

CANADIAN CATTLEMEN FOR FAIR TRADE v. UNITED STATES – MAD COW DISEASE

In August 2004, a group calling itself “Canadian Cattlemen for Fair Trade” (CCFT) announced that it was bringing a NAFTA Chapter 11 suit against the United States for its May 2003 decision to close the U.S.-Canadian border to beef and cattle after a case of mad cow disease was discovered in a cow in Alberta, Canada.¹ CCFT is a newly formed group of Canadian feedlot operators² who claim that their industry has suffered devastating losses as a result of the border closure. Lawyers for the group are actively soliciting more clients to initiate Chapter 11 action in the manner of a class action suit.³ CCFT has filed 100 more claims totaling a reported \$300 million, and the liability may rise even higher.⁴ As the status of the border closure is under active review by the U.S. government, these NAFTA claims constitute a timely effort to pressure the U.S. Department of Agriculture (USDA) to ignore the differing disease status of the two nations and open the border once again to trade in live cattle.

PUBLIC INTEREST

In 1986, a troubling disorder was identified in dairy cows in the United Kingdom. Called Bovine Spongiform Encephalopathy (BSE) by the scientists, later dubbed “mad cow disease” by the tabloids, the disease is marked by progressive degeneration of brain tissue leading to behavioral changes, abnormal posture, difficulty rising or walking, and finally death. While scientists worked steadily for 10 years to identify the cause of the disease and control for the risk factors that contributed to its spread, U.K. government officials continued to assure the public that the meat supply was safe. Some scientists theorized that like a rare disorder found among New Guinea islanders some 50 years ago, the disease might be caused by cannibalistic feeding practices. In a precautionary move to prevent the potential spread of the disease, the United States stopped importing meat, cattle and most rendered protein products used in cattle feed from the U.K. in 1989.⁶ Although millions of cattle were destroyed in the U.K. in an attempt to eradicate the disease, it was later discovered to have taken hold in many European nations via the importation of live animals as well as contaminated animal feed. The disease would eventually be detected in 25 nations. However, it could be present in many others because the U.K. continued to ship potentially contaminated feed to some 80 nations before the practice was stopped in the mid-1990s.⁷

"By entering into NAFTA, the United States no longer has the right to protect its domestic cattle industry from contamination."

Gilles Stockton, Western
Organization of Resource
Councils⁵

In 1996, what had been a puzzling animal health crisis became an explosive human health issue when U.K. health officials announced that BSE had jumped the species barrier. Scientists revealed the link between BSE and a new form of Creutzfeldt-Jakob disease (CJD) in humans. Given the name “new variant” CJD (vCJD) by scientists, vCJD is a fatal, brain-deteriorating disease for which there is no known cure. To date, some 157 people,⁸ mostly British, have been diagnosed with the disease and most have perished. Due to the long incubation period characteristic of both BSE and vCJD, the full human toll of the disease is not yet known.⁹

In 1993, a single case of BSE was discovered in Canada in an animal later determined to have been imported from Britain.¹⁰ Thus, Canada did not suffer the severe long-term trade repercussions it would have if it had been an indigenous case. The first reported case of indigenous BSE in Canada was found in Alberta, on May 20, 2003. On May 29, 2003, the USDA, acting in accordance with U.S. animal disease control policy and legally required administrative law procedures, issued an emergency rule closing the U.S.-Canadian border to imports of Canadian beef and cattle retroactive to May 20.¹¹ This

action was consistent with U.S. law and trading practices. Since 1989, the United States has not accepted any cattle or beef from nations with even one indigenous case of the disease. Thus, previously the United States had closed the border to imports from Austria, Finland, Greece and Israel after the discovery of a single case of BSE in each nation.

