NOTICE OF INTENT
TO SUBMIT A CLAIM TO ARBRITRATION
UNDER SECTION B OF CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

COR VAN RAAY, CHRISTINE VAN RAAY, RICK PASKAL,
DIANNA PASKAL, KURTIS PASKAL, KEVIN PASKAL
AND CRAIG PASKAL

Claimants / Investors

-Against-

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent / Party

The Claimants hereby serve notice of intent to submit a claim to arbitration pursuant to Articles 1116 and 1119 of the North American Free Trade Agreement ("NAFTA").

A. Name and Address of the Disputing Investors

Cor Van Raay, c/o
Cor Van Raay Farms Ltd (Alberta)
Box 64 Iron Springs, AB T0K 1G0

Christine Van Raay, c/o
Cor Van Raay Farms Ltd (Alberta)
Box 64 Iron Springs, AB T0K 1G0

Rick Paskal, c/o
Rick Paskal Livestock Ltd.
Box 89 Iron Springs, AB T0K 1G0

Dianna Paskal, c/o
Rick Paskal Livestock Ltd.
Box 89 Iron Springs, AB T0K 1G0

Kurtis Paskal, c/o
Rick Paskal Livestock Ltd.
Box 89 Iron Springs, AB T0K 1G0

Kevin Paskal, c/o
Rick Paskal Livestock Ltd.
Box 89 Iron Springs, AB T0K 1G0

Craig Paskal, c/o
Rick Paskal Livestock Ltd.
Box 89 Iron Springs, AB T0K 1G0

B. Allegation of NAFTA Breach

The Claimants allege that the Government of the United States of America (hereinafter "U.S.") has breached its obligations towards the investors under Article 1102(1) of the NAFTA, and that they have suffered loss and/or damage as a result of the breach.

C. Factual Basis for the Claim

The Investors and their Investments

1. Cor Van Raay, Christine Van Raay, Rick Paskal, Dianna Paskal, Kurtis Paskal, Kevin Paskal and Craig Paskal are all Canadian citizens.

2. Cor Van Raay and Christine Van Raay own Cor Van Raay Farms Ltd., an Alberta-incorporated company, based in Iron Springs, Alberta, which maintains feedlot facilities capable of holding approximately 103,000 head of cattle and an additional capacity of 10,000 head of cattle which was under construction in May 2003. Cor Van Raay Farms Ltd. has been forced to drastically reduce its inventories, falling dramatically below capacity.

3. Rick Paskal, Dianna Paskal, Kurtis Paskal, Kevin Paskal and Craig Paskal each own 20% of Rick Paskal Livestock Ltd., an Alberta-incorporated company based in Picture Butte, Alberta. Rick Paskal Livestock Ltd. maintains a feedlot capable of feeding 10,000 head of cattle, which prior to May 2003 was maintained at maximum capacity. It also used to feed an additional 2500 to 3000 head of cattle through the use of custom-feeders. Its current herd has been considerably reduced as a result of the measures described herein.

4. Butte Grain Merchants Ltd. is an Alberta-incorporated company based in Picture Butte, Alberta. It is owned 65% by Cor Van Raay Farms Ltd. and 35% by Rick Paskal Livestock Ltd. Butte Grain Merchants Ltd. maintains five cattle-related businesses: standard feedlot operations; custom feedlot operations; cattle brokerage services; the sale and service of Rotomix feedboxes; and cattle transportation services. As a result of the measures described herein, its feedlots are currently operating at less than 20% of their capacity of 41,000 head of cattle. All aspects of its businesses have been seriously damaged, and it has been forced to reduce its workforce from 64 to only 23 people.

5. The open market, upon which each of these investment enterprises relied, was guaranteed by the U.S. through its ratification and implementation of the *Canada-U.S. Free Trade Agreement* ("CUSFTA") in 1989, and its recommitment to that open market with the ratification and implementation of the NAFTA in 1994.

