of refined sugar from the European Union. Given that the four named countries are part of the European Union and that the combined effects of dumping and subsidizing are difficult, if not impossible, to distinguish when present together, the Tribunal is satisfied that such an assessment would be appropriate in its analysis of likelihood of injury.<sup>23</sup>

### **Likelihood of Injury**

103. Subsection 37.2(2) of the *Regulations* lists the factors that the Tribunal may consider in addressing the question of likelihood of injury in cases where the CBSA has determined that there is a likelihood of continued or resumed dumping or subsidizing. The factors that the Tribunal considers relevant in this expiry review are discussed in detail below.

104. In making its assessment of likelihood of injury, the Tribunal has consistently taken the view that the focus should be on circumstances that can reasonably be expected to exist in the near to medium term, which is generally considered to be 18 to 24 months from the expiry of the finding or order.<sup>24</sup> Given the uncontested claim by the CSI that such a 24-month period is consistent with the industry practice regarding market projections and given LMC's submission that it is normal practice in the sugar industry to conduct near-term forecasts of supply, demand and prices over one to three years, the Tribunal will focus on the circumstances that can reasonably be expected to exist within the next 24 months.

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23. The Tribunal notes that, on several occasions, including at the time of the original inquiry into this matter and during subsequent reviews, it has made a cumulative assessment of the injurious effects of both dumped and subsidized goods ("cross-cumulation"). See, for example, *Thermoelectric Containers* (11 December 2008), NQ-2008-002 (CITT) at paras. 69-71; *Carbon Steel Welded Pipe* (20 August 2008), NQ-2008-001 (CITT) at paras. 50-52; *Refined Sugar* (2 November 2005), RR-2004-007 (CITT) at paras. 57-58.

24. *Preformed Fibreglass Pipe Insulation* (17 November 2003), RR-2002-005 (CITT) at 11; *Prepared Baby Foods* (28 April 2003), RR-2002-002 (CITT) at 8; *Solder Joint Pressure Pipe Fittings* (16 October 1998), RR-97-008 (CITT) at 10.

## Global Market Conditions

105. In coming to its view on the likely volumes and prices of the subject goods and their impact on the domestic industry if the orders were rescinded, the Tribunal will first consider changes in global market conditions, as contemplated by paragraph 37.2(2)(j) of the *Regulations*.

106. Since the last expiry review, there have been important changes in global market conditions with respect to the consumption, production, trade and prices of refined sugar.

107. Global sugar consumption grew by approximately 5 percent annually over the period of review, increasing from approximately 156.3 million metric tonnes raw value (MTRV)<sup>25</sup> in 2006-2007<sup>26</sup> to 163.8 million MTRV in 2009-2010. Global consumption is forecasted to reach 167.2 million MTRV in 2010-2011. This growth has been fuelled primarily by increasing demand and economic development in emerging economies, notably in Asia. In terms of major consuming countries, India ranked first in 2009-2010, representing 15 percent of global consumption, followed by the European Union with 11 percent, China with 10 percent and Brazil with 8 percent.<sup>27</sup>

108. During the period of review, global production of total sugar (raw sugar and refined sugar combined) decreased by 4 percent, going from 166.2 million MTRV in 2006-2007 to 158.8 million MTRV in 2009-2010. In 2008-2009, global production was adversely affected by certain factors, particularly adverse weather conditions in Brazil and India, which led to global production deficits.<sup>28</sup>

109. Brazil, the world's dominant sugar producer, is expected to account for over 25 percent of global sugar production in 2009-2010, followed by India (13 percent) and the European Union (11 percent). The United States is expected to represent 4 percent of total global sugar production.<sup>29</sup> Global production is projected to return to a small surplus in 2010-2011 when it is forecasted to reach 170.4 million MTRV.<sup>30</sup>

110. While the forecasted production increases are expected to result in increased global stocks, the global stocks-to-use ratio in 2010-2011 is estimated to be 33.6 percent, which is one of the lowest levels in 20 years and well below the average of 39.7 percent for the 10 years ending in 2009-2010.<sup>31</sup> Notwithstanding the forecasted small surplus, a low stocks-to-use ratio will continue to underlie the market fundamentals.

111. During the period of review, global exports of refined sugar decreased by over 6 percent, declining from 21.3 million MTRV in 2006-2007 to 20.0 million MTRV in 2009-2010. Exports of refined sugar are concentrated in a few countries.

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25. Raw value expresses the combined weight of refined and raw sugars, with refined sugar converted to raw sugar equivalent weight (raw sugar equivalent).

26. The sugar marketing year generally runs from October 1 to September 31.

27. Tribunal Exhibit RR-2009-003-32.21, Administrative Record, Vol. 1A at 170.166, 170.221-170.224.

28. Manufacturer's Exhibit RR-2009-003-A-17 at paras. 54-55, Administrative Record, Vol. 11; *Staff Report* (public), Tribunal Exhibit RR-2009-003-05, Administrative Record, Vol. 1.1 at 70; Tribunal Exhibit RR-2009-003-32.21, Administrative Record, Vol. 1A at 170.224.

29. Tribunal Exhibit RR-2009-003-32.21, Administrative Record, Vol. 1A at 170.222-170.224.

30. *Ibid.* at 170.221.

31. The ISO reports that the lowest stocks-to-use ratio in the past 20 years was 33.5 percent in 2009-2010. Manufacturer's Exhibit RR-2009-003-A-17A, appendix 8 at 80, Administrative Record, Vol. 11A; Tribunal Exhibit RR-2009-003-32.21, Administrative Record, Vol. 1A at 170.150-170.151.

112. In 2009-2010, Brazil was the leading exporter of refined sugar, representing approximately 36 percent of total exports, followed by Thailand with 15 percent and the European Union with 10 percent. In 2010-2011, the European Union is expected to fall to fifth position globally, exporting 0.7 million MTRV or 3.7 percent of all exports of refined sugar. In 2010-2011, global exports of refined sugar are expected to decrease to 18.7 million MTRV.<sup>32</sup>

113. Increased global demand for sugar, combined with sugar shortages over the past few years, has led to increases in both world raw sugar and refined sugar prices.

114. Given that it is responsible for approximately 59 percent of world exports of raw sugar in 2009-2010,<sup>33</sup> Brazil has a strong influence on world sugar prices. Brazilian currency has appreciated considerably against the U.S. dollar since 2002-2003, which in turn has resulted in increased Brazilian sugar production costs and higher raw sugar and refined sugar prices. Brazil's production costs however are not the only driver of world sugar prices. In this regard, the price of raw sugar in Brazil closely tracks the price of ethanol, which also uses sugar cane as a feedstock.<sup>34</sup>

115. The No. 11 raw sugar price<sup>35</sup> increased by 81 percent during the period of review, from US\$218/metric tonne (MT) in 2007 to US\$395/MT in 2009. The No. 11 raw sugar price increased by 94 percent between the first quarter of 2009 (US\$281/MT) and the first quarter of 2010 (US\$545/MT).<sup>36</sup>

116. During the same period, the No. 5 white sugar price<sup>37</sup> increased by 58 percent from US\$309/MT in 2007 to US\$488/MT in 2009. Between the first quarter of 2009 and the first quarter of 2010, the No. 5 white sugar price increased by 77 percent from US\$375/MT to US\$662/MT.

117. The fact that sugar stocks remained low in several countries in 2009-2010 has contributed to the sustained high prices for refined sugar worldwide. It also explains the lagged response to the declining trend in the raw sugar price. However, with forecasts predicting a recovery for sugar production by 2010-2011, it is expected that the No. 11 raw sugar price and the No. 5 white sugar price will decrease over the next 24 months.<sup>38</sup>

118. As for global refining capacity, the expert report submitted by the CSI indicates that, since 2009, there has been an additional 11.6 million MTs of new or planned capacity worldwide. As of now, approximately 28 percent of this additional refining capacity is operational. Of the remaining capacity, approximately 68 percent is expected to come on line by the end of 2012. Most of this new or expanded refining capacity is to take place in the Red Sea and Persian Gulf region (38 percent), the Mediterranean region (22 percent) and the Indian Subcontinent (17 percent).<sup>39</sup>

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32. *Staff Report* (public), Tribunal Exhibit RR-2009-003-05, Administrative Record, Vol. 1.1 at 73; Tribunal Exhibit RR-2009-003-32.21, Administrative Record, Vol. 1A at 170.228-170.230.

33. Tribunal Exhibit RR-2009-003-32.21, Administrative Record, Vol. 1A at 170.229-170.230.

34. Manufacturer's Exhibit RR-2009-003-A-16 at paras. 1.11-1.14, Administrative Record, Vol. 11.

35. The No. 11 raw sugar price: the Intercontinental Exchange Sugar No. 11 contract is the world benchmark contract for raw cane sugar.

36. Tribunal Exhibit RR-2009-003-32.05, Administrative Record, Vol. 1A at 156.

37. The No. 5 white sugar price: the London International Financial Futures and Options Exchange No. 5 contract, which establishes spot and futures prices for white sugar, is an FOB-qualifying port price and is commonly used as a proxy for the world price of refined sugar.

38. Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 316; Tribunal Exhibit RR-2009-003-32.06, Administrative Record, Vol. 1A at 159.

39. Manufacturer's Exhibit RR-2009-003-A-16, table 3.2, Administrative Record, Vol. 11.

### Likelihood of Injury from the United States

119. The Tribunal will next turn to a consideration of the likelihood of injury to the domestic industry from the resumed or continued dumping of refined sugar from the United States. The Tribunal will first examine the U.S. sugar program and U.S. market conditions and then proceed to an examination of the factors relevant to its analysis of the likelihood of injury.

#### The U.S. Sugar Program<sup>40</sup>

120. The supply of sugar in the United States is managed by the Department of Agriculture (USDA), pursuant to the *Food, Conservation, and Energy Act of 2008*<sup>41</sup> (*2008 U.S. Farm Bill*).

121. At the beginning of each fiscal year, the USDA is required to estimate the total domestic human consumption of sugar in the United States.

122. The *2008 U.S. Farm Bill* stipulates that not less than 85 percent of this demand must be allocated to domestic sugar producers. This volume is referred to as the overall allotment quantity (OAQ).<sup>42</sup>

123. The OAQ is divided between sugar beet processors (54.35 percent) and sugar cane millers (45.65 percent). The respective volumes of cane sugar and beet sugar are then further allocated to individual refiners.

124. The “Flexible Marketing Allotments”, an amendment introduced with the implementation of the *2008 U.S. Farm Bill*, requires the USDA to adjust allotment quantities during the course of the marketing year to avoid forfeiture of sugar to the Commodity Credit Corporation (CCC).

125. Specifically, the USDA is required to re-estimate demand and allotments on a quarterly basis with the objective of maintaining raw sugar and refined sugar prices above forfeiture levels and maintaining adequate supplies in the domestic market, subject to the OAQ not being less than 85 percent of the estimated quantity of sugar for domestic human consumption.

126. If a processor cannot market its allotment, the volume is first offered to other processors in the same state and then to processors in other states. If the allotment still cannot be filled, the CCC can sell sugar from its stocks, as long as such sales do not have a significant effect on the price of sugar.<sup>43</sup> If this does not fill the unused allotment, the deficit can be assigned to imports of raw cane sugar. Any sugar produced in excess of the OAQ, referred to as “blocked stocks”, if not exported, must be stored at the sugar refiners’ own expense.

127. In addition to marketing allotments, domestic supply is controlled through tariff rate quotas (TRQs), which limit market access by foreign suppliers, including Canadian producers. Prior to the start of a fiscal year, the Secretary of Agriculture announces the quantity of sugar that may be imported at a preferential in-quota tariff rate during that fiscal year. There is no limit to the quantity of sugar that may be imported at the higher over-quota (Tier II) tariff rate.

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40. *Ibid.* at paras. 2.1-2.62, Administrative Record, Vol. 11; Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 283-84; Tribunal Exhibit RR-2009-003-32.18, Administrative Record, Vol. 1A at 170.116-170.119.

41. Pub. L. No. 110-234. The effective date of the *2008 U.S. Farm Bill* is from June 2008 to September 2013.

42. A second condition used in setting the OAQ is to ensure that sugar prices in the United States remain above forfeiture levels.

43. The CCC has not held stocks of sugar since at least 2003-2004. Tribunal Exhibit RR-2009-003-32.03, Administrative Record, Vol. 1A at 123.

128. The TRQ volumes are specified separately for imports of raw cane sugar and refined sugar and are subject to a minimum combined access commitment under the WTO of 1.14 million MTs.<sup>44</sup>

129. Pursuant to the *2008 U.S. Farm Bill*, the TRQ must remain at the minimum commitment level until April 1 of every year, except in emergency situations, as declared by the USDA. After April 1, the USDA can adjust the volume of TRQ imports to make up for any domestic production shortfall.

