FRESH, CHILLED, OR FROZEN PORK FROM CANADA

Views on Remand in
Investigation No. 701–TA-
(Final)

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UNITED STATES INTERNATIONAL TRADE COMMISSION

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PREFACE

In August 1989, the U.S. International Trade Commission made a determination in investigation No. 701-TA-298 (Final) that an industry in the United States was threatened with material injury by reason of subsidized imports of fresh, chilled, or frozen pork from Canada (USITC Pub. No. 2218 (September 1989)). That determination was subsequently appealed to an Article 1904 Binational Panel established pursuant to the United States-Canada Free-Trade Agreement and remanded to the Commission for further consideration on August 24, 1990. The attached views were submitted to the Binational Panel in response to the remand on October 23, 1990.

CONTENTS

Note.--Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this report. Such deletions are indicated by asterisks.

VIEWS OF THE COMMISSION

VIEWS OF COMMISSIONER DAVID B. ROHR

Fresh, Chilled, or Frozen Pork from Canada
Inv. No. 701-TA-298

I determine that the domestic pork producing industry is threatened with material injury by reason of imports of pork from Canada that have been found by the Department of Commerce to be benefiting from subsidies. In making this determination, I have considered the record of this investigation as compiled in the Commission's original 1989 investigation,[1] as well as the supplements to that record received in the course of this remand investigation.[2] I readopt the findings and conclusions contained in the Commission majority views in the 1989 final investigation of fresh, chilled or frozen pork, to the extent such views are not inconsistent with those contained herein.

In making this determination, I note that, on the basis of the current record, it is likely that the increase in Canadian imports, which formed an important part of my initial determination, will be substantially less than appeared probable at the time of the Commission's original determination. Even at a lower level, however, I conclude such imports will be sufficient to contribute to the material injury which I project the domestic industry will be experiencing during the imminent downturn of the hog cycle. An affirmative finding of threat is therefore required under the U.S. countervailing duty laws.

Vulnerability of the Industry

The first element in my analysis of whether the domestic pork producing industry is threatened with material injury by reason of subsidized imports of pork from Canada involves the condition of the domestic industry. For purposes of this analysis, I readopt the conclusions concerning the condition of the domestic industry contained in the Commission's original

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[1] That record incorporates the 1985 Commission live swine and pork title VII case, which in turn incorporates the Commission's 1984 section 332 study of pork and live swine, Conditions of Competition Between the U.S. and Canadian Live Swine and Pork Industries, Inv. No. 332-186, USITC Publication 1615 (November 1984).

[2] With respect to the inclusion of such additional material in the record, I concur with the comments made by my colleague, Commissioner Newquist, concerning the reopening of the record contained in his views in this remand investigation.

views.[3]

To begin, I note that the Panel suggested that the Commission might wish to reassess its views of the vulnerability of the domestic industry in light of certain corrections to facts relating principally to the operations of the Canadian industry. In conducting my reassessment, I believe there are some fundamental misconceptions about the role of the Commission's assessment of vulnerability in its threat analysis, as well as what a conclusion about the vulnerability of the industry means. I therefore feel it important to set forth how I view my assessment of industry vulnerability.

In the bifurcated mode of injury analysis, the two separate questions which the Commission poses are (1) whether an industry is injured and (2) whether the imports under investigation are a cause of (that is, contribute to) that injury.[4] These same questions underlie the analysis of both present injury and threat of injury. In the threat context, however, the traditional bifurcated analysis questions are usually implicit rather than explicit.

Looked at from the perspective of the two fundamental injury questions, when faced with an investigation in which "threat" must be considered, there are several possible alternative scenarios the Commission might face. An industry might be experiencing material injury, but imports are not, at the present moment, contributing to that injury. The threat issue in such a case is whether the imports are likely to contribute to that injury at some imminent future time. Alternatively, an industry might not be injured at the present time. In such a case, however, the industry may face injury at some imminent future date, and imports may or may not contribute to that injury.

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[3] Fresh, Chilled, or Frozen Pork From Canada, Inv. No. 701-TA-298 (Final), USITC Publication 2218, Views of Commissioners Eckes, Rohr and Newquist ("Original Views") at 10-16 (September 1989) ("1989 Pork Case"). With regard to an analysis of this industry I heartily endorse the comment of my colleague, Commissioner Newquist who notes that each investigation the Commission conducts is sui generis and can only be decided on a case by case basis.

[4] LMI-La Metalli Industriale, S.p.A. v. United States, 13 CIT ____, 712 F. Supp. 959, 971 (1989); Citrosuco Paulista, S.A. v. United States, 12 CIT ____, 704 F. Supp. 1075, 1101 (1988).

If the industry is not yet experiencing material injury, it must be recognized that it might be more or less difficult to depress the industry's condition below that level of operations which divides an injured from an uninjured industry. Obviously, the better an industry is performing, the further its condition has to deteriorate to fall to the level of "material injury." On the other hand, an industry operating barely above the threshold of material injury might require only the smallest of downward declines in operating performance to be characterized as being materially injured.

The vulnerability assessment that I undertake is to provide some basis for a judgement about where the industry stands in a continuum of uninjured to injured industries. It is based on the current performance level of the industry, as well as structural characteristics which make it more or less difficult to shift the performance of the industry upwards or downwards. Therefore, factors affecting the level or possible effects of the imports are simply not relevant to my assessment, and I would specifically attempt to disregard them.

The level and possible effects of imports are obviously important to a threat analysis, but only once the assessment of the domestic industry has been completed. It must also be kept in mind that an assessment of the vulnerability of an industry is merely the starting point for an analysis of threat and does not dispose of the issue. Even an industry that was operating at very high performance levels, and hence might not be characterized as particularly vulnerable, might still be threatened by a particular combination of projected future levels of imports and import prices.

In 1989, I concluded, along with the Commission majority, that the domestic pork producing industry was "vulnerable" to material injury.[5] To rephrase that finding in practical terms, I judged that, due to a combination of structural characteristics and the current level of its performance, the industry was operating very close to a level that I would have determined to be characteristic of material injury. Further, the vulnerability finding meant that very small negative changes in the performance of the industry, which could be caused

[5] Original Views at 16.

by relatively small changes in the markets which affect the industry, would be sufficient to push it into a condition of material injury. I continue to believe so.

To elaborate upon my reasons for this conclusion, I begin by noting that there appears to be some question of why the Commission did not explicitly consider the "vulnerability" of the industry in the 1985 Live Swine and Pork investigation,[6] and therefore why the industry is "vulnerable" now, when it was not "vulnerable" then.[7] This question misses a fundamental point of the 1985 decision. The Commission majority in 1985, of which I was a member, found the industry to be currently experiencing material injury in 1985. A discussion of "vulnerability" would have been superfluous in light of that finding.[8] Anything that would be said about vulnerability would be subsumed into the finding that the industry was already injured.

In the current investigation, which led to this remand, I was more reluctant to make a finding that the industry was currently experiencing material injury. For example, in contrast to the 1985 situation in which the pork packers were experiencing negative operating returns, in 1989 they had small but positive returns. Although it was a very close call, I did not believe it proper to characterize the industry in 1989 as currently experiencing material injury. I attempted to express how close a call this finding was in the alternative finding I made in footnote 75 to the Original Views. I stated that even had I found the industry to be injured, I would have found no causal connection between imports and the present condition of the industry.

In this situation, I consider a more complete examination of the vulnerability of the industry to be important. Several factors contribute to my assessment that the domestic pork producing industry is vulnerable to the effects of imports. First, I note that, financially, the

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[6] Live Swine and Pork from Canada, Inv. No. 701-TA-224 (F), USITC Publication 1733 (July 1985)(Live Swine).

[7] That decision resulted in a 2-1 affirmative finding on swine and a 2-1 negative finding on pork.

[8] Live Swine at 10 - 12 ("We determine, based upon all the indicators discussed above, that this industry is experiencing material injury").

1-2 percent operating margins that we found to exist for packers in the 1989 investigation are very low. Pork packing is not a highly profitable type of activity. This is important because, while one would not expect pork packing to be a highly profitable activity, low profitability on the "up" side of a business cycle means that the industry is unlikely to be able to rely on the larger profits from the "up" cycle to even out the lower profits of the "down" side of the cycle.[9]

Second, the operations of packers are very dependent upon the volume of hogs to be slaughtered. Related to very low per-animal margins, packers operate most profitably and efficiently when they are slaughtering the highest volumes of swine. Conversely, packers tend to lose money or operate at bare break even levels when the volume of swine to be slaughtered is low. Similarly, the profitability of this industry is "squeezed" when the spread between the price the industry pays farmers for hogs and the ultimate prices the industry can get for the pork which it has slaughtered narrows.

These factors tie into the third important factor affecting the vulnerability of this industry. That factor is the hog cycle itself. Packers tend to do best at or around that point in the hog cycle when the volume of swine is at its peak. At that point, there are large volumes of swine to be slaughtered (because farmers are reducing herds) and there is little upward pressure from below on hog price (again because of the volume of pigs to be slaughtered). Conversely, on the down side of the hog cycle ("down" defined as decreasing volumes of swine) packers are caught in a double squeeze. Declining volumes of hogs means they operate less profitably. The same declining volumes puts price pressure on the packers from hog prices which they may or may not be able to pass through to consumers without at least some short term loss.

This picture of the industry is confirmed by the information that the Commission has gathered in its investigations of this industry. Packers who have provided information to the Commission over the course of its investigation have consistently maintained the existence of

[9] The business cycle relevant to the pork industry is, of course, the hog cycle.

a relationship between volume of hogs slaughtered and their profitability. A specific correlation of financial profitability from the records of the companies and the hog cycle, however, is difficult due to the lack of relationship between packers' financial years and the years of the hog cycle. There is at least some data supporting the relationship in the 1986-1988 up cycle in which packer profitability was increasing.

Therefore, generally, the logic of how the pork packers operate dictate that in the down portion of the cycle, while the volume of hogs to be slaughtered is declining, they are likely to operate at levels which are depressed. The data confirm this logic by showing that during the last down portion of the hog cycle the industry was materially injured. At the time of the Commission's live swine decision in 1985, the U.S. was on the down side of its hog cycle.

This meant that for purposes of threat, however, I was looking at a prospective upturn in the hog cycle and what would likely be improvements in packers' performance (a conclusion actually borne out by their performance in the 1986-1988 period). In the current investigation, I am looking at an industry at or near the peak of its cycle. This means that for purposes of threat, I am looking at an imminent future of the downward portion of the cycle. This is precisely the most "vulnerable" period for the industry. It is the period in which it can be squeezed at the downstream end by prices for pork which are likely to be low due to the large quantities of pork on the market, quantities made even larger by the inventories that are at such high current levels. It is further squeezed on the supply end by decreasing volumes of hogs, (which occurs once the herds have been liquidated) and increasing hog prices as the volume of hogs declines.

In light of these factors, the only proper conclusion for me is that the industry is particularly vulnerable to the effects of even small changes in prices and volumes of pork and hogs. The question is whether, in light of this vulnerability, subsidized Canadian imports will affect the prices and volumes of pork and hogs and, thus, threaten the industry. It is quite probable that this industry will be experiencing material injury during the upcoming down cycle. The issue is whether during this same upcoming down cycle Canadian imports will be a cause of that injury, that is, will they contribute, "even minimally," as the CIT has phrased it, to that injury.

Effect of Canadian Subsidies[10]

Having provided a basic analysis of the condition of the domestic industry, the next step in my analysis of threat is to make an assessment of the future trends in imports of pork from Canada. The first element in this assessment is a consideration of the nature of Canadian subsidy programs.[11] For purposes of this remand, I take as given the subsidies found by the Department of Commerce in its original decision.[12] I note that the Commission requested the Panel to delay this remand until after the Department of Commerce rules in its remand concerning the calculation of subsidies. Such a delay would have conformed the timing of the remand to the timing of the statutory investigation. Because the Panel refused to issue a postponement of this remand, I believe the Commission is constrained to apply the original findings.

However, for purposes of my decision, the subsidy calculations and the margins found by Commerce are of secondary importance. The basic question is whether the nature of the subsidies provided by Canadian governmental authorities is to increase exports of pork to the United States. To answer this question, I considered the actual data for the performance of the Canadian industry and its exports to the United States over the period during which it has been receiving subsidies.

I looked first, however, at the U.S. hog cycle. I note that there seemed to be a long cycle of somewhere between 8-12 years and, within each long cycle, one or more smaller cycles. When I contrast this to the Canadian hog cycle, I note that the U.S. and Canadian hog cycles were quite similar throughout most of the decade of the 1970's. In the late 1970's, however,

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[10] I wish also to state my general concurrence with the comments of my colleague Commissioner Newquist with regard to the nature of the subsidies which analyze the nature of Canadian subsidies from a slightly different perspective than the one I employ herein.

[11] 19 U.S.C. §1677(F).

[12] 54 Fed. Reg. 30774.

the Canadian and U.S. hog cycles began to diverge. In the early 1980's, for example, when U.S. production declined significantly, Canadian production declined very slightly. In the subsequent years between 1983 and 1985, when U.S. production again declined, Canadian production actually increased. The divergence of the Canadian and U.S. hog cycles ceased after 1985. The pattern of the cycles in the U.S. and Canada begin moving, at least through 1988, in similar directions, although at substantially different levels than prior to the late 1970's.[13]

What is significant in this picture is that in the late 1970's, when the cycles are seen to have diverged, Canada had begun its large subsidization of hogs. Further, 1985, the point at which the cycles appear to resume their synchronous movement, is the point at which the U.S. first imposed its countervailing duties on Canadian hogs. I believe this evidence is compelling that the Canadian subsidies, and the way these subsidies are countervailed against under the U.S. countervailing duty laws, have a significant impact on Canadian production.

