

Ottawa, Wednesday, March 20, 2002

**Expiry Review No. RR-2001-001**

IN THE MATTER OF an expiry review, under subsection 76.03(3) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on March 21, 1997, in Inquiry No. NQ-96-002, concerning:

**FRESH GARLIC ORIGINATING IN OR EXPORTED FROM  
THE PEOPLE'S REPUBLIC OF CHINA**

**ORDER**

The Canadian International Trade Tribunal, under the provisions of subsection 76.03(3) of the *Special Import Measures Act*, has conducted an expiry review of its finding made on March 21, 1997, in Inquiry No. NQ-96-002, concerning fresh garlic originating in or exported from the People's Republic of China, imported into Canada from July 1 to December 31, inclusive, of each calendar year.

Pursuant to paragraph 76.03(12)(b) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby continues the finding made in Inquiry No. NQ-96-002 concerning the above-mentioned goods.

Peter F. Thalheimer  
Peter F. Thalheimer  
Presiding Member

Patricia M. Close  
Patricia M. Close  
Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

Ottawa, Wednesday, March 20, 2002

Expiry Review No. RR-2001-001

**FRESH GARLIC ORIGINATING IN OR EXPORTED FROM  
THE PEOPLE'S REPUBLIC OF CHINA**

*Special Import Measures Act* – Whether to rescind or continue, with or without amendment, the finding made by the Canadian International Trade Tribunal on March 21, 1997, in Inquiry No. NQ-96-002.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	February 5 to 7, 2002
Date of Order and Reasons:	March 20, 2002
Tribunal Members:	Peter F. Thalheimer, Presiding Member Patricia M. Close, Member Zdenek Kvarda, Member
Director of Research:	Sandy Greig
Research Manager:	Douglas Kemp
Economist:	Ihn Ho Uhm
Statistical Officer:	Lise Lacombe
Counsel for the Tribunal:	Philippe Cellard Dominique Laporte
Registrar Officers:	Gillian E. Burnett Nathalie Thériault

**Participants:**

Richard Wagner  
Barbara Langer-Macdougall  
Alexander I. Macdougall  
for Garlic Growers Association of Ontario

**(Association of Growers)**

Jon Johnson  
Cyndee Todgham Cherniak  
for Cangshan County Beidouxing Co., Ltd.  
China Chamber of Commerce for Import & Export of  
Foodstuffs, Native Produce and Animal By-Products

**(Foreign Grower/Other Party)**

**Witnesses:**

Wayne Passmore  
ClenAgra Inc.

Douglas Sholdice  
D.K. Sholdice Investments Limited

Leigh Allossery  
Jennalee Farms

Warren Ham  
Flat Creek Farms Inc.

Zhang Zhi Biao  
Vice Secretary General  
China Chamber of Commerce for Import &  
Export of Foodstuffs, Native Produce and  
Animal By-Products

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Ottawa, Wednesday, March 20, 2002

Expiry Review No. RR-2001-001

IN THE MATTER OF an expiry review, under subsection 76.03(3) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on March 21, 1997, in Inquiry No. NQ-96-002, concerning:

**FRESH GARLIC ORIGINATING IN OR EXPORTED FROM  
THE PEOPLE'S REPUBLIC OF CHINA**

TRIBUNAL: PETER F. THALHEIMER, Presiding Member  
PATRICIA M. CLOSE, Member  
ZDENEK KVARDA, Member

**STATEMENT OF REASONS**

**BACKGROUND**

This is an expiry review, under subsection 76.03(3) of the *Special Import Measures Act*,<sup>1</sup> of the finding made by the Canadian International Trade Tribunal (the Tribunal) on March 21, 1997, in Inquiry No. NQ-96-002, concerning fresh garlic originating in or exported from the People's Republic of China (China), imported into Canada from July 1 to December 31, inclusive, of each calendar year.<sup>2</sup>

On July 9, 2001, the Tribunal issued a notice of expiry review<sup>3</sup> to all known interested parties. As part of the review, the Tribunal sent questionnaires to Canadian growers, importers, exporters and foreign producers of fresh garlic. These questionnaires formed part of the records of both the Canada Customs and Revenue Agency (CCRA) and the Tribunal.

On July 10, 2001, the Commissioner of the CCRA (the Commissioner) initiated an investigation to determine whether the expiry of the Tribunal's finding was likely to result in the continuation or resumption of dumping of fresh garlic from China. On November 6, 2001, the Commissioner concluded his investigation and determined, pursuant to subsection 76.03(7) of SIMA, that the expiry of the finding was likely to result in the continuation or resumption of dumping of fresh garlic from China.

On November 6, 2001, upon receipt of the Commissioner's determination, the Tribunal began its inquiry, pursuant to subsection 76.03(10) of SIMA, to determine whether the expiry of the finding was likely to result in material injury to the domestic industry. To update the information already on the record from Inquiry No. NQ-2000-006, the Tribunal issued additional questionnaires to the domestic garlic growers, garlic importers and a garlic grower in China.

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

2. On May 2, 2001, in Inquiry No. NQ-2000-006, the Tribunal found that the dumping of garlic, fresh or frozen, originating in or exported from China and Vietnam, excluding fresh garlic subject to the finding made in the Tribunal Inquiry No. NQ-96-002, had caused material injury to the domestic industry.

3. C. Gaz. 2001.I.2559.

The record of this expiry review consists of the testimony heard during the public and *in camera* hearings held in Ottawa, Ontario, from February 5 to 7, 2002, all relevant documents, including the CCRA's *Protected Expiry Review Report* and *Statement of Reasons*, with supporting documentation, the protected and public replies to the Tribunal's and the CCRA's questionnaires, as well as the public and protected pre-hearing staff reports from Inquiry Nos. NQ-96-002 and NQ-2000-006, and this review. All public exhibits were made available to interested parties, while protected exhibits were provided only to counsel who had filed a declaration and undertaking with the Tribunal in respect of confidential information.

The Garlic Growers Association of Ontario (GGAO) was represented by counsel at the hearing. The GGAO submitted evidence and made arguments in support of a continuation of the finding.

