

Ottawa, Wednesday, March 7, 2001

Inquiry No.: NQ-2000-005

IN THE MATTER OF an inquiry, under section 42 of the *Special Import Measures Act*,
respecting:

**CERTAIN GRAIN CORN ORIGINATING IN OR EXPORTED FROM THE UNITED
STATES OF AMERICA AND IMPORTED INTO CANADA FOR USE OR
CONSUMPTION WEST OF THE MANITOBA-ONTARIO BORDER**

FINDING

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping and subsidizing of grain corn in all forms, excluding white dent corn imported by snack food and tortilla manufacturers for use by them in the manufacture of snack food and tortillas, seed corn (used for reproductive purposes), sweet corn and popping corn, originating in or exported from the United States of America, and imported into Canada for use or consumption west of the Manitoba-Ontario border, have caused injury or retardation, or are threatening to cause injury to domestic producers of like goods in that region.

This inquiry is pursuant to the issuance by the Commissioner of the Canada Customs and Revenue Agency of a preliminary determination dated November 7, 2000, and of a final determination dated February 5, 2001, that grain corn originating in or exported from the United States of America and imported into Canada for use or consumption west of the Manitoba-Ontario border is being dumped and subsidized.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping and subsidizing of the aforementioned goods have not caused injury or retardation, nor are they threatening to cause injury to the producers of all or almost all of the production of like goods in Canada, west of the Manitoba-Ontario border.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will be issued within 15 days.

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|---------------------------|---|
| Place of Hearing: | Winnipeg, Manitoba |
| Dates of Hearing: | February 5 to 9, 2001 |
| Date of Finding: | March 7, 2001 |
| Tribunal Members: | Pierre Gosselin, Presiding Member Zdenek Kvarda, Member James A. Ogilvy, Member |
| Director of Research: | Selik Shainfarber |
| Lead Researcher: | Audrey Chapman |
| Researcher: | Joël J. Joyal |
| Economist: | Ihn Ho Uhm |
| Statistical Officers: | Julie Charlebois Marie-Josée Monette |
| Counsel for the Tribunal: | John Dodsworth Eric Wildhaber |
| Registrar Officer: | Claudette D. Friesen |
| Participants: | Peter Clark Gordon LaFortune Sean Clark Yannick Beauvalet John Currie Jin Li for Manitoba Corn Growers Association Inc. |
| | (Representing Domestic Producers) |
| | Jim Linaker Animal Nutrition Association of Canada – Manitoba Division |
| | Bob Zelenka Minnesota Grain and Feed Association |
| | Clifford Z. Sosnow David M. Attwater Kenneth S. Purchase for The Seagram Company Limited |
| | Steven D. Strege North Dakota Grain Dealers Association |

C.J. Michael Flavell, Q.C.
Geoffrey C. Kubrick
Martin G. Masse
J. Peter Jarosz
for The Black Velvet Distilling Company,
A Division of Schenley Distilleries Inc.

Christine Mercier
Animal Nutrition Association of Canada

A. Wayne Anderson
Animal Nutrition Association of Canada –
Alberta Division

Martin T. Rice
Canadian Pork Council

James M. Lyons
for Executive Office of the President
The United States Trade Representative

Peter E. Kirby
for Canadian Snack Food Association

Dennis Kornelsen
Hytek Feeds

Marcel Hacault
Manitoba Pork Council

Randall J. Hofley
Susan M. Hutton
Glenn A. Cranker
Jason L. Gudofsky
Patrick Gay
for Maple Leaf Foods Inc.

Maria Morellato
Lisa Hynes
Roy Millen
for British Columbia Agriculture Council
and Animal Nutrition Association of Canada –
British Columbia Division

J.C. Puckett
Animal Nutrition Association of Canada –
Saskatchewan Division

Fred Homann
Manitoba Chicken Producer Board

Dennis Laycraft
Canadian Cattlemen's Association

J.W. Brandau
Agri Trading Corporation

for Ross Eagleton
Brar Natural Flour Milling Incorporated

Greg A. Tereposky
Kirsten M. Goodwin
Georges Bujold
Roger Nassrallah
for Association of Canadian Distillers

Roger Barnabé
Seed-Ex Inc.

Wanda McFadyen
Manitoba Cattle Producers Association

G.R. Sargent
Alberta Cattle Commission

Morris Zallen
Que Pasa Mexican Foods

(Importers/Exporters/Others)

Ottawa, Thursday, March 22, 2001

Inquiry No.: NQ-2000-005

**CERTAIN GRAIN CORN ORIGINATING IN OR EXPORTED FROM THE UNITED
STATES OF AMERICA AND IMPORTED INTO CANADA FOR USE OR
CONSUMPTION WEST OF THE MANITOBA-ONTARIO BORDER**

Special Import Measures Act — Whether the dumping and subsidizing of the above-mentioned goods have caused injury or retardation, or are threatening to cause injury to domestic producers of like goods in that region.

DECISION: The Canadian International Trade Tribunal hereby finds that the dumping and subsidizing of grain corn in all forms, excluding white dent corn imported by snack food and tortilla manufacturers for use by them in the manufacture of snack food and tortillas, seed corn (used for reproductive purposes), sweet corn and popping corn, originating in or exported from the United States of America and imported into Canada for use or consumption west of the Manitoba-Ontario border, have not caused injury or retardation, nor are they threatening to cause injury to the producers of all or almost all of the production of like goods in Canada, west of the Manitoba-Ontario border.

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|---------------------------|---|
| Place of Hearing: | Winnipeg, Manitoba |
| Dates of Hearing: | February 5 to 9, 2001 |
| Date of Finding: | March 7, 2001 |
| Date of Reasons: | March 22, 2001 |
| Tribunal Members: | Pierre Gosselin, Presiding Member Zdenek Kvarda, Member James A. Ogilvy, Member |
| Director of Research: | Selik Shainfarber |
| Lead Researcher: | Audrey Chapman |
| Researcher: | Joël J. Joyal |
| Economist: | Ihn Ho Uhm |
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| Counsel for the Tribunal: | John Dodsworth Eric Wildhaber |
| Registrar Officer: | Claudette D. Friesen |

Participants:

Peter Clark
Gordon LaFortune
Sean Clark
Yannick Beauvalet
John Currie
Jin Li
for Manitoba Corn Growers Association Inc.

(Representing Domestic Producers)

Jim Linaker
Animal Nutrition Association of Canada –
Manitoba Division

Bob Zelenka
Minnesota Grain and Feed Association

Clifford Z. Sosnow
David M. Attwater
Kenneth S. Purchase
for The Seagram Company Limited

Steven D. Strege
North Dakota Grain Dealers Association

C.J. Michael Flavell, Q.C.
Geoffrey C. Kubrick
Martin G. Masse
J. Peter Jarosz
for The Black Velvet Distilling Company,
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Alberta Division

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Hytek Feeds

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Randall J. Hofley
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for Maple Leaf Foods Inc.

Maria Morellato
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Roy Millen
for British Columbia Agriculture Council
and Animal Nutrition Association of Canada –
British Columbia Division

J.C. Puckett
Animal Nutrition Association of Canada –
Saskatchewan Division

Fred Homann
Manitoba Chicken Producer Board

Dennis Laycraft
Canadian Cattlemen's Association

J.W. Brandau
Agri Trading Corporation

Ross Eagleton
for Brar Natural Flour Milling Incorporated

Greg A. Tereposky
Kirsten M. Goodwin
Georges Bujold
Roger Nassrallah
for Association of Canadian Distillers

Roger Barnabé
Seed-Ex Inc.

Wanda McFadyen
Manitoba Cattle Producers Association

G.R. Sargent
Alberta Cattle Commission

Morris Zallen
Que Pasa Mexican Foods

(Importers/Exporters/Others)

Witnesses:

Leonard Buhler
Sales Manager
Kroeker Machinery Sales Ltd.

Michael B. Coates
President
Manitoba Corn Growers Association Inc.

Kelvin Smith
President
Smith Potato Farms Ltd.

J.L. (Jan) Leishman
Perdue Shafer Inc.

Robert Piggot
Distilling Manager
The Black Velvet Distilling Company
A Division of Schenley Distilleries Inc.

Henry Van de Velde
Special Project Manager
Hytek Feeds

Roger Barnabé
Seed-Ex Inc.

Martin T. Rice
Executive Director
Canadian Pork Council

Theresa Bergsma
Secretary Manager
Manitoba Corn Growers Association Inc.

Shawn McCutcheon
Owner, Self-employed Farmer

Lance Mistelbacher
Director of Risk Management
Maple Leaf Foods Inc.

Rory Wright
Vice President & Plant Manager
The Black Velvet Distilling Company
A Division of Schenley Distilleries Inc.

Eric Peters
President
Henervic Farms Ltd.

Dennis Kornelsen
Feed Mill Manager
Hytek Feeds

Edouard Asnong
President
Canadian Pork Council

Marcel Hacault
Chairman
Manitoba Pork Council

A. Wayne Anderson
Manager
Animal Nutrition Association of Canada –
Alberta Division

Ken Rempel
General Manager
Arborg Feeds Ltd.

Herb Schultz
Office Manager
Animal Nutrition Association of Canada –
Manitoba Division

Arne Mykle
Managing Director
Excel Feeds Inc.

Rick Thiessen
BC Chicken Marketing Board

Ben Brandsema
Director
B.C. Federation of Dairymen's Associations

Chuck Poelman
Chief Financial Officer
Ritchie-Smith Feeds, Inc.

David M. Gibson
Dairy Nutritionist
Ritchie-Smith Feeds, Inc.

J.E. (John) Johnson
Perdue Shafer Inc.

Bob McFadden
District Sales Manager
Pioneer Hi-Bred Limited

Roy S. Eyjolfson
Plant Manager
Seagram Americas

Gordon Mackay
Director, Production Planning
Seagram Americas

Andrew Mayville
Director of Blending & Technical Services
Seagram Americas

Patrick R. Riley
Director, Grains, Cooperage & Bulk Sales
Seagram Americas

Address all communications to:

Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Ottawa, Thursday, March 22, 2001

Inquiry No.: NQ-2000-005

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respecting:

**CERTAIN GRAIN CORN ORIGINATING IN OR EXPORTED FROM THE UNITED
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TRIBUNAL: PIERRE GOSSELIN, Presiding Member
ZDENEK KVARDA, Member
JAMES A. OGILVY, Member

STATEMENT OF REASONS

BACKGROUND

The Canadian International Trade Tribunal (the Tribunal), under the provisions of section 42 of the *Special Import Measures Act*,¹ has conducted an inquiry into whether the dumping and subsidizing of grain corn in all forms, excluding white dent corn imported by snack food and tortilla manufacturers for use by them in the manufacture of snack food and tortillas, seed corn (used for reproductive purposes), sweet corn and popping corn, hereinafter referred to as grain corn, originating in or exported from the United States of America and imported into Canada for use or consumption west of the Manitoba-Ontario border have caused injury or retardation or are threatening to cause injury to the domestic producers of all or almost all of the production of grain corn.

On August 9, 2000, the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), following a complaint filed on behalf of the Manitoba Corn Growers Association Inc. (MCGA), initiated an investigation into whether imports of grain corn were being dumped or subsidized. On August 10, 2000, pursuant to subsection 34(2) of SIMA, the Tribunal issued a notice advising interested parties that it had initiated a preliminary injury inquiry to determine whether the evidence disclosed a reasonable indication that the dumping and subsidizing had caused injury or retardation or were threatening to cause material injury. On October 10, 2000, pursuant to subsection 37.1(1) of SIMA, the Tribunal determined that the evidence disclosed a reasonable indication that the dumping and subsidizing of grain corn had caused injury to the domestic industry.

On November 7, 2000, the Commissioner issued a preliminary determination of dumping and subsidizing.

