

ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
UNITED STATES-CANADA FREE TRADE AGREEMENT

IN THE MATTER OF:

FRESH, CHILLED AND FROZEN PORK
FROM CANADA

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USA-89-1904-06

MEMORANDUM OPINION AND ORDER REGARDING
COMMERCE'S DETERMINATION ON REMAND

Introduction

This Panel review is conducted pursuant to Article 1904(2) of the United States-Canada Free Trade Agreement¹ following motions for review and further remand of certain determinations made by the Department of Commerce ("Department" or "Commerce") in its Remand Determination, including: (1) payments to hog producers (and thus pork producers) from the Canadian Tripartite Benefit Program ("Tripartite Program") under the Agricultural Stabilization Act ("ASA") were de facto limited to a specific group of enterprises or industries; (2) hog producers received 12.5% of Alberta Crow Benefit Offset Program ("CBOP") payments; and (3) benefits to hog producers (and thus pork producers) under the Quebec Farm Income Stabilization Insurance Program ("FISI") were de facto limited to a specific group of enterprises or

¹ 27 I.L.M. 281 (1988) (entered into force January 1, 1989).

industries.²

Set forth below is the history of each issue, the Panel's analysis of the issue, and its resolution. With respect to the first issue, the Panel affirms the Department's finding that the Tripartite Program is de facto limited to a specific industry or group of industries. Second, the finding that hog producers received 12.5% of the payments distributed under the CBOP is not supported by sufficient information or reasoning, and must be revised on a second remand. Lastly, the finding that FISI is de facto limited to a specific industry or group of industries is not supported by substantial evidence or in accordance with law and thus is remanded.

I. The Tripartite Program

The Panel determined in its first opinion³ that Commerce's finding that the Tripartite Program was de facto specific in regard to hogs was not adequately supported by facts and legal analysis.⁴ Commerce had stressed that only nine types of farm products had qualified for benefits, that certain products had been turned down for discretionary reasons, and that the types of programs created for various products were subject to considerable discretion and variation.⁵ The Panel concluded that these facts were not inconsistent with a finding of de facto specific subsidy, but that there was simply not

² See Remand Determination of Final Countervailing Duty Determination on Fresh, Chilled and Frozen Pork from Canada, Case No. USA-89-1904-06, U.S. Department of Commerce (December 7, 1990) (hereinafter "Remand Determination").

³ Memorandum Opinion and Remand Order, United States-Canada Binational Panel Review, Fresh, Chilled and Frozen Pork from Canada (September 28, 1990) (hereinafter "First Panel Memorandum Opinion").

⁴ Id. at 40-54.

⁵ Fresh, Chilled and Frozen Pork from Canada, 54 Fed. Reg. 30,774, 30,776-78 (Dept. Comm. 1989) (final determination) (hereinafter "Final Pork Determination").

enough legal theory and factual analysis provided to determine what rule of law Commerce was espousing and how a foreign government would know when it was crossing the line.⁶ First of all, the Panel wanted to know whether the fact that only nine industries had received benefits so far was deemed by Commerce to be decisive in itself.⁷ The Panel was not certain whether Commerce believed that the relative fewness of recipients was: (1) predictable, from the statutory scheme or from the circumstances; (2) surprising; or (3) simply regarded as conclusive, regardless of explanations.⁸ The Panel suggested that the fewness of beneficiaries should be analyzed further in light of the number of possible beneficiaries, the criteria for eligibility, and the most likely reasons why only twelve agricultural "industries" sought to participate and only nine actually did participate.⁹ Secondly, the Panel wanted to know whether the alleged discretion in administering the program had resulted in disproportionate benefit to hog producers or to a specific, definable group or type of products.¹⁰

On November 16, 1990, Commerce filed a Motion to Extend the Time for Determination on Remand, requesting an additional seventy-five days in which to file its results of the remand, so it could reopen the record on these points. In light of Commerce's delay in seeking an extension and the tight review timetable, the Panel felt constrained not to grant such a substantial extension of time for that purpose.¹¹ Commerce thereafter submitted a brief

⁶ First Panel Memorandum Opinion at 40-54.

⁷ See id. at 50-52.

⁸ Id.

⁹ Id. at 51-52.

¹⁰ Id. at 53-54.

