

UNITED STATES - CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL

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

DECISION OF THE PANEL
MAY 19, 1992

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

v.

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

and

NATIONAL PORK PRODUCERS COUNCIL, ET AL.
Intervenor

Before:

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

Appearances:

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

Stephen J. Powell, Mary Patricia Michel, for
International Trade Administration, U.S. Department of
Commerce

Paul C. Rosenthal, Nicholas D. Giordano, for National
Pork Producers Council, Et Al.

I. INTRODUCTION

This Panel has been convened under Article 1904 of the United States - Canada Free Trade Agreement¹ ("FTA") to hear various challenges to the final results reached by the International Trade Administration, U.S. Department of Commerce ("Commerce") in the fourth administrative review of the countervailing duty order on live swine from Canada.² Jurisdiction over this action is conferred on the Panel by Article 1904(2) of the FTA and section 516A(g)(2) of the Tariff Act of 1930, as amended (the "Act").³

The product under investigation is live swine (or hogs) from Canada.⁴ Fresh, chilled and frozen pork is not covered by Commerce's determination.⁵

¹ United States - Canada Free Trade Agreement, Jan. 1, 1988, 27 I.L.M. 281 (1988) (entered into force Jan. 1, 1989).

² Live Swine From Canada; Final Results of Countervailing Duty Administrative Review, 56 Fed. Reg. 28531 (June 21, 1991) ("Final Swine Determination").

³ 19 U.S.C. § 1516a(g)(2) (1992).

⁴ Imports of live swine are currently classifiable under subheadings 0103.91.00 and 0103.92.00 of the Harmonized Tariff Schedule.

⁵ Fresh, chilled and frozen pork from Canada is covered by a separate U.S. countervailing duty order issued on September 14, 1989. Countervailing Duty Order: Fresh, Chilled, and Frozen Pork from Canada, 54 Fed. Reg. 39031 (Sept. 22, 1989). Pork has been the subject of several binational panel proceedings under Chapter 19 of the FTA. See, e.g., In the Matter of: Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-06 (Sept. 28, 1990) ("Pork I").

The fourth administrative review of the countervailing duty order on swine from Canada covered the period April 1, 1988, through March 31, 1989. Final Swine Determination, supra note 2, at 28531. Out of forty-one investigated programs, nine were found to confer countervailable subsidies on Canadian producers of live swine. Id. In their briefs before this Panel, complainants challenge Commerce's determinations with respect to seven of these programs: (1) the National Tripartite Stabilization Scheme for Hogs ("Tripartite"); (2) the Quebec Farm Income Stabilization Insurance Program ("FISI"); (3) the Saskatchewan Hog Assured Returns Program ("SHARP"); (4) the Alberta Crow Benefit Offset Program ("ACBOP"); (5) the British Columbia Feed Grain Market Development Program ("B.C. Feed Program"); (6) the British Columbia Farm Income Insurance Plan ("FIIP"); and, (7) the Feed Freight Assistance Program ("FFA"). In addition, complainant P. Quintaine & Son Ltd. ("Quintaine") argues that the scope of the order should not include sows and boars. Finally, complainant Pryme Pork Ltd. ("Pryme") (a) challenges Commerce's refusal either to exclude weanlings from the scope of the order or to establish a separate rate (or subclass) for weanlings and (b) argues that it should have been assigned a separate company rate since it only exports weanlings to the United States.

After review of the administrative record and the arguments presented by the parties, this Panel remands the

determinations on Tripartite, FISI, SHARP, ACBOP, FFA and establishment of a subclass for weanlings. Commerce's determinations on B.C. Feed Program and FIIP, and inclusion of weanlings within the scope of the order, are upheld. Lastly, the Panel denies Pryme's request for a separate company rate and Quintaine's request to exclude sows and boars from the scope of the order.

II. BACKGROUND

A. Administrative Proceeding

The countervailing duty order on live swine from Canada was published in the Federal Register on August 15, 1985. Countervailing Duty Order; Live Swine From Canada, 50 Fed. Reg. 32880 (Aug. 15, 1985). Each year since the order, Commerce has conducted an administrative review pursuant to section 751(a)(1) of the Act.⁶

The fourth administrative review was initiated by Commerce on September 20, 1989. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 54 Fed. Reg. 38712 (Sept. 20, 1989). On November 16, 1989, the agency presented its countervailing duty questionnaire to the Canadian Government. Public Record ("P.R.") 6. Between September 19 and October 4,

⁶ 19 U.S.C. § 1675(a)(1) (1992).

1990, officials from Commerce conducted on-site verification of the questionnaire responses.

The preliminary results of the administrative review were issued January 31, 1991, and published in the Federal Register on February 12, 1991.⁷ On February 15, 1991, parties to the proceeding were provided with copies and an explanation of Commerce's preliminary calculations. Copies of the verification report were provided to all parties on February 22, 1991.

Case Briefs were filed by the parties pursuant to 19 C.F.R. § 355.38(c) on March 25, 1991. Rebuttal Briefs were filed by the parties on April 3, 1991. Commerce conducted an oral hearing on the issues pursuant to 19 C.F.R. § 355.38(f) on April 8, 1991.

The final results of the administrative review were issued on June 12, 1991, and published in the Federal Register on June 21, 1991. For live swine, other than sows and boars, the net subsidy during the period of review was determined to be Can\$0.0449/lb. For sows and boars, the net subsidy during the review period was determined to be Can\$0.0047/lb.

This appeal under Article 1904 of the FTA was requested by the complainants on July 8, 1991. United States-Canada Free-Trade Agreement Article 1904 Binational Panel Reviews; Request for Panel Review, 56 Fed. Reg. 33016 (July 18, 1991). The Panel

⁷ Most, if not all, of the parties received copies of the preliminary results on February 5, 1991.

conducted an oral hearing in Washington, D.C., on February 12, 1992.

B. Prior Panel Ruling

In August and October of 1991, this Panel was presented with two motions by the Canadian Pork Council and its members ("CPC") and the Government of Quebec ("Quebec") to expand Commerce's administrative record. The CPC sought to add two documents. The documents were portions of the CPC's Case and Rebuttal Briefs that had been stricken from the record by Commerce as untimely submissions of "factual" information pursuant to 19 C.F.R. § 355.31(a)(3). Quebec sought to add seven documents. Two of the documents were letters to Commerce by counsel for Quebec contesting allegations made by counsel for the National Pork Producers Council, et al. ("NPPC") during the administrative hearing held on April 8, 1991.⁸ The other five documents concerned a request by Quebec to correct an alleged ministerial error in the final results issued by Commerce.⁹

⁸ The two letters were dated April 18, 1991 and June 6, 1991, from the law firm Ackerson & Feldman to Commerce.

⁹ The five documents related to the issue of ministerial error were: (a) three letters dated June 24, June 26 and July 25, 1991, from the law firm of Ackerson & Feldman to Commerce; (b) an internal Commerce memorandum dated July 25, 1991; and, (c) a letter dated July 31, 1991, from Commerce to the law firm of Ackerson & Feldman.

By a unanimous decision issued on November 25, 1991, the Panel granted the CPC's motion to expand the record. In the Matter of: Live Swine From Canada, USA-91-1904-03 (November 25, 1991) ("Preliminary Ruling"). In the opinion of the Panel, the previously stricken portions of the CPC's Case and Rebuttal Briefs could "fairly be read as timely comments upon the preliminary results," and not untimely submissions of new factual information. Id. at 5.

Also by a unanimous vote, the Panel granted, in part, and denied, in part, Quebec's motion to expand the underlying record. Id. at 3, 5-8. With respect to Quebec's letters of April 18 and June 11, 1991 regarding allegations made by counsel for the NPPC at the administrative hearing, the Panel denied the motion on the grounds that the issue had been rendered moot by the passage of time. With regard to the allegation of ministerial error referenced in the five remaining documents, the Panel granted Quebec's motion on the grounds that Commerce had not explained why the final results were free of ministerial error. Until it had that explanation, the Panel stated, there could be no basis upon which to affirm the agency's refusal either to amend its final results or add the documents to the record. Id. at 8.

III. APPLICABLE LAW

Panels under Chapter 19 of the FTA are directed to apply:

the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

FTA, supra note 1, at Art. 1904(2). In addition, Article 1904(3) of the FTA requires all panels to apply the "general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." "General legal principles" are defined in Article 1911 to include "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." Id. at Art. 1911.¹⁰ Finally, Article 1904(3) also directs panels to apply the "standard of review . . . and the general legal principles that a court of the importing Party otherwise would apply."

If the present action were not before this Panel, it would be before the United States Court of International Trade ("CIT").¹¹ Hence, this Panel will apply the substantive and

¹⁰ See discussion infra pp. 8-11.

¹¹ Pursuant to 28 U.S.C. § 1581(c), the CIT has exclusive jurisdiction over all civil actions brought against Commerce under section 516A of the Act (19 U.S.C. § 1516a) challenging

procedural laws of the United States to the same extent, and in the same fashion, that the CIT would apply these laws to the present action.

IV. STANDARD OF REVIEW

The standard of review applied by the CIT to final affirmative countervailing duty determinations is found in section 516A(b) (1) (B) of the Act which states, in part:

The Court shall hold unlawful any determination, finding, or conclusion, found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

19 U.S.C. § 1516a(b) (1) (B) (1992).

This standard of review has been applied and was discussed at length in previous binational panel decisions. See Replacement Parts For Self-Propelled Bituminous Paving Equipment From Canada, USA 89-1904-02, at 3-5 (Jan. 22, 1990); Fresh, Chilled or Frozen Pork From Canada, USA 89-1904-11, at 5-13 (Aug. 24, 1990); New Steel Rails From Canada, USA 89-1904-08, at 6-8 (Aug. 30, 1990); Replacement Parts For Self-Propelled Bituminous Paving Equipment From Canada, USA 90-1904-01, at 13-18 (May 24, 1991). Under this standard, binational panels may not engage in de novo review or simply impose their constructions of the statute upon the agency. S. Rep. No. 249, 96th Cong., 1st Sess.

final countervailing duty determinations.

251-52 (1979); American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986), citing Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). They must restrict their examination of the facts to the administrative record, 19 U.S.C. § 1516a(b)(1)(B), and they should not disturb agency interpretations of the statute unless it appears from the statute or its legislative history that the interpretation is not one that Congress would have sanctioned. PPG Industries, Inc. v. United States, 928 F.2d 1568, 1572 (Fed. Cir. 1991), citing United States v. Shimer, 367 U.S. 374, 382-83 (1961).

In the absence of clearly discernible legislative intent, panels must limit their inquiry to whether Commerce's statutory interpretations are "sufficiently reasonable." American Lamb Co., *supra*, citing Chevron U.S.A., *supra*. In this regard, "[t]he agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." *Id.* See also Consumer Prod. Div., SCM Corp. v. Silver Reed America, 753 F.2d 1033, 1039 (Fed. Cir. 1985); In Re Red Raspberries From Canada, USA-89-1904-01, at 16 (Dec. 15, 1989). It is sufficient if the interpretation in question has a rational basis that comports with the object and purpose of the underlying statute. See Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1314-18 (Fed. Cir. 1986), *reversing sub nom.* Continental Steel Corp. v. United States, 614 F. Supp. 548 (Ct. Int'l Trade 1985). See

also PPG Industries, supra, at 1571-73, citing Chevron, supra. Moreover, Commerce has been given great discretion in administering the U.S. countervailing duty laws. PPG Industries, supra, at 1571. As the Federal Circuit noted in PPG Industries, Inc. v. United States, "countervailing duty determinations involve complex economic and foreign policy decisions of a delicate nature, for which the courts are woefully ill-equipped." Id. (emphasis added), citing United States v. Hammond Lead Prods., Inc., 440 F.2d 1024, 1030, cert. denied, 404 U.S. 1005 (1971).

When reviewing factual determinations by the agency, panels must examine whether the determination is based on such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. Matsushita Elec. Indus. Co., Ltd. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984), citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). See also Ceramica Regiomontana v. U.S., 679 F. Supp. 1119 (Ct. Int'l Trade 1986), aff'd., 810 F.2d 1137 (Fed. Cir. 1987). That the panel may be inclined to draw a different conclusion from the evidence does not prevent an agency's findings from being supported by substantial evidence. Matsushita, supra. See also Replacement Parts For Self-Propelled Bituminous Paving Equipment From Canada, USA 89-1904-02, at 2 (Jan. 22, 1990). "It is not the ambit of the Court to choose the view which it would have chosen in a trial de novo as long as the agency's decision is

supported by substantial evidence." Pork I, supra note 5, at 11, citing Hercules, Inc. v. United States, 673 F. Supp. 454, 479 (Ct. Int'l Trade 1987). However, "a reviewing court is not barred from setting aside [an agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view." Universal Camera Corp. v. NLRB 340 U.S. 474, 488 (1951).

