IN THE MATTER OF:

Live Swine from Canada

USA 91-1904-03

Available in Canada through

your local bookseller

or by mail from

Canada Communication Group--Publishing

Ottawa, Canada K1A 0S9

Catalogue No. E100-2/2-91-1904-03E

UNITED STATES - CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL

IN THE MATTER OF:	)	**Secretariat File No.**
	)	**USA-91-1904-03**
LIVE SWINE FROM CANADA	)	

DECISION OF THE PANEL
MAY 19, 1992

CANADIAN PORK COUNCIL AND ITS MEMBERS; GOVERNMENT OF CANADA; GOVERNMENT OF QUEBEC; P. QUINTAINE & SON LTD.; PRYME PORK LTD.
Complainants

v.

INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE
Respondent

and

NATIONAL PORK PRODUCERS COUNCIL, ET AL.
Intervenor

Before:

Murray J. Belman, Chairperson
Gail T. Cumins
David McFadden
Simon V. Potter
Gilbert Winham

Appearances:

Homer E. Moyer, Jr., Catherine Curtiss, Amy Rothstein, for Government of Canada; Elliot J. Feldman, Melissa A. Thomas, for Government of Quebec; William K. Ince, Michele C. Sherman, for Canadian Pork Council and Its Members; Joel K. Simon, Christopher M. Kane, for P. Quintaine & Son, Ltd., and Pryme Pork, Ltd.

Stephen J. Powell, Mary Patricia Michel, for International Trade Administration, U.S. Department of Commerce

Paul C. Rosenthal, Nicholas D. Giordano, for National Pork Producers Council, Et Al.

I. INTRODUCTION

This Panel has been convened under Article 1904 of the United States - Canada Free Trade Agreement[1] ("FTA") to hear various challenges to the final results reached by the International Trade Administration, U.S. Department of Commerce ("Commerce") in the fourth administrative review of the countervailing duty order on live swine from Canada.[2] Jurisdiction over this action is conferred on the Panel by Article 1904(2) of the FTA and section 516A(g)(2) of the Tariff Act of 1930, as amended (the "Act").[3]

The product under investigation is live swine (or hogs) from Canada.[4] Fresh, chilled and frozen pork is not covered by Commerce's determination.[5]

The fourth administrative review of the countervailing duty order on swine from Canada covered the period April 1, 1988,

---

[1] United States - Canada Free Trade Agreement, Jan. 1, 1988, 27 I.L.M. 281 (1988) (entered into force Jan. 1, 1989).

[2] Live Swine From Canada; Final Results of Countervailing Duty Administrative Review, 56 Fed. Reg. 28531 (June 21, 1991) ("Final Swine Determination").

[3] 19 U.S.C. § 1516a(g)(2) (1992).

[4] Imports of live swine are currently classifiable under subheadings 0103.91.00 and 0103.92.00 of the Harmonized Tariff Schedule.

[5] Fresh, chilled and frozen pork from Canada is covered by a separate U.S. countervailing duty order issued on September 14, 1989. Countervailing Duty Order: Fresh, Chilled, and Frozen Pork from Canada, 54 Fed. Reg. 39031 (Sept. 22, 1989). Pork has been the subject of several binational panel proceedings under Chapter 19 of the FTA. See, e.g., In the Matter of: Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-06 (Sept. 28, 1990) ("Pork I").

through March 31, 1989. Final Swine Determination, supra note 2, at 28531. Out of forty-one investigated programs, nine were found to confer countervailable subsidies on Canadian producers of live swine. Id. In their briefs before this Panel, complainants challenge Commerce's determinations with respect to seven of these programs: (1) the National Tripartite Stabilization Scheme for Hogs ("Tripartite"); (2) the Quebec Farm Income Stabilization Insurance Program ("FISI"); (3) the Saskatchewan Hog Assured Returns Program ("SHARP"); (4) the Alberta Crow Benefit Offset Program ("ACBOP"); (5) the British Columbia Feed Grain Market Development Program ("B.C. Feed Program"); (6) the British Columbia Farm Income Insurance Plan ("FIIP"); and, (7) the Feed Freight Assistance Program ("FFA"). In addition, complainant P. Quintaine & Son Ltd. ("Quintaine") argues that the scope of the order should not include sows and boars. Finally, complainant Pryme Pork Ltd. ("Pryme") (a) challenges Commerce's refusal either to exclude weanlings from the scope of the order or to establish a separate rate (or subclass) for weanlings and (b) argues that it should have been assigned a separate company rate since it only exports weanlings to the United States.

After review of the administrative record and the arguments presented by the parties, this Panel remands the determinations on Tripartite, FISI, SHARP, ACBOP, FFA and establishment of a subclass for weanlings. Commerce's determinations on B.C. Feed Program and FIIP, and inclusion of

weanlings within the scope of the order, are upheld. Lastly, the Panel denies Pryme's request for a separate company rate and Quintaine's request to exclude sows and boars from the scope of the order.

II. BACKGROUND

A. Administrative Proceeding

The countervailing duty order on live swine from Canada was published in the Federal Register on August 15, 1985. Countervailing Duty Order; Live Swine From Canada, 50 Fed. Reg. 32880 (Aug. 15, 1985). Each year since the order, Commerce has conducted an administrative review pursuant to section 751(a)(1) of the Act.[6]

The fourth administrative review was initiated by Commerce on September 20, 1989. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 54 Fed. Reg. 38712 (Sept. 20, 1989). On November 16, 1989, the agency presented its countervailing duty questionnaire to the Canadian Government. Public Record ("P.R.") 6. Between September 19 and October 4, 1990, officials from Commerce conducted on-site verification of the questionnaire responses.

The preliminary results of the administrative review were issued January 31, 1991, and published in the Federal

---

[6] 19 U.S.C. § 1675(a)(1) (1992).

Register on February 12, 1991.[7] On February 15, 1991, parties to the proceeding were provided with copies and an explanation of Commerce's preliminary calculations. Copies of the verification report were provided to all parties on February 22, 1991.

Case Briefs were filed by the parties pursuant to 19 C.F.R. § 355.38(c) on March 25, 1991. Rebuttal Briefs were filed by the parties on April 3, 1991. Commerce conducted an oral hearing on the issues pursuant to 19 C.F.R. § 355.38(f) on April 8, 1991.

The final results of the administrative review were issued on June 12, 1991, and published in the Federal Register on June 21, 1991. For live swine, other than sows and boars, the net subsidy during the period of review was determined to be Can$0.0449/lb. For sows and boars, the net subsidy during the review period was determined to be Can$0.0047/lb.

This appeal under Article 1904 of the FTA was requested by the complainants on July 8, 1991. United States-Canada Free-Trade Agreement Article 1904 Binational Panel Reviews; Request for Panel Review, 56 Fed. Reg. 33016 (July 18, 1991). The Panel conducted an oral hearing in Washington, D.C., on February 12, 1992.

---

[7] Most, if not all, of the parties received copies of the preliminary results on February 5, 1991.

B. Prior Panel Ruling

In August and October of 1991, this Panel was presented with two motions by the Canadian Pork Council and its members ("CPC") and the Government of Quebec ("Quebec") to expand Commerce's administrative record. The CPC sought to add two documents. The documents were portions of the CPC's Case and Rebuttal Briefs that had been stricken from the record by Commerce as untimely submissions of "factual" information pursuant to 19 C.F.R. § 355.31(a)(3). Quebec sought to add seven documents. Two of the documents were letters to Commerce by counsel for Quebec contesting allegations made by counsel for the National Pork Producers Council, et al. ("NPPC") during the administrative hearing held on April 8, 1991.[8] The other five documents concerned a request by Quebec to correct an alleged ministerial error in the final results issued by Commerce.[9]

By a unanimous decision issued on November 25, 1991, the Panel granted the CPC's motion to expand the record. In the Matter of: Live Swine From Canada, USA-91-1904-03 (November 25, 1991) ("Preliminary Ruling"). In the opinion of the Panel, the previously stricken portions of the CPC's Case and Rebuttal Briefs could "fairly be read as timely comments upon the

---

[8] The two letters were dated April 18, 1991 and June 6, 1991, from the law firm Ackerson & Feldman to Commerce.

[9] The five documents related to the issue of ministerial error were: (a) three letters dated June 24, June 26 and July 25, 1991, from the law firm of Ackerson & Feldman to Commerce; (b) an internal Commerce memorandum dated July 25, 1991; and, (c) a letter dated July 31, 1991, from Commerce to the law firm of Ackerson & Feldman.

preliminary results," and not untimely submissions of new factual information. Id. at 5.

Also by a unanimous vote, the Panel granted, in part, and denied, in part, Quebec's motion to expand the underlying record. Id. at 3, 5-8. With respect to Quebec's letters of April 18 and June 11, 1991 regarding allegations made by counsel for the NPPC at the administrative hearing, the Panel denied the motion on the grounds that the issue had been rendered moot by the passage of time. With regard to the allegation of ministerial error referenced in the five remaining documents, the Panel granted Quebec's motion on the grounds that Commerce had not explained why the final results were free of ministerial error. Until it had that explanation, the Panel stated, there could be no basis upon which to affirm the agency's refusal either to amend its final results or add the documents to the record. Id. at 8.

III. APPLICABLE LAW

Panels under Chapter 19 of the FTA are directed to apply:

> the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

FTA, supra note 1, at Art. 1904(2). In addition, Article 1904(3) of the FTA requires all panels to apply 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 in Article 1911 to include "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." Id. at Art. 1911.[10] Finally, Article 1904(3) also directs panels to apply the "standard of review . . . and the general legal principles that a court of the importing Party otherwise would apply."

If the present action were not before this Panel, it would be before the United States Court of International Trade ("CIT").[11] Hence, this Panel will apply the substantive and procedural laws of the United States to the same extent, and in the same fashion, that the CIT would apply these laws to the present action.

IV. STANDARD OF REVIEW

The standard of review applied by the CIT to final affirmative countervailing duty determinations is found in section 516A(b)(1)(B) of the Act which states, in part:

> The Court shall hold unlawful any determination, finding, or conclusion, found . . . to be unsupported by substantial

---

[10] See discussion infra pp. 8-11.

[11] Pursuant to 28 U.S.C. § 1581(c), the CIT has exclusive jurisdiction over all civil actions brought against Commerce under section 516A of the Act (19 U.S.C. § 1516a) challenging final countervailing duty determinations.

> evidence on the record, or otherwise not in accordance with law.

19 U.S.C. § 1516a(b)(1)(B) (1992).

This standard of review has been applied and was discussed at length in previous binational panel decisions. See Replacement Parts For Self-Propelled Bituminous Paving Equipment From Canada, USA 89-1904-02, at 3-5 (Jan. 22, 1990); Fresh, Chilled or Frozen Pork From Canada, USA 89-1904-11, at 5-13 (Aug. 24, 1990); New Steel Rails From Canada, USA 89-1904-08, at 6-8 (Aug. 30, 1990); Replacement Parts For Self-Propelled Bituminous Paving Equipment From Canada, USA 90-1904-01, at 13-18 (May 24, 1991). Under this standard, binational panels may not engage in de novo review or simply impose their constructions of the statute upon the agency. S. Rep. No. 249, 96th Cong., 1st Sess. 251-52 (1979); American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986), citing Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). They must restrict their examination of the facts to the administrative record, 19 U.S.C. § 1516a(b)(1)(B), and they should not disturb agency interpretations of the statute unless it appears from the statute or its legislative history that the interpretation is not one that Congress would have sanctioned. PPG Industries, Inc. v. United States, 928 F.2d 1568, 1572 (Fed. Cir. 1991), citing United States v. Shimer, 367 U.S. 374, 382-83 (1961).

In the absence of clearly discernible legislative intent, panels must limit their inquiry to whether Commerce's statutory interpretations are "sufficiently reasonable."

American Lamb Co., supra, citing Chevron U.S.A., supra. In this regard, "[t]he agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." Id. See also Consumer Prod. Div., SCM Corp. v. Silver Reed America, 753 F.2d 1033, 1039 (Fed. Cir. 1985); In Re Red Raspberries From Canada, USA-89-1904-01, at 16 (Dec. 15, 1989). It is sufficient if the interpretation in question has a rational basis that comports with the object and purpose of the underlying statute. See Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1314-18 (Fed. Cir. 1986), reversing sub nom. Continental Steel Corp. v. United States, 614 F. Supp. 548 (Ct. Int'l Trade 1985). See also PPG Industries, supra, at 1571-73, citing Chevron, supra. Moreover, Commerce has been given great discretion in administering the U.S. countervailing duty laws. PPG Industries, supra, at 1571. As the Federal Circuit noted in PPG Industries, Inc. v. United States, "countervailing duty determinations involve complex economic and foreign policy decisions of a delicate nature, for which the courts are woefully ill-equipped." Id. (emphasis added), citing United States v. Hammond Lead Prods., Inc., 440 F.2d 1024, 1030, cert. denied, 404 U.S. 1005 (1971).

When reviewing factual determinations by the agency, panels must examine whether the determination is based on such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. Matsushita Elec. Indus. Co., Ltd. v.

United States, 750 F.2d 927, 933 (Fed. Cir. 1984), citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). See also Ceramica Regiomontana v. U.S., 679 F. Supp. 1119 (Ct. Int'l Trade 1986), aff'd., 810 F.2d 1137 (Fed. Cir. 1987). That the panel may be inclined to draw a different conclusion from the evidence does not prevent an agency's findings from being supported by substantial evidence. Matsushita, supra. See also Replacement Parts For Self-Propelled Bituminous Paving Equipment From Canada, USA 89-1904-02, at 2 (Jan. 22, 1990). "It is not the ambit of the Court to choose the view which it would have chosen in a trial de novo as long as the agency's decision is supported by substantial evidence." Pork I, supra note 5, at 11, citing Hercules, Inc. v. United States, 673 F. Supp. 454, 479 (Ct. Int'l Trade 1987). However, "a reviewing court is not barred from setting aside [an agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view." Universal Camera Corp. v. NLRB 340 U.S. 474, 488 (1951).

V. DISCUSSION

A. National Tripartite Stabilization Scheme For Hogs[12]

---

[12] In its preliminary results, Commerce described Tripartite in the following terms:

> The general terms of the Tripartite Scheme on Hogs are as follows: all hog

In its final results, Commerce determined that the Canadian federal government's Tripartite scheme for hogs conferred countervailable subsidies on Canadian swine producers during the period of review. Final Swine Determination, supra note 2, at 28534. In reaching its conclusion, the agency determined that Tripartite benefits (which take the form of payments triggered by market prices that fall below government-prescribed support prices) are provided "to a specific enterprise or industry, or group of enterprises or industries" within the meaning of section 771(5) of the Act (19 U.S.C. § 1677(5) (1992)). Id.

Commerce determined that Tripartite was not de jure specific. Id. at 28532. Rather, Commerce found that the Tripartite program operated in such a way as to render it de

---

> producers in participating provinces receive the same level of support per unit; the cost of the scheme is shared [equally] between Canada, the province, and the producer; producer participation in the scheme is voluntary; the provinces may not offer separate stabilization plans or other ad hoc assistance for hogs (with certain exceptions); and the federal government may not offer compensation to swine producers in a province not a party to an agreement. The scheme must operate at a level that limits losses but does not stimulate over-production. . . . Stabilization payments are made when the market price falls below the support price. The difference between the support price and the average market price is the amount of the stabilization payment.

Live Swine From Canada; Preliminary Results of Countervailing Duty Administrative Review, 56 Fed. Reg. 5676, 5678 (Feb. 12, 1991) ("Preliminary Swine Determination").

facto specific. Id. at 28534. The distinction between de jure and de facto is that the latter is found in the effect of a government action or program that otherwise has the appearance of being generally available under the de jure test. If de facto specificity is to be determined, it has to be demonstrated from evidence of government action, since, prima facie, the program under question is not de jure specific. PPG Industries, Inc. v. United States, 928 F.2d 1568, 1576 (Fed. Cir. 1991).

In its preliminary results, Commerce described its methodology for determining specificity:

> . . . to determine whether a program is limited to a specific enterprise or industry or group of enterprises or industries, we consider: (1) Whether the law of the foreign government acts to limit the availability of a program; (2) the number of industries or groups thereof that actually use a program; (3) whether there are dominant users of a program, or whether certain industries or groups thereof receive disproportionately large benefits under a program; and (4) the extent to which a government exercises discretion in conferring benefits under a program (*see e.g.* § 355.43(b)(2) of "Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comments", 54 FR 23366 at 23379, 1989).

Preliminary Swine Determination, supra note 12, at 5678, citing Countervailing Duties; Notice of Proposed Rulemaking, 54 Fed. Reg. 23366 (May 31, 1989). The Federal Register notice announcing Commerce's final results sets forth Commerce's factual findings:

> In analyzing *de facto* specificity, the Department looks at the actual number of commodities covered during the particular

> period under review. There is general agreement that there are at least 100 commodities produced in Canada. However, despite Tripartite's nominal general availability to all commodities, the Annual Report of the Agricultural Stabilization Board for the fiscal year ending March 31, 1989, shows that there were only six Tripartite agreements in place, covering just nine commodities. Furthermore, hog producers received 52 percent of the total payouts made under the six Tripartite Schemes in the review period. Since Tripartite's inception, 51 percent of all Tripartite payments made to all schemes have gone to hog producers. Although CPC argues that there are other Tripartite Schemes under negotiation (and honey and onion negotiations have been completed after the review period) we have no authority to take into account predictions about the future growth of the Tripartite Stabilization Plan. During the review period the program was limited, *de facto*, to a specific group of enterprises or industries, and is therefore countervailable.

Final Swine Determination, supra note 2, at 28534.

The CPC and the Government of Canada ("Canada") argue that Commerce's determination is flawed in several respects. Canada contends that the agency postulates an incorrect legal standard for determining specificity.[13] In its opinion, the correct test is whether Tripartite benefits are intentionally targeted at swine.[14] The CPC argues that Commerce failed to

---

[13] Brief of the Government of Canada, at 13-36, Live Swine from Canada (USA-91-1904-03) ("Brief of Canada").

[14] Brief of Canada, supra note 13, at 13-27. In its Reply Brief, Canada disavows advocating an intent test. See Reply Brief of the Government of Canada at 1-2, Live Swine from Canada (USA-91-1904-03). According to Canada, proof of targeting need not involve proof of intent:

> The targeting analysis that we urge, however, is not a search for government intent. It is

premise its determination of countervailability upon a finding that Tripartite benefits confer a "competitive advantage" on Canadian swine producers.[15] The CPC asserts that domestic subsidies that satisfy the specificity test in section 771(5) of the Act are not countervailable unless they "bestow a sufficient degree of competitive advantage in international commerce on users" of the subsidies to warrant countervailing their benefits. Lastly, both Canada and the CPC believe the determination that Tripartite is provided to a specific group of enterprises or industries is unsupported by substantial evidence on the record or otherwise not in accordance with law.[16] (Neither complainant disputes the fact that Canadian hog producers receive an economic benefit from Tripartite.)

In our opinion, Commerce applied the correct legal standard, insofar as it does not have to find intentional targeting and it does not have to make a separate determination of competitive advantage. The agency does, however, have to base its determination upon substantial evidence, and it is obliged to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection

---

> a search for evidence of government action from which targeting can be inferred. The analyses are distinct.

Id. (footnote omitted).

[15] Brief of the Canadian Pork Council and its Members, at 16-18, Live Swine from Canada (USA-91-1904-03) ("Brief of CPC").

[16] Id. at 18-41; Brief of Canada, supra note 13, at 36-59.

between the facts found and the choice made.'" Motor Vehicles Mfgrs. v. State Farm, 463 U.S. 29, 43 (1983), citing Burlington Truck v. U.S., 371 U.S. 156, 168 (1962). The specificity test cannot be reduced to a precise mathematical formula, and Commerce must exercise its judgment and carefully consider all relevant factors in order to determine whether an unfair practice is taking place. See Countervailing Duties; Notice of Proposed Rulemaking, 54 Fed. Reg. 23366, 23368 (May 31, 1989). As we describe more fully below, because Commerce's determination is not supported by substantial evidence in several important respects, or is otherwise not in accordance with law, a remand for further administrative action in accordance with this opinion is required.

1. Legal Standard For Determining De Facto Specificity

The specificity test is a highly litigated issue under U.S. countervailing duty law. See, e.g., PPG Industries, supra; Cabot Corp. v. United States, 620 F. Supp. 722 (1985), appeal dismissed, 788 F.2d 1539 (Fed. Cir. 1986), reh'g denied, May 22, 1986. Its origins lie in a collection of administrative determinations made by the U.S. Treasury Department during the 1970s. There, for the first time, the United States chose not to apply its countervailing duty law to generally available domestic programs. See, e.g., Bicycle Tires And Tubes From The Republic Of China, 43 Fed. Reg. 32912 (July 28, 1978); Certain Textiles And Textile Products From Singapore, 44 Fed. Reg. 35334, (June

19, 1979); Certain Textiles And Textile Products from Malaysia, 44 Fed. Reg. 41001 (July 13, 1979).

The test was not incorporated into the statutes, however, until the Trade Agreements Act ("TAA") of 1979. Pub. L. 96-39, § 101, 93 Stat. 144, 151 (1979) (codified at 19 U.S.C. § 1677(5)). The TAA implemented the Tokyo Round of Multilateral Trade Negotiations, including the Subsidies Code. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, opened for signature Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 ("Subsidies Code"). Article 11 of the Subsidies Code defines countervailable domestic subsidies as those "granted with the aim of giving an advantage to certain enterprises, . . . either regionally or by sector." Subsidies Code, supra at Art. 11, para. 3 (emphasis added).

Section 771(5)(B) of the TAA codified this concept in U.S. law by defining actionable domestic subsidies as benefits "provided or required by government action to a specific enterprise or industry, or group of enterprises or industries." 19 U.S.C. § 1677(5)(B). If a benefit (other than an export subsidy) is made more widely available, it is not countervailable under U.S. law.[17] "Domestic subsidies must be bestowed only on a specific enterprise or industry or a specific group of enterprises or industries to be countervailable." PPG

---

[17] Export subsidies are, by definition, specific. See, e.g., Countervailing Duties: Notice of Proposed Rulemaking, 54 Fed. Reg. 23366, 23367 and 23379 (May 31, 1989).

Industries, Inc. v. United States, 928 F.2d 1568, 1576 (Fed. Cir. 1991).

The legislative history of section 771(5)(B) suggests two principal motives for the specificity test. First, Congress understood that every imported article has benefited, in some way, from government assistance.[18] In most countries (including the United States), exports benefit, for example, from government sponsored roads, utilities, education, and assorted tax policies. Thus, without a specificity test, every import might be subject to countervailing duties.[19] See Barcelo, Subsidies and Countervailing Duties -- Analysis and a Proposal, 9 L. & Pol'y Int'l Bus. 779, 836 (1977).

Secondly, Congress recognized that the countervailing duty law is primarily meant to offset government programs that upset free market forces.[20] Government programs that do not distort the allocation of resources by artificially increasing the revenues or decreasing the costs of the product under investigation, do not upset market forces, and should not be countervailable. Id. By enacting the specificity test, Congress

---

[18] See, e.g., 125 Cong. Rec. 20160, 20168, 20185 (1979).

[19] As Judge Maletz noted in Carlisle Tire and Rubber Co. v. United States, 564 F. Supp. 834, 838 (Ct. Int'l Trade 1983), the specificity test helps to preclude the "absurd result" that would arise if programs benefiting public highways and bridges were countervailed.

[20] See, e.g., 125 Cong. Rec. 20160, 20168, 20185 (1979). See also Proposed Amendments to the Countervailing Duty Law: Hearings Before the Subcommittee On Trade, House Committee On Ways And Means, 98th Cong., 1st Sess. (1983).

sought to distinguish between widely available subsidies that do not distort markets and special (or specific) subsidies that distort prices, supplies and the general allocation of resources within an economy.

a. Targeting. Under the statutory scheme, the pertinent inquiry is not whether Canada has intentionally targeted benefits to swine producers, but rather, whether it has done something, intentionally or otherwise, that confers a benefit upon "a specific enterprise or industry or group of enterprises or industries."[21] 19 U.S.C. § 1677(5)(B) (1992).

In this regard, section 771(5)(B) of the Act requires Commerce to:

> determine whether the bounty, grant, or subsidy in law or in fact is provided to a specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulation, program or rule establishing a bounty, grant or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant, or subsidy in law or in fact is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof.

