FRESH, CHILLED, OR FROZEN PORK FROM CANADA

Views on Second Remand in
Investigation No. 701–TA–298
(Final)

USITC PUBLICATION 2362

FEBRUARY 1991

United States International Trade Commission
Washington, DC 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

Anne E. Brunsdale, Acting Chairman

Seeley G. Lodwick

David B. Rohr

Don E. Newquist

Address all communications to
Kenneth R. Mason, Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

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

FRESH, CHILLED, OR FROZEN PORK FROM CANADA

SECOND REMAND DETERMINATION

Pursuant to the remand order dated January 22, 1991, of the Article 1904 Binational Panel (Panel) Review USA-89-1094-11 in Fresh, Chilled, or Frozen Pork from Canada, the Commission reports to the Panel that the U.S. International Trade Commission (Commission) unanimously determines that an industry in the United States is not materially injured, threatened with material injury, or materially retarded from being establihsed by reason of imports of fresh, chilled, or frozen pork from Canada which the Department of Commerce (Commerce) has found to be subsidized.

VIEWS OF COMMISSIONERS ROHR AND NEWQUIST

Determination

Pursuant to the remand order dated January 22, 1991, of the Article 1904 Binational Panel (Panel) Review USA-89-1094-11 in Fresh, Chilled, or Frozen Pork from Canada, Commissioners Rohr and Newquist report to the Panel that they have determined that an industry in the United States is not materially injured, threatened with material injury, or materially retarded from being established by reason of imports of fresh, chilled, or frozen pork from Canada which the Department of Commerce (Commerce) has found to be subsidized.

Background

On September 13, 1989, by a three to two vote, the Commission determined that an industry in the United States was threatened with material injury by reason of subsidized imports of fresh, chilled, or frozen pork. Fresh, Chilled, or Frozen Pork from Canada, Inv. No. 701-TA-298 (Final) USITC Pub. No. 2218 (September 1989)(Final Determination). On August 24, 1990, the Panel remanded the Final Determination to the Commission primarily for reconsideration of a statistical error concerning Canadian pork production, and the effects of that error on the Commission's determination. Memorandum Opinion and Remand Order, August 24, 1990 (First Panel Decision).

On September 19, 1990, the Commission notified the parties to the investigation that the Commission would open the record in the remand proceeding. 55 Fed. Reg. 39,073 (Sept. 24, 1990). Parties submitted supplemental data as well as briefs commenting on data gathered by the Commission. On October 23, 1990, the Commission issued its Views on Remand, Fresh, Chilled, or Frozen Pork from Canada, Inv. No. 701-TA-298 (Views on Remand) USITC Pub. 2230 (October 1990)(Remand Determination), in which the

Commission, by a two to one vote, again found the domestic industry to be threatened with material injury by reason of imports of pork from Canada. Complainants requested that the Panel review the Commission's Remand Determination pursuant to Rule 74 of the Article 1904 Binational Panel Rules (Rules).

On January 22, 1991, the Panel again remanded the determination to the Commission, holding that the Commission had erred by exceeding the scope of its Federal Register notice, that the majority's findings as to product-shifting were not supported by substantial evidence, and there is no evidence of causation. Memorandum Opinion and Order Regarding ITC's Determination on Remand (Remand Decision). The Panel instructs the Commission to limit the supplemental record gathered on remand to data on the "three narrow issues" referred to in its Federal Register notice and to evidence within the original record, and to consider no new legal or economic arguments not raised in the First Panel Decision. This remand determination is made pursuant to those instructions.

Like Product

In the original determination, the Commission determined that the like product was fresh, chilled, or frozen pork. That determination was not challenged on appeal and therefore the Commission has not reconsidered that finding. Based on its like product determination, the Commission found that the domestic industry was composed of pork packers.[1] That determination was not appealed and has not been reconsidered.

---

[1] Commissioner Newquist defined that domestic industry to include swine farmers. Final Determination at 27-35. (Additional Views of Commissioner Don E. Newquist.)

Threat of Material Injury

In its Remand Opinion, the Panel concluded that the Commission majority erred in considering evidence and issues that it believed relevant but which the Panel viewed as outside the scope of the Federal Register notice. The Panel now precludes the Commission, in this remand, from considering relevant evidence as to both U.S. and Canadian pork production and from considering product shifting as a basis for a threat determination. Furthermore, the Panel held that, in the absence of underselling, the Commission is precluded from making a finding of price suppression.[2] The Panel further circumscribed the Commission's discretion on remand by obliquely holding, without explanation, that Canadian exports to the United States will not gain a higher relative share of the U.S. market when U.S. production declines.[3] We believe that these restrictions are contrary to the facts and the law, but because they are imposed by the Panel, they are legally binding on us. Thus, we have no choice but to determine on remand that the domestic industry is not threatened with material injury by reason of imports of fresh, chilled, or frozen pork from Canada which the Department of Commerce has determined are being subsidized.

Notwithstanding this determination, this Second Panel Decision violates fundamental principles of the United States-Canada Free-Trade Agreement (FTA) and contains egregious errors under U.S. law. Had this decision come from the

---

[2] Compare, Second Panel Decision at 36 with 19 U.S.C. § 1677(7)(F)(IV).

[3] The Panel ruled that the Commission's finding of a likelihood of a rise in import penetration is unsupported by substantial evidence. Second Panel Decision at 37. Although Rule 73 of the Binational Rules requires a written decision with reasons, the Panel's "reasons" on this point consist entirely of its conclusion. In making this holding, the Panel likewise dismissed the Commission's finding that pork production in Canada, and exports from Canada, would be at a higher level than they otherwise would be due to the nature of the subsidies.

Court of International Trade, unlikely in light of the numerous CIT authorities contrary to the Panel's holding, we would have directed counsel to appeal it to the Court of Appeals for the Federal Circuit. That avenue, however, is not available to us in light of the provisions of the FTA. At a minimum, however, we find many aspects of the Panel decision to lack "intrinsic persuasiveness"[4] and, thus, we will not change our practice or procedure to conform with those aspects of the Panel opinion discussed below.

Violations of Free-Trade Agreement

The Second Panel Decision in this matter violates the provisions of the United States-Canada Free-Trade Agreement. We raise this concern because the governments of the United States and Canada have a joint interest in assuring that the binational Panels convened under the Agreement conform to the authority and jurisdiction that the Agreement grants to them. In its first decision the Panel appeared to recognize the limits of that authority. There, the Panel stated,

> "In cases such as this, in which the United States is the importing country, Article 1911 of the FTA defines the standard of review to be applied by the Panel as the standard of review set forth in Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended. Thus, under the FTA, the Panel must look to that section for the standard of review and to the decisional law of the Court of International Trade and the Court of Appeals for the Federal Circuit for the appropriate legal principles."[5]

As the Panel also stated, "With this standard of review in mind, the Panel [must] examine[] the Record to determine whether the ITC's findings are supported by substantial evidence."[6] Despite its recitation of these

---

[4] The United States-Canada Free-Trade Agreement Implementation Act, Statement of Administrative Action at 109.
[5] First Panel Decision at 5.
[6] First Panel Decision at 13.

principles in its first decision, in its second decision, the Panel departed from them.