¹¹ Opinion and Order (November 26, 1990). The Panel extended the deadline for Commerce's remand determination to December 7, 1990. Id.

opinion on December 7, 1990 offering certain additional facts and further analysis.¹² It stated that its judgment was that there were "hundreds" of separate agricultural products and industries in Canada,¹³ that all of them were potentially eligible for Tripartite Program benefits, and that all or most of them were actually or potentially subject to fluctuation in income that might make protection attractive.¹⁴ It thus concluded that having only nine recipients after four years was anomalously small.¹⁵

In regard to the Panel's second inquiry, Commerce pointed out in its Remand Determination that in the primary year being studied, 1988, hog producers had received more than 60% of all government contributions to all industries being aided under the Tripartite Program.¹⁶ At oral argument, it became clear that money put in an insurance fund is not necessarily a benefit in itself, since such funds are only paid out if income drops to certain prescribed levels, and are returned to the government after ten years if unused.¹⁷ In terms of benefits paid out, it appears that hog producers received more than 30% of all such disbursements in 1988, but received no government benefits at all in 1986 and 1987.¹⁸

The National Pork Producers Council ("NPPC") sought to buttress Commerce's Remand Determination by providing further details concerning the

¹² Remand Determination at 4-11.

¹³ Id. at 9.

¹⁴ Id. at 8-9.

¹⁵ Id.

¹⁶ Id. at 9.

¹⁷ Transcript of Proceedings, Fresh, Chilled and Frozen Pork from Canada, Case No. USA 89-1904-06 (February 11, 1991) (hereinafter "Tr.") 107, 149.

¹⁸ Id. at 150.

large number of eligible industries or products (the NPPC counted about 170), the high degree of discretion and certain indications that Canada was really aiding meat products primarily, since cattle and hogs together received over 60% of all contributions and benefits.¹⁹ Both Commerce²⁰ and the NPPC²¹ also believed that it was significant to note that the hog industry had received a similarly large percentage of benefits in 1981 when it was being aided under the ASA program. Neither Commerce nor NPPC made it quite clear whether they viewed this comparison with 1981 as tending to prove intent or as showing some type of predictability which is relevant under the amended subsidy law of 1988.

Canada and the other Canadian parties argued that Commerce had failed to meet the Panel's request to formulate a legal rule concerning when fewness of beneficiaries is fatal to a foreign government program of aid to industries.²² Secondly, they argued that the relatively small number of industries aided under the program was explained and justified by the existence of other similar programs which were equally available,²³ and by the fact that this program involves a substantial contribution and long-term commitment of

¹⁹ Id. at 134-66. See also Response Brief of the NPPC et al. Concerning the Remand Determination of the International Trade Administration, February 4, 1991. (hereinafter "NPPC Response Brief").

²⁰ Remand Determination at 10.

²¹ NPPC Response Brief at 36.

²² See, e.g., Comments By the Government of Canada on the Remand Determination, January 18, 1991 (hereinafter "Government of Canada Brief"), at 7-9; Brief on Remand Submitted on Behalf of Complainant, The Canadian Pork Council and Its Members, January 18, 1991 (hereafter "Canadian Pork Council Brief"), at 4-6.

²³ Government of Canada Brief at 16-20; Canadian Pork Council Brief at 8-15.

resources which many industries are unwilling to make.²⁴ They continued to stress that all benefits are capped at 6% of industry turnover and that major industries like hogs receive more money simply in proportion to greater total value of product.²⁵

The Panel remains dissatisfied with Commerce's efforts to set forth a rule of law which is clear, principled and capable of distinguishing intentional or predictably specific programs from those that appear specific in a given year or two merely because of unpredictable economic variations which buffet some industries or types of products more than others.²⁶ Of course, we do recognize that the problem may lie in the vagueness of the 1988 amendment itself.²⁷ The legislative history of this amendment suggests that the U.S. Congress still accepts a general availability defense, but wishes to see that defense rejected whenever de facto results tend strongly to refute it.²⁸ But the law does not make clear whether a foreign government can in turn explain away the fewness of beneficiaries. Nor does the 1988 law indicate what proof will suffice. Some U.S. courts have suggested that intent

²⁴ Government of Canada Brief at 13-16; Canadian Pork Council Brief at 6-8. The Canadians contended that the estimates of hundreds of industries was too large, but offered no alternative number.

²⁵ Government of Canada Brief at 26-28; Canadian Pork Council Brief at 16-22.

²⁶ A separate concurring opinion is being filed on this issue by Panel Member Mark R. Joelson.

