The *Free Trade Agreement* Meets its First Challenge: Dispute Settlement and the *Pork* Case

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The most innovative aspect of the *Canada-U.S. Free Trade Agreement* was the provision for binational review of decisions of each country's administrative agencies on issues of alleged unfair trade. On the whole this process has worked well, depoliticizing trade disputes, reducing the suspicion of "home town justice," and making the administrative agencies more accountable and professional. In one case, however, involving exports of pork products from Canada to the United States, the process became acrimonious, and threatened to bring the whole *Agreement* down. The author tells the story of the *Pork* case, including initiation by the United States of the Extraordinary Challenge Procedure, and the subsequent dénouement of the controversy, making it possible for the dispute settlement process — and perhaps the *Free Trade Agreement* as a whole — to survive.

L'aspect le plus innovateur de l'*Accord de libre-échange* entre le Canada et les États-Unis fut l'inclusion d'un processus de révision bilatéral des décisions des instances administratives des deux pays relativement aux pratiques de commerce illégitimes. De façon générale, ce processus a bien fonctionné; il aura entre autres permis de dépolitiser les conflits commerciaux, d'amoindrir les risques et les craintes face aux « justices locales » et de rendre les organes administratifs plus responsables et professionnels. Cependant, dans le cas précis des exportations de porc du Canada vers les États-Unis, le processus est devenu tellement conflictuel que l'existence même de l'*Accord* fut menacée. L'auteur raconte le déroulement de l'affaire *Pork*, remontant, au début de la procédure de contestation extraordinaire, puis jusqu'au dénouement subséquent de la controverse, qui ont permis la survie du processus de règlement des différends et, ultimement, peut-être de tout l'*Accord de libre-échange*.

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Revue de droit de McGill
To be cited as: (1992) 37 McGill L.J. 597
Mode de citation: (1992) 37 R.D. McGill 597

Synopsis

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Introduction

When the *Canada-United States Free Trade Agreement*[1] entered into effect in January 1989, there was much expectation and a good deal of apprehension about its novel dispute settlement mechanism. Particularly Chapter 19 of the agreement, concerning what Canadians call contingent protectionism and Americans call defense against unfair trade, raised considerable doubts on both sides of the border. The origin of Chapter 19 was, in essence, that the American side, in agreeing to establish a binational area not separated by ordinary customs duties, was not prepared to give up protection against goods made in Canada and sold in the United States at unfairly low ("dumped") prices and, even more important, against goods receiving subsidies from the federal or provincial governments of Canada. The Canadian side was not willing to permit determinations of dumping and subsidies to be made unilaterally by American officials and courts in whose priorities and predispositions they had less than complete confidence. The unique solution reflected in Chapter 19 of the *FTA* was to find a procedural way out of a controversy whose substantive elements remained — and continue to remain — to be worked out. The solution — appellate review by binational panels of decisions of administrative agencies of each country — has been widely described both in Canada and in the United States, and need not be reviewed here. Overall, the process, in my judgment and in that of most participants and observers on both sides of the border, has been quite successful. Hard fought disputes have been resolved in much less time than would have been taken if appeals had been submitted to the courts in each country; sloppy findings by administrative agencies have been corrected; and the joint participation of public officials and private parties in a single international proceeding has worked better than could have been expected. The opinions issued by the panels have been thorough and intellectually rigorous. Most important, the participants in the process, even when they did not prevail, were left with the knowledge that their contentions had been fairly considered. Nearly all the panel decisions were made unanimously: it did not matter whether a given panel consisted of three American and two Canadian members or vice versa, and it did not matter to the decision of the panels (putting aside questions of style) whether the chairman was Canadian or American.

To all of this there was one exception — the case of *Fresh, Chilled, and Frozen Pork*. The *Pork* case has received a great deal of publicity, especially in Canada. But the issues were complicated, even for experts; the texts were lengthy; the proceedings were confusing; and the mix of economics, politics, and law are difficult to sort out. This paper makes the effort to tell the story step by step.

The *Pork* case arose out of a claim by the National Pork Producers Council of the United States that pork imported into the United States from Canada had benefited from a variety of governmental assistance programs, that the United

[1]22 December 1987, Can. T.S. 1989 No. 3, 27 I.L.M. 281 [hereinafter *FTA*] (Part A, Schedule to the *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65; entered into force 1 January 1989).

States pork industry had been injured as a result of these imports, and that a countervailing duty should be imposed by the United States designed — in the modern cliché — to "level the playing field." Under United States law, consistent with the *General Agreement on Tariffs and Trade*,[2] a countervailing duty proceeding has two separate phases. The existence and measure of subsidization are determined by the International Trade Administration of the Department of Commerce, an agency of the executive branch; the existence of "material injury to an industry" is determined by the U.S. International Trade Commission, a so-called independent regulatory commission made up, when all positions are filled, of six commissioners appointed for staggered six-year terms. For much of the time relevant to the events here told, there were three vacancies on the Commission. The *Pork* case, as detailed below, was fiercely contested both before the Commerce Department and before the International Trade Commission, and two separate panels under the *FTA* were convened to hear appeals from the decisions of the respective agencies — more than once, as it turned out.

I. Subsidy Phase: Round I[3]

In January 1989, the National Pork Producers Council, along with 13 state pork producer associations, the National Pork Council Women, and 7 pork producers, filed a petition with the International Trade Administration of the U.S. Department of Commerce, alleging that producers and exporters of fresh, chilled, and frozen pork in Canada received subsidies within the meaning of U.S. trade law. The Commerce Department excluded some 33 programs recited in the petition, but commenced an investigation of one federal, two joint federal/provincial, and 36 provincial programs alleged to bestow countervailable subsidies on Canadian pork producers.[4] In fact there had been an earlier investigation into allegations of subsidies by Canadian and provincial governments with respect to both live swine and pork, and the Department of Commerce had previously found that both producers of live swine and producers of pork in Canada received countervailable subsidies.[5] But in that case the bulk of the subsidies found to be countervailable had been paid to producers of live swine, and on appeal the U.S. Court of International Trade had found that the Department had failed to apply the "upstream subsidy" provision of the U.S. law, *Tariff Act of 1930* section 771A,[6] and had remanded the proceeding to the Department.[7] Because in that case the International Trade Commission had not found injury,[8]

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[2]30 October 1947, Can. T.S. 1947 No. 27, 55 U.N.T.S. 187, T.I.A.S. No. 1700, 1st supp. B.I.S.D. (1953) 6 [hereinafter *GATT*].

[3]*Fresh, Chilled and Frozen Pork from Canada* (1990), 3 T.C.T. 8308 (Ch. 19 Panel), summarized in 55 Fed. Reg. 41369 (1990) [cited to T.C.T.].

[4]Dept. of Commerce, *Initiation of Countervailing Duty Investigation; Fresh, Chilled, and Frozen Pork from Canada*, 54 Fed. Reg. 5537 (1989).

[5]Dept. of Commerce, *Live Swine and Fresh, Chilled, and Frozen Pork Products from Canada*, 50 Fed. Reg. 25097 (1985).

[6]19 U.S.C. § 1677-1, adopted in § 626(a) of Pub. L. 98-573, eff. 30 October 1984.

[7]*Canadian Meat Council* v. *United States*, 661 F. Supp. 622 at 625-29 (Ct. Int'l Trade 1987).

[8]*Live Swine and Pork from Canada*, Inv. No. 701-TA-224 (Final), USITC Pub. 1733 (July 1985) [hereinafter *Live Swine*], affirmed *sub nom. National Pork Producers Council* v. *United States*, 661 F. Supp. 633 (Ct. Int'l Trade 1987).

that investigation had become moot. Meanwhile Congress had adopted a new provision, section 771B,[9] and this provision provided the focus for the new petition.

