

PANEL ON CANADIAN COUNTERVAILING DUTIES
ON GRAIN CORN FROM THE UNITED STATES

*Report of the Panel adopted by the Committee on Subsidies and
Countervailing Measures on 26 March 1992
(SCM/140 and Corr.1 - 39S/411)*

1. INTRODUCTION

1.1 Since 1987, the United States has consulted with Canada on several occasions regarding the latter's countervailing duty investigation and subsequent determination of injury from grain corn imports from the United States. Following the failure to reach a mutually satisfactory solution through consultations in early 1987 under Article 3 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement (the "Subsidies Agreement"), the United States requested consultations with Canada under Article 16.1 of the Subsidies Agreement on 30 April 1987 (SCM/82). These consultations, held on 30 July 1987 and 29 June 1989, did not result in a mutually acceptable solution to the matter. On 2 October 1989, the United States referred this matter to the Committee on Subsidies and Countervailing Measures (the "Committee") for conciliation pursuant to Article 17 of the Subsidies Agreement (SCM/95). As the conciliation process did not lead to a resolution of this dispute, the United States, on 8 July 1991, requested the establishment of a panel under Article 18 of the Subsidies Agreement to examine the matter (SCM/118).

1.2 At its special meeting on 18 July 1991, the Committee agreed to establish a panel on the matter (SCM/M/52). The representative of the European Community reserved the Community's rights to intervene in the proceedings of the panel.

1.3 The Committee decided on the standard terms of reference provided in Article 18.1 of the Subsidies Agreement as follows (SCM/M/52):

Terms of Reference:

"The Panel shall review the facts of the matter referred to the Committee by the United States in SCM/118 and, in light of such facts, shall present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement."

1.4 The composition of the Panel was agreed on 7 August 1991 as follows:

Composition

Chairman: Mr. Luzius Wasescha

Members: Ms. Jo Tyndall
Mr. Hiroyuki Ishige

1.5 The Panel met with the parties on 27 September and 4 November 1991. It submitted its report to the parties to the dispute on 13 January 1992.

2. FACTUAL ASPECTS

2.1 In the view of the Panel, the following are the factual aspects of this dispute.

2.2 On 2 July 1986, pursuant to the Special Import Measures Act (SIMA), the Government of Canada initiated a countervailing duty investigation of imports of grain corn from the United States. The complaint was filed by the Ontario Corn Producers Association, a group of Canadian producers located within the Canadian province of Ontario. The investigation period considered for this case was 1 January 1984 to 1 July 1986. On 20 March 1987, the Canadian Import Tribunal (CIT) issued an affirmative finding that "subsidizing of importations into Canada of grain corn from the United States has caused, is causing and is likely to cause material injury".¹ In the Finding of the Canadian Import Tribunal, the section on the CIT's opinion included the following points.

2.3 Summary Of The CIT Opinion

The Main Features of the Canadian Market for Corn

2.3.1 The CIT stated that the Canadian market for corn received limited protection from international, and particularly United States, influences because the only measure of border protection for it was a low Canadian tariff (about 2% ad valorem equivalent tariff). In addition, due to the requirements of Canada's Plant Quarantine Act and the Animal Disease and Protection Act, the United States was the only viable source for its imported grain corn. Since the low Canadian tariff and transport costs were the only barriers to Canadian imports of grain corn from the United States, the grain corn markets of Canada and the United States were closely integrated. There was an established history of importation of corn from the United States and the Canadian corn had to be priced competitively with the cost of landing United States corn. The spot and future prices for corn established by the trading activity at the Chicago Board of Trade were the prices looked to by all corn traders, not only in the United States but also in many other parts of the world. The actual delivered prices at any given destination were determined relative to the Chicago Board of Trade, with differences accounted for by transportation costs and special circumstances in local markets. The CIT noted that the primary factors determining the Chicago Board of Trade price at any time were the supply and demand for grain corn, with supply including the amount held in storage at any particular time.

2.3.2 As evidence of the close link between the corn prices in Canada and the United States, the CIT Pre-hearing Staff Report had noted that the time profiles of the Chatham price and the Chicago price were closely correlated, and the CIT referred to the open border and access to a ready source of supply of United States grain corn based on price. Regarding Canadian imports of grain corn, the CIT noted the evidence that import volume had progressively declined from 1,364 thousand tons in 1980/81 to 226 thousand tons in 1983/84, before increasing to 612 thousand tons in 1984/85. Subsequently, the import volume declined in 1985/86 to 416 thousand tons.²

¹The conclusion of the CIT is given on page 19 of the "Subsidized Grain Corn Originating In or Exported From the United States of America, Finding of the Canadian Import Tribunal in Inquiry No. CIT-7-86 under Section 42 of the Special Import Measures Act", dated 6 March 1987 (herein referred to as "Finding of the Canadian Import Tribunal").

²Regarding the surge in imports just prior to the imposition of countervailing duties, the dissenting member of the CIT was of the opinion that the surge had three causes: first, it was a normal response to a well publicised countervail action; second, the growers withheld crops from the market in the hope of better prices resulting from countervail; and third, there were the fears of elevator operators of a shortage because Ontario growers had reduced planted acreage by 10 per cent for the current crop year." See the Finding of the Canadian Import Tribunal, Dissenting Views, pages 32-33.

Effects of the Subsidy Provided Under the United States Food Security Act of 1985

2.3.3 The CIT noted that the United States Food Security Act of 1985 subsidized grain corn produced in the United States, and also lowered the floor price of grain corn in that country. Moreover, the use of the Payments in Kind (PIK) Certificates by the United States allowed the stored corn "that is not supposed to be released to the market until the price rises well above the loan rate ... being released in massive quantities at prices well below the loan rate."¹ Given the dominance of the United States as a producer and exporter of grain corn in the world, the CIT concluded that the decline in United States price was in very large measure responsible for a dramatic decline in the international price for grain corn. On account of the open nature of the Canadian corn market, the Canadian producers had to accept lower grain corn prices in order to maintain domestic sales in the face of low-priced United States corn. The magnitude of the price decline was such as to constitute material injury, whether borne by the farmers directly in terms of reduced income, or indirectly by increased burden on government support programmes. The CIT noted that since the Canadian farmers had accepted lower prices to maintain sales, other indicia of injury normally considered, such as increased imports and loss of sales and employment, were not present in this case.

2.3.4 The CIT took account of the fact that for any primary agricultural product, a consideration of injury includes an increase in the financial burden on a federal or provincial agricultural support programmes. In the case at hand, the CIT noted that though the costs associated with the prevailing low prices were initially being borne primarily by the government support programmes, the burden would shift to the Canadian producers in future years because the support levels were determined mainly in relation to historical price levels.

2.3.5 For the reasons given above, and taking into account the increase in the competitiveness of the United States corn producers due to the United States government subsidies which also insulated them from the decline in prices, the CIT concluded "that the subsidization of United States grain corn has caused and is causing material injury to Canadian corn producers."² In addition, the CIT found that the subsidization of United States grain corn would continue to cause material injury to the Canadian producers of like goods because there was every indication that the prevailing conditions (i.e., the subsidy and large supply of subsidized grain corn in the United States whereby the lower prices were transferred to Canadian producers because of the open nature of trade in grain corn between Canada and the United States), would persist for some time.

