In the Productivity Commission

Inquiry into Pig and Pigmeat Industries

Public Hearing Submission of the Canadian Meat Council and the Canadian Pork Council

Application of the Agreement on Safeguards, and domestic legal issues

1 Introduction

This submission is lodged on behalf of the Canadian Meat Council and the Canadian Pork Council. It is intended to assist the Productivity Commission (*"the Commission"*) in appreciating the nature of the legal template within which the *"safeguards"* aspects of its inquiry pursuant to the Terms of Reference[1] must take place, and the way in which the circumstances of the case must be considered.

It is the intention of the Councils to lodge a further submission by the 18 September 1998 due date for submissions notified by the Commission. That submission will present the comprehensive factual evidence and argumentation, within the legal template applicable to a safeguards measures inquiry such as this, to show that safeguards measures cannot be recommended to the Minister, and that the Minister can have no justification to impose such measures.

2 The Canadian Meat Council and the Canadian Pork Council

This submission is made jointly on behalf of the Canadian Meat Council and the Canadian Pork Council (respectively the *"CMC"* and the *"CPC"*, and collectively *"the Councils"*). These private sector industry associations are parties interested in this pig and pigmeat safeguards inquiry being conducted by the Commission under the Terms of Reference. The interest of the associations arises naturally from the fact that they represent Canadian hog (ie pig) producers, processors and exporters of pork.

The Canadian Meat Council is the national trade association representing Canada's federally inspected meat packers/processors and their suppliers of goods and services. CMC members slaughter 94% of all the hogs processed under federal inspection in Canada. Their plants are monitored continually by inspectors from the Canadian Food Inspection Agency. They also process the carcasses into fresh and frozen pork products for sale domestically and on the global pork market. The

[1] Terms of Reference issued by the Treasurer under Parts 2 and 3 of the *Productivity Commission Act 1988* (26 June 1998).

associate membership of the CMC includes a significant number of Canadian trading houses that act in a sales capacity between Canadian packers and purchasers in export markets.

The Canadian Pork Council is the national federation of provincial commercial hog producers' marketing organisations and associations. Through this structure, the CPC represents the national and international interests of Canada's 20,000 hog producers. Farm cash receipts from the sale of hogs in 1997 were CDN3 billion. The value of hog and pork exports was CDN1.8 billion. Approximately 40% of Canadian hog and pork production is exported to more than 75 different countries around the world.

3 Advisers to the CMC and the CPC - qualifications

As this submission professes to deal with these international trade and legal issues on an expert basis, the qualifications of the advisers to the Councils should be established to an appropriate degree of satisfaction to the Commission.

Attachment A sets out the experience of the legal and trade advisers to the Councils who have prepared this submission on their behalf.

4 Safeguards measures inquiry - legal framework

The General Agreement on Tariffs and Trade 1994 (*"GATT 1994"*) and the World Trade Organisation (*"WTO"*) which was established by the GATT 1994 at the conclusion at the Uruguay Round create a framework for the observance and enforcement of specific international trade rules.

Compliance with the GATT 1994, and in particular with the Agreement on Safeguards[2], is the central aspect of the safeguards measures inquiry (or *"investigation"* as it is referred to under the Agreement on Safeguards) which forms part of the Commission's Terms of Reference in this matter.

This investigation must:

(a) take place in accordance with Australian laws, including most notably the *Productivity Commission Act 1998*, to ensure the domestic legality of any administrative action taken during and as a result of the inquiry; and

(b) accord with the international agreement to which Australia is a party, by way of its status as a Member of the WTO under the GATT 1994.

Otherwise, the conduct of the Commission may be susceptible to legal challenge in Australian courts, and in the international sphere the inquiry and its results may be subject to challenge within the Dispute Settlement Body of the WTO[3].

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[2] GATT 1994, II-A1A-14.

[3] Article IV.3 of the Agreement Establishing the Multilateral Trade Organisation (GATT 1994, II) and Understanding on Rules and Procedures Governing the Settlement of Disputes (GATT 1994, II-A2).

Unlike the Agreement on the Implementation of Article VI[4] and the Agreement on Subsidies and Countervailing Measures[5] (commonly referred to as the *"Anti-Dumping Code"* and the *"Countervailing Code"* respectively), which appear in Part XVB of the *Customs Act 1901*, the Agreement on Safeguards has not been implemented in Australian law pursuant to domestic legislation. Its provisions do not have legally binding effect in Australia.

