IN THE MATTER OF:

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Pork from Canada

USA 89-1904-11

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ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE UNITED STATES-CANADA FREE TRADE AGREEMENT

IN THE MATTER OF FRESH, CHILLED, OR FROZEN PORK FROM CANADA	)	USA 89-1904-11

Before: S. V. Potter (Chairman)
K. F. Patterson
T. M. Schaumberg
E.D.D. Tavender
J. Whalley

MEMORANDUM OPINION AND REMAND ORDER

August 24, 1990

INTRODUCTION

This is a review conducted pursuant to Article 1904 of the United States-Canada Free Trade Agreement ("FTA") and Title IV of the United States-Canada Free Trade Agreement Implementation Act of 1988, 19 U.S.C. par. 1516a(g)(2), following a Request for Panel Review initially filed by the Canadian Pork Council and its members and Moose Jaw Packers (1974) Ltd. contesting the final affirmative determination of threat of material injury made by the United States International Trade Commission ("ITC") in Fresh, Chilled, or Frozen Pork from Canada, 57 Fed. Reg. 37,838 (Sept. 13, 1989) ("ITC's Final Determination").

In this opinion, the Panel relates this review's procedural history, sets out the issues with which it must deal, examines the applicable law governing reviews such as this one and then considers the ITC's Final Determination in

the light of this law. The Panel concludes that the ITC's Final Determination ought to be remanded. Panelist John Whalley has also expressed additional views which follow this opinion.

I. PROCEDURAL HISTORY

On January 5, 1989, a petition was filed with the ITC and the International Trade Administration ("ITA") of the United States Department of Commerce on behalf of the National Pork Producers' Council ("NPPC") and others alleging that an industry in the United States was materially injured or was threatened with material injury by reason of allegedly subsidized imports of fresh, chilled or frozen pork ("pork") from Canada. The ITC instituted a preliminary injury investigation and determined that there was a reasonable indication that an industry in the United States was materially injured or threatened with material injury by reason of such imports. 54 Fed. Reg. 8835 (Mar. 2, 1989). In July 1989, the ITA made a final affirmative countervailing duty determination with respect to Canadian pork. 54 Fed. Reg. 3077 (July 24, 1989) ("ITA's Final Determination"). The ITA's Final Determination is subject to a separate FTA review under Binational Panel USA 89-1904-06.

On September 13, 1989, the ITC published its final affirmative determination with respect to pork from Canada. In the ITC's Final Determination, all participating Commissioners found an absence of present injury but three Commissioners found that an industry in the United States was threatened with material injury by reason of pork imports from Canada; two Commissioners dissented on this point, and one Commissioner did not participate.

Requests for Panel Review and Complaints challenging the ITC's Final Determination were filed by Moose Jaw Packers (1974) Ltd. ("Moose Jaw") and the Canadian Pork Council and its members, and then by the Canadian Meat Council and its members

and Canada Packers, Inc. ("CMC"), the Government of the Province of Alberta ("Alberta") and the Gouvernement du Québec ("Québec"). On January 9, 1990, following motions by the ITC, Québec and the Canadian Pork Council were dismissed from thereview for lack of standing, with separate opinions issued explaining the Panel's reasons.

On March 26, 1990, the ITC filed a notice of Motion Requesting Voluntary Remand of its decision on a particular point discussed below, which motion was denied by the Panel by order dated April 9, 1990. A hearing was held in Washington, D.C. on May 23, 1990 at which Complainants CMC, Moose Jaw and Alberta presented oral argument to the Panel. The ITC and NPPC defended the ITC's Final Determination.

II. SUMMARY OF THE ISSUES AND THE PANEL'S DECISION

Moose Jaw, CMC and Alberta challenge ITC's Final Determination on four aspects which, they argue, are not supported by substantial evidence on the administrative record of the ITC (the "Record") and render the ITC's Final Determination unlawful:

(i) the ITC's analysis of the U.S. domestic industry as being vulnerable to the threat of increased pork imports from Canada;

(ii) the ITC's calculation of Canadian pork production, imports, exports and consumption for the 1986-1988 period;

(iii) the ITC's conclusion that the Canadian subsidies enhance Canadian pork production and exports and, therefore, the likelihood of pork exports to the United States; and

(iv) the ITC's treatment of certain economic factors such as market penetration, likelihood of increased imports, price suppression, Canadian exports to other markets and distribution channels which were considered as evidence that threat of material injury to the U.S. domestic pork industry was real and actual injury imminent.

The specific issues confronting the Panel read therefore as follows:

1. Whether the ITC's determination that the Canadian subsidies increase Canadian pork production and exports is supported by substantial evidence on the Record;
2. Whether the ITC's determination that the U.S. domestic pork industry is threatened with material injury by reason of imports from Canada is supported by substantial evidence on the Record;
3. Whether the ITC's determination that the U.S. domestic pork industry was vulnerable to the threat of increased pork imports from Canada is supported by substantial evidence on the Record.

Upon examination of the Record and after full consideration of the arguments presented by the parties in their briefs and at the hearing held in Washington, D.C., the

Panel remands the ITC's Final Determination for reconsideration because it relied heavily throughout on statistics which appear at best questionable and that this reliance colored the ITC's assessment of much of the other evidence. The ITC is instructed to reconsider the evidence on the Record, and more particularly the figures on Canadian pork production, for action consistent with the Panel's decision.

The results of this remand shall be provided by the ITC 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 ITC's remand results.

III. STANDARD OF REVIEW

The FTA provides, in certain circumstances, for Binational Panel review to supplant judicial review of antidumping and countervailing duty determinations rendered by the administering authority in the importing country. See Article 1904(1) of the FTA and 19 U.S.C. par. 1516a(g)(2) (1989 Supp.). Under Article 1904(3) of the FTA, each Panel "shall apply the standard of review described in Article 1911 and the general legal principles[1] that a court of the importing Party otherwise would apply ...." In cases such as this, in which the United States is the importing country, Article 1911 of the FTA defines the standard of review to be applied by the Panel as the standard of review set forth in Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended. Thus, under the FTA, the Panel must look to that section for the standard of review and to the decisional law of the Court of International Trade and the Court of Appeals for the Federal Circuit for the appropriate legal principles. See Replacement Parts for

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[1] 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."

Self-Propelled Bituminous Paving Equipment from Canada, USA 89-1904-02, Memorandum Opinion and Order Regarding Scope Determination, dated Jan. 24, 1990 ("Bituminous Paving Equipment"), at 3-5 and New Steel Rail except Light Rail from Canada, USA 89-1904-07, Opinion of the Panel and Remand Order, dated June 8, 1990 ("Steel Rail"), at 2.

Section 516A(b)(1)(B) of the Tariff Act of 1930, codified at 19 U.S.C. par. 1516a(b)(1)(B), provides that a "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 Binational Panels have consistently applied the law of the Court of Appeals for the Federal Circuit with respect to the standard of review for these cases. In Bituminous Paving Equipment at 3-5, the Panel cited Matsushita Elec. Ind. Co., Ltd. v. United States, 750 F. 2d 927, 933 (Fed. Cir. 1984) for the principle that substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2]

Another Panel has noted that great deference must be accorded to the findings of the agency charged with making factual determinations under its statutory authority. Red Raspberries from Canada, USA 89-1904-01, decided Dec. 15, 1989, ("Red Raspberries") at 18-19; see also Smith-Corona Group v. United States, 713 F. 2d 1568, 1571 (Fed. Cir. 1983). In reviewing the ITC's findings, this Panel is not authorized to substitute its judgment for that of the agency; nor can the Panel reweigh the agency's evidence on the record.

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[2] In a companion case, Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA 89-1904-03, Memorandum Opinion and Order dated Mar. 7, 1990, at 3-4, the Panel incorporated by reference that part of its earlier Memorandum Opinion regarding the standard of review. See also New Steel Rails from Canada, USA 89-1904-09 and 89-1904-10, Opinion of the Panel dated August 13, 1990 ("New Steel Rails"), at 8-10.

Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (Ct. Int'l Trade 1989) ("Metallverken"). Rather, the Panel must assess the evidence in order to find out whether there is substantial support for the ITC's Final Determination. See Corning Glass Works v. U.S.I.T.C., 799 F.2d 1559, 1568 (Fed. Cir. 1986).

In assessing the evidence, the Panel must consider the Record as a whole, including evidence on the Record which detracts from the substantiality of the evidence relied on by the agency making its determination. See SSIH Equipment, S.A. v. U.S.I.T.C., 718 F. 2d 365, 382 (Fed. Cir. 1983), quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). As long as the determination is supported by a reasonable evaluation of the evidence on the record, however, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. See Bituminous Paving Equipment at 2, citing Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-620 (1966).

The proscription against a Panel reweighing the evidence does not foreclose a Panel from ever deciding that an ITC determination is unsupported by substantial evidence; nor is the deference properly owed to the ITC's determination without limits. 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). Moreover, whereas the agency is presumed "to have considered all pertinent information sought to be brought to its attention. ... [T]he court is in a position to determine if it has done so." Nakajima All Co., Ltd., v. United States, Slip Op. 90-67 (Ct. Int'l Trade, July 20, 1990), at 16 (citations omitted).

In the area of threat of material injury, the Senate Committee on Finance stated that an ITC determination must be "based upon evidence showing that the likelihood is real and imminent and not on mere supposition, speculation, or conjecture". S. Rep. No. 1298, 93rd Cong., 2d Sess. 180 (1974). In 1979, Congress again made its intent clear concerning determinations of future injury, articulating a practical test: there must be "information showing that the threat is real and injury is imminent, not a mere supposition or conjecture." S. Rep. No. 249, 96th Cong., 1st Sess. 88-89 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979).[3] In other words, if the record before the ITC shows "simply a mere possibility" that injury might occur at some remote future time, then such showing (viewed in the context of the "real and imminent" standard) compels the conclusion that the record lacks substantial evidence of a threat of injury. Alberta Gas Chemicals v. United States, 515 F. Supp. 780, 791 (Ct. Int'l Trade 1981) (emphasis in original).

Because this Panel is limited in its review to the ITC's decision on the Record,[4] it must have before it an adequate explanation of the bases for the ITC's Final Determination. In cases where such detail is not adequate, the Panel is authorized to remand the determination to the ITC. This remand authority is provided for in Article 1904(8) of the FTA, which states that a Panel may remand a final determination to the agency "for action not inconsistent with the panel's decision."[5]

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[3] This language was codified at 19 U.S.C. par. 1677 (7)(F)(ii) (1988).

[4] Article 41 of the Panel Rules of Procedure for Article 1904 Binational Panel Review clearly identifies the Panel's record for review as "all items contained in the administrative record" that are designated by the parties.

[5] See also the definition of remand in Article 1911, stating that, for the purposes of Chapter 19 reviews, "remand means a referral back for a determination not inconsistent with the panel or committee decision."

It is well established in case law that 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), citing S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979); Carlisle Tire and Rubber Co. v. United States, 564 F. Supp. 834, 837 (Ct. Int'l Trade 1983). See also Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) cited in Red Raspberries, at 18-19.

Article 1911 of the FTA states that the agency's reasons for its determination are considered part of the administrative record. In addition, Section 1328 of the Omnibus Trade and Competitiveness Act of 1988 amended Section 771(1) of the Tariff Act to require the ITC to "explain its analysis of each factor considered" in making certain determinations regarding material injury.[6]

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[6] 19 U.S.C. par. 1677(7)(B) states, in pertinent part, that "[T]he Commission shall explain its analysis of each factor considered under [par. 1677(7)(B)(i)] and identify each factor considered under [par. 1677(7)(B)(ii)] and explain in full its relevance to the determination" (emphasis added). 19 U.S.C. par. 1673d(d) requires the ITC, in antidumping determinations, to provide the petitioner, other parties and the ITA with "the facts and conclusions of law upon which the determination is based ...."

