

**IN THE MATTER OF:**  
**Live Swine from Canada**

**USA 91-1904-04**

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Catalogue No. E100-2/2-91-1904-04E

UNITED STATES - CANADA FREE TRADE AGREEMENT  
ARTICLE 1904 BINATIONAL PANEL

IN THE MATTER OF:                    )  
  )     Secretariat File No.  
  )     USA-91-1904-04  
LIVE SWINE FROM CANADA            )  
  )

DECISION OF THE PANEL  
August 26, 1992

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CANADIAN PORK COUNCIL AND ITS MEMBERS; GOVERNMENT  
OF CANADA; GOUVERNEMENT DU 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:*

*Glenn A. Cranker, Chairperson  
Wilhelmina K. Tyler  
Peter Clark  
Melvin S. Schwechter  
Mark D. Herlach*

*Appearances:*

*Homer E. Moyer, Jr., Catherine Curtiss, Amy L. Rothstein, for  
Government of Canada; Elliot J. Feldman, for Gouvernement Du  
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 Browne for International Trade  
Administration, U.S. Department of Commerce*

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

## I. INTRODUCTION

In accordance with Article 1904 of the United States-Canada Free Trade Agreement ("FTA") and implementing legislation<sup>1</sup>, this Binational Panel ("Panel") has been convened<sup>2</sup> to review the Final Results of the International Trade Administration, U.S. Department of Commerce ("Commerce"), for the fifth administrative review ("Fifth Review") of the countervailing duty order (the "Order")<sup>3</sup> on imports of live swine from Canada ("Final Results"), which were published on October 7, 1991.<sup>4</sup> On October 11, 1991, the Canadian Pork Council ("CPC") initiated the proceedings before this Panel by filing a Request for Panel Review.<sup>5</sup>

The Fifth Review covered 38<sup>6</sup> programs, of which 16<sup>7</sup> were

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<sup>1</sup> United States-Canada Free Trade Agreement, January 1, 1988, 27 I.L.M. 281 (1988), in force January 1, 1989; see also 19 U.S.C. §2112 P.L.100-216.

<sup>2</sup> Binational Panel jurisdiction is provided for by Article 1904(2), FTA, and by § 516A(g) (2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g) (2) (1992).

<sup>3</sup> Countervailing Duty Order; Live Swine from Canada, 50 Fed. Reg. 32880 (August 15, 1985).

<sup>4</sup> Live Swine from Canada; Final Results of Countervailing Duty Administrative Review, (C-122-404), 56 Fed. Reg. 50560 (1991).

<sup>5</sup> On October 15, 1991, the Government of Quebec filed a request for panel review. On November 6, 1991, P. Quintaine & Son Ltd. and Pryme Pork Ltd., filed complaints. On November 12, 1991, The Canadian Pork Producers Council, the Government of Quebec and the Government of Canada filed complaints. Notices of Appearance were filed by the National Pork Producers Council on November 19, 1991 and Commerce on November 25, 1991.

<sup>6</sup> Although the Final Results state that 38 investigated programs were covered in the Fifth Review, the Preliminary Results of Countervailing Duty Administrative Review (C-122-404), 56 Fed. Reg. 29224 (1991) ("Preliminary Results") list 39 programs.



determined by Commerce to have provided countervailable subsidies to Canadian producers of live swine during the period between April, 1, 1989 and March 31, 1990 ("Review Period"). The products involved are classifiable under item numbers 0103.91.00 and 0103.92.00 of the U.S. Harmonized Tariff Schedules ("HTS").

In the Preliminary Results, Commerce found that the net subsidy for the Review Period was 0.0051/lb CAD for sows and boars and 0.0937/lb CAD for all other live swine. Preliminary Results, 56 Fed. Reg. at 29230. In the Final Results, this figure was revised to 0.0049/lb CAD for sows and boars and .0932/lb CAD for other live swine. Final Results, 56 Fed. Reg. at 50565.

In the proceedings before this Panel, the Government of Canada ("Canada") and the CPC challenge Commerce determinations regarding the National Tripartite Stabilization Scheme for Hogs ("Tripartite"). Tripartite is a farm income stabilization program funded by the Canadian Government, the Provincial Governments and farmers. The Government of Quebec ("Quebec") challenges Commerce determinations regarding the Quebec Farm Income Stabilization Insurance Program ("FISI"). FISI is a provincial farm income stabilization program. In addition to its challenge to the Tripartite determinations, the CPC challenges Commerce determinations regarding (1) the Feed Freight Assistance Program ("FFA"); (2) the Alberta Crow Benefit Offset Program ("ACBOP"); and, (3) the British Columbia Farm Income Insurance Plan - Swine

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<sup>7</sup>(...continued)

<sup>7</sup> With respect to 10 of these 16 programs, Commerce found that benefits provided to swine producers amounted effectively to zero.

Producers' Farm Income Stabilization Program ("FIIP"). The FFA is a national grain transportation assistance program and ACBOP is a provincial program designed to compensate grain users in Alberta for the increased cost of grain resulting from the effect of the FFA on the grain market. FIIP is also a provincial farm income stabilization program.

Complainants contend that the Final Results are not supported by substantial evidence on the record and are not otherwise in accordance with law.<sup>8</sup> Specifically, Complainants submit, inter alia, that there are a number of findings upon which Commerce has relied that are either not supported by substantial record evidence, or are contradicted by substantial record evidence that Commerce improperly ignored. Further, Complainants argue that Commerce has applied an inappropriate test for determining de facto specificity, and that it failed to provide a reasoned articulation of its determinations in the Final Results. In addition, Quebec argues that the countervailability of FISI is a decided matter that Commerce is precluded from addressing.

Complainant P. Quintaine & Son Ltd. ("Quintaine") submits, further, that sows and boars are not within the scope of the Order. Likewise, Complainant Pryme Pork Ltd. ("Pryme") has argued that weanlings do not come within the scope of the Order. Alternatively, Pryme submits that if weanlings are within the scope of the Order, then Commerce should have either established a

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<sup>8</sup> Oral argument before this Panel took place in Washington, D.C., on May 29, 1992. References to the transcript of the hearing are identified as "Tr."

separate rate and subclass for weanlings, or have assigned to Pryme a separate company rate on the basis that Pryme exported only weanlings to the United States during the Review Period.

The decision of the Panel is to remand the Final Result to Commerce for it to reconsider some of its determinations in accordance with the reasons and instructions of this Panel hereinafter set forth. In particular, this Panel is remanding to Commerce parts of its determinations regarding Tripartite, FISI, FIIP and ACBOP. This Panel has upheld Commerce in its determination regarding the FFA. The specific remand instructions of the Panel are set forth in the body of this opinion at the end of our discussion in connection with each program.

Before proceeding with the substantive analysis of the issues that arise in this matter, the Panel will first address the standard of review.

## II. THE STANDARD OF REVIEW

### A. Questions Of Law

Article 1904(3) of the FTA requires this Panel to review Commerce's interpretation in accordance with U.S. standards of law and of judicial review. U.S. law requires that Commerce's interpretation of the statutes it administers be sustained, provided that the interpretation is reasonable and is based on a permissible construction of the statute. PPG Industries, Inc. v.

United States, 928 F.2d 1568, 1571 (Fed. Cir. 1991).<sup>9</sup> This Panel

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<sup>9</sup> The statute in question is 19 U.S.C. § 1677(5). It provides in pertinent part as follows:

(5) Subsidy

(A) In general

The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title and includes, but is not limited to, the following:

(i) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).

(ii) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

(I) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

(II) The provision of goods or services at preferential rates.

(III) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(IV) The assumption of any costs or expenses of manufacture, production, or distribution.

(B) Special rule

In applying subparagraph (A), the administering authority, in each investigation, shall determine whether the bounty, grant, or subsidy in law or in fact is provided to a specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulation, program, or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant, or subsidy is not, or

(continued...)

can only reject Commerce's interpretation of the law for compelling reasons. Wilson v. Turnage, 791 F.2d 151, 155-56 (Fed. Cir. 1986), cert. denied, 479 U.S. 988, 107 S. Ct. 580 (1986). Indeed, the Panel must uphold Commerce's reasonable interpretation, even if the Panel concludes that another interpretation is more reasonable. See American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986); PPG Industries, Inc. v. United States, 746 F. Supp. 119, 123 (Ct. Int'l. Trade 1990).

Commerce, however, does not enjoy unfettered discretion and deference, so Commerce's interpretation must be consistent with the object and purpose of the underlying statute. Burlington Truck Lines Inc. v. United States, 371 U.S. 156, 83 S. Ct. 239 (1962); Cabot Corp. v. United States, 694 F. Supp. 949, 953 (Ct. Int'l. Trade, 1988). Commerce cannot be permitted to ignore the intent of Congress. Cabot Corp. at 953.

B. Questions of Fact

Article 1904 of the FTA requires that the Commerce's factual determinations be reviewed "based on the administrative record" and in accordance with U.S. standards of judicial review. U.S. law provides that, "[t]he court shall hold unlawful any determination, finding, or conclusion found. . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). "Substantial evidence" must be more than a mere scintilla of evidence, that is, it must be "'such

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<sup>9</sup>(...continued)

has not been, in fact provided to a specific enterprise or industry, or group thereof.

relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Alberta Pork Producers' Marketing Bd. v. United States, 669 F. Supp. 445, 449 (Ct. Int'l. Trade 1987), aff'd, 683 F. Supp 1398 (Ct. Int'l. Trade, 1988), citing Federal Trade Comm'n v. Indiana Federation of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 2015 (1986).

When reviewing the evidence on the record, the Panel must decide whether the record evidence is sufficient to support the Final Results, not whether the Panel would reach the same conclusions Commerce did.

Where there is substantial evidence on the record, and conflicting conclusions can be drawn therefrom, this Court will defer to the judgment of the agency, even if the agency's decision is not in accord with the decision the court would have adopted had it reviewed the record de novo.

PPG Industries, 746 F. Supp. at 123, citing American Lamb, 785 F.2d at 1001.

U.S. courts have defined the "administrative record" as containing all information upon which the agency based its decision that is compiled by the agency and submitted to the reviewing court. See, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S. Ct. 1197 (1978); Camp v. Pitts, 411 U.S. 138, 93 S. Ct. 1241 (1973). Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419, 91 S. Ct. 814 (1971). Article 1911 of the FTA defines the administrative record differently, by actually listing the documents comprising the administrative record, unless the parties agree otherwise. In most cases, the different definitions will

result in nearly identical administrative records. It is, however, conceivable that the two definitions could result in different administrative records. Because none of the parties has argued that Article 1911 produces a different administrative record in this proceeding, this Panel assumes that the two definitions produce the same administrative record in this proceeding, and this Panel has applied the U.S. common law definition of administrative record and rules regarding exceptions, as instructed by Article 1904.

Generally, courts do not examine non-record evidence unless it falls within one of the exceptions established to prevent an agency from acting improperly or in bad faith. See Overton Park, 401 U.S. at 420; Public Power Council v. Johnson, 674 F.2d 791, 793-95 (9th Cir. 1982) (citing cases); National Corn Growers Ass'n v. Baker, 636 F. Supp. 921 (Ct. Int'l. Trade 1986); Star-Kist Foods, Inc. v. United States, 600 F. Supp. 212 (Ct. Int'l. Trade 1984). There is no suggestion of impropriety or bad faith in this proceeding and, therefore, the Panel will exclude all non-record evidence referred to by the parties, unless the parties otherwise agree.

With these principles regarding the standard of review in mind, the Panel will discuss each of the issues raised by the parties.

### III. THE NATIONAL TRIPARTITE STABILIZATION SCHEME FOR HOGS

#### A. Introduction

Tripartite is a Canadian support program designed to protect Canadian farmers against price and cost volatility in agricultural

markets. Canada Br. at 3.<sup>10</sup> Tripartite is funded by equal payments made into individual commodity accounts by producers, the federal government, and a participating provincial government.<sup>11</sup> In the Review Period, Tripartite programs were in effect for 11 commodities, including hogs, covered by eight agreements.

Stabilization payments are made when the market price falls below a support price. The difference between the support price and the average market price is the amount of the stabilization payment, and all swine producers in participating provinces receive the same level of support per unit. However, under the Tripartite agreement for hogs, only those hogs with an index of 80 or above are eligible for payments.<sup>12</sup> Sows and boars are not eligible for benefits because they are not indexed.

Producer participation in the program is voluntary, but Canadian provinces, with the exception of Quebec, may not offer separate stabilization plans or other ad hoc assistance for hogs.

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<sup>10</sup> References to the Brief of the Canadian Government are identified as "Canada Br."

<sup>11</sup> Nine provinces are signatories to Tripartite. Preliminary Results, 56 Fed. Reg. at 29225 (1991). Our description of Tripartite, as well as our description of other programs involved in this proceeding, is based primarily on the findings of Commerce in the Preliminary and Final Results. Since Complainants have not challenged these descriptions of the broad outlines of the programs as set forth by Commerce, we assume such descriptions are correct.

<sup>12</sup> Pryme argues that under the Tripartite Agreement, the Saskatchewan Hog Assured Returns Program and the Saskatchewan Livestock Investment Tax Credit, an index, based on fat to weight ratio, is established to determine eligibility. The argument put forth is that to exceed index 80, hogs must weigh 60 kg dressed or, on a live weight basis, an equivalent weight of 77 kg. Brief of Pryme Pork, Ltd. submitted to the Panel on February 20, 1992, identified as "Pryme Br." at 19-20.



Moreover, the federal government may not offer compensation to swine producers in a province not a party to an agreement. The program is intended to operate at a level that limits losses, but does not stimulate over-production.

During the Review Period, swine producers made payments and received benefits under Tripartite.<sup>13</sup> Commerce determined that while Tripartite does not, in law, limit the number of commodities eligible for participation, it is de facto specific and therefore the benefits received during the Review Period are countervailable. This determination of de facto specificity was based primarily on the following three findings:

1. In the Review Period, there were eight Tripartite agreements, which covered 11 of the more than 100 commodities produced in Canada;
2. Swine producers were the dominant users of the program, accounting for over 81% of total payouts made during the Review Period and 72% of total payouts since Tripartite's inception; and,
3. No explicit or standard procedures or criteria existed for evaluating requests by producer groups for the adoption of a Tripartite agreement with respect to a commodity.

Preliminary Results, 56 Fed. Reg. at 29225 (1991) and Final Results, 56 Fed. Reg. at 50561-62 (1991).

In the proceedings before this Panel, Complainants contend that the conclusions of Commerce with respect to Tripartite as set forth in the Final Results are not in accordance with law and are

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<sup>13</sup> Canada notes that while payments are made into the program every year, payouts are not always made. Canada Br. at 6.

not supported by substantial record evidence. In particular, they argue that Commerce:

1. Did not adopt the correct legal standard for evaluating the countervailability of Tripartite, since no finding of targeting or competitive advantage was made;
2. Did not act in accordance with the law since it should have considered trends in the conferral of Tripartite benefits and the availability and use of other agricultural programs in evaluating the countervailability of Tripartite, and should not have resorted to a mathematical construct in reaching its conclusions;
3. Did not base its conclusions with respect to Tripartite on substantial record evidence; and,
4. Did not provide a reasoned explanation for its conclusions in the Preliminary and Final Results.

Canada Br. at 14-49 and CPC Br. at 10-15 and 20-48.<sup>14</sup>

In response, Commerce and the National Pork Producers Council ("NPPC"), the Intervenor, contend that:

1. Commerce used the correct legal standard to determine specificity as no finding of targeting or competitive advantage need be made;
2. Commerce acted in accordance with law and there is ample record evidence supporting Commerce's determinations;
3. Sufficient criteria do not exist in the statute to limit the exercise of government discretion in conferring Tripartite benefits; and,
4. No other Canadian agricultural programs should be considered in evaluating the countervailability of Tripartite.

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<sup>14</sup> References to the Brief of the CPC are identified as "CPC Br.".

Commerce Br. at 10-23; NPPC Br. at 21-57;<sup>15</sup> and Tr. at 119, lines 11-23; at 120, lines 1-3.

B. The Standard of "Specificity" Applied By Commerce.

1. "Specificity" Under U.S. Law

United States law limits the imposition of countervailing duties to domestic programs which confer a benefit upon "a specific enterprise or industry or group of enterprises or industries".<sup>16</sup> See 19 U.S.C. §1677(5) (1979). Legislative history provides two rationales for this specificity test. First, Congress recognized that every export benefits from some general government assistance (*i.e.*, public roads, utilities, education), and therefore, every import would arguably be subject to countervailing duties without such a test. See 125 Cong. Rec. 20160, 20168, 20185 (1979); Carlisle Tire and Rubber Co. v. United States, 564 F. Supp. 834, 838 (Ct. Int'l. Trade 1983). Second, government programs which do not confer benefits selectively do not upset the free market forces that countervailing duties are meant to offset. See, *e.g.*, 125 Cong. Rec. 20160, 20168, 20185 (1979). See also Proposed Amendments.

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<sup>15</sup> References to the Brief of NPPC are identified, "NPPC Br.".

<sup>16</sup> It is settled law in the United States that a subsidy given to the entire agricultural sector of a country is not specific, and therefore not countervailable. See Proposed 19 C.F.R.; Preliminary Results, 56 Fed. Reg. at 29227 (1991); Memorandum Opinion: Live Swine From Canada, USA 91-1904-03, May 19, 1992 ("Swine IV"), at 16-17. The open issue is whether a subsidy program used by only one portion of the agricultural sector can be non-specific and, if so, in what instances is such a program non-specific.

Commerce implemented the specificity requirement in 1980 by adopting a "general availability test". See Carlisle Tire, 564 F. Supp. at 836-37; Cabot Corp. v. United States, 620 F. Supp. 722, 730 (Ct. Int'l. Trade 1985), dismissed, 788 F.2d 1539 (Fed. Cir. 1986). Using this test, Commerce refused to find a particular domestic program "specific" where the program's implementing statute and regulations indicated that the program was generally available. Id.

Ultimately, the Court of International Trade ("CIT") held that Commerce's "general availability test" was not in accordance with law. See Cabot, 620 F. Supp. at 730; Agrexco, Agricultural Export Co. v. United States, 604 F. Supp. 1238, 1242 (Ct. Int'l. Trade 1985). The CIT held that the appropriate standard for determining specificity "focuses on the de facto case by case effect of benefits provided to recipients rather than on the nominal availability of benefits." Cabot, 620 F. Supp. at 732.

The U.S. Congress amended 19 U.S.C. § 1677(5) in 1988 to require the assessment of countervailing duties for government programs that are specific "in law or in fact...[regardless of] nominal general availability." 19 U.S.C. § 1677(5)(B). Congress "intended that this provision codify the holding by the Court of International Trade in Cabot, 620 F. Supp. 722. See Omnibus Trade Act of 1987, Report of the Committee on Finance, United States Senate on S. 490, Report No. 100-71, at 122 (1987). By amending the law, Congress intended to prevent nations from avoiding countervailing duties by simply declaring that benefits are

generally available when, in fact, benefits only "accrued to specific individuals or classes." Cabot, 620 F. Supp. at 731.