In August 2003, in a controversial move contrary to the USDA's prior practice, the USDA issued a press release announcing that it would partially lift the ban on boneless cuts of Canadian beef from cattle under 30 months of age.¹² The USDA also said it would "accept applications" for certain other, previously banned, ruminant meat products as well.¹³ Following this announcement, the USDA was required by law to implement rulemaking to open the border to these cuts of meat. On November 4, 2003, the USDA issued the proposed rule that would result in the opening of the border sometime after January 5, 2004.¹⁴

Before rulemaking was completed, however, the USDA illegally began to allow in certain cuts of meat from Canada, including meat that was not even permitted under its proposed policy. It was estimated that some 33 million pounds of banned product came into the United States.¹⁵ This importation was brought to light and stopped by U.S. cattle producers who took the matter to court and obtained an injunction against the USDA, ensuring that the border was kept closed until rulemaking was complete. The illegal border opening has prompted an investigation by the USDA's Inspector General, who is charged with making sure USDA employees follow the law.¹⁶

The November 2003 proposed USDA rule indicated that the USDA planned to change its regulatory structure to introduce a newly defined category of regions that would be eligible to export beef to the United States, regions that present a "minimal risk" of introducing BSE. Interestingly, only Canada qualified under this new designation. It is also notable that this categorization was contrary to the international categories promulgated by the Office of International Epizootics (OIE) in Paris and recognized as the world's "trade-legal" standards under the WTO. Under OIE standards, Canada is categorized as a "moderate risk" nation, a higher category of risk than "minimal" and the second worst of five categories.¹⁷ The U.S., in contrast, is categorized as "BSE free." The USDA's plans to open the border and downgrade the risk from Canada suffered a setback just two months later. Rather than presenting a "minimal" risk to the U.S. cattle industry, to the contrary, Canada posed a significant risk as the first case of imported mad cow disease in the United States was found in December 2003. The BSE positive cow was quickly traced back to a herd in Alberta, Canada, but the damage was done as some 53 nations quickly closed their borders to imports of U.S. beef and cattle.

It is important to note that neither the United States nor Canada have done all they can to prevent mad cow disease. Consumer groups have been pushing both governments for years to close regulatory loopholes that could incubate the disease, but governments have been slow to act.¹⁸ Worse, on March 8, 2004, the USDA reissued its proposed rule to open the Canadian border.¹⁹ Currently the USDA is planning on opening the border on March 7, 2005. In the meantime, even with a limited testing system, two more diseased cows were found in Canada in January 2005.

NAFTA ATTACK

CCFT filed its first NAFTA Chapter 11 claim on August 12, 2004.²⁰ The CCFT claimants allege violations of NAFTA Article 1102 stating that the United States is discriminating against Canadian feedlot operators by providing less favorable treatment to the Canadian cattlemen than it has to U.S. cattlemen who own Canadian cattle.²¹ In its filings, CCFT notes that the United States has failed to make any effort to round up or trace Canadian cattle that had already crossed the border before the closing. What the petition fails to mention is that the United States currently has no traceability system for doing so.²² They also allege that USDA officials, by indicating on a number of occasions that they would move

forward to lift the border closure then “intentionally or negligently making and then failing to observe its commitments to eliminate its temporary ban on the importation of live cattle,”²³ have breached the U.S. government’s obligation to provide a minimum standard of treatment under international law and NAFTA Article 1105 (1). They assert that this international law principle includes the obligation to pay restitution “for reasonable but detrimental reliance on government conduct or statements.”²⁴

Canadian beef producers, whose businesses have unquestionably been devastated by the border closing, estimate their losses due to the closing at \$2-3 billion.²⁵ While the initial claim was for \$75 million, more recently, up to 100 claims have been filed reportedly amounting to \$300 million. NAFTA Article 1125 provides for the consolidation of claims in certain circumstances, and that may be what happens in this case. The United States is faced with a number of possible scenarios. It might agree to open the border to settle the claims. However, if dozens of cattlemen are involved in the claim, all may not agree to the terms and may proceed with their NAFTA cases. In that instance, the United States could be faced with the unpleasant possibility of having agreed to open the border – and expose U.S. consumers to increased risk – while later facing the possibility of being forced to pay damages to Canadian cattlemen for losses incurred during the period that the border was closed.

OUTCOME

The claim(s) have recently been filed. Arbitration has not yet commenced.

