



Ottawa, Monday, July 22, 1996

Review No.: RR-95-003

IN THE MATTER OF a review, under subsection 76(2) of the *Special Import Measures Act*, of the order made by the Canadian International Trade Tribunal on July 22, 1991, in Review No. RR-90-006, continuing, without amendment, the finding made by the Canadian Import Tribunal on July 25, 1986, in Inquiry No. CIT-2-86, concerning:

**BONELESS MANUFACTURING BEEF ORIGINATING IN OR EXPORTED  
FROM THE EUROPEAN ECONOMIC COMMUNITY IN RESPECT OF  
WHICH SUBSIDIES HAD BEEN PAID DIRECTLY OR INDIRECTLY BY THE  
EUROPEAN ECONOMIC COMMUNITY AND/OR THE GOVERNMENT OF A  
MEMBER STATE**

**ORDER**

The Canadian International Trade Tribunal, under the provisions of subsection 76(2) of the *Special Import Measures Act*, has conducted a review of its order made on July 22, 1991, in Review No. RR-90-006, continuing, without amendment, the finding made by the Canadian Import Tribunal on July 25, 1986, in Inquiry No. CIT-2-86.

Pursuant to subsection 76(4) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby rescinds the above-mentioned order.

Arthur B. Trudeau  
Arthur B. Trudeau  
Presiding Member

Raynald Guay  
Raynald Guay  
Member

Desmond Hallissey  
Desmond Hallissey  
Member

Michel P. Granger  
Michel P. Granger  
Secretary



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MEMBER STATE**

*Special Import Measures Act* - Whether to rescind or continue, with or without amendment, the order made by the Canadian International Trade Tribunal on July 22, 1991, in Review No. RR-90-006, continuing, without amendment, the finding made by the Canadian Import Tribunal on July 25, 1986, in Inquiry No. CIT-2-86.

Place of Hearing: Ottawa, Ontario  
Dates of Hearing: May 21 to 23, 1996  
Date of Order and Reasons: July 22, 1996

Tribunal Members: Arthur B. Trudeau, President Member  
Raynald Guay, Member  
Desmond Hallissey, Member

Director of Research: Sandy Greig

Research Manager: Don Shires

Statistical Officers: Jeremy Weinstein  
Po-Yee Lee

Counsel for the Tribunal: Hugh J. Cheetham

Registration and Distribution  
Officer: Pierrette Hébert

**Participants:** Peter Clark  
Gordon LaFortune  
for Canadian Cattlemen's Association  
Lakeside Packers, A Division of Lakeside Feeders Ltd.  
Dairy Farmers of Canada

**(Domestic Producers)**

Gordon B. Greenwood  
Brian J. Barr  
for The Irish Food Board

**(Exporter)**

David K. Wilson  
for Australian Meat and Live-stock Corporation

**(Exporter/Party Supporting the Industry)**

Peter E. Kirby  
for Uni Foods Inc.  
Foodane APS Denmark

**(Exporters)**

Richard S. Gottlieb  
Darrel H. Pearson  
for Delegation of the European Commission in Canada

**(Exporter)**

Otto H. Larsen  
Government of Denmark

**(Exporter)**

**Witnesses:**

David Andrews  
President  
Canadian Cattlemen's Association

Dennis Laycraft  
Executive Vice-President  
Canadian Cattlemen's Association

Chris Mills  
Policy Adviser  
Canadian Cattlemen's Association

Mark Ishoy  
General Manager  
M.G.I. Packers Inc.

Phil Jensen  
Acting Director General  
International Trade Policy Directorate  
Department of Agriculture and Agri-Food

D.E. Hobson  
Director General  
Export and Import Controls Bureau  
Department of Foreign Affairs and  
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Al Rogerson  
Business Operations General Manager  
Lakeside Packers, A Division of Lakeside  
Feeders Ltd.

Owen Brooks  
Director, International Markets  
The Irish Food Board

Jim McMahon  
Director  
Ashbourne Meat Processors Ltd.

Steven Mintz  
President  
Uni Foods Inc.

Thorkild S. Rasmussen  
Head of Unit, Beef Division,  
DG VI (Agriculture)  
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TRIBUNAL:           ARTHUR B. TRUDEAU, Presiding Member  
                          RAYNALD GUAY, Member  
                          DESMOND HALLISSEY, Member

**STATEMENT OF REASONS**

**BACKGROUND**

This is a review, under subsection 76(2) of the *Special Import Measures Act*<sup>1</sup> (SIMA), of the order made by the Canadian International Trade Tribunal (the Tribunal) on July 22, 1991, in Review No. RR-90-006, continuing, without amendment, the finding made by the Canadian Import Tribunal (the CIT) on July 25, 1986, in Inquiry No. CIT-2-86, concerning boneless manufacturing beef originating in or exported from the European Economic Community in respect of which subsidies had been paid directly or indirectly by the European Economic Community and/or the government of a member state.

Pursuant to subsection 76(2) of SIMA, the Tribunal initiated a review of the order and issued a notice of review<sup>2</sup> on February 9, 1996. A notice of change of date of the public hearing<sup>3</sup> was issued on February 16, 1996. These notices were forwarded to all known interested parties.