130. As of January 1, 2008, unrestricted volumes of refined sugar can enter the United States duty free from Mexico pursuant to the terms of the *North American Free Trade Agreement*.<sup>45</sup> It is noteworthy that Canada does not benefit from such preferential treatment in respect of refined sugar. Imports from Canada are subject to a specific annual TRQ volume of 10,300 MT.

131. In managing the supply of sugar, the USDA attempts to maintain an ending stocks-to-use ratio of approximately 13.5 percent.<sup>46</sup>

132. The following is a summary of key aspects of the U.S. sugar program.

– Nonrecourse Loan Program

133. The nonrecourse loan program permits sugar beet processors and sugar cane millers to use sugar as collateral for operating loans from the USDA at legislated loan rates.<sup>47</sup> The loan rates for raw cane sugar and beet sugar are set to increase through the life of the *2008 U.S. Farm Bill*. The loan rate for raw cane sugar was 18.00¢US/lb. in 2009-2010 and will increase by 0.25¢US/lb. in 2010-2011 and 2011-2012 to eventually reach 18.75¢US/lb. in 2012-2013. The loan rate for refined beet sugar is 128.5 percent of the loan rate for raw cane sugar.<sup>48</sup>

134. Loans can be taken for up to nine months and must be paid in full by the end of the fiscal year with interest. Because they are non-recourse loans, the processor can, at any time, forfeit the sugar pledged as collateral in lieu of cash payment. If the U.S. market prices were to fall below the loan rate, forfeiture becomes an attractive option. In this way, an effective floor price is established for refined sugar.

135. The Secretary of Agriculture is directed to operate the nonrecourse loan program at no cost to the federal government by avoiding loan forfeitures to the CCC.

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44. This includes 1.14 million MTs of raw cane sugar and at least 22,000 MTs of refined sugar. Tribunal Exhibit RR-2009-003-32.14, Administrative Record, Vol. 1A at 170.74.

45. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [NAFTA].

46. The target stocks-to-use ratio was lowered from approximately 15 percent in response to free trade in sugar with Mexico.

47. Unlike most other U.S. commodity programs, the U.S. sugar program makes loans to processors and not directly to producers. This is because sugar cane and sugar beets, being bulky and very perishable, must be processed into sugar before they can be traded and stored. To qualify for loans, processors must agree to provide payments to producers that are proportional to the value of the loan received by the processor for sugar beets and sugar cane delivered by producers. The USDA has the authority to establish minimum producer payment amounts.

48. Tribunal Exhibit RR-2009-003-32.14, Administrative Record, Vol. 1A at 170.76.

136. Sugar forfeited to the CCC by a processor counts against its marketing allotment in the year in which the loan to the processor was made. Sugar in excess of a processor's allotment at the end of the marketing year cannot be forfeited. Also counted against allotments are the following: (1) sales of sugar under the Feedstock Flexibility Program for Bioenergy Producers; (2) exports of sugar from the Customs Territory of the United States eligible to receive credits under re-export programs for refined sugar or sugar-containing products administered by the USDA's Foreign Agricultural Service (FAS); (3) sales of sugar eligible to receive credit for the production of polyhydric alcohol under the Polyhydric Alcohol Program administered by the FAS; and (4) in the case of an integrated processor and refiner, the movement of raw cane sugar into the refining process.<sup>49</sup>

– The Feedstock Flexibility Program for Bioenergy Producers

137. The 2008 U.S. *Farm Bill* introduced the Feedstock Flexibility Program for Bioenergy Producers, which also operates to avoid sugar loan forfeitures to the CCC. If a reduction in production is necessary to avoid forfeitures, the quantity of sugar cane and sugar beets that has already been planted may not be used for any commercial purpose other than as a bio-energy feedstock.<sup>50</sup> The USDA can require the diversion of sugar from food use to ethanol production. On September 1 of every year (one month before the end of the marketing year), the Secretary of Agriculture announces the amount of sugar (if any) for the CCC to purchase and to be made available for sale to ethanol producers. Raw, refined and in-process sugars are eligible for purchase. Such sugars can be purchased from any marketer located in the United States. Any sugar purchased from a cane sugar refiner or sugar beet processor is counted against their respective marketing allotments.<sup>51</sup>

138. The U.S. sugar policy also includes three programs that allow producers of sugar and sugar-containing products to export at world prices. They are as follows: the Refined Sugar Re-Export Program, the Sugar-Containing Products Re-Export Program and the Polyhydric Alcohol Program.

– Refined Sugar Re-Export Program

139. The Refined Sugar Re-Export Program allows sugar refiners to export refined sugar and receive a credit for the importation of an equivalent volume of raw cane sugar. Exports of refined sugar must be counted against the refiner's marketing allotment. Blocked stocks cannot be exported through this program. Over the past 10 years, usage of this program has averaged 195,000 MTRV.<sup>52</sup>

– Sugar-Containing Products Re-Export Program

140. The Sugar-Containing Products Re-Export Program allows producers of refined sugar to receive credit for transfers of refined sugar to a licensee of the Sugar-Containing Products Re-Export Program. The volume of sugar under the program has averaged 125,000 MTRV over the past decade.<sup>53</sup>

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49. Tribunal Exhibit RR-2009-003-32.18, Administrative Record, Vol. 1A at 170.117-170.118.

50. Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3B at 46.

51. Tribunal Exhibit RR-2009-003-32.18, Administrative Record, Vol. 1A at 170.118.

52. This volume represents approximately 2.6 percent of U.S. production. Mexico has been the largest recipient of re-export sugar, accounting for over 85 percent of re-export sugar. Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 284; Tribunal Exhibit RR-2009-003-32.17, Administrative Record, Vol. 1A at 170.112-170.114.

53. Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 284.

– Polyhydric Alcohol Program

141. The Polyhydric Alcohol Program operates in a similar manner to the Sugar-Containing Products Re-Export Program, but pertains to exported alcohol not destined for human consumption. Raw cane sugar imports under this program have represented about 40,000 MTRV over the last decade.<sup>54</sup>

U.S. Market Conditions

142. The tight global market situation for raw sugar and refined sugar in 2008-2009 and 2009-2010 was also reflected in the U.S. market.

143. U.S. sugar production declined from 7.4 million MTRV in 2007-2008 to 6.8 million MTRV in 2008-2009, a decrease of 7.6 percent. Notwithstanding a near doubling of imports of sugar from Mexico, which increased from 630,000 MTRV to 1.2 million MTRV, the stocks-to-use ratio declined from 15.3 percent to 14.3 percent in 2007-2008 to 2008-2009.<sup>55</sup> The decline in production resulted primarily from a diversion of acreage normally planted with sugar beets, to higher value crops such as grain corn.<sup>56</sup>

144. In 2009-2010, with low beginning stocks, the United States experienced a poor beet crop, with total sugar production remaining at approximately 7.1 million MTRV. Compounding the tight supply situation, exports from Mexico declined by 61 percent, to 481,000 MTRV. As a result, overall sugar supplies tightened further, such that the stocks-to-use ratio declined to 13.7 percent in 2009-2010.<sup>57</sup>

145. The tight supply situation, which prompted the USDA to increase TRQ imports in 2009-2010 by approximately 37 percent,<sup>58</sup> resulted in prices that were high enough to allow higher-tariff Tier II imports to enter the U.S. market (in the US\$882/MT to US\$948/MT FOB mill range).<sup>59</sup>

146. For 2010-2011, the latest available USDA projections estimate an increase in total domestic production of both sugar cane and sugar beets to 7.6 million MTRV. By limiting TRQ imports to just over WTO commitment volumes and assuming that imports from Mexico will be approximately 0.5 million MTRV, the USDA's current estimate of the stocks-to-use ratio is 11.6 percent.<sup>60</sup> The forecasts of McKeany-Flavell and LMC indicate that this tight supply situation may relax in 2011-2012, as a result of potential Mexican production and export growth to the United States, with the stocks-to-use ratio in the United States reaching as high as 15.0 percent.<sup>61</sup>

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54. *Ibid.*

55. Other Parties' Exhibit RR-2009-003-D-01, tab 4 at 69, Administrative Record, Vol. 13.

56. Manufacturer's Exhibit RR-2009-003-A-16 at para. 2.1, Administrative Record, Vol. 11.

57. Other Parties' Exhibit RR-2009-003-D-01, tab 4 at 69, Administrative Record, Vol. 13.

58. *Ibid.*

59. Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 289. The U.S. raw cane sugar Tier II duty rate is approximately US\$338.70/MT or 15.36¢US/lb. Tribunal Exhibit RR-2009-003-32.14, Administrative Record, Vol. 1A at 170.75. The actual tariff rate varies with polariscope degree measurement. See Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3B at 142. With the No. 11 raw sugar price averaging approximately 20.13¢US/lb. from January to June 2010 (Tribunal Exhibit RR-2009-003-32.05, Administrative Record, Vol. 1A at 156), the minimum import price was around 35.49¢US/lb. or US\$782/MT, before freight and other handling charges to land the imported goods in the United States. The U.S. refined sugar prices had reached approximately 49.83¢US/lb. or US\$1,098/MT from January to June 2010 (Tribunal Exhibit RR-2009-003-32.04, Administrative Record, Vol. 1A at 154).

60. Other Parties' Exhibit RR-2009-003-D-01, tab 4 at 69, Administrative Record, Vol. 13.

61. Manufacturer's Exhibit RR-2009-003-A-16, table 2.3, Administrative Record, Vol. 11; Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 289-90.



147. In this regard, the expert witness for the CSI presented actual and projected figures relating to the fulfilment of cane and beet allotments. These data are partly reproduced in the table below. Cane sugar refiners are expected to under-fill their allotment by an increasing margin over the 2009-2010 to 2011-2012 period. However, sugar beet processors are expected to exceed allotments by a small margin in 2011-2012.

<b>Percentage of OAQ filled by U.S. Refiner Production</b>				
	<b>(%)</b>			
	<b>2008-2009</b>	<b>2009-2010</b>	<b>2010-2011(f)</b>	<b>2011-2012(f)</b>
Beet Sugar	91	89	98	101
Cane Sugar	98	94	81	81

Source: Manufacturer's Exhibit RR-2009-003-A-16, table 2.1, Administrative Record, Vol. 11.

#### Likely Volumes of Dumped Goods

148. The CSI submitted that, unlike in prior reviews, where there were substantial surpluses of refined sugar and, indeed, of blocked stocks in the United States, in the current expiry review, the U.S. market for refined sugar has been in short supply for the last two years. However, the CSI submitted that its case does not rely on there being a surplus of refined sugar in the U.S. market. It argued that the United States, which is set to see considerable growth in refining capacity over the next few years, will be seeking out export opportunities for refined sugar in order to maximize plant throughput and earn credits under the U.S. re-export program for the importation of raw cane sugar outside the TRQ at prevailing No. 11 raw sugar prices.

149. In this regard, the CSI submitted that the United States already has a substantial amount of excess refining capacity, with an additional 363,000 MT of new capacity coming on stream in the fourth quarter of 2011, in Gramercy, Louisiana, under a partnership agreement between Cargill, Imperial Sugar Company and Louisiana Sugar Growers and Refiners.

150. This increased capacity will have an inverse effect on the capacity utilization rate of U.S. cane sugar refiners, which is expected to decline from approximately 90 percent in 2007 to 70 percent in 2010-2011 and to 66 percent in 2011-2012. The CSI argued that sugar production facilities are capital intensive and require minimal additional throughput to lower average unit costs of production.

151. In this respect, the CSI argued that, with a saturated domestic market, U.S. refiners are dependent on the use of the re-export program and access to remunerative export markets in order to increase capacity utilization rates, so as to improve operating margins through the reduction of their average unit costs of production.

152. The problem of excess refining capacity is exacerbated by the U.S. sugar program, which severely restricts the supply of raw cane sugar through the TRQ mechanism, effectively depriving U.S. refiners of their full raw cane sugar requirements.

153. From a U.S. refiner's perspective, recourse to the sugar re-export program allows it to obtain access to raw cane sugar outside the TRQ at No. 11 raw sugar prices, thereby allowing for increased production volumes and capacity utilization.

154. The CSI submitted that U.S. export opportunities are effectively limited geographically to Mexico and Canada. In this regard, it claimed that there was a demonstrated history of use of the Refined Sugar Re-Export Program for sales into Mexico's IMMEX<sup>62</sup> zone and that the re-export program would be used to sell refined sugar to Canada, if anti-dumping duties were rescinded.

155. The CSI further argued that the problem of excess capacity will be compounded by the effect of *NAFTA*, which allows for the free movement of refined sugar and high-fructose corn syrup (HFCS) between the United States and Mexico.

156. Substitution of HFCS for high-priced domestically refined sugar in Mexico has created large export sales of refined sugar to the United States. In this regard, the CSI submitted that the consumption of HFCS in Mexico, according to the USDA and McKeany-Flavell forecasts, is expected to reach from 1.0 million MTs to 1.4 million MTs in 2010-2011, up from 650,000 MTs in 2008-2009.

