



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Dumping and Subsidizing

---

## ORDER AND REASONS

Expiry Review No. RR-2009-003R

Refined Sugar

*Order and reasons issued  
Friday, September 28, 2012*

## TABLE OF CONTENTS

ORDER .....	i
STATEMENT OF REASONS .....	1
INTRODUCTION .....	1
Tribunal's Expiry Review in <i>Refined Sugar</i> .....	1
Judgment of the Court .....	2
Tribunal's Recommencement of Expiry Review .....	2
ANALYSIS .....	3
Scope of Expiry Review on Remand .....	3
Alleged Displacement of EU Exports From Traditional Markets .....	3
Likely Volume of EU Exports to Canada .....	5
Cumulation .....	9
Likelihood of Injury .....	11
CONCLUSION .....	12

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, in respect of the dumping of refined sugar 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 originating in or exported from the European Union;

AND FURTHER TO orders made by the Canadian International Trade Tribunal on November 1, 2010, continuing its order in respect of the dumping of refined sugar originating in or exported from the United States of America and rescinding 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;

AND FURTHER TO a judgment of the Federal Court of Appeal, dated May 30, 2012, which set aside the order made by the Canadian International Trade Tribunal on November 1, 2010, rescinding 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, and returned the matter to the Canadian International Trade Tribunal for reconsideration.

**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**

**ORDER**

The Canadian International Trade Tribunal, further to the judgment of the Federal Court of Appeal, dated May 30, 2012, recommenced the expiry review of 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.

Pursuant to paragraph 76.03(12)(b) of the *Special Import Measures Act*, the Canadian International Trade Tribunal, having reconsidered the matter as directed by the Federal Court of Appeal, hereby continues the aforementioned order.

Pasquale Michael Saroli  
Pasquale Michael Saroli  
Presiding Member

Serge Fréchette  
Serge Fréchette  
Member

Jason W. Downey  
Jason W. Downey  
Member

Dominique Laporte  
Dominique Laporte  
Secretary

Tribunal Members:	Pasquale Michael Saroli, Presiding Member Serge Fréchette, Member Jason W. Downey, Member
Research Director:	Rose Ritcey
Research Manager:	Mark Howell
Senior Research Officer:	Paula Enright
Counsel for the Tribunal:	Alain Xatruch
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Cheryl Unitt

**PARTICIPANTS:****Domestic Producers**

Canadian Sugar Institute

Alberta Sugar Beet Growers Association

**Counsel/Representatives**Gerry H. Stobo  
Greg Tereposky  
Olivier Nguyen  
Daniel Hohnstein  
Rhema Kang  
P. John Landry

Richard G. Dearden

**Importers/Exporters/Others**

Food Processors of Canada

Delegation of the European Union to Canada

**Counsel/Representatives**Peter Clark  
Renée Clark

H.E. Matthias Brinkmann

Please address all communications to:

The Secretary  
Canadian International Trade Tribunal  
333 Laurier Avenue West  
15th Floor  
Ottawa, Ontario  
K1A 0G7Telephone: 613-993-3595  
Fax: 613-990-2439  
E-mail: [secretary@citt-tcce.gc.ca](mailto:secretary@citt-tcce.gc.ca)

## STATEMENT OF REASONS

### INTRODUCTION

1. This expiry review proceeding is further to a judgment of the Federal Court of Appeal (the Court), dated May 30, 2012,<sup>1</sup> which set aside one of the orders made by the Canadian International Trade Tribunal (the Tribunal) on November 1, 2010, in Expiry Review No. RR-2009-003,<sup>2</sup> and returned the matter to the Tribunal for reconsideration. Before setting out its decision and reasons in this matter, the Tribunal will recall the proceedings in its expiry review in *Refined Sugar*, those before the Court and those in the course of this expiry review.