2. The Proposed Regulations

In 1989, Commerce issued proposed regulations summarizing its interpretation of the 19 U.S.C. § 1677(5) specificity requirement. See Countervailing Duties: Proposed Regulation, 54 Fed. Reg. 23366, 23379 (May 31, 1989) ("Proposed Regulations" or "Proposed 19 C.F.R. § 355.43(b)"); Tr. at 40. Specifically, the Proposed Regulations provide, inter alia, that:

(b)(1) Domestic programs. Selective treatment, and a potential countervailable domestic subsidy, exists where the Secretary determines that benefits under a program are provided, or are required to be provided, in law or in fact, to a specific enterprise or industry, or group of enterprises or industries.

(2) In determining whether benefits are specific under paragraph (b)(1) of this section, the Secretary will consider, among other things, the following factors:

(i) The extent to which a government acts to limit the availability of a program;

(ii) The number of enterprises, industries, or groups thereof that actually use a program;

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

(iv) The extent to which a government exercises discretion in conferring benefits under a program.

Proposed 19 C.F.R. § 355.43(b).

Complainants argue that, as part of the specificity analysis, Commerce must find targeting and that a program bestowed a competitive advantage. This Panel is not persuaded that the Proposed Regulations require a finding of targeting or the conferral of a competitive advantage. See Swine IV at 20; PPG Industries, 928 F.2d at 1576-77.

### 3. The Legal Significance of Targeting

Section 1677(5) does not expressly require governmental targeting or intent as a precondition to a determination of specificity. See 19 U.S.C. § 1677(5). Indeed, the CIT, in a decision specifically addressing the targeting issue, concluded that "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." Saudi Iron and Steel Co. (Hadeed) v. United States, 675 F. Supp. 1362, 1367 (Ct. Int'l. Trade 1987), modified, 686 F. Supp. 914 (Ct. Int'l. Trade, 1988). See also Swine IV at 20-22. Canada argues, however, that Commerce has in fact interpreted 19 U.S.C. §1677(5) as requiring targeting, and that Commerce cannot change its interpretation without providing a detailed explanation which is absent in this case.

None of the arguments, Court of International Trade (CIT) cases or final determinations relied on by Canada persuades this Panel that targeting is a precondition of specificity pursuant to

19 U.S.C. § 1677(5)(B). See Canada Br. at 20-23.<sup>17</sup> Other cases cited by Canada do no more than support Commerce's contention that targeting is one factor that Commerce may consider when determining whether de facto specificity exists. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Singapore, 54 Fed. Reg. 19125, 19128 (1989); Fresh Asparagus from Mexico, 48 Fed. Reg. 21618, 21621 (1983).<sup>18</sup>

Complainants' reliance on the use by Commerce of the word "targeted" in the discussion section of the Proposed 19 C.F.R. § 355.43(b) is similarly unpersuasive. See Proposed Regulations, 54 Fed. Reg. at 23367 (1989) (discussion of Proposed 19 C.F.R. § 355.43). Commerce does not define or emphasize the term, and, more significantly, Commerce did not list "targeting" as a requirement of specificity in the text of Proposed 19 C.F.R. § 355.43(b)(2). At most, Commerce's passing reference to targeting simply confirms that targeting is a factor, among others, that may be considered when determining specificity. Therefore, this Panel

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<sup>17</sup> Many of Canada's cited authorities, generally use the term "targeting" as a synonym for "specific" or "exercise of discretion." See Roses, Inc. v. United States, 743 F. Supp. 870, 873 (Ct. Int'l. Trade 1990); PPG Industries, Inc. v. United States, 662 F. Supp. 258, 263 (Ct. Int'l. Trade, 1987), aff'd 928 F.2d 1568 (Fed. Cir. 1991); PPG Industries, Inc. v. United States, 712 F. Supp. 195, 200-01 (Ct. Int'l. Trade, 1989).

<sup>18</sup> Canada also relies on Commerce's use of the "general availability test" before the 1988 amendment to support its targeting argument. Canada Br. at 21, citing Certain Steel Products from the Netherlands, Final Determination, 47 Fed. Reg. 39372, 39373 (1982); Comeau Seafoods, Ltd. v. United States, 724 F. Supp. 1407, 1417 (Ct. Int'l. Trade 1989); Agrexco, 604 F. Supp. at 1241-42. Whether the "general availability test" required a finding of targeting is irrelevant, however, because that test was modified by Cabot and the 1988 amendment of the law. See pp. 14-16, supra.

holds that Commerce's failure to make a finding of targeting is not an abuse of discretion, and is reasonable and in accordance with law.

4. The Meaning of Competitive Advantage

CPC has challenged the specificity standard employed in the Fifth Review on the grounds that Commerce failed to find that Canadian swine producers received a "competitive advantage" from the Tripartite payments in addition to considering whether the payments were de facto specific. CPC Br. at 12-15. CPC does not cite to any statutory requirement of "competitive advantage"; instead, it relies on one sentence of legislative history and dicta in several CIT cases, including the PPG dissent.<sup>19</sup> Id.

The legislative history on which CPC relies does not indicate that a finding of competitive advantage is required; it merely states that subsidies "often [have] the effect of providing some competitive advantage [to the recipients] in relation to products of another country." See CPC Br. at 12, quoting S. Rept. No. 249, 96th Cong. 1st Sess. at 37 (1979). Moreover, this legislative history relates to the adoption of 19 U.S.C. § 1677(5)(A), not to the subsequent adoption of 19 U.S.C. § 1677(5)(B). There is no mention of any Congressional intent to require a finding of "competitive advantage" in the legislative history of Section 1677(5)(B).

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<sup>19</sup> See PPG Industries, 928 F.2d at 1980 . . . In his dissent Judge Michael stated that the post Cabot inquiry involves two different steps. First, the benefits must be specific . . . . Second, the subsidy must amount to an additional benefit or competitive advantage."



Likewise, the passages from Court of International Trade decisions cited by CPC do not analyze the term or require a finding of "competitive advantage." In those cases, the CIT defined a "bounty or grant" as a benefit which gives rise to a "competitive advantage". PPG Industries, 928 F.2d at 1574; Cabot, 620 F. Supp. at 732; Roses, 743 F. Supp. at 879. In no instance have the courts held that a finding of "competitive advantage", separate from a finding of a bounty or grant, is necessary under 19 U.S.C. § 1677(5).<sup>20</sup> The Swine IV Panel also considered this issue and found CPC's arguments regarding "competitive advantage" unpersuasive. Swine IV at 15.

As this Panel finds no authority to support the requirement of a finding of competitive advantage under U.S. law and believes the rationale of the Swine IV Panel persuasive, this Panel holds that Commerce's failure to make a finding of competitive advantage is reasonable and in accordance with law.

C. Commerce's Application of the Specificity Standard.

Having established that Commerce's specificity standard is reasonable, it is next necessary to review whether Commerce's application of the standard in the Final Results is otherwise in accordance with law. In this respect, four principal issues arise. First, should Commerce have considered the availability and use of other Canadian agricultural programs in analyzing the

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<sup>20</sup> This Panel notes, however, that the CIT, in Roses Inc. v. United States, 774 F. Supp. 1376, 1379 n. 3 (Ct. Int'l. Trade 1991) recognized that "the appellate court (Fed. Cir.) in PPG was not in accord over the proper specificity test to be applied by Commerce".

countervailability of Tripartite? Second, did Commerce use an impermissible statistical analysis to reach its conclusions? Third, was Commerce required to consider trends in Tripartite benefits? Finally, in order to satisfy the government discretion criterion set forth in proposed 19 C.F.R. § 355.43 (b)(2)(iv), must Commerce find only an ability to exercise discretion or the actual exercise of the same?

1. Consideration of Other Programs

In their arguments before this Panel, Canada and the CPC contended that in considering de facto specificity and, therefore, the countervailability, of Tripartite, Commerce should have considered the availability and use of other Canadian Government agricultural programs, including certain supply management and crop insurance programs, that may provide similar types of benefits. Canada Br. at 6-8A and 26, and CPC Br. at 37; See also Tr. at 42. In their view, such consideration would help explain why, despite the fact that Tripartite was generally available, no more than 11 commodities were covered under the program.

In its Final Results, Commerce analyzed the countervailability of Tripartite on its specific facts and without reference to other Canadian Government agricultural programs. The question before this Panel is whether Commerce acted in accordance with law in this respect.

Under Proposed 19 C.F.R § 355.43(b)(5), Commerce has indicated that:

Unless the Secretary determines that two or more programs are integrally linked, the Secretary will determine the specificity of a

program for purposes of paragraph (b)(1) of this section solely on the basis of the availability and use of the particular program in question. In determining whether programs are integrally linked, the Secretary will examine, among other factors, the administration of the programs, evidence of a government policy to treat industries equally, the purposes of the programs as stated in their enabling legislation, and the manner of funding the programs (emphasis added).

This language requires that the Secretary determine the specificity of a particular program solely on its availability and use, unless the Secretary determines that two or more programs are integrally linked. Proposed 19 C.F.R § 355.43(b)(5) does not require Commerce to make a determination regarding integral linkage in the absence of a request by the parties. Although this Panel understands that the linkage issue has been raised by Canada in the context of the administrative review for the next review period (1990-1991), it was not raised by the parties in the administrative review before this Panel.<sup>21</sup> Therefore, this Panel concludes that Commerce's decision not to consider the availability and use of other agricultural programs in reaching a determination regarding Tripartite's countervailability was not an abuse of discretion, and was otherwise in accordance with law. Under the clear language of the Proposed Regulations, the Secretary could not have considered the availability and use of other programs in performing the specificity analysis.

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<sup>21</sup> See Tr. at 29 lines 20-23, at 254 lines 12-19.

## 2. The Role of Statistical Analysis

Under U.S. countervailing duty law, a de facto specificity determination based solely on an unreasoned and mechanistic numbers approach cannot be sustained. See Proposed Regulations, 54 Fed. Reg. at 23368 (1989); PPG, 928 F.2d 1568, Roses, 774 F. Supp. 1376. Complainants argue that by simply counting the number of commodities covered under Tripartite, the number of agricultural products produced in Canada, and the percentage of benefits paid to swine producers under Tripartite, Commerce indeed used just such an unreasoned and mechanistic approach. Canada Br. at 33-39.

This Panel believes that, while Commerce has based much of its determination on statistical information, the specificity standard set forth in the Proposed 19 C.F.R § 355.43(b)(2) calls for the evaluation of just such information, specifically requiring Commerce to consider, among other things, the number of enterprises, industries or groups thereof that actually use a program. In this light, this Panel is of the opinion that a statistical analysis is appropriate, provided (i) relevant non-statistical information is not excluded from consideration and analysis and, (ii) the statistics used are on the record, are consistently applied, are at the same level of comparability and are directly related to the specificity factors.

The problem in this proceeding is that, based on the Preliminary and Final Results and the record in the Fifth Review, this Panel cannot determine if the above criteria have been met. For example, it is unclear whether non-statistical information was excluded from consideration, why Commerce used more than 100

agricultural commodities as constituting the universe of agricultural commodities, and whether the identification of 11 covered commodities was based on the same level of comparability as the finding of a universe of more than 100 agricultural commodities. See Section III,D,1, infra.

Therefore, the Panel cannot decide whether Commerce's use of statistics with respect to Tripartite was unreasonable until Commerce provides the Panel with a reasoned explanation of the Final Results as instructed below. See Section III, E, infra.

### 3. Trends in the Development of Tripartite

Complainants argue that Commerce should have considered, in its specificity analysis, trends in the development of Tripartite, particularly the expanding nature of its product coverage. See CPC Br. at 28-39. As to future trends in a program, it is the opinion of this Panel that if predictions regarding events after the period under review are placed on the record in a timely manner, then Commerce must consider such information, but need not base its final results on these future possibilities. See Swine IV at 31-35.

An administrative review is, by nature, a snapshot of events taking place in such period. While Commerce can consider evidence of predicted trends in determining the countervailability of a program, determinations will generally be limited to facts for the period under review set forth in materials on the record. Of course, determinations may change in a subsequent review if the possible events actually occur, and such changes are set forth in materials on the record of the subsequent review.

Unlike predictions regarding future events, facts regarding actual events which took place in or prior to the period under review, to the extent that materials containing such evidence are placed on the record of the review in question, should be taken into account by Commerce in reaching its determinations. See Swine IV at 35. Thus, Commerce must examine additions to<sup>22</sup>, subtractions from, and rejections of<sup>23</sup> commodities from Tripartite coverage, if any, and must examine payouts and other relevant government action which occur prior to or during the Review Period, to the extent that materials containing such evidence are placed on the record.

This Panel believes that, although Commerce has taken note of a number of important factors of this nature in its Preliminary and Final Results, particularly the number of commodities covered and the amount of payouts under the program, Commerce does not appear to have considered other important trends. For example, Commerce does not explain the significance of (i) products being added to Tripartite coverage both prior to and during the Review Period, and (ii) swine producers not being given payments in the early years of the program. Without consideration of these issues and an explanation of its position on the same, this Panel cannot reach a conclusion as to whether Commerce committed an abuse of discretion

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<sup>22</sup> Tripartite agreements for both onions and honey were concluded in the Review Period under review, and other commodities were added in previous review periods. See Preliminary Results, 56 Fed. Reg. at 29225 (1991), Live Swine From Canada, 55 Fed. Reg. 20812 (1990), and Annual Report of the Agricultural Stabilization Board for the Year Ended March 31, 1990 (1989/90 ASB Report), R. 22, Feb. 25, 1991 response, Tab C, Schedule L at 19.

<sup>23</sup> Preliminary Results, 56 Fed. Reg. at 29225 (1991).

or has otherwise acted in a manner that is not in accordance with law.

4. The Discretion Criterion

One of the factors that the proposed Regulations require Commerce to consider in performing its specificity analysis is the "extent to which a government exercises discretion in conferring benefits under a program". Proposed 19 C.F.R. § 355.43 (B)(2)(iv). Canada and the CPC have argued that in order to satisfy this provision, Commerce must have record evidence of examples of the Canadian Government actually exercising discretion. For its part, Commerce interprets this Proposed Regulation as being satisfied in this case as long as it can point to record evidence demonstrating the foreign government's ability to exercise discretion as a result of the lack of specific standards and criteria being set forth in the authorizing legislation. Tr. at 249. See also, Tr. at 139-40.

As more fully set forth *infra*, at Section III, E, the Panel believes this is an important issue which requires resolution in the context of this case. However, the Panel is of the view that it cannot reach a decision on this issue until a more reasoned explanation of Commerce's position is received.

D. Substantial Weight of the Evidence

The Panel must decide whether the determinations of Commerce with respect to Tripartite are supported by substantial record evidence. In this connection this Panel finds that either the administrative record before this Panel is lacking record evidence of several findings, or Commerce has failed to identify the requisite substantial record evidence. For example, Commerce has

not identified record evidence supporting its claim that several commodities have been dropped from Tripartite negotiations. See Tr. at 157. There is likewise no record support identified by Commerce for the claim that the Canadian agricultural sector consists of more than one hundred commodities.<sup>24</sup> See Tr. at 11, 123, 125, 165. Nor is there record evidence identified in support of the NPPC's claim that the Canadian government intended the hog Tripartite agreement to be the first Tripartite agreement negotiated, and there is nothing identified in the record regarding the length of negotiations for each Tripartite agreement. See NPPC Br. at 45; CPC Br. at 33; Tr. at 157, 186-87.

Generally, courts do not examine non-record evidence unless it falls within one of the exceptions established to prevent an agency from acting improperly or in bad faith. See Overton Park, 401 U.S. at 420; Public Power Council v. Johnson, 674 F.2d 791, 793-95 (9th Cir. 1982) (citing cases); National Corn Growers Ass'n v. Baker, 636 F. Supp. 921 (Ct. Int'l. Trade 1986); Star-Kist Foods, Inc. v. United States, 600 F. Supp. 212 (Ct. Int'l. Trade 1984). Several exceptions allow, but do not require, a court to admit non-record evidence where: (1) agency action is not adequately explained in the administrative record; (2) the agency failed to consider factors which are relevant to its final decision; (3) the agency considered evidence which it failed to include in the record; (4) a case is so complex that the court needs more evidence to enable

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<sup>24</sup> The only comprehensive list of agricultural commodities produced in Canada in the administrative record seems to be the Farm Cash Receipts list, which contains approximately 45 commodities. A.R. 22, Tab A, Sch. E.



it to understand the issues clearly; and (5) evidence arising after the agency action shows whether the decision was correct or not. See generally Power Council v. Johnson, 674 F.2d 791; Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 285 (D.C. Cir. 1981); Asarco, Inc. v. EPA, 616 F.2d 1153, 1159 (9th Cir. 1980); County of Suffolk v. Secretary of the Interior, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1977).

The Panel is of the view that the circumstances in this proceeding do not generally fall within the exceptions and, therefore, this Panel will exclude all non-record evidence referred to by the parties, except where there is no disagreement with respect to its admission.<sup>25</sup> The gaps in the record before this Panel reflect the failure of all parties to construct a complete administrative record. Furthermore, while all parties have made factual assertions based on non-record evidence, none of the parties has actually submitted the "evidence" to this Panel for consideration. Admitting these assertions would require that the Panel search out the non-record evidence, a task that is not required of this Panel and one that this Panel declines to undertake. Finally, this Panel is of the view that the policy behind the exceptions would not be served by admitting the non-record evidence in this case. The exceptions are designed to permit justice to prevail in deserving circumstances, not to reward the failure of the parties to assemble a record that supports their respective cases. Therefore, this Panel has relied only on the

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<sup>25</sup> The Panel notes that the record has been reopened for ACBOP, by agreement of the parties. See, infra, p. 60.

evidence in the administrative record before this Panel in considering whether the Final Results are supported by substantial evidence on the record.

The Panel will proceed with an evaluation of the evidence on the record as it relates to the de facto specificity factors set forth in the Proposed Regulations.

1. Number of Commodities Covered by Tripartite

Commerce has stated that only 11 of more than 100 eligible commodities currently are covered by Tripartite agreements. Final Results, 56 Fed. Reg. at 50562 (1991). Commerce admits it relied on information obtained in an earlier administrative review and not in the administrative record before this Panel to arrive at the number of eligible commodities. Tr. at 123. Therefore, Commerce's conclusion that there are more than 100 commodities eligible for Tripartite agreements is not supported by substantial record evidence on the record identified by Commerce. Additionally, even if more than 100 commodities were listed in this record, Commerce has not provided this Panel with any way to determine whether Commerce applied the same level of comparability in determining the number of users and the universe of eligible commodities.