157. Sugar displaced by the penetration of HFCS into the Mexican market will seek out an alternative market, which would naturally be the United States. Moreover, with no quantitative restrictions on imports of raw cane sugar into Mexico, Mexican production of refined sugar exported to the United States can be back-filled from the world market, creating a virtually unlimited supply of refined sugar.

158. With respect to beet sugar production in the United States, the CSI submitted that it has been the general practice for beet growers in the past to plant extra acreage in order to allow for possible crop irregularities and reduced yields. Historically, any surplus beet sugar production (i.e. above a marketing allotment) would have been ploughed under rather than further processed into blocked stocks of refined sugar.

159. The CSI argued that, if the current order in respect of the United States is rescinded, the largest beet sugar producing co-ops, such as American Crystal Sugar Company (American Crystal) in the Red River Valley of North Dakota and Michigan Sugar in Michigan, which are all situated in proximity to the Canadian border, would no longer need to plough under their precautionary additional sugar beet acreage. With unrestricted access to the Canadian market, surplus U.S. sugar beets could be processed into refined sugar, with Canada becoming a logical outlet market for the resulting blocked stocks (i.e. refined sugar volumes in excess of marketing allotments).

160. Finally, the CSI noted that the ability to sell (swap) re-export credits to cane sugar refiners, which are facing tight raw cane sugar supplies, would be an added incentive for beet sugar exports.

161. The ASBGA, for its part, submitted that even a small volume of dumped imports could have a seriously adverse impact on a commodity product such as refined sugar, which competes primarily on the basis of price. It noted that the USDA's crop production forecast as of August 2010 for sugar beets was 29.4 million MTs for the 2010 crop year, up by 10 percent from the previous year and by 21 percent from 2008. The ASBGA added that most, if not all, U.S. sugar beet processors will meet their allotments in 2010-2011. The evidence of McKeany-Flavell and LMC indicated that favourable beet growing conditions in U.S. central and northwestern states will result in a bumper crop, with an additional 150,000 MTs to 200,000 MTs of production in 2009-2010. This has prompted U.S. sugar beet processors to start their processing campaigns a few weeks earlier than usual this year, in order to accommodate the additional production.

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62. IMMEX is a customs-free zone established by the Mexican Government under the *maquiladora* program to stimulate employment.

162. It is expected that, in the very near term, sugar beet processors could increase production capacity with existing infrastructure by simply beginning their campaigns a few weeks earlier, as is the case in the current crop year. It is also believed that, within a period of 12 to 18 months, minimal investments in storage facilities would accommodate additional volumes of refined sugar. In the long term, capital investment in processing capacity would be required in order to sustain a continued expansion in refined sugar production.

163. The ASBGA argued that, over time, with access to the Canadian market, U.S. beet growers could become “vocational” producers of blocked stocks (i.e. refined sugar volumes in excess of marketing allotments) for export to Canada.

164. The FPC submitted that it was difficult to have a high degree of confidence in the numbers and forecasts provided by the domestic industry. In this regard, it referred to the testimony of McKeany-Flavell that the USDA is running the U.S. sugar program conservatively, with U.S. production, consumption, import and stock numbers being regularly adjusted and most accurate near harvest.

165. There was extensive evidence and testimony on the likelihood of blocked stocks being sold to Canada on a “variable-cost-plus” basis (i.e. at prices covering the variable cost of production and providing a contribution to fixed costs). However, the USBSA submitted that the likelihood of beet sugar being exported to Canada from the United States in the foreseeable future was conditional on the existence of blocked stocks in the United States, in the absence of which U.S. sugar beet processors could only export allotment sugar to Canada.

166. With respect to the likelihood of blocked stocks being created, the USBSA noted that the USDA can establish any overall allotment quantity above the minimum 85 percent level. The projections by the expert witness for the CSI that there would be a beet sugar surplus above allotment of 1 percent in 2011-2012 assumed an overall allotment quantity of 85 percent. The USBSA submitted that, in the last three years, the USDA has increased the overall allotment quantity to a level that avoided the creation of blocked stocks and that there was reason to believe that it would do the same for the next two years.

167. The USBSA also noted that there are other reasons that make it unlikely that there would be a beet sugar surplus. As the witness from McKeany-Flavell testified and the evidence of LMC indicates, a sugar beet processor that has surplus sugar over allotment can make arrangements with a processor that is in a deficit to fill its allotment. The USBSA argued that, for the first six months of the year, this arrangement goes on quite regularly in the United States. If this is not worked out between processors, the USDA, under the authority of the *2008 U.S. Farm Bill*, first reassigns the deficit to processors within the same state, then across states. Both the private and USDA reassignments work toward reducing any possibility of blocked stocks in the beet sugar sector.

168. In the absence of blocked stocks, the USBSA submitted that export sales of allotment sugar to Canada on a variable-cost-plus basis would be unlikely, since such sugar could be sold at more lucrative prices in the supply-managed U.S. sugar market. It added that a sugar beet processor would only sell allotment sugar to Canada if it could obtain the equivalent of the U.S. domestic price for refined sugar.

169. With respect to the CSI’s assertions that beet sugar re-export credits will be sold to cane sugar refiners, the USBSA submitted that some companies may be engaging in these kinds of transactions; however, the *2008 U.S. Farm Bill* was amended to preclude this activity. It submitted that the language in the *2008 U.S. Farm Bill* is now clear, in that the marketing allotments apply to sugar beet processors, that the allotments do not apply to exports of beet sugar by a sugar beet processor and that such exports are not eligible for re-export credits. The USBSA submitted that, at some point, there will be a program audit and participants will have to conform to the law.

– Tribunal’s Analysis

• Cane Sugar

170. In the Tribunal’s view, the current U.S. sugar program distorts the normal business behaviour of the market participants by subjecting imports of raw cane sugar into the United States to stringent TRQ restrictions. While U.S. cane sugar refiners have unfettered access to raw cane sugar from Mexico, the Tribunal accepts that the operation of the U.S./Mexican agreement on free trade in sugar under *NAFTA*, in the context of the broader U.S. sugar program, creates an incentive for Mexican interests to move up the processing chain and export higher-valued refined, rather than raw, cane sugar. In this regard, the Tribunal accepts that rescission of the current order in respect of the United States would provide U.S. cane sugar refiners with additional scope to avail themselves of the sugar re-export program to increase production throughput in an effort to achieve the lower average unit costs of production deriving from economies of scale.

171. The evidence indicates that the United States currently has 1.1 million MTs of excess cane sugar refining capacity.<sup>63</sup> Net new capacity of approximately 363,000 MTs is also scheduled to come on stream toward the end of 2011, with the completion of a new refinery in Gramercy.<sup>64</sup> In addition, the Imperial Sugar Company’s refinery in Georgia that was damaged by an explosion in 2008 took approximately 15 percent of total U.S. capacity off-line.<sup>65</sup> Not only did other refiners increase their capacity to fill the resulting void but Imperial Sugar Company has since rebuilt its refinery, having returned to full production capacity in the first quarter of 2010.<sup>66</sup>

172. The Tribunal notes that the shortfall in available raw cane sugar in the United States will prevent cane sugar refiners from filling their marketing allotments. Concern over the expectation of a continued tight supply of raw cane sugar is further evidenced by Cargill’s effort to lock up domestic supplies of raw cane sugar through arrangements with Louisiana cane growers, in order to feed the new plant in Gramercy.<sup>67</sup>

173. The Tribunal accepts the uncontroverted submissions of the CSI that the restrictive import volumes of raw cane sugar under the Tier I TRQ will exacerbate U.S. refiners’ ability to increase throughput. While the Tribunal understands that the USDA has the authority, in certain circumstances, to reassign marketing allotments to imports when the allotments are not filled, it believes that the USDA will continue to manage TRQ imports in a conservative manner in an effort to address the uncertainties associated with the potential volumes of refined sugar imported from Mexico.

174. Parties opposing the continuation of the order in respect of the United States argued that re-exports were more likely to go to Mexico, where the price of refined sugar is higher than in Canada. While it is true that the price of refined sugar in Mexico is higher than in Canada,<sup>68</sup> the evidence indicates that re-export sugar from the United States is not eligible for duty-free treatment unless destined for the Mexican IMMEX

63. Manufacturer’s Exhibit RR-2009-003-A-04 at para. 50, Administrative Record, Vol. 11.

64. Manufacturer’s Exhibit RR-2009-003-A-16 at para. 2.67, Administrative Record, Vol. 11.

65. Manufacturer’s Exhibit RR-2009-003-A-17 at para. 110, Administrative Record, Vol. 11; Manufacturer’s Exhibit RR-2009-003-A-17A, appendix 24 at 317, Administrative Record, Vol. 11A.

66. Manufacturer’s Exhibit RR-2009-003-A-16 at para. 2.65, Administrative Record, Vol. 11; Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3 at 33.

67. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 196-97.

68. *Transcript of Public Hearing*, Vol. 3, 9 September 2010, at 290; *Staff Report* (protected), Tribunal Exhibit RR-2009-003-06, Administrative Record, Vol. 2.1 at 55; Tribunal Exhibit RR-2009-003-32.19, Administrative Record, Vol. 1A at 170.121.

zone.<sup>69</sup> In this regard, refined sugar prices in the IMMEX zone are established on the basis of the No. 11 raw sugar price, yielding a formula-based methodology for the determination of price that is similar to that used in Canada.<sup>70</sup>

175. The Tribunal therefore finds it reasonable to assume that U.S. cane sugar refiners would likely make significant use of the re-export program to earn re-export credits for the importation of raw cane sugar at world prices so as to achieve the lower average unit costs of production associated with increased plant capacity utilization. Accordingly, the Tribunal is of the view that rescission of the order in respect of the United States would likely lead to a significant volume of refined sugar being shipped to Canada.

- Beet Sugar

176. As noted above, beet sugar production in the United States is returning to historical levels after two years of reduced harvests. Almost 70 percent of the forecasted production increase for 2010-2011, as measured in raw sugar equivalents, will be accounted for by the production of beet sugar.<sup>71</sup> In this regard, the Tribunal heard persuasive evidence that sugar beet processors normally plant additional, precautionary acres of sugar beets to ensure that they are still able to fill their allotments, should poor weather conditions adversely affect yields.

177. The expert witness for the CSI testified that there are limited options for disposing of surplus production, which include the following: (1) the ploughing under of the surplus crop; (2) the seeking of additional beet sugar allotment; (3) the storage of surplus beet sugar as blocked stocks; and (4) the exportation of surplus beet sugar production.

178. The Tribunal heard evidence that sugar beet growers regularly plough under precautionary acreage.<sup>72</sup> The Tribunal's expert witness indicated that if, in the current crop year, U.S. sugar beet producers did not plough under their excess production, the 2009-2010 crop could include an additional 150,000 MTs to 200,000 MTs over and above the 5.0 million MTs currently forecasted for beet sugar production.<sup>73</sup>

179. The Tribunal is of the view that, with access to the Canadian market, there would be less need for U.S. sugar beet growers to plough under their excess sugar beet crop. In this regard, the Tribunal agrees with LMC and McKeany-Flavell that rescission of the order in respect of the United States would create an incentive for U.S. growers to dispose of surplus beet sugar in the Canadian market.<sup>74</sup>

180. The Tribunal understands that, in some years, relative crop prices could result in the diversion of sugar beet acreage to higher-valued crops and thus lead to under-filled allotments, as occurred in 2008-2009. However, the Tribunal accepts that this is not a regular occurrence<sup>75</sup> and that, under more typical market

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69. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 69, 199, 208-209; *Transcript of Public Hearing*, Vol. 2, 8 September 2010, at 251.

70. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 199.

71. Other Parties' Exhibit RR-2009-003-D-01, tab 4 at 69, Administrative Record, Vol. 13.

72. *Transcript of Public Hearing*, Vol. 2, 8 September 2010, at 145-46; Manufacturer's Exhibit RR-2009-003-A-16 at para. 2.19, Administrative Record, Vol. 11; Manufacturer's Exhibit RR-2009-003-A-17B, Administrative Record, Vol. 11A at 2.

73. *Transcript of Public Hearing*, Vol. 3, 9 September 2010, at 287-88.

74. Manufacturer's Exhibit RR-2009-003-A-16 at para. 2.19, Administrative Record, Vol. 11; Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 286.

75. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 160-61; *Transcript of Public Hearing*, Vol. 2, 8 September 2010, at 278-79.

conditions, the precautionary acreage dedicated to sugar beets represents a significant volume of refined sugar. The Tribunal is of the view that, given its proximity and the similarity of consumer demand requirements, Canada would become a logical destination for this surplus production if the current order in respect of the United States were rescinded.