A foreign exporter, Cangshan County Beidouxing Co., Ltd. (CCBCL), and the China Chamber of Commerce for Import & Export of Foodstuffs, Native Produce and Animal By-Products (Foodstuffs Chamber) were also represented by counsel at the hearing. CCBCL and the Foodstuffs Chamber (the Chinese parties) submitted evidence and made arguments in support of an exclusion from the finding for CCBCL or, in the alternative, for a regional exclusion. CCBCL's representative was unable to attend the hearing, but the witness from the Foodstuffs Chamber indicated that he had seen all the evidence submitted by CCBCL and could answer questions on it.

A representative of Loblaw Companies East (Loblaw), a purchaser of fresh garlic, also appeared as a witness at the Tribunal's request.

## **PRODUCT**

### **Product Definition and Description**

The subject goods are defined as fresh garlic originating in or exported from China, imported into Canada from July 1 to December 31, inclusive, of each calendar year.

Garlic is grown in order to harvest the bulb, which develops underground in much the same way as an onion does. A garlic bulb is made up of numerous layers of skin wrapped around a number of individual segments called cloves, which usually number from 4 to 15. Garlic is used principally as a food product and for seasoning.

The subject goods include all strains of garlic. Both the hardneck and softneck subspecies may be exported to Canada as whole garlic bulbs that have been cured, trimmed and cleaned or as individual cloves, whether peeled or not. Garlic delivered in cold storage (chilled garlic) is considered fresh garlic. The subject goods do not include dehydrated garlic, garlic flakes, garlic powder, garlic paste or similar processed garlic.

### **Production Process**

Garlic grown in Canada is predominantly of the hardneck subspecies, although some softneck garlic was planted last year. Garlic is planted in the fall and, while the hardneck subspecies is somewhat better suited to successful production in regions having cold winters, softneck garlic supposedly has a higher yield. Garlic is usually harvested and sent to market from mid-July to late July, depending on the strain and geographical location. Once garlic bulbs are harvested, they are cured to reduce the moisture content and to improve storage and handling characteristics. Garlic destined for the fresh retail market is then trimmed, cleaned and graded. Garlic bulbs are typically sorted into nine size categories, ranging from small (about

37 mm in diameter) to super colossal (up to 75 mm in diameter). Typically, there are three main sizes: 37 mm, 50 mm and 62 mm in diameter.

## **DOMESTIC GROWERS**

The commercial production of garlic for the fresh market began in Canada, in the province of Ontario, between 1984 and 1988. Garlic has been grown commercially in all provinces except Newfoundland. The major production area is southwestern Ontario.

The GGAO represents approximately 100 growers who are, for the most part, full-time farmers in the province of Ontario who grow garlic as part of their selection of crops. The GGAO is the only organized garlic producer association in Canada. Based on a survey of the 1999-2000 production conducted by the GGAO, its members accounted for over 68 percent of the total Canadian production of garlic (by acreage).

## **PAST PROCEEDINGS**

### **Summary of the Finding in Inquiry No. NQ-96-002**

In this inquiry, the Tribunal found that dumped imports of fresh garlic from China had caused material injury to the domestic industry. The Tribunal found that, while domestic growers were increasing the acreage planted and the volumes harvested, imports from China were growing rapidly, thereby preventing the domestic industry from gaining market share in the fresh bulk market and causing growers to divert production to the seed market. The Tribunal also found that the dumped imports from China caused material injury to the domestic growers of fresh garlic in the form of price erosion, lost sales, lost accounts and reduced financial performance.

The evidence also showed that the domestic growers were able to supply only part of the domestic market's requirements and concentrated their sales in the last half of the year. Similarly, over 80 percent of the annual imports of garlic from China entered Canada between July and the end of October. On the basis of this evidence, the Tribunal found that the dumping in Canada of fresh garlic originating in or exported from China, from July 1 to December 31, inclusive, of each calendar year, had caused material injury to the domestic industry.

### **Requests for an Interim Review of Inquiry No. NQ-96-002<sup>4</sup>**

In August 1997, the GGAO requested that the Tribunal review its finding based on evidence of circumvention of the finding. At that time, the Tribunal decided not to review its finding, as it did not find that there had been any fundamental structural changes in the dynamics of the Canadian or Chinese garlic industries. In February 2000, the GGAO again requested that the Tribunal review its finding on the basis of evidence of circumvention of the finding and continued material injury to the domestic industry. In that case, the Tribunal determined that the request was to expand the scope of the finding and that it did not have jurisdiction to do so.

### **Summary of the Finding in Inquiry No. NQ-2000-006**

To address, amongst others, the issue of imports of fresh garlic from China into Canada just before the six months of protection afforded by the finding issued in Inquiry No. NQ-96-002, the GGAO filed a new complaint. On May 2, 2001, the Tribunal found that the dumping of garlic, fresh or frozen, originating

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4. *Fresh Garlic* (24 November 1997), RD-97-002 (CITT); *Fresh Garlic* (12 June 2000), RD-99-002 (CITT).

in or exported from China and Vietnam, excluding fresh garlic subject to the finding made in the Tribunal Inquiry No. NQ-96-002, had caused material injury to the domestic industry. As a result of this finding, imports of garlic from China became subject to anti-dumping duties during the whole year.

The Tribunal found that the pattern of dumped imports from China changed dramatically after 1997, to the point that most of the dumped garlic from China entered Canada in the period from January 1 to June 30. In the Tribunal's view, the seasonal shift in the import pattern was due to the importers' desire to avoid the application of anti-dumping duties.

The Tribunal found that the substantial volumes and very low prices of the dumped garlic from China and Vietnam had caused material injury to the domestic industry in the form of price erosion, reduced profitability and reduced plantings. Dumped prices had materially affected market prices, forcing them down to below the domestic growers' production costs. In the Tribunal's view, the resultant financial loss of about \$1 million, most of which was related to the price erosion, was a material loss for the industry. The Tribunal also expected that the considerable reduction in plantings in 2000 would lead to a material reduction in production and sales in 2001.

### **Request for an Interim Review of the finding in Inquiry No. NQ-2000-006<sup>5</sup>**

In December 2001, the Chinese parties requested an interim review of the Tribunal's finding on the basis of new facts and circumstances, and to allow for a concurrent review of the findings in Inquiry Nos. NQ-2000-006 and NQ-96-002. The Tribunal was of the view that the likely impact of the new facts or changes of circumstances referred to by the Chinese parties was not sufficient to warrant an interim review of the finding in Inquiry No. NQ-2000-006.

