CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, October 10, 2000

Preliminary Injury Inquiry No.: PI-2000-001

IN THE MATTER OF a preliminary injury inquiry, under subsection 34(2) of the *Special Import Measures Act*, respecting:

THE DUMPING AND SUBSIDIZING OF 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

PRELIMINARY DETERMINATION OF INJURY

On August 9, 2000, the Acting Director General, Anti-dumping and Countervailing Directorate, Canada Customs and Revenue Agency, notified the Canadian International Trade Tribunal that an investigation had been initiated into the alleged injurious 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.

Following receipt of the notice, the Canadian International Trade Tribunal, under the provisions of subsection 34(2) of the *Special Import Measures Act*, has conducted a preliminary inquiry into whether the evidence discloses a reasonable indication that the dumping and subsidizing of the above-mentioned grain corn have caused injury to the domestic industry.

Pursuant to subsection 37.1(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby determines that the evidence discloses a reasonable indication that the dumping and subsidizing of the above-mentioned grain corn have caused injury to the domestic industry.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

The statement of reasons will be issued within 15 days.

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Date of Determination:	October 10, 2000
Date of Reasons:	October 25, 2000
Tribunal Members:	Pierre Gosselin, Presiding Member Zdenek Kvarda, Member James A. Ogilvy, Member
Director of Research:	Selik Shainfarber
Lead Researcher:	Ken Campbell
Economist:	Ihn Ho Uhm
Counsel for the Tribunal:	John Dodsworth Eric Wildhaber
Registrar Officer:	Gillian E. Burnett

Submissions

Animal Nutrition Association of Canada

Animal Nutrition Association of Canada – Alberta Division

Animal Nutrition Association of Canada – British Columbia Division

Animal Nutrition Association of Canada – Manitoba Division

BC Agriculture Council

Canadian Pork Council

Canadian Snack Food Association

Genetic Seeds, Inc.

Manitoba Corn Growers Association Inc.

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Ottawa, Wednesday, October 25, 2000

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IN THE MATTER OF a preliminary injury inquiry, under subsection 34(2) of the *Special Import Measures Act*, respecting:

THE DUMPING AND SUBSIDIZING OF 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

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
ZDENEK KVARDA, Member
JAMES A. OGILVY, Member

STATEMENT OF REASONS

BACKGROUND

On August 9, 2000, pursuant to subsection 31(1) of the *Special Import Measures Act*,[1] the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) initiated an investigation respecting the alleged injurious 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.

The investigation was initiated following a complaint filed on behalf of the Manitoba Corn Growers Association Inc. (MCGA) on June 19, 2000. On July 10, 2000, the Canada Customs and Revenue Agency (CCRA) informed the MCGA that its complaint was properly documented and also informed the Government of the United States of the filing of the complaint.

On August 10, 2000, pursuant to subsection 34(2) of SIMA, the Canadian International Trade Tribunal (the Tribunal) issued a notice advising interested parties that it had commenced a preliminary injury inquiry to determine whether the evidence discloses a reasonable indication that the dumping and subsidizing have caused material injury or retardation or are threatening to cause material injury.

The record of this preliminary injury inquiry consists of all documents that relate to the Commissioner's decision to initiate the investigation, his statement of reasons for the initiation and the public and protected versions of the complaint. In addition, the record consists of all submissions filed in response to the Tribunal's notice. All public exhibits were made available to the parties. Protected exhibits were made available only to counsel who had filed a declaration and 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.

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

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The Tribunal issued its preliminary determination of injury on October 10, 2000.

PRODUCT

For the purpose of the CCRA's investigation, the subject goods 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 is harvested when kernels are dry and hard, usually from September through November. The kernels are removed from the cob at harvest, putting the corn in a marketable and transportable condition. There are numerous varieties of grain corn. However, the most common variety of corn grown in North America is dent corn, also known as field corn. The scientific name is *Zea mays indentata*. Dent corn is a variety with a kernel, which contains both hard and soft starches, that becomes indented at maturity. It is mainly used for animal feed, but is also used in a wide variety of other products, such as alcohol (including fuel ethanol and spirits), corn syrup and sweeteners, cornstarch, human and pet foods, and industrial products.

