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Suspension Agreement
Public Document**

Comments on the Draft Amendment to the Agreement Suspending the Countervailing Duty Investigation on Sugar from Mexico

The International Sugar Trade Coalition Inc. (ISTC)¹ is pleased to submit the following comments on the draft amendment to the December 19, 2014 agreement suspending the countervailing duty investigation of Mexican sugar in the above-referenced case (hereinafter referred to as the “CVD SA”).²

1. The SA Access Formula, as Currently Applied, Violates the WTO Rights of the TRQ Quota Holders.

With one exception,³ ISTC supports all of the proposed amendments to the CVD SA, as well as the proposed amendments to the suspension agreement in the parallel antidumping case. ISTC’s comments relate instead to the provision of the original CVD SA that determines Mexico’s access to the U.S. sugar market, which provision violates the WTO rights of the quota holders. (*See* Section II.R of the December 19, 2014 CVD SA, defining “U.S. Needs.”)

Both the U.S. sugar industry and the quota holders were damaged by Mexico’s dumped and illegally subsidized sugar exports to the United States. The suspension agreements in the antidumping

¹ ISTC is a non-profit association of sugar exporters in countries that hold allocations under the U.S. tariff rate quota (TRQ) on raw sugar. The members of ISTC come from Barbados, Belize, the Dominican Republic, Eswatini, Fiji, Guyana, Jamaica, Malawi, Mauritius, Mozambique, Panama, the Philippines, and Zimbabwe. Together, the members of ISTC represent approximately one-half of the TRQ.

² These comments are submitted in response to the notice provided by the U.S. Department of Commerce (DOC) on November 6, 2019, inviting interested parties to submit comments on the proposed amendment by November 12, 2019.

³ ISTC does not support the proposed amendment to Section V.B.4 of the CVD SA, which has the effect of giving Mexico the exclusive right to supply U.S. sugar import requirements in excess of the bound minimum TRQ, the FTA quotas, and the Export Limits calculated pursuant to the access formula contained in the CVD SA. This proposed amendment violates the WTO rights of the quota holders to supply any U.S. sugar import requirements in excess of the bound minimum TRQ.

and countervailing duty cases against Mexican sugar have succeeded in stabilizing the U.S. sugar market. Unfortunately, the innocent quota holders continue to be damaged. This is because the formula in the CVD SA that governs Mexico's access to the U.S. market unfairly and illegally transfers a portion of the TRQ to Mexico.

Prior to the full implementation of NAFTA's sugar provisions in 2008, TRQ shortfall reallocation⁴ was a routine and almost automatic occurrence. Since 2008, however, TRQ shortfall reallocation has no longer been routinely implemented. Rather, USDA has used shortfall reallocation as a tool to help balance supply and demand in the U.S. market, implementing reallocation in years when the market required additional sugar, but withholding reallocation when Mexico exported more sugar than the market could accommodate.

It is important to remember that the limit imposed on Mexico's access by the CVD SA is a remedy for Mexico's illegally subsidized exports that was intended to eliminate surging surplus exports from Mexico. One would have expected this would also make TRQ shortfall reallocation more likely by restraining unneeded imports from Mexico. Unfortunately, the access formula established in the CVD SA has had the opposite effect. The CVD SA access formula is defined in Section II.R as:

$$\begin{array}{r}
 1.135 \text{ times Total Use} \\
 - \quad \text{Beginning Stocks} \\
 - \quad \text{U.S. Production} \\
 - \quad \text{TRQ Imports} \\
 - \quad \text{Other Program Imports} \\
 - \quad \text{“High Tier” and “Other” Imports} \\
 = \quad \text{“U.S. Needs” (i.e., Mexico’s access)}
 \end{array}$$