²⁷ See Omnibus Trade and Competitiveness Act of 1988 1312, 19 U.S.C. 1677(5)(B)(1988).

²⁸ See H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 587, reprinted in 1988 U.S. Code Cong. & Admin. News 1547, 1620. See generally Roses, Inc. v. United States, 743 F. Supp. 870, 877 n.15 and accompanying text (discussion legislative history to 1988 amendment).

is not the issue,²⁹ but we doubt that the law can mean that a benefit must be deemed not generally available whenever a significant percentage of potential beneficiaries fail to ask for it. If intent to target or to limit benefits is not the standard for subsidy law enforcement, then it appears that there must be a slightly looser evidentiary surrogate, such as predictability of limited usefulness or disproportionality of benefits.

All this being said, and in light of the deference we are required to afford to the expert agency dealing with these complexities, we conclude that Commerce has now supplied sufficient facts and rationale to justify its finding of specific subsidy in this matter. The first key fact supplied is the approximate size of the universe. We still do not know that number exactly, since 200 products might be grouped into somewhat fewer industries, but the list of unrelated products (and thus likely industries) does seem to well exceed 100. A program that benefits less than ten industries out of probably more than one hundred over a four year period creates a prima facie indication of de facto specific subsidy in such circumstances. In that circumstance, even slight additional indication of targeting, limitation or disproportionate benefit is sufficient to raise the prima facie showing to a sustainable administrative determination. Here, major corroborating evidence is that more than 50% of all government contributions, and more than 30% of all paid benefits, went to hog producers. Moreover, the experience under the ASA program in 1981 indicates that such disproportionate benefit to hog producers was a foreseeable result of the Tripartite Program. Legislatures, like persons, may be legally presumed to intend the foreseeable consequences of their actions. Thus, the evidence here strongly suggests that disproportionate benefit to hog producers was an intended or at least

²⁹ See, e.g., Saudi Iron and Steel Co. (Hadeed) v. United States, 675 F. Supp. 1362, 1367 (Ct. Int'l Trade 1987), appeal after remand, 686 F. Supp. 914 (Ct. Int'l Trade 1988).

contemplated result of the Tripartite Program. This is corroborated by evidence indicating that the benefit formula under the program for hog producers was improved for the specific purpose of inducing them to participate in a Tripartite Program.³⁰

In our view, a foreign government can disprove a purely statistical case of specific subsidy by showing that the fewness of beneficiaries, or the apparent disproportionate benefit to certain industries, was due purely to unforeseeable economic trends, or merely results from evaluating a program over too short a time period. But it now appears undisputed here that it was quite predictable that less than 20% of Canadian agriculture industries would use this program, and that hog producers alone would receive more than 20% of all benefits paid out. Looking at the Tripartite Program over a four-year period, the number of industries being aided does not seem to fluctuate much. There is some indication, or contention, that over perhaps fifteen years, the number of industries under the program might rise to twenty or even thirty.³¹ But twenty or thirty would still be a clear minority of all agricultural industries. Moreover, we do not believe that Commerce has the authority to vindicate a subsidy program solely because of speculation that it might become widely used over another decade or two.

Two further explanations remain, which could be somewhat persuasive in some factual contexts but which are dubious here and in any event raise difficult questions of legislative intent. The first is that only a minority

³⁰ See Department of Commerce "Verification Report for the Federal Government of Canada in the Countervailing Duty Investigation of Fresh, Chilled, and Frozen Pork from Canada (C-122-807)", Memorandum for Roy A. Malmose, Acting Director, Office of Countervailing Investigations, from Rick Herring, et al., filed June 22, 1989, at 10.

³¹ Tr. at 40-41.

of industries use the Tripartite Program because most agricultural industries use other, somewhat similar programs. It is fairly clear that a foreign nation can avoid U.S. subsidy duties if it creates a program to aid all products in its agricultural economy, and if most products receive such aid in rough proportion to the value of the products involved. But what if a foreign government creates two, three or four aid programs, each open to all applicants, and 90% of all producers receive benefits, with 20% or 30% joining each of the programs? Assuming this is not countervailable, what if a government adds a third program to two existing ones, and the new program lures away 30% of those already participating in the earlier programs?

