Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

DETERMINATION AND REASONS

Preliminary Injury Inquiry
No. PI-2005-001

Grain Corn

Determination issued
Tuesday, November 15, 2005

Reasons issued
Wednesday, November 30, 2005

Canada

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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 GRAIN CORN ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA

PRELIMINARY DETERMINATION OF INJURY WITH RESPECT TO UNPROCESSED GRAIN CORN AND TERMINATION OF THE PRELIMINARY INJURY INQUIRY WITH RESPECT TO PROCESSED GRAIN CORN

The Canadian International Trade Tribunal, under the provisions of subsection 34(2) of the *Special Import Measures Act*, has conducted a preliminary injury inquiry into whether the evidence discloses a reasonable indication that the dumping and subsidizing of grain corn in all forms, excluding seed corn (used for reproductive purposes), sweet corn and popping corn, originating in or exported from the United States of America, have caused injury or retardation or are threatening to cause injury to the domestic industry.

This preliminary injury inquiry is pursuant to the notification, on September 16, 2005, that the President of the Canada Border Services Agency had initiated an investigation into the alleged injurious dumping and subsidizing of the above-mentioned goods.

The Canadian International Trade Tribunal finds that unprocessed grain corn constitutes a class of goods separate from processed grain corn. Unprocessed grain corn includes whole kernel grain corn and grain corn which has been milled to a limited degree, such that the milled grain corn, regardless of its physical form, preserves all the constituent parts of whole kernel grain corn and is chemically identical to whole kernel grain corn.

The processed grain corn subject to this preliminary injury inquiry, in contrast, results from dry milling operations that separate or remove constituent parts of the whole kernel grain corn, such as the bran layer or pericarp, germ, tip cap or endosperm.

Pursuant to paragraph 35(1)(*b*) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby concludes that the evidence does not disclose a reasonable indication that the dumping and subsidizing of processed grain corn have caused injury or retardation or are threatening to cause injury to the domestic industry. Therefore, pursuant to paragraph 35(3)(*a*) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby terminates the preliminary injury inquiry with respect to processed grain corn.

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

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Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
Member

Hélène Nadeau
Hélène Nadeau
Secretary

The statement of reasons will be issued within 15 days.

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STATEMENT OF REASONS

BACKGROUND

1. On November 15, 2005, pursuant to subsection 37.1(1) of the *Special Import Measures Act*,[1] the Canadian International Trade Tribunal (the Tribunal) determined that there was evidence that disclosed a reasonable indication that the dumping and subsidizing of unprocessed grain corn had caused injury to the domestic industry.

2. On the same date, pursuant to paragraph 35(1)(*b*) of *SIMA*, the Tribunal concluded that the evidence did not disclose a reasonable indication that the dumping and subsidizing of processed grain corn had caused injury or retardation or were threatening to cause injury to the domestic industry. Therefore, pursuant to paragraph 35(3)(*a*), the Tribunal terminated the preliminary injury inquiry with respect to processed grain corn.

3. The Tribunal's decisions completed its preliminary injury inquiry, which was commenced following the initiation, on September 16, 2005, by the President of the Canada Border Services Agency (CBSA) of an investigation into the alleged injurious dumping and subsidizing of grain corn in all forms, excluding seed corn (for reproductive purposes), sweet corn and popping corn, originating in or exported from the United States of America (the subject goods). The investigation was initiated by the CBSA following a complaint filed on August 12, 2005, by the Ontario Corn Producers' Association (OCPA), the Federation of Quebec Producers of Cash Crops (FQPCC) and the Manitoba Corn Growers' Association (MCGA), collectively the Canadian corn growers (CCG).

CBSA'S DECISION

4. On September 30, 2005, the CBSA issued a statement of reasons for the initiation, on September 16, 2005, of its investigation into the alleged injurious dumping and subsidizing of the subject goods.

5. The CBSA estimated the margins of dumping for the period from September 1, 2003, to August 31, 2005. Its analysis indicated that approximately 63 percent of the goods imported into Canada during its period of investigation were dumped by margins ranging from 0.1 to 161.0 percent, with an estimated average margin of dumping of 4.4 percent, expressed as a percentage of the export price.

