UNITED STATES - CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL

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

DECISION OF THE PANEL
October 30, 1992

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

v.

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

and

NATIONAL PORK PRODUCERS COUNCIL, ET AL.
Intervenor

Before:

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

Appearances:

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

Stephen J. Powell, Berniece A. Browne, Jeffery C. Lowe, for International Trade

Administration, U.S. Department of Commerce

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

I. INTRODUCTION

This is a second review conducted by this Panel pursuant to Article 1904 of the United States - Canada Free Trade Agreement ("FTA"), following the new determination made on remand by the International Trade Administration, U.S. Department of Commerce ("Commerce") on July 20, 1992 ("Remand Determination") in the fourth administrative review of the countervailing duty order on live swine from Canada, 56 Fed. Reg. 28531 (June 21, 1991) ("Final Swine Determination") in response to this Panel's decision dated May 19, 1992 ("Panel Decision" or "Remand Order"). The fourth administrative review of the countervailing duty order on live swine from Canada covered the period April 1, 1988 through March 31, 1989. Final Swine Determination, at 28531.

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

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

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

II. PROCEDURAL HISTORY

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

On May 29, Complainants Canadian Pork Council ("CPC") and Government of Quebec ("Quebec") each filed a motion for reexamination of the Panel's decision based on Rule 77 of the Article 1904 Panel Rules. By a unanimous decision issued on July 7, 1992, the Panel ordered that the motions be denied, with the exception of the motion for reexamination by Quebec concerning the characterization of its position contained in footnote 53 of the Panel Decision; this judgment makes Quebec's argument moot.

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

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

("NPPC Submission").

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

III. PRELIMINARY MOTIONS

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

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

Report (the "Regie Report"), which was already on the Administrative Record before the agency.

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

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

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

IV. SUMMARY OF THE ISSUES

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

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

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

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

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

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

V. APPLICABLE LAW AND STANDARD OF REVIEW

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

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

Commerce's Remand Determination which "did not comply with the statutory... and regulatory requirements" or which is unsupported by substantial evidence on the record. Olympic Adhesives, Inc. v. United States, 899 F. 2d 1565, 1574 (Fed. Cir. 1990); see also Asociacion Colombiana de Exportadores v. United States, 916 F. 2d 1571 (Fed. Cir. 1990); LMI - La Metalli Industriale S.p.A. v. United States, 912 F. 2d 455 (Fed. Cir. 1990).

VI. DISCUSSION

A. National Tripartite Stabilization Scheme for Hogs

1. The Panel's instructions

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

In its Remand Order, the Panel remanded Commerce's

determination on Tripartite with the following instructions:

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

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

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

Tripartite's expanding nature prior to and during the period of review;

- Explain whether the history of payments under Tripartite (both during and before the period of review) is probative of disproportionality or dominant use. Furthermore, explain how this evidence fits into its specificity analysis in this case. For example, of what relevance is the fact that 52 percent of Tripartite benefits go to swine producers , when the agency believes the program is used by less than ten percent of the potential participants;
- Explain whether it is appropriate to consider disproportionality/dominant use with an eye only to Tripartite or to the combined experience under Tripartite and ASA and, if combined, whether that would change the determination of disproportionality/dominant use. Furthermore, respond to Canada's and the CPC's arguments that swine producers do not receive disproportionately large benefits because: (i) one-third of all Tripartite participants are hog producers, (ii) hog producers did not receive any payments under Tripartite during its first several years, (iii) the negotiations necessary to establish a Tripartite

agreement are complex and this is a relatively recent government program, and (iv) income stabilization schemes, like Tripartite, always benefit some products more than others during any given year;

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

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

2. Commerce's response

In its Remand Determination, Commerce again concluded that, during the review period, Tripartite was limited de facto to a specific group of agricultural commodities and was therefore

countervailable. With respect to the number of commodities in Canada, while acknowledging that the Administrative Record did not contain the actual source documentation upon which Commerce relied in reaching its original determination that the universe of Canadian agricultural commodities consisted of over 100 commodities, Commerce nevertheless came to the same conclusion, relying on two governmental publications that were not physically on the Administrative Record and requesting the Panel to permit it to reopen the record in order to add these reports. Remand Determination, at 2-12.

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

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

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

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

3. The arguments of the Parties

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

Canada contends that Commerce reformulated the legal test of specificity and reduced it to a single subjective criterion, whether the number of commodities covered by a program is "small" compared to the total number of commodities produced. In its opinion, Commerce thereby resorted to an improper, purely mechanical test; the American courts and Commerce have always stated that the specificity test could not be reduced to a precise mathematical formula. Brief of Canada, at 2 and 22-27. The CPC also argues that Commerce's new specificity standard is contrary to the statute and to American case law which, in its opinion, requires Commerce to base its specificity finding on more than a mere counting of the number of commodities. Brief of CPC, at 16-23.