IMPLICATIONS

No Foreign Investment Necessary to Bring a NAFTA Complaint?: If the Canadian cattlemen are permitted to move forward with their case, a bedrock principle of NAFTA’s investment chapter will have been discarded. NAFTA Chapter 11 will no longer even have the pretense of being a series of investor protections in a discriminatory and unstable investment climate. Rather, Chapter 11 will be unveiled as a deregulatory rendering machine best suited to shredding the laws and regulations that protect public health and the environment. While the U.S. government has argued that the cattlemen do not have a claim because they have no “investment” in the United States,²⁶ this position is contradicted by language in NAFTA. The definition section of NAFTA (Article 1139) defines an investor of a Party as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment” – period. It does not say “that seeks to make, is making or has made an investment *in the territory of the other Party*” the way that later FTAs (such as CAFTA) do – a potentially costly omission. NAFTA claimants do not state that they have actual businesses or property in the United States, but they argue that they have made “substantial investment in order to compete, and profit from participation, in the North American cattle industry” and therefore qualify as investors.²⁷ In addition, given that recent NAFTA panel decisions suggest that “market access” as well as “market share” could be considered legitimate NAFTA investments, the U.S. government has cause for concern regarding this unusual NAFTA case.²⁸

Democratic, Administrative Procedure is Not a Trade Barrier; It’s the Law: The Canadian cattlemen allege that the USDA by dragging its feet is doing the bidding of protectionist U.S. cattlemen. Far from being “captured” by protectionist producers, it has been widely publicized that the USDA is thoroughly dominated by pro-free trade stalwarts from the head of the Department on down.²⁹ The Bush administration has hired numerous cattle industry lobbyists for key positions at the USDA. The National Cattlemen’s Beef Association (which is dominated by meat packing firms that prefer cheaper Canadian beef) and the ardently pro-free trade USDA both wanted the border opened and the matter disposed of quickly. Fortunately, U.S. law does not allow USDA officials merely to follow their own inclinations. The USDA must follow its own binding regulations, which prohibit the importation of live ruminants and certain ruminant products from regions in which BSE is known to exist³⁰ and separately require that the

public be given notice, and a chance to comment before any nation is struck from the list of nations that are not allowed to import such products.³¹ The NAFTA claimants appear to be amazed and offended that the U.S. government “chose” to utilize “tedious” rulemaking, calling it “unnecessary” and a “potent and effective trade barrier,”³² when in fact it is mandatory. The NAFTA claimants are also astonished that the United States paused for four months to reconsider its plan to open the border after the discovery of BSE in the United States. Rather than seeing this delay as a reasonable response to a significantly changed situation – with grave implications for public health and potentially catastrophic implications for the U.S. cattle industry – the NAFTA claimants argue that USDA “chose to continue a regulatory policy based upon protectionist politics rather than science.”³³ They blame a lawsuit by U.S. producers for keeping the border closed, when in fact this producer group merely used the courts to force the USDA to abide by U.S. law and regulation and keep the border closed until rulemaking is finalized. It is worth noting that no other nation has opened its borders to trade in live cattle from Canada. Though it may be cold comfort to Canadian cattlemen whose businesses have been unquestionably devastated, the United States before opening any border it had closed due to animal disease must pursue a deliberate and open regulatory process per the requirements of U.S. law. The cattlemen should consider suing their own government for the lax rules that incubated the disease, not U.S. taxpayers.

NAFTA Claim Riddled with Errors: Underlying the Canadian cattlemen’s claim is the premise that the United States is acting in a protectionist manner and is failing to act on “sound science.” Yet the filing making these claims is filled with errors and does an extremely poor job of understanding the science behind the BSE-related measures both governments have taken. First, the cattlemen ignore the fact that the United States receives only two percent of its live cattle from Canada – far from the “fully integrated North American cattle industry” they claim has been disrupted.³⁴ Second, while citing OIE reports applauding the U.S. and Canada for their handling of the epidemiological investigations, the claimants completely ignore the fact that the U.S. and Canada enjoy very different BSE designations under international rules promulgated by OIE. The U.S. still enjoys the status of a “BSE free” nation under OIE rules, while Canada is a “moderate risk” nation, the second worst of five categories. It has long been the policy of both nations to import beef and cattle *only* from “BSE free” countries.³⁵ Third, CCFT repeatedly claims that the USDA’s administrative actions were “arbitrary” and punish the Canadian cattlemen “by mere dint of their location relative to the scientifically artificial U.S.-Canadian border.”³⁶ They allege that the risk of BSE infection remains small “and the border has nothing to do with it,”³⁷ when in fact the United States has been successful for years in preventing the importation of BSE *because* of strict border controls first applied in 1989. Fourth, CCFT alleges that the USDA had “no valid reason to make a distinction between processed beef and live cattle”³⁸ when it proposed the border opening in November 2003, even though it is clearly far easier for the United States to inspect incoming meat and limit imports to low risk cuts of meat than it is to implement a currently non-existent traceability system to keep track of live Canadian cattle for many years before they are slaughtered. Finally, CCFT asserts that the U.S. BSE-positive cow made it into the food chain and the Canadian cow did not, when the opposite may well be true. The U.S. government claims that even though the U.S. cow was rendered, it was successful in halting the distribution of all the meat and bone meal from the sick cow.³⁹ However, the Canadian Broadcast Corporation recently uncovered through a Freedom of Information request that the Canadian cow was sent to a rendering plant and turned into poultry feed, which was later fed by farmers to cattle.⁴⁰ In short, CCFT is demanding the U.S. to engage in a radical departure from prior food safety measures and change long-term trading practices based solely on a threatened damage claims that could amount to \$300 million.

