

IN THE MATTER OF:

Fresh, Chilled, and Frozen Pork

USA-89-1904-06

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UNITED STATES-CANADA BINATIONAL PANEL REVIEW

In the matter of:

FRESH, CHILLED, AND FROZEN PORK

USA-89-1904-06

Before: Joel Davidow, Esq., Chairman
Mark R. Joelson, Esq.
A. de Lotbiniere Panet, Q.C.
Margaret Prentis
Herbert C. Shelley, Esq.

MEMORANDUM OPINION AND ORDER

September 28, 1990

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Mark S. McConnell and Lynn J. Barden, of Hogan & Hartson, Washington D.C., submitted a brief on behalf of the Government of the Province of Ontario.

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MEMORANDUM OPINION

I. Introduction and Summary of Panel Action

This panel review was requested by the federal government of Canada, the provincial governments of Québec, Alberta, and Ontario, the Canadian Meat Council ("CMC"), and the Canadian Pork Council ("CPC") to contest the final affirmative countervailing duty determination of the U.S. Department of Commerce ("Commerce" or the "Department") in the matter of Fresh, Chilled, and Frozen Pork from Canada.^{1/} This Panel has jurisdiction over this action pursuant to Article 1904(2) of the United States-Canada Free Trade Agreement ("FTA")^{2/} and section 516A(g)(2) of the Tariff Act of 1930, as amended.^{3/}

The products at issue in this review are imports from Canada of fresh, chilled, and frozen pork.^{4/} Though this case raises a great variety of questions concerning international trade law and administrative law, there are two overarching concerns. First, only a fraction of the programs found to be countervailable

^{1/} Fresh, Chilled, and Frozen Pork from Canada, 54 Fed. Reg. 30,774 (Dep't Comm. 1989) (final determination) [hereinafter Final Pork Determination].

^{2/} 27 I.L.M. 281 (1988) (entered into force Jan. 1, 1989).

^{3/} 19 U.S.C. § 1516a(g)(2) (West Supp. 1990).

^{4/} Fresh, chilled, and frozen pork are currently classifiable under item numbers 0203.11.00, 0203.12.90, 0203.19.40, 0203.21.00, 0203.22.90, and 0203.29.40 of the Harmonized Tariff Schedule. 54 Fed. Reg. at 30,775. Live swine is not covered by Commerce's determination, nor are further processed pork products such as canned ham, sausage, and cured bacon. Id.

provide subsidies directly to pork processors; the great majority of programs cited by Commerce are directed toward producers of live swine. Accordingly, Commerce's determinations with respect to most of the Canadian programs rest on its finding, under section 771B of the Tariff Act of 1930 (the "Tariff Act"), 19 U.S.C. § 1677-2 (West Supp. 1990) (effective 1988), that subsidies provided to swine producers confer benefits on pork processors. Second, Commerce's determination of countervailability with respect to each program involves a finding under section 771(5)(B) of the Tariff Act, 19 U.S.C. § 1677(5)(B) (West Supp. 1990), that the program benefits are targeted to a specific enterprise, industry, or group of enterprises or industries. The complainants challenge these findings, as well as Commerce's use of a conversion factor which allocated all of the alleged subsidies to only a portion of the swine.

In its final determination, Commerce found that a total of eighteen federal and provincial programs confer countervailable subsidies on producers of fresh, chilled, and frozen pork from Canada.^{5/} In their briefs, however, complainants have only challenged Commerce's countervailability determinations with respect to seven of these programs: (1) Tripartite Programs under the Agricultural Stabilization Act; (2) Feed Freight Assistance Program; (3) Western Diversification Program; (4) Canada/Québec Subsidiary Agreement on Agri-Food Development; (5) Alberta Crow Benefit Offset Program; (6) Alberta Department of Economic

^{5/} Id. at 30,774 (listing programs found to confer subsidies).

Development and Trade Act; and (7) Québec Farm Income Stabilization Insurance Program. Accordingly, this Panel will only rule upon these seven programs. As to items (3) and (4) above, Commerce has itself requested a remand on the ground that substantial evidence does not exist on the record to support its findings.

Upon examination of the record and after consideration of the arguments presented by the parties, this Panel makes the following determinations:

- 771B Determination: affirmed.
- Benefit Conversion Allocation: remanded.
- ASA Tripartite Benefits: remanded.
- Feed Freight Assistance Program: affirmed.
- Western Diversification Program: remanded.
- Canada/Québec Subsidiary Agreement on Agri-Food Development: remanded.
- Alberta Crow Benefit Offset Program: remanded.
- Alberta Department of Economic Development Trade Act: affirmed.
- Québec Farm Income Stabilization Insurance Program: remanded.

II. The Administrative Proceedings

A. Prior-Related Investigations

This case has its origins in an earlier Commerce investigation into Canadian swine and pork programs.^{6/} In 1984, American hog producers, led by the National Pork Producers Council ("NPPC"), filed a petition seeking the imposition of countervailing duties against two categories of imports from Canada: (1) live swine and (2) fresh, chilled, and frozen pork. Although most of the Canadian programs at issue directly provided benefits only to producers of live swine, the Department's final determination found that both producers of live swine and producers of fresh, chilled, and frozen pork from Canada received countervailable subsidies.^{7/}

Several appeals followed. The Court of International Trade ("CIT") remanded as to Commerce's determination with respect to fresh, chilled, and frozen pork, concluding that the Department's failure to apply the upstream subsidy provision, section 771A of the Tariff Act, 19 U.S.C. § 1677-1, was based on an impermissible interpretation of the statute and was not in accordance with law.^{8/} Subsequently, the remand ordered by the CIT was mooted

^{6/} The history is discussed in more detail in the portion of the opinion pertaining to section 771B of the Tariff Act, infra at 11.

^{7/} Live Swine and Fresh, Chilled, and Frozen Pork Products from Canada, 50 Fed. Reg. 25,097 (Dep't Comm. 1985) (final determination) [hereinafter Live Swine I].

^{8/} Canadian Meat Council v. United States, 661 F. Supp. 622, 625-29 (Ct. Int'l Trade 1987).

and Commerce never undertook the upstream subsidy investigation for pork products.

B. The Proceedings Below

On January 4, 1989, U.S. pork producers, led once again by the NPPC, filed another petition seeking countervailing duties against fresh, chilled, and frozen pork from Canada. One impetus for the NPPC's second petition was the newly-enacted section 771B of the Tariff Act,^{9/} under which subsidies found to be provided to a raw agricultural product may be deemed to be provided to the processed product under certain circumstances.

Commerce commenced its countervailing duty investigation on January 25, 1989.^{10/} On February 21, 1989, the International Trade Commission ("ITC") issued its preliminary determination that there was a reasonable indication that an industry in the United States was materially injured, or threatened with material injury, by reason of allegedly subsidized imports of fresh, chilled, or frozen pork from Canada.^{11/} On May 1, 1989, Commerce issued its preliminary determination that Canadian federal and provincial programs provided benefits to producers and exporters

^{9/} Section 771B was originally adopted as section 1313 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1185, and is now codified at 19 U.S.C. § 1677-2.

^{10/} Fresh, Chilled, and Frozen Pork from Canada, 54 Fed. Reg. 5537 (Dep't Comm. 1989) (initiation) [hereinafter Pork Initiation].

^{11/} Fresh, Chilled, or Frozen Pork from Canada, USITC Pub. No. 2158, Inv. No. 701-TA-298 (Feb. 1989).

of fresh, chilled, and frozen pork that constituted subsidies within the meaning of the countervailing duty law.^{12/} Commerce undertook verification review of data submitted by the respondents from May 15, 1989 to June 1, 1989, and on June 28, 1989 held a public hearing to afford interested parties an opportunity to comment on its preliminary determination.^{13/}

On July 24, 1989, Commerce published its final affirmative countervailing duty determination, which found that eighteen federal or provincial programs conferred countervailable subsidies on producers or exporters of fresh, chilled, and frozen pork, with an estimated net subsidy of Can\$0.08/kg.^{14/} On September 9, 1989, the ITC published its final determination that an industry in the United States was threatened with material injury by reason of imports of fresh, chilled, or frozen pork from Canada.^{15/} On September 22, 1989, Commerce issued a countervailing duty order with respect to the products subject to investigation.^{16/} On August 22, 1989, complainants filed their

12/ Fresh, Chilled, and Frozen Pork from Canada, 54 Fed. Reg. 19,582 (Dep't Comm. 1989) (preliminary determination) [hereinafter Preliminary Pork Determination].

13/ Final Pork Determination, 54 Fed. Reg. at 30,774.

14/ Id.

15/ Fresh, Chilled, and Frozen Pork from Canada, 54 Fed. Reg. 37,838 (ITC 1989) (final determination).

16/ Notice, 54 Fed. Reg. 39,031 (Dep't Comm. 1989).

request for a panel review under the FTA.^{17/} The hearing was held on July 5, 1990 in Washington, D.C.

C. Motion to Expand the Record

By a motion dated November 1, 1989, the Government of the Province of Alberta ("Alberta") requested that the record of review be expanded to include four additional documents.^{18/} The first two documents were letters by counsel for some of the Canadian participants transmitting corrections to the transcript of the June 28, 1989 hearing on Commerce's preliminary determination.^{19/} The second two documents concerned a request by Alberta for the correction of an alleged ministerial error in a calculation by Commerce, and a response letter from Commerce rejecting the request.^{20/}

By an order dated December 11, 1989, the Panel unanimously granted Alberta's motion to expand the record with respect to the first two documents concerning the transcript corrections.^{21/} In

^{17/} Request for Panel Review, 54 Fed. Reg. 35,709 (1989).

^{18/} Alberta's Motion to Expand the Record, Fresh, Chilled, and Frozen Pork from Canada, USA-89-1904-06 (Nov. 1, 1989).

^{19/} The first set of documents consisted of: (1) a letter of July 18, 1989 from the law firm of Arnold & Porter to Commerce and (2) a letter of July 27, 1989 from the law firm of Cameron & Hornbostel to Commerce. Motion to Expand the Record at 2-3.

^{20/} The second set of documents consisted of: (1) a letter of August 2, 1989 from the law firm of O'Melveny & Myers to Commerce; and (2) a letter of August 18, 1989 from Francis J. Sailer, Deputy Assistant Secretary for Investigations, to the law firm of O'Melveny & Myers. Motion to Expand the Record at 3.

^{21/} Order Granting Motion to Expand the Record, USA-89-1904-06 (Dec. 11, 1989).

an accompanying opinion, the Panel stated that Commerce and the U.S. participants would have an opportunity to set forth in their opposition briefs any contentions they might wish to make regarding the accuracy of the corrections.^{22/}

By a 4-1 vote, the Panel also granted Alberta's motion to expand the record with respect to the two documents concerning the calculation by Commerce. In its written opinion, the majority reasoned that Commerce's regulations expressly provide for motions to correct ministerial errors in final determinations, and that any such motion and the reply to it must be considered part of the record of the proceeding below, even though, by their nature, they occur after the final determination.^{23/} In addition, the Panel emphasized that its ruling expanding the record implied nothing about the relevance of the four documents or the merits of any arguments made in them.^{24/}

By an order dated January 18, 1989, the Panel denied a motion by Commerce to reconsider the Panel's December 11, 1989 order expanding the record for review.^{25/}

III. The Standard of Review

^{22/} Panel Opinion in Support of Order to Expand the Record, Fresh, Chilled, and Frozen Pork from Canada, USA-89-1904-06 (Dec. 15, 1989) at 2-3.

^{23/} Id. at 3.

^{24/} Id. at 2.

^{25/} Order, Fresh, Chilled, and Frozen Pork from Canada, USA-89-1904-06 (Jan. 18, 1990).

Article 1904(3) of the FTA requires the Panel to apply the standard of review set forth in section 516A(b)(1)(B) of the Tariff Act, 19 U.S.C. § 1516a(b)(1)(B) (West Supp. 1990), and the general legal principles^{26/} set out by the Court of International Trade ("CIT") and the Court of Appeals for the Federal Circuit. See Fresh, Chilled, or Frozen Pork from Canada, USA-89-1904-09 and USA-89-1904-10, slip op. at 5 (Aug. 13, 1990).

Section 516A(b)(1)(B) of the Tariff Act provides that: "The Court shall hold unlawful any determination, finding, or conclusion, found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." The substantial evidence standard is well-established under U.S. law. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951); accord Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984).

In reviewing the evidence, deference must be accorded to the findings of the agency charged under a statute with making factual determinations. See Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984). Even where a view opposing the agency's also may appear to be reasonable, "it is not the ambit of the Court to choose the

^{26/} Article 1911 of the FTA defines "general legal principles" as including "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies."

view which it would have chosen in a trial de novo" as long as the agency's decision is supported by substantial evidence.

Hercules, Inc. v. United States, 673 F. Supp. 454, 479 (Ct. Int'l Trade 1987).

Thus, the burden of demonstrating that the agency's determinations are incorrect is on the party challenging those determinations. Hannibal Indus., Inc. v. United States, 710 F. Supp. 332, 337 (Ct. Int'l Trade 1989). Such deference to the fact-finding agency, however, is not limitless. The Panel may "not permit the agency, under the guise of lawful discretion or interpretation, to contravene or ignore the intent of Congress." Cabot Corp. v. United States, 694 F. Supp. 949, 953 (Ct. Int'l Trade 1988). As another Panel recently stated, the Panel "is not to merely look for the existence of an individual bit of data that agrees with a factual conclusion and end its analysis at that." New Steel Rails from Canada, USA-89-1904-09, slip op. at 9 (August 13, 1990). Rather the Panel must examine whether the agency's "conclusions are supported by evidence on the record as a whole." Id. (citations omitted) (emphasis in original). Any reviewable determination may be remanded if it lacks a reasoned basis. See American Lamb Co. v. United States, 785 F.2d 994, 1004 (Fed. Cir. 1986).

IV. Section 771B Determination

The instant proceeding commenced when, following receipt of a petition filed on behalf of the U.S. industry, Commerce initiated an investigation to determine whether producers or

exporters in Canada of fresh, chilled, and frozen pork receive benefits which constitute subsidies within the meaning of the U.S. countervailing duty law.^{27/} In both its Preliminary Determination^{28/} and its Final Determination,^{29/} Commerce applied a new section 771B of the Tariff Act, 19 U.S.C. § 1677-2, to reach the conclusion that subsidies found to be provided with respect to live swine were deemed to be provided with respect to the manufacture, production, or exportation of fresh, chilled, and frozen pork. On this basis, Commerce deemed benefits under a number of Canadian federal and provincial programs for hog growers to constitute subsidies provided with respect to the pork products under investigation.

Section 771B provides as follows:

In the case of an agricultural product processed from a raw agricultural product in which --

(1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and

(2) the processing operation adds only limited value to the raw commodity,

subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.

27/ Pork Initiation, supra note 10.

28/ Preliminary Pork Determination, supra note 12.

29/ Final Pork Determination, supra note 1.

Commerce found both criteria of this provision to be met. First, it determined that the demand for live swine is "substantially dependent" on the demand for fresh, chilled, and frozen pork, inasmuch as pork constitutes the primary product of the slaughtered hog. Second, it determined that the processing operation used to manufacture fresh, chilled, and frozen pork adds "only limited value" to the live swine. It verified that pork producers in Canada add, on average, approximately twenty percent in value to the live swine. Commerce viewed this addition in value as "limited." It reasoned that the added value is in part attributable to profits from product presentation, rather than to processing costs, and hence the processing does not change the essential character of the live swine.^{30/}

Complainants challenge the Department's application of section 771B in this proceeding as legally and factually unsustainable for several reasons. They urge that, in order to construe the provision in a manner which is consistent with U.S. countervailing duty law and the United States' obligations under the General Agreement on Tariffs and Trade ("GATT"), section 771B must be read as imposing countervailing duties only to offset subsidies actually received. Complainants also reason that, since there is no evidence in the record that any "upstream subsidy" to the hog producers has been passed through to the pork

^{30/} Id. at 30,775-76.

packers, section 771B cannot be interpreted as imposing countervailing duties on the latter.^{31/}

Complainants further maintain that, in any event, neither of the two prongs for application of the provision is met here. The first prong is not satisfied, in their view, because the demand for live swine is driven more by the demand for further processed pork products -- including bacon, sausage, canned hams, etc. -- than by the demand for fresh, chilled, and frozen pork.^{32/} The second requirement is not met either, complainants urge, because the packing process that transforms a live swine into a split carcass or other pork product adds significant value, and not "only limited value," to the raw input, swine.^{33/}

Section 771B is, as noted, a new provision of the U.S. countervailing duty law, and there are no judicial precedents addressing the issues of interpretation raised by these contentions. Because the Panel considers that the administrative and legislative history of the matter are highly relevant to the

^{31/} See Brief of the Canadian Meat Council and its Members and Canada Packers, Inc. at 25-32, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06) [hereinafter Brief of CMC/CPI]; Brief of the Government of Canada at 59-73, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06) [hereinafter Brief of Canada].

^{32/} See Brief of CMC/CPI at 18-19.

^{33/} See Brief of Canada at 78-85 (brief describes the ten steps involved in the "packing process" that transforms a live hog into a split carcass, plus the additional steps involved in "fabrication" or "processing" by which split carcasses are either converted into wholesale or retail cuts or cured, smoked, or otherwise processed into sausage or bacon).

questions of interpretation, there follows a brief recitation of that history.