In the Red Raspberries review, the Panel remanded a final antidumping determination to the ITA because that agency failed to provide an adequate explanation why it had rejected certain evidence in the record as the basis for its determination.[7] The Panel stated that the ITA had failed to provide a basis on which the Panel could assess whether the ITA's decision was supported by substantial evidence on the record. Based on Section 1328 of the Omnibus Trade and Competitiveness Act of 1988, the Panel stated that "an explanation of the reasons for the record in this review is essential before this Panel can conduct a proper review." Red Raspberries at 22 (footnote omitted). The Panel's remand opinion provided the ITA with specific instructions for recalculating the dumping margins at issue. In the opinion of the Panel on remand, the Panel found the ITA's explanation "legally deficient," and remanded the case to the ITA a second time with additional instructions. See Red Raspberries (determination on remand), decided April 2, 1990, at 1.

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[7] The ITA's antidumping and countervailing duty decisions, which are subject to the same standard of review as the ITC's injury determinations, can be remanded for further development of facts by the agency on the record. "An explanation on the record discussing [a significant factor in the determination] is necessary for the court to conduct a proper judicial review." Toho Titanium Co., Ltd. v. United States, 657 F. Supp. 1280, 1286 (Ct. Int'l Trade 1987).

The Court of International Trade has held that the ITC must provide an adequate explanation of the reasons for its decision on the record. In USX Corporation v. United States, 655 F. Supp. 487, 490 (Ct. Int'l Trade 1987) ("USX Corp."), the Court remanded an ITC determination because the ITC's analysis failed to include an explanation of the significance of a primary factor to other evidence in the administrative record.[8] Similarly, in this case, the ITC must provide a satisfactory explanation of the reasons underlying its decision on the Record before this Panel can find adequate support for the ITC's Final Determination.

On the other hand, an agency need not provide a minutely detailed explanation of each of its bases for reaching a determination. The Court of International Trade has stated that "the ITC is not required to amass every conceivable shred of relevant data in order to comply with the requirement of the law, [however,] the absence of information necessary for a thorough analysis may render a determination unsupportable by substantial evidence." USX Corp. at 498, citing Kenda Rubber Indus. Co. v. United States, 630 F. Supp. 354, 358 n.4 (Ct. Int'l Trade 1986).[9] Judicial authority supports a remand if it fosters and promotes fundamental fairness. See Borlem S.A.-Empreedimientos Industriais v. United States, 710 F. Supp. 797 (Ct. Int'l Trade 1988) ("Borlem I"), citing Alhambra Foundry Co., Ltd. v. United States, 685 F. Supp. 1252, 1262 (Ct. Int'l Trade 1988).

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[8] See generally Borlem S.A.-Empreedimientos Industriais v. United States, 718 F. Supp. 41 (Ct. Int'l Trade 1989) ("Borlem II"). In that case, finding that the ITC apparently had made its injury finding in an antidumping case "based upon material and significant inaccurate facts" (718 F. Supp. at 46), the Court held that the ITC has and should use its authority to reconsider a final determination upon remand by the Court.

[9] In USX Corp., the Court remanded a case to the ITC stating that the agency had articulated no rationalization between evidence on the record and its ultimate determination.

The case before the Panel was decided affirmatively by the ITC on the basis of threat of material injury. As noted by the Court of International Trade, "as it deals with the projection of future events, a threat analysis is inherently less amenable to quantification than the material injury analysis." See Metallverken at 742; see also Hannibal Industries Inc. v. United States, 710 F. Supp. 332, 338 (Ct Int'l Trade 1989). For this reason, the Court has stated that if a threat of injury determination is based in part on any factor, it is the "better practice to have an explicit statement on this issue rather than leaving the Court to make this inference." See Metallverken at 744. Citing Kurzon v. United States Postal Serv., 539 F. 2d 788, 796 (1st Cir. 1976), the Court stated that remand is appropriate when the Court is in substantial doubt regarding whether the agency would change its ultimate finding if a mistake of fact that figured in its determination were removed. Metallverken at 743.

In a case in which the Court remanded a threat of injury determination to the ITC, the Court stated that it was "loathe to affirm a determination that might be based on a questionable record." Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988) ("Citrosuco"), quoting Serampore Indus. v. United States, 696 F. Supp. 665, 673 (Ct. Int'l Trade 1988). In Citrosuco, the Court remanded a portion of the ITC's determination of threatened material injury for reconsideration of the significance of inventories in the U.S.

The ITC has an even higher burden to meet for a finding of threat of material injury where there is a finding of no present material injury. In the New Steel Rails review, the Panel stated that, in such cases, "the record must reveal, at least, a deterioration in the condition of the domestic industry (i.e., increased susceptibility to material injury by

reason of the subject imports) or increased or different effects of the imports on that industry or a combination of such factors". See New Steel Rails at 35-36 (citations omitted).

Following the principles stated in the above cases and in the FTA, this Panel is precluded from substituting its judgment for that of the ITC. For its part, however, the ITC is obligated to set forth sufficient reasons to support its determination, so that the Panel may determine whether the substantial evidence test has been met. In this case, on a review of the whole Record and considering the ITC'srepresentations, the Panel concludes, as detailed below, that there appear to be mistakes of fact in the ITC's Record and Final Determination such that the Panel has substantial doubt as to what the ITC's determination would have been without them.

IV. THE ITC'S THREAT OF MATERIAL INJURY DETERMINATION

With this standard of review in mind, the Panel has examined the Record to determine whether the ITC's findings are supported by substantial evidence.

The U.S. threat statute, codified at 19 U.S.C. par. 1677(7)(F), provides the basis for any determination of threat by the ITC. Subpart (ii) states that any determination by the ITC that an industry in the U.S. is threatened with material injury shall be made on the basis of evidence that threat of material injury is real and actual injury is imminent.

Subpart (i) enumerates ten economic factors which the ITC shall consider, among other relevant economic factors, in order to assess the probable impact of imports on the U.S. industry. These factors, aimed at identifying relevant economic trends both in the foreign and U.S. industries, are as follows:

(I) if a subsidy is involved, such information as may be presented to it by [Commerce] as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement [on Subsidies and Countervailing Measures]);

(II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States;

(III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level;

(IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise;

(V) any substantial increase in inventories of the merchandise in the United States;

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country;

(VII) any other demonstrable adverse trends that indicate the probability that importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury;

(VIII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation (s) [or final orders under] this title, are also used to produce the merchandise under investigation;

(IX) in any investigation under this title which involves imports of both a raw agricultural product (within the meaning of paragraph (4) (E) [iv]) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1671 (b) (1) or 1673d(b) (1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both);

(X) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

The factors relating to investigations of raw and processed agricultural goods and to effects on existing development efforts were found to be inapplicable to the ITC's finding of threat. The conclusions on these two factors have not been challenged. In addition, the ITC's Final Determination (as was confirmed by the ITC in its Brief at 77) did not rely on a finding of substantial increase in inventories or on the potential for product shifting.

Pursuant to its analysis of the remaining six economic factors, the ITC found that the U.S. domestic pork industry was threatened with material injury by reason of subsidized pork imports from Canada.

The Panel comes to the conclusion that several of the ITC's findings, on various issues which it quite properly considered, rely heavily or flow directly from faulty use of statistics. The Panel is convinced that, had the three ITC Commissioners in the majority been fully aware of the weaknesses inherent in these findings of fact, they would have wanted to reconsider the conclusions which they saw as flowing from them and to give greater consideration to other facts which appear to have been relegated to an undeserved secondary status by apparent reliance on the questionable findings.

More specifically, the Panel is of the view that the ITC's findings on the nature of Canadian subsidies, the likelihood of increased Canadian pork exports, the likelihood of an increase in market penetration ratios, price suppression, distribution channels, the imminence of threat of material injury due to the countercyclical nature of the hog cycle and the vulnerability of the U.S. domestic industry are all colored by the questionable finding of greatly increased Canadian pork production and, therefore, the Panel must remand the ITC's Final Determination for reconsideration.

1. The Nature of the Canadian Subsidies

The majority Commissioners first considered the nature of the Canadian subsidies and found that "to the extent that the subsidies increase production in Canada, and because

Canadian production is largely dependent on export sales, particularly to the United States, the effect of such subsidies is to enhance the likelihood of increased subsidized imports to the U.S. market".[10]

The ITC indeed found that, since the subsidies have the effect of decreasing the cost of producing hogs, and therefore the cost of producing pork, Canadian pork production and exportation are thereby enhanced.[11] The ITC found that this increase of Canadian production was of major proportions, from 2 billion pounds of pork in 1986 to 2.6 billion pounds in 1988[12] while Canadian consumption of pork only increased by 110 million pounds in the same period.

This finding lay behind and colored the majority Commissioners' views of several issues which they rightly considered, such as the likelihood of further increases of production, the power of the subsidies to offset natural cycles in hog and pork production, the vulnerability of the American industry, the likelihood of increased exports, the likelihood of further market penetration and underselling in the United States.

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[10] ITC's Final Determination at 19. See also ITC Brief at 10, 26 and 50.

[11] ITC's Final Determination at 18.

[12] ITC's Final Determination at 18-19 and at A-40, Table 17.

The Panel is of the view that this finding is based on a questionable interpretation of statistics which appear unreliable. The appearance of a rapid increase in the Canadian production of pork is due to a change of method of counting and reporting pork production by Agriculture Canada and Statistics Canada between 1987 and 1988. This was pointed out to the ITC by the U.S. Department of Agriculture and is part of the Record.[13] The statistical error was also admitted by the NPPC in its Brief (at 40) and it was recognized by the ITC itself which sought a voluntary remand of its decision on that particular point on March 26, 1990.

According to the CMC, the increase in Canadian production was actually 170 million pounds instead of 600 million, thereby lowering the production growth from 31% as thought by the ITC to 8,4% for the 1986-1988 period, which is less than the U.S. industry's growth in production over the same period.[14] In the same way, CMC estimated that the increase in Canadian consumption of pork was around 4% rather than 7% between 1986 and 1988.

Because of this statistical inconsistency, the Canadian pork production data relied on by the ITC in its determination appear at least inaccurate. Without deciding whether any of the Complainants are correct in their calculations or interpretation of the statistics on this question, it does appear to the Panel that the Commissioners may well, on proper consideration of the evidence, find that the net growth, if any, in the production of Canadian pork available for export, whether to the United States or elsewhere, would be considerably smaller than what the majority Commissioners appear to have taken as a fact.

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[13] See Public Document 116(A36) at 21 (Attachment R to MJP Brief) and Public Document 115J at 12 (Attachment S to MJP Brief).

[14] CMC Brief at 59 and CMC Reply Brief at 61.

Taking this smaller growth into consideration, rather than the very striking growth erroneously reflected in the Record, the Panel requests the ITC to reconsider the effect of the Canadian subsidies on pork production. The ITC had to consider 18 Canadian federal and provincial subsidy programs which offered benefits to the pork producers, but only three of these were of any real consequence and a proper consideration of the trends in Canadian production while these three subsidies were available to Canadian pork producers might well lead to conclusions different from those the Panel has before it.

Furthermore, it appears that the ITC was sufficiently struck by the appearance of a great increase in Canadian pork production between 1987 and 1988, a year in which the Commissioners unanimously found absence of injury to the U.S. industry, that it seems too hastily to have assumed that similar production increases out of proportion to the hog cycle would go on into the future. This assumption clearly also underlies the finding of threat of material injury. On remand, once the statistical anomalies are erased, the ITC might attach greater importance to other facts, which seem to have been drowned out by the inaccurate 600-million pound increase mentioned above.

For example, Canadian statistics regarding the numbers of hogs currently being bred on Canadian farms and the proportions of those being kept back for further breeding forecast a decline in Canadian hog breeding potential: the ITC Record[15] shows that Canadian pigs on farms were expected to drop by 2% between April 1988 and April 1989, that sows for

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[15] Public Document 74, Attachment E at 1. See also CMC Brief at 72 and CMC Reply Brief at 50 and 57.

breeding and bred gilts were estimated to be down 3% and that the 1989 estimate for farrowings for the first quarter of 1989 was down 2% from the 1988 estimate for the same period. The Panel considers that these statistics seem to indicate a fall-off in Canadian production of pork at least for the next few years which seems inconsistent with the finding that the subsidies are likely to increase Canadian production and, consequently, exports.

Similarly, the U.S. Department of Commerce and the U.S. Department of Agriculture predicted declines in production of Canadian pork for 1989 and 1990[16].

