IN THE MATTER OF:

Live Swine from Canada

ECC-93-1904-01USA

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ARTICLE 1904.13
EXTRAORDINARY CHALLENGE COMMITTEE
UNITED STATES-CANADA FREE-TRADE AGREEMENT

IN THE MATTER OF:	
LIVE SWINE FROM CANADA	**ECC-93-1904-01USA**

DECISION
APRIL 8, 1993

THE UNITED STATES TRADE REPRESENTATIVE
AND
THE INTERNATIONAL TRADE ADMINISTRATION OF THE
UNITED STATES DEPARTMENT OF COMMERCE
ON BEHALF OF THE
UNITED STATES GOVERNMENT
Requestor

and

THE NATIONAL PORK PRODUCERS COUNCIL
U.S Non-Party Participant

v.

THE GOVERNMENT OF CANADA
Respondent

and

THE GOUVERNEMENT DU QUEBEC;
THE CANADIAN PORK COUNCIL AND ITS MEMBERS;
PRYME PORK LTD.
Canadian Non-Party Participants

BEFORE: Charles B. Renfrew
Willard Z. Estey
Herbert B. Morgan

APPEARANCES: Timothy M. Reif, Stephen J. Powell, Jeffrey C. Lowe for the Government of the United States; Paul C. Rosenthal, Kathleen W. Cannon, Joanna K. McIntosh, Stephen A. Jones for the National Pork Producers Council.

Homer E. Moyer, Jr., Gerald Goldman, James P.Tuite, Catherine Curtiss, Philip J. Ferneau for the Government of Canada; Elliot J. Feldman, Jonathan D. Cahn, F. Alexander Amrein for the Gouvernement du Quebec; William K. Ince, Michele C. Sherman for the Canadian Pork Council and its Members; Joel K. Simon, Christopher M. Kane for Pryme Pork Ltd.

MEMORANDUM OPINION AND ORDER REGARDING BINATIONAL PANEL REMAND DECISION AND ORDER

April 8, 1993

I. INTRODUCTION.

This memorandum opinion and order arises from the extraordinary challenge proceeding conducted pursuant to Article 1904.13 and Annex 1904.13 of the United States-Canada Free-Trade Agreement ("FTA") in the matter of Live Swine From Canada. The proceeding followed a Request For An Extraordinary Challenge Committee ("Request") filed by the Office of the United States Trade Representative ("USTR"), on January 21, 1993 on behalf of the United States. The events which gave rise to the request were as follows. On June 21, 1991, the International Trade Administration of the Department of Commerce ("Commerce") caused to be published the final results of its fourth administrative review of the countervailing duty order on Live Swine from Canada. This decision was challenged by the Government of Canada and other Canadian Participants before a binational panel ("Panel"). The Panel published its determination on May 19, 1992 ("Decision I") and therein remanded certain questions back to Commerce for further consideration. Pursuant to the remand, Commerce produced its final results of redetermination on July 20, 1992 ("July 1992 Remand Determination"). The Canadian government and other Canadian Participants requested a second

Panel review of the July 1992 Remand Determination. The Panel rendered its decision on October 30, 1992 ("Decision II") and on that occasion denied Commerce's request to re-open the record to include additional reports on the number of agricultural commodities in Canada; overturned Commerce's finding of specificity with respect to two government agricultural support programs, instead directing Commerce to find that the programs were not specific; and directed Commerce to calculate a separate countervailing duty ("CVD") rate for weanlings. Commerce did so on November 19, 1992, and on December 21, 1992 the Panel signed an Order Affirming the Determination on Remand. Both Decision I and Decision II are now being challenged before this Committee.