In November of 1984, the NPPC filed a countervailing duty petition on behalf of domestic pork producers alleging that producers or exporters in Canada of live swine and fresh, chilled, and frozen pork products were receiving subsidies under various federal and provincial programs. Benefits under programs for hog growers were alleged to be received also by pork producers. The respondents argued to Commerce, inter alia, that live swine are an "input" into the production of unprocessed pork meat, and that, hence, the Department was obligated to apply

section 771A of the Tariff Act, 19 U.S.C. § 1677-1,^{34/} to determine whether any benefits to hog growers were passed through to pork packers.^{35/} Commerce rejected the contention that live swine is an "input" into unprocessed pork primarily on the ground that a pork packer adds a low level of value to the swine (then calculated at ten percent).^{36/} It determined that section 771A was, therefore, inapplicable to the case and found the programs in question to confer countervailable subsidies on both live swine and fresh, chilled, and frozen pork products.^{37/}

On appeal, CMC, representing the pork processing industry, challenged the Department's final determination with respect to pork products, and argued that the Department was required to conduct an upstream subsidy investigation. The CIT reversed Commerce's determination, finding that Commerce should have

^{34/} Section 771A, entitled "upstream subsidies," authorizes Commerce to include in countervailing duties imposed on merchandise the amount of subsidies conferred on "input products" for the merchandise, where the subsidy bestows a "competitive benefit" on the merchandise and has a "significant effect" on the cost of manufacturing or producing the merchandise.

^{35/} Respondents in that case argued that an upstream subsidy investigation would show no competitive benefit passing from hog growers to pork packers since packers buy hogs from unrelated farmers in arms-length transactions. Live Swine I, 50 Fed. Reg. at 25,098.

^{36/} Commerce also noted that, "[t]he salient criterion is the degree to which the demand for the prior stage product is dependent on the demand for the latter stage product." It found that, "[t]he demand for the slaughtered and quartered swine is by far the predominant determinant of the demand for live swine." Id. at 25,098-99.

^{37/} See Live Swine I, 50 Fed. Reg. at 25,097-112.

conducted an upstream subsidy investigation under existing law, and instructed Commerce to conduct an upstream subsidy investigation in accordance with section 771A to determine whether payments to hog growers conferred any "competitive benefit" on pork producers.^{38/} The court stated that Commerce had to apply the upstream subsidy provision because it found no exception to that provision for agricultural products either in the statute or its legislative history.^{39/} It reasoned that Congress intended section 771A to be the statutory mechanism for dealing with allegations that products subject to investigation were benefiting from subsidies conferred at earlier stages of production.^{40/} In a separate appeal, the CIT affirmed Commerce's determination with respect to live swine and its determination that benefits received by hog producers constituted countervailable subsidies.^{41/}

Meanwhile, in its parallel injury investigation, the International Trade Commission ("ITC") issued a final decision regarding injury to domestic industries.^{42/} With respect to imports of live swine, the ITC made an affirmative injury determination. With respect to imports of fresh, chilled, and

^{38/} Canadian Meat Council, 661 F. Supp. 622, 629.

^{39/} Id. at 625-29.

^{40/} Id. at 629.

^{41/} Alberta Pork Producers' Mktg. Bd. v. United States, 669 F. Supp. 445, 450-51 (Ct. Int'l Trade 1987).

^{42/} Live Swine and Pork from Canada, USITC Pub. No. 1733, Inv. No. 701-TA-224 (July 1985).

frozen pork, however, the ITC rendered a negative injury determination. In separate opinions, the CIT upheld the ITC's injury determinations.^{43/} Consequently, since the ITC's negative injury ruling as to pork was sustained, there was no basis for Commerce to undertake on remand an upstream subsidy investigation. The CIT, thus, vacated the remand order.^{44/}

On June 26, 1987, a little over a month after the CIT had ruled that Commerce could not deem benefits to hog growers to constitute subsidies to pork packers without conducting an upstream subsidy investigation under section 771A, section 771B was born in the U.S. Congress. During the Senate debate on the omnibus trade legislation, Senator Baucus introduced as an amendment the proposed new section 771B, with a description of the 1985 agency and court proceedings involving both hogs and fresh, chilled, and frozen pork from Canada. 133 Cong. Rec. S8814 (1987) (statement of Sen. Baucus). Referring to the ITC's ruling that the two represent separate industries, he stated:

Now, that just doesn't make sense. Hogs and pork are both the same product. As one farmer once told me, 'Pork is just a very mature hog.'

^{43/} See National Pork Producers Council v. United States, 661 F. Supp. 633, 641 (Ct. Int'l Trade 1987) (upholding ITC's negative injury determination with respect to fresh, chilled, and frozen pork); and Alberta Pork Producers' Mktg. Bd., 669 F. Supp. at 460 (upholding ITC's affirmative injury determination with respect to live swine).

^{44/} Canadian Meat Council v. United States, 680 F. Supp. 390, 393 (Ct. Int'l Trade 1988).

Id. at S8814.

Turning to the CIT's reversal of Commerce in the Live Swine case, Senator Baucus said:

A recent U.S. Court of International Trade decision held that the Commerce Department had no statutory authority to impose duties on processed agricultural products if the raw agricultural product was being subsidized.

This means that even if the ITC determines that pork processors are being injured by subsidized Canadian hogs, the Commerce Department would not be able to impose any countervailing duties on pork.

. . . .

A foreign nation could avoid a U.S. countervailing duty on an agricultural product merely by doing some minor processing of the agricultural product before it is exported to the United States.

For example, a duty on raspberries could be avoided by merely freezing the raspberries before they are shipped to the United States.

. . . .

And we're not just talking about raspberries. We're talking about fish, rice, lamb, pork, and many other products that right now are subject to countervailing duties. These duties soon will be either lifted or left open to easy foreign circumvention.

In its decision, the Court of International Trade did not argue that it was right to permit this circumvention. It merely said that there was no statutory basis for preventing circumvention.

. . . .

In other words, the court looked to us to fix a glitch in the law.

. . . .

That is why Senator Grassley and myself, with the support of Senator Pryor, are today offering an amendment to the trade bill that directs the Commerce Department to place duties on processed agricultural products if the raw agricultural product is being subsidized.

The purpose of this amendment is to codify Commerce Department practice.

Id. at S8815.

Senator Grassley made similar remarks supporting the new provision while characterizing section 771A, the upstream subsidy provision, as incompatible with the nature of agricultural commodity markets. He observed:

[T]he Department of Commerce developed the rule codified in the proposed amendment. The rule was most recently applied in the final affirmative countervailing duty determination: [Live Swine I].

Id. (statement of Sen. Grassley).

Senator Pryor also supported the legislation with specific reference to Canadian pork imports. Id. at S8816. Senator

Bentsen^{45/} closed the debate on the amendment in the Senate, stating:

Mr. President, this amendment basically codifies the past policies of the Department of Commerce regarding subsidies on agricultural products.

. . . .

Senator Baucus has shown this amendment to the administration and has shown it to the ranking member of the minority side. I personally have no objection to it. I support it and recommend its adoption. I have been assured by staff on the minority side that it has been cleared. I urge its adoption.

Id. at S8816 (statement of Sen. Bentsen).

No other pertinent legislative history on this provision has been proffered to this Panel by the parties or found by the Panel.

Before addressing the questions posed in this proceeding, which turn on an interpretation of section 771B, we note some governing rules under U.S. law regarding statutory construction. It is an established principle of statutory interpretation that, where words of a statute are ambiguous, it is the practice of U.S. courts to consider the legislative history of the statute. Blum v. Stenson, 465 U.S. 886, 896 (1984). In addition, under the principle of deference to administrative interpretation,

^{45/} The Panel takes judicial notice that Senator Bentsen was, at the time, Chairman of the Senate Committee on Finance, which committee's jurisdiction included international trade matters. Congressional Directory Office, 1987-1988 Official Congressional Directory, 100th Congress 575 (1987).

"considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (footnote omitted). Therefore, to sustain the agency's interpretation as a permissible one, it is not necessary to find that this construction is the only reasonable one or that it is necessarily the result that a court or panel would itself have reached if it were considering the question independently. Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); American Lamb, 785 F.2d at 1001.

Furthermore, where possible, a U.S. statute should be construed so as not to conflict with international law or with an international agreement of the United States. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) (hereinafter "Restatement"). However, where an act of Congress and an earlier rule of international law or a provision of an international agreement cannot be fairly reconciled, the statute prevails as law of the United States. Restatement at § 115; Sutherland Stat. Const. § 23.22 (4th ed. 1984). More specifically, 19 U.S.C. section 2504(a) (West Supp. 1990) states that trade agreements shall not be given effect as U.S. law if they conflict with statutes of the United States. See, e.g., Algoma Steel Corp. v. United States, 865 F.2d 240, 242 (Fed.

Cir.) (should there be a conflict, U.S. legislation must prevail over the GATT), cert. denied, __ U.S. __, 109 S. Ct. 3244 (1989).

With these guiding principles, we turn to the dispute over the interpretation of section 771B. At the outset, complainants urge that, in order to make the provision consistent with the GATT and U.S. countervailing duty law, section 771B must be read as imposing a countervailing duty on pork producers only to the extent that it is shown that a subsidy has actually been received by them. Citing an absence of any evidence in the record indicating that pork producers received a portion of the subsidy that was found to be provided to producers of live swine, they argue that Commerce should not have applied section 771B without first finding that economic benefits attributable to the subsidies to hog growers had been passed through to pork producers. See, e.g., argument of Counsel for the Government of Canada, Hearing Tr. at 73-74. Commerce argues that its application of section 771B is consistent with both U.S. law and the GATT rules on subsidies.^{46/}

While the Panel is aware of the importance of the GATT question raised, and has carefully considered the contentions of the parties on it, the Panel does not decide the GATT issue. We have concluded that resolution of this issue will not assist the Panel in interpreting section 771B. We do not find section 771B ambiguous on the point at issue and, as noted, consistency with

^{46/} Brief of the Department of Commerce at 37-39, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06) [hereinafter Brief of Commerce].

the GATT is not a prerequisite to the application of a U.S. statute. The construction of section 771B that complainants claim is necessary to make the provision "GATT compatible" would create a "pass through" test or third precondition that plainly is not imposed by the language of the statute. On the contrary, section 771B clearly directs that, where the two tests of "substantial dependence" and "only limited value [added]" are met, "subsidies found to be provided to either producers or processors of the [raw agricultural product] shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed products." (Emphasis added.) Even if we were not required (as we are) to give deference to the administrative interpretation here, we would be hard put to deduce from this language the requirement for a "pass through" test.^{47/} Indeed, the language and the history of the provision suggest that the statute was designed so as to obviate the need for such a test.^{48/}

^{47/} Complainants have acknowledged that, "[s]ection 771B is a substitute for an investigation into the extent of subsidies and creates an irrebuttable presumption that processed agricultural products satisfying the two conditions benefit 100 percent from benefits received by producers of the upstream raw agricultural product." Brief of CMC at 28 (emphasis in original).

^{48/} For example, while complainants characterize section 771B as "an upstream subsidy provision," Brief of Canada at v, one of the provisions's sponsors, Senator Grassley, stated that, "[t]he upstream subsidies test, if applied to agricultural commodities, would understate the magnitude of the subsidy and permit wholesale circumvention of the countervailing duty statute." 133 Cong. Rec. at S8815.

Before specifically addressing the two criteria or tests set out in section 771B, the Panel finds it necessary to address the significance of the statements made on the Senate floor about the amendment that became section 771B (excerpted, supra, at 18-20). These statements indicate that Congress intended to codify Commerce's approach in the Live Swine I case, which deemed benefits received by producers of raw agricultural products (such as live swine) to be benefits received by producers of processed agricultural products (such as fresh, chilled, and frozen pork) without the need for conducting an upstream subsidy analysis. As complainants concede,^{49/} the remarks of the sponsors of the provision during floor debate should be given weight in the interpretation of the statute, particularly where, as here, there is no significant discussion of the matter in House, Senate, or conference reports. See NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760, 377 U.S. 58, 65-67 (1964); United States v. City and County of San Francisco, 310 U.S. 16, 22 (1940). Statements by individual legislators, even if they are not sponsors of the measure, also provide evidence of Congress' intent. See Brock v. Pierce County, 476 U.S. 253, 263 (1986); Grove City College v. Bell, 465 U.S. 555, 567 (1984). Therefore, in assessing the reasonableness of Commerce's statutory interpretation here, we must and will give weight to the statements of the amendment's sponsors, Senators Baucus and Grassley, as well as to the remarks of the other Senators

^{49/} Brief of Canada at 75.

concerned, that their intent was to permit Commerce to proceed in future cases by the methodology it had employed in Live Swine I. However, we do not view these congressional statements as controlling on the issues presented in this case because the language of the statute must be applied to the facts in the record.

With respect to section 771B's first criterion, various complainants assert that the Department erred in concluding that the demand for live swine is substantially dependent on the demand for fresh, chilled, and frozen pork.^{50/} This contention is based on the premise that the demand for live swine is driven more by the demand for further processed pork products than by the demand for fresh, chilled, and frozen pork. However, complainants do not dispute the fact, relied upon by Commerce in its determination, that live swine must first be processed as fresh, chilled, and frozen pork before it can be further processed into, e.g., canned ham, bacon or sausage.^{51/} The demand for live swine can, therefore, be viewed as "substantially dependent" on the demand for fresh, chilled, and frozen pork within the meaning of section 771B, and it is irrelevant that the latter is further processed into other products. Moreover, the application of the statute would be made very difficult, if not defeated, if it were construed as inapplicable to intermediate

^{50/} See Brief of CMC/CPI at 18-21; Brief of the Government of Québec at 23-27, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06) [hereinafter Brief of Québec].

^{51/} Final Pork Determination, 54 Fed. Reg. at 30,775.

products which are processed into other products for which there is greater retail demand. We thus conclude that Commerce's determination that the demand for live swine is substantially dependent on the demand for fresh, chilled, and frozen pork is supported by substantial evidence on the record and is in accordance with the law.

With respect to section 771B's second criterion -- that "the processing operation adds only limited value to the raw commodity" -- the issues are more complex. Complainants put forth a number of grounds to support their contention that Commerce erred in determining that pork processing operations add "only limited value" to live swine. They argue that the phrase "only limited value" was not intended to apply to substantial processing operations like the transformation of live swine to pork, but rather to minor finishing operations (designed to circumvent countervailing duties) such as the freezing of produce. They further contend that the existing administrative and judicial precedents establish that a value-added of twenty percent or more cannot be considered as "limited."^{52/} In addition, complainants maintain that the Department departed from the language of the statute by using a cost of production standard for the required value added test and also by improperly

^{52/} Complainants do not challenge Commerce's finding that the packing process adds approximately 20 percent in value to live swine, although they note that pork processing sometimes adds value far in excess of 20 percent. See Brief of CMC at 32-33; Brief of Canada at 84.

applying an "essential character" notion in construing section 771B.^{53/} We will discuss each of these arguments in turn.^{54/}

First, must the provision be limited to situations involving minor finishing operations or attempts at circumvention of the U.S. countervailing duty law? The phrase "only limited value" is ambiguous -- from the language of the statute alone the Panel cannot determine whether it applies to multistep processing operations like the one used to manufacture fresh, chilled, and frozen pork. However, in view of the generality of the language used and the background of the provision which we have described, it is reasonable to infer that the ambiguity was formulated purposely so as to give the administering authority significant flexibility for interpretation and application. Further, in the Panel's view, while the Senate floor discussion does indicate that the enactment of section 771B was largely motivated by a

^{53/} See Brief of Canada at 73-92; Brief of CMI/CPI at 32-47; Brief of Québec at 27-33; Brief of the Government of the Province of Ontario at 7-19, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06) [hereinafter Brief of Ontario].

^{54/} Complainants also argue that a narrow construction, limiting section 771B to those instances where it is clear that the benefits to the producers of the raw agricultural product are fully conferred on the producers of the processed product, is mandated to avoid placing the United States in violation of its international obligations under the GATT. With respect to this argument, once again, the Panel does not reach the issue under the GATT that the parties have briefed because resolution of that issue is not necessary or helpful to the question of U.S. domestic law presented. As we have discussed, supra at 22-23, the provision cannot fairly be read as being restricted to situations where the benefits to the producers of the raw agricultural product are fully conferred on the producers of the processed product.

Congressional desire to prevent circumvention of the countervailing duty law, neither that discussion nor the statutory language demonstrates a Congressional purpose to restrict the application of the provision to situations where an intent to circumvent is shown or where minor finishing operations, such as the freezing of raspberries, take place. Indeed, the processing operation involving the transformation of live swine to fresh, chilled, and frozen pork was mentioned several times during Senate debate as a situation to be covered by the amendment. Therefore, in light of the language of this provision, the legislative history, and the deference to be accorded to contemporaneous administrative interpretation, the Panel cannot accept as binding on the agency the narrow construction of the statute advocated by complainants.