2. Dominant Use

Proposed 19 C.F.R § 355.43(b)(2)(iii) provides that Commerce will consider whether there are "dominant users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program." Proposed Regulations, 54 Fed. Reg. at 23379 (1989) (emphasis added). According to the plain language of the clause, Commerce need find

only a dominant user or a group receiving disproportionately large benefits to satisfy this factor.

Commerce concluded that swine producers were dominant users of Tripartite primarily because swine producers received 81% of the total payout under Tripartite during the Review Period and 72% of total payouts since the inception of Tripartite. See Preliminary Results, 56 Fed. Reg. at 29225; Final Results, 56 Fed. Reg. at 50561 (1991). Complainants argue that Commerce improperly ignored the following facts: (i) swine producers made more than 76% of producer contributions during the life of the program; and, (ii) swine producers are not dominant users when all federal agricultural stabilization programs are considered together.

It is clear to this Panel that Commerce's finding on dominant use is supported by substantial record evidence. By any definition, receipt of more than 80% of payouts during the Review Period and more than 70% of payouts over the life of Tripartite supports Commerce's conclusion that swine producers were the dominant or primary users of the program. Complainants' argument that swine producers made over 70% of producer contributions, only supports Commerce's determination that swine producers were the dominant users of the program.

Swine producers' dominance in light of all stabilization programs is irrelevant since Complainants have not argued that such programs are integrally linked. See supra at Section III, C, 1. This Panel therefore holds that Commerce's finding that swine producers are dominant users of Tripartite is supported by substantial record evidence.

### 3. Government Discretion

In the Preliminary and Final Results, Commerce stated that the Tripartite enabling legislation does not contain explicit or standard criteria for evaluating requests for Tripartite agreements. Final Results, 56 Fed. Reg. at 50562 (1991). Commerce looked to subsection 10.1 of the Agricultural Stabilization Act ("ASA"), which provides that the Minister of Agriculture may enter into agreements that will not give some producers an advantage over others or be an incentive to overproduce. Commerce concluded that these are broad principles that may be taken into account in entering into agreements, but that the record is silent with respect to specific criteria used to evaluate applications and select producers for Tripartite agreements.

While the record is silent as to such criteria, this Panel notes that it appears that Commerce may have mischaracterized the relevant section of the ASA which states that:

The Minister may enter into an agreement with a province in respect of an agricultural commodity only if the Minister is of the opinion that such an agreement

(a) would not give to the producers of the commodity who are to be parties to the agreement or for whose benefit the agreement would be entered into, a financial advantage in the production or marketing of the commodity not enjoyed by other producers of the commodity in Canada; and

(b) would not be an incentive to the producers of the commodity who are to be parties to the agreement or for whose benefit the agreement would be entered into, to overproduce the commodity.

R.S.C. 1985, c. A-8, as amended by R.S.C. 1985, c. 40 (1st Supp.), subs. (13)(3) (emphasis added).

The Minister can only enter Tripartite agreement if the factors specified in this provision are satisfied. In this light, and as more fully set forth at Section III, F, infra, this Panel remands Commerce's findings regarding government discretion for a complete and reasoned explanation with respect to the exercise of discretion, including a discussion as to why the criteria contained in the ASA are not specific enough.

E. Reasoned Explanation

It is a basic principle of U.S. administrative law that an agency must provide a reasoned explanation of the determinations it is making. See Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80; 63 S.Ct 454 (1943); American Lamb, 785 F.2d 994; SCM Corp. v. United States, 487 F. Supp. 96 (Cust. Ct. 1980). While this Panel is aware of Commerce's significant caseload, its staffing and budgetary constraints, and the desire of the U.S. Congress to have timely determinations and administrative reviews, none of these considerations can be allowed to vitiate the legal requirements of a point-by-point review of the relevant issues, and of determinations which reflect a reasoned and cogent analysis of the same. Such an approach is absolutely necessary to insure that Commerce's determinations are in accordance with law, that interested parties understand the reasoning of Commerce on all relevant issues, and that Binational Panel and judicial reviews of agency action can proceed quickly and efficiently.

In this light, this Panel believes that Commerce has not provided the reasoned explanation which the law demands on several key points. Commerce has not provided any reasoned explanation of (i) why Farm Cash Receipts were not taken into account in ascertaining the number of agricultural commodities produced in Canada, especially since it is, apparently, the only systematic compilation of the number of such commodities which is on the record in the Fifth Review, and (ii) whether the level of comparability used to identify commodities covered under Tripartite was the same as that used to determine the universe of potentially eligible commodities.

Furthermore, as noted, supra, in Section III, D, 3, this Panel is of the view that Commerce has failed to explain adequately its position as to whether or not the Government of Canada exercises discretion in operating Tripartite. In addition to its possible misconstruction of the ASA, Commerce has not indicated how the lack of explicit or standard criteria for evaluating Tripartite requests demonstrates the exercise of discretion. Moreover, Commerce's discretion analysis fails to address: (i) that Tripartite covers a variety of different types of agricultural commodities; (ii) that coverage expanded during the Review Period; and (iii) the contention that, during the Review Period, some Tripartite commodity negotiations either were rejected<sup>26</sup> or were no longer

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<sup>26</sup> The Preliminary Results, 56 Fed. Reg. at 29225 state that Tripartite agreements were rejected for asparagus, and producers of sour cherries and corn.

under negotiation; and, (iv) the fact that market forces trigger Tripartite payments.

Finally, this Panel notes that Commerce has not explained, in either its Preliminary or Final Results, its position as to whether the law requires only an ability to exercise discretion or the actual exercise of the same in order to consider a governmental program specific and countervailable. Since the Proposed Regulations speak of "the extent to which a government exercises discretion in conferring benefits", 19 C.F.R § 355.43 (b)(2)(iv) (emphasis added), and no details regarding specific instances of the exercise of discretion were cited in the Preliminary or Final Results, this Panel believes it to be essential for Commerce to explain its position on this issue.

F. Conclusion

In light of the above, this Panel affirms Commerce's Final Results on the following points:

1. The Proposed Regulations provide an appropriate legal standard by which to evaluate the countervailability of Tripartite;
2. Evidence of targeting or the conferral of a competitive advantage need not be found in order to find Tripartite specific and countervailable; and,
3. The finding that swine producers are the dominant users of Tripartite is supported by substantial record evidence.

This Panel further finds that, in the absence of a determination of integral linkage, Commerce appropriately evaluated the countervailability of Tripartite based only on an analysis of

Tripartite, without reference to other Canadian government agricultural programs.

This Panel remands to Commerce to:

1. Identify and explain evidence on the record in the Fifth Review, if any, supporting its statement that there are more than 100 agricultural commodities in Canada;
2. Provide a reasoned explanation based on record evidence as to why it did not take Farm Cash Receipts into account in establishing the universe of Canadian agricultural commodities;
3. Provide a reasoned explanation based on record evidence as to comparability between the number of commodities covered by Tripartite and the universe of agricultural commodities produced in Canada;
4. Provide a reasoned explanation based on record evidence of its position on whether the Proposed Regulations require only the ability to exercise discretion or the actual exercise of the same in order to find selectivity.
5. In light of its response to item no. 4 above, provide a reasoned explanation based on record evidence of its position on whether or not the Canadian Government exercises discretion in administering Tripartite, specifically considering:
  - (i) all the relevant sections of the ASA and the criteria set forth therein (which explanation should include a discussion as to why such criteria are not specific enough);
  - (ii) the variety of different products covered by Tripartite;
  - (iii) the expanding coverage of Tripartite, both prior to and during the Review Period;
  - (iv) the rejection of or failure to conclude Tripartite negotiations regarding a number of agricultural commodities;



- (v) the facts that market forces trigger payments and, the fact that swine producers were not given payments in the early years of Tripartite coverage.

#### IV. QUEBEC INCOME STABILIZATION INSURANCE PROGRAM

##### A. Introduction

Commerce determinations in respect of FIS I have been the subject of judicial and binational panel review on a number of occasions. See Memorandum Opinion: Fresh Chilled and Frozen Pork from Canada, USA 89-1904-06, Sept. 28, 1990 ("Pork I"), Memorandum Opinion: Fresh Chilled and Frozen Pork From Canada, USA-89-1904-06, March 8, 1991 ("Pork II"), In the Matter of: Fresh, Chilled, and Frozen Pork from Canada, USA-89-1904-06, June 3, 1991 ("Pork III") and Swine IV. See also, Alberta Pork, 669 F. Supp. 445. In this particular round of review, Quebec has advanced a variety of objections to the Final Results insofar as they relate to FIS I. After a brief description of the program in question, this Panel will proceed to consider these objections.

##### 1. The Program in Question

In the Preliminary Results, at 56 Fed. Reg. 29226, Commerce found that FIS I was established in 1976 in order to guarantee a "positive net annual income" to participants the income of which is lower than a "stabilized net annual income". Loi sur l'Assurance-Stabilisation des Revenus Agricoles, R.S.Q. 1977, c. A-31.<sup>27</sup>

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<sup>27</sup> 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. A participant receives a  
(continued...)

Funding for FIS I is provided through a combination of producer assessments (1/3) and government contributions (2/3). With respect to swine producers, coverage under FIS I is limited to a maximum of 5,000 feeder hogs and 400 sows per farmer. Since Quebec joined Tripartite in 1989, FIS I covers only the difference between payments made under Tripartite and payments that would have been made under FIS I in the absence of Tripartite payments. All producers enrolled in FIS I are also enrolled in Tripartite.

Participation in FIS I is voluntary, but once enrolled, a participant must make a five year commitment. Interested commodity producers must apply to the Régie des Assurances Agricoles du Québec to establish an insurance plan. The plan determines the basis for calculating premiums and benefits. In order to be eligible for coverage, producers must satisfy a number of criteria. Only farm products the producers of which can be expected to achieve "a positive net annual income" are eligible. Individual producers must be domiciled in Quebec, own their farm and own the hogs (or other products) insured. Only Quebec production is eligible for insurance.

## 2. The Determination in Question

In the Final Results, 56 Fed. Reg. at 50564 (1991), Commerce stated that:

This is the fifth review of this case in which we have determined that FIS I benefits are de facto specific to a group of enterprises or

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<sup>27</sup>(...continued)

payment under the program at the end of each year in which and to the extent that the annual average farm worker income is lower than the stabilized net annual income in Quebec.

industries. As in previous reviews, we noted that the program provides benefits to a relatively limited number of the commodities produced in Quebec (11 schemes covering 15 products) and that products accounting for a large portion of Quebec's agricultural production (eggs, poultry, and dairy products) are not covered by this program. In addition to these facts, we noted that this program has been consistently providing benefits to the same group of commodities (with the exception of the addition of soybeans during this period of review) over the last nine years.

Thus, Commerce effectively based its determination with respect to FISII upon three nominal findings of fact:

1. fifteen of the forty-five different producer groups in Quebec received benefits under FISII during the Review Period;
2. producers of eggs, dairy products and poultry, among others, did not receive benefits under FISII during the Review Period; and
3. the same group of producers (with the exception of soybeans producers) have been consistently receiving benefits under FISII since 1981.

#### B. Issues In Dispute

Quebec's first argument in this proceeding is that as a result of the decision of the Pork II Panel, which held that Commerce had failed to adduce substantial evidence of specificity in that proceeding, Commerce is precluded from again raising the issue of the countervailability of FISII in the Fifth Review pursuant to the doctrine of collateral estoppel. Quebec Br. at 36.

Second, Quebec argues that the principle of finality enunciated in Article 1904(9) of the FTA operates to obligate Commerce to exclude FISII from its duty determination in the Fifth Review, as a result of the decision in Pork II. Quebec Br. at 35.

Third, as a result of the decision in Pork II, Commerce removed the benefits received under FISI by producers in Quebec from its duty calculation for that period. In so doing, Quebec argues that Commerce made a final determination in that period that FISI was not countervailable. Quebec Br. at 9. Quebec argues that Commerce cannot, therefore, in the Fifth Review, find FISI countervailable, absent new evidence or a change in law. Quebec Br. at 31. According to Quebec, to do so would defy administrative practice, reason, logic and fairness. Quebec Br. at 33.

Fourth, Quebec submits that there is no record evidence to support the finding by Commerce that the same group of producers in Quebec (with the exception of soybean producers) have been consistently receiving benefits under FISI since 1981. Moreover, Quebec argues that even if such a finding could be supported by substantial record evidence, it would be legally irrelevant. Quebec has added that, in fact, the number of producer group recipients of FISI benefits has increased from eleven to fifteen over the years. Quebec Br. at 23 and 10-13.

Fifth, Quebec maintains that FISI provides generally available benefits to a wide variety of different producer groups in Quebec and that no commodity has ever been denied coverage under the program. Quebec Br. at 25 and 4. Quebec asserts that Commerce has not adduced substantial evidence of specificity in the Fifth Review, and the record evidence ignored by Commerce demonstrates that a large proportion of producers in Quebec received benefits under FISI during the Review Period. Quebec Br. at 19-23.

### C. Analysis

#### 1. Collateral Estoppel

The doctrine of collateral estoppel is among the "general legal principles" to be applied pursuant to Article 1904(3) of the FTA in Panel reviews of Commerce determinations. In matters of trade, a leading case on the subject is the decision of the CIT in PPG Industries, 746 F. Supp. 119. In that case, the Court held that, in determining whether a particular issue is precluded from relitigation, it will consider whether: (1) the issues are identical; (2) the issue was actually litigated in a previous case; (3) the previous determination of the issue was necessary to the decision; and, (4) the party precluded from raising the issue was fully represented by counsel in the first proceeding. Id. at 133.

FISI has been the subject of a number of proceedings, see supra, Section IV. A., and in every such proceeding (with one exception), Commerce determinations involving FISI were remanded by the reviewing authority.<sup>28</sup> In Pork II, the Panel in that case decided that Commerce had not adduced substantial evidence of

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<sup>28</sup> In Alberta Pork, 669 F. Supp. 445, the Court upheld a determination by Commerce that FISI was specific in that period on the grounds, inter alia, that "[FISI] is a stabilization plan established for producers of feeder hogs and weaner pigs ..." and that "[p]roducts are eligible for coverage only if a specific regulation identifying the product is adopted by the provincial government." Commerce has not relied upon such findings in this proceeding and the arguments advanced by the plaintiff in Alberta Pork (which was not Quebec as it only began to participate as a party to trade litigation after binational panel review under the FTA became possible; see Quebec Br. p.7) were not the same as those advanced by Quebec and other complainants in this proceeding. The decision in Alberta Pork does not, therefore, apply in this proceeding with respect to the issues and findings of fact involving FISI.

specificity and ultimately instructed Commerce to remove FISID benefits from its duty calculation for that period. As a result, Quebec has argued that the countervailability of FISID is a decided matter and that the doctrine of collateral estoppel precludes its relitigation at this time. Quebec Br. at 36.

The same argument was advanced by the Quebec in the proceedings before the Swine IV Panel, which decided that the issues before it were not identical to those before the Pork Panels. The Swine IV Panel held that the doctrine of collateral estoppel did not apply to preclude Commerce from raising the issue of the countervailability of FISID in that review. The Swine IV Panel noted that "appellate review of countervailing duty determinations is limited to the facts developed in the underlying administrative record". Swine IV, at 43. See also, 19 U.S.C. § 1516a(b)(1)(B). Further, the Swine IV Panel observed that Commerce develops a separate administrative record in each administrative review. Id. See also 19 U.S.C. § 1675 (1991).

This Panel is in agreement with the opinion of the Swine IV Panel on this point and concludes that the doctrine of collateral estoppel does not preclude reconsideration of the countervailability of FISID. In matters of trade:

Congress has made specific provision for periodic administrative reviews... [and] since the agencies involved perform the function of expert finders of fact concerning different programs, different time frames, economic statistics and other factors..., principles of issue preclusion should be carefully applied.

See PPG Industries, 712 F. Supp. at 199.

It would be contrary to the evident purpose of the periodic administrative review to preclude Commerce from even raising the issue of the countervailability of a program, unless the facts and issues are identical.<sup>29</sup>

2. Article 1904(9) of the FTA

Collateral estoppel is not dissimilar to the principle of finality enunciated in Article 1904(9) of the FTA, which provides that "[t]he decision of a Panel under this Article shall be binding on the Parties with respect to the particular matter between the Parties that is before the Panel." The doctrine of collateral estoppel and the principle enunciated in Article 1904(9) of the FTA have a common underlying rationale, which is that "a party who has litigated an issue [or "particular matter"] and has lost should be bound by that decision and cannot demand that the issue be decided over again." Mother's Restaurant Inc. v. Mama's Pizza Inc., 723 F. 2d 1566 (Fed. Cir. 1983).

Quebec submits that "Commerce was obligated to exclude FISI from its countervailing duty determination under the FTA and under the U.S. statute giving effect to the Agreement" as a result of the

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<sup>29</sup> On June 16, 1992, Quebec submitted a Memorandum Correcting Record in respect of its response during the Hearing to a question posed by panelist Schwechter. The Memorandum deals with jurisprudence requested by panelist Schwechter in relation to initiation of investigations by Commerce and the doctrine of collateral estoppel. On June 18, 1992, Commerce moved to strike this Memorandum on the basis that it constitutes an "unauthorized submission". In turn, on June 29, 1992, Quebec moved that the motion to strike by Commerce be denied. This Panel is of the view that reference by a party, in this proceeding, to judicial authority does not require specific authorization under the FTA Rules. There is no provision of the FTA Rules with which such a submission would be inconsistent and the information was requested by a Panelist. The motion to strike is denied.

decision in Pork II. Quebec Br. at 35. For reasons analogous to those with respect to collateral estoppel, this Panel is of the view that the "particular matter" between the parties in this proceeding is not the same "particular matter" that came before the Pork Panels. That is, different administrative review periods are involved and different facts are to be considered. Article 1904(9) of the FTA does not, therefore, operate to obligate Commerce to exclude FISII from its countervailing duty determination.

3. Prior Final Determination by Commerce

Quebec has argued that as a result of the decision in Pork II, Commerce made a final determination that FISII was not countervailable in that period. Quebec Br. at 6-10. Commerce denies that it ever made such a determination. Commerce Br. at 47. This issue has already been addressed by the Pork III Panel. In its remand determination following the Pork II Panel's decision, Commerce removed FISII benefits from its duty calculation for that period, but it did not state that it was thereby finding FISII non-countervailable. Quebec then petitioned the Pork III Panel to instruct Commerce to make such a statement. In its decision with respect to the petition of Quebec, the Pork III Panel concluded that when Commerce eliminated FISII benefits from its duty calculation in accordance with the remand instructions of the Pork II Panel, "it was in fact making a finding of no subsidy in regard to that program, on the record adduced in [that] case". Pork III at 2. This Panel finds the reasoning of the Pork III Panel to be reasonable on this point. However, the Pork III Panel specifically declined to address the circumstances in which Commerce will



reexamine a finding in a prior review that a program was not countervailable.