The Panel's decision explicitly adopts a standard of review that does not apply to review of Commission determinations in United States courts. Complainants before the Panel argued that the Commission failed to follow its own Federal Register notice on remand and that its failure to do so violated United States law guaranteeing due process of law. As the Panel notes,[7] respondents urged that U.S. constitutional principles of due process do not apply as urged by complainants. However, the Panel believed that it need not decide whether U.S. law concerning constitutional due process even applied, holding instead that because Article 1911 of the Agreement incorporates the principle of "due process", the Panel could apply its own notions of fair play "for the benefit of all participants in proceedings subject to the FTA review."[8] The notion of due process included in Article 1911's definition of "general legal principles," however, is made applicable to Panel proceedings only to the extent "that a court of the importing Party otherwise would apply [it] to a review of a determination of the competent investigating authority."[9] The Panel has deliberately avoided the task of deciding whether, much less how, a court of the United States would apply due process to a review of this

---

[7] Memorandum Opinion and Order Regarding ITC's Determination on Remand, January 22, 1991 (Second Remand Decision) at 20. The Panel decision states that it does not reach the question whether foreign citizens are proper claimants to due process rights under the U.S. Constitution. However, even if foreign citizens were so entitled, U.S. law has been consistent in not recognizing a constitutional right of access to or opportunity to comment on all information gathered in the Commission's trade or tariff nonadjudicatory investigations. See, Norwegian Nitrogen Products v. United States, 288 U.S. 294 (1933; Pasco Terminals, Inc. v. United States, 477 F. Supp. 201, 212 (Cust. Ct. 1979), aff'd, 634 F.2d 610 (C.C.P.A. 1980).

[8] Second Remand Decision at 20.

[9] FTA Article 1904(3).

determination and instead has substituted its own notion of due process that it finds grounded only in the Free-Trade Agreement, wholely independent of U.S. law.

Moreover, as is discussed below, the procedures that the Commission followed on remand conformed strictly to U.S. decisional and statutory law, including legislative history, concerning the discretion of the Commission to seek information independently of the parties and to rely on it even in the absence of that information being made available to parties for comment. The Panel did not even address this statutory framework for Commission investigations. The Panel's decision, therefore, is tantamount to a holding that Commission procedures authorized under U.S. statute, as construed by U.S. courts, are inconsistent with the FTA. Such a decision is directly contrary to the fundamental principle of the FTA concerning antidumping and countervailing duties--namely, that "[e]ach Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other Party."[10]

The Panel's construction of the FTA as an independent source of constraint on the operation of U.S. law does not stop with its finding an FTA-specific notion of due process. Under U.S. law, the appropriate remedy for a failure by an administrative agency to live up to "the principles of fair play . . . that the participants at least be afforded notice and an opportunity for a hearing"[11] is to remand the matter to the agency so it will provide the participants such an opportunity.[12] The Panel declined, however, to adopt this

---

[10] FTA Art. 1902(2).
[11] Second Remand Decision at 20.
[12] PPG Industries, Inc. v. United States, 708 F. Supp. 1327 (CIT 1989)(appropriate remedy for lack of opportunity to comment on a particular (continued...)

remedy, not because of any consideration founded in U.S. law, but rather because "an FTA Panel, unlike the CIT, has strict governing time limits."[13] Those time limits, however, are irrelevant to the issue. They require that the procedural rules governing binational panels be designed to result in final decisions in initial reviews of determinations within 315 days, for a remand not to exceed the maximum amount of time permitted for the original investigation, and for the review of a remand determination to be completed within 90 days.[14] Those time limits do not put a limit on the number of remands, as witness this second remand, or on the actions an agency may take on remand if it can be completed within the time limits permitted for remands.[15] For the Panel, relying on the FTA, not to include in its remand order instructions allowing this agency to entertain comments on all evidence it gathered in the original remand, but rather to require the Commission to ignore a portion of that evidence, is, in the words of the United States Supreme Court that the Panel cites, and then ignores, to "stray outside [its] province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."[16] This result gives Canadian complainants a benefit from the FTA

---

[12] (...continued)
document was to remand to the agency with instructions to permit comments by parties on that document).

[13] Second Remand Decision at 19.

[14] FTA Art. 1902(2).

[15] The Panel notes that under Article 1904(8), the Panel is to render a "final decision" after a remand. Second Remand Decision at 6. The Panel gleans from this phrase an urgency to settle this issue by providing sufficiently specific instructions to finalize this case. However, as the current remand recognizes, this language does not preclude a final decision in the nature of a remand. That the use of the word "final" before "decision" does not suggest that this second remand decision is to be the last Panel decision is evident by the fact that the Panel is also directed under Article 1904(14) to render a "final decision" within 315 days of the original determination, that "final decision" may either uphold a final determination or remand it.

[16] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 144.

that the Canadian government did not obtain in negotiations and deprives the Commission of authority that the FTA preserved.[17]

The Panel not only found authority in the FTA that is not there, but it also explicitly ignored requirements in the FTA that are expressly included. As noted above, in the First Panel Decision, the Panel repeatedly accepted that the applicable standard of review is that applied under 516A of the Tariff Act of 1930, codified at 19 U.S.C. § 1516a(b)(1)(B).[18] That standard limits the Panel's review of the majority's determination to review based on the administrative record. The Panel correctly defined the administrative record as "all items contained in the administrative record."[19] Nevertheless, in its second review, the Panel ignored the statutory and FTA-mandated standard of review and assessed Commissioner Newquist's views on the basis of information outside the record.[20] By considering evidence not part of administrative record in reviewing the Commissioners' views, the Panel has violated those

---

[17] The Panel notes that the Court of International Trade remanded the Commission's determination several times in the case of Atlantic Sugar Ltd. v. United States, 744 F.2d 1556 (Fed. Cir. 1984), cited in Second Panel Decision at 6. The Commission notes that that litigation was completed when the Court of Appeals for the Federal Circuit reversed the Court of International Trade, and upheld the Commission.

[18] E.g., First Remand Decision at 5-8.

[19] First Panel Decision at 8 n. 3, quoting Panel Rule 41.