6. The CBSA also found that there was reason to believe that there were a number of programs and incentives offered by the U.S. Government that might constitute actionable subsidies under *SIMA*. In reviewing the information found in the reports and articles provided by the CCG or obtained through its own research, the CBSA developed the following list of programs and incentives that are available to grain corn producers in the United States: (1) Direct and Counter-cyclical Payment Program (formerly the Marketing Loss Assistance Payments); (2) Non-recourse Marketing Assistance Loans and Loan Deficiency Payments; and (3) Federal Crop Insurance Programs.

7. The CBSA found that the estimated amounts of subsidy were equal to US$0.44 per bushel, or 18 percent of the average export price of the goods shipped to Canada in the 2003-2004 crop year,[2] and

1. R.S.C. 1985, c. S-15 [*SIMA*].
2. The crop year is from September 1 to August 31.

US$0.91 per bushel, or 44 percent of the average export price of the goods shipped to Canada from September 1, 2004, to May 31, 2005.

8. The CBSA noted that its estimates of the margins of dumping and subsidizing relate to imports of the subject goods classified in Chapter 10 of the *Customs Tariff*,[3] with the exception of classification No. 1005.90.00.99 (other corn, including white dent corn). These imports represent approximately 94 percent by value of the subject goods.

9. In summary, the CBSA was of the opinion that there was evidence that the subject goods had been dumped and subsidized. Further, the CBSA stated that there was evidence that disclosed a reasonable indication that the dumping and subsidizing had caused and were threatening to cause material injury to the Canadian industry. An investigation was therefore initiated into the dumping and subsidizing of grain corn from the United States.

PRELIMINARY MATTER

10. A notice of motion was filed on October 14, 2005, under subrule 24(1) of the *Canadian International Trade Tribunal Rules*,[4] by the CCG seeking an order disqualifying Mr. Peter Clark and his firm, Grey, Clark, Shih and Associates Limited, from acting as counsel of record for any respondent party in the current proceedings.

CCG

11. The grounds in support of the motion can be summarized as follows. Mr. Clark was retained to represent the MCGA in an inquiry[5] relating to the dumping and subsidizing of grain corn for use or consumption west of the Manitoba-Ontario border. Mr. Clark represented the MCGA at all stages of those proceedings. The CCG submitted that many of the issues addressed in *Grain Corn 2000*, notably the U.S. subsidy programs, are identical to the issues that will be raised in the current proceedings. It is further alleged that Mr. Clark knows the strengths and weaknesses of the MCGA's position because of the privileged access that he previously had to confidential information acquired as counsel for the MCGA in *Grain Corn 2000* and, consequently, that Mr. Clark and his firm will not be able to represent his current clients without making use of that confidential information.

12. It was argued that the MCGA relied on the trust and confidence inherent in the previous relationship that it had with Mr. Clark and his firm to disclose such confidential information to them. The CCG submitted that all counsel are subject to the same obligations when appearing before the Tribunal. Reference was also made to the Supreme Court of Canada's decision in *MacDonald Estate v. Martin*,[6] in which the Supreme Court of Canada stated that, if "there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge."[7] In addition, the CCG contended that the facts in issue are distinguishable from the Tribunal's recent ruling on a similar motion in *Bicycles*.[8]

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3. S.C. 1997, c. 36.
4. S.O.R./91-499.
5. *Grain Corn* (7 March 2001), NQ-2000-005 [*Grain Corn 2000*].
6. [1990] 3 S.C.R. 1235 [*MacDonald Estate*].
7. *MacDonald Estate* at 1260.
8. *Bicycles and Finished Painted Bicycle Frames* (September 2005), GS-2004-001 and GS-2004-002 (CITT).

13. In its reply submission, the CCG cited *Ontario Hydro v. Ontario Energy Board*,[9] a case involving rate hearings before the Ontario Energy Board. In that case, a lawyer who had represented Ontario Hydro at rate hearings from 1976 to 1986, and who ceased representing Ontario Hydro in 1986, was, eight years later, precluded from acting against his former client on the basis of conflict of interest.

14. In response to Mr. Clark's submission that he was not in possession of confidential information, the CCG submitted that the misuse that they fear does not relate to the use of publicly available economic data, but rather to disclosure of the strategic, procedural, contextual, tactical and intangible information that Mr. Clark gained during his representation of the MCGA in *Grain Corn 2000*. The CCG further argued that *Grain Corn 2000* and the current proceedings are materially the same. The CCG submitted that the members of the MCGA are part of the domestic industry in the current proceedings and that the fact that the scope of the latter is broader than that in *Grain Corn 2000* is immaterial.

