UNITED STATES - CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL

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

DECISION OF THE PANEL
June 11, 1993

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

v.

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

and

NATIONAL PORK PRODUCERS COUNCIL, ET AL.
Intervenor

Before:

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

Appearances:

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

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

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

I. INTRODUCTION

A. BACKGROUND

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

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

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

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

[3] Countervailing Duty Order; Live Swine from Canada, 50 Fed. Reg. 32880 (August 15, 1985).

Panel also affirmed Commerce's determination that sows, boars and weanlings are within the scope of the Order. August 26 Decision, at 69 and 72.

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

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

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

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

B. Decisions of Prior Binational Panel and Extraordinary Challenge Committee

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

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

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

disagreed with Commerce's conclusion that FISI conferred a countervailable subsidy.[7]

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

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

> Not only did the Panel accurately articulate its standard of review in rendering its two decisions, it also discussed and referred to the standard of review in other sections of its first decision, and concluded after a brief discussion of the specificity test, that Commerce's determination was not in accordance with law, nor based on substantial evidence in its second decision. Decision I at 15-22,26-77; Decision II at 22-27, 30, 36. Although we need not and will not reach a decision on the merits of these conclusions, the Committee felt the Panel may have erred. Nonetheless, on balance, the Committee was not persuaded that the Panel failed to apply the properly articulated standard of review. ECC, at 13.

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

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

Extraordinary Challenge Committee Decision, USA-91-1904-04, May 14, 1993, at 11.

Despite the Committee's comments "that the Panel may have erred", it was very clear to provide that "[it] need not and will not reach a decision on the merits" of the conclusions of the Swine IV Panel. ECC II, at 13. Accordingly, having regard to the limited jurisdiction of the Committee, the ECC II decision is not relevant to the merits of this proceeding, which the Panel has considered in the context of the administrative record in this Review Period.

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

C. Role of Binational Panels

Although Binational Panels perform certain functions previously entrusted to the Court of International Trade, they are not appellate courts. Nevertheless, Panels are required under

articles 1904(3) and 1911 of the FTA to hold unlawful the determinations of Commerce that do not meet the standard of review set forth in § 516A(b)(1)(B) of the Tariff Act of 1930, as amended, (19 U.S.C. § 1516a(b)(1)(B) (1992)). ECC II, at 11. That is, Panels are required to hold unlawful the determinations of Commerce that are unsupported by substantial record evidence or otherwise not in accordance with law.[8] However, Panels "must follow and apply the law, not create it." ECC II, at 14. Moreover, like the Court of International Trade, Panels must show deference to Commerce with respect to its interpretation of the law, as well as its determinations on the facts in each case. Id.[9] At the same time, Commerce must respond to and respect a Panel's requests and instructions in the same manner as it would those of the Court of International Trade. ECC II, at 15.

D. Decision of the Panel

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

1. AFFIRM Commerce's redetermination that Tripartite was countervailable during the Review Period. The Panel has concluded that substantial evidence in the record supports Commerce's redeterminations that:

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

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

(a) Hog producers were the dominant users of Tripartite in that 81 percent of all Tripartite payments went to hog producers during the Review Period and hog producers had received 72 percent of benefits conferred under the program to date;

(b) There were too few users of Tripartite-at most less than twenty percent of eligible commodities actually participated in the program; and,

(c) No other factor or record evidence raises a significant question with regard to Commerce's determination of countervailability during the Review Period.

2. REMAND Commerce's Redetermination regarding FISI, with instructions for it to remove FISI benefits from its duty calculation for the Review Period. The Panel concludes that Commerce's redetermination that FISI provided a subsidy to a specific enterprise or industry, or group of enterprises or industries, is based upon a "mathematical formula" which fails to indicate that Commerce exercised judgment and balanced the various factors in analyzing the facts of this particular case and, consequently, is not in accordance with law.

3. AFFIRM Commerce's redetermination that FIIP was de jure countervailable during the Review Period. None of the Complainants has commented on the Redetermination with respect to FIIP. Insofar as FIIP is concerned, there was no challenge to the redetermination.

