

Ottawa, Tuesday, March 30, 1993

Inquiry No.: NQ-92-006

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

**TOMATO PASTE IN CONTAINERS LARGER THAN 100 FLUID OUNCES,
ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA**

FINDING

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry following the issuance by the Deputy Minister of National Revenue for Customs and Excise of a preliminary determination of dumping dated November 30, 1992, and of a final determination of dumping dated February 26, 1993, respecting the importation into Canada of tomato paste in containers larger than 100 fluid ounces, originating in or exported from the United States of America.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping in Canada of the aforementioned goods from the United States of America has not caused, is not causing and is not likely to cause material injury to the production in Canada of like goods.

W. Roy Hines

W. Roy Hines
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Lise Bergeron

Lise Bergeron
Member

Michel P. Granger

Michel P. Granger
Secretary

The statement of reasons will be issued within 15 days.

Inquiry No.: NQ-92-006

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	March 1-10, 1993
Date of Finding:	March 30, 1993
Tribunal Members:	W. Roy Hines, Presiding Member Arthur B. Trudeau, Member Lise Bergeron, Member
Director of Research: Research Manager:	Douglas Cuffley T.A. Geoghegan
Statistical Officers:	Sonya McEachern Nynon Burroughs
Counsel for the Tribunal:	Gilles B. Legault
Registration and Distribution Officer:	Claudette Friesen
Participants:	G.P. (Patt) MacPherson Suzette C. Cousineau for Ontario Food Processors Association (Complainant) and H.J. Heinz Company of Canada Ltd. Nabisco Brands Ltd./Grocery Division Sun-Brite Canning Limited (Manufacturers) Peter A. Magnus Gregory O. Somers Lynn Starchuk for The Borden Company, Limited Cadbury Beverages Canada Inc. Miller & Smith Foods Inc. Wing's Food Products Riyaz Dattu Colin Stephen Baxter for Nestlé Canada Inc. Nestlé Food Company Thomas J. Lipton, a division of U L Canada Inc. Kraft General Foods Canada Inc. Richard A. Wagner for Campbell Soup Company Ltd. Campbell Soup Company W. Jack Millar for Hunt-Wesson Canada, a division of Norton Simon Canada Inc. Hunt-Wesson Inc. (Importers/Exporters)

Ottawa, Wednesday, April 14, 1993

Inquiry No.: NQ-92-006

**TOMATO PASTE IN CONTAINERS LARGER THAN 100 FLUID OUNCES,
ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA**

Special Import Measures Act - Whether the dumping of the above-mentioned goods has caused, is causing or is likely to cause material injury to the production in Canada of like goods.

DECISION: The Canadian International Trade Tribunal has found that the dumping in Canada of the aforementioned goods from the United States of America has not caused, is not causing and is not likely to cause material injury to the production in Canada of like goods.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	March 1-10, 1993
Date of Finding:	March 30, 1993
Date of Reasons:	April 14, 1993
Tribunal Members:	W. Roy Hines, Presiding Member Arthur B. Trudeau, Member Lise Bergeron, Member
Director of Research:	Douglas Cuffley
Research Manager:	T.A. Geoghegan
Statistical Officers:	Sonya McEachern Nynon Burroughs
Counsel for the Tribunal:	Gilles B. Legault Shelley Rowe
Registration and Distribution Officer:	Claudette Friesen
Participants:	G.P. (Patt) MacPherson S.C. Cousineau for Ontario Food Processors Association (Complainant) and H.J. Heinz Company of Canada Ltd. Nabisco Brands Ltd./Grocery Division Sun-Brite Canning Limited (Manufacturers)

Peter A. Magnus
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Lynn Starchuk
for The Borden Company, Limited
Cadbury Beverages Canada Inc.
Miller & Smith Foods Inc.
Wing's Food Products

Riyaz Dattu
Brian C. Pel
Colin Stephen Baxter
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Thomas J. Lipton Inc., a division of
U L Canada Inc.
Kraft General Foods Canada Inc.

Richard A. Wagner
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Campbell Soup Company

W. Jack Millar
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Norton Simon Canada Inc.
Hunt-Wesson, Inc.

(Importers/Exporters)

Witnesses:

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Walter Brown
Director
The Ontario Vegetable Growers'
Marketing Board

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Plant Manager
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Henry Iacobelli
President
Sun-Brite Canning Limited

John Mumford
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L.R. Inglis
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John P. Grant
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Bruna Gambino
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Larry Moss
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Borden Catelli

Vito Vescio
Director of Administration
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Ottawa, Wednesday, April 14, 1993

Inquiry No.: NQ-92-006

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

**TOMATO PASTE IN CONTAINERS LARGER THAN 100 FLUID OUNCES,
ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA**

TRIBUNAL: W. ROY HINES, Presiding Member
ARTHUR B. TRUDEAU, Member
LISE BERGERON, Member

STATEMENT OF REASONS

CONDUCT OF THE INQUIRY

The Canadian International Trade Tribunal (the Tribunal), under the provisions of section 42 of the *Special Import Measures Act*¹ (SIMA), has conducted an inquiry following the issuance by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) of a preliminary determination of dumping dated November 30, 1992, respecting the importation into Canada of tomato paste in containers larger than 100 fluid ounces, originating in or exported from the United States of America. A final determination of dumping respecting the subject goods was issued on February 26, 1993. The Deputy Minister's investigation into dumping covered imports of the subject goods from January 1 to June 30, 1992. In the final determination of dumping, the Deputy Minister indicated that 46.02 percent of the subject goods examined during the period of investigation were found to be dumped by a weighted average margin of dumping of 11.19 percent.

