NOTICE OF ARBITRATION AND STATEMENT OF CLAIM
UNDER THE ARBITRATION RULES
OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

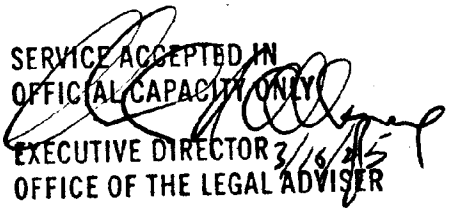
THEODORUS DE BOER, SIMON DE BOER AND JACK DE BOER

Claimants / Investors

- AND -

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent / Party



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DEPARTMENT OF STATE

Pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL") Rules of Arbitration (Resolution 31/98 adopted by the General Assembly on December 15, 1976) and Articles 1116 and 1120 of the North American Free Trade Agreement ("NAFTA"), the Claimants initiate recourse to arbitration.

A. DEMAND THAT THE DISPUTE BE REFERRED TO ARBITRATION

Pursuant to Article 1120(1)(c) of the NAFTA, the Claimants hereby demand that the dispute between them and the Respondent be referred to arbitration under the UNCITRAL Rules of Arbitration.

B. NAMES AND ADDRESSES OF THE PARTIES

Claimants/Investors:

Theodorus de Boer
De Boer Farms Ltd.
Box 156 Monarch, Alta
T0L 1M0

Simon de Boer
De Boer Farms Ltd.
Box 156 Monarch, Alta
T0L 1M0

Jack de Boer
De Boer Farms Ltd.
Box 156 Monarch, Alta
T0L 1M0

Respondent/Party:

Government of the of the United States of America
Executive Director
Office of the Legal Advisor
United States Department of State
Room 5519
2201 C. Street NW.
Washington, D.C.
20520

C. REFERENCE TO THE ARBITRATION CLAU.S.E OR THE SEPARATE ARBITRATION AGREEMENT THAT IS INVOKED

The Claimants invoke Section B of Chapter 11 of the NAFTA, and specifically Articles 1116, 1120 and 1122 of the NAFTA, as authority for the arbitration. Section B of Chapter 11 of the NAFTA sets out the provisions agreed upon concerning the settlement of disputes between a Party and an investor of another Party.

D. REFERENCE TO THE CONTRACT OUT OF OR IN RELATION TO WHICH THE DISPUTE ARISES

The dispute arises from measures adopted and maintained by the Government of the United States of America ("U.S."), banning the sale of live cattle from Canada, which have caused harm to the Claimants as Investors in the North American Free Trade Area, contrary to its obligations under Article 1102(1) of the NAFTA.

E. THE GENERAL NATURE OF THE CLAIM AND AN INDICATION OF THE AMOUNT INVOLVED

The Investors and their Investments

1. Theodorus de Boer, Simon de Boer and Jack de Boer are Canadian citizens. Each owns a 33% interest in the Investment, 589494 Alberta Ltd. Brenda de Boer, Darlene de Boer and Cindy de Boer each hold a .0033% interest in 589494 Alberta Ltd.

2. 589494 Alberta Ltd. is an Alberta-incorporated company with land and facilities in Monarch, Alberta. 589494 Alberta Ltd. is a 100% owner of De Boer Farms Ltd., an Alberta-incorporated company based in Monarch, Alberta. Approximately C$16.1 million has been invested by the Claimants in the business of these enterprises.

3. Operating on their own behalf, and through their Investment, the Claimants established cattle feeding and feedlot businesses, which were predicated on the existence of a North American market for live cattle. This market was guaranteed by the U.S. through its ratification and implementation of the *Canada-US Free Trade Agreement* ("FTA") in 1989, and its recommitment to that open market with the ratification and implementation of the NAFTA in 1994.

4. Through their Investment, the Investors normally maintained a herd of approximately 15,000 to 18,000 head of cattle. The current size of the Claimants' herd is only 8,500, significantly under capacity.

F. THE NORTH AMERICAN CATTLE INDUSTRY – AN INTERDEPENDENT AND FULLY INTEGRATED, CONTINENTAL MARKET

> *The United States and Canada have an integrated North American cattle, beef and feed market ...*[1]
>
> *There is extensive integration at every level.*[2]
>
> *I believe that as quickly as possible young cows ought to be allowed to go across*

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[1] Report of the Canadian Delegation of the Canada-United States Inter-Parliamentary Group, March 15 to 17, 2004.
[2] Caswell, Julie A. and Sparling , David. *Risk Management in the Integrated NAFTA Market: Lessons From The Case of BSE.* Commissioned paper presented at the First Annual North American Agrifood Market Integration Workshop, Cancun, Mexico, May 2004, p. 7. ("Risk Management"). See http://www.farmfoundation.org/naamic/cancun/sparlingpres.pdf.

our border. I understand the integrated nature of the cattle business.[3]

5. Since May 20, 2003, the Claimants have been unable to carry on their normal business operations because of a prohibition on the shipment of their livestock to businesses located within the United States' portion of the North American Free Trade Area. Such a prohibition (hereinafter referred to as "the border ban") is both contrary to the Claimants' rights to national treatment under NAFTA Article 1102(1) and contrary to sound science and logic within the context of the North American market for cattle and beef.

6. The North American market for live cattle and beef is interdependent and fully integrated, particularly as between its Canadian and American segments. The American Meat Institute (AMI) states that the Canadian and U.S. segments are "mirror images"[4] of each other, with governments and consumers relying upon the integrity of the effectively unified production, marketing and regulatory systems found in both countries. Canada and the United States promoted and protected the development of such continental markets with the establishment of the Canada-United States Free Trade Agreement ("FTA") in 1989, followed by the NAFTA in 1994.

7. The Claimants relied upon the promise of the North American Free Trade Area, and the continental market in beef and cattle which it promised, when they invested their hard work, money and lives into it, watching their businesses flourish – until May 20, 2003. On that date, the U.S. Government embarked upon an arbitrary and discriminatory process that has barred access to that interdependent and integrated market to the Investors. The Investors submit that by closing the border to the entry of Canadian-based livestock (as of May 20, 2003) and keeping it closed for nearly two years, the U.S. Government caused great and unnecessary harm to their investment in the integrated market.[5]

8. Following the advent of the FTA and NAFTA North American cattle and beef production has become increasingly interdependent and integrated, reflected in continent-wide sales and shipments of all types of cattle and beef, and in cross-border investments in slaughter

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[3] President George W. Bush quoted in "Bush Tells U.S. Officials to Hasten Beef Resolution", Financial Post, p. FP4, December 1, 2004.

[4] See: AMI Press Release, 30 December 2004; http://www.meatami.com/Template.cfm?Section=Home&template=PressReleaseDisplay.cfm&PressReleaseID=2248&News=Y, accessed 14 January 2005.

[5] J. Patrick Boyle of the AMI stated:

> *Once the toothpaste leaves the tube, as the saying goes, there's no amount of wishful thinking or heavy-handed coercion that's going to force it back in. This is also true for the evolutionary, and revolutionary, changes that have taken place over the last 20 years in trade harmonization and agricultural practices between the United States and Canada.*
>
> *(...)The beef industries in the U.S. and its northern neighbor have become so alike in recent years that it's nearly impossible to differentiate between the two, outside of political jurisdictions. In fact, the cattle not only come from the same gene pool, but are raised under nearly identical conditions, fed virtually the same feed and handled under the same regimens.*

See: http://www.billingsgazette.com/index.php?id=l&display=rednews/2004/11/06/build/opinion/40-guest-op.inc.

facilities.[6] Over the past two decades, North America has thus become a major player in world cattle and beef production, with the industry integrated at every level, from production through the markets for end use.

9. Moreover, as the Canadian International Trade Tribunal (CITT) has noted, "long before the FTA and the NAFTA, the Canadian and United States cattle and beef industries were functioning as integrated industries."[7] This degree of interdependence and integration, and its concordant flow of cattle across borders, has previously raised protectionist interests on the part of certain U.S. cattle producers, particularly in the States of Idaho, Washington and Montana. As the CITT has noted, approximately five years ago the ever-increasing level of competition spurred by such integration gave rise to a protectionist movement of U.S. Investors, described in more detail below, who have actively pursued litigation to curtail, and even roll back, this process of integration.

10. The low-cost factors of production found in many areas of Canada has allowed Canadian producers to expand their share of the continental market through increased sales of both live cattle and beef to industry members located in the United States.[8] Shipments from Canadian-based producers have thus become an integral input for beef production facilities based in many cities and towns throughout the United States. Similarly, Canadian slaughter plants and feedlot owners would obtain significant amounts of all of the above classes of cattle from producers based in the United States. Significant quantities of beef would be shipped between market participants across the Canada-US border based purely upon market factors, such as price and geography. This conclusion was apparent soon after the NAFTA was implemented:

> *Canadian cow-calf operations supply some of the young stock to U.S. producers, but the major movement is from backgrounders to U.S. feedlots or from feedlots to U.S. processing facilities. This trade has advanced to the point that U.S. feedlots, particularly in the northwestern states, are dependent on Canadian cattle for their normal operations.*[9]

The fact that so many U.S. meat packers have reduced or shut down their operations since the border ban was imposed, is testament to the integrated and interdependent nature of the industry, particularly ten years after the coming into force of the NAFTA.[10]

Indicators of Integration

11. Certain key market indicators demonstrate the interdependence and integration that existed prior to the implementation of the border ban. These indicators include:

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[6] "A Look at Rising Cattle and Beef Trade in North America", Monica Castillo (May 2, 2003) FAS Online.
[7] *Competitiveness of the Canadian Cattle and Beef Industries in the North American and World Markets* (Government of Canada, Canadian International Trade Tribunal).
[8] See footnote 2.
[9] Ibid, p. 8.
[10] http://www.pbs.org/newshour/bb/canada/jan-june05/beef_3-3.html.

- **Volume and value of cattle shipments between Canada and the United States;**
- **Volume of the intra-continental trade in feeder cattle;**
- **Grade Standards; and**
- **Parallelism in price.**

12. Observance of these key factors in analysis of economic integration led a team of agricultural economists to conclude that the current restrictions on cattle shipments has caused considerable economic damages in both Canada and the United States:

> *The United States (US) and Canadian cattle and beef industries were highly integrated prior to closure of the border to live animal trade in to the US following the May 20, 2003. Harmonized cattle and beef trade between US and Canada provided substantial economic benefits to both countries prior to this event. The US imposed border restrictions prohibiting exports of Canadian cattle and beef to the US. These restrictions have caused a substantial decline in availably supply of slaughter cattle for US packers. The impacts of these border restrictions on slaughter cattle flow were much greater in particular regions of the US where packing plants relied heavily upon Canadian cattle imports for capacity utilization.*[11]

Volume of the Intra-Continental Trade in Beef

13. The North American cattle industry could be described as being composed of the following tiers: slaughter cattle, cattle for further feeding, and breeding cattle. All cattle are eventually slaughtered, and, therefore, the slaughter mix itself includes two broad groupings, commonly referred to as the trade as "fed cattle" and "non-fed" cattle. The former consists of younger steers and heifers, fed for the express purpose of beef production. The non-fed segment consists of breeding animals that have been culled from breeding herds and former dairy cattle. There is also a cross border trade in both commercial and purebred animals for breeding, as well a significant trade in dairy heifers for both milk production and breeding. Additionally, the trade in breeding stock includes significant trade in germ plasm (e.g., semen and ova). For each of these tiers, the market for the relevant goods and services is continental in scope.

14. Since 1989, all classes of cattle had been crossing the border unhampered by tariffs or quotas. A majority of these cattle do not enter the herds of domestic Investors for long periods of time (as contrasted with breeding stock). The product also enters into the post-slaughter processing, merchandising and consumption continuum, further evidencing a high degree of interdependence and integration.

15. There are two broad classes of live cattle being produced and shipped between and among U.S. and Canadian investors for slaughter. Fed cattle[12] outnumber non-fed cattle[13]

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[11] Ted Schroeder and John Leatherman, December 28, 2004.

[12] Fed cattle includes youthful steers and heifers that are normally fed out in feedlots which are finished and readied for slaughter between 18 months to two years of age.

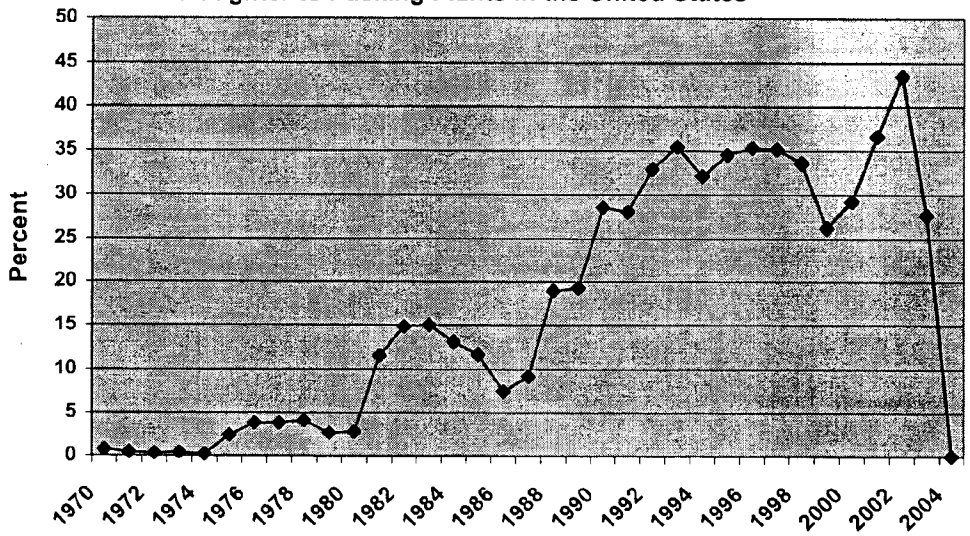
[13] Non-fed cattle includes surplus breeding stock which normally consists of culled beef and dairy cows and bulls.

by a ratio of approximately 10 to 1.