As indicated in the product definition, white dent corn, seed corn (used for reproductive purposes), sweet corn and popping corn are excluded from the scope of the CCRA's investigation. Also not included in the investigation is silage or forage corn, a type of corn which does not have the kernels removed from the cob at harvest. The entire corn plant is chopped up, including the stalk, leaves and husk. Silage corn is used for animal feed on the farms where it is grown and is not normally traded or used for industrial processing. Indian corn and broomcorn, which are generally used for decorative purposes, are also not included.

INDUSTRY

There are two associations that represent grain corn producers in Western Canada: the complainant, the MCGA, which represents 391 grain corn producers in Manitoba; and Bow Island Corn Marketing, Ltd. (Bow Island), which represents about 12 grain corn producers in Alberta. Although it does not support the complaint, Bow Island does not oppose the MCGA's action. There is little or no grain corn production in either Saskatchewan or British Columbia.

Manitoba producers account for over 90 percent of the western Canadian production of grain corn (i.e. corn grown west of the Manitoba-Ontario border). These producers have generally sold most of their production through five or six main buyers that then sell it to end users throughout Western Canada. The buyers may have the grain corn shipped to their elevators or directly to some of their large customers, such as distillers and pet food manufacturers. Producers also sell to local feed mills and end users, such as livestock producers.

Bow Island markets grain corn under contract in southern Alberta. Its members harvested about 2,500 acres of grain corn in the past crop year, accounting for about 3 percent of western Canadian production.

COMMISSIONER'S INVESTIGATION

In its preliminary estimate of dumping margins, the CCRA accepted the complainant's assertion that selling prices in the United States did not represent profitable prices. Accordingly, the CCRA constructed normal values on the basis of the aggregate of the cost of production of the goods, a reasonable amount for administrative, selling and other costs, and a reasonable amount for profit. In calculating export prices, the CCRA relied on actual import data from sampled customs documentation.

The estimated margins of dumping were determined by comparing the CCRA's calculations of normal values and export prices. On the basis of these estimates, about 54 percent of the subject goods were considered to have been dumped. The margins of dumping range from 26 to 53 percent, expressed as a percentage of normal value. The overall margin of dumping is estimated at 40 percent.

In support of its allegations of subsidized imports, the MCGA provided the CCRA with various U.S. federal and state government documents and reports which describe the alleged subsidy programs. In its initial submission to the CCRA, the MCGA alleged that the major subsidy programs fall into two principal categories: non-recourse marketing assistance loans and loan deficiency payments; and various ethanol support programs. In a supplementary submission to the CCRA, the MCGA provided a list of additional programs available to U.S. corn producers. For purposes of its analysis with regard to initiating the investigation, however, the CCRA has focused on the two principal program categories described in the initial submission.

The CCRA estimates, at this preliminary stage, that the aggregate of loan benefits and loan deficiency payments, when allocated over the total U.S. corn production, yielded an average benefit of US$0.14 per bushel in 1998; US$0.22 in 1999; and a minimum of US$0.21 in 2000. These benefits represent approximately 8 percent, 13 percent and 12.5 percent of the export value of the goods in 1998, 1999 and 2000 respectively.

Although the CCRA has not estimated the extent of the benefits to U.S. corn growers resulting from the various ethanol support programs, it is satisfied that there are sufficient grounds to warrant the start of a subsidy investigation and to investigate all the programs identified by the complainant.

SUMMARY OF SUBMISSIONS

In response to the Tribunal's notice of commencement of a preliminary injury inquiry, notices of appearance were filed by 20 parties. However, only eight of these parties filed submissions, all opposing the complaint: the Animal Nutrition Association of Canada; the Animal Nutrition Association of Canada – Alberta Division; the Animal Nutrition Association of Canada – British Columbia Division; the Animal Nutrition Association of Canada – Manitoba Division; the BC Agricultural Council; the Canadian Pork Council; the Canadian Snack Food Association (CSFA); and Genetic Seeds, Inc. The Office of the United States Trade Representative (USTR), on behalf of the Government of the United States, had already filed a brief with the CCRA opposing the complaint. This brief is part of the record that was transferred to the Tribunal by the CCRA. The MCGA filed a brief in response to these submissions.