It is not simply Canadian production, however, but the impact of Canadian subsidies on Canadian exports over the period of the Canadian subsidization which is most relevant.[14] In the early 1970's, total Canadian imports into the United States rose at a very slight pace. By the late 1970's exports had dropped to around 50 percent of their early 1970's levels. Beginning in 1977, however, a large and continuing growth in total Canadian imports into the United States began. Except for a small decline between 1980 and 1981, the volume of Canadian imports increased steadily until 1985. Between 1985 and 1986 there was a significant drop, but the upward movement immediately continued thereafter.

I am persuaded that it is significant that the rise in overall imports began with the introduction of the subsidy programs in the late 1970's and that there was at least a

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[13] See Investigations Memorandum, Inv-N-123 (Oct. 23, 1990)(Remand Report) at Figure B.

[14] In this discussion I have considered both total Canadian exports to the United States, that is the combined total of hog and pork exports, which I refer to as total or overall exports, and pork exports. Both are important because the ability to switch between exports of hogs and exports of pork can significantly affect the volume of pork shipped to the United States.

significant, albeit short-lived, drop in total imports in 1986 when the countervailing duties were imposed.

It is, of course, possible that the increases and decreases in total imports from Canada corresponding to the introduction of the subsidies and their initial countervailing by the United States might be mere coincidences.

I cannot believe in such a coincidence without some logical reason. There is nothing on the record to persuade me that the trends are merely a coincidence. Certainly, other factors may also have affected the level and direction of the changes in production. However, I find it a reasonable inference from the record that the subsidies did at least contribute to the situation.

However, it is true that, to the extent the conclusions are drawn from data that include both hogs and pork, they provide no basis for saying specifically that pork imports rather than swine are likely to increase. The question of the relationship between hog and pork imports is more complex, and more difficult of statistical proof. This is an important issue however, and I feel I must draw some conclusions.

First, as I previously stated, with the exception of the years 1980 to 1981 and 1985 to 1986, total Canadian imports into the United States have risen each year since the late 1970's.[15] Dividing total imports into its two component parts of swine and pork, and adjusting swine imports to a carcass weight equivalent basis, I can compare their movements. The trend in swine imports was beginning to increase in the late 1970's when the subsidies went into effect.[16] These imports rose rather steadily through the early 80's until 1983. In 1984, swine imports jumped by a very large amount. This high level continued until live swine imports were countervailed in 1985. There was a very significant drop in live swine imports in 1986, with a small continuing drop in 1987. Live swine imports began to rise again by a substantial amount in 1988, continuing this increase in the first quarter of 1989.

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[15] Remand Report at Figure A.

[16] USDA's Livestock and Meat Statistics, 1984-1988 (USDA Meat Statistics) at 248.

For pork imports, the trends are similar, but there are also some significant differences. First, like the situation for swine, there was a decline in pork imports from Canada between 1980 and 1981.[17] However, the magnitude of the change in swine imports was considerably greater than the magnitude of the change in pork imports.[18] The drop in pork in that period was, in my judgment, insignificant.[19] When we reach the period of the countervailing duties, I note that, while, as between 1985 and 1986, total imports declined by a moderate amount, pork imports actually increased by a significant amount. Further, in 1988, when there was a decline in pork imports, swine imports increase by what appears to be an even larger amount so that total imports therefore rose significantly.[20]

At least a part of the explanation for these changes is found in the relationship between the Canadian subsidies and the U.S. countervailing duties. The advent of the subsidies seems to have increased both swine and pork exports to the United States. Obviously, other factors must also have been at work to cause the huge increase in swine imports in 1984 and 1985. In 1986, many of these other factors may also have contributed, but it is clear that the countervailing of the subsidies was a factor leading to the decline of the swine exports but the continued growth of the pork exports.

The subsidies that are relevant to this investigation are based on payments made by the Canadian governmental authorities that, as a general rule, are higher at the peak and on the downside of the Canadian hog cycles while lower at the bottom and on the upside of the cycle (recognizing that lags and yearly averaging affect precise timings). The data indicate that the Canadian hog cycle was in an upward phase during most of the period of investigation, but that it was entering, or was about to enter, the downward phase at the time the

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[17] See, eg., NPPC Prehearing Brief at 2-B.

[18] There was also a slight decline in pork imports of another 4 million pounds between 1982 and 1983. Overall imports increased that year.

[19] A similarly small drop in pork exports occurred in 1983. Like the 1981 decline, it was surrounded by very large increases in pork imports in the preceding and following years. I therefore do not view these small declines as detracting from the overall upward trend.

[20] USDA Meat Statistics.

investigation was completed. This means that throughout the 1986-88 period, subsidy payments were at their low, while countervailing duties (when they are finally liquidated for that period) will also be low. This relationship is confirmed by the final liquidation for the 1985-86 period which substantially lowered the bonding rate based on the small subsidies received.[21] At the same time, in mid-1989, it is on the record that the subsidy payments had increased dramatically, an occurrence consistent with the proposition that Canada had reached the top and was entering the downward phase of its hog cycle.[22]

Therefore, there is obviously a disincentive to export hogs when countervailing duties are high. Countervailing duties are high when subsidy payments are high. Subsidy payments are high through the peak and on the downward side of the Canadian hog cycles. The hog cycle has begun to turn down. The data seem to confirm this general relationship also during the up portion of the cycle. 1988 was a period, based on yearly averages, of low subsidies, and therefore, prospectively of low countervailing duties and therefore high swine imports relative to pork. That is what the data show happened.[23] Further, as exemplified by the 1985-86 data, when countervailing duties begin to bite on swine exports to the United States, pork exports continue to grow, even if overall Canadian production and exports go down.

Therefore, respondent's academic study notwithstanding, logic dictates that the subsidies have an effect on Canadian production and exports to the United States. The data show that such effects have occurred. I conclude that the nature of the subsidies, by protecting Canadian interests against declines in the hog cycles, tends to do so by shifting the negative effects of the hog cycles to U.S. producers in the form of increased pork imports, increased, at least, over what they would have been had not the Canadian government intervened in the market.

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[21] 53 Fed. Reg. 22189 (June 14, 1988); 54 Fed. Reg. 651 (Jan. 9, 1989).

[22] Transcript of Commission Hearing in Fresh, Chilled, or Frozen Pork from Canada at 19, Aug. 1, 1989.

[23] 1989 Pork Case at A-41, Table 8.

The Likelihood of Increased Imports

The next issue relevant to the issue of threat is the likelihood of imports "rising" to an injurious level. Several of the statutory factors are relevant to this inquiry, particularly trends in imports and market shares, as well as capacity. Rather than segregate these individual statutory factors, which results in a very disjointed picture of what is actually occurring, I will provide that story as I think it should be told.

First, as I related above, pork imports, like overall imports, increased in almost unbroken succession between 1976 and 1987. The two exceptional years of 1981 and 1983 had drops respectively of roughly 2 million and 4 million pounds.[24] I regard such drops as insignificant. The only significant drop in pork imports was the one year 1988, the last full year of our investigation. What significance should be placed on the one year as indicative of future declines in Canadian imports as compared to the almost unbroken line of the past ten years?[25]

First, I note that the only two years in which overall exports to the United States declined, 1980-81 and 1985-86 both correspond to down portions of the Canadian hog cycle.[26] This suggests that, perhaps, downturns are related to decreasing overall exports. However, in the 1981/82 period, which was also a down portion of the Canadian cycle, overall imports increased by more than 100 million pounds. The evidence thus does not establish that downturns in the Canadian hog cycle will lead to a reduction in even overall exports to the United States.

Further, when one looks specifically at pork exports to the United States, the relationship between declines in the Canadian hog cycle and declines in exports to the United

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[24] USDA Meat Statistics at 248.

[25] I note that based on first quarter statistics there was a decline in pork imports in 1989 from first quarter 1988 levels, although up from fourth quarter levels. The Commission has traditionally been reluctant to place great weight on declines in imports during the period in which an investigation is pending. I continue to view such data skeptically but note that it does show a decline.

[26] USDA Meat Statistics at 248; see also Figure B.

States disappears. There is to be sure the 2 million pound drop in exports in 80-81 but we see an over 70 million pound increase in pork exports to the United States the very next year. The 4 million pound drop between 1982 and 1983 corresponds to an up cycle in each country while the 80 million pound increase the following year corresponds to an up cycle in Canada and a down cycle in the United States. Finally, the Canadian exports of pork to the United States also increased by some 39 million pounds between 1985 and 1986 although this was statistically also a downturn in the Canadian cycle.

The data thus demonstrate that the fact that Canada is entering a down portion of its hog cycle does not mean that either total Canadian exports to the United States or, specifically, pork exports to the United States are likely to decline. Based on the 1986 downturn, which is the only downturn with comparable conditions (i.e., a countervailing duty assessable on hog imports), one would have to conclude that the likelihood is that pork imports will increase.

Looking at the data from another perspective, the last cyclic downturn for the U.S. industry lasted from 1982-83 to 1985-86. Over the course of that downturn, Canadian pork exports increased from approximately 275 million pounds to approximately 440 million pounds, an increase of approximately 165 million pounds.[27] Further, would it be reasonable to dismiss any connection between the 1988 decline in pork imports when in that very same year there was an even greater increase in swine imports? Yet again, keeping in mind the questionable validity of partial year data (particularly when that data is from a period in which an investigation is ongoing), the decline in pork imports in the first quarter of 1989 is more than matched by a continuing increase in the carcass weight equivalent of swine imported in that quarter.

Thus, the only factor which appears to have reduced pork imports in recent years would appear to be the ability of Canadian producers to export live swine. Going back to my discussion of the nature of the subsidies, this ability is conditioned upon low CVD rates which are dependent upon low levels of subsidy payments. However, the subsidy payments within

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[27] USDA Meat Statistics at 248.

Canada had already climbed in the middle of 1989. CVD's must therefore be projected to rise as well. Thus, the continuation of the ability to export live swine which appear to be the only factor that is clearly related to reducing pork exports cannot be projected to continue.

Respondents place much emphasis on projected declines in Canadian hog production as a basis for concluding that pork exports to the United States are unlikely to rise. As indicated above, however, the evidence does not show that declines in total Canadian hog production have significantly restricted the ability of Canadian producers to export pork to the United States over the entire course of the decade of the 1980's.[28] Furthermore, even accepting a two to three percent drop in Canadian production, such a reduction would be less than the carcass equivalent of the live swine exported to the United States in 1988.

The question then becomes what kind of increase is it reasonable to expect over the course of the upcoming downturn in the U.S. hog cycle. Part of this depends on the relationship between hog and pork exports, and, as I have previously indicated, it is my belief that there is an inverse relationship between subsidy payments and hog imports relative to pork imports. This suggests that pork imports will increase.

The next determinant of what kind of change in the level of Canadian pork imports is to be expected is overall Canadian production levels. Here, Table 17 (Table 1 of the Remand Report), which has been adjusted in accordance with the Panel's remand, becomes significant. First, as the Commission majority noted in the Original Views, the data from both the original and revised tables shows that production within Canada had increased over the period of investigation. Further, the most recent year's estimate, which is the basis from which future changes, up or down, would be based, remains essentially unchanged. The data for 1986 and 1987 Canadian production have been revised, however. Several factors are important in analyzing the data presented in this Table. First, the increase over the period of this investigation is significantly smaller. Second, the ability of Canadian producers to increase production by 500 million pounds in a single year is simply not supported by the evidence.

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[28] There does appear to be some relation to overall exports to the United States. This merely turns the question back to the relationship between swine and pork discussed above.

The largest increase evident in this table is 130 million pounds in the 1987-88 comparison.

On the other hand, the 1988 Canadian production level is approximately 300-400 million pounds higher than its level when I concluded, in 1985, that Canadian imports did not threaten the U.S. industry. Further, as stated before, even a decline in overall Canadian production has not historically led to declines in the export of pork to the United States. Therefore, I cannot conclude that levels of Canadian production provide any necessary guide to either the direction or magnitude of changes in pork exports to the United States. They certainly do not provide a sufficient basis for a negative determination.

Nevertheless, in the original investigation, I looked at potential increase in pork production of as much as 500 million pounds. With a relatively stable domestic Canadian market and insignificant third markets, such production could have nearly doubled the level of Canadian exports to the United States over the course of the upcoming down side of the domestic U.S. pork cycle. Based on the current data, I believe that the possibility of increases in imports into the United States from Canada of the magnitude I considered possible in the Original Views are unlikely. Nonetheless, Canadian producers have evidenced the ability to increase production by over 100 million pounds in a single year. They have increased pork exports to the United States alone by more than 70-80 million pounds on more than one occasion on the historical record. They have also demonstrated that even when decreasing production they do not decrease but rather increase exports to the United States.

The next question is whether third markets are likely to absorb a significant amount of Canadian produced pork that would otherwise go to the United States. In the Original Views, the Commission majority emphasized that it believed that whatever diversion had been occurring to the Japanese market would likely stop once Taiwan resumed its place in the market. The additional data which the Commission has obtained from Japanese government sources tell a different story.

In fact, Canada has been able to maintain a relatively consistent export level since it was able to penetrate the Japanese market due to the Taiwanese residue problem in early 1988.

Canada's exports to Japan have consistently been around 5 million pounds monthly.[29] While the evidence does not support the proposition that this level will necessarily decrease, it also provides no basis for concluding that it will be growing. An annual projection of 60 million pounds of exports to Japan to compare with annual exports to the United States of 605 million would therefore be reasonable. My conclusion is that, even assuming Canada manages to maintain its level of exports to Japan, such exports do not significantly reduce the amount of pork available to be exported to the United States.

The next question is capacity. The Commission drew some very specific conclusions about capacity diversion due to a strike at one Canadian plant.[30] This discussion illustrates to me two important points. The first is that trying to make specific inferences about the behavior of an individual producer from the general data of the kind the Commission is able to obtain from abroad is always problematic. Second, it shows how easily the details of an anecdote the Commission uses to illustrate a more general point can become a red herring for lawyers wishing to challenge a Commission decision.