Mr. Clark

15. In response to the motion, Mr. Clark argued that the CCG had not demonstrated that *Grain Corn 2000* and these proceedings are related. He argued that they are totally distinct proceedings because of differences in period of inquiry, geographic scope, product coverage and composition of the domestic industry. Mr. Clark indicated that Manitoba's production represents only 2 percent of the total Canadian production and that the current proceedings will focus on Ontario and Quebec rather than on Manitoba.

16. Accordingly, Mr. Clark stated that, although the CCG relied on the presumption that confidential information is imparted to counsel, it failed to establish that the two proceedings are sufficiently related for the presumption to be relevant to this case.

17. He indicated that he is not in possession of any confidential information filed with the Tribunal in *Grain Corn 2000*, nor is he in possession of any confidential information obtained from the MCGA in his role as counsel to it. Mr. Clark acknowledged that all counsel appearing before the Tribunal are subject to the same obligations as those that apply to lawyers. He noted that his commercial relationship with the MCGA ended immediately after the issuance of the Tribunal's statement of reasons in *Grain Corn 2000*, on March 22, 2001.

18. Mr. Clark also argued that, in an agricultural commodity case such as this one, confidential information is of little or no importance, since the matter is decided on the basis of publicly available macro-economic data. As regards the Tribunal's recent ruling on a similar motion in *Bicycles*, Mr. Clark argued that, in that case, the Tribunal found that, since the two bicycle cases did not cover overlapping periods, they were not related proceedings. He argued that, in this case, the two periods were even further apart in time and hence unrelated.

19. Finally, in response to the CCG's reply submission, Mr. Clark contended that the strategy, tactics and procedures appropriate in *Grain Corn 2000* could in no way be applicable to the current proceedings. He also indicated that, given the size and state of the industry in Western Canada, he did not intend to examine the MCGA's witness or any other witness from Western Canada.

9. [1994] O.J. No. 824 (Ont. Ct. Gen. Div.).

Reasons for Decision

20. On November 2, 2005, the Tribunal dismissed the motion.

21. As it stated in *Bicycles*, the Tribunal considers it very important that counsel who appear before it be free from conflicts of interest.[10] Because the Tribunal is a court of record, its jurisdiction to consider all issues necessary to the fulfilment of its mandate includes the ability to consider matters regarding participation and appearance of parties and counsel before it.[11]

22. It was not disputed that trade counsel who are not members of a provincial or territorial law society who appear before the Tribunal are subject to the same obligations of loyalty and confidentiality as those applicable to lawyers.

23. A lawyer's duty to avoid conflicts of interest includes, notably, a general duty of loyalty and a duty of confidentiality. With respect to the duty of loyalty, it is recognized that lawyers must act in the best interest of their clients by avoiding conflict situations. Pursuant to that duty, a lawyer who has acted for a client in a previous matter must not act against that client in a related matter. With respect to the duty of confidentiality, a lawyer who has acted for a client must not thereafter act against that client in a new matter, if the confidential information received during the previous relationship is relevant to the matter at hand.

24. The classic statement of the conflict of interest principle between lawyers and clients is found in *MacDonald Estate*. Sopinka, J., stated the following:

> . . .
>
> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?
>
> . . . In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication . . . .
>
> The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client . . . .[12]

10. "The sine qua non of the justice system is that there be an unqualified perception of its fairness in the eyes of the general public." *O'Dea v. O'Dea* (1987), 68 Nfld. & P.E.I.R. 67 (Nfld. Unif. Fam. Ct.) at 75, aff'd Nfld. C.A., June 6, 1988; cited with approval in *MacDonald Estate* at 1256.
11. *466353 Ontario Ltd. v. Ontario (Municipal Board)*, [2005] O.J. No. 979 (Ont. Sup. Ct.).
12. *MacDonald Estate* at 1260-61.

25. The first question that must be answered by the Tribunal is whether the current proceedings are sufficiently related to those in *Grain Corn 2000* to place Mr. Clark in a situation of conflict of interest and to constitute a breach of his duty of loyalty.