Because of the faulty interpretation of production data, the Panel has no way of knowing how the ITC considered these indicia of the near future or whether the ITC's conclusion would have been wholly different had it known what production actually was. See Metallverken at 743.

In addition, as far as the impact of the subsidies on Canadian pork production is concerned (which the majority Commissioners assumed to be resulting in substantial increases), the Panel notes that expert testimony in the ITC Record concludes that no significant supply response has been observed from the three major Canadian stabilization programs[17].

As well, particularly bearing in mind the unanimous conclusion of the ITC that there was no material injury to American production due to exports of pork from Canada, the ITC, armed with correct production data, might have considered

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[16] See Public Document 116(A3) at 22, Public Document 115J at 11 and Document 116(A35) at 14 and 35. See also Attachment 1 to ITC Brief.

[17] See Public Document 74, Attachment A and Public Document 116 (A13).

any prospect of a change in the Canadian subsidies or of a change in their effect on Canadian pork production or exports. For example, the ITA's Final Determination stated at 30,782 that the smallest one of the three major Canadian programs, the SHARP Program, was being phased out and terminated. Given a more accurate picture of Canadian production, the ITC may find the fact relevant.

The Panel is also unable to ascertain whether the statistical misinterpretation allowed the ITC to give any weight, to the trends of Canadian export volumes over the past several years. These trends have followed U.S. price levels down and up, without there being an appearance of Canadian subsidies having produced a surplus of pork during cycle throughs or of Canadian exporters taking advantage of weaknesses in the American market. Were the production increase of 600 million pounds of Canadian pork a reality as believed by the ITC, one might reasonably conclude that the trends could not possibly hold up into the future. If that is the conclusion which explains the majority Commissioners' decision not to deal with the Canadian export trends at all, it is all the more reason that these trends be considered by the ITC in the light of correct information regarding Canadian production figures.

Considering the heavy reliance by the ITC on an erroneous interpration of Canadian pork production figures and the fact that several economic indicators in the Record forecasted a decline in both Canadian pork production and Canadian subsidies, the Panel remands the ITC majority's findings on the effect of Canadian subsidies for reconsideration in light of corrected data.

2. Likelihood of Increased Exports to the United States

The majority Commissioners also concluded that there was a likelihood of an increase in Canadian exports of pork to the United States. As far as increased Canadian exports are concerned, the majority Commissioners grounded their finding on the nature of the Canadian subsidies and the underutilization of Canadian production capacity.

i) Canadian subsidies

As discussed above, the ITC's Final Determination (at 19) states that, "to the extent that the subsidies increase production in Canada, and because Canadian production is largely dependent on export sales, particularly to the United States, the effect of such subsidies is to enhance the likelihood of increased subsidized imports to the U.S. market". On its face, this finding of increased exports flowing from the Canadian subsidies relies directly on the questionable appearance of a dramatic increase in the production of pork in Canada. The Panel believes that this finding must be reviewed by the ITC, not only excluding from consideration the inacurate increase in production of Canadian pork, but also with due attention to other telling parts of the Record.

For example, statistics on the Record regarding Canadian pork exports to the United States in recent years indicate clear declines. Those exports went down 8.2% in 1988, even according to the statistics relied upon by the ITC; that

is, those exports declined even during the very year of the questionable increase in Canadian production.[18] Those exports went down further in 1989, decreasing by 13.9% in the first quarter of 1989 compared to the same period in 1988.

The ITC appears also to have relied on its inaccurate interpretation of Canadian production statistics to conclude that it was unnecessary to consider the projections in the Record of increases in hog exports from Canada to the United States, which exports would leave fewer hogs in Canada to become pork exportable or not. Indeed, the increase in hog exports began in early 1988 and accelerated dramatically in early 1989, quite apparently reducing Canada's exports of pork to the United States[19].

ii) Underutilization of Capacity

The majority Commissioners also gave consideration to the underutilization of Canadian production capacity, more specifically, to the ending of a strike at the Fletcher's Fine Foods plant in Canada. The ITC concluded that this strike contributed "potentially" to the decline in Canadian pork exports during 1988 and that the added production likely to come from this plant as a result of the settlement of the strike in March 1989 would likely increase chances of further Canadian exports of pork to the United States.[20]

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[18] ITC's Final Determination at A-41, Table 18. See also Public Document 115J at 13, Public Document 116(A3) at 22 and CMC Brief at 62.

[19] See NPPC Exhibit 1 filed at the hearing and ITC's Final Determination at A-41, Table 18.

[20] ITC's Final Determination at 19 and 20.

In coming to its conclusion on the return to production of underutilized capacity following settlement of the Fletcher's strike, the majority Commissioners also relied on the erroneous production, consumption and export figures in Table 17. The Panel does not know whether or to what extent the ITC considered other evidence. For example, there appears to be no consideration of the materiality of the plant's return to full production after the strike to the productive capacity it had before the strike. As well, it appears that, during this strike, pork which would normally have been processed at this plant was processed at two other Canadian plants managed by the struck plant[21] so that, in the Panel's view, the evidence must clearly be reviewed to determine whether the settlement of the strike will or will not increase overall Canadian processing capacity.

Referring to another plant in Alberta (the Gainers plant), the majority Commissioners referred to an undisbursed governmental grant authorized for it and concluded that this grant would also increase production in Canada and, consequently, exports to the United States. Again, against the backdrop of a belief in vastly increased Canadian pork production, the ITC may have given greater weight to this fact in reaching an affirmative threat finding than it might do once the underlying data are interpreted correctly.

Moreover, the ITC's reliance on the inaccurate production statistics may have overshadowed evidences of increases in hog exports from Canada to the United States. ITC counsel argued that the increase in hogs was due to the closure at Fletcher's, which may explain some of the increase, but the

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[21] Confidential Document 15J, note dated Aug.28/1989.

increase in volume of hog imports appears to surpass the capacity at Fletcher's and coincides closely in time with the reduction of the countervailing duty on hogs, thus tending to show that fewer hogs would be available in the foreseeable future in Canada for conversion to pork.

On remand, the Panel requests that the ITC reconsider its finding of likely increased exports to the United States in light of corrected production data and other facts on the Record.

3. **Likelihood of Increase in Market Penetration Ratios**

As far as market penetration is concerned, the majority Commissioners predicted an increase in Canada's share of the market to an injurious level[22], though they recognized that market penetration ratios had declined over the most recent period. Four specific factors led them to believe that there is a threat of an increase in market penetration ratios of Canadian pork imports to an injurious level.

One of those factors is explained in a paragraph which makes specific reference to the increase in Canadian production shown in the questionable Table 17. The second is a reference to the settlement of the Fletcher's strike mentioned above. The third one is a reference to the increase of Canadian pork exports to Japan, and the fourth concerns U.S. consumption of pork.

Regarding the third of these factors, the ITC referred to statistics on Canada's pork exports to countries other than the United States and concluded that those exports would likely

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[22] ITC's Final Determination at 21.

be diverted to the United States in future. Referring to an increase of Canadian pork exports to the Japanese market during 1988, because of quality problems with Japan's traditional source of supply, Taiwan, and to increases in Taiwan's exports of pork to Japan since resolving those quality problems, the majority Commissioners concluded that it is likely that the Canadian exports of pork to Japan will drop off and pork exports not sent to Japan will find themselves diverted to the United States.[23]

This strikes the Panel as inappropriate, selective fact finding from the Record as the Record is also clear that, even since the apparent resolution of Taiwan's difficulties, Canadian exports to Japan have continued to increase, by rather striking proportions, quarter by quarter and month by month, with the sole exception of April, 1989, a month seized upon post-hoc by ITC counsel to argue that the ITC had perhaps been correct to foresee a decline in Canadian exports to Japan. In the Panel's view, reliance on such data appears to be so contrary to the Record as a whole that it amounts to reliance on "isolated tidbits" which does not meet the "substantial evidence" standard of review. The Court of International Trade has stated in USX Corp that the "ITC may not rely upon isolated tidbits of data which suggest a result contrary to the clear weight of evidence". See USX Corp at 489.

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[23] ITC's Final Determination at 21.

The Record shows that, through the first half of 1989, Canadian pork exports to Japan were increasing and were greater than in the comparable 1988 period. All evidence showed that Canadian exports to Japan continued at high levels even after Taiwan exports to Japan began to increase.[24]

Hence, the Panel is of the opinion that the Record does not support the finding that Canadian exports to Japan were likely to decline and the excess be diverted to the United States and the ITC is asked to reconsider this point.

Finally, citing to the Final Determination at A-8, Table 1, the ITC concluded that because U.S. consumption had decreased slightly over the past ten years, an increase in Canadian imports could not be easily absorbed by the market and would displace domestic pork, thus increasing Canadian market share. Table 1, however, depicts per capita consumption, not total consumption, and hence does not take into account any population growth. In fact, U.S. apparent consumption of pork increased over the period reviewed by the Commission. [25] Hence the fourth finding that influenced the ITC's conclusion that increased market penetration is likely is not supported by the Record.

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[24] It appears to the Panel, from a review of relevant evidence, that Japanese imports of Canadian pork had increased 14,5% in 1986, 36,9% in 1987, 14,2% in 1988 and 45.4% over the first four months of 1989; all of 1989's Canadian exports to Japan were also higher than all of 1988's, increasing by 25% over the first six months of 1989. See ITC Brief, Attachment 3; Public Document 74 at 20 and Attachment D and ITC's Final Determination at A-25 and A-39; see also MJP Brief at 67 and CMC Reply Brief at 65. And even taking April 1989's drop-off without cancelling it by other months' increases, that drop-off is infinitesimal compared to Canada's exports of pork to the United States.

[25] ITC's Final Determination at A-22, Table 3.

The Panel concludes that the ITC's findings on market penetration must be reexamined since two of the four specific factors relied on by the majority Commissioners are not supported by substantial evidence on the Record and the remaining two may have been tainted by misuse of the Canadian production statistics.

4. **Price Depression or Suppression**

The majority Commissioners found that "(b)ecause the pork market is a price sensitive market, the likely increase in imports will have a price suppressing effect. This is particularly significant in light of the vulnerability of the industry". [26] In the Panel's view, this was clearly premised on the likelihood of an increase in imports into the United States of Canadian pork, which was itself in part based on flawed use of Canadian production data. Since that premise, as explained above, is questionable, the Panel requests the ITC to review its finding regarding price suppression on the basis of its reconsideration.

Once the ITC has corrected its misinterpretation of the information regarding the magnitude of Canadian production and of Canadian exports to the United States, it may find it appropriate to give greater attention to the evidence of underselling in the ITC Record.

The majority Commissioners, looking at examples of under- and overselling by Canadian pork in the U.S. market concluded that "of the 28 comparisons made, there were 17 periods in which Canadian pork undersold domestic pork and 11 periods in which Canadian pork oversold domestic pork."[27]

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[26] ITC's Final Determination at 22.

[27] ITC's Final Determination at 22.

A review of the Record indicates that these "periods" were reported by no more than three purchasers and that reference might just as easily have been made to the 34 respondents, only eight of whom saw underselling by Canadian pork rather than overselling.

In this light, the Panel requests the ITC to readdress its conclusion of a likelihood of price suppression by Canadian pork exports.

5. Other Adverse Trends: Distribution Channels and Countercyclical Nature of Hog Cycle

The majority Commissioners finally referred to a change in the pork market occasioned by the fact of some Canadian producers having purchased two packing facilities in the United States, consequently gaining apparent access to distribution networks in the United States.[28]

The ITC did not indicate what weight that factor held in its affirmative determination. Nonetheless, the Panel feels compelled to note that one of these facilities does not import pork at all[29] and that there are plans to shut it down. In the Panel's view, there appears to be no substantial evidence on the Record as to the materiality of the single facility remaining, in terms of offering to Canadian pork exporters distribution and transportation facilities or of removing from Canadian pork exporters constraints on Canadian production and exportation to the United States.

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[28] ITC's Final Determination at 23. This was apparently to distinguish the 1989 case from a previous case, Live Swine and Pork from Canada, Inv. no. 701-TA-224(Final), USITC Pub. 1733 (July 1985), in which the ITC had unanimously found absence of past, present or future injury.