16. The following two graphs illustrate the proportion of total production (by number of head) that has been shipped live for slaughter to industry members located in U.S. annually since 1970.[14]

17. Non-fed cattle shipments from Canada to the United States for slaughter (**Graph 1**) have followed a steep growth trend: rising from negligible levels in the 1970's to one third of total Canadian production in the 1990's and further to 43% in 2002, before dropping to zero after May, 2003. These shipments are "net shipments" because on numerous occasions significant numbers of cattle, particularly fed cattle, have been shipped from the United States for slaughter in Canada.

Graph I - Percentage of Canadian Non-Fed Cattle Shipped Live for Slaughter to Packing Plants in the United States



18. In **Graph II**, net live shipments of fed cattle from Canadian producers to slaughter located in the United States is displayed. Again, the shipments increase from negligible amounts in the early 1970's to over 25% in 1995 and 1996. Though the percentage eases after 1996 due to a rapidly expanding Canadian domestic slaughter, it still settles at the

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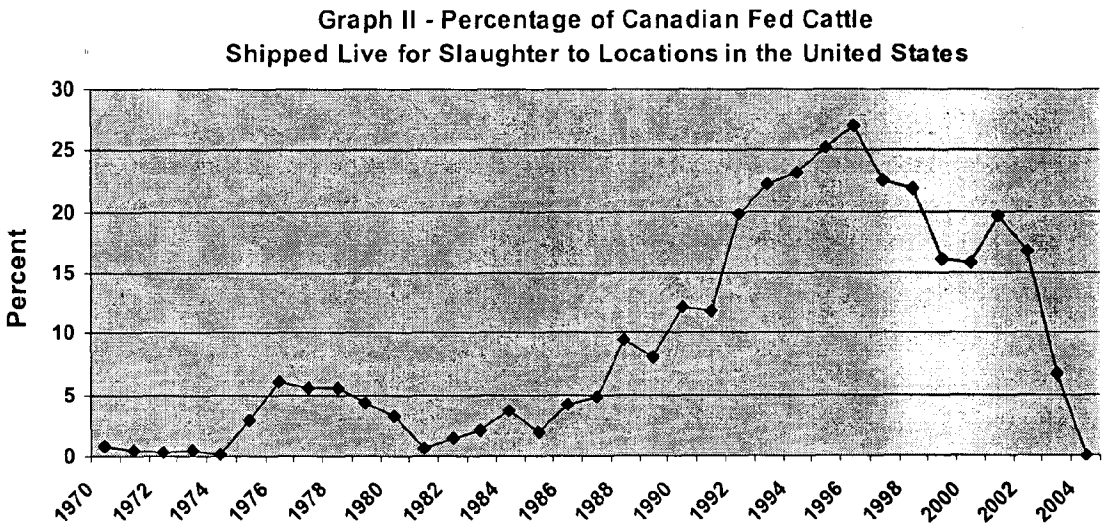
[14] Graphic illustrations and data were compiled by Mr. Charles A. Gracey, P.A.G., B.S.A., M.S.A., former Executive Vice-President of the Canadian Cattlemen's Association. Sourced from CANFAX, a market information service of Canadian Cattlemen's Association and instituted during Mr. Gracey's tenure.

Graph 1's representation is determined by the following formula: Total live exports of fed cattle for immediate slaughter in the US/((Total domestic fed cattle slaughter) + (Total live exports of fed cattle for immediate slaughter in the USA)) expressed as a percentage. The same formula applies to non-fed cattle. Source: Domestic slaughter - Canadian Beef Grading Agency; Live slaughter exports - Statistics Canada and Agriculture Canada.

Sourced from CANFAX, a market information service of Canadian Cattlemen's Association and instituted during Mr. Gracey's tenure. All further graphic depictions are also sourced from CANFAX.

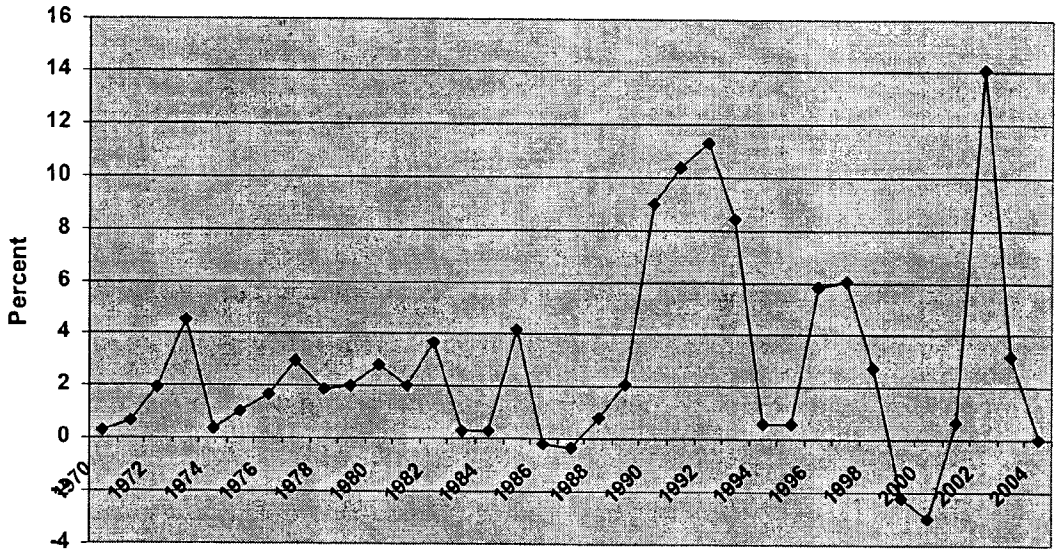
15% to 20% range. As in the earlier graph, it falls immediately to zero after May 20, 2003.



Volume of the Intra-Continental Trade in Feeder Cattle

19. In addition to the free and integrated movement of slaughter cattle between Canadian and U.S Investors, there has always been a considerable amount of intra-continental trade in feeder cattle and feeder calves. There is a strong two-way trade in these classes of cattle and the Graph displays net trade. Such net shipments from Canada have ranged from as low as –3% to as high as +14% of total Canadian production.[15]

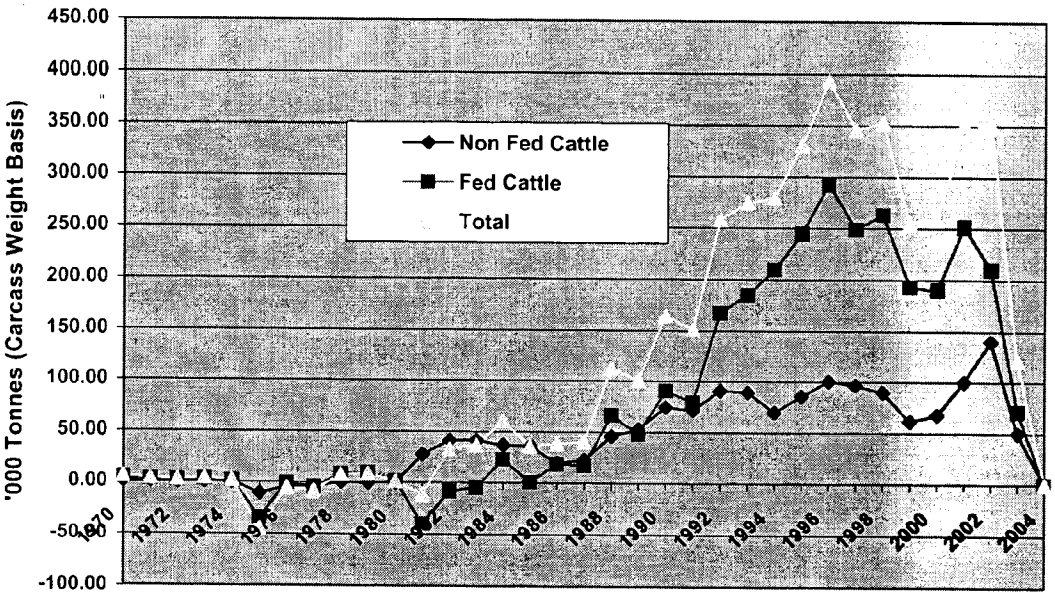
Graph III - Percentage of Feeder Cattle Shipped from Canada to the United States



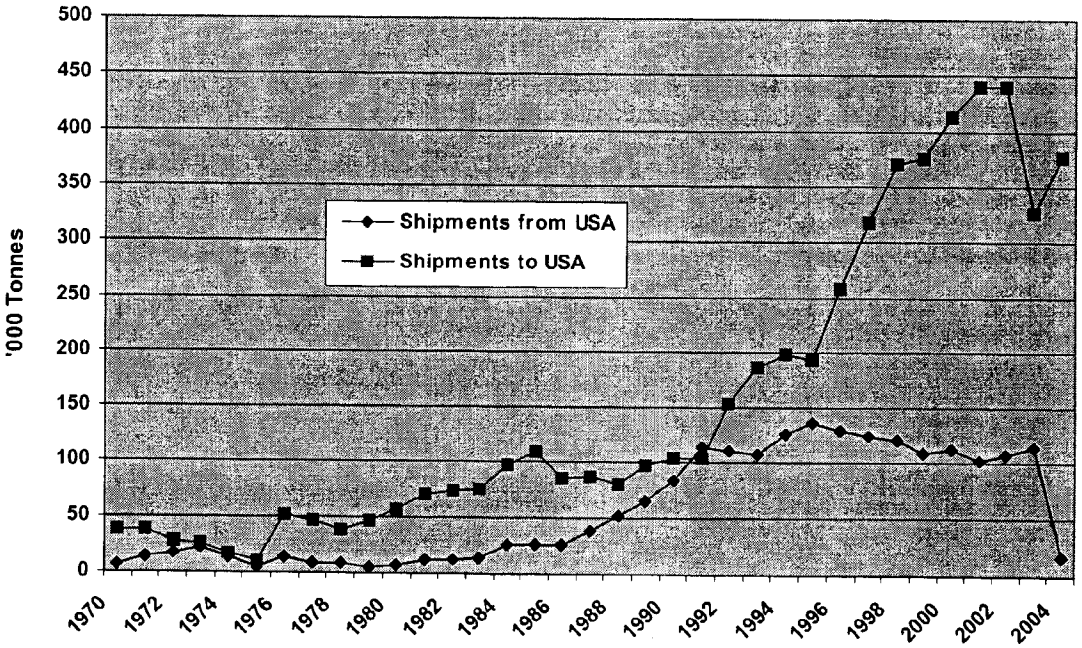
20. In recent years, shipments of beef from Canada to the United States have eclipsed live cattle shipments in terms of tonnage. The tonnages of slaughter cattle shipments are represented in carcass weight equivalents so as to standardize between live cattle and product. **Graphs IV** and **V** demonstrate the flow of slaughter cattle and beef products between businesses in Canada and the United States. The two graphs reveal the significant and growing trade from especially Canada to the United States in cattle and product.

[15] The formula that determines this annual number is: (Net feeder cattle and calf shipments)/Total Disposal of Steers and heifers in the year.

Graph IV - Net Live Slaughter Cattle Shipments from Canad to the United States (1970 to 2004)



Graph V- Intra-Continental Shipments of Beef (1970 - 2004)



21. **Graph V** depicts the dramatic changes which have occurred in the disposition of Canadian beef production over the past quarter century.[16] In the decade from 1970 to 1980, 90% or more of Canadian beef production was consumed in Canada and the balance was shipped to locations within the U.S. either as live slaughter cattle or as beef. Such total shipments reached roughly 10% of Canadian production by 1980. Between 1980 and 1990, however, the proportion of production that was shipped to locations in the U.S. more than doubled to about 25%, with live slaughter cattle accounting for about 60% of the total tonnage.[17]

22. As Canadian beef production expanded rapidly after 1989, a rapidly declining proportion of total production remained in Canadian territory. By 2000, tonnages shipped to locations within the United States alone essentially mirrored declines in the production being consumed in Canada. At the same time, exports to third markets approached 10% of total production. These trends were severely interrupted on May 20, 2003, with the complete cessation of all live cattle and beef shipments from producers located in Canada to producers based in the United States. As will further be addressed, beef from cattle aged under 30 months was permitted to cross the United States border after a decision was made by the United States to do so in August, 2003.

23. The disposition of Canadian beef in the Canadian market declined from over 90% in the 1970's to only 40% in 2002. This is evidence of a dramatic evolution of the industry, from one which had been based on national, political lines to one based upon economic and market factors.