¹Finding of the Canadian Import Tribunal, page 13. On this page the CIT further says that, "According to one witness, there could be 6.5 to 7 billion dollars worth of PIK certificates issued into the summer of 1987. The same witness testified that about 75 per cent of the certificates issued to date have been used to redeem corn. It also appears that, in order to move corn from temporary storage, the U.S. government authorized the sale of approximately one billion bushels (approximately 25 mmt) from storage in December 1986, at which time the cash price in the central corn belt fell from US\$ 1.65/bu. on December 1, 1986, to US\$ 1.45/bu. on January 5, 1987. ... U.S. ending stocks in 1986/87 are estimated to reach 147 mmt, an amount equal to almost three times annual world trade of 52.2 mmt."

²Finding of the Canadian Import Tribunal, page 14.

The Definition of Subsidized Imports for Determining Injury

2.3.6 Both parties to the CIT injury investigation raised the issue of the interpretation of subsidized imports. In responding to the various arguments raised the CIT view was that, "Both the Special Import Measures Act and the GATT Subsidies Code exist for the express purpose of dealing with unfairly traded goods which cause or threaten injury. Necessarily, their provisions must be interpreted, not in the abstract, but within the context of the environment within which they apply, namely, international trade. Since the economic and commercial realities of international trade dictate that price must be met or market share lost, the majority of the panel is persuaded to adopt the broader interpretation of "subsidized imports," that is, that cognizance be taken of potential or likely imports in the determination of material injury. To do otherwise, in the view of the majority of the panel, would be to frustrate the purpose of the system."¹

2.3.7 Thus, in this case of price suppression, the CIT included in the definition of subsidized imports actual and potential or likely imports for the purpose of establishing the causal link between subsidized imports and material injury which is required for imposing a countervailing duty. The inclusion of potential or likely imports was based on the argument that these imports would have actually occurred had the Canadian producers not lowered their prices. The CIT opinion in this context was that, "In the case of grain corn, imports into Canada have existed in recent years, albeit at modest levels. The issue, therefore, is not whether imports have taken place, but whether they would have increased substantially in the absence of a price response by the domestic producers to the subsidized U.S. corn. Given the openness of the Canadian market, much higher levels of imports would have been a certainty."¹

2.3.8 One member of the CIT dissented with the majority view², saying that "even if the premise be accepted that the subsidization has contributed to the depressed world price, no case has been made that U.S. subsidized imports into Canada are responsible for the harm being suffered".³ The dissenting member said that an array of factors impacted on the world price, and for the complaint to succeed, the injury suffered must be related to subsidized imports and not simply to the availability of trans-border stocks at depressed world prices, i.e. the issue was one of causality. Arguing that, "the evidence is that Canada is basically self-sufficient in grain corn, that it is not a U.S. export target, that imports [of grain corn] enter Canada on a need, or perceived need, basis and not because of any price advantage"⁴, the dissenting member was of the view that the required causality had not been demonstrated in this case. Regarding likelihood of injury, the dissenting member's opinion was that it "would be sheer speculation and conjecture to hold that, in the absence of a countervailing duty, subsidized imports would enter Canada in such volume as to cause material injury. The reality of trade in corn is that the world pricing mechanism inhibits exports to countries which are self-sufficient in corn, as is Canada, except for special circumstances of geography and need".⁵

¹Finding of the Canadian Import Tribunal, page 16.

²Under Canadian law, it is only the majority decision which has legal standing.

³Finding of the Canadian Import Tribunal, Dissenting Views, page 24.

⁴Finding of the Canadian Import Tribunal, Dissenting Views, page 32.

⁵Finding of the Canadian Import Tribunal, Dissenting Views, pages 34-35.

3. MAIN ARGUMENTS

3.1 Findings sought by the Parties

3.1.1 The issue before the Panel was to examine whether Canada acted in a manner consistent with its obligations under Article 6 of the Subsidies Agreement in making a determination that the subsidization of United States grain corn had caused, was causing and was likely to cause material injury to Canadian corn producers. The United States requested the Panel to find that the CIT's determination of injury in the case of grain corn imports from the United States was inconsistent with Canada's obligations under the Subsidies Agreement, and to recommend to the Committee that the Committee request that Canada bring its measure into conformity with its obligations under the Agreement.

3.1.2 Canada requested the Panel to find that the CIT injury finding with respect to imports of grain corn from the United States was consistent with Article 6 of the Subsidies Agreement.

3.2 Nature of the Evidence as Required by Article 6

3.2.1 The United States said that the type of evidence used by the CIT for determining injury did not meet the requirements of Article 6 of the Subsidies Agreement. The United States contended that instead of investigating the volume and price effects of imports from the United States on Canadian prices on the basis of positive evidence, the CIT made an affirmative injury determination on the basis of mere presence of some imports from the United States together with price suppression, which as the CIT found, resulted from lower world prices. Similarly, with regard to threat of injury and inclusion of potential imports in the volume of subsidized imports, the United States said that positive evidence was neither sought nor adduced by the CIT in support of an affirmative determination that the effects of U.S. imports in Canada, or that significantly increased volumes of U.S. imports, were imminent and likely. For these reasons, the United States claimed that the CIT had demonstrated neither threat nor present injury in conformity with requirements of the Subsidies Agreement, and that "the CIT determination rests on a mere assumption rather than on positive evidence necessary for an affirmative determination under the Code".

3.2.2 Canada said that the CIT had used appropriate evidence in this case. In its determination of injury, including threat to domestic like products, the CIT had sought and examined carefully the relevant and feasible positive data on subsidized imports, import prices and the indices of injury. Thus, Canada argued that the CIT had met the requirements specified for determining injury under Article 6 of the Subsidies Agreement.

Examination of the actual imports, or imports which had crossed the border

3.2.3 According to the United States,

"Article 6.2 of the Code clearly and explicitly requires a consideration of whether (1) "there has been a significant increase" in subsidized imports, or in their share of the Canadian market, and (2) there has been significant price undercutting by the subsidized imports compared to the prices of the domestic like product, or whether the prices "of such imports" depress prices to a significant degree." (emphasis added by the United States).

Thus, the United States argued that the CIT's demonstration of material injury under the Subsidies Agreement should have been based on positive evidence of the volume of imports from the United States, their market share over time, the actual prices at which subsidized imports entered Canada and the effect of these prices on Canadian producers in terms of loss of sales or inability to maintain or raise prices.

3.2.4 Canada agreed that for an injury determination, there must be actual imports of the subsidized product and that these imports must be examined, considered and taken into account. Canada said there were actual subsidized imports and that the CIT examined these imports. Canada noted further that Canadian law did not permit a finding of injury in the absence of actual subsidized imports. Its Special Import Measures Act required that an investigation be terminated prior to the making of a preliminary determination where, inter alia, the actual or potential volume of imports was negligible. The subsidized imports of grain corn which were the subject of the preliminary determination by Canada's Deputy Minister of National Revenue were explicitly referred to and taken into account by the CIT.¹

3.2.5 Canada referred to the fact that, as stated in the CIT Pre-hearing Staff Report, the CIT first examined the actual subsidized imports of United States corn, and then turned to a detailed examination of the effects of the United States subsidies provided under the 1985 Farm Bill in order to assess the effect of existing and future subsidized corn imports. In its examination, the CIT had considered the volume of imports, and had noted that their trend had varied during the period of investigation and the period preceding the investigation. The investigation made it clear to the CIT that the price of Canadian corn was set by the United States market, and that much more than the normal volume of corn would flow into Canada unless domestic producers matched the price of subsidized imports.

3.2.6 The United States said that the mere noting of the presence of actual imports was not sufficient for an affirmative determination under the Subsidies Agreement. According to the United States, demonstration of injury under the Subsidies Agreement must be grounded in an analysis of actual imports, using positive evidence to make a determination, and the CIT had not met this requirement.