181. The Tribunal understands that increased sugar beet processing could, in the short term, be achieved relatively easily by running longer processing campaigns.<sup>76</sup> Indeed, the expert witness for the CSI indicated that certain sugar beet processors, for example, American Crystal and Michigan Sugar, are well placed in the near term to exceed their marketing allotments.<sup>77</sup>

182. The Tribunal also accepts that the storage of excess sugar is not an attractive option. With storage costs being significant and the quality of the sugar tending to deteriorate over time,<sup>78</sup> processors would generally be inclined to export, rather than store, surplus sugar.

183. As noted above, the U.S. sugar program includes certain mechanisms for the redistribution of marketing allotments. These include transfers from processors unable to fill their marketing allotments to those with surplus production, or via the USDA increasing the OAQ through quarterly re-estimates. The Tribunal understands that, through these mechanisms, the U.S. sugar program aims to mitigate the risk of forfeitures to the CCC and ensure that the program operates at no cost to the taxpayer. However, in the Tribunal's view, the practice of increasing the allotment throughout the crop year, as necessary, provides a further inducement to plant additional sugar beet acreage. In any event, regardless of actual allotments, the Tribunal is of the view that sugar beet growers would continue to plant precautionary acres in an effort to ensure that their lucrative allotments were filled.

184. Turning to the argument that refined sugar production in excess of allotments would be exported to the most remunerative markets, the evidence before the Tribunal indicates that sugar beet processors in the United States face certain disadvantages when exporting refined sugar outside North America. In particular, because U.S. sugar beet processors are largely landlocked, the additional costs of inland freight incurred to reach shipping ports impose a significant cost disadvantage.<sup>79</sup> In addition, because the world market normally trades in 50-kg bags of refined sugar, while the U.S. standard, as in Canada, is a 40-kg bag, export selling prices would have to be discounted or additional costs would have to be incurred to re-package the sugar into 50-kg bags.<sup>80</sup>

185. Mexico and Canada are two potential export markets for U.S. beet sugar. According to Mr. Makin and Mr. Bamberger, allotment sugar sold into Mexico under the U.S. re-export program is not eligible for duty-free treatment under *NAFTA* unless destined for the IMMEX zone.<sup>81</sup> Wholesale prices of refined sugar in Mexico proper are at about the same level as prices in the U.S. market and above prices in the Canadian market.<sup>82</sup> However, for sugar beet processors that are largely located in the northern states, the freight costs

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76. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 186-87.

77. Manufacturer's Exhibit RR-2009-003-A-16 at para. 2.23, Administrative Record, Vol. 11.

78. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 203.

79. *Ibid.* at 106-107; *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 131-32.

80. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 173, 248; *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 132.

81. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 199, 208-209; *Transcript of Public Hearing*, Vol. 2, 8 September 2010, at 251.

82. *Staff Report* (protected), Tribunal Exhibit RR-2009-003-06, Administrative Record, Vol. 2.1 at 55; Tribunal Exhibit RR-2009-003-32.04, Administrative Record, Vol. 1A at 154; Tribunal Exhibit RR-2009-003-32.19, Administrative Record, Vol. 1A at 170.121.

associated with transporting refined sugar to major Mexican markets, which tend to be located in the interior of the country (e.g. Mexico City), would be significantly greater than the freight costs for refined sugar destined for major markets in Canada.<sup>83</sup> As well, the Mexican market, as most other world markets, predominantly trades in 50-kg bags. U.S. refined sugar would therefore have to be re-packaged from the 40-kg bags that are standard in the United States in order to conform to the 50-kg bags demanded by the Mexican market.

186. Finally, the Tribunal accepts that there would be little incentive for U.S. producers to export refined sugar to Mexico, as any such exports would simply displace and free up Mexican sugar for export to the United States. In this regard, witnesses before the Tribunal were in agreement that there was reluctance within the U.S. sugar refining industry to disrupt the integrated U.S./Mexican sugar market.<sup>84</sup>

187. The Tribunal is of the view that, in comparison to beet sugar export sales to Mexico, beet sugar export sales to Canada would generally incur lower transportation costs. Canada also provides a readily identifiable and similar customer base to that of the United States, which would accept U.S. sugar from both a quality and packaging perspective. Finally, because the access to the Canadian market that would be afforded to U.S. producers of refined sugar by rescission of the current order would not be reciprocated, U.S. producers would not have to worry about the possibility of their domestic market being disrupted by exports of refined sugar from Canada.<sup>85</sup> Consequently, should the order in respect of the United States be rescinded, Canada would, in many respects, be viewed as a more attractive and viable market than Mexico for surplus U.S. beet sugar production.

– Summary

188. On the basis of the foregoing analysis, the Tribunal finds that the likely volumes of cane sugar and beet sugar, taken both individually and collectively, that would be exported to Canada if the order in respect of the United States were rescinded would be significant in relation to the size of the Canadian market.

Likely Prices of Dumped Goods and Effects on Prices of Like Goods

189. The Tribunal will next examine whether the dumped goods from the United States are likely to significantly undercut, depress or suppress the prices of like goods.<sup>86</sup>

190. The CSI submitted that the evidence clearly demonstrates that refiners are willing to export refined sugar at low prices. These prices need only cover variable costs and make a small contribution to fixed costs. Insofar as sales at such price levels help realize the production efficiencies associated with increased plant throughput, they are consistent with rational economic behaviour. While this is particularly relevant for cane sugar refiners with excess capacity, it is also applicable to beet sugar producers that can sell the raw cane sugar import credits earned under the U.S. re-export program on their export sales of allotment beet sugar, at a premium, to cane sugar refiners (i.e. swaps).

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83. *Transcript of Public Hearing*, Vol. 2, 8 September 2010, at 247.

84. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 136-37, 169; *Transcript of Public Hearing*, Vol. 3, 9 September 2010, at 319-20.

85. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 198-99; *Transcript of Public Hearing*, Vol. 2, 8 September 2010, at 247.

86. Paragraph 37.2(2)(b) of the *Regulations*.

191. The CSI submitted that any sale into Canada of blocked stocks could easily be made at variable costs, adding that, since U.S. beet growers had already incurred the variable costs of growing the sugar beets, they would only need to cover the balance required to process the sugar beets into refined sugar, which is much lower than forecasted No. 11 raw sugar prices for the next few years.

192. The ASBGA argued that the Tribunal's order in respect of the United States must be continued because imports of dumped refined sugar from the United States will resume in volumes sufficient to depress prices in Canada to a point where neither Alberta sugar beet growers nor the Taber plant would survive.

193. The ASBGA submitted that refined sugar is a commodity product, with price being the primary factor in purchasing decisions. It argued that only a small volume of dumped sugar from the United States would be sufficient to depress the price that Lantic could obtain for sugar produced in its Taber plant. Depressed sugar prices would in turn affect the payments that Lantic could make to Alberta sugar beet growers. If payments to growers became too low, they would have no choice but to stop planting sugar beets and would lose the millions of dollars that they have invested in the specialized equipment needed to grow sugar beets. Without a sufficient volume of sugar beets to process, the Taber plant would ultimately have to close. History indicates that, once a sugar beet plant closes in Canada, it never re-opens.

194. The FPC submitted that there was no reason to conclude that U.S. producers would try to "buy" market share in Canada by drastically cutting prices should the Tribunal rescind its order in respect of the United States. Canadian prices are low and unattractive to the higher-cost sugar beet processors in the northern U.S. states close to Canada.

195. The USBSA noted that the discussion of the variable-cost-plus concept would only apply to exports of blocked stocks into Canada. In this regard, it submitted that, since it is not foreseeable that there will be any blocked stocks, even if the order in respect of the United States were rescinded, there is no reason to expect export sales at variable-cost-plus pricing, as alleged by the CSI.

196. As for the likelihood of exports of allotment sugar, the USBSA submitted that, for a sugar beet processor to give up a pound of its marketing allotment to an export sale, it would require a net return equivalent to that which it would have realized if the sugar were sold in the domestic market.

197. The USBSA submitted that U.S. sugar beet processors would export refined sugar to Mexico before exporting to Canada, as it would enter Mexico duty-free, adding in this regard that they are able to ship in bulk and by rail into Mexico. The USBSA submitted that, with Mexican prices for refined sugar often being above those in the United States, there was a sizable premium to be earned in the Mexican market, with that market being much larger than the Canadian refined sugar market. In this regard, the witness for McKeany-Flavell testified that there were sizable shipments of beet sugar to Mexico in 2007-2008 and that the price in Mexico was approximately 0.39¢US/lb., whereas the price in Canada was currently about 0.30¢US/lb.

– Tribunal's Analysis

198. As already indicated, refined sugar is a commodity product that trades in large part on the basis of price. U.S. refined sugar is comparable in quality to that produced by Canadian refiners and processors. Since the major sugar producers in the United States are capable of supplying refined sugar that meets the requirements of the Canadian market, including the "just-in-time" delivery needs of most users, interested suppliers could readily gain market share by simply quoting a lower price, should the order in respect of the United States be rescinded.



199. In the Tribunal's opinion, the economic imperative for U.S. cane sugar refiners to maximize plant throughput will lead to export sales of refined sugar into Canada at prices that can be as low as variable costs, plus a small contribution to fixed costs (plus the cost of transportation).

200. The Tribunal heard credible testimony regarding the financial benefits accruing to sugar refiners from export sales at prices that covered variable costs and made a contribution to fixed costs. By increasing plant throughput via export sales, various efficiencies could be realized at the plant level, resulting in other direct and indirect financial contributions to the operating cost structure of a cane sugar refiner or a sugar beet processor. For example, improved throughput generally implies fewer shutdowns and start-ups, with reduced down-time and the more efficient utilization of labour, and a more efficient use of energy, with the overall result being a reduction in the per metric tonne cost of production.<sup>87</sup>

201. The Tribunal is of the view that prices covering variable cost of production and providing a contribution to fixed costs would be the minimum that U.S. cane sugar refiners or sugar beet processors could accept for sales to Canada. Indeed, the evidence before the Tribunal indicates that selling refined sugar on a variable-cost-plus basis is a normal practice of refiners in responding to competition, with the incremental sales volumes generated helping to maximize plant capacity utilization, thereby lowering the per-unit average cost of production.<sup>88</sup>

202. With respect to U.S. cane sugar refiners and their current shortage of domestically produced raw cane sugar, the Tribunal has little doubt that they will avail themselves of the re-export program to the greatest extent possible in an effort to maximize plant throughput and realize the benefits that derive from economies of scale. In this regard, the Tribunal has examined the pricing evidence on the record. When considering the bulk refined sugar price differential between Canada and the United States,<sup>89</sup> as well as the price differential between the No. 11 raw sugar price and the U.S. market price,<sup>90</sup> there were clear instances, over the Tribunal's period of review, when such transactions would have been financially beneficial to U.S. cane sugar refiners.

203. The ability of U.S. cane sugar refiners to export at prices that reflect very thin refining margins has been enhanced by consolidation in the cane sugar refining sector since the last review, with such consolidation allowing cane sugar refiners to service customers across Canada from plants located on both coasts of the United States, thereby reducing distribution costs.<sup>91</sup>

204. Finally, the Tribunal heard testimony that U.S. cane sugar refiners can further enhance the financial attractiveness of the re-export program for sales into Canada by minimizing freight costs through the use of swap transactions,<sup>92</sup> whereby export credits earned by sugar beet processors are sold to cane sugar refiners. In this regard, the Tribunal understands that the financial benefits of increasing plant throughput may be

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87. Manufacturer's Exhibit RR-2009-003-A-08 at para. 11, Administrative Record, Vol. 11.

88. Manufacturer's Exhibit RR-2009-003-A-06 at paras. 36, 48, Administrative Record, Vol. 11.

89. *Staff Report* (protected), Tribunal Exhibit RR-2009-003-06, Administrative Record, Vol. 2.1 at 55; Tribunal Exhibit RR-2009-003-32.04, Administrative Record, Vol. 1A at 154.

90. Tribunal Exhibit RR-2009-003-32.05, Administrative Record, Vol. 1A at 156; Tribunal Exhibit RR-2009-003-32.16, Administrative Record, Vol. 1A at 170.110.

91. Manufacturer's Exhibit RR-2009-003-A-08 at para. 72, Administrative Record, Vol. 11.

92. The Tribunal heard arguments from the USBSA that the 2008 *U.S. Farm Bill* precluded this type of activity. However, witnesses for the domestic industry and the Tribunal's expert witness submitted that these types of transactions do occur. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 201, 212-18; *Transcript of Public Hearing*, Vol. 3, 9 September 2010, at 336-37; Other Parties' Exhibit RR-2009-003-E-01 at para. 10, Administrative Record, Vol. 13.

such that U.S. sugar cane refiners would be willing to pay a premium for these re-export credits above the differential between U.S. and Canadian prices. Affiliations between cane sugar refiners and sugar beet processors, such as those evidenced by Cargill, would be, in the Tribunal's opinion, conducive to re-export credit swap transactions.