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

On November 8, 2000, the Tribunal issued a notice of commencement of inquiry.² As part of the inquiry, the Tribunal sent questionnaires to the MCGA, the Department of Agriculture and Agri-Food (Agriculture and Agri-Food Canada), the Manitoba Department of Agriculture, importers, purchasers and the Office of the United States Trade Representative (USTR). From the replies to the questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing and supplementary staff reports.

The record of this inquiry consists of all Tribunal exhibits, including the public and protected replies to questionnaires, all briefs, witness statements, exhibits filed by the parties throughout the inquiry and their replies to the requests for information, as well as the transcript of all proceedings. All public exhibits were made available to the parties. Protected exhibits were made available only to counsel who had filed a declaration and confidentiality undertaking with the Tribunal in respect of the use, disclosure, reproduction, protection and storage of confidential information on the record of the proceedings, as well as the disposal of such confidential information at the end of the proceedings or in the event of a change of counsel.

On February 5, 2001, the Commissioner issued a final determination of dumping and subsidizing respecting grain corn from the United States and imported into Canada for use or consumption west of the Manitoba-Ontario border.

Public and in camera hearings were held in Winnipeg, Manitoba, from February 5 to 9, 2001. The MCGA made submissions and was represented by counsel at the hearing. In addition, Maple Leaf Foods Inc. (Maple Leaf), The Black Velvet Distilling Company, A Division of Schenley Distilleries Inc. (Black Velvet), the British Columbia Agriculture Research Council and the Animal Nutrition Association of Canada – British Columbia Division (ANAC-BC), the Association of Canadian Distillers (ACD), The Seagram Company Ltd. (Seagram), the Canadian Snack Food Association and Brar Natural Flour Milling Incorporated were represented by counsel at the hearing. Hytek Feeds (Hytek), Seed-Ex Inc. (Seed-Ex), the Canadian Pork Council (CPC), the Manitoba Pork Council (MPC), the Animal Nutrition Association of Canada – Alberta Division (ANAC-Alberta), and the Animal Nutrition Association of Canada – Manitoba Division (ANAC-Manitoba) also gave evidence at the hearing, but were not represented by counsel.

The Tribunal heard testimony from a witness from Perdue Shafer Inc., who was subpoenaed by counsel for Black Velvet. At the Tribunal's request, a witness from Pioneer Hi-Bred Limited, and witnesses from Seagram also appeared.

Submissions were received from the USTR, Que Pasa Mexican Foods, Ralston Purina Canada Inc., Champion Petfoods, a division of Champion Feed Services Ltd. and Bow Island Corn Marketing Ltd. (Bow Island). None of these parties participated in the hearing.

At the Tribunal's request, economists from Agriculture and Agri-Food Canada constructed an economic model of the Western Canada grain corn sector and conducted some analyses using this model. Officials of Agriculture and Agri-Food Canada did not participate in the hearing.

2. C. Gaz. 2000.I.3476.

RESULTS OF THE COMMISSIONER'S INVESTIGATION

Based on the results of the investigation, the Commissioner found that the subject goods have been dumped and subsidized and that the margin of dumping and the amount of subsidy were not insignificant. Accordingly, on February 5, 2001, the Commissioner made a final determination of dumping and subsidizing pursuant to paragraph 41(1)(a) of SIMA.

Dumping Investigation

The dumping investigation covered all the subject goods shipped to Canada during the period of investigation from July 1, 1999, to June 30, 2000 (dumping POI). For purposes of the final determination, the overall weighted average normal value, as determined pursuant to subsection 29(1) of SIMA, was US\$2.39 per bushel for 1998 and US\$2.46 per bushel for 1999.³

Of the goods shipped to Western Canada from the United States during the dumping POI, 89 percent were reviewed. The Canada Customs and Revenue Agency (CCRA) found 94 percent of these goods to be dumped. The margins of dumping ranged from 0.2 to 75 percent, expressed as a percentage of normal value. The average margin of dumping for all goods reviewed was 27 percent. This margin amounts to dumping of US\$0.67 per bushel.

The CCRA also examined the shipments of grain corn from the United States to the rest of Canada. The CCRA found that more than 90 percent of these imports into the rest of Canada were dumped by a margin of 18.2 percent.

Subsidy Investigation

The subsidy investigation covered subsidies on U.S. grain corn during the period from January 1, 1998, to June 30, 2000 (subsidy POI). Based on the information available, the CCRA has determined that the following programs provide actionable subsidies:

1. Loan Deficiency Payments and Marketing Assistance Loans;
2. Marketing Loss Assistance Payments; and
3. Federal Crop Insurance programs.

An amount of subsidy for the above programs was calculated for both the 1998 and 1999 crop years. The programs, in aggregate, provided an amount of subsidy of US\$0.35 per bushel in 1998 and US\$0.63 per bushel in 1999. Based on the investigation, the amount of subsidy represents approximately 35 percent of the weighted average export price of the goods for 1999.

The CCRA's findings concerning subsidizing apply to all U.S. production of grain corn. Therefore, the amount of subsidy found in the final determination is also applicable to all U.S. grain corn imported into the rest of Canada.

3. To correspond to the harvest periods, the margins of dumping for shipments to Canada from July 1 to October 31, 1999, were calculated using the 1998 crop year normal value. Margins of dumping for shipments to Canada from November 1, 1999, to June 30, 2000, were calculated using the 1999 crop year normal value.

PRODUCT

Product Definition and Description

The products subject to the Tribunal's inquiry are defined as:

grain corn in all forms, excluding white dent corn imported by snack food and tortilla manufacturers for use by them in the manufacture of snack food and tortillas, seed corn (used for reproductive purposes), sweet corn and popping corn, originating in or exported from the United States of America and imported into Canada for use or consumption west of the Manitoba-Ontario border.

For greater clarity, "grain corn in all forms" within the scope of the investigation includes, but is not limited to, whole kernel corn and processed grain corn, such as cracked, crushed, ground or flaked. Also included is grain corn mixed with other products, including but not limited to millet, which can be separated from the grain corn after importation.

Grain corn imports subject to this inquiry are classified under the following classification numbers:

| | |
|---------------|---------------|
| 1005.90.00.11 | 1005.90.00.14 |
| 1005.90.00.12 | 1005.90.00.19 |
| 1005.90.00.13 | 1005.90.00.99 |

There are many varieties of grain corn. Over the years, grain corn seed companies have created corn hybrids that suit the particular growing conditions of specific areas throughout North America. For example, dent corn is the common variety of grain corn grown in the United States. Dent corn is characterized by the presence of corneous, horny endosperm at the sides and back of the kernel, and by a soft, floury central core extending to the crown of the endosperm. In Western Canada, the most successful seed varieties planted have a flint corn genetic background (dent/flint hybrids). The flint characteristics enable the grain corn to withstand colder temperatures and mature with fewer heat units. The dent/flint hybrid grain corn varieties have a thicker, harder endosperm layer surrounding a smaller granular centre than the full dent varieties. Both dent and dent/flint varieties of grain corn are used for feed products, distillery products and pet food.

Production Process

Planning for corn planting begins in the fall of each year, as producers review what crops were planted in the past year and what rotation they plan to use in the coming year. Producers then review yield data to choose the variety of corn that is most suited to their production area. Corn seed is often purchased in late fall or early winter. Certain buyers and users of grain corn may also coordinate with producers to plant particular varieties most suitable for their needs.

Soil preparation begins in early spring, with optimum planting dates occurring in the first two weeks of May. In June and July, producers cultivate and spray for weed control. During the growing months, producers monitor cornfields to check for disease or pest infestations.

Grain corn is harvested when the kernels are dry and hard, usually from September through October. At harvest, the husk is removed and the corn kernels are separated from the cob. The corn is then dried, putting it in a marketable and transportable condition. Some grain corn is sold at harvest time; however, certain Manitoba producers store their corn on farms and sell at various times throughout the year. Stored grain corn must be monitored to maintain optimum temperature and moisture levels.

Some large grain corn producers in Western Canada make the most efficient use of their harvesting time and machinery by planting assorted varieties of grain corn. Certain grain corn varieties that need fewer heat units are harvested first. Other grain corn varieties that need more heat units and take longer to mature are harvested last.

In recent years, the development of new grain varieties containing genetically modified organisms (GMOs) has expanded in Canada, the United States and Argentina. However, certain end users may specify non-GMO grain corn. This requires segregation of the corn by the producers and/or brokers in the distribution chain.

WESTERN CANADIAN INDUSTRY

There are two associations that represent grain corn producers in Western Canada: the MCGA, which represents grain corn producers in Manitoba; and Bow Island, which represents approximately 12 grain corn producers that planted about 2,500 acres in the 1999-2000 crop year in Alberta. Bow Island indicated to the CCRA that it did not wish to get involved, but did not oppose the MCGA's trade action.

The MCGA was founded in 1970 with an initial membership of 35 corn growers. In 1981, the MCGA was incorporated to enable it to administer the Federal Cash Advance Payment Program. Since 1998, the MCGA is the representative organization for all producers of corn in Manitoba, as designated by the *Manitoba Corn Growers Association Designation Regulation* (designation regulation) issued under the *Agricultural Producers' Organization Funding Act*.⁴ Pursuant to the designation regulation, the MCGA collects a levy of .05 percent (check-off levy)⁵ on sales of grain corn. The purchasers of the grain corn pay the levy. According to the designation regulation, a levy is collected only for grain corn that is sold on the market. Grain corn that is produced and used on the farm by the grower is not sold; therefore, no levies are collected for this production.

In the crop year 1999-2000 (September 1 to August 31), approximately 520 farms produced 10.2 million bushels of grain corn in Western Canada. Manitoba producers accounted for about 92 percent of the western Canadian production of grain corn in that year. It is estimated that approximately 80 percent of grain corn grown in Manitoba is produced in the Red River Valley region.

According to Agriculture and Agri-Food Canada, in the crop year 1999-2000, Alberta produced approximately 8 percent of the western Canadian grain corn, and there was little or no grain corn production in either Saskatchewan or British Columbia.

EXPORTERS

The CCRA identified 133 exporters of the subject goods. Exporters included various elevator operators, brokers, cooperatives and some individual producers. Significant exporters include Farmers Co-op Elevator, Agri Trading Corp., Lansing Grain Company and Cenex Harvest States Co-operatives.

4. Tribunal Exhibit NQ-2000-005-RI-01, Administrative Record, Vol. 9, Tab A, C.C.S.M. c. 18, Man. Reg. 137/98.

5. See Domestic Producers Exhibit 12.1B at 308-309, Administrative Record, Vol. 3; and Tribunal Exhibit NQ-2000-005-06E, Administrative Record, Vol. 1.1 at 225.

IMPORTERS/BROKERS

The CCRA identified 131 importers of the subject goods from the United States during the period of investigation. The Tribunal sent questionnaires to 14 major importers of grain corn from the United States. There is a high level of concentration of imports by relatively few importers. During the crop year 1999-2000, 10 of the importers surveyed by the Tribunal accounted for over 85 percent of the total imports from the United States. Brokers play the dominant role in the market in terms of importing and distributing U.S. grain corn to end users. A small number of end users and a handful of domestic producers import small volumes directly.

MARKETING AND DISTRIBUTION

The commercial corn market in Western Canada operates largely through brokers, although certain direct sales are made by individual producers to end users. Major brokers, such as Agricore Cooperative Ltd., Linear Grain Inc., Perdue Shafer Inc. and Vanderveen Commodity Service Ltd., handle and distribute both domestic and imported corn. Their purchases of domestic grain corn are sold primarily to users in Manitoba, with the exception of the purchases by Agricore Cooperative Ltd. in 1999-2000. Approximately 58 percent of reported sales of imported grain corn are in Manitoba and the balance, in Alberta and British Columbia. On-farm use, farm-to-farm transactions and certain direct sales by individual producers to end users, especially livestock producers, are also important aspects of consumption and the distribution process.