[29] See Confidential Document 15J.

In this light, the evidence relied on by the majority Commissioners to find that Canadian exporters had lost a constraint which had hampered them previously appears questionable. On remand, the Panel requests explanation of the significance of this finding.

The ITC also found the countercyclical nature of the hog cycle of swine production to pork imports from Canada to be another adverse trend. Again, as the analysis of this trend is founded on earlier findings which the ITC will be reconsidering on remand, the Panel requests reconsideration of this "adverse trend" as well.

6. Imminence of Threat

CMC argued that the ITC's Final Determination was not based on evidence that actual injury to the domestic industry was imminent.

A determination by the ITC that an industry in the United States is threatened with material injury must be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent. It may not be made on the basis of mere conjecture or supposition.[30]

The Court of International Trade has offered guidelines on the requirement that injury be "real and imminent". Recently the Court stated:

> An affirmative threat determination must be based upon "positive evidence tending to show an intention to increase the levels of importation". American Spring Wire, 8 CIT at 28, 590 F. Supp. at 1280. The "essence of the threat lies in the ability and incentive to act imminently." Republic Steel Corp. v. United States, 8 CIT 29, 41, 591 F. Supp. 640, 650 (1984).
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> * * *

[30] 19 U.S.C. par.1677(7)(F)(ii).

> Whether a threat of material injury is real and imminent is established through analysis of the threat factors listed under 19 U.S.C. par. 1677 (7) (F) (i). Asociacion Colombiana de Exportadores de Flores v. United States, 12 CIT _____ , 693 F. Supp. 1165, 1171 (1988).

Metallverken Nederland B.V. v. United States, Slip Op. 90-68 (Ct. Intl Trade, July 20, 1990), at 14-16.

The Panel concludes from this that, while the ITC need not make a specific finding that threat of material injury is "real and imminent", the imminence of the threatened injury must be apparent from the analysis of the economic factors.

In this case, the ITC did make a specific finding of imminence as follows:

> Hence, because the Canadian and the U.S. hog cycles run on generally parallel schedules, Canadian production, and hence exportation, is being encouraged just at that point of the hog cycle when the U.S. industry is the most vulnerable. Because the hog cycle is currently still at a peak, perhaps just beginning its downward trend, we find that although there is no present injury, the threat of injury is real and imminent.[31]

Clearly the ITC's ultimate finding that threat of material injury is real and imminent harks back to the questionable interpretation of statistics relating to Canadian pork production and to the concern that Canadian pork exports to the United States are likely to increase at the beginning of the downturn in the hog cycle.

On remand, the Panel requests a reexamination by the ITC as to whether threat of material injury is in fact real and imminent.

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[31] ITC's Final Determination at 24.

The Panel is of the view that the ITC will want to reconsider the likelihood of threat of material injury in relation to facts for which evidence does exist on the Record. Among these are the farrowing decisions already made in Canada and the declining stocks of both piglets and breeding swine in Canada, the current capacity utilization of U.S. pork packers nearing 100%[32], the likelihood that Japan would revert to past near-total reliance on Taiwan as a supplier in view of the trends of Canadian pork exports to Japan and the grant given to one Canadian producer and its impact on current levels of Canadian pork production and exports destined for the United States.

V. VULNERABILITY

The majority Commissioners' finding that Canada's share of the American pork market will increase and that this increase will lead to levels which will be injurious is put explicitly against the backdrop of the general condition of the U.S. domestic industry.[33]

In analyzing the condition of the domestic injury, the ITC determined that the most recent trends in the industry were downward, particularly in terms of profitability, and that therefore "they reflect an industry that is particularly vulnerable to the possible effects of increased imports of subsidized pork from Canada".[34]

Moose Jaw challenged this finding arguing that the determination of vulnerability was not supported by substantial evidence on the Record. Moose Jaw takes the long-term approach to its challenge, arguing that any signs of weakness noted by the ITC majority were merely the natural manifestations of the

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[32] TC's Final Determination at 12.

[33] ITC's Final Determination at 10 to 16.

[34] ITC's Final Determination at 16.

hog cycle and that the state of the industry was certainly no worse, and perhaps even better, than at the onset of similar phases in the hog cycle in the past.[35] The ITC's response essentially is that the ITC is not required to demonstrate that the industry was any more vulnerable at this particular phase of the cycle than it was previously in a similar phase. ITC Counsel argues that the U.S. pork industry is vulnerable every time the downturn in the hog cycle commences.

A finding of vulnerability serves in turn as a backdrop against which the ITC assesses the impact of imports and appears to lessen the threshold for an affirmative finding of threat. Having found that the U.S. pork industry was vulnerable, the ITC also found that if Canadian imports increased, they risked pushing the U.S. pork industry from a non-injured to an injured state. Since the ITC concluded that Canadian imports would increase, it also concluded that the U.S. industry was threatened with material injury.

The Panel is of the view that, as with so much of the Final Determination, the finding of vulnerability was also affected by the belief that Canadian pork production had increased significantly and that an increase in exports to the United States would ensue. Since the ITC had previously found the U.S. pork industry not to have been injured either at the downturn in the cycle[36] (which was considered during the previous investigation) or at the upturn (during the current investigation), the ITC may well have interpreted the issue of vulnerability differently had it not been under the misapprehension as to Canadian production data.

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[35] The Panel leaves aside the quibble that the Commissioners have referred erroneously to "billions" rather than "millions" at page 15 of the Final Determination, as this appears to be a likely clerical error or oversight.

[36] Live Swine and Pork from Canada, Inv.No. 701-TA-224 (Final), USITC Pub. 1733 (July 1985).

In the Panel's view, the ITC's conclusions on the American industry's vulnerability seem to give insufficient consideration to various factors.

There is no evidence on the Record that the projected trough in the American pork cycle is likely to be exceptionally deep, that is deeper than any preceding trough already found to have produced no material injury to American pork producers despite the existence of Canadian subsidies.

In addition, the Record shows that the U.S. pork industry appears healthier now than in past years. American packers need Canadian pork to fill their order quotas from time to time.[37] U.S. pork production and U.S. domestic consumption of pork had been increasing over the last few years.[38] In fact, U.S. consumption was increasing more rapidly than Canadian consumption. Total employment had also been increasing in the U.S. industry[39] as did the aggregate operating income and the cash flow of the U.S. pork producers.[40]

Vulnerability is not an absolute. Rather, it is a relative term. An industry is neither vulnerable nor invulnerable. An industry can show greater vulnerability at some times than at others. Some industries are by their nature more vulnerable than others. The greater the vulnerability, the greater the likelihood of injury. So far, the ITC has failed to consider whether the American pork industry is more vulnerable now than it was in its uninjured past, or even whether the vulnerability which might result from a future trough in the hog cycle is likely to be greater than vulnerability in past troughs. See New Steel Rails at 35-39.

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[37] As pointed out by the majority Commissioners at page 9 of the ITC's Final Determination.

[38] See ITC's Final Determination at A-23 and A-24 and Public Document 116(A36).

[39] ITC's Brief at 41 and ITC's Final Determination at A-22.

[40] ITC's Final Determination at 14 and 15.

Therefore, the Panel requests that the ITC reconsider its finding of vulnerability, including whether it is intended to mean that the U.S. pork industry enters a vulnerable phase during every cycle.

VI. CONCLUSION

For the reasons stated above, and pursuant to Article 1904(8) of the FTA and Court of International Trade precedents, the Panel remands the ITC's Final Determination in Fresh, Chilled, or Frozen Pork from Canada, Inv. no 701-TA-298 (Final) to the ITC so that the ITC might reconsider the evidence on the Record consistently with the views expressed above.

The results of this remand shall be provided by the ITC 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 ITC's remand results.

(Date)	Simon V. Potter
(Date)	Kathleen F. Patterson
(Date)	Tom M. Schaumberg
(Date)	E. David D. Tavender
(Date)	John Whalley

ADDITIONAL VIEWS

of

Panelist John Whalley *

These are my additional views to those of the FTA Panel reviewing the ITC injury determination regarding imports of fresh, chilled or frozen pork from Canada. This statement of additional views goes somewhat farther than the panel report, however, in suggesting that not only were there inaccuracies in the interpretation of basic production data underlying the majority opinion but, in addition, there are a number of areas in which there were, in my opinion, an incompleteness in the analytical logic which linked cause (various factors) and effect (threat of injury). I raise these issues of incompleteness of analytical logic to offer further input into whatever deliberations may follow upon remand.

As a panelist it is perhaps important to stress that I have interpretated the mandate of FTA panels as being not only to ask whether or not ITC determinations are supported by substantial evidence on the record in the sense of determining the accuracy of the record itself. I also ask myself whether the logical chains

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of connection which link the record to the final determination are reasonable and can be supported on the basis of best professional practice.

In discussing instances of logical incompleteness in the majority ITC opinion, I follow the same flow of argumentation as

in the written opinion (U.S. ITC Publication 2218 September, 1989). I begin with the discussion of the nature of subsidies on page 18. I am aware that the issue of determining whether or not subsidization had occurred in this case was a matter for Commerce and not for the ITC. With the subsidy determination complete, the ITC's task was to determine whether injury or a threat of injury also existed. The arguments set out in the key section on the nature of subsidies on page 18, however, seem to me to be logically incomplete in a number of ways.

Firstly, because the ultimate determination rested on a threat of material injury, the links between subsidies and threat of injury need to be more carefully discussed than is the case in the majority opinion. A simple analytical economic model, using conventional demand-supply analysis incorporating subsidies, would suggest that once subsidies are in place for increased imports, and hence threat of injury, to occur in the future some further change must take place. The mere continuation of subsidies at present levels provides an insufficient logical basis to link subsidies to threat of injury.

Subsidies would need to be offered (or be expected to be offered) at more generous levels than currently, or some external factors (such as, say, the possibility of entering an economic downturn) would need in some way to be linked to special characteristics of the subsidies to demonstrate threat of injury. Presence of subsidies and threat of future injury do not, to my taste, have the analytical interconnection that seems to be suggested in the majority opinion. The argument on pages 18 and 19 of the majority opinion suggests that because subsidies exist "the effect of such subsidies is to enhance a likelihood of

increased subsidized imports to the United States market". Without a more complete discussion of whether a change in subsidies themselves seemed likely, or whether other external changes were anticipated in the future which were somehow linked to the operation of subsidy programs so as to precipitate injury, it is difficult on grounds of economic logic to accept the completeness of the analytical argument made in this instance.

Issues of incompleteness of analytical logic also arise with the discussion on page 18 on the nature of subsidies. The majority opinion states that "subsidies generally are aimed at or have the effect of decreasing the cost of producing hogs which decreases the cost of producing pork". Once again, a simple supply and demand analysis would indicate that in the case where there is an upward sloping supply function for pork, reflecting the presence of both fixed and variable costs, that the effect of a subsidy (in the form of a price support as indicated in footnote 83) would be to encourage existing producers to move up their individual supply functions with a corresponding positive market supply response in aggregate. Benefits of the price support for non-marginal producers would return as income transfers to fixed factors. The underlying cost function of both the industry and individual production units in the industry remain unaffected by the presence of a subsidy. The subsidy, if offered in the form suggested here (as a price support), undoubtedly has the effect of changing market behaviour and increasing output, but the language used does not correspond to analytical logic as, in my view, represented by what would be used by the mainstream economics profession.

The Commission discusses on page 19 the likelihood of

increased imports from Canada, pointing to the strike at Fletcher's Fine Foods. Some of the data aspects underlying the significance of work stoppages at Fletcher's Fine Foods in 1988 and 1989 are discussed in the panel report. At an analytical level, however, it does seem to me, once again, that the majority Commission opinion does not clearly demonstrate the link between a work stoppage at Fletcher's Fine Foods and the potential impact on aggregate market activity in Canada and, hence, the translation into potential future exports from Canada. One effect of a work stoppage at Fletcher's Fine Foods could, for instance, have been to encourage other production units in Canada to operate at higher capacity levels in the short run. In the short run, capacity utilization rates do not have as clearly defined limits as in the long run. If rival Canadian firms to Fletcher's saw an opportunity to increase both production and profits by making good the loss of output due to the work stoppage, they may have done so. At the end of such a work stoppage other production units could then move back to their normal production activity. Over time aggregate market output could be much the same with or without the stoppage.