19 U.S.C. § 1677(5)(B) (1992). Even if we were not required (as we are) to give deference to Commerce's statutory interpretation,

---

[21] The Panel does not mean to suggest that only government subsidies are countervailable under U.S. law. See Galvanized Steel Wire Strand From South Africa; Preliminary Affirmative Countervailing Duty Determination, 48 Fed. Reg. 6756 (Feb. 15, 1983) (according to the legislative history of section 771(5) of the Act, private subsidies may be subjected to countervailing duties). See also Steel Pipe and Tube Products from South Africa; Affirmative Preliminary Countervailing Duty Determination, 48 Fed. Reg. 9899 (Mar. 9, 1983).

we would be hard pressed to deduce from this statutory language that purposeful or intentional targeting is a prerequisite for a determination of de facto specificity.

Moreover, the legislative history of section 771(5)(B) strongly suggests that a targeting requirement should not be imputed. Prior to the ruling in Cabot, Inc. v. United States, supra, Commerce basically ignored the extent to which a program under investigation was used within the exporting country. As long as everyone in the exporting country was legally entitled to obtain the benefits, the subject program was considered non-specific and non-countervailable. See, e.g., Carbon Black From Mexico Final Affirmative Countervailing Duty Determination and Countervailing Order, 48 Fed. Reg. 29564, 29566 (June 27, 1983). In Cabot, Judge Carmen rejected Commerce's position. In his view, Commerce was required to:

> examine the actual results or effects of assistance provided by foreign governments and not the purposes or intentions. (citation omitted) . . . The question is what aid or advantage has actually been received 'regardless of whatever name or in whatever manner or for whatever purpose' the aid was provided. . . . The appropriate standard focuses on the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits.

620 F. Supp. at 732 (emphasis added).

In 1988, in section 1312 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1185 (now codified at 19 U.S.C. § 1677(5)), Congress codified the holding in Cabot. As the pertinent Senate Report explains:

> In Cabot, the court held that nominal general availability of a subsidy should not be conclusive evidence that a subsidy is not provided to a specific industry. Instead, the Commerce Department must look on a case by case basis to the actual availability of a subsidy. A subsidy provided in law to a specific industry is clearly countervailable. The issue addressed in Cabot is whether a subsidy provided in fact to a specific industry is countervailable.

S. Rep. No. 71, 100th Cong., 1st Sess. 122-23 (1987). See also H. Rep. No. 40 (Part I), 100th Cong., 1st Sess. 123-24 (1987).

Thus, Congress amended section 771(B)(5) of the Act to ensure that where benefits received by a specific enterprise or industry, or group of enterprises or industries, harm a competing U.S. industry, countervailing duties may be imposed. Whether specific benefits are intentional or inadvertent is irrelevant.

Finally, we believe two judicial rulings are instructive with respect to the targeting issue. First, in Saudi Iron and Steel Co. (Hadeed) v. United States, plaintiff argued that "Commerce has found a benefit bestowed upon a specific group of enterprises only where there was clear evidence of some form of selection or targeting by the foreign government." 675 F. Supp. 1362, 1367 (Ct. Int'l Trade 1987), appeal after remand, 686 F. Supp. 914 (Ct. Int'l Trade 1988). In rejecting that argument, the court stated:

> Decisions of this Court require Commerce to conduct a *de facto* case by case analysis to determine whether a program provides a subsidy, or a bounty or grant, to 'a specific enterprise or industry or group of enterprises or industries' within the meaning of section 1677(5)(B). (citations omitted) Under this 'specificity test,' proof of the

> intent of the foreign government to target or select specific enterprises or industries is not a prerequisite to the countervailability of the benefit provided.

Id. (emphasis added). See also SSAB Svenskt Staal AB v. United States, 764 F. Supp. 650, 655 (Ct. Int'l Trade 1991) ("The actual results or effects of the benefits provided must be examined and not the purposes or intentions of those benefits."). Second, in PPG Industries, Inc. v. United States, supra, the Federal Circuit held that Commerce's three-part test, which does not require a showing of targeting, is in accordance with law.[22]

In sum, the statute's plain meaning, its legislative history and the manner in which U.S. law has been construed by U.S. courts do not support Canada's argument that targeting is a prerequisite for a finding of de facto specificity.

---

[22] Canada relies on the binational panel decision in Pork I, supra note 5, at 49-52. Brief of Canada, supra note 13, at 20. That decision held (at 51-52) that U.S. countervailing duty law requires "convincing circumstantial evidence that the program . . . has been targeted at hogs."

However, when it considered Commerce's remand determination in March of 1991, the same panel suggested that "intent to target or to limit benefits" may not be necessary and might be replaced by a "slightly looser evidentiary surrogate, such as predictability of limited usefulness or disproportionality of benefits." In the matter of: Fresh, Chilled and Frozen Pork from Canada, USA-891904-06, at 8 (Mar. 8, 1991) ("Pork II"). Moreover, the Panel affirmed Commerce's determination on Tripartite even though the agency did not apply a targeting test. Id. at 7-8.

We find that, taken together, Pork I and Pork II are not persuasive authority that there can be no de facto specificity without targeting. We find that the other authorities cited in the text of this opinion are persuasive to the contrary.

b. Competitive Advantage. Similarly unpersuasive is the CPC's argument that Commerce's determination was contrary to law because it failed to apply a separate and distinct competitive advantage test.[23] For this proposition, the CPC refers us to Cabot, supra, Roses, Inc. v. United States, 743 F. Supp. 870 (Ct. Int'l Trade 1990), and PPG Industries, supra. However, the passages cited by the CPC are isolated statements using the term "competitive advantage" without taking the further step of requiring Commerce to analyze whether it is present in particular cases. In Cabot, for example, Judge Carmen did not suggest that preferential Mexican prices for carbon black feedstock would only be countervailable if they were specific and conferred a competitive advantage in international commerce on consumers. He simply treated the terms "competitive advantage" and "benefit" as interchangeable, based in part upon Judge Newman's conclusion in British Steel Corp. v. United States, 605 F. Supp. 286, 294 (Ct. Int'l Trade 1985), that benefits, such as debt forgiveness and grants, inevitably bestow a "competitive advantage" upon the recipient.

The same thing can be said about PPG Industries. Judge Nies did not articulate a new or different test based on competitive advantage. PPG Industries dealt with the specificity issue. 928 F.2d at 1573. In the language quoted by the CPC in its brief, Judge Nies is simply responding to the argument that the specificity test is illegal and that all competitive

---

[23] Brief of CPC, supra note 15, at 16.

advantages bestowed upon a foreign producer/exporter should be countervailable:

> In sum, the statutory term 'bounty or grant' has not been *defined*, as a matter of law, by the courts to encompass *every domestic subsidy conferring a competitive advantage* and, thus, does not mandatorily prohibit the limitation of countervailable domestic subsidies in the present statute to benefits provided only to a specific industry or group of industries.

Id. at 1574 (emphasis in original). See also PPG Industries, Inc. v. United States, 712 F. Supp. 195, 200-01 (Ct. Int'l Trade 1989) (the court in Cabot did not adopt a "competitive advantage" test).

Finally, Roses Inc. v. United States, 743 F. Supp. 840 (Ct. Int'l Trade 1990) does not support a separate competitive advantage test under the U.S. countervailing duty law. In considering Commerce's second remand determination in that case, Judge Restani expressly distanced herself from this notion:

> Plaintiffs also contend that Commerce was required in its countervailability determination to inquire into the competitive advantage derived from the benefit, i.e., the effect upon international commerce of any FIRA benefit. While this is a general concern and information on this issue may assist Commerce in its determination, it does not provide a useful bright-line test. The problem with plaintiffs' contention is that United States trade laws are not aimed at protecting United States industry from every competitive advantage afforded by government action. [citation omitted] Furthermore, precise assessment of whether there is a competitive advantage may be extremely difficult in a particular case.

774 F. Supp. 1376, 1381-82 (Ct. Int'l Trade. 1991) (emphasis in original).

In sum, nothing in the Act requires Commerce to calculate the extent to which specific domestic subsidies confer a competitive advantage in international commerce on the recipient, nor has any judicial decision imposed that requirement. Therefore, the agency's interpretation must be upheld by this Panel.

c. Conclusion. While the test set forth in Commerce's proposed regulations for determining de facto specificity (and in Commerce's final determination in the instant proceeding) conforms to law, Commerce may not base its determinations on a purely mechanical analysis. "Commerce does not perform a proper de facto analysis if it merely looks at the number of companies that receive benefits under [a] program." Roses Inc. v. United States, 774 F. Supp. 1376, 1380 (Ct. Int'l Trade 1991). "It is not the sheer number of the enterprises receiving benefits that dictates whether or not a program is countervailable." Id. at 1384. Rather, Commerce must examine all relevant factors to determine whether "if, in its application, the program [at issue] results in a subsidy only to a specific enterprise or industry or specific group of enterprises or industries." PPG Industries, supra, at 1576 (emphasis in original). To fulfill this requirement, Commerce must comply with its own proposed regulations, as expressly approved by the Court of Appeals for the Federal Circuit, in PPG

Industries, Id., and it "must exercise judgment and balance various factors in analyzing the facts of a particular case in order to determine whether an 'unfair' practice is taking place." Commerce "must always focus on whether an advantage in international commerce has been bestowed on a discrete class of grantees despite nominal availability, program grouping, or the absolute number of grantee companies or 'industries.'" Roses Inc. v. United States, 743 F. Supp. 870, 881 (Ct. Int'l Trade 1990).

In sum, while we cannot say that the standard articulated by Commerce for determining the presence or absence of de facto domestic subsidies is unreasonable, we are concerned that in applying this standard, Commerce may have placed undue weight on a mathematical construct, and may have failed to properly consider all of the evidence submitted in support of respondents' contention that a domestic subsidy was not bestowed.

2. Substantial Evidence For Determining De Facto Specificity

Canada and the CPC assert that Commerce's determination that Tripartite benefits are de facto specific is not supported by substantial evidence and is otherwise not supported by law.[24] In support of their argument, they advance the following: (i) there is no evidence in the administrative record to support Commerce's claim that there are "at least 100 commodities produced in Canada," nor that 100 commodities comprise the

[24] Brief of Canada, supra note 13, at 41-59; Brief of CPC, supra note 15, at 18-41.

universe of eligible industries which could (in theory) take part in the Tripartite program; (ii) within its first four years, the Tripartite program has been made available to 46,000 enterprises producing nine commodities -- from sugar beets in Manitoba to cattle on Prince Edward Island; (iii) during the period of review, negotiations to further expand the program were underway; (iv) evidence in the record demonstrates that three more commodities, including honey and onions, joined the Tripartite program between the end of the review period and the issuance of the final results; (v) although hog producers may have received 52 percent of all Tripartite payments during the period of review, they received nothing during the first several years and they made almost 50 percent of all producer contributions to the Tripartite fund during the period of review; (vi) there is no evidence that government authorities exercise undue discretion when conferring Tripartite benefits; and, (vii) hog producers received only 19.42 percent of all stabilization payments (under the Agricultural Stabilization Act ("ASA"), including Tripartite) during FY 1989, and only 9.12 percent of all stabilization payments from FY 1986/87 through FY 1988/89.

Although we are compelled to accord great deference to Commerce's administration of the U.S. countervailing duty law, PPG Industries, supra, at 1571, administrative determinations may be remanded if they lack a reasoned basis. American Lamb, supra, at 1004. As more fully described below, we believe Commerce's determination regarding Tripartite lacks a reasoned basis.

It is settled law in the United States that a program granting benefits to the entire agricultural sector of an economy is not provided to a specific enterprise or industry or group of enterprises or industries and, therefore, is not countervailable. See, e.g., Final Affirmative Countervailing Duty Determination: Fuel Ethanol From Brazil, 51 Fed. Reg. 3361 (Jan. 27, 1986); Countervailing Duties; Notice of Proposed Rulemaking, 54 Fed. Reg. 23366, 23368 (May 31, 1989). It is equally well established that benefits provided to a wide variety of agricultural products may negate a finding of de facto specificity. See, e.g., Final Negative Countervailing Duty Determination; Certain Fresh Cut Flowers From Kenya, 52 Fed. Reg. 9522, 9525 (Mar. 25, 1987). It follows from this authority that Commerce must determine, in every case involving agricultural products, the number of commodities produced in the country under investigation; otherwise, the agency may impose countervailing duties on a domestic program that is not de facto specific.

In the present case, Commerce has failed to do this. As Canada and the CPC note in their briefs, nothing in the underlying administrative record fully supports Commerce's determination that "there are at least 100 commodities produced in Canada."[25] Final Swine Determination, supra note 2, at 28534. In its brief, Commerce tries to deflect this criticism by pointing to Canada's questionnaire response (P.R. 10, Tab C.,

---

[25] Brief of Canada, supra note 13, at 44; Brief of CPC, supra note 15, at 21.

App. 6) which identifies over 60 different agricultural commodities in Canada.[26] Our problems with this argument are several.

First, we are reviewing an administrative determination. Post-hoc rationalizations by agency counsel are no substitute for substantial evidence. Timken Co. v. United States, 894 F.2d 385, 389 (Fed. Cir. 1990); A. Hirsh, Inc. v. United States, 729 F. Supp. 1360, 1365 (Ct. Int'l Trade 1990). Commerce, not its counsel on appeal, must define the universe of commodities in Canada and base that determination upon substantial evidence.

Secondly, the argument ignores the fact that Commerce apparently failed to consider the suggestion put forth by the CPC in its Case and Rebuttal Briefs that Farm Cash Receipts ("FCRs") prepared by Statistics Canada provide the best indication of all agricultural commodities in Canada.[27] See Granges Metallverken AB v. United States, 716 F. Supp. 17, 24 (Ct. Int'l Trade 1989) ("it is an abuse of discretion for an agency to fail to consider an issue properly raised by the record evidence . . ."). In its brief before this Panel, Canada submits that the FCRs demonstrate

---

[26] Brief in Support of the U.S. Department of Commerce, at 19, Live Swine from Canada (USA-91-1904-03) ("Brief of Commerce").

[27] See P.R. 49, at 14; P.R. 56, at 27. In its Case Brief, for example, the CPC argues that FCRs should be used to define the universe of Canadian agricultural commodities, in part, because they would exclude products not farmed in Canada, by-products and research items. P.R. 49, at 14, n. 10.

that there are only "about two dozen [agricultural] commodities" in Canada.[28]

In sum, Commerce's determination that at least 100 agricultural commodities are produced in Canada is remanded in order that the agency may reexamine, based on substantial evidence in the record, whether its categorization of commodities is consistent and accurate and, in particular: (i) whether quantitative assessment based on FCRs (or equivalent data) would be appropriate in achieving consistent and accurate categories, and (ii) what number of commodities makes up the relevant universe.

For similar reasons, we believe Commerce's determination regarding the number of commodities covered by Tripartite should be remanded.[29] In its preliminary results, Commerce stated that there were twelve commodities under eight Tripartite agreements.[30] Four months later, in its final results, Commerce found only six agreements covering nine commodities.[31]

---

[28] Brief of Canada, supra note 13, at 47. The NPPC disputes the utility of FCRs because they allegedly exclude processed commodities, and Tripartite covers "any natural or processed products of agriculture." P.R. 10. Brief of the National Pork Producers Council, at 32, n. 38, Live Swine from Canada (USA-91-1904-03) ("Brief of NPPC").

[29] For Canada's and the CPC's arguments on this issue, see Brief of Canada, supra note 13, at 41, and Brief of CPC, supra note 15, at 23.

[30] Preliminary Swine Determination, supra note 12, at 5678.

[31] Final Swine Determination, supra note 2, at 28534.

Whatever the number, it cannot be disputed that Commerce must calculate this figure according to the same methodology that it calculates the relevant universe. Nonetheless, the administrative record suggests this may not have been done. For example, the Tripartite program treats cows and calves as one commodity,[32] while Canada's listing of all agricultural products in its questionnaire response distinguishes between "Dairy Cows" and "Feeder Calves."[33] On remand, Commerce should reexamine the evidence and (i) determine the number of agricultural commodities covered by Tripartite in the same manner that it determines the number of commodities in Canada, and (ii) identify the number of enterprises or industries in Canada's agricultural sector and the number of enterprises or industries covered by Tripartite.[34]

Related to these issues is the argument by Canada and the CPC that Commerce failed to consider the expanding nature of Tripartite. They argue that Commerce should have been influenced by the fact that the Tripartite program has shown a consistent

---

[32] See, e.g., P.R. 30 at 3; P.R. 10, Tab C, App. 7.

[33] P.R. 10, Tab C, App. 6.

[34] As the CPC notes in its brief, Commerce's analysis focuses upon commodities and not "enterprises" or "industries." Brief of CPC, supra note 15, at 20-21. This may or may not be harmless error. For example, if the universe of agricultural commodities translates into only forty or fifty industries, and Tripartite is determined on remand to cover nine industries, would nine out of forty or fifty constitute a "group of industries" within the meaning of 19 U.S.C. § 1677(5)(B)?

pattern of growth since its inception.[35] In its second year of existence, Tripartite covered only four commodities. Live Swine From Canada; Preliminary Results Of Countervailing Duty Administrative Reviews, 55 Fed. Reg. 20812, 20813 (May 21, 1990). By the end of its third, Tripartite covered eight commodities. Id. By the end of the fourth review period (i.e., March 31, 1989), it covered one more, Final Swine Determination, supra note 2, at 28534; however, Canada and the CPC point out that three more commodities, including onions and honey, were added before Commerce's final results were issued.[36] See P.R. 30 at 3. They also contend that Commerce ignored the fact that Tripartite agreements, like the one for hogs, involve complex and lengthy negotiations.[37] Hence, they argue, it will take time for all commodities to join Tripartite and Commerce should not penalize the first ones. Finally, Canada and the CPC contend that Commerce erred when it refused to consider the record evidence which indicates that negotiations to add three or four more commodities to Tripartite were pending at the time of the agency's final results.[38]

---

[35] Brief of Canada, supra note 13, at 41-44; Brief of CPC, supra note 15, at 23-27.

[36] Brief of Canada, supra note 13, at 42; Brief of CPC, supra note 15, at 23.

[37] Brief of Canada, supra note 13, at 43; Brief of CPC, supra note 15, at 26.

[38] Brief of Canada, supra note 13, at 42-43; Brief of CPC, supra note 15, at 25-26.

With one exception, Commerce apparently did not consider these arguments in its final results. The one exception concerns Commerce's express refusal to consider evidence on the record that relates to events after March 31, 1989 (the period of review). Final Swine Determination, supra note 2, at 28534. On this point, Commerce stated:

> Although CPC argues that there are other Tripartite Schemes under negotiation (and honey and onion negotiations have been completed after the review period) we have no authority to take into account predictions about the future growth of the Tripartite Stabilization Plan.

Id.

In fact, the CPC did not ask Commerce to speculate or "take account of predictions" about the future growth of Tripartite.[39] It asked the agency to consider verified information on the record regarding the newly concluded agreements and certain pending negotiations. Thus, the issue raised by this information did not relate to its speculative nature; rather, the issue before us is whether Commerce may base a determination under 19 U.S.C. § 1677(5)(B) upon information that arises after the period of review, but prior to its determination, which Commerce was able to verify.

It is a firmly established principle of U.S. countervailing duty law that administrative reviews under section 751 of the Act (19 U.S.C. § 1675(a)) are intended to calculate the level of subsidization during the period of review. See,

---

[39] See Case Brief of CPC, P.R. 49 at 5-9.

e.g., Certain Castor Oil Products From Brazil; Final Results of Administrative Review of Countervailing Duty Order, 46 Fed. Reg. 62487, 62489 (Dec. 24, 1981).[40] If information arises subsequent to the period of investigation that affects the level of subsidization, it should be addressed in the next administrative review. Final Affirmative Countervailing Duty Determination; Carbon Steel Plate From Brazil, 48 Fed. Reg. 2568, 2577 (Jan. 20, 1983). See also Certain Steel Products From Italy; Final Affirmative Countervailing Duty Determination, 47 Fed. Reg. 39356 (Sept. 7, 1982).

However, this principle does not necessarily hold when it comes to evaluating the program itself to determine whether its benefits are countervailable as opposed to calculating the level of subsidization. As the CPC discusses in its brief, Commerce frequently bases determinations under section 771(5)(B) of the Act upon events occurring before the period of review.[41] See, e.g., Certain Fresh Atlantic Groundfish from Canada; Final Affirmative Countervailing Duty Determination, 51 Fed. Reg. 10041, 10062 (Mar. 24, 1986); Carbon Steel Wire Rod from Saudi Arabia; Final Affirmative Countervailing Duty Determination, 51

---

[40] Administrative reviews perform essentially two functions. First, they calculate the duty, if any, which should be applied to the merchandise covered by the review. Secondly, they calculate the estimated deposit rate that merchandise covered by the next review will have to pay upon entry. 19 U.S.C. § 1675(a)(1992). See, e.g., Non-Rubber Footwear From Spain; Final Results of Administrative Review of Countervailing Duty Order, 48 Fed. Reg. 40536, 40537 (Sept. 8, 1983).

[41] Brief of CPC, supra note 15, at 32.

Fed. Reg. 4206, 4208 (Feb. 3, 1986). As long as the information is properly placed in the record of the administrative review under consideration, this practice is long-standing and in accordance with law.

In the present case, we have no suggestion that Commerce considered the history of Tripartite's negotiation and growth to be important or meaningless. Neither the preliminary nor the final determination discusses these issues. It may be that the agency considered the evidence regarding payments under Tripartite since its inception to outweigh the evidence regarding negotiation and growth. Therefore, on remand, Commerce must consider and respond to these arguments that Tripartite is expanding.

Similarly, just as Commerce may look to events occurring before the period of review, it may be relevant for Commerce, in examining de facto specificity, to look at a period subsequent to the period under investigation. The fact that the number of participants in a program is continuously increasing and that the Government is planning to include additional enterprises as recipients in the future may constitute probative evidence on specificity. As long as such evidence is presented to Commerce in a sufficiently timely manner so as to allow verification to take place, it may be appropriate for Commerce to consider it. On remand, Commerce should consider the evidence presented.

Canada and the CPC also take exception to Commerce's determination that 52 percent of all Tripartite payments went to hog producers during the period of review and 51 percent of all Tripartite payments have gone to hog producers since its inception.[42] Final Swine Determination, supra note 2, at 28534. They contend that this determination is meaningless unless, in accordance with its standard methodology, Commerce explains how and why these payments are disproportionately large. Furthermore, Canada and the CPC believe these payments are in no way disproportionate because: (i) one-third of all Tripartite participants are hog producers, (ii) hog producers did not receive any payments under Tripartite during its first several years, (iii) income stabilization schemes, like Tripartite, always benefit some products more than others during any given year, and (iv) when compared to a broader universe, such as all FCRs or all payments under ASA, Tripartite payments to hogs are not disproportionate.[43]

In its preliminary results, Commerce indicated that "[h]og producers were the dominant users of the [Tripartite] program accounting for 52 percent of the total payouts from the program in FY 1988/89." Preliminary Swine Determination, supra note 12, at 5678 (emphasis added). In its final results, Commerce referred to the 52 percent figure (as well as the 51

---

[42] Brief of Canada, supra note 13, at 48-50; Brief of CPC, supra note 15, at 29-40.

[43] Brief of Canada, supra note 13, at 48-50; Brief of CPC, supra note 15, at 29-37.

percent figure) without indicating whether this information supported a conclusion of disproportionality or dominant use. Final Swine Determination, supra note 2, at 28534.[44]

On remand, Commerce must explain whether the history of payments under Tripartite is probative of disproportionality or dominant use. Furthermore, it must explain how this evidence fits into its specificity analysis in this case. Commerce must consider whether it is appropriate to consider disproportionality with an eye only to Tripartite or to the combined experience under Tripartite and ASA and, if combined, whether it would change the determination of disproportionality.[45] Finally, the agency must respond to the relevant arguments raised by Canada and the CPC during the administrative proceeding.[46]

---

[44] Where a domestic subsidy is, in fact, used by a wide range of enterprises or industries, evidence of most benefits going to a handful of enterprises or industries may support a conclusion of de facto specificity under section 771(5)(B) of the Act. Commerce should consider whether, when it determines that the program at issue is used, say, by less than ten percent of the available participants, whether the fact that 52 percent of the benefits go to one group is relevant.