Briefly stated, the USTR contends that the complaint filed by the MCGA does not provide sufficient evidence of injury caused by imports of U.S. grain corn. It claims that the complaint contains virtually no information relating to the condition of the Canadian industry other than anecdotal allegations by individual corn growers. As such, the USTR submits that the complaint constitutes "simple assertions, unsubstantiated by relevant evidence" within the meaning of Article 11.2 of the *Agreement on Subsidies and Countervailing Measures*.[2]

The Canadian Pork Council also contends that there is insufficient evidence of injury. It claims that, although North American grain corn producers, as a whole, have been struggling with depressed corn prices in recent years, corn growers in Western Canada have done relatively well, as evidenced by their significant increase in corn production.

The Animal Nutrition Association of Canada and its western divisions claim that there has always been a demand for U.S. grain corn by western feed manufacturers, primarily because of insufficient supply of local corn and because U.S. corn more consistently meets the quality required for certain types of feed. The British Columbia and Alberta divisions of the Animal Nutrition Association of Canada also request an exemption for imports into their respective provinces on the grounds that Manitoba corn producers have historically been unable to meet their regions' demand. The BC Agriculture Council also requests an exemption for imports into British Columbia on similar grounds.

The CSFA claims that corn for use in the manufacture of whole kernel corn snack food should be considered a separate class of goods, as it is distinguishable from other corn varieties in many important respects. Moreover, the CSFA is of the view that the evidence discloses no reasonable indication that the importation of corn for use in the manufacture of snack food has caused or threatens to cause injury to the domestic production of that class of goods or has retarded the development of a domestic industry. Similarly, Genetic Seeds, Inc. has requested an exemption for imports of yellow dent corn for use by the snack food industry. Genetic Seeds, Inc. claims that the supply of yellow dent corn to snack food and tortilla manufacturers can only be satisfied with longer-maturing, trait-specific corn that cannot be grown in Manitoba.

ANALYSIS

This is the first preliminary injury inquiry conducted by the Tribunal following the changes made to SIMA, which came into force on April 15, 2000. Pursuant to these changes, the responsibility for making the determination as to whether there is evidence of injury, at the preliminary stage of an investigation, has been transferred from the CCRA to the Tribunal. The Tribunal's new authority is contained in subsection 34(2) of SIMA, which reads as follows:

> The Tribunal shall, without delay after receipt by the Secretary under subparagraph (1)(*a*)(i) of a notice of an initiation of an investigation, make a preliminary inquiry (which need not include an oral hearing) into whether the evidence discloses a reasonable indication that the dumping or subsidizing of the goods has caused injury or retardation or is threatening to cause injury.

The preliminary injury evidentiary test of "reasonable indication" that the Tribunal is required to apply under the new legislation is the same test that the CCRA was required to apply under the former legislation. It is also the same test that the Tribunal applied whenever, under the former legislation, it was

2. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

called upon from time to time by the CCRA, or one of the parties, to provide its "advice"[3] on the question of injury at the preliminary stage of an investigation. Thus, although there has been a jurisdictional change, as well as certain procedural changes,[4] the substantive evidentiary test to be applied in this preliminary injury inquiry remains that of a "reasonable indication". Moreover, the threshold has always been interpreted by the Tribunal as implying a lower threshold than that required in arriving at a final determination of injury.[5]

Within the context of the foregoing, the Tribunal notes that the Commissioner's investigation relates to grain corn imported from the United States for use or consumption west of the Manitoba-Ontario border. In other words, this case involves a regional market within the meaning of Article 4.1(ii) of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* and Article 16.2 of the *Agreement on Subsidies and Countervailing Measures*.[6] According to these provisions, in certain extraordinary cases, a national territory may be divided into separate regional markets for dumping and subsidizing cases, and an investigation may be initiated even though the complainant may not represent a major portion of the total domestic industry. The provisions of the above-mentioned agreements require that four conditions be met in the exceptional circumstances of a regional industry investigation. SIMA incorporates these conditions in subsection 2(1.1), which defines two conditions for the existence of a regional market, and in subsection 42(5), which defines two conditions for injury to a regional market, as follows:

> **Regional Market**
>
> (a) the producers in the market must sell all or almost all of their production of like goods in the market; and
>
> (b) the demand in the market must not be to any substantial degree supplied by producers of like goods located elsewhere in Canada.
>
> **Injury to Regional Market**
>
> (a) if there is a concentration of dumped or subsidized goods into the regional market; and
>
> (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.