The Agreement on Safeguards is, however, part of an international treaty to which Australia is a signatory. Breach of that treaty would expose Australia to retaliatory action under the procedures set out in the Understanding on Rules and Procedures Governing the Settling of Disputes[6] (commonly referred to as the *"Dispute Settlement Understanding"*, or *"DSU"*).

5 GATT 1994 and the Agreement on Safeguards - philosophy

Safeguards action under Article XIX of the GATT 1994 allows a member to derogate from the fundamental tariff binding commitments of the GATT. Accordingly the imposition of a safeguards measures is a severe step. The definitional and threshold tests which must be met to justify such action, and the investigative procedures, specified under the Agreement on Safeguards must be the subject of strict and careful compliance.

Safeguards measures are a permissible derogation from the tariff bindings which are carefully negotiated between Members and are at the heart of the multilateral trading system. As such, Members realise that the undisciplined implementation of safeguard measures could unravel the achievement of the objectives of free trade under the GATT. This is clear from one of the recitals to the Agreement on Safeguards, which states the following:

> *"Recognising the need to clarify and reinforce the disciplines of the GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control."*

Safeguards measures can only be justified in emergency cases, when the specific requirements of Article XIX and of the Agreement on Safeguards have clearly been met.

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4 GATT 1994 II-A1A-8.

5 GATT 1994 II-A1A-13, Part V.

6 See footnote 3.

6 Conditions for the application of safeguards measures

6.1 Article XIX of the GATT 1994

This Article is headed, and deals with, the principles to be applied in relation to *"Emergency Action on Imports of Particular Products"*. It is worthwhile to remember the "*emergency"* context of Article XIX.

6.2 Like or directly competitive products

Article 2 of the Agreement of Safeguards makes it clear that the "*domestic industry"* concerned is the industry which produces like or directly competitive products to those being imported. Two important questions must be resolved in relation to this critical aspect of this safeguards measures inquiry. In our view, each has a simple answer. They are these:

- first, is there an Australian industry which produces like or directly competitive products to those that are imported?; and
- secondly, what constitutes the Australian industry which produces those products?

Clearly, there is an Australian industry which makes "*like"* products to those imported. Whilst there may be different views as to comparability of the products in terms of the way in which they are cut, or their quality, these types of differences are not enough to lead to the finding that the products are not alike in their physical characteristics. The industry which makes these like products is the pork processing industry. However, as it is or will become apparent to the Commission, firms which are pork processors *per se* are not complaining about imports. Pig growers, who are complaining about imports, do not produce processed pork. It is conceded that they have a relevant commercial interest, as a group, in the importation of processed pork products into Australia. The CPC's position as an interested party is itself testament to this interest. However, the interest of Australian pig growers in this inquiry does not, by some "*bootstraps"* reasoning, qualify them as members of the industry producing like or directly competitive products.

The concept of "*like products"* is a familiar one under Australian law, as it is an important criteria in the anti-dumping context and has been subject to both judicial (in the Federal Court) and administrative (in the Anti-Dumping Authority) analysis. The clear result of the consideration of these issues in each case has been that the determination of whether a particular product is "*like"* another relates to the physical likeness of the products.

To overcome the obvious impediment presented to agricultural industries by reason of the fact that their products were not "*like"* processed products made from their products, the Australian legislature introduced the concept of "*close processed agricultural goods"*[7] into the anti-dumping provisions of the *Customs*

[7] Section 269T(4A) of the *Customs Act 1901*.

Act 1901. From the point of view of GATT-compliance, this concept is controversial. It amounts to an admission that downstream products are not like goods, and introduces a definition of the affected industry which is wider than that permitted by the strict words of the Anti-Dumping Code.[8]

We submit that as a pig is not a frozen processed piece of a pig, the imported product is not *"like"* the product produced in Australia by pig growers. Whilst pig growers no doubt object to this characterisation, it flows ordinarily and naturally from the proper interpretation of the international legal instrument pursuant to which this inquiry must be conducted.

The Agreement on Safeguards extends the ambit of the industry which is the focus of the analysis of injury by including the industry producing *"directly competitive goods"* to the imported goods. Are pigs directly competitive products with pork which is derived from them by way of upstream processing?

We consider that an upstream product cannot be *"directly competitive"*, in the sense required under the Agreement on Safeguards, with something it later becomes. Quite a lot needs to be done to a live pig before a buyer can consider it side-by-side with a processed piece of pork and be faced with a choice as to what he should buy. If there is a flow on effect to pig growers by reason of the comparative price of products which, after the next production level, compete directly with each other (eg imported processed pork, domestic processed pork, beef, chicken, lamb and etc), this could only be referred to as an *"indirect"* competitive effect. Processed pork and pigs do not compete in the same market, because transport, abattoirs, certification, finishing and packing processes need to be performed in respect of pigs before they are processed. Commercial risk must be assumed, and expense incurred, from the farm to the production of the processed pork cut.