[20] The Panel relied on the Federal Register notice of preliminary annual reviews of countervailing duty (CVD) levels from the Department of Commerce to rebut Commissioner Newquist's views on product-shifting. Second Panel Decision at 28, n. 16, discussing Commerce preliminary notice of its annual reviews of 1986/87 and 1987/88. 55 Fed. Reg. 20,812 (May 21, 1990). These preliminary reviews were not published until May, 1990, and, in contrast to the Canadian pork production data also discussed below, could not have been obtained by the Commission prior to that date. The document relied on by the Commission, the 1989 Annual Statistics, reported "events," namely pork production, imports, exports, and consumption from 1986 to 1988, that had occurred at the time of the Commission's final determination. By contrast, the "event" relied on by the Panel, the preliminary determination by Commerce of CVD levels, had not occurred at the time of the Commission's final determination. Such information therefore was not, and could not have been, part of the Commission's administrative record.

provisions of the FTA that require the Panel to apply the law that would be applied by a court of the importing Party, and, more specifically, to apply the standard of review established in 19 U.S.C. § 1516a(b)(1)(B).[21]

The Panel's reasoning is strikingly inconsistent and one result of that inconsistency is the unfortunate appearance that the Second Panel Decision reaches out in contravention of U.S. law and the Agreement to deprive the Commission of decisionmaking authority. On the one hand, as mentioned above, the Panel holds that the majority erred in relying on an official Canadian publication issued after the Commission's original determination that contained data that would have been available during the Commission's original proceeding in unpublished form and that concerned events that were the subject of the Commission's original investigation. On the other hand, in overturning Commissioner Newquist's determination, the Panel relies on a Federal Register notice of preliminary determinations of the U.S. Department of Commerce that was published eight months after the Commission's original determination and that would not have been available in any form during the Commission's original investigation.[22] We respectfully submit that, even though the result of this inconsistency favors Canadian citizens, the Canadian government should be no less concerned than the United States government with this outcome which requires the Commission to make adjustments in official Canadian data rather than obtaining the adjustments in those data from the Canadian agency that issued them. The inconsistency in this outcome may suggest to the public that the Panel's singular purpose was to reach a particular result, an impression that can only undermine the Panel process.

---

[21] FTA Art. 1904(2) & (3).

[22] See Second Remand Decision at 28, discussing 55 Fed. Reg. 20,812 (May 21, 1990).

Violations of U.S. Law

Under the FTA and U.S. law, binational panel decisions are not binding in other cases and may be taken into consideration only for their intrinsic persuasiveness as views of American law.[23] We believe it incumbent on us to explain, for the guidance of those who may appear before the Commission in the future, why we find that aspects of the Panel's second decision are intrinsically unpersuasive as precedent for future cases.

The Panel concluded that the majority unlawfully considered certain data gathered in the first remand proceeding and consequently prohibits the Commission from including that data in the record in this remand. The Panel bases this prohibition on the grounds that the data in question fell outside the scope of the Commission's Federal Register notice. In particular, the Panel excludes from consideration in this remand investigation the document entitled "1989 Annual Livestock and Meat Product Statistics" (1989 Annual Statistics). In the First Remand Decision, the Panel faulted the majority for relying on data from two inconsistent statistical series.[24] As the Commission majority acknowledged, they had not appreciated during the period of investigation that the Canadian government had changed its method of calculating pork yields from swine, and the Commission therefore merged 1986-1987 data based on the old methodology with 1988 data based on the new methodology. This led to an overstatement of certain trends. In response, the Commission could have limited itself to data in the original administrative record and attempted to recompute the data in the record to make recent and historical data conform. But, not only was it unclear from the record evidence

---

[23] FTA Article 1904 (9) & (10); 19 U.S.C. § 1516a(b)(3); U.S.-Canada Free-Trade Agreement Implementation Act, Statement of Administrative Action at 109.
[24] First Remand Decision at 18.

on which series the Commissioners should rely, but the parties themselves could not agree upon which series the Commissioners should focus. Furthermore, available data in the record that were derived from a consistent methodology did not include all the figures necessary for the Commissioners' determination. Therefore, the Commissioners, seeking to comply with the Panel's direction to use consistently derived data, relied on the official Canadian government statistics. To have rejected that official Canadian data, as the Panel now suggests the majority should have done, would have risked relying on inconsistent as well as insufficient data, when the correct and adequate data could have been obtained from the Canadian government. Furthermore, in taking such action the Commission would have risked failing to comply with the explicit direction of the Panel to rely on data from a consistent methodology. This approach, in our view, would not have been reasonable, especially when the data eventually relied upon by us was official government information that could (as required by the terms of the Federal Register notice) have been obtained during the Commission's investigation and would have been obtained had the Commission been aware of the change in the Canadian methodology. The fact that the data did not appear in an official publication until July, 1990, should not preclude the Commission from relying on it if such data could have been obtained during the time of the original investigation. The Commission will continue to regard itself as having the discretion on remand to gather data correcting information already on the record, where that data could have been obtained by the Commission at the time of the final determination and pertains to an issue the Commission has been specifically ordered to correct.[25]

---

[25] By contrast, complainants never alleged that the supplemental information they proposed the Commission consider would have been available at the time of (continued...)

The Panel likewise precludes the majority from consideration of purportedly "new legal or economic arguments, other than those raised in the First Panel Order,"[26] and in the Commission's own Federal Register notice. Such restrictions are expressly counter to the applicable law, as well as the Panel's instructions in the First Remand. As the Federal Circuit has stated, "[c]ertainly neither the [agency] nor the courts are free to abandon the statutory framework when a case is remanded."[27] Likewise, the CIT has expressly held that, on remand, "the agency must consider the issue anew and may not let its prior conclusion govern the new outcome."[28] CIT precedents underpin our view that the Commission is free on remand to revisit, indeed is required to revisit, its original determination in its entirety.

In holding that the Commission may not consider on remand evidence on subjects other than those on which it asked the parties to the investigation to provide information, the Panel disregards the investigative nature of the Commission process. In Title VII investigations, which are not inter-partes proceedings, the Commission frequently gathers information that it has not requested from the parties to the proceeding. There is no failure of notice and opportunity to comment when the Commission relies on such information, particularly when the Commission, as is the case with most of the excluded information here, has made the information available to the parties for comment. Moreover, when, as is the case with some of the information in the remand proceeding, the Commission obtains evidence too late to provide it to

---

[25] (...continued)
the Commission's final determination. Furthermore, their evidence did not concern an issue which the Commission was directed to correct on remand.
[26] Second Remand Decision at 17.
[27] Freeport Minerals Co. v. United States, 759 F.2d 629, 636 (Fed. Cir. 1985).
[28] Koyo Seiko Co., Ltd. v. United States, 715 F. Supp. 1097, 1100 (CIT 1989).

the parties for comment, Congress has specifically stated that the inability of parties to comment does not bar Commission consideration of that evidence.[29] We do not regard the limitations that the Panel has set on the issues and facts that the Commission may consider on remand as being in accordance with U.S. law and will not regard the Panel's reasoning as persuasive in the conduct of future proceedings.