#### **Tribunal's Expiry Review in *Refined Sugar***

2. On February 17, 2010, the Tribunal, pursuant to subsection 76.03(3) of the *Special Import Measures Act*,<sup>3</sup> initiated an expiry review of its orders made on November 2, 2005, in Expiry Review No. RR-2004-007, continuing, with amendment, its orders made on November 3, 2000, in Expiry 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 (refined sugar), originating in or exported from the United States of America (United States), Denmark, the Federal Republic of Germany (Germany), the Netherlands and the United Kingdom, and the subsidizing of refined sugar originating in or exported from the European Union (the subject goods).

3. On February 18, 2010, the Canada Border Services Agency (CBSA) initiated an investigation to determine whether the expiry of the orders was likely to result in the continuation or resumption of dumping and/or subsidizing of the subject goods.

4. On June 17, 2010, the CBSA determined, pursuant to paragraph 76.03(7)(a) of *SIMA*, that the expiry of the orders would likely result in the continuation or resumption of dumping and subsidizing of the subject goods.

5. On June 18, 2010, following the CBSA's determination, the Tribunal began its expiry review to determine whether the expiry of the orders was likely to result in injury to the domestic industry. The Canadian Sugar Institute (CSI)<sup>4</sup> and the Alberta Sugar Beet Growers Association (ASBGA) participated in these proceedings by submitting evidence and making arguments in support of a continuation of the orders. The Delegation of the European Union to Canada (EU Delegation), Food Processors of Canada (FPC) and the United States Beet Sugar Association also participated in these proceedings, but submitted evidence and made arguments in support of a rescission of the orders.

6. On November 1, 2010, the Tribunal determined, pursuant to subsection 76.03(10) of *SIMA*, that the expiry of its order in respect of the dumping of refined sugar originating in or exported from the United States (the order on U.S. sugar) would likely result in injury to the domestic industry but that the expiry of 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

---

1. *Canadian Sugar Institute v. Canada (Attorney General)*, 2012 FCA 163 (CanLII) [*Canadian Sugar Institute*].

2. *Refined Sugar* (1 November 2010) (CITT) [*Refined Sugar*].

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

4. Lantic Inc. and Redpath Sugar Ltd., both domestic producers of refined sugar, are the sole members of the CSI.

the European Union (the order on EU sugar), would not likely result in injury to the domestic industry. The Tribunal therefore made an order, pursuant to paragraph 76.03(12)(b) and subsection 76.04(1), continuing the order on U.S. sugar and made another order, pursuant to subparagraph 76.03(12)(a)(ii), rescinding the order on EU sugar. The Tribunal issued its statement of reasons on November 15, 2010.

7. On December 1, 2010, the CSI filed, with the Court, a notice of application for judicial review of the Tribunal's order rescinding the order on EU sugar.

### **Judgment of the Court**

8. On May 30, 2012, the Court heard the CSI's application for judicial review. On the same day, the Court allowed the application, set aside the Tribunal's order rescinding the order on EU sugar and returned the matter to the Tribunal for reconsideration.

9. In its reasons for judgment, the Court stated that the issue in this judicial review was "... whether the decision of the Tribunal was reasonable having regard to the evidence before it and the reasons given by the Tribunal."<sup>5</sup>

10. In allowing the application for judicial review, the Court stated as follows:

[4] Having considered the written and oral submissions of the [CSI], we are unable to discern from the Tribunal's reasons and the evidence to which we were referred how the Tribunal reached the conclusions it did about the expected volume of refined sugar exports from the named countries during the relevant period, and the operational capacity of new refineries. For that reason, this application for judicial review will be allowed, the order will be set aside with respect to the European Union, and the matter will be returned to the Tribunal for reconsideration.

### **Tribunal's Recommencement of Expiry Review**

11. On June 18, 2012, the Tribunal issued a notice indicating that, further to the Court's judgment in *Canadian Sugar Institute*, it was recommencing the expiry review of the order on EU sugar.<sup>6</sup> In the notice, the Tribunal stated that this expiry review proceeding would be conducted by way of written submissions and set out deadlines for the filing of same.

12. The additional information appended to the notice of recommencement of expiry review indicated that submissions, which were to be limited to argument only,<sup>7</sup> were to address the conclusions of the Tribunal mentioned at paragraph 4 of the Court's reasons for judgment, the impact of these conclusions on the Tribunal's decision not 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, and its determination that the expiry of the order on EU sugar would not likely result in injury to the domestic industry.