3.2.7 Canada agreed with the United States' observation that when looking at the issue of price undercutting, the investigating authority must, necessarily, examine the actual price and sales data. Canada pointed out, however, that Article 6.2 of the Subsidies Agreement provides that the investigating authority shall consider price undercutting or price depression (emphasis by Canada). The consideration of price undercutting is, thus, one of two options and is not mandatory as the United States had asserted (emphasis by Canada). Canada said that the CIT concluded from its examination that loss of sales and increased imports were not present in this case. Accordingly, the CIT focused its consideration on the price depression or suppression element, thereby fully meeting the obligations of Article 6.2. Further, Canada noted that on examining the situation, the CIT had concluded that the immediate effect of price suppression was being borne by the government support programmes, rather than by a loss in market share of the domestic producers.²

3.2.8 The United States pointed out that the CIT did not draw a nexus between the effects of subsidized imports (as required by Article 6.2) and any other factor in Article 6.3, including an "increased burden on government support programmes". The United States also said that increased burden on government support programmes as set out in Article 6.3 was not intended to substitute for other factors set out in this Article regarding the impact of imports. Article 6.3 provided that an injury analysis include an examination of all the relevant economic factors including the impact on agricultural support programmes.

¹For evidence on this point, Canada referred to page 16 of the Finding of the Canadian Import Tribunal. On this page, the CIT notes that the imports of grain corn into Canada had existed at a modest level. However, the CIT argued that when considering the relevant volume of subsidized imports in a case of price suppression, it was necessary to take into account those subsidized imports which would have entered the market in the absence of a price response by the Canadian producers.

²Canada noted that Canadian farmers had to sell their corn in order to benefit from the government support programmes.

3.2.9 Canada said that its contention was not that the increased burden on government support programmes was intended as a substitute for other factors set out in Article 6.3. Canada's intent was simply to highlight that the Subsidies Agreement recognised, in the case of agricultural products, that the normal indices of injury may not apply and that the impact of subsidization may be felt more or even predominantly in terms of increased pay-outs to producers from government support programmes (emphasis by Canada). Canada mentioned that the CIT had examined other indices of injury, but determined that in this case, they were not applicable given the nature of the injury in terms of price suppression and the existence and operation of domestic government support programmes.¹

3.2.10 The United States argued that though the CIT had noted the increased burden on government support, it had not demonstrated the price and volume effects of the imports from the United States, on which basis an evaluation of their impact on the Canadian industry - including with reference to the Canadian support programmes - might have occurred. The volume, market share, and pricing of the imports were not discussed or tied to a finding of a causal link between the subsidized imports and the material injury.

3.2.11 Canada said that Article 6 allowed that in addition to an examination of subsidized imports which actually crossed the border, authorities may also examine the effects of potential subsidized imports when this was appropriate to determine causality between subsidized imports and material injury suffered or threatened to domestic producers of like goods. In the case at hand, given the open border, a highly price sensitive, highly fungible commodity, readily available in large volumes to the Canadian domestic consumers in the form of low priced subsidized United States imports, a larger volume of grain corn imports would have been a certainty if the Canadian producers had not responded with lower prices to the subsidized imports. Canada said that for a price sensitive, fungible commodity such as grain corn, if domestic producers match the lower import price, actual imports do not increase - in fact they may even decrease for a time depending on the capability of the producers, in conjunction with the support programmes, to meet the unfair competition. Thus Canada maintained that in addition to an examination of actual imports, by considering potential or probable imports, the CIT had fully taken into account the relevant subsidized imports and had made a clear linkage between these imports and the material injury suffered by domestic producers. According to Canada, injury due to price suppression from potential or probable imports was no less real than that caused by actual imports, and therefore, the examination of probable or potential imports conducted by the CIT in its investigation of material injury was both reasonable and in accordance with commercial reality in certain cases, including the present one.

¹For evidence on this point, Canada referred to page 9 of the Finding of the Canadian Import Tribunal. On this page, the CIT said that, "The essential question to be addressed is whether the operation of the 1985 U.S. Food Security Act, which, as the Deputy Minister found, subsidized grain corn produced in the United States, was such as to cause prices in Canada to decline to levels judged to be of a material nature. Other indicia of injury normally considered, such as increased imports and loss of sales and employment, are not present in this case because Canadian corn producers have accepted lower prices in order to maintain sales in the face of the potential inflow of low-priced U.S. corn. ... For the first time also, by virtue of the definition of material injury in subsection 2(1) of the Special Import Measures Act, the Tribunal, in its consideration of material injury, is required to take account of any increase in the financial burden on a federal or provincial agricultural support program."

Inclusion of potential or likely imports in the volume of subsidized imports

3.2.12 The United States agreed that an injury determination, particularly in the case of price suppression or depression, need not be limited to actual imports which had crossed the border. However, the United States said that the determination of injury on the basis of potential or likely imports as used by the CIT had introduced a standard which was broad and ambiguous, and was susceptible to far more than one definition and interpretation. In this context, the United States pointed out that even Canada had had difficulty defining "potential imports" and had used a number of different attempted definitions of the term during the Panel proceedings. The United States argued that allowing the standard used by the CIT under the Subsidies Agreement would result in material injury being demonstrated on the basis of speculative or hypothetical imports. The United States pointed out that a threat of material injury analysis under the Subsidies Agreement can only be caused by imports whose future entry is imminent, not by imports that "would have" happened in the past but never in fact did, as asserted by the CIT. To characterize a continuing but never-realized possibility as a "threat" was to permit a countervailing duty to be imposed under virtually any circumstances.

3.2.13 According to the United States, an unambiguous and non-speculative interpretation of the Subsidies Agreement required that if an investigation of injury had to include a consideration of subsidized imports other than those which had already crossed the border, the coverage of such subsidized imports be limited to sales for importation which had been completed or were imminent.¹ The United States contended that the CIT had not met such a requirement because it did not base its determination on, for example, actual, binding sales or contracts to sell. Instead, "what the CIT considered, thus, was essentially an open-ended offer to sell, to the world, at a given price."

3.2.14 Canada said that in the context of this case, by "potential" imports the CIT was not referring to goods which were hypothetically capable of being imported, but to those imports which were probable, i.e. those imports that were or are available - on offer - and had or have a high probability of being sold for import into the market of the investigating country. Pointing out that the United States had agreed that it may be proper to include sales for importation which had been completed or were imminent, Canada said that in the case of grain corn, the imminence of sales was a critical factor in the consideration of the effect potential imports had on prices. The CIT had found that there was a large supply of highly subsidized United States grain corn that was readily available for export to Canada², the United States was the only viable source for imported grain corn, bilateral trade was essentially unrestricted except for a low tariff and transportation costs, the buyers in Canada were indifferent between domestic and United States sources for grain corn, there was a ready access of buyers in Canada to supplies from the United States, and there was an established pattern of trade in grain corn between Canada and the United States. Canada argued that in this situation, with the Chicago Board of Trade price being known and given for the relevant buyers and sellers, the sales of imported United States corn were imminent (or a certainty as the C.I.T. had concluded), unless Canadian producers matched the given price.

¹According to the United States, consideration of such imports may be appropriate particularly in the case of low-volume, high value items such as certain types of large capital equipment.