V. DISCUSSION

A. National Tripartite Stabilization Scheme For Hogs¹²

In its final results, Commerce determined that the Canadian federal government's Tripartite scheme for hogs conferred countervailable subsidies on Canadian swine producers during the period of review. Final Swine Determination, supra note 2, at 28534. In reaching its conclusion, the agency determined that Tripartite benefits (which take the form of payments triggered by market prices that fall below government-prescribed support prices) are provided "to a specific enterprise or industry, or group of enterprises or industries" within the

¹² In its preliminary results, Commerce described Tripartite in the following terms:

The general terms of the Tripartite Scheme on Hogs are as follows: all hog producers in participating provinces receive the same level of support per unit; the cost of the scheme is shared [equally] between Canada, the province, and the producer; producer participation in the scheme is voluntary; the provinces may not offer separate stabilization plans or other ad hoc assistance for hogs (with certain exceptions); and the federal government may not offer compensation to swine producers in a province not a party to an agreement. The scheme must operate at a level that limits losses but does not stimulate over-production. . . . Stabilization payments are made when the market price falls below the support price. The difference between the support price and the average market price is the amount of the stabilization payment.

Live Swine From Canada: Preliminary Results of Countervailing Duty Administrative Review, 56 Fed. Reg. 5676, 5678 (Feb. 12, 1991) ("Preliminary Swine Determination").

meaning of section 771(5) of the Act (19 U.S.C. § 1677(5) (1992)). Id.

Commerce determined that Tripartite was not de jure specific. Id. at 28532. Rather, Commerce found that the Tripartite program operated in such a way as to render it de facto specific. Id. at 28534. The distinction between de jure and de facto is that the latter is found in the effect of a government action or program that otherwise has the appearance of being generally available under the de jure test. If de facto specificity is to be determined, it has to be demonstrated from evidence of government action, since, prima facie, the program under question is not de jure specific. PPG Industries, Inc. v. United States, 928 F.2d 1568, 1576 (Fed. Cir. 1991).

In its preliminary results, Commerce described its methodology for determining specificity:

. . . to determine whether a program is limited to a specific enterprise or industry or group of enterprises or industries, we consider: (1) Whether the law of the foreign government acts to limit the availability of a program; (2) the number of industries or groups thereof that actually use a program; (3) whether there are dominant users of a program, or whether certain industries or groups thereof receive disproportionately large benefits under a program; and (4) the extent to which a government exercises discretion in conferring benefits under a program (see e.g. § 355.43(b) (2) of "Countervailing

Duties; Notice of Proposed Rulemaking and Request for Public Comments", 54 FR 23366 at 23379, 1989).

Preliminary Swine Determination, supra note 12, at 5678, citing Countervailing Duties; Notice of Proposed Rulemaking, 54 Fed.

Reg. 23366 (May 31, 1989). The Federal Register notice announcing Commerce's final results sets forth Commerce's factual findings:

In analyzing *de facto* specificity, the Department looks at the actual number of commodities covered during the particular period under review. There is general agreement that there are at least 100 commodities produced in Canada. However, despite Tripartite's nominal general availability to all commodities, the Annual Report of the Agricultural Stabilization Board for the fiscal year ending March 31, 1989, shows that there were only six Tripartite agreements in place, covering just nine commodities. Furthermore, hog producers received 52 percent of the total payouts made under the six Tripartite Schemes in the review period. Since Tripartite's inception, 51 percent of all Tripartite payments made to all schemes have gone to hog producers. Although CPC argues that there are other Tripartite Schemes under negotiation (and honey and onion negotiations have been completed after the review period) we have no authority to take into account predictions about the future growth of the Tripartite Stabilization Plan. During the review period the program was limited, *de facto*, to a specific group of enterprises or industries, and is therefore countervailable.

Final Swine Determination, supra note 2, at 28534.

The CPC and the Government of Canada ("Canada") argue that Commerce's determination is flawed in several respects. Canada contends that the agency postulates an incorrect legal standard for determining specificity.¹³ In its opinion, the correct test is whether Tripartite benefits are intentionally targeted at swine.¹⁴ The CPC argues that Commerce failed to premise its determination of countervailability upon a finding that Tripartite benefits confer a "competitive advantage" on Canadian swine producers.¹⁵ The CPC asserts that domestic subsidies that satisfy the specificity test in section 771(5) of the Act are not countervailable unless they "bestow a sufficient degree of competitive advantage in international commerce on users" of the subsidies to warrant countervailing their benefits.

¹³ Brief of the Government of Canada, at 13-36, Live Swine from Canada (USA-91-1904-03) ("Brief of Canada").

¹⁴ Brief of Canada, supra note 13, at 13-27. In its Reply Brief, Canada disavows advocating an intent test. See Reply Brief of the Government of Canada at 1-2, Live Swine from Canada (USA-91-1904-03). According to Canada, proof of targeting need not involve proof of intent:

The targeting analysis that we urge, however, is not a search for government intent. It is a search for evidence of government action from which targeting can be inferred. The analyses are distinct.

Id. (footnote omitted).

¹⁵ Brief of the Canadian Pork Council and its Members, at 16-18, Live Swine from Canada (USA-91-1904-03) ("Brief of CPC").

Lastly, both Canada and the CPC believe the determination that Tripartite is provided to a specific group of enterprises or industries is unsupported by substantial evidence on the record or otherwise not in accordance with law.¹⁶ (Neither complainant disputes the fact that Canadian hog producers receive an economic benefit from Tripartite.)

In our opinion, Commerce applied the correct legal standard, insofar as it does not have to find intentional targeting and it does not have to make a separate determination of competitive advantage. The agency does, however, have to base its determination upon substantial evidence, and it is obliged to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicles Mfgs. v. State Farm, 463 U.S. 29, 43 (1983), citing Burlington Truck v. U.S., 371 U.S. 156, 168 (1962). The specificity test cannot be reduced to a precise mathematical formula, and Commerce must exercise its judgment and carefully consider all relevant factors in order to determine whether an unfair practice is taking place. See Countervailing Duties; Notice of Proposed Rulemaking, 54 Fed. Reg. 23366, 23368 (May 31, 1989). As we describe more fully below, because Commerce's determination is not supported by substantial evidence in several important

¹⁶ Id. at 18-41; Brief of Canada, supra note 13, at 36-59.

respects, or is otherwise not in accordance with law, a remand for further administrative action in accordance with this opinion is required.

1. Legal Standard For Determining De Facto Specificity

The specificity test is a highly litigated issue under U.S. countervailing duty law. See, e.g., PPG Industries, supra; Cabot Corp. v. United States, 620 F. Supp. 722 (1985), appeal dismissed, 788 F.2d 1539 (Fed. Cir. 1986), reh'g denied, May 22, 1986. Its origins lie in a collection of administrative determinations made by the U.S. Treasury Department during the 1970s. There, for the first time, the United States chose not to apply its countervailing duty law to generally available domestic programs. See, e.g., Bicycle Tires And Tubes From The Republic Of China, 43 Fed. Reg. 32912 (July 28, 1978); Certain Textiles And Textile Products From Singapore, 44 Fed. Reg. 35334, (June 19, 1979); Certain Textiles And Textile Products from Malaysia, 44 Fed. Reg. 41001 (July 13, 1979).

The test was not incorporated into the statutes, however, until the Trade Agreements Act ("TAA") of 1979. Pub. L. 96-39, § 101, 93 Stat. 144, 151 (1979) (codified at 19 U.S.C. § 1677(5)). The TAA implemented the Tokyo Round of Multilateral Trade Negotiations, including the Subsidies Code. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, opened for signature Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 ("Subsidies

Code"). Article 11 of the Subsidies Code defines countervailable domestic subsidies as those "granted with the aim of giving an advantage to certain enterprises, . . . either regionally or by sector." Subsidies Code, supra at Art. 11, para. 3 (emphasis added).

Section 771(5)(B) of the TAA codified this concept in U.S. law by defining actionable domestic subsidies as benefits "provided or required by government action to a specific enterprise or industry, or group of enterprises or industries." 19 U.S.C. § 1677(5)(B). If a benefit (other than an export subsidy) is made more widely available, it is not countervailable under U.S. law.¹⁷ "Domestic subsidies must be bestowed only on a specific enterprise or industry or a specific group of enterprises or industries to be countervailable." PPG Industries, Inc. v. United States, 928 F.2d 1568, 1576 (Fed. Cir. 1991).

The legislative history of section 771(5)(B) suggests two principal motives for the specificity test. First, Congress understood that every imported article has benefited, in some way, from government assistance.¹⁸ In most countries (including the United States), exports benefit, for example, from government

¹⁷ Export subsidies are, by definition, specific. See, e.g., Countervailing Duties: Notice of Proposed Rulemaking, 54 Fed. Reg. 23366, 23367 and 23379 (May 31, 1989).

¹⁸ See, e.g., 125 Cong. Rec. 20160, 20168, 20185 (1979).

sponsored roads, utilities, education, and assorted tax policies. Thus, without a specificity test, every import might be subject to countervailing duties.¹⁹ See Barcelo, Subsidies and Countervailing Duties -- Analysis and a Proposal, 9 L. & Pol'y Int'l Bus. 779, 836 (1977).

Secondly, Congress recognized that the countervailing duty law is primarily meant to offset government programs that upset free market forces.²⁰ Government programs that do not distort the allocation of resources by artificially increasing the revenues or decreasing the costs of the product under investigation, do not upset market forces, and should not be countervailable. Id. By enacting the specificity test, Congress sought to distinguish between widely available subsidies that do not distort markets and special (or specific) subsidies that distort prices, supplies and the general allocation of resources within an economy.

a. Targeting. Under the statutory scheme, the pertinent inquiry is not whether Canada has intentionally targeted benefits to swine producers, but rather, whether it has

¹⁹ As Judge Maletz noted in Carlisle Tire and Rubber Co. v. United States, 564 F. Supp. 834, 838 (Ct. Int'l Trade 1983), the specificity test helps to preclude the "absurd result" that would arise if programs benefiting public highways and bridges were countervailed.

²⁰ See, e.g., 125 Cong. Rec. 20160, 20168, 20185 (1979). See also Proposed Amendments to the Countervailing Duty Law: Hearings Before the Subcommittee On Trade, House Committee On Ways And Means, 98th Cong., 1st Sess. (1983).

done something, intentionally or otherwise, that confers a benefit upon "a specific enterprise or industry or group of enterprises or industries."²¹ 19 U.S.C. § 1677(5)(B) (1992).

In this regard, section 771(5)(B) of the Act requires Commerce to:

determine whether the bounty, grant, or subsidy in law or in fact is provided to a specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulation, program or rule establishing a bounty, grant or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant, or subsidy in law or in fact is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof.

19 U.S.C. § 1677(5)(B) (1992). Even if we were not required (as we are) to give deference to Commerce's statutory interpretation, we would be hard pressed to deduce from this statutory language that purposeful or intentional targeting is a prerequisite for a determination of de facto specificity.

²¹ The Panel does not mean to suggest that only government subsidies are countervailable under U.S. law. See Galvanized Steel Wire Strand From South Africa; Preliminary Affirmative Countervailing Duty Determination, 48 Fed. Reg. 6756 (Feb. 15, 1983) (according to the legislative history of section 771(5) of the Act, private subsidies may be subjected to countervailing duties). See also Steel Pipe and Tube Products from South Africa; Affirmative Preliminary Countervailing Duty Determination, 48 Fed. Reg. 9899 (Mar. 9, 1983).

Moreover, the legislative history of section 771(5) (B) strongly suggests that a targeting requirement should not be imputed. Prior to the ruling in Cabot, Inc. v. United States, supra, Commerce basically ignored the extent to which a program under investigation was used within the exporting country. As long as everyone in the exporting country was legally entitled to obtain the benefits, the subject program was considered non-specific and non-countervailable. See, e.g., Carbon Black From Mexico Final Affirmative Countervailing Duty Determination and Countervailing Order, 48 Fed. Reg. 29564, 29566 (June 27, 1983). In Cabot, Judge Carmen rejected Commerce's position. In his view, Commerce was required to:

examine the actual results or effects of assistance provided by foreign governments and not the purposes or intentions. (citation omitted) . . .
. The question is what aid or advantage has actually been received 'regardless of whatever name or in whatever manner or for whatever purpose' the aid was provided. . . .
The appropriate standard focuses on the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits.

620 F. Supp. at 732 (emphasis added).

In 1988, in section 1312 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1185 (now codified at 19 U.S.C. § 1677(5)), Congress codified the holding in Cabot. As the pertinent Senate Report explains:

In Cabot, the court held that nominal general availability of a subsidy should not be conclusive evidence that a subsidy is not provided to a specific industry. Instead, the Commerce Department must look on a case by case basis to the actual availability of a subsidy. A subsidy provided in law to a specific industry is clearly countervailable. The issue addressed in Cabot is whether a subsidy provided in fact to a specific industry is countervailable.

