with the parties concerned, on the composition of the Panel (SR.45/2, page 9)

1.2 The terms of reference are as follows:

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Canada in document DS7/1 and to make such findings as will assist the CONTRACTING PARTIES

this product. One of the conditions is that "a competitive benefit has been bestowed when the price for the input product … is lower than the price that the manufacturer or producer which is the subject of countervailing duty proceeding would otherwise pay for the product in obtaining it from another seller in an arms-length transaction." The CMC argued that had the DOC used Section 771A, it would have found that a "competitive benefit" had not been bestowed on the pork processing sector by the provision of assistance to swine producers.

2.3 The DOC declined to conduct an upstream subsidy enquiry under Section 771A, concluding that "live swine was not an 'input' into unprocessed pork".[1] The basis of the DOC determination was two criteria: (i) the level of value added by pork processors and (ii) the rôle of the processor in converting swine into pork. The DOC stated: "Given the congressional mandate to acknowledge the special nature of agriculture, our practice, the ITC's past practice, which is now sanctioned by the CIT and the reasonableness of treating the new and next stage product together for purposes of subsidy analysis, we do not consider live swine to be an input into unprocessed pork."[2]

2.4 The CMC appealed the final subsidy determination by the DOC to the US Court of International Trade (CIT). The particular point of the appeal was the decision by the DOC not

2.6 Subsequent to the CIT decision in the pork and swine case, Congress amended, in 1988, the Tariff Act of 1930 by adding Section 771B. This provision reads:

> "In the case of an agricultural product processed from a raw agricultural product in which
>
> (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."

2.7 On 5 January 1989, the US National Pork Producers' Council again filed a petition with the DOC to initiate a countervailing duty investigation on fresh, chilled and frozen pork imported from Canada. The DOC published an affirmative preliminary determination of subsidization on 8 May 1989[1], and an affirmative final determination of subsidization on 24 July 1989.[2] The ITC affirmative final threat of injury finding was made on 28 August 1989.[3] Of the eighteen programmes found to be countervailable, five were found to have been provided to pork processors; the others were provided to producers of live swine. The DOC final subsidy determination found the subsidy to pork to be $00.08 per kilogramme ($ Can). Of this, $00.079144 per kilogramme was attributed to subsidies provided to Canadian producers of live swine and $00.000856 per kilogramme (or 1.1 per cent of the total) was attributed to subsidies provided to pork processors.

2.8 In making its determination, the DOC decided that the criteria of Section 771B of the Tariff Act of 1930 were fulfilled and deemed that subsidies found to have been provided to live swine were provided with respect to the manufacture, production, or exportation of fresh, chilled, and frozen pork. Briefly summarized, the United States used the following methodology to determine the amount of the subsidies bestowed upon the production of the fresh, chilled, and frozen pork:

(a) Applying the test set forth in Section 771B, the DOC first examined the demand for live swine and found that it depended substantially on the demand for fresh, chilled, and frozen pork. "Swine producers raise most swine for slaughter. Pork constitutes the primary product of the slaughtered pig. Thus, the demand for pork and for live swine are inextricably

(c) Having determined that the statutory criteria had been met, the DOC then used the percentage carcass weight equivalent for live swine (0.795) to convert the subsidies pertaining to live swine into subsidies to fresh, chilled, and frozen pork. The two largest programmes in the investigation used similar conversion factors and the DOC concluded that 79.5 per cent most closely approximated the conversion factor used by the Canadian stabilization programmes and the provincial marketing boards and packers in determining the final price to be paid for live swine.

(d) The result of the determination was that the DOC found countervailable subsidies on fresh, chilled and frozen pork based on subsidies granted to producers of live swine where the criteria contained in Section 771B were met.

III. MAIN ARGUMENTS

Findings and recommendations requested by the parties

3.1 Canada requested the Panel to find that the United States, by levying a countervailing duty on pork in excess of an amount equal to a subsidy determined to have been granted on the production of pork, had failed to comply with the conditions set out in Article VI:3 for the levying of countervailing duties and thus had acted inconsistently with Article II of the General Agreement. It requested the Panel to recommend that the United States refund the excess duties collected, that no further duties be collected unless the conditions of Article VI:3 were met and that the United States terminate Section 771B.

3.2 The United States requested the Panel to find that the countervailing duty was levied consistently with Article VI:3 and to recommend the rejection of the complaint.

Article VI of the General Agreement

3.3 Canada pointed out that the United States had bound its tariff on fresh, chilled, and frozen pork under the GATT. Article II.2.b provided that a contracting party might impose a countervailing duty on the importation of any products regardless of a binding of the tariff, provided it was applied consistently with the provisions of Article VI. Canada argued that Article VI should be interpreted in a narrow

or indirectly on the manufacture, production or export of a product, the provision made it clear through the use of the words "any product" and "such product" that, if a countervailing duty was levied, it had to be based on an examination of subsidies to the specific product under investigation.