4. AFFIRM Commerce's Redetermination regarding ACBOP. The Panel has reviewed Commerce's recalculations in pertinent respect and has concluded that the reasoning of Commerce as to how and why it proceeded to make certain adjustments is adequately articulated in the Redetermination, is based upon substantial record evidence and is otherwise in accordance with law.

5. AFFIRM Commerce's redetermination that there is some evidence on the record concerning weanlings, but that it is insufficient to create a subclass. Substantial evidence on the record does not establish (i) whether benefits were paid to weanling producers in their capacity as farmers; (ii) the value of any benefits paid to weanling producers under the various programs involved in this proceeding; (iii) domestic and export sales volumes for weanlings; and, (iv) export prices of weanlings. It is not unreasonable for Commerce to require such information in order to create a subclass.

II. Tripartite

A. Background

In its decision of August 26, 1992, this Panel affirmed Commerce's findings that hog producers "accounted for a dominant share of all Federal Tripartite contributions." See, Final Results, at 56 Fed. Reg. at 50561; August 26 Decision, at 32. On other issues, the Panel concluded that, by failing to provide a reasoned explanation of its findings, Commerce had precluded the Panel from determining whether Commerce's findings were supported by the substantial weight of record evidence and otherwise in accordance with law. Therefore, the Panel remanded Commerce's determination with certain instructions.[10] At the same time, the

[10]The Panel directed the Department to:

1. Identify and explain evidence on the record in the Fifth Review, if any, supporting its statement that there are more than 100 agricultural commodities in Canada;

2. Provide a reasoned explanation based on record evidence as to why it did not take Farm Cash Receipts into account in establishing the universe of Canadian agricultural commodities;

3. Provide a reasoned explanation based on record evidence as to the comparability between the number of commodities covered by Tripartite and the universe of agricultural commodities produced in Canada;

4. Provide a reasoned explanation based on record evidence of its position on whether the Proposed Regulations require only the ability to exercise discretion or the actual exercise of the same in order to find selectivity;

5. In light of its response to item no. 4 above, provide a reasoned explanation based on record evidence of its position on whether or not the Canadian Government exercises discretion in administering Tripartite, (continued...)

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

B. Analysis

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

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[10](...continued)
specifically considering:

(i) all the relevant sections of the Agricultural Stabilization Act and the criteria set forth therein (which explanation should include a discussion as to why such criteria are not specific enough);

(ii) the variety of different products covered by Tripartite;

(iii) the expanding coverage of Tripartite, both prior to and during the Review Period;

(iv) the rejection of or failure to conclude Tripartite negotiations regarding a number of agricultural commodities; and,

(v) the fact that market forces trigger payments and, the fact that swine producers were not given payments in the early years of Tripartite coverage. See, Swine V, at 33-34.

1. The Proposed Regulations

The Parties agree that the proposed amendments to 19 C.F.R. § 355 reflect, in relevant part, existing Commerce practice for analyzing specificity under United States law.[11] Further, as the Panel concluded in its first opinion, the Proposed Regulations represent a reasonable interpretation of the law. The Parties do not, however, agree on the proper application of the Proposed Regulations. Commerce has argued that the presence of only one of the named factors requires a finding of de facto specificity. See, Redetermination, at 11. Canada has argued that Commerce must base a determination of de facto specificity on an evaluation of all

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[11]The relevant portion of proposed 19 C.F.R. § 355.43(b) states:

> (2) In determining whether benefits are specific...the Secretary will consider, among other things, the following factors:
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> (i) The extent to which a government acts to limit the availability of a program;
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> (ii) The number of enterprises, industries, or groups thereof that actually use a program;
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> (iii) Whether there are dominant users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program; and
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> (iv) The extent to which a government exercises discretion in conferring benefits under a program.

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

enumerated factors, as well as any other factors that are relevant in a particular case. See, Canada Challenge, at 27.