Quebec submits that "longstanding" Commerce Department practice, as well as general principles of administrative law, dictate that once a program is found not to be countervailable, it thereafter will not be found countervailable absent new evidence or a change in law." Quebec Br. at 31. In Industrial Nitrocellulose From France: Final Results of CVD Admin. Review, 52 Fed. Reg. 833 (1987), Commerce stated that:

[W]hile Congress did not intend that countervailing duty law be applied in a narrow and restrictive fashion, it also did not intend that the law be applied without regard to statutory guidelines, international obligations, and administrative precedents...[T]o waver between two policies only encourages interested parties to insist that the Panel tie benefits to particular products in some cases but not in others, an approach that defies reason, logic, and fairness.

In the instant proceeding, Commerce has reiterated this position at page 38 of its Brief:

The Department will not revisit a finding of countervailability or non-countervailability from review to review absent new information about a particular program.

The importance of administrative precedent has been articulated well by the CIT in Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1088 (Ct. Int'l. Trade 1988):

An agency must either conform itself to its prior decisions or explain the reasons for its departure. This rule is not designed to restrict an agency's consideration of the facts from one case to the next, but rather it is to ensure consistency in an agency's administration of a statute.

Accordingly, this Panel is of the view that Commerce must on remand explain its practices and the standards which govern the reexamination, in a later administrative review, of a program that Commerce previously determined involved no subsidy. Commerce must next apply that standard to the facts in this case and explain the reasons that would justify departure from the prior determination in the Pork proceedings that FISI was not countervailable,<sup>30</sup> and bring to the attention of this Panel any "change in law" or "new information" that would justify departure from the prior finding of non-countervailability.

4. Same Group of Commodities Covered by FISI

Commerce has argued that the lack of change in the commodities covered by FISI justifies a determination that FISI is de facto specific. In Final Results, 56 Fed. Reg. at 50564 (1991), Commerce stated that:

In addition to these facts, the Panel noted that [FISI] has been consistently providing benefits to the same group of commodities (with the exception of the addition of soybeans during this period of review) over the last nine years.

Quebec has argued that there is no evidence on the record in the Fifth Review to support such a finding by Commerce; that such evidence does not exist because participants under FISI have changed over the years in question; and that even if there was evidence on the record in the Fifth Review to support such a

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<sup>30</sup> While Binational Panel decisions do not constitute binding precedent on U.S. courts, they may be considered for "intrinsic persuasiveness". See H.R. Doc. No. 216, 100th Cong., 2nd Sess. (1988) at 271.

finding by Commerce, it would be legally irrelevant. Quebec Br. at 14-15.

In support of this argument that participants under FISII have in fact changed over the years, Quebec submits, inter alia, that:

In Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, ... Commerce acknowledged that "11 agricultural commodities are covered." In Live Swine from Canada, ... Commerce determined that, "twelve commodities" were covered. In Live Swine from Canada, ... "14 commodities" were covered. Commerce now acknowledges that fifteen commodities are covered by the program. Quebec Br. at 14.

Commerce has argued that "with the exception of the addition of soybeans in the Fifth Review, these variations are attributable to inconsistencies in classification and reporting by Quebec, not to actual differences in product coverage." Commerce Br. at 51, note 9.

While the record in the Fifth Review contains evidence pertaining to the number of commodities covered by FISII during the Review Period, Commerce has not pointed to any evidence on the record in the Fifth Review pertaining to the number of commodities covered by FISII in previous periods. As already noted, in Section II, supra, regarding the standard of review, this Panel must restrict its examination of the facts in this proceeding to the administrative record adduced in the Fifth Review. Under Article 1904 of the FTA, this Panel is instructed to review the Final Results "based on the administrative record". Article 1911 of the FTA defines "the administrative record" to include "all documentary or other information presented to or obtained ... in the course of the administrative proceeding." Documentary or other information

contained in the records assembled for prior proceedings need not, but may be, included in the record. Materials pertaining to the number of commodities covered by FISI in previous periods have not, however, been included in the record adduced in the Fifth Review. To the extent, therefore, that the finding of Commerce that FISI has been consistently providing benefits to the same group of commodities relies on evidence in the records in previous reviews, which evidence is not on the record in the Fifth Review, this finding would not be based on substantial evidence on the record.

The second difficulty with this debate permeates the entire Final Results. This difficulty involves adopting a consistent classification method for purposes of determining the number of commodities participating in FISI and the "universe" of commodities which could participate in FISI. This Panel observes that this difficulty is not isolated to this particular review. In Swine IV, at 46, the Panel in that case stated that "there would appear to be legitimate questions regarding Commerce's classification of commodities." Likewise, in the Fifth Review, Commerce has not explained whether the method of classification applied to determine the number of participants in FISI is consistent with the method applied to determine the universe of potential participants, that is, the number of different commodities produced in Quebec.

Commerce should, therefore, on remand, point to substantial evidence on the record in the Fifth Review pertaining to the number of commodities covered by FISI in previous periods. Second, Commerce should explain whether the method of classification it applied to determine the number of participants in FISI is

consistent with the method applied to determine the universe of potential participants.

5. Determination of de facto Specificity

As already noted, Commerce effectively based its determination in the Fifth Review with respect to FISI upon three nominal findings of fact. These are that:

- (i) fifteen of the forty-five different producer groups in Quebec received benefits under FISI during the Review Period;
- (ii) producers of eggs, dairy products and poultry, among others, did not receive benefits under FISI during the Review Period; and,
- (iii) the same group of producers (with the exception of soybeans producers) have been consistently receiving benefits under FISI since 1981.

The question arises as to whether, such findings of fact constitute substantial evidence that FISI provided benefits to a specific group of enterprises or industries during the Review Period, and was, therefore, countervailable. The proper test for specificity is neither simple numbers counting nor some other mechanical operation.<sup>31</sup> Rather, Commerce's Proposed Regulations provide that in determining whether benefits under a program are specific to a group of enterprises or industries, "The Secretary will consider, among other things, the following factors:

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<sup>31</sup> In the Notice of Proposed Rulemaking, Commerce states that "the specificity test cannot be reduced to a precise mathematical formula. Instead, the Department must exercise judgment and balance the various factors in analyzing the facts of a particular case." See Proposed Regulations, 54 Fed. Reg. at 23368 (1989).

- (i) The extent to which a government acts to limit the availability of a program;
- (ii) The number of enterprises, industries, or groups thereof that actually use a program;
- (iii) Whether there are dominant users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program; and
- (iv) The extent to which a government exercises discretion in conferring benefits under a program." Id.

With respect to the second factor, i.e., the number of producer groups using FISI, Commerce has placed a great deal of reliance upon its finding that fifteen of the forty-five different producer groups in Quebec received benefits under FISI during the Review Period. It should be noted, however, that Commerce brought similar findings before the Pork II Panel, which concluded that:

The Department effectively based its determination on two premises: (1) only calves, feeder cattle, potatoes, piglets, feeder hogs, corn, oats, wheat, barley, heavy veal and sheep are recipients of FISI benefits and (2) eggs, dairy products and poultry do not receive FISI benefits...

The evidence on the record is thus insufficient to support a decision that the number of recipients of FISI is so small as to be de facto a subsidy. Pork II, at 7026.

The Pork II Panel was, therefore, of the opinion that coverage of only eleven different producer groups in Quebec, excluding eggs, dairy products and poultry was inadequate as substantial evidence of specificity. If eleven different producer groups were held to be insufficient evidence of specificity by the Pork II Panel, Commerce should on remand explain the reasons why FISI coverage of

fifteen commodities in the Fifth Review should, in law, constitute substantial evidence of specificity.

With respect to the third factor, i.e., dominant or disproportionate use, Quebec has argued that FISI covered "82% of the total value of Quebec's insurable agricultural products excluding eggs, dairy products and poultry." Quebec Br. at 13. Eggs, dairy products and poultry are excluded by Quebec from its calculation of "insurable agricultural products" on the basis that "they are already insured against price and climatic risks through the federal government's supply management program".

While this Panel does not agree with Quebec's distinction between insurable agricultural production and total agricultural production<sup>32</sup>, there is evidence on the record of the value of total agricultural production covered by FISI. Specifically, the documents filed by Quebec indicate that FISI covered 38.6% of total Quebec agricultural production. See AR 22, Vol. 2, Appendix 3. Quebec has argued this evidence is relevant to a de facto specificity analysis and that Commerce has improperly ignored it.

This Panel agrees that the value of Quebec agricultural production covered by FISI is relevant to a de facto specificity analysis. The Proposed Regulations direct Commerce to consider all four of the factors, "among other things". In this Panel's view,

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<sup>32</sup> Commerce has determined that these programs are not integrally linked and Quebec has not advanced the position that they are. See, respectively, Final Results, 56 Fed. Reg. at 50564 (1991), and Tr. at 69. This Panel notes that the Swine IV Panel rejected the use by Quebec of "insurable production" values on the ground that this "underestimates the value of agricultural production in Quebec". Swine IV at 47, note 57.

it is insufficient for Commerce merely to count the number of commodities covered by FISI without considering whether these commodities account for a significant portion of total Quebec agricultural production. Supra, note 31.

Commerce should, on remand, consider the percentage of total Quebec agricultural production covered by FISI during the Review Period and explain whether this evidence is consistent with its determination that FISI is specific.

With respect to the fourth factor, Commerce states that the lack of change in FISI coverage since 1981 is relevant to determining the extent to which the Government of Quebec exercises discretion in conferring benefits under FISI. Commerce Br. at 50. However, as stated above, Commerce has not identified any substantial evidence on the record in this connection.

Further, Commerce has not directed this Panel to substantial evidence on the record that the Government of Quebec unreasonably exercised discretion in conferring benefits under FISI.<sup>33</sup> On remand, Commerce is directed to bring to this Panel's attention record evidence that the Government of Quebec has limited the availability of FISI or has otherwise exercised impermissible discretion in conferring benefits under the program.

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<sup>33</sup> With respect to governmental discretion, the Pork I Panel concluded that "[T]here is no substantial evidence on the record, as articulated by Commerce, that would support a conclusion that FISI was designed or administered to discourage applications or prevent the addition of other products as they apply." Pork I at 80.



D. Conclusion

To summarize, on remand, Commerce should:

1. Explain its practices and the standards which govern the reexamination, in a later administrative review, of a program that Commerce previously determined involved no subsidy;
2. Explain the reasons why Commerce should not follow the determination in the Pork proceedings that FISI was not countervailable.
3. Identify evidence on the record in the Fifth Review pertaining to the number of commodities covered by FISI in previous periods;
4. Explain whether the method of classification it applied to determine the number of participants in FISI is consistent with the method applied to determine the universe of potential participants in Quebec;
5. Consider the percentage of total Quebec agricultural production covered by FISI during the Review Period and explain whether this evidence is consistent with its determination that FISI is specific; and,
6. Identify any record evidence that the Government of Quebec has limited the availability of FISI or has otherwise exercised impermissible discretion in conferring benefits under the program.

V. BRITISH COLUMBIA FARM INCOME INSURANCE ACT SWINE PRODUCER'S FARM INCOME STABILIZATION PROGRAM

A. Introduction

In its Preliminary Results, 56 Fed. Reg. at 29226 (1991), Commerce found that FIIP was established in 1979 to assure income for farmers when commodity prices fluctuate below basic costs of production. Commerce made the following additional findings. Programs exist under the Farm Income Insurance Act in respect of: (1) beef; (2) tree fruits; (3) blueberries; (4) hogs; (5) processing vegetables; (6) processing strawberries; (7) lambs; and

(8) potatoes.<sup>34</sup> Guidelines with respect to swine producers were set out at Schedule B4 to the Act<sup>35</sup>. Sows and boars are not eligible for benefits. The program is administered by the Provincial Ministry of Agriculture and Food and the British Columbia Federation of Agriculture, and is funded equally by producers and the provincial government.

Having made these findings, Commerce concluded that:

Because [FIIP] is only available to farmers producing commodities specified in the Schedule B Guidelines, we preliminarily determine that this program is countervailable because payments were limited to a specific group of enterprises or industries.

Preliminary Results, 56 Fed. Reg. at 29226 (1991).

In the Final Results, Commerce concluded that:

Department's Position: we have addressed the issue of the general availability of FIIP in Live Swine Final Results. In that notice, the Department found that the program is limited to a specific group of enterprises or industries, and, therefore, is countervailable, because it is only available to farmers producing commodities specified under Schedule B guidelines to the Farm Income Insurance Act of 1973. Therefore, since this program is de jure specific, no determination of undue government discretion is required.

Final Results, 56 Fed. Reg. at 50563 (1991).

#### B. Issues

Essentially, the CPC has advanced three objections to the conclusions of Commerce with respect to FIIP. First, the CPC argues that neither the relevant statute pursuant to which the

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<sup>34</sup> Farm Income Insurance Act, R.S. 1979, c. 123 (the "Act").

<sup>35</sup> The Guidelines were in fact contained in the Farm Income Program Regulation, B.C. Reg. 394/79 (O.C. 2381/79).

program was established, nor the Schedule B Guidelines are on the record in the Fifth Review. The CPC concludes, therefore, that the determination of Commerce in this respect "has no evidentiary support" and "cannot be upheld in the absence of any record evidence." CPC Br. at 75.

Second, the CPC argues that FIIP is not de jure specific because benefits pursuant thereto are not limited to those producer groups listed in the Schedule B Guidelines. Rather, argues the CPC, "eligibility for FIIP is not conditional upon being listed in Schedule B". The CPC explains that "[c]ommodities are listed in Schedule B when they become subject to FIIP." (emphasis original). Id.

Third, the CPC argues that commodities accounting for 41% of British Columbia's Farm Cash Receipts (F.C.R.s) are covered by the federal government's supply management programs; that commodities covered by the Western Grains Stabilization Act (crop insurance) account for 3% of F.C.R.s; and that commodities covered by FIIP account for 36% of F.C.R.s. The CPC concludes, therefore, that "83% to 88% of the Farm Cash Receipts for the province are provided by commodities participating in one of these various programs."<sup>36</sup>

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<sup>36</sup> CPC Br. at 76-77. It seems difficult to understand how the CPC concluded that approximately 83%-88% of the F.C.R.s are provided by commodities covered by the various programs when the sum of the individual coverage figures quoted by the CPC amount to exactly 80%.

### C. Analysis

Throughout its pleadings in this proceeding with respect to FIIP, Commerce has argued that its "determination in the fifth review relies on its determination of this program in the fourth review, where it found FIIP de jure specific." Commerce Br. at 38. As noted above, see, Section III regarding FISI, there is authority in the U.S. that Commerce need not revisit a finding of counter-availability or non-counteravailability from review to review absent new information about the particular program. PPG Industries, Inc. v. United States, 746 F.Supp. at 134-5. Indeed, Commerce is required either to be consistent with or to explain the reasons for its departure from a prior determination. Citrosuco Paulista v. United States, supra.

Although Commerce is entitled to rely on its earlier determination that FIIP is de jure specific, it is incumbent upon Commerce to assemble record evidence that will establish that such a determination is supported by substantial evidence. Commerce has concluded that FIIP is de jure specific because benefits thereunder are available only for commodities listed in the Schedule B Guidelines. However, this Panel observes that the record is deficient in that neither the Farm Income Insurance Act nor the Schedule B Guidelines have been placed on the record. Likewise, the CPC complains that relevant legislative materials are not on the record in the Fifth Review, yet it continues to refer to these materials in its arguments. The CPC argues that "[c]ommodities have been added to, and removed from, Schedule B since the statute

authorizing FIIP was promulgated in 1973." CPC Br. at 75. The CPC adds that:

Raspberries (Schedule B10) were removed from the regulations (and, therefore, from participation in FIIP) in 1985, while potatoes (B11) were added in 1983. Before the dairy industry instituted a federal supply management program it participated in FIIP.

In order for this Panel to decide whether Commerce correctly concluded that FIIP is de jure specific, and to consider the arguments advanced by CPC, this Panel has reviewed the Farm Income Insurance Act and the regulations in question. Our preliminary review of the legislation indicates that the Schedule B Guidelines in question were repealed by B.C. Regulation 242/89, midway through the Review Period. British Columbia Gazette, Sept. 5, 1989, p. 252. The repeal of the Schedule B Guidelines in question during the Review Period calls into question the validity of Commerce's determination that FIIP is de jure specific. Similarly, the decision of the Swine IV Panel in this respect may not apply due to the repeal of Schedule B4 during the Review Period.<sup>37</sup>

By the same token, Complainants failed to bring to the attention of Commerce and the Panel the repeal of the Schedule B guidelines even though the Questionnaire specifically asked whether there had been any changes in FIIP since the preceding annual review.

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<sup>37</sup> The Swine IV Panel upheld Commerce in its determination in the fourth review that FIIP was limited to a specific group of enterprises or industries because availability of benefits thereunder was limited to those commodities listed in the Schedule B Guidelines. Swine IV at 70.

In light of the foregoing facts, the Panel<sup>38</sup> remands for Commerce to: (1) consider whether complainants waived any argument they might have advanced based on the repeal of Schedule B4 by their failure to bring it to the attention of Commerce in a timely fashion, (2) consider whether, in light of Commerce's specific reliance on Schedule B, Commerce was under any obligation to obtain an up to date copy of the law, (3) explain the impact of the repeal of Schedule B upon its determination that FIIP was de jure specific during the Review Period, and (4) if the repeal of Schedule B is inconsistent with Commerce's determination that FIIP was de jure specific throughout the Review Period, explain whether FIIP is de facto specific in light of evidence on the record.

## VI. ALBERTA CROW BENEFIT OFFSET PROGRAM

### A. Introduction

#### 1. The Program in Question

To make grain grown in the prairie provinces of Canada available to all consumers at similar prices, the federal government pays a portion of transportation costs pursuant to the Western Grains Transportation Act ("WGTA"). While these expenditures known as "Crow Benefit" payments, have made grain available throughout Canada at similar prices, they have tended to increase the price of grain in Alberta and some of the other farm provinces. Preliminary Results, 56 Fed. Reg. at 29227 (1991).

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<sup>38</sup> Panelist Schwechter dissents from the remand in Item nos. 3 and 4.

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.

2. The Determination in Question

In its Preliminary Results, Commerce determined that:

Because this program is limited to feed grain users, we preliminarily determine that it is limited to a specific group of enterprises or industries, and is therefore countervailable. Preliminary Results, 56 Fed. Reg. at 29227 (1991).

In its Final Results, Commerce determined that ACBOP certificates and payments provide an economic benefit to swine producers because the countervailed benefits are paid directly to swine producers, thus reducing their production costs. Final Results, 56 Fed. Reg. at 50562 (1991). In addition, Commerce confirmed 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. Preliminary Results, 56 Fed. Reg. at 29227. The CPC did not submit new information about the program which may have altered Commerce's long-standing interpretation, Final Results, 56 Fed. Reg. at 50562 (1991).