Canada also challenges Commerce's Remand Determination on the ground that it is not based on the evidence in the Administrative Record of this case. Brief of Canada, at 2. According to Canada, the Remand Determination is largely based on two documents that were not in the Record and were not seen or briefed by the Parties before this Panel review and, in doing so, Commerce acted contrary to the Panel's specific instructions that Commerce look at the number of agricultural commodities in Canada "based on the evidence in the record". Panel Decision, at 30. In addition, Canada argues that Commerce's reliance on extraneous documents violates fundamental notions of fairness and

due process as well as U.S. law and Commerce's own regulations. Brief of Canada, at 4-10. Canada adds that the evidence in the Administrative Record on Farm Cash Receipts ("FCRs") was sufficient to estimate the number of eligible industries and the universe of commodities in accordance with the Panel's instructions. Brief of Canada, at 10-14. See also Brief of CPC, at 6-16.

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

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

For all these reasons, Canada and CPC conclude that the Panel should remand Commerce's Remand Determination with

instructions to enter a negative determination as Commerce's finding that Tripartite is countervailable is not based on substantial evidence in the Administrative Record.

In its response brief, Commerce argues that its Remand Determination is based on substantial evidence on the record. More specifically, Commerce determined that it could not determine the number of commodities in Canada for the Tripartite program on the basis of the FCRs as these were categorized much more generally than Tripartite. Brief of Commerce, at 16-17. Therefore, the arguments goes, the Panel should permit Commerce to supplement the Administrative Record with those documents reasonably providing an accurate and consistent categorization of the agricultural universe in Canada, especially as Commerce in fact relied on those documents in reaching its original determination. Id., at 18-22.

Commerce further states that its test for determining de facto specificity was reasonable, based on substantial evidence and otherwise in accordance with law. Id., at 44-64. More specifically, Commerce argues that it need not base a finding on the fact that hog producers have received significantly more benefits than other commodity producers since Tripartite's inception or on the basis of the government's retention of discretion. According to Commerce, a finding of specificity can be based on the sole fact that, by itself, the

number of actual users is found to be small. No Court, Panel or administrative determination has found it necessary to rely on more than one of the factors enumerated in the Proposed Regulations. 54 Fed. Reg. at 23, 368.

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

4. Issues

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

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

b) Is Commerce's finding that Tripartite provides specific benefits solely because the number of industries receiving benefits is small in accordance with law? Does the law require Commerce to base a finding of specificity on a finding of disproportionality and/or dominant use and/or the exercise of discretion and/or evidence of factors other than a numerical test?

5. Reopening of the Record

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

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

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

The Panel takes note that, as argued by the National Pork Producers Council, U.S. courts have permitted agencies to

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

The Government of Canada opposes re-opening the record and has argued that: "The Department's reliance on extraneous documents violates fundamental notions of fairness and due process." Brief of Canada, at 9. Canada invokes Seacoast Anti-Pollution League v. Costle, 572 F. 2d 872, 881 (1978) in which the Court warns that "the use of the extra-record evidence must substantially prejudice petitioners...." However, in Seacoast the Court went on to conclude: "The appropriate remedy under these circumstances is to remand the decision to the Administrator because he based his decision on material not part of the record." (Id. at 882); and the Court instructed the Administrator to reach a new decision without non-record evidence, or to allow all parties an opportunity to examine all evidence. Commerce's request for a remand to add information to the record is distinguished from Seacoast, because such a request would permit parties to comment on this issue.

As already noted above, the Panel's instructions to

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

One of the primary goals of the United States and Canada in establishing binational dispute settlement procedures was to obtain "expeditious decisions, while at the same time preserving the rights of interested parties to be heard." Statement of Administrative Action to Accompany the United States-Canada Free Trade Agreement Implementation Act, reprinted in House Doc. 100-216, 100th Cong., 2d Sess., at 259. The Panel process was intended to provide "an innovative solution to a complex issue" by "combining independent review on judicial standards with an FTA-created forum and a tight schedule", in order to allow "quick resolution of AD/CVD issues between the two countries." Statement of Reasons as to How the United States-Canada Free Trade Agreement (FTA) Serves the Interests of U.S. Commerce, reprinted in House Doc. 100-216, at 38. As the U..S. Administration stated then: "With the tight timeframes required of panel decisions, costs to companies to contest agency determinations will be reduced, and business certainty will come sooner than under the present system." Id., See also Article 1904.13 Extraordinary Challenge Committee Opinion and Order, Fresh, Chilled or Frozen Pork from Canada, ECC-91-1904-01 USA, at 15-20 (June 14, 1991).

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

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

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

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

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

6. Specificity test

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

Remand Determination rests simply on the finding of a "small" number of beneficiaries (this is so whether we set aside or not the documents discussed just above). Commerce is clear in its view that this is enough.

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

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

In its discussion of U.S. countervailing duty law, the Court of International Trade ("CIT") in Roses Inc. v. United States, 774 F. Supp. 1376, 1378 (Ct. Int'l Trade 1991) ("Roses II") noted that case law, especially Cabot I "forced a change" in the application of U.S. Countervailing duty law and led Congress in 1988 to codify "the holding in Cabot I by way of a 'Special Rule' added in the Omnibus and Competitiveness Act". The

appropriate standard now focused "on the de facto case by case effect of benefits provided to recipients rather than on the nominal availability of benefits." Id. Commerce subsequently proposed regulations implementing the Special Rule, requiring that determination of de facto specificity be based, inter alia, on the number of industries, disproportional use, and government discretion. See 54 Fed. Reg. 23366, 23368, 23379 (May 31, 1989).