The above questions could be very close ones if it were clear that the various programs were not tailored, before or after enactment, to the known needs of specific industries. On the facts here, however, rejecting this defense is not so difficult. Rather than a related series of graduated programs, we find a variety of schemes, some complementary and some mutually exclusive, some of which have already been held countervailable. Moreover, there is strong indication that the Tripartite Program was tailored, both before and after its enactment, to be useful and attractive to hog producers or meat producers, with it being foreseeable that they would be major recipients of aid under the program. Lastly, we take cognizance that certain agricultural programs (of the supply management type) tend to restrict production, while income stabilization programs like Tripartite tend to encourage production, and thus are likely to cause exports to be larger than if the program did not exist. It would seem bad policy in interpreting a countervailing duty law to hold that programs which restrict production and ones that encourage production are equivalents.

The final explanation for the fewness of participants is that the requirements are stiff, i.e., that many industries are not prepared to put up

the money to create a substantial fund, and not prepared to tie up those funds for ten years.³² This argument has some appeal, in that a countervailing duty law generally should not punish governments for creating aid programs which require industry self-help rather than being pure giveaways. On the other hand, we have no hard evidence that this is the primary or sole explanation for the fewness of beneficiaries here. The requirement of advancing funds is somewhat balanced by the lure of twice as much governmental contribution. Certain of the participating industries are quite small. Many larger product groups did not apply. Some groups were delayed, or turned down, for participation for reasons not set forth in the statute creating the program. For all these reasons, it is not possible to credit this argument very much on these facts.

In sum, we conclude that it was not unreasonable for Commerce to conclude that an aid program which benefited only nine industries out of 100 or more over a four-year period, and that provided a large majority of all contributions and benefits to only two industries, hogs and cattle, was a program which in foreseeable effect and/or in practice tended to aid a specific group of industries rather than all industries, and was thus countervailable under U.S. law.

II. The Alberta Crow Benefit Offset Program

In its final determination, Commerce found that because the CBOP was limited to feed grain users, the program was limited to a specific enterprise or industry, or group of enterprises or industries and was therefore countervailable.³³

³² Government of Canada Brief at 13-16.

³³ Final Pork Determination, 54 Fed. Reg. at 30,779.

On the basis that it did not have precise data on hog consumption of feed grain, Commerce used, as best information available ("BIA"), data published in a booklet entitled Agriculture in Alberta, which indicated that hogs consumed 15% of the province's barley production and that barley is the primary grain fed to hogs. Commerce on that basis allocated 15% of the total amount of benefits paid to feed grain users in Alberta over the dressed-weight equivalent of hogs marketed during the review period.³⁴

In its Memorandum Opinion, the Panel held that Commerce was entitled, under the BIA rule, to consider data in Agriculture in Alberta as evidence in arriving at its decision.³⁵ However, the Panel found that the determination by Commerce that 15% of the total benefits paid to feed grain users under the CBOP should be allocated to hog producers was not supported by evidence on the record.³⁶ The Panel stated that the evidence cited only indicated that 10% or perhaps 15% of the barley production in Alberta is consumed by hogs but did not support the conclusion that 15% of all grain production is consumed by hogs. The Panel indicated that, given those facts, it would follow logically that the percentage to be allocated must be less than 15%.³⁷

The determination by Commerce with respect to CBOP was remanded by the Panel for reconsideration and determination based on all the relevant evidence on the record.³⁸

In its Remand Determination, Commerce stated that it had available to it

³⁴ Id.

³⁵ First Panel Memorandum Opinion at 68.

³⁶ Id. at 69.

³⁷ Id.

³⁸ Id.

two figures, 10% and 15%, that could potentially serve as surrogates for the information needed to make an accurate calculation of the benefits received by hog producers under the CBOP.³⁹ It indicated that it had not been able to reopen the record and obtain the needed information, and expressed the view that, in any event, it would have been unlikely to receive anything definitive given that its prior requests had not elicited precise information.⁴⁰ Then, citing the lack of any better basis and in order to comply with the Panel's conclusion, which it indicated it did not understand, that the appropriate number must be less than 15%, Commerce took a simple average of 10% and 15% and allocated 12.5% of the monies paid out under the CBOP to hog production.⁴¹

Complainants dispute the figure of 12.5% arrived at by Commerce in its Remand Determination.⁴² They argue that the recalculation by Commerce does not adequately implement the Panel's directive to recalculate countervailable CBOP benefits based on evidence on the record.⁴³ They maintain Commerce has continued to misread Agriculture in Alberta as referring to the percentage of all feed grain, as opposed only to barley, consumed by hogs in Alberta.⁴⁴ Complainants also claim that Commerce has continued to ignore evidence on the record submitted during the investigation that the 15% figure is incorrect, and that hogs in fact consume only 10% of barley production in Alberta.⁴⁵

³⁹ Remand Determination at 15.