²According to Canada, in 1985-86, U.S. end-year stocks were about 83½ per cent of world total end-year stocks, almost twice the size of world exports in that year. Moreover, the use of Payment in Kind (PIK) Certificates allowed for the release of large quantities of stored corn (which were at levels twice that of world annual trade in the 1985/86 crop year) into the world market at prices that effectively removed any remaining floor price represented by the loan rate and propelled prices sharply downwards in 1986/87.

3.2.15 Further, Canada maintained that since the CIT had logically examined those imports which would have flowed in the past or would flow in the future if the domestic producers did not match the subsidized import price, the United States was not correct in claiming that the CIT had considered only "essentially an open-ended offer to sell, to the world, at a given price". For the same reason, a consideration of probable or potential imports as used by the CIT did not open the door to abuse of the injury provisions.

3.2.16 Regarding the use of more than one definition of potential imports by Canada in these proceedings, Canada said that the definitions were not different; the alternative definitions were merely an elaboration of the first definition.

3.2.17 The United States replied that the CIT had used the term "potential imports" only in passing and had neither announced nor applied the definitions of this term that had been offered by Canada in the Panel proceedings. According to the United States, the arguments given by Canada were an elaborate post-hoc rationalization of a concept which was not made the centrepiece of the CIT finding. The United States said that the CIT had offered no evidence to support its assertion that much higher levels of imports from the United States would have been a certainty. The mere existence of a world spot-market for a fungible, low-value commodity like corn did not necessarily establish that imports from the United States into Canada adversely affected the industry. To substantiate this point, the United States quoted the dissenting member of the CIT who had said that, "there is nothing new about the corn granary of the world being situated just next door ... The reality of trade in corn is that the world pricing mechanism inhibits exports to countries which are self-sufficient in corn, as is Canada ...".¹ The United States thus argued that even if it was assumed that Canada's definition of potential imports was correct, the Subsidies Agreement's requirement that an injury determination be based on positive evidence concerning the volume and price effects of imports, had not been met by the CIT.

3.2.18 Canada stated that practically speaking, any attempt to measure the level of the potential subsidized imports which would have occurred in the absence of domestic price suppression would be a purely speculative exercise. The basis of the CIT decision was, rather, more appropriately focused on the effects of the price suppression caused by the subsidized imports (including potential or probable subsidized imports which would have occurred in the absence of a price response by the Canadian corn producers), and whether there was a causal link to the material injury suffered by the Canadian corn producers.

Examination of imports for determination of threat of injury

3.2.19 Regarding threat of injury, the United States said that the Subsidies Agreement required that a threat of material injury be real and imminent, and be based on positive evidence. However, the United States said that the Subsidies Agreement did not provide significant guidance on how to conduct a threat analysis. The United States argued that for this purpose, better guidance was available from the Anti-dumping Agreement, which had been negotiated at the same time, and went into greater detail by establishing a number of requirements for conducting a threat analysis. Quoting from Article 3.6 of the Anti-dumping Agreement, the United States said that:

"First, a threat determination must 'be based on facts and not merely on allegation, conjecture or remote possibility'. Second, 'the change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent'. And, third, an example of a clearly foreseen and imminent change would be one in which there would be convincing reason to believe that there would be, 'in the immediate future, substantially increased importations of the product at dumped prices'" (emphasis added by the United States).

¹Finding of the Canadian Import Tribunal, pages 34 and 35.

3.2.20 The United States presented several arguments to claim that the required criteria had not been met by Canada in this case. Thus, according to the United States, the CIT had provided no evidence of the likelihood of "substantially increased imports" in the immediate future, and the CIT had not adduced any evidence that material injury resulting from imports from the United States was clearly foreseen and imminent. The United States said that the CIT record showed that in the latest crop year for which data were available, imports from the United States had declined by about one-third, while the Canadian consumption had actually increased, resulting in a sharp fall in the Canadian market share held by the United States. Similarly, there was no evidence of binding contracts to supply an increasing amount of the subsidized product for importation in the immediate future nor a trend of increasing United States stocks diverted to the Canadian market. According to the United States, the CIT had not found a convincing reason to believe that the United States would unload its stocks of corn onto the Canadian market in the near future. The United States argued that on the basis of the available evidence, it would be inconsistent with any rational determination under the Subsidies Agreement that a threat of material injury was imminent by reason of imports of corn from the United States. According to the United States, reliance on potential imports alone as a basis for a threat determination could allow an affirmative determination simply on the basis of underutilized capacity in the exporting country, without any evidence of a likelihood that such exports would be directed to the country conducting the investigation. The United States quoted the CIT finding, "that the United States is able to transfer its farm policies to international markets has been demonstrated, with the exception of its ability to expand exports. ... Despite dramatically lower prices and the availability of export assistance programs, the U.S. has not succeeded in improving export performance."¹ (emphasis added by the United States)

3.2.21 Commenting on the trends in grain corn imports, Canada said that rather than following a downward trend, the level of imports had varied. In this context, Canada mentioned that the level of Canadian imports of grain corn had increased in the three years preceding the investigation. Various factors at any time affected the normal level of imports. In the period of investigation during which there was price suppression there had been a high crop yield which would normally have reduced import needs. In addition Canadian farmers had no choice but to match lower import prices, and their action had affected the level of Canadian imports.

3.2.22 With regard to the United States' point that a threat of material injury must be real and imminent, and be based on positive evidence, Canada said that the CIT had considered the market situation and had determined that the disposal of United States surplus of grain corn was an ongoing process, which would not be ending soon.² On the basis of the evidence before it, the CIT had determined that the injury to domestic like goods due to price suppression was likely to continue in the future as the large volume and the low price of the subsidized United States grain corn would not diminish in the foreseeable future. Thus the CIT had concluded that in the absence of a price response by the Canadian producers, increased subsidized imports would be a certainty. Furthermore, Canada pointed out that the CIT had considered the effect of the United States' subsidization on Canada's government support

¹Finding of the Canadian Import Tribunal, page 13.

²To support this contention, Canada quoted the CIT finding that, "There is every indication that present conditions will persist for some time. Even with more onerous acreage set-asides, U.S. production is unlikely to be brought into balance with current demand much before the 1988/89 crop year. Disposal of the existing burdensome stock would seem to require even more time. The 1985 Farm Bill provides for lower levels of target prices and loan rates in the years to come. The level of international trade shows no indication of increasing; on the contrary, the opposite seems to be the case. In these circumstances, prices cannot be expected to show much improvement, thus requiring the continuation of government support for U.S. producers. The majority of the panel finds, therefore, that the subsidization of U.S. grain corn will continue to be a cause of material injury to Canadian production of like goods." Finding of the Canadian Import Tribunal, page 14.

programmes, and had found that "the cost of prevailing lower prices was being borne by those programmes, but that because support payments were determined in relation to historical price levels, the burden would shift to producers in future years." Thus, Canada argued that the CIT had used positive evidence to find threat of material injury to Canadian producers of like goods.

3.2.23 The United States said that Canada had presented new factual evidence on import trends at the Panel's meeting. On the basis of the data available during the CIT proceedings, the United States pointed out that Canadian imports of grain corn fell in the last full year of the CIT investigation, and had also declined in 1983/84 and 1985/86 crop years; except for the 1984/85 crop year, there had been a steady decline in these imports since the 1980/81 peak. Arguing that the intended and actual effect of the United States subsidy programmes was to reduce production, and that the volume of imports from the United States had been trending downward over time, the United States maintained that the CIT opinion provided no positive evidence whatever that imports were likely to surge or cause material injury in the near future.