## B. Issues

As it did in the proceedings before the Swine IV Panel, the CPC argues that ACBOP is not countervailable because it does not provide swine producers with an economic benefit. CPC Br. at 53. Second, even if there is an economic benefit, the CPC argues that the benefit is received by grain producers, not grain consumers (such as swine producers), and thus, that an upstream subsidy investigation, pursuant to section 771A of the Tariff Act of 1930, 19 U.S.C. § 1677-1 (1992), is required before any benefits that flow through to swine producers may be countervailed. Id. at 62. Finally, in the event that this Panel upholds Commerce's determinations in other respects, the CPC claims that the subsidy calculations are incorrect. Id. at 49.

## C. Analysis

### 1. Offsets

CPC argues that ACBOP merely counteracts the disadvantages of a related program, thus resulting in no overall economic benefit to swine producers. Id. at 55. In support of its position, the CPC cites Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 39345 (1982) and Certain Steel Products from Belgium, 47 Fed. Reg. 39304 (1982), as examples of cases in which offset programs were not found countervailable. However, only certain costs incurred by producers which receive benefits under a program may be deducted from gross payments in determining the net benefit or subsidy conferred. For purposes of determining the net subsidy in each case, section 771(6) of the Act permits Commerce to deduct from the gross subsidy 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).

In this Panel's view, this provision cannot reasonably be interpreted to permit nor require Commerce to deduct from gross ACBOP payments an amount corresponding to the increase in the cost of grain in Alberta resulting from the Crow Benefit payments. Thus, the position of the CPC in this respect is not in accordance with law and does not provide a basis upon which to disturb the findings of Commerce. See Pork I and Swine IV, supra, which held likewise.

## 2. Upstream Subsidies

CPC alternatively argues, as it did in Swine IV, that if this Panel concludes that ACBOP provides an economic benefit, then that benefit is received by grain producers (not grain users) and Commerce must perform an upstream subsidy investigation pursuant to section 771A of the Tariff Act of 1930.<sup>39</sup> CPC Br. at 61-62. The

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<sup>39</sup> Section 771A defines upstream subsidies as follows:

The term "upstream subsidy" means any subsidy described in section 1677(5) (B) (i), (ii), (iii), or (iv) of this title by the government of a country that --

- (1) is paid or bestowed by that government with respect to a product (hereafter referred to as an "input product") that is used in the

(continued...)

record supports the determination of Commerce that swine producers raising grain receive ACBOP payments, either in the form of cash or certificates. This receipt of ACBOP benefits by swine producers is clearly a direct benefit that reduces the swine producers' production costs. <sup>40</sup> Preliminary Results, 56 Fed. Reg. at 29227 (1991). No upstream subsidy analysis is, therefore, required.

### 3. Calculation

Commerce determined the net subsidy in respect of ACBOP benefits by calculating the ratio of swine grain consumption to weight gain. 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 3.483 pounds of grain to one pound of swine weight gain. Preliminary Results, 56 Fed. Reg. at 29227 (1991). During the administrative review, the CPC argued that the use of this publication was improper because the ratio incorrectly measured feed instead of grain consumed, and did not factor out the use of protein supplements in feed. Thus,

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<sup>39</sup>(...continued)

manufacture or production in that country of merchandise which is the subject of a countervailing duty proceeding;

(2) in the judgment of the administering authority bestows a competitive benefit on the merchandise; and

(3) has a significant effect on the cost of manufacturing or producing the merchandise.

19 U.S.C. § 1677-1(a).

<sup>40</sup> See also, CPC Br. at 51. Thus, the government is paying a subsidy directly to swine producers, which subsidy lowers their cost of production.

the CPC submits that Commerce's benefit determination was too high. Commerce rejected these arguments on the grounds that its calculation was based on the best information available because the information obtained at verification was inadequate. Final Results, 56 Fed. Reg. at 50562 (1991).

During the course of the proceedings of the fourth administrative review (USA 91-1904-03), the CPC asked that 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. They granted CPC's motion on November 25, 1991. Swine IV, Preliminary Ruling, supra, at 8. In its Brief, submitted in the instant proceedings, Commerce requested a remand to consider these documents because its determination in the Fifth Review was made before the Swine IV Panel's ruling. Commerce Br. at 35. This Panel grants (1) Commerce's request to re-open the record for the sole purpose of including the documents admitted into the record by the Swine IV Panel in its November 25, 1991 Order and (2) Commerce's request for a remand to consider this new evidence.<sup>41</sup>

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<sup>41</sup> This Panel views this request to reopen the administrative record differently than every other instance in which this Panel has been asked to consider non-record evidence for three reasons. First, Swine IV ordered Commerce to re-open the administrative record in the fourth administrative review to include this information on November 25, 1991, after both the Preliminary and the Final Results in the Fifth Review had been issued. Second, all parties have agreed that the record in this case should be reopened to include the documents that were the subject of the November 25, 1992 Panel Order. Third, in this instance, the evidence has been obtained and formally offered by the parties; the Panel has not been asked to search out non-record facts to support elusive references.

It should be noted, however, that in responding to questions of this Panel, Counsel to Commerce explained that the methodology employed demonstrated that only grains had been included in the subsidy calculations of Commerce, based on USDA documents. Tr. at 221-22. This document segregates the values for grain and for supplements. The grain value is the 3.483 grain/gain ratio which was used in the Commerce calculations. This Panel finds Commerce's explanations as to why it rejected the information submitted by the Government of Alberta about appropriate feed/gain ratios inadequate. This Panel, therefore, remands to Commerce on this point as well so that it may explain, in detail, based on information in the record, why they rejected the evidence of feed/gain ratios filed by the Government of Alberta and to explain why they considered the said USDA publication to be preferable.

## VI. FEED FREIGHT ASSISTANCE PROGRAM

### A. Introduction

#### 1. The Program in Question

The FFA is administered by the Livestock Feed Board of Canada under the Livestock Feed Assistance Act of 1966. To make feed grains available throughout Canada at similar 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.<sup>42</sup>

## 2. The Determination in Question

Commerce determined that swine producers in British Columbia, Quebec, New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island and certain portions of Ontario, received FFA benefits. Id. In holding that these benefits conferred countervailable subsidies on swine producers, Commerce stated:

The arguments raised by the CPC regarding the countervailability of the FFA and the need for an upstream subsidy investigation have been fully addressed in Live Swine Final Results. As the Department stated in that Notice, the FFA benefits paid to feed producers who indicate that they raise live swine are countervailable because they result in reduced costs for live swine producers. For this reason, no upstream subsidy investigation is required.

Final Results, 56 Fed. Reg. at 50562-63 (1991).

### B. Issues

The CPC challenges these determinations on the same grounds as they did in Swine IV. First, it argues that, although FFA benefits are paid to swine 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.<sup>43</sup>

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<sup>42</sup> Preliminary Results, 56 Fed. Reg. at 29224 (1991).

<sup>43</sup> CPC Br. at 51 (emphasis in original).

Thus, the CPC argues that only feed grain producers (not swine producers as such) benefit from the FFA. Second, to the extent that swine producers benefit from the FFA, the CPC argues that the benefit is received with respect to an input (i.e., feed grain) and that Commerce should have performed an upstream subsidy investigation pursuant to section 771A of the Tariff Act of 1930. The CPC does not challenge Commerce's specificity determination under section 771(5) of the Act.

C. Analysis

1. Economic Benefit

It is undisputed that FFA payments are made directly to livestock producers that mill grain. See CPC Br. at 50. 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 3.25 percent (\$544,503) of the transportation assistance might have been paid directly to or for the benefit of swine producers.<sup>44</sup>

In analyzing ACBOP, this Panel agreed with the Swine IV Panel that the cost of producing swine is reduced any time swine producers directly receive benefits under a program designed to provide assistance in purchasing grain.<sup>45</sup> Further, the Panel in Pork I stated that:

The benefits under the FFA received by a hog producer, related to the purchase of grain,

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<sup>44</sup> A.R. Tab 22.

<sup>45</sup> Swine IV at 64.

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 benefitted 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), dismissed on other grounds, 698 F. Supp. 912 (Ct. Int'l. Trade 1988).

Pork I, at 56.

Like our colleagues in Swine IV, this Panel 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 reduce their costs of production.

## 2. Upstream Subsidy

The CPC argues that Commerce must conduct an upstream subsidy investigation to determine what benefits, if any, flow to swine producers from payments that the CPC argues only benefit grain millers.<sup>46</sup> Since this Panel has concluded that this program directly benefits swine producers, in our view, the refusal of Commerce to conduct an upstream subsidy investigation is in accordance with law. Therefore this Panel upholds the determination of Commerce with respect to the FFA.

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<sup>46</sup> CPC Br. at 62.

VII. SOWS AND BOARS

In the first administrative review of the Order, Commerce conducted a scope inquiry and determined that sows and boars were within the scope of the Order, but that they constituted a separate subclass of merchandise. See Final Results, 56 Fed. Reg. at 50565, referencing Live Swine from Canada: Final Results CVD Administrative Review, 54 Fed. Reg. 651 (1989). Quintaine did not challenge these findings after the first administrative review. Quintaine Rep. Br. at 8.<sup>47</sup>

In the Fifth Review, Commerce held that its Final Results in the first administrative review of this Order remain unchanged because Quintaine submitted no new information. Commerce therefore reaffirmed its earlier determination that sows and boars are within the scope of the Order, but constitute a separate subclass. Final Results, 56 Fed. Reg. at 50565.

Throughout these proceedings Quintaine has argued that Commerce erred by not finding that sows and boars were outside the scope of the Order.<sup>48</sup> Quintaine further argues that had Commerce given adequate consideration to the wording of 19 C.F.R. § 355.29(i)(1), rather than refusing to reconsider its prior determination, Commerce would have found that sows and boars were

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<sup>47</sup> Reply Brief submitted to this Panel by Quintaine, May 6, 1992 hereinafter identified as "Quintaine Rep. Br."

<sup>48</sup> Quintaine's arguments regarding the countervailability of individual programs are addressed in the preceding sections and will not be considered again here.



outside the contemplation of the original petition and the ITC's basis of injury.<sup>49</sup>

In the alternative, Quintaine argues that if 19 C.F.R. § 355.29(i)(1) was not dispositive, then the criteria in 19 C.F.R. § 355.29(i)(2) should have led Commerce to the conclusion that sows and boars were outside the scope of the Order. Quintaine maintains that sows and boars differ from hogs in respect of physical characteristics, expectations of ultimate purchasers, the ultimate use of the product and channels of trade. Quintaine Br. at 9-10.<sup>50</sup>

Commerce argues that because sows and boars were found to be within the scope of the Order, in the first administrative review, absent new evidence which was not submitted, Commerce does not have the authority to revisit the issue in the Fifth Review. Final Results, 56 Fed. Reg. at 50565 (1991). Commerce argues that it properly applied the Diversified Products Analysis to determine

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<sup>49</sup> Scope determinations are governed by 19 C.F.R. § 355.29(i) which instructs the Secretary, when considering whether a particular product is within the class or kind of merchandise described in an existing order, to take into account the following:

- (1) The description of the product contained in the petition, the initial investigation and the determinations, the Secretary and Commissioner.
- (2) When the above criteria are not dispositive, the Secretary will further consider: (i) the physical characteristics of the product; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; and (iv) the channels of trade.

Quintaine argues that Commissioner Rohr's statement that "the live swine being complained of are slaughter hogs" undermines Commerce's position that there was an unambiguous definition of merchandise within the scope of the Order.

<sup>50</sup> Quintaine Brief submitted to this Panel, February 20, 1992, hereinafter identified as "Quintaine Br."

that sows and boars were a subclass of the merchandise covered by the Order and that sufficient grounds existed for calculating a separate duty for sows and boars. Final Results, 56 Fed. Reg. at 50560 (1991); Commerce Br. at 58.

Quintaine had the opportunity to challenge the results of the scope inquiry on sows and boars after the first administrative review, under 19 U.S.C. § 1516a(a), but did not. Commerce, therefore does not have the legal basis to reexamine the scope issue in the Fifth Review absent new information.<sup>51</sup>

Quintaine responds that it is not estopped from bringing the scope issue before this Panel because Commerce could have conducted the scope review on its own initiative and that any appeal by Quintaine would have been futile. Quintaine Rep. Br. at 8-9.

This Panel notes, that the Swine IV Panel ruled on these very arguments. Swine IV, at 49-51. The facts in that decision are virtually identical to the facts at issue here, with the exception that in the previous review, Quintaine did not make its scope arguments before Commerce, but introduced them for the first time before that Panel. This Panel finds that this distinction is not dispositive and the Swine IV Panel's decision is intrinsically persuasive.

The doctrine of exhaustion of administrative remedies is a "general legal principle" that the FTA obligates this Panel to apply. See FTA, Articles 1911 and 1904(3). This doctrine provides

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<sup>51</sup> Pursuant to 1516a(a)(2)(A)(ii), Quintaine failed to make a timely objection to the determination in the First Administrative Review.

that the courts do not have jurisdiction to review administrative action unless the entity seeking to challenge that action has utilized the prescribed administrative procedures for raising its point. See Swine IV, at 49-51; Royal Business Machines Inc. v. U.S., 507 F. Supp. 1007 (Ct. Int'l. Trade 1980), aff'd 669 F.2d 692 (C.C.P.A. 1987); Sharp Corp. v. U.S., 837 F.2d 1058 (Fed. Cir. 1988), citing Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), 581 S. Ct. 459 (1938).

Quintaine contends that it did not challenge the results of the first administrative review because it would have been an exercise in futility. Quintaine maintains that futility is a judicially approved exception to the doctrine of exhaustion of administrative remedies.

This Panel finds the reasoning of the Swine IV Panel persuasive and concludes that Quintaine's failure to raise its scope arguments was a manifestation of its perception of limited success in this regard. This is not sufficient justification to buttress its argument that having done otherwise would have been futile and an exception to the doctrine of exhaustion of administrative remedies. The futility arguments raised in this proceeding are similar to the ones raised in PPG v. United States, 746 F. Supp. 119 (Ct. Int'l. Trade 1990). That court held:

Under certain unusual circumstances, such as futility of pursuing the administrative relief available, failure to exhaust administrative remedies will not preclude judicial review . . . The fact that a party to an administrative proceeding finds an argument may lack merit, or had failed to prevail in a prior proceeding based on different facts, does not, without more, rise to the level of futility barring exhaustion.

Id. at 137. That "futility" is properly a very limited exception to the doctrine of exhaustion is made more clear by the U.S. Supreme Court which held that:

. . . a failure to enforce the exhaustion of administrative remedies principle could lead to "frequent and deliberate flouting of the administrative process [that] could weaken the effectiveness of an agency . . . . Budd Co. Wheel and Brakes Division v. United States, 773 F. Supp 1549, 1555 (Ct. Int'l. Trade 1991), citing McKart v. United States, 395 U.S. 185, 193, 89 S. Ct. 1657, 1663, (1969).

Accordingly, this Panel affirms Commerce's determination that it was not required to reconsider its earlier finding that sows and boars were within the scope of the Order.

#### VIII. WEANLINGS

##### A. Introduction

In the fourth administrative review, Commerce determined that weanlings were included in the scope of the Order. See Live Swine From Canada; Final Results of Countervailing duty Administrative Review, 56 Fed. Reg. 28531, 28536 (1991). The Swine IV Panel reviewed the scope determination and held that "Commerce's determination, that weanlings are within the scope of the order is reasonable and in accordance with law." Swine IV, at 53. In the Final Results, Commerce found that: (i) Pryme had not submitted new information requiring Commerce to reexamine its previous determination that weanlings were within the scope of the countervailing duty order; (ii) that Pryme's request for a subclass determination for weanlings was untimely and required information not in the record; (iii) and that there was no basis for

determining an individual rate for Pryme. Final Results, 56 Fed. Reg. at 50564 (1991).

Pryme challenges Commerce's finding on the following, alternative grounds: (1) that Commerce erred in not finding weanlings outside the scope of the Order; (2) that Commerce erred by not establishing a separate subclass for weanlings; (3) that Commerce erred by not calculating an individual duty rate for Pryme; and (4) that Commerce erred by finding specific national and provincial programs countervailable.<sup>52</sup> Pryme Br. at 4-5.

1. Scope Determination

Scope determinations are governed by 19 C.F.R. § 355.29(i) (the "Diversified Products Analysis"), which instructs the Secretary, when considering whether a particular product is within the class or kind of merchandise described in an existing order, to take into account the following:

- (1) The description of the product contained in the petition, the initial investigation and the determinations of the Secretary and Commission.
- (2) When the above criteria are not dispositive, the Secretary will further consider:
  - (i) the physical characteristics of the product;
  - (ii) the expectations of the ultimate purchasers;
  - (iii) the ultimate use of the product; and

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<sup>52</sup> Having already spoken to the countervailability of specific programs, this Panel addresses only the arguments raised by Pryme regarding Commerce's scope, subclass, and individual rate determinations in this section.

(iv) the channels of trade.

19 C.F.R. § 355.29(i).

Pryme challenges the determination of Commerce and the logic of Swine IV. Pryme contends that Commerce's determination, based solely on the criteria under 19 C.F.R. § 355.29(i)(1), is wrong because said section is not dispositive and therefore Commerce must examine the criteria in 19 C.F.R. § 355.29(i)(2). In this regard, Pryme argues that weanlings are not within the scope of the countervailing duty Order according to the criteria under 19 C.F.R. § 355.29(i)(1) for two reasons. First, the International Trade Commission defined live swine as animals based for immediate slaughter. Second, weanlings are classified under the Harmonized Tariff System as item number 0103.91.00 dealing with swine weighing under 50 kgs while hogs are classified under the Harmonized Tariff System as item number 0101.92.00 dealing with swine weighing over 50 kg. See Pryme Br. at 6-11. See also Pryme Rep. Br. at 6. However, Commerce argues that once the original scope determination has been made and upheld on appeal, Commerce only has the ability to clarify the scope based on the presentation of new facts. See Commerce Br. at 63-64.

This Panel recognizes that Commerce does not have a duty or even the ability to revisit scope determinations absent new evidence presented by the parties. See Royal Business Machines, 507 F. Supp. at 1015; Diversified Products Corp. v. United States, 572 F. Supp. 883 (Ct. Int'l. Trade 1983); Kyowa Gas Chemical Industry Co., Ltd. v. United States, 582 F. Supp. 887, 889 (Ct. Int'l. Trade 1984). The Panel also finds that Pryme did not

present new evidence of the sort required to initiate a new scope inquiry.<sup>53</sup> Therefore, the Panel affirms Commerce's decision not to conduct a scope inquiry regarding Weanlings in the Fifth Review.

2. Subclass Determination or Individual Rate

The next substantive issue with which this Panel must grapple is whether Commerce erred in law and in fact by not recognizing a separate subclass for weanlings or calculating a separate duty rate for Pryme. Commerce has argued that Pryme's request for a separate rate for weanlings or, alternatively, a company-specific rate was untimely, as it was submitted after the publication of the Preliminary Results. See Commerce Br. at 65. In any event, Commerce stated, in the Final Results, that Commerce had considered the request and determined that a subclass determination or company-specific rate would require further information and that it would have been inappropriate to delay the proceedings to solicit the requisite information. See Final Results, 56 Fed. Reg. at 50564 (1991).