The North American Cattle Industry

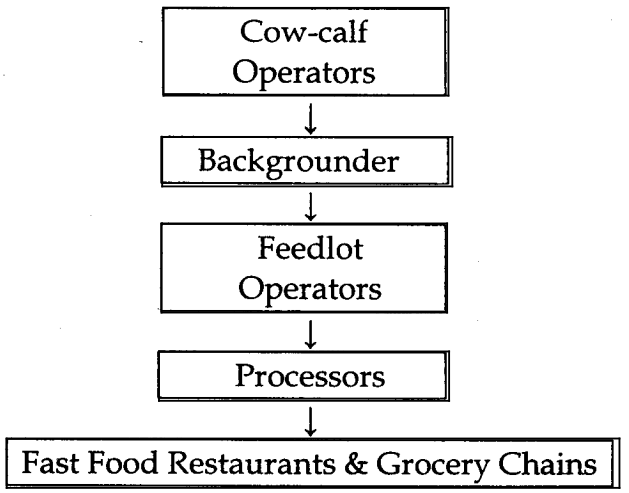
6. The North American cattle industry is composed of three basic segments: beef cattle bred for immediate human consumption; dairy cattle bred for milk production and eventual human consumption; and cattle breeding, including seminal services. For each of these segments, the market for the relevant goods and services are continental in scope.

7. The investor and investment are engaged in the beef cattle segment of the industry. This industry segment is basically composed of four groups: cow-calf producers; backgrounders; feedlot operators; and processors. Cow-calf producers normally breed and raise beef cattle until they attain an appropriate weight for sale to backgrounders and feedlot operators On most farms, the cow-calf process takes place exclusively outside on open pasture where the cattle graze and calves nurse until they reach a weight of 400 to 600 pounds. 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."

8. Feedlot operators purchase cattle from both cow-calf producers and backgrounders after they have attained a sufficient weight (of usually 800 lbs). At the feedlot, the animals are fed on a scientifically determined grain and protein diet until they weigh approximately 1,250 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 from grain farmers.

9. From 14 months to two years of age, the cattle, known as "fed cattle", are sold to beef processors who slaughter the animals and produce beef products. Feedlot operators sell their fed cattle to processors, of which there are a limited number in any particular region in North America. Larger feedlot operators typically maintain possession of their animals until delivered to the processor, whereas smaller ones sometimes transfer possession of their animals (or sell them for a commission) through "agents" who are often engaged in the purchase and sale of animals to and from feedlot owners (before and after feeding). The processors slaughter the animals and sell the beef to wholesalers, large retailers and restaurant chains.

10. The structure of the market can be summarized as follows:



11. Since the beginning of the "free trade" era, which began with the removal of market barriers such as tariffs with the 1989 CUSFTA, Canadian beef cattle producers have depended upon their ability to access the entire North American market. In the absence of artificial barriers, markets organize production and trade flows to efficiently provide the optimal set of products for consumers. As a result of the CUSFTA and NAFTA, the open market for beef and live cattle thus became organized based solely on resource availability and quality; transportation and geographical features; and the location of demand centers.

12. Since tariffs were removed in 1989, the abundance of inexpensive grain and suitable geography for large-scale feedlot operations permitted rapid development of animal production in the western provinces of Canada. Feedlot operators are dependent on the natural competitive advantage of abundant and suitable land, as well as climatic conditions, a solid infrastructure built up over years of free trade, and strong transportation links together with unfettered access to the U.S. market for their livestock.

13. Because of the vast east to west expanse of the two countries, geography and transportation costs have also continued to dictate that it is efficient for cattle and beef products from western Canada to move south and west into western U.S. demand centers, while cattle and beef continues to move north and south between the population centers of eastern Canada and the Eastern and Midwestern United States.

14. In other words, with the increased security of the NAFTA and complete removal of tariffs started by the CUSFTA, the North American cattle market became completely integrated. Given the close proximity of the entire Canadian population to the U.S. border, Canadian cattle and beef production has expanded over the intervening years to meet the incredible demand coming from all corners of the United States. By 2002 imports from Canada accounted for approximately

5% of the cattle slaughtered in the United States, and 4% of U.S. beef consumption came from processed beef imports from Canadian producers.