What is the point of the Commission's capacity discussion in this case? The only point is that Canada possesses sufficient slaughtering capacity for hogs to slaughter all the hogs that are produced in Canada. This means that all the live swine which Canada exports could be slaughtered in Canada, if Canada chose to do so. Put another way, limitations on slaughtering capacity, in general, do not result in the export of live hogs as opposed to pork.[31] This position was admitted by respondents in this case, who acknowledge that there is more than sufficient capacity in Canadian slaughtering operations to slaughter all hogs which are produced in Canada. I do not view capacity as telling me anything more about the ability of Canadian

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[29] Remand Report at Table 2.

[30] Original Views at 19.

[31] This is not to say individual specific short-term capacity problems may not affect exports. It was argued, for example, that one reason for the huge surge in live swine imports in the 1984-85 period was the shutdown of several plants throughout Canada due to labor troubles, an explanation that I have no reason to doubt was a contributing factor to the increase at the time. I have no doubt furthermore that several factors contributed to the 60 million pound increase in live swine imports in 1988.

producers to increase Canadian pork shipments to the United States.

The next element in an assessment of the likelihood that there will be an injurious volume of imports is to consider market shares. In the 1985 investigation the market share for Canadian pork was in the 1-2 percent range.[32] By the 1989 case, it had increased to the 3 percent range.[33] If the U.S. was entering the down phase of the hog cycle, with herd liquidation about at its peak, production in the United States in the upcoming phase must be assumed to be likely to decline. As such, even were the exports from Canada not to increase, as I expect them to, unless Canada decreased exports at least at the same pace that domestic producers decreased their production, the relative size of the Canadian market share and the impact of Canadian exports would increase.

There are no data to support the hypothesis that such declines will take place. The experience of the industry in past downturns is that domestic production has fluctuated downward by as much as 1 to 1.5 billion pounds in a single year. The declines in Canadian pork exports, to the extent they occur at all, are not proportional. Even were Canadian imports not to increase in absolute terms, their impact on a shrinking domestic production base would increase.

Finally, the Panel called upon the Commission to reevaluate its conclusions about the transportation and distribution bottlenecks that were referred to in the 1985 case. In 1989, I noted that these bottlenecks did not seem to be as much of a problem due, for example, to the acquisition by Canadian interests of some U.S. facilities and their related distribution nets.[34] Logically, I still believe that, at some point, the availability of transportation and distribution facilities must act to restrict short term increases of exports from Canada. Certainly, the availability of distribution nets makes it easier to export pork to the United States from Canada. In this regard, however, I note that, having reviewed the record, respondent's

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[32] Live Swine at A-39, Table 27.

[33] Original Views at 43, Table 21.

[34] Original Views at 23.

contentions that these distribution facilities have not increased since the 1985 case is simply unsupported by the record.

Further, and even more importantly, the reference in the 1985 case to these matters was in the context of factors which would act to restrict the rise in imports. The record of Canadian export performance, however, demonstrates that year to year increases of 50 to 80 million pounds in Canadian exports to the United States are not unusual, having occurred half a dozen times over the course of the decade of the 1980's. The absence of facilities thus is shown by the record not to be that significant a factor in restricting Canadian exports.

My conclusion upon evaluating these factors is that I believe it is likely that Canadian exports to the United States over the course of the upcoming down portion of the hog cycle will be at a level at which they will contribute, at least in part, to a condition of the industry that I project will be characterized as materially injured.

<u>Price Effects of Subsidized Canadian Pork</u>

I believe that the evidence in this investigation does not support a finding that subsidized imports have a significant direct effect on U.S. prices by means of underselling. While there are sporadic instances of underselling as reported in our original views, I will not attach much significance to them. From a purely statistical point of view, there were a limited number of observations. I have frequently cautioned about the overuse of the data in such situations. Second, the instances both of overselling and underselling appear to reflect merely short term distortions in the market without any real effect on overall price levels. This does not mean that the subsidized imports have no effect on price, merely that it is more difficult to explain the relationship.

My difficulty is that my understanding of the economics of this market conflicts with the requirements for analysis under the countervailing duty law. The laws are based on certain underlying assumptions about national industries which may or may not always correspond to how current markets are operating. The Commission's investigation of the economics of the pork market indicated that there is a "single North American market" for pork. Given the sophistication of the commodities markets for pork and the rapidity with which information about price can be exchanged both north and south of the border, it is not unreasonable from a strictly economic standpoint to look at such a single North American market. At least, it would make economic sense to look at the industries on both sides of the border as being part of a single market were it not for the distortive government intervention of the subsidies made by the Canadian government, which are the very subject of this investigation.

What this would mean, using 1988 numbers as a hypothetical, is that instead of looking at the impact of 400-500 million pounds of imported Canadian pork on the domestic U.S. producers of 16 billion pounds of pork, I would have looked at the total impact of close to 3 billion pounds of Canadian production on a total market of 19 billion pounds. There would be little question in my mind that the 15 percent of total North American production represented by Canadian production would have a significant impact on U.S. producers. Further, in a time of decreasing profitability and performance of a domestic industry, the pork represented by such production would be a cause of material injury.

Although this would appear to be the nature of the analysis which the Canadian Import Tribunal endorsed in its Corn Products decision, and may in fact reflect a more economically sound view of how the market operates, it is not a permitted mode of analysis under the U.S. countervailing duty law. Under the U.S. countervailing duty law, I can only consider the effect of imports on U.S. producers. Therefore, I can only consider the price effect of the imports subject to this investigation, i.e., pork not total imports, on the U.S. producers in a portion of the total North American market. The effect is much smaller, naturally.

Nevertheless, given the relatively smoothly operating commodity market for pork, the additional supplies on the market represented by subsidized Canadian imports does have a discernable, though small, negative effect on overall price levels. This is a factor which contributes to my conclusion that subsidized Canadian imports will be a cause of material injury to the domestic industry.

It is perfectly appropriate to consider the effect on price of the increased supply of pork represented by subsidized Canadian product.[35] Direct underselling, when it is relevant to a particular market, generally involves a combination of price effects including those attributable to supply volumes and market imperfections. Here the evidence suggests we are dealing primarily with the price effects of supply changes. In general, these will be negative, i.e. reducing the price, though small.

Assembling the Elements

It is, as a final matter, necessary for me to assemble the various elements of this analysis into what can be expected in the reasonably imminent future for the domestic pork producing industry. There is no question in my mind that the overall hog cycle is the largest determinant of the fortunes of the domestic pork producing industry. The performance of the industry improves when production can expand in the up portion of the cycle and declines during the down portion of the cycle. As evidenced by the data going back to the Commission's 1985 decision, during the down portion of the cycle it is likely that the condition of the domestic industry will be one which I consider materially injured.

The data make sense in light of my understanding of this industry, which is one in which good operations are a function of large volume of hogs to be slaughtered and the ability of producers to easily and quickly pass through price changes between their end product and their production inputs. In other words, in a situation in which the supply of hogs to be slaughtered declines or factors affect only one end of the end product price/input price function they are in serious trouble. This is precisely the situation facing the industry in the upcoming downturn. The evidence thus suggests that the material injury which existed for this industry in the last cyclic downturn will be repeated in the upcoming downturn.

The question then is whether Canadian imports will be at a level which will contribute to this injury. My projection of what will happen to Canadian imports starts from a level over

[35] Further, it is appropriate for me to consider the full effect of all subsidized imports. I am not concerned only with the increased imports that would be attributable to the subsidy. I am required by law to find a causal relationship between subsidized imports and material injury not merely the increase in subsidized imports attributable to the subsidy.

100 million pounds of pork higher than it was in 1985. It is based on a production base in Canada 300-400 million pounds higher than it was when I made my decision in 1985. We are further dealing with a market that will be experiencing its first full downturn in the presence of countervailing duties on live hog imports, which as I understand their operation, will provide a disincentive to the export of live hogs.

Certainly, in all this consideration I am also mindful that with a market as large as that of the United States, the effect of Canadian imports will be small. Certainly, the impact of the subsidized Canadian imports is much smaller than many other factors affecting the industry. But the standard I am legally required to apply is whether the imports will be contributing, even minimally, as the CIT states, to material injury. I am satisfied that this standard has been met. I find that subsidized imports of Canadian pork do threaten the domestic pork producing industry.

Views of Commissioner Don E. Newquist
Washington, DC

Investigation No. 701-TA-298(Final)(Remand)

Fresh, Chilled, or Frozen Pork from Canada

I determine that an industry in the United States is threatened with material injury by reason of subsidized imports of fresh, chilled, or frozen pork from Canada. My determination is based on the reexamination of the record, including revised data concerning Canadian production, imports, exports, and consumption, additional data on Japanese imports of pork from Canada and Taiwan, and production and capacity data from Canadian pork packers as required in the Memorandum Opinion and Remand Order (Panel Opinion) issued by the Binational Panel that reviewed the original determination pursuant to Article 1904 of the U.S.-Canada Free-Trade Agreement (FTA).

BACKGROUND

On January 5, 1989, the National Pork Producers Council (NPPC) filed a countervailing duty petition with the Department of Commerce (Commerce) and the United States International Trade Commission (Commission) alleging that an industry in the United States was being materially injured, or threatened with material injury, by reason of subsidized imports of fresh, chilled, or frozen pork from Canada. On July 24, 1989, Commerce published its final determination that subsidies were being provided to Canadian producers of pork;[1] on August 29, 1989, the Commission determined that a domestic industry was being threatened with material injury by reason of those imports.[2]

The Commission's finding of threat of material injury was appealed to an

[1] 54 Fed. Reg. 30,774 (July 24, 1989).
[2] 54 Fed. Reg. 37,838 (Sept. 13, 1989).

Article 1904 Binational Panel (Panel) established pursuant to the United States-Canada Free-Trade Agreement.[3] On August 24, 1990, the Panel remanded the Commission's finding of threat of material injury, directing the Commission inter alia to reconsider its original determination in light of corrected faulty statistics.

The Commission reopened the record to gather corrected information on Canadian production, imports, exports, and consumption, on Japanese imports from Taiwan and Canada, and on production and capacity of pork processing plants in Canada.[4] I have carefully reviewed the revised data in the record as well as the new information gathered, in addition to evidence on the original record, in light of the considerations set forth in the Panel's opinion.[5]

REOPENING THE RECORD

In order to comply with the instructions of the Panel, the Commission determined that it was necessary to reopen the record to seek additional data in three areas: 1) Canadian production, imports, exports and consumption to correct Table 17 of the Commission's original determination; 2) capacity and production of pork packing plants in Canada; and 3) Japanese imports of pork from Taiwan and Japan.

The Panel found that much of the Commission's determination was based on the "faulty use of statistics"[6] found in Table 17 of the Commission's final

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[3] 54 Fed.Reg. 43,192 (Oct. 23, 1989).
[4] Parties filed briefs on the issues raised by the Panel and on the revised and additional information gathered by the Commission.
[5] The Commission's definition of the like product and related definition of the domestic industry were not challenged on appeal and therefore are not addressed in this remand determination.
[6] In the matter of Fresh, Chilled, or Frozen Pork from Canada, Memorandum Opinion and Remand Order, August 24, 1990 (Panel Opinion) at 16.

determination and described those statistics as "unreliable" and "at least inaccurate."[7] In order to correct Table 17, the Commission determined that it was necessary to reopen the record to gather information that is specific to the product subject to investigation,[8] and based on a consistent methodology.[9] The information collected by the Commission was available at the time of the Commission's original determination, but had not been gathered at that time because the Commission was unaware that the figures in Table 17 were incommensurate. We found it necessary to gather this information because it ensured an accurate comparison as required by the Panel Opinion.[10]

The Commission also found it necessary to collect information on production and capacity of Canadian packing plants because the Panel instructed the Commission to consider "the materiality of the [Fletchers] plant's return to full production. . . ."[11] The Panel pointed specifically to the relationship between the number of hogs slaughtered at Fletchers and the increase in swine imports into the United States, and inferred that the number of hogs diverted from Fletchers was significantly less than the increase in

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[7] Panel Opinion at 18.

[8] Alberta Pork Producers Marketing Board v. United States, 669 F. Supp. 445, 464 (CIT 1987), aff'd on remand, 683 F. Supp. 1398 (CIT 1988) (Alberta Pork I) (elasticity estimates on which the Commission improperly relied covered both swine and pork when the Commission had found that swine and pork were separate like products); see also, Maverick Tube Corp. v. United States, 687 F. Supp. 1569 (CIT 1988).

[9] As described in Food Market Commentary, Vol. 11, No. 2 (July 1989), the Canadian government adopted a new procedure for estimating pork production reflecting a higher yield of pork per hog. Table 17 of the Commission Determination, relied in part on data from the old procedure for estimating pork production, and in part on the new, thus mixing methodologies. The Commission could not rely on that publication alone because it covers all pork and does not break out exports to the United States. U.S. law requires that the Commission seek information specific to the product under investigation. See Alberta Pork I; Maverick Tube.

[10] Sprague Electric Co. v. United States, 488 F. Supp. 910 (Cust. Ct. 1980) (The Commission reopened the record to admit corrected import data).

[11] Panel Opinion at 24.

hog exports to the United States. Because the record did not, in fact, contain production information specific to Fletchers, or other individual plants, the Commission felt compelled to gather that information to address the Panel's concerns. The additional data gathered by the Commission covered only the original period of investigation, 1986 through the first quarter of 1989.

Lastly, the Panel criticized the Commission's conclusion that pork exports from Canada would be diverted from Japan to the United States due to the resumption of Taiwanese imports into Japan.[12] The Panel suggested that, in order to predict future Canadian pork exports to Japan, greater attention be paid to the Taiwanese supply. The only data on the record concerning Taiwanese exports to Japan are on an annual basis, which was insufficient to address the Panel's concern. For this reason, the Commission found it necessary to reopen the record to gather additional information, again relying only on information that was available at the time of the Commission's initial determination and pertains to the Commission's original period of investigation.