Grain corn is moved either by truck or by rail into and within Western Canada. Domestic corn for use in Manitoba is moved primarily by truck. Imported grain corn is most often moved by rail throughout Western Canada.

Grain corn is used in the animal feed, distiller, pet food, snack food and other market segments. It is estimated that the animal feed segment accounts for approximately 80 percent⁶ of the total market for grain corn in Western Canada. The use of grain corn in Western Canada for distillation into alcoholic beverages is the second predominant market segment. Additional information on these two end-use segments, as well as the snack food segment, is set out below.

Feed Segment

The feed segment consists of feed mills that produce feed for various animals, including hogs, dairy and beef cattle and poultry. As noted above, in Western Canada, animal feed constitutes the largest use of grain corn. In recent years, corn has increasingly been used for animal feed, due to its availability, price and excellent feed characteristics. A major factor influencing the strong demand for grain corn in Manitoba in recent years has been the very significant increase in the livestock industry, particularly the hog sector. Indeed, demand for grain corn in both Manitoba and Western Canada is much larger than western Canadian supply. Therefore, this segment relies heavily on both domestic and imported corn supplies.

In addition to the volume of domestic production of grain corn that is sold for feed on the merchant market, there appears to be a relatively large and important portion of domestic production that is consumed on the farm or traded from farm to farm to feed livestock.

6. Tribunal Exhibit NQ-2000-005-06, Administrative Record, Vol. 1.1 at 106 and Tribunal Exhibit NQ-2000-005-09.2D, Administrative Record, Vol. 1.2 at 102.

Distiller Segment

The alcoholic beverage industry operates within a regulated environment. The federal government controls aspects of plant layout, product standards and product labelling. The success of the distilling industry in Canada is closely related to the availability of crops used in the manufacture of spirits, such as grains, potatoes and, in the case of liqueurs, fruits and nuts.

Canadian distillers in Western Canada, such as Seagram in Gimli, Manitoba, and Black Velvet in Lethbridge, Alberta, use corn as the starch base for the production of alcohol. Rye may be used in small amounts as a flavouring agent. A distiller can obtain the “rye whiskey” flavour by using as little as 5 percent rye grain in the starch base. In Western Canada, this segment also relies on both domestic and imported corn to meet its basic alcohol needs.

Snack Food Segment

The snack food industry in Canada is highly concentrated. In Western Canada, two major enterprises in Alberta are Hostess Frito-Lay and Old Dutch Foods Ltd. (Condillo Foods Ltd.). Although the snack food industry makes up a small portion of the total food and beverage segment, it has exhibited steady growth in recent years.

Snack food producers require corn that is naturally dried, has high density and a hard endosperm. Only corn with such particular characteristics will survive the cooking and soaking process. To meet their requirements, snack food producers in Western Canada have relied solely on imports of grain corn from the United States.

POSITIONS OF PARTIES

Party in Favour of an Injury Finding

MCGA

The MCGA argued that the dumping and subsidizing of the subject goods from the United States have caused and are likely to cause material injury to the production of like goods in the market west of the Manitoba-Ontario border. The MCGA argued that Western Canada is a regional market pursuant to the two-part test set out in subsection 2(1.1) of SIMA. Indeed, the MCGA submitted that the test set out in paragraph 2(1.1)(a) of SIMA has been met because there were no shipments of grain corn from Western Canada into Eastern Canada over the course of the period of inquiry; accordingly, the producers in the market have demonstrated that they sell all or almost all of their production of like goods in Western Canada. The MCGA submitted that the test set out in paragraph 2(1.1)(b) of SIMA is also met because there is no evidence that the western Canadian market is, to any substantial degree, supplied by producers of like goods located elsewhere in Canada.

The MCGA submitted that the evidence on the record demonstrates that all the conditions have been met for purposes of subsection 42(5) of SIMA. The MCGA argued that there is a concentration of dumped and subsidized goods into Western Canada.

The MCGA submitted that the weighted average margin of dumping in Western Canada is significantly higher than it is in Eastern Canada, a fact that is reflected in the average price per bushel for

shipments going into each region. The MCGA pointed to subsidies increasing from US\$0.35 per bushel to US\$0.63 per bushel between 1998 and 1999 and to record total U.S. government farm program payments of US\$28 billion for the year ending September 2000. The MCGA argued that the price effects of the dumped and subsidized imports have directly impacted on the price of grain corn in Western Canada and the financial results of its members.

The MCGA submitted that it is the designated representative of all Manitoba producers of grain corn and that Manitoba's production of grain corn represents 95 percent of the production in Western Canada. The MCGA argued that the injury suffered by Manitoba corn producers demonstrates injury to producers of all or almost all of the production of grain corn in Western Canada.

The MCGA submitted that U.S. grain corn has always impacted the western Canadian market. In this regard, the dumped and subsidized grain corn from the United States sets the price in Western Canada. In the MCGA's view, the price of grain corn in Western Canada, at any given time, is the U.S. price adjusted for exchange and brokerage, plus an amount for freight. The availability of low backhaul rates from the United States has also put downward pressure on the price of western Canadian grain corn. Manitoba growers have been forced to either accept the low U.S.-determined market price or hold on to their grain corn and wait for improved prices.

These depressed prices have, in turn, resulted in depressed returns to Manitoba corn producers in the form of reduced gross margins. In this connection, the MCGA pointed to the Tribunal record that shows a sharp decline in profitable sales, as well as deeper losses on unprofitable sales between the 1998-99 and 1999-2000 crop years. In addition, the MCGA argued that the depressed prices, margins and profits for grain corn produced in Western Canada have frustrated growth in the industry. In support of its submissions, four producers appeared at the hearing on behalf of the MCGA to attest to the injury that they have suffered. The MCGA pointed out that the reduced returns experienced by its membership have had a compounding negative effect because of increased costs. As a result, the MCGA argued that its members have been impacted with respect to their lines of credit and their ability to pay down debt, to the point that the survival of some farms is also in jeopardy.

A number of MCGA members opposed the present dumping and subsidizing complaint. These producers were respondents to a poll taken by Hytek, a feed mill and importer of corn. The MCGA argued that a number of the companies appearing on the Hytek list have other interests, which in the MCGA's view, disqualifies them from being part of the domestic industry pursuant to Article 4.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* and the similar provision of the *Agreement on Subsidies and Countervailing Measures*. For example, the MCGA noted that there are a number of organizations on the list that have joint venture operations in swine-raising in Manitoba, as well as involvement in importing.

The MCGA also submitted that, given projected record U.S. corn production, as well as the absence of any imminent increases in U.S. corn prices or reductions to the subsidy programs, there was a threat of material injury to the domestic industry.

Finally, the MCGA noted that certain parties to this inquiry had requested and argued at the hearing in favour of a number of exclusions. The MCGA was prepared to agree to the following: (1) yellow dent corn originating in Indiana and imported by Seagram, its agents, successors and assigns, for use by it in the production of its bourbon-flavoured whiskies; (2) yellow dent corn imported by snack food manufacturers for use in the production of snack food and tortillas; (3) yellow dent corn imported from Nebraska for use in

the production of flour by Brar Natural Flour Milling Incorporated; and (4) certified organic yellow dent corn.

All other exclusion requests were opposed by the MCGA.

Parties Opposing an Injury Finding and/or Parties Requesting Exclusions

Maple Leaf and Landmark Feeds Inc. (ML-LF)

Maple Leaf is a Canadian food processor with diverse activities involving pork and poultry, including feed production and marketing. Landmark Feeds Inc. (Landmark), one of the largest feed companies in Western Canada, is a wholly owned subsidiary of Maple Leaf. ML-LF argued that the conditions needed to establish the existence of a regional market have not been met. In this regard, ML-LF submitted that the condition “where the demand in the market is not to any substantial degree supplied by producers of like goods elsewhere in Canada” must be considered in light of the present circumstances and the expected patterns of supply in the future. This included the fact that shipments of Ontario corn to British Columbia have been recorded since November 7, 2000, and are anticipated to continue.

Further, ML-LF contended that the Tribunal, in conducting its inquiry, must take into account the separate effects of each of the subsidizing and the dumping when examining how or whether they have caused or threaten to cause injury to the domestic industry. In ML-LF’s view, the Tribunal’s analysis must also question whether the actionable U.S. subsidy programs themselves, and not just the subsidized imports, are the source of any alleged injury.

In addition to the above, ML-LF argued that the evidence on the record has not established that the dumping or subsidizing of the subject goods from the United States has caused, or threatens to cause, material injury to the producers of all or substantially all grain corn production in Western Canada. ML-LF submitted that it was necessary to go behind average pricing data in order to ascertain the highly variable prices paid to Manitoba corn growers for their production over the course of the period of inquiry. Doing so, according to ML-LF, showed that many sales occurred at prices that afforded Manitoba corn producers reasonable rates of return or better and, therefore, that these producers are not being injured.

ML-LF also submitted that the decline in prices for grain corn in Western Canada is a result of the declining prices of substitute feed components, notably wheat and barley, and is not caused by the dumping and subsidizing of the subject goods from the United States. ML-LF further argued that an assessment of the extent of any injury to the domestic industry could not be fully accomplished, given the absence from the record of data relative to domestic farm revenue earned from commodity “hedging” and pro rata government support payments for domestic corn grown under the Whole Farm Support Program. Finally, ML-LF argued that dramatic increases in grain corn planting in Manitoba over the last five years suggest the opposite of material injury. Moreover, the forecast for the imminent and foreseeable future is improved market conditions for grain corn and full sales for MCGA members. Therefore, no threat of injury exists.

However, ML-LF requested that, should the Tribunal nevertheless find that the domestic industry has suffered injury or that there is a threat of injury, it be granted an exclusion for imports of grain corn during the fourth quarter of each crop year (July to September inclusively). In ML-LF’s experience, Manitoba corn producers have been unable to guarantee supply in reasonable volumes over that period.

Hytek

Hytek, a feed mill operator and grain importer, submitted that the evidence presented in this inquiry does not satisfy the requirements set out in law in order for the Tribunal to find that the domestic industry has suffered material injury. Indeed, Hytek submitted that all or almost all of the corn growers in Western Canada have not been injured by the dumping or subsidizing of U.S. corn.

Specifically, according to Hytek, the evidence on the record does not demonstrate that all or almost all of the domestic production has been injured. Hytek contended that the MCGA evidence includes levy information for only 57 percent of the corn produced in Western Canada and that 57 percent clearly does not satisfy the test of all or almost all of the production.

In addition, Hytek noted that it had conducted a poll of corn producers in Manitoba and that the producers that responded to the poll represent 38 producers and over 15,000 acres of western corn production. Each of the producers, who together represent close to 15 percent of western corn production, had signed a declaration submitting that it has not been injured.

Further, in support of its contention that all or almost all of the production in Western Canada has not been injured, Hytek referred to situations where producers have the option to forward contract and, thereby, protect their prices against lower, prevailing cash or spot prices.

Seed-Ex

Seed-Ex, a grain dealer and importer, submitted that the allegations presented by the MCGA are not representative of all or almost all of the grain corn producers in Manitoba.

Seed-Ex argued that a substantial amount of domestic production of like goods is insulated from injury by way of its dedication to on-farm use in feed rations and farm-to-farm transfers. Seed-Ex estimated that up to 30 percent of grain corn grown in Western Canada is grown by integrated and diversified livestock operations that use corn as a component of their feed ration and that an additional 10 percent of grain corn grown in Manitoba is traded from farm to farm. In Seed-Ex's view, these grain corn producers are not being injured by the importation of U.S. grain corn.