As part of this review, the Tribunal sent comprehensive questionnaires to Canadian packers and importers of boneless manufacturing beef. From the replies to these questionnaires and other sources,<sup>4</sup> the Tribunal's research staff prepared public and protected pre-hearing staff reports. The record of this review consists of all relevant documents, including the notice of review, the notice of change of date of public hearing, public and confidential replies to the questionnaires, the public and protected pre-hearing staff

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1. R.S.C. 1985, c. S-15, as amended by S.C. 1994, c. 47.
  2. *Canada Gazette* Part I, Vol. 130, No. 7, February 17, 1996, at 537.
  3. *Canada Gazette* Part I, Vol. 130, No. 8, February 24, 1996, at 574.
  4. The Department of Agriculture and Agri-Food, Statistics Canada, the Department of Foreign Affairs and International Trade and CanFax Research.

reports for this review, as well as the 1986 finding, the 1991 order and the public and protected pre-hearing staff reports for the 1991 review. All public exhibits were made available to interested parties, while protected exhibits were provided only to independent counsel who had filed a declaration and confidentiality undertaking with the Tribunal.

Public and *in camera* hearings were held in Ottawa, Ontario, from May 21 to 23, 1996.

The Canadian Cattlemen's Association (CCA) and Lakeside Packers, A Division of Lakeside Feeders Ltd. (Lakeside Packers) were represented by counsel at the hearing.<sup>5</sup> They submitted evidence and made argument in support of continuing the order. M.G.I. Packers Inc. (M.G.I.) appeared without counsel, in support of the CCA's position and to represent the company's interests. The Australian Meat and Live-stock Corporation (AMLC) was also represented by counsel at the hearing, submitted evidence and made argument in support of continuing the order.

The Irish Food Board (IFB), the Delegation of the European Commission in Canada (the European Commission) and Uni Foods Inc. (Uni Foods) were represented by counsel at the hearing, submitted evidence and made argument in support of rescinding the order. Foodane APS Denmark was represented by counsel for Uni Foods, but did not submit evidence. The Government of Denmark was represented by the Minister Counsellor of the Royal Danish Embassy in Ottawa, but did not submit evidence or make argument. The Canadian Meat Importers Committee made a written submission in support of rescinding the order, but was not represented by counsel and did not participate in the public hearing.

The product which is the subject of this review is boneless manufacturing beef. Beef is the primary product resulting from the slaughter of cattle. There are two types of beef: high-quality beef (non-subject goods), derived primarily from heifers and steers; and boneless manufacturing beef, derived primarily from cows culled from the beef cattle cow-calf herd and from the dairy herd.<sup>6</sup> A secondary source of boneless manufacturing beef is from the carcass trimmings from heifers and steers.

Boneless manufacturing beef is comprised of two product groups: grinding beef and beef cuts for further processing. Grinding beef is used for manufacturing hamburger patties, ground beef and further processed products, such as wieners and sausages. The industry standard for grinding beef is 85 percent chemical lean (i.e. the fat content is 15 percent). Beef cuts are processed into deli meats, such as pastrami and corned beef, and are used in the manufacture of controlled portion cuts for the foodservice industry.

Domestic boneless manufacturing beef is sold primarily in the fresh state, while imported boneless manufacturing beef enters Canada in the frozen state.

## **SUMMARY OF THE 1986 FINDING AND 1991 ORDER**

On July 25, 1986, in Inquiry No. CIT-2-86, the CIT found that the importation into Canada of boneless manufacturing beef originating in or exported from the European Economic Community in respect

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5. The Dairy Farmers of Canada was also represented by counsel, but did not file a submission or attend the public hearing.

6. There are four broad classes of cattle slaughtered for beef in Canada: steers, heifers, cows and bulls. The yield from each of these classes of cattle includes a percentage of boneless manufacturing beef.

of which subsidies had been paid directly or indirectly by the European Economic Community and/or the government of a member state was likely to cause material injury to the production in Canada of like goods. On July 22, 1991, in Review No. RR-90-006, the Tribunal continued, without amendment, the finding of the CIT.

In the 1986 finding, the CIT noted that the market for cattle in North America was a continental market with prices being freely determined by supply and demand and that the general level of prices was governed by conditions in the United States. However, the CIT found that prices in Canada moved independently of those in the United States within certain limits known as the import ceiling and the export floor. The export floor provided a safety net below which Canadian beef prices could not fall before cattle would be traded with the United States rather than sold to domestic packers. The open border with the United States had insulated the domestic industry from the adverse effects of the low-cost subsidized imports.

With respect to the likelihood of injury, the CIT noted that EEC exports of subsidized beef to the United States were limited to 5,000 tonnes per year. In 1984, five times that amount entered Canada. As a net exporter of beef, primarily to the United States, Canada was faced with charges that it was a backdoor broker for EEC subsidized beef to enter the United States, and bills were introduced in the US Congress to address this concern. The CIT was persuaded that, in the absence of measures to limit EEC subsidized imports into Canada, US retaliation would restrict Canadian cattle trade with the United States, which would devastate the Canadian beef industry. In light of the circumstances, the CIT found that subsidized imports of boneless manufacturing beef from the European Economic Community were likely to cause material injury to the production in Canada of like goods.

In the 1991 order, the Tribunal found that there was a likelihood of a resumption of subsidized imports, given the continuing existence of the EEC agricultural support programs and the presence of the surplus of beef that the European Economic Community maintained in "intervention stocks." The Tribunal noted that the intervention stocks could be used to supply Irish and Danish customers, thereby making new production available for export to Canada. The Tribunal concluded that the European Economic Community's substantial export capacity would allow it to supply Canada with volumes equal to or exceeding those exported in 1984.

The Tribunal found that there was a likelihood of material injury to domestic packers and to live animal producers from a resumption of subsidized imports. The evidence indicated that boneless manufacturing beef was very price-sensitive. Accordingly, EEC exporters would have to price below prevailing market prices in Canada in order to reenter the market and would be able to do so because of the EEC subsidy programs.