CONDITION OF THE INDUSTRY

In its remand opinion, the Panel questioned whether the industry was more vulnerable in 1989 than in previous downturns. I would first note that "each injury determination before the Commission is sui generis. . . . Thus, . . . injury investigations are properly decided by the Commission on a case by case basis."[13] The record in this investigation contains not only a

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[12] Panel Opinion at 26.
[13] Armstrong Bros. Tool Co. v. United States, 489 F. Supp. 269, 279 (Cust. Ct. 1980) See also, Citrosuco Paulista S.A. v. United States, 704 F. Supp. 1075 1087-1088 (CIT 1988), citing Alberta Pork I, 669 F. Supp. at 461.

different factual basis but also different arguments.[14] For example, parties to this investigation have devoted considerable attention to the mechanics of the hog cycle, an argument not addressed in great detail in the 1985 determination, Live Swine and Pork from Canada, Inv. No. 701-TA-224 (Final), USITC Pub. 1733 (July 1985). During the last downturn in the hog cycle, beginning shortly before the time of the Commission's 1985 determination, the Commission found the pork packing industry to be materially injured.[15] In the 1989 Commission Determination, the majority recognized that the condition of the domestic industry had improved and was not presently suffering material injury. Nevertheless, various indicators portend the imminent downturn in the hog cycle, leading to a period in which packers' margins would be squeezed. The majority concluded, and I remain convinced, that in such circumstances the industry is increasingly vulnerable to material injury from subsidized imports of pork from Canada.[16]

I was not part of the Commission in 1985 and, therefore, I have not had the opportunity to review that record in full. Nevertheless, I have reviewed information contained in the public Commission report issued with the 1985 Live Swine determination and views contained in the record of this investigation. Based on that information, it is likely that I would have defined the domestic industry to include hog growers as well as pork packers,

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[14] Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169 n.5 (CIT 1988)("each finding . . . must be based on the particular record at issue including the arguments raised by the parties.")(emphasis added).

[15] The Commission determination was negative because the Commission majority failed to find a causal nexus between the injury and the imports found by Commerce to be subsidized.

[16] In light of the 1985 determination that the industry was suffering material injury, I concur in Commissioner Rohr's observation that the Panel's concern over why the domestic industry is vulnerable now, when it was not expressly found to be "vulnerable" in 1985, misses the point.

agreed with the finding of the majority in 1985 that the grower-processor industry was materially injured, and rendered an affirmative determination as to imports of both live swine and pork from Canada.[17]

THREAT OF MATERIAL INJURY

Nature of the Subsidies

The factors which the Commission is required to consider are set forth in 19 U.S.C. § 1677(7)(F). The first statutory factor addressed by the Commission is the nature of the subsidies. The Department of Commerce found 18 countervailable subsidies which benefitted Canadian pork producers.[18] One of the largest of those programs, the Agricultural Stabilization Act/National Tripartite Red Meat Stabilization Program (Tripartite program), I believe affects hog growers' production decisions because it acts as an insurance program.[19] The Tripartite program may not guarantee a farmer a profit every year. However, I find that this program does provide growers with a financial safety net which, because they can predict whether payments will be made,[20]

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[17] I note that the Commission rendered an affirmative determination with respect to imports of live swine from Canada, accounting for 2.6 percent of apparent U.S. consumption in 1984. Imports of Canadian pork in 1984 accounted for 2.2 percent of U.S. domestic consumption. In the instant investigation, imports of fresh, chilled or frozen pork total 2.9 percent of domestic consumption. I also note that combined imports of live swine and of pork from Canada increased steadily from 1986 to 1988, and (as explained below) I share the concern expressed by Commissioner Eckes in Live Swine, in regard to product shifting which has been quite pronounced since 1985. See NPPC Prehearing Brief at 66-B; Pork Determination at A-41.

[18] 54 Fed. Reg. 30,774 (July 24, 1990).

[19] Tr. at 165-6 (Mr. Martin testified that the Tripartite Program is "basically there to protect producers against a period of time when they have a lower than expected cash flow.")

[20] I disagree with respondents' contention that stabilization programs act to stimulate production only when the precise level of payments is known in advance. See also Transcript of the Commission's Hearing in Fresh, Chilled, or Frozen Pork, August 1, 1989 (Tr.) at 165 (According to an expert witness on behalf of the Canadian Meat Council (CMC), "there is a possibility of making a forecast [as to subsidy payments] ahead of time.")

allows growers to continue or possibly expand production levels when they would otherwise reduce production.[21] Figure B in the Commission's Remand Report[22] reflects the effect of Canadian subsidy programs, indicating that although the Canadian swine growing industry may retain remnants of a hog cycle, that cycle reflects much higher production levels than in the mid-1970's.[23]

As with the Tripartite program, most of the subsidies that the Commerce Department found to be countervailable are provided to Canadian hog farmers.[24] The general nature of these benefits is to alleviate the financial uncertainty of producing hogs.[25] Any decrease in the cost of raising hogs is likely to result in either lower priced hogs, increased production, or both.[26] These programs therefore affect pork packers directly because of the close supply relationship between growers and packers -- a decision to increase hog production will benefit Canadian pork packers by providing more hogs at a lower price.

Although the revised information indicates that the growth in Canadian production from 1986 to 1988 was 205 million pounds of pork, rather than 600

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[21] Tr. at 67; CMC Prehearing Brief, Att. A, App.A3, at 2. ("If producers know the program will protect them from price declines they may not cut back production.")

[22] INV-N-118 (Oct. 17, 1990) & INV-N-123 (Oct. 23, 1990)(Remand Report).

[23] By contrast, the range of production levels within the U.S. hog cycle has remained constant.

[24] 54 Fed. Reg. 30774-30786 (July 24, 1990).

[25] See e.g., Feed Freight Assistance Program (ensures feed grain availability and price stability); Alberta Department of Economic Development and Trade Act (provides grants, loans, and loan guarantees); Ontario (Northern) Livestock Improvement and Transportation Assistance Program (reduces high costs of herd maintenance and improvement); Quebec Farm Income Stabilization Insurance Program (insures net annual income); Saskatchewan Livestock Investment Tax Credit Program (provides a tax credit).

[26] At the Commission's August 1, 1989, hearing, a U.S. farmer testified that if he were guaranteed his margins and even some of his costs, he would "produce as many hogs" as possible. Tr. at 67.

million pounds, a more telling comparison begins in the late 1970's soon after the inclusion of hogs under various provincial subsidy programs.[27] By 1979, the number of hogs on farms in Canada began to rise dramatically; pork production showed a similar increase, both in 1979 and in 1980.[28]

The nature of these countervailable subsidies is to insulate Canadian hog farmers from the vacillation, both predictable and unpredictable, of the market. Furthermore, the record indicates that a sizeable portion of Canadian pork production is exported, predominantly to the United States.[29] This leads me to the conclusion that, because the nature of the subsidies encourage production, a sizeable portion of which is exported to the United States, exportation to the United States is thereby encouraged.

Likelihood of Increased Imports

The Panel has instructed the Commission to reconsider its finding of the likelihood of increased imports "in light of the corrected production data and other facts on the record."[30] The revised data collected by the Commission reveal that from 1986 to 1988, Canadian production increased by 205 million pounds, and exports from Canada to the United States increased by 59 million pounds.[31] In fact, pork production has risen steadily since 1982, notwithstanding a slight decline in hog production in 1985 to 1986 (due to the

[27] Conditions of Competition Between the U.S. and Canadian Live Swine and Pork Industries, Inv. No. 332-186, USITC Pub. 1615 (Nov. 1984) at 30.
[28] NPPC Prehearing Brief at 7C; Food Market Commentary at 20.
[29] Table 1 of the Commission's Remand Staff Report shows that in 1988 25 percent of all pork produced in Canada was exported as fresh, chilled, or frozen pork, and 85 percent of exports of fresh, chilled, or frozen pork went to the United States.
[30] Panel Opinion at 25.
[31] Remand Staff Report, Table 1.

expected downturn in the hog cycle).[32]

I recognize that there are predictions in the record of decreased pork imports from Canada.[33] Nevertheless, due to the impending increase in the duty on hogs, I believe there is an imminent prospect that exports from Canada will shift from hogs to pork. Thus, I am not persuaded that a decline in pork exports from Canada will occur.[34]

As directed by the Panel, I also have reconsidered the materiality of the work stoppage at the Fletchers plant in Red Deer, Alberta. Based on more detailed evidence gathered in this remand investigation, it appears that the increase in slaughter in other western Canadian packing plants may have compensated for the absence of production at Fletchers.[35] However, notwithstanding the increase in production at other plants, the plant at Fletchers represented temporary idle capacity, the current use of which can increase production of pork. Moreover, at the same time that Fletchers was on strike, Canadian swine exports to the United States for the last quarter of 1988 and the first quarter of 1989 rose sharply in comparison with both the

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[32] Food Market Commentary at 20; Remand Report, Table 4. Respondents have argued, and the Panel has noted, that hog production in Canada is expected to decrease in the future and thus pork production cannot increase. As discussed more fully below, a decrease in hog production does not automatically result in a decline in pork production because of the incentive for product shifting.
[33] See e.g., Livestock and Poultry, Situation and Outlook Report, July 1989, at 13.
[34] Information on packing plant capacity gathered in this remand investigation reveals that plants in Canada are operating at less than 100 percent of capacity, which, in conjunction with the availability of hogs in Canada, indicates that Canadian plants have the ability to increase production of pork. Indeed, as noted by Commissioner Rohr, "all the live swine which Canada exports could be slaughtered in Canada, if Canada chose to do so."
[35] Remand Staff Report, Table D; Food (May 1989) at 7 (CMC Pre-hearing Brief, App. B) ("Fletcher's is owned by hog producers through the Alberta Pork Producers Development Corp. During the lockout, they had to ship animals to plants in other provinces and the U.S.").

previous quarter and the corresponding period of the previous year.[36] These trends in swine exports provide a clear indication that when Fletchers resumes production, there is a ready supply of hogs to be slaughtered. Therefore, whether or not the work stoppage at Fletchers' decreased production, the production capacity at the Fletchers facility is again on-line, and represents a potential imminent increase in production.[37]

Increase of Market Penetration Ratios

In its initial determination, the majority found that, based on the increase in Canadian production compared to Canadian consumption, the possibility of a diversion of pork from the Japanese market to the United States, the recommencement of slaughter at Fletchers, and the decrease in consumption in the United States, there was a likelihood that market penetration ratios would increase to an injurious level. Most of these factors continue to be persuasive.

Table 1 of the Commission's remand report demonstrates that Canada continues to produce more pork than it consumes. Indeed, production as a share of consumption increased steadily over the period of investigation.[38]

As discussed below, I believe there is an imminent likelihood of a significant shift from the export of live swine, to the export of pork. Also,

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[36] Commission Determination at A-41. I note, especially as it relates to product-shifting, the statement from the Saskatchewan Pork Producers' Marketing Board that the upward trend in swine exports from Canada to the United States "was largely attributed to labour disruptions at Canadian meat packing plants." NPPC Post-Hearing Brief, Att. F.

[37] In the initial determination, the majority also pointed to a grant authorized to assist Gainers in renovating its plant. Commission Determination at 20, A-39. Renovation of such a plant will presumably increase its productivity and/or decrease the cost of slaughtering hogs. Although I do not place great weight on this evidence pertaining to a single Canadian producer, it provides a further indication of the efforts by the Canadian government to assist Canadian pork packers.

[38] Remand Staff Report, Table 1.

I note that the domestic industry is entering the contraction phase of the hog cycle.[39] As this phase of the cycle continues, hog production will decline, leading to a decline in U.S. domestic pork production. As explained elsewhere in this opinion, the Canadian subsidies are likely to result in a higher level of pork exports to the U.S. than would otherwise occur without those subsidies. Although it is possible that pork imports from Canada will decrease, it also is likely that production levels in the United States will decrease.[40] Thus, Canadian imports entering at a higher level than would be the case absent the subsidies (even if they are not increasing absolutely) may well -- given declines in U.S. production -- take an increasing share of the market.

Excess pork production in Canada, the likelihood of product shifting, and the impending decline in domestic production, all lead me to reaffirm my earlier finding that an increase in import penetration is likely.

Price Suppression

The Panel has requested that the Commission reconsider its analysis of underselling and price depression, as that analysis was premised in part on the likelihood of increased imports into the United States of pork from Canada, which itself was based in part on Canadian production data that were misreported in the original Commission Report.[41] Another concern on the part

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[39] The upswing in the hog cycle in 1987-1988 increased U.S. pork production. Pork, Table D-5. This increase, combined with a shift in Canadian exports from pork to swine, accounts for the reduced import penetration ratio in 1988. I note, however, that the import penetration levels for Canadian pork reported in this investigation have been significantly higher than those in the previous Live Swine case. Compare, Live Swine, USITC Pub. 1733 at A-40, Table 28 and Commission Determination at A-43, Table 21.

[40] Live swine exports from the United States are minimal. Thus, there is less potential (than in Canada) for product shifting resulting in an increase in pork production as swine production declines.