13. The CSI, ASBGA and FPC filed submissions with the Tribunal on July 17, 2012. The EU Delegation filed reply submissions with the Tribunal on July 30, 2012, while the CSI and FPC did the same on July 31, 2012.

---

5. *Canadian Sugar Institute* at para. 2.

6. C. Gaz. 2012.I.1820.

7. The additional information made it clear that the Tribunal would not allow the introduction of new or supplemental evidence.

14. The record for this expiry review proceeding consists of the entire record in the expiry review in *Refined Sugar*, as well as the additional submissions received from the parties in the context of the current proceeding.

## ANALYSIS

15. Before proceeding with its analysis, the Tribunal must clearly delineate the exact scope of this proceeding on remand.

### Scope of Expiry Review on Remand

16. As indicated above, in allowing the CSI's application for judicial review, the Court stated that it was "... unable to discern ... how the Tribunal reached the conclusions it did about the expected volume of refined sugar exports from the named countries during the relevant period, and the operational capacity of new refineries."<sup>8</sup> As a result, it set aside the Tribunal's order rescinding the order on EU sugar and stated that "... the *matter* [would] be returned to the Tribunal for *reconsideration*" [emphasis added].<sup>9</sup>

17. In delineating the scope of this expiry review, the following two questions immediately arise. What constitutes the *matter* returned to the Tribunal by the Court? What constitutes a *reconsideration* of that matter, as directed by the Court?

18. As to the first question, the Tribunal notes that, in its submissions, the CSI took the position that the Court's directions must be interpreted in the context of the arguments that it made in its application for judicial review. In this regard, the CSI noted that its oral submissions before the Court were restricted to two key findings made by the Tribunal regarding (i) the likely volume of EU exports and (ii) the loss of traditional nearby export markets for EU refined sugar. The Tribunal agrees that its findings regarding these two issues constitute the *matter* that it must reconsider.

19. As to the second question, the Tribunal is of the view that a *reconsideration* of the matter requires that the Tribunal re-examine these two findings against the evidence on the record, with due regard to the submissions made by the parties in respect thereof. If such reconsideration of the matter results in the alteration of either of these two findings, the Tribunal will then determine the implications, if any, for the ultimate disposition of the broader expiry review.

20. Insofar as the issue of the alleged displacement of EU exports of refined sugar from traditional nearby markets bears directly upon the issue of the volume of EU exports of refined sugar likely to be available for potential entry into the Canadian market if the order on EU sugar is rescinded, the Tribunal considers it convenient to address that issue first.

### Alleged Displacement of EU Exports From Traditional Markets

21. In its statement of reasons in *Refined Sugar*, the Tribunal stated as follows:

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.

---

8. *Canadian Sugar Institute* at para. 4.

9. *Ibid.*



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. 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.*

[Footnotes omitted, emphasis added]

22. The CSI submitted that the Tribunal's finding that the operational capacity of new refineries in traditional nearby markets does not fully replace the EU's historical export volume to these markets is erroneous. In this regard, it argued that both the report submitted by the CSI's expert witness, Mr. Martin Todd, Managing Director, LMC International (LMC), and other evidence that it submitted in its reply to the expiry review questionnaire indicated that new capacity built and operating in traditional EU export markets since 2005 and 2006 was almost double the decrease in historical export volumes to those markets. The CSI was of the view that the evidence disclosed that there were few opportunities to sell EU refined sugar into nearby markets and that even a small part of the available exports (or, for that matter, even the availability of EU refined sugar indicated by quotes from EU exporters) could substantially disrupt the Canadian market and cause material injury to the Canadian industry.

23. FPC submitted that the Tribunal had examined the CSI witnesses and expert witnesses on the subject of capacity additions and did not reach an unreasonable conclusion on the matter.