Once the International Trade Commission had made a preliminary determination that there was a "reasonable indication" that an industry in the United States was materially injured or threatened with material injury,[10] the Commerce Department went through the required stages of determining whether the challenged products were benefiting from countervailable subsidies, including submission of a questionnaire to the government of Canada, receipt of preliminary and supplemental responses from Ottawa as well as from the governments of Alberta, Ontario, Manitoba, Quebec, and Saskatchewan, receipt of briefs by petitioner and respondents, and conduct of a public hearing. On 24 July 1989, the Department of Commerce published its final countervailing duty determination, holding 18 separate programs, some provincial, some federal, and some mixed, to be countervailable subsidies, to a total amount of C$ 0.08 per kilogram, or C$ 0.036 per pound.[11] The Canadian parties asked for review by a panel under Chapter 19 of the *FTA*, challenging 7 of the determinations by the Department. Not only the Canadian Meat Council and several Canadian meat packers, but (for the first time) the government of Canada, as well as the governments of Alberta, Quebec, and Ontario, appeared before the Panel. Since, under article 1904 of the *FTA*, panel review is to be conducted under the law of the importing country and according to the standards applicable in that country for judicial review of decisions of the agency in question, all the Canadian parties, as well as the Department of Commerce and the U.S. petitioners, appeared by American counsel. The principal issue was how to deal with subsidies not given directly to the imported product — pork — but to a prior stage (one can hardly say ingredient) of that product — live swine. The *Pork* case represented the first opportunity to apply and interpret the 1988 amendment[12] to a 1984 "upstream subsidy" amendment to the U.S. countervailing duty law,[13] which, as noted, the Department had not applied to the prior case involving the same parties.[14]

A. Upstream Subsidies and the "Pass-Through" Issue

"Upstream subsidies" is a relatively new term in international trade designed to address the situation where the exporter of a processed or manufactured product does not itself receive a subsidy but benefits from a subsidy to an important input through cost savings not available to the domestic competitor. For example, one of the complaints that led to the adoption of the 1984 amendment was the claim that Mexican exporters of fertilizers were benefiting from

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[9]19 U.S.C. § 1677-2, adopted in § 1313(a) of Pub. L. 100-418, eff. 23 August 1988.

[10]19 U.S.C. §1671b(a)(1).

[11]*Fresh, Chilled and Frozen Pork from Canada*, 54 Fed. Reg. 30774 (1989). Eleven other programs challenged by the National Pork Producers Council had been found not countervailable.

[12]*Supra*, note 9.

[13]*Supra*, note 6.

[14]See *supra*, note 7 and accompanying text.

below-market supplies of natural gas, and thus gaining an unfair advantage over U.S. producers of fertilizers.[15]

Section 771B, the 1988 amendment applied by the Commerce Department in its finding of subsidy, reads as follows:

> In the case of an agricultural product processed from a raw agricultural product in which —
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> (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and
>
> (2) the processing operation adds only limited value to the raw commodity, subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.[16]

Senator Baucus, in introducing the amendment, had said that "pork is just a very mature hog,"[17] the point being that both of the conditions of the amendment were easily satisfied. Before the Panel, however, the Canadian parties argued that under the *GATT* and the overall U.S. countervailing duty law, countervailing duties may be enforced on a product only to the extent that it can be shown that a subsidy had been received "on the production or export of such product."[18] The Canadian parties argued that the record failed to show that pork producers had received any portion of the subsidy found to be provided to hog growers. Commerce argued that it was required to follow the statute, and denied that it was acting contrary to the *GATT*.

Thus *Pork* was the first case in which a panel established under the *FTA* had to construe a U.S. statute that had not been construed previously. The Panel explained — evidently for Canadian readers — that in the United States it is the practice to consider legislative history, as well as to accord deference to the interpretation given to a statute by the agency charged with its interpretation. Moreover, while an act of Congress is supposed to be construed, when fairly possible, so as not to conflict with international law, when a statute and an earlier rule of international law or agreement cannot be fairly reconciled, the statute prevails.[19] After considering the question of *GATT* compatibility, the Panel declined to decide it, and focused exclusively on section 771B itself: it held that

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[15]See J.Z. Barsy, "Upstream Subsidies and U.S. Countervailing Duty Law: The Mexican Ammonia Decision and the Trade Remedies Reform Act of 1984" (1984) 16 Law & Pol'y Int'l Bus. 263.

[16]*Supra*, note 9.

[17]133 Cong. Rec. S8787 (daily ed. 26 June 1987).

[18]*GATT*, *supra*, note 2, art. VI(3); *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade*, 26th supp. B.I.S.D. (1978-79) 56, art. 4(2) [hereinafter *GATT Subsidies Code*].

[19]*Supra*, note 3 at 8319. See *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minn.: American Law Institute, 1987) §§114, 115 quoted by the Panel. It may be noted that while this is a correct statement of the later-in-time rule, it is not clear which instrument is the latest to look at, since the *FTA*, which expressly incorporates the *GATT* rules, was signed on 2 January 1988, before passage of §771B, but entered into effect 1 January 1989, after passage of the amendment. Both the United States and the Canadian acts implementing the *FTA* were adopted after passage of the *Omnibus Trade and Competitiveness Act of 1988*, Pub. L. No. 100-418, which contained §771B.

the new section did not contain a "pass-through" test and indeed was designed expressly to avoid such a requirement, which had been found to inhere in section 771A, the 1984 amendment. Whether or not a pass-through test would be necessary to make an upstream subsidies provision consistent with the *GATT*, such consistency, the Panel said, is not a prerequisite to the application of a U.S. statute.[20]

B. Reading the Baucus Amendment

With the pass-through issue disposed of, it remained for the Panel to determine whether the two conditions expressly included in section 771B had been met. The Panel agreed with Commerce that the demand for live swine, whose producers received the challenged payments, was substantially driven by the demand for pork, even if it could be shown that pork is to a considerable extent an intermediate product and that the greater demand is for bacon, ham, and other end-products.[21] The other statutory requirement, that the processing operation adds only "limited value"[22] to the raw commodity, was more difficult for the Panel. The Canadian parties argued that the statute was not intended to apply to substantial processing operations such as transformation of live swine to pork, but only to minor finishing operations such as freezing of produce; and further, that existing precedents (including the earlier *Pork* case)[23] established that 20 percent added value, as found in this case by the Department, would not be considered "limited." The Panel pointed out, however, that these precedents all turned on different statutes; moreover, Commerce had found that most of the added value of pork is attributable to marketing, whereas the actual *cost* of processing live swine into pork is substantially less than the added value and does not change the essential character of the product. After elaborate discussion, the Panel concluded that the Department's interpretation of the new statute could not be found to be impermissible; accordingly the finding that the pork producers had added only limited value was allowed to stand.[24]

This left two more formidable problems for the Panel. *First*, assuming payments made to hog producers were countervailable, how should such payments be converted in order to impose duties per pound of imported pork? *Second*, which of the many kinds of payments were countervailable and which were not, because they failed the requirement of specific or targeted benefits?

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[20]*Supra*, note 3 at 8319-20. In a parallel proceeding initiated by Canada in *GATT* just after the United States imposed the countervailing duty in September 1989, a *GATT* panel did decide this issue, and upheld the Canadian contention. The Panel recommended that the United States either refund so much of the countervailing duties collected as represented subsidy paid to the swine producers, or conduct an investigation to determine the pass-through on a basis that satisfies art. VI(3). The Panel rejected a Canadian request that it recommend that §771B be withdrawn, on the ground that such a request went beyond its mandate. *United States — Countervailing Duties on Pork from Canada*, Recommended Decision of 3 August 1990, *GATT* Doc. L/6721 (5 September 1990). As of January 1992, this decision had not been adopted by the *GATT* Council, evidently because the United States has withheld its consent.

[21]*Supra*, note 3 at 8318.

[22]*Ibid.* at 8319.

[23]*Supra*, note 5.

[24]*Supra*, note 3 at 8320-21.