[41] Panel Opinion at 28.

of the Panel relates to the data cited by the Commission in regard to underselling.[42]

The bases for my conclusion that imports from Canada are likely to increase are explained in my discussion of the other statutory threat factors. In regard to underselling, as the Panel has noted, in 17 of 28 comparisons for which detailed data were provided, imports undersold domestically produced pork. Only 8 of 34 questionnaire respondents, however, reported any import underselling whatsoever. The reported data on import underselling therefore is mixed. As petitioner notes, however, in a market such as that for pork, where questionnaire respondents may possess imperfect knowledge as to the market behavior of their competitors, a failure to report underselling (or overselling) is not necessarily dispositive in determining whether such underselling (or overselling) occurred.[43]

More important to my reconsideration of this issue, however, is that even if (as Professor Whalley contends) Canadian and U.S. pork prices are set by behavior in the larger U.S. economy and not by behavior in the smaller Canadian economy, both the U.S. supply of pork and the demand for pork are inelastic.[44] Thus, even modest increases in imports of Canadian pork into the United States would have a dampening effect on domestic prices.[45] Based on this evidence, I again conclude that U.S. imports of fresh, chilled or frozen

[42] Panel Opinion at 28-29.
[43] NPPC Remand Brief at 18.
[44] Further, as noted in the Commission's Determination, the market for pork is extremely competitive and U.S. and Canadian pork are highly fungible. Exports of pork from Canada therefore may readily cause lost sales or exacerbate price declines, particularly when inventories show that pork supply is already in surplus. See Gifford-Hill Cement Co. v. United States, 615 F. Supp. 577 (CIT 1985).
[45] Indeed, in the view of Petitioner's expert, even a one percent increase in the supply of pork in the United States may act to depress prices by two percent. Tr. at 25-26.

pork from Canada is a factor that will contribute to declining prices for domestic producers.

<u>Inventories</u>

As noted in the initial determination, fresh, chilled, or frozen pork is highly perishable and for that reason is kept in storage only a minimal amount of time.[46] I note that cold storage stocks increased from 1987 to 1988,[47] a trend consistent with the liquidation of herds and increased production in the United States. Specifically, U.S. cold-storage stocks of pork held in inventory at the end of May, 1989, represented 5 percent of total shipments in 1988.[48] The average monthly stock held during the first five months of 1989 was 19 percent higher than for the same period in 1988.[49] The character of these inventories deserve further comment. Of particular concern is the build-up of increasingly unsalable cuts, such as bellies, in the current market, which undercuts the packers' ability to recover costs. As mentioned in the initial determination, the domestic inventories of frozen ham and bellies were 25 percent higher in 1988 than in 1987.[50]

<u>Other Demonstrable Adverse Trends</u>

In reaching an affirmative determination in our initial determination, the Commission majority relied on two adverse trends not specifically identified in the Statute.[51] The first focused on the newly acquired access by Canadian packers to channels of distribution in the United States. The record reveals that since the 1985 investigation, Canadian packing companies

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[46] Commission Determination at 22-23.
[47] Commission Determination at A-39.
[48] Commission Determination at A-25-A-26, Tables 6 and 7.
[49] Commission Determination at A-26, Table 7.
[50] Tr. at 56.
[51] Commission Determination at 23-24.

have acquired packing facilities in the United States. Evidence on the record indicates that Fletchers has "established in the United States, and on the West Coast, a sophisticated market in California, Hawaii, and Northwest states and Arizona. . . .[T]his has made a significant inroad into western pork marketing plans through the direct marketing in our area."[52] This testimony, in conjunction with confidential information on the record,[53] convinces me that the purchase of these plants facilitates the importation of pork from Canada, and will continue to do so in the future.[54]

Another adverse trend relied upon by the majority in the initial determination focuses on the effects of the subsidies on the Canadian hog cycle and how that differs from the hog cycle in the United States. Some of the subsidies, especially the Tripartite system and other such "stabilization" programs (e.g. FISI), are triggered when hog prices are low.[55] As explained above in my discussion of the nature of the subsidies, I believe these

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[52] Transcript of the January 26, 1989 conference in the preliminary investigation of Fresh, Chilled, or Frozen Pork from Canada at 18. The record reveals that in addition to Goerhings (now Victor Fine Foods) in Lodi, CA (the largest packer in northern California) and Western Iowa Pork Co. in Harlan, IA, Fletchers also owns an importing operation in Tukwila, WA.

[53] See confidential field notes of staff economist.

[54] The Panel asserts that one of the Canadian owned facilities plans to close and one does not even import from Canada. Panel Opinion at 29. I find no evidence to support these statements either in the document cited by the Panel or anywhere else in the record. I again conclude that the purchase of U.S. pork processing facilities by Canadian producers supports an affirmative threat determination.

[55] Hog prices are lowest at the peak of the hog cycle, when high supply causes low prices. The conventional grower response is to send sows to market, temporarily increasing hog supply (liquidation) and further suppressing prices. Because this reduces the number of breeding sows, eventually fewer piglets are born and the supply of slaughtering hogs declines. This decline leads to an increase in price, which in turn provides incentive to keep sows off the market for breeding, temporarily constricting supply and forcing up prices. As those sows produce, more hogs enter the market and the cycle starts over again. See Commission Determination at B-26 B-27. The hog cycles in Canada and the United States run on basically similar schedules.

subsidies have the effect of inducing hog farmers to maintain a higher level of production than they would otherwise. I do not suggest that the hog cycle has been altogether eliminated in Canada, but that, as Figures 2 and B of the Remand Report show, the subsidies have allowed the Canadian cycle to trend upwards while the U.S. trends have remained at generally the same level for the past 18 years -- more than four hog cycles.[56] The supply of hogs to Canadian packers, therefore, appears to be higher than would be the case absent the subsidies. This higher supply of hogs has translated into higher pork production.[57] Pork production increased dramatically from 1979 to 1980 and, notwithstanding a short period of decline from 1980 to 1982, pork production has increased steadily ever since.[58] Also, it has increased faster than Canadian consumption, increasing the likelihood of the export of excess production.

Historically, the U.S. and Canadian hog cycles have operated on generally parallel schedules. Canadian subsidies, however, distort the operation of the Canadian cycle. Thus, at the bottom of the hog cycle, although Canadian exports of pork to the U.S. may decline in absolute terms, they decrease less than they would absent the subsidies. In my view, this phenomenon of higher than "normal" imports, just at that point in the cycle when U.S. packers would be expected to increase their demand for swine and thus force the upswing in the cycle toward the profitable phase of the cycle for packers, threatens material injury.

Product Shifting

As I explained in my "Additional Views" of this investigation, I

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[56] Remand Report, Figure B.
[57] Food Market Commentary at 20, Table 1.
[58] Id.

included hog growers in the domestic industry which faces a threat of material injury from subsidized imports of fresh, chilled or frozen pork from Canada. I did so pursuant to the most recent amendment to the Statute contained in the Omnibus Trade and Competitiveness Act of 1988, which authorizes the Commission to include the producers or growers of a raw agricultural product within the domestic industry producing a downstream processed product that is like the imports under investigation.[59]

Congress made another quite relevant change to the definition of material injury provisions of the Statute as well. Specifically, Congress directed the Commission to consider in any investigation which involves imports of both a raw agricultural product and a product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission with respect to either the raw agricultural product or the processed agricultural product, but not both.[60] While it is true that in this investigation, the Commission is not faced with imports of both swine and pork, an outstanding CVD order is currently in place on live swine, pursuant to the Commission's 1985 determination of material injury to the U.S. swine grower industry.

Therefore, in my analysis of the real and imminent threat of material injury in this investigation, I am particularly sensitive to the Congressional intent, evident in both of these amendments, that the Commission be mindful of the inter-relationship of the producing and processing sectors of agricultural

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[59] 19 U.S.C. § 1677(4)(E).
[60] 19 U.S.C. § 1677(7)(F)(IX).

industries and the unique conditions of trade for agricultural commodities.[61]

By way of clarification, an important basis for my affirmative determination in this investigation is the ability of Canadian growers and processors, if faced with high U.S. countervailing duties on Canadian swine, to shift from the export of swine to the export of fresh, chilled or frozen pork.

First, I note that "product shifting" from swine to pork --that is, the sale of Canadian swine to a Canadian rather than a U.S. pork packer -- does not require any costly alteration of the farmer's production facilities and equipment, or other kinds of transaction costs usually associated with product shifting in a manufacturing industry.[62] Further, as noted by respondents, slaughter capacity in Canada is not a constraint on pork production.[63] Thus, a decline in U.S. demand for live swine from Canada relative to U.S. demand for fresh, chilled or processed pork from Canada, could readily lead to product shifting.[64]

Second, U.S. import data over the past several years confirm that sharp annual variations in the relative levels of pork imports versus swine imports from Canada are not uncommon.[65] For example, from 1985 to 1987, imports of Canadian pork increased 22 percent, while imports of Canadian swine fell by 64 percent. Further, the share of total pork and swine imports accounted for by swine went from 16 percent in 1986, to 13 percent in 1987, to 22 percent in

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61 See, e.g., 133 Cong. Rec. 2120-21 (daily ed. Jan. 28, 1987) (Statement of Sen. Grassley).
62 See Tr. at 25.
63 CMC Remand Brief, at 10.
64 The cost of swine accounts for roughly 85 percent of the costs in producing fresh, chilled or frozen pork. EC-M-315 at 5. Additional data on packing plants in Canada reveal that there is plentiful slaughter capacity.
65 See, e.g., Petition at 58; Commission Determination at A-41 (Table 18) and B-31.

1988.[66] Thus, there is a demonstrated ability to readily shift and respond to short term U.S. market changes.

Third, I am persuaded by petitioner's argument that substantial increases in countervailable subsidy payments to Canadian swine growers will lead to corresponding increases in the countervailing duty rate on U.S. imports of live swine from Canada.[67] Increases in the swine duty, in turn, create the likelihood of a substantial shift from the export of live swine to the export of fresh, chilled, or frozen pork.

I note that the initial cash deposit duty rate on live swine following the Commission's affirmative determination in 1985 was Can$0.044 cents per pound. Following administrative reviews by Commerce, the duty was eliminated on certain entries of sows and boars, and the rate was reduced to Can$0.022 on all other live swine from Canada.[68] The final duty rate on 1989-1990 imports, however, will be changed in response to changes in the level of countervailable Canadian subsidy payments, and the latest data available to the Commission at the time of our initial determination showed substantial increases in countervailable payments under the Tripartite Program during late 1988 and into the first half of 1989.[69] According to petitioner's

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[66] Commission Determination at A-41 (Table 18). Quarterly variations were even more pronounced. For instance, in 1988, the ratio of live swine imports to total imports of both live swine and fresh, chilled, or frozen pork went from 16 percent in the first quarter, to 17 percent in the second quarter, to 25 percent in the third quarter, to 33 percent in the fourth quarter. Id. During the first quarter of 1989, both swine and pork imports increased over the previous quarter, with swine imports up by some 22 million pounds (a 50 percent increase) and pork up by 28 million pounds (a 30 percent increase). Id. See also Tr. at 24.

[67] NPPC Brief on Remand, at 8-10.

[68] See 53 Fed. Reg. 22189 (June 14, 1988); 54 Fed. Reg. 651 (Jan. 9, 1989).

[69] Tripartite payments are reported to have increased from Can.$3.14 per hog in the first quarter of 1988, to $38.24 per hog in the first quarter of 1989, and Can.$36.23 in the second quarter of 1989. Hearing Tr. at 19, 30; Petition, (continued...)

calculations, "[f]rom a level of practically zero for hogs imported during 1986 and 1987, the U.S. countervailing duty on live swine was predicted to increase to Can$10.00 to Can$15.00 for hogs imported in 1988, and even higher for hogs imported in 1990."[70]

In my view, the information indicating roughly tenfold increases in quarterly payments under the Tripartite program, and the prospect that such increase will lead to corresponding increases in the CVD rate on live swine, has not been effectively rebutted. With the price for live swine sold in the U.S. market running from $35 to $45 (cwt) in late 1988, I believe that large increases in the CVD rate on live swine would create a strong incentive to avoid the payment of such duties through product shifting of the sort that so concerned Congress in its 1988 revision of the statutory threat factors.[71]

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[69] (...continued)
Attachments 8, and 9. I recognize that the Saskatchewan Hog Assured Returns Program (SHARP) is being phased out and will terminate on March 31, 1991. The ASA/National Tripartite Red Meat Stabilization Program, however, is the most important pork subsidy program in Canada, based on its national application and rate of benefits. See EC-M-315. The net subsidy conferred under the SHARP was zero on meat from sows and boars, and Can.$0.001408 on other fresh, chilled or frozen pork produced in Saskatchewan. By contrast, the net subsidy conferred under the ASA Tripartite program was calculated by Commerce to be zero on meat from sows and boars and Can.$0.012468 on other fresh, chilled, or frozen pork. 54 Fed. Reg. 30782 (July 24, 1989).

[70] NPPC Brief on Remand, at 9. See also id. at 10-11.

[71] I note that in April-June 1988, U.S. imports of live swine from Canada totalled 26.4 million pounds (carcass weight equivalent). Following the 50 percent reduction by Commerce in the duty on live swine announced June 14, 1988, live swine imports increased to 37.4 million pounds in July-September 1988; 45.2 million pounds in September-December 1988; and 67.5 million pounds in January-March 1989. Commission Determination at Table 18. Even if it were shown that these trends were not influenced by a change in the CVD rate from 4.4 cents to 2.2 cents per pound, various Canadian commentators would appear to agree that a significant increase in the CVD on live swine would encourage a shift from the export of swine to pork. See Bertin, "U.S. Producers Squealing as Canadian Pork Pour In," Toronto Globe and Mail (Nov. 17, 1986) (Petition, Attachment 26) ("There is little doubt that the [1985] ITC decision changed the shape of the Canadian export trade, and in an entirely surprising manner. It hindered exports of live hogs, but also helped improve the
(continued...)

The potential magnitude of such a shift from the export of swine to pork is substantial. In 1987, imports of fresh, chilled or frozen pork from Canada totalled 512 million pounds, while the carcass weight equivalent of live swine imports totalled 75 million pounds of pork.[72] In 1988, however, pork imports declined to 470 million pounds, but live swine were imported at the carcass weight equivalent of 135 million pounds.[73] From January through March 1989, pork imports increased 30 percent compared to the fourth quarter of 1988, while swine imports increased 50 percent and accounted for some 36 percent of swine and pork imports combined.[74]

Thus, there is little or no evidence of significant barriers to product shifting, and there is substantial evidence that the final U.S. countervailing duty rate on live swine imports in 1989 and 1990 is likely to increase significantly. Higher duty payments may be circumvented, however, by a shift from the export of swine to the export of pork. In my view, these conditions portend an increase in the export of fresh, chilled or frozen pork from Canada into the United States.[75]

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[71] (...continued)
fortunes of the Canadian meat packing industry."); Alberta Pork Producers Marketing Board Annual Report at 3 (Petitioner's Prehearing Brief, Attachment 3) ("The [1985] I.T.C. ruling encourages slaughter in Canada.")