The Panel, based on its erroneous interpretation of the FTA concerning the "finality" of its second review, felt compelled "to state its views on two grounds, even assuming them to be advanced as independent of the product-shifting hypothesis."[30] Insofar as the Panel's views on these additional grounds are based on views of U.S. law that may have more general application, we are also obliged to state, for the guidance of parties in future investigations, why we regard the Panel's views as fundamentally mistaken. Specifically, the Panel was "troubled" by the absence of underselling and the reliance by the Commissioners on the increase in volume to support their finding of a likelihood of price suppression. In fact, the statute does not explicitly require a finding of underselling in considering "the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect . . . ."[31] Although underselling is mentioned as a consideration in finding material injury, the Commission is also directed to consider whether "the effects of imports of such merchandise otherwise depresses [or suppresses] prices," a recognition of the potential supply effect on prices.[32] Indeed, the CIT has expressly held that price

---

[29] H.R. Rep. 576, 100th Cong. 2nd Sess. 624 (1988).
[30] Second Panel Decision at 35.
[31] 19 U.S.C. § 1677(7)(F)(i)(IV).
[32] 19 U.S.C. § 1677(7)(C)(ii)(II).

underselling is not a prerequisite to a finding of price suppression.[33] In prohibiting the Commission from concluding that there is a threat of price suppression is the absence of underselling, the Panel patently misconstrued and misapplied the statute and applicable case law.

In the First Panel Decision, the Panel concluded that the faulty data tainted "several of the ITC's findings,"[34] and in directing the Commission to reconsider the evidence before it, suggested that the Commission "give greater consideration to other facts which appear to have been relegated to an undeserved secondary status by apparent reliance on the questionable findings."[35] In our remand determination, we took this guidance at face value, giving greater emphasis to previously subordinated factors that both favored and disfavored an affirmative determination. It is now clear from this Second Panel Decision that the Panel wanted the Commission to reach a preordained outcome by considering only those facts "relegated to an undeserved secondary status" that would support a negative determination.

Both of us on remand regarded the likelihood of product shifting as an important element in reaching the conclusion that the domestic industry was threatened with material injury. While our separate views highlighted different factors as most important in leading us to those determinations, we regard both approaches as being quite reasonable and as being supported by

---

[33] See, Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. 445, 465 (CIT 1987)(even "without a finding of underselling by imported hogs, the Commission's determination contains sufficient evidence to support the injury finding based on 'the effect of imports of that merchandise on prices in the United States.'" (citation omitted); Maine Potato Council v. United States, 613 F. Supp. 1237, 1245 (CIT 1985)(higher priced imports could have a price-suppressive effect; hence, underselling is not a prerequisite to an affirmative injury determination.)

[34] First Panel Decision at 16.

[35] Id.

substantial evidence. We now join in our comments regarding the Panel's treatment of our individual views because the Panel's decision has barred any interpretation of the evidence of record that finds a likelihood of product shifting.

Errors In Review Of Commissioner Rohr's Views

In attacking Commissioner Rohr's findings, the Panel stated that it was their "opinion" that there was no evidence that high subsidy payments and high countervailing duties have an effect on swine imports. To support their counterintuitive, counterfactual, and illogical, but legally binding, conclusion, the Panel pointed out that in 1988 when Canadian subsidies increased so did swine imports. They decided that this refutes the existence of a connection by stating that if the "prospect" of countervailing duties were a disincentive to swine exports, swine exports would have declined in 1988. They connect their conclusions by stating that Commissioner Rohr "believed" that the market response to subsidy payments was swift.

These comments betray a deliberate mischaracterization of Commissioner Rohr's views or a woeful lack of knowledge about how the U.S. countervailing duty law operates, or both. The data on which Commissioner Rohr relied show beyond question that there is a relationship between the imposition of countervailing duties and the level of hog imports. To anyone with a working knowledge of U.S. countervailing duty laws, there is also a relationship between the level of subsidies and the level of countervailing duties, even though the Panel characterized them as only "arguably corresponding."

Commissioner Rohr did not proceed at length to describe the time factors affecting the change in the levels of the subsidies, CVD's, and exports. He took it as obvious that anyone with a knowledge of the U.S. law would recognize

the existence of such lags. Commissioner Rohr did not deal with the length of these lags, because the lags between a change in one variable and another were not material to his decision as long as they all would occur within a time that could be characterized as reasonably imminent.

To quote from the Commissioner's remand views:

> 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 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.

The connection is clearly made between subsidies and the trends in imports in the future. The CVD level is an import element in the chain of events between them. Had he viewed subsidies to have an immediate effect on import levels Commissioner Rohr would have analyzed the case as one of present injury rather than threat.

Instead of addressing the argument as Commissioner Rohr presented it in his views, the Panel attacked an argument he never made, but one to which the Commission is now bound, as a matter of law, in this investigation. Commissioner Rohr's views did not depend on an immediate reaction between the granting of a subsidy and a reduction in exports because of a fear of CVD's. We believe in fact there is evidence of, and logic to, such a lag, as Commissioner Rohr's views indicated.

In 1988 a countervailing duty order was in effect on Canadian swine. It is true that in the second half of 1988 Canadian subsidies increased. Did U.S. countervailing duties increase when the subsidies increased? No. Of course, they did not. Does this mean there is no relationship between subsidies and

imports? Of course not. The U.S. government is simply not as quick in countervailing subsidies as other governments are in granting them. In fact, in 1988, U.S. countervailing duties on swine went down despite the increase in subsidies because the calculations made related to subsidies granted in prior years. Is it any wonder that swine imports increased when the countervailing duty on swine decreased?

If anything, the facts relied on by the Panel support rather then refute Commissioner Rohr's argument that there is a connection between the subsidies, CVD's, and import levels. In fact, because of the lags involved, the connection between these three variables is even more relevant in a threat determination because the issue is what will happen in the future when the subsidies being granted now are translated into CVD's which affect the future level of exports.

The Panel also made another egregious intrusion into the factual decisionmaking authority of the Commission when it said that in the "period subject to the threat analysis, the cash deposits can be expected to remain low." This offhand assertion, unsupported by any citation to the record or any legal or factual argument is not the proper subject for determination by the Panel. There is no set time period subject to the threat analysis of the Commission. It could involve periods as long as it takes fruit trees to bear commercial quantities of fruit or as short as the length of a particular consumer fad.

Commissioner Rohr found that his threat analysis was applicable to the upcoming down portion of the domestic hog cycle. This period could contain one, two, or possibly even three, administrative recalculations of CVD's. The conclusion that none of these recalculations will reflect the increases in

Canadian subsidies, which are admitted to have occurred, is an interesting exercise in prognostication, but one to which the Commission is apparently bound as a matter of law.