Grading Equivalency

24. The Canadian grading system is equivalent to the U.S. grading system. In fact, the Canadian Beef Grading Agency adopted the United States Department of Agriculture ("USDA") Marbling standards for their official use in 1997. Both industries have a substantially similar prime grade: 'USDA Prime' and 'Canada Prime.' The 'USDA Choice' grade is the equivalent of the 'Canada AAA' grade and the 'USDA Select' grade is equivalent to 'Canada AA'. In 2004, 52.6% of carcasses graded in the United States were graded 'USDA Choice' while 47.7% of Canadian carcasses were graded 'Canada AAA.' In addition, 35.5% of U.S. carcasses were graded 'USDA Select' while 46.9% of Canadian carcasses fell into the equivalent 'Canada AA' grade. This similarity and uniformity in grading practises and statistics further demonstrates the equivalent quality of Canadian and U.S. finished cattle.[18]

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[16] The denominator in this equation is in all cases the total annual production of beef expressed as carcass weight and, as such, includes each of the components in the chart, namely, domestic slaughter, net live animals exported for immediate slaughter, beef exported to the US and beef exported to the rest of the world. The sources of this data have already been mentioned above. They include official data on domestic slaughter and on live cattle and beef exports.

[17] In 1990, with the establishment of the Canadian Beef Export Federation, some modest export diversification into third markets occurred. Very small quantities of beef were shipped to third markets referred to in this graph as Rest of World ("ROW") until the Canadian Beef Export Federation became an active force after 1990.

[18] Canadian Beef Grading Agency, and C. Gracey.

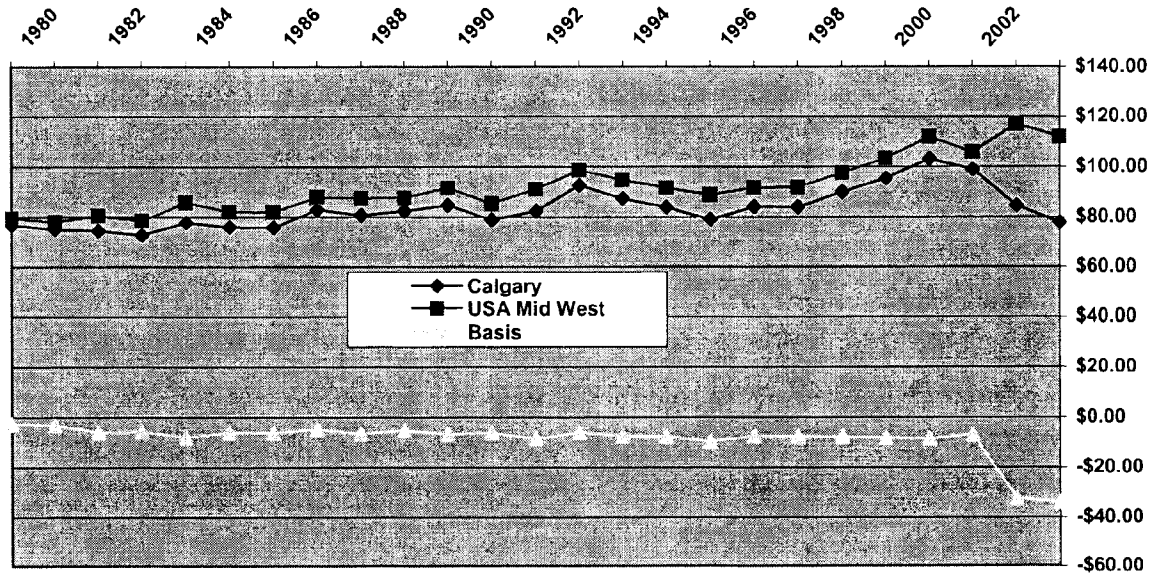
25. The evidence above highlights the creation of the continental market in cattle in the North American Free Trade Area. This single cattle industry was supported and underpinned by the political framework promised by the FTA and then followed with the NAFTA.

Price relationships and "Basis"

26. Prior to the imposition of the border ban, the price for producers across the continent was normally set by recourse to the daily fluctuations of the Chicago Mercantile Exchange, the largest commodities market in the world. Similarly, long-term price relationships between various classes of cattle and for beef, confirm – beyond any doubt – that a very high degree of market interdependence and integration exists between and among the Canadian and U.S. Investors in it. In fact, the flow of cattle and beef among Canadians and U.S. is merely a physical manifestation of a high degree of market integration and interdependence. For all practical purposes, a single North American herd was created.

27. As **Graph VII** demonstrates, a dramatic and abrupt price divergence immediately followed May 20, 2003. This divergence plainly indicates the reliance of many Canadian Investors on unfettered access to U.S. consumers.[19]

Graph VII - Steer Prices Calgary vs. US Mid West (1980 - Sept 2004)



As set out in more detail below, pursuant to NAFTA Article 1102(1), the Claimants are guaranteed national treatment as North American investors. In the context of a fully interdependent and integrated market, denial of national treatment is antithetical to both the letter and the spirit of the NAFTA.

[19] Price convergence in 2004 was as a result of an increase in packing plant capacity in Canada.

G. BACKGROUND ON THE NORTH AMERICAN CATTLE INDUSTRY

28. The Investors are engaged in the cattle feeding segment of the industry. This industry segment is basically composed of four groups: "cow-calf producers"; "backgrounders"; feedlot operators; and processors (i.e., "slaughter plants"). Cow-calf producers normally breed and raise beef cattle until they attain an appropriate weight for sale as feeder cattle to backgrounders and/or feedlot operators. On most farms, the cow-calf production process takes place exclusively on open pasture where the cattle graze and calves nurse until they reach a weaning weight of 400 to 600 pounds at approximately 6 to 7 months of age.

29. After weaning, calves are "over-wintered" on hay and silage-based diets until their weight increases to about 800 pounds. This phase is known as "backgrounding" and can be done by the cow-calf producer, a middleman known as a "backgrounder", or by a feedlot operator. The backgrounding process can take place either in a feedlot or on pasture land.

30. Feedlot operators purchase feeder cattle or weaned calves from both cow-calf producers and backgrounders after they have attained a weight desired by the feedlot operator. At the feedlot, the animals are "finished" (i.e., fed to their slaughter weight) on a scientifically determined diet of silage, grain, and protein. The slaughter weight differs from breed to breed, ranging from approximately 1,250 pounds to as much as 1,700 pounds. This high-energy ration normally consists of at least 75% grain and 25% silage (such as hay, barley or corn silage). Most feedlot operators grow their own silage and purchase the remainder of their feed (i.e., the protein ration) from grain farmers and feed manufacturers located in either Canada or the United States, a further sign of an integrated market.

31. Depending on the method of production, these fed cattle are finished and made ready for market. They are then sold to slaughter plants for processing and further fabrication. Prior to May 20, 2003, feedlot operators were able to offer cattle and receive bids from both Canadian and U.S. plants.

32. Prior to May 20, 2003, transportation costs determine where feedlot operators sold their livestock for processing. Feedlot operators normally sell their finished cattle to processors located within a limited geographic range of approximately one or two days' travel by truck. The range is dictated by the degree to which an animal can be expected to lose weight, or "shrink" while in transport. Pre May 20, 2003, whether the slaughter house was located in Canada or in the United States was of no consequence to the seller or buyer.

33. Larger feedlot operators typically maintain possession of their animals until they are delivered to the processor, whereas smaller operations sometimes transfer possession of their animals (or sell them based upon a pre-arranged commission arrangement) through agents (also known as "order buyers"). Agents are normally engaged in the purchase and sale of animals to and from feedlot owners (i.e., before and after feeding). Once the

North America. There have been two in 2003 – one in Alberta, and one in Washington State as well as two in Alberta in January, 2005.[24] As concluded by international experts on BSE, it is likely that a small number of future cases could be discovered elsewhere in North America, until such time as the governments' harmonized feed bans have purged the continental herd of the – albeit negligible – risk that may remain in older cattle (fed prior to, or shortly after, the feed bans were put into place).[25]

39. BSE is a form of transmissible spongiform encephalopathy (TSE) in bovine species. It is a fatal neurological disorder associated with an abnormal natural protein known as a prion. Scientists are unsure of the cause of BSE, but it is not contagious and therefore not considered by health authorities to be a serious threat to human or animal health in North America.[26]

40. It is generally accepted that the cause of BSE is dietary exposure to feedstuffs containing infected meat and bone meal (MBM).[27] Consequently, in August, 1997, Canada and the U.S. both imposed bans on the production of cattle feed using rendered protein products from ruminant animals (cattle, sheep, goats, bison, elk or deer) to other ruminants. More recently, both countries began requiring the removal of certain tissues, known as "specified risk materials" (SRM), from human food at the time of slaughter. Specified risk materials are tissues that, in BSE-infected cattle, could contain the agent that may transmit the disease.[28]

41. BSE is an unusual disease in that the time between an animal's exposure to the disease and the onset of clinical signs ranges from three to six years. Animals with BSE may show a number of different symptoms, including nervous or aggressive behaviour, abnormal posture, lack of co-ordination or difficulty in rising from a lying position, decreased milk production, and weight loss despite an increased appetite. These symptoms may last for a period of two to six months before the animal dies.

42. Variant Geutzfeldt-Jakob disease (vCJD) is a rare and fatal human neurodegenerative condition classified as a transmissible spongiform encephalopathy. vCJD is a new disease that was first described in March 1996. vCJD is strongly linked with exposure to the BSE agent.[29] It is significant that as of January 7, 2005, there have been no known cases of vCJD in Canada and/or the United States that have been attributed to the consumption of beef in Canada or the United States. There has been one case in Canada and one case in the United States, each one attributable to the deceased's exposure to the agent in the United Kingdom during the outbreak, in which there have been over 184,000 cases of BSE reported. In any event, there have only been 153 suspected or confirmed cases of vCJD in the world, and trends show a decline in the incidence of vCJD.[30]

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[24] This statement refers to the spontaneous occurrence of the disease in cattle native to the continent.
[25] Harvard Risk Assessment http://www.aphis.usda.gov/lpa/issues/bse/bse_Harvard.html; CFIA http://www.inspection.gc.ca/english/anima/feebet/rumin/revexa/revintroe.shtml.
[26] USDA Final Rule on BSE http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/fs_ahbse_minrisk.html.
[27] http://www.oie.int/eng/maladies/fiches/a_B115.htm.
[28] In diseased animals, the infective agent is concentrated in certain tissues such as the brain and spinal cord.
[29] www.who/int/mediacentre/factsheets/fs180/en/print.html.
[30] www.cjd/ed.ac.uk/figures.htm; and http://www.cjd.ed.ac.uk/vcjdq.htm.

the United States, with a similar percentage of Canadian-origin beef being consumed by US consumers.[20]

38. Unfettered access to the U.S. market has been of particular significance to feedlot operators such as the Claimants since the FTA came into effect in 1989. Alberta cattle "on feed" inventory has grown by over 70% to 1.6 million head since that time, making Alberta the fourth largest beef region in North America (after Texas, Kansas, and Nebraska).[21]Prior to May 20, 2003, the price for live cattle, (whether of Canadian or U.S. origin) was based in supply – demand forces operating in the North American market. Prices were directly responsive to the index price set in Chicago's Mercantile Exchange. In the context of the integrated market, the relevant factor is the processor's "offer price" as adjusted to reflect the applicable exchange rate and transportation costs. The Canada – U.S. border was simply not a factor.

39. For Western Canada, there were seven processors operating nine plants within commercially viable feedlots. These processors were: X-L Beef in Moose Jaw, Saskatchewan; X-L Beef in Calgary, Alberta; Cargill Foods in High River, Alberta; Tyson-Lakeside in Brooks, Alberta; Washington Beef in Toppenish, Washington; IBP in Pasco, Washington; IBP in Boise, Idaho; E.A. Miller in Hyrum, Utah; and Swift & Co. in Greeley, Colorado.

40. Since May 20, 2003, the Investors' access has been limited to three of these nine plants. The border ban that prevented such access upset the competitive balance that had previously existed between producers and processors. As a result, the Claimants have suffered severe economic loss that has greatly threatened their on-going viability. These losses have gravely threatened the ongoing viability of the Investors' business. Equity has been severely depleted, causing particular damage as the cattle feeding business is especially dependent on a high level equity.

41. On May 20, 2003, it is estimated that there were over 200,000[22] live feeder and breeding cattle in the United States of Canadian origin. Investors who owned these animals were not and have not been affected by U.S. measures related to the May 20, 2003, border closing. This U.S. measure created severe economic damage to the Claimants but was implemented in spite of the fact that isolated cases of BSE created minimal risk and that that risk was a North American issue with respect to what is a North American herd.

H. RESPONSE TO BOVINE SPONGIFORM ENCEPHALOPATHY ("BSE")

> *There is no reason to believe that there is any food safety risk with Canadian beef.*[23]

42. Over the past decade, there have only been four cases of BSE throughout the whole of

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[20] Rita K. Athwal, *Integration of Canadian and U.S. Cattle Markets* (Statistics Canada: Ottawa, 2002) at 3.
[21] CANFAX www.canfax.ca. (CANFAX is the Canadian cattle marketing agency in Canada.)
[22] CANFAX www.canfax.ca and Statistics Canada report.
[23] USDA Secretary Ann Veneman, "U.S. gives no hint of beef ban's end" Globe and Mail, 11 July 2003, A3.