205. With respect to beet sugar, the Tribunal accepts that sugar beet processors have a pricing advantage over cane sugar refiners. Specifically, beet sugar pricing is not constrained by the No. 11 raw sugar price or the U.S. domestic raw cane sugar prices.<sup>93</sup> Since most production costs would have already been recovered in the protected U.S. domestic market through the sales of allotment sugar, the Tribunal accepts that variable-cost-plus pricing of sugar exports processed from precautionary surplus acreage becomes feasible for reasons already discussed.

206. Given that the market price in Canada for refined sugar is above the No. 5 white sugar price, access to the Canadian market would likely encourage the planting of additional acres on a "vocational"<sup>94</sup> basis, which would not only help ensure that the lucrative beet sugar allotments in the United States were filled but likely also generate blocked stocks, a significant part of which would, in the Tribunal's view, find their way into the Canadian market.<sup>95</sup>

207. In this regard, the Tribunal notes that beet sugar production is recovering in the United States and that some processors may already be producing beyond their allotments. Given the high cost of storing refined sugar, it is likely that these processors would avail themselves of the export sales opportunities afforded by access to the Canadian market, rather than incur the cost of storing these blocked stocks.<sup>96</sup>

208. Even if such "vocational" production of surplus beet sugar does not fully materialize, the evidence is clear that even small volumes of imports would be highly disruptive to Canadian price levels, given the geographic proximity of U.S. beet sugar producers to the Canadian market, and that pricing information tends to disseminate quickly through the market,<sup>97</sup> especially given the level of sophistication of Canadian customers in both the retail and industrial segments of the market. In this regard, the Tribunal notes that the geographic proximity of U.S. producers to major Canadian purchasers enables U.S. exporters of refined sugar to meet the just-in-time delivery requirements of these purchasers and to accommodate smaller purchase volume orders.

209. Furthermore, given the established links between producers of SCPs in Canada and their parent firms in the United States, the Tribunal accepts that low-priced refined sugar from the United States will be offered to Canadian producers of SCPs, with resulting export volumes likely satisfying their entire needs and not simply the volume of refined sugar required to manufacture products that are subject to Canada's duty deferral program.<sup>98</sup>

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93. *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 87-88.

94. The Tribunal interprets the term "vocational" to mean "committed".

95. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 160-61.

96. *Transcript of Public Hearing*, Vol. 3, 9 September 2010, at 291.

97. Manufacturer's Exhibit RR-2009-003-A-01 at para. 114, Administrative Record, Vol. 11; Manufacturers' Exhibit RR-2009-003-A-06 at para. 33, Administrative Record, Vol. 11.

98. Section 97 of the *Customs Tariff*, S.C. 1997, c. 36, allows for duty relief in the form of (1) duty drawback (which means that duties are paid upon importation and subsequently refunded when the goods are re-exported) or (2) duty deferral (duties are not paid at the time of importation because the goods will be re-exported and duties become payable when goods enter the commerce of Canada) in limited circumstances where the goods are re-exported to a NAFTA country (the United States or Mexico).

210. In the Tribunal's view, variable cost plus pricing by either cane sugar refiners or sugar beet processors represents the low end of the potential pricing spectrum. With Canada being a premium-priced refined sugar market with prices above world prices, there is ample scope for U.S. refined sugar exports to be sold in the Canadian market at prices that undercut these premium prices.

211. Since most export markets, including that of the United States, are essentially closed to Canadian refined sugar, domestic refiners would have no alternative but to try to compete with this lower-priced imported sugar, with domestic producers likely opting to lower their prices rather than surrender market share.<sup>99</sup> This will force Canadian refiners to accept reduced refining margins (which form part of the total selling price formula<sup>100</sup>) at levels considerably lower than the net margins that they would normally achieve on sales of refined sugar that is not in competition with sugar imported from the United States under the duty deferral program or HFCS.

212. The Tribunal is of the view that, if the order in respect of the United States were rescinded, the impact on prices would be immediate and severe. In this regard, the evidence indicates that the majority of contracts in the industrial segment of the market will be up for renewal within the next 24 months.<sup>101</sup> Therefore, existing contracts with the domestic industry would not likely be a significant barrier to entry by low-priced imports. Indeed, because of the substantial negotiating leverage enjoyed by industrial consumers of refined sugar as a result of the considerable consolidation that has occurred in this segment of the market, and the significant volume of sugar covered by certain contracts, low-priced imports of refined sugar from the United States could be expected to have a significant adverse effect on the prices that Canadian producers will have to offer in order to retain these accounts.

213. Parties opposed argued that, with higher selling prices for refined sugar in Mexico, exports of refined sugar are likely to be sold in that market first. As noted earlier, there are a number of logistical and other impediments that will limit the volume of refined sugar sold to Mexico. Moreover, in contrast to Mexican exporters, U.S. exporters of refined sugar will be able to sell to Canada at price levels which will not impact their core market, given that Canadian refiners have no reciprocal access to the U.S. market.

– Summary

214. It is therefore the Tribunal's view that, if the order in respect of the dumping of refined sugar from the United States were rescinded, prices of dumped refined sugar from that country would inevitably significantly undercut prices of like goods, depress those prices or suppress them by preventing price increases that would otherwise occur. Moreover, the price competition that these imports would generate would likely quickly spread to other segments of the refined sugar market, causing a general reduction in refiners' net margins.

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99. Manufacturer's Exhibit RR-2009-003-A-04 at paras. 72-73, Administrative Record, Vol. 11; Manufacturer's Exhibit RR-2009-003-A-06 at para. 21, Administrative Record, Vol. 11.

100. Manufacturer's Exhibit RR-2009-003-A-22 at para. 8, Administrative Record, Vol. 11.

101. *Transcript of Public Hearing*, Vol. 2, 8 September 2010, at 254-55; Manufacturer's Exhibit RR-2009-003-A-13 (protected) at paras. 17-18, Administrative Record, Vol. 12.

Likely Performance of the Domestic Industry and Likely Impact of Dumped and Subsidized Goods on the Domestic Industry

215. The Tribunal will next turn to an assessment of the likely impact that the above volumes and prices would have on the domestic industry if the order in respect of the United States were rescinded, taking into consideration the domestic industry's likely performance.<sup>102</sup>

216. The CSI submitted that the domestic market for refined sugar has contracted significantly since the last review. Several major producers of SCPs have ceased operations in Canada. There has also been significant consolidation among remaining industrial users of sugar, and purchasers in the retail sector have also become more concentrated. These changes in domestic market conditions have made domestic refined sugar producers more vulnerable to resumed dumping, should the order in respect of the United States be rescinded.

217. The CSI submitted that there is widespread government intervention in national sugar markets around the globe and, in particular, in the United States and the European Union. The implication of this government intervention is the one-way nature of the trade that it creates.

218. In the absence of the Tribunal's order in respect of the United States, U.S. sugar producers and intermediaries can maximize their profits by exporting to Canada, whereas Canadian sugar producers have no meaningful access to the U.S. market. The normal market forces that temper pricing do not apply to U.S. sugar that is exported to Canada.

219. The CSI submitted that Canadian purchasers of refined sugar, which are large sophisticated buyers, will seek out opportunities to purchase refined sugar from the United States. They will want to pull low-priced sugar into Canada and use these low prices as negotiating leverage with domestic refiners.

220. The CSI claimed that the only response that domestic producers have against aggressive U.S. pricing is to immediately drop their prices in the Canadian market. Pricing information is transmitted quickly and transparently in the market. A single importer with only a small quantity of refined sugar can therefore substantially disrupt the market.

221. The CSI stated that the geographic proximity of key Canadian customers to U.S. sugar production facilities substantially minimizes freight rates between the two countries. That almost all large customers have plants in both Canada and the United States will ensure that much of the Canadian market will be served by cross-border supply contracts. With relationships already established with U.S. refiners, these same customers will enjoy substantial leverage in purchasing U.S. sugar.

222. The CSI submitted that, if the order in respect of the United States were rescinded, a large portion of the Canadian market would, within six months, be locked into these new prices, with increasingly more volume being locked in thereafter.

223. Lantic claimed that, while its western operations would be most at risk immediately following the removal of the duties, the entire Canadian market, and therefore all of Lantic's operations, would be in jeopardy within a very short time period.

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102. Paragraphs 37.2(2)(c),(e) and (g) of the *Regulations*.

224. Refined sugar production in Western Canada is more reliant on the retail (rather than industrial) segment of the market than is refined sugar produced in Eastern Canada, and the market in Western Canada would be a prime target for full-line, high-quality retail products from the United States. The market in Western Canada is also situated very close to U.S. beet sugar production. Lantic argued that, if it were faced with unsustainable refining margins and forced to cede market share, the result would be an inevitable rationalization of production facilities, which could result in the cessation or significant reduction of its operations in Canada.

225. The ASBGA submitted that, if the order in respect of the United States were rescinded, imports of U.S. sugar would depress the price of sugar in Canada to a point where neither the growers nor Lantic would receive adequate returns to survive.

226. The CBSA enforcement data show that CAN\$20.4 million in anti-dumping duties were assessed over the 2007-to-2009 period. This indicates that there remains significant interest among Canadian customers in buying U.S. refined sugar. It also demonstrates the continuing interest of the U.S. sugar industry in serving customers in Canada.

227. The ASBGA noted that a resumption of dumped imports of refined sugar into Canada will reduce the returns to growers below their break-even point. In this regard, it contended that even a small volume of dumped or subsidized imports can have a serious adverse impact on a commodity product such as refined sugar, which competes primarily on price. As a result, numerous sugar beet farmers would simply stop growing sugar beets and switch to alternative crops, with the Taber plant having to close if it did not have sufficient sugar beets to process.

228. The ASBGA claimed that “once a sugar beet plant closes in Canada it never re-opens”.<sup>103</sup> In the present case, closure of the Taber sugar beet processing plant would result in the loss of over CAN\$4 million in investments in capital equipment made over the past five years. In addition, millions of dollars of investment in specialized production equipment would be lost by growers.

229. The ASBGA noted that, apart from the loss of direct jobs in the industry (i.e. on the farm and at the Taber plant), other jobs in the transportation, equipment, seed, chemical and fertilizer sectors would be adversely affected if the sugar beet industry does not survive in southern Alberta.

230. The FPC submitted that the Canadian market is supplied by the domestic industry on a competitive basis and is being well served. With respect to the alleged likelihood of injury to Alberta sugar beet processors, the FPC submitted that they do not produce like goods. The FPC noted that, in *Boneless Manufacturing Beef*,<sup>104</sup> the GATT panel concluded that the cattlemen did not produce beef; consequently, they were not producers of like goods and therefore did not have standing.

– Tribunal’s Analysis

231. As indicated earlier, the Tribunal is of the view that, given the commodity nature of refined sugar, the necessity for cane sugar refiners to maximize plant throughput, and the facility with which sugar beet growers can process rather than plough under surplus sugar beets, refiners and processors in the United States would export refined sugar to Canada at prices below Canadian domestic prices if the current order were rescinded.

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103. Other Parties’ Exhibit RR-2009-003-B-01 at para. 5, Administrative Record, Vol. 11B.

104. (25 July 1986), CIT-2-86 (CIT).

232. Notwithstanding the positive overall performance of the domestic industry over the period of review, refining margins in the industrial bulk and HFCS-substitutable segments of the market remained significantly lower than other segments as a result of competition from other sources. In particular, the industrial bulk segment of the market, which had the lowest refining margins throughout the period of review,<sup>105</sup> was in direct competition with refined sugar from the United States that was not subject to anti-dumping duties by virtue of the duty drawback program.

233. The Tribunal believes that, if the order in respect of the United States were rescinded, these price levels and reduced refining margins would quickly spread to other segments of the domestic market.

234. Given the sophistication, consolidation and negotiating leverage of large retail and industrial sugar buyers, the Tribunal has no doubt that even relatively low volume imports of low-priced refined sugar from the United States would be sufficient to adversely affect Canadian prices. As previously noted, the geographic proximity of the U.S. suppliers to major Canadian purchasers and their related ability to respond to the specific requirements of Canadian purchasers (e.g. relating to timely delivery and order volumes) would render even relatively small import volumes at low prices disruptive to the Canadian market.

235. If the order in respect of the United States were rescinded, Canadian refining margins would likely be driven down to unsustainable levels within the 24-month timeframe being considered by the Tribunal. As Canadian producers have only one viable market in which to sell their refined sugar, the Tribunal accepts that they would endeavour to defend their share of the Canadian market at all costs, especially as they face the same production imperative as their U.S. counterparts.

– Summary

236. In view of the above, the Tribunal finds that the resumed or continued dumping of refined sugar from the United States will likely result in injury to the domestic industry.