In the Request, the USTR alleged four instances of error warranting remand of Decision II to the Panel under FTA Article 1904.13(a)(iii) and 1904.13(b). Request at 6. First, the USTR alleged that the Panel in Decision II disregarded "its responsibility to rule on the question of whether Commerce's interpretation of the standard under U.S. law for determining de facto specificity yielded a result that was unreasonable or otherwise not in accordance with U.S. law . . ." (the "specificity issue").[1] Id. at 7. The USTR argued that the Panel impermissibly substituted its own interpretation for that of Commerce "of a reasonable standard

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1 FTA Articles 1904.2, 1904.3 and 1911 require us to apply United States law to the dispute before us.

under U.S. law for evaluating specificity"; and that the Panel failed "to rule on whether Commerce's interpretation of the statute for determining de facto specificity was reasonable as applied to the facts of this proceeding." Id.

Second, the USTR alleged error because it claimed the Panel improperly invoked a rule of finality in Decision II. Id. at 8. Third and fourth, the USTR charged that the Panel in each of its two decisions, had "impermissibly substitut[ed] its interpretation of U.S. law for that of Commerce and improperly [determined] that Commerce was 'required' to calculate a separate, product-specific CVD rate for weanlings." Id. at 9, 10.

In its written brief and at the March 10, 1993 hearing, the USTR restricted its challenge to the specificity issue, thereby withdrawing the "finality" and "weanlings" issues from consideration. Transcript of Extraordinary Challenge Committee Oral Proceedings held in Washington, D.C. on March 10, 1993 ("Transcript") at 28-29. Therefore, we address only the specificity issue in this opinion. The Panel's prior decisions and orders regarding weanlings and finality shall remain in effect.[2]

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2 The hearing by the within Committee proceeded on the basis that both Decisions I and II of the Panel were here in issue. No question was raised by any counsel as to whether issues arising under Decision I may be barred by the time limitations in the FTA or in any applicable rules or regulations, and the Committee has proceeded on the assumption that all issues

(continued...)

After full consideration of the arguments presented by the Parties and the Participants in their briefs and at the March 10, 1993 hearing, we conclude, for the reasons set out below, that the alleged errors by the Panel do not meet the test for a successful extraordinary challenge that is set forth in Article 1904.13. Accordingly, we dismiss the request for an extraordinary challenge and affirm the Panel's Order Affirming the Determination on Remand dated December 21, 1992.

II. THE ROLE OF AN EXTRAORDINARY CHALLENGE COMMITTEE.

An Extraordinary Challenge Committee ("ECC") does not serve as an ordinary appellate court. Article 1904.13 provides that a Party may avail itself of the extraordinary challenge procedure only if it satisfies each prong of a three-part threshold test.[3] If the USTR fails to meet its

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2(...continued)
arising under both Decisions of the Panel may be properly addressed here.

3 Article 1904.13 reads:

> Where, within a reasonable time after the panel decision is issued, a Party alleges that:
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> a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
>
> ii) the panel seriously departed

(continued...)

burden, we must affirm the Panel's decision. As pointed out by the first ECC in its June 14, 1991 Decision:

> "This three-prong requirement provides explicit, narrow grounds for extraordinary challenges and makes clear that an extraordinary challenge 'is not intended to function as a routine appeal.' Statement of Administrative Action, United States - Canada Free-Trade Agreement at 116, reprinted in H.R. Doc. No. 216, 100th Cong., 2d Sess., 163, 278 (1988). Indeed, the Committee's only function is to ascertain whether each of the three requirements set forth in Article 1904.13 has been established", [that is compliance with any one of the Article 1904.13(a)(i-iii) criteria and both requirements of subparagraph (b).] In the Matter of Fresh, Chilled,

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3(...continued)

from a fundamental rule of procedure, or

iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, and

b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process,

that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.

or Frozen Pork from Canada, ECC 91-1904-01USA ("ECC I") at 10.