24. The Tribunal reviewed the evidence on the record in *Refined Sugar*, starting with the LMC report, which shows that, from 2005 and 2006 to 2009, there was a decline of approximately 5 million metric tonnes (MTs) in exports of EU refined sugar.<sup>10</sup> Other evidence on the record, including: the report of McKeaney-Flavell,<sup>11</sup> data prepared by the International Sugar Organization<sup>12</sup> and evidence submitted in the CSI's reply to the expiry review questionnaire,<sup>13</sup> corroborates the magnitude of the decline in exports of EU refined sugar over this period.

25. The evidence on the record also indicates that, during this same period, approximately 10.3 to 11.4 million MTs of refining capacity was added worldwide, much of it in the European Union's traditional export markets.<sup>14</sup> Despite a discrepancy of approximately 1 million MTs between the former estimate provided by LMC and the latter provided by the CSI (which was likely due, in part, to the different time periods covered), both estimates show that the total added refining capacity worldwide exceeded the decrease in EU refined sugar exports.<sup>15</sup>

---

10. Manufacturer's Exhibit A-16, Diagram 3.2, Administrative Record in *Refined Sugar*, Vol. 11.

11. Tribunal Exhibit RR-2009-003-31B, Administrative Record, Vol. 1 at 305.

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

13. Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3 at 76.

14. Manufacturer's Exhibit A-16, Diagram 3.5, Administrative Record in *Refined Sugar*, Vol. 11; Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3 at 76; Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3B at 451-64.

15. The LMC report gives additional capacity for the period from 2006 to 2010, whereas the CSI evidence gives additional capacity for the period from 2005 to 2009. Manufacturer's Exhibit A-16, Diagram 3.5, Administrative Record in *Refined Sugar*, Vol. 11; Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3 at 76; Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3B at 451-64.

26. Moreover, the uncontroverted evidence submitted by the CSI shows that, with the exception of non-EU Europe, the additional capacity built in each traditional EU export region exceeded the decline in EU exports to that region.<sup>16</sup>

27. However, the Tribunal observes that, notwithstanding the decline in EU exports associated with reforms to the European Union's sugar policy, and despite the addition of new refining capacity in traditional EU export markets that exceeded the decline in its exports, the evidence on the record indicates that the European Union continued to export refined sugar to its traditional export markets in 2009, albeit in significantly reduced volumes.<sup>17</sup> However, while those markets remained open to EU refined sugar exports, the Tribunal remains satisfied that the addition of new refining capacity in excess of the European Union's historical export volumes has likely resulted in the partial displacement of exports of EU refined sugar from those markets. The Tribunal is also of the view that this sugar would likely be available for export to Canada under the right economic conditions.

### **Likely Volume of EU Exports to Canada**

#### Exports of Out-of-quota Refined Sugar

28. In *Refined Sugar*, although the Tribunal did not provide a specific estimate of the likely volume of EU out-of-quota refined sugar exports, it found that the volume of EU out-of-quota exports would likely not exceed the European Union's World Trade Organization (WTO) export subsidy commitment level of 1.35 million MTs.

29. The Tribunal was also of the view that the European Union's exportation of 500,000 MTs of sugar above its WTO commitment level in 2010 was a "one-off" event reflecting the extraordinary market circumstances prevailing at the time, including the fact that the No. 5 white sugar price<sup>18</sup> exceeded the EU market price.

30. Indeed, the CSI acknowledged that "...the record evidence could support the conclusion that *out-of-quota EU sugar exports* will not exceed the EU WTO export subsidy commitment level . . .".<sup>19</sup>

31. The Tribunal maintains the view that EU out-of-quota sugar exports will not exceed 1.35 million MTs. The question to be considered by the Tribunal with respect to this out-of-quota sugar is therefore whether exports of such sugar to Canada would likely be more than negligible if the order on EU sugar were rescinded.

32. First, with regard to logistical considerations, a producer of sugar-containing products (SCP), which relies on *just-in-time delivery*, testified that there are supply risks associated with importing EU refined sugar because of the greater shipping distances involved.<sup>20</sup> On the other hand, a witness for the domestic industry countered that there are well-established, frequent and reliable shipping services between Europe

---

16. Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3 at 76; Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3B at 451-64.