S. Rep. No. 71, 100th Cong., 1st Sess. 122-23 (1987). See also H. Rep. No. 40 (Part I), 100th Cong., 1st Sess. 123-24 (1987).

Thus, Congress amended section 771(B)(5) of the Act to ensure that where benefits received by a specific enterprise or industry, or group of enterprises or industries, harm a competing U.S. industry, countervailing duties may be imposed. Whether specific benefits are intentional or inadvertent is irrelevant.

Finally, we believe two judicial rulings are instructive with respect to the targeting issue. First, in Saudi Iron and Steel Co. (Hadeed) v. United States, plaintiff argued that "Commerce has found a benefit bestowed upon a specific group of enterprises only where there was clear evidence of some form of selection or targeting by the foreign government." 675 F. Supp. 1362, 1367 (Ct. Int'l Trade 1987), appeal after remand, 686 F. Supp. 914 (Ct. Int'l Trade 1988). In rejecting that argument, the court stated:

Decisions of this Court require Commerce to conduct a *de facto* case by case analysis to determine whether a program provides a subsidy, or a bounty or grant, to 'a specific enterprise or industry or group of enterprises or industries' within the meaning of section 1677(5)(B). (citations omitted) Under this 'specificity test,' proof of the intent of the foreign government to target or select specific enterprises or industries is not a prerequisite to the countervailability of the benefit provided.

Id. (emphasis added). See also SSAB Svenskt Staal AB v. United States, 764 F. Supp. 650, 655 (Ct. Int'l Trade 1991) ("The actual results or effects of the benefits provided must be examined and not the purposes or intentions of those benefits."). Second, in PPG Industries, Inc. v. United States, supra, the Federal Circuit held that Commerce's three-part test, which does not require a showing of targeting, is in accordance with law.²²

²² Canada relies on the binational panel decision in Pork I, supra note 5, at 49-52. Brief of Canada, supra note 13, at 20. That decision held (at 51-52) that U.S. countervailing duty law requires "convincing circumstantial evidence that the program . . . has been targeted at hogs."

However, when it considered Commerce's remand determination in March of 1991, the same panel suggested that "intent to target or to limit benefits" may not be necessary and might be replaced by a "slightly looser evidentiary surrogate, such as predictability of limited usefulness or disproportionality of benefits." In the matter of: Fresh, Chilled and Frozen Pork from Canada, USA-891904-06, at 8 (Mar. 8, 1991) ("Pork II"). Moreover, the Panel affirmed Commerce's determination on Tripartite even though the agency did not apply a targeting test. Id. at 7-8.

We find that, taken together, Pork I and Pork II are

In sum, the statute's plain meaning, its legislative history and the manner in which U.S. law has been construed by U.S. courts do not support Canada's argument that targeting is a prerequisite for a finding of de facto specificity.

b. Competitive Advantage. Similarly unpersuasive is the CPC's argument that Commerce's determination was contrary to law because it failed to apply a separate and distinct competitive advantage test.²³ For this proposition, the CPC refers us to Cabot, supra, Roses, Inc. v. United States, 743 F. Supp. 870 (Ct. Int'l Trade 1990), and PPG Industries, supra. However, the passages cited by the CPC are isolated statements using the term "competitive advantage" without taking the further step of requiring Commerce to analyze whether it is present in particular cases. In Cabot, for example, Judge Carmen did not suggest that preferential Mexican prices for carbon black feedstock would only be countervailable if they were specific and conferred a competitive advantage in international commerce on consumers. He simply treated the terms "competitive advantage" and "benefit" as interchangeable, based in part upon Judge Newman's conclusion in British Steel Corp. v. United States, 605 F. Supp. 286, 294 (Ct. Int'l Trade 1985), that benefits, such as

not persuasive authority that there can be no de facto specificity without targeting. We find that the other authorities cited in the text of this opinion are persuasive to the contrary.

²³ Brief of CPC, supra note 15, at 16.

debt forgiveness and grants, inevitably bestow a "competitive advantage" upon the recipient.

The same thing can be said about PPG Industries. Judge Nies did not articulate a new or different test based on competitive advantage. PPG Industries dealt with the specificity issue. 928 F.2d at 1573. In the language quoted by the CPC in its brief, Judge Nies is simply responding to the argument that the specificity test is illegal and that all competitive advantages bestowed upon a foreign producer/exporter should be countervailable:

In sum, the statutory term 'bounty or grant' has not been defined, as a matter of law, by the courts to encompass every domestic subsidy conferring a competitive advantage and, thus, does not mandatorily prohibit the limitation of countervailable domestic subsidies in the present statute to benefits provided only to a specific industry or group of industries.

Id. at 1574 (emphasis in original). See also PPG Industries, Inc. v. United States, 712 F. Supp. 195, 200-01 (Ct. Int'l Trade 1989) (the court in Cabot did not adopt a "competitive advantage" test).

Finally, Roses Inc. v. United States, 743 F. Supp. 840 (Ct. Int'l Trade 1990) does not support a separate competitive advantage test under the U.S. countervailing duty law. In

considering Commerce's second remand determination in that case, Judge Restani expressly distanced herself from this notion:

Plaintiffs also contend that Commerce was required in its countervailability determination to inquire into the competitive advantage derived from the benefit, i.e., the effect upon international commerce of any FIRA benefit. While this is a general concern and information on this issue may assist Commerce in its determination, it does not provide a useful bright-line test. The problem with plaintiffs' contention is that United States trade laws are not aimed at protecting United States industry from every competitive advantage afforded by government action. [citation omitted] Furthermore, precise assessment of whether there is a competitive advantage may be extremely difficult in a particular case.

774 F. Supp. 1376, 1381-82 (Ct. Int'l Trade. 1991) (emphasis in original).

In sum, nothing in the Act requires Commerce to calculate the extent to which specific domestic subsidies confer a competitive advantage in international commerce on the recipient, nor has any judicial decision imposed that requirement. Therefore, the agency's interpretation must be upheld by this Panel.

c. Conclusion. While the test set forth in Commerce's proposed regulations for determining de facto specificity (and in Commerce's final determination in the instant

proceeding) conforms to law, Commerce may not base its determinations on a purely mechanical analysis. "Commerce does not perform a proper de facto analysis if it merely looks at the number of companies that receive benefits under [a] program." Roses Inc. v. United States, 774 F. Supp. 1376, 1380 (Ct. Int'l Trade 1991). "It is not the sheer number of the enterprises receiving benefits that dictates whether or not a program is countervailable." Id. at 1384. Rather, Commerce must examine all relevant factors to determine whether "if, in its application, the program [at issue] results in a subsidy only to a specific enterprise or industry or specific group of enterprises or industries." PPG Industries, supra, at 1576 (emphasis in original). To fulfill this requirement, Commerce must comply with its own proposed regulations, as expressly approved by the Court of Appeals for the Federal Circuit, in PPG Industries, Id., and it "must exercise judgment and balance various factors in analyzing the facts of a particular case in order to determine whether an 'unfair' practice is taking place." Commerce "must always focus on whether an advantage in international commerce has been bestowed on a discrete class of grantees despite nominal availability, program grouping, or the absolute number of grantee companies or 'industries.'" Roses Inc. v. United States, 743 F. Supp. 870, 881 (Ct. Int'l Trade 1990).

In sum, while we cannot say that the standard articulated by Commerce for determining the presence or absence of de facto domestic subsidies is unreasonable, we are concerned that in applying this standard, Commerce may have placed undue weight on a mathematical construct, and may have failed to properly consider all of the evidence submitted in support of respondents' contention that a domestic subsidy was not bestowed.

2. Substantial Evidence For Determining De Facto Specificity

Canada and the CPC assert that Commerce's determination that Tripartite benefits are de facto specific is not supported by substantial evidence and is otherwise not supported by law.²⁴ In support of their argument, they advance the following: (i) there is no evidence in the administrative record to support Commerce's claim that there are "at least 100 commodities produced in Canada," nor that 100 commodities comprise the universe of eligible industries which could (in theory) take part in the Tripartite program; (ii) within its first four years, the Tripartite program has been made available to 46,000 enterprises producing nine commodities -- from sugar beets in Manitoba to cattle on Prince Edward Island; (iii) during the period of review, negotiations to further expand the program were underway; (iv) evidence in the record demonstrates that three more

²⁴ Brief of Canada, supra note 13, at 41-59; Brief of CPC, supra note 15, at 18-41.

commodities, including honey and onions, joined the Tripartite program between the end of the review period and the issuance of the final results; (v) although hog producers may have received 52 percent of all Tripartite payments during the period of review, they received nothing during the first several years and they made almost 50 percent of all producer contributions to the Tripartite fund during the period of review; (vi) there is no evidence that government authorities exercise undue discretion when conferring Tripartite benefits; and, (vii) hog producers received only 19.42 percent of all stabilization payments (under the Agricultural Stabilization Act ("ASA"), including Tripartite) during FY 1989, and only 9.12 percent of all stabilization payments from FY 1986/87 through FY 1988/89.

Although we are compelled to accord great deference to Commerce's administration of the U.S. countervailing duty law, PPG Industries, supra, at 1571, administrative determinations may be remanded if they lack a reasoned basis. American Lamb, supra, at 1004. As more fully described below, we believe Commerce's determination regarding Tripartite lacks a reasoned basis.

It is settled law in the United States that a program granting benefits to the entire agricultural sector of an economy is not provided to a specific enterprise or industry or group of enterprises or industries and, therefore, is not countervailable. See, e.g., Final Affirmative Countervailing Duty Determination: Fuel Ethanol From Brazil, 51 Fed. Reg. 3361 (Jan. 27, 1986);

Countervailing Duties; Notice of Proposed Rulemaking, 54 Fed. Reg. 23366, 23368 (May 31, 1989). It is equally well established that benefits provided to a wide variety of agricultural products may negate a finding of de facto specificity. See, e.g., Final Negative Countervailing Duty Determination; Certain Fresh Cut Flowers From Kenya, 52 Fed. Reg. 9522, 9525 (Mar. 25, 1987). It follows from this authority that Commerce must determine, in every case involving agricultural products, the number of commodities produced in the country under investigation; otherwise, the agency may impose countervailing duties on a domestic program that is not de facto specific.

In the present case, Commerce has failed to do this. As Canada and the CPC note in their briefs, nothing in the underlying administrative record fully supports Commerce's determination that "there are at least 100 commodities produced in Canada."²⁵ Final Swine Determination, supra note 2, at 28534. In its brief, Commerce tries to deflect this criticism by pointing to Canada's questionnaire response (P.R. 10, Tab C., App. 6) which identifies over 60 different agricultural commodities in Canada.²⁶ Our problems with this argument are several.

²⁵ Brief of Canada, supra note 13, at 44; Brief of CPC, supra note 15, at 21.

²⁶ Brief in Support of the U.S. Department of Commerce, at 19, Live Swine from Canada (USA-91-1904-03) ("Brief of Commerce").

First, we are reviewing an administrative determination. Post-hoc rationalizations by agency counsel are no substitute for substantial evidence. Timken Co. v. United States, 894 F.2d 385, 389 (Fed. Cir. 1990); A. Hirsh, Inc. v. United States, 729 F. Supp. 1360, 1365 (Ct. Int'l Trade 1990). Commerce, not its counsel on appeal, must define the universe of commodities in Canada and base that determination upon substantial evidence.

Secondly, the argument ignores the fact that Commerce apparently failed to consider the suggestion put forth by the CPC in its Case and Rebuttal Briefs that Farm Cash Receipts ("FCRs") prepared by Statistics Canada provide the best indication of all agricultural commodities in Canada.²⁷ See Granges Metallverken AB v. United States, 716 F. Supp. 17, 24 (Ct. Int'l Trade 1989) ("it is an abuse of discretion for an agency to fail to consider an issue properly raised by the record evidence . . ."). In its brief before this Panel, Canada submits that the FCRs demonstrate that there are only "about two dozen [agricultural] commodities" in Canada.²⁸

²⁷ See P.R. 49, at 14; P.R. 56, at 27. In its Case Brief, for example, the CPC argues that FCRs should be used to define the universe of Canadian agricultural commodities, in part, because they would exclude products not farmed in Canada, by-products and research items. P.R. 49, at 14, n. 10.

²⁸ Brief of Canada, supra note 13, at 47. The NPPC disputes the utility of FCRs because they allegedly exclude processed commodities, and Tripartite covers "any natural or processed products of agriculture." P.R. 10. Brief of the

In sum, Commerce's determination that at least 100 agricultural commodities are produced in Canada is remanded in order that the agency may reexamine, based on substantial evidence in the record, whether its categorization of commodities is consistent and accurate and, in particular: (i) whether quantitative assessment based on FCRs (or equivalent data) would be appropriate in achieving consistent and accurate categories, and (ii) what number of commodities makes up the relevant universe.