3.2.24 Canada said that the data different from that available to the CIT had been provided in response to a question of the Panel. It was not an attempt to suggest that this was the information available to the CIT. Regarding the fall in imports in the last year of the period of investigation, Canada said that this had happened because it was a good crop year for the country, and imports would in any case have been down even in normal circumstances. However, Canada emphasised that though there were a number of reasons for the level of imports to vary, this did not reduce the reality of price suppression occurring through the effects of actual or potential imports in this case.

Examination of the price effects of subsidized imports

3.2.25 The United States claimed that the CIT did not use appropriate price data to ascertain the price effects of subsidized imports. According to the United States, the CIT could not have considered the price data pertaining to import sales because it did not collect such data in this case. The United States contended that failing even to seek data pertaining to one of the mandatory factors specified in the Subsidies Agreement demonstrated conclusively the invalidity of the CIT determination.

3.2.26 Canada disagreed with the United States' position, and said that the CIT had made its finding of price effects on the basis of the Chicago price for corn, which was essentially the import price because this was the price offered to Canadian buyers of corn from the United States. Canada said that the CIT had noted that in cases of highly price-sensitive, fungible commodities such as corn, where the price of the next probable or potential import was known (the Chicago Board of Trade price in this case) to both buyers and sellers, the price of these imports exerted a suppressive effect on these commodities. Canada said that the CIT had examined in detail the effect of the Chicago price on the Canadian price for corn, including the dynamics of the pricing relationship in this situation where virtually all (i.e., 99.99 per cent) of Canada's grain corn imports came from the United States on account of transport costs and phyto-sanitary requirements. On this basis, the CIT had reached a conclusion that the Canadian corn producers had virtually no choice but to match the United States price or lose sales. Thus Canada claimed that the CIT had considered the appropriate price of subsidized imports in drawing a link between actual and potential subsidized imports and price suppression.

3.2.27 The United States maintained that by using the observation that Canadian prices tended to track prices of corn in markets in the United States as evidence of price suppression, the CIT had not relied on positive data in order to determine whether imports were a cause of price suppression. For a proper investigation, the United States argued that the CIT needed to base its findings on one or more of several different evidentiary indicia of price suppression, including, for example, confirmed instances where imports from the United States were sold at a price which undercut the Canadian price, or to specific instances of sales lost to the imports from the United States due to the lower prices offered for the United States product, or to illustrative and specific instances of revenues lost on account of specific

Canadian producers being forced to lower their asking price due to a specific competing offer to sell by a United States producer. The United States pointed out that what is key is consideration of prices of imports, which the CIT did not do, and that the CIT staff itself indicated that the Chicago price did not reflect the actual price of imports. To back its assertion that the CIT determination rested on a mere assumption rather than positive evidence, the United States mentioned that the CIT Staff Report had said that there were many factors at play, working in concert, to determine the price for specific lots of corn, and that the United States (Chicago) price would only be one influence on the actual prices even in "the normal course of market operations". Thus the United States said that "Absent facts showing a significant relationship between prices of U.S. imports and price suppression in Canada, Canada's findings as to price suppression cannot stand under the Code".

3.2.28 Canada said that though the type of evidence mentioned by the United States was usually collected in the preliminary phase of the CIT investigation by seeking such price data from the relevant parties, the assessment of the CIT staff in this case was that collection of this type of data would not be feasible. Such data could be gathered only for products whose individual transactions could easily be examined. Injury examinations involving commodity-type products could not always be done on a transactions basis, especially for items such as corn. Canada said that there were no middlemen in the case of corn, and that the equivalent levels of trade was foreign seller/domestic buyer and domestic producer/domestic buyer. Because of the fungible nature of the product, there was no way for the buyers to tell which domestic sales were from imports or from domestic production. Additional complications arose on account of the tens of thousands of transactions ordinarily involved. Therefore, in this case, it was clear that trade effects could not be localized and attributed to particular transactions. Instead of considering factors governing individual behaviour, the CIT analysis had to look at factors governing the market, and it was necessary to determine factors in the aggregate, through statistical and economic methodologies. In Canada's view, aggregate analysis in this case was additionally valid since pricing between buyers and sellers was essentially transparent as it was based on known, open market quotations. Hence, Canada argued that the CIT's approach was justified in light of the facts of the case, and mentioned that this approach had not been challenged by United States exporters represented by counsel at the CIT hearings, including expert witnesses from both sides.

3.2.29 Refuting Canada's assertion regarding all parties having accepted the price analysis of the CIT, the United States said that during the CIT hearings, exporters from the United States had pointed out that the CIT was not considering the import price. Further, the United States stated that while it did not disagree that given the nature of commodity markets, price suppression could occur for these products, it was not appropriate to presume price suppression on the basis of a foreign price. The United States' contention was that even for fungible commodities, the sales (or transaction) prices of imports could be ascertained through investigation, and that the United States had not found it impossible to get such price data for fungible commodities; the representative of the United States was not aware of a single United States case where such relevant information had not been sought. The United States said that by not considering sales (or transaction) prices of imports, the CIT decision sanctioned a finding of price suppression merely on the basis of the presence of a country which was a large producer of a fungible product and relatively open international markets. Furthermore, the United States said that if injury occurred due to a decline in the world price, it had to be addressed by a measure other than a countervailing duty.

3.2.30 Canada said its authorities had not conducted as many injury investigations as had the United States but the nature of the corn case was such that the CIT staff had decided on assessing the case that getting import transaction price data that would have any degree of reliability was difficult if not impossible.

3.3 The parties to the dispute disagreed as to whether the CIT had drawn a causal link with subsidized imports or with a subsidy programme.

3.3.1 The United States said that the CIT's determination had found that the injury to Canadian industry was due to a factor other than the subsidized imports, namely, the world supply and demand for corn and, in particular, world prices for corn. According to the United States, the sole focus of the CIT inquiry was to determine whether there was a nexus between subsidies provided in accordance with the United States Food Security Act of 1985 and the injury suffered by Canadian corn growers (emphasis by the United States). In this context, the United States quoted from the CIT's opinion and finding¹:

"The essential question to be addressed is whether the operation of the 1985 U.S. Food Security Act ... was such as to cause prices in Canada to decline to levels judged to be of a material nature. ... For these reasons, the majority of the panel therefore concludes that the subsidization of U.S. grain corn has caused and is causing material injury to Canadian corn producers [and] will continue to cause material injury to Canadian production of like goods" (emphasis added by the United States).

The United States argued that the CIT reached its affirmative determination on the basis of the following line of reasoning: there is an imbalance in the world supply and demand for grain corn; United States production and stocks have a dominant impact on world supply and demand and the setting of world prices for grain corn; United States subsidy programmes have a major influence on levels of United States production; these programmes have had the effect of lowering world prices; grain corn movement between Canada and the United States is essentially unrestricted; and because of the open nature of the Canadian market these lower prices were transferred to Canada, with substantial adverse effect on Canadian producers.

3.3.2 Thus the United States said that Canada had not established the nexus between subsidized imports and material injury as required by the Subsidies Agreement. Elaborating on the Subsidies Agreement's requirement, the United States referred to the provisions of Article 6.1 that determination of injury must involve an examination of:

"both (a) the volume of the subsidized imports and their effect on prices in the domestic market for like products ... and (b) the consequent impact of these imports on domestic producers of such products" (emphasis added by the United States).

The United States said that similarly, references to "subsidized imports" recurred in Articles 6.2, 6.6 and 6.7 as well. In particular, the United States pointed out that Article 6.2, which addresses the relevance of price suppression or depression, states that the injury analysis must include a consideration of,

"whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree" (emphasis added by the United States).