The notices of preliminary and final determinations of dumping were published in Part I of the December 12, 1992, and March 13, 1993, editions of the Canada Gazette, respectively. The Tribunal's notice of commencement of inquiry issued on December 3, 1992, was published in Part I of the December 12, 1992, edition of the Canada Gazette.

As part of the inquiry, the Tribunal sent detailed questionnaires to Canadian producers and importers of the subject goods, requesting production, financial, import and market information, as well as other information, covering the period from 1989 to 1992. From the replies to the questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports and protected supplementary notes to the protected pre-hearing staff report covering that period.

1. R.S.C. 1985, c. S-15.

The record of this inquiry consists of all Tribunal exhibits, including the public and protected replies to questionnaires, all exhibits filed by the parties at the hearing, as well as the transcript of all proceedings. All public exhibits were made available to the parties, while protected exhibits were made available only to independent counsel who had given undertakings.

A pre-hearing conference was held in Ottawa, Ontario, on February 12, 1993, to discuss issues relating to the inquiry. Public and *in camera* hearings were held in Ottawa, Ontario, starting on March 1, 1993.

During the course of this inquiry, the Tribunal received requests from counsel for an opportunity to make representations on the question of public interest under subsection 45(2) of SIMA. Such representations were requested for March 19, 1993, and a response by the complainant by March 26, 1993. In view of the Tribunal's decision, it will not be necessary to pursue this matter.

The complainant, Ontario Food Processors Association (the OFPA), an association of food processors representing the principal producers of tomato paste, including H.J. Heinz Company of Canada Ltd. (Heinz), Nabisco Brands Ltd. (Nabisco), Sun-Brite Canning Limited (Sun-Brite), which also participated at the hearing (hereinafter referred to as the complainants), was represented by counsel at the hearing and submitted evidence and arguments in support of an injury finding. Counsel for The Borden Company, Limited (Borden), Cadbury Beverages Canada Inc. (Cadbury), Miller & Smith Foods Inc., Wing's Food Products (Wing's), Nestlé Canada Inc. (Nestlé), Nestlé Food Company, Thomas J. Lipton Inc., a division of U L Canada Inc. (Lipton), Kraft General Foods Canada Inc. (Kraft), Campbell Soup Company Ltd. (Campbell), Campbell Soup Company, Hunt-Wesson Canada, a division of Norton Simon Canada Inc. (HWC) and Hunt-Wesson, Inc. submitted evidence and made arguments in support of a finding of no injury. The Tribunal called a witness, Mr. Larry Moss, a former employee of the Southern Ontario Tomato Cooperative (the SOTC), who responded to questions concerning the firm's closure. The Ontario Vegetable Growers' Marketing Board (the OVGMB) also appeared as a witness for the complainant.

On March 30, 1993, the Tribunal issued its finding that the dumping in Canada of the subject goods from the United States of America had not caused, was not causing and was not likely to cause material injury to the production in Canada of like goods.

PRODUCT

The product that is the subject of this inquiry is described by the Deputy Minister in the preliminary determination of dumping as tomato paste in containers larger than 100 fluid ounces, originating in or exported from the United States of America.

The subject tomato paste is an intermediate processed product used as a major raw material by domestic food processors in the production of finished products such as ketchup, spaghetti sauce, pizza sauce, soup and vegetable cocktail.

Tomato paste is made from whole processing tomatoes containing between 4.5 and 5.5 percent tomato solids. With regard to solid content, the industry normally refers to NTSS (natural tomato soluble solids), a measure which excludes all insoluble

solids. In accordance with Canadian standards, tomato paste must contain at least 20 percent NTSS. The most popular concentration in Canada is 31 percent NTSS.

The subject tomato paste is sold to secondary food processors that specify the type of paste that they require. Generally, these processors will specify the NTSS count and container size, and whether the tomato paste that they require is hot-break or cold-break.

Hot-break and cold-break tomato pastes possess different attributes which allow them to be used for different applications. The major difference between hot-break and cold-break tomato paste is the amount of pectin present in the finished product. The pectin contributes to the firmness of the tomato. Enzymes are also present in tomatoes, and they contribute to the natural softening of the tomato as it degrades. This softening occurs as enzymes break down the tomato pectin.

Enzymes are deactivated in the hot-break process by means of high temperature processing (about 200°F). Precise control of the break temperature is necessary to minimize the scorching or browning of the product and to minimize the flavour changes which also take place during heating. Properly broken hot-break tomato paste possesses acceptable colour and thickness, and no residual enzyme activity, thereby making it stable for storage. Buyers of hot-break tomato paste are interested in the paste's relative thickness and seek suppliers that can consistently deliver paste with low Bostwick readings (the lower the Bostwick reading, the thicker the paste) and coarse finishes. The pectin present in the hot-break tomato paste is responsible for the thickness, or water-holding ability, of the finished product. For buyers of hot-break tomato paste, colour and flavour are considered less important than a low Bostwick reading and coarse finish.