### **Likelihood of Injury from the European Union**

237. The Tribunal will next turn to the consideration of the likelihood of injury to the domestic industry from the resumed or continued dumping of refined sugar from Denmark, Germany, the Netherlands and the United Kingdom and the resumed or continued subsidizing of refined sugar from the European Union. The Tribunal will first address the EU sugar program and EU market conditions, followed by the factors that it considers relevant to its analysis of likelihood of injury.

#### EU Sugar Program

238. In February 2006, the European Union instituted the first major reform to its sugar program since its inception. With the regime set to expire on June 30, 2006, the European Union was required to address several considerations relating to the continued functioning of its sugar program. These included the following: (1) the criticism of high EU sugar prices relative to world prices; (2) the WTO Appellate Body report regarding the cross-subsidizing of out-of-quota exports with revenues from within quota sugar production;<sup>106</sup> and (3) the European Union's "Everything But Arms" initiative, which allows the 50 least developed countries free access to the European Union at the higher EU internal prices.<sup>107</sup> The reforms were phased in over a four-year transition period from 2006-2007 to 2009-2010.

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105. *Staff Report* (protected), Tribunal Exhibit RR-2009-003-06, Administrative Record, Vol. 2.1 at 56.

106. *European Communities—Export Subsidies on Sugar* (28 April 2005), WTO Docs. WT/DS265/AB/R, WT/DS266/AB/R and WT/DS283/AB/R.

107. Tribunal Exhibit RR-2009-003-15.01B, Administrative Record, Vol. 3C at 266.

239. With respect to the first point, the reformed sugar program called for the renunciation by EU growers and refiners of 6 million MTs of production quota,<sup>108</sup> which was largely accomplished through price cuts and payouts. In this regard, the pre-reform production quota of 17.55 million MTs was reduced to 13.34 million MTs in 2009-2010, representing a reduction of 4.22 million MTs or 24 percent. McKeany-Flavell estimates that, by 2010-2011, the reduction of the production quota will amount to 5.95 million MTs.<sup>109</sup>

240. In an effort to reduce EU market prices for raw and refined sugar, the reference prices<sup>110</sup> for raw and refined sugar, as well as the minimum price for sugar beets, were reduced. Between 2006-2007 and 2010-2011, the reference price for raw sugar was reduced by 33 percent, from €497/MT to €335/MT. During the same period, the reference price for refined sugar decreased by 36 percent, from €632/MT to €404/MT. The minimum price guaranteed to sugar beet growers decreased by 21 percent, from €33/MT in 2006-2007 to €26/MT in 2010-2011.<sup>111</sup> The combined effect of these changes reduced the incentive to produce sugar beets and refined sugar.

241. The European Union also needed to address the WTO Appellate Body's report regarding cross-subsidizing of out-of-quota sugar exports.<sup>112</sup> To this end, the European Union committed to limiting its exports of subsidized sugar to 1.35 million MTs (i.e. export subsidy commitment level).<sup>113</sup> Under the reformed sugar program, out-of-quota sugar production can be carried forward, used in non-food industrial products or exported under commitment levels. If out-of-quota sugar production does not meet any of these options, it will be subject to a prohibitive €500/MT charge.<sup>114</sup>

242. In September 2007, the European Union also rescinded the ACP<sup>115</sup>/EU Sugar Protocol, which had provided former colonies with a quota for duty-free access to the high internal EU prices for sugar. Changes to this policy are intended to be phased in over a period of six years between 2009 and 2015. During this time, the European Union plans to offer financial assistance to ACP countries in order to facilitate their adjustment to the reductions in the EU price.<sup>116</sup>

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108. Sugar for the chemical and pharmaceutical industries and for the production of bio-ethanol is excluded from production quotas. Tribunal Exhibit RR-2009-003-12.19, Administrative Record, Vol. 1.4A at 257; Tribunal Exhibit RR-2009-003-15.01B, Administrative Record, Vol. 3C at 45.

109. Production of sugar has ceased in certain regions and has been significantly curtailed in others. The evidence on the record indicates that, out of a total of 184 processing plants operating in 2005-2006, 108 remained in operation in 2007-2008, for an overall closure of 41 percent of EU refined sugar processing plants. Tribunal Exhibit RR-2009-003-15.01B, Administrative Record, Vol. 3D at 355; Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 303; Tribunal Exhibit RR-2009-003-15.01B, Administrative Record, Vol. 3D at 7.

110. "Reference price" is the minimum support price for raw and refined sugar guaranteed by the European Union.

111. Tribunal Exhibit RR-2009-003-15.01B, Administrative Record, Vol. 3C at 30; Tribunal Exhibit RR-2009-003-31C, Administrative Record, Vol. 1 at 322.

112. Under the pre-reform sugar regime, the Member States could produce beyond their quota but that over-quota production (C Sugar) had to be sold outside the European Union. The WTO found that exports of C Sugar were being cross-subsidized with revenues from production under quota. Tribunal Exhibit RR-2009-003-15.01B, Administrative Record, Vol. 3C at 45, 265-66.

113. The actual WTO obligation is 1.374 million MTs, which includes isoglucose. According to the EU Delegation the WTO obligation with respect to out-of-quota exports is limited to 1.35 million MTs. Other Parties' Exhibit RR-2009-003-F-01 at para. 2, Administrative Record, Vol. 13; Tribunal Exhibit RR-2009-003-12.19, Administrative Record, Vol. 1.4A at 322.

114. Tribunal Exhibit RR-2009-003-26.02B, Administrative Record, Vol. 7 at 66-67.

115. ACP countries are the former colonies in Africa, the Caribbean and the Pacific.

116. Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol 1 at 302.

243. Finally, the reform provides for the maintenance of non-preferential import duty rates at €419/MT for white sugar and €339/MT for raw cane sugar.<sup>117</sup>

#### Inward Processing Relief

244. Inward Processing Relief (IPR) is a program that allows relief from duties that are otherwise applicable on goods imported from outside the European Union and which are processed and exported to countries outside the European Union. As such, it is available to EU sugar refiners. Use of the program is subject to member state approval (i.e. individual operators are required to obtain authorization to import the raw sugar, which is granted at the discretion of the EU member state authority<sup>118</sup>). Under this program, imported raw sugar that is refined and re-exported as such or in SCPs is eligible for duty relief. This re-exported sugar is deemed to be non-EU sugar and, as such, does not fall under the EU sugar regime, nor is it subject to the WTO export subsidy commitment level of 1.35 million MTs.<sup>119</sup>

245. According to a witness for the CSI, beet sugar processors can also use the IPR to export beet sugar to countries outside the European Union and then sell the resulting credit under that program to a cane sugar refiner that can use it to import an equivalent quantity of raw cane sugar.<sup>120</sup>

246. According to witnesses for the CSI, although the IPR has been in place for over 40 years, it has only recently become attractive to sugar processors/exporters, due to the increase in EU cane refining capacity and sugar program reforms which have eliminated export refunds.<sup>121</sup>

#### EU Market Conditions

247. According to the International Sugar Organization (ISO), since 2005-2006, domestic consumption of refined sugar in the European Union has remained relatively stable at close to 18 million MTRV.<sup>122</sup> Going forward, McKeany-Flavell estimates that sugar consumption should grow by about 1 to 2 percent annually, reflecting population growth.<sup>123</sup>

248. Production of total sugar in the European Union, as reported by the ISO, has decreased significantly since 2005-2006. In 2009-2010, total EU sugar production declined by 15 percent from pre-reform (2005-2006) levels, from 20.5 million MTRV to 17.4 million MTRV in 2009-2010, 41 percent of which is currently accounted for by production in Denmark, Germany, the Netherlands and the United Kingdom. In 2010-2011, the ISO forecasts total sugar production to decrease further to an estimated 16.5 million MTRV.<sup>124</sup>

249. Looking forward, the record indicates that there is little consensus with respect to forecasts of exports of refined sugar. In this regard, McKeany-Flavell and the USDA forecast exports of refined sugar to decrease to 1.2 to 1.5 million MTRV in 2010-2011. For its part, the ISO forecasts a more significant

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117. Tribunal Exhibit RR-2009-003-15.01B, Administrative Record, Vol. 3C at 44.

118. Tribunal Exhibit RR-2009-003-RI-06, Administrative Record, Vol. 9 at 2.

119. *Ibid.*

120. Manufacturer's Exhibit RR-2009-003-A-10 at para. 60, Administrative Record, Vol. 11.

121. *Ibid.* at para. 62, Administrative Record, Vol. 11; Manufacturer's Exhibit RR-2009-003-A-16 at para. 3.10, Administrative Record, Vol. 11.

122. Tribunal Exhibit RR-2009-003-32.20, Administrative Record, Vol. 1A at 170.136.

123. Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol 1 at 301.

124. Tribunal Exhibit RR-2009-003-32.20, Administrative Record, Vol. 1A at 170.134; Tribunal Exhibit RR-2009-003-32.21, Administrative Record, Vol. 1A at 170.219.



decrease in exports of refined sugar, projecting 0.7 million MTRV in 2010-2011. For 2011-2012, the only available forecast was provided by McKeany-Flavell, which estimates exports of refined sugar to reach 2.9 million MTRV.<sup>125</sup>

250. As for the market prices of refined sugar in the European Union, the evidence shows that they have fallen continuously since the implementation of the EU sugar reform. These prices decreased by approximately 23 percent between 2007 and the first quarter of 2010, falling from an average price of €623/MT (US\$854/MT) to €477/MT (US\$683/MT).<sup>126</sup>

251. The EU domestic market price of refined sugar was higher than the No. 5 white sugar price throughout the period of review, by an average of 130 percent, except in January and February 2010, when the No. 5 white sugar price peaked and exceeded EU prices by 9 percent.

252. In March and April 2010, the EU domestic price of refined sugar was approximately US\$51 to US\$63 above the No. 5 white sugar price of US\$648/MT to US\$684/MT.<sup>127</sup>

#### Likely Volumes of Dumped and Subsidized Goods

253. The CSI argued that, notwithstanding the EU sugar reform, imports into Canada of the dumped and subsidized refined sugar would remain a serious threat to domestic producers of refined sugar, should the order in respect of the European Union be rescinded.

254. The CSI and its expert witness both submitted that surplus beet sugar production in the European Union will lead to EU export volumes exceeding its WTO commitment of 1.35 million MTs. In this regard, the CSI noted that the European Union has both the ability and the propensity to produce and export significant volumes of out-of-quota sugar and remains a significant net exporter of refined sugar. In support of this contention, it submitted that the total EU out-of-quota refined sugar production for 2009-2010 is forecasted to be approximately 4.6 million MTs and that, in February of 2010, the European Union exceeded its WTO commitment level by exporting an additional 500,000 MTs of refined sugar.

255. In addition to its claim of surplus beet sugar production, the CSI submitted that approximately 1.5 million MTs of new cane sugar refining capacity has been, or is being added, in the European Union. In this regard, it submitted that overall surplus capacity is expected to reach 804,000 MTs by 2011-2012.

256. The CSI submitted that the increase in refining capacity in the European Union has been a result of investment in new and expanded facilities in Spain, the United Kingdom, Portugal, Germany, Poland and France and changes to import regulations for raw cane sugar imports under preferential agreements, such as the "Everything But Arms" initiative, in October 2009, that granted broader access to these imports.

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125. Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 305; Tribunal Exhibit RR-2009-003-32.08, Administrative Record, Vol. 1A at 170; Tribunal Exhibit RR-2009-003-32.21, Administrative Record, Vol. 1A at 170.228.

126. The Bank of Canada's monthly average U.S./Canada exchange rate for April 2010 was 0.9950. *Staff Report* (public), Tribunal Exhibit RR-2009-003-05, Administrative Record, Vol. 1.1 at 78-79; Tribunal Exhibit RR-2009-003-RI-06, Administrative Record, Vol. 9 at 4-5.

127. *Staff Report* (public), Tribunal Exhibit RR-2009-003-05, Administrative Record, Vol. 1.1 at 78, 79; Tribunal Exhibit RR-2009-003-32.06, Administrative Record, Vol. 1A at 159; Tribunal Exhibit RR-2009-003-RI-06, Administrative Record, Vol. 9 at 4, 5.

257. The expert witness for the CSI indicated that competition for these preferential imports has led to all eligible raw cane sugar volume being committed under long-term contracts until 2014-2015. The expert witness for the CSI estimated that the EU surplus capacity will increase from 7 percent in 2008-2009 to 13 percent in 2010-2011 and 23 percent in 2011-2012.

258. Given excess cane sugar refining capacity, restricted access to raw cane sugar and the production imperative of maximizing plant throughput in order to reduce average unit costs of production, the CSI argued that cane sugar refiners in the European Union will avail themselves of the IPR re-export program. The expert witness for the CSI suggested that the level of exports under the IPR program could reach 800,000 MTs.