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

of beneficiaries exist." Roses II, 774 F. Supp. at 1379.

In the instant case, Commerce concluded that the Tripartite Program provided countervailable subsidies because the number of beneficiaries (i.e., ten) was small. The commodities subsidized included hogs, lambs, yellow-seeded onions, honey, wheat, and so forth. Commerce made no effort to indicate how the recipients of Tripartite subsidies constituted a discrete class of beneficiaries, or how the pattern of benefits constituted a bestowal upon a specific class. Commerce's case for specificity rested on the mere identification of the commodities that benefited, and its conclusion that the number of commodities that benefited was small. By proceeding in this manner, Commerce ignored the PPG Industries directive that specificity does not exist "merely if recipients of a domestic subsidy are identifiable" (928 F.2d at 1577) as well as the clear and unambiguous statement of the Court in Roses II that "...it is not the sheer number of the enterprises receiving benefits that dictates whether or not a program is countervailable." (774 F. Supp. at 1384).

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

The role of specificity in U.S. countervail law is to prevent an unrestrained use of countervailing duties against generally available subsidies, which could lead to the "absurd" result recognized by the Court in Cabot I, supra at 731. While, on the one hand, the U.S. Congress and Courts have widened the scope of specificity by requiring that it be assessed de facto as well as de jure, Congress and the Courts have, on the other hand, required that a finding of de facto specificity rest on a demonstration of a bestowal of benefits upon a specific class of recipients. In its Remand Determination, Commerce did not provide such a demonstration.

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

Commerce's mathematical formula is not consistent with

the express directive of the Court of International Trade in Roses II: "Commerce does not perform a proper de facto analysis if it merely looks at the number of companies that receive benefits under the program; the discretionary aspects of the program must be considered from the outset." (774 F. Supp.at 1380). Commerce must examine all relevant factors to determine "if, in its application, the program results in a subsidy only to a specific enterprise or industry or specific group of enterprises or industries." PPG Industries, 928 F. 2d. at 1576 (emphasis in original). Therefore, in order for Commerce to reach an affirmative determination on Tripartite, the Agency must use greater judgment than simple counting. It must balance the various factors discussed in the Remand Order and in Commerce's proposed Regulations, or else conclude that the Tripartite Program does not offer countervailable benefits.

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

7. Reasons for specific instructions

In holding that Commerce's Remand Determination is contrary to law and not supported by substantial evidence in the record, this Panel rejects the attempts by counsel for the NPPPC and Commerce to resuscitate Commerce's opinion by presenting arguments as to potential reasons why Tripartite may be viewed as being de facto specific. In this regard, we have determined that Commerce's Remand Determination clearly was premised solely on resort to a mathematical formula. This being the case, this Panel "is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper

basis." Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 195 (1947). Commerce's determination can only be upheld, "if at all, on the same basis articulated in the order, by the agency itself." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962). This Panel "must rely upon the rationale articulated by the agency. It may not rely upon post-hoc rationalizations." Actor Inc. v. United States, 658 F. Supp. 295, 300 (Ct. Int'l Trade 1987).

Given our conclusion that Commerce's remand determination did not conform to law, and was not premised on substantial evidence, this Panel must next consider the appropriate remedy. We must determine whether we should remand this matter to Commerce for further examination in accordance with the reasoning set forth in this determination, and in detail in our original determination of May 19, 1992, or whether we should remand the Commerce determination requiring the Agency to find that the Tripartite program was not de facto specific.

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

facto subsidy exists (and in avoiding a result based solely on a formula), we provided Commerce with a long list of factors which (at 75-77) we "directed" the agency to "reexamine," "explain" and "consider".

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

Given what we believe were our clear and unequivocal instructions and Commerce's response thereto, we have no assurance at this point in the proceedings that Commerce would not again either ignore or declare itself unable to follow the Panel's directives upon a second remand. In addition, this Panel is required to reach a final decision as expeditiously as possible: one of the primary goals of the United States and Canada in establishing procedures for Panel review was to reduce the time in which final determinations were issued in unfair trade cases. Further remand for further analysis would frustrate this purpose.