[45] The administrative record in this proceeding reveals that "since tripartite agreements are in place to stabilize the prices of cattle, hogs, and lambs, the application of the named commodities provisions for these commodities is suspended during the life of the agreement." P.R. 10 (ASB Annual Report for 1989) at 4. In its December 7, 1990, remand determination in Pork at 7, Commerce recognized that "a product cannot be covered simultaneously by ASA and the Tripartite." These statements suggest that Commerce should consider all payments under ASA and Tripartite together in determining disproportionality.

[46] We note, for example, that the CPC addressed the relevance of other government programs to the universe of product coverage for the purposes of determining disproportionality. Brief of CPC, supra note 15, at 29-36. And the panel in Pork I stated: "However, on remand, the coverage and comparability of

Also on remand, Commerce should, in accordance with its proposed countervailing duty regulations (see 54 Fed. Reg. at 23379), consider the extent to which Canadian authorities exercise discretion in conferring benefits under Tripartite. The preliminary results suggested that administrative discretion was a factor in the agency's determination because it found an absence of "explicit or standard procedures or criteria for evaluating Tripartite Agreement requests." Preliminary Swine Determination, supra note 12 at 5678. The final Determination is completely silent on this point.

In considering this issue, Commerce should, inter alia: (i) explain whether it believes the proposed regulations require the actual exercise of discretion or permit the exercise of discretion; (ii) respond to Canada's argument that there is no record evidence that reveals government discretion to limit the availability of Tripartite benefits; and (iii) respond to the NPPC's claim that Canadian authorities have rejected Tripartite agreements for asparagus, sour cherries and corn.

B. Quebec Farm Income Stabilization Insurance Program

In every administrative review of the order on live swine from Canada, Commerce has determined that FISI confers countervailable subsidies on a group of enterprises or industries

---

all ASA benefit programs should be considered in light of the standards set forth in this opinion regarding whether the number of beneficiaries is disproportionately small". Pork I, supra note 5, at 50.

within the meaning of section 771(5) of the Act. See Live Swine from Canada; Final Results of Countervailing Duty Administrative Review, 54 Fed. Reg. 651, 652 (Jan. 9, 1989); Live Swine from Canada; Final Results of Countervailing Duty Administrative Review, 56 Fed. Reg. 10410, 10413 (Mar. 12, 1991); Final Swine Determination, supra note 2, at 28537. FISI is an income stabilization scheme, not unlike Tripartite. Indeed, with the advent of Tripartite, many hog producers in Quebec have joined Tripartite.[47] The operation of the program was described by Commerce in its preliminary results:

> The purpose of the program is to gurarantee [sic] a positive net annual income to participants whose income is lower than the stabilized net annual income. The stabilized net annual income is calculated according to a cost of production model that includes an adjustment for the difference between the average wage of farm workers and the average wage of all other workers in Quebec. When the annual average farm worker income is lower than the stabilized net annual income, the Regie makes payment to the participant at the end of the year.

---

[47] In the preliminary results, Commerce explained the interrelationship between FISI and Tripartite:

> Quebec joined the federal government's Tripartite Price Stabilization Scheme during the review period. The Tripartite Scheme largely replaces the FISI, but the difference between payments made under the Tripartite Scheme and what FISI payments would have been before Tripartite are still covered by FISI. All producers enrolled in the FISI program are also in the Tripartite Scheme, whereas some farmers opted for single coverage under the Tripartite Scheme.

Preliminary Swine Determination, supra note 12, at 5680.

Preliminary Swine Determination, supra note 12, at 5679-80.

In determining that FISI benefits are de facto specific, Commerce stated, in part:

> In a province producing at least 45 commodities, FISI benefits are provided through 10 schemes covering only 14 commodities, and have been provided to the same 14 commodities since 1981, with no change in the commodities covered. Furthermore, according to information provided by the GOQ in its supplemental questionnaire response, and sourced from Quebec's Regie des Assurances Agricole's, these 14 commodities represent only 27 percent of the total value of agricultural production in Quebec.

Final Swine Determination, supra note 2, at 28537. Another fact discussed in the preliminary results, which Quebec seems to accept,[48] is that "[s]everal major agricultural commodities, such as eggs, dairy products, and poultry, which make up a large portion of Quebec's total agricultural production, are not covered under this program." Preliminary Swine Determination, supra note 12, at 5680.

Quebec challenges Commerce's determination on essentially three grounds. First, it believes a binational panel under Chapter 19 of the FTA has previously determined that FISI is not countervailable under U.S. law. Thus, Quebec argues, this Panel is precluded by the doctrine of collateral estoppel from upholding Commerce's determination. Secondly, Quebec contends that Commerce should have determined specificity based on the

---

[48] Brief of the Government of Quebec, at 24, Live Swine from Canada, (USA-91-1904-03) ("Brief of Quebec").

same targeting standard articulated by Canada in connection with Tripartite.[49] Finally, Quebec argues that Commerce's determination regarding de facto specificity is not based on substantial evidence. For this proposition, Quebec marshals a number of facts and arguments but does not dispute the fact that FISI payments artificially increase the revenues of hog producers.[50]

1. Collateral Estoppel. Quebec's first argument on appeal is that we are collaterally estopped by the binational panel ruling In the Matter of: Fresh, Chilled, and Frozen Pork from Canada, USA-89-1904-06 (June 3, 1991) ("Pork IV") from considering the issue of FISI's countervailability.[51] Quebec argues that the issues, facts and parties in this proceeding are identical to the ones before the panel in Pork IV. The doctrine of collateral estoppel is one of the "general legal principles" we are obligated to apply pursuant to Article 1904(3) of the FTA. Under the doctrine, "issues which are actually and necessarily determined by a court of competent jurisdiction are conclusive in

---

[49] We have ruled that targeting is not required for a determination of specificity under U.S. law. See notes 21 - 23 supra and accompanying text.

[50] Quebec does make one more argument. In its motion to expand the administrative record (discussed previously in section "II, B") and brief before this Panel, Quebec accuses Commerce of biased and unfair record-keeping. Brief of Quebec, supra note 48, at 14-15, 52-57.

The Panel has carefully reviewed this allegation. After a thorough review of the facts, the Panel finds no basis for this claim.

[51] Brief of Quebec, supra note 48, at 29-32.

a subsequent suit involving the parties to the prior litigation." Mother's Restaurant Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1569 (Fed. Cir. 1983), citing Restatement (Second) of Judgments § 27 (1980) (which prefers the term "issue preclusion" over "collateral estoppel"). "The underlying rationale is that a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again." Id., citing Warthen v. United States, 157 Ct.Cl. 798, 800 (1962); 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.443[1] (2d ed. 1983).

According to the Court of Appeals for the Federal Circuit, four circumstances must be present for collateral estoppel to take effect: (i) the issue previously adjudicated must be identical with the one now presented; (ii) the issue must have been actually litigated in the prior case; (iii) the previous determination of that issue must have been necessary to the end-decision then made; and, (iv) the party precluded must have been fully represented by counsel in the prior action. Thomas v. GSA, 794 F.2d 661, 664 (Fed. Cir. 1986); Mother's Restaurant, supra at 1569.

The issues in this case are not identical to the issues before the panel in Pork IV; therefore, we do not need to consider the other requirements of the doctrine. In Pork IV and its predecessors, the panels were asked to determine whether FISI could be considered de facto specific between January 1, 1988 and December 31, 1988 if: (i) eleven out of forty-four commodities

participated in the program; (ii) several important commodities (i.e., poultry, eggs and dairy) were excluded; and (iii) no established criteria existed for adding new commodities. See, e.g., Pork I, supra note 5, at 75. In the instant proceeding, we face an entirely different issue, that is, whether a finding of de facto specificity with respect to FISI can be upheld if between April 1, 1988 and March 31, 1989: (i) fourteen out of forty-five commodities participated; (ii) several important commodities (i.e., poultry, eggs and dairy) were excluded; (iii) twenty-seven percent of Quebec's agricultural production was covered by the program; and, (iv) FISI has covered the same fourteen commodities since 1981.

As we have previously noted, appellate review of countervailing duty determinations is limited to the facts developed in the underlying administrative record.[52] 19 U.S.C. § 1516a(b)(1)(B) (1991). In each administrative review under the Act, Commerce develops a separate administrative record. 19 U.S.C. § 1675 (1991). Therefore, the burden on the party seeking collateral estoppel must be exacting. PPG Industries, 712 F. Supp. at 199. "This is especially so in trade cases, since Congress has made specific provision for periodic administrative reviews. . . Since the agencies involved perform the function of expert finders of fact concerning different programs, different time frames, economic statistics and other factors in countervailing duty and dumping investigations as well as similar

---

[52] See section "IV" supra.

functions during periodic reviews, principles of issue preclusion should be carefully applied."[53] Id.

In sum, while we are not estopped to consider the countervailability of FISI, we shall look to the "intrinsically persuasive" aspects of the Pork rulings and subsequent practice by Commerce.[54] We will especially examine what new facts have arisen on the record of the instant case to distinguish it from the facts in Pork, where Commerce failed to sustain a determination of de facto specificity with respect to the same program during roughly the same period of review. Furthermore, we will examine the ruling in Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. 445 (Ct. Int'l Trade 1987). Although that case is nearly five years old, it also dealt with the countervailability of FISI (during the initial investigation).

2. Substantial Evidence. Quebec contends that Commerce's determination that FISI benefits are de facto specific is not supported by substantial evidence. In support of its allegation, Quebec advances the following arguments: (i) FISI covers 74.4 percent of the total insured value of commercial farm

---

[53] Quebec suggests that Commerce would be free to take new facts into account in this administrative review. Brief of Quebec, supra note 48, at 21. This admission acknowledges that collateral estoppel, which would preclude new fact finding, does not apply. C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4416 (1981).

[54] See FTA, supra note 1, at art. 1904(9); United States - Canada Free Trade Agreement Implementation Act, Statement of Administrative Action, at 109, H. Doc. No. 216, 100th Cong., 2d Sess. 271 (July 26, 1988).

production in Quebec; (ii) Commerce erred when it determined that only 27 percent of Quebec's total agricultural production is covered by FISI -- the correct figure is 35.8 percent;[55] (iii) FISI is inextricably linked with Quebec's other agricultural support schemes (i.e., income stabilization, crop insurance and supply management), therefore, Commerce should have been influenced by the fact that these schemes cover 84.8 percent of Quebec's total agricultural value; and (iv) nothing in the administrative record supports Commerce's claim that the same 14 commodities have been covered since 1981 and even if there is, this fact does not support a conclusion of de facto specificity.[56]

We believe the parties have overlooked an important threshold question. Of what relevance to a de facto specificity determination is information regarding the percentage of total production covered? For example, if a program that is de jure generally available covers two out of one-hundred agricultural commodities, but those two account for ninety-nine percent of the relevant country's total agricultural production value, is the program specific? More importantly, is that a relevant question under section 771(5) of the Act? If it is, then Commerce should, on remand, reexamine its analysis of Tripartite, since evidence

---

[55] At one point in its brief, Quebec asserts that the correct figure is 38.1 percent. Brief of Quebec, supra note 48, at 36.

[56] Brief of Quebec, supra note 48, at 35-40.

regarding production coverage was not included in the agency's determination.

Another aspect of Commerce's determination that troubles us is the conclusion that FISI covers 14 out of 45 commodities. Final Swine Determination, supra note 2, at 28537. As with Tripartite, there would appear to be legitimate questions regarding Commerce's classification of commodities. For example, based on evidence in the record and arguments at the hearing, it is unclear whether feeder cattle and slaughter cattle should be treated as one or two commodities, whether mixed grains are the same as oats, barley and rye, and whether the program covers soybeans. P.R. 71; Transcript ("Tr.") at 237-41.

Therefore, on remand, Commerce should address the following:

° Explain how evidence regarding the extent to which FISI covers Quebec's total agricultural value is relevant to a finding of de facto specificity.

° To the extent it is deemed relevant: (i) explain why the absence of this evidence in connection with Tripartite is not fatal to the agency's determination regarding that program; and, (ii) consider the evidence added to the administrative record by the Panel's Preliminary Ruling of November 25, 1991 which Quebec claims will establish that FISI covers 35.8 percent (instead of 27 percent) of Quebec's total agricultural value.[57]

---

[57] On remand, there are two issues that Commerce need not revisit. First, it does not have to reexamine Quebec's claim that FISI covers 74.4 percent of the total insured value of

° Reexamine the classification of commodities covered by FISI during the period of review and since 1981, and determine whether it is accurate and consistent with the classification of all agricultural commodities in Quebec.

° Reexamine the finding that FISI has covered the same fourteen commodities since 1981, in light of the finding in Pork that 11 commodities participated in the program.

Finally, in accordance with its proposed regulations (and the Panel's analysis of Tripartite), Commerce should consider on remand (i) whether there are dominant users of FISI, or whether certain enterprises, industries, or groups receive disproportionately large benefits, and (ii) the extent to which Quebec exercises discretion in conferring benefits under FISI. See Countervailing Duties; Notice of Proposed Rulemaking, 54 Fed. Reg. 23366, 23379 (May 31, 1989).

Quebec's commercial farm production. See Brief of Quebec, supra note 48, at 33. As the agency states in its final results, this argument "understates the value of agricultural production in Quebec." Final Swine Determination, supra note 2, at 28537. Secondly, it need not reconsider Quebec's argument that 84.8 percent of Quebec's agricultural value is covered by either crop insurance, income stabilization, or supply management. See Brief of Quebec, supra note 48, at 32-35. The record contains substantial evidence supporting Commerce's determination that these schemes are "fundamentally different from one another in their operation and purpose" (see, e.g., P.R. 10 & 30) and should not be linked. Fresh Cut Flowers from the Netherlands; Final Affirmative Countervailing Duty Determination, 52 Fed. Reg. 3301 (Feb. 3, 1987) (comparable programs should not be analyzed together unless "integrally linked"). See also Certain Fresh Atlantic Groundfish from Canada; Final Affirmative Countervailing Duty Determination, 51 Fed. Reg. 10041 (Mar. 26, 1986).

C. Scope of the Order: Sows and Boars

During the fourth review, Pryme sought to exclude live weanling swine ("weanlings") from the scope of the countervailing duty order on live swine from Canada. Preliminary Swine Determination, supra note 12, at 5676. After reviewing the terms of the order and the original determination on injury by the ITC, Commerce rejected Pryme's request. In its preliminary results, the agency stated:

> This order is on live swine. The ITC, at page A-2 of its final determination, defined live swine as follows: 'in general usage, swine are referred to as hogs and pigs. The term 'hogs' generally refers to mature animals and 'pigs' to young animals. The provision for live swine in the TSUS under item 100.85 applies to all domesticated swine regardless of age, sex, size, or breed.' (citation omitted) . . . The product descriptions of the merchandise contained in the ITC's determination and the CVD order are dispositive as to whether the merchandise in question is within the scope of the countervailing duty order.

Id. at 5677.

Quintaine argues that this ruling improperly includes sows and boars within the scope of the order on live swine.[58] According to Quintaine, most of the Canadian programs found countervailable by Commerce are limited to indexed slaughter hogs. Thus, sows and boars, which are not indexed, receive little or no benefit from these programs and, therefore, should

---

[58] Brief of P. Quintaine & Son, Ltd., at 7-17, Live Swine from Canada (USA-91-1904-03) ("Brief of Quintaine").

be excluded from the order.[59] Quintaine also argues that sows and boars were not included in the ITC's definition of the relevant U.S. industry.[60] Quintaine contends that the ITC focused primarily, if not exclusively, on slaughter hogs, not sows and boars.[61] Thus, because sows and boars are used for breeding and hogs are not, and sows and boars are nearly twice as large as hogs, sows and boars should be excluded from the countervailing duty order on live swine.

The Panel finds that Quintaine failed to exhaust its administrative remedies. Quintaine never made these arguments before Commerce and raised the issue for the first time before this Panel.

Another of the "general legal principles" we are obligated to apply to this proceeding is the doctrine of exhaustion of administrative remedies.[62] Under this doctrine, "judicial review of administrative action is inappropriate unless and until the person seeking to challenge that action has utilized the prescribed administrative procedures for raising the point." Sharp Corp. v. United States, 837 F.2d 1058, 1062 (Fed. Cir. 1988), citing Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). See also National Knitwear & Sportswear

---

[59] Id. at 7-12.

[60] Id. at 13-14.

[61] Id.

[62] See note 10 supra and accompanying text.

Assn. v. United States, No. 90-10-00537, 1991 Ct. Int'l Trade, LEXIS 381, at 24 (Ct. Int'l Trade 1991).

In this case, Quintaine did not exhaust its administrative remedies. Commerce determined in the first administrative review that all swine, regardless of weight (including sows and boars), were within the scope of the order. Live Swine From Canada; Final Results of Countervailing Duty Administrative Review, 55 Fed. Reg. 651, 653 (Jan. 9, 1989). At no time during the first review, or even the next three review periods (including the present one), did Quintaine challenge this determination.

Quintaine contends that its request fits within one of the judicially approved exceptions to the exhaustion doctrine. Citing Rhone Poulenc, S.A. v. United States, 583 F. Supp. 607, 610 (Ct. Int'l Trade 1984), Quintaine asserts that it would have been futile to raise its argument with Commerce during the administrative proceeding because Commerce already had made a determination regarding scope adverse to Quintaine.[63] Rhone Poulenc, however, is distinguishable. In that case, the Court held that "it appears that it would have been futile for plaintiffs to argue that the agency should not apply its own regulation."[64] Id. Quintaine's argument in the present case

---

[63] Brief of Quintaine, supra note 58, at 9-10.

[64] Additionally, the court in Rhone Poulenc noted that there was evidence in the record that Commerce had, sua sponte, considered the issue during the administrative proceeding that was being raised for the first time on appeal. 583 F. Supp. at 610. There is no evidence in the present case that Commerce

does not concern the application of Commerce's regulations. Rather, Quintaine argues that it had not succeeded before on this issue and it was not likely to succeed this time.

Quintaine's argument is closer to that addressed in PPG Industries, Inc. v. United States, 746 F. Supp. 119 (Ct. Int'l Trade 1990) ("PPG IV") and Budd Co., Wheel & Brake Div. v. United States, 773 F. Supp. 1549 (Ct. Int'l Trade 1991). In PPG IV, the court held that "[t]he fact that a party to an administrative proceeding finds that an argument may lack merit, or had failed to prevail in a prior proceeding on different facts, does not, without more, rise to the level of futility barring exhaustion." PPG IV, 746 F. Supp. at 137. In Budd, the court held that "[p]laintiff did not attempt to raise its present line of argument before Commerce on the assumption that Commerce would not be amenable to its proposals. This is no excuse for Plaintiff's not exhausting its administrative remedies." Budd, 773 F. Supp. at 1555.

In the present case, Quintaine did not raise its argument regarding the scope of the order because it did not think it would win. That is not an excuse to the doctrine of exhaustion of administrative remedies that the law recognizes. Thus, Quintaine's request to exclude sows and boars from the scope of the order is untimely and denied.

---

addressed the issue of sows and boars during the fourth administrative review.

D. Weanlings

1. Scope of the Order. As previously stated, Pryme asked Commerce during the fourth administrative review to exclude weanlings from the scope of the order on live swine from Canada. See section "V.C" supra. In support of its request, Pryme argued: (i) the ITC's injury determination focused exclusively on slaughter hogs; (ii) the Harmonized Tariff Schedule ("HTS") classifies weanlings separately from swine; (iii) most of the programs countervailed by Commerce required indexing and weanlings are not indexed; and (iv) weanlings are not the same "class or kind" of merchandise as live swine. P.R. 47.

In its preliminary and final results, Commerce rejected Pryme's request. According to Commerce:

> This order is on live swine. The ITC, at page A-2 of its final determination, defined live swine as follows: 'in general usage, swine are referred to as hogs and pigs. The term 'hogs' generally refers to mature animals and 'pigs' to young animals. The provision for live swine in the TSUS under item 100.85 applies to all domesticated swine regardless of age, sex, size, or breed.' (citation omitted).

Preliminary Swine Determination, supra note 12, at 5677. In further support of its determination, Commerce stated in its final results:

> While weanlings certainly fall within HTS item number 0103.92.00, other live swine are also included under this subheading, since it encompasses live swine, other, weighing 50 kg. or less each. Pryme's own definition of weanlings is the following: (weanlings) are swine at the age when they are taken from their mothers and place on diets of sold food to prepare them for market. They typically

> weigh 35 to 40 pounds (15.5 to 17.8 kg.) at the time of sale. The HTS subheading thus encompasses swine other than weanlings, because weanlings weigh no more than 17.8 kg., while the subheading covers swine weighing up to 50 kg. Therefore, the swine entering the United States under HTS 0103.92.00 may eat a solid diet of feed grains, and may receive benefits under many of the grain-related and other programs the Department has found countervailable.

Final Swine Determination, supra note 2, at 28536. On appeal to this Panel, Pryme essentially reiterates the arguments it made during the administrative proceeding.[65]

In our opinion, Commerce's determination that weanlings are within the scope of the order is reasonable and in accordance with law. First, the ITC unequivocally stated that its material injury determination covered "all domesticated swine regardless of age, sex, size, or breed." Final ITC Determination, supra at A-2. In a concurring opinion to the preliminary injury determination, Commissioner Rohr described the merchandise under investigation as "slaughter hogs." This comment was not made in the context of the scope of the investigation, but in the context of finding swine and pork to be two separate (i.e., "like") industries. USITC Pub. No. 1625, at A-13 to 15. In addition, Commissioner Rohr never took issue with, or expressly contradicted, the majority's view in the final injury determination that the investigation covered all swine, regardless of age or size.

---

[65] Brief of Pryme Pork Ltd, at 7-26, Live Swine from Canada (USA-91-1904-03) ("Brief of Pryme").

Secondly, HTS subheading 0103.92.00 does not support the conclusion that weanlings should be excluded from the order. As Commerce explains in nearly every antidumping and countervailing duty determination, including the present one:

> TSUSA and HTS item numbers are provided for convenience and Customs purposes. The written description [of the merchandise] remains dispositive.

See, e.g., Final Swine Determination, supra note 2, at 28531. In the present case, both the order and the ITC's determination expressly covered all entries of live swine. 50 Fed. Reg. at 32880; Final ITC Determination, supra at A-2.

Thirdly, the issue whether weanlings are covered by the scope of the order is separate from whether any Canadian programs confer countervailable subsidies within the meaning of the Act. A scope determination is governed by, inter alia, the "description of the product contained in the petition, the initial investigation, and the determinations of the Secretary and the Commission." 19 C.F.R. § 355.29(i)(1). It is different and separate from a determination that a product benefits from a countervailable program.

Finally, in support of its argument that weanlings are not the same class or kind of merchandise as weanlings, Pryme contends that weanlings differ from swine in terms of their physical characteristics, channels of trade, uses and consumer expectations.[66] This argument misapprehends the relevant law.

---

[66] Brief of Pryme, supra note 65, at 19-20.

Part 355 of Commerce's regulations states that scope determinations may not be based upon the arguments advanced by Pryme unless "[t]he descriptions of the product contained in the petition, the initial investigation and the determinations of the Secretary and the Commission . . . are not dispositive." 19 C.F.R. § 355.29(i) (emphasis added). In this case, Commerce properly determined that the countervailing duty order and the ITC's final injury determination were dispositive of the scope issue. Therefore, it was not error for Commerce to include weanlings within the scope of the order on live swine.

2. Separate Rate For Weanlings As A Subclass. During the administrative proceeding, Pryme argued that if weanlings were not excluded from the order, they should receive a separate rate from swine.[67] In response to this request, Commerce stated:

> Pryme did not request a separate rate for weanlings until its submission of a case brief. At that time, the Department deemed it inappropriate to delay the processing of the review to solicit the necessary information in order to determine whether it is appropriate or possible to calculate a separate rate for weanlings in this final results. Based on the record, we have no way of determining how many weanlings were raised by, and exported from, each province, nor do we have complete knowledge of weanling producers' participation in the various programs.

[67] P.R. 47 at 9-10.