259. The CSI further argued that these exports could come to Canada for the following reasons: (1) Canada is a premium refined sugar market, with price regularly above world prices; (2) EU refined sugar meets Canadian quality requirements to which buyers are accustomed; (3) many industrial and retail customers in Canada have corporate and supply relationships in or with the European Union; (4) the decline in available traditional export markets, previously supplied with EU sugar, due to local construction of refineries within those former markets; and (5) the availability of lower-cost container freight alternatives.

260. For its part, the EU Delegation submitted that, since the reform, the European Union, as a whole, has become a net importer of sugar. It argued that, while some Member States produced more sugar than they consumed, others do not produce sugar at all and, therefore, depend to a large extent on the importation of sugar from other Member States or on imported raw cane sugar which is refined in either Portugal, Spain, Hungary, Slovakia, Romania, Bulgaria, Greece or Finland. According to the EU Delegation, because of the reduced production and limited volumes available for export, there is no available refined sugar that could come to Canada.

261. The EU Delegation acknowledged that the volume of exports at the beginning of 2010 was above the WTO export subsidy commitment level, but claimed that this was an exceptional situation, citing a shortage on the world sugar market and world market prices largely exceeding EU internal prices and EU production costs. The European Union submitted that it was only responding to a unique, time-limited situation and that this was not disruptive to the world market or Canada.

– Tribunal's Analysis

262. The Tribunal notes that EU exports of refined sugar have declined significantly as a result of the reform program. Historically, the European Union was one of the world's largest net exporters of refined sugar.<sup>128</sup> While still a net exporter of refined sugar, the EU's export volumes have decreased by 73 percent, from 7.5 million MTRV in 2005-2006 to 2.0 million MTRV in 2009-2010.<sup>129</sup>

263. In 2005-2006, the European Union was the world's largest exporter of refined sugar, representing 33 percent of total world exports. By 2009-2010, the European Union had become the third largest exporter of refined sugar behind Brazil and Thailand, representing 10 percent of total world exports.<sup>130</sup>

264. Therefore, though the European Union is a net importer of sugar in aggregate, the Tribunal is satisfied that it remains a net exporter of refined sugar.

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128. Tribunal Exhibit RR-2009-003-32.21, Administrative Record, Vol. 1A at 170.228-170.230.

129. Tribunal Exhibit RR-2009-003-32.09, Administrative Record, Vol. 1.01 at 38.

130. *Ibid.* at 38-41.

265. Contrary to the assertions of the CSI, the Tribunal is not convinced that all out-of-quota production will be available for export from the European Union. In this regard, the Tribunal notes the report by F.O. Licht, which indicates that, of the 4.6 million MTs of out-of-quota production in 2009-2010, only 2.1 million MTs<sup>131</sup> had been assigned for export. This amount includes 1.85 million MTs under export licences issued for 2009-2010, approximately 222,000 MTs under export licences issued for 2008-2009, but not yet used, and 50,000 MTs of isoglucose. The balance of out-of-quota production was either carried forward or destined for non-food industrial use.<sup>132</sup>

266. The Tribunal finds the evidence unclear as to whether the 2008-2009 licences were actually used and as to the period or conditions under which any unused 2008-2009 licences would count against the WTO export subsidy commitment level.

267. The Tribunal is however of the view that the out-of-quota production exported in 2009-2010 was limited to the 1.85 million MTs. This figure includes the European Union's WTO export subsidy commitment level of 1.35 million MTs plus the 500,000 MTs of refined sugar that was exported outside this WTO level, which the EU Delegation claimed had occurred at a time when world prices were above the EU domestic price.

268. The Tribunal is also of the view that the exports outside the WTO commitment level were likely at non-injurious prices and in response to the unique circumstances that prevailed in the market at the time. That being the case, the Tribunal finds that there is inadequate basis to assume that the European Union will continue to export outside its WTO export subsidy commitment level over the next 18 to 24 months.

269. The CSI further submitted that currently unused and planned refining capacity in the European Union constituted a further threat, especially with regard to cane sugar refiners. It stated that refiners would engage this additional capacity through use of the IPR so as to increase production throughput.

270. The Tribunal, however, prefers the evidence of LMC, McKeany-Flavell and F.O. Licht, which is consistent in the expectation that European sugar refiners will not exceed the European Union's WTO export subsidy commitment level.<sup>133</sup> For reasons already stated, the Tribunal is not convinced that the European Union will breach this WTO commitment, nor does it consider that the additional 500,000 MTs exported in 2010, when sugar prices were at a record high, is an event that is likely to repeat itself.

271. Turning next to the likely destination of EU refined sugar exports, the expert witness for the CSI indicated that the European Union continues to rely on a wide range of export destinations, with a high proportion of sales destined for regional markets in Europe, the Mediterranean, and the Red Sea and Persian Gulf regions, with relatively smaller volumes going to more distant markets, primarily in Asia.<sup>134</sup>

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131. The Tribunal notes that the volume of exports reported by F.O. Licht is consistent with the volume reported by the ISO.

132. Manufacturers' Exhibit RR-2009-003-A-17A, appendix 29 at 395, Administrative Record, Vol. 11.

133. McKeany-Flavell and F.O. Licht estimate that, in 2010-2011, the European Union will be within its WTO export commitments of 1.35 million MTs, with the potential for a slight carry-over into the 2011-2012 season. LMC also believes that EU exports can be expected to approach the 1.35 million MTs limit in most years, although the European Union may exceed its limit again if prices are high. Manufacturer's Exhibit RR-2009-003-A-16 at para. 3.9, Administrative Record, Vol. 11; Manufacturers' Exhibit RR-2009-003-A-17A, appendix 29 at 395, Administrative Record, Vol. 11; Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 306.

134. Manufacturer's Exhibit RR-2009-003-A-16 at paras. 3.19-3.20, Administrative Record, Vol. 11.

272. With respect to the CSI's argument that the European Union has lost significant market opportunities for its exports as a result of the construction of sugar refineries in the above-mentioned markets, the Tribunal notes that the operational capacity of these new refineries does not fully replace the EU's historical export volumes to these markets.<sup>135</sup> Furthermore, with respect to any planned capacity and capacity currently under construction, the Tribunal is not convinced by the evidence on the record that this capacity will actually come online within the next 24 months.

273. The Tribunal agrees with the expert evidence of LMC and McKeany-Flavell that EU refiners will seek out export markets that provide the highest return. On this point, the evidence suggests that these destinations would be markets that are in geographic proximity to the European Union.

274. In this regard, the Tribunal notes the testimony of Mr. Todd, Mr. Makin and Mr. Combs that freight costs are an important factor when analyzing the potential net returns to a sugar refiner.<sup>136</sup> The Tribunal considers that freight rates will continue to make nearby markets more attractive export destinations than Canada for the limited volumes of refined sugar available for export.

275. In addition, the Tribunal notes that at least some of these nearby markets have tended to have higher wholesale refined sugar prices than Canada.<sup>137</sup> Therefore, based on the economic rationale that refiners will seek to export to the most remunerative destinations, the Tribunal believes that EU exports will be predominately sold in these markets rather than in Canada, should the order in respect of the European Union be rescinded.

276. Finally, the Tribunal's witness from Kraft testified that, for SCP producers such as itself, just-in-time delivery requirements and the risks associated with transborder shipments were very important considerations when it came to sourcing decisions. The European Union, in particular, was not seen as a very attractive supplier of refined sugar because of these delivery and distance shipping risk considerations.<sup>138</sup>

277. The Tribunal notes that, of Lantic's top 10 customers,<sup>139</sup> the majority are multinational firms similar in size to Kraft and, therefore, likely have similar requirements and concerns when purchasing refined sugar.

278. Given the existence of more remunerative and geographically proximate markets for EU sugar refiners, together with the logistical and commercial risk considerations associated with purchasing from more distant suppliers, the Tribunal accepts that there is unlikely to be significant exports of EU refined sugar into Canada and that the European Union would not be a preferred source of refined sugar for Canadian purchasers of refined sugar.

279. The Tribunal accepts that EU exporters would have the opportunity to sell into the Canadian market absent the order in respect of the European Union. However, on the basis of the evidence, it is the Tribunal's view that the circumstances in the near to medium term will be such that EU exporters will not do so to any appreciable level, as available export volumes would most likely be sold into markets that are likely to yield a higher net return than Canada.

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135. *Ibid.* at paras. 3.19-3.20, 3.24-3.28, table 3.2, Administrative Record, Vol. 11.

136. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 123, 127-28; *Transcript of Public Hearing*, Vol. 3, 9 September 2010, at 293-94; Manufacturer's Exhibit RR-2009-003-A-04 at para. 68, Administrative Record, Vol. 11.

137. Tribunal Exhibit RR-2009-003-32.13, Administrative Record, Vol. 1A at 170.33-170.34.

138. *Transcript of Public Hearing*, Vol. 3, 9 September 2010, at 356-60.

139. *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 110.

280. In summary, the Tribunal is of the view that, if the order in respect of the dumping of refined sugar from Denmark, Germany, the Netherlands and the United Kingdom and the subsidizing of refined sugar from the European Union is rescinded, imports of refined sugar from the European Union are not likely to enter the Canadian market in significant volumes in the near to medium term.

Likely Prices of Dumped and Subsidized Goods and Effects on Prices of Like Goods

281. The CSI submitted that, because Canada is a premium market and its prices are higher than world market prices, it is an attractive market for EU sugar.

282. In terms of likely prices, the CSI argued that, absent the order in respect of the European Union, EU sugar would enter Canada at (1) the prevailing white premium price, plus costs associated with landing refined sugar in the Canadian market, and/or (2) prices that will only cover variable costs and provide a small contribution to fixed costs.

283. Furthermore, the CSI argued that imports of sugar from the European Union could enter Canada at prices that represent very low refining margins, well below those currently being realized by domestic producers.

284. In addition, the CSI submitted that the European Union now exports the majority of its sugar outside the European Union at container freight rates that are very competitive over very long distances and that this mode of shipping allows producers to supply sugar on a regular basis to industrial customers and in retail-ready packaging.

285. The EU Delegation submitted that, due to the reform to EU sugar policy, the EU internal price has been reduced significantly. It argued that, because the current EU market price is in fact below the world market price, any exports at this price level to Canada would not be dumped. Furthermore, due to the reform and ensuing restructuring, the EU sugar industry has become highly competitive, which is reflected in the competitive price levels, which will certainly remain competitive beyond 2015.

– Tribunal's Analysis

286. The Tribunal notes the CSI's evidence that refined sugar exported from the European Union can be sold at the No. 5 white sugar price. In the Tribunal's view, this is the starting point for any consideration of likely prices of imports of refined sugar from the European Union.

287. Using the No. 5 white sugar price as a starting point, the evidence indicates that freight and other costs associated with landing refined sugar in Canada place EU suppliers at a cost disadvantage.<sup>140</sup> This is even more evident when it comes to making such sugar available to Canadian purchasers, considering the challenges posed by Canada's particular geography.

288. Testimony indicates that shipping refined sugar from Eastern Canada to Western Canada is uneconomical.<sup>141</sup> The Tribunal recalls the testimony of witnesses for the CSI to the effect that US producers have more incentive to sell within continental North America, due to the significant inland freight and other

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140. *Staff Report* (public), Tribunal Exhibit RR-2009-003-05, Administrative Record, Vol. 1.1 at 78, 79; Tribunal Exhibit RR-2009-003-16.02 (protected), Administrative Record, Vol. 4 at 137; Tribunal Exhibit RR-2009-003-32.05, Administrative Record, Vol. 1A at 156; Tribunal Exhibit RR-2009-003-32.06, Administrative Record, Vol. 1A at 159.

141. *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 167.

costs associated with getting sugar to ports. The Tribunal believes that this same argument would hold true with respect to EU sugar landed at ports in Eastern Canada for shipment to markets in the Canadian interior. In the Tribunal's view, the domestic industry's operations in Taber and Vancouver would therefore be insulated from any significant price effects from EU refined sugar by these inland freight considerations.

289. The Tribunal also notes that, as part of its submissions, Lantic provided an analysis that compared the EU price (based on the No. 5 white sugar price on March 24, 2010) of bulk refined sugar, landed and unloaded in Montréal, Quebec, with the estimated cost of producing bulk white refined sugar in Montréal.<sup>142</sup>

290. This analysis suggests that EU exports will likely be priced at the No. 5 white sugar price. However, the Tribunal is of the view that it does not represent a true comparison of an actual landed price of EU refined sugar in Canada and the selling price of domestically produced refined sugar.

291. Specifically, the Tribunal notes that a number of cost factors are not reflected in the analysis (e.g. the cost of maritime transport insurance, brokerage fees) nor does the record afford a reasonable basis upon which the Tribunal could estimate these cost factors for the purposes of a representative comparison in relation to bagged sugar, which testimony suggests is the principal area of concern for the domestic industry.