15. Unfettered access to the U.S. market has been of particular significance to operators such as the Claimants since the CUSFTA came into effect in 1989. Alberta cattle "on feed" inventory has grown by over 70% to 1.6 million head since that time, making the province the fourth largest beef region in North America (after Texas, Kansas, and Nebraska).

16. Before the U.S. imposed its border ban, the price for all live cattle, whether processed in Canada or the United States, depended upon the index price set in Chicago's mercantile exchange. The production of cattle is an extremely low-margin undertaking. Whether fed cattle are sold to a U.S.-based processor or one located in Canada has absolutely nothing to do with nationality. The only relevant factor is the processor's offer price, adjusted to reflect the applicable transportation costs. In other words, the border was not relevant. Fattened cattle could be sold to any processor within one day's drive (as the weight of the animal deteriorates if it is transported too far, due to stress on the animal),

17. For the investor and its investments, seven processors fell within an acceptable transportation range. These processors included X-L Beef in Moose Jaw, Saskatchewan; X-L Beef in Calgary, Alberta; Cargill Foods in High River, Alberta; IBP-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. With access limited to only three of these nine processors for the processing of live cattle under thirty months,[1] the Claimants have suffered deep losses which – even after being partially being off-set by emergency financial assistance from Canada's federal and provincial governments – threaten the viability of their business.

Bovine Spungiform Encephalopathy ("BSE")

18. BSE is a form of transmissible spongiform encephalopatyhy (TSE) in bovines. It is a fatal neurological disorder associated with an abnormal protein known as a prion. While scientists are unsure of the cause of BSE, it is not contagious and therefore not considered a serious threat to human or animal health. Indeed, as United States Department of Agriculture ("USDA") Secretary Veneman stated in July 2003, "there is no reason to believe that there is any food safety risk with Canadian beef." USDA officials were similarly quoted as agreeing that there was only "a minuscule risk" presented by Canadian-origin cattle, given the integrated nature of the market and the two countries' complementary regulatory regimes.

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[1] As described below, on August 4, 2003 the U.S. permitted boneless beef processed from cattle under thirty months in age to be imported into the country from Canada. X-L Beef in Calgary was never licensed to export the kind of beef to the U.S. and accordingly is mostly slaughtering older cows at this time.

19. 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 behavior, 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.

20. In 1997, Canada and the U.S. jointly took steps to ban the feeding of rendered protein products from ruminant animals (cattle, sheep, goats, bison, elk or deer) to other ruminants. And this is why now both countries require the removal of certain cattle tissue, know as specified risk materials, at slaughter since BSE was detected in Canada and the U.S. Specified risk materials are tissues that, in BSE-infected cattle, contain the agent that may transmit the disease. In diseased animals, the infective agent is concentrated in certain tissues such as the brain and spinal cord. Within the past ten years, there have only been two identified cases of BSE in the whole of North America – one in Alberta, in May 2003, and one in Washington State, on December 23, 2003.

The Canadian Response to BSE in May 2003

21. Following the discovery of BSE in Alberta, the Canadian government reacted swiftly and decisively. Eighteen farms were quarantined and 2800 animals were slaughtered and tested. This step was neither required by science nor by international guidelines related to BSE. The investigation included tracing back the entire lifespan of the animal and tracing forward the whereabouts of all of its offspring. These further investigations found no evidence of BSE outside of the original animal.

22. 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."

23. In its communication, Canada referred to a team of four international BSE experts who praised Canada's handling of the case. It submitted that the following products presented no definite or negligible risk:

- veal calves less than 36 weeks old for immediate slaughter;
- bovine animals less than 30 months old for immediate slaughter;
- bovine meat from animals less than 30 months of age;
- sheep and goats for immediate slaughter and meat therefrom;
- wild caribou and musk ox; and
- non-ruminant pet food.