Although this is the first case arising under section 771B, complainants assert further that Commerce's interpretation of the statute's "only limited value" language departs from the Department's previous practice and from the pertinent precedents in this area. The Panel does not perceive a critical departure in this regard, particularly because the statutory phrase is new and previous rulings do not interpret the same language. For example, the CIT's decision in National Pork Producers Council, 661 F. Supp. at 637 (upholding a determination by the ITC that the steps of the packing process "add substantial value by transforming the live animal into pork"), does not address the legislative language and history involved in this case. See also

Koru N. Am. v. United States, 701 F. Supp. 229 (Ct. Int'l Trade 1988) (in holding that the processing of certain fish constituted a "substantial transformation," the CIT applied a country of origin marking statute); Certain Internal-Combustion, Industrial Forklift Trucks from Japan, 55 Fed. Reg. 6028 (Dep't Comm. 1990) (final determination) (in finding that a value added ranging from twenty-five to forty percent was not "small," Commerce applied section 781 of the Tariff Act, relating to the prevention of circumvention of antidumping and countervailing duty orders; it also stated that the determination was expressly limited to the industrial context considered by the Department in that case); Certain Table Wine from France, 50 Fed. Reg. 40,580 (Dep't Comm. 1985) (initiation) (in an initiation notice in a subsidy case where Commerce stated that a value added situation of ten percent added "little value" compared to a situation involving twenty percent, Commerce applied the Tariff Act before it was amended by section 771B). Additionally, as stated above, from the legislative history it is clear that Congress wanted to codify the approach taken by Commerce in Live Swine I, where the agency had determined that the value added by the packing process did not contribute significantly to the value of the live swine. See 50 Fed. Reg. at 25,099.

The conclusion that Commerce could reasonably determine in this proceeding that twenty percent value added constitutes "only limited value" does not end our inquiry, however, inasmuch as the Department has maintained both in argument to us and in the

determination under review that "a figure may help focus the evaluation of value added under section 771B(2), but it does not resolve the question whether a processing operation adds only limited value."^{55/} The Department reasoned thus:

[T]he figure of 20 percent value added to a degree corresponds to the higher profits earned in the marketplace by product presentation, and not the cost of processing the split carcass into primal or trimmed cuts. For these reasons, we find in this investigation that the processing operation adds only limited value to the raw commodity because the processing represented by the figure of 20 percent has not changed the essential character of the live swine.^{56/}

Complainants argue that this reasoning is flawed because processing cost and essential character are irrelevant to the statutory value added standard and because the "essential character" test is neither explained nor is the conclusion thereon justified. Although we agree with complainants that section 771B(2) does not explicitly contain either a cost incurred test or an essential character test, the questions posed for the Panel are whether it was reasonable for Commerce to apply these tests in giving content to the "only limited value [added]" concept of the statute and, if so, whether the Department's conclusions on these issues are supported by substantial evidence on the record.

^{55/} Brief of Commerce at 27-28; Final Pork Determination, 54 Fed. Reg. at 30,776.

^{56/} 54 Fed. Reg. at 30,776 (emphasis added).

The Panel believes that Commerce could lawfully take into account the cost incurred and essential character criteria in construing and applying the statutory language in this case. The "value" concept is not defined in the statute. The legislative history is not very informative on this score either, but it does indicate that the Congress considered the nature and extent of the processing operations involved to be pertinent to the purpose of the statute and, hence, its application.^{57/} Such factors had been considered in Live Swine I, 50 Fed. Reg. at 25,098; cf. Smith-Corona Group v. United States, 713 F.2d at 1577 (Commerce may consider cost as an indicium of value in making adjustments to foreign market value under the U.S. antidumping statute). Commerce evidently reasoned in its determination here that the significance of the twenty percent added value figure should be assessed in context, and that the context included two factors perceived as important by Commerce: (1) that the twenty-percent average added value is in part brought about by the relatively small cost operation of processing the split carcass into primal or trimmed cuts for product presentation, and (2) that the processing represented by the figure of twenty percent does not change the essential character of the swine. Particularly given the deference which must be accorded the Department's interpretation of this new statute, the Panel cannot find the agency's consideration of the above factors to have been impermissible. Although the Panel is somewhat troubled by the

^{57/} See 133 Cong. Rec. S8814-16.

Department's lack of clarity in articulating its criteria for what constitutes "only limited value," an "[agency's] decision of less than ideal clarity [may be upheld where its] path may reasonably be discerned." Ceramica Regiomontana, S.A. v. United States, 810 F.2d 1137, 1139 (Fed. Cir. 1987).

Complainants urge, further, that Commerce has failed to explain its "essential character" test and that "common sense dictates that a live hog is fundamentally different in 'essential character' from a pork chop found on a grocer's shelf."^{58/} As they point out, the CIT held in Canadian Meat Council, 661 F. Supp. at 626, that "the transformation of live swine to fresh, chilled, and frozen pork indisputably involves a process of manufacture or production, and live swine and packed pork are not in essence identical." Commerce did not, however, claim that the products are identical. In interpreting this new statute, Commerce was giving weight to the fact that the processed product, while not identical to the agricultural product, was nonetheless essentially unchanged in composition.^{59/} It was

^{58/} Brief of CMI/CPI at 36.

^{59/} The Panel notes that the Canadian Import Tribunal made the following similar observation in the proceeding entitled Boneless Manufacturing Beef Originated in or Exported from the European Economic Community (Canada 1986) at 10:

Manufacturing grade beef is an intermediate agricultural product for processing into something else. It can be viewed as being cut from the beef carcass as grapes are taken from the vine, or sugar cane cut in the field, or apples plucked from the tree. There has been no radical transformation of

permissible for Commerce to make this finding and to give it weight.

Therefore, with respect to the second criterion, the Panel concludes that Commerce's determination that the processing of live swine into fresh, chilled, and frozen pork adds only limited value to the live swine is supported by substantial evidence in the administrative record and otherwise in accordance with law.

Overall, we thus find that Commerce's application and interpretation of section 771B are supported by substantial evidence in the record and otherwise in accordance with law.

V. Benefit Conversion Allocation

As the Panel has noted supra, applying the provisions of section 771B, Commerce deemed that subsidies found to be provided to producers of live swine were provided to the processors who convert the live swine into fresh, chilled, or frozen pork. Using a live-weight to dressed-weight conversion factor of 79.5 percent (a figure premised on evidence in the record) to calculate the percentage of pork yield from live swine, the Department allocated the amount of the subsidy paid to hog producers over the processors' pork products on a per-pound basis.^{60/} This methodology apportioned none of the subsidy to

the new product, as from grapes into wine, or sugar cane into refined sugar, or apples into cider. This transformation only takes place when the manufacturing grade beef has been processed.

^{60/} Final Pork Determination, 54 Fed. Reg. at 30,776.

the remaining 20.5 percent of the hog (by weight), consisting of some five percent totally unusable material and a balance of various byproducts.^{61/} The Department rejected respondents' contention that the subsidy should be allocated over the entire live weight of the swine on the ground that hogs are raised for the sole purpose of producing pork.^{62/}

Canada, Ontario, and CMC/CPI urge that the Department should, in any event, have allocated the subsidies found on live swine to all of the related commercially valuable products, representing ninety-five percent of the live weight of the slaughter hog. They point out that the Department's methodology imposed a higher per unit duty rate on pork than if the subsidy had been allocated over all commercially valuable products and, in fact, resulted in an amount of subsidy per pound of pork greater than the amount of subsidy per pound of hog, i.e., a greater than 100 percent "pass-through." Complainants reason that U.S. countervailing duty law and the GATT require the Department to allocate the benefits of a domestic subsidy on a particular product over all of the commercial products to which the benefits are tied, not just over the primary product.^{63/}

^{61/} The conversion of the hog in terms of 79.5 percent for pork products, five percent for unusable material and 15.5 percent for usable byproducts is not disputed. See Brief Canada at 97; Brief of Ontario at 29; Reply Brief of CMC/CPI at 38. Hearing Tr. at 157, 249.

^{62/} 54 Fed. Reg. at 30,787.

^{63/} See Brief of Canada at 93-100; Brief of Ontario at 26-31; Brief of CMC/CPI at 48-56.

Commerce defends its methodology as a reasonable application of section 771B, although it acknowledges that "[s]ection 771B does not define the methodology that Commerce must use to convert the live swine that received subsidies into fresh, chilled, and frozen pork."^{64/} It maintains that the methodology which it applied here is consistent with U.S. precedent and with the GATT.^{65/} NPPC supports Commerce's position, emphasizing that pork meat is many times more valuable than byproducts by weight and that the value of the non-carcass components may therefore be ignored in the allocation of the subsidy as "negligible."^{66/}

Before considering the precedents on this issue, the Panel wishes to comment on some preliminary points. It notes, first, that Commerce seeks to justify its methodology in part on the ground that the Tripartite Program and the Québec Farm Income Stabilization Insurance Program both use the conversion factor of 79.5 percent to approximate the pork yield from live swine.^{67/} In the Panel's view, however, the fact that a particular conversion ratio is used in determining the pork yield from a live hog is not probative on the question of how the subsidies paid on hog production should be allocated among the further products. Second, the issue of the relative value of the pork

^{64/} Brief of Commerce at 32.

^{65/} Id. at 37-39.

^{66/} Brief of NPPC at 97, 103, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06) [hereinafter Brief of NPPC].

^{67/} Brief of Commerce at 33.

products and the byproducts is not fairly presented in this record. Indeed, none of the presentations made in the briefs or at the hearing requested that the method of allocation be changed from a weight base to a value base. Therefore, the matter must be addressed on a weight, and not on a value, basis.

Commerce relies on its previous rulings in Live Swine I^{68/} and Lamb Meat from New Zealand, 54 Fed. Reg. 1402 (Dep't Comm. 1989) (preliminary determination) [hereinafter Lamb II], as support for its methodology. It repudiates Lamb Meat from New Zealand, 50 Fed. Reg. 37,708 (Dep't Comm. 1985) (final determination) [hereinafter Lamb I], upon which complainants rely, as based upon incorrect methodology, which the Department corrected in Lamb II.^{69/} Commerce denies that its ruling in Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041 (Dep't. Comm. 1986) (final determination) [hereinafter Groundfish], upon which complainants also rely, supports their contention.^{70/}

In Live Swine I, Commerce applied the same methodology as it has here, reasoning that "[l]ive swine are raised for the primary purpose of producing pork meat. Any commercial value resulting from the by-products is secondary to the production of pork meat."^{71/} However, in Lamb I the Department allocated subsidies

68/ Live Swine I, *supra* note 7.

69/ Brief of Commerce at 35-36.

70/ See Final Pork Determination, 54 Fed. Reg. at 30,787.

71/ See 50 Fed. Reg. at 25,111.

conferred on sheep over all products resulting from the slaughter operation, including pelts, wool and offal, as well as the lamb meat.^{72/} Later, in Lamb II, as the Department notes, it allocated the benefits received by lamb growers only to lamb meat.^{73/} Neither of the determinations in the Lamb proceedings contains a discussion of the principle involved in the allocation decision.

In Groundfish, Commerce determined that Canada provided certain domestic subsidies to commercial fishermen who produced both groundfish (the product under investigation) and shellfish that were not under investigation. It allocated the subsidies to the entire fish industry.^{74/} In its determination in this case, Commerce reasoned that Groundfish is not analogous because benefits under those programs were provided to both fish and shellfish and could not be segregated to the subject merchandise.^{75/}

The Panel does not find in Groundfish or in the other administrative precedents cited by the parties a rule or reasoned principle that should be deemed controlling in this case. Nor do we read section 771B as requiring that all benefits conferred on the prior stage agricultural product must be allocated to the primary next stage product when the statutory test is met,

^{72/} See 50 Fed. Reg. at 37,715.

^{73/} See 54 Fed. Reg. at 1404.

^{74/} See 51 Fed. Reg. at 10,044.

^{75/} Final Pork Determination, 54 Fed. Reg. at 30,787.

without regard to the portion of the subsidy that may in fact benefit other next-stage commercial products.

The statute must be construed, to the extent possible, so as to be consistent with U.S. countervailing duty law generally and with the GATT, which limits the imposition of such duties on a product to the amount of net subsidy received by the product. See 19 U.S.C. § 1671(a) (West Supp. 1990); GATT Art. VI(3);^{76/} GATT Subsidies Code Art. 4(2).^{77/} The Panel therefore concludes that it is unreasonable and not in accordance with law for Commerce to allocate the entire subsidy conferred on hogs to pork products when other commercial products resulting from hogs are also benefitting from the subsidy. If Commerce chooses to allocate the subsidy on a weight basis, as it has here, the subsidy should be allocated by weight over all of the commercial

^{76/} General Agreement on Tariffs and Trade, 1947, Art. VI(3), T.I.A.S. 1700. This provision of the GATT states, in relevant part:

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation

^{77/} General Agreement on Tariffs and Trade, 1979, Art. 4(2), 31 U.S.T. 523, T.I.A.S. No. 9619.

products resulting from the hog.^{78/} This issue is, accordingly, remanded for reconsideration in accordance with this Opinion.

VI. Tripartite Benefit Programs under the ASA

Commerce held that Canada's provision of funds under the Tripartite Benefits Program ("TBP" or "Tripartite Program"), a program added to the Canadian Agricultural Stabilization Act ("ASA") in 1985, conferred countervailable subsidies on the hog growing industry and thus (through section 771B) on the pork processing industry.^{79/} The Canadian federal government enacted the ASA in 1958 to provide for the price stabilization of certain agricultural commodities. In 1975, the government amended the ASA to revise the list of named commodities to include cattle, hogs, sheep, industrial milk and cream, corn, soybeans, and oats and barley grown outside the Canadian Wheat Board designated areas.^{80/} In 1985, in Live Swine I, petitioners challenged stabilization payments to hog producers under the ASA's "named commodities" provision.^{81/} Commerce determined that Canada limited benefits under the ASA to a specific enterprise or industry, or group thereof, in part because it singled out three

^{78/} We note that, if Commerce had determined to make the allocation on an ad valorem basis and if it were also determined that the value of the commercial by-products was de minimis, a case could be made for the reasoning that Commerce has sought to apply here. The weight proportion which has been ascribed to the commercial byproducts cannot be described as de minimis, however.

^{79/} Final Pork Determination, 54 Fed. Reg. at 30,776-78.

^{80/} See Final Pork Determination, 54 Fed. Reg. at 30,776.

^{81/} 50 Fed. Reg. 25,000-01.

types of "named" commodities.^{82/} Other natural or processed products had to be "designated" by the Governor in Council before they could receive benefits under the ASA.^{83/} The CIT affirmed Commerce's decision, holding:

[T]he ASA discriminates between commodities by providing pre-authorized, regular payments to producers of the named commodities, while offering unpredictable benefits to others who may apply for designation under the ASA. . . . The distinction drawn by Commerce between such benefits and those made available to producers of designated commodities is reasonable regardless of whether the Canadian government is guided by objective factors in selecting designated commodities under the ASA.^{84/}

Also in 1985, after Commerce had found ASA benefits specific and countervailable, Canada amended the ASA (by Bill C-25) to create the Tripartite Program. The Program authorizes the Minister of Agriculture, with the approval of the Governor in Council, to enter into tripartite agreements with the provinces and producers to provide price stabilization schemes for any natural or processed product of agriculture. Here, Commerce found that the TBP is expressly available to stabilize the price of any natural or processed product of agriculture, and held that the program was therefore not de jure specific.^{85/} Nevertheless, Commerce found the program de facto specific because only nine products received benefits during the first four years of the

^{82/} Id.

^{83/} Id.

^{84/} Alberta Pork Producers' Mktg. Bd., 669 F. Supp. at 451.

^{85/} Id. at 30,777.

program, because three products were either denied relief or sent back for more preparation, and because the lack of clear standards and uniform benefits indicated that discretion and favoritism were present.^{86/}

Tripartite agreements have been signed for the following nine commodities: (1) hogs; (2) cattle; (3) cows/calves; (4) lambs; (5) sugar beets; (6) apples; (7) white pea beans and other dry edible beans; (8) honey; and (9) yellow seeded onions.^{87/}

Producers of two other commodities -- sour cherries and corn -- requested agreements, but agreements have not been drawn "because of 'administrative difficulties' involving the valuation of land and other factors."^{88/} Producers of one other commodity -- asparagus -- requested a tripartite agreement and were not granted one at that time "because government officials deemed there was little need for an asparagus agreement due to the rising price of asparagus and the relatively small value of asparagus sales."^{89/}

Canada noted that, with respect to sour cherries and corn, "although no agreements have yet been drawn up, discussions are ongoing and agreements are still being contemplated."^{90/} With respect to asparagus, Canada asserted that due to a "rising

^{86/} Id. at 30,777-78.

^{87/} Final Pork Determination, 54 Fed. Reg. at 30,777.

^{88/} Id.

^{89/} Id.

^{90/} Brief of Canada at 44.

trend" in asparagus prices "negotiation of an asparagus support scheme assumed a lower priority than agreements for other commodities" but an asparagus agreement "is still under study."^{91/}

The verification indicated that Canadian cost of production models do not always reflect the experience of the relevant producer group, and that the support level has varied historically for the same product and may differ for different commodities.^{92/} Commerce argued that "the support level for hogs was raised from 93 percent to 95 percent" and that "the support level for apples and beef is only 85 percent."^{93/} However, government contributions under all Tripartite agreements are limited to a maximum of six percent of market returns. Thus, it may be that the relative payments drawn from stabilization funds across the commodities will tend to even out over time.^{94/} It seems that a lower support level does not necessarily lead to a lower payment level, because other elements of the Tripartite formula -- particularly cost, price and margin elements -- can offset the lower support level.^{95/}

Commerce stated that it was employing a three-prong test, under which the first prong was de jure limitation, the second

^{91/} Id. at 45.

^{92/} Final Pork Determination, 54 Fed. Reg. at 30,777.

^{93/} Id.

^{94/} See Brief of Canada at 50.