North America. There have been two in 2003 – one in Alberta, and one in Washington State as well as two in Alberta in January, 2005.[24] As concluded by international experts on BSE, it is likely that a small number of future cases could be discovered elsewhere in North America, until such time as the governments' harmonized feed bans have purged the continental herd of the – albeit negligible – risk that may remain in older cattle (fed prior to, or shortly after, the feed bans were put into place).[25]

43. BSE is a form of transmissible spongiform encephalopathy (TSE) in bovine species. It is a fatal neurological disorder associated with an abnormal natural protein known as a prion. Scientists are unsure of the cause of BSE, but it is not contagious and therefore not considered by health authorities to be a serious threat to human or animal health in North America.[26]

44. It is generally accepted that the cause of BSE is dietary exposure to feedstuffs containing infected meat and bone meal (MBM).[27] Consequently, in August, 1997, Canada and the U.S. both imposed bans on the production of cattle feed using rendered protein products from ruminant animals (cattle, sheep, goats, bison, elk or deer) to other ruminants. More recently, both countries began requiring the removal of certain tissues, known as "specified risk materials" (SRM), from human food at the time of slaughter. Specified risk materials are tissues that, in BSE-infected cattle, could contain the agent that may transmit the disease.[28]

45. BSE is an unusual disease in that the time between an animal's exposure to the disease and the onset of clinical signs ranges from three to six years. Animals with BSE may show a number of different symptoms, including nervous or aggressive behaviour, abnormal posture, lack of co-ordination or difficulty in rising from a lying position, decreased milk production, and weight loss despite an increased appetite. These symptoms may last for a period of two to six months before the animal dies.

46. Variant Geutzfeldt-Jakob disease (vCJD) is a rare and fatal human neurodegenerative condition classified as a transmissible spongiform encephalopathy. vCJD is a new disease that was first described in March, 1996. vCJD is strongly linked with exposure to the BSE agent.[29] It is significant that as of January 7, 2005, there have been no known cases of vCJD in Canada and/or the United States that have been attributed to the consumption of beef in Canada or the United States. There has been one case in Canada and one case in the United States, each one attributable to the deceased's living in the United Kingdom during the outbreak, in which there were millions of cases of BSE. In any event, there have only been 153 suspected or confirmed cases of vCJD in the world, and trends show a decline in the incidence of vCJD.[30]

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[24] This statement refers to the spontaneous occurrence of the disease in cattle native to the continent.
[25] Harvard Risk Assessment http://www.aphis.usda.gov/lpa/issues/bse/bse_Harvard.html; CFIA http://www.inspection.gc.ca/english/anima/feebet/rumin/revexa/revintroe.shtml.
[26] USDA Final Rule on BSE http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/fs_ahbse_minrisk.html.
[27] http://www.oie.int/eng/maladies/fiches/a_B115.htm.
[28] In diseased animals, the infective agent is concentrated in certain tissues such as the brain and spinal cord.
[29] www.who/int/mediacentre/factsheets/fs180/en/print.html.
[30] www.cjd/ed.ac.uk/figures.htm; and http://www.cjd.ed.ac.uk/vcjdq.htm.

47. The *Office International des Epizooties* ("OIE") collects the most recent scientific information with the aim of updating the international standards published in the OIE Code called the *Terrestrial Animal Health Code* (the "Code"). The Code is a guide to assist OIE Member Countries in developing their animal health measures applicable to imports and exports of animals and animal products to protect public and animal health while avoiding unjustified sanitary barriers.[31]

48. With respect to BSE, Chapter 2.3.13 of the Code provides recommendations to manage the human and animal health risks associated with the presence of the BSE agent in cattle. The present OIE Code has never suggested a total embargo of animals and animal products coming from BSE infected countries.[32]

The Canadian Response to BSE in May 2003

> *The Canadian food supply remains safe and that our system is effective and sensitive - just as it was designed.*[33]

49. The Claimants note that the OIE is on record as indicating that its international standards with regard to BSE have been misunderstood and could be commandeered by protectionists. It has accordingly warned against "using the Code to create justified sanitary barriers."[34]

50. The OIE has suggested that member countries " ... consider the obligations under the World Trade Organization-Sanitary and Phytosanitary Agreements (WTO-SPS), whereby the importing country cannot be more trade-restrictive than necessary to achieve the desired national level of protection, and that its measures must not be different from those applied to products within the domestic market."[35]

51. The OIE warns against the use of trade-disrupting measures:

> *Except for short trade suspensions during the investigation period following a new epidemiological event, it is of particular concern to the OIE that many countries apply trade bans when an exporting country reports its first case of BSE, without having conducted a risk analysis as described in the Code. Such situations penalize countries with a good and transparent surveillance system for animal diseases and zoonoses, and which have demonstrated their ability to control the risk identified. This may result in a reluctance to report future cases and an increased likelihood of disease spread internationally.*[36]

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[31] http://www.oie.int/eng/normes/mcode/en_sommaire.htm.
[32] http://www.oie.int/eng/press/en_031002.htm.
[33] Statement by Canada to Meeting of the WTO Committee on Sanitary and Phytosanitary Measures, Doc. No. G/SPS/GEN/415, 23 July 2003, at para. 6.
[34] The OIE Standards on BSE: A Guide For Understanding And Proper Implementation, January 2004.
[35] Ibid.
[36] Ibid.

52. Following the discovery of a "downer" suffering from BSE in Alberta on May 20, 2003, the Canadian Food Inspection Agency (CFIA) reacted swiftly and decisively. The BSE-positive cow was born in 1996, prior to the introduction of a ban ruminant feed. She was condemned at slaughter and never entered the food chain.[37]

53. Eighteen farms were quarantined and 2,800 animals were slaughtered and tested. These measures were not specifically required by science nor by international guidelines related to BSE but were considered a prudent and responsible response. The investigation included tracing back the entire lifespan of the animal and its herd mates and tracing forward the whereabouts of all of its offspring and herd mates. These further investigations found no evidence of BSE beyond the original animal.[38]

54. During the investigation, the source of the contaminated feed was traced.

> *As a result of the extensive integration of the cattle industries in Canada and the United States of America (US), the contaminated feed could have been manufactured in Canada or imported from the US. Historically, approximately fifty percent of the MBM used in Canadian feed mills was imported from the US. However, it is not possible to confirm if the supplements fed to the herds in which the cow resided were manufactured using MBM of Canadian or US origin*
>
> *The original source of the BSE prion in MBM is likely to have been from a limited number of cattle imported directly into either Canada or the US from the UK in the 1980s, before BSE was detected in that country. It is likely that some of these animals were slaughtered or died and entered the animal feed system prior to a ban on further importations from the UK in 1990.*[39]

55. In June 2003, Canada reported to the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee) that the "Canadian food supply remains safe and that our system is effective and sensitive - just as it was designed." In its communication, Canada also referred to a team of four international BSE experts who praised Canada's handling of the case.[40]

56. On June 7, 2003, a BSE expert team of international scientists arrived in Canada to review the actions taken by Canada in response to the first indigenous case of BSE and to make suggestions for possible improvements.[41]

57. On June 26, 2003, the team reported very favourably about the Canadian regulatory environment and the reaction taken to the discovery of the diseased animal. It noted the

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[37] See http://www.inspection.gc.ca/english/corpaffr/newcom/2003/20030520e.shtml.
[38] CFIA http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/evalsume.shtml http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/evale.shtml.
[39] http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/evalsume.shtml.
[40] Government of Canada, Canadian Food Inspection Agency, "Summary of the report of the investigation of Bovine Spongiform Encephalopathy (BSE) in Alberta, Canada." http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/evalsume.shtml; accessed on 11 January 2005.
[41] http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/internate.shtml.

international consensus that BSE is not a contagious disease and stated:

> *The team is impressed with the comprehensive scope, level of analysis and thoroughness of the investigation to date. In a very short time Canadian experts have collected and assessed a level of information that exceeds the investigations done in most other BSE-affected countries. This serves as a testament to the competence, capacity and dedication of effort of Canadian officials.*
>
> *The investigation has looked at both the circumstances surrounding the index case of BSE and the macro-epidemiological risk factors which have contributed to the expression and detection of the first indigenous case in North America.*
>
> *It is important to acknowledge that measures previously in place achieved their designed outcome as demonstrated by the identification of the positive animal in a manner which precluded its entry into the human food chain. Furthermore, the various risk management measures implemented by Canada over a number of years have reduced the risks of spread and amplification of the disease.*
>
> *The team applauds the proactive examination of industry characteristics (rendering industry, feed formulation, feeding and husbandry practices on farm and the surveillance activities) that is essential to a full understanding of the complex interrelationships of factors associated with the disease. The Canadian regulators, veterinary profession and livestock industries have learned in a demonstrable way from the experiences of other countries which have been affected by BSE, and have applied that knowledge beneficially.*[42]

58. As early as June 26, 2003, the Canadian government announced that it would be "responding quickly to the recommendations of the international expert team, in close consultation with provinces, territories, and Canadian industry. Ministers also indicated that close consultations with U.S. officials and other trading partners on moving ahead will be essential given the integrated North American market. Canada agreed to implement a plan that would:

    (i) Implement a prohibition on specified risk material (such as the animal's spinal cord) from human food;
    (ii) Review and strengthen the existing mammalian-to-ruminant feed ban to determine if even more stringent measures are required; and
    (iii) Review the number of animals tested with a focus on the highest risk cattle including neurological cases, dead stock, downers, dying and diseased animals.[43]

59. The Government of Canada amended its *Food and Drug Regulations*[44] and the *Health of Animals Regulation*[45] in order to prevent SRM from entering the human food supply.

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[42] U. Kihm (Switzerland), W. Hueston (United States), Dr. D. Heim (Switzerland), Report on actions taken by Canada in response to the confirmation of an indigenous case of BSE, http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/internate.shtml, accessed 11 January 2005.
[43] http://www.fda/gov/bbs/topics/news/2004/NEW01084.html
[44] http://www.inspection.gc.ca/english/reg/appro/2003/20089ria_e.shtml.
[45] http://www.inspection.gc.ca/english/reg/appro/2003/20089_e.shtml.

While the effective date for the regulations was August 23, 2003, federally-registered establishments were required to remove SRM immediately upon the Canadian Food Inspection Agency (CFIA) announcement or regulatory amendment.[46] The United States announced that it would follow suit with similar ban approximately one year later on July 9, 2004.

60. There was also a North American response in the form of a joint *démarche* sent to the OIE in August 2003 by the United States, Mexico and Canada designed to encourage a more current, practical, risk-based approach to BSE.[47] The joint letter underscored the need to reassure consumers around the world of the safe food supply and to avoid adverse economic impact on a country with strong safeguards in place. The *démarche* concluded by pointing out that it is imperative to move quickly so that countries will have confidence to trade in animals and animal products in spite of the possibility of isolated cases of BSE in the future. In fact, the three NAFTA Agriculture Ministers have already recognized the need for a more current, practical, risk-based approach to BSE. In this joint letter to the OIE in the summer of 2003, the three ministers stated

> *... more is being learned about BSE and many countries with and without BSE have taken steps to prevent and control it. These developments place the international trading community in a much better position today to develop a more practical, risk-based approach to addressing trade issues and assuring consumers worldwide of a safe food supply ... We believe it is imperative to move quickly to establish science-based risk-mitigation measures so that countries will have the confidence to trade in animals and animal products in spite of the possibility of isolated cases of BSE in the future.*[48]

I. UNITED STATES' REACTION –A STUDY IN CONTRADICTION

> **July 11, 2003** - *There is **no reason** to believe that there is **any food safety** risk with Canadian beef.* [49] (emphasis added)
>
> USDA Secretary Anne Veneman
>
> *... **but almost two years later** ...*
>
> **January 4, 2005** - *USDA announced **limited** opening of U.S. border to Canadian beef.*[50] (emphasis added)

61. Following the May 20, 2003, discovery of BSE, Canadian and U.S. authorities worked together and the United States was presented with abundant evidence to lead to the conclusion that livestock and beef products from Canada represented a "minimal risk". In fact, while the process was moving forward, the Agriculture Ministers of the three NAFTA parties made the joint *démarche* to the OIE cited above.

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[46] Canadian Food Inspection Agency Announcement.
[47] Canada, U.S. and Mexico request science-based international response to BSE, Ottawa, August 25, 2003. See http://www.agr.gc.ca/cb/index_e.php?s1=n&s2=2003&page=n30825b.
[48] Letter to Bernard Vallat, Director General OIE, September 5, 2003.
[49] "U.S. gives no hint of beef ban's end" The Globe and Mail, 11 July 2003, A3.
[50] The Globe and Mail, January 4, 2005.

62. On May 29, 2003, the U.S. Animal and Plant Health Inspection Service (APHIS), an agency within the U.S. Department of Agriculture, prohibited the entry into the U.S. of ruminants (including livestock) and ruminant products from Canada retroactive to May 20, 2003. APHIS did this under the powers delegated to it by the Secretary of Agriculture and pursuant to the *Animal Health Protection Act* (*AHPA*)[51].

63. On August 8, 2003, the U.S. Department of Agriculture announced in a News Release that it would begin accepting applications for permits for the importation from Canada of boneless bovine meat from animals under 30 months of age.[52] However, the ban on the importation of live cattle was maintained. The authority for this ban is purportedly found in § 8303 of the *AHPA*, under which the Secretary may prohibit or restrict the importation or entry of any animal [or] article ... if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or livestock.[53] To take such action, the Secretary (APHIS) is required to make substantive findings that any prohibition or restriction is necessary.