Because of the weak financial position of the beef packing industry and the tight margins under which it operated, the Tribunal was of the view that the meat packers would not be able to respond to the increased price competition. Under these circumstances, the industry would abandon significant market share and, consequently, production of boneless manufacturing beef and the demand for cattle would be reduced.

The Tribunal reached these conclusions without considering the impact on the industry of retaliation by the United States against Canadian exports of live cattle or beef.

## **POSITION OF PARTIES**

### **The CCA, the Dairy Farmers of Canada and Lakeside Packers**

The CCA, the Dairy Farmers of Canada and Lakeside Packers took the position that the finding should be continued. Counsel for the domestic producers argued that the European Union would continue to subsidize beef exports to Canada. Counsel also argued that, even with the scheduled reductions to the restitution (subsidy) levels under the World Trade Organization (WTO) *Agreement on Agriculture*,<sup>7</sup> the restitution levels are flexible in terms of the levels set for individual products and countries and are structured in a way as to ensure access to a market under changing market conditions. Counsel noted that the restitution available for Canada has not been used for a number of years and that the level would likely be reviewed by the European Union. Moreover, it was submitted that SIMA is concerned with all subsidies, not only with export subsidies referred to in the Canada-European Union Agreement<sup>8</sup> (the Agreement). Counsel argued that all European beef is subsidized and that there are generous subsidies available.

Counsel for the domestic producers argued that the bovine spongiform encephalopathy (BSE) scare<sup>9</sup> in the European Union reduced consumption of beef in Europe and created excess supply. Counsel contended that a partial recovery of consumption is likely, but not a complete recovery. Counsel pointed out that, even if EU consumption recovered to 90 percent, there would remain 750,000 tonnes of oversupply for the EU market. It was submitted that the oversupply would increase intervention purchases and stocks. Counsel acknowledged that intervention beef cannot be marketed directly to Canada, but argued that large stocks permit EU producers to export production directly from slaughterhouses to Canadian importers.

Counsel for the domestic producers argued that the industry is vulnerable to subsidized imports of EU boneless manufacturing beef. They explained that, for most of the previous 10 years, the Canadian cattle industry experienced growth and that, by 1995, the domestic beef cow herd had increased to record levels. However, the cattle industry is entering the reduction phase of the cattle cycle. Over a two- to three-year period, approximately 15 to 20 percent of the beef cow herd will be culled, and the supply of slaughter cows and boneless manufacturing beef will increase significantly. Counsel argued that the market for boneless manufacturing beef is already saturated and that prices for cattle and boneless manufacturing beef are low. According to counsel, the rising supply of slaughter cattle and boneless manufacturing beef will further reduce the returns to packers that will, in turn, reduce their price offers for domestic cows. Counsel argued that cattle producers will lose revenue on domestic sales and will increase cattle exports to the United States.

Counsel for the domestic producers argued that a resurgence of subsidized EU imports will exacerbate the circumstances facing domestic packers and cattle producers and cause material injury by suppressing the price for boneless manufacturing beef and subsequently eroding the prices for cows. Moreover, reduced revenues for packers will place them at a disadvantage when competing with US cattle buyers in Canada, therefore increasing the volume of cattle shipped to the United States and the threat of retaliatory trade action by the United States.

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7. Signed at Marrakesh on April 15, 1994.

8. Tribunal Exhibit RR-95-003-44, Administrative Record, Vol. 1B at 118, 119 and 122.

9. On March 20, 1996, UK officials announced that the consumption of beef produced from cattle infected with BSE could infect humans with Creutzfeldt-Jakob disease.



According to counsel for the domestic producers, the displacement of domestic slaughter cattle by subsidized imports of EU boneless manufacturing beef would be interpreted by the United States as providing backdoor access for EU beef to the US market, thereby circumventing the access level permitted by the United States for EU beef. As indicative of the emotional nature of the market, counsel noted the US imposition of a 100 percent duty on the 5,000 tonnes of imports allocated to the European Union for the US market, in response to the hormone ban imposed by the European Union. Counsel argued that any disruption in access to the US market would be injurious to cattle producers, packers and boners and noted that the processing sector requires high levels of capacity utilization in order to remain competitive.

It was the CCA's position that not one pound of subsidized imports of EU boneless manufacturing beef is acceptable. Counsel for the domestic producers argued that the European Union's unilateral proposal to the Canadian government to restrict the volume of subsidized imports was accepted by the Canadian government without the agreement of the CCA and without any consideration as to whether or not that volume would be injurious. According to counsel, it is not envisaged, within SIMA, that these types of undertakings can be offered or accepted; moreover, it is totally inappropriate to be dealing with the European Union's undertaking or for the industry to be asked to recommend what level of subsidized imports would be appropriate for it.

### **The AMLC**

The AMLC submitted that the finding should be continued. Counsel for the AMLC argued that continuation is essential to prevent a resurgence of low-priced EU imports into Canada, supported by state subsidies and interventions in response to the BSE scare. Counsel argued that the BSE scare severely depressed consumption in the European Union. Counsel submitted that the European Union's immediate responses to the BSE scare, increasing intervention purchases and the subsequent creation of a special fund of \$1.5 billion to boost sales of EU beef within Europe are indicative of the seriousness of the crisis. In order to relieve the pressure of oversupply, counsel argued that the European Union would attempt to increase its exports, even though domestic and international supplies of boneless manufacturing beef are high and prices are depressed. In the case of Canada, counsel argued that the European Union would reexamine and adjust the restitution level to that necessary to move product into the Canadian market, with a consequent loss of market share by domestic producers and non-subsidized exporters, such as Australian producers.