^{95/} See id. at 53-54.

was the number of enterprises which actually use the program, including examination of disproportionate or dominant users, and the third was the extent to and manner in which the government exercises discretion in making the program available.^{96/}

On this appeal, complainants attack Commerce's application of the second prong in two ways and also attack the relevance of the third prong. First, they argue that the number of industries being aided should be examined by reference to both the ASA program and the Tripartite Program. The latter aids only nine products, but the former aids over thirty. It is argued that Commerce unfairly and improperly changed the focus of its investigation after the preliminary ruling to focus only on the Tripartite Program.^{97/}

Complainants argue secondly that when a program is made available during its first four years to nine different products of quite various types from all regions, there is nothing to suggest the program is limited to any specific product, type or class of product or producer, region or specific group of products. Nor is it denied, they contend, that many more products may well be supported in future years.^{98/} The Department replies that a numerical test is appropriate,^{99/} and notes that courts have upheld findings of specificity when only a

^{96/} Id. at 30,777.

^{97/} Brief of Canada at 9-22.

^{98/} Id. at 26-33.

^{99/} Brief of Commerce at 63-67.

limited number of products are ultimately benefited, even though others might theoretically qualify for benefits.^{100/}

U.S. countervailing duty law has always applied only to benefits afforded to a "specific" industry or group of industries, with the Department and courts agreeing that the adjective "specific" applies both to the industry and the group.^{101/} Judges interpreting countervailing duty law have struggled continually with the problem of how to distinguish between a government program bestowed on a specific group of industries and one bestowed on industries generally.

Two types of cases have produced close questions. In the first type, a subsidized input is apparently generally available but is practically useful to only a few industries and is in fact used only by them. See, e.g., Cabot Corp. v. United States, 620 F. Supp. 722, 731-32 (Ct. Int'l Trade 1985), appeal dismissed, 788 F.2d 1359 (Fed. Cir. 1986) [hereinafter Cabot I] (carbon black in principle available to any industry, but in fact used only by rubber industry); Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453, 37,455 (Dept' Comm. 1986) (stumpage programs in fact used only by lumber, pulp and paper industry). In such cases, the rule that has emerged is that such subsidy

^{100/} Id.

^{101/} See discussion in Roses, Inc. v. United States, No. 84-5-00632, slip op. at 10-11 (Ct. Int'l Trade July 3, 1990).

programs are specific, potentially trade distorting and thus countervailable.

In the second type, a program which is apparently generally available and which would in fact be useful to all or most industries turns out in fact to be bestowed on far fewer industries than one would expect (e.g., seventy percent of all industrial loans go to one or two industries). In such cases, despite de jure general availability, de facto analysis of the law as administered has led to the conclusion that the subsidy is being bestowed on a specific, discrete group of industries. See, e.g., Saudi Iron and Steel Co. (Hadeed) v. United States, 675 F. Supp. 1362, 1367 (Ct. Int'l Trade 1987), appeal after remand, 686 F. Supp. 914 (Ct. Int'l Trade 1988) (over five year period, only three firms received "generally available" subsidized industrial project loans from the government).

The U.S. countervailing duty law was amended in 1988 to "codify" the holding in Cabot I and make clear that nominal general availability is not a complete defense in itself. Section 1312 of the Omnibus Trade and Competitiveness Act of 1988 amends section B of section 771(5) of the law, codified at 19 U.S.C. § 1677(5)(B), regarding domestic subsidies, stating:

[T]he administering authority, in each investigation, shall determine whether the bounty, grant, or subsidy in law or in fact is provided to a specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulation, program, or rule establishing a bounty, grant, or subsidy, of the benefits thereunder

is not a basis for determining that the bounty, grant, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof.

Thus, if factual investigation reveals that ostensibly generally available benefits are in fact being targeted or manipulated to aid a single industry or a discrete group of industries, Commerce is required to find specificity and countervail. The Conference Report, in referring to the House version of the 1988 amendment, notes that Commerce must determine whether the benefit "is in fact bestowed on a specific industry or group of industries or instead is bestowed on industries in general."^{102/}

Commerce itself has recognized that a program granting benefits to the entire agricultural sector in general is not countervailable on the grounds that it is provided to more than a specific enterprise or industry or group of enterprises or industries. Final Affirmative Countervailing Duty Determination: Miniature Carnations From Colombia, 52 Fed. Reg. 32,033, 32,037 (Dept' Comm. 1987). Programs bestowing benefits on a wide variety of agricultural products have been held to be non-specific and not countervailable, if there is no evidence of major exclusion or significant favoritism for particular products. See e.g., Final Negative Countervailing Duty

^{102/} H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 587, reprinted in 1988 U.S. Code Cong. & Admin. News 1547, 1620, cited in Roses, slip op. at 16 n.15.

Determination: Certain Fresh Cut Flowers From Kenya, 52 Fed. Reg. 9,522, 9,525 (Dept' Comm. 1987).

Despite continuing efforts of Commerce and the courts to explain and clarify this issue, however, the standards for finding de facto specificity remain underdeveloped, opaque, contradictory, elusive, and unsatisfying. There are numerous conundrums. Is a benefit generally available if it relates to a rare event (flood, disaster, glut)? Is a benefit program generally available if most industries prefer a different but similar benefit program? Does a government forfeit its de facto general availability defense if it denies eligibility to some applicants? If it denies eligibility inconsistently? If it denies eligibility wrongly? If an aided group of industries is less than all industries but is randomly constituted, should the benefit be countervailed because not everyone has received benefits (yet)? Most of these difficult issues are raised by this case. Though each raises a close question, we conclude that each must usually be answered in the negative, at least on facts like those presented here.

The wording and purpose of the 1988 "de facto specific subsidy" amendment convinces us that proof that benefits have been specifically bestowed on the relevant product, or a discrete and definable group of products, is required, and is complainant's (or Commerce's) burden once de jure general availability is conceded. It thus follows that specificity is not demonstrated simply because not all industries applied for

aid or received aid, or because some decisions regarding eligibility appear arbitrary or random. The countervailing duty law is not intended to be triggered by how well or how transparently governments administer their de jure generally available benefit programs. The presumption in international trade generally, and in regard to the FTA particularly, is that imports should not be burdened with countervailing duties unless there is convincing circumstantial or actual evidence that the exporting government limited the benefits it was bestowing to a single industry or a small or definable group of industries.

Complainants first raise the issue that they were unfairly prejudiced because Commerce limited the latter part of its investigation to examining the de facto scope of the TBP without reference to the thirty or so agricultural industries already covered by the ASA. In Live Swine I, Commerce ruled that ASA benefits were not generally available because non-designated commodities were not as clearly or certainly covered as were designated commodities.^{103/} It is reasonable to assume that if Canada had amended the ASA to remove the disadvantages to non-designated products, such amendment would have removed the countervailing duty problem. Since U.S. law looks to the substance of coverage, not to mere form, it is arguably irrelevant that Canada chose to cover thirty or more agricultural products by enacting a second program rather than by widening the

^{103/} See Live Swine I, 50 Fed. Reg. at 25,100-01, aff'd sub nom. Alberta Pork Producers' Mktg. Bd., 699 F. Supp. at 450-51.

first one. Still, we are not prepared to conclude that Commerce prejudiced Canada's defense by limiting the case to examination of the TBP only, since it clearly is a separate and distinct program and since Commerce has considerable discretion in structuring its analysis. However, on remand, the coverage and comparability of all ASA benefit programs should be considered in light of the standards set forth in this opinion regarding whether the number of beneficiaries is disproportionately small.

The Commerce ruling fails to explain why aid to nine products is surprisingly or anomalously small, or what the nine industries have in common. The Tripartite Program is not bestowed, but must be requested. Canada may have little control over the number of applicants. To participate, producers must desire price support badly enough to put up a third of the money themselves. Commerce does not suggest that the program was designed or administered to discourage applications, nor does it estimate the number of possible applicants or predict how many industries should reasonably have been expected to apply. Certainly, the availability of ASA benefits or supply management programs as alternatives are relevant at least as providing an explanation of why many producers do not apply for the Tripartite Program. Moreover, it may well be that not all agricultural products fluctuate sufficiently in price to justify the effort of creating a fund and applying for federal and provincial assistance. Conceivably, product glut occurs in only a small

percentage of agricultural products over any five year period, but in a higher percentage over a decade or two decades.

We conclude that Commerce, to achieve the true purpose of the 1988 amendment, must formulate a test to determine whether the number of products or enterprises aided is disproportionately small in terms of the predictable number that would be expected to apply in light of the criteria for aid, the availability of alternative types of aid and the relevant economic conditions of the covered industries. It is conceded here that there is no designation or limitation in the Tripartite Program as to type of product. Thus, there must be convincing circumstantial evidence that the program in operation has been targeted at hogs, or at discrete, i.e., non-random, classes of products, such as those likely to be exported, those from a certain region, etc. "[S]pecificity of some type is required."^{104/} We remand so that Commerce can formulate such a test and then redetermine whether the nine products aided here are in that sense too few.

In regard to the third prong, nature and extent of discretion, complainants allege that the test is inappropriate and that Commerce's finding of discretionary application in fact is not supported by substantial evidence. Commerce makes our task difficult by failing to explicate clearly what type of discretion, or exercise of discretion, it finds fatal to the defense of general availability. If a government may legally grant loans to all industries which fall within a general

^{104/} Roses, slip op. at 11 (citation omitted).

criterion, it must be able to have discretion to determine whether applicants do or do not meet the statutory standard. Since actual results are the key issue, the mere existence of discretion cannot be crucial in itself.

Here, in regard to a program expressly designed to stabilize product prices, Canadian officials apparently determined that the price of asparagus was so high it needed no stabilization, and that the applications of the sour cherry and corn producers did not adequately explain their price problems and how to solve them. Unless Commerce assumed that an agricultural program with any standard of eligibility is de jure specific and countervailable (which they expressly did not do), it is hard to understand the legal significance of the rejections or postponements discussed in this case. There is no contention that either the rejections or the acceptances reflect any pattern of preference for a discrete group or any secret agenda to make the program more limited than its legislative purpose would imply.

There is lastly a contention that Canada favored hogs by allowing them a ninety-five percent support level while beef, for instance, had an eighty-five level.^{105/} Certain complainants reply that the same formula -- six percent of industry revenues -- determines the maximum support contribution from government whatever the support level.^{106/} They further explain that the

^{105/} Final Pork Determination, 54 Fed. Reg. at 30,777.

^{106/} Brief of Canada at 50.

support percentage is applied to average gross margins, so that an eighty-five factor applied to a higher gross margin for beef would produce approximately the same level of support infusion as a ninety-five factor applied to a lower-average margin for hogs.^{107/} The Commerce Department did not explain why this explanation is inaccurate. We conclude that a nation which is allowed to aid all or most agricultural industries is permitted to employ varying formulas related to differences in price-cost structures, growing cycles, etc., so long as basic parity in government support is not altered and disproportionate real benefit is not shown. We instruct Commerce on remand to determine whether the actual level of benefits received by the hog industry, or a definable group of industries, was disproportionately higher than for other agricultural industries for reasons not explicable by variations in the conditions, economic or otherwise, of those industries.^{108/}

VII. Feed Freight Assistance Program

The Feed Freight Assistance Program ("FFA"), established by the federal Livestock Feed Assistance Act, is designed to ensure the availability of feed grain to meet the needs of livestock feeders, the availability of adequate storage space in eastern Canada, and reasonable stability in the price of feed grain in eastern Canada, British Columbia, the Yukon and the Northwest

^{107/} Id. at 51-54.

^{108/} Additional views on this issue are being filed by Panel Member Mark R. Joelson.

Territories. Only users of feed grain, i.e. those who buy grain to feed to livestock, are eligible for assistance. Eligibility is restricted to feed grain millers in designated geographic areas and to livestock owners in specific parts of the country. FFA benefits may be claimed if the grain is transported outside the farm where it is grown and moved through commercial channels. (PR. 33, Tab 1 at 21-24).

Commerce determined that the FFA conferred a countervailable benefit on the basis that Canada limited the FFA to feed grain users in designated areas whose grain is fed to livestock and to livestock owners in certain areas of Canada.^{109/} Of the provinces examined in this investigation, it found that livestock owners in the provinces of Ontario and Québec only are eligible for assistance under the FFA. Having determined that no benefits were provided to hog producers in Ontario, it only considered assistance provided to producers in Québec. Commerce determined that 2.7 percent of all payments under this program went to livestock owners in Québec and, on the basis that fifty percent of feed grains were consumed by hogs, calculated 1.35 percent (fifty percent of 2.7 percent) of total payments as the benefit to hog producers.^{110/}

Complainants dispute this determination on the basis that benefits under the FFA are paid to producers of livestock in their capacity as grain users rather than as growers of hogs or

^{109/} Final Pork Determination, 54 Fed. Reg. at 30,778.

^{110/} Id.

other livestock. In addition, complainants argue that, if any benefit does flow to hog producers, it is received as a benefit which goes to an input in the hog production process and the refusal by Commerce to conduct an upstream subsidy investigation is not supported by substantial evidence on the record, nor is it in accordance with law. Complainants also argue that the calculation by Commerce of benefits to hog producers in Québec is unsupported by substantial evidence on the record and is not in accordance with law.^{111/}

The Panel notes that the FFA is entitled "An Act to provide assistance to livestock feeders in eastern Canada and British Columbia."^{112/} However, complainants maintain that the benefits received by livestock producers are made to them in their capacity as grain users, not as livestock producers. In considering this matter, the Panel observes that there is evidence on the record that feed constitutes a significant portion of the cost of production of hogs.^{113/} The benefits under the FFA received by a hog producer, related to the purchase of grain, result in a reduction in the cost of production of the hogs. In our view, it is of no relevance whether these monies were received by hog producers technically in their capacity as

^{111/} Brief of the Canadian Pork Council at 42-54, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06) [hereinafter Brief of CPC].

^{112/} Public Record 36, attachment 23 (emphasis added).

^{113/} Public Record 36 (Canada), attachment 18 at 3A (National Figures).

such, as opposed to any other capacity, if the payments received benefited the production of hogs, including a reduction in the cost of production of the hogs. On this record, Commerce could reasonably conclude that benefits under the FFA decreased a hog producer's cost of production. See Saudi Iron and Steel v. United States, 686 F. Supp. 914, 916-18 (Ct. Int'l Trade 1988) (transfer of steel rolling company to foreign steel company indirectly benefited foreign steel company's production of carbon steel wire rod by allowing for reduction of production costs through increased billet production).

Complainants also argue that, since FFA payments are tied to grain production, not hog production, Commerce should have conducted an upstream subsidy investigation into feed grains as an input before assessing countervailing duties. In the Panel's view, Commerce having found the subsidy received by hog producers to be a decrease in their cost of production, the applicable law did not require the Department to conduct an upstream subsidy investigation under section 771A, which would, inter alia, entail the making of a "competitive benefit" determination.

Finally, complainants argue that the calculation by Commerce of benefits received by hog producers under the FFA was not supported by substantial evidence on the record. Commerce states that it was unable to verify how many livestock owners in Québec who received benefits were hog producers, and it relied on evidence that hogs account for about fifty percent of total feed consumption in western and eastern Canada as best information

available ("BIA") to calculate the amount of benefits paid to hog producers under the FFA.^{114/} Complainants respond that the fifty percent figure is not reasonable or accurate, and that Commerce failed to ask for information about the farms in Québec receiving FFA benefits.^{115/}

The issue raised by complainants relates to the information requested and received by Commerce concerning hog producers in Québec who received benefits under FFA. Based on its review of the record, the Panel concludes that the questions raised by Commerce were reasonable in the circumstances and relevant to its investigation. The responses to these questions were, in our view, incomplete in that they did not fully supply the information requested. For example, replies to questions and supplementary questions from Commerce in this area consisted of estimates, most of which were not documented. Public Record 33 at 24; Public Record 43 (FFA Section); Public Record 55 (Outline) at 6, 2.g. Further, a review of the record discloses evidence that some of the farmers in Québec who received benefits under FFA raised swine while none in Ontario did. Public Record 85 at 17.

Under U.S. law, where Commerce is "unable to verify the accuracy of the information submitted" or a party under investigation "refuses or is unable to produce information

^{114/} Brief of Commerce at 107-08; Final Pork Determination, 54 Fed. Reg. at 30,778.

^{115/} Reply Brief of CPC at 37-39.

requested in a timely manner and in the form required" the use of BIA is authorized. 19 U.S.C. § 1677e(b), (c) (West Supp. 1990); 19 C.F.R. § 355.37 (1990). However, the right of Commerce to apply the BIA rule is subject to some limits. See Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1572 (Fed. Cir. 1990). The use by Commerce of BIA has been rejected where the Department selected information that was not "reasonable and justified" under the circumstances. See N.A.R., S.p.A. v. United States, No. 88-06-0041, slip op. at 18 (Ct. Int'l Trade June 26, 1990).

In this investigation, Commerce requested specifics concerning the estimate made as to the percentage of FFA payments benefiting hog producers in Québec. The response was that some farmers in Québec raised swine while none do in Ontario. Public Record 85 at 17. In our view, this response is incomplete and accordingly the use by Commerce of the BIA rule is in accordance with U.S. law and is supported by substantial evidence on the record. See Algoma Steel Corp. v. United States, USA-89-1904-08, slip op. at 19 (BIA used after information could not be verified).

Complainants further argue that the record evidence does not support Commerce's conclusion that fifty percent of feed grains receiving FFA benefits were consumed by hogs. In this regard, the role of the Panel is not to decide whether Commerce has chosen and used the best of all available evidence, but rather to consider whether the information used by Commerce is supported by

substantial information on the record. N.A.R., S.p.A., slip op. at 13. In our view, there is evidence on the record that hogs account for approximately fifty percent of total feed consumption in western and eastern Canada (Public Record 85 at 15; Public Record 75 (Attachment B, Table 2.d)).^{116/} The information which Commerce may use as BIA includes "all information that is accessible or may be obtained, whatever its source." Timken Co. v. United States, 673 F. Supp. 495, 500 (Ct. Int'l Trade 1987) (citing Budd Co. Railway Div. v. United States, 507 F. Supp. 997, 1003-04 (Ct. Int'l Trade 1980)). Thus, the information relied upon by Commerce as BIA is supported by substantial evidence on the record.