C. *Measuring the Subsidy*

The Commerce Department had used a conversion factor based on the pork yield of live swine, essentially assuming that the entire value of a hog was expressed in pork products. The exporters, however, argued that this method ignored the by-products of hog raising. The precedents, involving several lamb and fish cases,[25] were inconsistent, and, as the Panel found, yielded no clear principle. Since there was no clear conflict on this issue between section 771B and the *GATT* or the basic U.S. subsidies law, those sources, which look to "net subsidies,"[26] must be used. The Panel concluded that

> it is unreasonable and not in accordance with law for Commerce to allocate the entire subsidy conferred on hogs to pork products when other commercial products resulting from hogs are also benefiting from the subsidy.[27]

On this issue, the Panel remanded the case to the Department for reconsideration.[28]

D. *Specificity*

The question of "specificity" is a more general one. The idea is that if a government benefit is generally available — for instance a new highway, or an advanced training institute, or an improved weather service — it is not regarded as a countervailable subsidy, even though a given producer or exporter may be shown to have derived advantage from it. In *Pork*, the parties agreed that if a given program of government assistance were generally available, it would not be countervailable. They disagreed, however, about how to define or determine whether or not a given program of assistance met the specificity test. The Canadian parties in *Pork* contended that the so-called "tripartite" stabilization programs (federal government, provincial government, and producer councils) were generally available and thus not countervailable. Commerce responded that while the programs might in theory or *de jure* be open to all, *de facto* they were used only by a few producers, including the producers of swine, and thus met the test of specificity.[29] It turned out that producers of nine agricultural products had benefited from the tripartite programs, and producers of other eligible products had for one or another reason not applied. The Panel, after several pages of discussion, concluded that once a government program of assistance is stated to be generally available, the burden was on Commerce to show that the program was in fact targeted at the product sought to be made subject of a countervailing duty, or at a discrete class including that product. On this issue as well, the Panel remanded.[30]

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[25]Cited in *ibid.* at 8322.

[26]*GATT*, *supra*, note 2, art. VI(3); *GATT Subsidies Code*, *supra*, note 18; 19 U.S.C. §1671(a)(2)(A)(ii).

[27]*Supra*, note 3 at 8323.

[28]*Ibid.*

[29]*Ibid.* at 8323-24.

[30]*Ibid.* at 8327.

E. Deciding on the Evidence

The Panel proceeded one by one through all of the separate programs that had been found by Commerce to be countervailable.[31] With respect to some of the programs, Commerce itself asked for a remand because its lawyers had concluded that the record did not contain substantial evidence to support the challenged finding. The Canadian parties requested that the Panel instruct the Department to dismiss as to those programs; the Panel preferred to give the Department a second chance, on the understanding that any action it would take could again be challenged before the same Panel.[32]

With respect to other programs of government assistance, the evidence was not clear: in some instances the best information available (BIA) was good enough; in others the Panel remanded for more precise information. In an instance where the Province of Alberta had declined to provide certain information on the basis of a provincial confidentiality rule, the Panel upheld Commerce in using BIA, rejecting the contention that BIA had been used in an arbitrary or punitive way.[33]

F. Raising New Arguments

One interesting issue of administrative law emerged when the government of Quebec, which had participated in the proceeding before the Commerce Department, sought to raise an issue before the Panel that it had not raised before the Department. The Panel held that the doctrine of exhaustion of administrative remedies applied, but that Quebec's appeal came within an exception, because the issue that it sought to raise before the Panel had been decided adversely to its position in earlier cases before the Department, and raising it in *Pork* before the Department would have been futile. "To have required exhaustion in this case," the Panel wrote, "would have been insistence on a useless formality."[34] One may wonder whether the exception to the exhaustion doctrine was justified in this case, given the right of agencies to change their mind and a change of administrations between the first and second *Pork* cases; on the other hand, granting an exception and declining to accept an unsatisfying ruling on procedural grounds reflects the kind of consideration to foreign parties (particularly government parties) that one ought to expect from an international dispute settlement mechanism.

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[31]*Ibid.* at 8327-8336.

[32]Note that under art. 1904(8) of the *FTA* and under the corresponding section of the *United States-Canada Free Trade Implementation Act of 1988*, Pub. L. 100-449, 102 Stat. 1851, §401(7), a panel is not authorized to dismiss a proceeding, but it may instruct the national agency in question to do so and the agency is required to follow the instruction.

[33]*Supra*, note 3 at 8333-34.

[34]*Ibid.* at 8335. The issue in question was whether Quebec's Farm Income Stabilization Insurance Program was or was not specific and therefore countervailable. The issue had been fully considered in the 1985 *Live Swine* case (*supra*, note 8). On the merits once it got over the exhaustion point, the Panel remanded.

II. Subsidy Phase: Round II

On remand, the Commerce Department first asked for a 75-day extension; when that was denied by the Panel, the Department did issue its Determination on Remand on time. The effect of the reconsideration was to reduce the countervailing duty from C$0.08 to C$0.066 per kilogram.[35] On the issue of whether particular assistance programs were generally available or were, at least *de facto*, specific enough to be countervailable, the Department omitted two of the programs that had been included in its first determination, but found the other three to meet the specificity test. The Canadian parties sought review with respect to each of these programs and the Panel issued its decision 90 days later.[36]

A. *Specificity Again*

The Panel had been struck in its first review by the small number of products benefiting from certain assistance programs such as the so-called Tripartite Benefits Program, which seemed from the statute that established it[37] to be open to a much larger number of agricultural producers than actually participated in the program. The Department, on remand, in effect said it could not give an informed explanation of the discrepancy between the number of eligible farmers and the number of actual participants, but it found that hog producers made up approximately 35 percent of all farmers benefiting from the Tripartite Agreements and received over half the total amount of payments — enough to meet the specificity test. On its second review, the Panel wrote that it

> remains dissatisfied with Commerce's efforts to set forth a rule of law which is clear, principled and capable of distinguishing intentional ... programs from those that appear specific in a given year or two merely because of unpredictable economic variations... .[38]

Nevertheless the Panel concluded that Commerce had "not supplied sufficient facts and rationale to justify its finding of specific subsidy in this matter."[39]

Further, the Panel in its first review had stated that Commerce did not provide adequate justification for its determination that a Quebec Farm Income Stabilization Insurance Program (FISI) met the specificity test. The government of Quebec, as we saw, had been permitted to raise an argument before the Panel that it had not raised in the administrative proceeding, namely that 75 percent of Quebec's insurable agricultural products received benefits from FISI, showing, Quebec argued, that the program was not specific to hog growers.[40] In its

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[35]*Department of Commerce Remand Determination: Final Countervailing Duty Determination on Fresh, Chilled and Frozen Pork* (7 December 1990), USA-89-1904-06.

[36]*Memorandum Opinion and Order Regarding Commerce Determination on Remand* (8 March 1991), USA-89-1904-06, reported as *Fresh, Chilled and Frozen Pork From Canada* (1991), 4 T.C.T. 7026 (Ch. 19 Panel).

[37]*Agricultural Stabilisation Act*, R.S.C 1985, c. A-8, s. 13, amended R.S.C. 1985, c. 40 (1st Supp.), repealed S.C. 1991, c. 22, s. 27.

[38]*Supra*, note 36 at 7030.

[39]*Ibid.*

[40]*Supra*, note 3 at 8335-36.

decision on remand, the Department pointed out that it had not previously had an opportunity to reply to Quebec's figures, which it would have done had the argument been made during the investigation. Commerce asserted that if certain products that Quebec had excluded from its calculation were counted among "all agricultural products," the beneficiaries of FISI would be far less than 75 percent of all of Quebec's agricultural products. Thus Commerce stuck by its specificity determination. The Panel, looking at essentially the same discussion a second time, was still not satisfied that the specificity test had been met, and remanded again on this issue.[41]

B. From Corn to Hogs

Another program that Commerce had held to be countervailable in its first subsidy determination concerned payments made to feed grain users, on the basis of an estimate of the percentage of the consumption of feed grain attributable to consumption by hogs. In the first round the Department had put the figure at 15 percent, and the Panel had said this figure was not supported by evidence in the record. On remand, the Department asserted that such evidence as existed on the ratio of feed grain consumption by hogs to total consumption suggested that the percentage was either 10 or 15 percent, and so it would settle on a finding of 12.5 percent. The Panel was not satisfied, and remanded again, with some suggestions on how Commerce "should be able to arrive at a reasonable estimate."[42]

C. Further Remand

On 11 April 1991, the Commerce Department considered the case for the third time, and essentially went along with the Panel. As to the FISI program in Quebec, the Department eliminated FISI benefits from the calculation of the amount of the subsidy. As to the allocation of grain benefits to hogs, the Department settled on a figure of 11.4 percent, as a "potential (albeit imperfect) proxy for the amount of feed consumed by hogs."[43] Altogether, the Countervailing Duty Deposit Rate came to C$0.036 per kilogram, as compared with the initial determination of C$0.08 kilogram. It was estimated that the final determination came to a subsidy of 2.9 per cent *ad valorem.*