26. Having considered the evidence and the arguments on the record, the Tribunal finds that the proceedings in *Grain Corn 2000* and these proceeding are not sufficiently related to place Mr. Clark in a situation of conflict of interest and to constitute a breach of his duty of loyalty. In this regard, the Tribunal first notes that *Grain Corn 2000* dealt with grain corn imported into Canada for use or consumption west of the Manitoba-Ontario border and, therefore, was a "regional market" case. In contrast, the current proceedings deal with imports of grain corn into Canada as a whole. The Tribunal believes that this distinction is of great significance. Indeed, in *Grain Corn 2000*, the MCGA, as the sole complainant on behalf of its members, purported to represent all or almost all of the production of like goods west of the Manitoba-Ontario border. In contrast, this is a "national market" as opposed to a "regional market" case, and the MCGA's share of the total domestic production now represents only approximately 2 percent. The relative significance of the MCGA's performance in the context of the Tribunal's injury analysis must be looked at accordingly. Also, some conditions governing the conduct of a regional market case are very different from those that apply in a national market case. These conditions relate, for example, to the segregation of the trade within the regional market from the trade in the rest of the national market and to the fact that injury must be found in respect of the domestic producers of all or almost all of the production of like goods.

27. Second, the Tribunal notes that the proceedings in *Grain Corn 2000* ended on March 22, 2001, with the issuance of its statement of reasons. Mr. Clark indicated that his commercial relationship with the MCGA ended immediately after that. Almost five years have elapsed between the two proceedings and there is no overlap between the respective inquiry periods. As stated in *Bicycles*, this is a crucial point to consider. The Tribunal further notes that this motion is not brought in the context of expiry review proceedings, where it would be examining an order or finding directly relating to the proceedings.

28. With respect to the duty of confidentiality, the Tribunal is of the view that, mainly for the reasons that have been provided above, any confidential information that may have been imparted to Mr. Clark by his former client will not be relevant to the case at hand. In this connection, the Tribunal notes the importance of publicly available macro-economic data in the injury analyses that it conducts in national agricultural commodity cases. The Tribunal further notes that the CCG could not point to any meaningful or substantive example of the type of information that would have been acquired from the MCGA and that would constitute relevant confidential information in the context of the current proceedings.

29. In light of the above, the Tribunal is satisfied that Mr. Clark's participation in the current proceedings does not constitute a breach of his duty of loyalty and his duty of confidentiality and does not place him in a situation of conflict of interest. Consequently, the Tribunal dismissed the motion.

SUBMISSIONS

Domestic Industry

30. In its complaint, the CCG submitted that the dumping and subsidizing of the subject goods have caused and threaten to cause injury to the domestic industry. In addition, the CCG submitted that the subject goods threaten injury to the production of white dent corn. In support of its allegations, the CCG provided evidence of price depression and suppression; reduced acreage, incomes, return on investment and cash flows; and an increased burden on government programs.

Parties Opposed to the Complaint

31. The Tribunal received 23 submissions from the following parties opposed to the CCG's complaint: Canadian Pork Council, Animal Nutrition Association of Canada, Canadian Cattlemen's Association, Food Processors of Canada, Brewers of Canada, Schenley Distilleries Inc. and Alberta Distillers Limited, Maple Leaf Foods Inc., Association of Canadian Distillers, Commercial Alcohols Inc., Newco Commodities Limited, Diageo Canada Inc., Brar Natural Flour Milling Incorporated, Casco Inc. and Corn Products International, Inc., Canadian Snack Food Association, U.S. Corn Coalition, Nature's Path Foods Inc., Animal Nutrition Association of Canada—Manitoba Division, Hytek Limited, Ontario Agri Business Association, Animal Nutrition Association of Canada—British Columbia Division, Office of the United States Trade Representative, Que Pasa Mexican Foods, and Animal Nutrition Association of Canada—Alberta Division.

32. Submissions were made on the scope of the product definition, like goods, classes of goods and other factors as causes of injury not attributable to the alleged injurious dumping and subsidizing of the subject goods. Certain parties argued that the product definition of the subject goods was too broad and requested that the Tribunal address this concern, either on the basis of several classes of goods or by way of product exclusions. Generally, the parties opposed to the complaint submitted that the evidence did not disclose a reasonable indication that the alleged injurious dumping and subsidizing of the subject goods had caused injury or were threatening to cause injury.