I am not suggesting that this is in fact what happened in Canada when the work stoppage situation at Fletcher's Fine Foods occurred. But it does seem to me that it is important that the Commission be aware of the argument that because of substitution of production between individual production outlets, a strike affecting one production unit does not, in the short run, necessarily imply that when that unit returns to full production market, output automatically increases. This counter argument is not disposed of in the majority opinion as written.

In the section in the majority opinion on the increase of market penetration ratios, there again are issues of analytical logic. It is suggested that as a percentage of Canadian production, Canadian exports had been increasing, and because the United States was at that point the largest foreign consumer of Canadian pork exports, it seemed likely that exports to the United States would continue to increase. This line of argumentation is purely data extrapolation; it is not based on underlying analytical logic as to why this need automatically be the case. There are many counter examples from other fields one can point to of trends which change, interrupt themselves, or reverse.

In the section on price depression or suppression, there are once again analytical issues. The argument here is that pork prices in the United States and Canada are highly correlated, and as a result, increasing imports from Canada (because of subsidies) will have a price suppressing effect. Furthermore, this would be occurring in an industry which was vulnerable to such an event.

The data that is presented in the majority opinion to support this contention involves a series of price comparisons made across different periods linking the Canadian and U.S. markets. In this data, there are more periods in which Canadian pork undersells domestic U.S. pork than vice versa. Hence, the sensitivity of U.S. pork prices to Canadian imports is inferred, implying a determination of vulnerability.

The analytical issue here concerns the relative size of the markets which are linked and, hence, which set of producers provide the marginal source of supply into the integrated two

country market. In analytical work on the Canadian economy, it is quite common to represent Canada as a small open price taking economy. This is a treatment which considerably simplifies economic analysis, but reflects the contention that in goods markets where there are no, or only small, formal barriers to trade (such as tariffs or quotas), and in capital markets where international capital flows are mobile across the borders, Canada is substantially smaller than the United States. In this case, prices in both of these markets are set by behaviour in the large economy not by behaviour in the smaller one. If this analytical assumption is accepted, there is simply no issue of price depression or suppression occurring in U.S. markets from increased Canadian imports.

In reality, of course, there are many reasons why there may be the differences in price between Canadian and U.S. pork markets which the majority of Commissioners find in the data they report. The issue, however, is what such data actually demonstrate about the presence of a price suppressing effect. Prices can differ between countries, even with integrated markets, because of transportation costs, quality differences which are reflected in differential prices, asymmetries of information to suppliers to each of the two markets, or because of differential transactions costs in the two countries. The presence of price differences between two linked economies in and of itself is not sufficient, in my view, to invalidate the assumption of small open price taking economy behaviour.

Put another way and, perhaps, put overly strongly, the data presented at the top of page 22 of the majority opinion concerning price comparisons, does not seem to me, in analytical

terms, to be relevant to the question posed; namely whether price suppression or depression was likely to occur from increased Canadian imports. In my judgement, the question of whether price depressing effect will occur can only be answered with reference to an underlying analytical structure which takes into account the different sizes of the two economies. This ultimately comes back to the issue of the supply elasticities characterising production in each of the two countries. The data which is referred to in the majority opinion may not be germane to the argument being made, and in turn, the data which is relevant, the supply elasticities in the appropriate markets, would need to be examined before a completely convincing argument could be made.

In the section on inventories on pages 22 and 23, data presented show large inventories in Canada and are also cited as a further justification of a finding of threat of injury. In analytical terms, the automatic linking of inventory accumulation in Canada to increased future exports and, hence, threat of injury to U.S. producers can also be challenged. The Canadian economy could, for instance, have been in a downturn such that in the future Canadian consumption would grow without any necessary increase in exports to the United States.

In the section on other demonstrable adverse trends, here once again it seems to me that there are a number of examples of incompleteness of analytic logic which the Commission could usefully reexamine. In the middle of page 23, there is a reference to "importation data indicating that Canadians have developed the means of transporting, distributing and selling their pork products in the United States" (with a reference to

data on live swine at A-38). Since, import data only record the value of transactions at the border, (i.e. the value of pork entering the United States market) they give no indication of what is happening beyond the border. Therefore, the contention that import data indicate that Canadians have developed the means of transporting, distributing and selling in the United States seems to me to be logically questionable.

In the discussion of the counter cyclical nature of the hog cycle, there are further analytical issues. The line of argumentation is that subsidies in Canada involve, in part, rate of return regulation to producers and that this is more advantageous to producers at the bottom of the hog cycle. As the ITC determination was made at the peak of the hog cycle, with the industry about to enter a downturn, this was taken to support an argument of imminence of threat. However, if an industry is moving into a downturn, and if the downturn is sufficiently severe, the rate of return on all assets in the industry may fall to levels such that no new investment will take place anywhere in the industry. Were this the case, rate of return regulation in one country but not the other, would generate no effect on output but would simply provide a transfer to existing producers.

The way these examples of incompleteness of analytical logic are set out in this statement of additional views is perhaps overly academic in tone, and clearly reflect the approach of an academic economist dealing with these matters. What I would suggest, however, is that in this and, indeed, in other panel decisions arising from the FTA, it may be reasonable to ask whether or not the record itself which underlies the determination at issue has been used in a way which demonstrates

a convincing logical connection between the record and the determination.

I stress that this statement of additional views is not intended to suggest that the logical underpinnings of the majority opinion in this case are necessarily incorrect, but merely to point out a number of instances where the conclusion need not automatically follow from the factual evidence presented in support.

ARTICLE 1904

BINATIONAL PANEL REVIEW

UNDER THE UNITED STATES-CANADA FREE TRADE AGREEMENT

IN THE MATTER OF	)	
	)	USA 89-1904-11
FRESH, CHILLED, OR FROZEN	)	
PORK FROM CANADA	)	
	)	

Before: S. V. Potter (Chairman)
K. F. Patterson
T. M. Schaumberg
E.D.D. Tavender
J. Whalley

REMAND ORDER

August 24, 1990

For the reasons stated in the memoranda of opinion of the Panelists, the Panel remands the International Trade Commission' Final Determination in Fresh, Chilled or Frozen Pork from Canada, Inv. no. 701-TA-298 (Final) so that the International Trade Commission might reconsider the evidence on its Record.

The results of this remand shall be provided by the ITC 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 ITC's remand results.

(Date)	Simon V. Potter
(Date)	Kathleen F. Patterson
(Date)	Tom M. Schaumberg
(Date)	E. David D. Tavender
(Date)	John Whalley

IN THE MATTER OF:

Fresh, Chilled, or Frozen
Pork from Canada

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ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE UNITED STATES-CANADA FREE TRADE AGREEMENT

IN THE MATTER OF:	
FRESH, CHILLED, OR FROZEN PORK FROM CANADA	**USA-89-1904-11**

Before: S.V. Potter (Chairman)
K.F. Patterson
T.M. Schaumberg
E.D.D. Tavender, Q.C.
J. Whalley

MEMORANDUM OPINION AND ORDER REGARDING ITC'S DETERMINATION ON REMAND

January 22, 1991

INTRODUCTION

This is a second review conducted by this Panel pursuant to Article 1904 of the United States-Canada Free Trade Agreement ("FTA"), following the new affirmative determination of imminent threat of material injury made on remand by the United States International Trade Commission ("ITC" or the "Commission") in Fresh, Chilled, or Frozen Pork from Canada on October 23, 1990 ("Views on Remand" or "Remand Determination") in response to the Panel's Memorandum Opinion and Remand Order dated August 24, 1990 ("Decision" or "Remand Order").

In this opinion, the Panel relates this second review's procedural history, sets out the issues with which it must deal and

then considers the ITC's Views on Remand in light of the applicable law. The Panel concludes that the ITC's Remand Determination be remanded again.

I. PROCEDURAL HISTORY

On August 24, 1990, the Panel remanded to the ITC for further consideration its September 13, 1989, final determination ("ITC's Final Determination") that the United States pork industry, though so far not materially injured, was threatened with material injury by reason of subsidized imports of fresh, chilled or frozen pork ("pork") from Canada. The Panel instructed the ITC to review the evidence on the administrative record of the ITC (the "Record") for action not inconsistent with the Panel's Decision.

On September 20, 1990, Complainants[1] Canadian Meat Council and its members and Canada Packers, Inc. ("CMC") and Moose Jaw Packers (1974) Ltd. ("MJP") filed a Motion for Clarification of the Panel's Decision in order to determine whether the Panel's instructions to the ITC to reconsider the evidence on the Record allowed the ITC to reopen the Record on some issues. On September 27, 1990, the Panel denied this Motion for Clarification of the Panel's Remand Order but added that this denial should not be taken

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[1]The Government of the Province of Alberta ("Alberta") is also a Complainant. CMC, MJP and Alberta are collectively referred to as the "Complainants".

as an expression of any opinion as to the appropriateness of the ITC's reopening its Record.

On October 12, 1990, the ITC moved for an extension of time to complete the remand proceedings to coincide with the remand schedule of a separate panel that was reviewing the International Trade Administration's ("ITA's") decision[2] in this matter. The other panel had briefly suspended its proceedings pursuant to Rule 78 of the Article 1904 Panel Rules, in order to replace a panel member, and would therefore issue its opinion later than this Panel. The Complainants opposed the ITC's motion. This Panel denied the ITC's motion, noting that at least one of the parties had invoked Rule 36(2), thereby establishing separate panels for the ITC and ITA's decisions. This Panel stated that even though the other panel had suspended its proceedings, both panels were nonetheless subject to the FTA's strict time requirements.

On October 23, 1990, the ITC issued its Views on Remand, with Commissioners Rohr and Newquist ("majority Commissioners") finding in separate opinions that the United States pork industry was threatened with material injury by reason of imports of pork from Canada; Chairman Brunsdale dissented. On October 26, 1990, a Motion for Panel Review of the ITC's Remand Determination was filed by the Complainants pursuant to Rule 74, which motion was granted by the Panel on November 5, 1990.

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[2]54 Fed. Reg. 30,774. USA-89-1904-06.

The ITC and the National Pork Producers' Council ("NPPC") filed briefs in support of the ITC's Views on Remand while the Complainants presented briefs contesting the ITC's findings on remand.[3]

II. SUMMARY OF THE ISSUES

CMC, MJP and Alberta challenge the ITC's Remand Determination on two main grounds.

First, they argue that the remand proceedings conducted by the ITC were inconsistent with the Panel's Remand Order, and were therefore not in accordance with law, in that the ITC first reopened its Record and then violated its own notice governing that reopening. The Complainants add that the ITC ignored the Panel's specific instructions to reconsider its Final Determination based on the evidence on the Record.

Second, the Complainants argue that there is no substantial evidence on the Record to support the majority Commissioners' conclusions on the nature of Canadian subsidies, the

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[3]On November 30, 1990, the ITC moved to strike portions of MJP's Brief on Remand. The Panel hereby grants the ITC's motion. On December 12, 1990, CMC filed another interlocutory motion for leave to reply to the ITC's Brief on Remand, and the ITC moved on December 14, 1990 to oppose CMC's motion. The Panel hereby denies the CMC's motion and grants the ITC's motion of December 14, 1990.

likelihood of increased imports, product shifting, vulnerability of the domestic industry, price suppression or other demonstrable adverse trends.

III. "FINAL DECISION"

This second review raises the issue of the proper interpretation to be given to Article 1904(8) of the FTA and of the extent of the Panel's authority in reviewing a determination on remand.

The question arises whether the Panel is limited by the words which appear in the first sentence of Article 1904(8),[4] or must go further and avoid any further review, because of that same Article's reference to the Panel's obligation at this point to "issue a final decision".[5] Similarly, does Rule 83's contemplation of a "Notice of Completion of Panel Review"[6] suggest that a Panel's second review must be its last?

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[4]"The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision."

[5]"If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall issue a final decision within 90 days of the date on which such remand action is submitted to it."