Commerce might arguably have based an affirmative finding on a rationale which conformed to law but it chose not to. As a result, we believe that the most appropriate remedy, and one which finds ample support in law, is for this Panel to reverse Commerce's Remand Determination without allowing further inquiry. See, e.g., National Labor Relations Board v. Wyman-Gordon Company, 394 U.S. 759, 766 n. 6 (1969) "Chenery does not require that we convert judicial review of agency action into a

ping-pong game."); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 425 (1923) ("After parties have had a full and fair opportunity to prepare their case," we cannot "permit them to drag out litigation by bringing in new evidence which with due diligence they ought to have discovered before the hearing."); Olympic Adhesives, Inc. v. United States, 899 F. 2d 1565 (Fed. Cir. 1990); American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority, 778 F. 2d 850, 862 n. 19 (D.C. Cir. 1985); Greyhound Corporation v. Interstate Commerce Commission, 668 F. 2d 1354, 1364 (D.C. Cir. 1981) ("The Commission has had ample time and opportunity to provide a reasoned explanation... . We find no useful purpose to be served by allowing the Commission another shot at the target."); International Union (UAW) v. N.L.R.B., 45g F. 2d 1329, 1357 (D.C. Cir. 1972) ("We are convinced there is no longer anything to be gained by a further remand which would, in essence, offer the Board the same three alternatives it rejected last time."); Office of Commun. of United Church of Christ v. Federal Communications Commission, 425 F. 2d 543, 549-550 (D.C. Cir. 1969); ILWW Local 142 v. Donovan, 678 F. Supp. 307, 310 (Ct. Int'l Trade 1988).

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

We therefore hold that Commerce's determination regarding Tripartite is contrary to law. We remand this matter to Commerce with instructions that it determine that, during the

period under review, the Canadian federal government's Tripartite scheme did not confer a countervailable subsidy on Canadian producers of live swine.

B. FISI

1. The Panel's instructions

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

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

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

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

of 27%) of Quebec's total agricultural value;

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

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

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

2. Commerce's Response

In its Remand Determination, Commerce again determined that the Quebec provincial government's FISI scheme for hogs

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

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

In response to the Panel's second instruction, Commerce determined that (a) the number of all agricultural commodities in Quebec had been underestimated and was in fact at least 69 rather than 45 and (b) the classification of commodities covered by FISI during the period of review and since 1981 has essentially remained constant but has appeared to grow only because of the inconsistent manner in which Quebec has reported the commodities in Commerce's questionnaire. In so doing, Commerce determined that, of the 69 commodities produced in Quebec, only 13 had operational FISI agreements during the period of review, not 14 as previously mentioned in the final determination.

With respect to the Panel's instructions to consider disproportionality and government discretion, Commerce determined

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

3. The arguments of the Parties

Quebec argues that there is no record evidence to support Commerce's conclusion that there is a universe of 69 agricultural commodities in Quebec and that Commerce has applied a simple mechanical, arithmetic count of commodities which does not meet the specificity test under American law. Brief of Quebec, at 2.

With respect to the number of agricultural commodities in Quebec, Quebec argues that there is nothing on the Administrative Record as to what was actually produced in Quebec during the period of review. The Régie Report on which Commerce relies to conclude that there is a universe of 69 agricultural

commodities in Quebec is, according to Quebec, a simple list of insurable commodities in Quebec and not a list of agricultural goods produced during the period of review. Id., at 9-27.

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

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

Finally, Quebec argues that Commerce's new specificity test is inadequate as it is a simplistic one-step, one-factor counting test insufficient as a matter of law to meet the statutory specificity requirement. Commerce failed to weigh and balance various factors on the Administrative Record, contrary to what the regulations and Commerce's own past practice require it to do, and to consider all factors, not only the relative number

of users. In view of these elements and of the finality clause inserted in Article 1904 (9) of the FTA, Quebec asks this Panel to conclude that Commerce has not been able to point to substantial evidence on the Record to find FISI countervailable. Id., at 47-50.

In response to Quebec's arguments, NPPC argues in its brief that the Department's findings on FISI were in accordance with American law and supported by substantial evidence on the Administrative Record. Brief of NPPC, at 2. NPPC reviews the evidence analyzed by Commerce and concludes that each finding is supported by substantial evidence. More specifically, NPPC states that the Panel should not substitute Quebec's commodities classification system for that of Commerce as it is arbitrary and self-serving. Id. at 50-57. NPPC further adds that the Régie Report provides substantial evidence for Commerce's finding that there are 69 commodities produced in Quebec. As to the specificity test used by Commerce, NPPC argues, as it did on Tripartite, that relying on a simple counting of commodities covered, meets the specificity test under American law notwithstanding the fact that there is no evidence of government discretion or of disproportionality in the case of FISI. Id. at 71-73.

In its reply brief, Commerce argues that its determination regarding the universe of agricultural commodities

produced in Quebec is accurate.

4. Issues

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

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

5. Specificity test

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

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

C. Weanlings

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

On remand, the DOC declined to follow the Panel's

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

Having reviewed the original record in this proceeding, Commerce's decision on remand, the briefs submitted by all parties in response to the remand determination, and the argument (and accompanying Exhibit) presented by counsel for Pryme Pork Ltd. at the September 10, 1992 oral argument, the Panel holds that Commerce's refusal to comply with the Panel's Remand Order renders Commerce's new determination contrary to law. The Panel further holds that the record in this proceeding contains sufficient information for Commerce to determine a separate rate for weanlings. The Panel, therefore, orders Commerce to calculate a separate rate for weanlings, in the same manner as Commerce previously had calculated a separate rate for sows and boars, by finding that weanlings received zero benefits for those programs which required that live swine be indexed to qualify for benefits, and by appropriately reducing the benefits applicable

to weanlings for those programs which do not require indexing.