The Panel therefore affirms the countervailability of the Federal Feed Freight Assistance Program.

VIII. Western Diversification Program

Commerce determined that the Canadian Government's Western Diversification Program was countervailable because it was limited to Western Canada,^{117/} and this determination was challenged before this Panel by complainants.^{118/} Commerce, having re-examined the record, has requested that this Panel remand the determination that Canada limited benefits under this program because substantial evidence does not exist on the record

^{116/} This statement was confirmed by a verification document (SCG-3 at 3).

^{117/} Final Pork Determination, 54 Fed. Reg. at 30,778.

^{118/} Brief of Canada at 100-02.

to support this finding.^{119/} Canada responded that, given this concession, the Panel's remand should instruct the Department to find that the Western Diversification Program does not confer a countervailable subsidy to the product under investigation.^{120/} At the hearing, Commerce took the position that it had not yet decided what to do on remand. Since Commerce has acknowledged that any action which it takes will be subject to review by this Panel,^{121/} we remand as requested by Commerce.

IX. Canada/Québec Subsidiary Agreement on Agri-Food Development

Commerce determined that Canada limited the Canada/Québec Subsidiary Agreement on Agri-Food Development ("Agri-Food"), subprogram 2.A., to a specific enterprise or industry, or group thereof.^{122/} The CPC challenged this determination.^{123/} In its brief to this Panel, Commerce, having re-examined the record, requested that the Panel remand the determination because substantial evidence does not exist on the record to support this finding.^{124/} In response, the CPC requested that, given this concession, the Panel should remand the determination to the

^{119/} Brief of Commerce at 145.

^{120/} Reply Brief of Canada at 45.

^{121/} Hearing Tr. at 296.

^{122/} Final Pork Determination, 54 Fed. Reg. at 30,779.

^{123/} Brief of CPC at 54-57.

^{124/} Brief of Commerce at 144.

Department with instructions to reverse.^{125/} At the hearing, Commerce took the position that it had not yet decided what it would do regarding Agri-Food on remand.^{126/} Again, since Commerce has acknowledged that its further action will be subject to review by this Panel, this determination is remanded to Commerce.

X. Alberta Crow Benefit Offset Program

Commerce determined that the Alberta Crow Benefit Offset Program ("CBOP") is countervailable because it is limited to feed grain users and therefore is limited to a specific enterprise or industry, or group of enterprises or industries.^{127/}

Complainants dispute this finding on the basis that it is not supported by substantial evidence on the record and is otherwise not in accordance with law. In addition, complainants dispute the calculation by Commerce of the amount of the subsidy provided to fresh, chilled, and frozen pork.^{128/}

The CBOP was designed to counteract the market distortions in feed grain prices created by the federal government's policy of subsidizing railway transportation costs for grain.^{129/}

^{125/} Reply Brief of CPC at 40-41.

^{126/} Hearing Tr. at 296.

^{127/} 54 Fed. Reg. 30,779.

^{128/} Brief of the Government of the Province of Alberta at 27-43, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06) [hereinafter Brief of Alberta].

^{129/} Public Record 35 at 23.

Assistance is provided with respect to feed grain produced in Alberta, to feed grain produced outside Alberta but sold in Alberta, and to feed grain produced in Alberta to be fed to livestock on the same farm. Certificates are provided by the government of Alberta to registered feed grain users, such as hog producers, and to registered feed grain merchants, which can be used for partial payments for grains purchased from grain producers. Feed grain producers who feed their own grain to their own livestock may submit a claim directly to the government for payment.^{130/}

Commerce found that hog producers receive benefits in one of three ways: those producers who do not grow their own feed grain receive certificates which are used to cover part of the cost of purchasing grain; those producers who grow all of their own grain submit a claim to the government of Alberta for direct payment; and hog producers who grow part of their own grain but who also purchase grain receive both certificates and direct payments.^{131/}

Complainants argue that the CBOP is not countervailable because it does not provide an unfair competitive advantage to producers -- it merely offsets hog producers' increased production costs, resulting from artificially high feed grain prices created by federal Crow Benefit payments. Alberta contends that, in the past, Commerce has found such offsetting programs not countervailable when there is no gross subsidy to

^{130/} Public Record 35 at 23-26; 54 Fed. Reg. at 30,779.

^{131/} Final Pork Determination, 54 Fed. Reg. at 30,779.

the producer.^{132/} In support of their position, complainants rely on Commerce's decisions in Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 39,345 (Dep't Comm. 1982) (final determination), and Certain Steel Products from Belgium, 47 Fed. Reg. 39,304 (Dep't Comm. 1982) (final determination), as examples of cases involving offset programs which were found not countervailable. In addition, complainants claim that, if there is any benefit to hog producers, it is a benefit which goes to an input, and therefore Commerce should have conducted an upstream subsidy analysis.

The applicable statute specifies only certain offsets which may be subtracted from a gross subsidy.^{133/} Upon review of the CBOP, we find that its benefits do not fall under one of these provisions. Nor do we believe that an exception to the offset rule must be created here by Commerce. Neither of the precedents set in Belgium Steel or German Steel apply in this case; nor did

^{132/} Brief of Alberta at 31-38.

^{133/} Section 771(6) of the Tariff Act, 19 U.S.C. § 1677(6) (1980 & West Supp. 1990), states that Commerce may subtract from the gross subsidy the following offsets:

- (a) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy,
- (b) any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and
- (c) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

Commerce find an offset in either of these cases, because it never found a relevant subsidy.

In Belgium Steel, the Belgian government, in restructuring its steel industry, funded certain costs which it had imposed on Belgian steel companies by mandating early retirement of certain workers. Commerce determined in that case that this assistance was not countervailable because it benefited only the workers, not the steel companies. In German Steel, restrictions by the German government on the import of coal into Germany resulted in upward pressure on the price of coal in Germany. To offset this increase, the government subsidized the production of coal in Germany. The coal subsidies and coal import restrictions were found by Commerce to be a comprehensive program to assist the German coal industry and, accordingly, the steel industry did not receive benefits from subsidies to the German coal industry. The situation in the present case is different in that there is evidence on the record that hog producers are among the recipients of payments under the CBOP and thus do receive a benefit. Public Record 41 (Alberta) at 2-16. Moreover, the present case differs in that the payments under the CBOP are not part of a comprehensive program relating to the input product, as was the case in German Steel, but rather are received directly by the hog producers. The Panel is therefore of the view that Commerce was not required to conduct an upstream analysis and

could reasonably find that compensation under the CBOP confers a countervailable benefit on Alberta hog producers.^{134/}

Next, complainants argue that the calculation by Commerce of benefits to hog producers in Alberta is not in accordance with U.S. law and is unsupported by substantial evidence on the record.^{135/} They dispute the use by Commerce of data in a publication entitled Agriculture in Alberta,^{136/} as BIA, as the basis for the calculation of the benefits received by hog producers in Alberta from the CBOP.^{137/} During its investigation, Commerce sought evidence as to the amount of payments made under the CBOP with respect to feed grain which was used by hog producers. It appears clear from the record that payments under the Program were on account of all feed grains, including barley, consumed in Alberta by a variety of animals, including hogs.^{138/} In reply to questions from Commerce, Alberta provided information regarding the value of hog production in Alberta as compared to the value of all livestock produced in Alberta. Based on such information, estimates were made by Alberta and submitted to Commerce as to the amount of payments under the CBOP for grain consumed by hogs.^{139/}

^{134/} Brief of Alberta at 31-38.

^{135/} Brief of Alberta at 27-34.

^{136/} Public Verification Exhibits, Alberta-8 at 25.

^{137/} Id. at 38-43.

^{138/} Public Record 35 at 25-26.

^{139/} Public Record 41 (Alberta) at 13-16.

In its determination, Commerce cited the lack of precise data on hog consumption of feed grain and used data published in Agriculture in Alberta, as BIA, which indicate that hogs consumed fifteen percent of the province's barley production and that barley is the primary grain fed to hogs.^{140/}

With respect to the issues raised by complainants, the role of the Panel is to consider whether the use by Commerce of the BIA rule was in accordance with U.S. law and, if so, whether its findings are supported by substantial evidence on the record.

In this case, Commerce requested information as to the amount of payments made under the CBOP to hog producers in Alberta. Alberta was unable to provide precise figures in response to this request, but did provide two estimates by way of response. Estimates based on one methodology indicated that 11.4 percent of payments under the CBOP were made for grain that may ultimately have been consumed by hogs^{141/} and those based on another methodology indicated that 5.48 percent of the payments were made for grain that may ultimately have been consumed by hogs.^{142/} Commerce rejected these estimates because neither indicated the actual amount of benefits paid to hog producers that used feed.^{143/}

^{140/} Final Pork Determination, 54 Fed. Reg. at 30,779.

^{141/} Public Record 75, Attachment F at 5.

^{142/} Id. at 6.

^{143/} Brief of Commerce at 86.

In its determination, Commerce instead chose a figure in the publication Agriculture in Alberta as the basis for its calculation. In our view, Commerce was acting within its authority in so doing. As stated previously, Commerce may invoke the BIA rule where a party under investigation is unable to produce the information in the form required and is unable to verify the information supplied. See Algoma Steel Corp., slip op. at 9-20.

In the present case, the information requested by Commerce was relevant to its investigation as to the amount of payments under the CBOP to hog producers in Alberta. Further, the request for such information was, in our view, reasonable in all the circumstances of the investigation. Accordingly, Commerce was entitled, under the BIA rule, to consider the figure in Agriculture in Alberta as evidence in arriving at its decision.

The Panel has also to consider whether the conclusions arrived at by Commerce are supported by substantial evidence on the record. The issue raised by complainants relates to the use by Commerce of the figure of fifteen percent in its calculation of the benefits received by hog producers under the CBOP. After consideration, the Panel concludes that the determination by Commerce that fifteen percent of the total benefits paid to feed grain users under the CBOP should be allocated to hog producers is not supported by the evidence on the record. The evidence cited by Commerce in this regard, being the statement in Agriculture in Alberta as a caption to a picture, indicates only

that fifteen percent of the barley production in Alberta is consumed by hogs. However, this does not support the conclusion that fifteen percent of all grain production in Alberta is consumed by hogs. Moreover, the discussion of swine on the same page states that the hog industry consumed ten percent of the province's barley production. Public Verification Exhibits, Alberta-8 at 25. Indeed, given the evidence on the record that other feed grains are produced in Alberta and are also the subject of payments under the CBOP,^{144/} it would appear that the percentage to be allocated must be less than fifteen percent.

Accordingly, the Panel remands this determination by Commerce with respect to the CBOP for reconsideration and determination based on the evidence on the record.

XI. Alberta Department of Economic Development and Trade Act

The Alberta Department of Economic Development and Trade Act ("EDTA") fosters economic development in the province of Alberta by offering assistance in the form of grants, loans, or loan guarantees. Two Alberta hog producers, Gainers Inc. and Fletcher's Fine Foods, received benefits under this program during the period of investigation. Commerce found the terms of the loans and loan guarantees provided to be inconsistent with commercial considerations.^{145/} In light of Alberta's failure to produce certain information, Commerce determined that it could

^{144/} Public Record 35 at 25-26.

^{145/} Final Pork Determination, 54 Fed. Reg. 30,779-80.

not accept at face value the Province's contention that its economic development loans were generally available. It determined, on the basis of BIA, that the EDTA is limited to a specific enterprise or industry, or group of enterprises or industries. Alberta challenges this determination as unsupported by substantial evidence on the record and otherwise not in accordance with law.

In its determination Commerce reasoned as follows:

During verification, we found no standard criteria for either the approval or rejection of applicants under this program. We were unable to review applications of successful and rejected companies under this program. We were also unable to determine why certain companies were approved for either a loan or a loan guarantee, including both pork packers under investigation in Alberta. Provincial officials were unable to provide us with a list of rejected companies. They were also unable to determine the number of companies that have applied for benefits under this program. In addition, we noted that there was no formal or standard application process.^{146/}

In making this determination, Commerce also observed that Gainers received about seventy-five percent of the loan amounts granted since the program began in 1986 and that Alberta provided only a limited number of loan guarantees each year.^{147/}

Alberta claims that it provided the Department with extensive evidence showing that assistance under the EDTA is both de jure and de facto generally available to and used by a wide

^{146/} Id.

^{147/} Id. at 30,780.

range of applicants. It explains that it could not disclose memoranda prepared in connection with the province's evaluation of applications because of provincial rules prohibiting government employees from disclosing confidential cabinet documents.^{148/} Alberta maintains that Commerce was not entitled to invoke the BIA rule because the additional information which it requested was not necessary to an adequate investigation of de facto specificity.^{149/}

Commerce does not find that the EDTA is de jure specific.^{150/} As to the program's de facto availability, Alberta has shown that the benefits have been extended to a variety of enterprises and industries. It is undisputed, however, that Alberta was unable to produce records showing whether there were applicants who did not receive benefits and unwilling to reveal records showing the grounds for granting or denying loans under the program.^{151/} Commerce is expressly authorized by 19 U.S.C. § 1677e to use BIA if it is "is unable to verify the accuracy of the information submitted," or if a party in the proceeding "refuses or is unable to produce information requested in a

^{148/} Brief of Alberta at 7.

^{149/} Id. at 20.

^{150/} Final Pork Determination, 54 Fed. Reg. at 30,779-80.

^{151/} At the hearing, counsel for Alberta indicated that documents stating why applicants were approved or rejected were cabinet confidential, and that the province did not keep records of applications or rejections. Hearing Tr. 102-04.

timely manner and in the form required, or otherwise significantly impedes an investigation."^{152/}

Decisions of other panels and of the U.S. courts confirm Commerce's authority to use BIA in cases where Commerce was "unable to verify the accuracy of the information submitted" pursuant to 19 U.S.C. § 1677e. See e.g., Algoma Steel Corp., Ltd. v. United States, USA 89-1904-08, slip op. at 8-20 (Aug. 30, 1990); Ceramica Regiomontana S.A. v. United States, 636 F. Supp. 961, 969 (Ct. Int'l Trade 1986). Panels, like U.S. courts, will not substitute their notions of proof for the verification carried on by Commerce. Agrexco, Agr. Export Co., Ltd. v. United States, 604 F. Supp. 1238, 1244 (Ct. Int'l Trade 1985).

We recognize, however, that Commerce's rejection of information submitted by a party and use instead of BIA must not be arbitrary or unreasonable. For instance, in Olympic Adhesives v. United States, 899 F.2d 1565, 1574 (Fed. Cir. 1990), the U.S. Court of Appeals for the Federal Circuit held that Commerce may not resort to the use of BIA "in circumstances where a questionnaire is sent and completely answered." The court noted that section 1677e(c) "clearly requires noncompliance with an information request before resort to the best information rule is justified, whether due to refusal or mere inability."^{153/} See also N.A.R., S.p.A. v. United States, CIT No. 88-06-00401, slip op. at 15-18 (Ct. Int'l Trade, June 26, 1990) (Commerce's use

^{152/} 19 U.S.C. § 1677e(b) and (c) (1988).

^{153/} Id. at 1574.

for BIA purposes of a third party's cost data in calculating respondent's costs may be unreasonable if those costs are based on a higher-cost production process).

Alberta asserts that, under the holding of Olympic Adhesives, supra, the use by Commerce of the BIA in this situation is unduly punitive and unreasonable.^{154/} As noted, in Olympic Adhesives, the Court of Appeals for the Federal Circuit held that Commerce may not wield BIA as a club over respondents who have fully answered the questions posed. 899 F.2d at 1572. The court also pointed out, however, that Commerce "cannot be left merely to the largesse of the parties at their discretion to supply [it] with information" and that "if the responses provided to an information request are only partially complete in that not all questions requiring a response are answered or answers to questions do not fully or accurately supply the information requested, partial completeness under section 1677e(b) may justify resort to the best information rule." Id. at 1571-72.

Alberta is, of course, entitled to retain no records of applications or rejections under the EDTA program. It is certainly free to keep any of its files confidential. But Alberta's rights in these regards are wholly separate matters from the legal consequences arising under U.S. trade law from the province's refusal or inability to furnish to Commerce the needed information. Without information concerning any rejected applications or concerning the reasons which led Alberta to grant

^{154/} Reply Brief of Alberta at 8.

benefits to the successful applicants, Commerce could not reasonably determine whether limitations or favoritism had vitiated the de facto availability of this program. The information before Commerce indicated that significant benefits were being given to hog producers under the EDTA. We cannot say that Commerce exceeded its discretion in concluding, on the basis of BIA, that the missing evidence might have shown these to be specific benefits, or otherwise indicated the less than general availability of the program. Accordingly, we sustain Commerce's determination as to the EDTA.