¹ “Beef Producers File Mad-Cow Claim against U.S.,” *Globe and Mail*, Aug. 13, 2004.

² Feedlot operators purchase and prepare cattle for slaughter by fattening them on a grain and protein diet.

³ Canadian Cattlemen for Fair Trade Fact Sheet, cited Sep. 7, 2004, available at: www.ccft.info, on file with Public Citizen.

⁴ Cathy Roemer, “Canadian Cattlemen Sue United States, Compensation at Issue,” *Lee Agri-Media*, Dec. 3, 2004.

⁵ Cathy Roemer, “Canadian Cattlemen Sue United States, Compensation at Issue,” *Lee Agri-Media*, Dec. 3, 2004.

⁶ This history is reprised in 69 FR 42287 (Jul. 14, 2004).

⁷ “Have Contaminated Feed Exports Spread BSE Across the Globe?” *New Scientist*, Feb. 10, 2001.

⁸ Emma Ross, “Human Mad Cow Infection May Be More Widespread than Previously Thought,” *Associated Press*, Aug. 5, 2004.

⁹ In addition to other measures taken by the U.S. government, in 1997 the U.S. FDA prohibited the use of all mammalian protein, with the exception of pure pork and pure equine protein, in animal feeds given to cattle and other ruminants (but not pork or chicken). Some loopholes in this feedban, which allow the feeding of plate waste to ruminants and the feeding of bovine blood to calves, as well as the potential for farmers to improperly give pork and chicken feed (which may contained rendered cattle) to cattle, have continued to expose U.S. consumers to risk. The FDA announced in 2003 that it would close these loopholes, but has not yet done so.

¹⁰ In this instance, the United States permitted Canada to maintain its BSE free status and did not close the border to Canadian imports. Under the same logic, now the United State argues that it is BSE free and is asking its trading partners not to close their borders to U.S. meat and cattle.

¹¹ 68 FR 31939 (May 29, 2003).

¹² USDA “Veneman Announces that Import Permit Applications For Certain Ruminant Products from Canada Will Be Accepted,” News Release No. 0281.03, Aug. 8, 2003. Veneman announced that USDA will no longer prohibit the importation of hunter-harvested wild ruminant products intended for personal use and USDA will accept applications for import permits for certain products from Canada, including: boneless sheep or goat meat from animals under 12 months of age; boneless bovine meat from cattle under 30 months of age; boneless veal (meat) from calves that were 36 weeks of age or younger at slaughter; fresh or frozen bovine liver; vaccines for veterinary medicine for non-ruminant use; and, pet products and feed ingredients that contain processed animal protein and tallow of non-ruminant sources when produced in facilities with dedicated manufacturing lines. At the current time, some scientists think that cattle under 30 months are unlikely to have the disease because of its many-year incubation period and boneless cuts of meat are unlikely to include the brain and nerve tissue thought to be the most infective.

¹³ USDA “Veneman Announces that Import Permit Applications For Certain Ruminant Products from Canada Will Be Accepted,” News Release No. 0281.03, Aug. 8, 2003.

¹⁴ 68 FR 62386 (Nov. 4, 2003).

¹⁵ Marc Kaufman, “USDA Expands Mad Cow Inquiry, Inspector General to Examine Relaxed Rules on Canadian Beef,” *Washington Post*, Jul. 3, 2004.

¹⁶ Marc Kaufman, “USDA Expands Mad Cow Inquiry, Inspector General to Examine Relaxed Rules on Canadian Beef,” *Washington Post*, Jul. 3, 2004.