Cold-break tomato paste is subjected to lower temperatures (about 140°F) during processing and, as a result, the colour and flavour changes are less severe than they are during the hot-break process. However, cold-break tomato paste contains residual enzymes which contribute to product separation during storage. This separation is caused by the breakdown of the pectin in the tomato paste. Buyers of cold-break tomato paste, on the other hand, consider colour and flavour of primary importance. Cold-break tomato paste is a thinner product and is used to produce pasta and tomato sauce products, soup and vegetable cocktail.

The main factors considered when purchasing tomato paste from a supplier are product quality, reliable supply and the ability to consistently meet product specifications which affect product yield and price.

In Canada, tomato paste is produced from tomatoes during the period from August to early October. This period is commonly known as the pack-year. Product processed during the pack-year is normally sold from the fall to the end of the following summer.

DOMESTIC INDUSTRY

At the present time, there are three firms in southern Ontario which produce tomato paste. They are Heinz, Nabisco and Sun-Brite.

Heinz is a wholly owned subsidiary of H.J. Heinz Co., Pittsburgh, Pennsylvania. The Canadian head office is located in North York, Ontario.

Heinz, either directly or through its subsidiaries, produces and markets processed food products primarily for the Canadian market. Heinz produces goods such as ketchup, baby food, condensed soup, pickles, condiments, weight-control food, beans, juice and canned pasta.

Production of tomato paste for internal use and for industrial sales takes place at Heinz's facility located in Leamington, Ontario. With respect to industrial sales, the firm sells hot-break and cold-break tomato pastes with an NTSS count of 31 percent in 55-US-gallon drums and 60-US-gallon bags. It also sells tomato paste in tanker trucks.

Nabisco is a wholly owned subsidiary of RJR Nabisco Inc., New York, New York. The Canadian head office is located in Toronto, Ontario, and the two divisional offices (biscuit and grocery) are located in Etobicoke, Ontario. The firm produces tomato paste, stewed tomatoes, tomato soup, ketchup, and a wide variety of other processed fruits and vegetables under such brand names as Del Monte, Aylmer, Coronation and Ideal.

Nabisco operates seven plants in Canada. The facility located in Dresden, Ontario, produces tomato paste for internal use and industrial sales. The firm sells hot-break tomato paste with an NTSS count of 26.5 percent in 60-gallon bins and 300-gallon scholle bags.

Sun-Brite, located in Ruthven, Ontario, is a privately owned company. Goods produced by Sun-Brite include tomato paste for internal use, tomato paste for industrial sales, crushed tomatoes, whole and diced tomatoes, tomato purée and a variety of other tomato-based products.

Primo Foods Limited (Primo), whose head office is located in Woodbridge, Ontario, is a wholly owned subsidiary of PET Incorporated of St. Louis, Missouri. The firm's plant is located in Cottam, Ontario, where it produces tomato purée and tomato-based products. In November 1992, it began importing crushed tomatoes from the United States to produce its tomato-based products. Prior to these importations, Primo produced tomato paste for further manufacturing into tomato-based products.

The SOTC, formerly of St. Thomas, Ontario, was a producer of tomato paste for industrial sales. It began producing tomato paste in the mid-1980s. This firm produced about eight million pounds of tomato paste for industrial sales in each of the years 1988 and 1990, but did not produce any in 1989. Its last year of production was 1990. While production ceased nearly three years ago, sales of tomato paste were made from inventory until 1992.

SCOPE OF THE PRODUCTION IN CANADA OF LIKE GOODS

The first question that the Tribunal must address in determining whether the dumping of the subject goods has caused, is causing or is likely to cause material injury to the production in Canada of like goods is the scope of that production. In considering any question relating to the production in Canada of any goods, subsection 42(3) of SIMA directs the Tribunal to take fully into account the provisions of paragraph 1 of

Article 4 of the GATT Anti-Dumping Code² (the Code), which defines "industry" for the purposes of determining injury.

The Code requires that, in determining injury, the term "domestic industry" shall be interpreted as referring to the domestic producers, as a whole, of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Three issues were raised concerning the question of production in Canada of like goods. Should tomato paste production include both the production of tomato paste for industrial sales and that for internal use? Should the production of tomatoes be included? And, do crushed tomatoes constitute like goods to tomato paste?

Internal production

Several counsel for importers and exporters made preliminary submissions to the Tribunal, submitting that production in Canada of like goods includes both production of tomato paste for internal use and that for industrial sales. At the pre-hearing conference, after having heard further arguments from all counsel, the Tribunal ruled, as a preliminary matter, that production in Canada of like goods included the production of all tomato paste.

There was no evidence presented during the hearing which alters this position. The Tribunal is of the view that bulk tomato paste is produced by processing fresh tomatoes, and the ensuing product, which is the equivalent of the raw tomatoes in a storable and non-perishable form, is placed in large containers from which it is drawn for subsequent use. As noted earlier, bulk tomato paste can be used to make several tomato-based products, such as ketchup, soup, sauce, etc. In addition, it can be packaged in several forms of containers for eventual sale to the retail, institutional and food service sectors. Finally, the product can be sold in drums or bags, or shipped by tank truck to producers of tomato-based products. The Tribunal does not agree with the complainant's initial position that tomato paste destined for internal use should not be included in the production in Canada because there was no sale of the product.