The ECC should be perceived as a safety valve in those extraordinary circumstances where a challenge is warranted to maintain the integrity of the binational panel process. See, e.g. *United States-Canada Free Trade Agreement Hearing before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives*, H. Serial No. 60, 100th Cong., 2d Sess. 69, 75-76 (1988) (Prepared Testimony of M. Jean Anderson, Chief U.S. Negotiator of Binational Panel Provisions), ("Anderson House Testimony"). An ECC corrects "aberrant Panel decisions" and "aberrant behavior by panelists." See ECC I at 9 quoting (H.R. Rep. No. 816, 100th Cong., 2d Sess., pt. 4, at 5 and 12 (1988)). The exceptional nature of an extraordinary challenge was accentuated by the drafters of the FTA by limiting extraordinary challenges to the United States and Canadian governments, and not to other Participants in the Panel's proceedings.[4] The ECC should address systemic problems and not mere legal issues that do not threaten the

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4 FTA Article 1904.13 makes clear that only a Party can avail itself of an Extraordinary Challenge Committee. A Party is defined in the Rules of Procedure for Article 1904 Extraordinary Challenge Committees as the Government of Canada or the Government of the United States. Paragraphs 37(1), 38 and the "interpretation" section of the same Rules of Procedure make clear that "a participant in the panel review that is the subject of the extraordinary challenge" can participate in the extraordinary challenge by filing a Notice of Appearance and a brief.

integrity of the FTA's dispute resolution mechanism itself. A systemic problem arises whenever the binational panel process itself is tainted by failure on the part of a panel or a panelist to follow their mandate under the FTA. See, e.g., *United States-Canada Free Trade Agreement Hearing before the Comm. on the Judiciary, United States Senate, on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases*, S. Serial No. J-100-62 (S. Hrg. 1081), 100th Cong., 2d Sess. 95 (1988) (Testimony of M. Jean Anderson) ("Anderson Senate Testimony").

The Canadian government argues that the ECC's scope of review should be analogous to the restrictive judicial review of a private commercial arbitration under U.S. law, and therefore that the Panel's decision should not be disturbed. The Government of Canada's Brief to the ECC ("Canada Brief") at 25-27,33-40. Such an analogy is inappropriate. Unlike a court reviewing a commercial arbitration, the ECC is a participant in an innovative exercise under the FTA entailing integration of two separate trading communities.[5] The

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5 U.S. legislative history demonstrates that Congress and the White House recognized the historic nature of the FTA. See H.R. Rep. No. 816, 100th Cong., 2d Sess., pt. 1, at 5 (1988) ("The United States-Canada Free-Trade Agreement is truly historic as one of the most comprehensive bilateral trade agreements ever negotiated and that creates one of the world's largest internal markets for goods and services."); See also Id. at 32, 89; Id., pt. 3 at 2; Id., pt. 4 at 2 n.1; pt. 8 at 18 (letter of transmittal from President Ronald Reagan to House Speaker Jim Wright) ("With this Agreement . . . we break (continued...)

Preamble to the FTA accentuates the lofty purpose of the treaty, e.g. "TO CONTRIBUTE to the harmonious development and expansion of world trade and to provide a catalyst to broader international cooperation." Such an experiment requires a mechanism to correct aberrant panel behavior when it materially affects a decision and threatens the integrity of the binational panel process. At the same time, the ECC can not become an appeal forum for every frustrated participant in the binational panel process.

III. ALLEGATION OF ERROR BY THE USTR.

The USTR on behalf of the Government of the United States argues that the Panel Majority in Decision II manifestly exceeded its jurisdiction by failing to apply the appropriate standard of judicial review, and in particular by reversing Commerce's specificity determination and "supplanting it" with "the appropriate test" announced by the Panel Majority in its opinion. The Brief of the United States ("U.S. Brief") at 7-8, 13-14. The USTR asserts that such error materially affected the Panel's decision and thereby threatened the integrity of the binational panel review process. Id. Based on the oral and written record, the Committee is not persuaded that the USTR has sustained its burden of proving that the

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free from limitations of the past not only to enhance our prosperity today, but also to build a better tomorrow for the generations to come in the 21st century.").

Panel manifestly exceeded its jurisdiction by failing to apply the correct standard of judicial review.