24. In spite of Canada's comprehensive and effective response, the U.S. closed the border and kept it closed. It has also done so despite all available scientific

evidence demonstrating that cattle, beef products and other products of Canadian-origin, present no or negligible risk vis-à-vis the U.S. market. At the same time, and in a move that contradicted any rationale for the closing of the border, the U.S. took no action to identify, test and/or cull any Canadian-origin cattle held by U.S. investors in the cattle industry.

25. To be clear, the measures that would have been comparable to a complete ban on the importation of live cattle from Canada would have been as devastating to U.S. investors as the ban has been for Canadians. Between 1999 and 2003, 1,118,014 feeder cattle were sent from Canadian to American members of the industry. During the same period, 3,951,307 cattle were sent for slaughter by U.S.-based processors and 72,213 cattle were sent to the U.S. for breeding. Rather than visiting the same kind of economic injury upon American participants that has been borne by Canadians, the U.S. apparently chose to ignore the obvious – that border measures are utterly ineffective when dealing with a fully integrated industry.

26. The Canada-U.S. beef market has become fully integrated under free trade. One animal can pass back and forth across the border several times. The fact that the U.S. government failed to take any steps vis-à-vis Canadian-origin cattle belied an acceptance that there was no risk associated with the hundreds of thousands of such animals in the U.S. at the time. It is worth noting that such an approach would have created severe hardships for U.S. investors in the cattle industry.

27. In other words, if Canadian-origin cattle were so dangerous as to justify the imposition of a complete ban on imports as of May 20, 2003, how could the U.S. ignore all of the Canadian-origin animals brought into the United States on May 19, 2003 or earlier? The only difference between these animals appears to be the present state of their ownership (i.e. whether the owner is Canadian or American).

28. The arbitrary and discriminatory nature of the U.S. response is 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.

29. This means that for cattle born since 1997, there is minimum, if any, risk. Moreover, the vast majority of live cattle traded in North America will be less than thirty months of age. The USDA has explicitly accepted in its rulemaking process that there should be no important prohibition for such animals. Yet the border remains closed.

30. And in this regard, it should be noted that the BSE-positive animal, which was the original source of the border closure on May 20, 2003, was born before this feed ban went into effect.

The OIE's First North American Visit

31. On June 7, 2003, a team of international scientists from the *Office International des Epizooties* ("OIE") arrived in Canada to conduct studies on the safety of live cattle in Canada and to make suggestions for possible improvements. The OIE is the international standards body that issued the *Terrestrial Animal Health Code* (the "Code"), which provides the relevant criteria against which to measure risk of BSE in cattle. The Code identifies as minimum risk any location there has been less than one in a million cases of BSE in each of the last four consecutive 12-month periods within the cattle population over 24 months of age. Both Canada and the United States have long ago put in place all of the other basic requirements of the Code.

32. The Government of Canada invited the OIE to provide a proper assessment of federal and provincial compliance with the Code and to ensure all steps had been taken to ensure that Canadian cattle and beef products were safe. On June 26, 2003, the OIE reported very favourably about the Canadian regulatory environment and the reaction taken to the discovery of the diseased animal, stating:

> 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.
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> 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.
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> 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.
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> 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.

33. Both Canada and the U.S. responded quickly to the OIE recommendations. By July 9, 2003, this response included separate announcements concerning immediate plans to:

    (i) Implement a prohibition on specified risk material (such as the animal's spinal cord) from human food and the animal feed chain;

(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.

34. The response also included a *demarche* jointly sent to the OIE in August 2003 by the U.S., Mexico and Canada designed to encourage a more current, practical, risk-based approach to BSE. 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 *demarche* 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.

Contradictory Action by the USDA

35. On August 8, 2003, the U.S. Secretary of Agriculture opened the border for the importation of boneless bovine meat from animals under 30 months of age. However, the ban on the importation of live cattle was maintained. At this stage, the USDA launched a contradictory, lengthy and tedious bureaucratic process that featured errors and delays. The process itself has become a significant barrier for the Claimants.