In the view of counsel for the AMLC, the European Union is under considerable pressure to export substantial quantities of beef. Counsel argued that it would be improper for the Tribunal to place any weight on the European Union's offer to limit subsidized exports to 5,000 tonnes. In counsel's view, there is no agreement between Canada and the European Union because the offer is part of an agreement that: (1) deals with a number of trade issues; (2) has not been drafted in its final form; (3) has not been signed; (4) only comes into effect upon being signed; and (5) is still under negotiation in certain key aspects. Counsel submitted that the process for granting undertakings under SIMA has not been followed. Having attempted to make an undertaking in 1986, which was turned down, the European Union should not be permitted to gain access through the back door. Counsel further argued that the government's desire to resolve outstanding trade issues should not be the basis for rescinding the finding.

## **The IFB**

The IFB was in favour of rescinding the finding. Counsel for the IFB argued that the Agreement was a binding agreement. In this regard, counsel pointed out that 5,000 tonnes of subsidized imports of EU beef amounts to only one quarter of the volume that the CIT had found to cause a threat of injury in 1986, when the CIT feared that, without a finding of threat of injury, even greater volumes would enter the Canadian market from the European Union. Counsel also pointed out that the Canadian market has increased since the 1986 finding.

Counsel for the IFB suggested that the Tribunal consider other evidence in support of a decision to rescind the finding: (1) that changes in exchange rates have greatly reduced the competitiveness of EU beef in Canada; (2) that EU beef would be uncompetitive without restitution payments and may be uncompetitive even if restitution levels were changed; (3) that the remaining unallocated portion of the tariff rate quota (TRQ) was not even enough to cover the 5,000 tonnes; and (4) that it was likely that these tonnes would be divided between packers and boners in at least three member states and, thus, individual sales may be of very small quantities.

Counsel for the IFB acknowledged the fact that the European Union would continue to subsidize the subject goods, but submitted that the Tribunal should consider the reliability of the European Union in keeping international commitments similar to the Agreement, as reflected in the evidence relating to the agreement between the European Union and the United States and, in particular, to the Andriessen Agreement between the European Union and Australia. With respect to the impact of the BSE situation, counsel stated that responsibility for dealing with this issue did not rest with the Tribunal.

Turning to the issues of diversion and retaliation, counsel for the IFB took the Tribunal through a number of aids to argument which set out trends in cattle exports, imports of the subject goods and pricing over the last 15 years. They submitted that this evidence revealed no consistent identifiable relationship between these factors during this period and, thus, submitted that, because there was no link between these factors, the argument that retaliation would follow from increased imports of the subject goods into Canada could not be sustained. In addition, they submitted that the expansion plans of Lakeside Packers, when fully implemented, would overwhelm any possible effect from the 5,000 tonnes because the amount of cattle that Lakeside Packers would purchase, 500,000 head, represents approximately half of Canada's net trade surplus in cattle with the United States in 1995. This amount would relieve any pressure in the US market that may result from displacement of cattle in Canada due to the importation of 5,000 tonnes of the subject goods from the European Union.

## **Uni Foods**

Uni Foods was in favour of rescinding the finding. Counsel for Uni Foods argued that the evidence before the Tribunal establishes that there is a binding agreement between Canada and the European Union to limit subsidized imports of EU boneless manufacturing beef into Canada to 5,000 tonnes per year. He submitted that there is no argument that the European Union subsidizes beef and, thus, acknowledged that the evidence before the Tribunal establishes that there is a propensity to subsidize. Counsel contended that it remains for the Tribunal to determine whether 5,000 tonnes of subsidized imports is likely to cause material injury.

Counsel for Uni Foods argued that the evidence does not support continuation of the finding. The current reduction phase of the cattle cycle is not evidence of vulnerability, but rather, in his view, a condition facing all cyclical industries. He argued that it is not the Tribunal's mandate to protect industries from cycles. Counsel further observed that the industry has experienced a record period of growth in the beef cow herd and noted that herd buildup occurs when the industry is healthy.

Counsel for Uni Foods argued that 5,000 tonnes of subsidized EU imports is too low a volume to provide an incentive for individual EU exporters to buy market share. Instead, the limited volume of EU imports permitted is an incentive for exporters to attempt to obtain the highest possible price. He further submitted that the 5,000 tonnes of EU imports will not influence domestic prices. Counsel noted that, during the 1991-93 period, considerably greater volumes of Australian and New Zealand beef entered the Canadian market and that, although the price of that product declined over the period, Canadian domestic prices increased and tracked US prices. Counsel contended that, currently, import prices basically track prevailing North American prices.

The threat of US retaliation, argued counsel for Uni Foods, is not supported by the evidence. Even though there have been huge increases in exports of cattle and beef to the United States since 1991, there has been no retaliation. In counsel's view, if exports to the United States have not been an issue to date, then an additional 5,000 tonnes of beef, which equates to approximately 25,000 to 35,000 head of cattle, will not be an issue.

On the issue of displacement, counsel for Uni Foods argued that the Canadian market is not saturated. He noted that Lakeside Packers plans to produce an additional 140 short tons per day of boneless beef, of which 50 short tons per day will be coarse ground beef and the remaining 90 short tons will be boneless beef. Counsel also submitted that Lakeside Packers did not anticipate any market disruption from the addition of this product. In counsel's view, this evidence shows that the market can absorb huge amounts of additional beef.

Counsel for Uni Foods further argued that some processors of boneless manufacturing beef that export to the United States are not being properly served by the domestic industry. He submitted that about 73 percent of the requests to domestic producers for boneless manufacturing beef by applicants for supplementary import permits were refused or not responded to by the producers. Counsel noted that beef that entered Canada under supplementary import permits amounted to 37,000 tonnes in 1994 and 14,742 tonnes in 1995. He argued that these imports were non-injurious because domestic producers were given the first opportunity to supply that demand, but were unable to do so.