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

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

PPG III, 978 F. 2d at 1239-1240, citing PPG I, 928 F.2d at 1576.[12] Similarly, In the Matter of Softwood Lumber Products from Canada, USA 92-1904-01 (May 6, 1993) ("Softwood Lumber"), at 39, the Binational Panel concluded that:

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

The Panel agrees with these comments and has concluded that Commerce is required to consider each of the factors specified in

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

the Proposed Regulations, in addition to any other factors that may be relevant in a particular case. However, the Panel need not and has not decided whether a finding on more than one factor is necessary to support the conclusion that a given program is de facto specific.[13] We address only Commerce's findings as to the specificity of the programs at issue on this administrative record.

2. The Limited Number of Program Users

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

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

In its Redetermination, Commerce admitted that it was unable to find record support for its initial contention that more than 100 commodities were potential beneficiaries of Tripartite[14]. Commerce did claim that it had identified seventy such commodities from among the documents submitted by respondents and contained in the record. Redetermination, at 26-27. However, Commerce failed to list specifically those seventy commodities in the Redetermination.

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

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[14]Commerce requested that the record be re-opened to add two reports which allegedly support the 100 commodities claim. The Panel has denied this request. Commerce and parties bear the burden of assembling an adequate administrative record in the first instance. This Panel refuses to sanction carelessness by re-opening the administrative record at this late date to add factual material well known to Commerce and other parties at the time of the administrative review. In any event, based on the record before the Panel, there is already enough information to establish that the number of commodities eligible for benefits was small compared to the total number of agricultural commodities in Canada.

Commerce next addressed the degree of comparability between the actual number of users of Tripartite and the forty-five potential users identified in Farm Cash Receipts. Commerce redetermined that the two numbers were not comparable because there are separate Tripartite agreements for commodities that were consolidated under one heading in Farm Cash Receipts. Redetermination, at 24-25.[15]

The Panel has concluded that this redetermination was reasonable.[16] The number of commodities listed in Farm Cash

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

CATEGORIES OF COMMODITIES

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

[16]Although certain inconsistencies remain (i.e., in that Commerce retained separate categories for calves and cattle under (continued...)

Receipts and those participating in Tripartite Agreements were not comparable. To engage in a meaningful comparison, it was reasonable for Commerce to make these two different lists of commodities comparable either by reducing the number of categories of actual users or by enlarging the list of potential users.

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

3. The Alleged Exercise of Government Discretion

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

Commerce cites only the language of the Agricultural Stabilization Act ("ASA") to support its claim. Id., at 36. The Panel finds that the statutory language cited by Commerce is ambiguous. As Commerce itself has admitted, the plain language of

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[16](...continued)
the FCRs yet it collapsed these commodities into one category for purposes of determining the number of actual users), the general approach adopted by Commerce was reasonable under the circumstances of this review.

a statute or regulation does not always indicate clearly a government agency's powers or the way in which the law is applied. Redetermination, at 33.[17]

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

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

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

4. Additional Considerations

At the Panel's instruction, Commerce considered the effect on governmental discretion and specificity of (i) the variety of agricultural commodities covered by Tripartite, (ii) the expansion of the program during the period of review, (iii) the evidence of failed negotiations, and (iv) the effect of market forces on Commerce's determination. After considering these and other factors, Commerce determined that none of these materially detracted from Commerce's finding that Tripartite was specific.[18] See, Redetermination, at 39-46.

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

Commerce also considered the "fact that market forces trigger payments and, the fact that swine producers were not given payments in the early years of Tripartite coverage." Id., at 45. Commerce concluded that the effects of market forces do not relate to the

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

specificity of a program but rather to whether a particular industry receives benefits in a specific time period. Id. Furthermore, as Commerce pointed out, it did not exclude commodities which did not receive benefits during the period of review from its consideration of the number of users. Id., at 45-46.