The fact that there is no sale, in itself, does not preclude the product from being considered as production in Canada. Neither SIMA nor the Code restricts the meaning of production in Canada to the expression "production in Canada for sale in Canada." Furthermore, when tomato paste is produced, the product is stored in large bins or silos, and, in certain instances, such product which could have been earmarked for internal use can be and is sold. Therefore, although producers do contract for tomatoes on the basis of what they perceive to be their internal or external requirements, no evidence was presented to conclude that totally different processes or storage facilities are used. The Tribunal, therefore, reaffirms its ruling that the production of tomato paste includes both the bulk production of tomato paste for internal use and that for industrial sales.

2. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, signed in Geneva on April 12, 1979.

Growers

In this case, counsel for the complainant (the OFPA) asked the Tribunal to include the growers of tomatoes within the scope of the production in Canada of tomato paste. Counsel argued that tomato growers produce processing tomatoes for their solids which are dedicated to the production of tomato paste. Moreover, according to counsel, growers are located close to the processing plants, and growers and processors describe their relationship as a partnership in which growers produce tomatoes under contract with the processors.

Two previous decisions, one made by the Canadian Import Tribunal (the CIT), the other by this Tribunal, have dealt with the issue of including growers with processors for the purposes of defining the scope of the production in Canada of like goods in cases involving agricultural products.

In 1986, in the *Beef*³ case, the CIT characterized the production in Canada of boneless beef from cattle as follows:

*The production of the subject goods in Canada is a continuous sequential process commencing with the live cattle and ending with the boxed grinding beef. Nothing takes place without the initial contribution of the cattlemen, and they are dependent upon this continuous sequential process for their returns. There is a high degree of functional dedication and economic dependence in this sequential process.*⁴ (Emphasis added)

Thus, in an inquiry involving agricultural products, growers and processors may constitute the production in Canada of like goods for the purposes of assessing the material injury thereto, provided there is a continuous sequential process. Such sequential process exists if the raw product is functionally dedicated to the processed product, that is, if the main reason for the production of the raw product is the production of the processed product, and provided there is an economic dependence, which may be found in cases where prices for the raw and processed products are interdependent.

As pointed out by counsel for the importers, the *Beef* decision was referred to the GATT Committee on Subsidies and Countervailing Measures (the Committee) under the Code on Subsidies and Countervailing Duties⁵ (the Subsidies Code). That Committee's report⁶ has not yet been adopted and is still subject to discussion among the parties to the Subsidies Code. Accordingly, since the report, as it stands, has no legal status, it cannot have any bearing on the Tribunal's determination in this case.

3. *Boneless Manufacturing Beef Originating in or Exported from the European Economic Community*, Canadian Import Tribunal, Inquiry No. CIT-2-86, July 25, 1986.

4. *Ibid.* at 11.

5. *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*, signed in Geneva on April 12, 1979.

6. Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC, October 13, 1987.

Notwithstanding the Committee's report, this Tribunal, in the *Sour Cherries*⁷ case, adopted the CIT's criteria with respect to the scope of the production in Canada of like goods in a case involving raw and processed agricultural products. Indeed, in that case, the Tribunal found that a "single, continuous line of production" existed in terms of the industry structure. The sour cherry industry was "highly integrated" and the raw product, sour cherries, "yields only one commercially significant end product."⁸ The Tribunal also found an economic dependence in terms of a "high level of interlocking ownership in the Canadian sour cherry industry with nearly all processors being also growers."⁹

It was, therefore, of primary importance for the domestic industry in this case to clearly establish that, in light of the two existing criteria, that is, the dedication of the raw product to a further process product and an economic dependence, growers are actually part of the production in Canada of tomato paste. But in applying these criteria to the case at hand, the Tribunal finds that, although some growers produce and sell tomatoes solely for their solids that are further transformed in tomato paste and, thus, that a single continuous line of production may exist, there is little evidence that growers and tomato paste processors are actually involved in an economically dependent relationship. Undoubtedly, such a relationship existed during the years 1986-90, when the SOTC was involved in the production of tomato paste from tomatoes produced by its members.

Allegations that tomato growers have experienced price decreases and lost volume, because tomato paste producers have had difficulties, do not, by themselves, establish that such economic dependence exists in the absence of any direct evidence from the growers themselves as to that situation. It was incumbent on the growers to appear as parties to the inquiry in their capacity as domestic producers, in accordance with the Tribunal Rules,¹⁰ if they intended to be seriously considered part of the subject industry. The OVGMB did appear, but its representatives appeared only as witnesses in support of the domestic tomato paste producers and not as full participants. In summary, there was insufficient evidence to determine whether there exists an economic dependence sufficient to permit the inclusion of tomato growers within the production in Canada of tomato paste for the purposes of the Tribunal's inquiry.

Crushed Tomatoes

During the course of the inquiry, it was suggested that crushed tomatoes are like goods to tomato paste, essentially because tomato paste can be substituted for crushed tomatoes. Subsection 2(1) of SIMA defines "like goods" in relation to the other goods, as:

- (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.

7. *Sour (Tart) Cherries Originating in or Exported from the United States of America*, Canadian International Trade Tribunal, Inquiry No. CIT-2-88, January 30, 1989.

8. *Ibid.* at 5.

9. *Ibid.*

10. *Canadian International Trade Tribunal Rules*, SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18.

Tomato paste differs from other tomato products, such as crushed tomatoes or tomato purée, in that it does not contain seeds or skin and, according to Canadian standards, must have a minimum of 20 percent NTSS. As indicated in the evidence, neither crushed tomatoes nor tomato purée has all the characteristics that closely resemble those of tomato paste.