Final Swine Determination, supra note 2, at 28536. Pryme argues that Commerce had enough information in the record to calculate a separate rate for weanlings.[68]

The record shows that weanlings do not benefit from many of the programs found countervailable by Commerce. For example, Tripartite, SHARP and FIIP have certain eligibility standards for swine. The standards use an index based on a fat-to-weight ratio. See, e.g., P.R. 10, Tab C at p.3 and Sch. A; Tr. 124-25. The threshold weight for the index is 40 kg. Id. In addition, the programs require a swine index of 80, which requires a weight of 60 kg. Id. As we note above, weanlings typically weigh 15 kg. See also Brief of Pryme, supra note 65, at 13. Thus, weanlings are not "indexed" and do not qualify for benefits under these programs.

We recognize that Commerce must have the authority to set strict time limits on the submission of comments and factual information. As the CIT stated in Rhone Poulenc, Inc. v. United States, "[a]n agency's discretion to fashion its own rules of administrative procedure includes the authority to set and enforce time limits on the submission of data." 710 F. Supp. 348, 350 (Ct. Int'l Trade 1989), citing Vermont Yankee Nuclear Power Corp. v. Nat. Resources Defense Council, 435 U.S. 519, 544-45 (1978).

In its brief before this Panel, Commerce argued that "the Department did not have information on the record with which

---

[68] Brief of Pryme, supra note 65, at 30.

to make a subclass determination as to weanlings, . . . because the issue was raised so late in the proceeding."[69] However, at the oral hearing, counsel for Commerce conceded that the record did indeed contain enough verified information to calculate a more accurate rate for weanlings. Tr. 262-66. Therefore, on remand, Commerce is directed to determine a separate rate for weanlings based on the evidence in the administrative record.

3. Separate Company Rate For Pryme. Pryme's request for a separate (company-specific) rate is untimely. Pryme first raised the issue in its brief before this Panel. See Brief of Pryme, supra note 65, at 33. Thus, as Pryme did not exhaust its administrative remedies with regard to this issue, it may not raise it on appeal.[70]

E. Saskatchewan Hog Assured Returns Program

Commerce found SHARP to be countervailable in its preliminary results. Preliminary Swine Determination, supra note 12, at 5679. Although Commerce did not discuss SHARP in its final results, it did include SHARP in its final subsidy calculation.[71]

---

[69] Brief of Commerce, supra note 26, at 74.

[70] See discussion regarding doctrine of exhaustion of administrative remedies, supra note 62 and accompanying text.

[71] Although the CPC raised the calculation issue in its Case Brief, Commerce did not address it in its final results. P.R. 49 at 62-63.

On appeal to this Panel, the CPC argues that Commerce miscalculated the benefit attributable to SHARP.[72] (Neither the CPC, nor any other complainant, challenges the fact that Saskatchewan hog producers receive a de facto specific economic benefit from SHARP.) Specifically, the CPC argues that Commerce mistakenly based its calculation on accrued data rather than actual data.[73]

In its questionnaire, Commerce asked the Government of the Province of Saskatchewan (hereinafter "Saskatchewan") to report all SHARP payments actually made, rather than accrued, during the period of review. P.R. 49 at 62-63. In its response, Saskatchewan stated that SHARP payments were Can$3,929,000. P.R. 10, Tab M, p. 3, Table I. Saskatchewan also provided Commerce with SHARP's financial statements for FY 1988/89, which indicated that SHARP payments during the review period were Can$4,321,807. P.R. 30, Ex. Sask-1.

Following on-site verification of the questionnaire responses, Commerce concluded that the financial statements contained the correct figure. As its verification report stated:

> We accepted the information concerning payments under SHARP presented in Saskatchewan Exhibit 1 in verifying the total payout listed in the response. Total payout in the review period listed in the response was Can$3,929,000. However, the annual report shows the stabilization payments to producers as Can$4,321,807. This number is Can$392,807 greater than the number listed in

---

[72] Brief of CPC, supra note 15, at 89-92.

[73] Id.

> the response. We were told that the response underreported the SHARP payments made in the review period because the response was submitted before the final SHARP payment amount was completely updated for the annual report. We amend the response accordingly.

Verification of the Questionnaire Response for Live Swine from Canada, Case C-122-404, at 16 ("Verification Report") (emphasis added).

In its brief, the CPC states that "the [Commerce Department] case analyst had telephoned CPC's counsel prior to the issuance of the Preliminary Results and asked why the payment amount reported in the response was less than the amount in the financial statements. Counsel [for CPC] informed the case analyst that the amount of payments reported in the response was accurate."[74] According to the CPC, the case analyst ignored its comments.

Commerce responds in its brief that:

> The record in this review contained two separate figures which appeared to show the amount actually paid out under the SHARP program for the review period. However, there is no information on the record with which to reconcile the discrepancies. In the absence of any record evidence to support the lower figure or explain the discrepancy between the figures, the Department determined, for purposes of its final results, to use the figure from SHARP's audited financial statements . . . Although CPC claims that the figure used by the Department shows accrued, as opposed to actual amounts paid out, SHARP's financial statements do not make that fact clear . . . Without further information, the Department could not assume that the figure in the questionnaire responses was more reliable than the audited financial statements.

---

[74] Brief of CPC, supra note 15, at 91.

Brief of Commerce, supra note 26, at 50 (emphasis added).

We cannot agree with the agency. In the audited financial statement for SHARP, the "Notes to the Financial Statements" provides that "[t]hese financial statements are prepared on the accrual basis of accounting." P.R. 30, Ex. Sask-1, p. 11. In our opinion, this evidence leads to the conclusion that Saskatchewan's questionnaire response contained the best information available regarding the subsidy conferred by SHARP during the period of review.

In sum, Commerce's determination regarding the benefit received under SHARP is not supported by substantial evidence. Accordingly, it is remanded with instructions to calculate the benefit using data in the record on actual payments. In all other respects, Commerce's determination with respect to SHARP is affirmed.

F. Alberta Crow Benefit Offset Program

To make grain grown in the Prairie Provinces of Canada available to all consumers at reasonable prices, the federal government subsidizes transportation costs pursuant to the Western Grains Transportation Act ("WGTA"). While these subsidies, known as "Crow Benefit" payments, have apparently made grain more available throughout Canada, they have tended to increase the price of grain in Alberta and some of the other farm

provinces.[75] Preliminary Swine Determination, supra note 12, at 5680.

To mitigate these increased prices, Alberta has established ACBOP. Under ACBOP, "the government provides certificates to registered feed grain users and registered feed grain merchants, which can be used as partial payments for grains purchased from grain producers. Feed grain producers who feed their own grain to their own livestock submit a claim directly to the government for payment." Id.

In its final results, Commerce determined that ACBOP certificates and payments provide an economic benefit to hog producers because they reduce the price producers would otherwise have to pay for grain. Final Swine Determination, supra note 2, at 28534. In addition, the agency concluded that ACBOP is expressly limited to feed grain users and, therefore, is limited to a specific enterprise or industry, or group of enterprises or industries. Id. (affirming finding in preliminary results).

The CPC disputes certain of these determinations. First, it argues that ACBOP is not countervailable because it does not provide hog producers with an economic benefit. According to the CPC, it simply offsets the artificially high grain prices created by the Crow Benefit payments.[76] Secondly, even if there is an economic benefit, it goes to grain producers,

---

[75] See, e.g., discussion of B.C. Feed Program at note 83 infra and accompanying text.

[76] Brief of CPC, supra note 15, at 41-45.

not grain consumers. Thus, the CPC argues, Commerce should have conducted an upstream subsidy investigation pursuant to section 771A of the Act (19 U.S.C. § 1677-1 (1992)). Lastly, in the event that this Panel upholds Commerce's determinations, the CPC claims the subsidy calculations are incorrect. It does not dispute Commerce's specificity determination.

We are not the first binational panel under Chapter 19 to review ACBOP. In Pork I, the complainants made the same arguments regarding offsets and the need for an upstream subsidy investigation that we have before us. Pork I, supra note 5, at 62-69. In a unanimous decision, the panel in Pork I rejected these arguments.

We are persuaded by the analysis and result in Pork I. We believe Commerce's determination regarding ACBOP is in accordance with law and based on substantial evidence. We remand for Commerce to review the accuracy of its calculations.

1. Offsets. The CPC argues that ACBOP merely counteracts the disadvantages of a related program, thus resulting in no overall economic benefit to hog producers.[77] In support of its position, the CPC cites Roses, Inc. v. United States, 743 F. Supp. 870 (Ct. Int'l Trade 1990), Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 39345 (Sept. 7, 1982) and Certain Steel Products from Belgium, 47 Fed. Reg. 39304 (Sept. 7, 1982), as examples of cases in which offset programs were not found countervailable.

---

[77] Brief of CPC, supra note 15, at 45-51.

Section 771(6) of the Act identifies only certain offsets that may be deducted from the gross subsidy.[78] 19 U.S.C. § 1677(6) (1992). After review of the WGTA, we find that Crow Benefit payments and their effect on grain prices in Alberta do not fall within the statute.

This would normally end our analysis; however, the CPC argues that Commerce and the courts have essentially expanded the scope of section 771(6) by refusing to countervail programs that do not confer a "competitive advantage in international commerce upon a discrete class of beneficiaries."[79] We do not agree.

As we have already determined in connection with our analysis of Tripartite, U.S. law does not contain a separate and distinct "competitive advantage" test.[80] Moreover, neither the courts nor Commerce have created an exception to section 771(6)

---

[78] For purposes of determining the net subsidy in each case, section 771(6) of the Act permits Commerce to deduct the following:

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

19 U.S.C. § 1677(6) (1992).

[79] Brief of CPC, supra note 15, at 45.

[80] See note 23 supra and accompanying text.

of the Act. Indeed, none of the cases cited by the CPC actually deal with offsets against gross subsidies. The Roses case dealt with specificity[81] and the panel in Pork I explained how the Belgian and German steel cases turned on the fact that certain gross subsidies were not received by the merchandise under investigation. Pork I, supra note 5, at 65.

2. Upstream Subsidies. The CPC's next argument is couched in the alternative -- that is, if we determine that ACBOP provides an economic benefit, then that benefit is received by grain producers (not grain users) and the agency must perform an upstream subsidy investigation pursuant to section 771A of the Act. In our opinion, if Commerce only counted payments made directly to grain users, including hog producers,[82] this argument would also fail and there would be no need for Commerce to perform an upstream subsidy inquiry.

3. Calculation. Commerce determined ACBOP benefits by calculating the ratio of swine grain consumption to weight gain.

---

[81] Furthermore, as we explained during our discussion of Tripartite, Judge Restani expressly disavowed the "competitive advantage" test when reviewing the agency's second remand results. Roses, Inc. v. United States, 774 F. Supp. 1376, 1381-82 (Ct. Int'l Trade 1991).

[82] ACBOP benefits swine producers in three ways. First, swine producers who grow their own feed grain receive payments directly from the government. Second, swine producers who purchase feed grain are given "A Certificates" which are used to cover part of the cost of purchase. Finally, swine producers that buy and grow their feed grain, receive A Certificates and payments from the government. P.R. 30; Preliminary Swine Determination, supra note 12, at 5680. See also Brief of CPC, supra note 15, at 43-45. Thus, the government is paying a subsidy directly to swine producers that lowers their cost of production.

Commerce used information in Economic Indicators of the Farm Sector, Costs of Production - Livestock and Dairy, U.S. Dept. of Agriculture (1989) to calculate a ratio of 3.5 pounds of grain to one pound of swine weight gain. Preliminary Swine Determination, supra note 12, at 5680. During the administrative review, the CPC argued that the use of this publication was improper because the ratio incorrectly measured grain instead of feed consumed, and did not take into account the use of protein supplements in feed. Thus, Commerce's benefit determination was too high. Commerce rejected these arguments on the grounds that its calculation was based on the best information available. Final Swine Determination, supra note 2, at 28534.

During the course of this appeal, the CPC asked this Panel to expand the administrative record to include documents in support of its argument that Commerce incorrectly determined the ratio of grain consumed to weight gained. We granted CPC's motion on November 25, 1991. Preliminary Ruling, supra at 8. In its brief, Commerce requested a remand to consider these documents. Since these materials were not before the agency when it issued its final results, and we have previously ruled that they should have been, this Panel grants Commerce's request and remands to it the final calculations for review consistent with the record, as amended.

On remand, Commerce is also instructed to: (i) explain the extent to which protein supplement and vitamin consumption reduces the amount of grain consumed by hogs -- the verification

report suggests 39.27 kilos per hog (P.R. 30 at 20) whereas the final calculations appear to ignore this fact (P.R. 73 at 6); and, (ii) confirm with appropriate reference to the record, that the final calculations for ACBOP do not include payments to livestock other than hogs. If this fact cannot be confirmed, Commerce should reconsider its determinations on this issue.

G. B.C. Feed Grain Market Development Program

In both its preliminary and final results, Commerce determined that the B.C. Feed Program provided de jure specific subsidies to a group of enterprises or industries within the meaning of section 771(5) of the Act. Preliminary Swine Determination, supra note 12, at 5682; Final Swine Determination, supra note 2, at 28536. Similar to ACBOP, the B.C. Feed Program is designed, in part, to offset the effects of Crow Benefit payments under the WGTA, Id.; Brief of CPC, supra note 15, at 87, by lowering the price of grain paid by livestock producers in British Columbia. Id. at 86-88. On every ton of feed grain consumed during the period of review, livestock producers (including hog producers) were paid Can$11/ton. Preliminary Swine Determination, supra note 12, at 5682. See also P.R. 30 at 23-24.

On appeal to this Panel, the CPC does not challenge Commerce's finding of de jure specificity. Rather, it makes the

same arguments it did with regard to ACBOP.[83] As we explain more fully in connection with ACBOP, these arguments must fail.

First, the B.C. Feed Program is not affected by one of the allowable offsets to gross subsidies identified in section 771(6) of the Act. 19 U.S.C. § 1677(6) (1991). Secondly, it confers an economic benefit on swine producers because it lowers their cost of production by lowering the cost of an input. Finally, payments under the B.C. Feed Program are paid directly to livestock producers. Thus, the agency did not need to perform an upstream subsidy investigation under section 771A of the Act. 19 U.S.C. § 1677-1 (1991).

H. B.C. Farm Income Insurance Plan

FIIP is an income stabilization scheme similar to Tripartite. When commodity prices fall below basic costs of production, the plan makes payments to participating producers that effectively eliminate the loss. Preliminary Swine Determination, supra note 12, at 5679.

In its final results, Commerce concluded that benefits under FIIP were expressly limited to a specific group of enterprises or industries:

> The program is only available to farmers producing commodities specified in the Schedule B guidelines to the Farm Income Insurance Act of 1973 (with limited number of agricultural products listed), and is therefore limited to a specific group of

---

[83] Brief of CPC, supra note 15, at 86-89.

> enterprises or industries, and therefore countervailable.

Final Swine Determination, supra note 15, at 28535.

On appeal, the CPC challenges Commerce's determination on essentially three grounds. First, it argues that FIIP is not de jure specific. In support of this claim, the CPC argues that "eligibility for FIIP is not conditional upon being listed in Schedule B."[84] According to the CPC, commodities are simply listed in Schedule B "when they become subject to FIIP."[85] Having concluded that FIIP is not de jure specific, the CPC next argues that Commerce failed to base its determination of countervailability upon a proper finding of de facto specificity. In particular, it contends that the agency should have applied the previously discussed "targeting" test or, at the very least, the four-part specificity test articulated by Commerce in its proposed countervailing duty regulations.[86] Finally, the CPC claims that the record lacks substantial evidence of specificity. It takes special issue with Commerce's apparent reliance on the fact that "only 36 percent of British Columbia's farm cash receipts are covered by FIIP." Final Swine Determination, supra note 2, at 28535. The CPC believes this figure ignores the overwhelming evidence in the record that FIIP's participation level is not due to government discretion or selectivity, but

---

[84] Brief of CPC, supra note 15, at 79.

[85] Id.

[86] Id. at 78, 80-86.

inherent economic circumstances, such as the protection afforded other producers by federal supply management programs.[87]

Except to the extent that we have already rejected the view that U.S. law requires a showing of targeting, we do not consider the last two arguments advanced by the CPC, since the record contains substantial evidence supporting Commerce's determination that FIIP limits participation to certain commodities. Section 1 of the Farm Income Insurance Act regulations defines commodity as "an agricultural product specified in the guidelines to this regulation." P.R. 49, Tab I (emphasis added). Section 2 states that "[p]lans are hereby established for farmers who produce a commodity specified in the guidelines." Id. (emphasis added). Schedule B4 contains the guidelines for swine producers. Id. There is no provision in the regulations or enabling legislation that indicates that FIIP is available to all commodities.

Finally, the CPC argues that a finding of de jure specificity is negated by the fact that "commodities have been added to, and removed from, Schedule B since the statute authorizing FIIP was promulgated in 1973."[88] However, as the CPC itself notes, the only apparent changes in FIIP coverage during the past twenty years are the removal of raspberries and broiler hatching eggs, and the addition of potatoes.[89] These minor

---

[87] Id. at 80-86.

[88] Id. at 79.

[89] Id.

changes fail to demonstrate that Commerce's determination is unreasonable. Accordingly, this Panel upholds Commerce's finding that FIIP is limited to a specific group of enterprises or industries within the meaning of the Act.

I. Feed Freight Assistance Program

The FFA is similar in operation and effect to the WGTA.[90] To make feed grains available throughout Canada at reasonable prices, the federal government pays a portion of the costs associated with transporting feed grains to certain grain deficit regions. Feed grain users (which are defined as those who buy grain to make feed for livestock) in these regions may claim freight assistance under the FFA whenever feed grain is moved through commercial channels. P.R. 10, Tab C at 4; P.R. 20, Tab A, Sec. I, Question 1. See also Brief of CPC, supra note 15, at 71-72.

During the administrative review, Commerce determined that hog producers in British Columbia, Quebec, New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island and certain portions of Ontario, received FFA benefits. Preliminary Swine Determination, supra note 12, at 5677-78. This finding was based on the fact that many grain millers also produce hogs that are exported to the United States. P.R. 10, Tab. C at 4. In holding that these benefits conferred countervailable subsidies on hog producers, Commerce stated:

---

[90] See notes 75 to 81 supra and accompanying text.

> In the preliminary results, we determined that this program is countervailable because it is limited to a specific enterprise or industry, or group of enterprises or industries. The Department countervailed only the amount of FFA benefits paid to livestock producers who have indicated that they raise hogs. FFA benefits, in the form of reduced costs for feed, result in a direct reduction in the cost of production of hogs.

Final Swine Determination, supra note 2, at 28535.

The CPC challenges these determinations on three grounds. First, it argues that, although FFA benefits are paid to hog producers who mill grain for feed, "any benefit that accrues to livestock producers from this program is incidental; payments are made to them in their capacity as grain millers, not as growers of hogs . . . The reason some farmers receive FFA benefits is that they are able to transform feed grains into livestock feed; whether or not they are also livestock producers is irrelevant."[91] Thus, the CPC believes that only feed grain producers benefit from the FFA. Secondly, to the extent hog producers benefit from the FFA, the CPC argues that the benefit is received by an input (i.e., feed grain) and Commerce should have performed an upstream subsidy investigation pursuant to section 771A of the Act. Finally, the CPC contends that if this Panel upholds Commerce's determination regarding the FFA, we must remand the final calculations to correct an error. The CPC does not challenge Commerce's specificity determination under section 771(5) of the Act.

---

[91] Brief of CPC, supra note 15, at 72-73 (emphasis in original).

1. Economic Benefit. It is undisputed that FFA payments are made directly to livestock producers that mill grain. See, e.g., Brief of CPC, supra note 15, at 72-73. Canada's response to Commerce's questionnaire states:

> Livestock producers who buy grain to feed to livestock may claim assistance from the [Livestock Feed Board of Canada]. 'Livestock' includes . . . swine . . . Based on certain assumptions, the [Livestock Feed Board of Canada] has calculated that approximately 3.5 percent ($634,835) of the transportation assistance might have been paid directly to or for the benefit of hog producers.

P.R. 10, Tab C, p. 4.

In analyzing ACBOP, we stated that the cost of producing swine is reduced any time the cost of feed grain is reduced. See note 82, supra. Payments under FFA provide an economic benefit to hog producers because they artificially lower the cost of feed grain.

In Pork I, the panel confronted the same issue with respect to the FFA. It noted:

> The benefits under the FFA received by a hog producer, related to the purchase of grain, result in a reduction in the cost of production of the hogs. In our view it is of no relevance whether these monies were received by hog producers technically in their capacity as such, as opposed to any other capacity, if the payments received benefited the production of hogs. On this record, Commerce could reasonably conclude that benefits under the FFA decreased the hog producer's cost of production. See Saudi Iron & Steel v. United States, 686 F.Supp. 914, 916-18 (Ct. Int'l trade 1988)

Pork I, supra note 5, at 56 (emphasis added).

We believe this reasoning is compelling and intrinsically persuasive. It is irrelevant that swine producers wear their "feed grain milling hats" when they receive FFA payments. The essential point is that the payments artificially reduce their cost of producing swine.

2. Upstream Subsidy. In the event an economic benefit is theoretically traceable to swine, the CPC argues that Commerce must conduct an upstream subsidy investigation to determine what benefits, if any, flow to swine producers from payments that arguably only benefit feed grain.[92] We reject this argument for the same reasons we rejected a similar argument by the CPC regarding ACBOP.[93]

An upstream subsidy inquiry is only required when benefits are provided to an input producer that does not produce the product under investigation. In this case, FFA payments are made directly to swine producers. Thus, there is no need for an upstream subsidy investigation.[94]

3. Calculation. The CPC asserts that Commerce's calculation is not in accordance with law and not supported by substantial evidence. It argues that Commerce miscalculated the

---

[92] Brief of CPC, supra note 15, at 71-74.

[93] See note 82 supra and accompanying text.

[94] It should be noted that the panel in Pork I reached the same conclusion regarding FFA and the need for an upstream subsidy investigation. Pork I, supra note 5, at 57.

subsidy by including FFA benefits paid in Ontario, even though no swine producers in Ontario were covered by the program.[95]

In its brief, the CPC notes that "the areas theoretically eligible for FFA benefits include parts of . . . Ontario."[96] However, the CPC asserts that "Commerce was informed by the Livestock Feed Board at verification that there is no hog production in eligible FFA areas in Ontario. P.R. 30, Ver. Ex. Montreal-3."[97] Although Commerce's brief discusses many aspects of the calculation, it does not discuss this one.[98] We believe the record contains substantial evidence that demonstrates that Commerce should not have included Ontario in its FFA calculations. For example, exhibit "Montreal-3" to the verification report states in note 2: "[t]here is no hog production in the FFA eligible zones in Ontario." P.R. 30, Ex. Montreal-3. In another exhibit to the verification report, which shows FFA payments to feed mills and livestock producers, the case analyst underlined the amount paid to producers in Ontario and noted "9 producers - no hog producers." Id. at Ex. Montreal-2. See also Brief of CPC, supra note 15, at 27.

---

[95] CPC also argues that New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island, and parts of British Columbia and Quebec should be eliminated from the calculation. However, our review of the record has not disclosed any support for this allegation.

[96] Brief of CPC, supra note 15, at 76.

[97] Id. at 77.

[98] See Brief of Commerce, supra note 26, at 35-38.

At the hearing before this Panel, Commerce conceded that it had miscalculated the FFA benefit for Ontario, and agreed to accept a remand to correct the calculations. Tr. 269-70. Therefore, this Panel remands the FFA calculations to Commerce, with directions to remove payments covering Ontario.

VI. CONCLUSION

For the foregoing reasons, Commerce's determination is hereby affirmed in part and remanded in part. On remand, the agency is directed to:

A. Tripartite

° Reexamine, based on evidence in the underlying administrative record, whether its categorization of all agricultural commodities in Canada is accurate and consistent and, in particular: (i) whether quantitative assessment based on FCRs (or equivalent data) would be appropriate in achieving accurate and consistent categories, and (ii) what number of commodities makes up the relevant universe.

° Reexamine the evidence and (i) determine the number of agricultural commodities covered by Tripartite in the same manner that it determines the number of commodities in Canada, and (ii) identify the number of enterprises or industries in Canada's agricultural sector and the number of enterprises or industries covered by Tripartite.

° Reexamine its de facto specificity determination and, in particular: (i) consider verified information arising

after the period of review regarding Tripartite's coverage, and (ii) consider and respond to arguments presented by the CPC and Canada during the fourth administrative review regarding Tripartite's expanding nature prior to and during the period of review.