Another factor that Seed-Ex advanced to support the contention that many producers are not being injured is the high degree of cost variability from operation to operation. For example, certain corn production efficiencies and synergies are achievable on a diversified farm. As a result, producers that use their corn to feed animals on the farm often have lower costs to produce grain corn than non-diversified grain corn producers.

Seed-Ex further submitted that, since producers in Manitoba cannot supply the entire market demand for grain corn, they are in a position to choose the times to sell their corn, and, as a result, many producers attract premium prices for their corn at many times throughout the year. For example, opportunities for premiums arise by picking market highs, through spot market deliveries to feed mills that may have temporary corn shortages during inclement weather supply interruptions, and by selling corn with characteristics specific for distillery use.

ACD

The ACD submitted that the evidence on the record does not provide a sufficient basis to substantiate the domestic industry's claims that the dumping or subsidizing of the subject goods from the United States has caused it to suffer material injury or that it is faced with such a threat. The ACD argued that the conditions precedent for a finding of injury or threat of injury pursuant to subsection 42(5) of SIMA do not exist. In particular, the ACD submitted that prices for grain corn in Western Canada have declined as a result of the prices of alternative feed components, notably wheat and barley, and not because of the dumping and subsidizing of the subject goods from the United States.

The ACD submitted that the exceptional circumstances giving rise to the existence of a regional market do not exist and have not been proved in this case.

The ACD echoed arguments made by Maple Leaf with respect to the need for the Tribunal, in conducting its inquiry, to take into account the separate effects of each of the subsidizing and the dumping when examining how or whether they have caused or threaten to cause injury to the domestic industry.

Black Velvet

Black Velvet, a major distiller in Alberta, submitted that Western Canada does not meet the exceptional circumstance requirements of a regional market nor has the MCGA demonstrated, by way of positive evidence or otherwise, injury to the producers of all or almost all of the production of grain corn. Black Velvet further submitted that the MCGA has failed to demonstrate a causal relationship between the dumped and subsidized subject goods and any claims of injury or threat thereof.

Black Velvet made submissions addressing the reasons why it should be granted an exclusion for grain corn that meets certain technical requirements pertaining to fermentable carbohydrates (starch), in the event that the Tribunal were to make a finding of injury or threat thereof. Black Velvet alleged that the production process of its distillery requires grain corn that contains at least 75 percent fermentable carbohydrates, which is a level that Manitoba corn producers can neither provide nor guarantee.

ANAC-Manitoba

ANAC-Manitoba made written submissions to the Tribunal arguing that the case has not been made that Manitoba corn prices are depressed because of the dumping and subsidizing of the subject goods from the United States, at least not to the extent that the domestic industry would have suffered material injury. ANAC-Manitoba submitted that low barley and wheat prices are the cause of depressed grain corn prices in Western Canada.

CPC and MPC

The CPC and the MPC made separate written submissions to the Tribunal, arguing that the domestic industry has not suffered nor is it likely to suffer injury from the dumping and subsidizing of the subject goods from the United States. In support of this position, the CPC and the MPC pointed to ongoing growth in the domestic industry in terms of increased market share, increased planted acreage and the absence of stock buildup. The CPC and the MPC further argued that there is no indication that the favourable trends experienced by the domestic industry are about to take a turn for the worse.

British Columbia Agriculture Council (BCAC) and ANAC-BC

The BCAC and ANAC-BC made submissions in opposition to the imposition of duties on the subject goods imported from the United States for use in British Columbia, arguing that British Columbia should not be part of the regional market for the purposes of this inquiry. In the alternative, they made arguments in support of an exclusion from duties on corn imported from the United States into Canada for use or consumption in British Columbia on the grounds that, as Manitoba was a net importer of corn, growers would concentrate on that market and thus could not offer a reliable supply to B.C. users. Further, Manitoba corn is unsuitable for the B.C. feed industry. Failing a provincial exclusion, a specific exclusion was requested with respect to corn suitable for rolling and steam flaking for use in the B.C. dairy and poultry feed markets. The BCAC and ANAC-BC submitted that such exclusions were warranted in light of Manitoba's inability to supply the quantity and quality of grain corn required by the B.C. market.

ANAC-Alberta

ANAC-Alberta made written submissions to the Tribunal requesting that any injury finding exclude the province of Alberta. ANAC-Alberta argued that the province of Alberta should not be part of the regional market as alleged to the contrary by the MCGA and that, historically, Manitoba has not been a significant supplier of grain corn to Alberta.

USTR

The USTR made written submissions to the Tribunal, arguing against the imposition of duties on the subject goods imported from the United States. The USTR argued, *inter alia*, that any injury that the domestic industry may have experienced is due to the effect of other feed grains, particularly western Canadian barley.

According to the USTR, imported corn has virtually no effect on prices for corn grown in Manitoba or other western provinces. In this regard, the USTR noted that a considerable portion of imported corn is used to make end products in Western Canada for which much of the corn grown in Manitoba is unsuitable. Given such limited product substitutability, the USTR argued that one would not expect to find a price effect from the imports subject to the investigation.

The USTR did not appear at the hearing.

PRELIMINARY ISSUES

Before examining the regional market and the injury issues in this case, the Tribunal will address two preliminary legal matters that were raised by counsel.

Standing

The ACD argued that the MCGA lacks standing to file a complaint in the present case and that the Tribunal, therefore, lacks the jurisdiction to consider this case. The ACD acknowledges that the Tribunal has no explicit authority in SIMA to consider the issue of standing, but states that this absence of express language creates uncertainty, which requires the Tribunal to refer to provisions of the *Agreement*

Establishing the World Trade Organization,⁷ in particular the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*⁸ and the *Agreement on Subsidies and Countervailing Measures*.⁹ These provisions, according to the ACD, require the Tribunal to assess support for the complaint by the domestic industry before an investigation into injury can be conducted.

SIMA does not explicitly require the Tribunal to assess standing prior to initiating an injury inquiry. In the Tribunal's view, however, this does not create uncertainty. In its decision in *Bacteriological Culture Media*,¹⁰ the Tribunal expressed the view that, unlike subsection 31(2) of SIMA, subparagraph 42(1)(a)(i) does not require "support" by domestic producers to trigger the Tribunal's jurisdiction. As was stated in that case:

Although, prior to the World Trade Organization (WTO) amendments to SIMA, the Tribunal did, in most cases, treat the "major proportion" issue as a standing requirement, [the Tribunal] is of the view that the recent inclusion of a specific standing requirement before Revenue Canada in subsection 31(2) of SIMA now makes it clear that there is no such requirement before the Tribunal. In other words, the relevant provisions of SIMA go to the issue of injury and not standing.¹¹

Nor does the Tribunal have the authority to revisit or review the CCRA's decision to initiate its investigation, in which the Commissioner was required to determine the issue of standing.

Article 5 of the Anti-dumping Agreement refers to a requirement that the relevant authorities assess support of the domestic industry for the complaint at the initiation of an investigation into the existence, degree and effect of any alleged dumping.¹² In the Tribunal's view, this reference can only be read to indicate that the investigating authority must ensure that the standing requirements have been satisfied and that the assessment of support occurs at the initiation of an investigation. It does not, in the Tribunal's view, impose an additional obligation on the investigating authorities to ensure support for the complaint at each stage of that investigation, once it has been determined at initiation.

The Tribunal will not, therefore, consider whether the MCGA had standing to file a complaint on behalf of the domestic industry.

Cross-Cumulation

Counsel for the ACD and counsel for ML-LF argued that the effects of dumping and subsidizing should be considered separately, as neither SIMA nor the WTO agreements allow the Tribunal to cross-cumulate these effects when considering the likelihood of material injury to the domestic industry.

7. 15 April 1994, online: World Trade Organization http://www.wto.org/english/docs_e/legal_e/final_e.htm.

8. *Ibid.* [hereinafter Anti-dumping Agreement].

9. 15 April 1994, online: World Trade Organization http://www.wto.org/english/docs_e/legal_e/final_e.htm. [hereinafter SCM Agreement].

10. *Findings* (31 May 1996), *Statement of Reasons* (17 June 1996), NQ-95-004 (CITT).

11. *Ibid.*, *Statement of Reasons* at 10.

12. Article 5.1 of the Anti-dumping Agreement reads, in part, as follows: "an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry."

Article 5.4 of the Anti-dumping Agreement reads, in part, as follows: "An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed . . . by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry."

More specifically, counsel argued that the Tribunal must determine whether the operation of the subsidy programs identified by the Commissioner has had an effect on the price of the subject goods. The Tribunal is not convinced that the arguments raised by counsel are persuasive.

Rather, the Tribunal is of the opinion that nothing in SIMA precludes a cumulative assessment of the injurious effects of both dumped and subsidized goods and that such a view is in accordance with Canada's international trade obligations. Indeed, while Article 3.3 of the Anti-dumping Agreement and Article 15.3 of the SCM Agreement address cumulation within agreements, they are silent on the issue of cumulation between agreements, or cross-cumulation.

In the Tribunal's view, however, the purpose of these agreements is to provide a remedy against unfair trade practices causing injury to a domestic industry. To deny a remedy where the cumulative effect of dumping and subsidy practices is injury to a domestic industry would frustrate the purpose of these agreements. The Tribunal is also of the view that, regardless of whether dumping, subsidizing or both are present, there is a single price effect, which is the cause of injury to the domestic industry.

The Tribunal notes that the Commissioner has determined that the subject goods are dumped and subsidized. Questioning the mechanism by which actionable subsidies have been transmitted to the price of the subject goods would be tantamount to a reexamination of the determination made by the Commissioner. The Tribunal will not and cannot engage in such a review. Rather, the Tribunal must consider dumping and subsidizing as determined by the CCRA. In this context, the Tribunal's role, therefore, is to address the extent to which the dumped and subsidized goods are producing an effect that may warrant the protection that SIMA can afford to the domestic industry.

The foregoing is in keeping with subsections 37.1(1) and (2) of the *Special Import Measures Regulations*¹³ which prescribe certain factors for the Tribunal to consider in making its injury, retardation or threat of injury finding. The primary focus of these factors is the effect or impact that dumped or subsidized goods have had or may have on a number of economic indicia.

In accordance with previous rulings on this subject,¹⁴ the Tribunal adds that to contend that SIMA prohibits the Tribunal from considering together the effects of dumping and subsidizing when the same goods are being both dumped and subsidized, or are likely to be both dumped and subsidized, is unreasonable, given the impossibility of separating the effects of dumping from the effects of subsidizing those same goods. Indeed, the dumped and subsidized goods are, in fact, one and the same goods, they are fungible, and their price is attributable, in part, to dumping and, in part, to subsidizing. The effects of dumping and subsidizing, however, are so closely intertwined that it is impossible to unravel them in order to allocate specific or discrete portions to the dumping and subsidizing. Had Parliament intended not to allow the Tribunal to cross-cumulate in such situations, it would have said so clearly and directly.

Therefore, in the following analysis, the Tribunal has assessed the total effect of the dumping and subsidizing, taken together, of the subject goods from the United States.

13. S.O.R./95-26 [hereinafter SIMA Regulations].

14. See *Black Granite Memorials, Finding* (20 July 1994), *Statement of Reasons* (4 August 1994), NQ-93-006 (CITT), and *Order and Statement of Reasons* (19 July 1999), RR-98-006 (CITT); *Refined Sugar, Findings* (6 November 1995), *Statement of Reasons* (21 November 1995), NQ-95-002 (CITT); and *Certain Hot-rolled Carbon Steel Plate, Finding* (27 June 2000), *Statement of Reasons* (12 July 2000), NQ-99-004 (CITT).