⁴⁰ Id.

⁴¹ Id.

⁴² Brief of the Government of the Province of Alberta regarding the Remand Determination of the U.S. Department of Commerce, January 18, 1991 (hereinafter "Brief of Alberta") at 4.

⁴³ Id.

⁴⁴ Id. at 5.

⁴⁵ Id.

Complainants further argue that the use by the Department of BIA does not relieve Commerce of its obligation to rely on information that is reasonably consistent with the evidence on the record. In addition, complainants argued that, based on certain evidence on the record, a figure of 1.09% could represent the percentage of all CBOP payments made to hog producers in Alberta.⁴⁶

In response, and in rejecting the proposed figure of 1.09%, Commerce argues that it is not required to use any particular verified information as BIA, and that it is not required to choose the best of all available information but rather that the BIA selected need only be consistent with some substantial evidence on the record.⁴⁷ Commerce indicates that it chose to rely on the percentages found in Agriculture in Alberta in an attempt to use province-specific BIA. In response to the Panel's concern about the difference in barley consumption percentage (10% and 15%) appearing in the booklet, and given that barley is the primary feed consumed by hogs in Alberta, Commerce states that it chose the 12.5% figure as being a reasonable approximation of CBOP benefits provided to hog growers.⁴⁸ The NPPC supports the position taken by Commerce.⁴⁹

The BIA rule was the subject of discussion by the Panel in its Memorandum Opinion, where the Panel noted that the right of Commerce to apply

⁴⁶ Id.

⁴⁷ Brief, International Trade Administration, United States Department of Commerce, February 4, 1991 (hereinafter "Brief of Commerce"), at 5.

⁴⁸ Id. at 4.

⁴⁹ NPPC Response Brief at 48.

the BIA rule is subject to some limits.⁵⁰ The Panel does recognize that once Commerce has exercised its discretion to use the best information available rule, it is for Commerce, rather than a complainant, to determine what is the best information available.⁵¹ In reviewing a determination by Commerce based on BIA, the role of the Panel is not to decide whether Commerce has chosen and used the best of all available evidence, but rather to consider whether the information used by Commerce is reasonably consistent with evidence on the record.⁵² But even after a decision has been properly made by Commerce to rely on BIA, it cannot arbitrarily use information and averaging methods that it simply deems to be convenient. Commerce must look to and rely on a reasoned and reasonable analysis of the administrative record.

As indicated in its Remand Determination, Commerce calculated an average of the two figures of 10% and 15% which appear in Agriculture in Alberta. But reliance on barley figures alone has to overstate the result. Moreover, the Panel recognizes the likelihood that the 15% figure in Agriculture in Alberta is a typographical error and concludes that it would be inappropriate to rely on this figure at this stage of the proceeding, even as part of an average.⁵³ In light of all of the above, it is the Panel's view that in arriving at the 12.5% figure, Commerce has failed to reasonably base its determination.

With respect to the determination of an appropriate BIA figure, the Panel notes that, during the investigation, the Government of the Province of Alberta submitted to Commerce two estimates of the correct percentage, one of

⁵⁰ First Panel Memorandum Opinion at 58-59 (citing Olympic Adhesive, Inc. v. United States, 899 F.2d 1565, 1572 (Fed. Cir. 1990)).

⁵¹ See Rhone Poulenc v. United States, 710 F. Supp. 341, 346 (Ct. Int'l Trade 1989).

⁵² See N.A.R., S.p.A. v. United States, No. 88-06-0041, slip op. at 13 (Ct. Int'l Trade June 26, 1990).

⁵³ See Pre-hearing Brief of the Government of the Province of Alberta at 40-41; Brief of Alberta at 2.

5.48% and the other of 11.4%, based on different methodologies. We conclude that, taking account these conceded figures, as well as the 10% figure for barley, Commerce should be able to arrive at a reasonable estimate on remand.

In light of all of the above, it is the Panel's view that in arriving at the 12.5% figure, Commerce has failed to base its determination on substantial evidence on the record. Accordingly, the Panel remands this re-determination by Commerce for further reconsideration and determination based on the evidence on the record.