[72] Commission Determination, at A-41 (Table 18).

[73] I note that Canadian pork production accounted for roughly 14 percent of the North American market for pork in 1988. EC-M-315 at 5.

[74] I note that, while imports of live swine and imports of pork have (on an annual basis) trended in different directions over the period of investigation, total imports from Canada (imports of fresh, chilled or frozen pork combined with pork derived from live swine imported from Canada) have risen steadily, increasing from 545 million pounds in 1987 to 605 million pounds in 1988. Commission Determination at A-41 (Table 18).

[75] I note that there are estimates in the record that Canadian breeding potential may decline by 2 to 3 percent, which could result in a corresponding decline in Canadian exports. While I have considered this factor, I am convinced that the likelihood, and probable magnitude, of a shift from the export of swine to pork outweighs the prospect of sizeable declines in exports
(continued...)

Therefore, based on, among others, the expectation that increased countervailing duty rates will lead to product-shifting from swine exports to pork exports, in conjunction with the significant increase in pork imports from Canada in the first quarter of 1989, I find, in light of the current phase of the hog cycle portending negative margins for packers, that the threat of injury is real and imminent.[76]

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[75] (...continued)
of pork due to reductions in swine inventories. As noted above, since 1982 Canadian pork production has risen steadily, even in periods when Canadian hog production declined.

[76] As in the initial investigation, I find the remaining statutory factors in 19 U.S.C. § 1677(F), concerning negative effects on existing development efforts and dumping in third markets irrelevant to this investigation.

DISSENTING VIEWS OF ACTING CHAIRMAN ANNE E. BRUNSDALE

Fresh, Chilled, or Frozen Pork from Canada
Inv. No. 701-TA-298 (Final - Remand)

October 23, 1990

I dissented from the Commission's affirmative threat determination in the original proceedings in this investigation on the ground that, given the data in the extensive record developed in those proceedings, Canadian exports of pork to the United States were unlikely to reach injurious levels.[1] Subsequently, the affirmative threat determination was remanded to the Commission by the binational review panel established pursuant to the U.S.-Canada Free Trade Agreement.[2] The panel hinged its decision on the fact, conceded by the Commission, that Canadian pork production during 1987 and 1988 increased by only 8.4 percent during the period 1986 through 1988, as opposed to the 31 percent growth figure on which the Commission had relied in its original determination.[3] *A fortiori*, my initial views, though based also on the erroneous production figure, are confirmed. Here I add only a few points regarding other matters raised in the panel's decision.

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[1] Fresh, Chilled, or Frozen Pork from Canada, Inv. No. 701-TA-298, USITC Pub. 2218 (September 1989) at 37, 74-84 (Dissenting Views of Chairman Brunsdale and Vice Chairman Cass) (hereinafter, "*Pork I*").

[2] In the Matter of Fresh, Chilled, or Frozen Pork from Canada, Slip Op. No. USA 89-1904-11 (Binational Panel August 24, 1990) (hereinafter "*Panel Decision*").

[3] *Id*. at 18.

The statutory provisions that guide the Commission's threat determination are set forth in 19 U.S.C. § 1677(7)(F). The provision plainly requires the Commission to predict the future. In that vein, the specific factors the Commission must consider are phrased in terms of "likelihoods," "probabilities," and "potential."[4]

The threat provision does not, however, grant the Commission a license to engage in unbridled speculation. We are instructed that any threat must not be too far into the future -- indeed, it must be "imminent".[5] A threat determination "may not be made on the basis of mere conjecture or speculation."[6] Moreover, the ten specific threat factors that must be addressed are designed to tie the Commission's threat decision to the existing record. And the legislative history of the statute admonishes the Commission to engage in a "careful assessment of <u>identifiable</u> <u>current</u> trends and competitive conditions in the marketplace"[7] -- the mere possibility of a threat is insufficient to support an affirmative determination.[8] In sum, if the Commission cannot rest its prediction of real and imminent material injury on demonstrable facts in the record, then it cannot reach an affirmative

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[4] 19 U.S.C. § 1677(7)(F)(i).

[5] <u>Id</u>., § 1677(7)(F)(ii).

[6] <u>Id</u>.

[7] Conf. Rep. 1156, 100th Cong., 2d Sess. 174-75 (emphasis added).

[8] Alberta Gas Chemical, Inc. v. United States, 515 F. Supp. 780, 791 (Ct. of Int'l Trade 1981).

determination that a domestic industry is threatened by reason of the subject imports.

A critical reading reveals that the Panel Decision in this case rests on the inability of the Commission to point to facts on the record that demonstrate a real and imminent danger of material injury to the domestic pork industry. To place the matter in context, the record reveals that Canadian pork has never achieved an import penetration level into the United States higher than 3.4 percent -- a level that the Commission determined unanimously not to be injurious in the circumstances of this case. Given that the Canadian pork industry is less than one-fifth the size of the U.S. industry, the likelihood that Canadian exports could reach injurious levels in the near future is not high. Even if the actual 8.4 percent increase in total Canadian pork production during the 1986-1988 period had been sold in its entirety in the United States, then, all other things being equal, Canadian import penetration still would not have reached 5 percent of the U.S. market.[9] In its decision, the binational panel noted several facts on the record suggesting strongly that the penetration of Canadian pork into the U.S. market is not likely to reach even this level.[10]

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[9] See Pork I at 76.

[10] Panel Decision at 25-28. In particular, the panel noted that Canadian exports to other markets -- notably Japan -- increased markedly as Canadian production rose. Specifically, "[T]he Panel is of the opinion that the Record does not support the finding that the Canadian exports to Japan were likely to decline and the excess be diverted to the United States." Id. at 27.
(continued...)

In addition, the Panel Decision points out that any prior increase in Canadian pork production is unlikely to continue in light of recent commercial trends in the Canadian hog market. First, Canadian hog production was projected to decline during 1988 and 1989, suggesting "a fall-off in Canadian production of pork for at least the next few years."[11] Second, the panel recognized that the trend toward increased Canadian hog exports to the United States

> would leave fewer hogs in Canada to become pork exportable or not [sic]. Indeed, the increase in hog exports began in early 1988 and accelerated dramatically in early 1989, quite apparently reducing Canada's exports of pork to the United States.[12]

In sum, as I read the panel's opinion, it went beyond a request that the Commission reconsider the record in light of the mistaken calculation of the increase in Canadian production during the period of investigation. Had that been the panel's sole aim, it could have remanded the case to the Commission just for reconsideration on that point.[13] The Panel Decision is a clear statement that no threat of material injury to the domestic pork industry exists by virtue of subsidized Canadian pork imports and, indeed, that an affirmative threat determination cannot be tied to the data in the record of this case as required

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[10](...continued)
Furthermore, Canadian consumption of pork also rose during the relevant period. Id. at 18.

[11] Panel Decision at 20.

[12] Panel Decision at 23 (footnote omitted).

[13] Indeed, the Commission invited the panel to do so.

by law. In my view, the meaning of the Panel Decision is plain. I therefore hold to my original negative determination.

INFORMATION OBTAINED IN THE REMAND

Table 1
Canadian production,[1] imports,[2] exports,[3] and apparent consumption[4] of all pork and Canadian exports[5] of fresh, chilled, or frozen pork, 1986-88[6]

Item	1986	1987	1988
	Quantity (million pounds)		
All pork:			
Production	2,419	2,493	2,624
Imports	39	49	32
Exports to--			
United States	519	587	595
All other countries	81	77	108
Total	599	664	703
Inventory (stock) adjustments	2	(1)	(9)
Total apparent consumption	1,861	1,877	1,945
Less head, feet, and leaf fat	249	257	270
Apparent human consumption	1,612	1,620	1,674
	Share data (all pork) (percent)		
Production as a share of total apparent consumption	130	133	135
Exports as a share of production:			
To the United States	21	24	23
To other countries	3	3	4
Total	25	27	27
Exports to the United States as a share of total exports	87	88	85
	Quantity (million pounds)		
Fresh, chilled, or frozen pork:			
Exports to--			
United States	499	557	558
All other countries	78	74	102
Total	577	632	660
	Share data (percent)		
Exports of fresh, chilled, or frozen pork as a share of production of all pork:			
To the United States	21	22	21
To other countries	3	3	4
Total	24	25	25
Exports of fresh, chilled, or frozen pork to the United States as a share of total exports of fresh, chilled, or frozen pork	86	88	85

[1] These figures represent the carcass-weight equivalent of pork derived from all swine slaughtered in Canada (whether or not such pork is ultimately further processed), as reported by Statistics Canada in Livestock and Animal Products Statistics 1989, July 1990, p. 57.

Footnotes continued on next page.

[2] These figures represent the carcass-weight equivalent of **all pork** imported into Canada, as reported by Statistics Canada in Livestock and Animal Products Statistics 1989, July 1990, p. 57.

[3] These figures represent the carcass-weight equivalent of **all pork** exported from Canada, as reported by Statistics Canada in Livestock and Animal Products Statistics 1989, July 1990, pp. 43 and 57.

[4] "Total apparent consumption" represents the carcass-weight equivalent of Canadian production, plus imports, less exports, plus-or-minus changes in inventories of all pork (i.e., **including prepared and preserved**), as reported by Statistics Canada in Livestock and Animal Products Statistics 1989, July 1990, p. 57. "Apparent human consumption" (called "domestic disappearance" by Statistics Canada) represents the carcass-weight equivalent of "total apparent consumption" less leaf fat, heads, and feet (called "manufacturing" and "waste" by Statistics Canada), again as reported by Statistics Canada in Livestock and Animal Products Statistics 1989, July 1990, p. 57. Separate data on consumption of only fresh, chilled, or frozen pork are not available.

[5] These figures represent the carcass-weight equivalent of **fresh, chilled, or frozen pork** exported from Canada, as derived from data reported by Statistics Canada, Agriculture Division, facsimile transmissions of Mar. 6 and 7, 1990.

In the original presentation of this information (table 17 in USITC Publication No. 2218), data reported for "exports to the United States" were in fact official statistics from the Department of Commerce for U.S. imports from Canada of fresh, chilled, and frozen pork. This approach to data presentation was used since the Commission's confidence in the accuracy of official statistics for imports is higher than its confidence in the accuracy of official statistics for exports (whether reported by the United States or another country). Because of Canada's change in the methodology used to calculate its "official statistics," however, it is not desirable to mix data sources in examining the old and new numbers. Therefore, data shown in this table for Canadian exports to the United States reflect official Canadian statistics for exports of fresh, chilled, and frozen pork. For comparison, Commerce's statistics for imports of such products from Canada are 458 million pounds in 1986, 512 million pounds in 1987, and 470 million pounds in 1988.

[6] All data shown reflect Canada's **new reporting methodology**.

Note.--Because of rounding, figures may not add to the totals shown.

Source: As stated above.

Table 2
Japan's imports of fresh, chilled, or frozen pork from Canada, Taiwan, and all sources, by months, January 1988-April 1989

Month	Imports from--			Share of imports from all sources	
	Canada	Taiwan	All sources	Canada	Taiwan
	--------Million pounds[1]--------			-------Percent-------	
1988:					
January	3.1	17.9	37.7	8.2	47.4
February	2.5	20.9	40.2	6.1	51.9
March	1.8	12.9	33.8	5.2	38.2
April	5.3	6.3	39.5	13.5	16.1
May	5.3	20.0	57.0	9.3	35.1
June	5.0	26.4	73.4	6.8	36.0
July	5.1	25.2	69.6	7.4	36.2
August	4.6	24.6	71.0	6.4	34.6
September	4.3	24.2	67.7	6.3	35.7
October	5.7	29.6	75.3	7.5	39.3
November	5.6	30.1	81.3	6.9	37.1
December	5.2	32.4	65.4	7.9	49.5
Total	53.3	270.6	712.1	7.5	38.0
1989:					
January	4.7	14.2	46.0	10.1	30.9
February	4.5	14.5	42.6	10.5	34.1
March	5.5	22.6	58.5	9.4	38.6
April	3.8	16.1	40.6	9.3	39.7

[1] Product weight.

Note.--Because of rounding and year-end adjustments, figures may not add to the totals shown.

Source: Japan Ministry of Finance, "Imports of Commodity by Country," monthly issues, January 1988-April 1989.

Table 3
Canadian swine slaughter capacity, slaughter, and capacity utilization, total[1] and at specified plants, by quarters, January 1988-June 1989

Period	Fletcher's Red Deer	Britco	Springhill	3-plant total	Total[1]
	Capacity (number of animals)				
1988:					
Jan-Mar....	***	***	***	***	3,863,822
Apr-June...	***	***	***	***	3,996,074
July-Sept..	***	***	***	***	4,111,008
Oct-Dec....	***	***	***	***	4,144,273
Total....	***	***	***	***	16,115,177
1989:					
Jan-Mar....	***	***	***	***	4,120,325
Apr-June...	***	***	***	***	4,197,712
	Slaughter (number of animals)				
1988:					
Jan-Mar....	***	***	***	***	3,161,955
Apr-June...	***	***	***	***	3,145,781
July-Sept..	***	***	***	***	3,152,878
Oct-Dec....	***	***	***	***	3,357,472
Total....	***	***	***	***	12,818,086
1989:					
Jan-Mar....	***	***	***	***	3,193,095
Apr-June...	***	***	***	***	3,310,920
	Capacity utilization (percent)				
1988:					
Jan-Mar....	***	***	***	***	81.8
Apr-June...	***	***	***	***	78.7
July-Sept..	***	***[2]	***	***	76.7
Oct-Dec....	***	***[2]	***	***	81.0
Average..	***	***[2]	***	***	79.5
1989:					
Jan-Mar....	***	***	***	***	77.5
Apr-June...	***	***	***	***	78.9

[1] Totals represent data for 26 Canadian plants including Fletcher's, Britco, and Springhill.
[2] Counsel for the Canadian Meat Council informed the Commission (by letter of October 10,1990) that * * *.