ANALYSIS

Pursuant to subsection 42(1) of SIMA, the Tribunal is required to “make inquiry . . . as to whether the dumping or subsidizing of the goods [to which the preliminary determination applies] . . . has caused injury or retardation or is threatening to cause injury”. Injury is defined in subsection 2(1) of SIMA, as “material injury to a domestic industry”. In this inquiry, the domestic industry is based on a regional market, specifically the producers of like goods west of the Manitoba-Ontario border.

Given these circumstances, the Tribunal must consider the following issues. First, the Tribunal must determine what constitutes like goods. The Tribunal must then consider what constitutes the domestic industry, in particular whether producers of grain corn west of the Manitoba-Ontario border constitute a separate regional market. The Tribunal must also determine whether there is a concentration of the subject goods into the regional market. Finally, the Tribunal must consider whether the dumping and subsidizing of certain grain corn to which the preliminary determination applies have caused or are threatening to cause material injury to the domestic producers of all or almost all of the production of like goods in that regional market.

Since injury and threat of injury are distinct findings, the Tribunal needs to make a finding regarding threat of injury only in circumstances in which it finds that the domestic industry has not suffered injury.

Like Goods

The Tribunal must determine which domestically produced goods are like goods to the grain corn from the United States.

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 goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

The subject goods are defined by the Commissioner as “grain corn in all forms, excluding white dent corn imported by snack food and tortilla manufacturers for use by them in the manufacture of snack food and tortillas, seed corn (used for reproductive purposes), sweet corn and popping corn, originating in or exported from the United States of America and imported into Canada for use or consumption west of the Manitoba-Ontario border”.

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 appearance), their method of manufacture, their market characteristics (such as substitutability, pricing and distribution) and whether the goods fulfil the same customer needs.

The Tribunal examined the like goods/class of goods issue at the preliminary injury stage of this case and has been presented with no additional information that would lead it to alter the views that it expressed at that time. As the Tribunal stated then, there are many varieties of both imported and domestic grain corn.¹⁵ However, all the varieties share certain fundamental characteristics. First, they are all members of the same

15. Unless otherwise specified, domestic corn refers to corn grown in Western Canada, as defined by the regional market.

biological genus, *Zea mays*. They are all grown and cultivated in a similar way, and they are all grains that are borne on cobs enclosed in husks. Indeed, in terms of physical appearance, the evidence indicates that different corn varieties, whether dent or dent/flint hybrids, are not readily distinguishable from each other, even by many farmers.¹⁶ On the basis of their common characteristics, the Tribunal finds that domestic grain corn varieties, regardless of whether they are grown and used on-farm or sold off-farm, are like goods.¹⁷

In light of the above, the Tribunal is of the view that all grain corn produced in Western Canada, as described in the Commissioner's product definition, is "like goods" to the subject goods and that it comprises a single class of goods for the purposes of this inquiry.

Existence of a Regional Market

The Tribunal must address two issues: whether the conditions for a regional market are met; and what the domestic industry is in that regional market. Looking at the first issue, subsection 2(1) of SIMA defines "domestic industry" as:

other than for the purposes of section 31 and subject to subsection (1.1), 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 except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, "domestic industry" may be interpreted as meaning the rest of those domestic producers.

Subsection 2(1.1) of SIMA stipulates the circumstances in which a domestic industry may be based on a regional market. Subsection 2(1.1) states:

In exceptional circumstances, the territory of Canada may, for the production of any goods, be divided into two or more regional markets and the domestic producers of like goods in any of those markets may be considered to be a separate domestic industry where

- (a) the producers in the market sell all or almost all of their production of like goods in the market; and
- (b) the demand in the market is not to any substantial degree supplied by producers of like goods located elsewhere in Canada.

Conditions

The first condition for a regional market is that the producers in the region sell all or almost all of their production in the region. It is clear from evidence on the record that there were no shipments of grain corn from Western Canada into Eastern Canada for the crop years from 1994-95 to 1999-2000.¹⁸

The second condition for a regional market is that the demand in the market must not be supplied to any substantial degree by producers of like goods located elsewhere in Canada.

16. *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 274, and Vol. 2, 6 February 2001, at 323-24.

17. The issue of on-farm use is discussed further in the section entitled "Injury to All or Almost All of the Production".

18. *Public Pre-hearing Staff Report*, Tribunal Exhibit NQ-2000-005-06, Administrative Record, Vol. 1.1 at 34.

Evidence on the record shows that there have been no shipments from Eastern Canada into Western Canada for the crop years from 1997-98 to 1999-2000.¹⁹ There is evidence on the record projecting shipments in 2000-2001 of one million bushels of grain corn to Western Canada from Ontario, should the anti-dumping and countervailing duties remain in place. In fact, initial shipments had already taken place at the time of the hearing. However, as far as the initial projection for 2000-2001 is concerned, there was subsequent evidence filed which shows that the forecast of one million bushels has been revised downward substantially.²⁰

The Tribunal is of the view that it is required to determine whether the regional market exists during the period of inquiry, not whether it will exist based on projections which are, by their nature, uncertain. Whether trade flows of grain corn within Canada change substantially in the future will depend upon transportation costs and market prices of grain corn throughout Canada, which, in turn, will be impacted by the Tribunal's finding in this inquiry.

Therefore, the two required conditions established by subsection 2(1.1) of SIMA are met. For the purposes of this inquiry, therefore, the Tribunal will consider producers of grain corn west of the Manitoba-Ontario border as a separate domestic industry.

Domestic Industry

The Tribunal will now consider what constitutes the domestic industry in the regional market in this case. The MCGA argued that certain producers of grain corn located in Western Canada either imported the subject goods or were related to importers of the subject goods and should not be considered part of the domestic industry, in accordance with Article 4.1(i) of the Anti-dumping Agreement. The Tribunal notes that the provisions of the Anti-dumping Agreement referred to by the MCGA have been incorporated into Canadian legislation in the definition of "domestic industry" found in subsection 2(1) of SIMA, which has been cited above. Specifically, according to this provision, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, "domestic industry" may be interpreted as meaning the rest of those domestic producers.

The Tribunal finds that there is no compelling reason to exclude any producers from the domestic industry. Insofar as importing is concerned, the evidence indicates that producers of grain corn in Western Canada import very little grain corn from the United States directly.²¹

With regard to related parties, the MCGA alleges that certain grain corn producers are shareholders in swine operations²² along with others that are importers or that are related to importers. For example, evidence at the hearing indicated that Elite Swine Inc. (Elite Swine) was an investor in a number of swine operations. Since Elite Swine was owned by Landmark, an importer of the subject goods, the MCGA argued that corn producers participating in these swine operations should be excluded from the domestic industry.

19. *Ibid.*

20. Domestic Producers Exhibit A-01, Tab 7, Administrative Record, Vol. 11.

21. Tribunal Exhibit NQ-2000-005-07D (protected), Administrative Record, Vol. 2.1 at 192-97.

22. Other Parties Exhibit N-05 (protected), Administrative Record, Vol. 14.3.

The Tribunal notes that subsection 2(1.2) of SIMA sets out the circumstances in which a domestic producer is related to an exporter or an importer of dumped or subsidized goods, for the purposes of this section. Subsection 2(1.2) states:

For the purposes of the definition of “domestic industry” in subsection (1), a domestic producer is related to an exporter or an importer of dumped or subsidized goods where

- (a) the producer either directly or indirectly controls, or is controlled by, the exporter or importer,
- (b) the producer and the exporter or the importer, as the case may be, are directly or indirectly controlled by a third person, or
- (c) the producer and the exporter or the importer, as the case may be, directly or indirectly control a third person,

and there are grounds to believe that the producer behaves differently towards the exporter or importer than does a non-related producer.

Further, subsection 2(1.3) of SIMA provides that a person is deemed to control another “where the first person is legally or operationally in a position to exercise restraint or direction over the other person”.

Having regard to these provisions, the Tribunal notes that the swine operations alluded to by the MCGA are entities which allow numerous investors to group together to make an investment in the hog industry. These investors may be individuals or corporations, and they may include both farmers and non-farmers. A farmer is hired to run the hog barns on behalf of the investors that do not appear to have any day-to-day involvement in the operations.²³ Given how these swine operations are structured and managed, the Tribunal finds that relationships among participants are too diffuse to establish control for the purposes of SIMA. Moreover, with respect specifically to Landmark, according to the evidence, although it uses imported corn, it does not import it directly to any significant degree.²⁴

The definition of “domestic industry” in SIMA clearly indicates that the Tribunal has the discretion to exclude or not to exclude those producers that are related to exporters or importers or that are themselves importers of the subject goods. The Tribunal does not find that the circumstances in this case warrant excluding any producers from the domestic industry on the grounds argued by the MCGA.

Therefore, for the purposes of this inquiry, the Tribunal determines that the grain corn industry in Western Canada comprises all grain corn producers west of the Manitoba-Ontario border. Specifically, this includes producers that grow grain corn for sale into the merchant market, producers that trade grain corn with nearby farms and producers that grow corn for on-farm use. The issue of on-farm use is discussed later in these reasons under the section entitled “Injury to All or Almost All of the Production”.

Concentration in a Regional Market

As previously noted, because this case involves a regional market within the meaning of Article 4.1(ii) of the Anti-dumping Agreement and Article 16.2 of the SCM Agreement, certain conditions must be met in order to find injury. In this regard, SIMA incorporates these conditions in subsection 42(5), which defines two conditions for injury to a regional market, as follows:

- (a) [if] there is a concentration of those goods into the regional market; and

23. *Transcript of In Camera Hearing*, Vol. 1, 5 February 2001, at 2-3; and *Transcript of Public Hearing*, Vol. 2, 6 February 2001, at 307-314.

24. Tribunal Exhibit NQ-2000-005-05 (protected), Administrative Record, Vol. 2.D at 136.

(b) [if] the dumping or subsidizing of those goods has caused injury or retardation or is threatening to cause injury to the producers of all or almost all of the production of like goods in the regional market.

This section examines the condition set out in (a) above. The second condition regarding injury, as set out in (b), will be discussed later.

The Tribunal has traditionally applied three tests, alone or in combination, to measure concentration. Before considering these tests, the Tribunal notes that, based on the final margins and volumes of dumping and subsidizing found by the CCRA, 94 percent of U.S. imports into Western Canada reviewed by the CCRA were found to be dumped and 100 percent were subsidized. In the rest of Canada, 90 percent of U.S. imports reviewed were found to be dumped and 100 percent were subsidized. Using the CCRA's calculations for the percentage of dumped and subsidized imports in Eastern and Western Canada, where applicable, the three concentration tests indicate the following.

In the first test, the density test, the volume of dumped and/or subsidized imports into the regional markets is compared to the grain corn supplied by Canadian producers within the market. A density test result of more than 1.0 indicates that there are more dumped and/or subsidized imports in the regional market than domestically produced goods (the subject imports have a higher market share than the domestic products). In the 1999-2000 crop year, the density test result was 1.3 for Western Canada.

The second test, the distribution test, establishes the proportion of the dumped and subsidized goods imported into all of Canada that is represented by the quantity of those goods imported into the regional market. In the 1999-2000 crop year, dumped and subsidized imports into Western Canada represented a 35 percent share of the total dumped and subsidized imports into Canada.

The third test is the ratio test. It compares the regional market's share of the total dumped and/or subsidized imports (i.e. the distribution test result, in this case, of approximately one third) to the regional market's share of total grain corn consumption in Canada. The ratio test is generally considered to be the most robust indicator of whether there is a concentration of imports of the subject goods into the regional market.

The western Canadian regional market comprised about 7 percent of the total Canadian consumption and its imports were 35 percent of the total dumped and subsidized U.S. imports into Canada in the 1999-2000 crop year. This produces a ratio test result of about 5:1, meaning that the regional market's share of dumped and/or subsidized imports is about 5 times as great as its share of Canadian grain corn consumption.