For similar reasons, we believe Commerce's determination regarding the number of commodities covered by Tripartite should be remanded.²⁹ In its preliminary results, Commerce stated that there were twelve commodities under eight Tripartite agreements.³⁰ Four months later, in its final results, Commerce found only six agreements covering nine commodities.³¹

Whatever the number, it cannot be disputed that Commerce must calculate this figure according to the same methodology that it calculates the relevant universe.

National Pork Producers Council, at 32, n. 38, Live Swine from Canada (USA-91-1904-03) ("Brief of NPPC").

²⁹ For Canada's and the CPC's arguments on this issue, see Brief of Canada, supra note 13, at 41, and Brief of CPC, supra note 15, at 23.

³⁰ Preliminary Swine Determination, supra note 12, at 5678.

³¹ Final Swine Determination, supra note 2, at 28534.

Nonetheless, the administrative record suggests this may not have been done. For example, the Tripartite program treats cows and calves as one commodity,³² while Canada's listing of all agricultural products in its questionnaire response distinguishes between "Dairy Cows" and "Feeder Calves."³³ On remand, Commerce should reexamine the evidence and (i) determine the number of agricultural commodities covered by Tripartite in the same manner that it determines the number of commodities in Canada, and (ii) identify the number of enterprises or industries in Canada's agricultural sector and the number of enterprises or industries covered by Tripartite.³⁴

Related to these issues is the argument by Canada and the CPC that Commerce failed to consider the expanding nature of Tripartite. They argue that Commerce should have been influenced by the fact that the Tripartite program has shown a consistent pattern of growth since its inception.³⁵ In its second year of

³² See, e.g., P.R. 30 at 3; P.R. 10, Tab C, App. 7.

³³ P.R. 10, Tab C, App. 6.

³⁴ As the CPC notes in its brief, Commerce's analysis focuses upon commodities and not "enterprises" or "industries." Brief of CPC, supra note 15, at 20-21. This may or may not be harmless error. For example, if the universe of agricultural commodities translates into only forty or fifty industries, and Tripartite is determined on remand to cover nine industries, would nine out of forty or fifty constitute a "group of industries" within the meaning of 19 U.S.C. § 1677(5) (B)?

³⁵ Brief of Canada, supra note 13, at 41-44; Brief of CPC, supra note 15, at 23-27.

existence, Tripartite covered only four commodities. Live Swine From Canada; Preliminary Results Of Countervailing Duty Administrative Reviews, 55 Fed. Reg. 20812, 20813 (May 21, 1990). By the end of its third, Tripartite covered eight commodities. Id. By the end of the fourth review period (i.e., March 31, 1989), it covered one more, Final Swine Determination, supra note 2, at 28534; however, Canada and the CPC point out that three more commodities, including onions and honey, were added before Commerce's final results were issued.³⁶ See P.R. 30 at 3. They also contend that Commerce ignored the fact that Tripartite agreements, like the one for hogs, involve complex and lengthy negotiations.³⁷ Hence, they argue, it will take time for all commodities to join Tripartite and Commerce should not penalize the first ones. Finally, Canada and the CPC contend that Commerce erred when it refused to consider the record evidence which indicates that negotiations to add three or four more commodities to Tripartite were pending at the time of the agency's final results.³⁸

With one exception, Commerce apparently did not consider these arguments in its final results. The one exception

³⁶ Brief of Canada, supra note 13, at 42; Brief of CPC, supra note 15, at 23.

³⁷ Brief of Canada, supra note 13, at 43; Brief of CPC, supra note 15, at 26.

³⁸ Brief of Canada, supra note 13, at 42-43; Brief of CPC, supra note 15, at 25-26.

concerns Commerce's express refusal to consider evidence on the record that relates to events after March 31, 1989 (the period of review). Final Swine Determination, supra note 2, at 28534. On this point, Commerce stated:

Although CPC argues that there are other Tripartite Schemes under negotiation (and honey and onion negotiations have been completed after the review period) we have no authority to take into account predictions about the future growth of the Tripartite Stabilization Plan.

Id.

In fact, the CPC did not ask Commerce to speculate or "take account of predictions" about the future growth of Tripartite.³⁹ It asked the agency to consider verified information on the record regarding the newly concluded agreements and certain pending negotiations. Thus, the issue raised by this information did not relate to its speculative nature; rather, the issue before us is whether Commerce may base a determination under 19 U.S.C. § 1677(5)(B) upon information that arises after the period of review, but prior to its determination, which Commerce was able to verify.

It is a firmly established principle of U.S. countervailing duty law that administrative reviews under section 751 of the Act (19 U.S.C. § 1675(a)) are intended to calculate the level of subsidization during the period of review. See,

³⁹ See Case Brief of CPC, P.R. 49 at 5-9.

e.g., Certain Castor Oil Products From Brazil; Final Results of Administrative Review of Countervailing Duty Order, 46 Fed. Reg. 62487, 62489 (Dec. 24, 1981).⁴⁰ If information arises subsequent to the period of investigation that affects the level of subsidization, it should be addressed in the next administrative review. Final Affirmative Countervailing Duty Determination; Carbon Steel Plate From Brazil, 48 Fed. Reg. 2568, 2577 (Jan. 20, 1983). See also Certain Steel Products From Italy; Final Affirmative Countervailing Duty Determination, 47 Fed. Reg. 39356 (Sept. 7, 1982).

However, this principle does not necessarily hold when it comes to evaluating the program itself to determine whether its benefits are countervailable as opposed to calculating the level of subsidization. As the CPC discusses in its brief, Commerce frequently bases determinations under section 771(5)(B) of the Act upon events occurring before the period of review.⁴¹ See, e.g., Certain Fresh Atlantic Groundfish from Canada; Final Affirmative Countervailing Duty Determination, 51 Fed. Reg. 10041, 10062 (Mar. 24, 1986); Carbon Steel Wire Rod from Saudi

⁴⁰ Administrative reviews perform essentially two functions. First, they calculate the duty, if any, which should be applied to the merchandise covered by the review. Secondly, they calculate the estimated deposit rate that merchandise covered by the next review will have to pay upon entry. 19 U.S.C. § 1675(a) (1992). See, e.g., Non-Rubber Footwear From Spain; Final Results of Administrative Review of Countervailing Duty Order, 48 Fed. Reg. 40536, 40537 (Sept. 8, 1983).

⁴¹ Brief of CPC, supra note 15, at 32.

Arabia; Final Affirmative Countervailing Duty Determination, 51 Fed. Reg. 4206, 4208 (Feb. 3, 1986). As long as the information is properly placed in the record of the administrative review under consideration, this practice is long-standing and in accordance with law.

In the present case, we have no suggestion that Commerce considered the history of Tripartite's negotiation and growth to be important or meaningless. Neither the preliminary nor the final determination discusses these issues. It may be that the agency considered the evidence regarding payments under Tripartite since its inception to outweigh the evidence regarding negotiation and growth. Therefore, on remand, Commerce must consider and respond to these arguments that Tripartite is expanding.

Similarly, just as Commerce may look to events occurring before the period of review, it may be relevant for Commerce, in examining de facto specificity, to look at a period subsequent to the period under investigation. The fact that the number of participants in a program is continuously increasing and that the Government is planning to include additional enterprises as recipients in the future may constitute probative evidence on specificity. As long as such evidence is presented to Commerce in a sufficiently timely manner so as to allow verification to take place, it may be appropriate for Commerce to

consider it. On remand, Commerce should consider the evidence presented.

Canada and the CPC also take exception to Commerce's determination that 52 percent of all Tripartite payments went to hog producers during the period of review and 51 percent of all Tripartite payments have gone to hog producers since its inception.⁴² Final Swine Determination, supra note 2, at 28534. They contend that this determination is meaningless unless, in accordance with its standard methodology, Commerce explains how and why these payments are disproportionately large. Furthermore, Canada and the CPC believe these payments are in no way disproportionate because: (i) one-third of all Tripartite participants are hog producers, (ii) hog producers did not receive any payments under Tripartite during its first several years, (iii) income stabilization schemes, like Tripartite, always benefit some products more than others during any given year, and (iv) when compared to a broader universe, such as all FCRs or all payments under ASA, Tripartite payments to hogs are not disproportionate.⁴³

In its preliminary results, Commerce indicated that "[h]og producers were the dominant users of the [Tripartite]

⁴² Brief of Canada, supra note 13, at 48-50; Brief of CPC, supra note 15, at 29-40.

⁴³ Brief of Canada, supra note 13, at 48-50; Brief of CPC, supra note 15, at 29-37.

program accounting for 52 percent of the total payouts from the program in FY 1988/89." Preliminary Swine Determination, supra note 12, at 5678 (emphasis added). In its final results, Commerce referred to the 52 percent figure (as well as the 51 percent figure) without indicating whether this information supported a conclusion of disproportionality or dominant use. Final Swine Determination, supra note 2, at 28534.⁴⁴

On remand, Commerce must explain whether the history of payments under Tripartite is probative of disproportionality or dominant use. Furthermore, it must explain how this evidence fits into its specificity analysis in this case. Commerce must consider whether it is appropriate to consider disproportionality with an eye only to Tripartite or to the combined experience under Tripartite and ASA and, if combined, whether it would change the determination of disproportionality.⁴⁵ Finally, the

⁴⁴ Where a domestic subsidy is, in fact, used by a wide range of enterprises or industries, evidence of most benefits going to a handful of enterprises or industries may support a conclusion of de facto specificity under section 771(5)(B) of the Act. Commerce should consider whether, when it determines that the program at issue is used, say, by less than ten percent of the available participants, whether the fact that 52 percent of the benefits go to one group is relevant.

⁴⁵ The administrative record in this proceeding reveals that "since tripartite agreements are in place to stabilize the prices of cattle, hogs, and lambs, the application of the named commodities provisions for these commodities is suspended during the life of the agreement." P.R. 10 (ASB Annual Report for 1989) at 4. In its December 7, 1990, remand determination in Pork at 7, Commerce recognized that "a product cannot be covered simultaneously by ASA and the Tripartite." These statements suggest that Commerce should consider all payments under ASA and

agency must respond to the relevant arguments raised by Canada and the CPC during the administrative proceeding.⁴⁶

Also on remand, Commerce should, in accordance with its proposed countervailing duty regulations (see 54 Fed. Reg. at 23379), consider the extent to which Canadian authorities exercise discretion in conferring benefits under Tripartite. The preliminary results suggested that administrative discretion was a factor in the agency's determination because it found an absence of "explicit or standard procedures or criteria for evaluating Tripartite Agreement requests." Preliminary Swine Determination, supra note 12 at 5678. The final Determination is completely silent on this point.

In considering this issue, Commerce should, inter alia: (i) explain whether it believes the proposed regulations require the actual exercise of discretion or permit the exercise of discretion; (ii) respond to Canada's argument that there is no record evidence that reveals government discretion to limit the availability of Tripartite benefits; and (iii) respond to the

Tripartite together in determining disproportionality.

⁴⁶ We note, for example, that the CPC addressed the relevance of other government programs to the universe of product coverage for the purposes of determining disproportionality. Brief of CPC, supra note 15, at 29-36. And the panel in Pork I stated: "However, on remand, the coverage and comparability of all ASA benefit programs should be considered in light of the standards set forth in this opinion regarding whether the number of beneficiaries is disproportionately small". Pork I, supra note 5, at 50.

NPPC's claim that Canadian authorities have rejected Tripartite agreements for asparagus, sour cherries and corn.

B. Quebec Farm Income Stabilization Insurance Program

In every administrative review of the order on live swine from Canada, Commerce has determined that FISI confers countervailable subsidies on a group of enterprises or industries within the meaning of section 771(5) of the Act. See Live Swine from Canada; Final Results of Countervailing Duty Administrative Review, 54 Fed. Reg. 651, 652 (Jan. 9, 1989); Live Swine from Canada; Final Results of Countervailing Duty Administrative Review, 56 Fed. Reg. 10410, 10413 (Mar. 12, 1991); Final Swine Determination, supra note 2, at 28537. FISI is an income stabilization scheme, not unlike Tripartite. Indeed, with the advent of Tripartite, many hog producers in Quebec have joined

Tripartite.⁴⁷ The operation of the program was described by Commerce in its preliminary results:

The purpose of the program is to gurarantee [sic] a positive net annual income to participants whose income is lower than the stabilized net annual income. The stabilized net annual income is calculated according to a cost of production model that includes an adjustment for the difference between the average wage of farm workers and the average wage of all other workers in Quebec. When the annual average farm worker income is lower than the stabilized net annual income, the Regie makes payment to the participant at the end of the year.

Preliminary Swine Determination, supra note 12, at 5679-80.