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3. Subsection 34(1)(*b*) of SIMA prior to April 15, 2000, read as follows:

   (1) Where the Deputy Minister causes an investigation to be initiated respecting the dumping or subsidizing of goods,

   . . .

   (*b*) in the case of an investigation initiated pursuant to subsection 31(1), the Deputy Minister may, on the date of the notice given to the complainant pursuant to paragraph (*a*), or any person or government that was given notice pursuant to paragraph (*a*) may, within thirty days from the date of the notice, refer to the Tribunal the question whether the evidence discloses a reasonable indication that the dumping or subsidizing of any goods in respect of which the Deputy Minister has caused the investigation to be initiated has caused injury or retardation or is threatening to cause injury. [Emphasis added]

4. Under the new procedures, parties and counsel have access to the record, including the complaint and other relevant information filed with the CCRA. Parties are also invited to make submissions to the Tribunal not only on whether there is injury but also on other issues, as specified in the notice. Such issues include: whether there are goods produced in Canada that are like goods to the allegedly dumped or subsidized goods; whether there is more than one class of goods; and which domestic producers of like goods comprise the domestic industry.
5. See, for example, *Malt Beverages, Commonly Known as Beer, Advice* (2 May 1991), RE-91-001 (CITT).
6. *Supra* note 2.

Before addressing the question of injury, the Tribunal must be satisfied that the above conditions have been met, on the basis of the information available to date. In regard to the regional market test set out above, the evidence indicates that there have been no shipments of grain corn crossing the Manitoba-Ontario border, either eastbound or westbound, for the past several years. Therefore, the western Canadian region, as defined in the complaint, meets the test of being an isolated regional market.

The Tribunal notes that submissions have been received that requested that imports into British Columbia and Alberta be exempted from the scope of the investigation. The grounds provided for this request are primarily that the demand for the subject goods in these provinces is not met by Manitoba grain corn. Should the Tribunal grant these exemptions, it could have the effect of redefining and narrowing the territorial scope of the regional market as delineated in the complaint, and the regional tests might have to be reapplied to the narrower territory. However, the Tribunal is of the view that there is insufficient evidence on the record at this time to subdivide the region as defined. The claims by British Columbia and Alberta are contested by the MCGA, and there is no statistical information concerning the movement of Manitoba grain corn to other western provinces. If the Commissioner issues a preliminary determination of dumping and/or subsidizing, the Tribunal will want to further examine these requests and the effect that such exemptions might have on regional market determinations.

Turning to the issue of whether there is a concentration of dumped or subsidized imports into the regional market, as set out above, the Tribunal notes that, in recent crop years, imports of U.S. grain corn have regularly held over 50 percent of the regional market. Moreover, one third of the total imports of U.S. grain corn into Canada flow into the regional market, about five times the regional market's share of total Canadian consumption of grain corn. Therefore, based on the data available at the present time, the Tribunal is of the view that the concentration test has been met. The Tribunal notes that the dumping and subsidizing data that are currently available on imports of U.S. grain corn are based on preliminary estimates by the CCRA. The above tests will have to be reexamined by the Tribunal when additional information becomes available, following a more in-depth investigation by the CCRA.[7]

Looking at the test of injury to the producers of all or almost all of the production, the Tribunal notes that the complainant in this case, the MCGA, represents Manitoba growers whose production represents 89 to 97 percent of total regional market production for the two most recent crop years. Therefore, the test will be met, in the Tribunal's opinion, if the evidence establishes a reasonable indication of injury to Manitoba growers.

In its complaint to the Commissioner, the MCGA has alleged that, as a result of the dumping and subsidizing, Manitoba corn growers have sustained injury in the form of price suppression, lost sales, reduced income, impaired lines of credit and lost incentive to expand production. More particularly, the MCGA provided evidence, in the form of statistical data, as well as through letters from individual farmers, to demonstrate the scope and effect of price declines for grain corn, especially in the 1999-2000 crop year. According to the MCGA, prices in Manitoba closely reflect U.S. prices and, as U.S. domestic and export prices have fallen because of overproduction by U.S. growers, they have dragged down prices not only in Manitoba but in Western Canada in general. According to the evidence, at current price levels, western

7. In view of the possibility that the territorial scope of the regional market could be narrowed as this case goes forward, the Tribunal will require separate dumping and subsidizing information from the CCRA with regard to imports of U.S. grain corn into British Columbia and Alberta so that it may consider the effect of the requested territorial exemptions on the concentration test.