292. Although, on a bulk calculation, the EU price remains above a comparable Canadian price, the analysis goes on to invite the reader to compare the price of EU bulk containerized sugar to two formats of bagged sugar. However, in the Tribunal's view, because the analysis does not reflect, or make adequate adjustments to reflect, the comparison of equivalents, it is unable to accord much in the way of probative value to the adverse price implications that, as suggested, would ensue from a rescission of the order in respect of the European Union.

293. The Tribunal next examined the CSI's assertions that EU refiners will export refined sugar to Canada at prices that cover variable costs and provide a contribution to fixed costs. However, the paucity of information on the record on variable costs of production for EU refiners precludes the Tribunal from placing much reliance on this evidence.<sup>143</sup> The Tribunal was also presented with little to no evidence as to the cost of growing beets in the European Union, except for a blanket assertion that the cost must be similar to that in Canada.

294. The Tribunal did however find persuasive the expert evidence that EU exports of refined sugar would be sold to the most remunerative markets.<sup>144</sup> As noted above, certain traditional EU refined sugar markets tend to have higher wholesale prices and lower freight costs than is the case for Canada, which indicates to the Tribunal that sales to these markets would be more remunerative than sales to Canada.

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142. Tribunal Exhibit RR-2009-003-15.02, Administrative Record, Vol. 3E at 164; Tribunal Exhibit RR-2009-003-16.02 (protected), Administrative Record, Vol. 4 at 137. A similar analysis can be found at Manufacturer's Exhibit RR-2009-003-A-08 at paras. 81-82, Administrative Record, Vol. 11; Manufacturer's Exhibit RR-2009-003-A-09 (protected) at paras. 81-82, appendix 9, Administrative Record, Vol. 12.

143. Manufacturers' Exhibit RR-2009-003-A-11 (protected) at para. 63, Administrative Record, Vol. 12; Tribunal Exhibit RR-2009-003-RI-01C (protected), Administrative Record, Vol. 10 at 8.

144. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 123, 127-28; *Transcript of Public Hearing*, Vol. 3, 9 September 2010, at 293-94; *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 169-71.

295. In this regard, the witness from Sweet Source testified that he would be willing to look at importing EU sugar only if there is a competitive advantage to be gained in doing so.<sup>145</sup> However, in his view, purchasing EU sugar would be unlikely because the EU refiners could export to geographically closer markets at higher net returns and, therefore, at higher prices than those of his current sources of supply.<sup>146</sup>

296. The Tribunal has no doubt that EU refined sugar exporters will look to markets that will maximize their returns. Notwithstanding that the world price of refined sugar has consistently been somewhat lower than the Canadian domestic market price,<sup>147</sup> the Tribunal is of the view that, given freight and other costs associated with supplying refined sugar to Canadian purchasers, EU exporters of refined sugar will most likely take advantage of opportunities closer to home that can offer a higher net return.

297. With respect to the argument that the simple availability of sugar from the European Union will suppress prices, the Tribunal accepts that this may have a nominal short-term impact on Canadian prices, as customers try to capitalize on the rescission of the order. However, this effect is not likely to last, given the logistical concerns and attendant commercial risks associated with sourcing from abroad and the fact that the final “all-in” landed price of EU refined sugar is not likely to be below prevailing Canadian prices.

– Summary

298. For the foregoing reasons, the Tribunal is of the view that the likely price levels of the likely limited volumes of refined sugar from the European Union will not be injurious.

Likely Performance of the Domestic Industry and Likely Impact of Dumped and Subsidized Goods on the Domestic Industry

299. The CSI argued that, given surplus beet sugar production and the unused cane sugar refining capacity in the European Union, there is a huge incentive for cane sugar refiners to export product to markets at a price that covers variable costs and provides a contribution to fixed costs.

300. As with the United States, the CSI argued that, if low-priced dumped and subsidized sugar imports from the European Union were allowed to enter the Canadian market, domestic producers would be forced to reduce their selling prices, and margins would erode, which, in turn, would result in reduced profitability. The domestic producers submitted that they would not be able to sustain their operations at the net margin levels that would result from such dumped and subsidized sugar.

301. The CSI also argued that the mere availability of EU refined sugar in the Canadian market would be enough to suppress prices and reduce domestic refining margins.

302. In this regard, the Tribunal notes that Mr. Lafrance of Lantic indicated that, should any likely volumes of EU refining sugar penetrate the Canadian market, it would only impact a relatively small proportion of Lantic’s business.<sup>148</sup> Furthermore, with respect to Lantic’s operations in Vancouver and Taber, as discussed above, the Tribunal is of the view that the additional costs of moving EU refined sugar inland to the western market would be uncompetitive and, therefore, would have little impact on these operations. As well, given just-in-time delivery requirements, it would be more attractive for purchasers in Western Canada to ship by truck from the United States than ship containers from the European Union.

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145. *Transcript of Public Hearing*, Vol. 2, 8 September 2010, at 236.

146. *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 169-71.

147. *Staff Report* (protected), Tribunal Exhibit RR-2009-003-06, Administrative Record, Vol. 2.1 at 42, 79; Tribunal Exhibit RR-2009-003-32.06, Administrative Record, Vol. 1A at 159.

148. *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 137.

303. Although the CBSA has found a likelihood of continued or resumed dumping of refined sugar from Denmark, Germany, the Netherlands and the United Kingdom and a likelihood of continued or resumed subsidizing of refined sugar from the European Union, the Tribunal is of the view that, if the order in respect of the European Union is rescinded, there will be no injurious effect in the near to medium term, as the evidence has established that imports from the European Union, including the four named countries, are likely to be minimal over the next 18 to 24 months and at prices that are above domestic prices.

– Summary

304. Given the above, the Tribunal finds that it is not likely that the resumed or continued dumping of refined sugar from Denmark, Germany, the Netherlands and the United Kingdom and the resumed or continued subsidizing of refined sugar from the European Union will result in injury to the domestic industry.

## CONCLUSION

305. Pursuant to paragraph 76.03(12)(b) and subsection 76.04(1) of *SIMA*, the Tribunal hereby continues its order in respect of the dumping of refined sugar originating in or exported from the United States.

306. Pursuant to paragraph 76.03(12)(a)(ii) of *SIMA*, the Tribunal hereby rescinds its order in respect of the dumping of refined sugar originating in or exported from Denmark, Germany, the Netherlands and the United Kingdom, and the subsidizing of refined sugar originating in or exported from the European Union.

Pasquale Michaele Saroli

Pasquale Michaele Saroli  
Member

Jason W. Downey

Jason W. Downey  
Member



**APPENDIX****GOODS EXCLUDED FROM THE FINDINGS MADE BY THE TRIBUNAL IN  
INQUIRY NO. NQ-95-002**

1. *Co-crystallized products* - For greater clarity, these products are comprised of sugar syrups or liquid sucrose blends and one or more non-sucrose ingredients combined through a co-crystallization process to form a dry solid structure in granulated or powder form.
2. *Pearl sugar* - For greater clarity, pearl sugar is hard granulated sugar, pellet-formed by subjecting sugar syrup to intense heat. The pellet, which is the size of a pea, is shaped like a football. It is coarser than coarse sugar, i.e. confectioners' sugar.
3. *Bottler's floc-free beet sugar* - Imported by McNeil Consumer Products Company for use in pharmaceutical preparations.
4. *Lyle's Golden Syrup* - Produced by Tate & Lyle PLC.
5. *Lyle's Pouring Syrup* - Produced by Tate & Lyle PLC.
6. *Daddy brand wrapped sugar dominoes in 1-kg boxes* - For greater clarity, these are sugar cubes which are wrapped in illustrated paper wrappings, each of which contains two sugar cubes.
7. *Daddy brand wrapped sugar cubes in 5-kg boxes containing 960 portion* - For greater clarity, each portion contains two sugar cubes which are wrapped in illustrated paper wrappings.
8. *Saint Louis brand pre-cut brown cane sugar lumps in 1-kg boxes* - For greater clarity, these are rough-shaped sugar lumps comprised of brown cane sugar.
9. *Daddy brand shaped white sugar pieces in 500-g boxes* - For greater clarity, these sugar pieces are pre-cut into diamond, heart, spade and club shapes.
10. *Daddy brand brown or blond "Vergeoise" sugar in 500-g cases.*
11. *Comptoir du Sud brand brown and white sugar pieces in 1-kg and 500-g boxes.*
12. *Daddy brand brown coffee sugar in 500-g box packets* - For greater clarity, this is a large granule brown sugar.
13. *Demerara sugar cubes* - Produced by Tate & Lyle PLC.
14. *Amber sugar crystals* - Produced by Tate & Lyle PLC. For greater clarity, these are large sugar crystals in varying shades of brown.
15. Low-colour liquid sucrose with a colour no higher than 10 maximum ICUMSA (International Commission for Uniform Methods of Sugar Analysis) colour units and distiller's grade liquid sucrose imported by Gilbey Canada Inc. for use as ingredients in its production process.

**GOODS EXCLUDED BY THE ORDERS MADE BY THE TRIBUNAL IN  
REVIEW NO. RR-99-006 FROM THE FINDINGS MADE BY THE TRIBUNAL IN  
INQUIRY NO. NQ-95-002**

1. Bottler's floc-free beet sugar imported for use in pharmaceutical preparations where it is established by the importer that floc-free beet sugar from Canadian sources does not meet the applicable product specifications.
2. Golden, pouring and other table syrups imported in retail-ready packaging in containers not exceeding 3 L.
3. Subject to the exception below, specialty wrapped sugar cubes, each individual wrapping containing not more than 3 sugar cubes, imported in retail-ready packages not exceeding 5 kg in weight. This exclusion does not include generic wrapped white sugar cubes (i.e. where the illustration consists of primarily a trade-mark, trade name, company name or other commercial identification as opposed to a unique illustration).
4. Pre-cut specialty shaped sugar pieces, imported in retail-ready packaging, in packages not exceeding 1 kg in weight. For greater clarity, these include diamond-, heart-, spade- and club-shaped sugar but do not include cube- or domino- (i.e. rectangular) shaped sugar.
5. Rough-shaped lumps and pieces, in lumps or pieces weighing between 3 and 10 g on average, imported in retail-ready packaging, in individual packages not exceeding 1 kg in weight.
6. Very large crystal sugar, in crystals exceeding 0.05 g in weight on average, imported in retail-ready packaging, in individual packages not exceeding 1 kg in weight.
7. Specialty sugar cubes and dominoes (i.e. rectangles), made from demerara, brown, yellow or any other non-white sugar, imported in retail-ready packaging, in packages not exceeding 1 kg in weight. For greater clarity, this does not include any sugar cube or domino made from white granulated sugar.
8. Low-colour liquid sucrose with a colour no higher than 10 ICUMSA (International Commission for Uniform Methods of Sugar Analysis) colour units and distiller's grade liquid sucrose imported for use in the production of distilled spirits where it is established by the importer that low-colour liquid sucrose and distiller's grade liquid sucrose from Canadian sources do not meet the applicable product specifications.
9. Organic sugar meeting the requirements of the Canadian General Standards Board standard No. CAN/CGSB-32.310-99 (Organic Agriculture), the U.S. *Federal Organic Foods Production Act of 1990* or any rules adopted under that act, or the European Union EN2092/94 (Organic Regulation), where it is accompanied by a transaction certificate affirming compliance with the standard signed by an ISO Guide 65 accredited certifying authority.

**GOODS EXCLUDED BY THE ORDERS MADE BY THE TRIBUNAL IN  
REVIEW NO. RR-2004-007 FROM THE FINDINGS MADE BY THE TRIBUNAL  
IN INQUIRY NO. NQ-95-002**

1. Individually wrapped rectangular cane sugar tablets.

IN THE MATTER OF an expiry review, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, of the orders made by the Canadian International Trade Tribunal on November 2, 2005, in Expiry Review No. RR-2004-007, continuing, with amendment, its orders made on November 3, 2000, in Review No. RR-99-006, continuing, with amendment, its findings made on November 6, 1995, in Inquiry No. NQ-95-002, concerning:

**THE DUMPING 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 REFINED SUGAR, REFINED FROM SUGAR CANE OR SUGAR BEETS, IN GRANULATED, LIQUID AND POWDERED FORM, ORIGINATING IN OR EXPORTED FROM THE EUROPEAN UNION**

**STATEMENT OF REASONS**

**CORRIGENDUM**

The first sentence of paragraph 302 of the Statement of Reasons should read as follows: “In this regard, it is the Tribunal’s view, based on the evidence, that, should any volumes of EU refined sugar penetrate the Canadian market, it would impact a relatively small portion of the volume of Lanctic’s business.”<sup>148</sup>

By order of the Tribunal,

Dominique Laporte  
Secretary