° Explain whether the history of payments under Tripartite (both during and before the period of review) is probative of disproportionality or dominant use. Furthermore, explain how this evidence fits into its specificity analysis in this case. For example, of what relevance is the fact that 52 percent of Tripartite benefits go to swine producers, when the agency believes the program is used by less than ten percent of the potential participants.

° Explain whether it is appropriate to consider disproportionality/dominant use with an eye only to Tripartite or to the combined experience under Tripartite and ASA and, if combined, whether that would change the determination of disproportionality/dominant use. Furthermore, respond to Canada's and the CPC's arguments that swine producers do not receive disproportionately large benefits because: (i) one-third of all Tripartite participants are hog producers, (ii) hog producers did not receive any payments under Tripartite during its first several years, (iii) the negotiations necessary to establish a Tripartite agreement are complex and this is a relatively recent government program, and (iv) income

stabilization schemes, like Tripartite, always benefit some products more than others during any given year.

° Consider the extent to which Canadian authorities exercise discretion in conferring benefits under Tripartite. In considering this issue, Commerce must, inter alia: (i) explain whether it believes the proposed countervailing duty regulations require the actual exercise of discretion or the ability to exercise discretion, (ii) respond to Canada's argument that there is no record evidence that reveals government discretion to limit the availability of Tripartite benefits, and (iii) respond to the NPPC's claim that Canadian authorities have rejected Tripartite agreements for asparagus, sour cherries and corn.

B. FISI

° Explain how evidence regarding the extent to which FISI covers Quebec's total agricultural value is relevant to a finding of de facto specificity.

° To the extent it is deemed relevant: (i) explain why the absence of this evidence in connection with Tripartite is not fatal to the agency's determination regarding that program, and (ii) consider the evidence added to the administrative record by the Panel's Preliminary Ruling of November 25, 1991 which Quebec claims will establish that FISI covers 35.8 percent (instead of 27 percent) of Quebec's total agricultural value.

° Reexamine the classification of commodities covered by FISI during the period of review and since 1981, and

determine whether it is accurate and consistent with the classification of all agricultural commodities in Quebec.

° Reexamine the finding that FISI has covered the same fourteen commodities since 1981, in light of the finding in Pork that 11 commodities participated in the program.

° Finally, in accordance with its proposed regulations (and the Panel's analysis of Tripartite), Commerce should consider on remand (i) whether there are dominant users of FISI, or whether certain enterprises, industries, or groups receive disproportionately large benefits, and (ii) the extent to which Quebec exercises discretion in conferring benefits under FISI.

C. Weanlings

° Determine a separate rate for weanlings based on the evidence in the administrative record.

D. SHARP

° Recalculate the benefit received by swine producers using data in the record on actual payments.

E. ACBOP

° Reexamine the final calculations in light of the information added to the administrative record by this Panel's November 25, 1991 ruling.

° Explain the extent to which protein supplement and vitamin consumption reduces the amount of grain consumed by hogs.

° Confirm, with appropriate reference to the record, that its final calculations for ACBOP do not include payments to

livestock other than hogs. If this fact cannot be confirmed, Commerce should reconsider its determinations on this issue.

F. FFA

° Remove payments covering Ontario from the final calculations for the FFA.

The results of this remand shall be provided by the agency to the Panel within 60 days of this decision. If amendments to the Rules of Procedure for Article 1904 binational panel review are published in the Federal Register and Canada Gazette prior to the issuance of the remand determination, the parties are directed to follow those rules; otherwise, all parties will comply with the existing rules and the time for parties challenging the remand determination to submit comments shall be 20 days.

Signed in the original by:

May 19, 1992	Murray J. Belman
Date	Murray J. Belman
May 19, 1992	Gail T. Cumins
Date	Gail T. Cumins
May 19, 1992	David McFadden
Date	David McFadden
May 19, 1992	Simon V. Potter
Date	Simon V. Potter
May 19, 1992	Gilbert Winham
Date	Gilbert Winham

UNITED STATES-CANADA BINATIONAL PANEL REVIEW

IN THE MATTER OF:	
LIVE SWINE FROM CANADA	USA-91-1904-03

Additional Views
of
Chairman Murray J. Belman

While I am in agreement with the Panel's determination to remand for further consideration Commerce's finding of de facto specificity of the Tripartite program, I disagree with the Panel's comments and suggestions regarding linkage of ASA and Tripartite that appear in footnotes 45 and 46 and the accompanying text.

First, I believe that the issue of linkage was not raised by Canada (which submitted no briefs to Commmerce) or the CPC during the administrative proceedings and was thus beyond the proper scope of our review under the principles of waiver and exhaustion of administrative remedies. The passages from CPC's Brief on Appeal, cited by the Panel at footnote 46 to justify consideration of the linkage issue, are not, of course, relevant to the question whether the arguments were raised during the administrative proceedings. CPC's discussion of disproportionality, dominant use and program coverage in its Case Brief submitted to Commerce makes no reference to ASA and is wholly confined to analysis of the Tripartite programs. Case Brief of CPC, 5-17. Earlier in that brief and even in its brief on appeal, CPC stated: "These [Tripartite] plans * * * are significantly different from the stabilization plans under ASA found to be

countervailable by the Department in 1985." CPC Case Brief, 2; CPC Brief on Appeal, 14 (reference to "the Department" changed to "Commerce"). In view of these facts, I believe it was improper for the Panel to consider the linkage argument.

Secondly, I believe that the references quoted by the Panel in footnote 45 do not "suggest" that ASA should be linked with Tripartite in Commerce's consideration of disproportionality or dominant use on remand. The statement made by the Canadian Agricultural Stabilization Board (Tripartite agreements stabilize the "prices" of covered commodities) is plainly mistaken, since all parties agree that the Tripartite program is aimed at income maintenance, rather than price support. See e.g., Brief of Canada on Appeal, 4-5. In the very same report cited by the Panel in footnote 45, the ASB stated that the ASA's main objective is to stabilize "the prices" of covered commodities. P.R. 10 Ann. Rep. of the Agricultural Stabilization Board for the year ended March 31, 1989, p. 1. It is difficult for me to see how ASB's misdescription of Tripartite can be said to support a finding of linkage with ASA. The second statement quoted in the footnote, pointing out that products may not be covered simultaneously by ASA and Tripartite, offers nothing to the analysis of linkage under Commerce's practice or its proposed regulations, since, in isolation, it says nothing to suggest that the two programs are subject to joint administration, were enacted with the intent to treat industries equally, are aimed at similar purposes or are eligible for common funding. Of course, as noted above, none of

these arguments was raised by Canada or the CPC during the administrative proceedings in this case.

In summary, I believe that the Panel has engaged in an effort to breathe life into an agrument not made below and not supported by its citations to the record. While Commerce, as directed by the Panel, is now obligated to consider linkage in reconsidering disproportionality and dominant use, it is not obligated to stretch the record or distort its own regulations in doing so.

UNITED STATES - CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL

IN THE MATTER OF: LIVE SWINE FROM CANADA	)	Secretariat File No. USA-91-1904-03

DECISION OF THE PANEL
October 30, 1992

CANADIAN PORK COUNCIL AND ITS MEMBERS; GOVERNMENT OF CANADA; GOVERNMENT OF QUEBEC; P. QUINTAINE & SON LTD.; PRYME PORK LTD.
Complainants

v.

INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE
Respondent

and

NATIONAL PORK PRODUCERS COUNCIL, ET AL.
Intervenor

Before:

Murray J. Belman, Chairperson
Gail T. Cumins
David J. McFadden
Simon V. Potter
Gilbert R. Winham

Appearances:

Homer E. Moyer, Jr., Stuart E. Benson, Catherine Curtiss, Amy Rothstein, for Government of Canada; Elliot J. Feldman, Jonathan D. Cahn, for Government of Quebec; William K. Ince, Michele C. Sherman, for Canadian Pork Council and Its Members; Joel K. Simon, Christopher M. Kane, for P. Quintaine & Son, Ltd. and Pryme Pork, Ltd.

Stephen J. Powell, Berniece A. Browne, Jeffery C. Lowe, for International Trade Administration, U.S. Department of Commerce

Paul C. Rosenthal, Joanna K. McIntosh, for National Pork Producers Council, et al.

I. 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 determination made on remand by the International Trade Administration, U.S. Department of Commerce ("Commerce") on July 20, 1992 ("Remand Determination") in the fourth administrative review of the countervailing duty order on live swine from Canada, 56 Fed. Reg. 28531 (June 21, 1991) ("Final Swine Determination") in response to this Panel's decision dated May 19, 1992 ("Panel Decision" or "Remand Order"). The fourth administrative review of the countervailing duty order on live swine from Canada covered the period April 1, 1988 through March 31, 1989. Final Swine Determination, at 28531.

In its Remand Determination, Commerce again concluded that during the review period, Canada's National Tripartite Stabilization Scheme for Hogs ("Tripartite") and Quebec's Farm Income Stabilization Insurance Program ("FISI") were limited de facto to a specific group of agricultural commodities and were therefore countervailable. Commerce also determined that it was unable to comply with the Panel's Remand Order with respect to weanlings or to determine a separate rate for this specific category of hogs based on the evidence in the administrative record (the "Administrative Record"). With respect to the Saskatchewan Hog Assured Returns Program ("SHARP"), the Alberta Crow Benefit Off-set Program ("ACBOP") and the Feed Freight

Assistance Program ("FFA"), Commerce has recalculated the benefits to live swine under these programs, in accordance with the Panel's instructions. Panel Decision, at 57-66 and 70-75.

In this opinion, the Panel relates this second review's procedural history, sets out the issues with which it must deal and then considers Commerce's Remand Determination in light of the applicable law. After review of the Administrative Record and the arguments presented by the parties in their briefs and orally, this Panel remands again, with specific instructions, the determinations made by Commerce on Tripartite, FISI and the establishment of a sub-class for weanlings. Commerce's Remand Determination on ACBOP, SHARP and FFA is upheld.

II. PROCEDURAL HISTORY

On May 19, 1992, the Panel remanded to Commerce for further consideration its June 21, 1991 final determination that nine Canadian agricultural programs conferred countervailable subsidies on Canadian producers of live swine. The Panel instructed Commerce to review the evidence on the Administrative Record for action not inconsistent with the Panel's decision with regard to its findings on Tripartite, FISI, SHARP, ACBOP, FFA and the establishment of a sub-class for weanlings.

On May 29, Complainants Canadian Pork Council ("CPC") and Government of Quebec ("Quebec") each filed a motion for

reexamination of the Panel's decision based on Rule 77 of the Article 1904 Panel Rules. By a unanimous decision issued on July 7, 1992, the Panel ordered that the motions be denied, with the exception of the motion for reexamination by Quebec concerning the characterization of its position contained in footnote 53 of the Panel Decision; this judgment makes Quebec's argument moot.

On July 20, 1992, Commerce issued its Remand Determination. On August 10, 1992, CPC, Quebec, the Government of Canada ("Canada") and Pryme Pork Ltd. ("Pryme Pork") filed challenges under Rule 75 of the Article 1904 Panel Rules against the Department's Remand Determination. Canada and other Complainants also filed a motion for oral argument on the Remand Determination. This motion was granted by the Panel on August 28, 1992.

Commerce and NPPC filed briefs in support of Commerce's Remand Determination while the Complainants presented briefs contesting Commerce's findings. On August 10, 1992, NPPC also filed a submission under Rule 75 of the Article 1904 Panel Rules requesting the Panel to take judicial notice of the number of commodities produced in Canada and to remand Commerce's Remand Determination with respect to the calculation of ACBOP benefits. ("NPPC Submission").

On August 28, 1992, a notice of oral argument was issued by the Panel. A hearing was held on September 10, 1992 during which the Parties presented arguments in support of their respective positions.

III. PRELIMINARY MOTIONS

On August 18, 1992, this Panel was presented with a motion by Commerce to strike the affidavit attached to Quebec's response to Commerce's Remand Determination as well as related portions of Quebec's challenge. ("Commerce Motion") According to Commerce, this affidavit consisted of information that was not part of the Administrative Record and could not therefore be taken into account by the Panel. Commerce Motion, at 1-3.

On August 28, 1992, Quebec filed an Opposition to Commerce's Motion on the ground that no new information had been presented in the affidavit of Deputy Minister Guy Jacob. ("Quebec Opposition") According to Quebec, the affidavit represented the Government's interpretation of the Administrative Record in rebuttal to Commerce's assertion that there were 69 agricultural commodities in Quebec. Quebec Opposition, at 1-2. Quebec argued that all factual statements made in the affidavit were derived from the Régie des assurances agricoles' Annual Report (the "Regie Report"), which was already on the Administrative Record before the agency.

By a unanimous decision issued on September 10, 1992 at the hearing on Commerce's Remand Determination, the Panel denied Commerce's Motion but accepted the affidavit attached to Quebec's response to Commerce's Remand Determination, not as evidence on the record but rather as argument made by Quebec on this issue.

On September 3, 1992, the Panel was also presented with a Motion by CPC to strike Commerce's amendment to its Remand Determination with respect to ACBOP or, alternatively, for leave to file a challenge under Rule 75 to the amended Remand Determination in that regard. ("CPC Motion") CPC argued that it was untimely for Commerce to amend its own revised calculations and methodology for ACBOP and that CPC should at least be given the right to challenge these new calculations and methodology as it had not challenged Commerce's Remand Determination with respect to ACBOP in its brief. CPC Motion, at 1-2.

By a unanimous vote, this Panel grants, in part, CPC's Motion. The Panel denies the Motion to strike Commerce's proposed amendments to its Remand Determination but grants CPC leave to file its challenge, under Rule 75, to the proposed amendments regarding ACBOP. The merits of Commerce's and CPC's arguments on ACBOP are considered in this opinion in Section VI D.

IV. SUMMARY OF THE ISSUES

CPC, Canada, Quebec and Pryme Pork challenge Commerce's Remand Determination on the following grounds.

With respect to Tripartite, Canada and CPC argue that the remand proceedings conducted by Commerce were inconsistent with the Panel's Remand Order, that Commerce ignored the Panel's specific instructions to reconsider its final determination based on the evidence on the Administrative Record, and that there is no substantial evidence on the record to support Commerce's conclusions on the countervailability of this Canadian program.

With respect to FISI, Quebec argues that there is no record evidence to support Commerce's conclusions on the number of agricultural commodities produced in Quebec and that Commerce has simply abandoned the specificity test that has governed American countervailing duty law over the last decade.

With respect to the sub-class for weanlings, Pryme Pork argues that Commerce simply ignored the Panel's instructions in that respect and that there is sufficient evidence on the Administrative Record to calculate a benefit for this sub-class.

The Complainants do not challenge the new methodology or the recalculations of the benefits under SHARP, FFA and ACBOP.

NPPC has also filed a submission under Rule 75 requesting the Panel to take judicial notice of the number of commodities produced in Canada and argues that Commerce's ACBOP calculations in the Remand Determination are not supported by substantial evidence on the Administrative Record as they ignore the amount of grain consumed by "creeps" and "starters". NPPC Submission, at 1-2.

V. APPLICABLE LAW AND STANDARD OF REVIEW

The standard of review applied in this second review is whether Commerce's Remand Determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law,", 19 U.S.C. Å 1516a (b) (1) (B) (1992). The analysis of this standard, set forth at pages 7 to 11 of the Panel Decision, is adopted and incorporated in this opinion.

We note that reviewing Courts have rejected Commerce's "exercise of administrative discretion if it contravenes statutory objectives." Ipsco, Inc. v. United States, 899 F. 2d 1192, 1195 (Fed. Cir. 1990). "The grant of discretionary authority to an agency implies that the exercise of discretion be predicated upon a judgment anchored in the language and spirit of the relevant statute and regulations." Freeport Minerals (Freeport- McMoran, Inc.) v. United States, 776 F. 2d 1029, 1032 (Fed. Cir. 1985). Thus, we cannot affirm any portion of Commerce's Remand Determination which "did not comply with the

statutory... and regulatory requirements" or which is unsupported by substantial evidence on the record. Olympic Adhesives, Inc. v. United States, 899 F. 2d 1565, 1574 (Fed. Cir. 1990); see also Asociacion Colombiana de Exportadores v. United States, 916 F. 2d 1571 (Fed. Cir. 1990); LMI - La Metalli Industriale S.p.A. v. United States, 912 F. 2d 455 (Fed. Cir. 1990).

VI. DISCUSSION

A. National Tripartite Stabilization Scheme for Hogs

1. The Panel's instructions

In its Final Determination, Commerce held that the Canadian federal government's Tripartite scheme for hogs conferred countervailable subsidies on Canadian swine producers during the period of review. Final Swine Determination, at 28534. In reaching its conclusion, Commerce had determined that Tripartite was not de jure specific but that Tripartite benefits were provided "to a specific enterprise or industry or group of enterprises or industries" within the meaning of section 771 (5) of the Act (19 U.S.C., Å 1677 (5) (1992)). Id., at 28532-28534.

In its Remand Order, the Panel remanded Commerce's determination on Tripartite with the following instructions:

- Reexamine, based on evidence in the underlying Administrative Record, whether its categorization of all agricultural commodities in Canada is accurate and consistent and, in particular: (i) whether quantitative assessment based on FCRs (or equivalent data) would be appropriate in achieving accurate and consistent categories, and (ii) what number of commodities makes up the relevant universe;

- Reexamine the evidence and (i) determine the number of agricultural commodities covered by Tripartite in the same manner that it determines the number of commodities in Canada, and (ii) identify the number of enterprises or industries in Canada's agricultural sector and the number of enterprises or industries covered by Tripartite;

- Reexamine its de facto specificity determination and, in particular: (i) consider verified information arising after the period of review regarding Tripartite's coverage, and (ii) consider and respond to arguments presented by the CPC and Canada during the fourth administrative review regarding Tripartite's expanding nature prior to and during the period of review;

- Explain whether the history of payments under Tripartite (both during and before the period of review) is probative of disproportionality or dominant use. Furthermore, explain how this evidence fits into its specificity analysis in this case. For example, of what relevance is the fact that 52 percent of Tripartite benefits go to swine producers , when the agency believes the program is used by less than ten percent of the potential participants;

- Explain whether it is appropriate to consider disproportionality/dominant use with an eye only to Tripartite or to the combined experience under Tripartite and ASA and, if combined, whether that would change the determination of disproportionality/dominant use. Furthermore, respond to Canada's and the CPC's arguments that swine producers do not receive disproportionately large benefits because: (i) one-third of all Tripartite participants are hog producers, (ii) hog producers did not receive any payments under Tripartite during its first several years, (iii) the negotiations necessary to establish a Tripartite agreement are complex and this is a relatively recent government program, and (iv) income stabilization schemes, like Tripartite, always benefit some products more than others during any given year;

- Finally consider the extent to which Canadian authorities exercise discretion in conferring benefits under Tripartite. In considering this issue, Commerce must, inter alia: (i) explain whether it believes the proposed countervailing duty regulations require the actual exercise of discretion or the ability to exercise discretion, (ii) respond to Canada's argument that there is no record evidence that reveals government discretion to limit the availability of Tripartite benefits, and (iii) respond to the NPPC's claim that Canadian authorities have rejected Tripartite agreements for asparagus, sour cherries and corn.

Panel Decision, at 11-27 and 75-77.

2. Commerce's response

In its Remand Determination, Commerce again concluded that, during the review period, Tripartite was limited de facto to a specific group of agricultural commodities and was therefore countervailable. With respect to the number of commodities in Canada, while acknowledging that the Administrative Record did not contain the actual source documentation upon which Commerce relied in reaching its original determination that the universe of Canadian agricultural commodities consisted of over 100 commodities, Commerce nevertheless came to the same conclusion,

relying on two governmental publications that were not physically on the Administrative Record and requesting the Panel to permit it to reopen the record in order to add these reports. Remand Determination, at 2-12.

Commerce further added that the future expansion of Tripartite was not relevant to its finding of de facto specificity and that, in any event, no new commodities have been added to Tripartite since 1989.

With respect to the Panel's third instruction, Commerce determined that, standing alone, a finding that the number of recipients is small relative to the universe of potential recipients is sufficient evidence to justify determining that a domestic subsidy program is de facto specific. Remand Determination, at 13. Therefore, Commerce has not reached any conclusion for this review as to whether hog producers were dominant users of the Tripartite program or whether they had received disproportionately large benefits since the inception of Tripartite. Id. at 20.

Similarly, Commerce also concluded that it was not appropriate to consider disproportionality in terms of the combined experience under Tripartite and any other provision of the Agricultural Stabilization Act ("ASA") as no information regarding linkage had been placed on the Administrative Record during the administrative proceedings. Id. at 21-23.

With respect to government discretion, Commerce did not consider it necessary to conclude that its specificity determination regarding Tripartite was partially dependant upon a finding of government discretion since, according to Commerce, it need not find evidence that a government actually exercised discretion in order to reach a finding of specificity. Id. at 25. Although Commerce did not conclude that the evidence in the Administrative Record supported the finding that Tripartite was de facto specific on the basis of the government of Canada's retention of discretion, it found that the government of Canada had retained discretion in the administration of the program. Id. at 26.

3. The arguments of the Parties

The CPC and Canada argue that Commerce's Remand Determination is flawed in several respects and substantially disregards the Panel's instructions.

Canada contends that Commerce reformulated the legal test of specificity and reduced it to a single subjective criterion, whether the number of commodities covered by a program is "small" compared to the total number of commodities produced. In its opinion, Commerce thereby resorted to an improper, purely mechanical test; the American courts and Commerce have always stated that the specificity test could not be reduced to a

precise mathematical formula. Brief of Canada, at 2 and 22-27. The CPC also argues that Commerce's new specificity standard is contrary to the statute and to American case law which, in its opinion, requires Commerce to base its specificity finding on more than a mere counting of the number of commodities. Brief of CPC, at 16-23.

Canada also challenges Commerce's Remand Determination on the ground that it is not based on the evidence in the Administrative Record of this case. Brief of Canada, at 2. According to Canada, the Remand Determination is largely based on two documents that were not in the Record and were not seen or briefed by the Parties before this Panel review and, in doing so, Commerce acted contrary to the Panel's specific instructions that Commerce look at the number of agricultural commodities in Canada "based on the evidence in the record". Panel Decision, at 30. In addition, Canada argues that Commerce's reliance on extraneous documents violates fundamental notions of fairness and due process as well as U.S. law and Commerce's own regulations. Brief of Canada, at 4-10. Canada adds that the evidence in the Administrative Record on Farm Cash Receipts ("FCRs") was sufficient to estimate the number of eligible industries and the universe of commodities in accordance with the Panel's instructions. Brief of Canada, at 10-14. See also Brief of CPC, at 6-16.

Finally, Canada alleges that Commerce failed to abide by the Panel's instructions in refusing to determine the number of Tripartite participants, to consider the evidence of Tripartite expansion and to consider the importance of other ASA programs on the question of disproportionality. Brief of Canada, at 15-21.

CPC adds that Commerce also ignored the requirement that there be evidence of government action in order to support its finding of specificity. Brief of CPC, at 19-20. In its opinion, there is simply no substantial evidence on the Administrative Record with respect to government discretion to limit Tripartite's availability, even though Commerce finds that government discretion is not "necessary" to its finding of specificity. Id. at 30-31.

For all these reasons, Canada and CPC conclude that the Panel should remand Commerce's Remand Determination with instructions to enter a negative determination as Commerce's finding that Tripartite is countervailable is not based on substantial evidence in the Administrative Record.

In its response brief, Commerce argues that its Remand Determination is based on substantial evidence on the record. More specifically, Commerce determined that it could not determine the number of commodities in Canada for the Tripartite program on the basis of the FCRs as these were categorized much

more generally than Tripartite. Brief of Commerce, at 16-17. Therefore, the arguments goes, the Panel should permit Commerce to supplement the Administrative Record with those documents reasonably providing an accurate and consistent categorization of the agricultural universe in Canada, especially as Commerce in fact relied on those documents in reaching its original determination. Id., at 18-22.

Commerce further states that its test for determining de facto specificity was reasonable, based on substantial evidence and otherwise in accordance with law. Id., at 44-64. More specifically, Commerce argues that it need not base a finding on the fact that hog producers have received significantly more benefits than other commodity producers since Tripartite's inception or on the basis of the government's retention of discretion. According to Commerce, a finding of specificity can be based on the sole fact that, by itself, the number of actual users is found to be small. No Court, Panel or administrative determination has found it necessary to rely on more than one of the factors enumerated in the Proposed Regulations. 54 Fed. Reg. at 23, 368.