### **The European Commission**

Counsel for the European Commission argued that the finding should be rescinded, as there has been a change in circumstances under which a threat of injury likely to be caused by subsidizing is no longer foreseen and imminent. Counsel argued that, because there will be a limit on the volume of subsidized boneless manufacturing beef permitted to be exported to Canada, the limit precludes any likelihood that those exports will cause material injury. Respecting the limit on the volume of subsidized exports, counsel noted that the European Union will adopt an export licensing system similar to that which has been used to control the level of EU beef exports to the United States since 1979. Under that system, the EU exporter would apply for an export licence via the relevant authority of one of the member states authorized to export

beef to Canada. The applications would be submitted to the European Commission on a quarterly basis. The export licence would specify the conditions to be met by the exporter. At the point of export, upon presentation of the export licence, EU customs officials would issue an identity certificate to accompany the consignment. The original certificate would be presented to Canada Customs upon arrival of the shipment.<sup>10</sup> Counsel argued that, on the balance of probabilities and a reasonable weighing of the evidence, the Tribunal should find that it is unforeseen and not imminent that more than 5,000 tonnes of subsidized beef will enter Canada per annum in the foreseeable future.

Counsel for the European Commission submitted that the CCA failed to show that it would suffer material injury due to the importation of 5,000 tonnes of subsidized beef from the European Union. Counsel argued that, as a matter of principle, the CCA has taken the position that not one pound of subsidized boneless manufacturing beef should enter Canada. Counsel submitted that the CCA provided no evidence to substantiate its claim that material injury would occur in the form of retaliation by the United States in response to increases in Canadian exports of cattle resulting from displacement by imports of EU beef. Counsel argued that the 5,000 tonnes of EU beef would amount to between 25,000 and 38,000 head, which would be more than ameliorated by Lakeside Packers' plan to increase its annual slaughter by 500,000 head and by the displacement of some 12,000 to 15,000 tonnes of imported oceanic boneless manufacturing beef as a result of Lakeside Packers' plan to enter the production of coarse ground beef. Counsel also noted that the AMLC estimated that Australian exports in 1996 would amount to 24,000 tonnes or 60 percent of Australia's allocation of the TRQ. Counsel argued that the remaining 18,000 tonnes of Australian quota, more than three times the access level under the Agreement, could be used by the European Union. In counsel's view, the impact of 5,000 tonnes of subsidized imports from the European Union alleged by the CCA is conjectural.

Turning to the processing sector, counsel for the European Commission submitted that no evidence of financial difficulty was submitted by either Lakeside Packers or M.G.I. Counsel noted the submission of M.G.I. alleging that it would have difficulty securing adequate supplies of reasonably priced cattle if subsidized EU beef entered the market. Counsel argued that, in light of the growing supply of cattle predicted by the CCA, even the displacement of 38,000 head from the market would not put M.G.I. in an inadequate supply position.

Counsel for the European Commission submitted that the industry's allegation that the 5,000 tonnes of EU beef would be sold at discount prices is based on the lower-valued beef that was shipped from the European Union 10 years ago when the product was largely 65 percent chemical lean and the volume of EU imports was unlimited. Counsel argued that it is inappropriate to compare the prices in the two time periods. Counsel further argued that a price of \$1.50/lb. would be required at the current restitution level for the Canadian market to be attractive to EU exporters of boneless manufacturing beef. Alternatively, an increase in the restitution level of 65 to 67 percent would be required. Counsel submitted that neither was likely according to the evidence of the witnesses for the IFB.

Counsel for the European Commission argued that 5,000 tonnes of EU imports, which amounts to 1.5 percent of the 1995 market, would have no influence on market prices. They noted that the difference between Australian and domestic prices during 1994 and 1995 was not held to be materially injurious by the

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10. Exporter's Exhibit H-4, Administrative Record, Vol. 11B.

industry nor was the difference between US and domestic prices in the same time period. Counsel argued that there is no basis for concluding that the pricing of 5,000 tonnes of subsidized imports of EU boneless manufacturing beef will be injurious to the domestic industry.

## ANALYSIS

Section 76 of SIMA provides that, on completion of a review, the Tribunal shall rescind an order or finding, or continue it with or without amendment. In making its decision in this matter, the Tribunal must deal with two fundamental questions. First, the Tribunal must determine whether a resurgence of subsidized imports of boneless manufacturing beef from the European Union is likely, if the order is rescinded. Second, the Tribunal must determine whether such a resurgence of subsidized imports is likely to cause material injury.

In this particular case, however, there is one issue of such importance in assessing the two fundamental questions that the Tribunal has decided to consider it at the outset. The issue is whether there exists between Canada and the European Union an agreement to limit EU export subsidies on boneless manufacturing beef destined for Canada to no more than 5,000 tonnes annually.

On December 5, 1995, the Minister for International Trade and the Minister of Agriculture and Agri-Food announced that Canada and the European Union had reached the Agreement to settle several outstanding trade issues.<sup>11</sup>

The text of the Agreement, insofar as it affects beef trade, is as follows:

*The EC [European Community\*] will limit export subsidies on fresh, chilled or frozen beef and veal destined for Canada to no more than 5,000 tonnes annually.*<sup>12</sup>

EU export subsidies<sup>13</sup> are designed to compensate for the amount by which domestic prices within the European Union exceed prices in export markets. Export subsidies are limited to designated countries of destination, of which Canada is one. The level of subsidy varies from country to country and depends on local market conditions. There is, however, a constraint on overall expenditure levels. Under the *WTO Agreement on Agriculture*, the European Union has committed itself to reducing the global subsidy level.<sup>14</sup>

Officials from the Canadian and EU governments testified with respect to the Agreement. They explained that the Agreement was meant to deal with a number of long-standing trade irritants between Canada and the European Union, including the trade in fresh, frozen or chilled beef. They stated that the Agreement represented a valid agreement between the two parties which had already been implemented to a great degree, notwithstanding that the final signing had not taken place. Implementation was reflected in a

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11. Tribunal Exhibit RR-95-003-44, Administrative Record, Vol. 1B at 117-27.

