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

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

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

MEMORANDUM OPINION AND ORDER REGARDING ITC'S DETERMINATION ON REMAND

January 22, 1991

INTRODUCTION

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

In this opinion, the Panel relates this second review's procedural history, sets out the issues with which it must deal and then considers the ITC's Views on Remand in light of the applicable law. The Panel concludes that the ITC's Remand Determination be remanded again.

I. PROCEDURAL HISTORY

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

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

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

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

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

establishing separate panels for the ITC and ITA's decisions. This Panel stated that even though the other panel had suspended its proceedings, both panels were nonetheless subject to the FTA's strict time requirements.

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

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

II. SUMMARY OF THE ISSUES

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

First, they argue that the remand proceedings conducted by the ITC were inconsistent with the Panel's Remand Order, and were therefore not in accordance with law, in that the ITC first reopened its Record and then violated its own notice governing that reopening. The Complainants add that the ITC

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

ignored the Panel's specific instructions to reconsider its Final Determination based on the evidence on the Record.

Second, the Complainants argue that there is no substantial evidence on the Record to support the majority Commissioners' conclusions on the nature of Canadian subsidies, the likelihood of increased imports, product shifting, vulnerability of the domestic industry, price suppression or other demonstrable adverse trends.

III. "FINAL DECISION"

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

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

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

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

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

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

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

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

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

review as an institution brought by the FTA into the domestic laws of Canada and of the United States, not as an indicative suggestion but as "binding" (Article 1904(9)).[7]

IV. STANDARD OF REVIEW

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

V. REMAND PROCEEDINGS

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

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

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

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

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

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

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

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

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

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

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

Remand Order at 5.

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

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

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

The Complainants argue that the ITC had no authority to reopen the Record. They cite Mefford v. Gardner, 383 F.2d 748 (6th Cir. 1967) and City of

Cleveland v. Federal Power Comm'n, 561 F.2d 344, 346 (D.C. Cir. 1977). CMC Brief on Remand at 23. In the Mefford case, the court stated:

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

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

The Respondents advance the argument that the ITC has jurisdiction to reopen its Record and consider new issues upon remand. They cite Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) ("Pottsville"). In Pottsville, the United States Supreme Court ruled that the Federal Communications Commission ("FCC") had jurisdiction on a remand to reopen its administrative record in the context of considering an application to construct broadcasting facilities. In that case, the FCC in its remand proceedings had reopened its record in order to consider two rival applications for the construction of the same facilities. The Court of Appeals ordered the FCC to consider only Pottsville's application, on the basis of the original record. The Supreme Court characterized the Appeals Court's decision as having been based on "the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest." 309 U.S. at 140.

In reversing the Court of Appeals, the Supreme Court pointed out that administrative agencies differ from federal courts substantively and procedurally

and, thus, the doctrine invoked by the Court of Appeals is not necessarily operative in the administrative context. Justice Frankfurter observed:

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

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

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

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

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

The Panel is not satisfied that the principles set forth in Pottsville and Fly should be applied without qualification to the powers of the ITC in a remand determination under the FTA. The Panel thinks the decisions provide useful guidance, but their application should take into account certain special and distinguishing aspects of the ITC's authority on a remand

determination in a FTA Binational Review. The FTA and the Rules are designed to secure "the just, speedy, and inexpensive review of final determinations" within a set period.

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

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

Article 1904(3) further provides:

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

"General legal principles" are defined at Article 1911 as including "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." Article 1904(14) authorizes the adoption of rules of procedure which were to be based, "where appropriate, upon judicial rules of appellate procedure" with the intent that final decisions should be made within 315 days of the date on which a request for panel review is made. This statement of intent was carried forward into Rule 2, which states:

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

The FTA also appears to draw procedural distinctions between an initial final determination and "the action taken by the competent investigating authority on remand." Detailed procedures are spelled out in the Rules governing a Panel review of the initial final determination. What constitutes the "administrative record" on a Panel review of an initial final determination is defined in Rule 41. There are no comparable rules defining what constitutes the record following a remand. There is no rule which specifically authorizes the ITC on remand to reopen its record, adduce new evidence, or conduct a new hearing. There are, indeed, apart from Rule 75, no rules governing either the procedures to be followed by the ITC on remand or by a subsequent panel review following a remand determination. Rule 75 provides participants with a limited appeal procedure through the use of a notice of motion which, only if granted, entitles the participants to file written submissions and responses within short time frames. No provision is made for oral argument on a review of a remand determination. Rule 75(5) prescribes that the panel shall issue a written decision no later than 90 days after the determination on remand is filed.