17. Manufacturer's Exhibit A-16, Diagrams 3.2, 3.4, Administrative Record in *Refined Sugar*, Vol. 11; Tribunal Exhibit RR-2009-003-15.01, Administrative Record, Vol. 3B at 451-63.

18. 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.

19. Tribunal Exhibit RR-2009-003R-05.03, Administrative Record, Vol. 1 at 156.

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

and Canada.<sup>21</sup> As well, a Tribunal witness indicated that he had imported refined sugar from the European Union in the past and that, absent the current order, the European Union would become another potential source of supply for him.<sup>22</sup> Finally, it was the evidence of LMC that the majority of EU sugar is now shipped in containers, with freight rates for containers being competitive over long distances.<sup>23</sup>

33. Turning to the issue of potentially more attractive alternative markets than Canada, the Tribunal heard testimony that nearby and traditional importers of EU refined sugar, such as neighbouring European countries, the Middle East and parts of Africa, would be able to pay a higher premium for EU refined sugar because of lower freight costs.<sup>24</sup> In the Tribunal's view, it is unlikely that these alternative markets could absorb a significant amount of this refined sugar, especially in view of the demand side effects on EU sugar of newly added refining capacity in those regions.

34. The Tribunal notes that the imposition of anti-dumping and countervailing duties on imports of EU refined sugar has resulted in prices in the Canadian market that allow domestic producers to earn higher refining margins<sup>25</sup> than they would in the absence of such duties. The CSI argued that, if the order on EU sugar were rescinded, EU exporters would export refined sugar to Canada to take advantage of these higher refining margins and that this activity would quickly erode Canadian refining margins down to the prevailing white premium.<sup>26</sup>

35. The Tribunal compared the white premium to domestic producers' refining margins for industrial bagged sugar over the period of review.<sup>27</sup> Allowing for freight costs and handling charges of \$80/MT and duties at the Most-Favoured-Nation (MFN) rate of \$30.86/MT,<sup>28</sup> the refining margins available in Canada, when compared to the returns that would have been earned on sales of refined sugar at the No. 5 white sugar price, would likely have made the Canadian market an attractive destination for EU exporters. The expectation that the white premium would narrow in 2011<sup>29</sup> would have made refining margins in the Canadian market even more attractive to EU exporters.

36. Finally, on the basis of its re-comparison of the landed cost of refined sugar sold to Canada at the No. 5 white sugar price and domestic producers' selling prices for industrial bagged sugar,<sup>30</sup> the Tribunal accepts that, after accounting for freight costs, handling charges and duties at the MFN rate, the landed cost

---

21. *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 94.

22. *Transcript of Public Hearing*, Vol. 2, 8 September 2010, at 236; *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 170-71, 178.

23. Manufacturer's Exhibit A-16 at 45, Administrative Record in *Refined Sugar*, Vol. 11.

24. *Transcript of In Camera Hearing*, Vol. 2, 8 September 2010, at 170-71, 194-95.

25. "Refining margin" is the difference between a refiner's selling price of refined sugar to the customer and its cost of raw sugar.

26. The "white premium" is the difference between world prices for raw and refined sugar, i.e. the difference between the No. 5 white sugar price and the No. 11 raw sugar price. The No. 11 raw sugar price: the Intercontinental Exchange Sugar No. 11 contract is the world benchmark contract for raw cane sugar.

27. Tribunal Exhibit RR-2009-003-32.06, Administrative Record, Vol. 1A at 159; Tribunal Exhibit RR-2009-003-32.05, Administrative Record, Vol. 1A at 156; *Protected Staff Report*, Tribunal Exhibit RR-2009-003-06 (protected), Administrative Record, Vol. 2.1 at 56; *Staff Report*, Tribunal Exhibit RR-2009-003-05, Administrative Record, Vol. 1.1 at 78.

28. The CSI refers to white premium with ocean freight and unloading and MFN duty added as the "landed white premium". Tribunal Exhibit RR-2009-003R-05.03, Administrative Record, Vol. 1 at 137.