The lip service paid by this Panel to the standard of review applicable to determinations cannot be reconciled with their cavalier replacement of the Commission's factual judgment with a judgment of its own. By its actions, it has said that when it can read the evidence to support a conclusion other than that of the Commission, it has the right to replace the Commission as the fact-finder and decisionmaker in countervailing duty cases.

This case is not, however, about the absolute right or wrong of the Commission's decision, although that is what the Panel obviously thinks it is. The issue is not whether the Commission has proved beyond the shadow of a doubt that its decision is correct, although that is what the Panel has, in effect, required.

From the time of his initial determination in this investigation, and actually from the time of the initial determination in the original Live Swine case, Commissioner Rohr acknowledged that the investigation was a close one on which reasonable minds might differ. The Panel's decision is that there is no reasonable interpretation of the evidence that supports an affirmative. We disagree, but are not legally entitled to act upon this disagreement.

Errors In Review Of Commissioner Newquist's Views

The Panel likewise misconstrued Commissioner Newquist's views and substituted its interpretation of the facts for his. In reaching his original determination that a domestic industry was threatened with material injury by reason of unfairly traded pork imports from Canada, Commissioner Newquist began by analyzing evidence showing imminent deterioration in the condition of that

domestic industry. During most of the period from 1986 to 1988, the performance of domestic producers of fresh, chilled, and frozen pork was quite strong. By 1989, however, performance weakened. Compared with interim (Jan.-March) 1988, in interim 1989 gross profits fell almost 30 percent, operating income margins declined by 60 percent, and cash flow was down by more than 50 percent. The average unit value of domestic shipments also fell, from $0.72 to $0.65 per pound. Inventories were up, and five of twelve firms responding to Commission questionnaires reported operating losses in interim 1989.

Having included swine growers within the domestic industry producing the processed "like product," Commissioner Newquist considered evidence showing that the growers segment of this industry also was in decline. In mid-1989, growers had suffered negative operating margins for several months. Also, it appeared that the industry had entered, or was about to enter, the contraction phase of the hog cycle, characterized by falling prices and production cutbacks.[36]

Considering these recent declines in light of other, more favorable performance indicators (particularly as to the packers), and taking into account the industry's historically low profit margins, Commissioner Newquist concluded that the industry was not suffering what might be considered present material injury. It was clear, however, that this industry was beginning to encounter significant difficulties and that it was therefore "particularly vulnerable" to the effects of unfairly traded pork imports from Canada.[37]

In examining the question of whether or not imports from Canada posed a

---

[36] Final Determination at A-23 (Table 4); B-31. See also List 1, Doc. 116(A)(5) at 33; 116(A)(35) at 8-9.

[37] Fresh, Chilled or Frozen Pork from Canada, Inv. No. 701-TA-298 (Final), USITC Pub. 2218 (Sept. 1989) at 15-16, 35 ("Final determination").

threat of material injury to the domestic industry, Commissioner Newquist considered evidence indicating that U.S. pork and Canadian pork are highly fungible, and that the market for pork is characterized by inelastic supply. This evidence led Commissioner Newquist to agree with Petitioner's argument that domestic prices were particularly sensitive to changes in supply. Commissioner Newquist also concluded that the declining trends in both prices and hog supplies would likely continue. By mid-1986, hog prices had begun to show significant improvement, and growers responded throughout 1987 and into mid-1988 by increasing their inventory of animals kept for breeding purposes. By early 1989, however, it appeared that the supply of animals available for slaughter was becoming too large to clear the market at prevailing prices, and that the excess had caused live swine prices to begin to fall.[38] On the basis of this evidence, which this Binational Panel does not appear to contest, Commissioner Newquist concluded that the industry was at a point in the business cycle where even relatively low levels of subject imports from Canada, by contributing to excess supply, would act to accelerate the decline in market prices, and thus increase the pressure on U.S. growers to reduce their output.[39] [40] He noted that the hog cycle operated in such a fashion that eventually growers would reduce supply enough to cause hog prices to recover,

---

[38] Final Determination at A-59. The growers' net operating margins were negative for the last four months of 1988 and the first four months of 1989. The June 1, 1989, inventory of animals retained for breeding purposes was three percent below the June 1, 1988, level. Final Determination at B-30.

[39] Id. at 33.

[40] Certainly, another important factor or condition of competition in this market that acts to accelerate the point at which hog supplies reach a point of surplus is an increase in imports of live swine. In 1988, swine imports from Canada increased by 80 percent over 1987. Combined imports of pork and swine from Canada increased from 545 million pounds in 1986 to 605 million pounds in 1988. Final Determination at A-41.

which would then reduce the operating margins for packers.[41]

In light of USDA estimates that retail pork prices would likely average 3 to 5 cents below the 1988 average of $1.84 per pound, pork imports from Canada would also have a more short-term impact on packers.[42]

Against this background, Commissioner Newquist then considered whether there was a real likelihood that the subject imports would sustain or increase their penetration levels so as to constitute a cause of material injury. The evidence showed that imports from Canada increased in 1986-1987 from 3.0 to 3.4 percent as a share of U.S. apparent consumption, before falling to 2.9 percent in 1988. He pointed out, however, that much of this decline in pork imports in 1988 was due to product shifting. Further, the decline in the absolute level of imports was less than the decline in import penetration levels, due to the increase in U.S. production associated with the 1987-88 upswing in the hog cycle.[43] As additional support for his finding that import penetration levels would likely increase, Commissioner Newquist cited evidence that total Canadian pork production increased consistently over the period of investigation, and at a rate faster than that of Canadian consumption.[44]

In addition, Commissioner Newquist joined Commissioner Eckes' observation

---

[41] Id. at 24.

[42] List 1, Doc. 116(A)(35) at 7.

[43] Remand Determination at 33; Final Determination at A-43. In absolute terms, Canadian data show that the exports subject to investigation increased by some 12 percent over the period of investigation. U.S. Department of Commerce import data, on the other hand, show a smaller increase of approximately 2.6 percent. Compare Remand Determination at A-1 (Table 1); Final Determination at A-43 (Table 21).

[44] All pork production as a share of total apparent consumption in Canada went from 130 percent in 1986 to 136 percent in 1988. List 1, Doc. 116(A)(36). For the period 1986-87-88, the imports subject to investigation (as reported in official U.S. import data) accounted annually for 18.3 percent, 20.5 percent, and 17.9 percent of all pork production in Canada. Compare List 1, Doc. 116(A)(36) and Final Determination, Table 18, A-41.

that the imposition of a countervailing duty on swine, but not on pork, creates an "extraordinary economic incentive" to shift from the export of live swine to the export of fresh, chilled, or frozen pork.[45] In his remand views, Commissioner Newquist noted that respondents can switch readily from the export of live swine to fresh, chilled or frozen pork. Product shifting in this industry does not entail costly alterations in production facilities, and is documented by record evidence. Commissioner Newquist concluded that given a sufficient economic incentive, significant product shifting would recur.[46]

Just such an incentive was presented at the time of the Commission's determination. In late 1988 and early 1989, Canadian subsidy payments under the ASA-Tripartite program (subsidy payments which Commissioner Newquist concluded encourage Canadian production) increased roughly tenfold over the levels reported in early 1988. Commissioner Newquist reasoned that, because increased annual subsidies would be countervailed by increases in the Customs duties on live swine entering from Canada, absent a duty on pork, it was likely that respondents would attempt to avoid paying higher duties by switching from the export of live swine to the export of fresh, chilled, or frozen pork. This further supported the conclusion that Canadian import penetration levels would increase.

