

Dated: August 31, 1998.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import
Administration

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DEPARTMENT OF COMMERCE

International Trade Administration

[C-122-404]

Live Swine from Canada; Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of countervailing duty administrative review.

SUMMARY: On April 30, 1998, the Department of Commerce ("the Department") published in the **Federal Register** its preliminary results of administrative review of the countervailing duty order on live swine from Canada for the period April 1, 1996 through March 31, 1997 (63 FR 23723). The Department has now completed this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended. For information on the net subsidy, please see the *Final Results of Review* section of this notice. We will instruct the U.S. Customs Service ("Customs") to assess countervailing duties as detailed in the *Final Results of Review* section of this notice.

EFFECTIVE DATE: September 4, 1998.

FOR FURTHER INFORMATION CONTACT: Gayle Longest or Lorenza Olivas, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-2786.

SUPPLEMENTARY INFORMATION:

Background

The Department has determined that it is not practicable to conduct a company-specific review of this order because of the large number of producers and exporters which requested the review. Therefore, pursuant to section 777A(e)(2)(B) of the Tariff Act of 1930, as amended, we are conducting a review of all producers and exporters of subject merchandise covered by this order on the basis of aggregate data. This review covers 27 programs.

Since the publication of the preliminary results on April 30, 1998 (63 FR 23723), the following events have occurred. We invited interested parties to comment on the preliminary results. On June 10, 1998, case briefs were submitted by the Government of Quebec ("GOQ"), and the National Pork Producers Council ("petitioner"). On June 17, 1998, rebuttal briefs were submitted by the Government of Canada ("GOC"), GOQ, and the Canadian Pork Council ("CPC"). At the request of the GOQ, the Department held a public hearing on July 9, 1998.

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act ("URAA") effective January 1, 1995 ("the Act"). The Department is conducting this administrative review in accordance with section 751(a) of the Act. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations codified at 19 CFR Part 351, published in the **Federal Register** at 62 FR 27296 (May 19, 1997).

Scope of the Review

The merchandise covered by this order is live swine, except U.S. Department of Agriculture ("USDA") certified purebred breeding swine, slaughter sows and boars, and weanlings, (weanlings are swine weighing up to 27 kilograms or 59.5 pounds) from Canada. The merchandise subject to the order is classifiable under the *Harmonized Tariff Schedule* ("HTS") item numbers 0103.91.00 and 0103.92.00. The HTS item numbers are provided for convenience and Customs purposes. The written description of the scope remains dispositive.

Allocation Methodology

In the past, the Department has relied on information from the U.S. Internal Revenue Service ("IRS") on the industry-specific average useful life of assets in determining the allocation period for nonrecurring grant benefits. See *General Issues Appendix* appended to the *Final Countervailing Duty Determination; Certain Steel Products from Austria*, 58 FR 37063, 37226 (July 9, 1993). However, in *British Steel plc. v. United States*, 879 F. Supp. 1254 (CIT 1995) (*British Steel*), the U.S. Court of International Trade ("the Court") ruled against this allocation methodology. In accordance with the Court's remand order, the Department calculated a company-specific allocation period for nonrecurring subsidies based on the

average useful life ("AUL") of non-renewable physical assets. This remand determination was affirmed by the Court on June 4, 1996. See *British Steel*, 929 F. Supp. 426, 439 (CIT 1996).

The Department has not appealed the Court's decision and, we intend to determine the allocation period for nonrecurring subsidies using company-specific AUL data where reasonable and practicable. In *Live Swine from Canada; Preliminary Results of Countervailing Duty Administrative Review* (62 FR 52426; October 7, 1996) and *Live Swine from Canada; Final Results of Countervailing Duty Administrative Review* (62 FR 18087; April 14, 1997) (*Swine Tenth Review Results*), the Department determined that it is not reasonable and practicable to allocate nonrecurring subsidies using company-specific AUL data because it is not possible to apply a company-specific AUL in an aggregate case (such as the case at hand). Accordingly, in this review, the Department has continued to use as the allocation period the average useful life of depreciable assets used in the swine industry, as set forth in the U.S. IRS Class Life Asset Depreciation Range System (see *Swine Tenth Review Results*), which is a period of three years.