[6]"Where a panel issues a decision referred to in subrule 75(5) and no request for an extraordinary challenge committee is filed, the responsible Secretary shall cause to be published in the Canada Gazette and the Federal Register a Notice of Completion of Panel Review, effective on the 31st day after that decision is issued."

Though commentators regularly express the view that the Chapter 19 Panel Review of the FTA was meant to replace the judicial review (in the United States) of the Court of International Trade ("CIT"), a Panel is clearly not on the same footing as the CIT, which is not constrained to issue a "final decision" on a second review. Indeed, in the case of Atlantic Sugar Ltd. v. United States, 744 F.2d 1556 (Fed. Cir. 1984), there were several successive remands.

The Panel is of the view that a Chapter 19 Panel does not have the authority to do other than affirm or remand, in appropriate circumstances with instructions. On the other hand, Article 1904(8) speaks of a "final decision". The use of these words in the FTA, in the very Article describing the duty of the Panel, indicates that the Panel state its view with as much finality as the case permits.

The Panel is supported in this view by the action of an earlier panel, Red Raspberries from Canada, USA-89-1904-01 (Opinion of the Panel upon Remand, April 2, 1990). There, the Department of Commerce, having twice failed "to provide an adequate explanation" of its failure to use home market sales as the basis for determining foreign market value, had the matter remanded "with instructions" that it recalculate foreign market value using home market sales. Id. at 1.

A similar result is justified in a case such as this, in which the ITC's Record has been combed not once but twice in the search for substantial evidence of a threat of material injury. Clear direction from the Panel is essential if the Panel is to answer the FTA's insistence on a "final decision" at this stage (Article 1904(8)) and its repeated calls for expedition in the settling of matters such as these (Articles 1904(4), 1904(6), 1904(8), 1904(13), 1904(14) and 1904(15)(g)(ii)) and in light of the need for respect of Panel review as an institution brought by the FTA into the domestic laws of Canada and of the United States, not as an indicative suggestion but as "binding" (Article 1904(9)).[7]

IV. STANDARD OF REVIEW

The standard of review the Panel has followed in this second review is whether the ITC's Remand Determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law," 19 U.S.C. § 1516a(b)(1)(B), as more fully set forth at pages 5 to 13 of the Panel's Remand Order. That analysis is adopted and incorporated in this opinion.

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[7]The Panel notes that Rule 75(5) refers only to a "written decision" and not to a "final decision" in discussing second reviews and that Article 1904(14) does use the term "final decisions" to refer to decisions on a first remand, but this does not outweigh the compelling provisions mentioned above.

V. REMAND PROCEEDINGS

The Complainants have raised several important issues as to the ITC's authority and procedures in its remand proceedings. Specifically, the issues raised are these:

1. In the light of the Panel's Remand Order of August 24, 1990, did the ITC have the authority to reopen the Record, or should the ITC have limited itself to the Record filed by the parties on November 21, 1989, on which the ITC's original Final Determination was based?

2. Even if the Commission had such authority, was it open to the ITC in its remand proceedings to expand its Record and collect information on matters beyond the three specific factual areas and time-frame identified in the ITC's September 19, 1990 notice (the "Notice") of its remand proceedings?

3. Even if it was, was the ITC free to base its Remand Determination on issues not raised by the Panel in its Remand Order?

The material facts relating to these issues may be summarized as follows.

The ITC based its Final Determination on materials collected and used during the original investigation. These materials, as listed in a document filed November 21, 1989, constituted the "administrative record" within the meaning of Article 1911 of the FTA and Rule 41(5). On September 13, 1989, the ITC published its final affirmative determination of threat of injury based on the Record then before it and relying on evidence covering the period encompassing 1986 through the first quarter of 1989.[8] The ITC's Final Determination was based on an evaluation of several of the economic factors enumerated in 19 U.S.C. § 1677(7)(F).[9] The Panel held that the ITC's Final Determination was based inter alia on an erroneous finding of a substantial increase in pork production in Canada during the period under review.

This Panel remanded the matter to the ITC with these directions:

> ...[T]he Panel remands the ITC's Final Determination for reconsideration because it relied heavily throughout on statistics which appear at best questionable and that this reliance coloured the ITC's assessment of much of the other evidence. The ITC is instructed to reconsider the evidence on the Record, and more particularly the figures on Canadian pork

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[8]Commissioner Newquist describes the original period of investigation as 1986 through the first quarter of 1989. Remand Determination at 26.

[9]The Final Determination did not rely or was neutral on a finding of substantial increase in inventories or on the potential for product shifting (Final Determination, at 22-23 and 24-25), as confirmed by counsel for the ITC in its Brief on the initial Panel review, at 77. See also Panel's Remand Order at 15.

production, for action consistent with the Panel's decision.

Remand Order at 5.

On September 19, 1990 the ITC issued its Notice. That Notice stated, inter alia:

> These remand proceedings will be conducted under section 705(b) of the Tariff Act of 1930 (19 U.S.C. § 1671(d) (the act) to reexamine data concerning Canadian production, exports, imports, and apparent consumption; production capacity at Fletcher's Fine Foods and the Canadian industry as a whole; and Japanese imports of pork from Taiwan and Canada as well as the Commission majority's reliance on that data....
>
> The Commission will reopen the record to gather information on three narrow aspects of its investigation. It will seek new data concerning 1) Canadian production, imports, exports, and apparent consumption; 2) the production capacity and utilization of the Fletcher's Fine Foods pork packing plant in Red Deer, Alberta and of the Canadian pork packing industry as a whole; and 3) Japanese imports of pork from Taiwan and Canada. The data sought will cover only the period of the Commission's original investigation....
>
> No new factual material may be submitted to the Commission other than that relating to: 1) Canadian production, imports, exports and apparent consumption; 2) production capacity and capacity utilization of Fletcher's Fine Foods and capacity utilization of the Canadian pork industry; and 3) Japanese imports of pork from Taiwan and Canada. No new legal or economic arguments, other than those raised in the panel order, may be raised by the parties....

Remand Record, List 1A, Doc.2 at 1-3 (emphasis added).

The Complainants argue that the ITC had no authority to reopen the Record. They cite Mefford v. Gardner, 383 F.2d 748 (6th Cir. 1967) and City of Cleveland v. Federal Power Comm'n, 561 F.2d 344, 346 (D.C. Cir. 1977). CMC Brief on Remand at 23. In the Mefford case, the court stated:

> [O]n the remand of a case after appeal, it is the duty of the lower court, or the agency from which appeal is taken, to comply with the mandate of the court and to obey the directions therein without variation and without departing from such directions;... "nor will a court remand to permit new proofs where it would merely be giving the party an opportunity to reopen the case to make his proof stronger." Cyclopedia of Federal Procedure. Third Edition, Vol. 14, Section 68.98.

383 F.2d at 758. The City of Cleveland case held that on remand, the Federal Power Commission was obligated to follow everything decided expressly or by implication by the higher court at an earlier stage of the case.

The Respondents advance the argument that the ITC has jurisdiction to reopen its Record and consider new issues upon remand. They cite Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) ("Pottsville"). In Pottsville, the United States Supreme Court ruled that the Federal Communications Commission ("FCC") had jurisdiction on a remand to reopen its administrative record in the context of considering an application to construct broadcasting facilities. In that case, the FCC in its remand proceedings had reopened its record in order

to consider two rival applications for the construction of the same facilities. The Court of Appeals ordered the FCC to consider only Pottsville's application, on the basis of the original record. The Supreme Court characterized the Appeals Court's decision as having been based on "the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest." 309 U.S. at 140.

In reversing the Court of Appeals, the Supreme Court pointed out that administrative agencies differ from federal courts substantively and procedurally and, thus, the doctrine invoked by the Court of Appeals is not necessarily operative in the administrative context. Justice Frankfurter observed:

> [T]his court has recognized that bodies like the Interstate Commerce Commission, into whose mold Congress has cast more recent administrative agencies, "should not be too narrowly constrained by technical rules as to the admissibility of proof," Interstate Commerce Commission v. Baird, 194 U.S. 25, 44, 48 L.Ed. 860, 869, 24 S. Ct. 563, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. [Footnote omitted]. Compare New England Divisions Case, (Akron, C. & Y.R. Co. v. United States) 261 U.S. 184, 67 L.Ed. 605, 43 S. Ct. 270. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion.

Id. at 143-44. Further, Justice Frankfurter stated:

> It is, however, urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government.... Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal....

Id. at 146. Pottsville was applied in Fly v. Heitmeyer, 309 U.S. 146, 148 (1940):

> If, in the Commission's judgment, new evidence was necessary to discharge its duty, the fact of a previously erroneous denial should not, according to the principles enunciated in the Pottsville Broadcasting Co. Case, supra, bar it from access to the necessary evidence for correct judgment.

The Panel is not satisfied that the principles set forth in Pottsville and Fly should be applied without qualification to the powers of the ITC in a remand determination under the FTA. The Panel thinks the decisions provide useful guidance, but their application should take into account certain special and distinguishing aspects of the ITC's authority on a remand determination in a FTA Binational Review. The FTA and the Rules are designed to secure "the just, speedy, and inexpensive review of final determinations" within a set period.

The FTA and the Rules are virtually silent as to the procedures to be followed by the ITC following a remand order by a Panel and, in particular, as to the record of the investigative authority on remand. Article 1904(8) of the FTA provides in part:

> Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the facts and legal issues involved and the nature of the panel's decision. In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation. If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall issue a final decision within 90 days of the date on which such remand action is submitted to it.

Article 1904(3) further provides:

> The panel shall apply the standard of review described in Article 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

"General legal principles" are defined at Article 1911 as including "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." Article 1904(14) authorizes the adoption of rules of procedure which were to be based, "where appropriate, upon judicial rules of appellate procedure" with the intent that final decisions

should be made within 315 days of the date on which a request for panel review is made. This statement of intent was carried forward into Rule 2, which states:

> These Rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to panel reviews conducted pursuant to Article 1904 of the Agreement and are designed to result in decisions of panels within 315 days after the commencement of the panel review. The purpose of these Rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904. Where a procedural question arises that is not covered by these Rules, a panel may adopt the procedure to be followed in the particular case before it by analogy to these Rules.

The FTA also appears to draw procedural distinctions between an initial final determination and "the action taken by the competent investigating authority on remand." Detailed procedures are spelled out in the Rules governing a Panel review of the initial final determination. What constitutes the "administrative record" on a Panel review of an initial final determination is defined in Rule 41. There are no comparable rules defining what constitutes the record following a remand. There is no rule which specifically authorizes the ITC on remand to reopen its record, adduce new evidence, or conduct a new hearing. There are, indeed, apart from Rule 75, no rules governing either the procedures to be followed by the ITC on remand or by a subsequent panel review following a remand determination. Rule 75 provides participants with a limited appeal procedure through the use of a notice of

motion which, only if granted, entitles the participants to file written submissions and responses within short time frames. No provision is made for oral argument on a review of a remand determination. Rule 75(5) prescribes that the panel shall issue a written decision no later than 90 days after the determination on remand is filed.

In this case, the Panel in its Remand Order directed the ITC to "reconsider the evidence on the Record" (at 35) which certainly contemplated a reconsideration on the strength of the existing Record, not a reopening of the Record to adduce new evidence or the conduct of a new hearing. Nonetheless, the ITC, in giving notice of its remand proceedings, proposed a very limited reopening of the record "on three narrow aspects" within the period covered in the original investigation and stated that "no new legal or economic arguments, other than those raised in the panel order, may be raised by the parties." ITC's Notice at 3.

For the purposes of the present review, the Panel believes it is not necessary to define the limits of the ITC's authority to reopen its Record or consider new issues on remand. The Panel does not doubt that there may be instances where reopening is necessary.

In this case, in response to a motion for clarification by CMC, the ITC advised the Panel of its need for a narrow

reopening of the Record to correct factual errors noted by the Panel, and of its ability to conclude the remand proceedings within the time frame set by the Panel.[10] The Panel does not find error in the ITC's reopening its Record by the terms set forth in its Notice of September 19, 1990.