NPPC also filed a response to Complainants' challenges of Commerce's Remand Determination. NPPC argues that Commerce's application of the specificity test on remand was in accordance with the law as Commerce gave meaningful consideration to each of the specificity factors and did not reduce the specificity test

to a "mathematical" formula. Brief of NPPC, at 40-46. NPPC also argues that Commerce's Remand Determination with respect to Tripartite was supported by substantial evidence and was otherwise in accordance with law. Id. at 4-40. In its submission at the hearing, NPPC also invited the Panel to take judicial notice of the number of commodities produced in Canada, as the two public documents referred to by Commerce, and which Commerce wishes to add to the Administrative Record, are published by reliable sources and contain facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned". NPPCs Submission, at 2-5.

4. Issues

In view of the foregoing, the following issues are to be determined by the Panel in this second review:

a) Is the rejection by Commerce of the FCRs and its replacement by two government documents which are not part of the Administrative Record reasonable? If so, should Commerce be allowed to reopen the Record or may the Panel take judicial notice of these documents?

b) Is Commerce's finding that Tripartite provides specific benefits solely because the number of

industries receiving benefits is small in accordance with law? Does the law require Commerce to base a finding of specificity on a finding of disproportionality and/or dominant use and/or the exercise of discretion and/or evidence of factors other than a numerical test?

5. Reopening of the Record

The Remand Order (p. 75) required that the agency's re-examination of Tripartite be "based on evidence in the underlying administrative record" . The body of the Remand Order also makes clear this Panel's view that the remand determination was to proceed without any additions to the agency's record.

The Panel's instructions were consistent with U.S. law and with procedures for binational panels under Chapter 19 of the FTA. The standard of review limits judicial review to the evidence contained in the administrative record. The administrative record consists of "a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding...." 19 U.S.C. S1516a(b)(2). The Canada-U.S. FTA also defines the administrative record as "all documents or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding...." (Article 1911). The Rules of Procedure for Article 1904 Binational Panel Reviews identify precisely the administrative record by specifying that: "The investigating authority ... shall file ... a descriptive list of all items in the administrative record" following the request for a panel review. Rule 41(1).

The Department recognizes and accepts the evidentiary constraints imposed by the administrative record. In its Remand Determination in the instant case, Commerce states: "In conclusion, the Department bases its analysis of de facto specificity for an ongoing review period on the record of that period." Remand Determination, at 11-12. Elsewhere in the same Determination, Commerce notes it is unable to comply with a request to calculate a sub-class for weanlings in part because "... there is no information on the record detailing the amount of benefits paid to weanling producers in Ontario...." (Id., at 40)

The Panel takes note that, as argued by the National Pork Producers Council, U.S. courts have permitted agencies to supplement administrative records on remand. In Florida Power and Light Co. v. Lorion, 470 U.S. 729, 745 (1988), the Supreme Court faced a claim by a lower court that it lacked subject-matter jurisdiction to review the actions of an administrative agency, and it held that the court could "... remand to the agency for additional investigation or explanation". In circumstances less different from the instant case, the court in PGG Industries v. United States, 708 F. Supp. 1327, 1331 (Ct. Int'l Trade 1989), remanded to the Department of Commerce to open and supplement the record, stating that "...it is essential that administrative agencies have a full presentation of the facts to the maximum extent the laws and regulations require ... in order to insure that agencies as exclusive finders of the facts arrive at correct determinations."

The Government of Canada opposes re-opening the record and has argued that: "The Department's reliance on extraneous documents violates fundamental notions of fairness and due process." Brief of Canada, at 9. Canada invokes Seacoast Anti-Pollution League v. Costle, 572 F. 2d 872, 881 (1978) in which the Court warns that "the use of the extra-record evidence must substantially prejudice petitioners...." However, in Seacoast

the Court went on to conclude: "The appropriate remedy under these circumstances is to remand the decision to the Administrator because he based his decision on material not part of the record." (Id. at 882); and the Court instructed the Administrator to reach a new decision without non-record evidence, or to allow all parties an opportunity to examine all evidence. Commerce's request for a remand to add information to the record is distinguished from Seacoast, because such a request would permit parties to comment on this issue.

As already noted above, the Panel's instructions to Commerce to re-examine Tripartite "based on evidence in the underlying administrative record" are in accordance with U.S. law. Commerce did not comply with these instructions but instead has requested a remand to re-open and add to the administrative record two documents on which it has, in anticipation, already relied. The Panel does not grant Commerce's request. We are of the view that the interest in finality in the binational panel process requires the record to be kept closed at this juncture, particularly in light of the number of successive administrative reviews still pending in relation to live swine.

One of the primary goals of the United States and Canada in establishing binational dispute settlement procedures was to obtain "expeditious decisions, while at the same time preserving the rights of interested parties to be heard." Statement of Administrative Action to Accompany the United States-Canada Free Trade Agreement Implementation Act, reprinted in House Doc. 100-216, 100th Cong., 2d Sess., at 259. The Panel process was intended to provide "an innovative solution to a complex issue" by "combining independent review on judicial standards with an FTA-created forum and a tight schedule", in order to allow "quick resolution of AD/CVD issues between the two countries." Statement of Reasons as to How the United States-Canada Free Trade Agreement (FTA) Serves the Interests of U.S. Commerce, reprinted in House Doc. 100-216, at 38. As the U..S.

Administration stated then: "With the tight timeframes required of panel decisions, costs to companies to contest agency determinations will be reduced, and business certainty will come sooner than under the present system." Id., See also Article 1904.13 Extraordinary Challenge Committee Opinion and Order, Fresh, Chilled or Frozen Pork from Canada, ECC-91-1904-01 USA, at 15-20 (June 14, 1991).

A decision to reopen the record at this late date in the review process would contravene these clearly defined goals of expeditious decisions, finality, reduced costs and certainty. Moreover, our ultimate decision would remain the same even if the record included the documents in issue. Thus, no interested party is prejudiced by our decision that these documents are not and should not be part of the administrative record in this proceeding.

It is moreover our opinion that the Panel's action in not re-opening the administrative record does not materially prejudice Commerce's conclusion regarding the countervailability of subsidies provided by the Tripartite Program. Commerce has found that 10 commodities receive benefits under Tripartite, and it has previously stated that it has evidence on the record that 60 commodities are covered under Tripartite. Brief of Commerce (January 16, 1992) at 19. Presumably these data would be sufficient for Commerce to continue to conclude that the number of commodities receiving benefits under Tripartite is "small" and therefore countervailable, since in the case of FISI, Commerce has concluded that that program provides countervailable subsidies because 13 commodities out of a universe of 69 commodities receive benefits.

Again, even were this not the case, we believe that the need for finality in the panel process requires the record to be kept closed at this juncture.

Finally, as an alternative argument, the agency suggests that this Panel take judicial notice of the contents of the two documents. However, the debate surrounding these documents makes clear that their contents have nowhere near the indisputability required for judicial notice to be taken of them. They have to do with the numbers and kinds of agricultural commodities grown in Canada; this is not something which can be divined by fact-finders, but a matter to be discerned from evidence on the record.

There is at the very least a "reasonable doubt" as to the accuracy of the documents in question and, since the number of commodities it is reasonable to count in this case is not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned", we refrain from taking judicial notice of these documents. United States v. Judge, 846 F. 2d 274, 276 (5th Cir. 1988); See also Pina v. Henderson, 752 F. 2d 47, 50 (2d. Cir. 1985) ("A court should not go outside the record to supply a fact that is an essential part of a party's case unless the fact is clearly beyond dispute."); Hardy v. Johns-Mansville Sales Corp., 681 F. 2d. 334, 348 (5th Cir. 1982) ("Surely where there is evidence on both sides of an issue the matter is subject to reasonable dispute.").

6. Specificity test

The Remand Determination finds that the Tripartite Program is specific on the simple fact that the benefits accruing under it reach a "small" number of industries. If we note the agency's finding that Tripartite had not been administered with the exercise of discretion (but simply that discretion had not been explicitly barred by Canadian statute) and its refusal to consider disproportionality, the finding of specificity in the Remand Determination rests simply on the finding of a "small" number of beneficiaries (this is so whether we set aside or not

the documents discussed just above). Commerce is clear in its view that this is enough.

Commerce's Remand Determination that the Tripartite Program is specific simply because the benefits accruing under it reach a "small" number of industries is not the appropriate test for de facto specificity. It fails to find that the recipients of the Tripartite Program constituted a discrete class of recipients; Commerce's fundamental reliance on the finding of a "small" number of beneficiaries constitutes a purely mathematical analysis. It is not in accordance with law.

In its review of U.S. countervail legislation, the Court of Appeals for the Federal Circuit, in PPG Industries Inc. v. United States, 928 F.2d 1568, 1575 (Fed. Cir. 1991), noted that the concept of specificity was introduced in U.S. legislation to "conform U.S. countervailing duty law to the GATT Subsidies Code". Specificity is thus a limitation on countervail to avoid the "absurdity of a rule that would require the imposition of countervailing duties where producers or importers have benefited from general subsidies, as 'almost every product which enters international commerce' would be subject to countervailing duties." (Cabot Corporation v. United States, 620 F. Supp. 722, 731 (Ct. Int'l Trade 1985) ("Cabot I").

In its discussion of U.S. countervailing duty law, the Court of International Trade ("CIT") in Roses Inc. v. United States, 774 F. Supp. 1376, 1378 (Ct. Int'l Trade 1991) ("Roses II") noted that case law, especially Cabot I "forced a change" in the application of U.S. Countervailing duty law and led Congress in 1988 to codify "the holding in Cabot I by way of a 'Special Rule' added in the Omnibus and Competitiveness Act". The appropriate standard now focused "on the de facto case by case effect of benefits provided to recipients rather than on the nominal availability of benefits." Id. Commerce subsequently proposed regulations implementing the Special Rule, requiring

that determination of de facto specificity be based, inter alia, on the number of industries, disproportional use, and government discretion. See 54 Fed. Reg. 23366, 23368, 23379 (May 31, 1989).

U.S. Courts have consistently held that, in making a determination of specificity, Commerce must find that the benefits are bestowed on a discrete group or class of recipients. In Cabot I, the CIT investigated whether there was a "bestowal upon a specific class". (Cabot I, 620 F. Supp. at 732.) This same language was repeated by the Court in 1988 (Cabot Corporation v. United States, 694 F. Supp. 949, 95) (Ct. Int'l Trade 1988) ("Cabot II"). In 1990, the CIT stated in Roses Inc. v. United States, 743 F. Supp. 870, 881 (Ct. Int'l Trade 1990) ("Roses I"): "In deciding whether a countervailable domestic subsidy has been provided ITA must always focus on whether an advantage has been bestowed on a discrete class of grantees despite nominal availability, program grouping, or the absolute number of grantee companies or 'industries'." The position in Roses, and Cabot, was confirmed by the Court of Appeals for the Federal Circuit in PPG Industries: "As explained in Cabot, 620 F. Supp. at 732, application of the de facto aspect of the specificity test requires a 'case by case' analysis to determine whether "there has been a bestowal upon a specific class". (928 F. 2d at 1577). Finally, in 1991, the CIT noted that both the majority and the dissent in PPG Industries voiced support for the approach that a de facto analysis required a determination of "bestowal upon a specific class" and concluded that to determine de facto specificity "it remains paramount that a discrete class of beneficiaries exist." Roses II, 774 F. Supp. at 1379.

In the instant case, Commerce concluded that the Tripartite Program provided countervailable subsidies because the number of beneficiaries (i.e., ten) was small. The commodities subsidized included hogs, lambs, yellow-seeded onions, honey, wheat, and so forth. Commerce made no effort to indicate how the recipients of Tripartite subsidies constituted a discrete class

of beneficiaries, or how the pattern of benefits constituted a bestowal upon a specific class. Commerce's case for specificity rested on the mere identification of the commodities that benefited, and its conclusion that the number of commodities that benefited was small. By proceeding in this manner, Commerce ignored the PPG Industries directive that specificity does not exist "merely if recipients of a domestic subsidy are identifiable" (928 F.2d at 1577) as well as the clear and unambiguous statement of the Court in Roses II that "...it is not the sheer number of the enterprises receiving benefits that dictates whether or not a program is countervailable." (774 F. Supp. at 1384).

It is not enough that the number of beneficiaries be "small". Whether this is indicative of specificity depends on all the other factors, which the agency is bound to consider. A number may be "small" in the fifteenth year of a program's operation but surprisingly large in its first or second. A number is small or large in the context of the "universe" to which it must be compared. A number, small or large, might be more or less indicative of specificity depending on the variety of types of industries or enterprises which receive the benefits: several thousand enterprises all producing onions might be indicative of specificity while a much smaller number producing widely dissimilar products might not.

The role of specificity in U.S. countervail law is to prevent an unrestrained use of countervailing duties against generally available subsidies, which could lead to the "absurd" result recognized by the Court in Cabot I, supra at 731. While, on the one hand, the U.S. Congress and Courts have widened the scope of specificity by requiring that it be assessed de facto as well as de jure, Congress and the Courts have, on the other hand, required that a finding of de facto specificity rest on a demonstration of a bestowal of benefits upon a specific class of

recipients. In its Remand Determination, Commerce did not provide such a demonstration.

Commerce first presented its view that the number of beneficiaries was "small" as "relative to the universe of potential recipients" (Remand Determination at 13). This reference to context was dropped in the subsequent statement (also at page 13) "that, standing alone, the fact that the number of Tripartite users was small during the POR requires a finding that the program is specific." It appears that Commerce has taken a unidimensional, mathematical approach to the determination of specificity, despite the Agency's statement in its "Background" to its Proposed Regulations that "the Department must exercise judgment and balance various factors in analyzing the facts of the particular case". 54 Fed. Reg. at 23,368; see also PPG Industries, Inc, 928 F. 2d at 1576. Commerce also stated that "the specificity test cannot be reduced to a precise mathematical formula." 54 Fed. Reg. at 23,368. Yet Commerce, in our judgment, has resorted to just such a "precise mathematical formula" in finding that the benefits conveyed under the Tripartite Program were countervailable simply because they were "small".

Commerce's mathematical formula is not consistent with the express directive of the Court of International Trade in Roses II: "Commerce does not perform a proper de facto analysis if it merely looks at the number of companies that receive benefits under the program; the discretionary aspects of the program must be considered from the outset." (774 F. Supp.at 1380). Commerce must examine all relevant factors to determine "if, in its application, the program results in a subsidy only to a specific enterprise or industry or specific group of enterprises or industries." PPG Industries, 928 F. 2d. at 1576 (emphasis in original). Therefore, in order for Commerce to reach an affirmative determination on Tripartite, the Agency must

use greater judgment than simple counting. It must balance the various factors discussed in the Remand Order and in Commerce's proposed Regulations, or else conclude that the Tripartite Program does not offer countervailable benefits.

Because Commerce clearly did not make a finding in the Remand Determination on dominant use, disproportionality or discretion (Remand Determination, p. 26) or any factor other than "small", the Remand Determination was not in accordance with law.

7. Reasons for specific instructions

In holding that Commerce's Remand Determination is contrary to law and not supported by substantial evidence in the record, this Panel rejects the attempts by counsel for the NPPPC and Commerce to resuscitate Commerce's opinion by presenting arguments as to potential reasons why Tripartite may be viewed as being de facto specific. In this regard, we have determined that Commerce's Remand Determination clearly was premised solely on resort to a mathematical formula. This being the case, this Panel "is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 195 (1947). Commerce's determination can only be upheld, "if at all, on the same basis articulated in the order, by the agency itself." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962). This Panel "must rely upon the rationale articulated by the agency. It may not rely upon post-hoc rationalizations." Actor Inc. v. United States, 658 F. Supp. 295, 300 (Ct. Int'l Trade 1987).

Given our conclusion that Commerce's remand determination did not conform to law, and was not premised on substantial evidence, this Panel must next consider the appropriate remedy. We must determine whether we should remand this matter to Commerce for further examination in accordance with the reasoning set forth in this determination, and in detail

in our original determination of May 19, 1992, or whether we should remand the Commerce determination requiring the Agency to find that the Tripartite program was not de facto specific.

In our May 19, 1992 determination we chose remand for further review as the appropriate result, and reasonably believed that Commerce would comply with our instructions and consider the wide variety of factors we deemed appropriate in determining whether the Tripartite was de facto specific. Our May 19, 1992 opinion clearly stated (at 25) that "Commerce may not base its determinations on a purely mathematical formula". We then (at page 26) expressly voiced our concern that, in its initial determination, "Commerce may have placed undue weight on a mathematical construct, and may have failed to properly consider all of the evidence submitted in support of respondents' contention that a domestic subsidy was not bestowed.". Finally, in an attempt to ensure that Commerce would consider those factors which we believed were relevant in deciding whether a de facto subsidy exists (and in avoiding a result based solely on a formula), we provided Commerce with a long list of factors which (at 75-77) we "directed" the agency to "reexamine," "explain" and "consider".

Rather than follow our express instructions and reasonably attempt to reexamine, explain and consider all relevant factors as required by law, Commerce, in its Remand Determination, premised its determination solely on the fact that a limited number of commodities benefited from Tripartite during the period under review. In short, whether intentionally or otherwise, Commerce's Remand Determination failed to conform to the express holding and reasoning of this Panel.

Given what we believe were our clear and unequivocal instructions and Commerce's response thereto, we have no assurance at this point in the proceedings that Commerce would not again either ignore or declare itself unable to follow the

Panel's directives upon a second remand. In addition, this Panel is required to reach a final decision as expeditiously as possible: one of the primary goals of the United States and Canada in establishing procedures for Panel review was to reduce the time in which final determinations were issued in unfair trade cases. Further remand for further analysis would frustrate this purpose.

Commerce might arguably have based an affirmative finding on a rationale which conformed to law but it chose not to. As a result, we believe that the most appropriate remedy, and one which finds ample support in law, is for this Panel to reverse Commerce's Remand Determination without allowing further inquiry. See, e.g., National Labor Relations Board v. Wyman-Gordon Company, 394 U.S. 759, 766 n. 6 (1969) "Chenery does not require that we convert judicial review of agency action into a ping-pong game."); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 425 (1923) ("After parties have had a full and fair opportunity to prepare their case," we cannot "permit them to drag out litigation by bringing in new evidence which with due diligence they ought to have discovered before the hearing."); Olympic Adhesives, Inc. v. United States, 899 F. 2d 1565 (Fed. Cir. 1990); American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority, 778 F. 2d 850, 862 n. 19 (D.C. Cir. 1985); Greyhound Corporation v. Interstate Commerce Commission, 668 F. 2d 1354, 1364 (D.C. Cir. 1981) ("The Commission has had ample time and opportunity to provide a reasoned explanation... . We find no useful purpose to be served by allowing the Commission another shot at the target."); International Union (UAW) v. N.L.R.B., 45g F. 2d 1329, 1357 (D.C. Cir. 1972) ("We are convinced there is no longer anything to be gained by a further remand which would, in essence, offer the Board the same three alternatives it rejected last time."); Office of Commun. of United Church of Christ v. Federal Communications Commission, 425 F. 2d 543, 549-550 (D.C. Cir.

1969); ILWW Local 142 v. Donovan, 678 F. Supp. 307, 310 (Ct. Int'l Trade 1988).

This Panel cannot substitute, for that expressed by Commerce, a proper basis for finding Tripartite to be a subsidy. Commerce has already had the opportunity to cure defects in its reasoning and has not followed this Panel's directions. Our responsibility to render a final decision as expeditiously as possible pushes us to the determination that Commerce's decision that Tripartite is a countervailable subsidy cannot stand.

We therefore hold that Commerce's determination regarding Tripartite is contrary to law. We remand this matter to Commerce with instructions that it determine that, during the period under review, the Canadian federal government's Tripartite scheme did not confer a countervailable subsidy on Canadian producers of live swine.

B. FISI

1. The Panel's instructions

In its Final Dtermination, Commerce had decided that Quebec's FISI conferred countervailable benefits on the province's swine producers during the period of review. Final Swine Determination, supra note 3, at 28534.

The Panel remanded Commerce's determination that FISI was countervailable with the following instructions:

- explain how the evidence regarding the extent to which FISI covers Quebec's total agricultural value is relevant to a finding of de facto specificity;

- to the extent it is deemed relevant: (i) explain why the absence of this evidence in connection with Tripartite is not fatal to the agency's determination regarding that program and (ii) consider the evidence added to the Administrative Record by the Panel's preliminary ruling of November 25, 1991 which Quebec claims will established that FISI covers 35.8% (instead of 27%) of Quebec's total agricultural value;

- reexamine the classification of commodities covered by FISI during the period of review and since 1981, and determine whether it is accurate and consistent with the classification of all agricultural commodities in Quebec;

- reexamine the finding that FISI has covered the same fourteen commodities since 1981, in light of a finding in Pork that 11 commodities participated in the program;

- finally, in accordance with the Proposed Regulations

(and the Panel's analysis of Tripartite), consider on remand (i) whether there are dominant users of FISI, or whether certain enterprises, industries, or groups received disproportionately large benefits, and (ii) the extent to which Quebec exercises discretion in conferring benefits under FISI.

2. Commerce's Response

In its Remand Determination, Commerce again determined that the Quebec provincial government's FISI scheme for hogs conferred countervailable subsidies on Quebec's swine producers during the period of review. Remand Determination, supra note 2 at 27 - 36. In reaching its conclusion, the agency determined that FISI benefits are provided "to a specific enterprise or industry, or group of enterprises or industries" within the meaning of section 771 (5) of the Act (19 U.C.S., Å 1677 (5) (1992)).

More specifically, with respect to the first instruction of the Panel, Commerce did not consider the extent to which FISI covers Quebec's total agricultural production value as a relevant factor.

In response to the Panel's second instruction, Commerce determined that (a) the number of all agricultural commodities in Quebec had been underestimated and was in fact at least 69 rather than 45 and (b) the classification of commodities covered by FISI

during the period of review and since 1981 has essentially remained constant but has appeared to grow only because of the inconsistent manner in which Quebec has reported the commodities in Commerce's questionnaire. In so doing, Commerce determined that, of the 69 commodities produced in Quebec, only 13 had operational FISI agreements during the period of review, not 14 as previously mentioned in the final determination.

With respect to the Panel's instructions to consider disproportionality and government discretion, Commerce determined that, while it does normally consider these other factors in conducting its de facto specificity analysis, information on the Administrative Record in the case of FISI did not support a finding of disproportionality, or a finding regarding the degree of discretion maintained by the Government of Quebec or the extent to which the government exercises discretion. However, as in Tripartite, Commerce did not consider it necessary to support its determination of de facto specificity with more than one of the criteria outlined in the proposed regulations: the fact that FISI covered only 13 out of 69 commodities during the present review was, in Commerce's view, sufficient to conclude in favor of specificity.

3. The arguments of the Parties

Quebec argues that there is no record evidence to support Commerce's conclusion that there is a universe of 69 agricultural commodities in Quebec and that Commerce has applied

a simple mechanical, arithmetic count of commodities which does not meet the specificity test under American law. Brief of Quebec, at 2.

With respect to the number of agricultural commodities in Quebec, Quebec argues that there is nothing on the Administrative Record as to what was actually produced in Quebec during the period of review. The Régie Report on which Commerce relies to conclude that there is a universe of 69 agricultural commodities in Quebec is, according to Quebec, a simple list of insurable commodities in Quebec and not a list of agricultural goods produced during the period of review. Id., at 9-27.

Quebec also argues that to determine the countervailability of a program, Commerce should compare the potential users of a program to the actual users of such program. According to Quebec, there are rather 27 agricultural commodities in the province and 17 potential users of FISI, of which 14 are actually enrolled in FISI: the legally relevant universe of commodities includes those which are cyclical and which are exposed to the significant insurable risk of price fluctuation.

Quebec also adds that Commerce acknowledged the absence of any new facts in this Panel review: the percentage of covered agricultural products is the same as in 1981 and there is no evidence of government discretion or of disproportionality in FISI. Id., at 4 and 28-31.

Finally, Quebec argues that Commerce's new specificity test is inadequate as it is a simplistic one-step, one-factor counting test insufficient as a matter of law to meet the statutory specificity requirement. Commerce failed to weigh and balance various factors on the Administrative Record, contrary to what the regulations and Commerce's own past practice require it to do, and to consider all factors, not only the relative number of users. In view of these elements and of the finality clause inserted in Article 1904 (9) of the FTA, Quebec asks this Panel to conclude that Commerce has not been able to point to substantial evidence on the Record to find FISI countervailable. Id., at 47-50.