The GOQ submitted a comment on the allocation period. The GOQ agreed with the Department that the IRS tax tables are appropriate for allocating nonrecurring grants in this review. However, because better sources of information may be available in future reviews of this case, the GOQ argues that the Department should accept suggestions from interested parties in future reviews regarding more appropriate sources to calculate the allocation period. In future reviews, the Department will allow interested parties to submit information and comment on any other reasonable and practicable approaches for complying with the Court's ruling with respect to the appropriate allocation period.

Analysis of Programs

Based upon the responses to our questionnaire, and written comments from the interested parties, we determine the following:

I. Programs Conferring Subsidies

In the preliminary results, we found that the following programs conferred countervailable benefits on the subject merchandise. We did not receive any comments on these programs from the interested parties, and our review of the record has not led us to change any findings or calculations. Accordingly, the net subsidies for each of these

programs (less than Can\$0.0001 per kilogram, except for the National Transition Scheme for Hogs Program, which is Can\$0.0041 per kilogram), remain unchanged from the preliminary results.

1. National Transition Scheme for Hogs Program
2. Alberta Crow Benefit Offset Program (ACBOP)
3. Ontario Livestock and Poultry and Honeybee Compensation Program
4. Saskatchewan Livestock Investment Tax Credit
5. Saskatchewan Livestock Facilities Tax Credit
6. New Brunswick Livestock Incentives Program
7. New Brunswick Swine Industry Financial Restructuring and Agricultural Development Act—Swine Assistance Program

II. Programs Found Not To Confer Subsidies

In the preliminary results, we found the following program did not confer subsidies during the POR. Our analysis of the comments submitted by the interested parties, summarized below, has not led us to change our findings from the preliminary results.

1. Research Program under the Canada/Quebec Subsidiary Agreement on Agri-Food Development

III. Programs Found To Be Not Used

In the preliminary results, we found that the producers and/or exporters of the subject merchandise did not apply for or receive benefits under the following programs:

1. Western Diversification Program
2. Farm Income Stabilization Insurance
3. Federal Atlantic Livestock Feed Initiative
4. Agricultural Products Board Program
5. Newfoundland Farm Products Corporation Hog Price Support Program
6. Newfoundland Hog Price Stabilization Program
7. Newfoundland Weanling Bonus Incentive Policy
8. Nova Scotia Improve Sire Policy
9. Ontario Bear Damage to Livestock Compensation Program
10. Ontario Rabies Indemnification Program
11. Ontario Swine Sales Assistance Policy

We did not receive any comments on these programs from the interested parties, and our review of the record has not led us to change our findings from the preliminary results.

IV. Programs Found To Be Terminated

In the preliminary results, we found the following programs to be terminated and that no residual benefits were being provided. Our analysis of the comments submitted by the interested parties, summarized below, has not led us to change our findings from the preliminary results.

1. New Brunswick Swine Assistance Policy on Boars
2. Ontario Export Sales Aid

V. Other Programs Examined

On November 17, 1997, the GOC and the GOQ requested "green box" treatment for the Agri-Food Agreement. Under section 771(5B)(F) of the Act, domestic support measures provided with respect to the agricultural products listed in Annex 1 to the 1994 WTO Agreement on Agriculture shall be treated as noncountervailable if the Department determines that the measures conform fully with the provisions of Annex 2 of that same Agreement. The GOQ and the GOC claimed that the Agri-Food Agreement met these criteria, and therefore, funding under the Agri-Food Agreement should be noncountervailable pursuant to section 771(5B)(F) of the Act.

The initial Agri-Food Agreement was signed on February 17, 1987 and remained in effect from 1987 to 1991. On August 26, 1993, a new Agri-Food Agreement was enacted by the governments of Canada and Quebec covering the period April 1, 1993 through March 31, 1998. Funding for this agreement is shared 50/50 by the federal and provincial governments. Through this Agreement, grants are made to private businesses and academic organizations to fund projects under the following program areas: (1) Research, (2) Technology Innovations, and (3) Support for Strategic Alliances.

The Department has previously examined each of the three components under the Agri-Food Agreement (Research, Technology Innovation, and Support for Strategic Alliances) as three separate programs. *See Swine Tenth Review Results*. During the POR, producers of the subject merchandise received assistance under the three component programs of the Agri-Food Agreement for which the GOC and the GOQ have requested green box treatment.