XII. Québec Farm Income Stabilization Insurance Program

In its final determination, Commerce concluded that Québec's Farm Income Stabilization Insurance Program ("FISI") conferred countervailable subsidies on fresh, chilled, and frozen pork. FISI guarantees participating agricultural producers in Québec a positive net income.^{155/} The Regie des Assurances Agricoles du Québec ("Regie") administers the program by stabilizing the income of producers. The Regie calculates a stabilized net annual income. When the annual average income for growers sinks below the stabilized net annual income, the Regie makes a stabilization payment to the participants at the end of the program year. The payment differs depending on the economy. Commerce found that FISI is specific and thus countervailable because 1) it is limited to only eleven commodities; 2) several

^{155/} Final Pork Determination, 54 Fed. Reg. 30,781.

commodities are excluded from FIS I benefits; and 3) there are no established criteria for providing FIS I benefits to additional products.^{156/}

There are two issues before this Panel with regard to the Québec appeal. The first issue concerns whether Québec is precluded from contesting Commerce's determination on the FIS I before this Panel because it did not exhaust its administrative remedies. Commerce claims that, since Québec did not challenge Commerce's preliminary determination that FIS I is specific,^{157/} Québec may not raise this issue before this Panel.^{158/} The second issue concerns the substantive question as to whether FIS I is specific and therefore countervailable. In making its determination below, Commerce used the same three-prong test that it applied when considering the countervailability of the Tripartite Benefits Program of the Agricultural Stabilization Act, the Alberta Department of Economic Development and Trade Act, and the Alberta Crow Benefit Offset Program.^{159/}

A. Exhaustion of Administrative Remedies

The exhaustion of administrative remedies doctrine has been previously considered by a binational panel in Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada,

^{156/} Id.

^{157/} Preliminary Pork Determination, supra note 12.

^{158/} Brief of Commerce at 127-28.

^{159/} See Final Pork Determination, supra at note 1.

USA-89-1904-03, slip op. at 4-6 (Jan. 24, 1990) [hereinafter Paving Equipment]. Additionally, this issue has been considered in other appeals of Commerce's determinations by the CIT.

While the Panel in Paving Equipment determined that the administrative remedies had not been exhausted and, therefore, the relevant issues were not reviewable, the situation is different in the instant case. The courts have enumerated several exceptions to the exhaustion doctrine. The doctrine does not apply if the agency has insufficient power to grant the remedy; if the plaintiff would be irreparably harmed by the delay; if resorting to agency action would be futile; or if the plaintiff is attacking the constitutionality of the entire statutory scheme. See Alhambra Foundry Co. v. United States, 685 F. Supp. 1252, 1256 (Ct. Int'l Trade 1988); Hercules, Inc. v. United States, 673 F. Supp. 474, 476 (Ct. Int'l Trade 1987). See also McKart v. United States, 395 U.S. 185, 193 (1969). Québec argues that exhaustion of administrative remedies is discretionary if the party participated in the administrative proceeding.^{160/} In this regard, Québec is not correct. While participation of an interested party is a legal predicate to filing an appeal,^{161/} mere participation in the administrative procedure is not, in itself, sufficient to appeal any issue which might arise from the proceeding. If a party does not raise an issue during the course of the proceeding, there must exist an

^{160/} Reply Brief of Québec at 20-22.

^{161/} 19 U.S.C. § 1516a(g)(8) (West Supp. 1990).

exception to the exhaustion doctrine in order for it to raise such an issue on appeal.

In Paving Equipment, the plaintiff attempted to raise an issue on appeal through citation of an opinion which dealt, among several other issues, with the one plaintiff raised. The panel found that the issue had not been raised below and that no exception to the doctrine of exhaustion of administrative remedies applied. Such is not the case here. In the current review, Québec did participate in the administrative proceeding. As an "interested party," Québec answered Commerce questionnaires and participated fully as a "party to the proceeding."^{162/} Québec's failure to specifically raise FISI in the course of the review is not critical to this case.^{163/} After review of the record and arguments, we find that, in this particular instance, raising the issue below would have been futile.

FISI was fully considered in Live Swine I.^{164/} Commerce considered all arguments and, accordingly, made its determination. In fact, one of the Department's memoranda analyzing these issues is attached to a Commerce memorandum in the record of the

^{162/} See 19 C.F.R. § 355.2(i), (l) (1990).

^{163/} As noted during the oral argument, the panel does not condone the last minute presentation of additional information and argument to support Québec's position. Hearing Tr. 119-22, 138. The information submitted at that time, however, had no influence on this decision.

^{164/} 50 Fed. Reg. 25,097.

instant case.^{165/} Accordingly, because Commerce has specifically addressed the same argument, i.e., that FISI is not specific, and is thus aware of the argument, we find it highly unlikely that Commerce would reverse its earlier decision in the instant proceeding. For Québec to have raised the issue again below would have been futile. To have required exhaustion in this case, would have been an insistence on a useless formality, the outcome of which was predetermined and which would have done nothing but forced complainants and Commerce to have expended more time and resources in the prosecution of this investigation than was necessary. In particular, because of the history of this issue at the Department, Commerce has not been prejudiced by Québec's appearance in this review. Accordingly, we find that in this limited instance, there are exceptions to the exhaustion doctrine which are applicable. Québec, therefore, has the right to raise this issue in the current review.

B. FISI

With regard to the substantive determination of Commerce concerning FIS I, we concur with the Department that FIS I is not de jure specific.^{166/} The issue before the panel is thus whether the program is de facto specific. As set forth in the decision pertaining to the Tripartite Program, supra, Commerce's

^{165/} Commerce Memorandum to the File from Jennifer Owen, Case Analyst "re: including previous determinations as part of the record in our investigation involving fresh, chilled and frozen pork from Canada (C-1220807)." P.R. 18.

^{166/} Brief of Commerce at 130, n.80.

determination is not in accordance with law or based on substantial evidence in the record, because we believe Commerce has not applied a proper test of specificity.

As with the other Canadian programs we have specified, Commerce simply has not provided adequate justification for its determination that the FISI program is specific and, therefore, countervailable. For instance, there is no explanation of why, if seventy-five percent of Québec's insurable agricultural products (not counting three commodities) are subject to FISI, the program is specific. Likewise, there is no explanation of why the fact that eggs, dairy products and poultry do not receive FISI benefits, because they are covered by other programs, leads to the conclusion that FISI is specific.

In short, there is no substantial evidence on the record, as articulated by Commerce, that would support a conclusion that FISI was designed or administered to discourage applications or prevent the addition of other products as they apply. In Alberta Pork, 669 F. Supp. 445, the CIT relied on the fact that it was incumbent on the provincial government to pass specific regulations with respect to particular commodities in order for producers of such commodities to become eligible to receive benefits. While we are guided by CIT decisions, we are not bound by them. On the contrary, we believe the appropriate focus is not on requiring foreign governments to implement specific procedures to insure their programs are not countervailable by the United States, but rather on Commerce to investigate and

enunciate clear standards and explanations as to why a particular program is or is not being administered in a manner which will or will not make it de facto countervailable. Commerce has not done so here. Accordingly, this determination is being remanded for such a reconsideration.^{167/}

^{167/} We believe that Commerce reasonably could have performed its specificity analysis at the level of FISSI benefits as opposed to broader agricultural benefits, including crop insurance and/or the supply management program. Therefore, in reevaluating this program, Commerce can continue to perform its analysis at the FISSI benefit level.

XIII. Conclusion

For the reasons stated above, the Department's determination is hereby affirmed in part and remanded in part.

The results of this remand shall be provided by the Department to the Panel within 60 days of this decision. Each other party shall have 15 days thereafter to provide the Panel with any comments it may have on the Department's remand results.

Date

Joel Davidow

Date

Mark R. Joelson

Date

A. de Lotbiniere Panet

Date

Margaret Prentis

Date

Herbert C. Shelley

UNITED STATES-CANADA BINATIONAL PANEL REVIEW

In the matter of:)
)

USA-89-1904-06

FRESH, CHILLED, AND FROZEN PORK)
_____)

Before: Joel Davidow, Esq. Chairman
Mark R. Joelson, Esq.
A. de Lotbiniere Panet, Q.C.
Margaret Prentis
Herbert C. Shelley, Esq.

Order

September 28, 1990

For the reasons stated in the memorandum opinion of the Panelists, the Panel affirms in part and remands in part the Department of Commerce's Final Affirmative Countervailing Duty Determination in Fresh, Chilled, and Frozen Pork from Canada, CV-122-807, for further proceedings consistent with the memorandum opinion.

The results of the remand shall be provided by the Department to the Panel within 60 days of the date of this decision. Each other party shall have 15 days thereafter to provide the Panel with any comments it may have on the Department's remand results.

Signed in Original by:
Date

Joel Davidow
Joel Davidow

Date

Mark R. Joelson
Mark R. Joelson

Date

A. de Lotbiniere Panet
A. de Lotbiniere Panet

Date

Margaret Prentis
Margaret Prentis

Date

Herbert C. Shelley
Herbert C. Shelley

UNITED STATES-CANADA BINATIONAL PANEL REVIEW

In the matter of:)
)
)

FRESH, CHILLED, AND FROZEN PORK)
_____)

USA-89-1904-06

Additional Views
of
Panelist Mark R. Joelson

These comments relate solely to Commerce's determination on the Tripartite Programs under the Canadian federal Agricultural Stabilization Act ("ASA"). In this regard, I join with the remainder of the Panel in the conclusion that Commerce's determination that the Tripartite benefits are limited to a specific group of enterprises or industries is not in accordance with law. However, because I do not join in all of the observations of the Panel opinion and have some additional comments on this important issue, I am filing these separate views.

In determining that the Tripartite scheme is limited to a group of enterprises or industries within the meaning of section 771(B)(5) of the Tariff Act and is therefore countervailable,

Commerce applied a three-factor test.^{168/} The three-factor test seems to address correctly the question of whether a government limits a domestic subsidy to a discrete class of beneficiaries, although the test articulated may not prove sufficient for evaluating a program in every case. Of course, Commerce's application of the test to the record before it must be reasonable.

The first factor of the test clearly is warranted and does not present a problem here since Commerce has found that there is no de jure limitation as to which commodities may be covered under the Tripartite agreements.^{169/} The second factor of the test, the de facto inquiry into the number of enterprises or industries that actually use a program, is dictated by the "Special rule," added in the Omnibus Trade and Competitiveness Act of 1988, which follows the rationale of Cabot I.^{170/} See 19 U.S.C. § 1677(5)(B) (1988). See also Roses, Inc. v. United

^{168/} Fresh, Chilled, and Frozen Pork from Canada, 54 Fed. Reg. 30,774, 30,777 (Dep't Comm. 1989) (final determination). The three factors are: "The extent to which a foreign government acts (as demonstrated in the language of the relevant enacting legislation and implementing regulations) to limit the availability of a program; (2) the number of enterprises, industries, or groups thereof that actually use a program, which may include the examination of disproportionate or dominant users; and (3) the extent, and manner in which the government exercises discretion in making the program available." Id.

^{169/} Id.

^{170/} Cabot Corp. v. United States, 620 F. Supp. 722 (Ct. Int'l Trade 1985), appeal dismissed, 788 F.2d 1359 (Fed. Cir. 1986).

States, No. 84-5-00632, slip op. at 11-20 (Ct. Int'l Trade July 3, 1990). The third factor of the test -- assessing the extent and manner in which the government exercises discretion in making the program available -- appears to be a legitimate examination for Commerce to undertake in deciding whether targeting by the government of particular enterprises or industries is taking place. "With regard to the propriety generally of 'looking behind' the acts of foreign governments, the very essence of an affirmative countervailing duty determination is a determination by the Department, after having examined particular policies or programs of, or grants by, a foreign government, that these policies, programs, or grants are in the Department's opinion unfair or unjustifiable." Armco, Inc. v. United States, No. 88-05-00381, slip op. at 39 (Ct. Int'l Trade Mar. 29, 1990) (emphasis in original). Complainants dispute Commerce's application of the second and third factors of the test.

Before the Department's application of the test here can be reviewed, there must be a determination of the universe to which the test should be applied. Commerce has maintained that it was entitled to focus its determination of specificity on the Tripartite Programs.^{171/} Complainants argue that Commerce improperly carved out of the ASA only the Tripartite provisions and, moreover, that, even if considered alone, payments under the

^{171/} 54 Fed. Reg. at 30,777; Brief of Commerce at 71-77.

Tripartite Programs are not limited to a specific group of enterprises or industries.^{172/}

I believe that the evidence on the record and U.S. precedent adequately support Commerce's decision to focus the question of specificity just on Tripartite benefits, not on ASA benefits as a whole. In choosing between an umbrella program and one of its subsidiary programs, the case law indicates that Commerce may focus its analysis on the subsidiary level. See, e.g., Comeau Seafoods Ltd. v. United States, 724 F. Supp. 1407 (Ct. Int'l Trade 1989); IPSCO, Inc. v. United States, 687 F. Supp. 614 (Ct. Int'l Trade 1988). In Comeau Seafoods, the CIT upheld Commerce's determination that Canadian groundfish producers received countervailable benefits through the Canadian Economic and Regional Development Agreements program, which was "implemented through subsidiary agreements between the federal and individual provincial governments." 724 F. Supp. at 1415. Plaintiffs there unsuccessfully argued that Commerce erred in examining individual subsidiary agreements rather than the entire national umbrella program. In IPSCO, Commerce found that the umbrella agreements, pursuant to which subsidiary agreements were signed, were not programs per se:

They do not establish government programs, nor do they provide for the administration and funding of government programs. They are merely legal agreements under which the

^{172/} Brief of Canada at 3-4.

departments of the federal and provincial governments may cooperate in establishing and administering joint economic development programs in spheres of dual or conflicting jurisdiction. The implementation, administration, and funding of industry and regional-specific programs occurs exclusively through subsidiary agreements. Therefore, we decided that in determining whether a subsidiary agreement is limited to specific enterprises or industries, the proper level of analysis is the subsidiary agreement.

Oil Country Tubular Goods from Canada, 51 Fed. Reg. 15,037, 15,043 (Dep't Comm. 1986) (final determination), quoted in IPSCO at 631-32.

In this case, Commerce maintains that the implementation, administration, and funding of the Tripartite agreements differ significantly from that of the ASA stabilization plans.^{173/} My review of the scheme involved indicates that Commerce could reasonably have reached this conclusion and thus is entitled to focus its specificity analysis on Tripartite benefits.^{174/} This does not mean, in my view, that Commerce may simply shut its eyes to the existence of ASA programs (other than the Tripartite Programs) under which benefits may, in fact, also be bestowed. But the burden should be squarely on the respondent to bring

^{173/} Brief of Commerce at 77.

^{174/} It may be observed that complainants are in the somewhat awkward position of maintaining that the "named" portion of the ASA, which includes hogs, should not be taken into account while, at the same time, arguing that Commerce should have included all ASA benefits in its specificity analysis.

forward information on these programs and to establish that they confer comparable benefits.

As to the Tripartite scheme, which was first authorized in 1985, Commerce found that: by July 1989, agreements had been signed for hogs, cattle, cows/calves, lambs, sugar beets, apples, white pea beans and other dry edible beans, honey, and yellow seeded onions. Producers of asparagus requested a Tripartite agreement but were rejected. Producers of sour cherries and corn requested agreements "but no agreements are being drawn up for these commodities."^{175/} Complainants assert that "little need" for an asparagus support scheme was found because of rising prices and that, as to sour cherries and corn, discussions are ongoing and agreements still contemplated.^{176/}

Commerce's principal reason for determining that the Tripartite Programs did not meet the standard of de facto availability was that "since the January 1985 amendment authorizing tripartite agreements, only nine out of an innumerable number of agricultural commodities have been incorporated under such agreements."^{177/} This reasoning was inadequate to support Commerce's conclusion. In the first place, if Commerce wishes to postulate numerical parameters for measuring specificity, it cannot start with the wrong factual

^{175/} 54 Fed. Reg. at 30,777.

^{176/} Brief of Canada at 44-45.

^{177/} 54 Fed. Reg. at 30,777.

premise that there are "innumerable" (i.e., countless) commodities for which agreements could have been signed, and it should fix or at least estimate the outward boundary. Second, and more importantly, the parties in this case, including Commerce, agree (correctly, I think) that a numerical standard is of little value where (as here) the number of benefit recipients is, in the context of the universe involved, neither very high nor very low.^{178/}

In finding de facto limitation, Commerce stated, in addition, that "not all producers who request tripartite agreements for their commodities obtain such agreements."^{179/} This reasoning also was insufficient. Commerce recited the reasons given by the Canadian government officials for not signing agreements as to the three commodities in question but failed to indicate why, in its judgment, these actions indicated that the commodities receiving agreements had received an advantage "bestowed on a discrete class of grantees" Roses, supra, slip op. at 25. The Department should have offered such an explanation to substantiate its conclusion.

In applying the third factor of the specificity test, Commerce found an exercise of discretion in the administration of the Tripartite Programs which resulted in different treatment for

^{178/} See Hearing Tr. 47, 95-96, 187.

^{179/} 54 Fed. Reg. at 30,777.

different commodities.^{180/} Although, as I have observed above, Commerce may examine the extent and manner in which a government exercised discretion in determining whether targeting has taken place, the mere fact that a government administers a program with a measure of discretion is not ipso facto proof that specific enterprises or industries, or groups thereof, are being favored. It must appear that the discretion is being exercised so as to target particular recipients.

Commerce cited several areas of discretion exercised or exercisable by the Canadian authorities under the Tripartite Programs. First, it referred to a lack of explicit or standard criteria in the program for evaluating Tripartite agreement requests. Complainants dispute this point, but, in any event, the point carries little weight by itself. What Commerce needs to do, to prevail, is to adduce substantial evidence showing that particular requests to participate in the price stabilization scheme either benefited from, or suffered from, discretion targeted at limiting the Tripartite Programs to a group of enterprises or industries. Second, Commerce observed that the level of price stabilization and the terms of each scheme varied from producer to producer, and that the cost of production models used to determine benefits did not necessarily reflect the experience of the relevant producer group. Canada asserts that

^{180/} Id.

this conclusion is based on a misunderstanding of the arithmetic involved.^{181/} This issue should be further considered by Commerce on remand. Commerce's third finding, that the support level is often set differently for different commodities (with the support level for hogs raised to ninety-five percent), is met by Canada's response that the level of government payments into Tripartite stabilization funds is "comparable" under all agreements.^{182/} This question should also be further reviewed on remand.