Taking the subsidy phase of the *Pork* case as a whole, it seems that the process worked pretty much as intended. The subsidy phase of *Pork* was a big and complicated case, and it received thorough consideration — almost certainly more thorough than it could have received from a single overworked judge in the U.S. Court of International Trade. In the course of the review process the issues were narrowed and clarified substantially. Of the nine issues that had been challenged in the first review, the Panel had affirmed on three and remanded on six. On the first remand, one of Commerce's major revisions (the conversion factor from hogs to pork) was not further challenged, and two pro-

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[41]*Supra,* note 36 at 7034.
[42]*Ibid.*
[43]F.T.A.P.D. LEXIS 5, at * 2 (1991).

grams previously deemed countervailable were found not to have benefited the industry during the period of investigation. On the second round of panel review, one determination of the Department was upheld,and two were further remanded. While one would not say that the Department and the Panel were thinking alike on all issues, the review process was at all times professional, seeking to draw inferences from incomplete data and occasionally shifting the burden of coming forward with "best information available," or "substantial evidence on the record." Certainly nothing in the subsidy phase of the *Pork* case came close to the disrespect and defiance evident in the injury phase of the case, to which we now turn.

III. Injury Phase: Round I[44]

Under the United States trade law since 1979 (as under Canadian law and under the *GATT*), a finding that a product has been imported with the benefit of a subsidy is not sufficient to support imposition of a countervailing duty. A countervailing duty, in other words, is not seen as a penalty for improper conduct, but as a way to restore a balance that has been distorted. Before a countervailing duty may be imposed, there must be a finding of material injury to an industry, or "threat of material injury."[45] The determination of injury is made in the United States by the U.S. International Trade Commission (ITC), which, as noted in the introduction, is an independent regulatory agency not subject to direction by the executive branch, but subject, since the 1970s, to judicial review.

The injury phase of the *Pork* case came before the ITC in May 1989 (*i.e.*, after Commerce had made its preliminary determination of subsidy). The Commission's practice is to order a study by its own staff, and at the same time to invite interested persons to make written submissions, both of economic data and of legal arguments. In some instances, including the *Pork* case, the Commission holds an oral hearing.

When the Commission came out with its decision on injury in September 1989, it was unanimous that imports of pork from Canada were not presently causing material injury to the pork industry of the United States.[46] Domestic pork production had risen 11.6 percent during the period of investigation (1986-88), and was continuing to rise in the first quarter of 1989, though at a slower rate. Pork prices were falling, however, and three members of the Commission concluded that the U.S. pork industry was "entering a period of vulnerability to the effects of subsidized imports from Canada," *i.e.*, the industry was "threatened with material injury," within the meaning of § 705(b)(1)(A)(ii) of the *Tariff Act of 1930*, as amended.[47] Both the Chairman and the Vice-Chairman of the Commission dissented, and one member did not participate.

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[44]*Memorandum Opinion and Remand Order* (24 August 1990), USA-89-1904-11, reported as *Fresh, Chilled or Frozen Pork from Canada* (1990), 3 T.C.T. 8276 (Ch. 19 Panel), 3 T.T.R. 281 [hereinafter *Pork: Injury Phase* cited to T.C.T.].

[45]19 U.S.C. §1671(a).

[46]*Fresh, Chilled, or Frozen Pork from Canada*, USITC Pub. No. 2218 (September 1989).

[47]19 U.S.C. §1671d(b)(1)(A)(ii).

The majority quoted a decision of the Court of International Trade, to the effect that since determination of a threat of injury involves projection of future events, it is "inherently less amenable to quantification."[48] But the Commissioners reasoned that the subsidies found by the Commerce Department would increase production in Canada faster than consumption, that as a result exports to the United States would increase, and that as a consequence prices in the United States would be suppressed. The dissenters pointed out that in the last full year under investigation, imports of pork from Canada had constituted less than 3 percent of U.S. consumption by volume, that the effect of imports on prices of domestically produced pork was very small, and that the data on employment and capacity utilization did not "remotely suggest" the likelihood that the U.S. industry was in imminent danger of material injury.

Again, the Canadian parties applied for review by a panel under the *FTA*, and a different panel from the one that was hearing the subsidy phase was convened. Thus for most of the fall and winter 1989-90, two panels were sitting on the two aspects of the *Pork* case.

As previous panels had done, the Panel in *Pork: Injury Phase* went over the requirements of the *FTA*, that U.S. law be followed in its review, that it was bound by the substantial evidence standard, but that it was not bound to agree with the agency's decision.[49] The Panel in *Pork* emphasized, however, that a finding of *threat* of injury must be based on a record before the Commission showing more than a *possibility* of injury.[50] The Panel was not satisfied that the record supported the finding of threat of injury, and remanded that case with instruction to the Commission to reconsider the evidence. The Panel stated its view that the burden on the ITC is higher than in other cases when a finding of "*threat* of material injury" is coupled with a finding of "*no present* material injury." [emphasis added][51]

A. A Question of Numbers

The issue before the Panel was unusual in that it turned largely on what the Panel called questionable interpretation of unreliable statistics.[52] The argument of the Commission majority had been that pork production (found by Commerce to have been subsidized) had grown from 2 billion pounds in 1986 to 2.6 billion pounds in 1988, while Canadian consumption had increased by only 110 million pounds. *Ergo*, the Commission had found (i) the excess was likely to be exported to the United States; and (ii) the rate of increase was likely to continue. But much of the reported increase in production turned out to reflect a change of method of counting and reporting pork production in Canada. The actual increase in production had been only 170 million pounds, not 600 million

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[48]*Hannibal Industries Inc.* v. *United States*, 710 F. Supp. 332 at 338 (Ct. Int'l Trade 1989) [hereinafter *Hannibal Industries*].

[49]*Supra*, note 44 at 8278-79.

[50]*Ibid.* at 8279.

[51]*Ibid.* at 8281.

[52]*Ibid.* at 8283.

pounds, or 8.4 percent, not 31 percent — less than the increase in pork production in the United States.[53]

This discrepancy, acknowledged by the ITC itself, made a remand inevitable, and indeed the ITC had itself moved for a voluntary remand, which the Panel had denied because the motion had come too late. The error affected not only the estimate of increased exports to the United States that underlay the finding of threat of injury, but drowned out other facts to which the ITC might have attached greater importance, such as figures on hog breeding in Canada, which declined after 1988 in accordance with the so-called "hog cycle."[54] Once these production figures were reconsidered, the ITC might well have reached a different conclusion also on the causal link between the Canadian subsidy program for pork and imports to the United States; in addition, the ITC might have paid greater attention to the increased exports of hogs to the United States, which the Commission had found irrelevant but the Panel thought "quite apparently"[55] would reduce Canada's exports of pork.

B. A Question of Inferences

The Panel found other errors in the Commission's reasoning. For instance, Canadian exports of pork to Japan had increased because of quality problems with pork supplies to Japan from Taiwan. Once Taiwan corrected its problem, the Commission had reasoned, Canada's exports to Japan would be likely to drop, and the goods not sent to Japan would find their way to the United States. "This strikes the Panel as inappropriate, selective fact finding,"[56] the Panel wrote, pointing out that Canadian exports to Japan had continued to increase, quarter by quarter and month by month, with one exception seized upon by the ITC.

Again, to show that an increase in exports from Canada could not be easily absorbed, the ITC had argued that U.S. consumption of pork had declined over the past decade. But the Panel pointed out that only *per capita* consumption of pork in the U.S. had declined; given a growing population, overall consumption had in fact increased. Here was one more example of a finding by the Commission not supported by the record.[57]

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[53]*Ibid.*

[54]The "hog cycle," sometimes known as an illustration of the "cobweb theorem," assumes that as hog prices rise in Period I producers will increase the supply, so that in Period II supply exceeds long-run equilibrium in relation to demand. Consequently, the price in Period II will fall to less than an equilibrium position. In Period III supply will be reduced in response to the prior low price, and thereafter the price will again rise and over-shoot equilibrium, so that there will be an excess of supply, and so on. The basic operative decision is taken by the grower when he decides, on the basis of economic signals in the preceding 2-6 months, whether to fatten the 5-month old female for slaughter, or to retain her for breeding purposes, which occurs at about 8 to 10 months of age. Hogs gestate for about 4 months, and are ready for slaughter about 6 months after birth. In the United States, a hog cycle is typically 2 years in duration from peak to trough and 4 years from peak to peak.