On the basis of the above results, especially the ratio test, the Tribunal finds that there is a concentration of dumped and subsidized imports from the United States into Western Canada.

Injury to the Regional Market

Before addressing the issue of injury to "all or almost all of the production", the Tribunal will first examine certain key performance indicators for the industry and the market, as a whole, as summarized in the following table.

State of the Market and Industry

Domestic production of certain grain corn in Western Canada increased by 59 percent, rising from 6.4 million bushels in the 1997-98 crop year to 10.2 million bushels in 1999-2000. Production increased an additional 13 percent in 2000-2001, to 11.5 million bushels.

Total consumption of grain corn in Western Canada increased by 45 percent between 1997-98 and 1999-2000, growing from 17.7 million bushels to 25.6 million bushels. The major factor influencing the increased demand for grain corn in Western Canada has been the strong and steady growth in livestock, particularly hog, production.

Over the time period from 1997-98 to 1999-2000, imports of grain corn from the United States into Western Canada increased by 23.6 percent, from 11 million bushels to 13.6 million bushels.

The domestic share of the western Canadian market increased from 36.2 percent in 1997-98 to close to 40 percent in 1999-2000. Over the same period, the market share attributed to the importers of the subject grain corn declined from about 62 percent to 53 percent.

The overall weighted average market price for Manitoba grain corn, based on the "check-off" return data,²⁵ declined from \$3.00 in 1998-99 to \$2.88 in 1999-2000, a 4 percent decline. The simple average spot prices for grain corn in Manitoba and Minneapolis, Minnesota, tracked each other closely, as they both declined by close to 23 percent between the 1997-98 and 1999-2000 crop years.

Average total cost of production per acre for grain corn in Manitoba increased by almost 5.5 percent between 1997-98 and 1999-2000, going from \$255 per acre to \$269 per acre. On a per bushel basis, total costs decreased between 1997-98 and 1998-99 due to a marked increase in the average yield.

Western farm cash receipts of grain corn increased from \$16.7 million in 1997-98 to \$19.7 million in 1999-2000. Considering the average cost of production of \$2.86 per bushel and an average selling price of \$2.88 per bushel, producers of grain corn in Manitoba earned \$0.02 per bushel over total costs, on average, a rate of return of approximately half of one percent in 1999-2000. This is down from the 1998-99 crop year when Manitoba corn producers earned, on average, \$0.24 per bushel, a rate of return of close to 9 percent over fully absorbed costs.

25. *Supra* note 5.

| Key Market and Industry Performance Indicators | | | | |
|--|---|----------------|------------------|------------------|
| | Crop Year September 1 to August 31 | | | Est. |
| | 1997-98 | 1998-99 | 1999-2000 | 2000-2001 |
| Western Canada | | | | |
| Seeded Area (000s acres) | 79.1 | 99.8 | 125.0 | 160.1 |
| Harvested Area (000s acres) | 79.1 | 94.9 | 110.0 | 139.9 |
| Yield (bushels/acre) | 81.0 | 94.3 | 92.8 | 82.2 |
| Carry-in Stocks | 5.0 | 4.7 | 3.8 | 2.0 |
| Domestic Production (million bushels) | 6.4 | 8.9 | 10.2 | 11.5 |
| Imports from the United States (million bushels) | 11.0 | 13.1 | 13.6 | N/A |
| Carry-out Stocks | (4.7) | (3.8) | (2.0) | N/A |
| Western Canada Consumption | 17.7 | 22.9 | 25.6 | N/A |
| Market Shares—Western Canada⁽¹⁾ | | | | |
| Domestic Production (%) | 36.2 | 38.9 | 39.8 | N/A |
| Imports from the United States (%) | 62.1 | 57.2 | 53.1 | N/A |
| Total Canada | | | | |
| Carry-in Stocks | 23.9 | 36.1 | 42.3 | N/A |
| Domestic Production (million bushels) | 282.7 | 350.9 | 360.7 | N/A |
| Imports from the United States (million bushels) | 55.6 | 33.7 | 38.7 | N/A |
| Exports to the United States | (5.3) | (16.0) | (9.2) | N/A |
| Exports overseas | (0.2) | (21.3) | (14.1) | N/A |
| Carry-out Stocks | (36.1) | (42.3) | (50.0) | N/A |
| Total Canada Consumption | 320.6 | 341.1 | 368.3 | N/A |
| Market Shares—Total Canada⁽¹⁾ | | | | |
| Domestic Production (%) | 88.2 | 102.9 | 97.9 | N/A |
| Imports from the United States (%) | 17.3 | 9.9 | 10.5 | N/A |
| Average Grain Corn Prices (\$/bushel) | | | | |
| Weighted Average Western Domestic Prices ⁽²⁾ | N/A | 3.00 | 2.88 | N/A |
| Simple Average Spot Price (in Manitoba) ⁽³⁾ | 3.42 | 2.89 | 2.64 | N/A |
| Simple Average Spot Price (in Minneapolis) ⁽⁴⁾ | 3.43 | 2.83 | 2.61 | N/A |
| Average Grain Corn Cost of Production⁽⁵⁾ | | | | |
| Total Cost of Production (\$/acre) | 255.32 | 260.42 | 268.80 | N/A |
| Total Cost of Production (\$/bushel) | 3.20 | 2.76 | 2.86 | N/A |
| Financial | | | | |
| Western Farm Cash Receipts of Grain Corn (million \$) | 16.7 | 18.2 | 19.7 | N/A |

Note: Numbers may not add up due to rounding.
N/A = not available.

1. Market shares do not add up to 100 percent due to carry-in stocks, carry-out stocks and exports.
2. Western domestic prices are based on the actual weighted average prices reported, as per the MCGA “check-off” data. Tribunal Exhibit NQ-2000-005-06E, Administrative Record, Vol. 1.1 at 225.
3. Simple average spot prices. *Pre-hearing Staff Report*, Tribunal Exhibit NQ-2000-005-006, Administrative Record, Vol. 1.1 at 121.
4. Simple average spot prices. *Pre-hearing Staff Report*, Tribunal Exhibit NQ-2000-005-006, Administrative Record, Vol. 1.1 at 125.
5. Average costs are fully absorbed costs, including operating, fixed and labour costs.

Injury to All or Almost All of the Production

Having established the existence of a regional market and the concentration of the subject goods in that market and having examined certain key market and industry performance indicators, the Tribunal now

considers whether the dumping and subsidizing of the subject goods have caused material injury to the domestic industry in Western Canada.

The Tribunal notes that the injury standard in SIMA for a regional market case gives full effect to the regional market injury provisions in the WTO agreements.²⁶ This standard is stringent and denotes Parliament's intention to make it more difficult in a regional market case than in a national market case to find injury or threat of injury. Specifically, subsection 42(5) of SIMA provides that the Tribunal "shall not" make a finding of injury or threat of injury unless the subject goods have caused or threaten to cause injury "to the producers of all or almost all of the production of like goods in the regional market" [emphasis added].

In applying the injury standard, the expression "all or almost all" has been interpreted by the Tribunal and its predecessor, in past regional cases, to mean 90 percent or more.^{27,28} By comparison, in a national market case, under SIMA, an injury finding may be made if it is established that the producers of at least "a major proportion" of the domestic production have been injured by the subject imports.²⁹ The "all or almost all" threshold of a regional market case is considerably higher than the "major proportion" threshold in a national market case. Indeed, the term "major proportion" has been interpreted, in various past cases, to mean less than 50 percent.³⁰

Having regard to the foregoing, the injury standard to be met in this case is not whether the subject goods have caused or threaten to cause injury to the producers of a major proportion or to a majority or even

26. See Article 4.1(ii) of the Anti-dumping Agreement and Article 16.2 of the SCM Agreement.

27. See *Beer, Finding* (2 October 1991), *Statement of Reasons* (17 October 1991), NQ-91-002 (CITT) (99 percent of the production); *Iceberg (Head) Lettuce, Finding* (30 November 1992), *Statement of Reasons* (15 December 1992), NQ-92-001 (CITT) (95 percent of the production); and *Concrete Panels, Finding* (27 June 1997), *Statement of Reasons* (14 July 1997), NQ-96-004 (CITT) (100 percent of the production). By contrast, injury was not found in *Fertilizer Equipment* because the complainant could not demonstrate that it met the requirement of "all or almost all of the production". See *Fertilizer Equipment, Finding* (30 September 1987), *Statement of Reasons* (15 October 1987), CIT-3-87 (CIT) at 13-14.

28. In interpreting the phrase "all or almost all" in the context of establishing the existence of a regional market, a slightly lower threshold, on occasion, has been accepted. See *Certain Hot Rolled Carbon Steel Concrete Reinforcing Bars, Finding* (22 December 1987), *Statement of Reasons* (7 January 1988), CIT-8-87 (CIT) at 7, where the Tribunal's predecessor wrote as follows: "Taking an average of the data for the entire review period, 1984 to mid-1987, WCSL has sold 88 per cent of its Vancouver production in the B.C. market. That percentage has fluctuated from year to year, but at no time has it fallen below 80 per cent". In *Fresh Cauliflower, Finding* (4 January 1993), *Statement of Reasons* (19 January 1993), NQ-92-003 (CITT) at 12, the Tribunal wrote as follows: "the following table shows that, since 1988, B.C. growers have sold in excess of 80 percent of their fresh cauliflower production in British Columbia. In crop year 1991, this amount was 92 percent of total sales". In *Iceberg (Head) Lettuce*, a percentage of 88 percent was also accepted. Generally, however, the threshold has been higher than 90 percent in this context. In this regard, see, *inter alia*, *Potatoes, Finding and Statement of Reasons* (4 June 1984), ADT-4-84 (CIT) (little or no production shipped to other provinces); *Yellow Onions, Finding and Statement of Reasons* (30 April 1987), CIT-1-87 (CIT) (90 percent of production sold in regional market); *Fertilizer Equipment*, (100 percent of production sold in regional market); and *Concrete Panels*, (100 percent of production sold in regional market).

29. See definitions of "injury" and "domestic industry" under subsection 2(1) of SIMA.

30. See *Japan Electric Manufacturers Association v. Anti-dumping Tribunal*, 32 D.L.R. (4th) 222 (F.C.A.) and *McCulloch of Canada Ltd. v. Anti-dumping Tribunal* [1978] 1 F.C. 222.

to most of the corn production in Western Canada. The standard is whether the evidence discloses that the subject goods have injured the producers of all or almost all of the grain corn production in Western Canada.

In addressing the injury issue, the Tribunal notes, as described earlier under “State of the Market and Industry”, that the average price per bushel of domestic grain corn declined over the crop years from 1997-98 to 1999-2000. Over the same period, average domestic production costs per acre increased, although costs per bushel declined as a result of higher yields. However, on a per bushel basis, the price declines were larger than the cost reductions and, therefore, on average, there was a marked decline in the financial performance of domestic corn growers. This is illustrated by evidence submitted by the MCGA that indicates that, in the 1998-99 crop year, about 95 percent of Manitoba corn sales were profitable, but that, in the 1999-2000 crop year, only some 50 percent of sales were profitable.³¹ The MCGA also presented four witnesses who attested to the financial difficulties that they were having as a result of the decline in corn prices.

The above-noted decline in domestic corn prices reflects a similar decline in the Canadian dollar value of U.S. corn imports into Western Canada over the past three years.³² The U.S. import prices, in turn, correspond to declining corn prices in the U.S. market over the same period.³³ The question that the Tribunal will first address is whether there is a causal link between the decline in U.S. import prices of the subject goods that the CCRA has found to be dumped and subsidized, the decline in domestic prices and the ensuing injury suffered by corn growers in the regional market.