Notwithstanding its Notice, the Commission's Remand Record now contains numerous documents which are not part of the original Record and which are not confined to the three narrow points or to the limited period on which the Commission invited evidence and comments. For example, the document, entitled "Livestock and Meat Statistics 1984-88," (Remand Record, List 1A, Doc. 30(F)) was not part of the original Record and is not directly responsive to questions in the three narrow factual areas; yet it appears to have been relied upon heavily in the ITC's Remand Determination. See Remand Determination at 9-13. Moreover, in correcting Table 17 of the original Final Determination, the ITC

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[10]It clearly is not normal administrative practice for the ITC to reopen its record following a remand, even where invited to do so by the reviewing court. For example, in Alberta Pork Producers Marketing Bd. v. United States, 669 F. Supp. 445 (Ct. Int'l Trade 1987), the ITC was instructed that it could obtain new price elasticity estimates on remand or it could explain its redetermination in light of evidence already on the record. On remand, the ITC declined the court's invitation to reopen the record and instead reevaluated evidence already on the record although recognizing that the data were less than perfect. See Alberta Pork Producers Marketing Bd. v. United States, 683 F. Supp. 1398, 1400 (Ct. Int'l Trade 1988). The only case cited by the ITC where the record was reopened, in the absence of instructions to do so, was Sugars and Sirups from Canada, Inv. 731-TA-3 (Final) (Redetermination of Material Injury) USITC Pub. 1189 (Oct. 1981) at 8 n.12, in which one additional study from the General Services Administration was sought.

relied primarily on a document published in July, 1990, well outside the original period of investigation. Remand Determination at A-1, Table 1.

The ITC's enlargement of the Record beyond its Notice has led to an attempt by the parties to enlarge it even further. For example, MJP filed data on the first half of 1989 published after the date of the ITC vote. See MJP Brief on Remand at 34,35 and Tables 4-6. The ITC argues that the Commission declined to rely on MJP's evidence because it would not have been available until early 1990, after the Final Determination. By contrast, the Commission justifies its use of 1988 data, published after the Final Determination because the data could have been collected during the original investigation. ITC's Brief on Remand at 27-28. While the Panel understands the distinction, the fact remains that the data were not published until after the Record closed and, therefore, should not be included. There may well be other data covering the period 1986-1988 that parties, in hindsight, would like included in the Record but were not available at the time of the Commission vote.

The Panel's concern is that an FTA Panel, unlike the CIT, has strict governing time limits. A Panel cannot comply with those limits unless there is an end to new evidence and new issues, especially when the evidence or issues could have been collected,

raised or resolved during the agency's original investigation but were not. A line must be drawn somewhere.

The Panel finds that, although reopening the Record may have been appropriate, the Commission, having reopened, exceeded the scope of its own Notice. In developing new data, not limited in the manner provided in its Notice, it committed legal error.[11]

The Panel, in reaching this decision that the ITC failed to follow its own Notice on remand, has applied the fundamental principles of fair play as recognized by the Supreme Court in Pottsville. Even if the Record is to be reopened and new information developed and even if new issues are to be considered, the principles of fair play would require that the participants at least be afforded notice and an opportunity for a hearing on those matters. This opportunity was not given in the present case.

The Complainants submit that they are entitled to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution with the "opportunity to be heard at a meaningful time and in a meaningful manner" (See Mathews v. Eldridge, 424 U.S. 319, 333 (1976)). The Respondents argue that the Complainants are not persons within the borders of the United

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[11]See Squaw Transit Co. v. United States, 574 F.2d 492, 496 (10th Cir. 1978).

States and, as such, are not entitled to protection under the Fifth Amendment.

Whether this argument has validity under the United States Constitution need not be decided in view of the express incorporation under Article 1911 of the FTA of the general legal principle of "due process". Accordingly, the Panel is of the opinion that the principles of fair play and due process are available for the benefit of all participants in proceedings subject to the FTA review. The ITC violated both of these principles in its remand proceedings by not adhering to the terms of its Notice.

VI. PRODUCT SHIFTING

By admonishing the parties not to raise new legal or economic arguments "other than those raised in the panel order", the Commission itself was constrained by the same terms. The statutory criteria concerning product shifting and inventories were not raised specifically in the Remand Order. The NPPC did rely[12] on certain extracts of the Remand Order dealing with effects of subsidies on Canadian production and exports to make its submissions regarding product shifting. The issue of product

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[12]NPPC Brief on Remand at 33; Remand Record, List 1A, Doc. 13 at 8 n.8.

shifting is central to the remand findings of the majority Commissioners and the Panel prefers not to found its decision on the narrow, procedural issue whether product shifting was or was not raised in the Remand Order. The Panel prefers to deal with the issue on its merits. The Panel does so below.

A key element of Commissioners Rohr and Newquist's determinations on remand is the prediction that increases in subsidy payments on hogs in Canada will lead to a higher countervailing duty ("CVD") on swine with a resulting shift from imports of swine to imports of pork.[13]

Complainants CMC and MJP argue that this finding is not supported by substantial evidence on the Record. Complainants' arguments on product shifting essentially are that there is no relationship between the CVD on swine and the volume of pork imports, and that, even if there is, actual evidence of the size of the countervailing duty deposit rates as well as final duty rates as compared to imports of both swine and pork demonstrate that no such shift is likely during the period of the domestic industry's upcoming downturn.

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[13]The majority Commissioners occasionally discuss product shifting in their discussion of the nature of the subsidies. The Panel proposes to discuss the nature of the subsidies in this section dealing with product shifting. The majority Commissioners find that the Canadian subsidies increase (though to a lesser extent than believed at the time of the Final Determination) Canadian production and Canadian exports above those levels which would exist without subsidies without finding that, in and of themselves, they increase pork exports year by year.

Both Commissioners rely on evidence that countervailable payments on hogs increased on one program, from $3.14 per hog in the first quarter of 1988 to over $35 some time in the last half of 1988 and throughout the first half of 1989.[14]

Evidentiary Standard

"[A]n examination of threat of injury is necessarily predictive since it must assess the future course of imports and their effect upon the domestic industry." Copperweld Corp. v. United States, 682 F. Supp. 552, 576 (Ct. Int'l Trade 1988). Projection of these future events, "is inherently 'less amenable to quantification' than the material injury analysis." Hannibal Industries, Inc. v. United States, 710 F. Supp. 332, 338 (Ct. Int'l Trade 1989).

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[14]The evidence of Tripartite Program payments is as follows:

1988 Q1	Can $3.14
1988 Q2	No evidence
1988 Q3	Can.$23.53
1988 Q4	Can.$37.08
1989 Q1	Can.$38.24
1989 Q2	Can.$36.23

Record, List 1, Doc. 1, Att. 8 and 9; Doc. 97 at 19; Views on Remand at 40-41 n.69. No evidence is cited by any party as to what subsidy payments were expected to be starting in mid-1989 or at any later time. The increase in payments began in mid to late 1988, and continued to increase through the first quarter of 1989 with a slight decrease in the second quarter. See also Footnote 18, below.

Because of these difficulties, Congress intended the ITC to ground its determinations on information in the administrative record, particularly identifiable trends in data covering the period of investigation:

> In examining the threat of material injury, the [Commission] will determine the likelihood of a particular situation developing into actual material injury. In this regard, demonstrable trends--for example, the rate of increase of the subsidized or dumped exports to the U.S. market, capacity in the exporting country to generate exports, the likelihood that such exports will be directed to the U.S. market taking into account the availability of other export markets, and the nature of the subsidy in question (i.e., is the subsidy the sort that is likely to generate exports to the U.S.) will be important....
>
> An increase in market penetration may be an early warning signal of injury. Indicia of the threat of material injury will vary from industry to industry. The [Commission] should place emphasis on the rate of increase of market penetration....

H.R. Rep. No. 317, 96th Cong., 1st Sess. 47-48 (1979). See also S. Rep. No. 249, 96th Cong., 1st Sess. 88-89 (1979).

In 1984, Congress specified a minimum of ten factors to guide the ITC in threat determinations, in recognition that:

> [T]he projection of future events is necessarily more difficult than the evaluation of current data. Accordingly, a determination of threat will require a careful assessment of identifiable current trends and competitive conditions in the marketplace. This will require the ITC to conduct a thorough, practical, and realistic evaluation of how it operates, the role of imports in the market, the rate of increase in unfairly traded

imports, and their probable future impact on the industry.

Conference Report, H.R. Rep. No. 1156, 98th Cong., 2d Sess. 174-75 (1984), U.S. Code Cong. & Admin. News 1984, p. 4910. See the list of factors at 19 U.S.C. § 1677(7)(F)(i).

These groundings on "identifiable current trends" are necessary to avoid a finding of threat based on "conjecture or speculation": 19 U.S.C. § 1677(7)(F)(ii); see also Panel's Remand Order at 8, 30-31. Thus, the ITC's finding of threat of imminent injury must be based on substantial evidence, such as "demonstrable trends", "increase in market penetration" or some other such "indicia".

Commissioner Newquist's Findings

Commissioner Newquist considers the shift from swine to pork imports in three sections. In "Likelihood of Increased Imports," the Commissioner states that he is not persuaded by predictions on the Record from the U.S. Department of Agriculture that pork imports from Canada would decrease in 1989, but that, "due to the impending increase in the duty on hogs, I believe there is an imminent prospect that exports from Canada will shift from hogs to pork." Views on Remand at 31. In discussing "Increase of

Market Penetration Ratios," the Commissioner states "I believe there is an imminent likelihood of a significant shift from the export of live swine, to the export of pork." Id. at 32. The section "Product Shifting" sets forth the reasons why the Commissioner found that such a shift is imminently likely. Id. at 37-43.

The Commissioner first suggests there are no cost barriers to product shifting--a hog grower can just as easily sell to a Canadian packer as he can to a U.S. packer. Second, the Commissioner points out there have been sharp variations in recent years between the relative levels of pork and swine imports from Canada demonstrating an ability to respond quickly to short term U.S. market changes. Third, the Commissioner opines that increases in Tripartite Program payments in late 1988 and into the first half of 1989 will cause the countervailing duty on swine imports to increase which will, in turn, cause a shift to pork exports. The Commissioner states that "[t]he potential magnitude of such a shift from the export of swine to pork is substantial." Id. at 42. Further, the Commissioner finds that "there is substantial evidence that the final U.S. countervailing duty rate on live swine imports in 1989 and 1990 is likely to increase significantly." Id. The Commissioner concludes his analysis by stating:

> Therefore, based on, among others, the expectation that increased countervailing duty rates will lead to product-shifting from swine exports to pork exports, in conjunction with

> the significant increase in pork imports from Canada in the first quarter of 1989, I find, in light of the current phase of the hog cycle portending negative margins for packers, that the threat of injury is real and imminent. [Footnote omitted].

Id. at 43.[15]

Commissioner Newquist notes that in 1988, and early 1989, swine imports increased following the announcement of a reduction in the duty deposit rate. Views on Remand at 41 n.71. Other evidence on the Record, cited by Commission counsel in ITC's Brief on Remand at 94, also indicates that the publication of the January, 1989 reduction in deposit rate was followed by an increase in hog imports, apparently at the expense of pork. Record, List 1, Doc. 116A(5) at 38.

Commissioner Newquist points out (Views on Remand at 40) that the duty deposit rate was 4.4¢ per pound from 1985 until January 9, 1989, and has been 2.2¢ since, but predicted that the final duty rate on 1989 and 1990 entries will be pushed upwards by

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[15]It is true that pork imports from Canada increased in the first quarter of 1989, but from a level in the previous quarter which was the lowest in at least twelve quarters and to a level equal to 3.0% of the U.S. pork market. It is also worth noting, since this discussion revolves around product shifting, that the first quarter of 1989 saw an even greater increase in imports of live hogs, and that from a quarter which was the highest in at least twelve quarters, which itself had been the highest in at least eleven. See Final Determination at A-41, Table 18; A-43, Table 21.

high countervailable payments under the Tripartite Program starting in late 1988.