[55]*Supra*, note 44 at 8285.

[56]*Ibid.* at 8286.

[57]*Ibid.*

To take just one more point, the ITC had found the U.S. pork industry "particularly vulnerable."[58] The Panel did not find this conclusion, which differed from an earlier investigation of the ITC,[59] to be consistent with the evidence.[60]

C. A Question of Logic

One of the Canadian panelists, a professor of economics, submitted additional views, to emphasize what he regarded as not only inaccuracies in the interpretation of basic data but "incompleteness in the analytical logic"[61] linking cause and effect. His point was that continuation of subsidies at existing levels that do not cause material injury cannot, without some additional change, provide the basis for a finding of threat of injury in the future. Putting aside the substance of the argument, Professor Whalley's opinion is striking in that it calls for analysis in accordance with the "mainstream economic profession,"[62] a quite different standard from the test of substantial evidence on the record applied by the Court of International Trade and the Panel in *Pork* and all the other cases under Chapter 19 of the *FTA*. On the merits, Professor Whalley's critique of the Commission's reasoning is quite persuasive in challenging the effect in the large economy (USA) of behaviour in the smaller economy (Canada) linked by substantially open borders. In terms of the mandate of the panels, the professor's approach, in effect placing the burden on the Commission to defend its economic analysis and (because the issue is *threat* of material injury) its projections, is quite at variance with the deference that a reviewing court (and by definition the binational panel) is expected to accord to the expertise of an administrative agency. The other members of the Panel did not follow Professor Whalley's lead.

D. Summary of Round I

Each of the other panel decisions under Chapter 19 of the *FTA* — whether they sustained or reversed the agency — had considered close questions of law on which one could fairly come out either way. Also, each of the other panel decisions that had remanded a decision to the rendering agency had done so only in part. The injury phase of the *Pork* case was a total rejection of the decision of the ITC, for using erroneous data and then misinterpreting the data.

IV. Injury Phase: Round II

A. Back before the Commission[63]

On 23 October 1990, within the 60 days provided in the remand order, the ITC issued its Decision on Remand, and again found threat of injury, though on

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[58]*Ibid.* at 8288.
[59]*Live Swine, supra*, note 8.
[60]*Supra*, note 44 at 8288-89.
[61]*Ibid.* at 8289.
[62]*Ibid.* at 8290.
[63]*Fresh, Chilled, or Frozen Pork from Canada, Views on Remand*, Inv. No. 701-TA-298, USITC Pub. No. 2230 (October 1990).

somewhat different grounds. This time the vote in the Commission was 2-1, as two of the members of the Commission who had heard the original petition had in the meantime resigned.

The two members of the Commission who again found threat of injury, Commissioners Rohr and Newquist, writing separately, made elaborate analyses of the hog cycle, from which (with minor variations) they concluded that the U.S. pork industry would be most vulnerable in the coming downward portion of the cycle, which would coincide with higher Canadian subsidies on hogs (because there was really a single North American market affected by a single hog cycle). Higher Canadian subsidies on hogs, in turn, would lead to higher U.S. countervailing duties on live swine, which in turn would lead to "product shifting," *i.e.*, reduction of imports of live swine and correspondingly higher imports of pork, thus creating a "threat of injury" to the U.S. pork industry. "Certainly," Commissioner Rohr conceded,

> 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 ... to material injury. I am satisfied that this standard has been met.[64]

Commissioner Newquist wrote:

> Although it is possible that pork imports from Canada will decrease, it is also likely that production levels in the United States will decrease. 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.[65]

The argument about product shifting was new, at least in the form presented by the two commissioners. Acting Chairman Brnnsdale, who had been in the minority in the original decision, was not persuaded. She pointed out in a brief dissent that Canadian pork had never achieved an import penetration level into the United States higher than 3.4 percent — not an injury level — and that even if the total of Canadian increase in pork production in the two-year period under review had been sold to the United States, Canadian import penetration would not have reached 5 percent of the U.S. market.

Altogether, one could not say that the performance of the Commission was intellectually satisfying, as discussions of "threat of injury" rarely are. But the debate remained within the bounds of professional discourse, members of an independent commission doing their job as they saw it. As could be expected, the Canadian parties promptly moved for review of the Commission's Decision on Remand by the same panel that had remanded the earlier decision, and that motion was granted by the Panel.

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[64]*Ibid.* at 21.
[65]*Ibid.* at 33.

B. Back before the Panel

On 22 January 1991 (90 days after the Commission's second decision), the Panel rendered its second decision, in a Memorandum Opinion and Order of 38 pages.[66] The Panel concluded — it seems correctly — that it was required by article 1904.8 of the *FTA* to issue a "final decision,"[67] *i.e.*, that the *Agreement* did not contemplate or permit successive remands.[68]

I. *Reopening the Record*

One issue not previously discussed affected the remand proceedings in a major way. The ITC, having been criticized for using unreliable statistics, had announced that it would reopen the record on which it had based its original decision "on three narrow aspects."[69] Parties were invited to make submissions on these three aspects only, within 10 days. Thereafter, however, the Commission, on its own, had taken into account documentary information — particularly Canadian government statistics — going beyond the points specified in its notice and identified in the Panel's Remand Order. In part in reliance on this new information, the Commission's second decision had relied on a new ground to uphold its finding of threat of injury. The Canadian parties, complainants before the Panel, questioned whether the Commission had the authority to open the record, both on the "three narrow aspects" on which the parties could make further submissions and on other aspects.

The question of the authority of an administrative agency to go beyond the initial record in a remand from a court has been a controversial one in U.S. administrative law, and (perhaps to its own surprise) the Panel selected for its expertise in international trade law[70] now set out some of that controversy, quoting at length from a decision of the U.S. Supreme Court in a broadcast application case 50 years ago, *Federal Communications Commission* v. *Pottsville Broadcasting Co.*[71] In *Pottsville*, the Supreme Court, overruling the Court of Appeals, had sustained the FCC's decision to admit a new applicant into a proceeding after remand, on the ground that administrative agencies should not be

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[66]*Memorandum Opinion and Order Regarding ITC's Determination on Remand* (22 January 1991), USA-89-1904-11, reported as *Fresh, Chilled or Frozen Pork from Canada* (1991), 4 T.C.T. 7014 (Ch. 19 Panel).

[67]*Ibid.* at 7016.

[68]*FTA*, art. 1904.8 reads, in pertinent part, as follows:

> Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the facts and legal issues involved and the nature of the panel's decision. In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation. If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall issue a final decision within 90 days of the date on which such remand action is submitted to it.

[69]*Remand Notice*, Inv. No. 701-TA-298 (19 September 1990).

[70]See *FTA* annex 1901.2, paragraph 1.

[71]309 U.S. 134 (1940).

subjected to the tight rules applicable to lower courts, but "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[72] The Panel concluded, however, that the powers of the ITC in a remand determination ordered by a binational panel under the *FTA* might well be different. Had the Commission stuck to its Notice of Remand and enlarged the record only in respect to the three aspects mentioned, the Panel would not, it seems, have reversed the Commission on this ground.[73] However, the fact that the Commission had considered new material on other issues as well, without notice to the parties or opportunity for comment, struck the Panel as unacceptable. The Panel noted that in review of determinations on remand it was limited to 90 days,[74] and that it could not comply with such a limit unless there were an end to new issues and new evidence. "A line," it wrote, "must be drawn somewhere."[75] Thus the Commission had committed a legal error, and its second determination, like the first, must be set aside.[76] In view of the Commission's response to the Remand Order, as described below, it must be said that the Panel's tone was polite and restrained. Moreover, the Panel did not rest its decision on the procedural point, even if it characterized the point as one of "fair play."[77] The Panel went on to address on the merits the new issue raised by the Commission on remand, the issue of product shifting.