ANALYSIS

33. A number of parties to the current proceedings argued that the inquiry covered more than one class of goods. The Tribunal will address this issue and that of like goods before conducting its analysis of injury.

Classes of Goods and Like Goods

34. In addressing the issue of classes of goods, the Tribunal must determine whether the goods that are subject to an inquiry constitute like goods in relation to one another. Consequently, in determining whether there is more than one class of goods, the Tribunal will look at the factors that it generally considers in connection with the issue of like goods. Separate classes of goods are established only when goods that are alleged to be part of a single class of goods do not constitute "like goods" in relation to other subject goods. If the Tribunal finds that there is more than one class of goods, the question of whether the dumping and subsidizing of the goods have caused or are threatening to cause injury to a domestic industry that produces each corresponding class of like goods must be considered separately.[13]

35. 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.

13. *Fasteners* (7 January 2005), NQ-2004-005 (CITT) at paras. 69-70.

36. In considering the issues of both classes of goods and 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 domestic goods fulfill the same customer needs as the imported goods.[14]

37. The Tribunal notes that the product definition in the current case is broader than the product definitions used in *Grain Corn 2000* and another previous case.[15] In *Grain Corn 1986*, the product was initially described as follows:

> . . . grain corn in all forms, excluding seed corn, sweet corn and popping corn . . . .[16]

In *Grain Corn 1986*, the statement of reasons that accompanied the notice of investigation issued by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) indicated that the complainant was not interested in any of the manufactured corn products such as corn meal or flour, corn starch and high fructose corn syrup.[17] Grain corn which had received any further processing was excluded from the definition of the goods in that case. However, following the preliminary determination in that case, the Deputy Minister informed the Canadian Import Tribunal by letter dated December 1, 1986, that there was a growing indication of a change in the marketing of grain corn since the preliminary determination. By performing certain simple processing operations on the corn, or mixing it with other ingredients, the resulting product could be claimed to be non-subject goods for the purposes of the assessment of provisional duties. Accordingly, the Deputy Minister adjusted the definition of grain corn in all forms to include processed corn where all the constituent parts of the grain corn are present and those constituent parts comprise at least two thirds of the entire product by weight. Goods considered to be subject therefore included those where the kernel is whole, cracked, crushed, ground, rolled, sliced, or vitamin enriched, and corn screenings.[18]

38. In *Grain Corn 2000*, the product was described as "grain corn in all forms", excluding seed corn (used for reproductive purposes), sweet corn and popping corn. For greater clarity, grain corn in all forms within the scope of the investigation was defined to include, but was not limited to, whole kernel grain corn and processed grain corn, such as cracked, crushed, ground or flaked grain corn. Also included was grain corn mixed with other products, including but not limited to millet, which can be separated from the grain corn after importation.[19] The goods in that case were classified in subheading No. 1005.90.

39. In the current case, the "grain corn in all forms" has been defined to include whole kernel corn and grain corn which has been subject to limited processing or dry milling; it also includes ground corn such as corn flour, corn grits, corn meal, corn bran, sharps and other residues, and corn which is hulled, sliced or kibbled. In addition to the products covered by subheading No. 1005.90, six statistical codes have been included: 1102.20.00.00, 1103.13.00.10, 1103.13.00.20, 1104.23.00.00, 2302.10.00.10 and 2302.10.00.90. These cover corn flour; corn meal; corn grits used in the manufacture of corn flour; corn which is hulled, sliced or kibbled; chopped, crushed or ground bran sharps and other residues; and other bran sharps and residues respectively.

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14. *Laminate Flooring* (16 June 2005), NQ-2004-006 (CITT) at para. 65.
15. *Grain Corn* (6 March 1987), CIT-7-86 (CIT) [*Grain Corn 1986*].
16. *Grain Corn 1986* at 3.
17. *Grain Corn 1986* at 3.
18. *Grain Corn 1986* at 4.
19. *Grain Corn 2000* at 4.