29. *Transcript of Public Hearing*, Vol. 1, 7 September 2010, at 104; Manufacturer's Exhibit A-09 (protected) at para. 81, Administrative Record in *Refined Sugar*, Vol. 12.

30. Tribunal Exhibit RR-2009-003-32.06, Administrative Record, Vol. 1A at 159; *Protected Staff Report*, Tribunal Exhibit RR-2009-003-06 (protected), Administrative Record, Vol. 2.1 at 55, 78.

of EU refined sugar in Canada would have been lower than the prices for domestic sugar prevailing at the time, with the differential likely making Canada a viable destination for EU refined sugar.

37. In summary, upon reconsideration of the evidence on the record and having regard to the additional submissions received from the parties in respect thereof, the Tribunal is of the view that the likelihood of EU refined sugar being displaced by new refining capacity in the European Union's traditional export markets, coupled with the high refining margins available in Canada and the fact that Canada is considered a high-quality refined sugar market, would likely result in more than negligible shipments of dumped and subsidized EU refined sugar to Canada if the order on EU sugar were rescinded.

#### Exports of Refined Sugar Under the Inward Processing Relief Program

38. In its statement of reasons in *Refined Sugar*, the Tribunal described the Inward Processing Relief (IPR) program and how it relates to EU refined sugar as follows:

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). 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.

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.

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.

[Footnotes omitted]

39. Having already found that there is a likelihood of more than a negligible portion of EU out-of-quota refined sugar being diverted to Canada, the Tribunal does not feel compelled to delve at length into the CSI's submission that exports of IPR refined sugar would come to Canada if the order on EU sugar were rescinded.

40. The CSI claimed that the European Union would use the approximately 800,000 MTs of excess refining capacity available in 2011-2012 to produce IPR refined sugar for export, provided the sugar could be exported at prices that allowed EU refiners to recover variable costs plus an acceptable contribution to fixed costs.<sup>31</sup>

41. As in previous reviews on sugar,<sup>32</sup> the Tribunal accepts the argument that, given the capital-intensive nature of the industry, there is a production imperative applicable to sugar refining, such that, when confronted with substantial unused refining capacity, EU refiners have a strong economic incentive to use the IPR program to maintain, and realize the economies associated with, high production levels.

---

31. The CSI also added that, in some circumstances, there could be exports priced at or even below variable costs.

32. *Refined Sugar* (2 November 2005), RR-2004-007 (CITT) at para. 74.

42. As noted above, the protection afforded by the imposition of anti-dumping and countervailing duties has resulted in attractive refining margins in the Canadian market that exceed the white premium available at the No. 5 white sugar price. The Tribunal accepts the view that, if the totality of the variable costs associated with EU IPR refined sugar exports is less than the net refining margin available in the Canadian market, it is likely that EU exporters will export IPR refined sugar to Canada at a price that will allow them to cover their variable costs plus a contribution to fixed costs, in furtherance of the production throughput imperative for refined sugar production.

43. The Tribunal accepts that rescission of the order on EU sugar could open a window of opportunity for EU IPR refined sugar to be exported to the Canadian market to take advantage of high Canadian refining margins. Such exports would likely occur until Canadian refining margins were depressed to the white premium plus applicable freight, handling and MFN duties, i.e. the landed white premium. The Tribunal notes that the evidence on the variable cost of production for EU IPR refined sugar, as was acknowledged by the CSI in its submission, was largely based on the witness statement of a single senior official in the Canadian sugar industry.<sup>33</sup> Furthermore, the evidence on certain related variable costs, such as receiving, packaging and warehousing, was based solely on the experience of Canadian refiners.<sup>34</sup> The Tribunal also notes that the minimum acceptable contribution to fixed costs was based on the witness statement provided by another Canadian industry senior official.<sup>35</sup>

44. The Tribunal would have expected the domestic industry to provide a more rigorously substantiated and complete variable cost pricing analysis for EU IPR refined sugar, especially in view of its acknowledgement that the feasibility of IPR exports to Canada was contingent on the ability to earn a return that would allow EU refiners to recover their variable costs with a contribution to fixed costs. As an example, the Tribunal notes that there was no information given as to what items were included in the variable cost of production estimate provided by the witness for the Canadian producers. Furthermore and as correctly observed by the FPC, certain incidental costs, such as the cost of maritime insurance and brokerage fees, were not reflected at all in the evidence on the record.