2. *Product Shifting*

It was understood by all that the Canadian and provincial governments had been giving subsidies to producers of hogs (live swine),[78] and that at least some of these subsidies had led to countervailing duties imposed by the United States. The ITC majority, as discussed above, had predicted that Canadian subsidies on hogs and subsequently U.S. countervailing duties on live swine would be increased in periods following the period under review, and had inferred that this would lead to reduced exports of live swine to the United States and increased exports of pork. This prediction of product shifting, the Commissioners had reasoned, supported the finding of "threat of injury" to the American

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[72]*Ibid.* at 143.

[73]*Supra*, note 66 at 7020-21.

[74]See *FTA*, art. 1904.8, quoted at note 68 above.

[75]*Supra*, note 66 at 7020.

[76]A subsidiary argument concerned the contention of the Commission before the Panel that the complainants (Canadian parties) did not have the right to due process under the *Fifth* and *Fourteenth Amendments* to the *U.S. Constitution*. The Panel side-stepped this contention by pointing out that art. 1904.3 of the *FTA* required it to apply general legal principles and that art. 1911 defined general legal principles to include due process.

This writer's view, expressed in numerous writings, is that the *Bill of Rights*, and particularly the due process clause, constrains the conduct of officers of the United States acting in their official capacity wherever they act; here, of course, they acted in Washington D.C. in respect of proposed duties to be imposed on imports into the United States. Thus, whatever the merits of the controversy about the fairness of enlarging the record upon remand, the argument that the Commission is not bound by the requirements of due process is unfortunate, to put it as politely as possible, and one may hope that it will not be repeated.

[77]*Supra*, note 66 at 7020.

[78]See Subsidy Phase Round I, *supra*, note 3 and accompanying text.

pork industry. The Panel was not impressed. Neither of the Commissioners' findings, somewhat different from one another, rested, in the Panel's view, on substantial evidence.[79]

In support of this observation, the Panel perhaps made an error in that it, too, looked beyond the record by citing later findings of the Department of Commerce to show that the predictions of the two Commissioners were not sound.[80] In retrospect, the error was a tactical one, in that it opened up the Panel to criticism of doing what it had criticized the Commission for doing. It seems, however, that the Panel was correct in faulting the Commissioners for lack of support for the product shifting theory, and as Commissioner Brunsdale later pointed out,[81] the point was not necessary to the Panel's conclusion.

3. *More on the Hog Cycle*

The two Commissioners had made other arguments as well, based on their interpretation of the so-called hog cycle, and the likelihood, as the Commissioners viewed it, of oversupply of pork in a declining market, and of price cutting by sellers of Canadian pork. Again, the argument failed to persuade the Panel. "[T]he Panel is forced to the conclusion," it wrote, "that the theory is needed because of an absence of evidence of causation."[82]

At this point, the impatience of the Panel with the Commission majority was beginning to show through:

> [T]he Panel again remands the ITC's Remand Determination for action ... not inconsistent with the Panel's decision of August 24, 1990, and not inconsistent with the Panel's Memorandum Opinion [herein] ... and instructs the ITC to conduct this second remand without any further reopening of its Record ... The results of this further remand shall be provided by the ITC to the Panel within 21 days of the date of this decision.[83]

An outside observer might suggest that the traditional courtesies of international dispute settlement, which had on the whole been observed in the earlier phases of the *Pork* case and in all of the other cases under Chapter 19, were beginning to wear thin. The Panel's Memorandum was nothing, however, compared to what followed on the second remand.

V. Injury Phase: Round III

A. The Second Remand at the ITC

On its second remand, the ITC did as it was told. It unanimously determined that an industry in the United States was not materially injured or threat-

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[79]*Supra*, note 66 at 7026.

[80]*Ibid.* at 7024-25. The Panel referred to preliminary results of an administrative review by the Department of Commerce of results of a countervailing duty order on live swine originally issued in 1985, covering the period 1 April 1987–31 March 1988, 55 Fed. Reg. 20812 (1990), which indicated that the deposit rate on sows and boars would be reduced to 0.71 Canadian cents per lb. In its final determination, issued after all of the steps here discussed had been completed, the Department reduced the deposit further, to 0.30 Canadian cents per lb. See 56 Fed. Reg. 10410 (1991).

[81]See *infra*, note 89 and accompanying text.

[82]*Supra*, note 66 at 7025.

[83]*Ibid.* at 7026.

ened with material injury by reason of imports of pork from Canada found to have been subsidized.[84] But the Commissioners who had made up the majority on the first remand left no doubt about how they felt:

> 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. 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. 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 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 the minimum, however, we find many aspects of the Panel decision to lack "intrinsic persuasiveness" and, thus, we will not change our practice or procedure to conform with those aspects of the Panel opinion discussed below.[85]

...And so on for more than thirty pages, full of statements referring to the Panel's "preordained outcome," "counterintuitive, counterfactual, and illogical, but legally binding conclusion," "deliberate misunderstanding of the Commission's views," "woeful lack of knowledge," "egregious intrusion into the factual decision-making authority of the Commission," "impermissible reweighing of the evidence," etc.

The two Commissioners who had twice been overruled by the Panel wrote, as quoted above, that if the decision of the reviewing authority had come from the Court of International Trade they would have instructed their counsel to appeal, a remedy not open to them under the *FTA*. One may also safely surmise that if the decision on remand had been issued by the Court of International Trade, the Commissioners would not have used the tone they used to attack the Panel. The tension was compounded by the separate views of the Acting Chairman of the Commission, Anne E. Brunsdale, who concurred in the result because the finding of threat of injury had been rejected, but dissented, as before, from the views of Commissioners Newquist and Rohr, and complained that because her views on the merits were known, she had not even been permitted to review the draft opinion prepared by the General Counsel pursuant to the majority's instructions. Though she understood that the majority "takes umbrage with certain portions of the Panel's opinion," Brunsdale agreed with the Panel that as a matter of due process, the Commission should not base its

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[84] *Fresh, Chilled, or Frozen Pork from Canada, Second Remand Determination*, 12 February 1991 [on file with author].

[85] *Ibid.* at 4-5. Footnotes to the quoted text have been omitted.

decisions on remand on grounds different from those supporting its original decision.[86] "While I differ on some of the particulars of the Panel's decision," she wrote, "it does make good general points regarding the Commission's obligations when the case is remanded from an appellate authority. In the future, I will be sure to keep these principles in mind and act accordingly."[87]

VI. Some Reflections on the Clash between the Panel and the Commission

A. *Predietions, Predictions*

Beyond the quarrel between the Commission majority and the Panel, and among the members of the Commission, the *Pork* case raises an issue important both to administrative law and to international trade law. In its Determination on Remand on "threat of injury," the Commission had developed a theory of "product shifting," which as discussed above predicted a rise in imports of pork on the basis of an expectation of a rise in countervailing duties on live swine.[88] By the time the Panel heard the case for the second time, it had turned out that countervailing duties did not rise as much as the Commission had expected, as shown by later findings by the Commerce Department published in the Federal Register. In its opinion on the second remand, the majority of the Commission, stung by the Panel's criticism of its use of new information in the first remand, in turn criticized the Panel for citing the later figures from the Federal Register to support its rejection of the Commission's prediction. But as Chairman Brunsdale pointed out, it is hard to review a finding of "threat of injury" — by definition based on a prediction — while closing one's eyes to information showing that the prediction had been erroneous. Chairman Brunsdale chose to regard this part of the Panel's decision as *obiter dictum*.[89] To the present writer, it confirms a long-time scepticism about findings of threat of injury in the absence of a finding of present injury. Of course the concept of "threat of injury" is contained in article VI of the *GATT*, in the Subsidies and Anti-Dumping Codes concluded during the Tokyo Round of trade negotiations, and in both United States and Canadian law.[90] A good case can be made that in certain situations, typically when there have been rapid surges of imports and a clear trend has developed, the law need not require proof of devastating injury before relief can be granted. But given the uncertainty of predictions, it is sometimes said that burden of proof of threat of injury should be heavier than for proof of actual

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[86]*Ibid.* at 36-38 (concurring views of Acting Chairman Brunsdale).

[87]*Ibid.* at 37. Compare the last sentence in the Acting Chairman's opinion with the last sentence of the long quotation from the majority, *supra*, note 85 and accompanying text.

[88]*Supra*, note 65.