In considering this question, the Tribunal notes that it has been provided with two views as to how corn prices are set in Manitoba. Both views are partial answers to the pricing question and are necessarily coloured by their proponent’s role in the transaction. On the one hand, witnesses for the MCGA testified that Manitoba corn prices are determined by the price of U.S. corn at nearby U.S. border locations plus a “basis” for transportation and handling, translated into Canadian dollars at prevailing exchange rates. This view is reflected in information provided by an official of Agriculture and Agri-Food Canada as to how Manitoba prices are determined under different sets of circumstances.³⁴

The other view comes from witnesses from the feed industry, including feed mills and feed lots, as well as from traders and brokers. They testified that the prices of all feed grains, including corn, wheat and barley, tend to track each other. This is largely because they can be substituted for each other in most feed rations.³⁵ They explained that the use of feed grains in feed formulations depended on their respective nutrient value and their relative prices. Generally speaking, the formula that provided the required food energy for the least cost determined the type and volume of grains that they would buy at a given time. Thus, in their view, the volume of Manitoba corn used in feed formulations reflects its value relative to the value of competing substitute feed grains.

31. Domestic Producers Exhibit A-22, Administrative Record, Vol. 11.

32. *Public Pre-hearing Staff Report*, Tribunal Exhibit NQ-2000-005-06, Administrative Record, Vol. 1.1 at 29.

33. *Public Pre-hearing Staff Report*, Tribunal Exhibit NQ-2000-005-06, Administrative Record, Vol. 1.1 at 125 and 127.

34. Other Parties Exhibit B-01, Annex A, Administrative Record, Vol. 13.

35. Tribunal Exhibit NQ-2000-005-15.1, Administrative Record, Vol. 3.1 at 54-58; *Transcript of Public Hearing*, Vol. 3, 7 February 2001, at 544 and 614; and Tribunal Exhibit NQ-2000-005-09.2G, Administrative Record, Vol. 1.2 at 234.

In the Tribunal's opinion, the domestic price of grain corn in Western Canada is determined by a complex interaction of many market forces. In this regard, both of the above views, taken together, help to explain how prices are determined in the regional market. It is apparent that the prices of the principal feed grains have tended to move up and down in a related manner. It is also clear that, under normal circumstances, the specific prices of the different grains, at any given moment, can and do move relative to each other.³⁶ When such relative price changes occur, feed formulations may be adjusted³⁷ to account for the new relative value of each of the grains. For example, when the price of corn increases relative to the price of wheat or barley, less corn and more wheat or barley may be used in feed ration formulas.³⁸ This substitution effect tends to limit and circumscribe the extent to which the price of corn may move relative to substitute grains. Indeed, the restraining effect that substitute grains have on domestic corn is evident in the apparent inability of Manitoba corn prices to rise, following the preliminary determination, by more than some \$0.25 to \$0.30 per bushel,³⁹ despite the imposition of provisional duties of US\$1.58 per bushel on corn imports from the United States.⁴⁰ Moreover, this muted price rise has been accompanied by a considerable decline in the volume of corn used in feed mixes by feed mills.⁴¹

However, the fact that feed grains interact in the above way is not inconsistent with the view that landed U.S. corn import prices determine domestic corn prices. Once a feed mill has decided that it must have corn in a feed mix, or whenever a broker goes to the market to buy corn for a client, it will look for the most competitive price available.⁴² To determine that, it will ascertain relevant U.S. prices as provided by various wire services, such as Reuters.⁴³ The Canadian dollar value of U.S. corn at nearby U.S. locations, landed in the regional market, will become the benchmark for the prices that it is willing to bid for corn.⁴⁴ In these circumstances, a domestic grower will have only two choices: sell its corn at or close to the prevailing benchmark U.S. import price or hold on to its corn in the hope that better prices will become available at some future date.⁴⁵

With that in mind, the evidence shows that, in the 1999-2000 crop year,⁴⁶ demand for corn was surging in the regional market, as the price of domestic and imported corn was steadily falling and the proportion of corn used in feed mixes was increasing.⁴⁷ According to the evidence, over this period, farmers

36. *Public Pre-hearing Staff Report*, Tribunal Exhibit NQ-2000-005-06A, Administrative Record, Vol. 1.1 at 159.

37. *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 237 and 257.

38. *Transcript of Public Hearing*, Vol. 3, 7 February 2001, at 614; and *Transcript of In Camera Hearing*, Vol. 2, 6 February 2001, at 93 and *Transcript of Public Hearing*, Vol. 2, 6 February 2001 at 343.

39. *Transcript of In Camera Hearing*, Vol. 4, 8 February 2001, at 183.

40. Approximately CAN\$2.37 at an exchange rate of 1.50. Tribunal Exhibit NQ-2000-005-4, Administrative Record, Vol. 1 at 216.19.

41. The precipitous decline in corn consumption appears to reflect not only the relative rise in the price of corn but also other factors reported by witnesses, such as the temporary withdrawal from the market by buyers that reacted with some shock and confusion to the huge provisional duty that was imposed on November 7, 2000. *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 274, and Vol. 3, 7 February 2001, at 548-49; and *Transcript of In Camera Hearing*, Vol. 1, 5 February 2001, at 48.

42. *Transcript of In Camera Hearing*, Vol. 2, 6 February 2001, at 128.

43. *Transcript of Public Hearing*, Vol. 2, 6 February 2001, at 340.

44. *Transcript of In Camera Hearing*, Vol. 2, 6 February 2001, at 92-93.

45. *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 230-31.

46. Which roughly corresponds to the period covered by the POI.

47. This was a function not only of relative price but also of disease issues and increased hog production. *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 185 and 257-58; Tribunal Exhibit NQ-2000-005-24.11, Administrative Record, Vol. 5.2 at 164-65.

that sold some or all of their corn soon after harvest did so, on average, at prices which reflected low U.S. import prices.⁴⁸ Producers that held their crop back in the hopes of higher prices later, typically did no better. On the contrary, many fared even worse, as U.S. import prices and, hence, domestic prices trended lower throughout the crop year.⁴⁹

On the basis of the foregoing, the Tribunal concludes that the price of imports from the United States has had a depressing influence on the price of corn in the regional market in the 1999-2000 crop year. The price declines reduced average industry profit margins and caused financial injury to many corn producers. Therefore, the Tribunal finds that there is a causal link between the financial injury suffered by many domestic corn growers in the regional market and the dumped and subsidized imports.

The above analysis and conclusions are based primarily on average data and, accordingly, they describe the general condition of the industry and the market. This kind of global examination is typical of past agricultural cases. However, in this case, considerable evidence has been filed regarding market subsectors and individual circumstances that has led the Tribunal to look at the situation in a much less aggregated way than in other cases. The Tribunal considers it particularly necessary to go beyond the average data and conduct a more specific analysis in this case, in light of various issues that have arisen which are discussed below in regard to the “all or almost all” test.

In this connection, the Tribunal notes the detailed sales information that was compiled by the MCGA as part of its “check-off” system of levies. It reveals that widely varying prices were actually realized by individual domestic corn growers, in 1998-99 and in 1999-2000, not only from day to day, week to week and month to month, but also on sales made on the very same day.⁵⁰ It is evident from this that some individual producers were able to achieve better prices than others, and better prices than average, for their corn at various times throughout the crop year, despite the presence of dumped and subsidized imports from the United States.

The ability to achieve better than average prices may reflect the fact that, since western regional corn demand far outstrips domestic supply, domestic producers can sometimes obtain certain premiums based on their local presence and accessibility. For example, if buyers experience temporary or unexpected supply shortages, local growers can react more quickly than can more distant import sources of supply. Buyers are prepared to, and may have to, pay a premium in these circumstances.⁵¹ Some producers have long-standing relationships with feed companies or brokers that, based on quality, reliability and conditions of supply, allow them to obtain a premium for their corn. Other producers, using forward selling to reduce their market risk,

48. In determining the level of U.S. prices, the Tribunal has relied heavily on the export pricing data gathered by the CCRA for its POI, Tribunal Exhibit NQ-2000-005-5 (protected), Administrative Record, Vol. 2D at 24-304, adjusted for freight to estimate landed U.S. import prices. Although there is other pricing data on the record, some of which show higher average U.S. prices than the CCRA data, virtually all the witnesses who spoke about import prices at the hearing generally reported prices that corresponded more closely to the CCRA data than the other data.

49. *Public Pre-hearing Staff Report*, Tribunal Exhibit NQ-2000-005-06, Administrative Record, Vol. 1.1 at 121.

50. Tribunal Exhibit NQ-2000-005-RI-01B, Administrative Record, Vol. 9, Tab B at 1-66.

51. For example, while Black Velvet consumes primarily imported corn, it also sources a certain amount of its requirements locally from the Bow Island Co-operative (BI). According to Black Velvet, BI provides an emergency backup source for its distilling operation and, accordingly, Black Velvet pays a premium for this local corn. *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 264, and Vol. 2, 6 February 2001, at 345, 444-45 and 466.

may achieve a premium over average prices.⁵² In addition, certain major corn users, such as Seagram,⁵³ pay a higher than average price for domestic corn because of certain qualities or characteristics that they require for their operations. Whatever the reasons, it is apparent from the evidence that there are instances where a certain proportion of domestic producers are able to take advantage of a particular set of circumstances to obtain prices that depart, in some cases substantially, from the average.

Turning from prices to costs, the evidence also establishes that individual growers have costs of production that differ significantly from each other, as well as from average production costs. Indeed, the four corn producers that testified on behalf of the MCGA reported a cost spread of about \$0.80 per bushel⁵⁴ among themselves, in the 1999-2000 crop year, even though they all farm in or near Carman, a highly productive region of the Red River Valley in Manitoba.

Given actual prices and individual costs, it is apparent that some producers have been able to achieve reasonable rates of return, even in the 1999-2000 crop year when U.S. import prices were at their lowest levels. This is evidenced by the MCGA's profitability analysis, which shows that, despite an overall declining trend in profitable sales over the past two years, some 10 percent of the corn sold in the regional market in 1999-2000 achieved a net profit of between 11 and 20 percent.⁵⁵ It may be argued that these rates of return could have been even higher in the absence of dumping and subsidizing. However, it is not obvious to the Tribunal that the inability to achieve even higher returns than were actually realized would amount to injury of a material nature. Be that as it may, it is apparent to the Tribunal from the evidence that not all domestic corn producers that sell their corn on the commercial market have been affected to the same extent by the dumped and subsidized imports.

Moreover, there is another category of corn grower that has also not been affected by dumped and subsidized imports in the same way as the majority of producers that operate in the commercial market. This category, which appears to be a growing segment of the regional corn industry,⁵⁶ produces corn to be consumed on the farm on which it is grown (on-farm use).⁵⁷ The issue addressed in the analysis that follows is whether the situation of producers that grow corn for feed use on their own farms is relevant to the Tribunal's injury analysis and, if so, to what extent they have been affected by dumped and subsidized imports.

In considering this issue, the Tribunal first notes that, to the best of its knowledge, there is no public data available that segregate on-farm corn use from commercial corn sales. However, all the production data that it has gathered in this inquiry have included on-farm use in the figures reported for total regional corn production. This includes information received from Agriculture and Agri-Food Canada, the Manitoba Department of Agriculture, Statistics Canada, the CCRA, the Ontario Corn Producers' Association and the MCGA itself.⁵⁸ All of these sources estimated the size and growth rate of the domestic industry, as well as

52. Other Parties Exhibits L-01 and L-05, Administrative Record, Vol. 13.3.

53. Seagram's distillery is located in Gimli, Manitoba. It is the single largest consumer in the regional market of domestic corn for which it pays a premium. *Transcript of In Camera Hearing*, Vol. 4, 8 February 2001, at 181.

54. *Transcript of In Camera Hearing*, Vol. 1, 5 February 2001, at 11, 13, 19 and 20.