In determining that FISI benefits are de facto specific, Commerce stated, in part:

⁴⁷ In the preliminary results, Commerce explained the interrelationship between FISI and Tripartite:

Quebec joined the federal government's Tripartite Price Stabilization Scheme during the review period. The Tripartite Scheme largely replaces the FISI, but the difference between payments made under the Tripartite Scheme and what FISI payments would have been before Tripartite are still covered by FISI. All producers enrolled in the FISI program are also in the Tripartite Scheme, whereas some farmers opted for single coverage under the Tripartite Scheme.

Preliminary Swine Determination, supra note 12, at 5680.

In a province producing at least 45 commodities, FISI benefits are provided through 10 schemes covering only 14 commodities, and have been provided to the same 14 commodities since 1981, with no change in the commodities covered. Furthermore, according to information provided by the GOQ in its supplemental questionnaire response, and sourced from Quebec's Regie des Assurances Agricole's, these 14 commodities represent only 27 percent of the total value of agricultural production in Quebec.

Final Swine Determination, supra note 2, at 28537. Another fact discussed in the preliminary results, which Quebec seems to accept,⁴⁸ is that "[s]everal major agricultural commodities, such as eggs, dairy products, and poultry, which make up a large portion of Quebec's total agricultural production, are not covered under this program." Preliminary Swine Determination, supra note 12, at 5680.

Quebec challenges Commerce's determination on essentially three grounds. First, it believes a binational panel under Chapter 19 of the FTA has previously determined that FISI is not countervailable under U.S. law. Thus, Quebec argues, this Panel is precluded by the doctrine of collateral estoppel from upholding Commerce's determination. Secondly, Quebec contends that Commerce should have determined specificity based on the same targeting standard articulated by Canada in connection with

⁴⁸ Brief of the Government of Quebec, at 24, Live Swine from Canada, (USA-91-1904-03) ("Brief of Quebec").

Tripartite.⁴⁹ Finally, Quebec argues that Commerce's determination regarding de facto specificity is not based on substantial evidence. For this proposition, Quebec marshals a number of facts and arguments but does not dispute the fact that FISI payments artificially increase the revenues of hog producers.⁵⁰

1. Collateral Estoppel. Quebec's first argument on appeal is that we are collaterally estopped by the binational panel ruling In the Matter of: Fresh, Chilled, and Frozen Pork from Canada, USA-89-1904-06 (June 3, 1991) ("Pork IV") from considering the issue of FISI's countervailability.⁵¹ Quebec argues that the issues, facts and parties in this proceeding are identical to the ones before the panel in Pork IV. The doctrine of collateral estoppel is one of the "general legal principles" we are obligated to apply pursuant to Article 1904(3) of the FTA. Under the doctrine, "issues which are actually and necessarily determined by a court of competent jurisdiction are conclusive in

⁴⁹ We have ruled that targeting is not required for a determination of specificity under U.S. law. See notes 21 - 23 supra and accompanying text.

⁵⁰ Quebec does make one more argument. In its motion to expand the administrative record (discussed previously in section "II, B") and brief before this Panel, Quebec accuses Commerce of biased and unfair record-keeping. Brief of Quebec, supra note 48, at 14-15, 52-57.

The Panel has carefully reviewed this allegation. After a thorough review of the facts, the Panel finds no basis for this claim.

⁵¹ Brief of Quebec, supra note 48, at 29-32.

a subsequent suit involving the parties to the prior litigation." Mother's Restaurant Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1569 (Fed. Cir. 1983), citing Restatement (Second) of Judgments § 27 (1980) (which prefers the term "issue preclusion" over "collateral estoppel"). "The underlying rationale is that a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again." Id., citing Warthen v. United States, 157 Ct.Cl. 798, 800 (1962); 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.443[1] (2d ed. 1983).

According to the Court of Appeals for the Federal Circuit, four circumstances must be present for collateral estoppel to take effect: (i) the issue previously adjudicated must be identical with the one now presented; (ii) the issue must have been actually litigated in the prior case; (iii) the previous determination of that issue must have been necessary to the end-decision then made; and, (iv) the party precluded must have been fully represented by counsel in the prior action. Thomas v. GSA, 794 F.2d 661, 664 (Fed. Cir. 1986); Mother's Restaurant, supra at 1569.

The issues in this case are not identical to the issues before the panel in Pork IV; therefore, we do not need to consider the other requirements of the doctrine. In Pork IV and its predecessors, the panels were asked to determine whether FISI could be considered de facto specific between January 1, 1988 and

December 31, 1988 if: (i) eleven out of forty-four commodities participated in the program; (ii) several important commodities (i.e., poultry, eggs and dairy) were excluded; and (iii) no established criteria existed for adding new commodities. See, e.g., Pork I, supra note 5, at 75. In the instant proceeding, we face an entirely different issue, that is, whether a finding of de facto specificity with respect to FISI can be upheld if between April 1, 1988 and March 31, 1989: (i) fourteen out of forty-five commodities participated; (ii) several important commodities (i.e., poultry, eggs and dairy) were excluded; (iii) twenty-seven percent of Quebec's agricultural production was covered by the program; and, (iv) FISI has covered the same fourteen commodities since 1981.

As we have previously noted, appellate review of countervailing duty determinations is limited to the facts developed in the underlying administrative record.⁵² 19 U.S.C. § 1516a(b)(1)(B) (1991). In each administrative review under the Act, Commerce develops a separate administrative record. 19 U.S.C. § 1675 (1991). Therefore, the burden on the party seeking collateral estoppel must be exacting. PPG Industries, 712 F. Supp. at 199. "This is especially so in trade cases, since Congress has made specific provision for periodic administrative reviews. . . . Since the agencies involved perform the function of

⁵² See section "IV" supra.

expert finders of fact concerning different programs, different time frames, economic statistics and other factors in countervailing duty and dumping investigations as well as similar functions during periodic reviews, principles of issue preclusion should be carefully applied."⁵³ Id.

In sum, while we are not estopped to consider the countervailability of FISI, we shall look to the "intrinsically persuasive" aspects of the Pork rulings and subsequent practice by Commerce.⁵⁴ We will especially examine what new facts have arisen on the record of the instant case to distinguish it from the facts in Pork, where Commerce failed to sustain a determination of de facto specificity with respect to the same program during roughly the same period of review. Furthermore, we will examine the ruling in Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. 445 (Ct. Int'l Trade 1987). Although that case is nearly five years old, it also dealt with the countervailability of FISI (during the initial investigation).

⁵³ Quebec suggests that Commerce would be free to take new facts into account in this administrative review. Brief of Quebec, supra note 48, at 21. This admission acknowledges that collateral estoppel, which would preclude new fact finding, does not apply. C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4416 (1981).

⁵⁴ See FTA, supra note 1, at art. 1904(9); United States - Canada Free Trade Agreement Implementation Act, Statement of Administrative Action, at 109, H. Doc. No. 216, 100th Cong., 2d Sess. 271 (July 26, 1988).

2. Substantial Evidence. Quebec contends that Commerce's determination that FISI benefits are de facto specific is not supported by substantial evidence. In support of its allegation, Quebec advances the following arguments: (i) FISI covers 74.4 percent of the total insured value of commercial farm production in Quebec; (ii) Commerce erred when it determined that only 27 percent of Quebec's total agricultural production is covered by FISI -- the correct figure is 35.8 percent;⁵⁵ (iii) FISI is inextricably linked with Quebec's other agricultural support schemes (i.e., income stabilization, crop insurance and supply management), therefore, Commerce should have been influenced by the fact that these schemes cover 84.8 percent of Quebec's total agricultural value; and (iv) nothing in the administrative record supports Commerce's claim that the same 14 commodities have been covered since 1981 and even if there is, this fact does not support a conclusion of de facto specificity.⁵⁶

We believe the parties have overlooked an important threshold question. Of what relevance to a de facto specificity determination is information regarding the percentage of total production covered? For example, if a program that is de jure

⁵⁵ At one point in its brief, Quebec asserts that the correct figure is 38.1 percent. Brief of Quebec, supra note 48, at 36.

⁵⁶ Brief of Quebec, supra note 48, at 35-40.

generally available covers two out of one-hundred agricultural commodities, but those two account for ninety-nine percent of the relevant country's total agricultural production value, is the program specific? More importantly, is that a relevant question under section 771(5) of the Act? If it is, then Commerce should, on remand, reexamine its analysis of Tripartite, since evidence regarding production coverage was not included in the agency's determination.

Another aspect of Commerce's determination that troubles us is the conclusion that FISCI covers 14 out of 45 commodities. Final Swine Determination, supra note 2, at 28537. As with Tripartite, there would appear to be legitimate questions regarding Commerce's classification of commodities. For example, based on evidence in the record and arguments at the hearing, it is unclear whether feeder cattle and slaughter cattle should be treated as one or two commodities, whether mixed grains are the same as oats, barley and rye, and whether the program covers soybeans. P.R. 71; Transcript ("Tr.") at 237-41.

Therefore, on remand, Commerce should address the following:

- Explain how evidence regarding the extent to which FISCI covers Quebec's total agricultural value is relevant to a finding of de facto specificity.

- To the extent it is deemed relevant: (i) explain why the absence of this evidence in connection with Tripartite is

not fatal to the agency's determination regarding that program; and, (ii) consider the evidence added to the administrative record by the Panel's Preliminary Ruling of November 25, 1991 which Quebec claims will establish that FISII covers 35.8 percent (instead of 27 percent) of Quebec's total agricultural value.⁵⁷

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

- Reexamine the finding that FISII has covered the same fourteen commodities since 1981, in light of the finding in Pork that 11 commodities participated in the program.

Finally, in accordance with its proposed regulations (and the Panel's analysis of Tripartite), Commerce should

⁵⁷ On remand, there are two issues that Commerce need not revisit. First, it does not have to reexamine Quebec's claim that FISII covers 74.4 percent of the total insured value of Quebec's commercial farm production. See Brief of Quebec, supra note 48, at 33. As the agency states in its final results, this argument "understates the value of agricultural production in Quebec." Final Swine Determination, supra note 2, at 28537. Secondly, it need not reconsider Quebec's argument that 84.8 percent of Quebec's agricultural value is covered by either crop insurance, income stabilization, or supply management. See Brief of Quebec, supra note 48, at 32-35. The record contains substantial evidence supporting Commerce's determination that these schemes are "fundamentally different from one another in their operation and purpose" (see, e.g., P.R. 10 & 30) and should not be linked. Fresh Cut Flowers from the Netherlands; Final Affirmative Countervailing Duty Determination, 52 Fed. Reg. 3301 (Feb. 3, 1987) (comparable programs should not be analyzed together unless "integrally linked"). See also Certain Fresh Atlantic Groundfish from Canada; Final Affirmative Countervailing Duty Determination, 51 Fed. Reg. 10041 (Mar. 26, 1986).

consider on remand (i) whether there are dominant users of FISI, or whether certain enterprises, industries, or groups receive disproportionately large benefits, and (ii) the extent to which Quebec exercises discretion in conferring benefits under FISI. See Countervailing Duties; Notice of Proposed Rulemaking, 54 Fed. Reg. 23366, 23379 (May 31, 1989).

C. Scope of the Order: Sows and Boars

During the fourth review, Pryme sought to exclude live weanling swine ("weanlings") from the scope of the countervailing duty order on live swine from Canada. Preliminary Swine Determination, supra note 12, at 5676. After reviewing the terms of the order and the original determination on injury by the ITC, Commerce rejected Pryme's request. In its preliminary results, the agency stated:

This order is on live swine. The ITC, at page A-2 of its final determination, defined live swine as follows: 'in general usage, swine are referred to as hogs and pigs. The term 'hogs' generally refers to mature animals and 'pigs' to young animals. The provision for live swine in the TSUS under item 100.85 applies to all domesticated swine regardless of age, sex, size, or breed.' (citation omitted) . . . The product descriptions of the merchandise contained in the ITC's determination and the CVD order are dispositive as to whether the merchandise in question is within the

scope of the countervailing duty order.

Id. at 5677.

Quintaine argues that this ruling improperly includes sows and boars within the scope of the order on live swine.⁵⁸ According to Quintaine, most of the Canadian programs found countervailable by Commerce are limited to indexed slaughter hogs. Thus, sows and boars, which are not indexed, receive little or no benefit from these programs and, therefore, should be excluded from the order.⁵⁹ Quintaine also argues that sows and boars were not included in the ITC's definition of the relevant U.S. industry.⁶⁰ Quintaine contends that the ITC focused primarily, if not exclusively, on slaughter hogs, not sows and boars.⁶¹ Thus, because sows and boars are used for breeding and hogs are not, and sows and boars are nearly twice as large as hogs, sows and boars should be excluded from the countervailing duty order on live swine.

The Panel finds that Quintaine failed to exhaust its administrative remedies. Quintaine never made these arguments

⁵⁸ Brief of P. Quintaine & Son, Ltd., at 7-17, Live Swine from Canada (USA-91-1904-03) ("Brief of Quintaine").

⁵⁹ Id. at 7-12.

⁶⁰ Id. at 13-14.

⁶¹ Id.

before Commerce and raised the issue for the first time before this Panel.