[89]*Supra*, note 84 at 40.

[90]For the United States law, 19 U.S.C. §1671(a)(2)(A)(ii) (subsidies); §1673(2)(A)(ii) (dumping). For the Canadian law, see *Special Import Measures Act*, R.S.C. 1985, c. S-15, s. 3, which refers to "dumped and subsidized goods imported into Canada in respect of which the [Canadian International Trade] Tribunal has made an order or finding ... that the dumping or subsidizing of goods of the same description has caused, is causing, *or is likely to cause* material injury ... ." [emphasis added] See also the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. C-18.3, s. 26(4).

injury.[91] Could one go further and posit a general assumption that — as seems to have happened in the *Pork* case — scrutiny of the finding of threat of injury by the reviewing authority should be stricter, and deference to the administering authority should be less than for other issues in anti-dumping and anti-subsidy proceedings?

B. The Pork Case and the FTA

As to the binational review process itself, clearly it cannot continue if a major agency of the U.S. government — albeit an independent agency — regards the process as fundamentally unfair. However only two Commissioners have expressed this view, with the acting Chairman disagreeing and three vacancies; the Panel, for its part, has been discharged, and it is unlikely that its members will soon serve again as panelists — certainly not together. Thus the clouds of war may not be as threatening as one would have thought in the spring of 1991 from first reading the decisions of the Panel and the Commission majority in the *Pork* case. In fact the clouds became even darker in the ensuing months, before a silver lining appeared, as described below.

VII. Extraordinary Challenge: Round IV

A. Raising the Challenge

The two disgruntled Commissioners of the ITC had contented themselves, as described above, by venting their frustrations in their opinions on remand. The private litigants, however, *i.e.*, the National Pork Producers Council and its members and associates, first changed counsel and then sought to invoke — for the first (and at this writing, the only) time since the *FTA* entered into effect — the Extraordinary Challenge Procedure provided in article 1904.13 of the *FTA*. Article 1904.13 and the Annex to that article provide for establishment of a three-member committee selected from a roster of 10 retired judges (half Canadian, half American) which is supposed to decide within 30 days from its establishment whether

> a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
>
> ii) the panel seriously departed from a fundamental rule of procedure, or
>
> iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, and
>
> b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process.[92]

A private party cannot itself invoke the Extraordinary Challenge Procedure. That decision is up to the "Parties," *i.e.*, the two governments. For the

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[91]See, for example, *Hannibal Industries, supra*, note 48 at 338 quoted by the Panel in its second opinion in *Pork, supra*, note 66 at 7021. In that case the Court upheld the Commission's determination (3-2) that threat of injury had not been proved. Commissioner Rohr, one of the members of the majority in the *Pork* case, dissented in *Hannibal Industries, i.e.*, he would have found threat of injury, though not actual injury.

[92]*FTA*, art. 1904.13.

United States, the decision on whether to initiate an Extraordinary Challenge is committed to the U.S. Trade Representative, who is to consider recommendations from an interagency group under her chairmanship.[93]

The request for establishment of the Extraordinary Challenge Committee did not allege personal misconduct of any panelist; it did, however, invoke both paragraphs (a)(ii) and (a)(iii). In brief, the petition criticized the Panel in five respects. It asserted:

1. That the Panel had departed from a fundamental rule of procedure in holding that the Commission had been wrong in its determination on the first remand reopening the record beyond the limited notice it had given. According to the petition, the Panel was wrong to apply principles of "fair play and due process," rather than determining what process was due under U.S. law. "If panels are permitted to ignore U.S. law and make new *FTA* law," the petition asserted, "...the integrity of the binational panel process will be undermined."

2. That the Panel itself erroneously considered evidence outside the administrative record, *i.e.*, the information on actual sales of live swine as disclosed by the Department of Commerce after the Commission's original determination.

3. That the Panel had "invented" a rule of finality in ordering that its second review would be its last. The Panel, as noted above, had construed article 1904.8 of the *FTA* as requiring a "final decision" if review of a decision on (first) remand was needed. The petition, however, asserted error in that panel review is supposed to be like review by the Court of International Trade, which has from time to time remanded a case to the Commission more than twice. "This perceived need for finality," the petition asserted, "led to a rush to judgment at odds with the governing law."

4. That the Panel had disregarded the substantial evidence standard in rejecting the finding of Commissioners Newquist and Rohr that there was likelihood of product shifting from exports of live swine to pork. The Panel, it will be recalled, had thought the whole theory of product shifting was needed because the evidence was lacking.

5. That the Panel had erred in requiring evidence of price underselling, though the Commission had not made a specific finding of price underselling, but had simply inferred the likelihood of price suppression from the likelihood of increased supplies.[94]

Finally, the petition sought to put pressure on the Trade Representative. "[T]he Second Remand Decision," the petition said, "not only undermines the integrity of the binational review process with Canada but throws into doubt the wisdom of using such a mechanism in any free trade agreement negotiated with Mexico."[95]

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[93]See *U.S.-Canada Free Trade Agreement Implementation Act of 1988*, §405(a)(I)(A) and (B)(iv), Pub. L. 100-449.

[94]Petition to Invoke Extraordinary Challenge Procedure, at 18-20 [on file with author].

[95]*Ibid.*

The decision for the U.S. Trade Representative on whether to initiate the Extraordinary Challenge Procedure must not have been an easy one. On the one hand the Trade Representative surely desired to keep the *FTA* on track and to maintain the essentially non-political way that Chapter 19 disputes have been addressed; on the other hand, she had to take into account the discontent on the part of the ITC, as well as on the part of the National Pork Producers Council and its friends in Congress, whose votes would be needed in the context of the President's request for extension of fast-track authority for the Uruguay Round and for negotiation of a free trade agreement with Mexico.[96] In the event, the U.S. Trade Representative decided to request formation of an Extraordinary Challenge Committee, and to include in the request, dated 29 March 1991, every one of the points raised in the petition of the complainants.[97]

To the present writer, outside the line of fire, it seemed that the Extraordinary Challenge Procedure was not suitable for the issues raised in the *Pork* case, and I so stated in the Report to the Administrative Conference from which this paper is adapted. The potential members of the Extraordinary Challenge Committee, by definition, are not experts in international trade, but as retired judges, are expected to be able to recognize gross misconduct, conflict of interest, denial of the right to be heard, and the like. They are not supposed to be a court of appeal for the binational review procedure. If, as remarked earlier, patience on all sides had worn thin in this case by the time of the second determination and second remand, it did not seem to me that these manifestations "threaten[ed] the integrity of the binational panel review process." I was worried that Chapter 19 of the *FTA* might go the way of the World Bank *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*[98] — which has been seriously undermined by repeated resort to a procedure for annulment of arbitral awards[99] that was intended as a safety valve for gross violations of due process but has come to be used by dissatisfied litigants as a device for delay and repeated appeals.[100]

B. The Decision of the Extraordinary Challenge Committee

It turns out that I need not have worried. An Extraordinary Challenge Committee was quickly chosen, consisting of two retired Canadian judges and one

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[96]In fact letters to Ambassador Hills urging resort to the Extraordinary Challenge Procedure were sent from some 26 members of the Senate and about 50 members of the House of Representatives.

[97]I think it is not unfair to point out that Senator Baucus of Montana, the spokesman for the U.S. pork producers (and author of the amendment, *supra*, notes 9, 16 and accompanying text, with which the other *Pork* Panel had wrestled) was also the Chairman of the Subcommittee on International Trade of the Senate Finance Committee. Senator Baucus had already promised his support for fast-track authority, and with his help, the resolutions to reject fast-track authority were defeated in both Houses of Congress. See 137 Cong. Rec. H3517, 3588 (23 May 1991) (House of Representatives); 137 Cong. Rec. S6765, 6777, 6829 (24 May 1991) (Senate).

[98]18 March 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (in force 14 October 1966).

[99]*Ibid.* art. 52.