III. The Quebec Farm Income Stabilization Program

In its first opinion, this Panel decided that Commerce had not presented sufficient substantial evidence on the record or provided sufficient explanation of its determination to countervail the FISI.⁵⁴ Subsequent to the first Panel decision, all parties have had the opportunity to brief and further argue the merits of the Panel decision.

The Department effectively based its determination on two premises: (1) only calves, feeder cattle, potatoes, piglets, feeder hogs, corn, oats, wheat, barley, heavy veal and sheep are recipients of FISI benefits and (2) eggs, dairy products and poultry do not receive FISI benefits. Based on these premises, the Department found FISI to be de facto a subsidy.⁵⁵

In its brief and argument, the Department has done little more than reiterate its earlier statements. Thus, unlike the Tripartite determination where additional facts have been forthcoming which give some indication of the size of the industry and the relative amounts of benefits received by the hog

⁵⁴ First Panel Memorandum Opinion at 79-80.

⁵⁵ Final Pork Determination, 54 Fed. Reg. at 30,781.

industry, the Department has not presented any such additional information for FISI. In fact, the only new information to come forth indicates that Quebec produces a much narrower range of farm products than is true across Canada, and that a high percentage of products by value are covered.⁵⁶ 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. Likewise, since FISI has been determined to be de jure not countervailable because it is available to all agricultural industries, the fact that three industries are not recipients of FISI is insufficient to sustain the determination that the program is countervailable.

The Panel, therefore, finds that nothing has been presented to it which would support reversal of its earlier determination with respect to FISI. This decision is remanded to the Department with instructions to conform its determination in accordance with the decision of the Panel.

The Panel affirms Commerce's remand determinations with respect to the benefit conversion factor, the Western Diversification Program, and the Canada/Quebec Subsidiary Agreement on Agri-Food Development.

Date

Joel Davidow

Date

Mark R. Joelson

⁵⁶ Tr. at 12, and references cited (44 major agricultural products).

Date

A. de Lotbiniere Panet

Date

Margaret Prentis

Date

Herbert C. Shelley

UNITED STATES-CANADA BINATIONAL PANEL REVIEW

In the matter of:	)	
	)	
FRESH, CHILLED, AND FROZEN PORK	)	USA-89-1904-06
FROM CANADA	)	
	)	

Separate Views of
Panelist Mark R. Joelson
on the Remand Determination

These separate views pertain only to the Remand Determination of the Department of Commerce ("Department" or "Commerce") regarding the Tripartite Benefit Program ("Tripartite Program") under the Canadian Agricultural Stabilization Act ("ASA"). Like the other members of the Panel, I conclude that Commerce could reasonably find that payments made to hog producers under the Tripartite Program are limited to a specific group of enterprises or industries within the meaning of section 771(5)(B) of the Tariff Act¹ and are therefore countervailable. However, because I reach this conclusion through a somewhat different process of reasoning, much of which was indicated in my initial "Additional Views,"² I find it necessary to file these separate comments.

On September 28, 1990, the Panel found that Commerce's determination, that payments made to hog producers under the Tripartite Program were limited to a specific group of enterprises or industries, was not in accordance with law.³ In remanding this determination, the majority Panel opinion instructed the Department to reformulate its specificity test "to determine whether the

¹ 19 U.S.C. § 1677(5)(B) (1988).

² See Additional Views of Panelist Mark R. Joelson, Fresh, Chilled, and Frozen Pork from Canada, USA-89-1904-06 (Sept. 28, 1990)(hereinafter "Additional Views").

³ Memorandum Opinion and Order at 48-54, Fresh, Chilled, and Frozen Pork from Canada, USA-89-1904-06 (Sept. 28, 1990).

number of products or enterprises aided is disproportionately small in terms of 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."⁴ The Department also was instructed to "determine whether the actual level of benefits received by the hog industry, or a definable group of industries, was disproportionately higher than for other agricultural industries for reasons not explicable by variations in the conditions, economic or otherwise, of those industries."⁵

At that time, I submitted separate views on this issue because I did not agree with the Panel's decision to substitute a new test for the Department's. Rather, I found that Commerce's three-factor test might well be adequate for determining whether a government limits a domestic subsidy to a discrete class of beneficiaries,⁶ but that the Department had not reasonably applied the test to the record before it or adequately substantiated its conclusions.⁷

With respect to the second factor of the specificity test, I found that the Department had not adequately explained why a program, which covers "nine out of an innumerable number of agricultural commodities,"⁸ is necessarily de facto limited, and I suggested that the agency define the term "innumerable"

⁴ Id. at 51.