## **POSITION OF PARTIES**

### **GGAO**

The GGAO submitted that the Tribunal's finding in Inquiry No. NQ-96-002 should be continued without amendment and without exclusion for any grower or exporter in China. The GGAO submitted that the evidence establishes that the expiry of the finding is likely to result in material injury to the domestic industry.

On the question of the likely performance of the foreign industry, the GGAO claimed that the Commissioner's determination indicates that there is a significant export capacity in China for garlic. It submitted that exports by China more than doubled from 1998 to 2000 and tripled from 1998 to 2001. The GGAO submitted that China, being the largest garlic producer in the world, is performing very well and needs markets for its production surplus. The GGAO pointed out that, in addition to Canada, there are anti-dumping findings in place against garlic from China in the United States, South Africa and Brazil. According to the GGAO, with other markets shut by quotas and phyto-sanitary restrictions, e.g. in the European Union and Mexico, respectively, China is encouraged to ship to Canada.

The GGAO contended that, if the finding expired, the volume of dumped imports would increase significantly, given the ability of the importers and exporters to shift easily imports to the second six-month period of the year. In the GGAO's view, imports from China would represent a minimum volume of 7 million kilograms annually, more than 80 percent of the market. Regarding the likely prices of imports,

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5. *Garlic, Fresh or Frozen* (28 December 2001), RD-2001-001 (CITT).

the GGAO referred to the Commissioner's determination and submitted that imports will enter Canada at extremely low dumped prices. The GGAO submitted that this was corroborated by the most recent FOB prices observed for garlic from China at \$0.74/kg in the July to December 2001 period. The GGAO submitted that the likely volumes and prices would result in price erosion and price suppression to such an extent that they would cause material injury to the domestic industry.

In reply to the argument raised by the Chinese parties that imports from other countries were also entering at very low prices, the GGAO submitted that the imports from China were entering Canada at prices below those of other countries and that other countries did not have an export capacity comparable to that of China.

According to the GGAO, the evidence shows that, if the finding is allowed to expire, the domestic industry will be severely and adversely affected and its performance will suffer markedly. The GGAO, referring to the growers' testimony, submitted that they may not be able to remain viable in the garlic industry in the future. On the other hand, the GGAO submitted that, if the finding is continued, the growers will be able to get proper returns, for example, as was the case in 1998 when effective anti-dumping protection was in place. The GGAO further submitted that, with the security of year-round protection, the growers will be able to increase their production rapidly and could capture about 40 percent of the market within a few years. With increased volumes, productivity will increase, cost of production will decrease and, as a result, profits will increase. As well, market share, sales and employment will increase.

With respect to CCBCL's contention that imports from China are not dumped, it is the GGAO's position that this issue should be addressed by the CCRA and not the Tribunal. On the question of the exclusion of Flat Creek Farms Inc. (Flat Creek) from the domestic industry, the GGAO argued that there is no basis for this exclusion, as Flat Creek is not related to any Chinese exporter or importer of dumped goods and has never imported dumped goods from China.

The GGAO submitted that the Tribunal should not grant any exclusion to any individual importer or exporter of garlic from China. The GGAO underlined that CCBCL has never exported garlic to Canada and that the companies that did export dumped garlic were not present at the hearing. It submitted that CCBCL was, in fact, requesting a licence to dump 5 million kilograms of garlic per year. The GGAO stated that it is clearly established that exclusions should only be granted in exceptional circumstances and that none are present in this case. The GGAO noted, among other things, that there would be no market differentiation, as the garlic exported by CCBCL is identical to and substitutable for Canadian garlic, and that CCBCL's exports would compete in the same market segments, particularly in the fresh bulk market. The GGAO noted that, as found by the Tribunal in Inquiry No. NQ-96-002, the fresh bulk market still accounts for 90 percent of the domestic growers' sales.

Regarding the agreement between CCBCL and the Foodstuffs Chamber under which the former agrees to limit its exports of garlic to Canada, it is the GGAO's contention that it does not constitute a basis for exclusion, as it is not enforceable. Among the reasons given by the GGAO for the non-enforceability of the agreement were the following: (1) neither CCBCL nor the Foodstuffs Chamber control export permits; (2) the fine contemplated in case of breach amounts simply to a cost of doing business; and (3) no witness from CCBCL was present to testify in respect of the agreement. The GGAO emphasized that no minimum selling price was set in the agreement and that, consequently, nothing would ensure that the excluded garlic would be sold at undumped prices. The GGAO submitted that it never consented to such an exclusion, which would certainly cause injury to the domestic industry.



Dealing with CCBCL's request for a regional exclusion, and more precisely with the issue of regional market, the GGAO argued that this concept was used to define the domestic industry and that the Tribunal would have no jurisdiction, in an expiry review, to deal with that issue. It was further argued that, while there is a concentration of the domestic industry in the province of Ontario, there is production across Canada. It is the GGAO's position that there is no basis to grant a regional exclusion, as the evidence demonstrates that garlic is grown throughout Canada, except Newfoundland, and that domestic garlic is sold throughout Canada. In addition, the GGAO submitted that nothing could stop interprovincial sales of garlic.

In response to CCBCL's request for an interim review of the finding issued in Inquiry No. NQ-2000-006, the GGAO stated that there was absolutely no basis to do so, as no new information had been submitted.

### **The Chinese Parties**

The Chinese parties requested that the Tribunal's finding be rescinded insofar as it applies to CCBCL or, in the alternative, that the Tribunal grant a regional exclusion for garlic imported into provinces other than Ontario. The witness for the Foodstuffs Chamber also indicated support for the total rescission of the finding.

The Chinese parties argued that the use of Mexico as a surrogate country to determine normal values is inappropriate and that the Tribunal should take that into account in its assessment of the conduct of the Chinese garlic exporters in its determination of the likelihood of injury. The Chinese parties noted that one of the Mexican companies that provided information to the CCRA in this case was Los Rancheros, which sells garlic to Flat Creek and which is also one of Flat Creek's shareholders. The Chinese parties argued that this constituted new information to be considered by the Tribunal. In addition, it was argued by the Chinese parties that Mexico was a completely inappropriate choice of surrogate country, since the Mexican-based normal values bear no relationship to costs and prices in China. Therefore, it is the Chinese parties' position that the dumping that exists in this case is technical dumping as opposed to an unfair trade practice.