1. Jurisdiction Encompasses Standard of Review.

The North American Free Trade Agreement ("NAFTA") makes explicit what was implicit in the FTA, that if a panel fails to apply the appropriate standard of review, it manifestly exceeds "its powers, authority or jurisdiction," the first prong of our three-part test, FTA Article 1904.13(a)(iii). The equivalent provision in the NAFTA reads: "the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example, by failing to apply the appropriate standard of review . . ." (emphasis added).[6] Neither Party challenged the proposition that if the Panel failed to apply the proper standard of review, it had violated prong one of the test. See Transcript at 15-16, 61, 63-65, 132-133; U.S. Brief at 14-18; Canada Brief at 31 n.3.

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6 Canadian legislative history makes clear that this additional language was added to make explicit in NAFTA what was implicit in the FTA. See Testimony of Tim Page before the Sub-Committee on International Trade of the Standing Committee on External Affairs and International Trade of the House of Commons, H.C. Rep. No. 19, 34th Parl., 3d Sess. 10 (Nov.26, 1992); Written Statement of Simon V. Potter, submitted to the Sub-Committee on International Trade of the Standing Committee on External Affairs and International Trade of the House of Commons (Nov. 26, 1992), at 13.

2. The Panel Must Conscientiously Apply the Standard of Review.

During oral argument, Counsel for the Canadian government argued that it was required that a Panel "expressly refuse" to apply a standard of review prescribed in applicable domestic law in order to conclude that the Panel 'manifestly exceeded its ... jurisdiction'. Transcript at 8. Expressed rejection is not required. The appropriate test is whether the Panel accurately articulated the scope of review and, as the first ECC stated, whether it "has been conscientiously applied." (emphasis added) ECC I at 21. Although we cannot say here, based upon the record before us, that the Panel did not conscientiously apply the appropriate standard of review, that is not to say that in another case if a panel simply cites the correct standard of review and the record does not reflect the conscientious application of it, that panel would not be manifestly exceeding its jurisdiction.

The Panel correctly cited the standard of review it had to follow under U.S. law. Decision I at 8-11 and Decision II at 7-8. The Panel appropriately looked first to section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, (19 U.S.C. § 1516a(b)(1)(B) (1992)) for its scope of review. Decision I at 8-9 and FTA Articles 1904.3 and 1911. Section 516A(b)(1)(B) provides that the Panel shall hold "unlawful" any determination by Commerce found "to be unsupported by

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

In addition, both Parties and the Panel correctly recognized that the "Special Rule," 19 U.S.C. § 1677(5)(B) (1992), applied to the underlying dispute. Decision I at 15-21; U.S. Brief at 25-33; Canada Brief at 4-5. This provision requires that Commerce determine whether a "bounty, grant or subsidy" was provided to a "specific enterprise or industry...," but is silent as to how Commerce should do so (emphasis added). 19 U.S.C. § 1677(5)(B) (1992). Because this statutory provision is silent, the Panel properly recognized that it was required to give deference to Commerce's statutory interpretation. Decision I at 9-10, 19-20. The Panel appropriately cited Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) through its progeny in support of this proposition. Decision I at 9-10. The Panel stated in its first decision:

> "In the absence of clearly discernible legislative intent, panels must limit their inquiry to whether Commerce's statutory interpretations are 'sufficiently reasonable.' [American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986)], citing Chevron U.S.A., supra. In this regard, '[t]he agency's interpretation need not be the only reasonable construction or the one the court would adopt had the

question initially arisen in a judicial proceeding.' Id. . . . " Decision I at 9-10.

The Panel also recognized that "under [its standard of review], binational panels may not engage in de novo review or simply impose their constructions of the statute upon the agency." Decision I at 9.

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 specificity test,[7] that Commerce's determination was not in accordance with law, nor based on substantial evidence in its second decision. Decision I at 15-22, 26-27; 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. Because the Committee was not persuaded that the Panel manifestly exceeded the appropriate standard of review, the Committee need not address the second and third prongs of our test as set forth in FTA Article 1904.13(b).