Source: Compiled from data submitted on September 27, 1990, and October 1, 1990, by counsel for the Canadian Meat Council.

Swine Slaughter Plants in Canada

Fletchers
1 Red Deer
2 Britco
3 Springhill
4 Burns
5 Garden
6 Schneider
7 Fearman
8 Les Viandes St.Isidore
St.Isidore, Ont. (?)
9 Hub
10 Gainers
11 Quality
12 Hoffman
13 Intercontinental
14 Larsen
15 Aliments Jolibec
16 Abattoir a Trahan
17 Abattoir St. Alexander
18 Salison Brochn
19 St Hyacinthe
20 Abattoir Bienvenue
St. Valerie, Que(?)
21 Les Viandes du Breton
22 Coop. Federee de Que-Vallee Jonction
23 Coop. Federee de Que-Arthabaskan
24 Les Abattoirs R.Roy
25 Abattoir Quellet
Ste. Perpetue, Que (?)
26 Moose Jaw

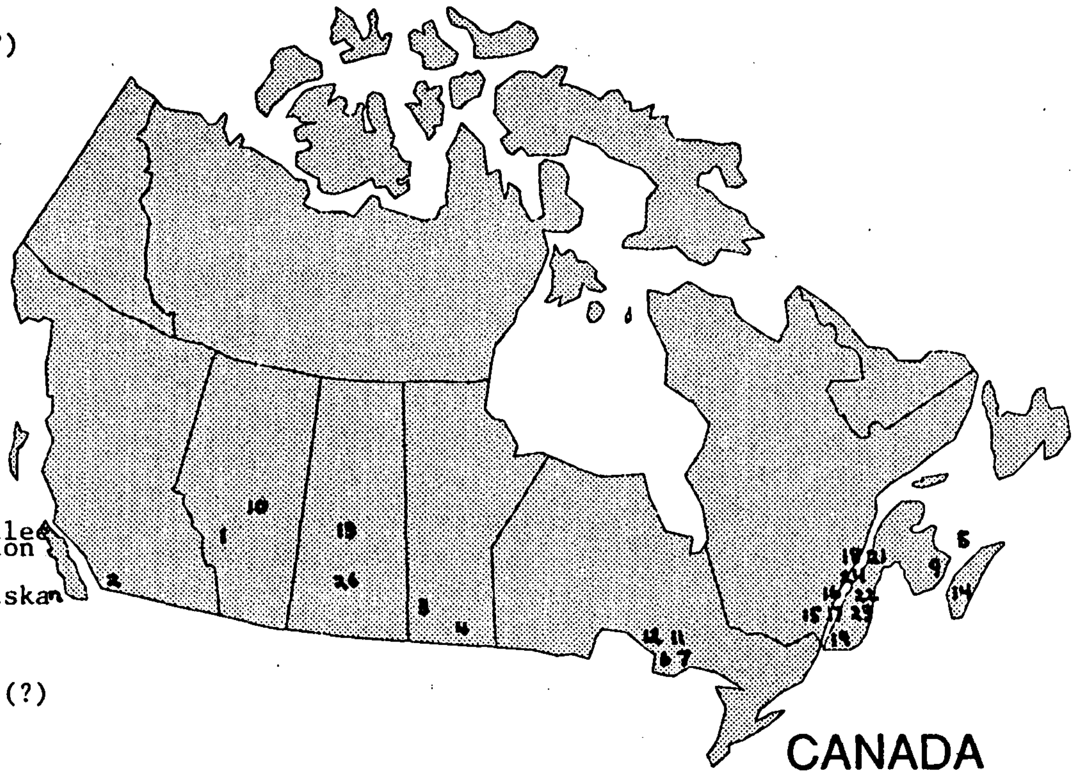


Table 4
Swine slaughter in Canada and the United States, U.S. imports of live swine from Canada, Canadian slaughter plus U.S. imports of live swine from Canada, and U.S. slaughter less imports of live swine from Canada, 1981-88

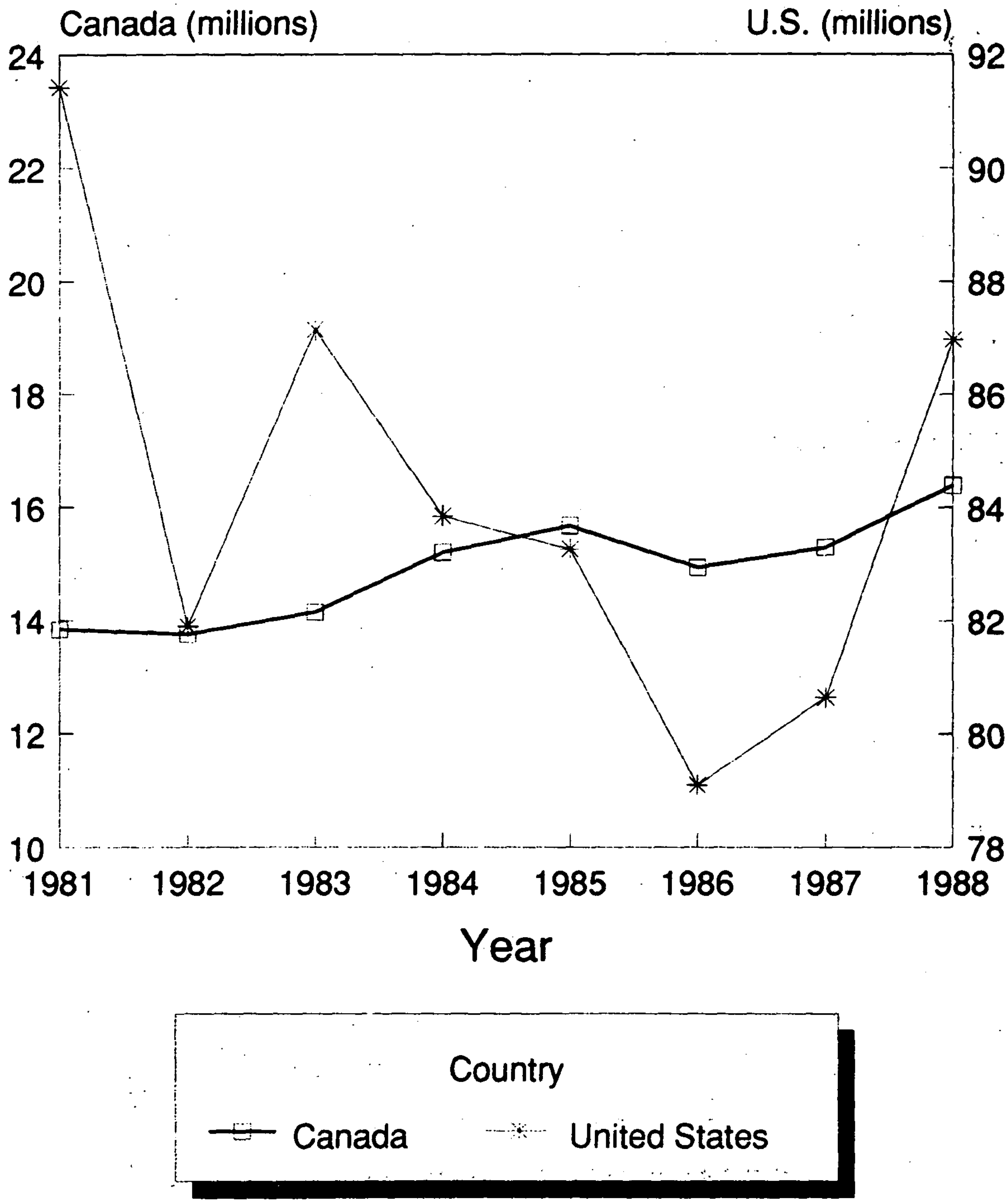
(1,000 animals)

Year	Slaughter in Canada[1]	Slaughter in the U.S.[2]	U.S. swine imports from Canada[2]	Canadian slaughter plus U.S. imports	U.S. slaughter less imports from Canada
1981.....	13,692	91,575	146	13,838	91,429
1982....	13,458	82,191	295	13,753	81,896
1983....	13,703	87,584	447	14,150	87,137
1984....	13,886	85,168	1,322	15,208	83,846
1985....	14,452	84,492	1,227	15,679	83,265
1986....	14,444	79,598	501	14,945	79,097
1987....	14,854	81,081	446	15,300	80,635
1988....	15,553	87,795	836	16,389	86,959

[1] Statistics Canada "Livestock and Animal Products Statistics", July 1990, pp. 56-57.
[2] Swine slaughter in the United States and U.S. imports of live swine were obtained from the following publications: for 1981-83, Live Swine and Pork from Canada, Inv. No. 701-TA-224 (Final), USITC Pub. 1733, July 1985, p. 22; for 1984-88, Fresh, Chilled, or Frozen Pork from Canada, Inv. No. 701-TA-298 (Final), USITC Pub. 2218, September 1989, p. B-30.

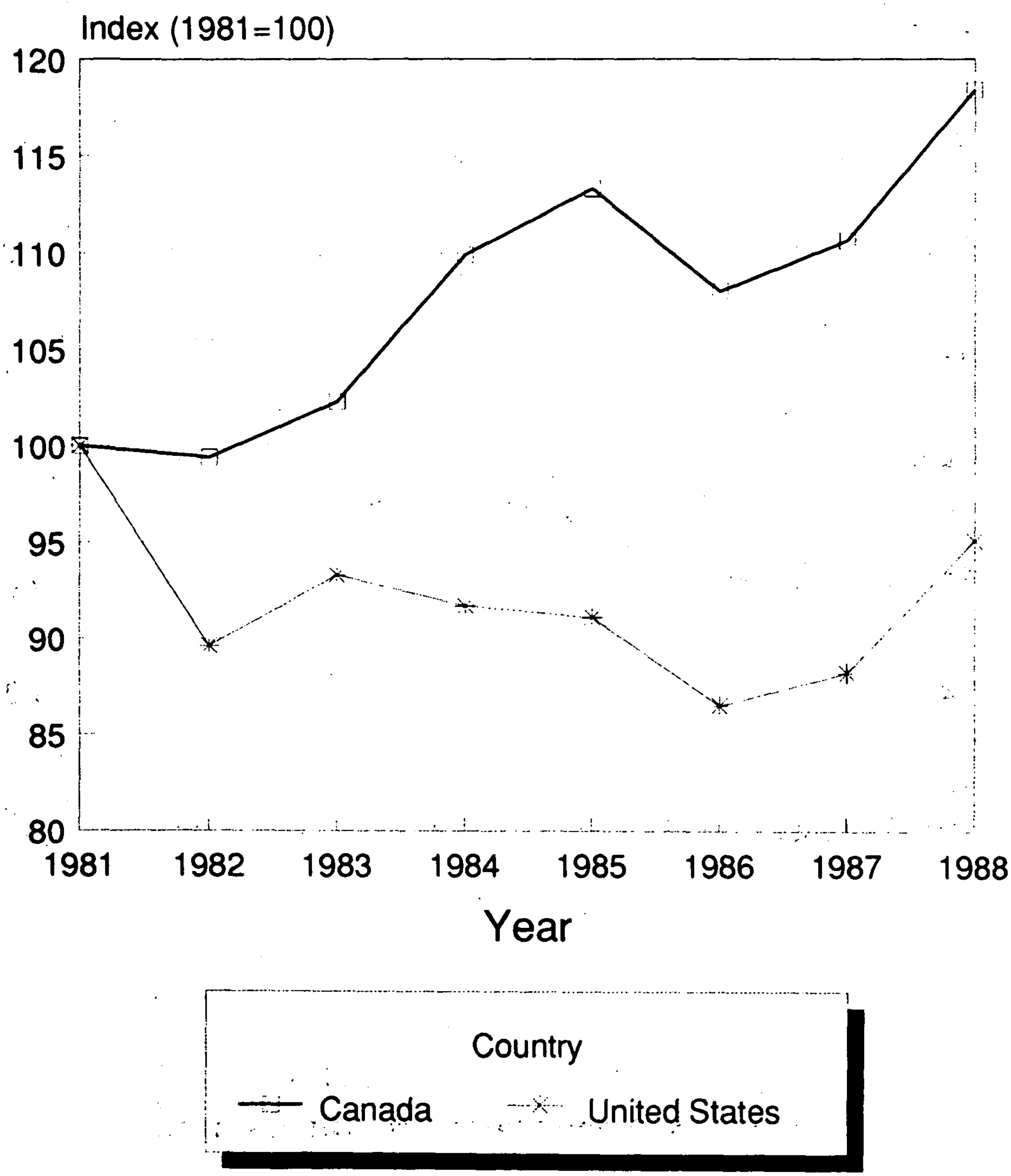
Source: See footnotes above.