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

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

a result of Pryme's submission, the record contained sufficient verified information to allow Commerce to determine whether weanlings constituted a distinct subclass of live swine.

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

This Panel believes that Commerce's sows and boars analysis is equally applicable to weanlings. Like sows and boars, weanlings are not indexed and, like sows and boars there exist sufficient differences between weanlings and other live swine for Commerce to apply a separate rate. Of particular relevance to this Panel's determination is the fact that the Canadian programs in issue provide benefits to live swine which mature in Canada to market/slaughter weight. Because weanlings are exported to the United States prior to such time as they are eligible for the benefits in issue, it is unreasonable, and

contrary to the purpose of U.S. law, to subject weanlings to additional duty. As the Department correctly concluded in Live Swine, 53 Fed. Reg. at 22190, "the distinction between slaughter sows and boars [and weanlings] and other live swine cannot be used as a means to circumvent the countervailing duty order."

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

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

While this Panel has found that the evidence of record

clearly was sufficient for Commerce to comply with the Panel's instructions, we believe that, even if Commerce did not totally share the Panel's view, Commerce should have recalculated the subsidy rate applicable to weanlings based on what Commerce viewed as "Best Information Available", in accordance with the Panel's express directive. The fact that the arithmetic allowed by the record might not produce the "perfect" result is immaterial.

D. ACBOP

In our decision of May 19, 1992, this Panel found that Commerce's determination that the Alberta Crow Benefit Offset Program (ACBOP) constituted a subsidy was in accordance with law and based on substantial evidence in the record. This Panel then remanded ACBOP to Commerce with instructions to reconsider the subsidy rate in light of additional material which Commerce had not previously considered. On remand, Commerce also was instructed to: 1) explain the extent to which protein supplement and vitamin consumption reduces the amount of grain consumed by hogs; and (2) confirm that its final calculations did not include payments to livestock other than hogs. In its July 20, 1992 Remand Determination, Commerce reviewed its initial determination and found that the Canadian document, Diets for Swine (material which Commerce previously had declined to examine), provided a

more accurate representation of the actual diet consumed by live swine in Alberta in order to calculate the rate of feed/weight grain conversion. Based on the information in this document, Commerce recalculated the ACBOP benefit. As a result of Commerce's recalculation, the benefit received was reduced from Can$0.0042/lb. to Can$0.0033/lb. In addition, Commerce re-examined the record and reported that it believed that the methodology utilized provided a reliable estimate of benefits paid to hog producers only.

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

Thereafter, CPC filed a Motion to Strike Commerce's amendments to its remand determination or, alternatively, for

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

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

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

Moreover, it simply is too late, at this point in the review process, for the parties, Commerce, and the Panel to engage in a potentially exhaustive, and perhaps inconclusive

analysis, as to whether and to what extent creeps and starters consume grain. This particular issue was not raised below and, on the basis of this Panel's review of the record, we conclude that Commerce's July 20, 1992 determination - which does not include grain consumed by creeps and starters - is supported by substantial evidence and is in accordance with law.

CONCLUSION

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

This opinion is signed by:

October 30, 1992	Murray J. Belman Murray J. Belman *
October 30, 1992	Gail T. Cumins Gail T. Cumins
October 30, 1992	David J. McFadden David J. McFadden
October 30, 1992	Gilbert R. Winham Gilbert R. Winham
October 30, 1992	Simon V. Potter Simon V. Potter

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

UNITED STATES - CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL

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

DISSENTING OPINION OF MURRAY J. BELMAN

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

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

Agreement.[2]

BACKGROUND

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

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

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

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

[3] Cabot Corp. v. United States, 620 F.Supp. 722 (Ct. Int'l Trade 1985), appeal dismissed, 788 F.2d 1539 (Fed. Cir. 1986) ("Cabot I"); Cabot Corp. v. United States, 694 F.Supp. 949 (Ct. (continued...)

the law in 1988 to add a "special rule" stating in pertinent part --

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

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

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

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

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

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

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

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

The proposed regulations also state that Commerce will not regard a program as being specific solely because it is limited to the agricultural sector. The explanatory notes to proposed section 355.43 state, however, that "an agricultural program may be deemed specific if, for example, benefits under the program are limited to, or provided disproportionately to, producers of particular agricultural products."[6]

THE ISSUES IN THIS CASE

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

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[5] Id. at 23379.

[6] Id. at 23368.

commodities they produce.

Tripartite

There is general agreement that, during the period of review, there were six Tripartite agreements covering ten commodities. However, the Canadian producers and the Government of Canada dispute the number of agricultural commodities produced in Canada, i.e. the "universe" against which Tripartite's coverage of ten commodities should be measured. While there is precedent suggesting that Commerce could reasonably assume that there are a large number of agricultural commodities produced in Canada, this panel has required record evidence of the size of the universe. Live Swine from Canada, USA-91-1904-03 at 30 (May 19, 1992) ("May Panel Decision").