\* The word "Community" replaced the word "Commission" in brackets in the English version of the statement of reasons as per the erratum issued by the Tribunal on July 24, 1996.

12. Exporter's Exhibit H-2, Administrative Record, Vol. 11B.

13. EEC Regulation 805/68, June 27, 1968, as amended by EEC Regulation 3290/94, December 22, 1994.

14. The annual value of the export subsidies is scheduled to decrease from 1,900.6 million ECUs in 1995 to 1,259.4 million ECUs by 2000. Over the same period, the annual volume of exports eligible for export subsidies will be reduced from 1.119 to 0.817 million tonnes. Manufacturer's Exhibit A-1, Annex 4, Administrative Record, Vol. 9.

number of actions of the two parties, including: (1) the Order-in-Council issued by the Governor General in Council, authorizing the Minister of Foreign Affairs either to sign the Agreement or to take specified steps to have the Agreement signed on behalf of the Government of Canada and to take the action necessary to bring the Agreement into force;<sup>15</sup> and (2) the decision of the EU Council of Ministers authorizing the signing of the Agreement.<sup>16</sup>

Mr. Phil Jensen, Acting Director General of the International Trade Policy Directorate of the Department of Agriculture and Agri-Food, indicated that, in his experience, it was not unusual to have agreements, such as the Agreement, signed on an *ad referendum* basis and to have parties implement them before final signature. He also stated that the Government of Canada was of the view that it was a valid agreement, binding on both Canada and the European Union.<sup>17</sup> Mr. Thorkild S. Rasmussen, Head of Unit, Beef Division, DG VI (Agriculture), European Commission, concurred in this view.<sup>18</sup>

With respect to the particulars of the Agreement, Mr. Jensen explained that it provides that the European Union will limit the amount of beef that may receive export subsidies to 5,000 tonnes. He confirmed that there was no limit on the amount of export subsidy that could be provided in respect of beef that was covered by the Agreement. He stated that the Agreement should not be seen as a voluntary export restraint because it limits the use of export subsidies, not exports. He concurred that the Agreement contained no specific time limitation or period, but explained that this was usual in these types of agreements. On the likelihood of the agreed level being raised through renegotiation, Mr. Jensen testified that the Agreement is intended to continue for some period in the future.<sup>19</sup>

With respect to the relationship of the Agreement to the current TRQ limitation of 76,809 tonnes, Mr. D.E. Hobson, Director General of the Export and Import Controls Bureau of the Department of Foreign Affairs and International Trade explained that the Agreement did not affect this limit nor the current quota allocations to Australia and New Zealand. Therefore, EU exporters would have to compete with beef from other sources, including Australia and New Zealand, for the unallocated 4,809 tonnes left in the TRQ.<sup>20</sup> Furthermore, based on the evidence of Mr. Hobson, only EU beef not subject to the Agreement, i.e. beef that does not receive export subsidies, would be eligible for supplementary import permits.<sup>21</sup>

Mr. Rasmussen explained in some detail the steps taken by the European Union to implement the Agreement and the manner in which it would be managed by the European Union through its export

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15. Tribunal Exhibit RR-95-003-52, Administrative Record, Vol. 1B at 173.

16. Council Decision 95/591/EC, December 22, 1995, Official Journal of the European Communities, Vol. 38, No. L 334 at 25, Exporter's Exhibit H-5B, Administrative Record, Vol. 11B.

17. Transcript of Public Hearing, Vol. 2, May 22, 1996, at 300 and 301.

18. *Ibid.* at 595-97.

19. *Ibid.* at 293.

20. *Ibid.* at 343.

21. Supplementary import permits may be issued for imports of non-NAFTA beef in excess of the TRQ, under certain terms and conditions and provided the price is not below the prevailing range of prices for similar imports of beef into the United States. Tribunal Exhibits RR-95-003-41 and RR-95-003-43, Administrative Record, Vol. 1 B at 26-42 and 102-108 respectively.

licensing system.<sup>22</sup> He affirmed that an export licence would be required to export beef from the European Union to Canada.

The government officials, as well as many of the witnesses called by other parties, discussed somewhat similar agreements between the European Union and the United States and between the European Union and Australia (the Andriessen Agreement). It was noted that, while the agreement with the United States had been implemented in a similar manner as the Agreement, the Andriessen Agreement had not been formalized and, yet, was still functioning as designed, about 10 years after it came into effect.

In the Tribunal's view, the evidence shows that, notwithstanding that a final form of the Agreement has not been signed, there exists between the European Union and Canada an agreement relating to a wide range of agricultural products, including the subject goods, which both parties consider binding on each other. The parties have taken all actions necessary, short of signing the final text, to implement the Agreement and are currently acting in a manner consistent with their obligations under the Agreement.

Having found that there exists between Canada and the European Union an agreement relating to subsidized imports of the subject goods, the Tribunal concludes that, if it rescinds the order, the European Union will likely recommence shipments of subsidized boneless manufacturing beef to Canada. The Tribunal now turns to consider whether there is a likelihood of injury to producers of boneless manufacturing beef as a result of a resurgence of shipments of subsidized boneless manufacturing beef from the European Union to Canada.