64. Based on the evidence before her that there was negligible human and/or animal health risk, the U.S. Secretary of Agriculture issued an order opening the border for the importation of boneless bovine meat from animals under 30 months of age.[54] However, without justification and in the face of evidence that there was no danger to health/life, the ban on the importation of live cattle was maintained. Due to an unnecessary, lengthy and discriminatory rule-making process, the ban remains in place, in breach of the Respondent's NAFTA Article 1102(1) obligation to the Claimants.

65. While the Secretary opened the border for certain beef products on August 8, 2003, and in spite of compelling evidence that the importation of livestock and other beef products entailed negligible risk, the United States maintained the prohibition. It was not until almost six months after it shut the border that the United States took action by launching a rulemaking process to establish conditions for the importation of live ruminants from minimal risk regions, including Canada.[55]

66. The administrative regulations that APHIS has issued pursuant to the authority delegated to it by the Secretary of Agriculture under the *AHPA* provides that:

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[51] http://www.aphis.usda.gov/lpa/issues/bse/bse-canada-memo.pdf
http://www.aphis.usda.gov/vs/highlights/section2/section2-3.html
[52] USDA News Release No. 0281.03, http://www.usda.gov/documents/NewsReleases/2003/08/0281.doc, accessed 11 January 2005.
[53] 7 U.S.C. § 8303.
[54] USDA News Release No. 0281.03, http://www.usda.gov/documents/NewsReleases/2003/08/0281.doc, accessed 11 January 2005.
[55] Federal Register: November 4, 2003,Volume 68, Number 213, pp. 62386-62405, Docket No. 03-080-1 ("Proposed Rule").

> *No ruminant*[56] *or product subject to the provisions of this part shall be brought into the United States except in accordance with the regulations in this part and part 94 of this subchapter. . . .* ***Notwithstanding any other provision of this subpart, the importation of any ruminant that has been in a region listed in § 94.18(a)(1) or (a)(2) of this subchapter is prohibited.*** *Provided, however, [APHIS] may upon request in specific cases permit ruminants or products to be brought into or through the United States under such conditions as [APHIS] may prescribe, when [APHIS] determines in the specific case that such action will not endanger the livestock . . . of the United States.*[57]
>
> (emphasis added)

67. The history of these regulations reveals that the version of § 93.401(a) that was in effect before May 29, 2003 was identical to the language quoted above, except that it did not include the sentence in boldface in the preceding paragraph. On May 29, 2003, APHIS published in the Federal Register an "interim rule and request for comments" in which it did two things: (1) it added the sentence in boldface to § 93.401(a); and (2) it added Canada to the list of regions in § 94.18(a)(1) where BSE exists because the disease has been detected in an animal in that region.[58] The effect of these two changes was apparently not only to impose a prohibition on the importation of ruminants from Canada, but also to bar APHIS from using its authority under the last sentence of § 93.401(a) to waive that prohibition by allowing imports of ruminants from countries listed in § 94.18(a)(1) on a case-by-case basis in response to individual requests. The regulatory amendments published on May 29, 2003 were effective retroactively to May 20, 2003, the day the CFIA reported a case of BSE in a beef cow in northern Alberta.[59] APHIS did not issue the required finding of necessity. Even if it's statement that the action was "necessary to prevent the introduction of [BSE] into the United States" is regarded as a finding of necessity, that finding is unsupported by the record. APHIS reacted to a single case by imposing a ban, even while failing to explain why it was "necessary" to prohibit imports of ruminants from Canada. At the same time, it admitted that pre-existing authority to prevent entry of live ruminants from regions affected by BSE had been effective. The conclusion of necessity is not supported by any documentation.

68. In fact, APHIS has the authority under the *AHPA* to "gather and compile information and conduct any inspection or investigation that it considered necessary.[60]

69. In breach of the Claimants' Article 1102(1) rights, APHIS failed to properly consider or act on implementing less trade-restrictive action rather than an absolute prohibition on imports is strengthened when one reviews the record as set out in the APHIS documents. APHIS stated that:

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[56] The regulations define ruminants as "[a]ll animals which chew the cud, such as cattle. . . ." 9 C.F.R. § 93.400.
[57] 9 C.F.R. § 93.401(a).
[58] Change in Disease Status of Canada Because of BSE, 68 Fed. Reg., 31,939 (May 29, 2003).
[59] *See* Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities; Final Rule and Notice, 70 Fed. Reg. 460, 529 (Jan. 4, 2005) ("From the time of the diagnosis of a BSE-infected cow in Canada in May 2003 until implementation of this final rule, the importation of live ruminants from Canada has been prohibited.").
[60] 7 U.S.C. § 8314(a)(1).

> *"[d]espite the difficulty in defining BSE experimentally with precision, risk factors for BSE that can be mitigated have been identified. . . . We believe that risk mitigation measures that address the risk factors for BSE will be effective regardless of the precise nature of the BSE agent."*[61]

70. It was not until November 2003 that APHIS determined that it was appropriate to recognize a new category of regions - the BSE minimal-risk region, which would include regions in which a BSE-infected animal has been diagnosed, but in which measures have been taken that make it unlikely that BSE would be introduced from the region into the U.S. APHIS proposed to designate Canada as a BSE minimal-risk region.[62] However, at the same time, it started an unnecessary and lengthy rule-making process.

71. It is submitted that the safeguards discussed in the November 2003 proposal were already in place in May 2003, when APHIS imposed the import prohibition. Ironically, these are the safeguards that led APHIS to conclude that closing the border was not necessary and Canada has taken the mitigation measures that qualify it as a BSE minimal-risk region. For example:

- Canada has maintained stringent import restrictions since 1990, prohibiting importation of live ruminants and most ruminant products from countries that had not been recognized as free of BSE;[63]
- In 1996, Canada made this policy even more restrictive by prohibiting the importation of live ruminants from any country that had not been recognized as free of BSE;
- Canada made efforts, similar to those taken in the U.S., to trace and eradicate animals imported into Canada from high-risk countries between 1982 and 1990;
- Import restrictions have been imposed on ruminant products since 1978;
- Canada has conducted surveillance for BSE since 1992; and
- Canada implemented a feed ban in 1997 that prohibits the feeding of ruminant meat and bone meal to ruminants.

78. APHIS stated in the preamble to the November 2003 proposal that "[t]his ban exceeds what we consider the minimal necessary measure of banning the feeding of ruminant material to ruminants."[64] APHIS also found that "the level of surveillance in Canada, and the fact that it has been active and targeted, has exceeded OIE recommendations."[65] It is submitted that the presence of these mitigation measures, already in place in May 2003,

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[61] Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities, 68 Fed. Reg. 62,386, 62,386 (Nov. 4, 2003).
[62] Ibid. at 62,387.
[63] Ibid. at 62,389.
[64] Ibid.
[65] Ibid.

provided clear evidence that no ban was required.[66]

79. The safeguards deemed crucial by APHIS to protecting against the risk of importing BSE-infected cows into the U.S. were already in place in May 2003. APHIS concluded in the preamble to the November 2003 proposal that compliance with the mitigation measures included in the proposed rule would create only an "extremely small" increased risk of BSE introduction into the U.S.:

> *If an introduction occurred, few, if any, additional animals would be infected. It is highly unlikely that such an introduction would pose a major animal health or public health threat in the United States; regulations and practices in the United States are robust and would militate against human exposure or disease spread.*[67].

80. It appears that, by November 2003, APHIS considered the proposed approach to be preferable to continuing to prohibit the entry of ruminants from a BSE minimal-risk region: "We also believe that listing Canada as a BSE minimal-risk region, together with the risk-mitigation measures that would be required, is a balanced, science-based response to Canada's request that ruminants and ruminant product imports by the United States from Canada be allowed to resume."[68] It is submitted that APHIS could and should have reached the same conclusion in May 2003, or at least should have reached that conclusion shortly thereafter.

81. The USDA policy was arbitrary and contradictory, as there was no valid scientific reason to make a distinction between processed beef and live cattle under 30 months of age in this case. In fact, the USDA rulemaking process was not even launched until November 2003. When it was launched the USDA cited a lengthy list of reasons why livestock imported from Canada represented a "minimal risk":

- *stringent import restrictions since 1990;*
- *careful and effective surveillance for BSE since 1992 which exceeds OIE recommendations;*
- *effective enforcement of a feed ban on mammalian protein proton ruminants since 1997;*
- *an extensive epidemiological investigation after the isolated case; and*

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[66] See also Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities, 69 Fed. Reg. 10,633, 10,634 (Mar. 8, 2004) (stating that risk analysis showed that "Canada had strong BSE controls in place").

[67] In the preamble to the final minimal-risk region regulations issued in January 2005, APHIS seemed to regard Canada as a unique case. In distinguishing the discovery of BSE in Canada with the presence of BSE in the United Kingdom and elsewhere in Europe, APHIS stated that the European situations "were very different for example, from the situation in Canada, where: (1) Control measures were in place before the detection of the disease; (2) only two animals of Canadian origin have been confirmed with BSE; (3) both were born before implementation of Canada's feed ban; and (4) Canada has maintained other protective measures (including import restrictions) that would help preclude a significant level of infectivity from being transmitted to the cattle population." Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities; Final Rule and Notice, 70 Fed. Reg. 460, 473 (Jan. 4, 2005). *See also* Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities, 68 Fed. Reg. at 62,400 (Nov. 4, 2003).

[68] 68 Fed. Reg. at 62,400 (Nov. 4, 2003).

- *additional risk-mitigation measures including culling and testing of suspect animals 24 months of age or older.*[69]

82. Despite their understanding of the scientific realities of BSE and reasonable risk reduction, the USDA chose a process for reopening the border which was so procedurally flawed that it was guaranteed to become the subject of legal action by opportunistic, protectionist U.S.-based investors. Thus, while the USDA appeared to champion the case for an open border, it had in fact chosen a process which would ensure that it remained closed for a considerable time.

83. The process for reopening the border chosen by the USDA encouraged a legal challenge from U.S. investors. Such a challenge was foreseeable by the USDA, given that a group known as the Cattlemen Action Legal Fund United Stock Growers of America ("R-CALF") had already called upon the USDA and legislators – as early as June 3, 2003 (just days after the May 20th discovery) – to impose and enforce a total border ban for not less than seven years.[70] The same group had previously pursued unsuccessful antidumping and countervailing duty complaints against Canadian and Mexican cattlemen, in order to benefit from artificially inflated cattle prices which would result from the imposition of such duties.[71]

84. There was never any probative scientific evidence upon which the United States could base its decision to close the border to beef products and other products of Canadian-origin. At the same time, and in a move that completely and utterly contradicted any potential rationale for the closing of its border to Canadian cattle, the United States took no steps to identify, test and/or cull the hundreds of thousands of head of cattle with a direct connection to Canada which were present in the United States as of May 2003. Obviously therefore, the U.S. government treated investors in their own market preferentially relative to the unwarranted sanctions that were placed on Canadian investors.

85. In failing to apply any measures to live cattle in the United States, including Canadian-origin cattle, the USDA undercut any possible effectiveness that any of these measures could have had. In particular, the U.S. action defied logic and common sense by failing to take into account the flow of Canadian-origin livestock into the United States. During the period 1999 to 2003, almost 1.2 million live cattle were sent from Canada to U.S. cattle feeders. During the same period, almost 4 million Canadian cattle were sent to the U.S. for slaughter, and over 70,000 animals were sent to the U.S. for breeding.[72]

86. It is submitted that APHIS recognized that there was no reason to prohibit the entry of livestock from Canada. It is further submitted that the USDA and APHIS had ample evidence to reach the same conclusion shortly after May 20, 2003, and that the border

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[69] 68 Fed. Reg. at 62,389-90.

[70] So long as the border remains closed, R-CALF members will enjoy a higher price for their cattle because of the dramatically reduced supply.

[71] See: *Ranchers-Cattlemen Action Legal Foundation* v. *U.S.*, 23 C.I.T. 861, 74 F.Supp.2d 1353, 21 ITRD 2093 (CIT 1999), *dismissed*, 232 F.3d 909 (Table), 2000 WL 377776 (Fed. Cir. Mar. 16, 2000)

[72] See: www.canfax.ca.

should have been opened at that time.

> *We also believe that listing Canada as a BSE minimal-risk region, together with the risk-mitigation measures that would be required, is a balanced, science-based response to Canada's request that ruminants and ruminant product imports by the United States from Canada be allowed to resume."*[73]

87. In the face of abundant and compelling evidence that such action was not necessary, and with the administrative power to open the border, APHIS not only kept the border closed for the past 22 months, it also effectively removed its discretion to make any exceptions on a case-by-case basis. This was confirmed in *Ranchers Cattlemen Action Legal Fund v. United States Department of Agriculture.*[74]

88. As the lead author of a revised BSE Risk Assessment commissioned by the USDA, Harvard Scientist Josh Cohen, was quoted as stating on July 22, 2004:

> *I don't think it's become a political issue - I think it's been a political issue all along... It's something that happens across a lot of [areas]. We crunch the numbers and it seems to suggest that one course of action is what makes sense and yet it doesn't happen... I'm not a policy-maker, but just sitting here, looking at it, I don't see why the border remains closed... I think the science is reasonably clear.*
>
> *... It turns out that, at worst, BSE would spread very slowly and it's most likely, even under these worst-case assumptions, to tend to die out over time rather than spread at all ... It wouldn't blow up in prevalence and therefore the risk is low. Our science supports opening the border.*[75]

89. Professor Cohen's appraisal of the situation was confirmed with remarkable candour by the U.S. Ambassador to the United States, Paul Cellucci, when he was quoted on October 25, 2004 as saying:

> *I don't want to say there's not politics involved. It is an election year.*[76]

And:

> *There is some opposition to this in the U.S. I think it is a minority view, but it is slowing things down too.*[77]

90. The continued ban and the politicization of the issue has exacerbated the Claimants' competitive position in the North American market. As long as the current situation prevails, the Claimants' United States-based counterparts enjoy the advantage of a protected market and a growth in their equity.