What seems to me necessary in the complex setting presented by the Tripartite Programs is a more detailed consideration and explication by Commerce of the Programs' functioning in the key respects discussed above. The main issue, overall, is whether there is substantial direct evidence of targeting or of a pattern from which targeting can fairly be inferred.

September 28, 1990

181/ Brief of Canada at 54, n.22.

182/ Id.

IN THE MATTER OF:

**Fresh, Chilled and Frozen Pork
from Canada**

USA-89-1904-06

ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
UNITED STATES-CANADA FREE TRADE AGREEMENT

IN THE MATTER OF:)
)
)

FRESH, CHILLED AND FROZEN PORK)
FROM CANADA)
)
)

USA-89-1904-06

MEMORANDUM OPINION AND ORDER REGARDING
COMMERCE'S DETERMINATION ON REMAND

Introduction

This Panel review is conducted pursuant to Article 1904(2) of the United States-Canada Free Trade Agreement¹ following motions for review and further remand of certain determinations made by the Department of Commerce ("Department" or "Commerce") in its Remand Determination, including: (1) payments to hog producers (and thus pork producers) from the Canadian Tripartite Benefit Program ("Tripartite Program") under the Agricultural Stabilization Act ("ASA") were de facto limited to a specific group of enterprises or industries; (2) hog producers received 12.5% of Alberta Crow Benefit Offset Program ("CBOP") payments; and (3) benefits to hog producers (and thus pork producers) under

¹ 27 I.L.M. 281 (1988) (entered into force January 1, 1989).

the Quebec Farm Income Stabilization Insurance Program ("FISI") were de facto limited to a specific group of enterprises or industries.²

Set forth below is the history of each issue, the Panel's analysis of the issue, and its resolution. With respect to the first issue, the Panel affirms the Department's finding that the Tripartite Program is de facto limited to a specific industry or group of industries. Second, the finding that hog producers received 12.5% of the payments distributed under the CBOP is not supported by sufficient information or reasoning, and must be revised on a second remand. Lastly, the finding that FISI is de facto limited to a specific industry or group of industries is not supported by substantial evidence or in accordance with law and thus is remanded.

I. The Tripartite Program

The Panel determined in its first opinion³ that Commerce's finding that the Tripartite Program was de facto specific in regard to hogs was not adequately supported by facts and legal

² See Remand Determination of Final Countervailing Duty Determination on Fresh, Chilled and Frozen Pork from Canada, Case No. USA-89-1904-06, U.S. Department of Commerce (December 7, 1990) (hereinafter "Remand Determination").

³ Memorandum Opinion and Remand Order, United States-Canada Binational Panel Review, Fresh, Chilled and Frozen Pork from Canada (September 28, 1990) (hereinafter "First Panel Memorandum Opinion").

analysis.⁴ Commerce had stressed that only nine types of farm products had qualified for benefits, that certain products had been turned down for discretionary reasons, and that the types of programs created for various products were subject to considerable discretion and variation.⁵ The Panel concluded that these facts were not inconsistent with a finding of de facto specific subsidy, but that there was simply not enough legal theory and factual analysis provided to determine what rule of law Commerce was espousing and how a foreign government would know when it was crossing the line.⁶ First of all, the Panel wanted to know whether the fact that only nine industries had received benefits so far was deemed by Commerce to be decisive in itself.⁷ The Panel was not certain whether Commerce believed that the relative fewness of recipients was: (1) predictable, from the statutory scheme or from the circumstances; (2) surprising; or (3) simply regarded as conclusive, regardless of explanations.⁸ The Panel suggested that the fewness of beneficiaries should be analyzed further in light of the number of possible beneficiaries, the criteria for eligibility, and the

⁴ Id. at 40-54.

⁵ Fresh, Chilled and Frozen Pork from Canada, 54 Fed. Reg. 30,774, 30,776-78 (Dept. Comm. 1989) (final determination) (hereinafter "Final Pork Determination").

⁶ First Panel Memorandum Opinion at 40-54.

⁷ See id. at 50-52.

⁸ Id.

most likely reasons why only twelve agricultural "industries" sought to participate and only nine actually did participate.⁹ Secondly, the Panel wanted to know whether the alleged discretion in administering the program had resulted in disproportionate benefit to hog producers or to a specific, definable group or type of products.¹⁰

On November 16, 1990, Commerce filed a Motion to Extend the Time for Determination on Remand, requesting an additional seventy-five days in which to file its results of the remand, so it could reopen the record on these points. In light of Commerce's delay in seeking an extension and the tight review timetable, the Panel felt constrained not to grant such a substantial extension of time for that purpose.¹¹ Commerce thereafter submitted a brief opinion on December 7, 1990 offering certain additional facts and further analysis.¹² It stated that its judgment was that there were "hundreds" of separate agricultural products and industries in Canada,¹³ that all of them were potentially eligible for Tripartite Program benefits, and that all or most of them were actually or potentially subject

⁹ Id. at 51-52.

¹⁰ Id. at 53-54.

¹¹ Opinion and Order (November 26, 1990). The Panel extended the deadline for Commerce's remand determination to December 7, 1990. Id.

¹² Remand Determination at 4-11.

¹³ Id. at 9.

to fluctuation in income that might make protection attractive.¹⁴ It thus concluded that having only nine recipients after four years was anomalously small.¹⁵

In regard to the Panel's second inquiry, Commerce pointed out in its Remand Determination that in the primary year being studied, 1988, hog producers had received more than 60% of all government contributions to all industries being aided under the Tripartite Program.¹⁶ At oral argument, it became clear that money put in an insurance fund is not necessarily a benefit in itself, since such funds are only paid out if income drops to certain prescribed levels, and are returned to the government after ten years if unused.¹⁷ In terms of benefits paid out, it appears that hog producers received more than 30% of all such disbursements in 1988, but received no government benefits at all in 1986 and 1987.¹⁸

The National Pork Producers Council ("NPPC") sought to buttress Commerce's Remand Determination by providing further details concerning the large number of eligible industries or

¹⁴ Id. at 8-9.

¹⁵ Id.

¹⁶ Id. at 9.

¹⁷ Transcript of Proceedings, Fresh, Chilled and Frozen Pork from Canada, Case No. USA 89-1904-06 (February 11, 1991) (hereinafter "Tr.") 107, 149.

¹⁸ Id. at 150.

products (the NPPC counted about 170), the high degree of discretion and certain indications that Canada was really aiding meat products primarily, since cattle and hogs together received over 60% of all contributions and benefits.¹⁹ Both Commerce²⁰ and the NPPC²¹ also believed that it was significant to note that the hog industry had received a similarly large percentage of benefits in 1981 when it was being aided under the ASA program. Neither Commerce nor NPPC made it quite clear whether they viewed this comparison with 1981 as tending to prove intent or as showing some type of predictability which is relevant under the amended subsidy law of 1988.

Canada and the other Canadian parties argued that Commerce had failed to meet the Panel's request to formulate a legal rule concerning when fewness of beneficiaries is fatal to a foreign government program of aid to industries.²² Secondly, they argued that the relatively small number of industries aided under the program was explained and justified by the existence of other

¹⁹ Id. at 134-66. See also Response Brief of the NPPC et al. Concerning the Remand Determination of the International Trade Administration, February 4, 1991. (hereinafter "NPPC Response Brief").

²⁰ Remand Determination at 10.

²¹ NPPC Response Brief at 36.

²² See, e.g., Comments By the Government of Canada on the Remand Determination, January 18, 1991 (hereinafter "Government of Canada Brief"), at 7-9; Brief on Remand Submitted on Behalf of Complainant, The Canadian Pork Council and Its Members, January 18, 1991 (hereafter "Canadian Pork Council Brief"), at 4-6.

similar programs which were equally available,²³ and by the fact that this program involves a substantial contribution and long-term commitment of resources which many industries are unwilling to make.²⁴ They continued to stress that all benefits are capped at 6% of industry turnover and that major industries like hogs receive more money simply in proportion to greater total value of product.²⁵

The Panel remains dissatisfied with Commerce's efforts to set forth a rule of law which is clear, principled and capable of distinguishing intentional or predictably specific programs from those that appear specific in a given year or two merely because of unpredictable economic variations which buffet some industries or types of products more than others.²⁶ Of course, we do recognize that the problem may lie in the vagueness of the 1988 amendment itself.²⁷ The legislative history of this amendment suggests that the U.S. Congress still accepts a general

²³ Government of Canada Brief at 16-20; Canadian Pork Council Brief at 8-15.

²⁴ Government of Canada Brief at 13-16; Canadian Pork Council Brief at 6-8. The Canadians contended that the estimates of hundreds of industries was too large, but offered no alternative number.

²⁵ Government of Canada Brief at 26-28; Canadian Pork Council Brief at 16-22.

²⁶ A separate concurring opinion is being filed on this issue by Panel Member Mark R. Joelson.

²⁷ See Omnibus Trade and Competitiveness Act of 1988 1312, 19 U.S.C. 1677(5)(B)(1988).

availability defense, but wishes to see that defense rejected whenever de facto results tend strongly to refute it.²⁸ But the law does not make clear whether a foreign government can in turn explain away the fewness of beneficiaries. Nor does the 1988 law indicate what proof will suffice. Some U.S. courts have suggested that intent is not the issue,²⁹ but we doubt that the law can mean that a benefit must be deemed not generally available whenever a significant percentage of potential beneficiaries fail to ask for it. If intent to target or to limit benefits is not the standard for subsidy law enforcement, then it appears that there must be a slightly looser evidentiary surrogate, such as predictability of limited usefulness or disproportionality of benefits.

All this being said, and in light of the deference we are required to afford to the expert agency dealing with these complexities, we conclude that Commerce has now supplied sufficient facts and rationale to justify its finding of specific subsidy in this matter. The first key fact supplied is the approximate size of the universe. We still do not know that

²⁸ See H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 587, reprinted in 1988 U.S. Code Cong. & Admin. News 1547, 1620. See generally Roses, Inc. v. United States, 743 F. Supp. 870, 877 n.15 and accompanying text (discussion legislative history to 1988 amendment).

²⁹ See, e.g., Saudi Iron and Steel Co. (Hadeed) v. United States, 675 F. Supp. 1362, 1367 (Ct. Int'l Trade 1987), appeal after remand, 686 F. Supp. 914 (Ct. Int'l Trade 1988).

number exactly, since 200 products might be grouped into somewhat fewer industries, but the list of unrelated products (and thus likely industries) does seem to well exceed 100. A program that benefits less than ten industries out of probably more than one hundred over a four year period creates a prima facie indication of de facto specific subsidy in such circumstances. In that circumstance, even slight additional indication of targeting, limitation or disproportionate benefit is sufficient to raise the prima facie showing to a sustainable administrative determination. Here, major corroborating evidence is that more than 50% of all government contributions, and more than 30% of all paid benefits, went to hog producers. Moreover, the experience under the ASA program in 1981 indicates that such disproportionate benefit to hog producers was a foreseeable result of the Tripartite Program. Legislatures, like persons, may be legally presumed to intend the foreseeable consequences of their actions. Thus, the evidence here strongly suggests that disproportionate benefit to hog producers was an intended or at least contemplated result of the Tripartite Program. This is corroborated by evidence indicating that the benefit formula under the program for hog producers was improved for the specific purpose of inducing them to participate in a Tripartite Program.³⁰

³⁰ See Department of Commerce "Verification Report for the Federal Government of Canada in the Countervailing Duty Investigation of Fresh, Chilled, and Frozen Pork from Canada (C-122-807)", Memorandum for Roy A. Malmose, Acting Director, Office of Countervailing

In our view, a foreign government can disprove a purely statistical case of specific subsidy by showing that the fewness of beneficiaries, or the apparent disproportionate benefit to certain industries, was due purely to unforeseeable economic trends, or merely results from evaluating a program over too short a time period. But it now appears undisputed here that it was quite predictable that less than 20% of Canadian agriculture industries would use this program, and that hog producers alone would receive more than 20% of all benefits paid out. Looking at the Tripartite Program over a four-year period, the number of industries being aided does not seem to fluctuate much. There is some indication, or contention, that over perhaps fifteen years, the number of industries under the program might rise to twenty or even thirty.³¹ But twenty or thirty would still be a clear minority of all agricultural industries. Moreover, we do not believe that Commerce has the authority to vindicate a subsidy program solely because of speculation that it might become widely used over another decade or two.

Two further explanations remain, which could be somewhat persuasive in some factual contexts but which are dubious here and in any event raise difficult questions of legislative intent. The first is that only a minority of industries use the

Investigations, from Rick Herring, et al., filed June 22, 1989, at 10.

³¹ Tr. at 40-41.

Tripartite Program because most agricultural industries use other, somewhat similar programs. It is fairly clear that a foreign nation can avoid U.S. subsidy duties if it creates a program to aid all products in its agricultural economy, and if most products receive such aid in rough proportion to the value of the products involved. But what if a foreign government creates two, three or four aid programs, each open to all applicants, and 90% of all producers receive benefits, with 20% or 30% joining each of the programs? Assuming this is not countervailable, what if a government adds a third program to two existing ones, and the new program lures away 30% of those already participating in the earlier programs?

The above questions could be very close ones if it were clear that the various programs were not tailored, before or after enactment, to the known needs of specific industries. On the facts here, however, rejecting this defense is not so difficult. Rather than a related series of gradated programs, we find a variety of schemes, some complementary and some mutually exclusive, some of which have already been held countervailable. Moreover, there is strong indication that the Tripartite Program was tailored, both before and after its enactment, to be useful and attractive to hog producers or meat producers, with it being foreseeable that they would be major recipients of aid under the program. Lastly, we take cognizance that certain agricultural programs (of the supply management type) tend to restrict

production, while income stabilization programs like Tripartite tend to encourage production, and thus are likely to cause exports to be larger than if the program did not exist. It would seem bad policy in interpreting a countervailing duty law to hold that programs which restrict production and ones that encourage production are equivalents.

The final explanation for the fewness of participants is that the requirements are stiff, i.e., that many industries are not prepared to put up the money to create a substantial fund, and not prepared to tie up those funds for ten years.³² This argument has some appeal, in that a countervailing duty law generally should not punish governments for creating aid programs which require industry self-help rather than being pure giveaways. On the other hand, we have no hard evidence that this is the primary or sole explanation for the fewness of beneficiaries here. The requirement of advancing funds is somewhat balanced by the lure of twice as much governmental contribution. Certain of the participating industries are quite small. Many larger product groups did not apply. Some groups were delayed, or turned down, for participation for reasons not set forth in the statute creating the program. For all these reasons, it is not possible to credit this argument very much on these facts.

³² Government of Canada Brief at 13-16.

In sum, we conclude that it was not unreasonable for Commerce to conclude that an aid program which benefited only nine industries out of 100 or more over a four-year period, and that provided a large majority of all contributions and benefits to only two industries, hogs and cattle, was a program which in foreseeable effect and/or in practice tended to aid a specific group of industries rather than all industries, and was thus countervailable under U.S. law.

II. The Alberta Crow Benefit Offset Program

In its final determination, Commerce found that because the CBOP was limited to feed grain users, the program was limited to a specific enterprise or industry, or group of enterprises or industries and was therefore countervailable.³³

On the basis that it did not have precise data on hog consumption of feed grain, Commerce used, as best information available ("BIA"), data published in a booklet entitled Agriculture in Alberta, which indicated that hogs consumed 15% of the province's barley production and that barley is the primary grain fed to hogs. Commerce on that basis allocated 15% of the total amount of benefits paid to feed grain users in Alberta over the dressed-weight equivalent of hogs marketed during the review

³³ Final Pork Determination, 54 Fed. Reg. at 30,779.

period.³⁴

In its Memorandum Opinion, the Panel held that Commerce was entitled, under the BIA rule, to consider data in Agriculture in Alberta as evidence in arriving at its decision.³⁵ However, the Panel found that the determination by Commerce that 15% of the total benefits paid to feed grain users under the CBOP should be allocated to hog producers was not supported by evidence on the record.³⁶ The Panel stated that the evidence cited only indicated that 10% or perhaps 15% of the barley production in Alberta is consumed by hogs but did not support the conclusion that 15% of all grain production is consumed by hogs. The Panel indicated that, given those facts, it would follow logically that the percentage to be allocated must be less than 15%.³⁷

The determination by Commerce with respect to CBOP was remanded by the Panel for reconsideration and determination based on all the relevant evidence on the record.³⁸

In its Remand Determination, Commerce stated that it had available to it two figures, 10% and 15%, that could potentially

³⁴ Id.

³⁵ First Panel Memorandum Opinion at 68.

³⁶ Id. at 69.

³⁷ Id.

³⁸ Id.

serve as surrogates for the information needed to make an accurate calculation of the benefits received by hog producers under the CBOP.³⁹ It indicated that it had not been able to reopen the record and obtain the needed information, and expressed the view that, in any event, it would have been unlikely to receive anything definitive given that its prior requests had not elicited precise information.⁴⁰ Then, citing the lack of any better basis and in order to comply with the Panel's conclusion, which it indicated it did not understand, that the appropriate number must be less than 15%, Commerce took a simple average of 10% and 15% and allocated 12.5% of the monies paid out under the CBOP to hog production.⁴¹

Complainants dispute the figure of 12.5% arrived at by Commerce in its Remand Determination.⁴² They argue that the recalculation by Commerce does not adequately implement the Panel's directive to recalculate countervailable CBOP benefits based on evidence on the record.⁴³ They maintain Commerce has continued to misread Agriculture in Alberta as referring to the

³⁹ Remand Determination at 15.