While some crushed tomatoes may have an NTSS count as high as that of tomato paste, they would still contain seeds and skin. This precludes their utilization in a large number of tomato-based products in which tomato paste is normally used. As for the uses of crushed tomatoes, the evidence is that, in most cases, the tomato-based products in which tomato paste is normally used would have to be reformulated in order to use crushed tomatoes. Moreover, the argument that tomato paste is a substitute for crushed tomatoes seems to be based on the assumption that a low price for tomato paste constitutes the determining factor upon which a producer of tomato-based products would switch to tomato paste. The evidence with respect to a large category of tomato-based products, however, is that customers are sensitive to any reformulation and that the characteristics of crushed tomatoes (that they contain seeds and skin) that appeal to many producers are what make crushed tomatoes different from tomato paste. Furthermore, crushed tomatoes were, are and will continue to be available, likely at low prices, which renders unlikely the switch to tomato paste just because of price.

In light of the evidence, the Tribunal finds that crushed tomatoes are not like goods for the purposes of this inquiry.

In conclusion, the Tribunal finds that, as Heinz, Nabisco, Sun-Brite and Primo were the sole producers of tomato paste during the Tribunal's period of inquiry, their production of tomato paste constitutes the production in Canada of like goods for the purposes of this inquiry.

ECONOMIC INDICATORS

After peaking in 1990, domestic production of all tomato paste declined in each of the subsequent years, with the largest decline occurring in 1992.

Total imports of tomato paste increased by 45 percent between 1989 and 1992, with a large part of the increase occurring in 1992. Between 1989 and 1992, U.S. imports surged from 23 million to 74 million pounds. Increases in each year were significant, with the largest increase occurring in 1992. In that year, U.S. imports represented 93 percent of total imports, compared to 41 percent in 1989. During the years of rapidly rising U.S. imports, traditional suppliers, such as Portugal, Turkey, Brazil and Mexico, saw their participation as foreign sources of the subject goods reduced to a minor role.

Apparent domestic consumption of tomato paste remained static throughout the period of inquiry. The domestic producers' share of consumption fell by about five percentage points between 1989 and 1991. Over the same period, the share held by imports from countries other than the United States fell sharply. These losses in shares of consumption were the result of the significant gains by U.S. imports. In 1992, while Heinz and Nabisco ceased production for industrial sales, U.S. imports surged by 50 percent and captured a significant share of domestic consumption.

POSITION OF THE COMPLAINANTS

Counsel for the complainants submitted that the importation of the subject goods at dumped prices had caused, was causing and was likely to cause material injury to the production in Canada of like goods.

Counsel argued that, for the purposes of analyzing material injury to the production in Canada of like goods, the Tribunal should define the domestic industry as being comprised only of the production of like goods for industrial sales, and not the production of the subject goods for use internally in the production of tomato-based products, such as ketchup, soup, sauce and vegetable cocktail, in which tomato paste is a significant ingredient. However, in light of the Tribunal's preliminary ruling at the pre-hearing conference that the domestic industry includes both production for industrial sales and internal use, counsel directed their arguments concerning injury to domestic production for both industrial sales and internal use.

In addressing the issue of domestic production of the subject goods for industrial sales, counsel submitted that the injury to this segment of the industry included the loss of production, sales, market share and profit margins, price erosion and reduced capacity utilization.

It was argued by counsel that the most significant and telling evidence of injury was the complete suspension of production of the subject goods for industrial sales for the 1992 pack-year by the two largest producers, Heinz and Nabisco. It was argued that this suspension of production occurred as a result of increased volumes of imports of the subject goods from California at declining prices, which made it impossible to maintain any profit margin and to justify any further involvement in the production of the subject goods for industrial sales. Counsel acknowledged that other factors contributed to the 20-cent-per-pound decline in U.S. tomato paste prices in 1991 and 1992, such as the lower production costs in California, the lower tariff rates as a result of the *Canada-United States Free Trade Agreement*¹¹ (the FTA) and the change in the exchange rate between the Canadian and U.S. dollars. However, counsel submitted that these other factors accounted for only about 15 cents of the decline in the price and that the remaining 5 cents was attributable to dumping.

Counsel further submitted that the market price for domestic production of the subject goods had been forced downward as a result of the availability of imports of the subject goods at dumped prices. This erosion of domestic prices affected the financial performance of the complainants, in particular, Heinz and Nabisco, such that net sales, gross margins and net income from the subject goods declined between 1991 and 1992, as indicated in the complainants' income statements.

One of the producers, Sun-Brite, although not involved in the production of the subject goods for industrial sales in 1991 and 1992, has had the capacity to engage in such production since 1991, but did not find it economically feasible to enter this market at a time when the subject goods were available from California at dumped prices. Counsel submitted that this underutilization was another form of injury being caused by the importation of the subject goods from California at dumped prices.

11. *Canada Treaty Series*, 1989, No. 3 (C.T.S.), signed on January 2, 1988.

Counsel made it clear that, without a finding of material injury by the Tribunal, the complainants would not resume production of the subject goods for industrial sales. Given the expectation of continued overproduction and low prices of Californian tomato paste, the complainants cannot afford to make volume commitments to the growers.