In response to Quebec's arguments, NPPC argues in its brief that the Department's findings on FISI were in accordance with American law and supported by substantial evidence on the Administrative Record. Brief of NPPC, at 2. NPPC reviews the evidence analyzed by Commerce and concludes that each finding is supported by substantial evidence. More specifically, NPPC states that the Panel should not substitute Quebec's commodities classification system for that of Commerce as it is arbitrary and self-serving. Id. at 50-57. NPPC further adds that the Régie Report provides substantial evidence for Commerce's finding that there are 69 commodities produced in Quebec. As to the specificity test used by Commerce, NPPC argues, as it did on Tripartite, that relying on a simple counting of commodities

covered, meets the specificity test under American law notwithstanding the fact that there is no evidence of government discretion or of disproportionality in the case of FISI. Id. at 71-73.

In its reply brief, Commerce argues that its determination regarding the universe of agricultural commodities produced in Quebec is accurate.

4. Issues

The issue to be dealt with by the Panel in this second review of FISI is as follows:

- Is Commerce's finding that FISI provides specific benefits, solely because the number of industries receiving benefits is small, in accordance with law?

5. Specificity test

The same comments can be made here as apply to Tripartite. It is not enough that the number of beneficiaries appears "small" to the agency. Commerce has applied an incorrect specificity test with the result that its determination that FISI provided countervailable benefits during the period of review is not in accordance with law.

We have already decided that the agency is not bound to follow Pork IV by the doctrine of collateral estoppel (Remand Order, p.42), as the period of reviews for the two cases are overlapping but not identical and as the administrative records do differ. Nevertheless, the agency finds that dominant use, discretion and other factors do not point the way to a finding of specificity, and relies on the "small" number of commodities covered by FISI (approximately the same coverage as in Pork IV). This leaves us with no alternative, particularly considering the need for some finality and for avoiding a continuing ping-pong of remands, but to find that the finding of specificity as regards FISI in this case is not in accordance with law. Perhaps the administrative records in other cases will permit otherwise.

C. Weanlings

In our decision of May 19, 1992, this Panel directed Commerce "to determine a separate rate for weanlings based on the evidence in the administrative record." The Panel reasoned that the record established that "weanlings do not benefit from many of the programs found countervailable by Commerce" since they required that live swine be indexed to qualify for benefits and weanlings are not indexed.

On remand, the DOC declined to follow the Panel's express directive. Commerce stated that it was "unable to comply

with this remand order" because the record did not include verified information as to whether weanlings constituted a distinct subclass of live swine, in the same manner as Commerce had been able to conclude in the final determination that sows and boars constituted a distinct subclass. Commerce then reasoned that even if it could conclude that weanlings were a distinct subclass, eligible for a separate subsidy rate, "the calculation of an appropriate rate is not possible".

Having reviewed the original record in this proceeding, Commerce's decision on remand, the briefs submitted by all parties in response to the remand determination, and the argument (and accompanying Exhibit) presented by counsel for Pryme Pork Ltd. at the September 10, 1992 oral argument, the Panel holds that Commerce's refusal to comply with the Panel's Remand Order renders Commerce's new determination contrary to law. The Panel further holds that the record in this proceeding contains sufficient information for Commerce to determine a separate rate for weanlings. The Panel, therefore, orders Commerce to calculate a separate rate for weanlings, in the same manner as Commerce previously had calculated a separate rate for sows and boars, by finding that weanlings received zero benefits for those programs which required that live swine be indexed to qualify for benefits, and by appropriately reducing the benefits applicable to weanlings for those programs which do not require indexing.

In the event that our decision today is reversed and the Tripartite program is ultimately found to constitute a subsidy, Commerce is directed to calculate the subsidy rate for weanlings under this program by apportioning the subsidy paid by the province of Ontario between weanlings and full size hogs, based on a 35/65 split, which results in a rate per pound of $.0007234 for weanlings and a rate per pound of $.00206696 for full-size hogs. The Panel's conclusion is based on the following rationale.

First, contrary to Commerce's suggestion, Pryme had submitted to Commerce in a timely manner, prior to the publication of the Preliminary Determination, the information needed by Commerce to conduct the Diversified Products analysis, which Commerce believes must be made in order to determine whether a subclass exists. While in the proceeding below Pryme argued that the information presented required Commerce to exclude weanlings from the scope of the Order, this information also constituted the basis for determining whether weanlings should be treated in the same manner as sows and boars; that is, covered by the Order but subject to a separate rate. See Live Swine from Canada, Preliminary Results of Countervailing Duty Administrative Review, 53 Fed. Reg. 22189-90 (June 14, 1988). As a result of Pryme's submission, the record contained sufficient verified information to allow Commerce to determine whether weanlings constituted a distinct subclass of live swine.

Second, this Panel rejects Commerce's current claim that "there is no statutory or regulatory authority for finding subclasses or otherwise calculating separate rates for different products within the class or kind of merchandise under review." This suggestion is totally at odds with Commerce's statement in Live Swine, 53 Fed. Reg. at 22189, that "the Department has considerable discretion in determining whether to differentiate among products within a class or kind of merchandise" as well as with Commerce's determination that sows and boars constitute a discrete subclass.

This Panel believes that Commerce's sows and boars analysis is equally applicable to weanlings. Like sows and boars, weanlings are not indexed and, like sows and boars there exist sufficient differences between weanlings and other live swine for Commerce to apply a separate rate. Of particular relevance to this Panel's determination is the fact that the Canadian programs in issue provide benefits to live swine which mature in Canada to market/slaughter weight. Because weanlings are exported to the United States prior to such time as they are eligible for the benefits in issue, it is unreasonable, and contrary to the purpose of U.S. law, to subject weanlings to additional duty. As the Department correctly concluded in Live Swine, 53 Fed. Reg. at 22190, "the distinction between slaughter sows and boars [and weanlings] and other live swine cannot be used as a means to circumvent the countervailing duty order."

Third, as discussed in our directions to Commerce, as set forth above, this panel rejects Commerce's claim that "the calculation of an appropriate separate rate is not possible". The methodology suggested by counsel for Pryme, which this Panel has adopted, is reasonable, premised on substantial evidence in the record and in accordance with law.

Finally, this Panel notes that Commerce is charged with the responsibility of determining applicable subsidy rates, and of complying with United States international obligations, U.S. law, and the decisions of reviewing Courts and Binational U.S. - Canada Panels. In fulfilling these responsibilities, Commerce often must calculate subsidy rates based on imperfect information or on what Commerce commonly characterizes as "Best Information Available". Commerce's failure to attempt to calculate a subsidy rate for weanlings in its Remand Determination was in direct contravention of the Panel's instructions and of Commerce's habitual treatment of a less than perfect data base.

While this Panel has found that the evidence of record clearly was sufficient for Commerce to comply with the Panel's instructions, we believe that, even if Commerce did not totally share the Panel's view, Commerce should have recalculated the subsidy rate applicable to weanlings based on what Commerce viewed as "Best Information Available", in accordance with the Panel's express directive. The fact that the arithmetic allowed

by the record might not produce the "perfect" result is immaterial.

D. ACBOP

In our decision of May 19, 1992, this Panel found that Commerce's determination that the Alberta Crow Benefit Offset Program (ACBOP) constituted a subsidy was in accordance with law and based on substantial evidence in the record. This Panel then remanded ACBOP to Commerce with instructions to reconsider the subsidy rate in light of additional material which Commerce had not previously considered. On remand, Commerce also was instructed to: 1) explain the extent to which protein supplement and vitamin consumption reduces the amount of grain consumed by hogs; and (2) confirm that its final calculations did not include payments to livestock other than hogs. In its July 20, 1992 Remand Determination, Commerce reviewed its initial determination and found that the Canadian document, Diets for Swine (material which Commerce previously had declined to examine), provided a more accurate representation of the actual diet consumed by live swine in Alberta in order to calculate the rate of feed/weight grain conversion. Based on the information in this document, Commerce recalculated the ACBOP benefit. As a result of Commerce's recalculation, the benefit received was reduced from Can$0.0042/lb. to Can$0.0033/lb. In addition, Commerce re-examined the record and reported that it believed that the

methodology utilized provided a reliable estimate of benefits paid to hog producers only.

The NPPC, in a brief filed on August 10, 1992, challenged Commerce's recalculations, claiming that Commerce erred by failing to account for grain consumed by swine in the creep stage and starter stage, and by inconsistently and incorrectly converting pounds to kilograms in determining the amount of feed consumed in the grower and finishing stages. In its August 31, 1992 reply brief, Commerce advised the Panel that it agreed with the NPPC suggestion regarding creep and starter grain consumption, and provided this Panel with a suggested recalculation methodology, which if adopted would result in a subsidy of Can$0.0039575/lb. Commerce then stated that NPPC's second claim, regarding conversion of pounds to kilograms, was without merit.

Thereafter, CPC filed a Motion to Strike Commerce's amendments to its remand determination or, alternatively, for leave the challenge under Rule 75 the amended determination regarding ACBOP, insofar as that determination differed from Commerce's initial determination on remand. Commerce replied to the CPC Motion by noting that it had not attempted to amend its Redetermination but had, in its Reply Brief, merely advised the Panel that it agreed with the NPPC arguments. Commerce noted that "the Panel will ultimately decide the merits of whether there should be further adjustments to the ACBOP."

Based on our review of the Administrative Record in the initial administrative proceeding and in its remand, this Panel determines that Commerce's Remand Determination is supported by substantial evidence in the record and is in accordance with law. Thus, the ACBOP benefit to sows and boars, weanlings, and all other live swine is Can.$0.0033 per pound.

In reaching this result, this Panel declines to reopen the record for additional evidence or additional argument regarding the manner in which ACBOP should be calculated. This matter had been briefed by all parties during the administrative proceeding, and had been carefully considered by Commerce in its July 20, 1992 Remand Determination.

Moreover, it simply is too late, at this point in the review process, for the parties, Commerce, and the Panel to engage in a potentially exhaustive, and perhaps inconclusive analysis, as to whether and to what extent creeps and starters consume grain. This particular issue was not raised below and, on the basis of this Panel's review of the record, we conclude that Commerce's July 20, 1992 determination - which does not include grain consumed by creeps and starters - is supported by substantial evidence and is in accordance with law.

CONCLUSION

For the reasons give above, we remand Commerce's Remand Determination of July 20, 1992, with instructions that Commerce determine that during the period under review: (1) the Canadian Federal Government's Tripartite program did not confer a countervailable subsidy on Canadian producers of live swine; (2) the Province of Quebec's FISI program did not confer a countervailable subsidy on Canadian producers of live swine; and (3) weanlings constituted a distinct subclass of live swine, requiring that Commerce calculate a separate rate for weanlings in the manner set forth in this Opinion. We affirm Commerce's Remand Determination on ACBOP, SHARP and FFA, and instruct that the July 20, 1992 Remand Determination regarding the ACBOP program remain unchanged.

This opinion is signed by:

October 30, 1992 — Murray J. Belman
Murray J. Belman *

October 30, 1992 — Gail T. Cumins
Gail T. Cumins

October 30, 1992 — David J. McFadden
David J. McFadden

October 30, 1992 — Gilbert R. Winham
Gilbert R. Winham

October 30, 1992 — Simon V. Potter
Simon V. Potter

* The Panel's Chairman dissents in part from this opinion, as regards the Tripartite and FISI programs, and his dissenting opinion appears separately.

UNITED STATES - CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL

IN THE MATTER OF:	)	Secretariat File No.
LIVE SWINE FROM CANADA	)	USA-91-1904-03

DISSENTING OPINION OF MURRAY J. BELMAN

Canada and Quebec have farm income maintenance programs that are ostensibly open to producers of all agricultural commodities. In actuality, producers of ten commodities subscribe to the Canadian program and producers of thirteen commodities subscribe to the Quebec program. Commerce found these programs to be specific, since they covered too few of the universe of agricultural commodities.

The panel now overturns and remands Commerce' decision on the ground that the standard applied (the programs cover too few commodities) is not in accordance with United States law. I dissent from that determination, since it severely distorts both United States countervailing duty law and the proper role of binational panels under the United States - Canada Free Trade Agreement.[2]

---

[2] In other respects, I join in the panel's decision.

BACKGROUND

The major elements of this case revolve around the concept of "specificity." Specificity analysis is required because it has long been recognized that the reach of the countervailing duty law should not extend to benefits and services, like highways, law enforcement and education, that governments routinely provide to their populations at large.

The statutory basis for drawing the distinction between widely used and specific domestic subsidies is found in the definition of "subsidy" in section 771(5) of the Tariff Act of 1930, as amended (the "Act"), which includes domestic subsidies only if "provided to a specific enterprise or industry, or group of enterprises or industries." 19 U.S.C. §1677(5)(B).

Originally, the Commerce Department implemented the statute by determining whether the foreign law or regulation under consideration made benefits available generally or to a specific enterprise, industry or group thereof. The courts quickly rejected this "general availability" test,[3] and Congress amended the law in 1988 to add a "special rule" stating in pertinent part

---

[3] Cabot Corp. v. United States, 620 F.Supp. 722 (Ct. Int'l Trade 1985), appeal dismissed, 788 F.2d 1539 (Fed. Cir. 1986) ("Cabot I"); Cabot Corp. v. United States, 694 F.Supp. 949 (Ct. Int'l Trade 1988) ("Cabot II"); Roses, Inc. v. United States, 743 F.Supp. 870, 879 (Ct. Int'l Trade 1990) ("Thus, the general availability rule under which [Commerce] conducted the investigation was flawed."). The panel now apparently seeks to resurrect this discarded test: "The role of specificity in U.S. countervail law is to prevent an unrestrained use of countervailing duties against generally available subsidies * * *" October Panel Decision at 25. That statement is simply wrong.

--

> Nominal general availability, under the terms of the law, regulation, program or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof. [19 U.S.C. §1677(5)(B).]

Following the enactment of the special rule, Commerce issued proposed regulations that, among other things, described how it planned to perform the specificity analysis.[4] First, Commerce will determine whether the bounty or grant is de jure specific, i.e. limited by law or regulation to a specific enterprise or industry or group thereof.

If de jure specificity is not found, Commerce will then consider other relevant factors to determine whether, nonetheless, the bounty or grant is in fact limited to a specific enterprise, industry or group thereof. Commerce' proposed regulations identify three factors that it "will" consider:

-- The number of enterprises, industries or groups thereof that actually use a program;

-- whether there are dominant users of a program or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program; and

-- the extent to which a government exercises discretion in conferring benefits under a program.[5]

The proposed regulations also state that Commerce will not

---

[4] Countervailing Duties, 54 Fed. Reg. 23366 (May 31, 1989) (Notice of Proposed Rulemaking) (to be codified at 19 C.F.R. §355.43).

[5] Id. at 23379.

regard a program as being specific solely because it is limited to the agricultural sector. The explanatory notes to proposed section 355.43 state, however, that "an agricultural program may be deemed specific if, for example, benefits under the program are limited to, or provided disproportionately to, producers of particular agricultural products."[6]

THE ISSUES IN THIS CASE

Here we are confronted with two programs, the National Tripartite Stabilization Scheme for Hogs ("Tripartite"), which is administered Canada-wide, and the Quebec Farm Income Stabilization Insurance Program ("FISI"), which is limited to Quebec. Without getting into the details of the programs, both provide direct payments to farmers whose income is reduced because of a drop in the market prices they receive for the commodities they produce.

Tripartite

There is general agreement that, during the period of review, there were six Tripartite agreements covering ten commodities. However, the Canadian producers and the Government of Canada dispute the number of agricultural commodities produced in Canada, i.e. the "universe" against which Tripartite's coverage of ten commodities should be measured. While there is precedent suggesting that Commerce could reasonably assume that there are a

---

[6] Id. at 23368.

large number of agricultural commodities produced in Canada, this panel has required record evidence of the size of the universe. Live Swine from Canada, USA-91-1904-03 at 30 (May 19, 1992) ("May Panel Decision").

In this case, resolution of the "universe" question raises the issue of aggregation. For example, if the agricultural sector is thought to consist of two groupings, plants and animals, a program devoted to, say, seedless grapes and milk-fed veal would, strictly on the numbers, support a finding of universal coverage.

To avoid this kind of "apples and oranges" problem, Commerce sought evidence describing the commodities grown and raised in Canada at the same level of aggregation as Tripartite. Remand Determination at 3. One document Commerce examined (at the request of this panel) was the Farm Cash Receipts ("FCRs") for Canada. Commerce found that, while there was some agreement between the FCRs and Tripartite, there were also serious discrepancies. Id. at 3-5. For example, while yellow-seeded onions and three different kinds of beans are covered by Tripartite programs, the correlatives under FCRs are aggregations of "vegetables" and "dry beans." Id.

Commerce located two other documents that it considered to provide a closer level of aggregation to that employed in Tripartite: the 1986 Census for Agriculture for Canada and the 1985 version of Agricultural Statistics for Ontario: Publication

20. Commerce found that these reports disaggregated vegetables and beans and treated cattle in a manner more similar to Tripartite than the FCRs.[7] Remand Determination at 5.

Based on its analysis of these documents, Commerce determined that at least 106 agricultural commodities are produced in Canada. Id. at 6. It also found that the 10 commodities covered by Tripartite were "too few . . . to justify a finding of nonspecificity." Id. at 17-18.[8]

Commerce' finding on this issue was complicated by the fact that the documents it sought to rely on had not been placed in the administrative record.[9] Consequently, Commerce sought the permission of the panel to reopen the record to accept both these documents and any pertinent comments or other information the

---

[7] FCRs cover only "cattle" and "calves," while there are Tripartite agreements for "cow/calves," "feed cattle" and "slaughter cattle." Both of the documents preferred by Commerce break down cattle into more specific categories.

[8] Commerce also determined that separate agricultural industries produce each commodity and, therefore, Tripartite conferred benefits on a specific group of industries within the meaning of the countervailing duty law. Remand Determination at 2, n. 1. The panel states that Commerce did not make an effort to indicate how the Tripartite beneficiaries constituted a discrete class. October Panel Decision at 24-25. If this contention is meant to suggest that Commerce must find that beneficiaries share a commonality of product (beyond the fact that they are all agricultural products), it has no basis in United States countervailing duty law. See discussion at pages 26-27 below.

[9] The record did contain a document, the Annual Report 1988-89 of the Regies des Assurances Agricoles du Quebec, which Commerce found to support the conclusion that there are at least 69 commodities produced in that province alone. That document is discussed at page 9-10 below.

parties might wish to add. The panel has now rejected this request.

As noted, Commerce determined that, because the number of users under Tripartite was so small when compared with the universe of agricultural products, it could not justify a finding of non-specificity.[10] Under these circumstances, Commerce said, it was not relevant to examine the disproportionality, dominant use and discretion factors. Id. In other words, where a subsidy program provides benefits for only a small proportion of the possible beneficiaries, that fact, by itself, justifies a finding of specificity. In taking this position, Commerce relied upon its prior decision in Carbon Black from Mexico, 51 Fed. Reg. 33085 (August 26, 1986) and even borrowed language used by the Senate Finance Committee in reporting the "special rule" amendment[11] in 1988:

> In a subsequent review of the determination under review in the Cabot case, the Commerce Department recognized that it had applied [the specificity] test in an overly restrictive manner and determined that there were too few users of carbon black feedstock in Mexico to find that the benefit * * * was

---

[10] The panel suggests that Commerce has somehow abandoned the need to compare the number of participants to a universe of potential participants, because no reference is made to a universe in one sentence on page 13 of the remand determination. October Panel Decision at 26. This suggestion is belied by the fact that, on the very same page, Commerce made clear that the number of users must be compared to "the universe of potential recipients." This misreading of what Commerce said would not be significant but for its use by the panel as support for its contention that "Commerce has taken a unidimensional, mathematical approach to the determination of specificity." Id.

[11] See discussion at pages 2-3 above.

> generally available. [S. Rep. No. 71, 100th Cong., 1st Sess. 123 (1987), emphasis added.]

Commerce also relied upon the inquiry made by this panel in its decision of May 19, 1992 (p. 37, n. 44):

> Where a domestic subsidy is, in fact, used by a wide range of enterprises or industries, evidence of most benefits going to a handful of enterprises or industries may support a conclusion of de facto specificity under section 771(5)(B) of the Act. Commerce should consider whether, when it determines that the program at issue is used, say, by less than ten percent of the available participants, whether the fact that 52 percent of the benefits go to one group is relevant.

The suggestion of the panel's rhetorical comment is that disproportionality may be relevant where a large segment of the universe is using a program, but not otherwise. Commerce has now interpreted the disproportionality prong to apply only in the former cases.[12]

While Commerce did not rest its determination of de facto specificity on the existence of governmental discretion in the administration of Tripartite, it did find that discretion existed in the sense required by the proposed regulations. First, Commerce interpreted its proposed regulation to require only a determination whether applications for benefits have been or may be disapproved and, if so, on what basis and why. Remand Determination at 25. Commerce then found that, since some

---

[12] The panel's statement, "Commerce has not reached any conclusion [regarding] dominant use [or] disproportionately large benefits," October Panel Decision at 12, ignores Commerce' extensive analysis of those factors and its conclusion that they are not relevant where there are too few users of a program. See pp. 24-26 below.

negotiations under Tripartite have not produced agreements, discretion possibly exists and no contrary demonstration was made by respondents. Consequently, Commerce concluded: "[W]e do find that the Government of Canada has retained discretion in the administration of the program." Id. at 26.

Finally, Commerce considered another factor, not in its proposed regulations, that the Canadian producers and government contended was evidence of nonspecificity -- the expanding nature of Tripartite. Commerce found that Tripartite had expanded only slightly since the period of review (two new commodities, yellow-seeded onions and honey, were added). Suggestions that active negotiations were underway with a variety of commodity groups were found to be too vague to support a conclusion that the program is significantly expanding, and the discontinuation of negotiations with canola and grain corn producers suggested stasis rather than growth. Id. at 9-11.

To summarize, Commerce concluded that an agricultural program covering only 10 of a universe of over 100 commodities could not be considered widely available and used; that Canada had retained discretion in implementing the program; and that there was insufficient evidence to support a conclusion that the program was at an early stage of progression towards universality. Id. at 2-8, 9-13, 24-26.

FISI

Insofar as specificity is concerned, the FISI program presents

virtually identical considerations to Tripartite. In analyzing this program, Commerce again sought to develop a "universe" of agricultural commodities (produced in Quebec) and to compare it to the commodities covered by FISI.

In its initial determination, Commerce had relied upon a statement made in Quebec's administrative case brief (March 25, 1991, p. 12) that the province produces about 45 agricultural commodities. In its remand determination, however, Commerce reviewed the Annual Report 1988-1989 of the Regie des Assurances Agricole du Quebec. Examining the various commodities disclosed by the report as being covered by FISI and by Quebec's crop insurance regulations, Commerce determined that the province produces at least 69 commodities.[13] Id. at 30. Commerce considered that the level of aggregation in the Regie's Report paralleled most closely that of the FISI list; it believed its conclusion in this respect was supported by the fact that the FISI program is administered by the Regie, whose report formed the basis of Commerce' list.

Commerce concluded that the number of commodities covered by

---

[13] This listing does not include eggs, dairy products, turkeys, hens and chickens, furs, maple products and forest products, which the record (Farm Cash Receipts) shows to be produced in Quebec. Indeed, in 1989, these unlisted items accounted for at least 46% of cash receipts of producers of agricultural products in Quebec. Administrative Record at 10.

FISI was 13.[14] Commerce also concluded that the coverage of the program had not changed since 1981; although the number of agreements had increased, this was due to splitting product categories into components (e.g., "wheat" into "feed wheat" and "food grade wheat").[15]

As it did in examining Tripartite, Commerce concluded that issues of disproportionate use and discretion are not relevant when considering a program that gives benefits only to a small proportion of the universe.[16] Consequently, Commerce reaffirmed its prior conclusion that FISI is countervailable.

While this recapitulation does not reflect every twist and turn of the many challenges to Commerce' determination, I believe it fairly covers the matters salient to the panel's decision. In a nutshell, Commerce has looked at the evidence and found the following:

-- Tripartite covers ten agricultural commodities out of over 100 produced in Canada.