The Chinese parties further submitted that, in any case, and assuming that garlic from China was imported at a normal value of \$2.50/kg or more, the domestic industry would be unable to compete with such undumped imports from China because of the domestic industry's higher costs of production.

In reply to the GGAO's position that increasing production could reduce these costs, the Chinese parties submitted that there was a limit to the extent to which it could be done and to the economies of scale that could be achieved. It was also argued that the domestic industry had failed to give any coherent plans, descriptions or statements as to how it would reduce its costs.

Turning to the question of injury caused by factors other than dumping, the Chinese parties argued that, if the sale of garlic from other countries at prices as low as \$1.04/kg does not cause injury to the domestic industry, then the sale of technically dumped garlic from China at the same price cannot cause injury. The Chinese parties also pointed out that a dramatic decline in production had occurred in 2001 at a time when the domestic industry had year-round anti-dumping protection.

Regarding the likely price of imports from China if the finding is allowed to expire, the Chinese parties submitted that the price of \$0.74/kg suggested by the GGAO gives no indication as to the prices that Chinese exporters would charge in the Canadian market, given the current application of a flat-rate anti-dumping duty of \$1.82/kg and the fact that the exporters cannot price up to the normal value.

On the commodity nature of the fresh bulk market, the Chinese parties submitted that it was contradicted by the testimony of the witness from Loblaw who stated that the low end of the market is very price sensitive and that the high end is not that price sensitive. It is the Chinese parties' position that only the high end of the market is served by the Canadian growers.

With respect to derivative products, the Chinese parties submitted that there was no evidence that garlic from China had caused or would cause injury to the derivative product market. It was further argued that the domestic industry was not taking advantage of this market.

Turning to the request for a producer exclusion, the Chinese parties contended that exceptional circumstances were present in this case. The choice of Mexico as a surrogate country, in their view, constituted an exceptional circumstance. The Chinese parties also pointed out that CCBCL's sales only represent a fraction of the production of garlic in China; that the agreement between the Foodstuffs Chamber and CCBCL limits the annual volume of exports to Canada to 5 million kilograms; and that, although imports from other countries were entering Canada at very low prices, there were no import restrictions against them.

It was also argued, in support of CCBCL's request for an exclusion, that the Foodstuffs Chamber will monitor CCBCL's exports to Canada and will take enforcement actions in case of a breach of the agreement. The Chinese parties submitted that, in order to maximize profits, CCBCL would export garlic at prices much higher than \$0.74/kg. In addition, it was submitted that CCBCL was well positioned to serve the western Canadian market, which is barely served by the domestic industry. The Chinese parties further argued that CCBCL had neither a propensity to dump nor a history of dumping.

In the alternative, the Chinese parties submitted that the domestic garlic industry is based on a regional market. While conceding that garlic was grown in all parts of Canada except Newfoundland, the Chinese parties argued that the Ontario share of national production was absolutely overwhelming. The Chinese parties noted that the percentages of sales by the domestic growers into Ontario ranged from 92 to 99 percent over the period of inquiry, and most of the growers indicated that they sold only in Ontario. The Chinese parties argued that the requirements for a regional market were, therefore, satisfied. In light of Article 11.1 of the World Trade Organization *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*,<sup>6</sup> it is the Chinese parties' position that maintaining anti-dumping duties against garlic imported into parts of Canada other than Ontario would result in the imposition of duties to an extent that goes beyond what is necessary to counteract injury. Accordingly, it is the Chinese parties' position that the finding should be amended to apply only to the subject goods imported into Ontario.

The Chinese parties requested that Flat Creek be excluded from the domestic industry for the purpose of this review, as the evidence demonstrates that it has imported large quantities of garlic from Mexico at dumped prices.

The Chinese parties also submitted that the Tribunal should initiate an interim review of the finding in Inquiry No. NQ-2000-006 on its own initiative, on the basis of the new evidence that has been presented with respect to imports of dumped garlic by Flat Creek and the shareholding in Flat Creek by Los Rancheros.

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6. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [hereinafter Anti-dumping Agreement].

## ANALYSIS

As noted earlier, the Commissioner made a determination under subsection 76.03(7) of SIMA that the expiry of the finding in respect of the subject goods is likely to result in the continuation or resumption of dumping. When such a determination is made by the Commissioner, the Tribunal has the duty, pursuant to subsection 76.03(10) of SIMA, to determine whether the expiry of the finding is likely to result in injury or retardation. Subsection 37.2(2) of the *Special Import Measures Regulations*<sup>7</sup> enumerates a number of factors that the Tribunal may consider in addressing the question of likelihood of injury. The various factors that the Tribunal considers relevant in this case are set out under the following headings: activities of foreign growers; likely volumes of dumped garlic; likely prices of dumped garlic; likely effects of dumped garlic on the domestic industry; and other factors affecting the domestic industry.

### Likelihood of Injury

The Tribunal must decide whether the expiry of its finding in Inquiry No. NQ-96-002 is likely to cause material injury to the domestic industry. The domestic industry is defined in section 2 of SIMA 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”. In this expiry review, the garlic grown in Canada constitutes the “like goods”.<sup>8</sup> The Tribunal’s analysis of likelihood of injury has focussed on the members of the GGAO that responded to the Tribunal’s questionnaires. These growers’ collective production of the like goods constitutes a major proportion of the total domestic production of the like goods. Therefore, these GGAO members constitute the domestic industry for the purpose of this expiry review.