Specifically, with regard to the Research program, we have determined that this program does not confer countervailable benefits because the results of the research are publicly available. As such, there is no need to address whether it is non-

countervailable in the context of section 771(5B)(F) of the Act. With regard to the Technology Innovations program and the Support for Strategic Alliances program, any benefit to the subject merchandise under either program or both programs combined is so small (Can\$ 0.0000013 and Can\$ 0.0000008 per kilogram, respectively) that there is no cumulative impact on the overall subsidy rate. Accordingly, because there is no impact on the overall subsidy rate in the instant review, we have not included the benefits from Technology Innovations program and the Support for Strategic Alliances program in the calculated subsidy rate for the POR, and do not consider it necessary to address the issue of whether benefits under these programs are noncountervailable as green box subsidies pursuant to section 771(5B)(F) of the Act. *See, e.g., Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Germany*, 62 FR 54990, 54995 (October 22, 1997); *Certain Carbon Steel Products from Sweden; Preliminary Results of Countervailing Duty Administrative Review*, 61 FR 64062, 64065 (December 3, 1996) and *Certain Carbon Steel Products from Sweden; Final Results of Countervailing Duty Administrative Review*, 62 FR 16549 (April 7, 1997); *Final Negative Countervailing Duty Determination: Certain Laminated Hardwood Trailer Flooring ("LHF") From Canada*, 62 FR 5201 (February 4, 1997); *Industrial Phosphoric Acid From Israel; Preliminary Results of Countervailing Duty Administrative Review*, 61 FR 28845 (June 6, 1996) and *Industrial Phosphoric Acid From Israel; Final Results of Countervailing Duty Administrative Review*, 61 FR 53351 (October 11, 1996).

In addition, some farmers in Prince Edward Island received payments during the POR under the Agricultural Disaster Insurance Program (ADIP), which is authorized under section 12(5) of the Farm Income Protection Act (FIPA) and a provincial statute. The GOC stated that this program was designed to meet the "green box" criteria under the 1994 WTO Agreement on Agriculture. With regard to the ADIP program, any benefit to the subject merchandise under this program is so small (Can\$ 0.0000081 per kilogram) that there is no impact on the overall subsidy rate, even when taking into account the assistance provided under the Technology Innovations program and the Support for Strategic Alliances program. In other words, when the benefits from the Technology Innovations program, the Support for Strategic Alliances program and the

ADIP program are summed, the aggregate benefit from these three programs has no impact on the overall subsidy rate. Accordingly, because there is no impact on the overall subsidy rate in the instant review, we have not included the benefits from ADIP in the calculated subsidy rate for the POR, and do not consider it necessary to address the issue of whether benefits under this program are countervailable in this review.

Analysis of Comments

Comment 1: Treatment of the Ontario Export Sales Aid Program—Termination

According to the petitioners, the Ontario Export Sales Aid Program should not be treated as a terminated program. The petitioners cite section 355.50(b)(2) of the Department's 1989 Proposed Regulations and claim that it is the Department's practice not to recognize a subsidy program as terminated unless there is an official law, decree, or regulation that has been enacted that terminates the program. (See *Notice of Proposed Rulemaking and Request for Public Comment*, May 31, 1989). In addition, the petitioners cite various cases and assert that the Department has only treated programs as terminated when the respondent has presented evidence of the termination with official documentation and, if possible, when the Department has verified that the program was actually terminated.

The petitioners contend that with respect to the Ontario Export Sales Aid program, the evidence on the record does not meet the standard for this program to be treated as a terminated program. According to petitioners, the only document on the record pertaining to this program, the "Background Document" issued by the Ontario Ministry of Economic Development, Trade and Tourism, is insufficient to support the conclusion that the Export Sales Aid program is terminated for purposes of this review, because this document only establishes that the program is being eliminated and does not reflect the official legal status of the program.

The petitioners further argue that the Department's treatment of the Ontario Export Sales Aid program is not consistent with its treatment of the Farm Products Board Hog Price Stabilization Program which has a similar status but the Department treated as not used. The petitioners maintain that the Government of the Province of Newfoundland submitted a budget document issued by the Newfoundland Ministry of Finance that clearly shows

that subsidies under the Hog Price Stabilization Program had been "eliminated" and that this documentation is of a similar nature to the documentation presented with regard to the Ontario program. Therefore, to be consistent with the record evidence and with other findings in this review, the petitioners argue that the Department should revise its finding with respect to the Ontario Export Sales Aid program and find the program to be not used in these final results.