40. The CCG submitted that grain corn in all forms, including grain corn which has been processed in a limited way (e.g. by cracking, crushing, rolling, grinding or flaking), including corn grits, corn meal and corn flour, or mixed with other grains or oilseeds, should be included in the scope of the inquiry. It argued that grain corn processed in a limited way (which includes dry milling but not wet milling) was a single class of goods.[20] The CCG submitted that, while processed grain corn is not identical in all respects to unprocessed grain corn, its uses and characteristics closely resemble those of unprocessed grain corn. Specifically, the CCG submitted that processed grain corn and unprocessed grain corn have essentially the same chemical and nutritional characteristics, that processed grain corn can be substituted for unprocessed grain corn in animal or poultry feed and most industrial uses (including the production of starches, sweeteners and alcohols—both spirits and ethanol) and that both unprocessed and processed grain corn fulfill the same customer needs and could employ the same channels of distribution.[21]

41. In its statement of reasons, the CBSA found that, based on chemical composition, channels of distribution, customers and substitutability, unprocessed and processed grain corn were a single class of goods.[22]

42. The parties opposed to the complaint submitted, *inter alia*, that the definition of the subject goods was too broad. They submitted that unprocessed grain corn consists of the corn kernel, which is generally separated from the corn husk at harvest and dried until it reaches a moisture content of approximately 15.5 percent. Among other purposes, grain corn is used to make processed grain corn products. The Canadian Pork Council, the Animal Nutrition Association of Canada and the Canadian Cattlemen's Association noted that flaking grits, used in the manufacture of corn flake breakfast cereals, are produced from the largest fractions of the corn endosperm. Coarse, medium and fine grits, made from progressively smaller fractions of the endosperm, are used as a fermentable sugar source in brewing. Corn cones and corn flour are progressively finer fractions of corn meal.[23] Maple Leaf Foods Inc. noted that corn bran is not produced from the endosperm, but rather from the bran and germ fractions of the kernel, and that the production process is separate from that of grits, meal and flour.[24]

43. The parties opposed to the complaint submitted that processed grain corn and unprocessed grain corn are generally sold to different end users through different modes of distribution.

44. The Tribunal is of the view that the evidence shows that unprocessed grain corn is not "like goods" in relation to processed grain corn because they differ significantly in terms of production process, physical characteristics and market characteristics, such as substitutability, modes of distribution, customers and price.

45. First, comparing unprocessed grain corn with processed grain corn, it is clear that they are not produced in the same way. Unprocessed grain corn is cultivated, harvested and dried as whole kernels of grain corn (although some kernels may be inadvertently broken as a result of the handling). The Tribunal notes that this grain corn may be milled to a limited degree, such that the milled grain corn, regardless of its physical form, preserves all of the constituent parts of whole kernel grain corn and is chemically identical to whole kernel grain corn. In the Tribunal's view, because of the unchanged chemistry and components, grain

20. Complaint at 25, Administrative Record, Vol. 1.
21. Complaint at 27-29, Administrative Record, Vol. 1.
22. CBSA's statement of reasons for initiation of investigation at 4-5, Administrative Record, Vol. 1A.
23. Submission by the Canadian Pork Council, the Animal Nutrition Association of Canada and the Canadian Cattlemen's Association at 31, Administrative Record, Vol. 3A.
24. Submission by Maple Leaf Foods Inc. at 24, Administrative Record, Vol. 3B.

corn that is milled to this limited degree may be considered "unprocessed". Processed grain corn subject to this preliminary injury inquiry, in contrast, results from dry milling operations that separate or remove constituent parts of the whole kernel grain corn, such as the bran layer or pericarp, germ, tip cap or endosperm. Consequently, it does not possess the same physical characteristics. Separation or removal of some constituent parts also implies that unprocessed grain corn and processed grain corn do not have the same chemical composition. Dry milling production of these products is a complex process that involves more than minor milling. Technical standards define the various processed products in terms of their chemical composition and level of fineness, as indicated by the different statistical codes used to describe these products.

46. As to market characteristics, the evidence submitted by users of unprocessed and processed grain corn indicated that there are limited substitution possibilities. The storage and handling equipment used by consumers is often designed to handle either whole kernels or the particular form of processed grain corn (i.e. grits, flakes, flour).[25] Changes to the size or constituent parts of the corn can have a negative impact on the efficiency of manufacturing processes and may render such processes inoperable.[26] Similarly, corn flour is not normally used as animal feed, nor can it be used for the production of ethanol or distilled spirits, because the starch has been removed.[27]

47. With respect to modes of distribution, the CCG recognized that processed grain corn is typically sold in bags and transported by truck to users such as bakers and brewers. Unprocessed grain corn is typically stored in bulk containers and transported by truck or rail to end users such as animal feed or ethanol producers.