55. Domestic Producers Exhibit A-22, Administrative Record, Vol. 11.

56. *Infra* note 75 and *Transcript of In Camera Hearing*, Vol. 2, 6 February 2001, at 122.

57. On-farm use is not unique to corn. Indeed, a significant volume of feed barley, an important feed substitute for corn, is also consumed on-farm, Tribunal Exhibit NQ-2000-005-09.2I, Administrative Record, Vol. 1.2 at 266.

58. Other Parties Exhibits O/P-13 at 1-2, Administrative Record, Vol. 13.4; and *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 156.

its share of total consumption compared to the subject imports, on the basis of both commercial production and production for on-farm use, without distinguishing between the two.

Furthermore, as indicated under “Like Goods”, although there are many different corn varieties, the corn sold in the merchant market is substantially the same as corn that is grown and fed on-farm. Moreover, the corn that is fed on-farm has the same end use as the vast majority of the domestic and imported corn that is sold on the commercial market, namely, animal feed, primarily hog feed. In other words, corn consumed on-farm or sold off-farm, as well as imported corn, is essentially interchangeable when used for animal feed, which is, by far, the largest end use for corn in the regional market.⁵⁹

The Tribunal also notes that the *Manitoba Corn Growers Association Designation Regulation* makes no distinction between different types of corn growers. Consistent with this, the MCGA states that it is the designated representative for all corn growers in Manitoba.⁶⁰ Indeed, in conducting a survey to establish the level of industry support for this trade action, the MCGA approached not only corn growers that sell their corn off-farm but also corn growers with livestock operations that feed corn on-farm.⁶¹ Finally, it is clear from the testimony of witnesses who appeared on behalf of the MCGA that on-farm users are considered to be part of the domestic corn-growing industry, regardless of what their other farming activities might be.⁶²

In view of the foregoing, the Tribunal finds that production for on-farm use constitutes domestic production of like goods and, therefore, that producers of corn used on-farm are part of the domestic regional industry.⁶³ As such, the conditions and circumstances of the growers of such corn are relevant to the determination of whether there is injury to producers of all or almost all of the production. Accordingly, the Tribunal will examine the extent to which on-farm users are or have been affected by the dumped and subsidized imports.

In this connection, the Tribunal notes that diversified farmers that have livestock operations and that also grow corn to feed their livestock are able to achieve certain synergies between their animal and grain operations. For example, the farmer can use the manure from the hog operation to fertilize the corn fields, thus reducing fertilizer costs.⁶⁴ Indeed, there is evidence on the record which suggests that some on-farm users have costs of production that range between 15 and 40 percent⁶⁵ below industry average costs of

59. *Public Pre-hearing Staff Report*, Tribunal Exhibit NQ-2000-005-06, Administrative Record, Vol. 1.1 at 106; and *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 130, and Vol. 3, 7 February 2001, at 651.

60. Tribunal Exhibit NQ-2000-005-12.1B, Administrative Record, Vol. 3 at 308; *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 58; and Tribunal Exhibit NQ-2000-005-RI-01, Administrative Record, Vol. 9.

61. Domestic Producers Exhibit A-23 (protected), Vol. 12; and *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 66 and 68.

62. *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 65-66; and Tribunal Exhibit NQ-2000-005-RI-01, Administrative Record, Vol. 9, Tab B at 1-14.

63. See earlier discussion under “Like Goods” and “Domestic Industry”.

64. *Transcript of Public Hearing*, Vol. 3, 7 February 2001, at 560 and 561.

65. *Transcript of Public Hearing*, Vol. 3, 7 February 2001, at 561.

production⁶⁶ depending on the costs of other materials such as fertilizer and on the overall efficiency of the farm operation.

In addition to the synergies, diversified farmers have an interest in growing corn on-farm because it tends to fix or at least stabilize an important feed input cost in their livestock operations. While livestock operators that buy their corn on the commercial market are fully exposed to the up and down cycles of corn prices, on-farm users are effectively insulated from most market price fluctuations.⁶⁷ In fact, the focus of on-farm users is the cost of their feed inputs, not the market price of grain corn. This indifference to market prices, combined with their lower-than-average costs of production, puts them on quite a different footing from commercial corn growers, as far as the effects of dumped and subsidized imports are concerned, in the estimation of the Tribunal.

Indeed, the Tribunal was presented with persuasive evidence that such on-farm users have not been injured. In this regard, the Tribunal notes that the President of the MCGA clearly acknowledged in testimony at the hearing that the MCGA had considered the effect of the trade action on different “production groups” and concluded that it would have “very little impact” on “farm-fed” corn.⁶⁸

Furthermore, the Tribunal notes that one of the parties opposing the MCGA’s trade action conducted a poll of certain corn growers prior to the hearing. The poll, referred to in this case as the Hytek Poll, covered 38 corn growers that represented about 11 percent of the total western domestic production in the 1999-2000 crop year. As part of the Hytek Poll, these growers were asked to, and did, sign a statement attesting that they had not been injured by the dumped and subsidized imports.⁶⁹ In commenting on this poll, the MCGA has noted that many of the people who signed appear to be diversified farmers with both animal and feed operations. This assertion is supported by testimony of witnesses who appeared at the hearing.⁷⁰ Based on the evidence, the Tribunal is of the view that on-farm users are, and have been, in a position to sidestep the injurious effects of the dumped and subsidized imports.

In terms of order of magnitude, the MCGA has estimated the volume of on-farm use to be about 10 percent of total domestic production.⁷¹ However, other parties estimated the volume of on-farm use to be much higher. One witness believed that it comprised up to 30 percent of the total production.⁷² Another witness considered that about 50 percent of the total feed consumption in Manitoba consisted of on-farm feed.⁷³

66. The industry average costs of production as reported in the *Public Pre-hearing Staff Report*, NQ-2000-005-06, Vol. 1.1 at 44, were developed by the Manitoba Department of Agriculture. These costs are estimated, based on assumptions made by the Manitoba Department of Agriculture for various input costs.

67. In certain circumstances, they might be better off to sell their own corn and buy lower-priced substitute grains. Additionally, if the costs of growing corn were higher than the costs of buying corn, they might decide to buy rather than grow. However, there is nothing to suggest that either of these situations was a factor in recent crop years.

68. *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 66, and Vol. 3, 7 February 2001, at 652.

69. Other Parties Exhibits L-03 and L-04, Administrative Record, Vol. 13.3 and Vol. 14.3 respectively.

70. *Transcript of Public Hearing*, Vol. 3, 7 February 2001, at 560; *Transcript of In Camera Hearing*, Vol. 1, 5 February 2001, at 3-4; and Other Parties Exhibit L-04, Administrative Record, Vol. 14.3.

71. *Transcript of Public Hearing*, Vol. 1, 5 February 2001, at 156.

72. *Transcript of Public Hearing*, Vol. 3, 7 February 2001, at 560.

73. *Transcript of Public Hearing*, Vol. 3, 7 February 2001, at 630.

The Tribunal notes that a more precise estimate of the volume of on-farm use may be obtained from the data on the record. Specifically, in a given year, if total domestic farm cash receipts are divided by average realized domestic prices per bushel and this number, which represents the number of bushels sold commercially, is subtracted from the total corn production reported in the regional market, the result produced is the volume of non-commercial corn production.⁷⁴ The Tribunal has done this calculation for the 1998-99 and 1999-2000 crop years and the estimated volumes of non-commercial production amount to 31.5 and 33.3 percent of the total production volume in each of those crop years respectively.⁷⁵

Such an order of magnitude for on-farm use is not unrealistic in the Tribunal's opinion. Indeed, it is consistent with the fact that the commercial sales reported to the MCGA as part of its check-off levy system could account for only about 60 percent of the total domestic production in 1999-2000.⁷⁶ The evidence strongly suggests that the substantial difference between the commercial sales registered by the MCGA and the total domestic production is likely accounted for, in large part, by production not sold in the commercial market.⁷⁷

Accordingly, the Tribunal is of the view that the volume of corn production for on-farm use lies at the higher end of the range of estimates provided by the various witnesses. Since most or all of this production has not been injured, it follows that a substantial proportion of corn growers whose corn production does not enter the regional commercial market have not been injured by the dumped and subsidized goods.⁷⁸ In the Tribunal's opinion, this volume of non-injured production is, by itself, significant enough to preclude a conclusion that there is injury to producers of all or almost all of the production in the regional market. However, as noted earlier, there is also a certain proportion of commercial production that does not appear to have been materially injured. When the two categories of non-injured production are combined, there can be little doubt, based on the evidence, that the minimum injury threshold has not been met in this case, having regard to any reasonable interpretation of the stringent standard implied by "all or almost all".⁷⁹

Turning to the issue of threat, the Tribunal is guided by subsection 37.1(2) of the SIMA Regulations. In addition, the threat, if one exists, must be clearly foreseen and imminent. The evidence indicates that

74. A certain amount of non-commercial production may be comprised of farm-to-farm transfers, including trades, barter and other forms of exchange that have not been reported as commercial sales. It would also appear that the non-commercial production so derived includes a certain volume of corn grown and used on-farm in Alberta that would represent the difference between the total production reported for Alberta, for the crop years reviewed, and the sales by BI to Black Velvet, which are the only reported commercial sales in the province.

75. For the 1998/99 crop year: $\$18.2 \text{ million} \div \$3/\text{bushel} = 6.1 \text{ million bushels}$, $8.9 \text{ million bushels} - 6.1 \text{ million bushels} = 2.8 \text{ million bushels}$, $2.8 \text{ million bushels} \div 8.9 \text{ million bushels} = 31.5\%$; and for the 1999/2000 crop year: $\$19.7 \text{ million} \div \$2.88/\text{bushel} = 6.8 \text{ million bushels}$, $10.2 \text{ million bushels} - 6.8 \text{ million bushels} = 3.4 \text{ million bushels}$, $3.4 \text{ million bushels} \div 10.2 \text{ million bushels} = 33.3\%$.

76. Domestic Producers Exhibit A-19 (protected), Administrative Record, Vol. 12; and *Public Pre-hearing Staff Report*, Tribunal Exhibit NQ-2000-005-06, Administrative Record, Vol. 1.1 at 24.

77. Even after accounting for the fact that the commercial sales registered by the MCGA may be somewhat understated because of some delinquent reporting and other factors.

78. It is possible that producers that grow corn to supply their livestock operations may occasionally have surplus corn or off-grade corn that they may wish to dispose of on the commercial market. In other words, some on-farm users may, on occasion, have some sales exposure to the prices prevailing in the merchant market. However, as a group, such exposure for on-farm users would appear to be limited. *Transcript of Public Hearing*, Vol. 3, 7 February 2001, at 652.

79. *Supra* note 27.

U.S. subsidies are likely to continue over the near to medium term. Although world and U.S. demand for corn appears robust, the outlook for U.S. production, as well as for U.S. and Canadian prices, remains uncertain. Thus, imports of dumped and subsidized U.S. corn will continue to affect the western regional corn market. However, for the reasons given above, there is a certain significant segment of the corn-growing industry in Western Canada that has not been materially injured by the subject imports. The evidence also indicates that on-farm use is a growing segment of the industry. Thus, there is no reason to believe that the “all or almost all” test can be met in the foreseeable future. The Tribunal, therefore, finds that there is no threat of injury to producers of all or almost all of the production in the regional market.

Finally, the Tribunal finds that there is no issue of retardation in this inquiry. The concept of retardation does not apply where, as in this case, there is a long history of production and an established producing community.

CONCLUSION

Having regard to the foregoing, the Tribunal finds that the dumping and subsidizing of certain grain corn have not caused injury or retardation, nor are they threatening to cause injury to producers of all or almost all of the production of like goods in Canada, west of the Manitoba-Ontario border. In view of this finding, it is not necessary for the Tribunal to make any findings with respect to the various requests for exclusion.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
Member