Pryme concedes that its request was sent after the Preliminary Results were issued. However, Pryme has argued that the issue of timeliness should be tempered by the relatively short period of time between the rejection of Pryme's argument in the Fourth Administrative Review and the publication of the Preliminary

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<sup>53</sup> The Panel recognizes that Harmonized Tariff System item numbers are provided only for convenience and that the written description remains dispositive. This Panel also finds no merit in Pryme's argument that the ITC defined swine as only those animals destined for immediate slaughter.

Results in the Fifth Review.<sup>54</sup> Pryme further contends that Commerce was obligated to initiate subclass and individual rate determinations sua sponte during the Fifth Review.<sup>55</sup>

Commerce has the discretion and ability to establish its own rules of procedure so long as those rules do not contravene the law. See Rhone Poulenc, Inc. v. United States, 710 F. Supp. 348, 350 (Ct. Int'l. Trade 1989), aff'd, 899 F.2d 1185 (Fed. Cir. 1990), citing Vermont Yankee Nuclear Power Corp. v. Nat. Resources Defence Council, 435 U.S. 519, 544-45 (1978) This discretion includes "the authority to set and enforce time limits on the submission of data." Id. However, the record in this review is not conclusive as to what Commerce's practice and procedure are in this area.

Accordingly, this Panel remands to Commerce to review the record and explain why there is insufficient information on the record to create, or consider the request to create, a separate subclass for weanlings.

Further, on remand, this Panel directs Commerce to articulate its practice and procedure on accepting requests for subclass and individual rate determinations after publication of its preliminary results of administrative review. Specifically, this Panel

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<sup>54</sup> This Panel notes that on June 21, 1991, Commerce rejected Pryme's subclass request in the fourth administrative review. On June 26, 1991, three business days thereafter, Commerce issued its Preliminary Results in the Fifth Review. On July 3, 1991, Pryme wrote to the Secretary requesting relief. Tr. at 236.

<sup>55</sup> This Panel has not been referred to any precedent requiring Commerce to initiate subclass or individual rate investigations on its own. Therefore, this Panel assumes that Commerce's failure to initiate an investigation of the possibility of a subclass for weanlings, or an individual rate for Pryme, was not an abuse of discretion.



requests information on the practice followed by Commerce when a request follows the preliminary results, whether there are exceptions to the general practice, and if there are such exceptions, why those exceptions were not applicable in this case.

X. CONCLUSION

For the foregoing reasons, Commerce's determination is affirmed in part and remanded in part. On remand, Commerce is directed to follow the specific remand instructions set forth at the end of each section. The determination on remand shall be provided by Commerce to the Panel within 60 days of this decision. The Article 1904 Panel Rules published in the Federal Register on June 15, 1992 shall apply if any participant wishes to challenge the determination on remand.

_____	_____
Date	Glenn A. Cranker
_____	_____
Date	Peter Clark
_____	_____
Date	Wilhelmina K. Tyler
_____	_____
Date	Mark D. Herlach
_____	_____
Date	Melvin S. Schwechter



UNITED STATES - CANADA FREE TRADE AGREEMENT  
ARTICLE 1904 BINATIONAL PANEL

IN THE MATTER OF:

LIVE SWINE FROM CANADA

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)  
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)

Secretariat File No.  
USA-91-1904-04

DECISION OF THE PANEL  
June 11, 1993

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CANADIAN PORK COUNCIL AND ITS MEMBERS; GOVERNMENT  
OF CANADA; GOUVERNEMENT DU 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:

Glenn A. Cranker, Chairperson  
Wilhelmina K. Tyler  
Peter Clark  
Mark D. Herlach  
Alan Kashdan

Appearances:

*Homer E. Moyer, Jr., Catherine Curtiss, Philip J. Ferneau, Amy L. Rothstein for Government of Canada; Valerie A. Slater, P.C., Spencer S. Griffith, Shannon S. Herzfeld, James E. Mendenhall, for Gouvernement du Québec; William K. Ince, Michele C. Sherman, for Canadian Pork Council and Its Members; Joel K. Simon, Christopher M. Kane, for P. Quintaine & Sons Ltd. and Pryme Pork Ltd.*

*Stephen J. Powell, 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

### A. BACKGROUND

This Binational Panel ("Panel") was convened pursuant to Article 1904 of the United States-Canada Free Trade Agreement ("FTA"), and its corresponding implementing legislation<sup>1</sup>, to review the Final Results<sup>2</sup> of the International Trade Administration, U.S. Department of Commerce ("Commerce"), for the fifth annual administrative review ("Review Period") of the countervailing duty order ("Order")<sup>3</sup> on imports of live swine from Canada. Proceedings before the Panel were initiated on October 11, 1991 when the Canadian Pork Council ("CPC") filed a Request for Panel Review.

On August 26, 1992 the Panel issued its first decision ("August 26 Decision"). In that decision, the Panel affirmed Commerce's determination regarding the Canadian federal government's Feed Freight Assistance program ("FFA"), which is designed to provide users of feed grains in certain regions with transportation cost assistance. August 26 Decision, at 64. The Panel also affirmed Commerce's determination that sows, boars and

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<sup>1</sup>United States-Canada Free Trade Agreement, January 1, 1988, 27 I.L.M. 281 (1988), in force January 1, 1989. United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. 100-449, 102 Stat. 1851. Binational Panel jurisdiction is provided for by Article 1904(2), FTA, and by § 516A(g) (2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g) (2) (1992).

<sup>2</sup>Live Swine from Canada; Final Results of Countervailing Duty Administrative Review, (C-122-404), 56 Fed. Reg. 50560 (1991) ("Final Results"). In the Final Results, Commerce found that the net subsidy for the review period was 0.0049/lb Canadian Dollars ("CAD") for sows and boars and 0.0932/lb CAD for other live swine. Final Results, 56 Fed. Reg. at 50565.

<sup>3</sup>Countervailing Duty Order; Live Swine from Canada, 50 Fed. Reg. 32880 (August 15, 1985).

weanlings are within the scope of the Order. August 26 Decision, at 69 and 72.

The Panel remanded to Commerce its determinations regarding:

- (i) the National Tripartite Stabilization Scheme for Hogs ("Tripartite"), which is a farm income stabilization program funded by the Canadian government, the provincial governments and by farmers;
- (ii) the Quebec Farm Income Stabilization Insurance program ("FISI"), which is a provincial farm income stabilization program covering agricultural production in the Province of Quebec;
- (iii) the British Columbia Farm Income Insurance Program ("FIIP"), which is also a provincial farm income stabilization program, covering agricultural production in the Province of British Columbia; and,
- (iv) the Alberta Crow Benefit Offset Program ("ACBOP"), which is a provincial program designed to compensate grain users in Alberta for the increased cost to them of grain resulting from the effect of the FFA on the grain market. August 26 Decision, at 33, 50, 55 and 60, respectively. Each of the programs involved in this proceeding has been more fully described in our August 26 Decision. The Panel also remanded to Commerce for further explanation its determinations that it could not establish a separate countervailing duty ("CVD") rate for weanlings or a separate company specific rate for Pryme Pork Ltd. ("Pryme"). August 26 Decision, at 73.

On October 30, 1992, Commerce filed the final results of its Redetermination pursuant to remand.<sup>4</sup> Commerce redetermined that Tripartite, FISI and FIIP conferred countervailable subsidies upon specific industries or groups of industries during the Review Period. Redetermination, at 5, 46 and 67, respectively. Commerce also redetermined that Pryme's request for the establishment of a separate subclass for weanlings was untimely and, in any event, that the record does not contain sufficient information for it to determine any such separate rates. Redetermination, at 74. With respect to ACBOP, Commerce recalculated the benefit conferred under the program and redetermined that the proper amount thereof received by swine producers during the Review Period is CAD 4,392,551, resulting in a benefit of CAD 0.00041/lb. Redetermination, at 72.

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<sup>4</sup>Live Swine from Canada; Final Results of Redetermination Pursuant to Binational Panel Remand, USA-91-1904-04, October 30, 1992 ("Redetermination").

The Redetermination has been challenged by the Complainants, each of which has filed its respective brief<sup>5</sup>, and the Parties were heard in oral argument in Washington, D.C., on December 17, 1992.<sup>6</sup>

B. Decisions of Prior Binational Panel and Extraordinary Challenge Committee

This Panel is the third Binational Panel which has reviewed Commerce determinations regarding certain Canadian agricultural programs such as Tripartite and FISI. The First Binational Panel In the Matter of Fresh, Chilled or Frozen Pork from Canada USA-89-19-04-06, March 8, 1992. ("Pork Panel") concluded that it was not unreasonable for Commerce to determine that Tripartite was countervailable in light of the limited number of agricultural industries covered under the program. However, the Pork Panel

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<sup>5</sup>Live Swine From Canada: Challenge of the Government of Canada to the Final Results of Redetermination Pursuant to Binational Panel Remand of the Department of Commerce, USA-19-1904-04, November 24, 1992 ("Canada Challenge"); Live Swine From Canada: Challenge by the Government du Quebec to the U.S. Department of Commerce Redetermination on Remand, USA-19-1904-04, November 24, 1992 ("Quebec Challenge"); Live Swine From Canada: Challenge [by the CPC and its Members] Under rule 75 to the Department's "Final Results of Redetermination Pursuant to Binational Panel Remand", USA-19-1904-04, November 24, 1992 ("CPC Challenge"); Live Swine From Canada: Challenge [by Pryme] to Redetermination Pursuant to Remand, USA-19-1904-04, November 18, 1992 ("Pryme Challenge"). P. Quintaine & Sons Ltd. has not challenged the Redetermination.

<sup>6</sup>On December 23, 1992, Panelist Melvin S. Schwechter withdrew from the Panel to avoid any conflict of interest which could arise due to his participation in another matter involving certain issues that are similar to those before this Panel. As a result, pursuant to Rule 78, proceedings before the Panel were suspended pending the selection of a substitute Panelist. The suspension was lifted on March 23, 1993, after Alan Kashdan was selected as substitute Panelist.



disagreed with Commerce's conclusion that FISII conferred a countervailable subsidy.<sup>7</sup>

In contrast, the Binational Panel which reviewed the final results of Commerce's fourth annual administrative review of the Order ("Swine IV Panel") issued a decision on October 30, 1992, which, among other things, directed Commerce to remove Tripartite and FISII benefits from its duty calculations for that period of review and instructed Commerce to calculate a separate CVD rate for weanlings. In the Matter of Live Swine From Canada: Memorandum Opinion and Order of the Binational Panel, USA-91-1904-03, October 30, 1992 ("Swine IV"), at 30, 37 and 38, respectively. The decision in Swine IV was the subject of Extraordinary Challenge proceedings under the FTA, which were concluded on April 8, 1993, when the Extraordinary Challenge Committee issued its decision, declining to disturb the decision of the Swine IV Panel. See, In the Matter of Live Swine From Canada: Memorandum Opinion and Order Regarding Binational Panel Decision and Order, ECC-93-1904-01 USA, April 8, 1993 ("ECC II"). The Committee stated that, based upon the record before it, it could not conclude that the Swine IV Panel "did not conscientiously apply the appropriate standard of review...." ECC II, at 11. Further, the Committee made the following remarks:

Not only did the Panel accurately articulate its standard of review in rendering its two decisions, it also discussed and referred to the standard of review in other sections of its first decision, and concluded after a brief discussion of the

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<sup>7</sup>The Pork Panel concluded as follows: "The evidence on the record is thus insufficient to support a decision that the number of recipients of FISII is so small as to be *de facto* a subsidy." USA-89-1904-06, March 8, 1991, at 20.

specificity test, that Commerce's determination was not in accordance with law, nor based on substantial evidence in its second decision. Decision I at 15-22,26-77; Decision II at 22-27, 30, 36. Although we need not and will not reach a decision on the merits of these conclusions, the Committee felt the Panel may have erred. Nonetheless, on balance, the Committee was not persuaded that the Panel failed to apply the properly articulated standard of review. ECC, at 13.

The ECC II decision was formally brought to the attention of the Panel by the NPPC as a subsequent authority. The Panel convened again for a hearing in Washington D.C. on May 25, 1993, and the parties were permitted to file briefs on the effect, if any, of ECC II on this proceeding. In the Matter of Live Swine From Canada: Request for Consideration of Subsequent Authority, USA-19-1904-04, April 8, 1993.

Commerce has argued that the above-mentioned comments in ECC II that "the Panel may have erred" indicate that the Swine IV Panel "misinterpreted U.S. law" and, therefore, erred when it held that Commerce applied an improper specificity test in those proceedings. In the Matter of Live Swine From Canada: Brief of the Department of Commerce on the Effect of the Extraordinary Challenge Committee Decision, USA-91-1904-04 (C-122-404), May 14, 1993, at 4. To the contrary, the complainants contended that the Committee concluded that the Swine IV Panel "had properly applied the deference standard" required under U.S. law. In the Matter of Live Swine From Canada: Brief of the Government of Canada on the Effect of the Extraordinary Challenge Committee Decision, USA-91-1904-04, May 14, 1993, at 11.

Despite the Committee's comments "that the Panel may have erred", it was very clear to provide that "[it] need not and will not reach a decision on the merits" of the conclusions of the Swine

IV Panel. ECC II, at 13. Accordingly, having regard to the limited jurisdiction of the Committee, the ECC II decision is not relevant to the merits of this proceeding, which the Panel has considered in the context of the administrative record in this Review Period.

Binational Panel and Extraordinary Challenge Committee decisions have binding effect in respect of the "particular matter" before them. They do not bind courts or subsequent Panels and Committees. Accordingly, the decisions in Pork, Swine IV and ECC II do not in any way bind this Panel or otherwise create any legal effects in respect of the particular matters that we are called upon to decide in this proceeding. They do, nevertheless, provide this Panel with interpretations of the relevant provisions of the FTA and the U.S. implementing legislation which underlie our jurisdiction and authority. To the extent that we find their interpretations to be intrinsically persuasive, we are free to adopt their conclusions and reasoning.

C. Role of Binational Panels

Although Binational Panels perform certain functions previously entrusted to the Court of International Trade, they are not appellate courts. Nevertheless, Panels are required under articles 1904(3) and 1911 of the FTA to hold unlawful the determinations of Commerce that do not meet the standard of review set forth in § 516A(b)(1)(B) of the Tariff Act of 1930, as amended, (19 U.S.C. § 1516a(b)(1)(B) (1992)). ECC II, at 11. That is, Panels are required to hold unlawful the determinations of Commerce that are unsupported by substantial record evidence or otherwise

not in accordance with law.<sup>8</sup> However, Panels "must follow and apply the law, not create it." ECC II, at 14. Moreover, like the Court of International Trade, Panels must show deference to Commerce with respect to its interpretation of the law, as well as its determinations on the facts in each case. Id.<sup>9</sup> At the same time, Commerce must respond to and respect a Panel's requests and instructions in the same manner as it would those of the Court of International Trade. ECC II, at 15.

D. Decision of the Panel

On the basis of the reasons which follow, the Panel has decided to:

1. AFFIRM Commerce's redetermination that Tripartite was countervailable during the Review Period. The Panel has concluded that substantial evidence in the record supports Commerce's redeterminations that:
  - (a) Hog producers were the dominant users of Tripartite in that 81 percent of all Tripartite payments went to hog producers during the Review Period and hog producers had received 72 percent of benefits conferred under the program to date;
  - (b) There were too few users of Tripartite—at most less than twenty percent of eligible commodities actually participated in the program; and,
  - (c) No other factor or record evidence raises a significant question with regard to Commerce's determination of countervailability during the Review Period.

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<sup>8</sup>In our August 26 Decision, the Panel articulated and elaborated upon the applicable standard of review, and has throughout these proceedings considered at some length and applied the authorities that are relevant in that respect. August 26 Decision, at 4-8.

<sup>9</sup>See, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); American Lamb Co. v. United States, 785 F. 2d 994 (CAFC 1986).

2. REMAND Commerce's Redetermination regarding FISI, with instructions for it to remove FISI benefits from its duty calculation for the Review Period. The Panel concludes that Commerce's redetermination that FISI provided a subsidy to a specific enterprise or industry, or group of enterprises or industries, is based upon a "mathematical formula" which fails to indicate that Commerce exercised judgment and balanced the various factors in analyzing the facts of this particular case and, consequently, is not in accordance with law.
3. AFFIRM Commerce's redetermination that FIIP was de jure countervailable during the Review Period. None of the Complainants has commented on the Redetermination with respect to FIIP. Insofar as FIIP is concerned, there was no challenge to the redetermination.
4. AFFIRM Commerce's Redetermination regarding ACBOP. The Panel has reviewed Commerce's recalculations in pertinent respect and has concluded that the reasoning of Commerce as to how and why it proceeded to make certain adjustments is adequately articulated in the Redetermination, is based upon substantial record evidence and is otherwise in accordance with law.
5. AFFIRM Commerce's redetermination that there is some evidence on the record concerning weanlings, but that it is insufficient to create a subclass. Substantial evidence on the record does not establish (i) whether benefits were paid to weanling producers in their capacity as farmers; (ii) the value of any benefits paid to weanling producers under the various programs involved in this proceeding; (iii) domestic and export sales volumes for weanlings; and, (iv) export prices of weanlings. It is not unreasonable for Commerce to require such information in order to create a subclass.

## II. Tripartite

### A. Background

In its decision of August 26, 1992, this Panel affirmed Commerce's findings that hog producers "accounted for a dominant share of all Federal Tripartite contributions." See, Final Results, at 56 Fed. Reg. at 50561; August 26 Decision, at 32. On other issues, the Panel concluded that, by failing to provide a reasoned explanation of its findings, Commerce had precluded the Panel from determining whether Commerce's findings were supported

by the substantial weight of record evidence and otherwise in accordance with law. Therefore, the Panel remanded Commerce's determination with certain instructions.<sup>10</sup> At the same time, the

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<sup>10</sup>The Panel directed the Department to:

1. Identify and explain evidence on the record in the Fifth Review, if any, supporting its statement that there are more than 100 agricultural commodities in Canada;
2. Provide a reasoned explanation based on record evidence as to why it did not take Farm Cash Receipts into account in establishing the universe of Canadian agricultural commodities;
3. Provide a reasoned explanation based on record evidence as to the comparability between the number of commodities covered by Tripartite and the universe of agricultural commodities produced in Canada;
4. Provide a reasoned explanation based on record evidence of its position on whether the Proposed Regulations require only the ability to exercise discretion or the actual exercise of the same in order to find selectivity;
5. In light of its response to item no. 4 above, provide a reasoned explanation based on record evidence of its position on whether or not the Canadian Government exercises discretion in administering Tripartite, specifically considering:
  - (i) all the relevant sections of the Agricultural Stabilization Act and the criteria set forth therein (which explanation should include a discussion as to why such criteria are not specific enough);
  - (ii) the variety of different products covered by Tripartite;
  - (iii) the expanding coverage of Tripartite, both prior to and during the Review Period;
  - (iv) the rejection of or failure to conclude Tripartite negotiations regarding a number of agricultural commodities; and,
  - (v) the fact that market forces trigger payments and, the fact that swine producers were not given payments in the early years of Tripartite coverage. See, Swine V, at 33-34.