As it will be important for interested parties to deal with an industry definition, or possible industry definitions, in their submissions, and because submissions may be quite different depending on the definition used, we urge the Commission to give some guidance to interested parties as to the Commission's thinking on this issue as soon as possible.

6.3 Investigation period

An important preliminary matter is to establish the relevant period over which the *"increased quantities"* of imports, and their effect on the defined Australian industry, are to be assessed. The Agreement on Safeguards does not define the relevant period over which an investigation of this type should consider the effect of imports. This is to be contrasted with Australia's implementation of the Anti-

[8] In *Review of the Australian Customs Service negative preliminary finding on frozen pork from Canada* (Report No 90, January 1993), the Anti-Dumping Authority agreed with Customs that pigs were not *"like"* imported pork, and that the *"close processed agricultural goods"* provision was applicable to include Australian pig growers with pork processors for the purposes of undertaking an analysis of whether injury had been caused to the Australian industry.

Dumping Code where determination of the investigation period is an important aspect.[9]

The investigation period in this case should not extend too far back, consistent with previous *"no injury"* findings and the *"emergency"* situation which safeguards measures are meant to deal with. Taking into account the following matters:

- the finding by the Australian Customs Service and the Anti-Dumping Authority in 1992 that Canadian imports of frozen pork did not cause material injury to the Australian industry;
- the Industry Commission's finding 1995 that imports did *"not appear to have had an appreciable effect on...the performance of the pig and pigmeat industries"*[10]; and
- the *"emergency"* context of Article XIX,

it is our view that the most appropriate investigation period is the period commencing calendar 1995 up until the present. In our experience, this is in the middle of the range of the lengths of investigation periods used by the investigating authorities for the purposes of considering the impact of dumped goods. It is also consistent with the intention that safeguards are meant to deal with unforeseen circumstances. Where imports already have a presence in the market, and that presence has been found to be non-injurious in earlier periods (as in this case), it is in our view reasonable to accept the proposition that only a large increase in imports relative to domestic production during a later period can form the basis for a safeguards investigation.

6.4 Increased quantities of imports

Article XIX itself, and Article 2 of the Agreement on Safeguards requires a finding that the product to which safeguard measures might apply is being imported in *"such increased quantities, absolute or relative to domestic production"* to have had the effect of causing serious injury. Safeguards measure are meant to address *"unforeseen developments"*[11], for example a sudden flood of imports for which a domestic industry is unprepared and which cause serious injury to that industry. That increase of imports must have some significance *"absolute or relative to domestic production"*.

In this case, Canadian imports first arrived in June 1990 following the relaxation of quarantine restrictions which previously applied. The Commission must ask itself whether, during an appropriate investigation period, there has been an increase of a magnitude and effect which fits within Article 2. As we have argued in 7.2 above, that investigation period should be 1995, 1996, 1997 and so much of 1998 for which statistics are available.

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[9] The relevant Australian provision is Section 269TC(4)(bf) of the *Customs Act 1901*.

[10] *Pigs and Pigmeat*, Industry Commission Research Project dated 30 October 1995, at page XIII (Key Finding 7).

[11] These words appear in Article XIX itself.

If there is any injury proven to the domestic pork processing industry (and that remains to be seen as they do not appear to constitute the complainant industry) due to an impact on its ability to profitably sell or transfer domestically produced pork to the next level of trade or of production, we believe that the evidence will show that such injury cannot be attributed to the small increase in imports relative to production.

6.5 Serious injury must have been caused by the imports

As the Issues Paper correctly points out, serious injury is a test of severity which exceeds the more familiar concept under Australian law and administrative practice of "*material injury*" under the anti-dumping and countervailing provisions of the *Customs Act 1901*.[12] However, there are a number of added dimensions to the concept of serious injury under the Agreement on Safeguards which have no direct counterpart in the anti-dumping context, and which underline the strict nature of the safeguards injury test.

For example, Article 6(a) provides that:

> "*serious injury shall be understood to mean a significant overall impairment in the position of a domestic industry*"

To us this suggests that there needs to be a pervasive aspect to the injury allegedly caused to the industry.