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

To avoid this kind of "apples and oranges" problem, Commerce sought evidence describing the commodities grown and raised in Canada at the same level of aggregation as Tripartite. Remand Determination at 3. One document Commerce examined (at the request of this panel) was the Farm Cash Receipts ("FCRs") for

Canada. Commerce found that, while there was some agreement between the FCRs and Tripartite, there were also serious discrepancies. Id. at 3-5. For example, while yellow-seeded onions and three different kinds of beans are covered by Tripartite programs, the correlatives under FCRs are aggregations of "vegetables" and "dry beans." Id.

Commerce located two other documents that it considered to provide a closer level of aggregation to that employed in Tripartite: the 1986 Census for Agriculture for Canada and the 1985 version of Agricultural Statistics for Ontario: Publication 20. Commerce found that these reports disaggregated vegetables and beans and treated cattle in a manner more similar to Tripartite than the FCRs.[7] Remand Determination at 5.

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

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

[8] Commerce also determined that separate agricultural industries produce each commodity and, therefore, Tripartite conferred benefits on a specific group of industries within the meaning of the countervailing duty law. Remand Determination at (continued...)

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

As noted, Commerce determined that, because the number of users under Tripartite was so small when compared with the universe of agricultural products, it could not justify a finding of non-specificity.[10] Under these circumstances, Commerce said,

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[8](...continued)
2, n. 1. The panel states that Commerce did not make an effort to indicate how the Tripartite beneficiaries constituted a discrete class. October Panel Decision at 24-25. If this contention is meant to suggest that Commerce must find that beneficiaries share a commonality of product (beyond the fact that they are all agricultural products), it has no basis in United States countervailing duty law. See discussion at pages 26-27 below.

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

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

it was not relevant to examine the disproportionality, dominant use and discretion factors. Id. In other words, where a subsidy program provides benefits for only a small proportion of the possible beneficiaries, that fact, by itself, justifies a finding of specificity. In taking this position, Commerce relied upon its prior decision in Carbon Black from Mexico, 51 Fed. Reg. 33085 (August 26, 1986) and even borrowed language used by the Senate Finance Committee in reporting the "special rule" amendment[11] in 1988:

> In a subsequent review of the determination under review in the Cabot case, the Commerce Department recognized that it had applied [the specificity] test in an overly restrictive manner and determined that there were too few users of carbon black feedstock in Mexico to find that the benefit * * * was generally available. [S. Rep. No. 71, 100th Cong., 1st Sess. 123 (1987), emphasis added.]

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

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

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[10](...continued)
its use by the panel as support for its contention that "Commerce has taken a unidimensional, mathematical approach to the determination of specificity." Id.

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

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

While Commerce did not rest its determination of de facto specificity on the existence of governmental discretion in the administration of Tripartite, it did find that discretion existed in the sense required by the proposed regulations. First, Commerce interpreted its proposed regulation to require only a determination whether applications for benefits have been or may be disapproved and, if so, on what basis and why. Remand Determination at 25. Commerce then found that, since some negotiations under Tripartite have not produced agreements, discretion possibly exists and no contrary demonstration was made by respondents. Consequently, Commerce concluded: "[W]e do find that the Government of Canada has retained discretion in the administration of the program." Id. at 26.

Finally, Commerce considered another factor, not in its proposed regulations, that the Canadian producers and government

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

contended was evidence of nonspecificity -- the expanding nature of Tripartite. Commerce found that Tripartite had expanded only slightly since the period of review (two new commodities, yellow-seeded onions and honey, were added). Suggestions that active negotiations were underway with a variety of commodity groups were found to be too vague to support a conclusion that the program is significantly expanding, and the discontinuation of negotiations with canola and grain corn producers suggested stasis rather than growth. Id. at 9-11.

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

FISI

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

In its initial determination, Commerce had relied upon a statement made in Quebec's administrative case brief (March 25,

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

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

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

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

"food grade wheat").[15]

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

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

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

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

-- Because these two programs cover such a low proportion of the universe, and because no factor has been suggested that Commerce found to be a satisfactory explanation for the ratio, it has found that specificity exists within the meaning of United States law.

The panel has now remanded this determination with instructions not to assess any countervailing duties for benefits

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

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

received under Tripartite or FISI during the period of review. For the reasons set out below, I believe that this decision distorts and misapplies United States law. Of greater concern to me, however, is the teaching of this panel's performance for the successful working of the binational panel process, and this is the reason I have set out these views at such length.

THE PANEL'S DECISION

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

Closing The Record

It will be recalled that the panel refused to permit Commerce to assume that there are a large number of agricultural commodities produced in Canada; the evidence must be on this record. Commerce identified documents that it believes would establish satisfactory record evidence, but the panel has now twice refused to allow the record to be reopened to admit that

evidence and comments on it any of the parties might wish to make.

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

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

USA-89-1904-11 at 19, 13 ITRD 1291 (Jan. 22, 1991).

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

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

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

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

Commerce' Interpretation of the Law

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

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

States, 928 F.2d 1568, 1571-1572 (Fed. Cir. 1991).]

The Federal Circuit has also stated:

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

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

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

Congressional Intent

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

All parties appear to agree that the present statutory

language was intended to codify the holding in Cabot I. As noted earlier, before that case, Commerce found nonspecificity if foreign subsidy laws or regulations made benefits generally available. The court in Cabot I did more than overrule that practice, it described the problem that specificity analysis is supposed to address:

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

See also Cabot II.