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7 The Panel in its two decisions states that Commerce cannot rely on the small number of beneficiaries of a program alone to determine de facto specificity. Decision I at 25-26, 75-77; Decision II at 22-27, 36. The USTR in its brief argues that Commerce can. U.S Brief at 35-46.

3. The Role of Binational Panels.

Panels must follow and apply the law, not create it. FTA Article 1904.2 and 1904.3; Anderson House Testimony at 76. Although Panels substitute for the Court of International Trade in reviewing Commerce's determinations, they are not appellate courts. Anderson House Testimony at 76; Anderson Senate Testimony at 95. Because the Committee's scope of review is so limited, most panel decisions will never be reviewed. United States-Canada Free-Trade Agreement, Statement of Administrative Action, printed in H.R. Doc. No. 216, 100th Cong., 2d Sess. 163, at 267 (1988). Panels must understand their limited role and simply apply established law. Panels must be mindful of changes in the law, but not create them. Panels may not articulate the prevailing law and then depart from it in a clandestine attempt to change the law.

4. The Relationship Between Investigating Authorities and Panels.

Panels are not appellate courts and must show deference to an investigating authority's determinations. In particular, panels must be careful not to unnecessarily burden an investigating authority on remand. We note that the Panel's first decision contains over 30 remand instructions to

Commerce, some of which Commerce apparently did not respond to in its July 1992 Remand Determination. Investigating authorities, too, should understand that even though panels are not appellate courts, they must be respected. Investigating authorities must respond to all remand requests and instructions. While the record may be said to hint at possible rancor and animosity between the Panel and Commerce, we are confident that such was not the case as rancor and animosity have no place in such proceedings.

Although the finality issue has been withdrawn from our consideration, we note that the Panel did not permit Commerce to add to the record two documents that it relied on to determine the universe of Canadian agricultural commodities. July 1992 Remand Determination at 5-6; Decision II at 18-22. Commerce in its July 20, 1992 remand determination requested the Panel to permit it to reopen the record for the express limited purpose of placing on the record both or either one of two public, published Canadian government documents: the 1986 Census for Agriculture for Canada published by Statistics Canada, or the 1985 version of Agricultural Statistics for Ontario: Publication 20, August, 1986. July 1992 Remand Determination at 5-6. Commerce stated that it needed at least one of the two documents in the record to comply with the Panel's remand request to determine the universe of Canadian agricultural commodities. July 1992 Remand Determination at 2-3, 6. The Panel denied the request. Decision II at 20-21.

This refusal is somewhat surprising given that the Panel remanded Commerce's determination in Decision I because it claimed the record did not contain substantial evidence to support Commerce's determination and then, in Decision II, after refusing to open the record, reversed on the alternative ground that Commerce's determination was not supported by sufficient evidence.[8] Decision I at 25-41, 44-47; Decision II at 27. Equally surprising, the Panel states in its decision that its refusal to open the record to admit these two documents would not materially prejudice Commerce's conclusion regarding the countervailability of subsidies. Decision II at 21. While failure to admit these two documents is not an issue before us, we mention it only to emphasize the need for panels to be sensitive to the demands they put upon the investigating authority as well as the need to obtain as complete a record as possible upon which to base their decision.

IV. CONCLUSION.

For the reasons stated above, this Committee dismisses the Request for an Extraordinary Challenge for failure by the United States to meet its burden of persuasion given the standards of an extraordinary challenge set forth under FTA Article 1904.13. Accordingly, the Binational Panel's

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8 Panels should take care to distinguish legal issues from factual ones, particularly where as here they base their decision upon the resolution of such issues.

October 30, 1992 Decision shall remain in effect and the Binational Panel's Order Affirming the Determination on Remand dated December 21, 1992, is affirmed.

SIGNED IN THE ORIGINAL BY:

April 8, 1993 Date	Charles B. Renfrew Charles B. Renfrew, Chairman
April 8, 1993 Date	Willard Z. Estey Willard Z. Estey
April 8, 1993 Date	Herbert B. Morgan Herbert B. Morgan