36. The policy was contradictory, as there was no valid reason to make a distinction between processed beef and live cattle. In fact, it is easier to test and control live cattle through testing and the slaughtering process than to test beef. With feedlots full, prices dropping and a glut on the Canadian market, Canadian livestock exporters were accordingly losing millions of dollars, based upon this wholly arbitrary distinction, while their U.S. counterparts faced no such restrictions.

37. In fact, the rulemaking process was not launched until October 31, 2003. Again, it was a contrary exercise. In its proposal, the USDA cited a lengthy list of reasons that 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
- additional risk-mitigation measures including culling and testing animals 24 months of age or older.

Thus, while the USDA process appeared to champion the case for an open border, the process chosen actually exacerbated the problem and opened the door to narrow, uninformed and protectionist elements to hijack it.

38. That such a challenge would come was unmistakable, given that an overtly protectionist group of U.S. investors known as the Ranchers Cattlemen Action Legal Fund United Stockgrowers of America ("R-CALF") had already called upon the USDA and legislators – as early as June 3, 2003 (just days after the May 22nd discovery) – to impose a complete border ban for not less than seven years.[2]

39. It was not until October 31, 2003 that the U.S. officially launched its rulemaking procedure for the removal of its ban on the importation of live cattle under thirty months of age. This was far from the "immediate" action promised by the Secretary of Agriculture months earlier. That process has since been hobbled by R-CALF court action, slowing it to a standstill.

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

> 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.

41. The U.S.'s language supports an open border, but its actions have promoted the *status quo*. The United States administrative system itself can be used as a potent and effective trade barrier. An individual enterprise without the vast resources of the U.S. government simply does not have the luxury to sit and wait. If it waits much longer, its businesses will not survive.

BSE in the United States and the OIE's Second Visit to North America

42. On December 23, 2003, the U.S. confirmed that its first case of BSE in cattle had been detected in a "downer" animal in Washington State which – ***unlike the first Canadian case*** – entered the food chain. Remedial steps very similar to those taken by Canada six months earlier were now undertaken by the U.S. The seven-year old animal was traced back to an Alberta herd, and the two Governments worked together to trace the animal, its herd, and its feed history, taking all necessary steps to ensure that there were no other discernible contacts between infected animals, feed or ruminants, and the North American food supply.

43. The U.S. also invited the OIE to conduct an examination of its regulatory system

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

and its response to the finding of a BSE-infected animal in a U.S.-based herd. The following OIE report was as complementary of the U.S.'s response as it had been of Canada's response, although it recommended further changes and made the following observations:

> The subcommittee believes that the number of cattle actually infected on the farm of origin in Canada was probably small. Indeed the index case identified in the U.S.A may be the only infected animal from the Canadian herd of origin that survived to adulthood. However, it is probable that other infected animals have been imported from Canada and possibly also from Europe. These animals have not been detected and therefore 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 of human infection and infection of cattle through feed.
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> Under the circumstances, the subcommittee believes 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.

44. In other words, what the OIE was clearly saying was that the barn door had already been left open. The U.S. could not claim to be "completely BSE-free" any more than could Canada, and the U.S. could not act as if it was merely protecting a pristine, BSE-free market. The risk of BSE infection in both the United States and Canada was, and remains, infinitesimally small – but the border had absolutely nothing to do with it. This is why the OIE consistently and undoubtedly treated the cattle industry as "North American" – not "Canadian" and not "American" – in its report. Rather, it concluded on February 2, 2004:

> 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.
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> Policy actions being considered by the U.S.A must achieve the following objectives:
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> • reduce public health risk for consumer protection
> • limit recycling and amplification of the agent
> • establish the level of effectiveness of measures through surveillance
> • prevent any inadvertent introduction of BSE from abroad in the future
> • contribute to the prevention of the spread of the epidemic worldwide

> To achieve the above objectives, a system of complementary barriers, and implementation and enforcement of all measures on the national level, is necessary.
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> The objectives cannot be successfully achieved by government alone; effective implementation of measures requires a shared commitment and action on the part of national and state governments, producers, consumers, private industry, and veterinary professionals. Extensive national coordination and cooperation is imperative, and should be extended to include the continent of North America. We suggest that a BSE task force, which includes governmental and non governmental stakeholders, is established under the leadership of the USDA in order to assure that policies are developed and implemented in a consistent, scientifically valid manner.