3.3.3 Canada replied that in this case, the CIT had not made an injury determination on the mere existence of a subsidy programme in another country or on the basis of vague effects of world prices as was alleged in complaint by the United States. Canada said that the provisions with respect to causality were contained in Article 6.4 of the Subsidies Agreement. This Article stated that, "It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury ..."

¹Finding of the Canadian Import Tribunal, page 9 and 19.

(emphasis added by Canada). Thus, what must be considered in demonstrating a causal link were only those effects of the subsidy that relate to subsidized imports. Canada said that these effects, i.e. those linked to subsidized imports, were set out in footnote 19 of the Subsidies Agreement, which directed one to the detailed factors provided in Articles 6.2 and 6.3 which included price suppression (where subsidized imports were matched by domestic producers and thus, did not flow across the border) and increased burdens on government support programmes. Canada argued further that the ability to examine the price suppressive effects and effects on government support programmes of subsidized imports in Article 6 would have little meaning if it were limited to those subsidized goods that had already been sold and imported. In reviewing the case for injury to domestic producers of corn caused by subsidized imports, it would therefore have been remiss for the CIT to limit the examination of injury to actual imports and not to examine the impact of higher levels of imports that would flow in the absence of a price response by Canadian producers. Canada said that the CIT decision was closely linked to a careful demonstration that subsidized imports were, through the effects of the subsidy, causing injury within the meaning of the Subsidies Agreement, as required by Article 6. The standard used by the CIT did not constitute a license to find injury in almost any circumstance where a country had subsidies, nor was it based on the notion of "hypothetical" imports.

3.3.4 The United States said that the Subsidies Agreement expressly required a finding based on a nexus between the effects of imports and injury, not between the effects of the subsidy and injury. In this regard, the United States said that the Subsidies Agreement had set out mandatory factors for consideration, namely, the significance of the volume of imports, their price effects and their impact on the domestic industry (emphasis by the United States). Further, referring to footnote 17 of the Subsidy Agreement, the United States argued that the Agreement stipulated that the nature and effect of the subsidy was only a permissive factor and not a mandatory factor.

3.3.5 While agreeing with the United States that footnote 17 was permissive, Canada said that this footnote did not constrain the authority provided under Article 6.4 to examine the price suppression effects of potential subsidized imports.

3.3.6 In addition to the argument that the decline in world price of grain, and not subsidized imports from the United States, was found by the CIT to cause declining prices in the Canadian market, the United States pointed out that the CIT had noted that, though important, the United States subsidies were among a variety of salient factors which had affected international trade in corn, such as the "disarray" in the international agricultural environment, the openness of Canada's market, the size of United States grain corn production relative to Canadian production, and the increasing self-sufficiency of other countries. The United States thus claimed that Canada had not met the fundamental and explicit requirement imposed by the Subsidies Agreement on the levying of countervailing duties that a causal link between subsidized imports and material injury be demonstrated. The United States pointed out that on page 14 of its finding, the CIT had found that the reason for the declining prices in the Canadian market was the dramatic decline in the world price of grain. According to the United States, "allowing 'world market conditions' alone to justify the imposition of countervailing duties in the manner of the CIT in this case would negate the material injury determination required by the Code". Furthermore, the United States said that contrary to Article 6.4 of the Agreement, the CIT had failed to issue a negative determination despite finding that a factor other than subsidized imports was the reason for the injured condition of the Canadian industry.

3.3.7 Canada said that the injury determination in this case was not based on the absence of actual subsidized imports, nor was it a determination based solely on the fact that certain goods in another market happen to be subsidized. Canada argued that the CIT decision was not, as suggested by the United States, based on a "disarray" in world agricultural trade. According to Canada, the CIT had examined both actual and potential imports in a case where a pattern of trade had been established, and taking into account the commercial reality, had established the necessary causal link between injury to domestic production and subsidized imports. Canada said that the CIT had also considered evidence

of price suppression caused by those subsidized imports, i.e. potential or probable imports, whose low prices were matched by Canadian producers. Canada further said that the United States had not contested that there were subsidized imports or material injury.

3.3.8 The United States disagreed with Canada's assertion that the United States had conceded that their grain corn exports to Canada were subsidized. It clarified that the United States position in this regard was that, "we are not, in this proceeding, contesting the subsidy portion of Canada's determination." Regarding Canada's argument that the CIT had drawn a link between material injury and potential imports, the United States said that Canada was giving a post-hoc rationalization of the CIT reasoning. According to the United States, a reading of the CIT finding showed that its decision was based on the subsidy programme, and only passing references were made to potential imports.

4. SUBMISSION BY THIRD PARTY

4.1 In its submission as a third party to the Panel, the European Community said that Article 6 of the Subsidies Agreement clearly stated the requirement that "a determination of injury has to involve an objective examination, based on positive evidence, of the volume of subsidized imports and the effect of these imports on prices in the domestic market of the importing country".¹ Similarly, Article 6.2 referred explicitly to subsidized imports. According to the Community, it was mandatory that an investigation of injury under Article 6 of the Agreement required the presence of subsidized imports, and an examination of the effects of these subsidized imports to demonstrate a causal link with material injury. Factors other than subsidized imports, such as price effects, could be examined only after the examination of the mandatory factors. The Community's opinion was that injury in this case had been caused by factors other than the imports of subsidized goods, and Canada had made its finding on the basis of these other factors without considering the mandatory factors.

4.2 In reply, Canada said that it fully agreed with the Community's interpretation of the Agreement that subsidized imports must be present and a causal link with material injury should be drawn with these imports. However, Canada disagreed with the Community's view that in this case, injury was caused by factors other than imports of subsidized goods and that the Canadian finding was in violation of the Subsidies Agreement. Arguing that the Community's allegations were unsubstantiated, Canada said that its response to the Panel had shown that the Community's position did not reflect the facts in the case at hand.

4.3 Referring to the Community's statement that after examining subsidized imports, it suggested that the investigating authorities look at the effects of prices, Canada asserted that this was what the CIT had done. "It examined very carefully the price effects of the United States subsidy programme and found that it dramatically influenced the price and supply of corn in the United States and via imports, the price in Canada".

¹Emphasis by the European Community. The Community said that this statement was based on Article 6.1 and footnote 17.

5. FINDINGS

5.1 Introduction

5.1.1 The Panel noted that the issues before it arose essentially from the following facts: Pursuant to SIMA, a countervailing duty investigation was initiated by the Government of Canada on 2 July 1986 in respect of imports of grain corn from the United States. On 20 March 1987, the CIT issued an affirmative determination that "the subsidizing of importations into Canada of grain corn ... has caused, is causing and is likely to cause material injury to the production in Canada of like goods".¹

5.1.2 The CIT's determination was based upon findings that: the grain corn markets of Canada and the United States were closely integrated, with an established pattern of trade between the two countries; the only border measure affecting exports to Canada was a two per cent tariff, and due to the nature of Canada's phytosanitary regulations and the costs of transportation, the United States was the only viable source for Canada's imports of grain corn, accounting for virtually all imports into Canada during the relevant period of the CIT investigation (January 1984 - June 1986); the price in the United States and in the world market was based on the price quoted by the Chicago Board of Trade, the principal grain exchange where open market bids and offers determined the spot and future prices; the United States Food Security Act of 1985 (the "1985 Farm Bill") subsidized corn produced in the United States and also lowered the floor price of grain corn in the country; given the dominance of the United States as a producer and exporter of grain corn in the world, the decline in the United States price was in very large measure responsible for a dramatic decline in the international price for grain corn; Canadian producers had to accept lower prices in order to maintain sales in the face of low-priced United States corn; and the magnitude of the price decline was such as to constitute material injury, whether borne by the farmers directly in terms of reduced income, or indirectly by increased burden on government support programmes.