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

C. Conclusion

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

1. Hog producers were the dominant users of Tripartite in that 81 percent of all Tripartite payments went to hog producers during the Review Period and hog producers had received 72 percent of benefits conferred under the program to date;

2. There were too few users of Tripartite – at most less than twenty percent of eligible commodities actually participated in the program; and,

3. No other factor or record evidence raises a significant question with regard to the

Commerce's determination of specificity during the Review Period.

In reaching its decision, the Panel notes that there are important differences between the material facts in Swine IV and those in this proceeding, which provide ample grounds to distinguish the Swine IV Panel's conclusions on the specificity of Tripartite from those of this Panel. For example, in Swine IV, Commerce found that only 52 percent of all Tripartite payments went to hog producers during the period of the review and that hog producers had received only 51 percent of benefits to date. See Swine IV, at 36. In contrast, in this proceeding those percentages are 81 and 72 percent, respectively. Commerce, therefore, found that hog producers were the dominant users of Tripartite and this Panel has affirmed this finding. There was no such finding made in Swine IV.

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

III. QUEBEC FARM INCOME STABILIZATION INSURANCE PROGRAM

A. Background

In the Final Results, Commerce determined that although FISI was not de jure specific, it was de facto specific during the Review Period. Quebec, among other complainants, has challenged

this determination on a number of grounds, including that Commerce was collaterally estopped, or precluded by the principle of finality under Article 1904(9) of the FTA, from raising the issue of the countervailability of FISI in this administrative review. Quebec also argued that Commerce's determination was not supported by substantial record evidence and otherwise not in accordance with law.[19]

The Panel agreed with Commerce that it was not collaterally estopped, or precluded by the principle of finality, from raising the issue of the countervailability of FISI in this review. August 26 Decision, at 40 and 41, respectively.[20] However, the Panel was

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

[20]In an attempt to persuade the Panel to reverse itself on this point, Quebec has since submitted an "expert opinion" written by Professor Arthur Miller of Harvard University as Attachment 2 to the Quebec Challenge. The introduction of this document has been vigorously opposed by Commerce, which filed a Notice of Motion to Strike the document and all references thereto in the Quebec Challenge on December 2, 1992. This Notice of Motion to Strike, in turn, was opposed by Quebec on December 10, 1992. The Panel has considered the arguments presented with respect to collateral estoppel and finality and has decided to maintain its earlier view. After our decision in Swine V was issued, the Court of Appeals for the Federal Circuit rendered its decision in PPG III. Consistent with reasons expressed in Swine V, the CAFC held that "[b]ecause the factual record regarding FICORCA is different in the instant case, the Court of International Trade correctly concluded that `there has not been a sufficient demonstration that the issues sought to be precluded as previously adjudicated are identical with
(continued...)

unable to affirm Commerce's determination because a number of questions we considered important remained unanswered.[21]

B. Analysis

In the context of Tripartite, the Panel concluded that Commerce is required to consider each of the factors specified in the Proposed Regulations, in addition to any other factors that may be relevant in a particular case. PPG III, 978 F. 2d at 1239-1240. However, we do not conclude that Commerce is necessarily required to base its de facto specificity determinations upon affirmative findings with respect to each of, or even more than one of, these factors. Indeed, in certain circumstances, an affirmative finding in connection with only one of the factors listed in the Proposed Regulations might be an appropriate basis for a de facto specificity determination, provided that it is supported by

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[20](...continued)
the issues now presented.' PPG II, 712 F. Supp. at 199." (citing to differences in the "time period under review" and to certain information that was not previously considered which, however, did not "materially affect" any facts found on the basis of the record in that case). PPG III, 978 F. 2d at 1239.

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

substantial record evidence and otherwise in accordance with law. Softwood Lumber, at 38.[22] The important point for Commerce and the Parties to bear in mind is that each case must be examined on its own facts and the listed factors, as well as any other relevant factors, must be considered.

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

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

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

there were too few users of FISI during the Review Period (factor (ii)). That is, Commerce concluded that:

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

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

1. Substantial Record Evidence

In the Final Results, Commerce found that FISI conferred benefits upon 15 of 45 commodities produced in Quebec during the Review Period. Final Results, at 56 Fed. Reg. 50564. In the Redetermination, however, Commerce found that "there are, in fact, at least 69 commodities produced in Quebec." Redetermination, at 56.