Canadian growers were, on average, operating at break-even levels and cutting back on production in the current crop year compared to previous years.

The Tribunal notes that, according to the data on the record, imports of U.S. grain corn grew by almost 50 percent between the 1995-96 crop year and the 1999-2000 crop year. Moreover, imports of U.S. grain corn are expected to grow by a further 21 percent in the current crop year, 2000-2001, as the United States harvests a crop that is anticipated to be at record levels. At this rate of growth, imports of U.S. grain corn are beginning to outpace the growth of consumption in Western Canada.

The Tribunal notes that the scope and extent of the injury claimed by the MCGA and its causal relation to imports of U.S. grain corn are contested by a number of the parties opposed to the complaint. However, the Tribunal is of the view that there is sufficient information to support the MCGA's claims, at this stage, to meet the test of "reasonable indication" of injury caused by the subject imports from the United States. In brief, the Tribunal finds that, based on the evidence before it, there is a correlation between the growth in dumped and subsidized imports of U.S. grain corn and falling Canadian prices and the declining financial performance experienced by the MCGA's members. However, proof of the MCGA's claims of injury caused by the dumping and subsidizing can only be established through a final injury inquiry.

The Tribunal will now address the claim that there is more than one class of goods to be considered in the investigation. The CSFA has submitted that corn imported for use in the production of snack food constitutes a separate class of goods. The Tribunal notes that, in initiating its investigation, the CCRA indicated, in its statement of reasons, that it had considered the question of whether the goods under investigation should be divided into more than one class and had concluded that there is only one class of goods.

As the Tribunal has stated in past cases, it is not bound by the CCRA's determination on the issue of class of goods. In other words, the Tribunal can determine, in this case, that there is more than one class of goods. Such a determination, if the Tribunal were to make it, would have significant implications for the conduct of this case. The CCRA would be required to conduct separate dumping and subsidizing investigations for each class of goods, and the Tribunal, similarly, would be required to conduct separate injury inquiries.

As the CSFA has argued, in considering this issue, 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.[8] When these factors are examined in relation to the corn varieties used by the snack food industry, it would seem that these varieties can be distinguished, in certain respects and to varying degrees, from the others. This is not surprising since there appear to be numerous corn varieties, besides those used in the snack food industry, that in one way or another can be distinguished from the others.

That having been said, all these various corn varieties, including those used in the snack food industry, share certain fundamental characteristics. First, they are all members of the same 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, a key determinant in segregating goods into

8. See, for example, *Certain Iodinated Contrast Media*, *Finding* (1 May 2000), *Statement of Reasons* (16 May 2000), NQ-99-003 (CITT).

separate classes, there is nothing in the record to suggest that snack food corn can be readily distinguished from other corn varieties. On the basis of these common characteristics, the Tribunal finds that, while the corn used in the snack food industry may be distinct from other corn varieties, it is not so different as to comprise an entirely separate class of goods.

Although the Tribunal finds that snack food corn is not a separate class of goods, this does not mean that it cannot be excluded from the scope of an injury finding. Indeed, imports of U.S. white dent corn for use in the snack food industry have already been excluded from the scope of the CCRA's investigation. The broader exemption requested by the CSFA for all snack food corn could be granted, either at this stage or at the final stage of the inquiry, if it can be established that such corn is not grown in Western Canada, is not substitutable and, consequently, is not a source of injury to the domestic industry. However, these claims by the CSFA are contested by the MCGA. It is only through a full inquiry that the Tribunal will be able to adequately test and evaluate these claims and counterclaims.

CONCLUSION

On the basis of the information before it, the Tribunal determines, pursuant to subsection 37.1(1) of SIMA, that the evidence discloses a reasonable indication that the dumping and subsidizing of 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, have caused injury to the domestic industry.

Pierre Gosselin
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Presiding Member

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