In rebuttal, the GOQ and the CPC argue that the Department's determination that the Ontario Export Sales Aid program was terminated is correct. The GOQ asserts that the petitioners have not cited any facts to dispute the Department's finding that the program was terminated. Moreover, the CPC claims that the documentation on the record provided by the Government of Ontario supports the decision and cites *Live Swine from Canada; Preliminary Results of Administrative Review*, 62 FR 47460 (September 9, 1997) and *Live Swine from Canada; Final Results of Administrative Review*, 63 FR 2204 (January 14, 1998) (*Swine Eleventh Review Results*) in which the Department made a determination that the Hog Price Stabilization program was terminated based on an announcement from the Government of Prince Edward Island's Department of Agriculture. The CPC also cites *Swine Tenth Review Results* in which the Department found the Livestock and Beeyard Damage Compensation Program terminated based on the Government of Alberta's submission of a memorandum from the program's administrator regarding the program's termination. The CPC asserts that the petitioners did not contest either of these determinations.

Furthermore, the CPC argues that these examples show that the Department has never articulated a blanket rule requiring an official law, decree or regulation before finding a program terminated. The CPC argues that when a provincial program is of a limited size and involves a limited number of users, the termination of the program may be carried out administratively without the passage of a separate law. In these cases, the CPC argues, if the Department were to require an official law, these programs, which are terminated and providing no benefits, would be reinvestigated year after year because their termination had been accomplished by means other than an official law. The GOQ and the CPC contend that the result would be a burden on the Department to continue investigating terminated programs that

were providing no benefits. Therefore, the GOQ and the CPC assert, that the Department's preliminary findings that the Ontario Export Sales Aid program is terminated is correct and should be maintained in these final results.

Department's Position: The Department's practice is to treat a program as terminated when the respondent presents satisfactory documentation to demonstrate that the program is terminated and not merely suspended. See e.g., *Final Affirmative Countervailing Duty Determination: Certain Pasta from Turkey*, 61 FR 30366, 30370 (June 14, 1996); *Certain Iron-Metal Castings from India; Final Results of Administrative Review*, 60 FR 44843, 44844 (August 29, 1995). In this instance, the GOC submitted official documentation from the Ontario Ministry of Economic Development demonstrating that the Export Sales Aid program has terminated as a consequence of a provincial-wide initiative to eliminate certain forms of direct monetary assistance to Ontario businesses. Because this official report was prepared by the authority responsible for administering the subsidy program, we are satisfied that the Export Sales Aid program was terminated on March 31, 1996 and not merely suspended. Therefore, our determination that the Ontario Export Sales Aid program is terminated remains unchanged in these final results.

In the case of Newfoundland's Farm Products Board Hog Price Stabilization program, there were no exports of the subject merchandise from Newfoundland during the POR. Therefore, we did not find it necessary to make a finding regarding the termination of this program during the POR.

Comment 2: Green Box Claim

The petitioners assert that, although the Department did not address the countervailability of two components of the Agri-Food Agreement and the Agricultural Disaster Insurance Program (ADIP), these programs are providing potentially countervailable benefits to live swine producers. The petitioners contend that because these benefits could increase in the future, the Department should treat the ADIP program and these Agri-Food programs as not used to preserve the Department's ability to address the countervailability of these programs should the level of benefits increase in subsequent reviews.

Department's Position: The Department's practice is to treat programs under which producers of the subject merchandise receive no

assistance during the POR as not used. (See *Swine Eleventh Review Results*). During this POR, producers of live swine received benefits under the Technology Innovations and Support for Strategic Alliances programs under the Canada/Quebec Subsidiary Agreement on Agri-Food Development and the ADIP program. Therefore, treating these programs as "not used" would be inconsistent with our longstanding practice. We note, however, that we will continue to examine these programs in future reviews.

Comment 3: The Countervailability of Benefits under the Research Program Under the Canada/Quebec Subsidiary Agreement on Agri-Food Development

The petitioners assert that the Department should not rely upon the public availability test as the basis for finding that the Research program under the Canada/Quebec Subsidiary Agreement on Agri-Food Development ("Research program") is noncountervailable. The petitioners point out that under the URAA, the countervailability of research subsidies are analyzed under the "green light" provision, and thus, the public availability test is outdated.