5.1.3 The issue submitted to the Panel was whether the determination of injury by the CIT, in its Finding in respect of "Subsidized Grain Corn Originating In or Exported from the United States of America", was based on an objective examination, in accordance with the provisions of Article 6 of the Subsidies Agreement, of both (a) the volume of subsidized imports of grain corn from the United States and their effect on prices in Canada for the like product and (b) the consequent impact of these imports on Canadian producers of the like product.

5.1.4 The United States requested the Panel to find that the CIT's determination of injury in the case of grain corn imports from the United States was inconsistent with Canada's obligations under Article 6 of the Subsidies Agreement. The United States requested the Panel to limit the enquiry to the issue set out in the preceding paragraph and not to consider whether the United States had subsidized the production of grain corn, or whether this subsidization may have contributed to a decline in the world market price for grain corn, or even whether this decline in the world market price constituted injury to the Canadian domestic industry in the form of depressed prices for grain corn. The United States further requested the Panel to recommend to the Committee that the Committee request Canada to bring its measure into conformity with its obligations under the Subsidies Agreement. Canada requested the Panel to find that the CIT's determination of injury was fully consistent with the requirements of Article 6.

¹Finding of the Canadian Import Tribunal, page 19.

5.2 Consistency of CIT Determination with Article 6

5.2.1 The Panel noted that the following provisions of Article 6 of the Subsidies Agreement are relevant in this case¹:

"1. A determination of injury² for purposes of Article VI of the General Agreement shall involve an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products and (b) the consequent impact of these imports on domestic producers of such products.

2. With regard to volume of subsidized imports the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing signatory. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing signatory, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3. The examination of the impact on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

4. It must be demonstrated that the subsidized imports are, through the effects³ of the subsidy, causing injury within the meaning of this Agreement. There may be other factors⁴ which at the same time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports."

5.2.2 The Panel noted that Article 6.1 directs that a determination of injury be based on positive evidence and include an objective examination of (a) the volume of subsidized imports and their effect on prices of the like product in the domestic market and (b) the consequent impact of these subsidized imports on the domestic industry; Article 6.2 gives more specificity on how to determine the volume and price effects of the subsidized imports; Article 6.3 specifies the factors which may be relevant in examining the impact of the subsidized imports on the domestic industry, including an additional

¹The parts of the provisions which the Panel considered particularly relevant are underlined.

²"Determination of injury under the criteria set forth in this Article shall be based on positive evidence. In determining threat of injury the investigating authorities, in examining the factors listed in this Article, may take into account the evidence on the nature of the subsidy in question and the trade effects likely to arise therefrom."

³"As set forth in paragraphs 2 and 3 of this Article."

⁴"Such factors can include, inter alia, the volume and prices of non-subsidized imports of the product in question, contraction in demand or changes in patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

factor in the case of agriculture, namely, whether there has been an increased burden on government support programmes; and Article 6.4 makes clear that there may be "other factors" which may at the same time be injuring the domestic industry, and the injury from these "other factors" must not be attributed to the subsidized imports. The Panel decided to examine these elements successively.

5.2.3 As the Panel considered that paragraphs 2, 3 and 4 of Article 6 provide more detailed guidance on the interpretation and application of Article 6.1, it was appropriate to begin its analysis of the CIT decision by considering if the CIT, in accordance with Article 6.2, examined whether there had been a significant increase in imports of subsidized grain corn from the United States, either in absolute terms or relative to production or consumption in Canada. In this regard, the Panel noted that the CIT briefly considered the question of imports, indicating that "imports into Canada have existed in recent years, albeit at modest levels".¹ The import data available to the CIT indicated that Canadian imports of grain corn fell in the last full year of the CIT investigation, and had also declined in the 1983-84 and 1985-86 crop years. Except for a surge in the 1984-85 crop year, there had been a steady decline in imports since the peak in 1980-81.² The CIT also commented that

"other indicia of injury normally considered, such as increased imports and loss of sales and employment, are not present in this case because Canadian corn producers have accepted lower prices in order to maintain sales in the face of the potential inflow of low-priced U.S. corn".³ (emphasis added)

5.2.4 Whereas the CIT did not find evidence of increased imports in this case, the Panel noted that the CIT made reference to the "potential or likely imports" that would occur in the absence of a price response by Canadian producers.⁴ The Panel recalled that Canada, in its submissions to the Panel, argued that this reference by the CIT to "potential or likely imports" was the basis for its finding that subsidized imports had caused injury. The CIT stated in its Finding, after concluding that the subsidization of United States grain corn caused material injury to Canadian corn producers,

"Since the economic and commercial realities of international trade dictate that price be met or market share lost, the majority ... is persuaded to adopt the broader interpretation of 'subsidized imports,' that is, that cognizance be taken of potential or likely imports in the determination of material injury. ... In the case of grain corn, imports into Canada have existed in recent years, albeit at modest levels. The issue, therefore, is not whether imports have taken place, but whether they would have increased substantially in the absence of a price response by the domestic producers to the subsidized U.S. grain corn. Given the openness of the Canadian market, much higher levels of imports would have been a certainty."⁴ (emphasis added)

The Panel considered that any effort at quantification of this notion of potential imports, as enunciated by the CIT, to determine the volume of imports which would have occurred in the absence of an adequate price response by the domestic producers would be a speculative exercise and had potentially very broad implications for the countervailing duty remedy.

¹Finding of the Canadian Import Tribunal, page 16.

²Finding of the Canadian Import Tribunal, page 20.

³Finding of the Canadian Import Tribunal, page 9.

⁴Finding of the Canadian Import Tribunal, page 16.

5.2.5 Thus, the Panel came to the conclusion that the CIT did not consider positive evidence of the level or trend of United States subsidized imports of grain corn into Canada¹, as required by Article 6.2.

5.2.6 The Panel then examined whether, pursuant to Article 6.2, the CIT examined the price effects of subsidized imports in the domestic market. On this point, the Panel first noted that the CIT did not have any information with respect to actual import prices and did not attempt to collect any statistics on this basis.² The Panel also noted that the CIT did not consider any evidence of price undercutting. As the Panel recalled, much of the CIT opinion was devoted to a discussion of the decline in world market prices for grain corn and its impact on Canadian producers. The CIT concluded that

"the price declines experienced by Canadian grain-corn producers are of a magnitude such as to constitute material injury, whether borne by the farmer directly in terms of reduced income, or indirectly by increased burden on government-support programs".³

It then went on to analyze the relationship between the 1985 Farm Bill of the United States and this world price decline, concluding that

"the dramatic decline in the international price for corn is, in very large measure, a direct consequence of the provisions of the 1985 Farm Bill ... Because of the open nature of the Canadian market these lower prices were transferred to Canada, with substantial adverse effect on Canadian producers. ... For these reasons, the majority ... concludes that the subsidization of U.S. grain corn has caused, ... is causing ... [and] will continue to be a cause of material injury to the Canadian production of like goods."⁴

The Panel noted however that whereas the CIT equated the world market price decline with the decline and depression of the price for corn in the Canadian market, the CIT did not attempt to make a link between subsidized imports and the price decline and depression in the Canadian market. No positive evidence was adduced on this point. Also, rather than attempting to investigate actual import price data, the CIT considered

¹The Panel noted that the CIT dissent contained the following statements on this issue:

"An examination of the record discloses that U.S. imports have been on a declining trend since the early '80s. ... While in some years Canada is a net exporter of corn, in others it is a net importer. In recent years, the volume on either account is less than 10 per cent of production. More recently, exports have exceeded imports. ... The conclusions I draw from the evidence is that Canada is basically self-sufficient in grain corn, that it is not a U.S. export target, that imports enter Canada on a need, or perceived need, basis and not because of any price advantage. ... The reality of trade in corn is that the world pricing mechanism inhibits exports to countries which are self-sufficient in corn, as is Canada, except for special circumstances of geography or need." Finding of the Canadian Import Tribunal, Dissenting Views, pages 32 and 35.