Panel denied motions to reopen the administrative record with respect to Tripartite. August 26 Decision, at 26-27.

B. Analysis

After considering Commerce's Redetermination and the briefs submitted by the parties, the Panel affirms Commerce's redetermination that Tripartite was countervailable during the Review Period. Our decision is based primarily upon Commerce's findings that the number of users of Tripartite was small relative to the universe of eligible users and that swine producers were the dominant users of the program during the Review Period. In our view, Commerce made these findings based upon substantial record evidence and its Redetermination is otherwise in accordance with law.

1. The Proposed Regulations

The Parties agree that the proposed amendments to 19 C.F.R. § 355 reflect, in relevant part, existing Commerce practice for analyzing specificity under United States law.<sup>11</sup> Further, as the

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<sup>11</sup>The relevant portion of proposed 19 C.F.R. § 355.43(b) states:

(2) In determining whether benefits are specific...the Secretary will consider, among other things, the following factors:

(i) The extent to which a government acts to limit the availability of a program;

(ii) The number of enterprises, industries, or groups thereof that actually use a program;

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

(continued...)

Panel concluded in its first opinion, the Proposed Regulations represent a reasonable interpretation of the law. The Parties do not, however, agree on the proper application of the Proposed Regulations. Commerce has argued that the presence of only one of the named factors requires a finding of de facto specificity. See, Redetermination, at 11. Canada has argued that Commerce must base a determination of de facto specificity on an evaluation of all enumerated factors, as well as any other factors that are relevant in a particular case. See, Canada Challenge, at 27.

This is not the first instance in which a Court or Binational Panel has considered this issue. In PPG Industries, Inc., v. United States, 978 F. 2d 1232 (Fed Cir. 1992) ("PPG III"), the Court of Appeals for the Federal Circuit held that:

[a]t least three factors must be considered on a case-by-case basis to determine whether a program is specific in its application. First, the ITA must consider the extent to which the foreign government acted to limit availability of the program. Second, the ITA must consider the number of enterprises or industries which actually use the program. Third, the ITA must consider the extent to which the foreign government exercises discretion in making the program available.

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<sup>11</sup>(...continued)

(iv) The extent to which a government exercises discretion in conferring benefits under a program.

Notice of Proposed Rulemaking and Request for Public Comment, 54 Fed. Reg. 23366, 23379 (1989) ("Proposed Regulations").



PPG III, 978 F. 2d at 1239-1240, citing PPG I, 928 F.2d at 1576.<sup>12</sup>

Similarly, In the Matter of Softwood Lumber Products from Canada, USA 92-1904-01 (May 6, 1993) ("Softwood Lumber"), at 39, the Binational Panel concluded that:

While this Panel is obligated to show deference to the agency's expertise, we are entitled to ensure that the agency's interpretation of the statute is reasonable. We find that it is simply not reasonable for Commerce to posit, as it has in this case, that it is not required to consider evidence relating to all four of the factors listed in the Proposed Regulations, as well as any other relevant record evidence, before coming to a conclusion on specificity.

The Panel agrees with these comments and has concluded that Commerce is required to consider each of the factors specified in the Proposed Regulations, in addition to any other factors that may be relevant in a particular case. However, the Panel need not and has not decided whether a finding on more than one factor is necessary to support the conclusion that a given program is de

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<sup>12</sup>The Panel notes that the CAFC was referring to Commerce's practice regarding specificity rather than the Proposed Regulations when it made this pronouncement. Nevertheless, it applies with equal force to the Proposed Regulations since, in relevant part, they codify existing Commerce practice. See, Proposed Regulations, 54 Fed. Reg. at 23366, 23368.

facto specific.<sup>13</sup> We address only Commerce's findings as to the specificity of the programs at issue on this administrative record.

## 2. The Limited Number of Program Users

On remand, the Panel directed Commerce to identify and consider (i) the number of potential users of Tripartite as established by the record in this case and (ii) the degree of comparability between the actual number of users and the number of potential users. August 26 Decision, at 33. Commerce redetermined that there were a large number of Canadian agricultural commodities which are potential beneficiaries of Tripartite and that only a few commodities currently were covered by Tripartite agreements. Therefore, Commerce concluded there were "too few users" of the program in support of its determination that Tripartite was specific and countervailable.

In its Redetermination, Commerce admitted that it was unable to find record support for its initial contention that more than 100 commodities were potential beneficiaries of Tripartite<sup>14</sup>.

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<sup>13</sup>Whereas Commerce has argued that the presence of only one factor (i.e., the number of users of a program, dominant use or government discretion) requires a finding of de facto specificity, it has not taken this position consistently and has also stated that "no one factor is necessarily dispositive". See, Redetermination, at 11. The Panel need not decide this issue in the context of Tripartite because Commerce has determined both that the program conferred benefits upon a limited number of users and that hog producers were the dominant users of the program during the Review Period ("As described above, in the final results we based the determination that Tripartite is de facto specific on the fact that the number of users during the POR was limited, as well as the fact that hog producers benefitted disproportionately compared to other recipients." Redetermination, at 43).

<sup>14</sup>Commerce requested that the record be re-opened to add two reports which allegedly support the 100 commodities claim. The Panel has denied this request. Commerce and parties bear the  
(continued...)

Commerce did claim that it had identified seventy such commodities from among the documents submitted by respondents and contained in the record. Redetermination, at 26-27. However, Commerce failed to list specifically those seventy commodities in the Redetermination.

Commerce's Redetermination also discussed the significance of the forty-five commodities identified in Farm Cash Receipts. Id. at 23-26. Commerce declared that the Farm Cash Receipts "are not designed to provide a reasonable estimate of the number of agricultural commodities produced in Canada." Redetermination, at 23. While Commerce has argued that Farm Cash Receipts underreports the universe of potential users of Tripartite, it also has failed to offer the Panel any other measure of that universe. Therefore, although the Panel affirms Commerce's determination that the number of potential users is large, we base our decision on the fact that this universe contains at least forty-five commodities.

Commerce next addressed the degree of comparability between the actual number of users of Tripartite and the forty-five potential users identified in Farm Cash Receipts. Commerce redetermined that the two numbers were not comparable because there are separate Tripartite agreements for commodities that were

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<sup>14</sup>(...continued)

burden of assembling an adequate administrative record in the first instance. This Panel refuses to sanction carelessness by re-opening the administrative record at this late date to add factual material well known to Commerce and other parties at the time of the administrative review. In any event, based on the record before the Panel, there is already enough information to establish that the number of commodities eligible for benefits was small compared to the total number of agricultural commodities in Canada.

consolidated under one heading in Farm Cash Receipts. Redetermination, at 24-25.<sup>15</sup>

The Panel has concluded that this redetermination was reasonable.<sup>16</sup> The number of commodities listed in Farm Cash Receipts and those participating in Tripartite Agreements were not comparable. To engage in a meaningful comparison, it was reasonable for Commerce to make these two different lists of commodities comparable either by reducing the number of categories of actual users or by enlarging the list of potential users.

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<sup>15</sup>For example, Commerce stated that there are three separate Tripartite agreements for white pea beans, kidney beans or cranberry beans, and other dry edible beans whereas Farm Cash Receipts lists only one commodity, dry beans. Id. To make the numbers comparable, Commerce aggregated the number of actual users according to Farm Cash Receipts categories rather than the number of agreements actually entered. Id. Using this approach, Commerce determined the comparable level of actual users of Tripartite to be eight. Commerce aggregated the commodities as follows:

CATEGORIES OF COMMODITIES

	<u>Tripartite</u>	<u>FCR</u>
(1)	Hogs	Hogs
(2)	Lambs - industry ewe flock	Lambs - home-raised
(3)	Cow/calves Feed cattle Slaughter cattle	Calves Cattle
(4)	Apples	Apples
(5)	Onions	Vegetables
(6)	Sugar beets	Sugar beets
(7)	White pea beans Kidney/cranberry Other dry edible beans	Dry beans
(8)	Honey	Honey

<sup>16</sup>Although certain inconsistencies remain (i.e., in that Commerce retained separate categories for calves and cattle under the FCRs yet it collapsed these commodities into one category for purposes of determining the number of actual users), the general approach adopted by Commerce was reasonable under the circumstances of this review.

The Panel affirms, on this administrative record, Commerce's determination that the number of users of Tripartite is small relative to the universe of potential users. Even using Farm Cash Receipts as the relevant universe of potential users, less than twenty percent of the eligible commodities participated in Tripartite during the Review Period.

3. The Alleged Exercise of Government Discretion

In the Redetermination, Commerce concluded there was no record evidence that the Government of Canada had affirmatively exercised its discretion in administering Tripartite. However, Commerce determined that because the Government of Canada had "retained" the ability to exercise discretion, this factor supported a finding of specificity. Redetermination, at 35.

Commerce cites only the language of the Agricultural Stabilization Act ("ASA") to support its claim. Id., at 36. The Panel finds that the statutory language cited by Commerce is ambiguous. As Commerce itself has admitted, the plain language of a statute or regulation does not always indicate clearly a government agency's powers or the way in which the law is applied. Redetermination, at 33.<sup>17</sup>

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<sup>17</sup>Commerce contends that the government discretion factor does not actually require the affirmative exercise of discretion: "[a]lthough on its face, this provision can be read as requiring evidence that some applicants or potential applicants actually have been denied benefits through a discretionary act of the government, we have not interpreted our policy as requiring such a finding." Redetermination, at 33-34.

There is no record evidence that Commerce sought or obtained any information from the complainants regarding the ability of the Canadian government to exercise discretion under the ASA. Redetermination, at 39. Therefore, no finding by Commerce regarding this factor can support its determination based on substantial record evidence. It would have been a straightforward matter for Commerce at least to have asked the complainants whether the government does in fact exercise or retain the ability to exercise discretion in the administration of Tripartite. Commerce did not, however, do so.

In the absence of record evidence supporting Commerce's claim, the Panel concludes that Commerce's finding regarding government discretion is not supported by substantial record evidence. However, the Panel will not remand to Commerce for further analysis because its determination that Tripartite is countervailable is affirmed based on the other findings of Commerce.

#### 4. Additional Considerations

At the Panel's instruction, Commerce considered the effect on governmental discretion and specificity of (i) the variety of agricultural commodities covered by Tripartite, (ii) the expansion of the program during the period of review, (iii) the evidence of failed negotiations, and (iv) the effect of market forces on Commerce's determination. After considering these and other factors, Commerce determined that none of these materially

detracted from Commerce's finding that Tripartite was specific.<sup>18</sup> See, Redetermination, at 39-46.

Regarding the variety of products covered, Commerce concluded that the breadth of coverage was a matter of interpretation. See Redetermination, at 42. In this context, Commerce determined that the expansion of the program to include honey and yellow-seeded onions did not significantly raise the number of commodities covered under Tripartite to an extent sufficient to negate a finding of specificity based on (i) the limited number of program users and (ii) dominant use of the program by hog producers. Redetermination, at 43.

Commerce also considered the "fact that market forces trigger payments and, the fact that swine producers were not given payments in the early years of Tripartite coverage." Id., at 45. Commerce concluded that the effects of market forces do not relate to the specificity of a program but rather to whether a particular industry receives benefits in a specific time period. Id. Furthermore, as Commerce pointed out, it did not exclude commodities which did not receive benefits during the period of review from its consideration of the number of users. Id., at 45-46.

The Panel concludes that Commerce's consideration of and determinations regarding the expansion of the program and the effects of market forces are reasonable, supported by substantial record evidence and otherwise in accordance with law.

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<sup>18</sup>Commerce did not specifically consider the impact of failed negotiations because the record does not establish whether such negotiations occurred. See, id., at 44.

### C. Conclusion

In its Redetermination, Commerce addressed each concern identified by the Panel in our August 26, 1992 opinion. Based on its review of the record, the Panel affirms Commerce's determination that Tripartite is specific and therefore countervailable during the Review Period. In particular, the Panel concludes that substantial evidence in the record supports Commerce's determinations that:

1. Hog producers were the dominant users of Tripartite in that 81 percent of all Tripartite payments went to hog producers during the Review Period and hog producers had received 72 percent of benefits conferred under the program to date;
2. There were too few users of Tripartite — at most less than twenty percent of eligible commodities actually participated in the program; and,
3. No other factor or record evidence raises a significant question with regard to the Commerce's determination of specificity during the Review Period.

In reaching its decision, the Panel notes that there are important differences between the material facts in Swine IV and those in this proceeding, which provide ample grounds to distinguish the Swine IV Panel's conclusions on the specificity of Tripartite from those of this Panel. For example, in Swine IV, Commerce found that only 52 percent of all Tripartite payments went to hog producers during the period of the review and that hog producers had received only 51 percent of benefits to date. See Swine IV, at 36. In contrast, in this proceeding those percentages are 81 and 72 percent, respectively. Commerce, therefore, found that hog producers were the dominant users of Tripartite and this



Panel has affirmed this finding. There was no such finding made in Swine IV.

These and other significant differences between the factual record in this case and the record of the Swine IV review have led this Panel to conclude that, notwithstanding the decision of the Swine IV Panel, Commerce acted in accordance with law and based its decision in this proceeding on substantial record evidence.

### III. QUEBEC FARM INCOME STABILIZATION INSURANCE PROGRAM

#### A. Background

In the Final Results, Commerce determined that although FIS I was not de jure specific, it was de facto specific during the Review Period. Quebec, among other complainants, has challenged this determination on a number of grounds, including that Commerce was collaterally estopped, or precluded by the principle of finality under Article 1904(9) of the FTA, from raising the issue of the countervailability of FIS I in this administrative review. Quebec also argued that Commerce's determination was not supported by substantial record evidence and otherwise not in accordance with law.<sup>19</sup>

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<sup>19</sup>Quebec argued, first, that Commerce has previously determined, during the Pork proceedings, that FIS I was not then countervailable and, consequently, that it is contrary to Commerce practice and, therefore, to law, for Commerce to determine that FIS I was countervailable during the Review Period absent any "new information" about the program or a change in law. Quebec has argued, moreover, that Commerce's determination is not in accordance with law because it applied an improper test in its specificity analysis.

The Panel agreed with Commerce that it was not collaterally estopped, or precluded by the principle of finality, from raising the issue of the countervailability of FISI in this review. August 26 Decision, at 40 and 41, respectively.<sup>20</sup> However, the Panel was unable to affirm Commerce's determination because a number of questions we considered important remained unanswered.<sup>21</sup>

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<sup>20</sup>In an attempt to persuade the Panel to reverse itself on this point, Quebec has since submitted an "expert opinion" written by Professor Arthur Miller of Harvard University as Attachment 2 to the Quebec Challenge. The introduction of this document has been vigorously opposed by Commerce, which filed a Notice of Motion to Strike the document and all references thereto in the Quebec Challenge on December 2, 1992. This Notice of Motion to Strike, in turn, was opposed by Quebec on December 10, 1992. The Panel has considered the arguments presented with respect to collateral estoppel and finality and has decided to maintain its earlier view. After our decision in Swine V was issued, the Court of Appeals for the Federal Circuit rendered its decision in PPG III. Consistent with reasons expressed in Swine V, the CAFC held that "[b]ecause the factual record regarding FICORCA is different in the instant case, the Court of International Trade correctly concluded that 'there has not been a sufficient demonstration that the issues sought to be precluded as previously adjudicated are identical with the issues now presented.' PPG II, 712 F. Supp. at 199." (citing to differences in the "time period under review" and to certain information that was not previously considered which, however, did not "materially affect" any facts found on the basis of the record in that case). PPG III, 978 F. 2d at 1239.

<sup>21</sup>The Panel remanded Commerce's determination, among other things, for it to: (i) identify its practices regarding the re-examination, in a later review, of a program that Commerce previously determined involved no subsidy; (ii) explain the reasons why Commerce should not follow the determination in the Pork proceedings that FISI was not countervailable; (iii) identify evidence on the record in the Fifth Review pertaining to the number of commodities covered by FISI in previous periods; (iv) consider the percentage of total Quebec agricultural production covered by FISI during the Review Period; (v) explain whether this evidence is consistent with its determination that FISI is specific; and, (vi) identify any record evidence that the Government of Quebec has limited the availability of FISI or has otherwise exercised impermissible discretion in conferring benefits under the program. August 26 Decision, at 50.

## B. Analysis

In the context of Tripartite, the Panel concluded that Commerce is required to consider each of the factors specified in the Proposed Regulations, in addition to any other factors that may be relevant in a particular case. PPG III, 978 F. 2d at 1239-1240. However, we do not conclude that Commerce is necessarily required to base its de facto specificity determinations upon affirmative findings with respect to each of, or even more than one of, these factors. Indeed, in certain circumstances, an affirmative finding in connection with only one of the factors listed in the Proposed Regulations might be an appropriate basis for a de facto specificity determination, provided that it is supported by substantial record evidence and otherwise in accordance with law. Softwood Lumber, at 38.<sup>22</sup> The important point for Commerce and the Parties to bear in mind is that each case must be examined on its own facts and the listed factors, as well as any other relevant factors, must be considered.

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<sup>22</sup>Having concluded that Commerce must consider all of the factors listed in the Proposed Regulations, the Softwood Lumber Panel, at 38, stated as follows:

This is not to say that Commerce could not, after having considered all of the evidence, determine that a particular program is specific where there is more than a trivial number of users and/or industries, no dominant or disproportionate user, and no government discretion. It is within Commerce's discretion to decide the weight to assign to the various relevant factors in a particular case. Rather, we find, as have other binational panels and the U.S. courts referred to above, that Commerce cannot ignore these factors in coming to its determination. In so doing, it must consider all of the evidence, and provide a reasonable analysis of the weight it assigns to such evidence.

In this case, pursuant to instructions by the Panel, Commerce considered the factors listed in the Proposed Regulations and determined that the record does not contain substantial evidence: that Quebec acted to limit the availability of FISII (factor (i)); that swine producers were dominant users of, or that they received disproportionately large benefits under, FISII (factor (iii)); or that Quebec exercised discretion in conferring benefits under FISII (factor (iv)). Redetermination, at 60 and 66. Commerce's redetermination, effectively, is based solely upon its finding that there were too few users of FISII during the Review Period (factor (ii)). That is, Commerce concluded that:

...having reviewed the information available to the Department on remand, we determine that FISII is countervailable based upon the limited number of users receiving benefits during the period of review. This determination is consistent with our policy that no more than one of the Department's proposed criteria for determining de facto specificity need be met in order to find a program limited to a specific industry or group of industries.