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[73] 68 Fed. Reg. at 62,400 (Nov. 4, 2003).
[74] 2004 WL 1047837 (D. Mont. Apr. 26, 2004).
[75] Canadian Press Newswire, "U.S. study supports reopening border to live Canadian cattle," 23 July 2004.
[76] Canadian Press Newswire, "Cellucci: Beef ban tied to U.S. election," 20 October 2004.
[77] Ibid.

91. In addition to effectively *buying time* for its investors to establish a dominant competitive position in the North American market, the United States has acted in a manner that has provided opportunistic investors, such as R-CALF members, with the procedural tools necessary to further delay normalization of the North American market. The U.S. regulatory system has been used as a potent and effective trade barrier by protectionist investors, particularly so when measures were negligently designed with patent procedural flaws that inevitably became the subject of legal proceedings launched by those investors in order to serve their own economic interests.

BSE in the United States and a Second Expert Team Visit to North America

> *I plan to serve beef for my Christmas dinner. And we remain confident in the safety of our food supply.*[78]
>
> *... it is important to recognize that [the] meat represents a minuscule risk ..."*[79]

92. On December 23, 2003, the United States confirmed that its first case of BSE in cattle was detected in a "downer"[80] animal in Washington State. Unlike the Alberta case, product from this animal had already entered the food chain. The United States undertook remedial steps which were similar to those taken by Canada six months earlier. The seven-year-old animal was traced back to an Alberta herd, and the two Governments worked together to trace the animal, its herd mates, and the feed history. Measures were taken to ensure that no herd mates or contact animals were involved and to ensure that the North American food supply was accordingly safe.[81]

93. As further evidence of integration, the animal discovered in Washington State had been resident in the U.S. for over two years prior to BSE detection.[82]

94. As in the Alberta case, an international team of experts was asked to review the U.S. case and they reported that the United States had responded properly and that there was no significant risk. The international experts also indicated that since:

> *[...]* ***infective material*** *has likely been rendered, fed to cattle, and amplified within the cattle population, [so] that cattle in the U.S.A. have also been indigenously infected. Therefore, animals that have not been identified from the birth cohort of the index case do not represent significant additional risk for further propagation of BSE within the U.S. Risk materials from these unidentified infected animals must be considered when developing policies for the prevention*

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[78] USDA, "Transcript of News Conference with Secretary Ann M. Veneman on BSE" December 23, 2003.
[79] Dr. Ron DeHaven, "Transcript of Technical Briefing with Webcast with U.S. Government Officials on BSE Case", USDA Release No. 0444.03, December 27, 2003 ("DeHaven").
[80] Downers are animals that are unable to stand or move without assistance. See, e.g.:
http://www.inspection.gc.ca/english/anima/meavia/commun/20040113come.shtml
http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/americ/wa_invest2003e.shtml
http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/americ/amerinveste.shtml
[82] This was determined through the Canadian health certificate, dated August 28, 2001, listing 82 ear tag numbers from cattle that were part of a herd dispersal in Alberta, Canada. One of the 82 ear tags matches the BSE-positive downers.

of human infection and infection of cattle through feed. (emphasis added)

The international team of experts concluded that:

> *[...] the epidemiological investigation should cease, and resources be redirected into the planning, implementation and enforcement of an extended, targeted, surveillance programme and other measures to protect human and animal health.*[83]

95. The arbitrary and discriminatory nature of the U.S. response was made all the more unacceptable in the light of the fact that both countries banned the feeding of rendered products from mammalian protein ruminants as long ago as 1997. This means that for cattle born since 1997, there is an infinitesimally small risk of the presence of BSE. Moreover, the vast majority of live cattle traded in North America have always been of less than thirty months of age. Older animals will only be sold one more time in their lives: for slaughter. For example, the BSE-positive animal found in Alberta in May 2003 was born before this feed ban went into effect, as was the animal found in Washington State in November 2003.

96. The team of experts concluded that cattle in the United States have also been indigenously infected. The issue of BSE and its treatment is a continental one and in the context of the interdependent and integrated market, the U.S. discriminatory treatment of the Claimants is unjustified. In the language of the industry, "once the barn door was open, it was too late to close it." The damage had been done.

97. The team of experts recognized that the risk of BSE infection in both countries was similar. The border plays no role in risk mitigation. The Subcommittee consistently treated this matter as a North American issue and concluded:

> *Having examined the information provided on trade in live cattle and livestock feed ingredients within the North American Free Trade Agreement (NAFTA), the subcommittee firmly believes that the first case of BSE in the United States can not be considered in isolation from the whole cattle production system in North America. The significance of this BSE case cannot be dismissed by considering it "an imported case". The first BSE case detected in the U.S.A., and the first "indigenous case" reported in Canada in 2003, must be recognised as both being BSE cases indigenous to North America. For this reason, close collaboration between all appropriate agencies in NAFTA is essential for the proper management of North America's BSE problem.*[84]

98. When its first U.S. case was discovered, the USDA reacted by reassuring the public that there was minimal risk to human and animal health/life, and that in fact:

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[83] U. Kihm, W. Hueston , D. Matthews, S. C. MacDiarmid and D. Heim, *Report on Measures Relating to Bovine Spongiform Encephalopathy (BSE) in the United States*, http://www.aphis.usda.gov/lpa/issues/bse/US_BSE_Report.pdf, accessed 12 January 2005.

[84] Ibid.

> *It is highly unlikely that BSE would be introduced from Canada under the proposed rule. [...] a BSE case in a second cow of Canadian origin does not alter our risk estimate.* [85]

99. The Claimants submit that the Canadian reaction to the U.S. case is highly instructive. Canada reacted to the U.S. case of BSE in a manner consistent with the "minimal risk" approach and announced interim measures on December 24, 2003, which reflected a scientific risk assessment. Canada continued to allow the importation of live cattle for commercial slaughter and boneless beef from cattle 30 months of age or less.[86] Less than four months later, the Canadian Government announced that it would allow the importation of a wider range of beef products, from boneless and bone-in beef to ground beef and salami.[87]

100. In contrast to Canada's reasonable approach, the United States reacted to its own case of BSE by attempting to shift all the responsibility on Canada. It stopped all progress on the rule-making process. Further, in the face of continued economic damage to the Claimants, the United States commenced a revised rule-making process on March 8, 2004.

101. In light of the fact that both Canada and the United States appropriately share a largely harmonized regulatory structure, a common – albeit negligible – risk, and a common North American herd, any discrimination against the Claimants' participation in the industry on the basis of the national origin of their inventories is unjustifiable.

102. The Claimants note that U.S. Agriculture Secretary Ann M. Veneman, Canadian Minister of Agriculture and Agri-Food Bob Speller and Mexican Secretary of Agriculture Javier Usabiaga said in their joint statement on January 16, 2004:

> *The highly integrated nature of the North American beef industry was recognized, as was the need for a coordinated approach to address both the regulatory and trade aspects of the current BSE challenges..... Their objective is to update OIE guidelines and encourage adherence to the science-based guidelines and applications for the international trade in safe animal and animal products in the OIE. Finally, the officials agreed....treating countries fairly and consistently if and when BSE is discovered.*[88]

103. It is submitted that the Canadian, U.S. and international investigations following the Washington State occurrence highlighted the fact that continued discrimination against the Claimants and other Canadian producers was unnecessary. Also, both countries were minimal-risk and there was no basis for discrimination vis-à-vis the Claimants and there was negligible risk to animal health/life in the North American context.

104. Canada and the United States have similar feed controls to prevent the spread of BSE.

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[85] Federal Register, Docket No. 03-080-2, p. 10635.
[86] CFIA, Press Release, December 24, 2003.
[87] CFIA, Press Release, April 23, 2004.
[88] http://www.agr.gc.ca/cb/index_e.php?s1=n&s2=2004&page=n40116a

Both countries restricted imports of animal and pet food from countries with BSE risk. Both countries implemented a ruminant feed ban on August 4, 1997. Both countries report that they verify compliance with the feed ban through regular inspections of renderers and feed manufacturers by government inspectors - although the United States Government Accountability Office, a research arm of the Federal Congress, has recently raised new doubts as to the quality of U.S. inspection practices.[89] No similar problems have been found in Canada. Moreover, Canada has already excluded the use of plate waste and chicken litter in ruminant feed; whereas the United States continues permit its use in cattle feeding.

105. In any event, instead of opening the border to live cattle on March 7, 2004, as had been originally foreseen, the United States created further unnecessary delay by re-opening the rule-making process and call for comments until April 7, 2004.

106. The USDA further compounded the damage to the Claimants through its inability to manage the process in an effective and timely fashion. On April 19, 2004, the USDA announced that an expanded list of beef products from Canada would be permitted for import, including bone-in-beef, ground beef and offal from cattle 30 months and under meeting the OIE standards for the removal of specified risk materials. While this action underscored the fact that any restrictions on Canadian-origin beef and beef products was unnecessary, it also created the setting for a court action that would ensure that an eventual border opening would take even longer.

107. By selecting the rule-making process it chose, and then prolonging and relaxing the restrictions outside the rule-making procedures, the USDA created an attractive vehicle for protectionist interests to create further delay and damage to their industry competitors, including the Claimants. As such, in *Ranchers-Cattlemen Action Legal Fund (R-CALF) vs. United States Department of Agriculture,*[90] a protectionist group was successful in forestalling the April 19th 2004 market opening and forcing the USDA to provide it with special advanced notice of any future attempts to amend or revoke the border ban.

108. In other words, having been found "offside" in its administration of the process by a Montana judge, on May 4, 2004 the USDA voluntarily entered into a binding legal agreement with R-CALF, which would convert the temporary restraining order into a preliminary injunction, for which the judge ordered notice to be provided in the event of any future attempts to change the status quo ante obtained through the injunction.[91] It is submitted that this arrangement between the USDA and R-CALF strengthened and emboldened this protectionist group, enabling it to be well-positioned to quash any future attempts to amend or eliminate the border ban in the same court.

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[89] United States Government Accountability Office, *Mad Cow Disease: FDA's Management of the Feed Ban Has Improved, But Oversight Weaknesses Continue to Limit Program Effectiveness*, GAO-05-101, February 2005.
[90] 2004 WL 1047837 (D Mont. April 26, 2004).
[91] The agreement provided preferential access and notice to R-CALF concerning any future steps taken to alter the cattle ban, with an understanding that R-CALF will effectively attempt to judicially veto any government action with which it does not agree, on the strength of its ability to challenge the flawed rule-making process unnecessarily chosen by the U.S. in the first place.

J. THE FINAL RULE AND A TWO ADDITIONAL CASES OF BSE IN CANADA

Positive BSE case in Canada shows surveillance system is working.[92]

USDA Says Canada Mad Cow Case Won't Alter Import Plan.[93]

109. On 4 January 2005, the USDA finally released its "Final Rule" on BSE,[94] twenty months after closing the border, costing the Canadian cattle industry over $5 Billion[95], and unjustly enriching their U.S.-based counterparts in the process. In its Final Rule, APHIS did classify Canada as a "Minimum Risk" region:

> *USDA has determined that Canada meets the requirements for a minimal-risk region. The minimal-risk standards that Canada has met include, among other things:*
>
> - *Import restrictions sufficient to minimize exposure to BSE. Since 1990, Canada has maintained stringent import restrictions preventing the entry of live ruminants and ruminant products, including rendered protein products, from countries that have found BSE in native cattle or that are considered to be at significant risk for BSE.*
> - *Surveillance for BSE at levels that meet or exceed international guidelines. Canada has conducted active surveillance for BSE since 1992 and exceeded the level recommended in international guidelines for at least the past seven years.*
> - *Ruminant-to-ruminant feed ban in place and effectively enforced. Canada has had a ban on the feeding of ruminant proteins to ruminants since August 1997, with compliance monitored through routine inspections.*
> - *Appropriate epidemiological investigations, risk assessment, and risk mitigation measures imposed as necessary. Canada has conducted extensive investigations of BSE cases and has taken additional risk mitigation measures in response to these cases. These risk mitigation measures include among others, prohibiting specified risk materials in human foods.*[96]

110. Although the Final Rule anticipated the long-awaited opening of the border for live cattle under 30 months, the U.S. foresees maintaining discriminatory restrictions. More specifically, the Rule is limited to:

- Bovines, for feeding or immediate slaughter, as long as they are slaughtered at less than 30 months;
- Sheep and goats (ovines and caprines), for feeding or immediate slaughter, as long as they are slaughtered at less that 12 months of age;

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[92] AMI Press Release, January 3, 2005.
[93] *Bloomberg News*, January 3, 2005.
[94] 9 CFR Parts 93, 94, 95 and 96 [Docket No. 03-080-3] RIN 0579 AB73, Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities, January 4, 2005.
[95] Canfax http://www.canfax.ca/
[96] Ibid.