The Chinese parties have submitted that Flat Creek should be excluded from the domestic industry as defined in section 2 of SIMA, given that Flat Creek had imported “dumped” garlic from Mexico, the surrogate country used to determine Chinese normal values, i.e. imported Mexican garlic at prices lower than the established normal values. Moreover, Flat Creek, they submitted, was also related to a Mexican company that exported such “dumped” garlic to Canada. In the Tribunal’s view, Flat Creek’s exclusion from the domestic industry cannot be justified. In this expiry review, the only product that has been found by the Commissioner to be likely dumped, if the finding expires, is the Chinese garlic. As the determination relating to dumping is within the sole purview of the Commissioner,<sup>9</sup> the Tribunal has no authority to determine that goods from non-subject countries are dumped, even those of the surrogate country used to determine the normal values of the subject country. Given that Flat Creek is not related to an exporter or importer of dumped Chinese garlic, nor is it an importer of such goods, the Tribunal does not see any basis to exclude Flat Creek from the domestic industry. Although Flat Creek did not plant garlic in 2000, the Tribunal notes that it did plant garlic in 2001 for harvest in 2002 and that, therefore, it is a grower of like goods.<sup>10</sup>

At the outset, the Tribunal notes that many arguments presented by the Chinese parties related to the Commissioner’s determination of likelihood of continued or resumed dumping and, more specifically, to the

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7. S.O.R./84-927 [hereinafter Regulations].

8. See Inquiry No. NQ-96-002 at 9.

9. See paragraph 76.03(7)(a) of SIMA. See, also, to illustrate the Commissioner’s mandate over dumping determinations, sections 15-30.3, 38, 41.

10. *Transcript of Public Hearing*, Vol. 1, 5 February 2002, at 170.

use of Mexico as a surrogate country to establish normal values. While the Tribunal acknowledges the interest shown by the Chinese parties in these proceedings, it does not have jurisdiction to deal with the likelihood of continued or resumed dumping nor the establishment of normal values. The Tribunal is not the proper forum to raise those concerns. Those matters are strictly within the Commissioner's jurisdiction.<sup>11</sup>

### Activities of Foreign Growers

The Tribunal had before it considerable data pertaining to the volume of fresh garlic grown in China over the last several years.<sup>12</sup> As well, the Tribunal had data showing the volume and value of fresh garlic exported from China to its major customers, including Canada.<sup>13</sup> Data obtained from the Food and Agriculture Organization of the United Nations and corroborated in the evidence of the Foodstuffs Chamber demonstrates that garlic production in China experienced sustained growth between 1994 and 2001, increasing by about 35 percent over that period.<sup>14</sup> By 2001, China had produced 6.6 billion kilograms of fresh garlic,<sup>15</sup> accounting for 65 percent of world garlic production.<sup>16</sup>

Significantly, fresh garlic exports from China have grown at a rate considerably faster than that of production. Since 1998, exports of fresh garlic have more than tripled, while the volume of garlic produced in China has increased by only about 14 percent. Exports of fresh garlic from China increased from 157.6 million kilograms in 1998 to 511.3 million kilograms in the first 11 months of 2001.<sup>17</sup> This increase in exports was about 29 times greater than the size of the entire Canadian market for fresh garlic in 2000.<sup>18</sup> The increase in exports may be due, in part, to the elimination of export quotas on garlic in China in 1999.<sup>19</sup> The Tribunal is of the opinion that there is no reason to assume that this export growth will not continue. The Chinese exporter that participated in the review maintained that garlic exports are expected to gradually increase from 2001 to 2003.<sup>20</sup> In fact, it seems to the Tribunal that the significant difference in the growth of exports when compared to the growth in production is indicative of the fact that the market for fresh garlic in China may be mature and that the export markets are more attractive than the Chinese market. In the Tribunal's opinion, when the trend in exports is considered in terms of the immense size of Chinese garlic production, it can only conclude that exports of fresh garlic from China pose a serious potential threat to the Canadian garlic industry.

### Likely Volumes of Dumped Garlic

None of the companies that have exported, or are currently exporting, fresh garlic to Canada provided any information concerning their plans to export fresh garlic to Canada in the event that the finding made in Inquiry No. NQ-96-002 is rescinded. One potential exporter, CCBCL, however, provided

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11. See paragraph 76.03(7)(a) of SIMA. See, also, to illustrate the Commissioner's mandate over dumping determinations, sections 15-30.3, 38, 41.
  12. Tribunal Exhibit RR-2001-001-47, Administrative Record, Vol. 1 at 242-44; Foreign Exporter's Exhibit B-1, Appendix 1, Administrative Record, Vol. 13.
  13. Tribunal Exhibit RR-2001-001-48, Administrative Record, Vol. 1 at 245-57.
  14. *Ibid.* at 244.
  15. Foreign Exporter's Exhibit C-3 at 4, Administrative Record, Vol. 13.
  16. *Transcript of Public Hearing*, Vol. 2, 6 February 2002, at 217-18.
  17. *Supra* note 13 at 246, 249.
  18. *Public Pre-hearing Staff Report*, 17 December 2001, Tribunal Exhibit RR-2001-001-05, Administrative Record, Vol. 1A at 31.
  19. *Supra* note 16 at 320-23.
  20. Tribunal Exhibit RR-2001-001-34.02, Administrative Record, Vol. 5.3 at 13.

information with respect to an agreement between it and the Foodstuffs Chamber concerning the volume of garlic that it would export to Canada, should the Tribunal grant it an exclusion.

The witness for the Foodstuffs Chamber testified that CCBCL agreed to limit its exports of fresh garlic to Canada to 5 million kilograms annually until the finding expires.<sup>21</sup> Notwithstanding this agreement, the Tribunal observes that CCBCL itself estimated that, given other export commitments, the actual volume of garlic that it would likely have available for export to Canada would be somewhat less than stipulated in the agreement.<sup>22</sup>

Regardless of whether CCBCL exports the entire 5 million kilograms of garlic to Canada that is mentioned in its agreement with the Foodstuffs Chamber; an even larger volume given that the agreement does not apply in the event of the rescission of the finding; or the somewhat smaller volume that CCBCL estimates that it would actually have available for export, it is clear to the Tribunal that, if the finding is rescinded, the volume of Chinese garlic likely to enter Canada from CCBCL alone remains significant. Given the current trend in the growth of fresh garlic exports from China, the 7 million kilograms shut out of Canada after the Tribunal's recent finding in Inquiry No. NQ-2000-006 and the clear interest of CCBCL in the Canadian market, as demonstrated by its request for an exclusion representing close to half the size of the Canadian market,<sup>23</sup> it appears to the Tribunal that more than 7 million kilograms of Chinese garlic could enter the domestic market during the next Canadian growing season, if the finding were rescinded. This increase in Chinese exports would swamp the domestic harvest in 2002, putting at jeopardy future domestic garlic plantings.