Counsel submitted that, if the Tribunal were to include the production of the subject goods for internal use as part of the scope of the production in Canada of like goods, it would be necessary for the Tribunal to consider the effect of the imports of the subject goods at dumped prices on the sales in Canada of tomato-based products. To support this position, counsel referred to paragraph 1 of Article 3 of the Code and, in particular, to the direction to look at the "consequent impact of [the] imports on domestic producers of such products." Counsel submitted that the complainants are the domestic producers of the subject goods and that, therefore, it is necessary to examine the impact of the dumped imports on domestic producers of the subject goods.

Counsel argued that tomato-based products made from tomato paste imported at dumped prices have an economic advantage over tomato-based products made from domestically produced tomato paste. As a consequence, domestic producers of tomato-based products made from domestically produced tomato paste have been forced to lower their prices in order to maintain sales volumes, and, as a result, profit margins have declined.

In discussing future injury to producers of tomato-based products, counsel submitted that loss of brand loyalty to the complainants' products would occur if imports of Californian tomato paste at dumped prices continued. Counsel referred to the decision of the Anti-dumping Tribunal in *Canned Ham*¹² where it was found that brands which are well-known, well-established and well-respected are not destroyed overnight and that injury to brand-name products occurs slowly. Counsel indicated that the price differentials between the complainants' brand-name tomato-based products and those of the competition are widening and will, in all likelihood, reach a point when consumer loyalty will no longer be sufficient to maintain the market share of those brand names.

In rebuttal argument, counsel clarified that the complainants were not contending that tomato-based products are like goods. Rather, he submitted that an examination of the financial performance of tomato-based products is necessary when considering the issue of injury to the domestic production of the subject goods for internal use.

POSITION OF THE IMPORTERS AND EXPORTERS

Counsel for the various importers and exporters argued, in separate submissions, that the dumped imports of the subject goods had not caused, were not causing and were not likely to cause material injury to the production in Canada of like goods and that the complainants had failed to satisfy their onus of proving that the domestic

12. *Canned Ham and Canned Picnic under 1.5 KG per Can, Originating in or Exported from Denmark and The Netherlands; and Canned Pork-Based Luncheon Meat Containing More Than 20 Per Cent by Weight of Pork, in Respect of Which a Subsidy has Been Paid Directly or Indirectly by the European Economic Community*, Anti-dumping Tribunal, Inquiry No. GIC-1-84, August 7, 1984; (1984) 7 C.E.R. 53.

industry had suffered injury and that the alleged injury was caused by the importation of the subject goods at dumped prices.

The importers and exporters, as a whole, disagreed with the complainants' position that they were experiencing poor financial performance and, further, that if they were experiencing poor performance, it was as a result of factors other than imports of the subject goods at dumped prices. Counsel referred specifically to Heinz's income statements for tomato-based products, which showed that its percentage profit margin increased between 1991 and 1992 and that the percentage profit margin for tomato-based products was greater than that for the products of the company as a whole. With regard to Nabisco's financial position, counsel argued that its financial concerns predated the Tribunal's period of inquiry and were not caused by the dumping of the subject goods.

In responding to the complainants' allegations of injury to the domestic production of the subject goods for industrial sales, counsel submitted that any loss of sales experienced by the complainants was caused by factors other than the importation of the subject goods at dumped prices, such as the complainants' inability to produce the subject goods with the required product specifications, their inability to supply required quantities in required containers and their failure to actively market the subject goods. Counsel referred to additional non-price factors that affected the sourcing decisions of the importers and exporters, such as the deregulation of the U.S. freight rates, declining tariff rates, more favourable exchange rates, internal purchasing policies and, finally, the avoidance of purchasing the subject goods from a competitor in the production of tomato-based products.

With respect to the allegation of injury to the production of tomato-based products, counsel submitted that, generally, there was no evidence of injury to such production and that there were other factors influencing the financial performance of tomato-based products, such as consumer preference and marketing efforts.

In discussing future injury, counsel submitted that the Tribunal should be guided by the provisions in paragraph 6 of Article 3 of the Code, which provides that "[a] determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility" and that the "injury must be clearly foreseen and imminent." Counsel argued that the evidence of industry analysts concerning the future of Californian production of tomatoes and the subject goods was not conclusive and that the evidence of the importers and the Tribunal's witness, Mr. Moss, indicated that the situation in California was improving and that appropriate adjustments were being made in contracts and planting in California to ensure that prices remain firm.

REQUESTS FOR EXCLUSION

Several importers and exporters requested that they be excluded from any positive finding of the Tribunal. Counsel raised specific arguments relating to each of the importers and exporters.

Counsel for Borden and Cadbury requested that imports of cold-break tomato paste with a minimum L value of 24.0 and an A/B ratio of 1.95 be excluded from a positive finding of the Tribunal on the basis that domestic producers do not produce the subject goods to these specifications. Counsel also requested that imports of the subject

goods by Wing's, Cadbury and Borden be excluded on the basis that these firms do not compete with the complainants in industrial sales of the subject goods.

Counsel for Kraft and Lipton requested that imports of the subject goods by these firms be excluded since there were no specific allegations of injury made against them. Counsel stated that Kraft's procurement policies are made for corporate reasons and require that Kraft purchase the subject goods from Kraft in the United States. Counsel submitted that imports of the subject goods by Nestlé should be excluded since this firm is a captive purchaser of Nestlé Food Company in the United States and that the subject goods are used to produce tomato-based products for domestic purposes and for export.