In this case, the Panel in its Remand Order directed the ITC to "reconsider the evidence on the Record" (at 35) which certainly contemplated a reconsideration on the strength of the existing Record, not a reopening of the Record to adduce new evidence or the conduct of a new hearing. Nonetheless, the ITC, in giving notice of its remand proceedings, proposed a very limited reopening of the record "on three narrow aspects" within the period covered in

the original investigation and stated that "no new legal or economic arguments, other than those raised in the panel order, may be raised by the parties." ITC's Notice at 3.

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

In this case, in response to a motion for clarification by CMC, the ITC advised the Panel of its need for a narrow reopening of the Record to correct factual errors noted by the Panel, and of its ability to conclude the remand proceedings within the time frame set by the Panel.[10] The Panel does not find error in the ITC's reopening its Record by the terms set forth in its Notice of September 19, 1990.

Notwithstanding its Notice, the Commission's Remand Record now contains numerous documents which are not part of the original Record and which are not confined to the three narrow points or to the limited period on which the Commission invited evidence and comments. For example, the document, entitled "Livestock and Meat Statistics 1984-88," (Remand Record, List 1A, Doc. 30(F)) was

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

not part of the original Record and is not directly responsive to questions in the three narrow factual areas; yet it appears to have been relied upon heavily in the ITC's Remand Determination. See Remand Determination at 9-13. Moreover, in correcting Table 17 of the original Final Determination, the ITC relied primarily on a document published in July, 1990, well outside the original period of investigation. Remand Determination at A-1, Table 1.

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

The Panel's concern is that an FTA Panel, unlike the CIT, has strict governing time limits. A Panel cannot comply with those limits unless there is an end to new evidence and new issues, especially when the evidence or issues could have been collected, raised or resolved during the agency's original investigation but were not. A line must be drawn somewhere.

The Panel finds that, although reopening the Record may have been appropriate, the Commission, having reopened, exceeded the scope of its own

Notice. In developing new data, not limited in the manner provided in its Notice, it committed legal error.[11]

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

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

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

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

VI. PRODUCT SHIFTING

By admonishing the parties not to raise new legal or economic arguments "other than those raised in the panel order", the Commission itself was constrained by the same terms. The statutory criteria concerning product shifting and inventories were not raised specifically in the Remand Order. The NPPC did rely[12] on certain extracts of the Remand Order dealing with effects of subsidies on Canadian production and exports to make its submissions regarding product shifting. The issue of product shifting is central to the remand findings of the majority Commissioners and the Panel prefers not to found its decision on the narrow, procedural issue whether product shifting was or was not raised in the Remand Order. The Panel prefers to deal with the issue on its merits. The Panel does so below.

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

Complainants CMC and MJP argue that this finding is not supported by substantial evidence on the Record. Complainants' arguments on product shifting essentially are that there is no relationship between the CVD on swine and the volume of pork imports, and that, even if there is, actual evidence of the size

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

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

of the countervailing duty deposit rates as well as final duty rates as compared to imports of both swine and pork demonstrate that no such shift is likely during the period of the domestic industry's upcoming downturn.

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

Evidentiary Standard

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

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

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

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

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

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

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

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

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

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

These groundings on "identifiable current trends" are necessary to avoid a finding of threat based on "conjecture or speculation": 19 U.S.C. § 1677(7)(F)(ii); see also Panel's Remand Order at 8, 30-31. Thus, the ITC's

finding of threat of imminent injury must be based on substantial evidence, such as "demonstrable trends", "increase in market penetration" or some other such "indicia".

Commissioner Newquist's Findings

Commissioner Newquist considers the shift from swine to pork imports in three sections. In "Likelihood of Increased Imports," the Commissioner states that he is not persuaded by predictions on the Record from the U.S. Department of Agriculture that pork imports from Canada would decrease in 1989, but that, "due to the impending increase in the duty on hogs, I believe there is an imminent prospect that exports from Canada will shift from hogs to pork." Views on Remand at 31. In discussing "Increase of Market Penetration Ratios," the Commissioner states "I believe there is an imminent likelihood of a significant shift from the export of live swine, to the export of pork." Id. at 32. The section "Product Shifting" sets forth the reasons why the Commissioner found that such a shift is imminently likely. Id. at 37-43.

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

final U.S. countervailing duty rate on live swine imports in 1989 and 1990 is likely to increase significantly." Id. The Commissioner concludes his analysis by stating:

> Therefore, based on, among others, the expectation that increased countervailing duty rates will lead to product-shifting from swine exports to pork exports, in conjunction with the significant increase in pork imports from Canada in the first quarter of 1989, I find, in light of the current phase of the hog cycle portending negative margins for packers, that the threat of injury is real and imminent. [Footnote omitted].

Id. at 43.[15]

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

Commissioner Newquist points out (Views on Remand at 40) that the duty deposit rate was 4.4¢ per pound from 1985 until January 9, 1989, and has been 2.2¢ since, but predicted that the final duty rate on 1989 and 1990 entries will be pushed upwards by high countervailable payments under the Tripartite Program starting in late 1988.