¹⁷ Moreover, among the OIE’s criteria for achieving a BSE “minimal” risk status is the requirement that a country that has had a BSE case in a native animal within the previous seven years must have enforced the ban on the feeding of ruminant byproducts for a period of eight years. Canada’s ban on the feeding of ruminant byproducts was implemented only six years ago and, therefore, Canada does not comply with the internationally accepted criteria. Conveniently, the new regulations proposed by the USDA in November 2003 would weaken this requirement to six years.

¹⁸ The U.S. Department of Health and Human Services, which regulates feed for animals for human consumption, has dragged its feet in implementing proposed changes to safeguard the food supply. After holding a press conference to announce a variety of new emergency measures on January 26, 2004, HHS failed to issue the promised, binding, emergency regulations which would have implemented four changes to the current animal feed rule. The rule would have: prohibit mammalian blood and blood products to be fed to other ruminants as a protein source; ban the use of “poultry litter” as a feed ingredient for ruminant animals; ban the use of “plate waste” as a feed ingredient for ruminants; and minimize the possibility of cross-contamination of ruminant and non-ruminant animal feed by requiring equipment, facilities or production lines to be dedicated to non-ruminant animal feeds if they use protein that is prohibited in ruminant feed. Instead, on July 14, 2004 HHS issued an exploratory “advanced notice of proposed rulemaking” which could take years to implement. This capitulation to industry pressure during an election year is known as “slow rolling” and made headlines in the *New York Times*. Given the differing disease status of the nations and the continued failure of regulators to take the measures consumer groups and their own hired scientific experts have recommended to protect the public from the spread of this disease, the border closure remains an important public health safeguard.

¹⁹ 69 FR 10633 (Mar. 8, 2004).

²⁰ Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004.

²¹ Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 14.

²² Such a traceability system could be made possible however, if the USDA moved ahead to implement the Country of Origin Labeling system required in the 2002 Farm Bill. Unfortunately, the USDA has been working to transform this mandatory program to a voluntary one and has not yet implemented the rule it promulgated in September 2004.

²³ Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 14.

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- ²⁴ Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 16.
- ²⁵ “Beef Producers File Mad-Cow Claim Against U.S.,” *Globe and Mail*, Aug. 13, 2004.
- ²⁶ “Canadian Cattle Industry Takes Action Against U.S. Ban on Live Cattle,” *Inside US Trade*, Aug. 20, 2004.
- ²⁷ Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 14.
- ²⁸ Partial Award, In a NAFTA Arbitration Under the UNCITRAL Arbitration Rules, *S.D. Myers, Inc. v. Government of Canada*, United Nations Commission on International Trade Law, Nov. 13, 2000, at 70-71. The S.D. Myers panel held, “In common with the Pope & Talbot Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word “tantamount” to embrace the concept of so-called “creeping expropriation,” rather than to expand the internationally accepted scope of the term expropriation.” Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Pope & Talbot Inc. and the Government of Canada, United Nations Commission on International Trade Law, Jun. 26, 2000, at 38.
- ²⁹ See, for example, Anne Mulhern, “Watchdogs or lap dogs? When advocates become regulators President Bush has installed more than 100 top officials who were once lobbyists, attorneys or spokespeople for the industries they oversee,” *Denver Post*, May 23, 2004. Phillip Mattera, *USDA, Inc. How Agribusiness Has Hijacked Regulatory Policy at the U.S. Department of Agriculture*, Jul. 23, 2004, available at: www.agribusinessaccountability.org/page/325/1.
- ³⁰ 9 CFR 94.18 (a) (1).
- ³¹ 9 CFR 92.2.
- ³² Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 10.
- ³³ Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 12.
- ³⁴ Canadian Cattlemen for Fair Trade Fact Sheet, cited Sep. 7, 2004, available at: www.cftf.info, on file with Public Citizen.
- ³⁵ For a list of countries that Canada imports from see, Canada info: <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/bsefaqe.shtml>.
- ³⁶ Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 15.
- ³⁷ Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 11.
- ³⁸ Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 9.
- ³⁹ U.S. Food and Drug Administration, “FDA Statement on Rendered Products Derived From BSE Cow in Washington State,” Press Release, Dec. 27, 2003.
- ⁴⁰ CBC Website News, “BSE-Infected Cow May Have Gotten into Animal Feed,” Oct. 1, 2004.