-- FISI covers 13 agricultural commodities out of at least 69 produced in Quebec.

-- Because these two programs cover such a low proportion of the universe, and because no factor has been

---

[14] Quebec believes that the correct number is 14, but acknowledges that the difference is "immaterial." Quebec Challenge (Aug. 14, 1992) at 11.

[15] Quebec also acknowledges that whether the number of covered commodities changed over time "has no bearing on the outcome." Id.

[16] Commerce did say that the burden of demonstrating an absence of government discretion was on Quebec and that that burden had not been sustained. Remand Determination at 35-36.

> suggested that Commerce found to be a satisfactory explanation for the ratio, it has found that specificity exists within the meaning of United States law.

The panel has now remanded this determination with instructions not to assess any countervailing duties for benefits received under Tripartite or FISI during the period of review. For the reasons set out below, I believe that this decision distorts and misapplies United States law. Of greater concern to me, however, is the teaching of this panel's performance for the successful working of the binational panel process, and this is the reason I have set out these views at such length.

THE PANEL'S DECISION

At bottom, the panel's decision rests upon the assertion that Commerce improperly interpreted United States law to require a finding of specificity when the number of products covered by a program is too small when compared to the universe. While the panel has not challenged Commerce' findings of fact, it has foreclosed it from adding certain documents to the record. While that decision is probably gratuitous in view of the panel's legal conclusion, I believe it is worthy of examination.

Closing The Record

It will be recalled that the panel refused to permit Commerce to assume that there are a large number of agricultural commodities produced in Canada; the evidence must be on this record. Commerce identified documents that it believes would

establish satisfactory record evidence, but the panel has now twice refused to allow the record to be reopened to admit that evidence and comments on it any of the parties might wish to make.

The panel's reasons for this ruling -- the interests of finality and expedition (October Panel Decision at 20-21) -- are unpersuasive. Commerce sought to use one of these documents, even before the panel first considered this case; it is a document included in the record of an earlier administrative review concerning live swine from Canada. Brief of the Department of Commerce at 19, n.4 (Jan. 16, 1992) (citing 1985 Agricultural Statistics for Ontario). The panel denied that use on the grounds that the document was not in this record, but then precluded opening this record on remand.

This draconian application of finality has not been followed by the Court of International Trade. See, e.g., Atlantic Sugar, Ltd. v. United States, 573 F.Supp. 1142 (Ct. Int'l Trade 1983) (review of a third determination on remand that relied on new evidence added to the administrative record); PPG Industries, Inc. v. United States, 708 F.Supp. 1327, 1331 (Ct. Int'l Trade 1989) ("considerations of fundamental fairness dictate that * * * it is essential that administrative agencies have a full presentation of facts * * * in order to assure that agencies * * * arrive at correct determinations"). Similarly, other binational panels have permitted the record to be reopened on

remand. See, e.g., Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11 at 19, 13 ITRD 1291 (Jan. 22, 1991).

The panel's refusal to see this evidence admitted into the record is even more puzzling when it is recalled that every tribunal that has previously considered the size of Canada's agricultural sector has accepted that it is "large" as a matter of common sense without the need for record proof. When Commerce originally examined various programs relating to hogs, it assumed that there are a great many different commodities produced in Canada. That assumption carried the day before the Court of International Trade in Alberta Pork Producers' Marketing Bd. v. United States, 669 F.Supp. 445 (Ct. Int'l Trade 1987) ("Alberta Pork").

In a related case, Commerce again assumed a large universe. On appeal, a binational panel at first required Commerce to compare the number of covered products with "the predictable number that would be expected to apply in light of the criteria for aid, the availability of alternative types of aid and the relevant economic conditions of the covered industries." Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-06 at 51, 12 ITRD 2299, 2316 (1990). Commerce responded that "implementing the broad-reaching test which the Panel envisions would impose an incredible administrative burden upon the Department," since it would require determining "why dozens, hundreds, or potentially thousands of producers of other products have chosen not to apply

for benefits under a program which is de jure available to them." Fresh, Chilled and Frozen Pork from Canada, Remand Determination at 6 (Dec. 6, 1990). Commerce then concluded that the only rational number to be used for the universe was the total number of natural and processed agricultural products produced in Canada, which it assumed was in the hundreds. Id. at 8-9. In reviewing Commerce' remand determination, the panel accepted that assumption as a "key fact" supporting Commerce' finding of specificity. Fresh, Chilled and Frozen Pork from Canada, Panel Decision at 8-9 (Mar. 8, 1991).

But what is most troubling about the panel's ruling on this issue is that it appears to be playing "gotcha" with Commerce rather than seeking a just resolution of this case. After all, the issue of the universe of Canadian agriculture will have to be addressed in every annual administrative review; what harm does it do to decide the issue in this case? If the documents at issue are pertinent (as they most certainly are), and if this is the first instance (as it is) where a tribunal has required record evidence that the Canadian agricultural universe is large, what notions of finality outweigh the interests of fairness to a party seeking relief under United States law? One is driven to the conclusion that the panel has hobbled Commerce and denied relief to the petitioners for no good reason.

Commerce' Interpretation of the Law

Before examining the panel's rulings on the legal interpretations Commerce has made, let us look at United States law governing the permitted scope of review of those interpretations. The Court of Appeals for the Federal Circuit (whose decisions are binding on this and all other binational panels) has spoken many times on this issue. For example:

> The Supreme Court has instructed that the courts must defer to an agency's interpretation of the statute an agency has been charged with administering provided its interpretation is a reasonable one. As the Supreme Court has succinctly stated: "When faced with a problem of statutory interpretation, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 * * * Kester v. Horner, 778 F.2d 1565, 1569 (Fed. Cir. 1985 ("To sustain an agency's construction of its authority, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.") * * *. Moreover, the Secretary of Commerce through the ITA has been given great discretion in administering the countervailing duty laws. As we noted in Smith Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983) in discussing the Secretary's comparable authority under the antidumping law:
>
> > The Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, establishes an intricate framework for the imposition of antidumping duties in appropriate circumstances. The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussion of a dumping determination, makes the enforcement of the antidumping law a difficult and supremely delicate endeavor. The Secretary of Commerce ... has been entrusted with responsibility for implementing the antidumping law. The Secretary has broad discretion in executing the law.
>
> These considerations are equally applicable to administration of the countervailing duty statute. [PPG Industries v. United States, 928 F.2d 1568, 1571-1572 (Fed. Cir. 1991).]

The Federal Circuit has also stated:

> A reviewing court must accord substantial weight to an agency's interpretation of a statute it administers. Zenith Radio Corp. v. United States, 437 U.S. 443, 450-51 * * * (1978); Udall v. Tallman, 380 U.S. 1, 16 * * * (1965). Though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is "sufficiently reasonable". Federal Election Committee v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 39 * * * (1981) * * *. the agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding. * * * [American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986).]

If it wishes to follow United States law, a panel thus must satisfy a demanding standard before it may properly overturn an interpretation of the countervailing duty statute made by the Commerce Department. The Secretary of Commerce has been entrusted by the Congress with broad discretion under this law. Her interpretations that do not contravene clearly discernible legislative intent may not properly be reversed unless they are unreasonable.

How does the panel's decision fare against these standards?

Congressional Intent

Looking first at the legislative history, is there any suggestion that Commerce' interpretation contravenes the "clearly discernible legislative intent"?

All parties appear to agree that the present statutory language was intended to codify the holding in Cabot I. As noted earlier, before that case, Commerce found nonspecificity if foreign subsidy laws or regulations made benefits generally available. The court in Cabot I did more than overrule that

practice, it described the problem that specificity analysis is supposed to address:

> The distinction that has evaded the ITA is that not all so-called generally available benefits are alike -- some are benefits accruing generally to all citizens, while others are benefits that when actually conferred accrue to specific individuals or classes. Thus while it is true that a nationalized benefit provided by government, such as national defense, education or infrastructure, is not a countervailable bounty or grant, a generally available benefit -- one that may be obtained by any and all enterprises or industries -- may nevertheless accrue to specific recipients. General benefits are not conferred upon any specific individuals or classes, while generally available benefits, when actually bestowed, may constitute specific grants conferred upon specific identifiable entities, which would be subject to countervailing duties. [Id. at 731, emphasis in original.]

See also Cabot II.

Commerce has stated that in looking at a subsidy program that is nominally available to all, it will find specificity when a relatively small number of potential participants is actually receiving benefits. In essence, Commerce is saying that to avoid a finding of specificity, a fairly large proportion of the universe must participate, a standard that is plainly not met when 10 out of more than 100 or 13 out of more than 69 are the relevant numbers. I find this conclusion fully consistent with and, indeed, compelled by the quoted language of Cabot (which Congress expressly endorsed)[17] and by the Congress' plain effort to distinguish between general programs (like national defense, infrastructure or education) and other programs (like Tripartite and FISI) under which cash payments are made to commercial

---

[17] H. Rep. 40, 100th Cong., 1st Sess. 124 (Apr. 6, 1987).

producers of a relatively small number of Canadian agricultural commodities. But whether or not one agrees, there is certainly nothing in the legislative history (or in any case decided by a United States court) from which a contrary view of the Congress is "clearly discernible."

Reasonableness

Is it reasonable to interpret United States countervailing duty law to require a finding of non-specificity when "the number of recipients is small relative to the universe of potential recipients"? Remand Determination at 13. Several considerations require an affirmative answer:

-- Commerce' interpretation rests on language used by the Senate Finance Committee in approving a finding of specificity where there are "too few users * * * to find that the benefit * * * was generally available." S. Rep. 71, 100th Cong., 1st Sess. 123 (1987). This is very credible evidence that the Congress would consider Commerce' analysis consistent with an effort to determine whether a benefit is accorded to "a specific enterprise or industry, or group thereof."

-- Commerce' approach has been upheld by the Court of International Trade in at least three instances, Cabot II, supra, and Cabot Corp. v. United States, No. 86-09-01109 (Ct. Int'l Trade, June 7, 1989) ("Cabot III") (affirming a determination on remand based upon "too

few users" of carbon black provided at preferential prices); Armco Inc. v. United States, 733 F.Supp. 1514, 1530 (Ct. Int'l Trade 1990) (remand of Commerce' finding of nonspecificity, since, while program generally available, it might "in fact be utilized by only a small number of companies"); Alberta Pork, supra (Canadian provincial programs found specific based upon too few users).

-- Commerce' proposed regulations envisage just the kind of analysis employed here. In discussing the treatment of programs limited to agricultural products, Commerce explained:

> [A]n agricultural program may be deemed specific if, for example, benefits under the program are limited to, or provided disproportionately to, producers of particular agricultural products.

Proposed Regulations, 54 Fed. Reg. at 23368 (emphasis added). These proposed regulations have been considered and approved by the Court of Appeals for the Federal Circuit. PPG Industries v. United States, 928 F.2d 1568 (Fed. Cir. 1991).

-- Commerce' interpretation is consistent with long-standing administrative practice. For example, in Certain Fresh Cut Flowers from the Netherlands, 52 Fed. Reg. 3301 (Feb. 3, 1987), (Final Affirmative Countervailing Duty Determination), Commerce determined that a preferential natural gas contract between a

government agency and a single user was de facto specific. Similarly, in Lime from Mexico, 49 Fed. Reg. 35672, (Sept. 11, 1984) (Final Affirmative Countervailing Duty Determination), Commerce determined that the provision of free fuel to one producer of lime by a state-owned company conferred de facto specific benefits. In both these cases, as in Alberta Pork, supra, Commerce rested its determination exclusively on the limited coverage of the program in issue -- disproportionality, dominant use and discretion were not considered by the agency. See also Carbon Black from Mexico, 51 Fed. Reg. 30385 (Aug. 26, 1986) (Final Results of Countervailing Duty Administrative Review).

-- If Commerce' interpretation is not reasonable, there must be another, "reasonable," standard that would produce a finding of nonspecificity in this case. Given the fact that application of Commerce' interpretation resulted in a finding of specificity when less than 10% of the eligible industries is covered (under the Tripartite program), the hypothetical alternative standard would have to permit a finding of de facto broad availability and use in such a case. When the objective is to determine whether a program should be likened to education, national defense or infrastructure, it is difficult to

see how 10% coverage could plausibly be considered to be general, at least in the absence of some indication that the program is in transition.[18] Indeed, this panelist believes that any objective observer would be hard pressed to conclude that the hypothetical alternative would itself pass the test of reasonableness.

In the face of these considerations, and recalling that United States law requires appellate tribunals to accord substantial weight to an agency's interpretation of the law (especially where, as here, the agency is given broad discretion in executing that law), Commerce' interpretation cannot seriously be considered to be unreasonable.

The panel's decision attempts to blink the issue of reasonableness by focusing on Commerce' proposed regulations. The panel asserts that Commerce failed to follow these regulations in three respects. First, the panel suggests that Commerce' new test is a mechanical or mathematical approach prohibited by the law and Commerce' own regulations. Secondly, the panel believes that Commerce was obligated to consider other

---

[18] The Canadian producers and government made numerous contentions that Tripartite was a growing program on its way to universal or at least general coverage. Commerce considered these contentions and concluded that the "record does not indicate any sustained attempt on the part of the Canadian government to expand significantly the de facto coverage of Tripartite." Remand Determination at 12. The panel does not challenge that determination.

factors beyond the question whether there are too few participants in a program, including the specific factors itemized in the proposed regulations. Finally, the panel faults Commerce because it did not show that the beneficiaries form a "discrete" class in the sense that the products they grow share some commonality. I believe that these arguments do not survive objective analysis.

1. Mechanics and Mathematics. The panel is correct in finding that the case law is replete with warnings to Commerce not to employ a mechanical approach in determining whether specificity exists. However, the context of these cases shows that, in every instance, the warning is addressed to any tendency that Commerce might have to find a program to be nonspecific solely because it is nominally generally available, without looking at how it is administered.[19] In that sense, Commerce

---

[19] Indeed, the only instances in which a United States court has overruled a specificity determination by Commerce have been cases where Commerce initially found no specificity. See, e.g., Cabot I, supra; Roses, Inc. v. United States, 743 F.Supp. 870 (Ct. Int'l Trade 1990); Armco, Inc. v. United States, 733 F.Supp. 1514 (Ct. Int'l Trade 1990).

The panel's reliance on the Roses, Inc. line of cases shows the danger of mechanically applying precedents to inapposite cases. As noted above (n. 2), in its first look at Commerce' decision in Roses, the Court of International Trade remanded solely because Commerce had employed the flawed test of general availability to find no specificity. 743 F.Supp. at 881. Thereafter, Commerce then conducted an investigation to determine whether de facto specificity existed and concluded that it did not. The Court of International Trade reviewed that determination and found it to be supported by substantial evidence. Roses, Inc. v. United States, 774 F.Supp. 1376 (1991) ("Roses II"). While there is language in

(continued...)

here has followed the judicial caution faithfully -- Tripartite and FISI, programs that are nominally of general application, were, upon examination, found to be used by only a handful of industries. This is not a "mechanical" application of the test, but adherence to the teaching of Cabot and its progeny.

Similarly, Commerce has not employed a "mathematical formula" in this case. The warning against using a mathematical formula comes from Commerce' own comments on its proposed regulations: "As the Department has explained in various determinations over the years, the specificity test cannot be reduced to a precise mathematical formula."[20] Proposed Regulations, supra, at 23368.

---

[19](...continued)
both decisions (much of which is quoted by the panel) criticizing a mechanical approach to specificity determinations, all of that criticism was addressed to the general availability test and how its application could, in some cases, erroneously result in findings of no specificity. The panel's suggestion that that concern would lead the court to reverse a finding that specificity exists on the ground that too few commodities are covered is a plain non sequitur.

Roses II is, nonetheless, of some relevance to this case, for the court there expressly approved Commerce' proposed regulations on specificity, including the language: "However, an agricultural program may be deemed specific if, for example, benefits under the program are limited to, or provided disproportionately to, producers of particular agricultural products." 774 F.Supp. at 1383-4. Of course, that language supports the decision Commerce made in this case. See pages 3-4, 19 above.

[20] Commerce has represented to the panel that this language was addressed to any suggestion that a particular percentage of program coverage could be identified as a cut-off between specificity and generality. While this interpretation would, perhaps, relieve Commerce of being tripped by its own words, it would not end its obligation to avoid strictly mathematical determinations.

Yet, in no reasonable sense can it be said that Commerce has employed some mathematical formula here. First, Commerce has labored with great care to establish the universe of agricultural products in Canada and Quebec.[21] Secondly, as described below, Commerce considered whether dominant use/disproportionality and government discretion could reasonably change the result of a case in which a small number of commodities within the agricultural universe is covered by a subsidy program. Commerce also considered the arguments made by Canada and the Canadian producers that the Tripartite program was expanding towards universality.[22] Indeed, there is no significant argument made by any of the respondents that was not considered by Commerce. To say that all of this analysis is the simple application of a mathematical formula is a gross mischaracterization.

2. The "Other" Factors. The proposed regulations state that Commerce "will consider" various factors, including whether there are dominant users or disproportionate beneficiaries of a program and the extent to which a government exercises discretion in conferring benefits. In this case, Commerce "considered"

---

[21] Compare the effort Commerce has expended on this issue with the determination that was upheld in Alberta Pork, supra. In that case, Commerce assumed (reasonably, I believe) that the universe of products produced in Canada and in Quebec was much larger than those covered by the various programs under consideration. The Court of International Trade was not troubled by the failure to establish a precise universe of products, but apparently was willing to accept as obvious that that number was much greater than that of the programs.

[22] Quebec made no equivalent argument regarding FISI.

these factors, but found them irrelevant to its determination. I believe that that conclusion was not only reasonable, it was required by any sensible interpretation of United States law.

With regard to disproportionality (or dominant use), if a small number of industries is covered by a program, what difference does it make whether one industry receives a disproportionate share of the benefits or is a dominant user? If, for example, Tripartite covered only yellow-seeded onions and honey, would it really matter whether the benefits were shared 50/50 or 90/10? Under any logical effort to separate the universal from the specific, these factors play a role only when there is a large number of industries covered by a program, but the benefits are principally realized by a particular industry or group of industries.[23] In such a case, dominant use or disproportionality could be the basis of a specificity finding, but these factors fade into insignificance where few of many industries are beneficiaries.

While it found that discretion was enjoyed by Canadian officials in administering the Tripartite program, Commerce said that this fact alone would not support its decision.[24] Like the

---

[23] As noted earlier, the panel's rhetorical comment to the Commerce Department strongly suggested this very point. See discussion at page 7 above.

[24] Commerce did not consider the issue of discretion in analyzing FISI, stating that the burden was on Quebec to show an absence of discretion and that the record did not support a conclusion one way or the other. Remand Determination at 35-36.

issues of disproportionality and dominant use, discretion may be relevant in certain circumstances, again principally those in which a large number of industries is covered by a particular program. See, e.g., Certain Steel Products from the Netherlands, 47 Fed. Reg. 39372 (1982). In those cases, evidence of discretion (or, as Commerce interprets the law, the ability to exercise discretion) could explain why there is dominant use or disproportionality. If discretion does not exist, and the program is otherwise evenhanded, dominant use or disproportionality might be disregarded. But whatever the value of the examination of discretion, it has little utility when a handful of the universe is covered. In other words, how can the presence or absence of discretion convert a program servicing, say, 10% of the universe into a universal program?[25]

3. Discrete classes and commonality. The panel also faults Commerce for making "no effort to indicate how the recipients of Tripartite subsidies constituted a discrete class of beneficiaries." October Panel Decision at 24-25. By introducing a "discrete class" requirement, the panel suggests that specificity could depend on whether beneficiaries are producing similar or dissimilar products. In other words, 10 products of a

---

[25] This issue is related to the issue of intent. As the panel properly held in its original decision, United States law does not require a determination of intentional targeting of benefits as a predicate to a finding of specificity; it is enough that benefits are going to a small group within the universe. May Panel Decision at 15.

universe of 100 might be specific if they are all, say, types of steel sheet, but not if some are steel bars and angles, aluminum tubes and brass strip.

The panel correctly notes that many decisions use language like "discrete class" and "specific class." However, there is no case law that stands for the interpretation the panel seeks to force on those words here. That interpretation has no logical support either, since, in distinguishing from programs of universal applicability, it makes no difference whether 10 beneficiaries of a universe of 100 are making products that can be fit into one category or several. And even if the panel's approach had any logic, it would present insurmountable problems of administration, since it would usually be possible to aggregate or disaggregate the covered products. For example, are the various products listed above dissimilar or part of a single, "metals" category?

In summary, Commerce' application of United States law and its own regulations resulted in a decision that is manifestly reasonable: benefits extended to 10 of 100 or 13 of 69 commodities are being given to a specific group of industries, and the programs in question cannot fairly be likened to widely available benefits like national defense, education and infrastructure. In overturning Commerce' interpretation of the law, the panel has produced a decision that is plainly wrong and remarkably insensitive to United States law.

CONCLUSIONS

How did we get to this juncture? I believe that several factors played a part:

1. The panel wholly accepted the invitation of the respondents to second-guess Commerce' determinations, especially its calculation of the universe of commodities produced in Canada and Quebec. The panel has no discernible expertise in this area, and, even if it did, it would have no business making any determination other than whether there was substantial evidence to support Commerce. I fear that dalliance with the facts colored the panel's ultimate decision.

2. Ignoring the appropriate standard of review, the panel did not pause to consider whether Commerce' interpretation of countervailing duty law was reasonable. Instead, it concluded that Commerce may not base its determination on the fact (and it is a fact) that only a small portion of agricultural commodities in Canada and Quebec benefit from Tripartite and FISI. Congress will be astonished at this interpretation of the "special rule" it adopted in 1988, since it runs so contrary to the effort to distinguish between universally used government services like defense, education and infrastructure, and benefits paid to select groups within the economy (or agricultural sector) at large. But even if the panel's interpretation were itself reasonable, that would, by itself, be no basis for overturning Commerce' conclusions of law.

3. The binational panel process was adopted as a compromise alternative to new rules on dumping and subsidization that would apply to trade between Canada and the United States. The compromise was grounded on the perceived need to develop confidence in both countries that trade laws were being fairly applied, free of political pressures. J. Bello, A. Holmer, D. Kelly, U.S. Trade Law and Policy Series No. 18: Midterm Report on Binational Dispute Settlement Under the United State - Canada Free Trade Agreement, 25 Int'l Law. 489, 495 (1991). It was always clear, however, that the substantive law of the parties would not be changed by the new process. See U.S.-Canada Free Trade Agreement, Article 1902. Nor was it suggested that the new process was required because the courts of either country were not independent of political influence. Hearings Before the Senate Committee on the Judiciary, May 20, 1988, at 8-9. Finally, it was recognized that the binational panel process raised delicate constitutional considerations in the United States.[26]

Against this background, this panel's decision is

---

[26] The Senate Committee on the Judiciary could not reach a consensus on recommending implementing legislation relating to the binational panel process and was discharged from consideration of that legislation. S. Rep. 529, 100th Cong., 2d Sess. 70 (Sept. 15, 1988). The Administration raised constitutional questions regarding implementation of panel decisions and recommended procedures for avoiding those questions; however, the implementing legislation did not adopt those recommendations. Id. at 31-32. In the end, special "fast track" procedures were adopted to deal with constitutional challenges to the binational panel process. Id. at 30; 19 U.S.C. §1516a(g)(4)(A).

breathtaking. The panel shows no recognition of the limitations imposed by United States law on reviewing bodies confronted with a highly technical, fact-intensive record and no consideration of the impact of its decision on the binational process.[27] While panel decisions are not binding on United States courts, they do influence other binational panels; if given precedential respect by other panels, this panel's decision would cause a fundamental change in the way United States countervailing duty law is administered in cases involving Canadian products. That result would be plainly incompatible with the expectations of the signatories, but that consideration is also disregarded by the panel.

The binational process is a critical element of the U.S.-Canada Free Trade Agreement. It rests upon a willingness by both parties to have ad hoc, non-judicial panels interpret national law, without any routine appeals process. Panels thus have a heavy responsibility to make sure that their decisions have a solid basis under those national laws, and panel members have the same responsibility not to acquiesce when they believe the process has badly gone awry. It is in that spirit that I dissent.

---

[27] Congress will soon be reviewing binational procedures in the North American Free Trade Agreement, which are patterned after those in the United States - Canada Free Trade Agreement.

Murray J. Belman

Original signed by: Murray J. Belman