[100]See, for example, W.M. Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration" [1989] Duke L.J. 739.

retired American federal judge, who served as chairman. The Committee received extensive briefs and heard oral argument on 15 May 1991.[101] By 14 June 1991, the Committee was ready with its opinion:

> As its name suggests, the "extraordinary" challenge procedure is not intended to function as a routine appeal. Rather the decision of a binational panel may be challenged and reviewed only in "extraordinary circumstances." While the legislative history of the extraordinary challenge committee mechanism is lacking in specifics, it is clear that the extraordinary challenge procedure is intended solely as "a safeguard against an impropriety or gross panel error that could threaten the integrity of the [binational panel review] process... ." ...The challenge committee's function is to determine whether a panel or panel member violated the three-prong standard of the extraordinary challenge procedure.[102] In contrast, a binational panel is composed of five individuals with expertise in international trade law. The panel members' function is to review the record evidence and the trade law issues that have been raised before the competent investigation authority. The committee and the panel have separate roles and different expertise; it is not the function of a committee to conduct a traditional appellate review regarding the merits of a panel decision.[103]

The Committee pointed out further that under the *FTA* it has only 30 days to complete its task, in contrast to the 315 days allotted to the ordinary panels for review of agency decisions, and that only governments, not private parties, could initiate challenge procedures.

The Committee reviewed all five allegations of error by the Panel in its second review:[104]

1. *The claim that the Panel created a due process principle independent of U.S. law.* This had to do with the Panel's criticism of the ITC for opening the record on remand beyond what it had announced. The assertion that applying a due process standard was contrary to U.S. law might have sounded strange to the Committee. The Commissioners had argued that as foreign nationals the Canadian parties were not entitled to the protection of the *Fifth Amendment* to the *U.S. Constitution* (a highly dubious argument),[105] and the Panel had side-stepped this issue by pointing out that in any event article 1911 of the *FTA* expressly incorporates due process as one of the "general legal principles" to be applied by the panels. The Committee rejected the argument raised in the challenge that this was using the *FTA* as an independent source of law, pointing out that the Panel had carefully reviewed U.S. cases on agency discretion following remand.
2. *The claim that the Panel improperly considered non-record evidence.* This had to do with the Panel's citation of later figures issued by the Commerce

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[101]Supporting the challenge were the U.S. Trade Representative, the ITC, and the National Pork Producers Council; opposing the challenge were the governments of Canada and Alberta, the Canadian Meat Council, Canadian Packers, and Moose Jaw Packers (1974) Ltd.

[102]See *FTA*, art. 1904.13, excerpted *supra*, note 92.

[103]*In the Matter of Fresh, Chilled or Frozen Pork from Canada* (14 June 1991), 4 T.C.T. 7037 (Ex. Chall. Ctee).

[104]Compare the somewhat fuller statement of the allegations at *supra*, note 94 and accompanying text.

[105]See, for example, *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931).

Department that showed that the Commissioner's predictions about higher countervailing duties on live swine had been erroneous. As suggested earlier, this was probably a mistake on the part of the Panel, and the Extraordinary Challenge Committee said so. But it probably did not affect the Panel's basic conclusion that Commissioner Newquist's finding of product shifting was unsupported by substantial evidence. In any event, even if the Panel's look at the Federal Register had constituted a serious departure from a fundamental rule of procedure or manifest excess of authority (see article 1904.13(a)(ii) and (iii)), which the Committee did not say, it had not "materially affected the panel's decision" and had not threatened the integrity of the binational review process (article 1904.13(b)), and so could not be the basis for setting aside the Panel's decision.

3. *The claim that the Panel improperly applied a procedural rule of finality.* This had to do with the Panel's instructions to the Commission to issue its decision without further reopening of the record and within 21 days. The Committee said that the Panel was within its authority to demand a final decision after the record before the ITC had been combed "not once but twice in search for evidence of threat of material injury."[106]

4. *The claim that the Panel effectively applied a "de novo standard of evidentiary review" instead of the correct standard of "substantial evidence on the record."* This again, had to do with the issue of product shifting for which the Panel could find no evidence. The Committee pointed out that the Panel had correctly stated the standard of review in its first decision, and had made considerable effort in both of its decisions to determine presence or absence of substantial evidence supporting the Commission's decisions. The Committee was not willing to substitute its judgment for that of the expert panelists on whether the Commission's findings were supported by substantial evidence, when it was clear that the correct standard had been conscientiously applied.

5. *The claim that the Panel reweighed the evidence in a manner contrary to United States law by requiring that the ITC find "price underselling" in order to find a likelihood of negative impact on the United States pork prices.* This had to do with the argument by the Commissioners about the hog cycle. Petitioners claimed that the Panel had unfairly accused the Commission of predicting underselling, for which it was conceded that there was no evidence, when all the Commissioners had meant was that increased supplies would lead to lower prices. The Committee concluded that the allegation overstated the Panel's finding that it had been troubled by Commissioner Rohr's argument; the Panel had merely mentioned the lack of evidence of underselling as an absence of evidence of causation.

> The Committee concludes that none of the allegations provide a basis for jurisdiction for an extraordinary challenge under *FTA* Article 1904.13(a), and that none of the alleged errors materially affected the panel decision or threaten the integrity of the panel review process under *FTA* Article 1904.13(b).[107]

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[106]*Supra*, note 66 at 7017.
[107]*Supra*, note 103 at 7042.

Thus the Panel's decision stood, the great case of *Fresh, Chilled, and Frozen Pork* was finished (at least for the time being), and the crisis in administering the dispute settlement system under Chapter 19 of the *FTA* was over.

Conclusion

It is, of course, still early in the history of the *FTA*, though if one takes seriously the provision in article 1906 that Chapter 19 is only an interim arrangement for five (or at most seven) years, we are more than half way through the try-out stage.[108] I believe that everyone concerned with the *FTA* has learned from the experience thus far, and I think the crisis in the *Pork* case may, in retrospect, have proven to be a kind of cement, binding the two countries together on their common adventure.

The Extraordinary Challenge Committee saw the danger that it would be seen as an appellate forum, and rejected that approach firmly, and I venture to predict decisively.

Both in the initial review and in the review of the decision on remand, all five members of the binational panel in *Pork: Injury Phase* were agreed on the principal findings. There is thus no basis for suggesting that the nationality of the Panel members led to what turned out to be an ugly scene; on the contrary, in both Panels in the *Pork* case, as well as in the Extraordinary Challenge Committee, there was no room for, and no evidence of, home town justice, party-appointed arbitrators, or other aspects of "diplomacy by other means."

On the merits, those persons in Canada who had never looked at their country's agricultural policy must have been startled that for a relatively minor product, 36 different programs of government aid were identified, and first 18, then eventually 15 or 16 (it is not easy to count) were held to be countervailable subsidies. The romantic figure of Farmer Brown in a Grant Wood painting seems ever more removed from reality — in Canada, as in the United States, in the European Community, and everywhere else the soil is cultivated or animals are raised for gain. On the other hand, the eventual conclusion that the United States and Canada are indeed one market must be reassuring to those on both sides of the border who really believe in the concept of a *Free Trade Agreement.*

Whether we have learned something about the law of subsidies — about "specificity," "upstream" and "downstream," "pass-through," and "product-shifting" — is hard to tell. Certainly the simple system of export subsidies described in the textbooks, where a bonus is paid on each item (or each additional item) exported, counteracted by a duty in equal amount, is very far from

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[108] *FTA*, art. 1906 provides:

> The provisions of this Chapter shall be in effect for five years pending the development of a substitute system of rules in both countries for antidumping and countervailing duties as applied to their bilateral trade. If no such system of rules is agreed and implemented at the end of five years, the provisions of this Chapter shall be extended for a further two years. Failure to agree to implement a new regime at the end of the two-year extension shall allow either Party to terminate the Agreement on six-month notice.

the issues that had to be decided in *Pork* as well as in the other cases that have come before panels under the *FTA*. I doubt that the drafters of the agreement on dumping and subsidies that is supposed to replace Chapter 19 have been helped by the experience of the panels, except to the extent that they could see the complexity of the issues and the depth of the feelings involved.

Finally, though the government of Canada at one point viewed resort by the United States government to the Extraordinary Challenge Procedure as an unfriendly act, eight or nine months later no scars remain, as far as I can see. If the dispute over pork — first between the American and Canadian producers and later between the two governments — was not exactly a lovers' quarrel, it does now seem more like a test of the durability of the relationship between the two countries, and a test of the *Free Trade Agreement*. That test, I believe, has been passed.