⁵ Id. at 53-54.

⁶ The three factors are: "(1) The extent to which a foreign government acts (as demonstrated in the language of the relevant enacting legislation and implementing regulations) to limit the availability of a program; (2) the number of enterprises, industries, or groups thereof that actually use a program which may include the examination of disproportionate or dominant users; and (3) the extent, and manner in which, the government exercises discretion in making the program available." Fresh, Chilled, and Frozen Pork from Canada, 54 Fed. Reg. 30,774, 30,777 (Dep't Comm. 1989) (final determination) (hereinafter "Final Pork Determination").

⁷ Additional Views at 2-3.

⁸ Final Pork Determination, 54 Fed. Reg. at 30,777.

and put the number nine in context vis-à-vis the universe involved.⁹ I also stated that the Department needed to explain its reasons for premising de facto limitation on the basis that Canadian officials had decided not to sign agreements as to three commodities.¹⁰ With respect to the third factor, I determined that, in order to establish that the Canadian authorities exercised discretion to favor specific enterprises or industries, Commerce needed to provide a more detailed consideration and explanation of the Tripartite Program's operation in key respects.¹¹

Based on Commerce's Remand Determination and the parties' submissions relating thereto, I now believe that the evidence on the record adequately supports Commerce's conclusion that Tripartite payments to hog producers are countervailable. I have written these separate remarks, however, because I continue to feel uncomfortable with the test used by the remainder of the Panel, especially because of the manner in which it would allocate the burden of proof and because of the vagueness of the concepts which are offered in place of the Department's original test. I do not believe that Commerce should have the burden of assessing the "predictability" that certain industries would use the Tripartite Program, of explaining why certain industries did not choose to apply for benefits, or of analyzing the extent to which alternative programs offer comparable benefits. Moreover, such concepts in the Panel's test as "surprisingly or anomalously small" or "relevant economic conditions" provide little guidance in measuring specificity. Unfortunately, the Department also has not further refined its test, nor has it articulated a meaningful numerical standard, although it purports to use such a standard.

Nonetheless, turning to this case, I am satisfied that the Department

⁹ Additional Views at 6-7.

¹⁰ Id. at 7.

¹¹ Id. at 7-9.

could reasonably conclude that the number of enterprises or industries actually using and benefiting from the Tripartite Program is de facto limited. It has now been clearly brought to the Panel's attention and appears to be undisputed that 170 (more or less) commercially distinct natural and processed agricultural products are produced in Canada and are nominally eligible for the Tripartite Program.¹² Therefore, given the fact that the Program has covered only nine different products since its inception in 1985,¹³ only three other products have shown interest in obtaining coverage during this time,¹⁴ and the number of products expected to join in the future is very limited,¹⁵ I find that the number of industries benefited by the Tripartite Program clearly comprises a small percentage of the universe of nominally eligible industries.¹⁶ As the Panel majority points out (and here our reasoning conjoins), a program like this one which benefits only a few industries over a number of years creates a prima facie indication of de facto specific subsidy in such circumstances.

Moreover, an examination of the actual benefits provided under the Tripartite Program reveals that hog producers are major beneficiaries of the Program. During the period of investigation (calendar year 1988), as well as for the period from 1985-1988, hog producers received approximately 30% of the

¹² See Response Brief of the National Pork Producers Council ("NPPC") Concerning the Remand Determination of the International Trade Administration ("ITA") at 11, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06).

¹³ Final Pork Determination, 54 Fed. Reg. at 30,777.

¹⁴ Id.

¹⁵ See Remand Hearing Tr. at 40-41.

¹⁶ While "products" may not equal "industries," there is no indication that the number of industries would be substantially less than the number of products.

total payments that were distributed to all producers.¹⁷ They also were the target of over 50% of all government contributions to Tripartite funds in 1988, as well as in previous years.¹⁸ This strongly evidences that hog producers are "disproportionate or dominant users" of the Tripartite Program, to use a phrase from the second prong of Commerce's specificity test.