45. Despite the fact that the "BSE problem" was as integrated between the three NAFTA countries as was the beef and cattle industry, the U.S. chose to continue a regulatory policy based upon protectionist politics rather than science. Shortly after the discovery of a BSE-infected animal in Washington State, it had suspended its "rulemaking" procedure. Rather than taking proactive steps to open the border to live cattle under thirty months of age, and focusing upon improving its surveillance programs in coordination with its NAFTA partners as recommended by the OIE, the U.S. chose first to re-launch its rulemaking process on March 8, 2004. The process called for submissions to be made on a proposed rule, which would permit the importation of live cattle under thirty months of age, by April 7, 2004.

46. On April 19, 2004, after having wed itself to the rulemaking process it had unnecessarily launched the previous year, 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 thirty months and under meeting the OIE standards for the removal of specified risk materials. These OIE standards were adopted by Canada and the U.S. in 1997. The USDA did not propose to accept live cattle under thirty months of age, however. This is the most important and relevant commodity for the beef cattle industry, and as such represents the Holy Grail in this dispute for protectionist U.S. investors represented by R-CALF.

47. Nonetheless, immediately upon hearing of the decision to change the *status quo*, R-CALF launched an action in a U.S. District Court in Montana to invalidate the entire process and cement the border ban permanently in place. On April 26, 2004, the District Judge granted R-CALF's request for a temporary restraining order, based upon its allegation that there was a "substantial likelihood" that R-CALF would prevail on the merits. It appears that some of the evidence that R-CALF relied upon may have been provided unofficially by USDA personnel.

48. Shortly thereafter, on May 4, 2004, the U.S. entered into a binding agreement with R-CALF which would convert the temporary restraining order into a preliminary injunction. The agreement provides preferential access and notice to R-CALF concerning any future steps taken to open the border, on the understanding that R-CALF will effectively veto any government action with

which it does not agree, on the strength of its ability to challenge the flawed rulemaking process unnecessarily chosen by the U.S. in the first place.

49. Either through negligence or by design, the U.S. has conducted its BSE regulation since May 2003 in a way which has made it beholden to the whims of an overtly and historically protectionist producer group. Its policy-making activities have been completely contradictory to the principles of sound science established by international bodies such as the OIE and its own Harvard risk assessment experts.

D. Issues and Applicable Law

Issues

50. Through the imposition and maintenance of its BSE policies, has the U.S. breached NAFTA Article 1102(1) by unjustifiably provided less favourable treatment to the Investors, despite their being in "like circumstances" with U.S.-based investors operating in the same North American industry?

51. By either intentionally or negligently making and then failing to observe its commitments to eliminate its temporary ban on the importation of live cattle from Canada to the United States, has the U.S. breached its obligation to the Claimants and the investments they have made in the North American cattle industry under Article 1105(1) of the NAFTA?

Applicable Law

52. Through its ratification of the NAFTA, the U.S. undertook to provide certain investors operating in the newly created North American Free Trade Zone with special procedural protections not offered to investors from non-NAFTA territories.

53. In particular, through Articles 1116 and 1122, the U.S., Canada and Mexico created a right of recourse to binding international arbitration for investors from other NAFTA Parties to obtain compensation for government measures that breached specified provisions of the NAFTA and caused loss or damages to that investor as a result.

54. NAFTA Article 1101(1)(a) provides that Chapter 11 (and its arbitration procedure) apply to "measures adopted or maintained by a Party relating to … investors of another Party." As Canadian investors, the Claimants meet this definition.