48. Evidence on the record of this preliminary injury inquiry indicates that there is significant value added to processed grain corn. Its prices are two to three times higher than those of unprocessed grain corn.[28] Even with the addition of anti-dumping and countervailing duties, the prices of imported unprocessed grain corn would be significantly lower than those of processed grain corn and, therefore, unlikely to lead to significant substitution by consumers.

49. For the above reasons, the Tribunal determines that unprocessed grain corn constitutes a class of goods separate from processed grain corn.

50. Some parties argued that unprocessed grain corn also comprises more than one class of goods. For example, the Canadian Snack Food Association submitted that white dent corn and hard endosperm grain corn constituted separate classes of goods. The Tribunal finds that the evidence on the record does not demonstrate that the goods that are part of the alleged separate classes of goods are sufficiently different, in terms of the relevant factors reviewed above, to warrant a determination that they constitute classes of goods separate from unprocessed grain corn. Therefore, the Tribunal finds that the subject goods comprise two classes of goods: unprocessed grain corn and processed grain corn.

51. With respect to the issue of which domestically produced goods constitute like goods to the subject goods, the Tribunal finds that the domestically produced unprocessed grain corn and processed grain corn constitute like goods to the unprocessed grain corn and processed grain corn subject to this inquiry respectively.

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25. Submission by Schenley Distilleries Inc. and Alberta Distillers Limited at 4, Administrative Record, Vol. 3.
26. Submission by Schenley Distilleries Inc. and Alberta Distillers Limited at 4, Administrative Record, Vol. 3.
27. Submission by the Office of the United States Trade Representative at 9-10, Administrative Record, Vol. 3.
28. Submission by the Office of the United States Trade Representative, Exhibit 1, Administrative Record, Vol. 3.

Reasonable Indication of Injury

52. Pursuant to subsection 34(2) and section 37.1 of *SIMA*, the Tribunal is required, for each class of goods, to determine whether the evidence discloses a reasonable indication that the dumping or subsidizing of the subject goods has caused injury or retardation or is threatening to cause injury. Subsection 2(1) defines "injury" as material injury to a domestic industry. It defines "domestic industry" as 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.

Unprocessed Grain Corn

53. The Tribunal notes that, in its decision to initiate the investigation, the CBSA found that the CCG, as a coalition of the OCPA, FQPCC and MCGA producer organizations, represent virtually all of the unprocessed grain corn producers in their respective provinces. Ontario, Quebec and Manitoba accounted for 98 percent of the unprocessed grain corn production in Canada in the 2003-2004 crop year, the last year for which complete data were available. The Tribunal therefore determines that the CCG constitute the domestic industry for the purposes of its preliminary injury inquiry.

54. In determining whether the evidence discloses a reasonable indication of injury, the Tribunal notes that, in its complaint, the CCG submitted that the alleged injurious dumping and subsidizing of the subject goods have caused and are threatening to cause material injury to the production in Canada of unprocessed grain corn. The CCG state that the domestic industry is being injured through price suppression and price erosion, reduced acreage, reduced incomes and cash flows and, in the case of the alleged injurious subsidizing, an increased burden on government support programs.

55. According to the CBSA, the domestic production of unprocessed grain corn in Canada decreased by 1.6 percent over the 2002-2003 to 2004-2005 period. It increased from 353 million bushels in the 2002-2003 crop year to 364 million bushels in the 2003-2004 crop year, and then declined by 4.7 percent in 2004-2005, to 347 million bushels.

56. The CBSA has also reported that the average unit value of the unprocessed grain corn production declined by 29 percent over the 2002-2003 to 2004-2005 period. In 2002-2003, it was CAN$4.00 per bushel and fell to CAN$3.77 per bushel in 2003-2004. The average unit value of the production then declined to CAN$2.86 per bushel in 2004-2005, representing a loss in farm cash receipts of over CAN$395 million.[29]

57. Based on the average cost of production for unprocessed grain corn of CAN$3.18 per bushel in Ontario, which accounts for approximately 60 percent of the Canadian grain corn production, grain producers experienced a loss in net income of approximately CAN$0.32 per bushel in 2004-2005.