Counsel for Campbell submitted that imports of the subject goods by Campbell should be excluded from a finding of injury on the basis that the complainants made no specific allegation that they had caused injury, that Campbell had never been approached by the complainants and had never purchased the subject goods from the complainants and, finally, that the subject goods imported by Campbell have special characteristics compared to those produced domestically, and such characteristics are required to achieve Campbell's superior quality, tomato-based products.

Counsel for HWC submitted that imports of the subject goods which are for the sole purpose of a co-packing arrangement between Hunt-Wesson, Inc. of the United States and Arkell Foods Limited should be excluded from a positive finding of the Tribunal. These imports are owned by Hunt-Wesson, Inc. at the time of their importation and are sold to HWC after they have been further processed into Hunt's spaghetti sauce with meat by Arkell Foods Limited. Counsel indicated that the volume of imports is small, representing less than 3 percent of the total market in 1992 and that he anticipates that this volume will remain constant.

REASONS FOR DECISION

Under section 42 of SIMA, the Tribunal must determine whether the dumping of tomato paste in containers larger than 100 fluid ounces, originating in or exported from the United States of America, has caused, is causing or is likely to cause material injury to the production in Canada of all tomato paste.

During most of the 1980s, tomato paste imported into Canada was sourced chiefly from offshore suppliers. It was only towards the end of the 1980s that a shift from offshore suppliers to U.S. suppliers occurred. Testimony at the hearing indicated that there were a number of reasons for the increasing preference for U.S. imports. First, there were the tariff reductions under the FTA, which resulted in the duty rates declining from 13.6 percent in 1988 to 8.16 percent in 1992. Second, the rise in the Canadian dollar contributed to the price declines of U.S. tomato paste, especially in the latter part of 1991. Third, freight deregulation in the United States resulted in lower freight rates on rail shipments from California, where over 90 percent of U.S. tomato paste is produced. Finally, U.S. producers experienced lower raw material costs and higher production efficiencies between 1989 and 1992.

In order to measure the extent of the displacement of offshore tomato paste by U.S. suppliers, the Tribunal considers it useful to review the movements in imports during the period of inquiry. Between 1989 and 1991, total imports of tomato paste increased by 11 percent. They rose from 55 million to 61 million pounds. During this

same period, U.S. imports advanced strongly from 23 million to 49 million pounds and increased their share of total imports from 41 to 80 percent. The largest annual increase in imports took place in 1992, when total imports surged by 30 percent to just under 80 million pounds. This sharp upward movement was the result of U.S. imports, which reached 74 million pounds. In 1992, U.S. imports represented 93 percent of total tomato paste imports.

During the 1980s, the domestic tomato paste industry was comprised of four producers, Heinz, Nabisco, Primo and the SOTC. Heinz has produced its own tomato paste requirements for years and, in 1983, began to sell tomato paste to industrial users. Nabisco, which also produces tomato paste for its own internal use, began selling tomato paste to industrial users in 1987. Primo produced tomato paste for its tomato-based products, but did not sell tomato paste to industrial users. The SOTC, the fourth producer, commenced producing tomato paste in the mid-1980s exclusively for industrial sales.

During the early 1990s, the domestic industry underwent some major changes which affected the supply of tomato paste in Canada. The SOTC, which had been a large producer of tomato paste for industrial sales, ceased production in 1990 for reasons unrelated to dumping. Primo, which previously produced tomato-based products from tomato paste, replaced tomato paste production with crushed tomato purchases from the United States in November 1992. Sun-Brite, which had previously purchased its tomato paste requirements, began producing tomato paste for internal use and industrial sales.

Since Heinz and Nabisco represent in excess of 90 percent of total tomato paste production in Canada, the Tribunal has focused its attention on the performance of these two firms during the period of inquiry.

The Tribunal notes that tomato paste production for industrial sales has represented a small proportion of total tomato paste production by both Heinz and Nabisco during the period of inquiry. Testimony provided at the hearing by industrial users indicated that, during the period of supply shortages in 1989, Heinz and Nabisco could not supply some Canadian processors. These processors were required to purchase product elsewhere at higher prices. Witnesses indicated that they were reluctant to purchase product from Heinz and Nabisco due to these previous supply problems and because they are in direct competition in the markets for tomato-based products.

The thrust of the case concerning past and present injury in this inquiry was that the increase in the volume of U.S. imports of tomato paste at declining prices, beginning in 1991, resulted in the cessation of production of tomato paste for industrial sales for the 1992 pack-year by Heinz and Nabisco. Heinz alleged that it had lost two of its largest accounts primarily because of the low price levels of U.S. tomato paste. Considerable testimony was provided by each of these accounts explaining the circumstances which led to increased purchases of U.S. tomato paste. A representative from Wing's stated that his firm had been purchasing tomato paste from Heinz for some time, but that, due to quality problems, this client ceased purchasing from Heinz in July 1991 and increased its imports from the United States.

The witness from Borden Catelli testified that its increasing purchases of U.S. tomato paste were also related to quality problems with the Heinz product. Although Borden Catelli had installed a bulk tank system to accommodate Heinz's tanker

shipments, tomato paste produced by Heinz from the 1990 and 1991 pack-years did not meet the firm's colour specifications. After ongoing attempts by Heinz and Borden Catelli to alleviate the quality problem, Borden Catelli increased its purchases of U.S. tomato paste in late 1991. These purchases were made at a price comparable to the price that the company had contracted with Heinz.