45. In the absence of other probative evidence on the record, the cost estimates provided by the domestic industry, such as they are, constitute the best information available on the matter. The Tribunal notes that the estimates provided by the domestic industry were not directly challenged by either the EU Delegation or the FPC and that there is a dearth of evidence on the record challenging the credibility of these amounts.

46. Regarding the FPC's contention that the evidence on the record did not afford a reasonable basis upon which the Tribunal could estimate the unspecified incidental costs of landing EU IPR refined sugar in Canada, the Tribunal, upon careful reconsideration, is satisfied that such costs would be subsumed in the deliberately high-side<sup>36</sup> public estimate of freight and unloading provided in the CSI's submission. In this regard, the Tribunal is of the view that, even after such incidental costs are taken into account, the refining margins prevailing in the Canadian market would most likely accommodate the costs of landing IPR refined sugar in Canada.

---

33. Tribunal Exhibit RR-2009-003R-06.03 (protected), Administrative Record, Vol. 2 at 36; Manufacturer's Exhibit A-11 (protected) at para. 63, Administrative Record in *Refined Sugar*, Vol. 12.

34. Manufacturer's Exhibit A-09 (protected), appendix 6, Administrative Record in *Refined Sugar*, Vol. 12.

35. Manufacturer's Exhibit A-15 (protected) at paras. 7, 11, 13, Administrative Record in *Refined Sugar*, Vol. 12.

36. Tribunal Exhibit RR-2009-003R-05.03, Administrative Record, Vol. 1 at 26.

47. While not necessary to the disposition of this remand, given the Tribunal's finding of the likelihood of out-of-quota sugar being diverted to Canada if the order on EU sugar were rescinded, the Tribunal, upon further consideration of the matter and, in particular, of the latitude afforded by current Canadian refining margins to recover variable costs plus a contribution to fixed costs, accepts that there is a likelihood of IPR refined sugar exports landing in Canada, should the order on EU sugar be rescinded.

48. In its submissions, the EU Delegation argued that, since exports of refined sugar under the IPR program are not subsidized and not subject to the WTO export subsidy commitment level of 1.35 million MTs, they cannot be taken into account for purposes of the Tribunal's injury analysis. While the Tribunal has accepted that exports of refined sugar under the IPR program are not subject to the European Union's WTO export subsidy commitments,<sup>37</sup> it does not have jurisdiction to conclude that such exports are not subsidized and thus exclude them from consideration in its likelihood of injury analysis.

49. In this regard, under *SIMA*, responsibility for determining whether the expiry of an order in respect of goods is likely to result in the continuation or resumption of dumping or subsidizing of the goods resides with the CBSA. On June 17, 2010, the CBSA determined, pursuant to paragraph 76.03(7)(a) of *SIMA*, that the expiry of the order on EU sugar would likely result in the continuation or resumption of subsidizing of refined sugar originating in or exported from the European Union. As refined sugar exported under the IPR program is clearly "originating in or exported from the European Union", and given that the CBSA has given no indication in its statement of reasons that such refined sugar was not intended to be covered by its determination, the Tribunal must presume that it is subsidized. The Tribunal notes that, in any event, the EU Delegation has not argued that refined sugar exported under the IPR program from Denmark, Germany, the Netherlands and the United Kingdom is not dumped.