Commerce based the latter finding upon evidence on the record assembled during the fourth administrative review of the Order; that is, not upon evidence on the record for this Review Period. Redetermination, at 57. Indeed, Commerce found that "the record does not contain information supporting a reasonable estimate of

the agricultural universe produced in Quebec." Redetermination, at 59. Nevertheless, Commerce submits that it is entitled to draw an "adverse inference against Quebec" on the basis of non-record evidence "because Quebec failed to respond to the Department's request" in the original questionnaire for it to file a report prepared by the Régie des Assurances Agricoles du Québec (the "Regie Report") covering agricultural production in Quebec during the Review Period. Redetermination, at 56, 59 and 62.

Quebec denies that its universe of agricultural commodities was composed of 69 commodities. Quebec Challenge, at 38. In fact, Quebec even denies that the universe of eligible agricultural products was composed of 45 commodities. Id., at 42. Rather, Quebec submits that the record establishes that no more than 29 commodities were produced in the Province during the Review Period. Id., at 39.[23] Finally, Quebec argues that Commerce is not entitled to draw an adverse inference against it on the basis of its failure to provide the Régie Report because Quebec "substantially complied" with the request. Id., at 47.[24]

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

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

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

The Panel recognizes that it is required to be sensitive to Commerce's "need to obtain as complete a record as possible" upon which to base its findings. ECC II, at 16. However, there is an important difference between re-opening the record for the purpose of permitting Commerce to include evidence which supports a finding of fact relied upon by it in the Final Results and re-opening the record for the purpose of permitting Commerce to include evidence which Commerce alleges would materially alter the facts upon which it relied in the Final Results. To do the latter would be to permit Commerce to materially alter the basis of its determination; that is, in effect, to re-write the Final Results so that it could at this late stage in the proceedings substitute its finding that the universe was composed of 45 commodities with a finding that the universe was composed of 69 commodities. Thus, the Panel has decided that the record should not be re-opened at this late stage in the proceedings to allow the Régie Report into evidence.

[24](...continued)
However, the finalized Régie Report was not subsequently filed by Quebec.

2. Determination Otherwise in Accordance with Law

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

Commerce has explained in various determinations over the years that:

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

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

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

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

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

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

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

Here, in contrast, Commerce did not explain the specific nature of the benefit conferred on Quebec swine producers other

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

C. Conclusion

There may have been evidence on the record that could have supported some other properly articulated rationale for determining that FISI was countervailable, but such a rationale was not articulated by Commerce.[26] The decision of the Panel is, therefore,

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

[26]See Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action."); National Fed'n of Fed. Emp.
(continued...)

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

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

A. Background

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

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[26](...continued)
Local 1669 v. FLRA, 745 F.2d 705, 708 (D.C. Cir. 1984) ("It is a long-established principle of administrative law that the agency must explain its reasons in its decision, rather than in counsel's post hoc rationalizations."). See, also, Actor Inc. v. United States, 658 F. Supp. 295, 300 (CIT 1987).

[27]The Panel notes that Swine IV is consistent with our decision regarding FISI, insofar as that Panel concluded that "Commerce has taken a unidimentional, mathematical approach to the determination of specificity, despite the Agency's statement in its "Background" to its Proposed Regulations that "the Department must exercise judgment and balance the various factors in analyzing the facts of the particular case." See also, PPG Industries, Inc, 928 F. 2d at 1576. Swine IV, at 26.

determination made to the same effect during the fourth administrative review.