Another of the "general legal principles" we are obligated to apply to this proceeding is the doctrine of exhaustion of administrative remedies.⁶² Under this doctrine, "judicial review of administrative action is inappropriate unless and until the person seeking to challenge that action has utilized the prescribed administrative procedures for raising the point." Sharp Corp. v. United States, 837 F.2d 1058, 1062 (Fed. Cir. 1988), citing Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). See also National Knitwear & Sportswear Assn. v. United States, No. 90-10-00537, 1991 Ct. Int'l Trade, LEXIS 381, at 24 (Ct. Int'l Trade 1991).

In this case, Quintaine did not exhaust its administrative remedies. Commerce determined in the first administrative review that all swine, regardless of weight (including sows and boars), were within the scope of the order. Live Swine From Canada; Final Results of Countervailing Duty Administrative Review, 55 Fed. Reg. 651, 653 (Jan. 9, 1989). At no time during the first review, or even the next three review periods (including the present one), did Quintaine challenge this determination.

⁶² See note 10 supra and accompanying text.

Quintaine contends that its request fits within one of the judicially approved exceptions to the exhaustion doctrine. Citing Rhone Poulenc, S.A. v. United States, 583 F. Supp. 607, 610 (Ct. Int'l Trade 1984), Quintaine asserts that it would have been futile to raise its argument with Commerce during the administrative proceeding because Commerce already had made a determination regarding scope adverse to Quintaine.⁶³ Rhone Poulenc, however, is distinguishable. In that case, the Court held that "it appears that it would have been futile for plaintiffs to argue that the agency should not apply its own regulation."⁶⁴ Id. Quintaine's argument in the present case does not concern the application of Commerce's regulations. Rather, Quintaine argues that it had not succeeded before on this issue and it was not likely to succeed this time.

Quintaine's argument is closer to that addressed in PPG Industries, Inc. v. United States, 746 F. Supp. 119 (Ct. Int'l Trade 1990) ("PPG IV") and Budd Co., Wheel & Brake Div. v. United States, 773 F. Supp. 1549 (Ct. Int'l Trade 1991). In PPG IV, the court held that "[t]he fact that a party to an administrative

⁶³ Brief of Quintaine, supra note 58, at 9-10.

⁶⁴ Additionally, the court in Rhone Poulenc noted that there was evidence in the record that Commerce had, sua sponte, considered the issue during the administrative proceeding that was being raised for the first time on appeal. 583 F. Supp. at 610. There is no evidence in the present case that Commerce addressed the issue of sows and boars during the fourth administrative review.

proceeding finds that an argument may lack merit, or had failed to prevail in a prior proceeding on different facts, does not, without more, rise to the level of futility barring exhaustion." PPG IV, 746 F. Supp. at 137. In Budd, the court held that "[p]laintiff did not attempt to raise its present line of argument before Commerce on the assumption that Commerce would not be amenable to its proposals. This is no excuse for Plaintiff's not exhausting its administrative remedies." Budd, 773 F. Supp. at 1555.

In the present case, Quintaine did not raise its argument regarding the scope of the order because it did not think it would win. That is not an excuse to the doctrine of exhaustion of administrative remedies that the law recognizes. Thus, Quintaine's request to exclude sows and boars from the scope of the order is untimely and denied.

D. Weanlings

1. Scope of the Order. As previously stated, Pryme asked Commerce during the fourth administrative review to exclude weanlings from the scope of the order on live swine from Canada. See section "V.C" supra. In support of its request, Pryme argued: (i) the ITC's injury determination focused exclusively on slaughter hogs; (ii) the Harmonized Tariff Schedule ("HTS") classifies weanlings separately from swine; (iii) most of the

programs countervailed by Commerce required indexing and weanlings are not indexed; and (iv) weanlings are not the same "class or kind" of merchandise as live swine. P.R. 47.

In its preliminary and final results, Commerce rejected Pryme's request. According to Commerce:

This order is on live swine. The ITC, at page A-2 of its final determination, defined live swine as follows: 'in general usage, swine are referred to as hogs and pigs. The term 'hogs' generally refers to mature animals and 'pigs' to young animals. The provision for live swine in the TSUS under item 100.85 applies to all domesticated swine regardless of age, sex, size, or breed.' (citation omitted).

Preliminary Swine Determination, supra note 12, at 5677. In further support of its determination, Commerce stated in its final results:

While weanlings certainly fall within HTS item number 0103.92.00, other live swine are also included under this subheading, since it encompasses live swine, other, weighing 50 kg. or less each. Pryme's own definition of weanlings is the following: (weanlings) are swine at the age when they are taken from their mothers and place on diets of sold food to prepare them for market. They typically weigh 35 to 40 pounds (15.5 to 17.8 kg.) at the time of sale. The HTS subheading thus encompasses swine other than weanlings, because weanlings weigh no more than 17.8 kg., while the subheading covers swine weighing up to 50 kg. Therefore, the swine entering the United States under HTS 0103.92.00

may eat a solid diet of feed grains, and may receive benefits under many of the grain-related and other programs the Department has found countervailable.

Final Swine Determination, supra note 2, at 28536. On appeal to this Panel, Pryme essentially reiterates the arguments it made during the administrative proceeding.⁶⁵

In our opinion, Commerce's determination that weanlings are within the scope of the order is reasonable and in accordance with law. First, the ITC unequivocally stated that its material injury determination covered "all domesticated swine regardless of age, sex, size, or breed." Final ITC Determination, supra at A-2. In a concurring opinion to the preliminary injury determination, Commissioner Rohr described the merchandise under investigation as "slaughter hogs." This comment was not made in the context of the scope of the investigation, but in the context of finding swine and pork to be two separate (i.e., "like") industries. USITC Pub. No. 1625, at A-13 to 15. In addition, Commissioner Rohr never took issue with, or expressly contradicted, the majority's view in the final injury determination that the investigation covered all swine, regardless of age or size.

Secondly, HTS subheading 0103.92.00 does not support the conclusion that weanlings should be excluded from the order.

⁶⁵ Brief of Pryme Pork Ltd, at 7-26, Live Swine from Canada (USA-91-1904-03) ("Brief of Pryme").

As Commerce explains in nearly every antidumping and countervailing duty determination, including the present one:

TSUSA and HTS item numbers are provided for convenience and Customs purposes. The written description [of the merchandise] remains dispositive.

See, e.g., Final Swine Determination, supra note 2, at 28531. In the present case, both the order and the ITC's determination expressly covered all entries of live swine. 50 Fed. Reg. at 32880; Final ITC Determination, supra at A-2.

Thirdly, the issue whether weanlings are covered by the scope of the order is separate from whether any Canadian programs confer countervailable subsidies within the meaning of the Act. A scope determination is governed by, inter alia, the "description of the product contained in the petition, the initial investigation, and the determinations of the Secretary and the Commission." 19 C.F.R. § 355.29(i)(1). It is different and separate from a determination that a product benefits from a countervailable program.

Finally, in support of its argument that weanlings are not the same class or kind of merchandise as weanlings, Pryme contends that weanlings differ from swine in terms of their physical characteristics, channels of trade, uses and consumer expectations.⁶⁶ This argument misapprehends the relevant law.

⁶⁶ Brief of Pryme, supra note 65, at 19-20.

Part 355 of Commerce's regulations states that scope determinations may not be based upon the arguments advanced by Pryme unless "[t]he descriptions of the product contained in the petition, the initial investigation and the determinations of the Secretary and the Commission . . . are not dispositive." 19 C.F.R. § 355.29(i) (emphasis added). In this case, Commerce properly determined that the countervailing duty order and the ITC's final injury determination were dispositive of the scope issue. Therefore, it was not error for Commerce to include weanlings within the scope of the order on live swine.

2. Separate Rate For Weanlings As A Subclass. During the administrative proceeding, Pryme argued that if weanlings were not excluded from the order, they should receive a separate rate from swine.⁶⁷ In response to this request, Commerce stated:

Pryme did not request a separate rate for weanlings until its submission of a case brief. At that time, the Department deemed it inappropriate to delay the processing of the review to solicit the necessary information in order to determine whether it is appropriate or possible to calculate a separate rate for weanlings in this final results. Based on the record, we have no way of determining how many weanlings were raised by, and exported from, each province, nor do we have complete knowledge of weanling producers' participation in the various programs.

⁶⁷ P.R. 47 at 9-10.

Final Swine Determination, supra note 2, at 28536. Pryme argues that Commerce had enough information in the record to calculate a separate rate for weanlings.⁶⁸

The record shows that weanlings do not benefit from many of the programs found countervailable by Commerce. For example, Tripartite, SHARP and FIIP have certain eligibility standards for swine. The standards use an index based on a fat-to-weight ratio. See, e.g., P.R. 10, Tab C at p.3 and Sch. A; Tr. 124-25. The threshold weight for the index is 40 kg. Id. In addition, the programs require a swine index of 80, which requires a weight of 60 kg. Id. As we note above, weanlings typically weigh 15 kg. See also Brief of Pryme, supra note 65, at 13. Thus, weanlings are not "indexed" and do not qualify for benefits under these programs.

We recognize that Commerce must have the authority to set strict time limits on the submission of comments and factual information. As the CIT stated in Rhone Poulenc, Inc. v. United States, "[a]n agency's discretion to fashion its own rules of administrative procedure includes the authority to set and enforce time limits on the submission of data." 710 F. Supp. 348, 350 (Ct. Int'l Trade 1989), citing Vermont Yankee Nuclear Power Corp. v. Nat. Resources Defense Council, 435 U.S. 519, 544-45 (1978).

⁶⁸ Brief of Pryme, supra note 65, at 30.

In its brief before this Panel, Commerce argued that "the Department did not have information on the record with which to make a subclass determination as to weanlings, . . . because the issue was raised so late in the proceeding."⁶⁹ However, at the oral hearing, counsel for Commerce conceded that the record did indeed contain enough verified information to calculate a more accurate rate for weanlings. Tr. 262-66. Therefore, on remand, Commerce is directed to determine a separate rate for weanlings based on the evidence in the administrative record.

3. Separate Company Rate For Pryme. Pryme's request for a separate (company-specific) rate is untimely. Pryme first raised the issue in its brief before this Panel. See Brief of Pryme, supra note 65, at 33. Thus, as Pryme did not exhaust its administrative remedies with regard to this issue, it may not raise it on appeal.⁷⁰

E. Saskatchewan Hog Assured Returns Program

Commerce found SHARP to be countervailable in its preliminary results. Preliminary Swine Determination, supra note 12, at 5679. Although Commerce did not discuss SHARP in its

⁶⁹ Brief of Commerce, supra note 26, at 74.

⁷⁰ See discussion regarding doctrine of exhaustion of administrative remedies, supra note 62 and accompanying text.

final results, it did include SHARP in its final subsidy calculation.⁷¹

On appeal to this Panel, the CPC argues that Commerce miscalculated the benefit attributable to SHARP.⁷² (Neither the CPC, nor any other complainant, challenges the fact that Saskatchewan hog producers receive a de facto specific economic benefit from SHARP.) Specifically, the CPC argues that Commerce mistakenly based its calculation on accrued data rather than actual data.⁷³

In its questionnaire, Commerce asked the Government of the Province of Saskatchewan (hereinafter "Saskatchewan") to report all SHARP payments actually made, rather than accrued, during the period of review. P.R. 49 at 62-63. In its response, Saskatchewan stated that SHARP payments were Can\$3,929,000. P.R. 10, Tab M, p. 3, Table I. Saskatchewan also provided Commerce with SHARP's financial statements for FY 1988/89, which indicated that SHARP payments during the review period were Can\$4,321,807. P.R. 30, Ex. Sask-1.

⁷¹ Although the CPC raised the calculation issue in its Case Brief, Commerce did not address it in its final results. P.R. 49 at 62-63.

⁷² Brief of CPC, supra note 15, at 89-92.

⁷³ Id.

Following on-site verification of the questionnaire responses, Commerce concluded that the financial statements contained the correct figure. As its verification report stated:

We accepted the information concerning payments under SHARP presented in Saskatchewan Exhibit 1 in verifying the total payout listed in the response. Total payout in the review period listed in the response was Can\$3,929,000. However, the annual report shows the stabilization payments to producers as Can\$4,321,807. This number is Can\$392,807 greater than the number listed in the response. We were told that the response underreported the SHARP payments made in the review period because the response was submitted before the final SHARP payment amount was completely updated for the annual report. We amend the response accordingly.

Verification of the Questionnaire Response for Live Swine from Canada, Case C-122-404, at 16 ("Verification Report") (emphasis added).

In its brief, the CPC states that "the [Commerce Department] case analyst had telephoned CPC's counsel prior to the issuance of the Preliminary Results and asked why the payment amount reported in the response was less than the amount in the financial statements. Counsel [for CPC] informed the case analyst that the amount of payments reported in the response was accurate."⁷⁴ According to the CPC, the case analyst ignored its comments.