Furthermore, the Tribunal notes that anti-dumping duties against Chinese garlic are currently in place in several jurisdictions, including the United States,<sup>24</sup> South Africa<sup>25</sup> and Brazil.<sup>26</sup> As well, there are restrictions on exports of Chinese garlic in the Republic of Korea,<sup>27</sup> Mexico<sup>28</sup> and the European Community.<sup>29</sup> While the Tribunal has heard that there may be some degree of resolution with respect to certain restrictions in some of these jurisdictions,<sup>30</sup> there has been no indication that, for the most part, they will not remain in place. In the United States, the United States International Trade Commission continued its injury finding against Chinese garlic in February 2001. If the finding in Inquiry No. NQ-96-002 is rescinded, the Tribunal has little doubt that exports that could otherwise be destined for many of these large markets will see Canada as an attractive outlet for the large and growing volume of garlic exports from China.

For these reasons, the Tribunal is of the opinion that, if the finding is rescinded, the volume of dumped goods from China is likely to be significant.

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21. Foreign Exporter's Exhibit C-25, Administrative Record, Vol. 13; *Transcript of Public Hearing*, Vol. 2, 6 February 2002, at 221-22.

22. Foreign Exporter's Exhibit B-2 (protected) at 24, Administrative Record, Vol. 14; *Transcript of Public Hearing*, Vol. 2, 6 February 2002, at 338.

23. *Transcript of Public Hearing*, Vol. 2, 6 February 2002, at 337.

24. Tribunal Exhibit RR-2001-001-46, Administrative Record, Vol. 1.0A at 1-92.

25. Tribunal Exhibit RR-2001-001-10.20, Administrative Record, Vol. 1.2A at 177.

26. Tribunal Exhibit RR-2001-001-05, Administrative Record, Vol. 1A at 14-15.

27. Foreign Exporter's Exhibit B-3 at 9, Administrative Record, Vol. 13; *supra* note 26.

28. Tribunal Exhibit RR-2001-001-40.02, Administrative Record, Vol. 7 at 67; *supra* note 26.

29. Foreign Exporter's Exhibit B-3 at 17, Administrative Record, Vol. 13; *supra* note 26.

30. Foreign Exporter's Exhibit C-3 at 8, Administrative Record, Vol. 13.

### Likely Prices of Dumped Garlic

The Tribunal observes that, according to *World Trade Atlas* data, firms in China have exported garlic to many countries in the world since 1999, at average prices ranging from \$0.52/kg to \$0.58/kg.<sup>31</sup> The Tribunal also notes that, during the January to June periods from 1998 to 2000, periods during which Chinese garlic could enter Canada without anti-dumping duties being imposed, the average price at which Chinese garlic was exported to Canada varied from \$1.04/kg in 1998 to \$0.68/kg in 2000.<sup>32</sup> During the July to September period of 2001, the FOB price of Chinese garlic was \$0.74/kg.<sup>33</sup>

The Tribunal is convinced that, in the absence of anti-dumping duties, Chinese garlic exporters will continue to price their garlic as they have since 1998. There is no reason to assume otherwise, especially given the competition provided by new Asian garlic exporters that are now selling at low prices in the Canadian market, although at prices higher than the Chinese prices. In the Tribunal's opinion, the Chinese exporters would most likely strive to regain market share lost to these new low-priced imports, hence their ability to raise prices would be restrained. In fact, it is the Tribunal's view that a rescission of the finding would lead to price erosion, as the Chinese exporters try to gain or regain market share by selling at prices lower than other imports.

In the January to June period prior to the finding being issued in Inquiry No. NQ-2000-006, the average FOB price of \$0.68/kg translated into a very low Canadian market price of \$1.11/kg.<sup>34</sup> The Tribunal is, therefore, of the opinion that, should the finding in Inquiry No. NQ-96-002 be rescinded, the prices of imports of fresh garlic from China will rapidly fall to levels observed prior to the imposition of anti-dumping duties in 2001.

### Likely Effects of Dumped Garlic on the Domestic Industry

The current state of the domestic garlic industry is not healthy. The benefits of the finding in Inquiry No. NQ-96-002 were, with certain exceptions, short-lived. The industry fared well in 1998 as domestic prices rose as high as \$4.88/kg. But, by the following year, almost all imports of Chinese garlic entered Canada during the first part of the year<sup>35</sup> to avoid anti-dumping duties and PRC garlic began entering the market at very low prices.<sup>36</sup> Because the garlic could be stored, price erosion re-occurred during the Canadian harvest period. In fact, the year 2000 marked the largest ever volume of imports of garlic into Canada from China.<sup>37</sup> In competition with the increasing volume of low-priced garlic from China in the period from 1998 to 2000, the domestic industry's financial performance grew progressively worse, and gross farm losses grew to about \$1 million by 2000.<sup>38</sup>

In the first half of 2001, with anti-dumping protection in place for much of the year, the volume of imports of garlic from China into Canada fell by over 70 percent. However, many domestic garlic growers already had decided, in the autumn of 2000, either to exit the business or to cut back on acreage planted in the face of the uncertainty concerning year-round dumping protection. As a result, and also because of the

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31. Tribunal Exhibit RR-2001-001-48, Administrative Record, Vol. 1 at 246-57.

32. *Public Pre-hearing Staff Report*, 17 December 2001, Tribunal Exhibit RR-2001-001-05, Administrative Record, Vol. 1A at 37.

33. *Ibid.*

34. *Ibid.* at 40.

35. Tribunal Exhibit RR-2001-001-05, Administrative Record, Vol. 1.A at 19.

36. *Transcript of In Camera Hearing*, Vol. 1, 5 February 2002, at 71; *Supra* note 32 at 40.

37. *Supra* note 32 at 19.

38. *Supra* note 32 at 46.

weather that year,<sup>39</sup> the volume of production and sales by the domestic industry in 2001 were down significantly. Although prices for sales of domestic garlic were higher in 2001 because of the year-round anti-dumping duties, unit costs of production were also higher because of the substantially reduced plantings and poor yields, and the growers continued to operate at a loss.