At the outset of the hearing, the Tribunal noted that, unlike the 1986 and 1991 cases, it is proceeding under SIMA as amended by the *World Trade Organization Agreement Implementation Act*.<sup>23</sup> SIMA previously defined material injury, in part, as "material injury to the production in Canada of like goods." Injury is now defined as "material injury to a domestic industry" and domestic industry is defined, in part, as "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." The Tribunal notes that, as a result of these amendments, the phrase "production in Canada of like goods" is no longer found in domestic law. The Tribunal requested counsel to address these amendments in argument.

Counsel for the CCA submitted that, previously, the Tribunal was directed to take into account provisions of particular international agreements. As a result of the WTO amendments, the wording of those provisions has been incorporated into domestic law and, thus, nothing has really changed in respect of the basis upon which the decisions as to the domestic industry were made in 1986 and 1991. Counsel for the IFB, for Uni Foods and for the European Commission essentially agreed with this conclusion, i.e. that no substantial change has occurred in terms of the definition of "domestic industry" in SIMA. They submitted, however, that the CIT in 1986 and the Tribunal in 1991 erred by including the cattlemen as part of the domestic industry and questioned whether the evidence in the record relating to the packers and boners was sufficient for the Tribunal to decide whether there was a likelihood of injury to a major proportion of the domestic industry.

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22. The export licensing system is applicable to exporters of beef to the United States. Exporter's Exhibit H-4, Administrative Record, Vol. 11B.

23. S.C. 1994, c. 47.

The Tribunal is of the view that whether the domestic industry is defined as including the cattlemen or not does not change the conclusion that the Tribunal reaches below, i.e. if the order is rescinded, producers of boneless manufacturing beef are not likely to be injured.

In assessing the likelihood of injury, the Tribunal first considered whether there were other support or subsidy programs available, apart from export subsidies, that would enable EU boneless manufacturing beef to be exported to Canada. In this regard, the Tribunal accepts the submission of the domestic industry<sup>24</sup> and the witnesses for the European Commission<sup>25</sup> and for the IFB<sup>26</sup> that imports of EU boneless manufacturing beef could not be price-competitive in the Canadian market in the absence of export subsidies. The Tribunal is also satisfied that intervention stocks<sup>27</sup> cannot be sold in the Canadian market because it is not possible to trace the origin of the beef and, thus, meet the requirements of the Department of Agriculture and Agri-Food for the importation of beef into Canada.<sup>28</sup>

For all of the above reasons, the Tribunal is of the opinion that, if the order is rescinded, the likely volume of subsidized boneless manufacturing beef exported to Canada will be no more than 5,000 tonnes per year. The question before the Tribunal now becomes whether there is a likelihood of injury to domestic producers of boneless manufacturing beef from the importation into Canada of no more than 5,000 tonnes of subsidized EU manufacturing beef.

In assessing the likelihood of injury to the domestic producers, the Tribunal notes that the situation in 1996 contrasts sharply with the situation in 1986. In the inquiry, the CIT considered the impact of significantly higher import levels, 22,000 tonnes in 1984 and 11,000 tonnes in 1985,<sup>29</sup> which represented significantly higher shares of the apparent market than in the present review, where the maximum import volume of 5,000 tonnes represents about 1.5 percent of the apparent market.

Although the volume of subsidized exports may be small, the domestic producers argued that the additional exports would be coming into a market already saturated with product offered at low prices. The producers led evidence to indicate that cattle production is currently at the top of its cycle<sup>30</sup> and is entering the reduction phase of the cycle. During this phase of the cycle, cattle producers are facing low prices and are forced to cull their cow herds to maintain income. This contributes to even greater supplies of boneless manufacturing beef and exerts further downward pressure on prices.

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24. Manufacturer's Exhibit A-1, Administrative Record, Vol. 9.

25. Transcript of Public Hearing, Vol. 2, May 22, 1996, at 561.

26. *Ibid.* at 465.

27. The intervention system is designed to stabilize markets and to ensure a fair standard of living for the agricultural community producing beef and veal. The intervention system involves removing beef from the EU market to prevent or mitigate a substantial fall in prices.

28. Transcript of Public Hearing, Vol. 2, May 22, 1996, at 562-64.

29. Tribunal Exhibit RR-95-003-8, Administrative Record, Vol. 1.1 at 76.

30. Manufacturer's Exhibit A-2 at 1, Administrative Record, Vol. 9.



In 1995, domestic production of boneless manufacturing beef was 332,841 tonnes, the highest level in five years.<sup>31</sup> Moreover, domestic prices had declined from a peak of \$1.65/lb. in the fourth quarter of 1993 to \$1.13/lb. in the fourth quarter of 1995.<sup>32</sup> The prices for Alberta and Ontario culled cows showed a similar trend.<sup>33</sup> Given the cattle cycle, the CCA expects that low prices and increased domestic production will persist over the next two to three years, the period required for the culling process to bring supply and demand into line.

Under such circumstances, the producers argued that even small increases in the volume of imported boneless manufacturing beef in the market will displace domestic manufacturing beef, that the subsidized imports will suppress the prices of domestic boneless manufacturing beef and cows and that there will be potential retaliatory action by the United States against increased cattle shipments from Canada.

In assessing the producers' argument, the Tribunal considered the likely prices at which it expected the subsidized boneless manufacturing beef from the European Union to be sold in the Canadian marketplace. To do so, the Tribunal considered the likely level of export subsidy to be established for the Canadian market and the likely pricing strategies of the EU exporters that, in aggregate, could ship no more than 5,000 tonnes.