The CPC then advanced three objections to Commerce's determination with respect to FIIP. First, the CPC argued that neither the relevant statute pursuant to which the program was established, nor the Schedule B Guidelines are on the record in the Fifth Review and, therefore, that the determination of Commerce "has no evidentiary support". CPC Br., at 75. Second, the CPC argued that FIIP is not de jure specific because benefits under the program are not limited to those producer groups listed in the Schedule B Guidelines. Rather, the CPC argued that "[c]ommodities are listed in Schedule B when they become subject to FIIP." (emphasis original). Id. Third, the CPC argued that commodities covered by FIIP accounted for 36% of British Columbia's Farm Cash Receipts (F.C.R.s) during the Review Period (i.e., a substantial proportion of total British Columbia agricultural production). Id.

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

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

Id., at 55.

B. Analysis

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

Guidelines is inconsistent with its determination that FIIP was de jure specific throughout the Review Period, or (ii) whether FIIP was de facto specific during the Review Period. Redetermination, at 70. Finally, Commerce, therefore, confirmed its determination that FIIP was de jure specific during the Review Period. Redetermination, at 71.

None of the Complainants has commented on the Redetermination with respect to FIIP. Indeed, when asked about this lack of comment during the Hearing, counsel for the CPC responded that, in so far as FIIP is concerned, there was no challenge to the Redetermination. December 17, 1992 Hearing Transcript, at 50. The Panel therefore, affirms the Redetermination of Commerce with respect to FIIP.

V. Alberta Crow Benefit Offset Plan

A. Background

In the Final Results, Commerce determined that ACBOP was de jure specific. Final Results, at 56 Fed. Reg. 50562. Since the Panel affirmed this finding, the only issue remaining was the appropriate amount to be included by Commerce in its CVD duty calculation regarding this program. August 26 Decision, at 60-61. To calculate the benefit conferred by ACBOP, the Panel granted the request of Commerce and the CPC to re-open the record for the sole purpose of including certain documents admitted into evidence by the Swine IV Panel. August 26 Decision, at 60. As well, the Panel directed Commerce to provide its rationale as to why it rejected

information submitted by the Government of Alberta concerning the appropriate feed/weight gain ratios for swine and considered that the USDA publication which it relied upon[28] was preferable. August 26 Decision, at 61.

B. Analysis

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

1. Adjustment for Sows and Boars

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

[28]Economic Indicators of the Farm Sector, Costs of Production - Livestock and Dairy 1989; hereafter, the "USDA publication".

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

"across-the-board increase in the total grain consumption for all live swine in Alberta." CPC Challenge at, 43-44.

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

2. Creep and Starter Diets

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

In reply, Commerce stated that the adjustments were made based upon information in Diets for Swine. In examining this information, Commerce ascertained that pigs weighing under 40 lbs eat several variations of diets based upon grains. Since ACBOP provides subsidies on livestock feed regardless of when it is eaten, these earlier diets must be taken into account when

calculating the amount of grain eaten over an animal's life-span. Redetermination, at 73.

3. Ministerial Error

Third, CPC noted that Commerce's calculations contained a ministerial error. The Government of Alberta reported that 4,523,300,000 kilograms of barley wheat and oats were grown in Alberta and consumed by livestock in the province during the review period. Commerce used the correct figure in its original calculations but used the inverted figure 4,532,300,000 in the Redetermination. CPC Challenge, at 41-42. The CPC also noted that Commerce's conversion of data from pounds to kilograms was inaccurate. CPC Challenge, at 44, footnote 18. Commerce has agreed that typographical errors were made and that it would correct them. Commerce Brief, at 74.

C. Conclusion

The Panel is not persuaded by CPC's arguments. In the Panel's view, since the CPC requested that Diets for Swine be entered into evidence, Commerce must be permitted to rely upon it in its entirety. Indeed, the CPC agreed with Commerce's redetermination that the information in Diets for Swine is more accurate for purposes of making the relevant calculations. CPC Challenge, at 40. Moreover, the purpose of re-opening the record was to permit Commerce to make adjustments to its calculations if any were necessary to arrive at more accurate figures.

The Panel has reviewed Commerce's recalculations in pertinent respect and, because the reasoning of Commerce as to how and why it

proceeded to make the adjustments in question is adequately articulated in the Redetermination, at 71-73, as well as based upon substantial record evidence and otherwise in accordance with law, we hereby affirm Commerce's Redetermination regarding ACBOP.