Mexico's access under the CVD SA “is calculated based on information published in the WASDE published by USDA . . .” (*See* December 19, 2014 CVD SA, Section II.R.) The term “TRQ Imports,” however, is not defined in the CVD SA, but it logically means either: (1) the amount of the bound minimum TRQ (1,117,195 MT) plus the amounts of the various FTA quotas; or (2) USDA's estimate of actual imports under the TRQ and the FTA quotas, *i.e.*, the bound minimum TRQ and FTA quotas minus estimated shortfall. Both figures are reflected in the WASDE data and, therefore, either would meet the requirements of CVD SA Section II.R.⁵

In fact, it has been the practice of USDA and DOC to calculate Mexico's access under the CVD

⁴ Due to weather and various other factors, not all quota holders fill their TRQ allocations every year. The unfilled amount of the TRQ is typically about 100,000 metric tons (MT) and is known as the TRQ shortfall. Each year USDA polls the quota holders to ascertain which will not fill their allocations and which will have additional sugar available. The amount of the TRQ shortfall is then reallocated by USTR among the quota holders that are able to supply additional sugar, using the standard country allocation percentages as adjusted to reflect the non-performing countries.

⁵ It is axiomatic that the parties to a contract are presumed not to intend an illegal result if the agreement can be construed in a manner that produces a legal outcome. Because use of the full bound minimum TRQ in the CVD SA access formula complies with WTO requirements governing quota access but use of the TRQ minus estimated shortfall does not, one would presume the CVD SA formula was intended to use the full TRQ.

SA using the TRQ and FTA quotas minus estimated shortfall. Unfortunately, this practice has the illogical result of transferring the amount of the TRQ shortfall from the quota holders to Mexico. This is a preferential reallocation of quota access to a non-quota holder (*i.e.*, Mexico) that discriminates against the quota holders and violates the WTO standards for allocating access under TRQs.

It is important to bear in mind that the SA are not part of NAFTA. Accordingly, they are not legally authorized by the WTO derogations for free trade agreements. Rather, the SA are a remedy imposed on Mexico as a sanction against its unfair trade practices. As such, they arise under the U.S. AD and CVD laws, not under the WTO rules governing FTAs.

Equally important, the SA are bilateral agreements between Mexico and the United States. The quota holders are not parties to the SA. Therefore, the SA cannot legally diminish the legitimate rights of the quota holders.⁶ But unfortunately, that is exactly the impact of the CVD SA: the amount of the estimated TRQ shortfall is *de facto* reassigned from the quota holders to Mexico when Mexico's minimum access is calculated in March of each year.⁷

Although it is possible that USDA could implement TRQ shortfall reallocation after the March access calculation has been made, the fact that the amount of the shortfall has already been included in Mexico's minimum access makes it much less likely that the market will require the additional sugar represented by the shortfall to be imported from the quota holders. Rather, the more likely outcome is that Mexico's access is increased by the amount of the TRQ shortfall, and the quota holders' access is reduced by that amount.

2. Using the Full Minimum TRQ in the SA Access Formula Would Cure the WTO Violation.

Fortunately, there is a simple solution to this problem that protects the rights of the quota holders while also providing USDA with additional flexibility in balancing supply and demand in the U.S. sugar market: use the full bound minimum TRQ in calculating Mexico's access under the CVD SA formula, rather than the figure net of estimated shortfall. The amount of estimated shortfall would then remain "on the table," and USDA could subsequently implement TRQ shortfall reallocation among the quota holders if and when it may determine that such imports are required by the market. On the other hand, if market conditions do not require additional imports, USDA could decline to implement TRQ shortfall reallocation. This is not an option under the current interpretation of the CVD SA, however, because the amount of the estimated TRQ shortfall has been *de facto* transferred to

⁶ Nor have the quota holders acquiesced in the SA's diminution of their access rights under the TRQ. On the contrary, ISTC repeatedly urged the U.S. Administration to respect the rights of the quota holders and objected to any decrease in their access under the TRQ as the SA were being negotiated. *See* ISTC letters to USDA, USTR and DOC dated May 5, 2017, June 7, 2017, and June 20, 2017.