58. According to the CCG, the decline in returns to the production of unprocessed grain corn has resulted in a decline in acreage seeded to grain corn. The CBSA found that seeded area declined from 1.30 million hectares in 2002-2003 to 1.18 million hectares in 2004-2005, or by 9.2 percent, and is estimated to have declined by an additional 4.2 percent, or 54,000 hectares, to 1.13 million hectares in 2005-2006.

29. Average unit values declined by CAN$1.14 per bushel, and production was 346.8 million bushels.

59. The decline in net income has also led to an increased burden on government support programs. The CCG alleged that the depressed prices for unprocessed grain corn have led to increased payouts of approximately CAN$90 million each by Ontario's Market Revenue Insurance Program and Quebec's *Programme d'assurance stabilisation des revenus agricoles*. The CCG also submitted that some portion of the additional CAN$50 million paid out by the Canadian Agricultural Income Stabilization Program, a whole farm income stabilization program, has been the result of low prices for unprocessed grain corn.

60. The decline in Canadian producers' cash receipts and income, the decrease in the acreage planted and the increased burden on government programs are alleged to be the result of price suppression and price erosion due to the dumping and subsidizing of imports of grain corn from the United States. Canada is a net importer of grain corn, that is, its domestic demand exceeds its domestic supply, and the difference, in any year, is almost entirely met by imports of unprocessed grain corn from the United States. As the border between Canada and the United States is free of any barriers to trade, prices established in the U.S. market, the world's largest producer and exporter of unprocessed grain corn, is a major determinant of the price of grain corn in Canada. The average price of unprocessed grain corn in the United States declined from US$2.42 per bushel in 2003-2004 to US$2.05 per bushel in 2004-2005, or by just over 15 percent. The average price per bushel in 2005-2006 declined by an additional 15 percent to US$1.75 per bushel or by almost 28 percent since the 2003-2004 crop year.[30]

61. The Tribunal considered the arguments put forward by the parties opposed to the complaint regarding the causal link between the U.S. prices for unprocessed grain corn and the domestic prices of like goods, as well as other factors, such as the impact of the exchange rate on domestic prices. The Tribunal has determined that these issues would best be resolved at the full inquiry stage.

62. Based on the evidence, the Tribunal finds that there is a correlation between the overall decrease in the dumped and subsidized prices of the subject goods and the injury factors described above and, more particularly, the price erosion and reduced profitability suffered by the domestic industry.

63. In light of the foregoing, the Tribunal determines that there is evidence that discloses a reasonable indication that the dumping and subsidizing of unprocessed grain corn have caused injury to the domestic industry.

64. Finally, the Tribunal notes that it will address requests for product exclusions within the context of an inquiry under section 42 of *SIMA*, if preliminary and final determinations of dumping or subsidizing are issued by the CBSA.

Processed Grain Corn

65. Having determined that processed grain corn constitutes a separate class of goods, the Tribunal must determine whether the evidence discloses a reasonable indication that the dumping and subsidizing of processed grain corn have caused injury or retardation or are threatening to cause injury to the domestic producers of like goods.

66. The Tribunal notes that the CCG represent producers of unprocessed grain corn. Maple Leaf Foods Inc. noted that the CCG have admitted that the producers that they represent do not produce processed grain

30. Complaint, Exhibit 21, Administrative Record, Vol. 1

corn and that the support of domestic producers of such products in respect of the complaint has not been obtained.[31]

67. The Tribunal notes that the complaint does not contain evidence of injury, retardation or threat of injury to the domestic producers of processed grain corn resulting from the dumping and subsidizing of processed grain corn imported from the United States.

68. In light of the above, the Tribunal concludes that the evidence does not disclose a reasonable indication that the dumping and subsidizing of processed grain corn have caused injury or retardation or are threatening to cause injury to the domestic industry. Therefore, pursuant to paragraph 35(3)(*a*) of *SIMA*, the Tribunal terminates the preliminary injury inquiry with respect to processed grain corn.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
Member

31. Submission by Maple Leaf Foods Inc. at 23, Administrative Record, Vol. 3B.