The Tribunal notes that Heinz has acknowledged that it experienced some quality problems with its tomato paste during the commissioning of its new processing equipment. The loss of these clients was important to Heinz because its list of tomato paste clients was not extensive. The Tribunal notes that, while the lost sales volume accounted for a significant proportion of Heinz's industrial sales, the lost volume represented a small share of its production of all tomato paste. The Tribunal also notes that the percentage gross margin for the products that Heinz produces from tomato paste was quite satisfactory and showed an improving trend in 1991 and 1992.

This loss of business by Heinz occurred some time before its February 1992 decision not to offer tomato paste for industrial sales from the 1992 pack-year. In the Tribunal's view, the reason for these lost accounts was, in large part, unrelated to price.

With respect to Nabisco, the Tribunal notes that this firm lost some sales to U.S. imports in 1991. However, these losses were very small in relation to the increase in Nabisco's production of tomato paste for internal use in that year.

U.S. imports replaced imports of offshore tomato paste between 1989 and 1991. In 1992, they recorded their largest volume increase, at a time when Heinz and Nabisco had decided not to produce any tomato paste for industrial sales. The Tribunal notes that the importers which appeared before the Tribunal were largely responsible for the switch to U.S. suppliers. In addition to the reasons cited above, several of these large importers stated that Heinz and Nabisco had not offered to sell them tomato paste, which raises questions as to the degree of commitment by Heinz and Nabisco in pursuing tomato paste sales with prospective clients. The fact that Heinz, the largest domestic producer of tomato paste, does not sell tomato paste in 300-gallon scholle bags, the most popular container size used by domestic secondary food processors, may have also been a factor. Although Heinz offers tomato paste in tanker trucks, many processors are not capable of handling such large volumes.

The Tribunal notes that many of the importers that appeared at the hearing have recently pooled their purchasing requirements for tomato paste with their U.S. affiliates. Other large importers purchase tomato paste from their parent companies and have some formulations that the domestic producers cannot meet. As well, some of these importers compete with Heinz and Nabisco and stated that they were not inclined to purchase a major ingredient from competitors. These developments, in the opinion of the Tribunal, preclude Heinz and Nabisco from selling to an important segment of the tomato paste market.

Heinz and Nabisco decided that U.S. prices were too low to compete with on a profitable basis for the 1992 production. The investigation by the Deputy Minister shows that only 46 percent of imports which entered Canada during the first half of 1992 were dumped. Heinz and Nabisco may have been adversely affected by U.S. imports; however, the Tribunal notes that a large proportion of lost volume was due to factors unrelated to dumping. While their decision not to produce tomato paste for industrial

sales from the 1992 pack-year may have been sound from a financial standpoint, it may have affected future relationships with customers. While U.S. prices of tomato paste were about US\$0.27 per pound F.O.B. California during the period of the Deputy Minister's investigation, the information available to the Tribunal indicates that prices started to firm up during the last half of 1992. The evidence shows that prices increased until February 1993, at which time the price of tomato paste was about US\$0.34 per pound F.O.B. California.

While Heinz calculated the opportunity loss in gross margin on the 1992 pack-year production for industrial sales as a direct result of dumping, the Tribunal notes that this lost margin is small when compared to the gross margin achieved on products that Heinz produces from tomato paste. With respect to Nabisco, the Tribunal notes that, in 1991, Nabisco's facility was running at a high level of capacity and that the firm used a large percentage of total production for internal use in that year. In the Tribunal's view, this was the main reason for the decline in Nabisco's production of tomato paste for industrial sales in 1991. While the financial results for Nabisco's tomato-based products may not have been as favourable as the company would have liked, these results, in the opinion of the Tribunal, had very little to do with dumping. In view of the foregoing, the Tribunal finds that the dumping of the subject goods has not caused and is not causing material injury to the production in Canada of like goods.

The Tribunal must now determine whether the dumping is likely to cause material injury to the production in Canada of like goods. The evidence of the complainants concerning future injury was not convincing. Their submissions indicated that the tomato paste glut would last into 1994 and that the dumping would continue if the Tribunal found no injury.

In the final determination of dumping, the Deputy Minister found that less than half the imports which entered Canada from the United States during the first six months of 1992 were dumped. In reaching this decision, the Deputy Minister used the 1991 pack-year to determine the amount of dumping. While there is no information on the margins of dumping on the 1992 pack-year, the Tribunal notes that prices of U.S. tomato paste began to firm up during the last half of 1992 and are presently at about US\$0.34 per pound F.O.B. California. Testimony from witnesses and evidence in the record indicate that prices are likely to continue their upward movement in 1993. Although inventories of tomato paste in California remain high, the evidence indicates that much of these inventories are committed. Although it is difficult to estimate the size of the 1993 U.S. tomato crop, suggestions are that it may be about eight million tons, which is close to the traditional norm. A bumper crop could, of course, alter the future market situation in the United States, but it would be pure speculation on the part of the Tribunal to suggest that this might lead to dumping and material injury to the domestic producers of tomato paste.

CONCLUSION

In light of the foregoing and based on all the information on record and the evidence adduced at the hearing, the Tribunal concludes that the dumping in Canada of tomato paste in containers larger than 100 fluid ounces, originating in or exported from the United States of America, has not caused, is not causing and is not likely to cause material injury to the production in Canada of like goods.

W. Roy Hines

W. Roy Hines

Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau

Member

Lise Bergeron

Lise Bergeron

Member