Given that the entire Canadian market for fresh garlic amounted to slightly more than 12 million kilograms in 2000, the last full year for which data are available, and that the Chinese garlic harvest will be ready for export in July 2002,<sup>40</sup> shortly after the finding is scheduled to expire, the Tribunal can only conclude that, should the finding be rescinded, the likely volume of dumped imports from China entering the Canadian market at very low prices in the second half of 2002 alone would devastate Canadian garlic production. The Chinese garlic would be of high quality, having just been harvested and in quantities large enough to swamp domestic production. Witnesses appearing before the Tribunal in this expiry review have testified that they could not withstand such likely volumes and prices of dumped garlic and that they would be forced to exit the market. In view of the precarious state of the domestic industry, the Tribunal is further convinced that such a large volume of dumped imports at such low prices, the point of reference for domestic garlic prices,<sup>41</sup> would effectively put an end to the garlic industry in Canada. Therefore, the Tribunal is convinced that the expiry of the finding would result in material injury to the domestic industry.

#### Other Factors Affecting the Domestic Industry

The Tribunal also reviewed other factors that could adversely affect the domestic industry. In the Tribunal's opinion, of the many factors that could affect the industry in the foreseeable future, besides the unpredictable vagaries of the weather, the two most likely factors are competition with imports from other countries and the cost structure of the industry.

The Tribunal notes that the price of garlic from some other countries is often lower than \$2.50/kg, the normal value established by the CCRA for garlic from China.<sup>42</sup> However, in the Tribunal's view, these lower prices are mitigated by a number of factors. Unlike garlic from China, garlic imported from a number of these countries enters Canada primarily during the domestic industry's off-season. Some of these imports may be offgrade or not even market-ready and, as such, are either at a different trade level or of a different quality from the garlic from China.<sup>43</sup> Furthermore, the Tribunal does not have data as to the sizing of the imported garlic, a factor that also affects price.<sup>44</sup> In other words, the commodity nature of garlic is, in the Tribunal's view, not quite as clear-cut as it might have appeared in previous inquiries.<sup>45</sup> In the final analysis, while many of these imports might have FOB prices lower than the normal value for Chinese garlic, their prices are still significantly higher than the FOB price for Chinese garlic.<sup>46</sup>

The Canadian producers cannot currently satisfy the total demand in the Canadian market, and there is no suggestion that they will be able to do so in the future. Significant volumes of imports are therefore

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39. *Transcript of Public Hearing*, Vol. 1, 5 February 2002, at 69.

40. Foreign Exporter's Exhibit B-3 at 6, Administrative Record, Vol. 13.

41. *Supra* note 39 at 65.

42. During the January to June period of 2001, the average FOB price of imports from the United States, Mexico, Argentina, the Philippines and Pakistan was less than \$2.50/kg. *Public Pre-hearing Staff Report*, 17 December 2001, Tribunal Exhibit RR-2001-001-05, Administrative Record, Vol. 1A at 37-38.

43. *Transcript of In Camera Hearing*, Vol. 1, 5 February 2002, at 53, 63.

44. *Transcript of Public Hearing*, Vol. 2, 6 February 2002, at 292-95.

45. *Ibid.*

46. *Public Pre-hearing Staff Report*, 17 December 2001, Tribunal Exhibit RR-2001-001-05, Administrative Record, Vol. 1A at 37-38.

needed to satisfy the Canadian demand. In the past, the domestic growers have shown their ability to compete against these imports. In 1998, the domestic industry was able to benefit from the application of the anti-dumping duties and demonstrated its ability to compete successfully against garlic imports from other countries.

The Tribunal observes that the lowest cost garlic currently in the Canadian market comes largely from new Asian entrants to the Canadian market. Countries such as Indonesia, the Philippines, Pakistan and Cambodia increased their exports to the Canadian market subsequent to the finding in Inquiry No. NQ-2000-006. While the Tribunal expects that the Canadian industry may face strong price competition from these imports, the Tribunal considers that this competition does not threaten the very survival of the domestic growers, as do the imports from China. Indeed, the evidence on the imports from the new Asian entrants does not indicate the same destructive pattern of competition as that from Chinese imports, which arrived in Canada in larger volumes and at lower prices.

With respect to the cost structure of the industry, the Tribunal notes that current average unit operational expenses of \$5.28/kg of sales<sup>47</sup> may well have serious implications for the industry. However, the Tribunal is of the opinion that these costs are not necessarily representative of what the industry's average costs will be in the future. In the autumn of 2000, many growers either did not plant garlic<sup>48</sup> or planted a smaller number of acres, given the uncertainty in the market at that time concerning year-round anti-dumping protection. The reduced plantings resulted in a smaller number of acres to cover operational costs and investments and, thus, increased the unit costs of production and sales. Moreover, winter-kill and a summer drought<sup>49</sup> resulted in lower-than-normal yields and further increased the unit cost of sales. The Tribunal fully expects that, if the finding is continued, the domestic industry will expand its plantings in the autumn of 2002 and the unit costs of production and sales will decline to competitive levels. This conclusion is supported by the fact that, in 1998, the average cost was \$2.80/kg.<sup>50</sup> The Tribunal also notes that there are growers whose costs of production are significantly lower than the average cost.<sup>51</sup>

In conclusion, even though other factors, especially the imports from non-subject countries and the cost structure of the domestic industry, may have an impact on the future performance of the domestic industry, the Tribunal is persuaded that it would not compare to the devastating effect that the dumping would have, should the finding expire, an effect amounting to material injury to the domestic industry.

### Requests for Exclusion

Having determined that the expiry of the finding in Inquiry No. NQ-96-002 is likely to result in material injury to the domestic industry, the Tribunal must decide whether a grower exclusion or a regional exclusion should be granted to CCBCL. It is well established that the Tribunal has discretion to grant exclusions,<sup>52</sup> whether based on a product, a country, a specific producer, or a region.<sup>53</sup>

Regarding the request for a grower exclusion made by CCBCL, the Tribunal notes that the circumstances that could justify granting a product or grower exclusion are, for example, when an exporter

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47. *Ibid.* at 120.