⁷⁴ Brief of CPC, supra note 15, at 91.

Commerce responds in its brief that:

The record in this review contained two separate figures which appeared to show the amount actually paid out under the SHARP program for the review period. However, there is no information on the record with which to reconcile the discrepancies. In the absence of any record evidence to support the lower figure or explain the discrepancy between the figures, the Department determined, for purposes of its final results, to use the figure from SHARP's audited financial statements . . . Although CPC claims that the figure used by the Department shows accrued, as opposed to actual amounts paid out, SHARP's financial statements do not make that fact clear . . . Without further information, the Department could not assume that the figure in the questionnaire responses was more reliable than the audited financial statements.

Brief of Commerce, supra note 26, at 50 (emphasis added).

We cannot agree with the agency. In the audited financial statement for SHARP, the "Notes to the Financial Statements" provides that "[t]hese financial statements are prepared on the accrual basis of accounting." P.R. 30, Ex. Saskatchewan, p. 11. In our opinion, this evidence leads to the conclusion that Saskatchewan's questionnaire response contained the best information available regarding the subsidy conferred by SHARP during the period of review.

In sum, Commerce's determination regarding the benefit received under SHARP is not supported by substantial evidence.

Accordingly, it is remanded with instructions to calculate the benefit using data in the record on actual payments. In all other respects, Commerce's determination with respect to SHARP is affirmed.

F. Alberta Crow Benefit Offset Program

To make grain grown in the Prairie Provinces of Canada available to all consumers at reasonable prices, the federal government subsidizes transportation costs pursuant to the Western Grains Transportation Act ("WGTA"). While these subsidies, known as "Crow Benefit" payments, have apparently made grain more available throughout Canada, they have tended to increase the price of grain in Alberta and some of the other farm provinces.⁷⁵ Preliminary Swine Determination, supra note 12, at 5680.

To mitigate these increased prices, Alberta has established ACBOP. Under ACBOP, "the government provides certificates to registered feed grain users and registered feed grain merchants, which can be used as partial payments for grains purchased from grain producers. Feed grain producers who feed their own grain to their own livestock submit a claim directly to the government for payment." Id.

⁷⁵ See, e.g., discussion of B.C. Feed Program at note 83 infra and accompanying text.

In its final results, Commerce determined that ACBOP certificates and payments provide an economic benefit to hog producers because they reduce the price producers would otherwise have to pay for grain. Final Swine Determination, supra note 2, at 28534. In addition, the agency concluded that ACBOP is expressly limited to feed grain users and, therefore, is limited to a specific enterprise or industry, or group of enterprises or industries. Id. (affirming finding in preliminary results).

The CPC disputes certain of these determinations. First, it argues that ACBOP is not countervailable because it does not provide hog producers with an economic benefit. According to the CPC, it simply offsets the artificially high grain prices created by the Crow Benefit payments.⁷⁶ Secondly, even if there is an economic benefit, it goes to grain producers, not grain consumers. Thus, the CPC argues, Commerce should have conducted an upstream subsidy investigation pursuant to section 771A of the Act (19 U.S.C. § 1677-1 (1992)). Lastly, in the event that this Panel upholds Commerce's determinations, the CPC claims the subsidy calculations are incorrect. It does not dispute Commerce's specificity determination.

We are not the first binational panel under Chapter 19 to review ACBOP. In Pork I, the complainants made the same arguments regarding offsets and the need for an upstream subsidy

⁷⁶ Brief of CPC, supra note 15, at 41-45.

investigation that we have before us. Pork I, supra note 5, at 62-69. In a unanimous decision, the panel in Pork I rejected these arguments.

We are persuaded by the analysis and result in Pork I. We believe Commerce's determination regarding ACBOP is in accordance with law and based on substantial evidence. We remand for Commerce to review the accuracy of its calculations.

1. Offsets. The CPC argues that ACBOP merely counteracts the disadvantages of a related program, thus resulting in no overall economic benefit to hog producers.⁷⁷ In support of its position, the CPC cites Roses, Inc. v. United States, 743 F. Supp. 870 (Ct. Int'l Trade 1990), Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 39345 (Sept. 7, 1982) and Certain Steel Products from Belgium, 47 Fed. Reg. 39304 (Sept. 7, 1982), as examples of cases in which offset programs were not found countervailable.

Section 771(6) of the Act identifies only certain offsets that may be deducted from the gross subsidy.⁷⁸ 19 U.S.C.

⁷⁷ Brief of CPC, supra note 15, at 45-51.

⁷⁸ For purposes of determining the net subsidy in each case, section 771(6) of the Act permits Commerce to deduct the following:

(a) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy,

(b) any loss in the value of the

§ 1677(6) (1992). After review of the WGTA, we find that Crow Benefit payments and their effect on grain prices in Alberta do not fall within the statute.

This would normally end our analysis; however, the CPC argues that Commerce and the courts have essentially expanded the scope of section 771(6) by refusing to countervail programs that do not confer a "competitive advantage in international commerce upon a discrete class of beneficiaries."⁷⁹ We do not agree.

As we have already determined in connection with our analysis of Tripartite, U.S. law does not contain a separate and distinct "competitive advantage" test.⁸⁰ Moreover, neither the courts nor Commerce have created an exception to section 771(6) of the Act. Indeed, none of the cases cited by the CPC actually deal with offsets against gross subsidies. The Roses case dealt with specificity⁸¹ and the panel in Pork I explained how the

subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and

(c) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

19 U.S.C. § 1677(6) (1992).

⁷⁹ Brief of CPC, supra note 15, at 45.

⁸⁰ See note 23 supra and accompanying text.

⁸¹ Furthermore, as we explained during our discussion of Tripartite, Judge Restani expressly disavowed the "competitive

Belgian and German steel cases turned on the fact that certain gross subsidies were not received by the merchandise under investigation. Pork I, supra note 5, at 65.

2. Upstream Subsidies. The CPC's next argument is couched in the alternative -- that is, if we determine that ACBOP provides an economic benefit, then that benefit is received by grain producers (not grain users) and the agency must perform an upstream subsidy investigation pursuant to section 771A of the Act. In our opinion, if Commerce only counted payments made directly to grain users, including hog producers,⁸² this argument would also fail and there would be no need for Commerce to perform an upstream subsidy inquiry.

3. Calculation. Commerce determined ACBOP benefits by calculating the ratio of swine grain consumption to weight gain. Commerce used information in Economic Indicators of the Farm Sector, Costs of Production - Livestock and Dairy, U.S. Dept. of

advantage" test when reviewing the agency's second remand results. Roses, Inc. v. United States, 774 F. Supp. 1376, 1381-82 (Ct. Int'l Trade 1991).

⁸² ACBOP benefits swine producers in three ways. First, swine producers who grow their own feed grain receive payments directly from the government. Second, swine producers who purchase feed grain are given "A Certificates" which are used to cover part of the cost of purchase. Finally, swine producers that buy and grow their feed grain, receive A Certificates and payments from the government. P.R. 30; Preliminary Swine Determination, supra note 12, at 5680. See also Brief of CPC, supra note 15, at 43-45. Thus, the government is paying a subsidy directly to swine producers that lowers their cost of production.

Agriculture (1989) to calculate a ratio of 3.5 pounds of grain to one pound of swine weight gain. Preliminary Swine Determination, supra note 12, at 5680. During the administrative review, the CPC argued that the use of this publication was improper because the ratio incorrectly measured grain instead of feed consumed, and did not take into account the use of protein supplements in feed. Thus, Commerce's benefit determination was too high. Commerce rejected these arguments on the grounds that its calculation was based on the best information available. Final Swine Determination, supra note 2, at 28534.

During the course of this appeal, the CPC asked this Panel to expand the administrative record to include documents in support of its argument that Commerce incorrectly determined the ratio of grain consumed to weight gained. We granted CPC's motion on November 25, 1991. Preliminary Ruling, supra at 8. In its brief, Commerce requested a remand to consider these documents. Since these materials were not before the agency when it issued its final results, and we have previously ruled that they should have been, this Panel grants Commerce's request and remands to it the final calculations for review consistent with the record, as amended.

On remand, Commerce is also instructed to: (i) explain the extent to which protein supplement and vitamin consumption reduces the amount of grain consumed by hogs -- the verification report suggests 39.27 kilos per hog (P.R. 30 at 20) whereas the

final calculations appear to ignore this fact (P.R. 73 at 6); and, (ii) confirm with appropriate reference to the record, that the final calculations for ACBOP do not include payments to livestock other than hogs. If this fact cannot be confirmed, Commerce should reconsider its determinations on this issue.

G. B.C. Feed Grain Market Development Program

In both its preliminary and final results, Commerce determined that the B.C. Feed Program provided de jure specific subsidies to a group of enterprises or industries within the meaning of section 771(5) of the Act. Preliminary Swine Determination, supra note 12, at 5682; Final Swine Determination, supra note 2, at 28536. Similar to ACBOP, the B.C. Feed Program is designed, in part, to offset the effects of Crow Benefit payments under the WGTA, Id.; Brief of CPC, supra note 15, at 87, by lowering the price of grain paid by livestock producers in British Columbia. Id. at 86-88. On every ton of feed grain consumed during the period of review, livestock producers (including hog producers) were paid Can\$11/ton. Preliminary Swine Determination, supra note 12, at 5682. See also P.R. 30 at 23-24.

On appeal to this Panel, the CPC does not challenge Commerce's finding of de jure specificity. Rather, it makes the

same arguments it did with regard to ACBOP.⁸³ As we explain more fully in connection with ACBOP, these arguments must fail.

First, the B.C. Feed Program is not affected by one of the allowable offsets to gross subsidies identified in section 771(6) of the Act. 19 U.S.C. § 1677(6) (1991). Secondly, it confers an economic benefit on swine producers because it lowers their cost of production by lowering the cost of an input. Finally, payments under the B.C. Feed Program are paid directly to livestock producers. Thus, the agency did not need to perform an upstream subsidy investigation under section 771A of the Act. 19 U.S.C. § 1677-1 (1991).

H. B.C. Farm Income Insurance Plan

FIIP is an income stabilization scheme similar to Tripartite. When commodity prices fall below basic costs of production, the plan makes payments to participating producers that effectively eliminate the loss. Preliminary Swine Determination, supra note 12, at 5679.

In its final results, Commerce concluded that benefits under FIIP were expressly limited to a specific group of enterprises or industries:

The program is only available to
farmers producing commodities
specified in the Schedule B
guidelines to the Farm Income

⁸³ Brief of CPC, supra note 15, at 86-89.

Insurance Act of 1973 (with limited number of agricultural products listed), and is therefore limited to a specific group of enterprises or industries, and therefore countervailable.

Final Swine Determination, supra note 15, at 28535.

On appeal, the CPC challenges Commerce's determination on essentially three grounds. First, it argues that FIIP is not de jure specific. In support of this claim, the CPC argues that "eligibility for FIIP is not conditional upon being listed in Schedule B."⁸⁴ According to the CPC, commodities are simply listed in Schedule B "when they become subject to FIIP."⁸⁵ Having concluded that FIIP is not de jure specific, the CPC next argues that Commerce failed to base its determination of countervailability upon a proper finding of de facto specificity. In particular, it contends that the agency should have applied the previously discussed "targeting" test or, at the very least, the four-part specificity test articulated by Commerce in its proposed countervailing duty regulations.⁸⁶ Finally, the CPC claims that the record lacks substantial evidence of specificity. It takes special issue with Commerce's apparent reliance on the fact that "only 36 percent of British Columbia's farm cash receipts are covered by FIIP." Final Swine Determination, supra

⁸⁴ Brief of CPC, supra note 15, at 79.

⁸⁵ Id.

⁸⁶ Id. at 78, 80-86.

note 2, at 28535. The CPC believes this figure ignores the overwhelming evidence in the record that FIIP's participation level is not due to government discretion or selectivity, but inherent economic circumstances, such as the protection afforded other producers by federal supply management programs.⁸⁷

Except to the extent that we have already rejected the view that U.S. law requires a showing of targeting, we do not consider the last two arguments advanced by the CPC, since the record contains substantial evidence supporting Commerce's determination that FIIP limits participation to certain commodities. Section 1 of the Farm Income Insurance Act regulations defines commodity as "an agricultural product specified in the guidelines to this regulation." P.R. 49, Tab I (emphasis added). Section 2 states that "[p]lans are hereby established for farmers who produce a commodity specified in the guidelines." Id. (emphasis added). Schedule B4 contains the guidelines for swine producers. Id. There is no provision in the regulations or enabling legislation that indicates that FIIP is available to all commodities.