The current level of export subsidy to Canada has been in place for 10 years.<sup>34</sup> At December 1995 exchange rates, exports to Canada were eligible for a subsidy of about \$0.60/lb.<sup>35</sup> or 52 percent of the domestic price of \$1.15/lb. in December 1995. Export subsidy levels for individual countries are set by the European Union and may vary. According to Mr. Rasmussen, the European Union will have to look at the current subsidy level and prices in the European Union and Canada to assess whether any adjustment to the export subsidy level is required to enable EU boneless manufacturing beef to be exported to Canada. Mr. Rasmussen stated that it was not the intention of the European Union "to dump or to undercut any markets."<sup>36</sup>

As for individual exporters, the Tribunal accepts the argument that the small volume of subsidized imports permitted under the Agreement provides no incentive for selling at low prices in order to buy market share. The expected quota allocation system that will subdivide the quota between countries and between packers within countries<sup>37</sup> will further remove any incentive to buy market share. An exporter indicated at the hearing that he would serve the Canadian market based on the available price in the Canadian market, the

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31. Tribunal Exhibit RR-95-003-5, Administrative Record, Vol. 1 at 177.

32. *Ibid.* at 185.

33. *Ibid.* at 175.

34. Transcript of Public Hearing, Vol. 2, May 22, 1996, at 566.

35. EEC Regulation 2854/95, December 11, 1995. The restitution level was 74.5 ECUs/100 kg, converted to Canadian funds using the December 1995 monthly average exchange rate of 1.78. This restitution level is lower than that submitted by the CCA (71¢/lb.) which was the level in June 1995 pursuant to EEC Regulation 1561/95, June 30, 1995.

36. *Supra* note 34 at 569.

37. *Ibid.* at 522-24.

subsidy level and the ability to make a profit in that situation.<sup>38</sup> He would not consider shipping boneless manufacturing beef to Canada at a loss.<sup>39</sup>

Based on the above, the Tribunal is satisfied that, if the order is rescinded, the prices, in Canada, of subsidized boneless manufacturing beef exported from the European Union will likely be at the prevailing prices for boneless manufacturing beef sold in Canada.

In the Tribunal's view, it is also likely that the imports of boneless manufacturing beef from the European Union, which will be predominately frozen, will displace frozen boneless manufacturing beef that otherwise would have come from other countries under the TRQ or the supplementary import permits policy. In this regard, the Tribunal notes that the supplementary import permits policy was put in place to meet market needs because, in recent years, there has not been sufficient domestic boneless manufacturing beef available to meet the demand for beef of a quality needed by further processors and other users at US competitive prices.<sup>40</sup> The Tribunal also notes that Australia will likely fall short of its 1996 allocation within the TRQ by some 18,000 tonnes of beef.<sup>41</sup> The Tribunal considers that, for 1996 at least, 5,000 tonnes of EU beef will simply replace Australian beef that has vacated the market.

For all of the above reasons, the Tribunal considers that the importation of no more than 5,000 tonnes of subsidized boneless manufacturing beef from the European Union to Canada will not likely suppress the prices of domestic boneless manufacturing beef, will not likely reduce the use of domestic boneless manufacturing beef and will not likely affect the profitability of the domestic producers. Moreover, the Tribunal considers that the prices of cows in Canada will not likely be affected, and there is no foreseeable concern about increased cow shipments to the United States and for US retaliation.

In the course of its deliberations, the Tribunal considered the likely impact on domestic producers of factors other than the importation of 5,000 tonnes of subsidized EU boneless manufacturing beef. In the Tribunal's view, the effect of 5,000 tonnes of subsidized imports of boneless manufacturing beef from the European Union on domestic producers pales in comparison with the impact of the culling of the cow herd which, over the next few years, is expected to increase the supply and depress the prices of boneless manufacturing beef. At the same time, the Tribunal notes that there have been developments that may lessen the negative impact of the reduction phase of the cattle cycle. For example, Lakeside Packers plans to produce 50 short tons<sup>42</sup> of coarse ground beef per day for sale to grocery retailers. This is a value-added product that will compete directly with imports of grinding beef. Lakeside Packers' overall expansion plan is expected to increase its annual slaughter by 500,000 head of cattle, coincidentally reducing by half the current trade surplus in cattle with the United States.<sup>43</sup> The Tribunal also notes that the report of the Beef Industry Trade and Development Committee<sup>44</sup> shows that the packers and cattlemen are pursuing a greater degree of co-operation and that domestic packers are taking steps to increase their use of domestic beef.

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38. Exporter's Exhibit D-4, Administrative Record, Vol. 11.

39. Transcript of Public Hearing, Vol. 2, May 22, 1996, at 472 and 478.

40. Tribunal Exhibit RR-95-003-43, Administrative Record, Vol. 1B at 102.

41. Transcript of Public Hearing, Vol. 3, May 23, 1996, at 651 and 652.

42. Transcript of Public Hearing, Vol. 2, May 22, 1996, at 410-20, 436 and 437.

43. Tribunal Exhibit RR-95-003-5, Administrative Record, Vol. 1 at 200.

44. Tribunal Exhibit RR-95-003-26, Administrative Record, Vol. 7 at 2.

**CONCLUSION**

For these reasons, the Tribunal is persuaded that there is no likelihood of injury to domestic producers from the annual importation of not more than 5,000 tonnes of subsidized EU boneless manufacturing beef into Canada. Therefore, the Tribunal rescinds the order in respect of subsidized boneless manufacturing beef originating in or exported from the European Union.

Arthur B. Trudeau

Arthur B. Trudeau  
Presiding Member

Raynald Guay

Raynald Guay  
Member

Desmond Hallissey

Desmond Hallissey  
Member