Commerce has stated that in looking at a subsidy program that is nominally available to all, it will find specificity when a relatively small number of potential participants is actually receiving benefits. In essence, Commerce is saying that to avoid a finding of specificity, a fairly large proportion of the universe must participate, a standard that is plainly not met when 10 out of more than 100 or 13 out of more than 69 are the relevant numbers. I find this conclusion fully consistent with and, indeed, compelled by the quoted language of Cabot (which

Congress expressly endorsed)[17] and by the Congress' plain effort to distinguish between general programs (like national defense, infrastructure or education) and other programs (like Tripartite and FISI) under which cash payments are made to commercial producers of a relatively small number of Canadian agricultural commodities. But whether or not one agrees, there is certainly nothing in the legislative history (or in any case decided by a United States court) from which a contrary view of the Congress is "clearly discernible."

Reasonableness

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

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

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

determine whether a benefit is accorded to "a specific enterprise or industry, or group thereof."

-- Commerce' approach has been upheld by the Court of International Trade in at least three instances, Cabot II, supra, and Cabot Corp. v. United States, No. 86-09-01109 (Ct. Int'l Trade, June 7, 1989) ("Cabot III") (affirming a determination on remand based upon "too few users" of carbon black provided at preferential prices); Armco Inc. v. United States, 733 F.Supp. 1514, 1530 (Ct. Int'l Trade 1990) (remand of Commerce' finding of nonspecificity, since, while program generally available, it might "in fact be utilized by only a small number of companies"); Alberta Pork, supra (Canadian provincial programs found specific based upon too few users).

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

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

Proposed Regulations, 54 Fed. Reg. at 23368 (emphasis added). These proposed regulations have been considered and

approved by the Court of Appeals for the Federal Circuit. PPG Industries v. United States, 928 F.2d 1568 (Fed. Cir. 1991).

-- Commerce' interpretation is consistent with long-standing administrative practice. For example, in Certain Fresh Cut Flowers from the Netherlands, 52 Fed. Reg. 3301 (Feb. 3, 1987), (Final Affirmative Countervailing Duty Determination), Commerce determined that a preferential natural gas contract between a government agency and a single user was de facto specific. Similarly, in Lime from Mexico, 49 Fed. Reg. 35672, (Sept. 11, 1984) (Final Affirmative Countervailing Duty Determination), Commerce determined that the provision of free fuel to one producer of lime by a state-owned company conferred de facto specific benefits. In both these cases, as in Alberta Pork, supra, Commerce rested its determination exclusively on the limited coverage of the program in issue -- disproportionality, dominant use and discretion were not considered by the agency. See also Carbon Black from Mexico, 51 Fed. Reg. 30385 (Aug. 26, 1986) (Final Results of Countervailing Duty Administrative Review).

-- If Commerce' interpretation is not reasonable, there must be another, "reasonable," standard that would

> produce a finding of nonspecificity in this case. Given the fact that application of Commerce' interpretation resulted in a finding of specificity when less than 10% of the eligible industries is covered (under the Tripartite program), the hypothetical alternative standard would have to permit a finding of de facto broad availability and use in such a case. When the objective is to determine whether a program should be likened to education, national defense or infrastructure, it is difficult to see how 10% coverage could plausibly be considered to be general, at least in the absence of some indication that the program is in transition.[18] Indeed, this panelist believes that any objective observer would be hard pressed to conclude that the hypothetical alternative would itself pass the test of reasonableness.

In the face of these considerations, and recalling that United States law requires appellate tribunals to accord substantial

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

weight to an agency's interpretation of the law (especially where, as here, the agency is given broad discretion in executing that law), Commerce' interpretation cannot seriously be considered to be unreasonable.

The panel's decision attempts to blink the issue of reasonableness by focusing on Commerce' proposed regulations. The panel asserts that Commerce failed to follow these regulations in three respects. First, the panel suggests that Commerce' new test is a mechanical or mathematical approach prohibited by the law and Commerce' own regulations. Secondly, the panel believes that Commerce was obligated to consider other factors beyond the question whether there are too few participants in a program, including the specific factors itemized in the proposed regulations. Finally, the panel faults Commerce because it did not show that the beneficiaries form a "discrete" class in the sense that the products they grow share some commonality. I believe that these arguments do not survive objective analysis.