Complainants urge that "[w]hen federal contributions to Tripartite funds are considered more logically – in light of the farm value of the products involved – there is no evidence of `disproportionality.'"¹⁹ They point out that the hog program has a very high participation rate and a relatively high unit value, whereas the participation of producers in and unit value of commodities under other programs are significantly lower. However, in my view, Commerce could reasonably conclude, in administering the countervailing

¹⁷ See Pub. Doc. 21, cited in Government of Canada's Post-hearing Submission of Information Requested by Panel Regarding Tripartite Payments to Hog Producers at 2, Fresh, chilled, and Frozen Pork from Canada (USA-89-1904-06) (hereinafter "Canada's Posthearing Submission"); NPPC's Supplemental Response to the Panel's Request for Additional Information at Charts 2 and 4, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06) (hereinafter "NPPC's Supplemental Response"). Total Tripartite payments to all producers for the first three-quarters of fiscal year 1988-1989 totalled \$159,991,000. See Pub. Doc. 21, cited in Canada's Posthearing Submission at 2. Of this amount, \$49,362,000 was distributed to hog producers. See Non-Pub. Doc. 16, cited in Canada's Posthearing Submission at 1-2. Of this amount, Commerce countervailed 66.67% (to adjust for producer contributions), or \$32,908,000. Canada's Post hearing Submission at 1-2.

They also received 17% of all payments (excluding payments made under the dairy program and contributions to Tripartite funds) distributed under the ASA program. See Pub. Doc. 43, cited in Canada's Posthearing Submission at 3. However, because I believe that, on this record, Commerce was entitled to focus its specificity test solely on Tripartite benefits, I find that this figure is not relevant.

¹⁸ See Pub. Doc. 21, cited in NPPC's Supplemental Response at Charts 6 and 7.

¹⁹ Brief on Remand Submitted on Behalf of Complainant, The Canadian Pork Council and Its Members at 19, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06); see also Government of Canada's Comments on the Remand Determination at 28-30, Fresh, Chilled, and Frozen Pork from Canada (USA-89-1904-06).

duty statute, that a favored industry is one which receives more funds from the government than another, without applying concepts bearing on numbers of participants or unit value.

A conclusion that the hog producers receive favored treatment is corroborated by additional facts. First, hog producers have enjoyed a special status under the "named" commodity provision of the ASA, a status which suggests targeting of their industry.²⁰ Second, to encourage hog producers to participate in the Tripartite Program, the average profit margin for hogs was raised to 95%, nearly ten percentage points above that for beef.²¹ This has resulted in incomes of hog producers being stabilized to a greater degree than those of some other producers.²²

In sum, on this record, the Department's conclusion with respect to Tripartite Program benefits must be upheld as supported by substantial evidence and in accordance with law.

March 8, 1991

²⁰ See Live Pork Producer's Mktg. Bd. v. United States, 669 F. Supp. 445, 450-51 (Ct. Int'l Trade 1987).

²¹ Final Pork Determination, 54 Fed. Reg. at 30,777.

²² Id. at 30,777-78.

ARTICLE 1904 BINATIONAL PANEL REVIEW

pursuant to the

UNITED-STATES-CANADA FREE TRADE AGREEMENT

IN THE MATTER OF:

FRESH, CHILLED AND FROZEN PORK
FROM CANADA

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USA-89-1904-06

Before: Joel Davidow, Esq., Chairman
Mark R. Joelson, Esq.
A. de Lotbiniere Panet, Q.C.
Margaret Prentis
Herbert C. Shelly, Esq.

REMAND ORDER

March 8, 1991

For the reasons stated in the Panel's Memorandum Opinion, the Panel remands the Department of Commerce's Remand Determination of its Final Countervailing Duty Determination in Fresh, Chilled, and Frozen Pork from Canada, CV-122-807, so that the Department might reconsider its determinations with respect to the Quebec Farm Income Stabilization Insurance Program and Alberta Crow Benefit Offset Program.

The results of this remand shall be provided by the Department to the Panel by March 28, 1991.

SIGNED IN THE ORIGINAL BY:

MARCH 8, 1991
Date

JOEL DAVIDOW
Joel Davidow

MARCH 8, 1991
Date

MARK R. JOELSON
Mark R. Joelson

MARCH 8, 1991
Date

A. DE LOTBINIERE PANET
A. de Lotbiniere Panet

MARCH 8, 1991
Date

MARGARET PRENTIS
Margaret Prentis

MARCH 8, 1991
Date

HERBERT C. SHELLEY
Herbert C. Shelley