3.5 Recalling that Article VI:3 stipulated that the estimate of the subsidy granted directly or indirectly had to be "determined", Canada submitted that the word "determined" was to be understood as an establishment of the facts. In support of its position, it quoted conclusions of the Panel on Swedish Anti-Dumping Duties where it was stated that "… it was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts had been established. As this represented an obligation of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these its action is challenged."[1]

manufacture of

The Committee's Report indicated that the Committee had purposefully inserted the words "directly or indirectly" to make clear that Article XVI:1 "can thus not be interpreted as being confined to subsidies operating directly to affect trade in the product under consideration."[1] Thus, the General Agreement indicated that a contracting party might, in order to implement the remedies established at Article VI, offset the full effects on trade caused by a subsidy provided to a product and thus restore trade to the position it would have been in without the subsidy.

3.7 Canada challenged this argument by contending that, if accepted, it would expand the scope of Article VI to permit the imposition of countervailing duties of an arbitrary amount to offset the effects on trade caused by a subsidy. Canada further said that this argument suggested that the notification of a subsidy pursuant to Article XVI, ipso

3.10 In the United States' view, Canada erred in confusing the

cent from 1985 and largely represents the pork equivalent that would have been produced from the decline in live hog imports in 1986. Pork imports are not subject to a countervailing duty." Section 771B was intended to address such circumstancedress

Canadian live swine in spite of the US countervailing duty on Canadian live swine. Given the integration of the swine and pork markets, Canadian swine producers, in considering where to market their swine, had two options: selling to US pork processors or selling to Canadian pork processors. Canadian swine producers would, naturally, sell to the processor offering them the highest price (net of the various costs associated with selling, such as shipping). If Canada were an isolated market and subsidies provided to Canadian swine producers were shown to affect swine supply, this would be expected to cause Canadian swine prices to decline. However, given the integrated nature of the North American market, any such supply response in Canada would have a negligible impact on North American and Canadian swine prices. To support its position Canada provided statistical information on the basis of which it considered that swine prices did not decline to any significant degree and subsidies allegedly provided to Canadian swine producers were not passed through to pork producers in any substantial way. An indirect subsidy investigation, taking into account the relevant economic factors, was required in order to determine whether, and to what degree, alleged subsidization of swine producers was passed through to Canadian processors.

3.15 The United States responded that the tests set forth in Section 771B were narrowly tailored to address a very specific problem. While Section 771B did not precisely define the type of processing operation that added "only limited

3.16 Canada replied that it had not requested the United States to undertake a price differential analysis in order to determine the degree to which input subsidies benefited the product subject to a countervailing duty investigation. Canada had suggested to the United States different methods which, in its view, met the requirement of Article VI. The United States, however, had refused to use a different method. In the case of commodities such as pork and swine in North America, markets were competitive. There was a large number of independent buyers and sellers, none of whom could individually affect market prices

duty on beef originating in Denmark and Ireland respectively. In the pork case there had been no export subsidies and

for a market hog in Canada was 79.5 per cent. This yield factor measured the ratio of the weight of the warm dressed carcass to the weight of the live hog. This factor also determined in part the settlement price paid by the pork packer to the hog farmer. Finally, and most important, the percentage pork yield from live swine was used by the Tripartite Programme and the Quebec Farm Income Stabilization Insurance Programme - the two largest subsidy programmes investigated - to calculate the benefits paid to live swine producers. Therefore, because the conversion factor of 79.5 per cent most closely approximated the pork yield from live swine, it was reasonable and fully consistent with US obligations under Article VI for the DOC to use this factor to convert the live swine that received subsidies into fresh,

4.4 The Panel examined this issue in the light of the wording of Article VI:3, the relationship between this provision and Article XVI, and the purpose of Article VI:3. In conducting this examination, the Panel took into

of live swine have been bestowed on the production of pork may be based solely on a finding that the criteria set out in Section 771B have been met. The Panel noted the views of the United States that Article VI:3 does not prescribe

that a countervailing duty be reimbursed (SCM/85, page 22). However, the Panel also noted that the case before it differs from the past cases in one important respect. In these cases the panels found that the duties should not have been levied at all, in one case because no causal link between the allegedly dumped imports and the injury to the domestic industry had been established, and in the other because the petition had not been made by the affected industry. The present Panel has not made the finding that the countervailing duty should not have been levied at all. It merely found that the determination that a subsidy was bestowed on pork production was not made in conformity with Article VI:3. It is not excluded that a subsidy determination meeting the requirements of Article VI:3 leads to the conclusion that the subsidies bestowed on swine producers benefit - at least in part - the production of pork. Under these circumstances it did not seem appropriate for the Panel to recommend that the CONTRACTING PARTIES request the immediate reimbursement of