Under Australian law the concept of the necessary causal link between dumping and material injury has been addressed by the Federal Court.[13] The Court has ruled that the necessary causal linkage required a finding that the dumping involved was a sole cause of injury which could, of itself, properly be called material. This is not to say that dumping must be the sole cause of injury to the domestic industry.

The position under the Agreement on Safeguards requires no departure from this general rule of causation. However, the Agreement on Safeguards adds a number of protective mechanisms to ensure that causal link is clear and the serious injury is clearly in evidence. It does this in a number of ways:

- by requiring that the injury cause a "*significant overall impairment*" in the position of the domestic industry;[14]
- by requiring competent authorities to "*evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of [the] industry*";[15]
- by requiring that the causal link must be "*demonstrate[d], on the basis of objective evidence*";[16]

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[12] Section 269TAE(1) of the *Customs Act 1901*.

[13] *ICI Australia Operations v Fraser* (1992) 106 ALR 257.

[14] Article 6(a).

[15] Article 7(a).

[16] Article 7(b).

- by stipulating that *"when factors other than increased imports are causing injury to the domestic industry at the same time, such injury will not be attributed to such imports."*[17]

All of this emphasises the strict approach which must be adopted in determining whether necessary circumstances exist for action to be taken against some imports by way of safeguards measures. If the pork processing industry is suffering injury, we urge the Commission to carefully and closely consider the issues of what constitutes *"serious injury"*, and the nature of the causal link between the increased imports and that injury. The severity of the serious injury standard is supported in the material facts alleged by Members in safeguards cases notified to the DSB since its inception.

Again, we believe that the evidence will show that the Australian pork processing industry has not suffered serious injury, or that if it or some different industry is found by the Commission to have suffered serious injury, increased imports cannot be seen as a sole cause of such injury.[18]

6.6 Serious injury threatened must be clearly imminent

The Agreement on Safeguards permits pre-emptive measures to be applied where there is no serious injury, but such injury is *"clearly imminent"*[19]. But again, as is the case with the careful explanation of the need for strict evidence in relation to finding if serious injury has been caused, the Agreement on Safeguards gives further guidance on the question of threat.

So, *"a determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility"*.[20]

The evidence will show that there is no such threat. Indeed, factors which have lead to recently decreased import volumes show no sign of changing in the time period suggested by the use of the word *"imminent"*.

7 Competing causes of injury - the evidence so far

In that increased quantities of imports must be a sole cause of serious injury significantly impairing the industry overall, one would expect there to be only few minor competing causes of injury. If it is shown that processors of Australian pork are suffering serious injury, then it will be necessary for the Commission to carefully consider why this injury is occurring. In the short period since the investigation commenced, interested parties have suggested that things like poor

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[17] Ibid.

[18] If some hybrid industry is accepted as the relevant industry (a proposition with which we do not agree), including pig growers, other meat processors and other parts of the wider industry, the Commission will still be required to consider *"overall"* effects: the performance of profitable parts of the industry will offset any poor performance by other parts of the industry.

[19] Article 6(b).

[20] Article 6(b).

returns on international markets and a concentration of retail buying power may be hurting the Australian industry, as well as low world commodity prices and even inadequate labelling laws. We would add other factors to the list, such as the price of directly competitive meats, and reduced consumption as a result of health scares concerning pork products.

Obviously, if there is any serious injury, isolating the causal link between increased imports and that injury will be rendered difficult if not impossible given the likelihood that there are other causes of injury apparent of a significant number and magnitude.

If input costs are high for Australian pork processors, then the reasons for this might need to be examined in the context of the wider inquiry referred to in paragraph 3 of the Terms of Reference. Again, the Commission has already heard much about the problems faced by pig growers, including weather, feed and protein costs and quarantine restrictions on genetic materials.

8 Concluding comments

The CMC and the CPC submit that there can be no grounds to apply safeguards measures to imported pork products falling within tariff sub-heading 0203.29.

The CMC and the CPC will offer their further assistance to the Commission by lodging another submission, which supports their position in this matter with available evidence and legal authority, by 18 September 1998.

Lodged for and on behalf of the Canadian Meat Council and the Canadian Pork Council by Freehill Hollingdale and Page

Daniel Moulis
Partner
24 August 1998

Attachment A - Qualifications of advisers

Freehill Hollingdale and Page - Daniel Moulis

Freehill Hollingdale and Page are Australian counsel to the CMC and the CPC.