VI. WEANLINGS

A. Background

In our August 26 decision, the Panel concluded that Commerce inadequately articulated the reasons for its determination that there was insufficient record evidence to support the creation of a subclass for weanlings. August 26 Decision, at 73. The Panel also directed Commerce to explain its practice with respect to answering requests for subclass determinations after the issuance of its preliminary results of administrative review. Id.

B. Analysis

1. Evidence on the Record

With respect to the Panel's first instruction, Commerce redetermined that there is some evidence on the record concerning weanlings, but that it is insufficient to create a subclass. Redetermination, at 77. Pryme has made arguments which suggest to this Panel that weanlings may be deserving of a subclass. However, Pryme has not demonstrated that there is sufficient record evidence for Commerce to calculate a separate CVD rate for weanlings.[30] The

[30]Commerce found that sows and boars were entitled to a subclass because they were distinguishable from other Swine, generally, on the basis of (i) purpose of breeding; (ii) time of (continued...)

Panel cannot intervene on the basis of arguments made by Pryme in the absence of substantial record evidence.

Pryme has also argued that the doctrine of collateral estoppel should apply with respect to this particular matter on the basis of the decision of the Swine IV Panel, which instructed Commerce to establish a subclass for weanlings. Pryme Challenge, at 15; Swine IV, at 38. The Swine IV Panel "found that the evidence of record clearly was sufficient" for Commerce to establish such a subclass in that administrative review. Swine IV, at 41. That may be true, but the record in Swine IV is not part of the record in this proceeding, to which the Panel must confine its review. Therefore, we cannot conclude that the two records are alike in this respect, which is one of the findings we would be required to make before applying the doctrine of collateral estoppel. PPG III, 978 F. 2d at 1239.

Pryme has taken the position that weanling producers do not receive benefits under agricultural programs that require indexing. However, Pryme acknowledges that weanling producers do receive benefits under certain agricultural programs. Indeed, this is why

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[30](...continued)
slaughter; (iii) weight at slaughter; (iv) age at slaughter; (v) indexing; (vi) ultimate use of product after slaughter; (vii) expectations of ultimate purchaser; (viii) ultimate use of product; (ix) facilities required to process product; (x) marketing; and, (xi) fungibility of products vis-a-vis each other. Certain such points of distinction in connection with weanlings were addressed by Pryme in its brief submitted to Commerce during the administrative proceedings leading up to the Final Results, as well as on other occasions in the proceedings before this Panel, but Pryme has not provided Commerce with sufficient evidence to support the arguments it has made. See, A.R. 48.

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

In the administrative review before this Panel, substantial evidence on the record does not establish (i) whether benefits were paid to weanling producers in their capacity as farmers; (ii) the value of any benefits paid to weanling producers under the various programs involved in this proceeding; (iii) domestic and export sales volumes for weanlings; and, (iv) export prices of weanlings. Commerce has determined that it requires such information in order to create a subclass for weanlings. Redetermination, at 77. In our view, this determination by Commerce is not unreasonable.

2. Timeliness of Request

In its August 26, 1992 decision, the Panel had also ordered Commerce to explain its practice for answering requests for a subclass determination after the issuance of its preliminary results of administrative review. In response, Commerce asserted that it "must have the authority to set strict time limits on the submission of comments and factual information." Redetermination,

at 76.[31] However, Commerce candidly admitted that "the regulations do not specifically address a time limit for considering requests for subclass determinations" and that there is "no specific practice or procedure on accepting requests for subclass determinations". Redetermination, at 74 and 76.

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

C. Conclusion

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

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

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

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

SIGNED ON THE ORIGINAL BY:

06/11/93	GLENN A. CRANKER Glenn A. Cranker
06/11/93	PETER CLARK Peter Clark
06/11/93	WILHELMINA K. TYLER Wilhelmina K. Tyler
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