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

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

The May 21, 1990, preliminary review announcement of subsidies equal to a maximum of 0.61¢ per pound for 1986-87 and 0.71¢ per pound for 1987-88 suggest that what is most likely imminent is a reduction in the duty deposit rate (currently standing at 2.2¢ per pound) and refunds to swine importers (who have posted duty deposits of 4.4¢ per pound), both to the benefit of those U.S. pork producers who purchase Canadian swine.

In other words, the evidence shows that deposit rates on hogs are decreasing and will remain low for some time, so that there is no substantial

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

evidence to support Commissioner Newquist's finding of an imminent shift towards pork imports rather than hog imports.

Commissioner Rohr's Findings

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

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

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

Id. at 11.

Having established these conclusions within the context of the "Nature of Subsidies," Commissioner Rohr then applies the findings in a section entitled

"The Likelihood of Increased Imports", in which he recognizes that CVD rates are finalized some time after the periods to which they apply:

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

Id. at 13-14.[17]

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

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

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

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

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

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

The Panel is of the opinion that this evidence does not support the theory that high subsidy payments and the arguably corresponding prospect of eventual high CVD's discourage swine imports. While payments in the first quarter of 1988 were low, (Can. $3.14 per hog),[20] relative to the second half of the year, the increase in payments is ten-fold beginning at the latest in the fourth quarter of 1988 and remaining high, according to the evidence relied on by Commissioner Rohr, through the first quarter of 1989. If the prospect of eventually high CVD's did result in product shifting, hog imports would have decreased and shifted to pork imports. The evidence, though, is that hog imports increased during this time to three successive record levels (since the beginning of 1986) and pork imports fell to a near-record low and then to a record low

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

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

(since the beginning of 1986), bringing Canadian pork's penetration of the U.S. market down to 2.9% in overall 1988 (from 3.4% in the first quarter of that year).[21]

Thus, Commissioner Rohr's conclusion that live swine cannot continue to be exported in substantial quantities when the swine growers are receiving high subsidies and facing prospectively high CVD's is not supported by substantial evidence on the Record. Rather, the opposite appears to have occurred. Despite high subsidy payments, and eventual high CVD liability, imports of live swine continued to increase in ever greater quantities. These data do not support the Commissioner's conclusion that the ability of hog producers to export is frustrated by the fear of high CVD's. The observable data show otherwise.

Conclusions on Product Shifting

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

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

VII. REMAINING CONSIDERATIONS

CMC argues that "[a]bsent product shifting, the evidence would compel a negative threat determination." CMC Brief on Remand at 72. The product shifting theory does seem to underpin Commissioner Rohr's consideration of the statutory factors. He writes that "additional supplies" of Canadian imports must have some effect on overall price levels. Views on Remand at 19. The ITC counsel interprets this to mean that "even small increases in supply will negatively affect prices". ITC's Brief on Remand at 76. There is no indication whence those increases are likely to come other than from the theorized product shifting.

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

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

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

(i) that the domestic pork industry is likely to be materially injured by the imminent downturn of the hog cycle and that the presence in the U.S. market of Canadian pork, at current levels, must be held to contribute to that injury simply by its contribution to overall supply, even in the absence of substantial evidence of underselling by imported Canadian pork. (Rohr, Views on Remand at 18-21), and

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

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

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

Similarly, the Panel is troubled by arguments which seek to show that Canada's share of the U.S. pork market, though at a noninjurious level at the time of the ITC's Final Determination, will grow, on the prediction that U.S.

producers' sales will decline and that, even if in absolute volume terms Canadian imports remain unchanged or even fall, they "may" therefore take an increasing percentage share of the market. Views on Remand at 33. This rests on no substantial evidentiary indication.

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

VIII. CONCLUSION

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

For these reasons, the Panel again remands the ITC's Remand Determination for action (using the words of Article 1904(8)) not inconsistent with the Panel's Decision of August 24, 1990, and not inconsistent with the Panel's decision in this Memorandum Opinion that the ITC's Record does not disclose substantial evidence of any imminent shift from imports of hogs to imports of pork or of any threat therefrom of material injury to the domestic pork industry. The Panel instructs the ITC to conduct this second remand without any further reopening of its Record but by reference to the Record as it existed at the time of the Final Determination, supplemented in a way consistent with its Notice, that is:

- limited to the "three narrow aspects" specifically mentioned in that Notice,

- covering only the period of the Commission's original period of investigation, and

- dealing with no legal or economic argument other than those raised in the Panel's Remand Order.

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

Original signed on January 22, 1991 by:

Simon V. Potter

K.F. Patterson

T.M. Schaumberg

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

J. Whalley