²See paragraph 3.2.28 above.

³Finding of the Canadian Import Tribunal, page 10.

⁴Finding of the Canadian Import Tribunal, page 14.

"that, generally, Canadian corn must be priced competitively with the cost of landing corn from the United States; in fact, buyers look to the Chicago Board of Trade price in deciding what they will offer for Canadian corn, and sellers look to the Chicago price in deciding the price they are prepared to accept."¹

Thus, the CIT discussed the effect of the Chicago price for grain corn on the Canadian price for the like product, but did not examine the effect of subsidized imports on the Canadian price. The CIT concluded that the Canadian grain corn producers had virtually no choice but to match the United States (Chicago) price or lose sales, but did so without considering any positive evidence on price depression or sales lost due to subsidized imports. The Panel accordingly found that the CIT did not consider the price effects of subsidized imports, as required by Article 6.2.

5.2.7 The Panel then examined whether the CIT determination complied with the provisions of Article 6.3 and 6.4, which require the examination of the consequent impact of the subsidized imports on the domestic industry, and a demonstration that the subsidized imports are, through the effects of the subsidy, causing the material injury to the domestic industry. Injuries caused by other factors must not be attributed to the subsidized imports. With respect to Article 6.3, the Panel noted the following statement of the CIT:

"The essential question to be addressed is whether the operation of the 1985 U.S. Food Security Act, which, as the Deputy Minister found, subsidized grain corn produced in the United States, was such as to cause prices in Canada to decline to levels judged to be of a material nature. Other indicia of injury normally considered, such as increased imports and loss of sales and employment, are not present in this case because Canadian corn producers have accepted lower prices in order to maintain sales in the face of the potential inflow of low-priced U.S. corn."² (emphasis added)

The CIT thus did not consider the "indicia of injury normally considered", and focused on the impact of the decline in world market price for grain corn in terms of the declining price for grain corn in Canada and the increased burden on government support programmes in Canada. The Panel recalled that increased burden on government support programmes is an additional element that, in accordance with Article 6.3, the investigating country may take into consideration in the case of subsidized imports of agricultural products. However, the Panel noted that consideration of this additional element did not justify a non-consideration of the mandatory elements of Article 6.2, i.e. the volume and price effects of subsidized imports. Here, the CIT did not consider positive evidence required to show that the increased burden on government support programmes was a result of subsidized imports. Instead, the CIT's finding regarding the increased burden was based on the world market price decline, which the CIT attributed -- at least in major part -- to the 1985 Farm Bill in the United States. Thus, in the view of the Panel, the CIT determination did not properly examine the relevant evidence of the impact of subsidized imports on the domestic industry, as required by Article 6.3 and 6.4.

5.2.8 With respect to the requirements of Article 6.4, the Panel noted that the CIT acknowledged the existence of factors other than subsidized imports having an effect on the price of Canadian grain corn, but made no effort to ensure that the injuries caused by other factors were not attributed to the subsidized imports. The CIT referenced various factors which contributed to the build-up of stocks of grain corn in the United States, the reduction in United States exports and the consequent drop in the world market price. The factors enumerated included:

¹Finding of the Canadian Import Tribunal, page 10.

²Finding of the Canadian Import Tribunal, page 9.

"worldwide recession; the increasing cost of U.S. product to importing countries; the increasing foreign debt burden of many developing countries, the servicing of which reduced their purchasing power; development of higher-yielding corn varieties combined with improved agricultural technology; and the U.S. embargo on grain exports to the U.S.S.R. in connection with the Afghanistan invasion, which caused some countries to regard the United States as an unreliable supplier. Whatever the reasons, many countries have chosen to adopt a policy of supplying a greater part of their need from local production."¹

The Panel noted that several of the items enumerated in the CIT decision were similar or identical to those mentioned in a footnote to Article 6.4, namely, "contraction in demand or changes in the pattern of consumption, ... developments in technology and the exports performance and productivity of the domestic industry". However, the CIT, contrary to the evidence in this case, attributed the injury only to subsidization of United States grain corn, and thus did not meet the express requirements of Article 6.4.

5.2.9 In the view of the Panel, the CIT's findings of injury and causality were themselves largely based on factors other than subsidized imports: in particular, the factor of a dramatic decline in world market prices resulting in large part from a United States subsidy under the 1985 Farm Bill.² Clearly, if there is a general and dramatic decline in world market prices for grain corn, this will affect Canadian producers. It will affect Canadian producers even if Canada does not import any grain corn from the United States, even if it imports grain corn from third countries, even if it is completely self-sufficient in grain corn or, indeed, even if it is a net exporter of grain corn, as it was in some crops years during the period of the CIT investigation. In each case, the Canadian price for corn would still be directly impacted -- in a material way -- by the world price decline. Thus, the price depression experienced in the Canadian market would have occurred in all such cases, and the imposition of countervailing duties would be contrary to Article 6.4, which requires that price depression or prevention of price increases caused by other factors must not be attributed to subsidized imports. Since no case was made by the CIT that subsidized imports from the United States were responsible for the decline in prices suffered in Canada, the Panel concluded that the CIT determination was inconsistent with the requirements of Article 6 of the Subsidies Agreement.

5.2.10 The Panel considered that the purpose of countervailing duties is to allow signatories to counteract injury from subsidized imports, not from a general decline in world market prices. Only a generally applicable import tariff, not however a countervailing duty on imports from a particular country, can normally prove effective in raising the domestic price when there is a general decline in world prices. The fact that in the present case the countervailing duty may have been partially effective in raising the price of grain corn in Canada, in that the United States was the only viable source for imports given the existence of phytosanitary regulations which effectively barred all other imports, does not relieve Canada of the duty of making an injury determination in accordance with Article 6, namely, of showing that subsidized imports are the cause of material injury. The Panel of course recognized that a general decline in world market prices resulting from a foreign subsidy may cause serious problems to domestic producers, and that this may have occurred in the present case. In this regard, the Panel recalled that the Subsidies Agreement takes account of situations where subsidies may cause injury which may not be remedied by countervailing duties, and provides for procedures to address such situations in Article 13.4.

¹Finding of the Canadian Import Tribunal, pages 11-12.

²Finding of the Canadian Import Tribunal, page 14.

6. CONCLUSIONS

6.1 The Panel concludes that the determination of injury by the CIT in respect of "Subsidized Grain Corn Originating In or Exported from the United States of America" is not consistent with the requirements of Article 6 of the Subsidies Agreement because the CIT did not determine on the basis of positive evidence relating to subsidized imports of grain corn from the United States that material injury to Canadian grain corn producers was caused by such imports.

6.2 The Panel recommends that the Committee request Canada to bring its countervailing duty measure into conformity with Canada's obligations under the Subsidies Agreement.