Redetermination, at 62 (emphasis added). The question before the Panel, therefore, is whether Commerce's determination, based solely upon its finding that FISII conferred benefits upon a "limited number of users" during the Review Period, is supported by substantial evidence on the record and otherwise in accordance with law.

#### 1. Substantial Record Evidence

In the Final Results, Commerce found that FISII conferred benefits upon 15 of 45 commodities produced in Quebec during the Review Period. Final Results, at 56 Fed. Reg. 50564. In the Redetermination, however, Commerce found that "there are, in fact,

at least 69 commodities produced in Quebec." Redetermination, at 56.

Commerce based the latter finding upon evidence on the record assembled during the fourth administrative review of the Order; that is, not upon evidence on the record for this Review Period. Redetermination, at 57. Indeed, Commerce found that "the record does not contain information supporting a reasonable estimate of the agricultural universe produced in Quebec." Redetermination, at 59. Nevertheless, Commerce submits that it is entitled to draw an "adverse inference against Quebec" on the basis of non-record evidence "because Quebec failed to respond to the Department's request" in the original questionnaire for it to file a report prepared by the Régie des Assurances Agricoles du Québec (the "Regie Report") covering agricultural production in Quebec during the Review Period. Redetermination, at 56, 59 and 62.

Quebec denies that its universe of agricultural commodities was composed of 69 commodities. Quebec Challenge, at 38. In fact, Quebec even denies that the universe of eligible agricultural products was composed of 45 commodities. Id., at 42. Rather, Quebec submits that the record establishes that no more than 29 commodities were produced in the Province during the Review Period. Id., at 39.<sup>23</sup> Finally, Quebec argues that Commerce is not entitled to draw an adverse inference against it on the basis of its failure

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<sup>23</sup>Citing to information based upon Farm Cash Receipts ("FCRs") contained in Canada's Questionnaire Response, A.R. 22, Vol. I, at Schedule E.

to provide the Régie Report because Quebec "substantially complied" with the request. Id., at 47.<sup>24</sup>

The Panel has concluded that Quebec breached its undertaking to file an English language version of the Régie Report. However, if Commerce wished to rely upon this failure to draw an adverse inference against Quebec, it should have done so in the Final Results.

The Panel recognizes that it is required to be sensitive to Commerce's "need to obtain as complete a record as possible" upon which to base its findings. ECC II, at 16. However, there is an important difference between re-opening the record for the purpose of permitting Commerce to include evidence which supports a finding of fact relied upon by it in the Final Results and re-opening the record for the purpose of permitting Commerce to include evidence which Commerce alleges would materially alter the facts upon which it relied in the Final Results. To do the latter would be to permit Commerce to materially alter the basis of its determination; that is, in effect, to re-write the Final Results so that it could at this late stage in the proceedings substitute its finding that the universe was composed of 45 commodities with a finding that the universe was composed of 69 commodities. Thus, the Panel has

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<sup>24</sup>Quebec responded to the request by indicating that the Régie Report was not finalized at the time the questionnaire was issued by Commerce and then undertook to provide Commerce with an English language version of the Régie Report, as required under 19 C.F.R. § 353.31(f) (1992), "as soon as possible." Quebec also filed a portion of the Régie Report at that time (including the financial statements of the Régie), some of which was translated into the English language. See, Response of the Government of Quebec ("Quebec's Questionnaire Response"), A.R. 22, Vol. 2, at 2. However, the finalized Régie Report was not subsequently filed by Quebec.

decided that the record should not be re-opened at this late stage in the proceedings to allow the Régie Report into evidence.

2. Determination Otherwise in Accordance with Law

Even if the Panel accepts, however, as Commerce did in the Final Results, that FISI conferred benefits upon 15 of 45 different commodities produced in Quebec during the Review Period, Commerce's determination that FISI was de facto specific continues to suffer from a fundamental flaw. That is, Commerce can point to no substantial record evidence that Quebec acted to limit the availability of FISI or that Quebec exercised discretion in conferring benefits under FISI. Redetermination, at 60 and 66. Moreover, unlike Tripartite, Commerce has not determined that there is substantial record evidence that swine producers were dominant users of, or that they received disproportionately large benefits under, FISI. Nor did Commerce point to any other factor to explain in this case how or why FISI provided a subsidy to a specific enterprise or industry, or group of enterprises or industries. See, 19 U.S.C. § 1677(5). Rather, Commerce's determination, effectively, is based solely upon its finding that there were too few users of FISI during the Review Period.

Commerce has explained in various determinations over the years that:

...the specificity test cannot be reduced to a precise mathematical formula. Instead, the Department must exercise judgment and balance the various factors in analyzing the facts of a particular case.

Proposed Regulations, at 54 Fed. Reg. 23368. Even if Commerce may base its determination of de facto specificity upon an affirmative finding in connection with only one of the factors listed in the

Proposed Regulations, for example, the number of enterprises, industries, or groups thereof that actually use a program, Commerce must "exercise judgment" and articulate a rational explanation of its determination.

To determine that a program is de facto specific simply by applying some "mathematical formula" to the number of users of a program would be to apply a test that was rejected in Roses Inc. v. United States, 774 F.Supp. 1376 ("Roses II"), where the Court of International Trade stated that "Commerce does not perform a proper *de facto* analysis if it merely looks at the number of companies that receive benefits under the program...." Roses II, at 1380. Moreover, in PPG III, the Court of Appeals for the Federal Circuit held that:

...although the actual number of eligible firms must be considered, it is not controlling. Instead, the actual make-up of the eligible firms must be evaluated. This analysis determines whether those firms comprise a specific industry or group of industries.

PPG III, 978 F. 2d at 1240-41.

Thus, although the number of actual users is an important consideration in a de facto specificity analysis, Commerce must still exercise judgment, evaluate the "actual make-up of the eligible firms" and articulate a rational explanation, based upon record evidence, of its determination that "those firms comprise a specific industry or group of industries." Id.

Here, in contrast, Commerce did not explain the specific nature of the benefit conferred on Quebec swine producers other than by stating that "FISI is countervailable based upon the limited number of users receiving benefits during the period of



review." Redetermination, at 62.<sup>25</sup> Nor did Commerce evaluate "the actual make-up of the eligible firms". PPG III, at 1240. Commerce did not interpret its finding that FISI conferred benefits upon 15 of 45 different commodities produced in Quebec during the Review Period against the background of information on the record to the effect that these commodities accounted for 38.6 percent of total Quebec agricultural production. Quebec's Questionnaire Response at Appendix 3. Moreover, Commerce did not evaluate the similarities or differences between these commodities in order to determine whether they form a "discrete" class rather than a wide variety of commodities. PPG III, at 1240.

### C. Conclusion

There may have been evidence on the record that could have supported some other properly articulated rationale for determining that FISI was countervailable, but such a rationale was not articulated by Commerce.<sup>26</sup> The decision of the Panel is, therefore, that Commerce's redetermination that FISI conferred a

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<sup>25</sup>In the Final Results, Commerce stated that "[i]n addition to these facts, we noted that this program has been consistently providing benefits to the same group of commodities (with the exception of the addition of soybeans during the period of review) over the last nine years." Final Results, at 56 Fed. Reg. 50564. However, in the Redetermination, Commerce "confirmed that the record for this review does not discuss the number of commodities produced in Quebec during previous reviews." Redetermination, at 55.

<sup>26</sup>See Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action."); National Fed'n of Fed. Emp. Local 1669 v. FLRA, 745 F.2d 705, 708 (D.C. Cir. 1984) ("It is a long-established principle of administrative law that the agency must explain its reasons in its decision, rather than in counsel's post hoc rationalizations."). See, also, Actor Inc. v. United States, 658 F. Supp. 295, 300 (CIT 1987).

subsidy during the review period, based solely on a finding that there were too few users of FISII, reflects the application of a "mathematical formula". Commerce failed, therefore, to exercise judgment and balance the appropriate considerations in analyzing the facts of this particular case. Consequently, Commerce's decision is not in accordance with law, and the Panel remands to Commerce its Redetermination regarding FISII with instructions for it to remove FISII benefits from its duty calculation for the Review Period.<sup>27</sup>

IV. BRITISH COLUMBIA FARM INCOME INSURANCE ACT SWINE PRODUCER'S FARM INCOME STABILIZATION PROGRAM

A. Background

In the Final Results, Commerce determined that FIIP was de jure specific "because it is only available to farmers producing commodities specified under Schedule B guidelines to the Farm Income Insurance Act of 1973." 56 Fed. Reg. at 50563. This determination by Commerce was based, in large measure, upon its determination made to the same effect during the fourth administrative review.

The CPC then advanced three objections to Commerce's determination with respect to FIIP. First, the CPC argued that neither the relevant statute pursuant to which the program was established, nor the Schedule B Guidelines are on the record in the

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<sup>27</sup>The Panel notes that Swine IV is consistent with our decision regarding FISII, insofar as that Panel concluded 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 the various factors in analyzing the facts of the particular case." See also, PPG Industries, Inc., 928 F. 2d at 1576. Swine IV, at 26.

Fifth Review and, therefore, that the determination of Commerce "has no evidentiary support". CPC Br., at 75. Second, the CPC argued that FIIP is not de jure specific because benefits under the program are not limited to those producer groups listed in the Schedule B Guidelines. Rather, the CPC argued that "[c]ommodities are listed in Schedule B when they become subject to FIIP." (emphasis original). Id. Third, the CPC argued that commodities covered by FIIP accounted for 36% of British Columbia's Farm Cash Receipts (F.C.R.s) during the Review Period (i.e., a substantial proportion of total British Columbia agricultural production). Id.

When considering the respective arguments of the Parties, the Panel observed that the record was deficient in connection with this program. August 26 Decision, at 53. Moreover, the Panel observed that the Schedule B Guidelines referred to by the Parties had been repealed midway through the Review Period. Id. Finally, the Panel noted that Complainants failed to bring this repeal of the Schedule B Guidelines to the attention of Commerce during the administrative proceedings. Id. Accordingly, the Panel remanded to Commerce with directions for it to:

(1) consider whether Complainants waived any argument they might have advanced based on the repeal of Schedule B4 by their failure to bring it to the attention of Commerce in a timely fashion, (2) consider whether, in light of Commerce's specific reliance on Schedule B, Commerce was under any obligation to obtain an up-to-date copy of the law, (3) explain the impact of the repeal of Schedule B upon its determination that FIIP was de jure specific during the Review Period, and (4) if the repeal of Schedule B is inconsistent with Commerce's determination that FIIP was de jure specific throughout the Review Period, explain whether FIIP is de facto specific in light of the evidence on the record.

Id., at 55.

## B. Analysis

In response to the above directions, Commerce submits, first, that Complainants waived any argument they might have had by their failure to bring the repeal of Schedule B4 to the attention of Commerce in a timely fashion. Redetermination, at 68. Second, Commerce has responded that, aside from requesting information about any changes to the program in its questionnaire, Commerce was under no obligation to obtain an up-to-date version of the Schedule B Guidelines before making its determination. Redetermination, at 69. Commerce's response to the third direction, essentially, is that it cannot consider the effect of the repeal of the Schedule B Guidelines upon its determination with respect to FIIP in the absence of instructions from the Panel for it to re-open the record to include therein legislative instruments which replaced the Schedule B Guidelines. Redetermination, at 69. Fourth, Commerce submits that the record does not contain adequate information to enable it to consider (i) whether the repeal of the Schedule B Guidelines is inconsistent with its determination that FIIP was de jure specific throughout the Review Period, or (ii) whether FIIP was de facto specific during the Review Period. Redetermination, at 70. Finally, Commerce, therefore, confirmed its determination that FIIP was de jure specific during the Review Period. Redetermination, at 71.

None of the Complainants has commented on the Redetermination with respect to FIIP. Indeed, when asked about this lack of comment during the Hearing, counsel for the CPC responded that, in so far as FIIP is concerned, there was no challenge to the

Redetermination. December 17, 1992 Hearing Transcript, at 50. The Panel therefore, affirms the Redetermination of Commerce with respect to FIIP.

V. Alberta Crow Benefit Offset Plan

A. Background

In the Final Results, Commerce determined that ACBOP was de jure specific. Final Results, at 56 Fed. Reg. 50562. Since the Panel affirmed this finding, the only issue remaining was the appropriate amount to be included by Commerce in its CVD duty calculation regarding this program. August 26 Decision, at 60-61. To calculate the benefit conferred by ACBOP, the Panel granted the request of Commerce and the CPC to re-open the record for the sole purpose of including certain documents admitted into evidence by the Swine IV Panel. August 26 Decision, at 60. As well, the Panel directed Commerce to provide its rationale as to why it rejected information submitted by the Government of Alberta concerning the appropriate feed/weight gain ratios for swine and considered that the USDA publication which it relied upon<sup>28</sup> was preferable. August 26 Decision, at 61.

B. Analysis

In its Redetermination, Commerce agreed that the documents admitted into the record at the request of the CPC, including Diets

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<sup>28</sup>Economic Indicators of the Farm Sector, Costs of Production - Livestock and Dairy 1989; hereafter, the "USDA publication".

for Swine<sup>29</sup>, provided a more detailed representation of the actual diet consumed by live swine in Alberta, and therefore, a more accurate basis for calculating an appropriate feed/weight gain ratio. Therefore, Commerce adjusted its CVD calculations taking into consideration the new information in Diets for Swine. Redetermination, at 71. The CPC objected to the revised calculations in the Redetermination on the following grounds.

1. Adjustment for Sows and Boars

First, CPC argued that Commerce changed its methodology in the Final Results to compute the total amount of grain consumed by a hog in its life-span by adding a new "adjustment for sows and boars". CPC Challenge, at 42. In CPC's view, Commerce had not adequately explained its reasons for making the adjustment and was "clearly unreasonable", in that the adjustment resulted in an "across-the-board increase in the total grain consumption for all live swine in Alberta." CPC Challenge at, 43-44.

In reply, Commerce stated that an average weight of 102.1 kg (approximately 225 lbs) for each swine had been consistently used in all its ACBOP calculations. Because the hog diets listed in Diets for Swine are based upon an upper weight limit for each swine of only 100 kg (approximately 220 lbs), an "adjustment for sows and boars" was required to maintain consistency with the weights used in the Final Results. Redetermination, at 72.

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<sup>29</sup>These documents consist of an affidavit by James R. Morris of Ridgetown College of Agricultural Technology of Ontario and, as an attachment, the Canadian document Diets for Swine, University of Guelph, Ontario, 1982.

## 2. Creep and Starter Diets

Second, CPC objected in its Challenge to Commerce's revised CVD calculations concerning the grain consumed by pigs at the "creep" and "starter" stages. Previously, Commerce had not accounted for the use of creep and starter diets in the Final Results on the assumption that pigs weighing less than 40 lbs. did not consume grain. See, Memo to File from Britt Doughtie, case analyst, A.R. 29. CPC contended the adjustments in the redetermination for creep and starter diets were neither adequately explained nor supported by substantial record evidence. CPC Challenge, at 44.

In reply, Commerce stated that the adjustments were made based upon information in Diets for Swine. In examining this information, Commerce ascertained that pigs weighing under 40 lbs eat several variations of diets based upon grains. Since ACBOP provides subsidies on livestock feed regardless of when it is eaten, these earlier diets must be taken into account when calculating the amount of grain eaten over an animal's life-span. Redetermination, at 73.

## 3. Ministerial Error

Third, CPC noted that Commerce's calculations contained a ministerial error. The Government of Alberta reported that 4,523,300,000 kilograms of barley wheat and oats were grown in Alberta and consumed by livestock in the province during the review period. Commerce used the correct figure in its original calculations but used the inverted figure 4,532,300,000 in the Redetermination. CPC Challenge, at 41-42. The CPC also noted that

clearly was sufficient" for Commerce to establish such a subclass in that administrative review. Swine IV, at 41. That may be true, but the record in Swine IV is not part of the record in this proceeding, to which the Panel must confine its review. Therefore, we cannot conclude that the two records are alike in this respect, which is one of the findings we would be required to make before applying the doctrine of collateral estoppel. PPG III, 978 F. 2d at 1239.

Pryme has taken the position that weanling producers do not receive benefits under agricultural programs that require indexing. However, Pryme acknowledges that weanling producers do receive benefits under certain agricultural programs. Indeed, this is why Pryme argues that the CVD rate applied to weanlings should be reduced instead of arguing that no duties at all should apply. Thus, it is not unreasonable for Commerce to require Pryme to furnish it with documented information which clearly establishes which programs require indexing and the value of any benefits paid to weanling producers under the various other programs. Arguments by Pryme in this connection simply do not constitute substantial record evidence.

In the administrative review before this Panel, substantial evidence on the record does not establish (i) whether benefits were paid to weanling producers in their capacity as farmers; (ii) the value of any benefits paid to weanling producers under the various programs involved in this proceeding; (iii) domestic and export sales volumes for weanlings; and, (iv) export prices of weanlings. Commerce has determined that it requires such information in order



to create a subclass for weanlings. Redetermination, at 77. In our view, this determination by Commerce is not unreasonable.

## 2. Timeliness of Request

In its August 26, 1992 decision, the Panel had also ordered Commerce to explain its practice for answering requests for a subclass determination after the issuance of its preliminary results of administrative review. In response, Commerce asserted that it "must have the authority to set strict time limits on the submission of comments and factual information." Redetermination, at 76.<sup>31</sup> However, Commerce candidly admitted that "the regulations do not specifically address a time limit for considering requests for subclass determinations" and that there is "no specific practice or procedure on accepting requests for subclass determinations". Redetermination, at 74 and 76.

The Panel notes that this area of the law is relatively underdeveloped. The legislation and regulations remain ambiguous and Commerce practice is unwritten.<sup>32</sup> However, because the Panel has concluded that Commerce's determination that there is insufficient evidence on the record to create a subclass is reasonable, we need not address this issue.<sup>33</sup>

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<sup>31</sup>Commerce referred the Panel to the Swine IV Panel decision, at 56, and to Vermont Yankee Nuclear Power Corp. v. Nat'l Resources Defence Council, 435 U.S. 519, 544-45(1978); Rhone Poulence, Inc. v. United States, 710 F. Supp 348, 350 (CIT 1989).

<sup>32</sup>The Sows and Boars subclass determination, which was made in the first administrative review of the Order, is the only such determination brought to the attention of the Panel.

<sup>33</sup>The Panel notes that the Redetermination fails to articulate what, if any, exceptions there are to the timeliness bar and why any such exceptions were not applicable in the instant review.

C. Conclusion

The decision of the Panel is that Commerce's Redetermination in connection with Pryme's request for the creation of a separate subclass for weanlings is in accordance with law and is hereby affirmed.

SIGNED ON THE ORIGINAL BY:

06/11/93

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