These judgments regarding the imminent deterioration in the condition of the domestic industry, the shift from the export of live swine to the export of

---

[45] Statements supporting the existence of an incentive to product shift in such circumstances were made by Petitioner, as well as by the U.S. Department of Agriculture, the Canadian press, and the Alberta Pork Producers Marketing Board. Also, Commissioners Brunsdale and Cass, who dissented from the Commission's affirmative determination, stated that "the 1985 countervailing duty on swine may have encouraged a shift from swine to pork imports[.]" Final Determination at 80.

[46] Remand Determination at 39-40.

pork, the likelihood of an increase in Canadian import penetration, and the negative price effects associated with these trends at a time when domestic prices and domestic hog supplies were falling are, of course, predictive. They cannot be made with mathematical precision or with complete certitude, and the record in this case may reasonably support a contrary view.[47] At the same time, however, the only issue before this Binational Panel is whether these judgments are based on more than a scintilla of relevant evidence.[48] Thus, regardless of the Panel's view as to the weight of the evidence in this case, the Panel may not vacate a Commission finding that is based upon such relevant evidence as a reasonable person might find adequate to support the particular finding.[49]

The Panel's Second Remand Decision - The Panel's unanimous rejection of the Commission's affirmative threat determination is, in our judgment, based on an impermissible reweighing of the evidence and, indeed, a decision to dismiss as insignificant any evidence that fails to support a negative determination.

In considering Commissioner Newquist's views with regard to whether import penetration levels are likely to increase, the Panel first states there is no imminent prospect of product shifting, because "if the past pattern is any indication," the final duty assessments on 1989/90 entries (which the Panel does not deny will likely increase substantially over current duty rates) will not occur until "well into 1992." Based on data that could not have been available to the Commission at the time of our determination, the Panel goes on

---

[47] This is not inconsistent, of course, with the legal definition of a determination supported by "substantial evidence."

[48] Alberta Pork Producers' Marketing Board v. U.S., 669 F. Supp. 445 (CIT 1987).

[49] See Alberta Pork Producers' Marketing Board v. U.S., 683 F. Supp. 1398, 1403 (CIT 1988).

to point out, that in the meantime, the duty deposit rate on current entries (which is pegged to the latest annual duty assessment by Commerce) is likely to decline, thus benefiting swine importers and U.S. pork producers who purchase Canadian swine.[50]

Assuming that the scenario outlined by the Panel is correct, we submit that one can still conclude that the final duty payments on 1989 and 1990 entries of live swine will be substantially higher than in previous years, that Canadian producers and U.S. importers were aware of this fact, and thus there was likely to be a shift to the export of pork.[51]

Neither respondents nor the Panel appears to contest the data and inferences underlying the prediction that the final duties to be paid on post-1988 imports will increase dramatically. The Panel, however, apparently believes there is no likelihood that these fairly predictable increases will, within a period reasonably subject to a threat analysis, lead to product shifting. The basis for this belief is the fact that Canadian subsidy payments began to increase significantly in the second half of 1988; yet, in spite of the "eventual high CVD liability" that would result from such increases, imports of live swine in late 1988 and the first quarter of 1989 "continued to increase in ever greater quantities."[52] The Commission's failure to provide an

---

[50] The Panel's suggestion that Commissioner Newquist considers the incentive to product shift to be driven entirely by current duty deposit rates is incorrect. Commissioner Newquist's Views on Remand spoke of the likelihood of product shifting to avoid the payment of higher final duties on 1989-90 imports, and drew a distinction between, and thus acknowledged the time lag between, the payment of cash deposit rates on imports at the time of entry and the subsequent collection of final duty rates. Remand Determination at 40.

[51] It appears that the final duty liability on live swine from Canada will increase from roughly Can. $1.00 per hog entered in 1986 and 1987, to roughly Can. $12.00 per hog entered in 1988, and (as long as the subsidy payment levels reported for the first half of 1989 persist) as high as Can. $23.00 per hog thereafter. See USITC Reply Brief on Remand, at 92 n.58.

[52] Second Panel Decision at 34.

explanation for this trend does not render its determination unsupported by substantial evidence.[53] Product shifting has occurred in the past. Although we may disagree as to the exact timing of product-shifting, for the Panel to suggest that in the face of a steep increase in the ultimate cost of imported swine (relative to imported pork), there is no reasonable likelihood that product shifting will occur before well into 1992, is, in our view, highly debatable.

Error in Direction Concerning Remaining Issues

Having rejected the Commission's findings as to product shifting, the Panel then proceeds (in "Remaining Considerations") also to reject the conclusion that Canadian imports will likely be "a cause" of material injury suffered by the U.S. industry in the imminent downturn in the hog cycle. The Panel notes that it is "troubled" by arguments that unfairly traded exports to the United States, at a time when market prices are declining, will contribute

---

[53] It is important to note that in calculating the final annual duty rate on 1988 entries, the high subsidy payments reported for the third quarter (Can.$23.53) and fourth quarter (Can.$37.08) of 1988 will be offset by the extremely low level of payments in the first and second quarters of 1988. First quarter payments were at Can.$3.14 per hog, and U.S.D.A. reports that "there were no second-quarter [1988] payments under the national tripartite stabilization program[.]" List 1, Doc. 116(A)(39). In contrast, during both the first and second quarters of 1989, Tripartite subsidy payments exceeded Can.$36.00 per hog. As the Panel observes, however, "[n]o evidence is cited by any party as to what subsidy payments were expected to be starting in mid-1989 or at any later time." While the parties may not have provided specific calculations as to projected subsidy payments after mid-1989, it is not clear to us that such evidence is essential to support the view that countervailing duties on subsidized entries in 1989 were likely to be substantially higher than those for 1988. Based on the latest reported subsidy payments, Petitioner predicted that annual CVD rates on post 1988 entries were likely to increase. Further, hog prices in the first half of 1989 were falling, or were generally below the levels reported 12 months earlier. Since the very function of the Tripartite program is to offset the shortfall between average market prices and the government support price, it certainly is not implausible to conclude that subsidy payments after mid-1989 were unlikely to fall dramatically.

to any injury caused by other factors.