⁴⁰ Id.

⁴¹ Id.

⁴² Brief of the Government of the Province of Alberta regarding the Remand Determination of the U.S. Department of Commerce, January 18, 1991 (hereinafter "Brief of Alberta") at 4.

⁴³ Id.

percentage of all feed grain, as opposed only to barley, consumed by hogs in Alberta.⁴⁴ Complainants also claim that Commerce has continued to ignore evidence on the record submitted during the investigation that the 15% figure is incorrect, and that hogs in fact consume only 10% of barley production in Alberta.⁴⁵ Complainants further argue that the use by the Department of BIA does not relieve Commerce of its obligation to rely on information that is reasonably consistent with the evidence on the record. In addition, complainants argued that, based on certain evidence on the record, a figure of 1.09% could represent the percentage of all CBOP payments made to hog producers in Alberta.⁴⁶

In response, and in rejecting the proposed figure of 1.09%, Commerce argues that it is not required to use any particular verified information as BIA, and that it is not required to choose the best of all available information but rather that the BIA selected need only be consistent with some substantial evidence on the record.⁴⁷ Commerce indicates that it chose to rely on the percentages found in Agriculture in Alberta in an attempt to use province-specific BIA. In response to the Panel's

⁴⁴ Id. at 5.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Brief, International Trade Administration, United States Department of Commerce, February 4, 1991 (hereinafter "Brief of Commerce"), at 5.

concern about the difference in barley consumption percentage (10% and 15%) appearing in the booklet, and given that barley is the primary feed consumed by hogs in Alberta, Commerce states that it chose the 12.5% figure as being a reasonable approximation of CBOP benefits provided to hog growers.⁴⁸ The NPPC supports the position taken by Commerce.⁴⁹

The BIA rule was the subject of discussion by the Panel in its Memorandum Opinion, where the Panel noted that the right of Commerce to apply the BIA rule is subject to some limits.⁵⁰ The Panel does recognize that once Commerce has exercised its discretion to use the best information available rule, it is for Commerce, rather than a complainant, to determine what is the best information available.⁵¹ In reviewing a determination by Commerce based on BIA, the role of the Panel is not to decide whether Commerce has chosen and used the best of all available evidence, but rather to consider whether the information used by Commerce is reasonably consistent with evidence on the record.⁵² But even after a decision has been properly made by Commerce to

⁴⁸ Id. at 4.

⁴⁹ NPPC Response Brief at 48.

⁵⁰ First Panel Memorandum Opinion at 58-59 (citing Olympic Adhesive, Inc. v. United States, 899 F.2d 1565, 1572 (Fed. Cir. 1990)).

⁵¹ See Rhone Poulenc v. United States, 710 F. Supp. 341, 346 (Ct. Int'l Trade 1989).

⁵² See N.A.R., S.p.A. v. United States, No. 88-06-0041, slip op. at 13 (Ct. Int'l Trade June 26, 1990).

rely on BIA, it cannot arbitrarily use information and averaging methods that it simply deems to be convenient. Commerce must look to and rely on a reasoned and reasonable analysis of the administrative record.

As indicated in its Remand Determination, Commerce calculated an average of the two figures of 10% and 15% which appear in Agriculture in Alberta. But reliance on barley figures alone has to overstate the result. Moreover, the Panel recognizes the likelihood that the 15% figure in Agriculture in Alberta is a typographical error and concludes that it would be inappropriate to rely on this figure at this stage of the proceeding, even as part of an average.⁵³ In light of all of the above, it is the Panel's view that in arriving at the 12.5% figure, Commerce has failed to reasonably base its determination.

With respect to the determination of an appropriate BIA figure, the Panel notes that, during the investigation, the Government of the Province of Alberta submitted to Commerce two estimates of the correct percentage, one of 5.48% and the other of 11.4%, based on different methodologies. We conclude that, taking account these conceded figures, as well as the 10% figure for barley, Commerce should be able to arrive at a reasonable estimate on remand.

⁵³ See Pre-hearing Brief of the Government of the Province of Alberta at 40-41; Brief of Alberta at 2.

In light of all of the above, it is the Panel's view that in arriving at the 12.5% figure, Commerce has failed to base its determination on substantial evidence on the record.

Accordingly, the Panel remands this re-determination by Commerce for further reconsideration and determination based on the evidence on the record.

III. The Quebec Farm Income Stabilization Program

In its first opinion, this Panel decided that Commerce had not presented sufficient substantial evidence on the record or provided sufficient explanation of its determination to countervail the FIS I.⁵⁴ Subsequent to the first Panel decision, all parties have had the opportunity to brief and further argue the merits of the Panel decision.

The Department effectively based its determination on two premises: (1) only calves, feeder cattle, potatoes, piglets, feeder hogs, corn, oats, wheat, barley, heavy veal and sheep are recipients of FIS I benefits and (2) eggs, dairy products and poultry do not receive FIS I benefits. Based on these premises, the Department found FIS I to be de facto a subsidy.⁵⁵

In its brief and argument, the Department has done little more than reiterate its earlier statements. Thus, unlike the

⁵⁴ First Panel Memorandum Opinion at 79-80.

⁵⁵ Final Pork Determination, 54 Fed. Reg. at 30,781.

Tripartite determination where additional facts have been forthcoming which give some indication of the size of the industry and the relative amounts of benefits received by the hog industry, the Department has not presented any such additional information for FISI. In fact, the only new information to come forth indicates that Quebec produces a much narrower range of farm products than is true across Canada, and that a high percentage of products by value are covered.⁵⁶ The evidence on the record is thus insufficient to support a decision that the number of recipients of FISI is so small as to be de facto a subsidy. Likewise, since FISI has been determined to be de jure not countervailable because it is available to all agricultural industries, the fact that three industries are not recipients of FISI is insufficient to sustain the determination that the program is countervailable.

The Panel, therefore, finds that nothing has been presented to it which would support reversal of its earlier determination with respect to FISI. This decision is remanded to the Department with instructions to conform its determination in accordance with the decision of the Panel.

The Panel affirms Commerce's remand determinations with respect to the benefit conversion factor, the Western

⁵⁶ Tr. at 12, and references cited (44 major agricultural products).

Diversification Program, and the Canada/Quebec Subsidiary Agreement on Agri-Food Development.

_____ Date	_____ Joel Davidow
_____ Date	_____ Mark R. Joelson
_____ Date	_____ A. de Lotbiniere Panet
_____ Date	_____ Margaret Prentis
_____ Date	_____ Herbert C. Shelley

UNITED STATES-CANADA BINATIONAL PANEL REVIEW

In the matter of:

FRESH, CHILLED, AND FROZEN PORK
FROM CANADA

USA-89-1904-06

Separate Views of
Panelist Mark R. Joelson
on the Remand Determination

These separate views pertain only to the Remand Determination of the Department of Commerce ("Department" or "Commerce") regarding the Tripartite Benefit Program ("Tripartite Program") under the Canadian Agricultural Stabilization Act ("ASA"). Like the other members of the Panel, I conclude that Commerce could reasonably find that payments made to hog producers under the Tripartite Program are limited to a specific group of enterprises or industries within the meaning of section 771(5)(B) of the Tariff Act¹ and are therefore countervailable. However, because I reach this conclusion through a somewhat different process of reasoning, much of which was indicated in my initial "Additional Views,"² I find it necessary to file these separate comments.

On September 28, 1990, the Panel found that Commerce's determination, that payments made to hog producers under the Tripartite Program were limited to a specific group of enterpris-

¹ 19 U.S.C. § 1677(5)(B) (1988).

² See Additional Views of Panelist Mark R. Joelson, Fresh, Chilled, and Frozen Pork from Canada, USA-89-1904-06 (Sept. 28, 1990) (hereinafter "Additional Views").

es or industries, was not in accordance with law.³ In remanding this determination, the majority Panel opinion instructed the Department to reformulate its specificity test "to determine whether the number of products or enterprises aided is disproportionately small in terms of the predictable number that would be expected to apply in light of the criteria for aid, the availability of alternative types of aid and the relevant economic conditions of the covered industries."⁴ The Department also was instructed to "determine whether the actual level of benefits received by the hog industry, or a definable group of industries, was disproportionately higher than for other agricultural industries for reasons not explicable by variations in the conditions, economic or otherwise, of those industries."⁵

At that time, I submitted separate views on this issue because I did not agree with the Panel's decision to substitute a new test for the Department's. Rather, I found that Commerce's three-factor test might well be adequate for determining whether a government limits a domestic subsidy to a discrete class of beneficiaries,⁶ but that the Department had not reasonably

³ Memorandum Opinion and Order at 48-54, Fresh, Chilled, and Frozen Pork from Canada, USA-89-1904-06 (Sept. 28, 1990).

⁴ Id. at 51.

⁵ Id. at 53-54.

⁶ The three factors are: "(1) The extent to which a foreign government acts (as demonstrated in the language of the relevant enacting legislation and implementing regulations) to limit the availability of a program; (2) the number of enterprises, industries,

applied the test to the record before it or adequately substantiated its conclusions.⁷

With respect to the second factor of the specificity test, I found that the Department had not adequately explained why a program, which covers "nine out of an innumerable number of agricultural commodities,"⁸ is necessarily de facto limited, and I suggested that the agency define the term "innumerable" and put the number nine in context vis-à-vis the universe involved.⁹ I also stated that the Department needed to explain its reasons for premising de facto limitation on the basis that Canadian officials had decided not to sign agreements as to three commodities.¹⁰ With respect to the third factor, I determined that, in order to establish that the Canadian authorities exercised discretion to favor specific enterprises or industries, Commerce needed to provide a more detailed consideration and explanation of the Tripartite Program's operation in key respects.¹¹

or groups thereof that actually use a program which may include the examination of disproportionate or dominant users; and (3) the extent, and manner in which, the government exercises discretion in making the program available." Fresh, Chilled, and Frozen Pork from Canada, 54 Fed. Reg. 30,774, 30,777 (Dep't Comm. 1989) (final determination) (hereinafter "Final Pork Determination").

⁷ Additional Views at 2-3.

⁸ Final Pork Determination, 54 Fed. Reg. at 30,777.

⁹ Additional Views at 6-7.

¹⁰ Id. at 7.

¹¹ Id. at 7-9.

Based on Commerce's Remand Determination and the parties' submissions relating thereto, I now believe that the evidence on the record adequately supports Commerce's conclusion that Tripartite payments to hog producers are countervailable. I have written these separate remarks, however, because I continue to feel uncomfortable with the test used by the remainder of the Panel, especially because of the manner in which it would allocate the burden of proof and because of the vagueness of the concepts which are offered in place of the Department's original test. I do not believe that Commerce should have the burden of assessing the "predictability" that certain industries would use the Tripartite Program, of explaining why certain industries did not choose to apply for benefits, or of analyzing the extent to which alternative programs offer comparable benefits. Moreover, such concepts in the Panel's test as "surprisingly or anomalously small" or "relevant economic conditions" provide little guidance in measuring specificity. Unfortunately, the Department also has not further refined its test, nor has it articulated a meaningful numerical standard, although it purports to use such a standard.

Nonetheless, turning to this case, I am satisfied that the Department could reasonably conclude that the number of enterprises or industries actually using and benefiting from the Tripartite Program is de facto limited. It has now been clearly brought to the Panel's attention and appears to be undisputed that 170 (more or less) commercially distinct natural and processed agricultural products are produced in Canada and are

nominally eligible for the Tripartite Program.¹² Therefore, given the fact that the Program has covered only nine different products since its inception in 1985,¹³ only three other products have shown interest in obtaining coverage during this time,¹⁴ and the number of products expected to join in the future is very limited,¹⁵ I find that the number of industries benefited by the Tripartite Program clearly comprises a small percentage of the universe of nominally eligible industries.¹⁶ As the Panel majority points out (and here our reasoning conjoins), a program like this one which benefits only a few industries over a number of years creates a prima facie indication of de facto specific subsidy in such circumstances.

Moreover, an examination of the actual benefits provided under the Tripartite Program reveals that hog producers are major beneficiaries of the Program. During the period of investigation (calendar year 1988), as well as for the period from 1985-1988, hog producers received approximately 30% of the total payments

¹² See Response Brief of the National Pork Producers Council ("NPPC") Concerning the Remand Determination of the International Trade Administration ("ITA") at 11, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06).

¹³ Final Pork Determination, 54 Fed. Reg. at 30,777.

¹⁴ Id.

¹⁵ See Remand Hearing Tr. at 40-41.

¹⁶ While "products" may not equal "industries," there is no indication that the number of industries would be substantially less than the number of products.

that were distributed to all producers.¹⁷ They also were the target of over 50% of all government contributions to Tripartite funds in 1988, as well as in previous years.¹⁸ This strongly evidences that hog producers are "disproportionate or dominant users" of the Tripartite Program, to use a phrase from the second prong of Commerce's specificity test.

Complainants urge that "[w]hen federal contributions to Tripartite funds are considered more logically — in light of the farm value of the products involved — there is no evidence of

¹⁷ See Pub. Doc. 21, cited in Government of Canada's Posthearing Submission of Information Requested by Panel Regarding Tripartite Payments to Hog Producers at 2, Fresh, chilled, and Frozen Pork from Canada (USA-89-1904-06) (hereinafter "Canada's Posthearing Submission"); NPPC's Supplemental Response to the Panel's Request for Additional Information at Charts 2 and 4, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06) (hereinafter "NPPC's Supplemental Response"). Total Tripartite payments to all producers for the first three-quarters of fiscal year 1988-1989 totalled \$159,991,000. See Pub. Doc. 21, cited in Canada's Posthearing Submission at 2. Of this amount, \$49,362,000 was distributed to hog producers. See Non-Pub. Doc. 16, cited in Canada's Posthearing Submission at 1-2. Of this amount, Commerce countervailed 66.67% (to adjust for producer contributions), or \$32,908,000. Canada's Post hearing Submission at 1-2.

They also received 17% of all payments (excluding payments made under the dairy program and contributions to Tripartite funds) distributed under the ASA program. See Pub. Doc. 43, cited in Canada's Posthearing Submission at 3. However, because I believe that, on this record, Commerce was entitled to focus its specificity test solely on Tripartite benefits, I find that this figure is not relevant.

¹⁸ See Pub. Doc. 21, cited in NPPC's Supplemental Response at Charts 6 and 7.

'disproportionality."¹⁹ They point out that the hog program has a very high participation rate and a relatively high unit value, whereas the participation of producers in and unit value of commodities under other programs are significantly lower. However, in my view, Commerce could reasonably conclude, in administering the countervailing duty statute, that a favored industry is one which receives more funds from the government than another, without applying concepts bearing on numbers of participants or unit value.

A conclusion that the hog producers receive favored treatment is corroborated by additional facts. First, hog producers have enjoyed a special status under the "named" commodity provision of the ASA, a status which suggests targeting of their industry.²⁰ Second, to encourage hog producers to participate in the Tripartite Program, the average profit margin for hogs was raised to 95%, nearly ten percentage points above that for beef.²¹ This has resulted in incomes of hog producers being stabilized to a greater degree than those of some other producers.²²

¹⁹ Brief on Remand Submitted on Behalf of Complainant, The Canadian Pork Council and Its Members at 19, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06); see also Government of Canada's Comments on the Remand Determination at 28-30, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06).

²⁰ See Live Pork Producer's Mktg. Bd. v. United States, 669 F. Supp. 445, 450-51 (Ct. Int'l Trade 1987).

²¹ Final Pork Determination, 54 Fed. Reg. at 30,777.

²² Id. at 30,777-78.

In sum, on this record, the Department's conclusion with respect to Tripartite Program benefits must be upheld as supported by substantial evidence and in accordance with law.

March 8, 1991

ARTICLE 1904 BINATIONAL PANEL REVIEW

pursuant to the

UNITED-STATES-CANADA FREE TRADE AGREEMENT

IN THE MATTER OF:)

FRESH, CHILLED AND FROZEN PORK)
FROM CANADA)

USA-89-1904-06

Before: Joel Davidow, Esq., Chairman
Mark R. Joelson, Esq.
A. de Lotbiniere Panet, Q.C.
Margaret Prentis
Herbert C. Shelly, Esq.

REMAND ORDER

March 8, 1991

For the reasons stated in the Panel's Memorandum Opinion, the Panel remands the Department of Commerce's Remand Determination of its Final Countervailing Duty Determination in Fresh, Chilled, and Frozen Pork from Canada, CV-122-807, so that the Department might reconsider its determinations with respect to the Quebec Farm Income Stabilization Insurance Program and Alberta Crow Benefit Offset Program.

The results of this remand shall be provided by the Department to the Panel by March 28, 1991.

SIGNED IN THE ORIGINAL BY:

MARCH 8, 1991
Date

JOEL DAVIDOW
Joel Davidow

MARCH 8, 1991
Date

MARK R. JOELSON
Mark R. Joelson

MARCH 8, 1991
Date

A. DE LOTBINIERE PANET
A. de Lotbiniere Panet

MARCH 8, 1991
Date

MARGARET PRENTIS
Margaret Prentis

MARCH 8, 1991
Date

HERBERT C. SHELLEY
Herbert C. Shelley