Figure 1 -- Adjusted U.S. and Canadian swine slaughter, 1981-88



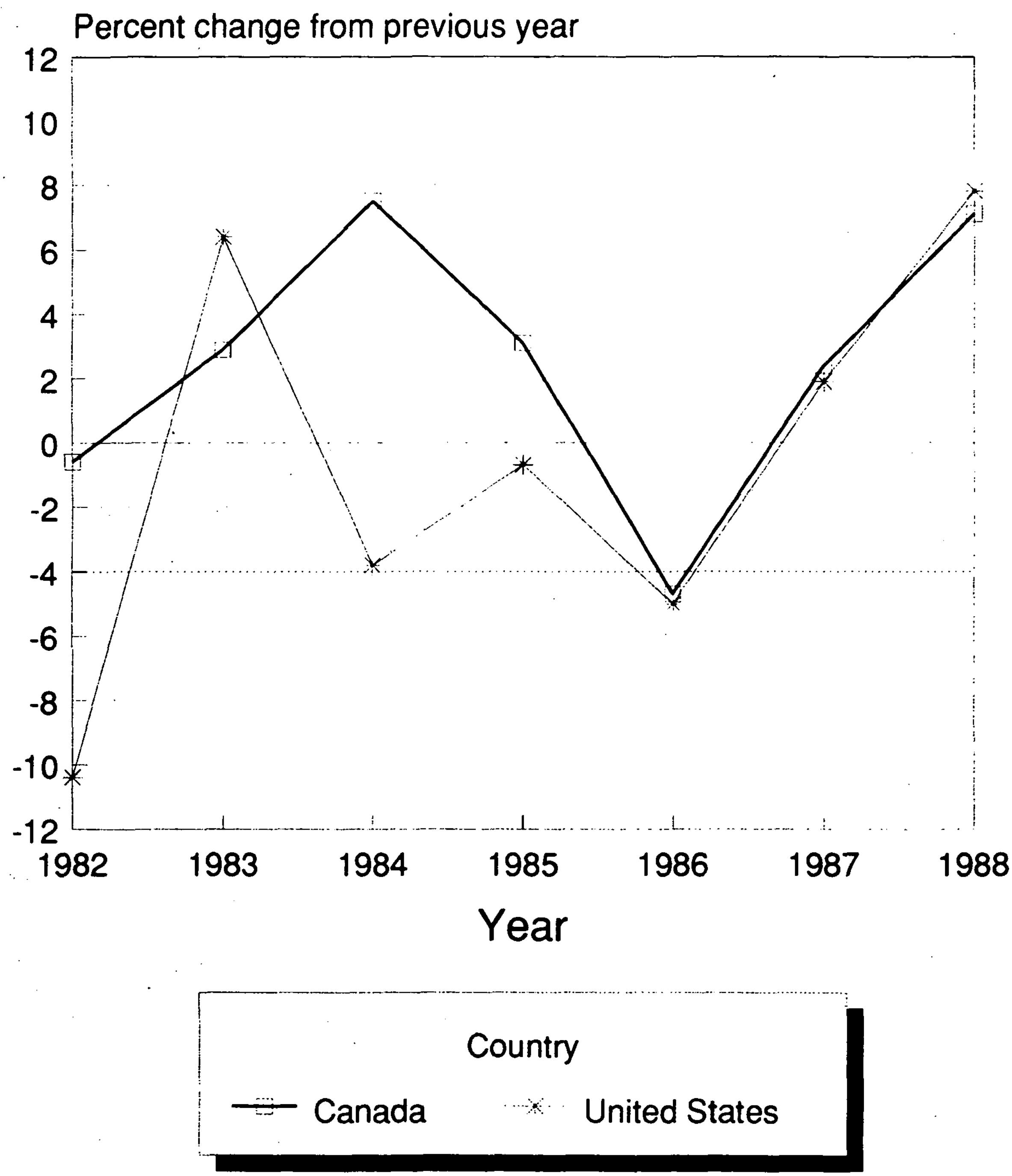
Source: Table 4

Figure 2 -- Index of Adjusted U.S. and Canadian swine slaughter, 1981-88



Source: Table 4

Figure 3-- Adjusted U.S. and Canadian swine slaughter, percent change from previous year, 1981-88



Source: Table 4

Table A
Average weekly swine slaughter in Canadian plants located near the Red Deer, Alberta, plant of Fletcher's Fine Foods, Ltd., by plants, January 1986-June 1988 (pre-strike period) and July 1988-March 1989 (strike period)

* * * * * * *

Source: Submission to the Commission by Arnold & Porter on Sept. 27, 1990.

Table B
Average weekly swine slaughter in Canadian plants located near the Red Deer, Alberta, plant of Fletcher's Fine Foods, Ltd., by plants, July 1987-March 1988 (pre-strike period) and July 1988-March 1989 (strike period)

* * * * * * *

Source: Submission to the Commission by Arnold & Porter on Sept. 27, 1990.

Table C
Average weekly swine slaughter in Canadian plants located near the Red Deer, Alberta, plant of Fletcher's Fine Foods, Ltd., by plants, October 1987-June 1988 (pre-strike period) and July 1988-March 1989 (strike period)

* * * * * * *

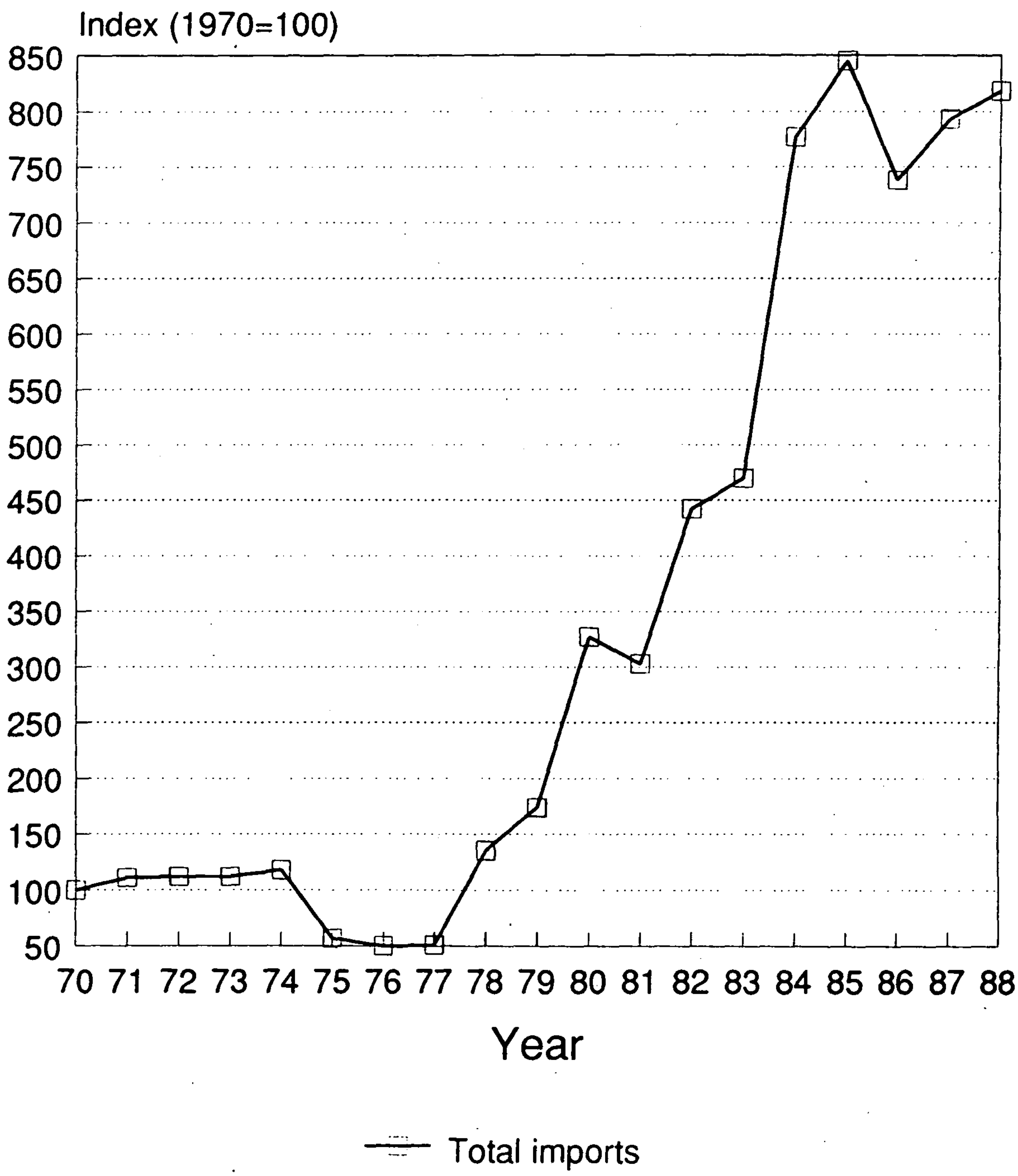
Source: Submission to the Commission by Arnold & Porter on Sept. 27, 1990.

Table D
Average weekly swine slaughter in Canadian plants located near the Red Deer, Alberta, plant of Fletcher's Fine Foods, Ltd., by plants, April-June 1988 (pre-strike period) and October-December 1988 (strike period)

* * * * * * *

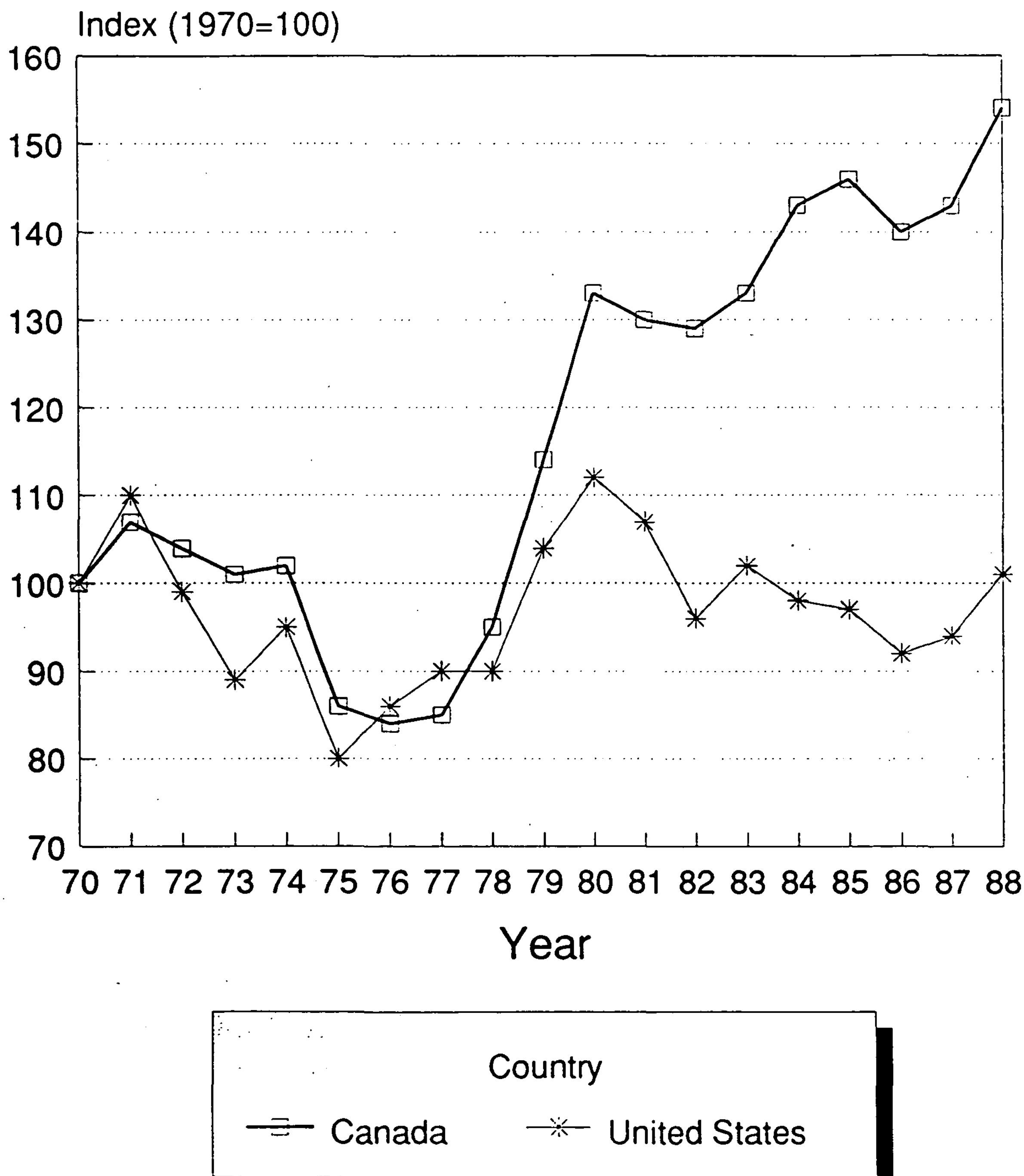
Source: Submission to the Commission by Arnold & Porter on Sept. 27, 1990.

Figure A-- Index of total U.S. imports from Canada (swine and pork combined), 1970-88



Source: U.S. imports of swine and pork from Canada were obtained from the following publications: for 1970-85, "USDA's Livestock and Meat Statistics, 1984-88," p. 248; for 1986-88, "Fresh, Chilled, or Frozen Pork from Canada, Inv. No. 701-TA-298 (Final), USITC Pub. 2218, September 1989, p. A-41.

Figure B-- Index of Adjusted U.S. and Canadian Swine Slaughter, 1970-88



Source: Adjusted U.S. and Canadian swine slaughter were obtained from the following publications: Adjusted U.S. swine slaughter, 1970-87, USDA's "Livestock and Meat Statistics, 1984-88," pp. 81 and 244; adjusted U.S. swine slaughter, 1988, "Fresh, Chilled, or Frozen Pork from Canada," Inv. No. 731-TA-298 (Final), USITC Pub. 2218, September 1989, p. B-30; adjusted Canadian slaughter, 1974-88, "1989 Statcan Catalogue 23-203," p. 39; 1973 "1988 Statcan Catalogue 23-203," p. 39; 1972 "1987 Statcan Catalogue 23-203," p. 39; 1971 "1986 Statcan Catalogue 23-203," p. 39; 1970 "1985 Statcan Catalog 23-203," p. 39.

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