- Meat from bovines, ovines, caprines and cervids (deer, elk, caribou, moose, and reindeer); and
- Certain other products and by-products, including bovine livers and tongues, gelatin, and tallow.[97]

111. In addition to the fact that the Final Rule – even as currently drafted – provides only limited access to Canadian Investors, it also entails a series of onerous, unnecessary and discriminatory conditions:

> *...The final rule provides the following additional requirements for live Canadian cattle designed to ensure they are slaughtered before they reach 30 months of age:*
>
> - *Slaughter cattle must be less than 30 months of age based on examination of each animal's dentition or verifiable birth records;*
> - *Feeder cattle must be permanently marked with a brand to identify the BSE minimal-risk region of origin before entering the United States. Feeder cattle exported from Canada will be branded with "C^N;"*
> - *Slaughter and feeder cattle must be individually identified with an ear tag before entering the United States. This ear tag allows the animal to be traced back to the premises of origin (birth herd);*
> - *Information must be included on the cattle's animal health certification, relating to all individual animal identification (brands, ear tags, markings, registration numbers), sex, breed, color, age in months, origin, destination, and responsible parties;*
> - *Feeder cattle must be moved directly to US feedlot in sealed container and cannot go to more than one US feed lot for feeding prior to slaughter;*
> - *Immediate slaughter cattle must be moved in a sealed vehicle directly to the slaughter establishment;*
> - *SRM's will be removed from Canadian cattle slaughtered in the United States in accordance with FSIS regulations, and*
> - *Any Canadian cattle deemed to be over 30 months of age at slaughter will be disposed at the owner's expense.*[98]

112. Furthermore, USDA and APHIS established additional requirements for shipment to the United States with respect to the implementation of the CFIA Veterinary Health Certificates which were not described in the published Final Rule. It is submitted that these additional requirements were arbitrary and discriminatory. For instance, 1) all Canadian heifers were required to be pregnancy-checked to ensure they were "open"; 2) each truckload of immediate-slaughter cattle was required to have its own health certificate specific to the individual cattle on the truck, even when a group of sealed trucks departed from the same feedlot on the same day and time and was going direct for slaughter to the same slaughter establishment; and 3) health certificates for immediate-slaughter cattle were required to include recordings of all individual ear-tag

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[97] "Questions and Answers for Minimal Risk/Canada Rule", Factsheet, APHIS Veterinary Services, December 2004. ("APHIS Factsheet, December 2004")

[98] APHIS Factsheet, December 2004.

identifications, brands, colorings, and markings.[99]

113. The rationale on which the Final Rule is based is economic rather than health-related. This is particularly evidenced by the fact that it allows the importation of beef from over 30 months of age and bans the importation of live cattle from over 30 months of age. As a result, the Final Rule drew swift comments from the U.S. meat industry. The Final Rule was essentially outsourcing the U.S. cattle slaughter industry and was riddled with inconsistencies, as it permitted the meat from a 30-month animal into the U.S., but not the actual animal.[100]

114. While the USDA purports to base the Final Rule on scientific principles, it dispenses with scientifically recognized OIE BSE guidelines. For instance, OIE guideline 2.3.13 permits the importation of live cattle born after the feed ban (for Canada that would be born after August, 1997) as well as meat from those cattle.[101] Despite this objective scientific evidence, the Final Rule assessed "beef from over 30 months of age" as safe, but not live cattle born after the feed ban. The American Meat Institute has noted that the continued ban on older cattle was "scientifically insupportable and [was] therefore arbitrary . . ."[102]

115. In direct response to protectionist pressure from the United States Congress, the USDA has now decided to conduct another risk assessment on beef and live cattle from over 30 months of age with no timelines given on its completion. The risk assessment of beef and live cattle over 30 months of age should have been undertaken when the original risk assessment was performed and parts of it were, given that the original Final Rule included beef over 30 months of age. This staged and apparently repetitive process of parts of the risk assessment, not fully assessing beef and cattle of all age groups in the original risk assessment as per OIE guidelines for trade, is another delay on the reopening of the Canadian border.

116. At the same time that the USDA finally announced that the border would be opened almost 22 months after it closed, the CFIA announced the discovery of a second BSE case.[103] The animal in question was an older dairy cow from Alberta that was born in 1996, prior to the introduction of the 1997 feed ban.[104]

117. CFIA officials stated: "This finding does not indicate an increased risk to food safety."[105] This case was detected through the enhanced surveillance program Canada put in place,

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[99] CFIA, USDA, NCBA eMember update, March 3, 2005.
[100] Rosemary Mucklow, executive director of the National Meat Association, as quoted by Pete Hisey at Beef News, "Not enough and too much: industry reacts to Canadian border rule change" Meetingplace.com, 12/30/04.
[101] http://www.oie.int/eng/normes/mcode/en_chapitre_2.3.13.htm.
[102] Pete Hisey, AMI launches suit against USDA, calls ban on older cattle 'capricious', Meetingplace.com 12/30/04. The AMI's Motion for Preliminary Injunction seeking to enjoin W. Ron Dehaven et al from enforcing of giving effect to the May 29, 2003 interim rule, insofar as it had the effect of preventing the importation live cattle 30 months of age or older into the U.S. was denied on March 4, 2005, by order of United States District Judge John Garrett Penn, in the District of Columbia.
[103] "BSE Confirmed in Suspect Animal, Investigations Underway", CFIA website, News Release, January 2, 2005.
[104] Ibid.
[105] Ibid.

which includes a minimum of 30,000 tests and a level that enables the program to detect BSE at a level as low as one in one million.[106]

118. In response to this second case of BSE, the USDA announced that it would not alter plans for the implementation of its Final Rule. This more enlightened, educated response is reminiscent of the APHIS response to the case of BSE found in the United States in December 2003, underscoring the simple fact that these rare cases of old cows testing positive for BSE represent an utterly negligible risk to human, plant or animal life or health given the risk mitigation practices in place in both Canada and the US. As a U.S. official indicated:

> *Under WHO guidelines, a country with a population of 5.5 million head over 24 months of age like Canada could have 11 cases of mad cow during a consecutive 12-month period and still be considered a minimal-risk country.*[107]

119. In this context, the President and CEO of the American Meat Institution (AMI) has indicated:

> *The fact that a second case of BSE has been found in Canada is proof that the Canadian BSE surveillance system is working. A second case was not entirely unexpected, given the fact that cattle which pre-date the feed ban are still alive in both countries ... Beef trade with Canada should move forward ...*[108]

120. When Canadian officials announced that a third animal, a Charolais heifer from Alberta, had been determined to have had BSE on January 11, 2005, the United States' Administration raised concerns with respect to Canada's compliance with the 1997 feed ban. Both the National Cattlemen's Beef Association (NCBA) and the USDA sent a team to investigate Canada's feed ban on prohibited materials.

121. The NCBA's delegate concluded that the "Canadian feed industry appears to be in compliance with its feed ban, based on visual inspection and multiple annual audit reports".[109] Similarly, the USDA's report stated that "Canada has a robust inspection program, that overall compliance with the feed ban is good and that the feed ban is reducing the risk of transmission of [BSE]. [Furthermore], [... the] agency found that compliance by feed mills and rendering facilities in Canada to their feed ban regulations is good, and just like the United States."[110] CFIA released its report on March 2, 2005, reviewing Canada's feed ban. "The Agency's review determined that the ban was appropriately designed—incorporating the best science of the day—and implemented. The review also found that compliance with the feed ban's requirements at rendering facilities and feed mills was high".[111] Thus, all 3 reports concluded that Canada was in

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[106] CFIA, "Questions and Answers, BSE Disease Investigations in Alberta (2004)", January 3, 2005.
[107] "Canada Confirms Second Mad Cow Case", *Washington Post*, January 2, 2005.
[108] "Positive BSE Case in Canada Shows Surveillance System Is Working", AMI Press Release, January 3, 2005.
[109] National Cattlemen's Beef Association http://www.beefusa.org/
[110] USDA report, released on February 25, 2005,
http://www.usda.gov/wps/portal/ut!/p/_s.7_0_A/7_10B?contentidonly=true&contentid=2005/02/0066.xml.
[111] http://www.inspection.gc.ca/english/corpaffr/newcom/2005/20050302e.shtml.

compliance with the feed ban, and that Canada's minimal disease BSE risk had not changed as the USDA had previously assessed.

122. Consequently, the discovery of the third BSE-positive animal in Canada cannot alter the findings of the scientific evidence as described above. In fact, USDA Secretary Mike Johanns and AAFC Minister Andrew Mitchell recently confirmed the industry's status as an integrated market, as well as the need to return "normal beef and cattle trade":

> *Each country is the largest for the other's food and agriculture products. In addition, our farm economies and our markets are significantly integrated. [... We] discussed BSE broadly and the path forward following the March 7 implementation of the Minimal Risk Rule to return to normal beef and cattle trade.*[112]

123. Nevertheless, the USDA responded to political pressure and pre-maturely altered the Final Rule by removing beef from cattle over 30 months of age. The USDA made this decision prior to the completion of the NCBA, USDA, and CFIA's feed ban compliance investigations, which were all completed before the proposed March 7 border reopening.[113] In making this revision to the Final Rule, the USDA is disregarding OIE guidelines[114], the Harvard Risk Assessment, in addition to its own prior risk assessment.

124. In any event, continuing prohibitions and restrictions are without justification. As the AMI has argued, since the USDA and APHIS have relied upon standards set by the OIE, cattle born sufficiently long enough after the 1997 bans on the use of bovine by-products in feed had been implemented, should be eligible for shipments within North America and around the world. As such, the APHIS' current and proposed restrictions are arbitrary and capricious:

> *There is no scientific basis for distinguishing between live cattle and processed beef... especially because APHIS has acknowledged that Canada's risk mitigation measures are equivalent to those adopted here in the United States.*[115]

125. Canada's system of surveillance, monitoring, testing, and follow-up is now, and for many months has been, more rigorous than the U.S. system. In August 2004, the USA's Inspector General issued a review of the U.S. surveillance system, and according to the USDA's own internal records, it failed to test nearly 500 suspected cases during 2002 –

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[112] http://www.usda.gov/wps/portal/usdahome?contentidonly=true&contentid=2005/02/0048.xml.

[113] http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_10B?contentidonly=true&contentid=2005/02/0047.xml.

[114] OIE guidelines stipulate that to maintain MD status, the prevalence of indigenous cases should be <2 case/million during the last 4 consecutive 12 month periods within the cattle population over 24 months of age. http://www.oie.int/eng/normes/mcode/en_chapitre_2.3.13.htm.
Canada's incidence was 0.149 in 2004, and approximately 0.149 in 2005. See: http://www.oie.int/eng/info/en_esbincidence.htm.
Furthermore, the USDA had previously stated that in roughly 5.5 million of cattle over 24 months of age, under OIE guidelines, up to 11 cases of BSE in this population could be detected and Canada could still be considered a minimal-risk country. Ron DeHaven, USDA Release No. 0001.05, January 3, 2005.

[115] *American Meat Institute* v. *USDA*, Complaint, 30 December 2004, at para. 53; http://www.meatami.com/AMIvAPHIS12.30.PDF, accessed on 14 January 2005.

2003.[116]

126. Indeed, questions have been raised with respect to the effectiveness of the U.S. surveillance system. In a Canadian Broadcasting Corporation ("CBC") report which examined the December, 2003 case in Washington State, a worker in a U.S. slaughter facility in Moss Lake, Washington admitted that:

> *...Not all cows arrive healthy. The sick ones known as downers, are supposed to be tested for mad cow disease. According to the USDA, they are the only cows that need to be tested for BSE. And the USDA maintains the cow that tested positive in Moss Lake wasn't well. It was a downer. And that's why the system caught it. I don't think so, says Dave. But let's be clear about this, was this cow a downer? Dave Louthan, Cuern's Meats: Oh No. That was good walking cow. That cow could outrun anybody here. It was a fluke. A technical mistake. Because I killed her on the trailer. That made her a back-door cow. She went right along with the downers. And because she went in with the downers, she got tested. If I had put her in the pens, the cow would have never been tested, and nobody would have ever known that it was a BSE cow.*[117]

127. This report gives rise to justifiable concerns, echoed even by the U.S. Government Accountability Office, that the most significant risk of transmission of BSE in North America will come from deficiencies in governmental enforcement regimes. The institution of a border ban can do nothing to reduce such risks, and instead arbitrarily penalizes investors whose inventory or facilities were located on a particular location on a map at a particular time, as of the day the ban was imposed.

K. THE BORDER BAN REMAINS IN PLACE

128. As in any competitive market, there are people who stand to benefit from the imposition and continuation of arbitrary measures such as the border ban. Despite OIE warnings, such people will attempt to co-opt or ignore the science of risk assessment and risk reduction, in order to obtain the benefits that flow from the arbitrarily-imposed status quo. In this regard, protectionist politics has already motivated a slim majority of the U.S. Senate to take legislative action to nullify the Final Rule, despite the concessions made by the USDA on boxed beef from cattle over 30 months in age.[118]

129. More importantly, however, protectionist industry members have also taken advantage of the manner in which the border ban was imposed and the way in which the USDA proposed to amend it, by taking legal action in the U.S. Federal Court. On March 2, 2005, Montana District Court Judge Richard Cebull, the same judge who ruled against

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[116] CBC Report "And Shoot, Shout and Shut Up", November 9, 2004.