The petitioners further argue that during this proceeding neither the GOC nor the GOQ has shown that the projects carried out under the Research program satisfy the criteria for noncountervailability. The petitioners contend that the public availability test is no longer sufficient to avoid a finding of noncountervailability for research subsidies. Therefore, the petitioners argue that the Research program can only satisfy the test for noncountervailability if it meets all of the statutory green light criteria.

In rebuttal, the GOC and CPC contend that the petitioners' arguments that the Research program should be examined under the green light provisions are untimely. The GOC maintains that the Department's policy since 1995, which is applied in this review, requires a submission of "green" claims much sooner than the case brief stage. The GOC and CPC contend that the questionnaire in the instant review instructed respondents to make green light or green box claims within two weeks. Moreover, the GOC and the CPC argue that petitioners had ample time to make this claim which is extraordinarily untimely at the case brief stage. The GOC cites several cases in which the Department rejected allegations that were not raised until the case briefs. The GOC and the CPC assert that the Department is not required to address

petitioners' green light claim at this late stage in the proceeding.

The GOC also contends that even if the petitioners' green light claim was timely, petitioners' arguments reflect analytical errors. In rebuttal to petitioners' claim that the public availability test is outmoded, the GOC, GOQ, and the CPC argue that the public availability test is still U.S. law and administrative practice. The GOC and GOQ maintain that there is nothing in the WTO agreements or U.S. implementing legislation that repeals the Department's practice of using the public availability test or preempts its application and cites several cases in which the Department has applied the public availability test under post-WTO cases. Although the Department's proposed regulations omit the prior proposed regulation on public availability, the GOC and the GOQ argue that no final regulations have been issued that actually change the policy.

Furthermore, the GOQ maintains that the Department has found the Research program noncountervailable in eight previous administrative reviews and should no longer examine this program in future reviews. The GOQ argues that in the *Delverde* case, the Department's practice not to initiate investigations on programs previously found not to be countervailable was affirmed, citing *Delverde v. United States*, No. 96-08-01997, Slip Op. at 10 (CIT December 1, 1997). As an example of the Department's practice, the GOQ cites the investigation in *Fresh, Chilled, and Frozen Pork from Canada*, in which the Department did not initiate on several programs previously found not to be countervailable in an administrative review on live swine from Canada. (See *Initiation of the Countervailing Duty Investigation; Fresh, Chilled, and Frozen Pork from Canada*, 54 FR 5537 (February 3, 1989)). In addition, the GOC, GOQ, and the CPC argue that the petitioner has provided no new information or evidence of changed circumstances requiring the Department to reconsider its analysis of the Research program during the POR. Therefore, the GOC, GOQ, and CPC assert that the Department should maintain its determination that the Research program is noncountervailable in these final results.

Department's Position: We disagree with the petitioners that we must analyze the Research program under the green light provisions. Unless parties make a timely green light claim, the Department does not examine whether a program meets the green light criteria for noncountervailability. Absent such a claim, we followed our standard

practice for determining whether this program was countervailable. (See *Swine Eleventh Review Results*, 62 FR 47460 at 47469 (September 9, 1997)).

However, we disagree with the GOQ's assertion that the Research program does not warrant reexamination in future reviews. The Department's current practice with regard to research and development programs is that research results must be publicly available with no restrictions. The standard contracts under the Research program contain a patent clause authorizing non-disclosure of research results with commercial value. As we explained in *Swine Eleventh Review Results*, the ability to restrict disclosure of research results requires a determination on the public availability of research results until projects are completed. (See 63 FR 2204, at 2207 (January 14, 1998)). Accordingly, we will continue to examine the Research program in future reviews.

Final Results of Review

For the period April 1, 1996 through March 31, 1997, we determine the net subsidy for live swine from Canada to be Can\$0.0041 per kilogram. This rate is *de minimis*.

We will instruct Customs to liquidate without regard to countervailing duties all shipments of the subject merchandise from Canada exported on or after April 1, 1996, and on or before March 31, 1997. The Department will also instruct Customs to waive cash deposits on all shipments of live swine from Canada entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR § 355.34(d). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are issued and published in accordance with section 751(a)(1) and 777(i)(1) of the Act (19 U.S.C. 1675(a)(1)).

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

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