48. Tribunal Exhibit RR-2001-001-16, Administrative Record, Vol. 3.1 at 63, 65, 67, 78, 85, 105, 107, 109, 111.

49. *Transcript of In Camera Hearing*, Vol. 1, 5 February 2002, at 21-22.

50. *Supra* note 47.

51. Tribunal Exhibit RR-2001-006 (protected), Administrative Record, Vol. 2A at 67-100.

52. *Certain Cold-rolled Steel Sheet* (1994), CDA-93-1904-09 (Ch. 19 Panel) at 54. See, also, *Hetex Garn A.G. v. The Anti-dumping Tribunal*, [1978] 2 F.C. 507 (FCA).

53. *Certain Hot-rolled Carbon Steel Plate* (27 June 2000), Inquiry No. NQ-99-004 (CITT).



ships a specific product that is not produced in Canada.<sup>54</sup> In addition, the Tribunal would consider factors such as whether there is any domestic production of substitutable or competing goods, whether the domestic industry is an “active supplier” of the product or whether it normally produces the product.<sup>55</sup>

In the Tribunal’s view, the circumstances of the present case do not warrant that an exclusion be granted with respect to CCBCL’s garlic. CCBCL requested an exclusion in order to export to Canada up to 5 million kilograms of fresh garlic a year. The Tribunal notes that, on an annual basis, this would represent nearly half of the entire Canadian market.<sup>56</sup> No evidence has been presented to the effect that CCBCL’s garlic is not substitutable and would not be in direct competition with Canadian garlic. Moreover, the Tribunal is not convinced by CCBCL’s argument that the choice of Mexico as a surrogate country constitutes an exceptional circumstance that warrants an exclusion. As previously stated, the determination as to whether the expiry is likely to result in continued or resumed dumping is within the Commissioner’s jurisdiction, as is the method of calculating the margin of dumping. For the above reasons, the Tribunal does not grant a grower exclusion to CCBCL.

In the Tribunal’s view, the above reasons justify, in themselves, not granting an exclusion to CCBCL. In addition, the Tribunal is persuaded that the exclusion for garlic produced by CCBCL would not merely displace other imports. Rather, it is the Tribunal’s view that CCBCL’s garlic would soon swamp the Canadian market in terms of volume. Moreover, in gaining any sales, given that CCBCL has never exported to Canada, it would have to gain its market share by undercutting prices. This, in the Tribunal’s view, would fuel a downward spiral of prices, as other exporters and the domestic industry would attempt to retain their market shares.

The Tribunal finds that the agreement between CCBCL and the Foodstuffs Chamber does not constitute a basis or an exceptional circumstance that warrants a grower exclusion. CCBCL, even respecting the agreement, could still export a significant volume of garlic that would, as indicated above, have serious repercussions on the domestic industry.

In addition, the Tribunal does not find that a regional exclusion for the provinces other than Ontario is warranted. As indicated earlier, the Tribunal has found that the expiry of the finding in Inquiry No. NQ-96-002 is likely to result in material injury to the domestic industry. The domestic industry, for the purpose of this case, is constituted by growers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods. Inquiry No. NQ-96-002 was conducted as a “national” case, as was this expiry review. Once the Tribunal has found that imports are likely to cause material injury to the domestic industry as defined above, there is no requirement in SIMA, and no justification to adopt, a regional market analysis of injury<sup>57</sup> under which the standard of injury to be met before continuing a finding would be higher.<sup>58</sup> This conclusion is consistent with the Anti-dumping Agreement, which indicates that a regional market analysis can only be used in exceptional circumstances. The Anti-dumping Agreement indicates that, “[I]n such circumstances, injury may be found to exist even where a major proportion of the total domestic industry is not injured”.<sup>59</sup> This highlights the fact that, once

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54. *Stainless Steel Round Bar* (4 September 1998), NQ-98-001 (CITT).

55. *Ibid.*

56. *Public Pre-hearing Staff Report*, 17 December 2001, Tribunal Exhibit RR-2001-005, Administrative Record, Vol.1A at 31.

57. See subsection 2(1.1) of SIMA that indicates that, in exceptional circumstances, the territory of Canada may, for the production of any goods, be divided into two or more regional markets.

58. See subsection 42(5) of SIMA.

59. Article 4.1(ii).

injury has been found to a major proportion of the total domestic industry, there is no need to conduct a regional market analysis.

The evidence shows that the garlic grown in Ontario, although principally sold within Ontario, is also sold outside Ontario. Garlic is also grown outside Ontario and sold in other provinces. Those sales made outside Ontario could be affected by an exclusion for Chinese garlic imported into provinces other than Ontario. Very significant also is the important risk of circumvention.<sup>60</sup> Indeed, the Tribunal is of the opinion that garlic destined for provinces other than Ontario could easily be shipped to Ontario. The testimony was clear that nothing would prevent Chinese garlic, although imported into other provinces, from being sold in Ontario.<sup>61</sup>

For the above reasons, the Tribunal refuses to grant the request for a grower exclusion and the request for a regional exclusion.

Finally, with respect to CCBCL's submission that the Tribunal should initiate an interim review of the finding in Inquiry No. NQ-2000-006 on its own initiative, the Tribunal has decided not to initiate such an interim review. The Tribunal does not find that the evidence submitted in this expiry review would justify the conduct of an interim review of the finding in Inquiry No. NQ-2000-006, especially given its conclusion in this review that the expiry of the Tribunal's finding in Inquiry No. NQ-96-002 is likely to cause material injury to the domestic industry.

## CONCLUSION

In light of the foregoing, the Tribunal, pursuant to paragraph 76.03(12)(b) of SIMA, hereby continues the finding made in Inquiry No. NQ-96-002 concerning fresh garlic originating in or exported from China.

Peter F. Thalheimer  
Peter F. Thalheimer  
Presiding Member

Patricia M. Close  
Patricia M. Close  
Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

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60. In Inquiry No. NQ-92-001, the Tribunal took into account the risks of circumvention of the finding when it refused to grant an exclusion on bulk and cello-wrapped lettuce.

61. *Transcript of Public Hearing*, Vol. 2, 6 February 2002, at 261.