Daniel Moulis is a partner of the Canberra office of the firm. His practice focuses on trade regulation, international business and government law. Mr Moulis has represented foreign governments and clients involved in a wide range of industries concerned with international trade. These have included the chemicals paper, building products, medical, food, footwear and consumer goods industries. He has been particularly active in the fields of anti-dumping, countervailing, safeguards, quarantine and intellectual property rights, and is experienced in World Trade Organisation dispute settlement body proceedings and in non-market economy issues. He has advised clients in relation to customs tariffs, tariff concession orders, effective transaction structuring, contract documentation for export/import, country of origin and government procurement issues in Australia.

Mr Moulis was one of the principal authors in the publications *Rules of Origin in International Trade - A Comparative Study* (Vermulst, Waer and Bourgeois, eds: Michigan University Press, 1994) and *Anti-Dumping Under the WTO: A Comparative Review* (ed. Steele, Kluwer/IBA 1996). He has given presentations on international trade law issues at Asia Pacific Economic Co-operation meetings and at private conferences throughout Asia and in Europe.

Mr Moulis is a member of the International Bar Association Committee C and is the Editor of Federal Trade Briefing (US/Australia Trade and Business Council). He has a law degree from the University of Sydney, granted in 1983, and is a solicitor admitted in the Australian State of New South Wales; a barrister and solicitor admitted in the Australian Capital Territory; and a practitioner entered on the Roll of Practitioners of the High Court of Australia.

Corporation House Limited - Patt MacPherson and Lyle Russell

Canadian Counsel for the CMC and the CPC are Patt MacPherson and Lyle Russell of Corporation House, Ottawa.

G.P. (Patt) MacPherson, President of Corporation House since 1983, is an international trade consultant specialising in the diagnosis and remedy of problems arising in international trade. Since 1978 he has acted frequently for producers and industry associations as counsel before the Canadian International Trade Tribunal in anti-dumping cases, countervail cases, safeguards cases and reference inquiries involving all aspects of international trade. He advises clients on market access issues abroad under the WTO and NAFTA, and in Canada under NAFTA and the Agreement on International Trade. His private practice clients include agri-food, beverage, carpet, chemicals, footwear, information technology, steel and textile industries.

Mr MacPherson joined Corporation House in 1973, following a career in the chemical and man-made fibre industries in market research, research and development planning, financial forecasting, product management, industrial marketing, financial management, government relations, public relations and corporate relations.

Lyle Russell, who is associated with Corporation House in the present inquiry, set up business in Ottawa as an independent international trade consultant in June 1997 after a distinguished career in the Canadian Federal Public Service. His last Government assignment was as a Member of the Canadian International Trade Tribunal (June 1994-June 1997). Born in Ontario in 1940, Mr Russell holds a Bachelor of Arts degree from the University of Western Ontario and a Graduate Diploma in Public Administration from Carleton University.

After joining the federal government as a Dominion Customs Appraiser in 1962, he moved in 1966 to the Department of Finance, where he stayed for 17 years. In Finance, he held a number of progressively senior positions in the trade policy field, including Assistant Director, International Economic Relations, Director of Tariffs and Acting General Director, International Trade and Finance. During this period, Mr Russell represented Canada at numerous OECD, GATT and UNCTAD meetings and trade negotiations.

Mr Russell moved to the Department of Regional Industrial Expansion (DRIE) at the end of 1983 as Director General of the Office of Industrial Adjustment, where his accomplishments included introduction of the Canada Awards for Business Excellence. As Director General of DRIE's Textile, Clothing and Footwear Branch in 1986/87 Mr Russell travelled to China, Hong Kong and Korea to negotiate bilateral agreements on textile and clothing trade.

After a brief stint as Executive Secretary to the Advisory Council on Adjustment, set up after conclusion of the Canada/USA Free Trade Agreement, Mr Russell moved in June 1988 to Canberra, Australia on a three year executive interchange. As Assistant Secretary, Business Environment in the Australian federal Department of Industry, Technology and Commerce, he negotiated a federal-state agreement on standards, accreditation and quality which led to Australian accession to the GATT Standards Code. He also represented the Australian Government on the Boards of Directors of Standards Australia and the National Association of Testing Authorities.

In 1991, he moved to Vancouver to represent Industry, Science, and Technology Canada (ISTC) as Executive Director for BC and Yukon. In this capacity, Mr Russell was involved in community consultations concerning federal economic policies, numerous trade promotion activities, implementation of the Canada/B.C Tourism Agreement and the merger of the regional operations of ISTC with those of the Departments of Communications and Consumer and Corporate Affairs.

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