55. NAFTA Article 1101(1)(b) states that Chapter 11 also applies to "measures adopted or maintained by a Party relating to … investments of investors of another Party in the territory of the Party." This provision is not relevant to the Investor's claim.

56. NAFTA Article 1139 defines "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." The Claimants have made substantial investments in order to compete, and profit from participation, in the North American cattle industry.

National Treatment

57. NAFTA Article 1102(1) provides:

> Each Party shall accord to investors of another Party treatment no less favorable 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.

58. 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 essentially all aspects of the investment made by those investors in the North American Free Trade Area. For this case, the relevant aspects of the Claimants' investments in the North American cattle industry include its operation, management, conduct and expansion – all of which have been impeded by the flawed BSE policy imposed and maintained by the U.S.A against Canadian investors whose cattle was located in Canada as of the day the ban was imposed.

59. Given the nature of the industry, it was never scientifically appropriate nor necessary for the U.S. to impose a complete ban on the importation of live cattle under thirty months of age, or on other non-risk cattle and beef products. And there is absolutely no valid health or safety reason for its ban to have remained in place up until the present day. At the very latest, the ban should have been removed in August 2003, when it was clear that Canadian, Mexican and American officials had jointly and adequately responded to the OIE report requested by Canada in June 2003. The OIE experts confirmed this simple reality in their report of February 2004 and Professor Cohen confirmed it again with his statements to the press in June 2004.

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

61. The impact of the U.S.'s flawed BSE policy has been to arbitrarily punish participants in one of North America's most pure commodity businesses, by mere dint of their location relative to the scientifically artificial U.S.-Canada 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, severely depressing prices for live cattle in Canada, while concomitantly increasing those prices in the United States.

62. Without access to the U.S.-portion of the North American market for live cattle, and the price-indexing effects that it 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. ever allowed it to be re-established.

63. 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 herds 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 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 herds, 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.

Fair and Equitable Treatment

64. Article 1105(1) provides:

> Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

65. It is accepted among the three NAFTA Parties that Article 1105(1) mirrors the obligation each bears under customary international law to provide treatment to investments that is neither arbitrary nor intentionally discriminatory, nor that which would be contrary to the general international law principle of good faith. This includes the obligation to pay restitution for reasonable but detrimental reliance on government conduct or statements.

66. In ratifying and implementing the CUSFTA and the NAFTA, the U.S. obliged itself to provide a transparent and predictable business environment for NAFTA investors which would be free from arbitrariness and discrimination. The investors relied upon this promise, and the removal of tariff and non-tariff barriers, to create a vibrant North American cattle industry with their U.S.-based colleagues (not all of whom share the protectionist designs of R-CALF officials and its membership).

67. Further encouraged by statements made by the U.S. in July and August 2003, the Claimants continued to rely – to their detriment – upon the reasonable expectation that the North American market could be arbitrarily closed and segmented into U.S. and Canadian parcels. In choosing the course of regulatory action that it undertook in response to the BSE issue since May 2003, the U.S. failed to provide the kind of fair, transparent and rational regime it was obliged to provide under

Article 1105 and customary international law.

E. Relief Sought and Damages Claimed

68. 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 and seminal products 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; and
    (k) loss of expenses incurred in disputing the measures of the Respondent.

69. The Investor will seek damages of not less than C$95,000,000.00 as compensation for the damages caused by, or arising out of, the Respondent's breach of NAFTA Article 1102(1).

70. The Investor 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: August 12, 2004

Co-Counsel for the Claimants:

Michael G. Woods

Gottlieb & Pearson
2020 University, #1920
Montreal, Quebec H3A 2A5
Tel: (514) 288-1744, ext. 238
Fax: (514) 288-6629
woods@gottliebpearson.com

Todd Weiler

NAFTALaw.org
3430 Turner Road
Windsor, Ontario N8W 3L6
Tel: (313) 686-6969
Fax: (309) 210-2353
tweiler@naftalaw.org

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