It is puzzling that the Panel should be troubled by this argument, as it is clear under U.S. law that unfairly subsidized imports need not be the sole cause of material injury in order to be countervailed. The issue is whether or not there is a real and imminent threat that such imports will "contribute, [if] even minimally, to the [injured] condition of the domestic industry."[54] In any case, the troubling argument is not confronted by the Panel. Instead, the Panel simply posits the absence of "affirmative evidence" of causation, then dismisses the conclusion that Canadian imports will enter the U.S. at injurious levels as mere "theory" and "conjecture."

We also are troubled — by the fact that the Panel would, by ignoring it, simply deem certain evidence to be insubstantial. In its first Panel decision, this Panel stated that in order to support an affirmative threat determination, "the record must reveal, at least, a deterioration in the condition of the domestic industry (i.e., increased susceptibility to material injury by reason of the subject imports) or increased or different effects of the imports on that industry or some combination of such factors."[55] These factors, in our judgment, are indeed revealed in the record of this investigation. There is evidence in this case regarding "identifiable current trends and competitive conditions" that bears directly on those statutory threat factors we are instructed to consider, and supports an affirmative threat determination. In addition to evidence concerning the likelihood of product shifting, there is evidence that Canadian subsidies cushion Canadian production at a time when U.S. hog supplies are contracting; evidence of substantial unused Canadian

---

[54] British Steel Corp. v. U.S., 593 F. Supp. 405 (CIT 1984).
[55] First Panel Decision at 13 (quoting the decision by another Binational Panel in New Steel Rails, at 35-36.)

production capacity; evidence that the subject imports account for a stable or increased share of increasing Canadian production; and evidence that in a declining, price-sensitive market, imports are entering the United States at levels exceeding those found to be significant in the Commission's 1985 determination in Live Swine from Canada, which was upheld by the Court of International Trade.[56] This evidence, however, is summarily dismissed.

Conclusion

We disagree with what we consider to be the Panel's faulty disposition of the appeal in this investigation. However, because we are bound by the Panel's determination that there is no substantial evidence of any likelihood of product shifting, or of causation, we determine that a domestic industry in the United States is not materially injured, or threatened with material injury, by reason of subsidized imports of fresh, chilled or frozen pork from Canada.[57] Due, however, to the number of legal errors and violations of the FTA contained in the Panel's Second Remand Decision, we will not, in future investigations, regard as persuasive or follow the procedural or substantive decisions contained in this Decision.

---

[56] Alberta Pork Producers' Marketing Board v. U.S., 683 F. Supp. 1398 (CIT 1988).

[57] In making this determination, Commissioner Rohr notes that he does not believe that the remaining evidence meets the substantial evidence test necessary to support a negative determination. He notes, however, that as a matter of law he is compelled to do so by the requirements of the review process.

CONCURRING VIEWS OF ACTING CHAIRMAN ANNE E. BRUNSDALE

Fresh, Chilled, or Frozen Pork from Canada

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

February 12, 1991

This case returns to us from the second decision issued in this investigation by a Binational Review Panel established under the United States-Canada Free Trade Agreement (FTA).[1] No one who has followed this case since the Commission issued its original final determination in September 1989 will be surprised that I concur in the present decision that the domestic pork industry is not materially injured by reason of subsidized pork imports from Canada. In support of that decision, I incorporate herein my views in the original final determination[2] and in the first remand.[3]

Regrettably, but consistent with Commission practice, my expressed intention to stick with my earlier views means that I have not been afforded an opportunity to review even the draft opinion prepared by the General Counsel pursuant to the majority's instructions. My understanding is, however, that the

---

[1] Memorandum Opinion and Order Regarding ITC's Determination on Remand, No. USA-89-1904-11 (Binational Panel January 22, 1991).

[2] Fresh, Chilled, or Frozen Pork from Canada, Inv. No. 701-TA-298 (Final), USITC Pub. 2218 (September 1989) at 37-84 (Dissenting Views of Chairman Brunsdale and Vice Chairman Cass). Of particular note are my views on threat, id. at 72-83.

[3] Fresh, Chilled, or Frozen Pork from Canada, Inv. No. 701-TA-298 (Final - Remand), USITC Pub. 2230 (October 1990) at 45-49 (Dissenting Views of Acting Chairman Brunsdale).

majority understandably takes umbrage with certain portions of the Panel's opinion that are critical of its earlier views.[4] Having reviewed all of the documents in this case quite carefully, I can see substantial room for disagreement on both sides.

I have become aware in recent days, however, that the majority opinion in this case may contain certain expressions of disagreement with the Panel decision that go beyond the merits of this particular case and bear directly on Commission policy. I feel compelled to express my views on three of these issues. If my comments do not match anything actually in the majority's opinion, then these views should be considered respectful commentary -- favorable and unfavorable -- on three important issues raised in the Panel's opinion.

Due Process and the FTA. Article 1904(3) of the FTA provides that the Panel shall apply the general legal principles of the courts of the party whose decision is under review. Article 1911 makes clear that those general legal principles include notions of due process. In the United States, due process derives from the Fifth and Fourteenth Amendments to the Constitution and embodies "traditional notions of fair play and substantial justice."[5]

---

[4] Once again, consistent with Commission practice, I had no opportunity to see my colleagues' views in prior phases of this investigation until after they were published.

[5] Milliken v. Meyer, 311 U.S. 457 (1940)

The Panel decision at hand takes issue with the Commission's procedures following the first remand, making the case that those procedures did not meet the requirements of due process. While I differ on some of the particulars of the Panel's decision, it does make good general points regarding the Commission's obligations when a case is remanded from an appellate authority. In the future, I will be sure to keep those principles in mind and act accordingly.

In addition, I am fascinated by the manner in which the Panel opinion derived its interpretation of the due process requirements. The FTA specifically incorporates national due process jurisprudence into the Panel's proceedings. The Panel reviewed United States Supreme Court and appellate decisions interpreting the due process requirement in the administrative context and applied the principles of those cases to the Commission's conduct.[6] In particular, the Panel relied on a case, Federal Communications Comm'n v. Pottsville Broadcasting Co.[7], also relied on by Respondents on appeal. The Panel concluded that these decisions "provide useful guidance, but their application should take into account certain special and distinguishing aspects of the ITC's authority on a remand determination in a FTA Binational Panel Review."[8]

---

[6] Second Remand at 12-20

[7] 309 U.S. 134 (1940).

[8] Second Remand at 14.

The Panel sidestepped the key issue of whether foreign respondents can challenge a Commission proceeding on constitutional due process -- a matter our reviewing courts have never decided. Rather, the Panel relied on principles of U.S. law it believed the FTA requires. Specifically, in language in Pottsville Broadcasting cited by the Panel, the Supreme Court stated: "[T]he laws under which the agencies operate prescribe the fundamentals of fair play."[9] The Supreme Court thus recognized that the notions of due process, already flexible in any application,[10] must be fashioned with respect to the particular administrative context.