1. Mechanics and Mathematics. The panel is correct in finding that the case law is replete with warnings to Commerce not to employ a mechanical approach in determining whether specificity exists. However, the context of these cases shows that, in every instance, the warning is addressed to any tendency that Commerce might have to find a program to be nonspecific

solely because it is nominally generally available, without looking at how it is administered.[19] In that sense, Commerce here has followed the judicial caution faithfully -- Tripartite and FISI, programs that are nominally of general application, were, upon examination, found to be used by only a handful of

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

The panel's reliance on the Roses, Inc. line of cases shows the danger of mechanically applying precedents to inapposite cases. As noted above (n. 2), in its first look at Commerce' decision in Roses, the Court of International Trade remanded solely because Commerce had employed the flawed test of general availability to find no specificity. 743 F.Supp. at 881. Thereafter, Commerce then conducted an investigation to determine whether de facto specificity existed and concluded that it did not. The Court of International Trade reviewed that determination and found it to be supported by substantial evidence. Roses, Inc. v. United States, 774 F.Supp. 1376 (1991) ("Roses II"). While there is language in both decisions (much of which is quoted by the panel) criticizing a mechanical approach to specificity determinations, all of that criticism was addressed to the general availability test and how its application could, in some cases, erroneously result in findings of no specificity. The panel's suggestion that that concern would lead the court to reverse a finding that specificity exists on the ground that too few commodities are covered is a plain non sequitur.

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

industries. This is not a "mechanical" application of the test, but adherence to the teaching of Cabot and its progeny.

Similarly, Commerce has not employed a "mathematical formula" in this case. The warning against using a mathematical formula comes from Commerce' own comments on its proposed regulations: "As the Department has explained in various determinations over the years, the specificity test cannot be reduced to a precise mathematical formula."[20] Proposed Regulations, supra, at 23368. Yet, in no reasonable sense can it be said that Commerce has employed some mathematical formula here. First, Commerce has labored with great care to establish the universe of agricultural products in Canada and Quebec.[21] Secondly, as described below, Commerce considered whether dominant use/disproportionality and government discretion could reasonably change the result of a

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

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

case in which a small number of commodities within the agricultural universe is covered by a subsidy program. Commerce also considered the arguments made by Canada and the Canadian producers that the Tripartite program was expanding towards universality.[22] Indeed, there is no significant argument made by any of the respondents that was not considered by Commerce. To say that all of this analysis is the simple application of a mathematical formula is a gross mischaracterization.

2. The "Other" Factors. The proposed regulations state that Commerce "will consider" various factors, including whether there are dominant users or disproportionate beneficiaries of a program and the extent to which a government exercises discretion in conferring benefits. In this case, Commerce "considered" these factors, but found them irrelevant to its determination. I believe that that conclusion was not only reasonable, it was required by any sensible interpretation of United States law.

With regard to disproportionality (or dominant use), if a small number of industries is covered by a program, what difference does it make whether one industry receives a disproportionate share of the benefits or is a dominant user? If, for example, Tripartite covered only yellow-seeded onions and honey, would it really matter whether the benefits were shared

[22] Quebec made no equivalent argument regarding FISI.

50/50 or 90/10? Under any logical effort to separate the universal from the specific, these factors play a role only when there is a large number of industries covered by a program, but the benefits are principally realized by a particular industry or group of industries.[23] In such a case, dominant use or disproportionality could be the basis of a specificity finding, but these factors fade into insignificance where few of many industries are beneficiaries.

While it found that discretion was enjoyed by Canadian officials in administering the Tripartite program, Commerce said that this fact alone would not support its decision.[24] Like the issues of disproportionality and dominant use, discretion may be relevant in certain circumstances, again principally those in which a large number of industries is covered by a particular program. See, e.g., Certain Steel Products from the Netherlands, 47 Fed. Reg. 39372 (1982). In those cases, evidence of discretion (or, as Commerce interprets the law, the ability to exercise discretion) could explain why there is dominant use or disproportionality. If discretion does not exist, and the

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

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

program is otherwise evenhanded, dominant use or disproportionality might be disregarded. But whatever the value of the examination of discretion, it has little utility when a handful of the universe is covered. In other words, how can the presence or absence of discretion convert a program servicing, say, 10% of the universe into a universal program?[25]

3. Discrete classes and commonality. The panel also faults Commerce for making "no effort to indicate how the recipients of Tripartite subsidies constituted a discrete class of beneficiaries." October Panel Decision at 24-25. By introducing a "discrete class" requirement, the panel suggests that specificity could depend on whether beneficiaries are producing similar or dissimilar products. In other words, 10 products of a universe of 100 might be specific if they are all, say, types of steel sheet, but not if some are steel bars and angles, aluminum tubes and brass strip.

The panel correctly notes that many decisions use language like "discrete class" and "specific class." However, there is no case law that stands for the interpretation the panel seeks to force on those words here. That interpretation has no logical

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

support either, since, in distinguishing from programs of universal applicability, it makes no difference whether 10 beneficiaries of a universe of 100 are making products that can be fit into one category or several. And even if the panel's approach had any logic, it would present insurmountable problems of administration, since it would usually be possible to aggregate or disaggregate the covered products. For example, are the various products listed above dissimilar or part of a single, "metals" category?

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

CONCLUSIONS

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

1. The panel wholly accepted the invitation of the respondents to second-guess Commerce' determinations, especially

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

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

3. The binational panel process was adopted as a compromise alternative to new rules on dumping and subsidization that would apply to trade between Canada and the United States. The compromise was grounded on the perceived need to develop

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

Against this background, this panel's decision is breathtaking. The panel shows no recognition of the limitations imposed by United States law on reviewing bodies confronted with

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

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

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

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

Murray J. Belman

Original signed by: Murray J. Belman