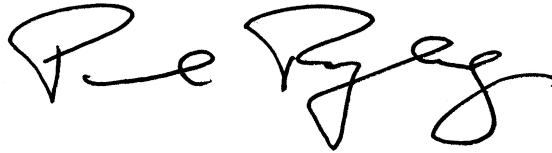
⁷ CVD SA Section V.3 provides that the amount of Mexico's access calculated in March using the information from the March WASDE report will not be reduced later in the year, but may be increased if USDA determines that additional sugar imports are required by the market. Thus, after Mexico's access is calculated in March, the estimated amount of any TRQ shortfall becomes part of Mexico's minimum access.

Mexico and cannot be withdrawn after March.

The U.S. TRQ on raw sugar was first established in 1982. In the early years, the TRQ was frequently set in the range of 2.0-3.0 million MT. After the sugar provisions of NAFTA were fully implemented in 2008, the TRQ has usually been restricted to the bound minimum level of 1,117,195 MT except in highly unusual circumstances. In most years since the SA were established in 2014, the quota holders' access has been *de facto* further reduced below the bound minimum level as a result of the transfer of the amount of TRQ shortfall from the quota holders to Mexico. This dramatic decline in the quota holders' access to the U.S. market has been extremely damaging to the quota holders. The quota holders cannot afford to suffer any further reduction in their access to the U.S. market, especially not for the purpose of providing additional access for Mexico.⁸ In short, it is time to stop punishing the innocent quota holders and rewarding Mexico for its unfair trade practices.

We appreciate your consideration of our views on TRQ shortfall reallocation, which is of great importance to the members of ISTC and the other quota holders under the U.S. TRQ on raw sugar. Please let us know if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Ryberg". The signature is written in a cursive, flowing style with some loops and flourishes.


Paul Ryberg

November 12, 2019

⁸ By contrast, Mexico's access has grown exponentially since NAFTA was implemented. Prior to NAFTA, Mexico was not a net exporter of sugar and held the minimum TRQ allocation of 7,258 MT. In 2012-14, Mexico exported in excess of 2.0 million MT to the U.S. market annually. Even under the SA, Mexico's exports have usually been in excess of 1.0 million MT.

Certificate

I, Paul Ryberg, President of the International Sugar Trade Coalition, Inc. (ISTC), certify that I have read the attached submission of ISTC's Comments on the Draft Amendment to the Agreement Suspending the Countervailing Duty Investigation on Sugar From Mexico, filed on November 12, 2019, pursuant the antidumping and countervailing investigation of sugar from Mexico, Case Nos. C-201-846, A-201-845. In my capacity as President of ISTC, I certify that the information contained in the submission is accurate and complete to the best of my knowledge. I am aware that U.S. law (including, but not limited to 18 U.S. C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. Government. In addition, I am aware that, even if this submission may be withdrawn from the record of the AD/CVD proceeding, the U.S. Department of Commerce may preserve this submission, including a business proprietary submission, for purposes of determining the accuracy of this certification. I certify that a copy of this signed certification will be filed with this submission to the U.S. Department of Commerce.



Signature:

Date: November 12, 2019

U.S. DEPARTMENT OF COMMERCE PUBLIC CERTIFICATE OF SERVICE

I, Paul Ryberg, hereby certify that on November 12, 2019, a copy of the foregoing submission is being served, via first-class mail, on the following parties:

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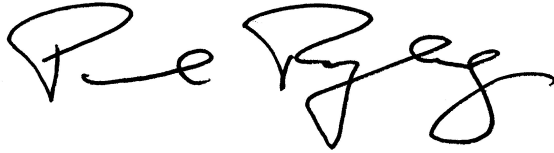
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A handwritten signature in black ink, appearing to read "Aristeo Lopez". The signature is written in a cursive style with a large initial "A" and "L".

Signature:

Date: November 12, 2019