In this case, the administrative context is the U.S. antidumping laws and the FTA itself. These laws may themselves contain an implicit requirement that the Commission "play fair." For example, the Commission is generally required to hold a hearing in every investigation.[11] One of the concerns raised by the Panel was that the Commission based its first remand decision on grounds different from those supporting its original determination without providing the parties with an opportunity to comment.

In future cases, and whatever may be said about the particulars of the Panel's decision in this case, the Commission

---

[9] 309 U.S. 144.

[10] "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319 (1976).

[11] 19 U.S.C. § 1677c.

should bear in mind the principles of due process raised by the Panel and provide such procedural safeguards as are due in the circumstances of the case.[12]

Product Shifting and Threat. The crux of the majority's argument on the first remand was that rising subsidy rates in Canada for live swine would lead to higher countervailing duty (CVD) rates under a 1988 CVD order. This in turn would result in higher pork imports as Canadian producers converted in Canada the swine destined for the U.S. market into pork to avoid the higher CVD rates. The Panel rejected that argument for two reasons: first, the Panel did not view the CVD system as operating with such alacrity that a change in subsidies would result in an increase in the CVD rates and a shift away from that product in the reasonably foreseeable future; second, the Panel noted that evidence on the record indicated that changes in imports of swine and pork during the investigation period were actually counter to the trend predicted by the product-shifting theory.[13]

The Panel did go further and cite a notice published in the Federal Register in 1990, after the period of investigation, setting CVD rates for imports of Canadian swine that were lower than anticipated by the product-shifting theory. Thus, the

---

[12] I thus reject any notion that the Panel erred by basing its notion of due process on the FTA and not the U.S. Constitution. Not only do I read the Panel's opinion differently, but such an argument appears incongruous in light of Respondents' argument before the Panel that the U.S. Constitution does not apply to the Canadian firms that brought the appeal. Second Remand at 20.

[13] Second Remand at 27-48 & 32-34.

prediction that the higher Canadian subsides would lead to higher CVD rates did not come true, at least for the time being. The Panel's reference to the 1990 Federal Register notice raises an important issue for the Commission, since it opens the door to "testing" a threat determination on appeal with evidence not on the record in the original proceeding. Ultimately, I read the Panel's use of this material as interesting obiter dictum and not a central point of its argument.[14] Whatever the merits of the product-shifting argument, I do not see the Panel's references to the Federal Register notices as especially problematic in this case.

Price Suppression and Underselling. I do find one part of the Panel's opinion troubling. The Panel faulted the majority's remand views for finding evidence of price suppression absent "substantial evidence of underselling by imported Canadian pork."[15] The Panel's conclusion, though erroneous in my view, is easily understood. The antidumping statute specifically states that "In evaluating the effect of imports of [dumped] merchandise on prices," the Commission "shall consider whether (I) there has

---

[14] Once again, however, objections on this point are somewhat hard to raise in these circumstances. The Panel's use of Federal Register notices, which are judicially noticeable even if not in evidence, is comparable to the Commission's use on remand of data relating to the period of investigation collated and published after the Commission's initial final determination had been made. In each case, the practice can be defended as an effort to establish actual events more precisely, or rejected as unfair to the Commission and to the parties who could never be certain when the record would be complete.

[15] Second Remand at 36.

been significant price underselling by the imported merchandise . . . , and (II) the effect of such imports . . . depresses [or suppresses] prices to a significant degree."[16] The Commission itself regularly conjoins these two clauses, using what purports to be evidence of underselling to support a finding of price suppression or depression. The fact that the Panel, enjoined to apply U.S. antidumping law and practice, acted similarly is not surprising.

I have often objected to the Commission's practice on a variety of grounds. First, though the statute requires the Commission to consider evidence of underselling, the Commission rarely collects credible or probative evidence on which to base a conclusion. The Commission normally asks importers and domestic producers for the price and quantity of their largest sales in each quarter under investigation, then compares the prices of the imported article and the domestic like product within each quarter.

This evidence is inapposite to the underselling issue for several reasons. Not all products are commodity products in which differences in quality and features can be ignored. Indeed, price suppression can result if the imports are of a better quality than the domestic like product, or have other unique, attractive features, even if they never undersell the domestic price. Even when a commodity product (like pork) is involved, the Commission does not account for differences in the

---

[16] 19 U.S.C. § 1677(7)(C)(ii).

terms of sale -- like quantity or delivery and credit terms. And, when price suppression does occur, the domestic price may react immediately; in that event, prices would appear to move in tandem with no apparent underselling. The Commission then would overlook a serious problem for the domestic industry based on a lack of underselling data. Last, but not least, the Commission's comparisons of data within quarters means that individual sales on which comparisons are based range from a day to months apart -- indeed, farther apart than similar sales in adjoining quarters. Particularly where the product is a commodity product subject to fluctuating prices, sales within the same quarter may be at widely different prices.[17]

My second objection to the Commission's usual practice and the Panel's statement on this matter is that even clear evidence of underselling does not establish price suppression or depression. The price of a product in a competitive market depends on the level of demand for the product and the available supply. Even a tremendous degree of underselling may have no appreciable impact on the market price of a product if the supply

---

[17] In those cases in which the Commission has collected probative data of underselling, I have examined and been swayed by that evidence. For example, in investigations involving Electrolytic Manganese Dioxide (from Greece, Ireland, and Japan Inv. Nos. 731-TA-406 - 408 (Preliminary), USITC Pub. 2097 (July 1988), and from Greece and Japan, Inv. Nos. 731-TA-406 and 408 (Final), USITC Pub. 2177 (April 1989)), I looked at evidence of underselling because the product at issue was close to a commodity product and was sold within a very small market through competitively bid long-term contracts. In fact, even in the case at hand, I gave more credence than I usually do to the evidence of underselling because of the particular characteristics of the domestic pork market. See USITC Pub. 2218 at 67-68.

of imports is limited and the quantity undersold is small relative to the supply available in the domestic market. On the other hand, imports can have an impact on prices even without underselling the market if they significantly enhance the supply of the product in a market characterized by relatively inelastic demand.

This was the basis for my analysis of the impact of Canadian pork on domestic prices with respect to both injury and threat. The central fact of this case is, as all are agreed, that the United States and Canada comprise one large North American market for pork. Within that market, the U.S. industry has by far the most powerful influence on prices. The impact of Canadian imports on U.S. pork prices, or, viewed another way, the impact of Canadian subsidies on the North American pork market, are minimal at best.[18] I continue to hold these views.

For the foregoing reasons, as well as the reasons set forth in my prior opinions in this investigation, I conclude that a domestic industry is neither injured nor threatened with material injury by reason of the subject imports.

---

[18] See note 3, supra.