[117] CBC Report.

[118] "Lawmakers Seek to Block Border Re-opening", *Rapid City Journal*, January 6, 2004. "N.D. Legislator Introduces Bill to Block Canadian Cattle", January 6, 2005, www.meatingplace.com. Indeed, "[c]ertainly, everyone favors a science-based approach to the rules relative to reestablishing trade with Canada. Similarly everyone agrees trade policy shouldn't be based on rhetoric, emotion or politics. The political reality, however, is there's seemingly very little political incentive to maintain the March 7 date, and a lot of incentive to adjust the timing of implementation and the rule itself." See: Troy Marshall, Editorial Opinion, *Cow-Calf Weekly*, 13 January 2005.

the USDA in April 2004, issued an order granting a preliminary injunction to Montana-based R-CALF.[119] The Canadian Government's request to file an *amicus curiae* brief was rejected as was that of the Canadian Cattlemen's Association, of whom the Claimants are active members.

130. Judge Cebull's decision to grant the preliminary injunction was criticized by many in the United States. Such criticism included the following:

> *We believe USDA's decision to reopen the border was deliberative and science-based, so far as it went ... In contrast to the characterization in yesterday's ruling, there has been no 'rush' to reopen the border. As we approach the nearly two year mark since the border closed, it is clear that USDA has relied upon extensive analysis by internal and external experts, including the report of an international review team that has analyzed Canada's BSE prevention and control strategies. Far from 'rushing' to reopen the border, if USDA erred it was by not reopening the border completely enough, leaving it closed to imports that are perfectly safe, like animals thirty months of age or over.*[120]

131. It is estimated that Judge Cebull's decision could delay the implementation of the Final Rule for at least six to twelve months, if not much longer. He will be the same judge who hears R-CALF's attempt to quash the Final Rule and thus strengthen the existing border ban. Against the backdrop of this strong and growing protectionist force among U.S. industry members,[121] it has been observed that it would be an error to assume "that R-CALF considers only its short-term economic gains."[122] The goal of maintaining the border ban in place is a more significant undertaking, dividing a market which took decades, and two wide-ranging free trade agreements, to build.

132. Thus there is a real danger that R-CALF's continued success before a "home town" judge, abetted by the tortuous and contradictory rule-making process undertaken by the USDA (to impose and then amend the border ban) could lead to attempts to roll back the status quo even further. Following Judge Cebull's ruling, one Montana rancher was quoted as saying: "There is optimism on our side of the industry. That's the producers, not the packers. They have to pay more than they want."[123]

133. In light of the fact that both Canada and the United States share an integrated market, common risk factors and risk mitigations, any discrimination against the Claimants is unjustified. As Mark Dropp, the Senior Vice-President of AMI has indicated:

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[119] *Ranchers-Cattlemen Action Legal Fund United Stock Growers of America vs. the United States Department of Agriculture*, CV-05-06-BLG-RFC.

[120] "American Meat Institute Expresses Strong Disagreement with Fact Detailed in U.S. District Court Ruling" March 3, 2005:
www.meatami.com/Template.cfm?Section=Current&template=PressReleaseDisplay.cfm&PressReleaseID=2352

[121] Ibid.

[122] Ibid.

[123] *MacLean's*, March 124, 2005, p. 13.

> *Once upon a time there were two calves in Flaxton, North Dakota – Bossie and Bessie. Then Farmer John sold Bessie to Farmer Jacques in Oxbow, Saskatchewan... Under the rule the USDA has just published, when Farmer Jacque seeks to sell Bessie, now 31 months old to a packer in North Dakota, he won't be allowed to do so. Instead, he'll send her to a packer in Moose Jaw, who can ship the beef back to the retail grocer in Flaxton, North Dakota... Instead of behaving like the Hatfields and the McCoys... we need to behave like the integrated North American meat industry that we have become.*[124]

134. That some of the very same U.S. ranchers whose court actions are designed to permanently divide the North American market are currently seeking to purchase feedlots and other assets located in Canada, and have bought, fed and sold cattle in Canada since the ban was imposed, speaks to just how integrated and interdependent the continental market once was. It also speaks to something more: the fact that the imposition and maintenance of the border ban was never about science and risk reduction. Rather, it has always been about politics and economics.

135. In other words, given the context of the integrated North American market, the U.S. border ban simply could not be justified. Had sound science and regulatory common sense governed the United States' decision-making from the start, the opportunity for parochial economic interests to extend the ban further would never have existed. For, as an AMI official recently noted: "calling Canadian beef unsafe is like calling your twin sister ugly."[125]

J. ISSUES AND APPLICABLE LAW

Issues

136. Through the imposition and/or maintenance of its cattle ban, has the U.S. breached NAFTA Article 1102(1) by unjustifiably providing less favourable treatment to the Investors, despite their being in "like circumstances" with U.S.-based investors operating in the same industry in the North American Free Trade Area, as defined in Article 101 of the NAFTA.

Applicable Law

137. Through its ratification of the NAFTA, the U.S. undertook to provide Canadian and Mexican investors operating in the newly created North American Free Trade Area with special protection not offered to either its own investors or to investors from non-NAFTA territories. That protection takes the form of a right to bring a claim for compensation against the U.S. for measures that it imposed in violation of its obligations contained within Section A of Chapter 11. In return for the U.S. extending this direct right of access to an international tribunal to all Canadian and Mexican investors, the Governments of Mexico and Canada have offered the same rights to U.S. investors vis-à-

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[124] AMI Press Release, 30 December 2004, supra note 4.
[125] AMI Press Release, 30 December 2004, supra note 4.

vis their commitments to honour their NAFTA Chapter 11 obligations in respect of measures relating to U.S. investors.

138. Pursuant to NAFTA Article 1122, the U.S. has consented to the submission of all claims to arbitration submitted in accordance with the procedures set out in the NAFTA. As recorded in the Claimants' letters attached at Annex 3, the Investors have also consented to this arbitration. As described below, the Claimants have also complied with all of the procedures set out in the NAFTA in the submission of this claim to arbitration.

139. Because they have made "investments" in the North American Free Trade Area, as defined under NAFTA Article 1139, and because they are nationals of Canada, the Claimants are "investors of another Party" as defined under Article 1139. Under NAFTA Article 1116, the Claimants are accordingly entitled to bring a claim to arbitration for loss or damages which they have suffered – as investors of another Party – due to conduct of the U.S. which constitutes a breach of an obligation contained within NAFTA Chapter 11A.

140. NAFTA Article 1101(1)(a) provides that Chapter 11 applies to "measures adopted or maintained by a Party relating to ... investors of another Party." The cattle ban constitutes a "measure," as defined under NAFTA Article 201, and it relates to the Investors because it directly affects their ability to operate their investments in the North American Free Trade Area.

141. On August 12, 2004, the Claimants served a Notice of Intent to Submit a Claim to Arbitration upon the U.S., in compliance with NAFTA Article 1119. The Claimants have waited longer than the minimum 90 day period set out in that provision to launch this claim.

142. Attached to this claim, at Appendix 3, are the Claimants' waivers of their rights to seek compensation from the U.S. in any other forum for the conduct which underlies this NAFTA claim. This meets the conditions of Article 1121(1)(a).

143. Finally, communications took place between counsel for the Claimants and the U.S. during the months of October and November, in which the Claimants offered to settle their claims though consultation and/or negotiation, as required under NAFTA Article 1118. The U.S. informed counsel for the Claimants on November 8, 2004 that it would not negotiate a settlement of the claim.

144. Accordingly, all of the procedures necessary to submit a claim to arbitration under NAFTA Articles 1116 to 1122 have been satisfied by the Claimants. As such the Tribunal is properly seized of jurisdiction to hear the Investors' claim.

National Treatment

145. NAFTA Article 1102(1) provides:

> Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

146. NAFTA Article 1102(1) requires the U.S. to provide "treatment no less favourable" to "investors of another NAFTA Party" than that which it provides to its own investors, "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." This case concerns how the U.S. cattle ban affects the Investors' ability to conduct, operate, manage and expand their investments in the North American Free Trade Area.

147. Given the nature of the unitary and fully integrated North American market in beef cattle, it was unreasonable and arbitrary for the U.S. to impose a complete ban on the shipment of live cattle from Canada to the United States. Given the fully integrated North American market for beef cattle there is absolutely no valid health or safety reason in this circumstance for the U.S. to rely on the political division – the border, to ban in the first instance nor to retain the ban up until the present day. The imposition of the live cattle ban and its continuation fails to be based upon the principles of sound science, which the U.S. is obliged to observe under international law.

148. Regardless of whether it was ever prudent to impose the import ban on live cattle less than thirty months of age, to avoid arbitrary and discriminatory treatment the ban should have been removed in the same fashion that it was removed on boneless cuts of meat in August 2003. Instead, the U.S. chose to observe a time-consuming and unnecessary rulemaking process, carrying on the pretence that the U.S. portion of the North American market can somehow be treated as a separate and unique area – despite the manifest evidence, both scientific and economic, to the contrary.

149. The impact of the U.S.'s cattle ban has been to arbitrarily punish participants in one of North America's purest and most integrated commodity businesses, by mere dint of their location relative to the political Canada-U.S. border. Cattlemen on the U.S. side of the border have maintained access to the single-largest cattle and beef market in the world, regardless of the origin of their herd. Cattlemen on the Canadian side of the border have lost access to this market, facing severely depressed prices for live cattle in Canada, while watching those prices rise in the United States. Such treatment is discriminatory and cannot be reasonably justified.

150. Without access to the U.S.-portion of the North American market for live cattle, and the price linking effects that such access provides to Canadian investors in it, the Claimants have suffered, and will continue to suffer, severe losses. These losses have depleted the equity that the Claimants held in their investments, thus critically disabling them from participation in the North American market – even if the U.S. was to allow it to be re-

established.

151. The most favourable treatment being offered by the U.S. to investors in the North American market for live cattle is that which is offered to investors whose cattle feeding operations were located in the territory of the United States on May 20, 2003, the day that the U.S. closed the border to live cattle of Canadian origin. The national identity of these investors is overwhelmingly American, whereas the nationality of investors with livestock in Canada as of May 20, 2003 was predominantly Canadian. Regardless of the national origin of their cattle, U.S.-based investors have obtained a much higher price for the sale of their live cattle because they have maintained access to the U.S. portion of the market which has been deprived to investors such as the Claimants.

152. With windfall profits partially derived from imposition of the cattle ban, U.S. investors are starting to arrive in Canada, intent on acquiring distressed investments at fire-sale prices. Those investments are distressed and available for sale because the imposition of the cattle ban has ruined the life's work of many Canadian investors – who cannot wait any longer for the continental market to be restored, and who have suffered such serious losses of equity that they will not be able to compete even when the border is opened and the North American market is restored.

153. By arbitrarily imposing and maintaining the cattle ban for political reasons, without due regard for the principles of sound science which were supposed to govern its conduct, the U.S. has provided an extended period of unfair competitive advantage to its own investors, at the expense of Canadian investors competing in the North American Free Trade Area which fostered the growth of a continental cattle and beef market.

154. The U.S. cattle ban permits U.S. investors to sell their cattle without restriction into a shorted market to processors throughout the U.S., despite the fact that many of their herds contain cattle of Canadian – some of which may have only entered the U.S. as late as May 19, 2003. Meanwhile, Canadians have been forbidden from accessing the same U.S. slaughter houses, merely because – on May 20, 2003 – their herds and feedlots were located north of the border. That border is an important political division; it does not affect the North American character of the cattle industry.

155. The U.S. is obliged under Article 1102(1) to provide treatment no less favourable to the Investors than it provides to their U.S. competitors. There is no valid policy reason, and no sound scientific grounds, upon which the lesser treatment which has been offered to the Investors and their Canadian counterparts can be justified.

L. RELIEF SOUGHT AND DAMAGES CLAIMED

156. The measures, and their the corresponding breach of Article 1102(1), have caused, and will continue to cause, loss and damage to the Investors, including but not limited to the following:

(a) past income loss up to and including the date of filing of this Notice of Intent;
(b) future income loss;
(c) reduced prices on live cattle sold in Canada by virtue of Canadian price discounts resulting from closure of the U.S. border;
(d) loss of foregone investment and expansion;
(e) loss caused by foregone capital investment due to decreased profitability;
(f) loss caused by uncertainty as manifested in increased capital costs among others;
(g) costs of incremental downtime;
(h) loss of tax carry-forwards;
(i) incremental management costs;
(j) loss of goodwill;
(k) loss of equity; and
(l) loss of expenses incurred in disputing the measures of the Respondent.

157. The Claimants seek damages of not less than C$11,000,000.00 as compensation for the damages caused by, or arising out of, the Respondent's breach of NAFTA Article 1102(1).

158. The Claimants will also seek the costs associated with these proceedings, including all professional fees and disbursements; fees and expenses incurred to oppose the infringing measures; pre- and post-award interest at a rate to be fixed by the Tribunal; payment of a sum of compensation equal to any tax consequences of the award; and such further relief that this Tribunal may deem appropriate.

Dated: March ___, 2005.

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