Finally, the CPC argues that a finding of de jure specificity is negated by the fact that "commodities have been added to, and removed from, Schedule B since the statute

⁸⁷ Id. at 80-86.

authorizing FIIP was promulgated in 1973."⁸⁸ However, as the CPC itself notes, the only apparent changes in FIIP coverage during the past twenty years are the removal of raspberries and broiler hatching eggs, and the addition of potatoes.⁸⁹ These minor changes fail to demonstrate that Commerce's determination is unreasonable. Accordingly, this Panel upholds Commerce's finding that FIIP is limited to a specific group of enterprises or industries within the meaning of the Act.

I. Feed Freight Assistance Program

The FFA is similar in operation and effect to the WGTA.⁹⁰ To make feed grains available throughout Canada at reasonable prices, the federal government pays a portion of the costs associated with transporting feed grains to certain grain deficit regions. Feed grain users (which are defined as those who buy grain to make feed for livestock) in these regions may claim freight assistance under the FFA whenever feed grain is moved through commercial channels. P.R. 10, Tab C at 4; P.R. 20, Tab A, Sec. I, Question 1. See also Brief of CPC, supra note 15, at 71-72.

⁸⁸ Id. at 79.

⁸⁹ Id.

⁹⁰ See notes 75 to 81 supra and accompanying text.

During the administrative review, Commerce determined that hog producers in British Columbia, Quebec, New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island and certain portions of Ontario, received FFA benefits. Preliminary Swine Determination, supra note 12, at 5677-78. This finding was based on the fact that many grain millers also produce hogs that are exported to the United States. P.R. 10, Tab. C at 4. In holding that these benefits conferred countervailable subsidies on hog producers, Commerce stated:

In the preliminary results, we determined that this program is countervailable because it is limited to a specific enterprise or industry, or group of enterprises or industries. The Department countervailed only the amount of FFA benefits paid to livestock producers who have indicated that they raise hogs. FFA benefits, in the form of reduced costs for feed, result in a direct reduction in the cost of production of hogs.

Final Swine Determination, supra note 2, at 28535.

The CPC challenges these determinations on three grounds. First, it argues that, although FFA benefits are paid to hog producers who mill grain for feed, "any benefit that accrues to livestock producers from this program is incidental; payments are made to them in their capacity as grain millers, not as growers of hogs . . . The reason some farmers receive FFA benefits is that they are able to transform feed grains into livestock feed; whether or not they are also livestock producers

is irrelevant."⁹¹ Thus, the CPC believes that only feed grain producers benefit from the FFA. Secondly, to the extent hog producers benefit from the FFA, the CPC argues that the benefit is received by an input (i.e., feed grain) and Commerce should have performed an upstream subsidy investigation pursuant to section 771A of the Act. Finally, the CPC contends that if this Panel upholds Commerce's determination regarding the FFA, we must remand the final calculations to correct an error. The CPC does not challenge Commerce's specificity determination under section 771(5) of the Act.

1. Economic Benefit. It is undisputed that FFA payments are made directly to livestock producers that mill grain. See, e.g., Brief of CPC, supra note 15, at 72-73. Canada's response to Commerce's questionnaire states:

Livestock producers who buy grain to feed to livestock may claim assistance from the [Livestock Feed Board of Canada]. 'Livestock' includes . . . swine . . . Based on certain assumptions, the [Livestock Feed Board of Canada] has calculated that approximately 3.5 percent (\$634,835) of the transportation assistance might have been paid directly to or for the benefit of hog producers.

P.R. 10, Tab C, p. 4.

⁹¹ Brief of CPC, supra note 15, at 72-73 (emphasis in original).

In analyzing ACBOP, we stated that the cost of producing swine is reduced any time the cost of feed grain is reduced. See note 82, supra. Payments under FFA provide an economic benefit to hog producers because they artificially lower the cost of feed grain.

In Pork I, the panel confronted the same issue with respect to the FFA. It noted:

The benefits under the FFA received by a hog producer, related to the purchase of grain, result in a reduction in the cost of production of the hogs. In our view it is of no relevance whether these monies were received by hog producers technically in their capacity as such, as opposed to any other capacity, if the payments received benefited the production of hogs. On this record, Commerce could reasonably conclude that benefits under the FFA decreased the hog producer's cost of production. See Saudi Iron & Steel v. United States, 686 F.Supp. 914, 916-18 (Ct. Int'l trade 1988)

Pork I, supra note 5, at 56 (emphasis added).

We believe this reasoning is compelling and intrinsically persuasive. It is irrelevant that swine producers wear their "feed grain milling hats" when they receive FFA payments. The essential point is that the payments artificially reduce their cost of producing swine.

2. Upstream Subsidy. In the event an economic benefit is theoretically traceable to swine, the CPC argues that Commerce must conduct an upstream subsidy investigation to determine what

benefits, if any, flow to swine producers from payments that arguably only benefit feed grain.⁹² We reject this argument for the same reasons we rejected a similar argument by the CPC regarding ACBOP.⁹³

An upstream subsidy inquiry is only required when benefits are provided to an input producer that does not produce the product under investigation. In this case, FFA payments are made directly to swine producers. Thus, there is no need for an upstream subsidy investigation.⁹⁴

3. Calculation. The CPC asserts that Commerce's calculation is not in accordance with law and not supported by substantial evidence. It argues that Commerce miscalculated the subsidy by including FFA benefits paid in Ontario, even though no swine producers in Ontario were covered by the program.⁹⁵

In its brief, the CPC notes that "the areas theoretically eligible for FFA benefits include parts of . . .

⁹² Brief of CPC, supra note 15, at 71-74.

⁹³ See note 82 supra and accompanying text.

⁹⁴ It should be noted that the panel in Pork I reached the same conclusion regarding FFA and the need for an upstream subsidy investigation. Pork I, supra note 5, at 57.

⁹⁵ CPC also argues that New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island, and parts of British Columbia and Quebec should be eliminated from the calculation. However, our review of the record has not disclosed any support for this allegation.

Ontario."⁹⁶ However, the CPC asserts that "Commerce was informed by the Livestock Feed Board at verification that there is no hog production in eligible FFA areas in Ontario. P.R. 30, Ver. Ex. Montreal-3."⁹⁷ Although Commerce's brief discusses many aspects of the calculation, it does not discuss this one.⁹⁸

We believe the record contains substantial evidence that demonstrates that Commerce should not have included Ontario in its FFA calculations. For example, exhibit "Montreal-3" to the verification report states in note 2: "[t]here is no hog production in the FFA eligible zones in Ontario." P.R. 30, Ex. Montreal-3. In another exhibit to the verification report, which shows FFA payments to feed mills and livestock producers, the case analyst underlined the amount paid to producers in Ontario and noted "9 producers - no hog producers." Id. at Ex. Montreal-2. See also Brief of CPC, supra note 15, at 27.

At the hearing before this Panel, Commerce conceded that it had miscalculated the FFA benefit for Ontario, and agreed to accept a remand to correct the calculations. Tr. 269-70. Therefore, this Panel remands the FFA calculations to Commerce, with directions to remove payments covering Ontario.

⁹⁶ Brief of CPC, supra note 15, at 76.

⁹⁷ Id. at 77.

⁹⁸ See Brief of Commerce, supra note 26, at 35-38.

VI. CONCLUSION

For the foregoing reasons, Commerce's determination is hereby affirmed in part and remanded in part. On remand, the agency is directed to:

A. Tripartite

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

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

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

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

- Explain whether the history of payments under Tripartite (both during and before the period of review) is probative of disproportionality or dominant use. Furthermore, explain how this evidence fits into its specificity analysis in this case. For example, of what relevance is the fact that 52 percent of Tripartite benefits go to swine producers, when the agency believes the program is used by less than ten percent of the potential participants.

- Explain whether it is appropriate to consider disproportionality/dominant use with an eye only to Tripartite or to the combined experience under Tripartite and ASA and, if combined, whether that would change the determination of disproportionality/dominant use. Furthermore, respond to Canada's and the CPC's arguments that swine producers do not receive disproportionately large benefits because: (i) one-third of all Tripartite participants are hog producers, (ii) hog producers did not receive any payments under Tripartite during its first several years, (iii) the negotiations necessary to establish a Tripartite agreement are complex and this is a relatively recent government program, and (iv) income stabilization schemes, like Tripartite, always benefit some products more than others during any given year.

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

B. FISI

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

- To the extent it is deemed relevant: (i) explain why the absence of this evidence in connection with Tripartite is not fatal to the agency's determination regarding that program, and (ii) consider the evidence added to the administrative record by the Panel's Preliminary Ruling of November 25, 1991 which Quebec claims will establish that FISI covers 35.8 percent (instead of 27 percent) of Quebec's total agricultural value.

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

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

- Finally, in accordance with its proposed regulations (and the Panel's analysis of Tripartite), Commerce should consider on remand (i) whether there are dominant users of FISI, or whether certain enterprises, industries, or groups receive disproportionately large benefits, and (ii) the extent to which Quebec exercises discretion in conferring benefits under FISI.

C. Weanlings

- Determine a separate rate for weanlings based on the evidence in the administrative record.

D. SHARP

- Recalculate the benefit received by swine producers using data in the record on actual payments.

E. ACBOP

- Reexamine the final calculations in light of the information added to the administrative record by this Panel's November 25, 1991 ruling.

- Explain the extent to which protein supplement and vitamin consumption reduces the amount of grain consumed by hogs.

- Confirm, with appropriate reference to the record, that its final calculations for ACBOP do not include payments to

livestock other than hogs. If this fact cannot be confirmed, Commerce should reconsider its determinations on this issue.

F. FFA

- Remove payments covering Ontario from the final calculations for the FFA.

The results of this remand shall be provided by the agency to the Panel within 60 days of this decision. If amendments to the Rules of Procedure for Article 1904 binational panel review are published in the Federal Register and Canada Gazette prior to the issuance of the remand determination, the parties are directed to follow those rules; otherwise, all parties will comply with the existing rules and the time for parties challenging the remand determination to submit comments shall be 20 days.

Signed in the original by:

May 19, 1992

Date

May 19, 1992

Date

May 19, 1992

Date

May 19, 1992

Date

May 19, 1992

Date

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UNITED STATES-CANADA BINATIONAL PANEL REVIEW

IN THE MATTER OF:

LIVE SWINE FROM CANADA

USA-91-1904-03

Additional Views
of
Chairman Murray J. Belman

While I am in agreement with the Panel's determination to remand for further consideration Commerce's finding of de facto specificity of the Tripartite program, I disagree with the Panel's comments and suggestions regarding linkage of ASA and Tripartite that appear in footnotes 45 and 46 and the accompanying text.

First, I believe that the issue of linkage was not raised by Canada (which submitted no briefs to Commerce) or the CPC during the administrative proceedings and was thus beyond the proper scope of our review under the principles of waiver and exhaustion of administrative remedies. The passages from CPC's Brief on Appeal, cited by the Panel at footnote 46 to justify consideration of the linkage issue, are not, of course, relevant to the question whether the arguments were raised during the administrative proceedings. CPC's discussion of disproportionality, dominant use and program coverage in its Case

Brief submitted to Commerce makes no reference to ASA and is wholly confined to analysis of the Tripartite programs. Case Brief of CPC, 5-17. Earlier in that brief and even in its brief on appeal, CPC stated: "These [Tripartite] plans * * * are significantly different from the stabilization plans under ASA found to be countervailable by the Department in 1985." CPC Case Brief, 2; CPC Brief on Appeal, 14 (reference to "the Department" changed to "Commerce"). In view of these facts, I believe it was improper for the Panel to consider the linkage argument.

Secondly, I believe that the references quoted by the Panel in footnote 45 do not "suggest" that ASA should be linked with Tripartite in Commerce's consideration of disproportionality or dominant use on remand. The statement made by the Canadian Agricultural Stabilization Board (Tripartite agreements stabilize the "prices" of covered commodities) is plainly mistaken, since all parties agree that the Tripartite program is aimed at income maintenance, rather than price support. See e.g., Brief of Canada on Appeal, 4-5. In the very same report cited by the Panel in footnote 45, the ASB stated that the ASA's main objective is to stabilize "the prices" of covered commodities. P.R. 10 Ann. Rep. of the Agricultural Stabilization Board for the year ended March 31, 1989, p. 1. It is difficult for me to see how ASB's misdescription of Tripartite can be said to support a finding of linkage with ASA. The second statement quoted in the footnote, pointing out that products may not be covered

simultaneously by ASA and Tripartite, offers nothing to the analysis of linkage under Commerce's practice or its proposed regulations, since, in isolation, it says nothing to suggest that the two programs are subject to joint administration, were enacted with the intent to treat industries equally, are aimed at similar purposes or are eligible for common funding. Of course, as noted above, none of these arguments was raised by Canada or the CPC during the administrative proceedings in this case.

In summary, I believe that the Panel has engaged in an effort to breathe life into an argument not made below and not supported by its citations to the record. While Commerce, as directed by the Panel, is now obligated to consider linkage in reconsidering disproportionality and dominant use, it is not obligated to stretch the record or distort its own regulations in doing so.