50. The EU Delegation also argued that additional data that have become available since the Tribunal made its orders in *Refined Sugar* show that export volumes of refined sugar from the European Union to Canada have not increased significantly and that, in particular, exports of refined sugar under the IPR program are insignificant. As stated above, the additional information appended to the Tribunal's notice of recommencement of expiry review clearly indicated that submissions were to be limited to argument only and that the introduction of new or supplemental evidence would not be allowed. Following the receipt of the EU Delegation's submissions, and further to the CSI's objection to the introduction of new evidence, the Tribunal sent a letter to the EU Delegation indicating that the new evidence that it introduced would not be taken into consideration in this expiry review proceeding.<sup>38</sup>

51. Even if the Tribunal had decided to take this new evidence into consideration, its probative value would have been heavily undermined by the fact that, since rescission of the order on EU sugar on November 1, 2010, the Canadian sugar industry has been protected from dumped and subsidized imports of EU refined sugar by the uncertainty created by the CSI's application for judicial review and by the risk that, should the application be successful and the order on EU sugar continued, anti-dumping and countervailing duties might be applied to imports of EU refined sugar on a retroactive basis.

## Cumulation

52. 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

---

37. *Refined Sugar* at para. 244.

38. Letter from the Tribunal to the EU Delegation dated August 10, 2012.

goods imported from any of the countries and the goods from any other of those countries, or the like goods of domestic producers. If the Tribunal is not satisfied that cumulation would be appropriate, it must then assess the effects of dumping and subsidizing for each country separately.

53. In its statement of reasons in *Refined Sugar*, the Tribunal stated the following with respect to cumulation:

97. ... 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.*

...

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.

[Emphasis added]

54. As the Tribunal has now determined, in the context of the current proceeding, that the expiry of the order on EU sugar is likely to result in the reappearance of more than a negligible quantity of refined sugar from the European Union in the Canadian market, it can only conclude that refined sugar from both the European Union and the United States would be present in the Canadian market at the same time if the order on U.S. sugar and the order on EU sugar were rescinded.<sup>39</sup>

55. In terms of the actual conditions of competition that exist between U.S, EU and domestically produced refined sugar, the Tribunal recalls the following statement that it made in Review No. RR-2004-007:<sup>40</sup>

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.

---

39. The Tribunal notes that, in *Refined Sugar*, it found that the likely volume of refined sugar that would be exported to Canada, if the order on U.S. sugar were rescinded, would be significant. See *Refined Sugar* at para. 188.

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

56. There is no evidence on the record to suggest that these conditions of competition no longer adhere or are likely change in the foreseeable future. That being the case, the Tribunal is 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.<sup>41</sup>

### **Likelihood of Injury**

57. In *Refined Sugar*, the Tribunal considered 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 separately. With respect to the United States, the Tribunal found that the resumed or continued dumping of refined sugar would likely result in injury to the domestic industry.<sup>42</sup> However, with respect to the European Union, it found that the resumed or continued dumping and subsidizing of refined sugar would not likely result in injury to the domestic industry.<sup>43</sup>

58. In light of the Tribunal's decision on the appropriateness of cumulatively assessing 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, and given its finding in *Refined Sugar* that the resumed or continued dumping of refined sugar from the United States would likely result in injury to the domestic industry, the Tribunal can only conclude that the resumed or continued dumping and subsidizing of refined sugar from the European Union and the resumed or continued dumping of refined sugar from the United States would, together, likely result in injury to the domestic industry.

59. Therefore, upon reconsideration of the matter, the Tribunal finds that the cumulative effect of the expiry of the order on EU sugar and the order on U.S. sugar would likely result in injury to the domestic industry.

---

41. 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, Review No. RR-2004-007 at paras. 57-58). The Tribunal is satisfied that such a cumulative assessment is also appropriate in this instance.

42. *Refined Sugar* at para. 236. The Tribunal notes that this finding was not the subject of the CSI's application for judicial review and was not returned to the Tribunal for reconsideration. As such, this finding cannot be altered or amended.

43. *Refined Sugar* at para. 304.



**CONCLUSION**

60. Pursuant to paragraph 76.03(12)(b) of *SIMA*, the Tribunal hereby continues 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 Michael Saroli

Pasquale Michael Saroli  
Presiding Member

Serge Fréchette

Serge Fréchette  
Member

Jason W. Downey

Jason W. Downey  
Member