None of this evidence can, however, support the Commissioner's findings that a significant shift from swine to pork imports is imminent. The 2.2¢ duty deposit rate is the result of the final Commerce Department CVD review for 1985/86 entries concluded in January, 1989, about 3-3/4 years after the first entry in question had occurred. 54 Fed. Reg. 651 (Jan. 9, 1989). The determinations for the years 1986/87 and 1987/88 are not yet final and there is no evidence as to the status of the review for the year 1988/1989.[16] If the past pattern is any indication, and no party has indicated that it should not be, the earliest there will be a final assessment on 1989/90 entries (upon which it is assumed by Commissioner Newquist that CVD's will be high) may be well into 1992. Until that time, the evidence (Commerce's preliminary finding) indicates that duty deposit rates are likely to decline even further when the reviews on 1986/87 and 1987/88 are finalized, and then to remain at these low levels for some time.

The May 21, 1990, preliminary review announcement of subsidies equal to a maximum of 0.61¢ per pound for 1986-87 and

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[16]Views on Remand at 40, 42. The preliminary determination for the first two of these periods was published in May 1990. 55 Fed. Reg. 20,812 (May 21, 1990). If the final assessment imitates the preliminary determination, the final duty will be reduced to 0.61¢ for 1986/87 and to 0.71¢ for 1987/88 and the duty deposit rate from the time of that final assessment will be 0.71¢.

0.71¢ per pound for 1987-88 suggest that what is most likely imminent is a reduction in the duty deposit rate (currently standing at 2.2¢ per pound) and refunds to swine importers (who have posted duty deposits of 4.4¢ per pound), both to the benefit of those U.S. pork producers who purchase Canadian swine.

In other words, the evidence shows that deposit rates on hogs are decreasing and will remain low for some time, so that there is no substantial evidence to support Commissioner Newquist's finding of an imminent shift towards pork imports rather than hog imports.

Commissioner Rohr's Findings

Commissioner Rohr first discusses the relationship between swine and pork imports within his discussion of the "Nature of the Subsidies." He concludes that the subsidies and the way in which they are countervailed in the United States have an effect on Canadian production and exports to the United States. The Commissioner opines that at least part of recent changes in pork and swine imports is due to the relationship between Canadian subsidies and U.S. countervailing duties and that "it is clear that the countervailing of the subsidies was a factor leading to the decline of the swine exports but the continued growth of the pork exports" in 1986. Views on Remand at 10.

Extrapolating from the experience of 1985 and 1986, when hog imports began to be countervailed, Commissioner Rohr concludes:

> [T]here is obviously a disincentive to export hogs when countervailing duties are high.... Subsidy payments are high through the peak and on the downward side of the Canadian hog cycles. The hog cycle has begun to turn down. The data seem to confirm this general relationship also during the up portion of the cycle. 1988 was a period, based on yearly averages, of low subsidies, ... and therefore high swine imports relative to pork. That is what the data show happened. [Footnote omitted]. Further, as exemplified by the 1985-86 data, when countervailing duties begin to bite on swine exports to the United States, pork exports continue to grow, even if overall Canadian production and exports go down.

Id. at 11.

Having established these conclusions within the context of the "Nature of Subsidies," Commissioner Rohr then applies the findings in a section entitled "The Likelihood of Increased Imports", in which he recognizes that CVD rates are finalized some time after the periods to which they apply:

> [T]he only factor which appears to have reduced pork imports in recent years would appear to be the ability of Canadian producers to export live swine. Going back to my discussion of the nature of the subsidies, this ability is conditioned upon low CVD rates which are dependent upon low levels of subsidy payments. However, the subsidy payments within Canada had already climbed in the middle of 1989. CVD's must therefore be projected to rise as well. Thus, the continuation of the ability to export live

> swine which appear (sic) to be the only factor that is clearly related to reducing pork exports cannot be projected to continue.

Id. at 13-14.[17]

In a section entitled "Assembling the Elements," Commissioner Rohr finds that pork imports from Canada will contribute in small measure to that injury in part because "[w]e are further dealing with a market that will be experiencing its first full downturn in the presence of countervailing duties on live hog imports, which as I understand their operation, will provide a disincentive to the export of live hogs." Id. at 21.

Thus, Commissioner Rohr predicts that swine imports are and will be discouraged by high subsidies and, hence, the prospect of high CVD's because "in mid-1989" subsidy payments[18] had "increased dramatically", which increase coincided with the downward phase of the hog cycle. Id. at 11.

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[17]In the original Final Determination, Commissioner Rohr found that the conclusion of Canadian labour disputes would increase Canadian production and Canadian exports to Japan would be diverted to the U.S. On remand, the Commissioner found that while the original findings were incorrect, the end of the disputes and the continuing exports to Japan do not operate to restrain pork exports to the U.S.

[18]Commissioner Rohr was referring to payments under the Tripartite Program said to account for about 90% of subsidies paid. Record, List 1, Doc. 97 at 19.

The Commissioner, again seeking to draw conclusions from observable data, then states "1988 was a period, based on yearly averages, of low subsidies, and therefore, prospectively of low countervailing duties and therefore high swine imports relative to pork. That is what the data show happened." Id. at 11.

Evidence cited for this statement was Table 18 at A-41 of the ITC's Final Determination. That table shows that throughout 1988, quarter by quarter, swine imports grew steadily both as compared to immediately preceding quarters and as compared to comparable periods of a year earlier. Over the same year, pork exports steadily decreased in each quarter of the year as compared to the immediately preceding quarter, but increased in the first quarter of 1989, though to significantly lower levels than in 1987 and the first half of 1988.[19]

The Panel is of the opinion that this evidence does not support the theory that high subsidy payments and the arguably corresponding prospect of eventual high CVD's discourage swine imports. While payments in the first quarter of 1988 were low, (Can. $3.14 per hog),[20] relative to the second half of the year, the increase in payments is ten-fold beginning at the latest in the

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[19]Commissioner Rohr states that there was a decline in Canadian pork exports to the U.S. in the first quarter of 1989, by comparing it to the first quarter of 1988. He also points out the questionable validity of data from early 1989. Views on Remand at 13.

[20]Views on Remand at 40 n.69.

fourth quarter of 1988 and remaining high, according to the evidence relied on by Commissioner Rohr, through the first quarter of 1989. If the prospect of eventually high CVD's did result in product shifting, hog imports would have decreased and shifted to pork imports. The evidence, though, is that hog imports increased during this time to three successive record levels (since the beginning of 1986) and pork imports fell to a near-record low and then to a record low (since the beginning of 1986), bringing Canadian pork's penetration of the U.S. market down to 2.9% in overall 1988 (from 3.4% in the first quarter of that year).[21]

Thus, Commissioner Rohr's conclusion that live swine cannot continue to be exported in substantial quantities when the swine growers are receiving high subsidies and facing prospectively high CVD's is not supported by substantial evidence on the Record.

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[21]Final Determination at A-41, A-43, Table 21. Without commenting on the strong evidence of dramatic increases, in late 1988 and early 1989, in swine imports in the face of increases in subsidy payments, NPPC argues that the CVD acts as a barrier to swine imports in a mixture of ways and that such changes cannot be expected to be instantaneous (NPPC Brief on Remand at 35). However, the evidence relied upon by both Commissioners indicates they believed market response to changes in subsidy payments (Rohr) or deposit rates (Newquist) was rapid. Moreover, NPPC itself argued that Canadian producers are fully aware of the obligation to pay duties "commensurate with the increased subsidy payments". NPPC Brief at 37. This statement, however, does not explain why hog exports did not show signs of decreasing at the end of 1988 and beginning of 1989. Rather they increased dramatically. Finally, both the ITC and the NPPC point to evidence that between 1985 and 1986 swine imports decreased significantly as a result of the CVD and that pork imports increased. This reaction, to the extent that it supports the argument that there is a quick reaction to the amount of cash deposits, is equally applicable here. However, in the period subject to the threat analysis, the cash deposits can be expected to remain low.

Rather, the opposite appears to have occurred. Despite high subsidy payments, and eventual high CVD liability, imports of live swine continued to increase in ever greater quantities. These data do not support the Commissioner's conclusion that the ability of hog producers to export is frustrated by the fear of high CVD's. The observable data show otherwise.

Conclusions on Product Shifting

The findings of imminent product-shifting, whether based on expected changes in duty deposit rates or on the anticipation of eventual increases in final CVD's, do not rest on substantial evidence.

VII. REMAINING CONSIDERATIONS

CMC argues that "[a]bsent product shifting, the evidence would compel a negative threat determination." CMC Brief on Remand at 72. The product shifting theory does seem to underpin Commissioner Rohr's consideration of the statutory factors. He writes that "additional supplies" of Canadian imports must have some effect on overall price levels. Views on Remand at 19. The ITC counsel interprets this to mean that "even small increases in supply will negatively affect prices". ITC's Brief on Remand

at 76. There is no indication whence those increases are likely to come other than from the theorized product shifting.

Commissioner Newquist states that "an important basis for my affirmative determination in this investigation is the ability of Canadian growers and processors, if faced with high U.S. countervailing duties on Canadian swine, to shift from the export of swine to the export of fresh, chilled or frozen pork." Views on Remand at 39.

Nowhere does either Commissioner state that this finding of threat would have been made without reliance on product shifting.

Although the Panel questions whether either Commissioner would come to an affirmative finding of threat of injury without the support of the product shifting argument, the Panel is moved by the requirements of finality (discussed above) to state its views on two grounds even assuming them to be advanced as independent of the product shifting hypothesis. These grounds are:

(i) that the domestic pork industry is likely to be materially injured by the imminent downturn of the hog cycle and that the presence in the U.S. market of Canadian pork, at current levels, must be held to contribute to that injury simply by its contribution to

overall supply, even in the absence of substantial evidence of underselling by imported Canadian pork. (Rohr, Views on Remand at 18-21), and

(ii) that the market share held by Canadian pork is likely to increase, even if in absolute terms imports from Canada do not increase, as a result of a predicted decrease in the production of U.S. pork and that, in the context of a hog cycle downturn, this added market penetration by imports will constitute material injury (Newquist, Views on Remand at 33).

The Panel is troubled by arguments which recognize that there is no substantial evidence of underselling by imported Canadian pork (Views on Remand at 18) but rely instead on the argument that any addition to the market of Canadian pork must have a negative effect on prices (Views on Remand at 19) and must, therefore, contribute at least "minimally" to any injury caused coincidentally to the U.S. pork industry by other factors. Views on Remand at 20-21.

Without affirmative evidence on which to judge the contribution of imports to material injury, the Panel is left with an unsupported theory. Furthermore, the Panel is forced to the conclusion that the theory is needed because of an absence of evidence of causation.

Similarly, the Panel is troubled by arguments which seek to show that Canada's share of the U.S. pork market, though at a noninjurious level at the time of the ITC's Final Determination, will grow, on the prediction that U.S. producers' sales will decline and that, even if in absolute volume terms Canadian imports remain unchanged or even fall, they "may" therefore take an increasing percentage share of the market. Views on Remand at 33. This rests on no substantial evidentiary indication.

These arguments, to the extent they may be argued to be findings, are not based on substantial evidence. The product shifting hypothesis cannot buttress them for the reasons given above, and they stand as simple conjecture as to what might happen.

VIII. CONCLUSION

The Panel has found that the ITC's failure to follow its own Notice was an error of law and that the majority Commissioners' findings of a threat of imminent material injury are not supported by substantial evidence.

For these reasons, the Panel again remands the ITC's Remand Determination for action (using the words of Article 1904(8)) not inconsistent with the Panel's Decision of August 24, 1990, and not inconsistent with the Panel's decision in this

Memorandum Opinion that the ITC's Record does not disclose substantial evidence of any imminent shift from imports of hogs to imports of pork or of any threat therefrom of material injury to the domestic pork industry. The Panel instructs the ITC to conduct this second remand without any further reopening of its Record but by reference to the Record as it existed at the time of the Final Determination, supplemented in a way consistent with its Notice, that is:

- limited to the "three narrow aspects" specifically mentioned in that Notice,
- covering only the period of the Commission's original period of investigation, and
- dealing with no legal or economic argument other than those raised in the Panel's Remand Order.

The results of this further remand shall be provided by the ITC to the Panel within 21 days of the date of this decision.

Original signed on January 22, 1991 by:

Simon V. Potter

K.F. Patterson

T.M. Schaumberg

E.D.D. Tavender, Q.C.

J. Whalley