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Investigation
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MEMORANDUM

TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the for the Final Determination in the Countervailing Duty Investigation of Live Swine from Canada

Background

On August 23, 2004, the Department of Commerce ("the Department") published the preliminary determination in this investigation. See Preliminary Negative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Live Swine from Canada, 69 FR 51800 ("Preliminary Determination"). The "Analysis of Programs" and "Subsidies Valuation Information" sections, below, describe the subsidy programs and the methodologies used to calculate the benefits from these programs. We have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the "Analysis of Comments" section below, which also contains the Department's responses to the issues raised in the briefs. We recommend that you approve the positions we have developed in this memorandum. Below is a complete list of the issues in this investigation for which we received comments and rebuttal comments from parties:

Comment 1: Specificity
Comment 2: Green Box Claims
Comment 3: Agricultural Income Disaster Assistance ("AIDA") Program Recurring vs. Nonrecurring
Comment 4: Quebec Farm Income Stabilization Insurance/Agricultural Revenue Stabilization Insurance Program
Comment 5: Saskatchewan Short-Term Hog Loan Program ("STHLP")
Comment 6: Saskatchewan Livestock and Horticultural Facilities Incentives Program

("LHFIP")

Subsidies Valuation Information

Allocation Period

In this proceeding, the average useful life ("AUL") period as described in 19 CFR 351.524(d)(2) is three years according to the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System. No party in this proceeding has disputed this allocation period.

Attribution of Subsidies

The Department's regulations at 19 CFR 351.525(b)(6)(I) state that the Department will normally attribute a subsidy to the products produced by the corporation that received the subsidy. However, 19 CFR 351.525(b)(6) directs that the Department will attribute subsidies received by certain other companies to the combined sales of those companies if 1) cross-ownership exists between the companies and 2) the cross-owned companies produce the subject merchandise, are a holding or parent company of the subject company, produce an input that is primarily dedicated to the production of the subject merchandise, or transfer a subsidy to a cross-owned company.

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This section of the Department's regulations states that this standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations. The preamble to the Department's regulations further clarifies the Department's cross-ownership standard. (See Countervailing Duties; Final Rule, 63 FR 65348, 65401 (November 25, 1998) ("Preamble").) According to the Preamble, relationships captured by the cross-ownership definition include those where

> the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same way it can use its own assets (or subsidy benefits). . .Cross-ownership does not require one corporation to own 100 percent of the other corporation. Normally, cross-ownership will exist where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) or a "golden share" may also result in cross-ownership.

Thus, the Department's regulations make clear that the agency must look at the facts presented in each case in determining whether cross-ownership exists.

Furthermore, the Court of International Trade ("CIT") has upheld the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of

another company in essentially the same way it could use its own subsidy benefits. See Fabrique de Fer de Charleroi v. United States, 166 F.Supp 2d. 593, 603 (CIT 2001) ("Fabrique de Fer").

The responding companies in this investigation have presented the Department with novel situations in terms of company relationships. Our findings regarding cross-ownership and attribution for individual respondents follow. See also the March 4, 2005 memorandum entitled "Final Determination Attribution Issues" ("Final Attribution Issues Memo") (which is on file in the Department's Central Records Unit in Room B-099 of the main Department building ("CRU")).

Maple Leaf Foods Inc. ("Maple Leaf")/Elite Swine Inc. ("Elite") (collectively, "Maple Leaf/Elite"): Elite is a live swine ("swine" or "subject merchandise") management and marketing company. It is a wholly-owned subsidiary of Maple Leaf, a Canadian food processing company, and is part of Maple Leaf's Agribusiness Group (one of Maple Leaf's three operating groups, along with the Meat Products and Bakery Products groups).

In addition to Elite, Maple Leaf has other wholly-owned operating subsidiaries or divisions that are involved in the production of swine, including Shur-Gain and Landmark Feeds Inc. ("Landmark"). These companies produce and sell animal feed and nutrients, including animal feed for swine production. Additionally, in September 2003, Maple Leaf signed an agreement to purchase the Schneider Corporation ("Schneider"), a Canadian food processing company. The acquisition of Schneider was not concluded until April 2004, subsequent to the period of investigation ("POI"), calendar year 2003. Finally, certain of Maple Leaf's wholly-owned subsidiaries have ownership positions in companies involved in the production of live swine. (For a more detailed discussion of these equity investments, whose details are proprietary, see the Final Attribution Issues Memo.)

No subsidies were received by Maple Leaf or any of its operating subsidiaries or divisions, including Elite, Shur-Gain, and Landmark, during the POI. Therefore, there are no benefits to these companies that require attribution. With regard to Schneider, because this company's purchase was not completed until after the POI, we are not including subsidies received by Schneider or Schneider's sales in our subsidy calculations. Also, for the reasons explained in the Final Attribution Issues Memo, we are not finding cross-ownership with respect to the companies owned, in part, by Maple Leaf subsidiaries or divisions other than Elite.

Turning to Elite, Elite is the principal operating subsidiary of Maple Leaf involved in live swine production. Elite holds an equity position in Genetically Advanced Pigs of Canada (Inc.) ("GAP"), a company which provides genetic services to Elite's suppliers and to other hog producers. Maple Leaf/Elite has reported that GAP received no subsidies during the POI. Therefore, we do not need to determine whether cross-ownership exists between Maple Leaf/Elite and GAP.

Elite also holds equity positions in some of the companies that are part of its swine production system and, depending on the company, may also provide operations and/or financial management services. The details of these relationships are proprietary and are discussed further in the Final Attribution Issues Memo.

For purposes of this final determination, we are finding cross-ownership between Maple Leaf/Elite and those companies in which Elite both owns shares and provides operations and/or financial management. See Final Attribution Issues Memo. Consequently, we are attributing the subsidies received by these companies to their combined sales.

Hytek Ltd. ("Hytek"): Hytek characterizes itself as a group of companies, including production operations, feed mills, genetics companies, and marketing companies, that are involved in swine production and sales. Hytek, which was created in 1994 by a small ownership group, has expanded its operations over time and has added new companies to the group with each expansion. In 2002, the ownership group reorganized and amalgamized certain operations in order to simplify the company structure. Subsequent to this reorganization, Hytek continued to add companies to its group and expand its operations through the POI.

Hytek has some level of equity interest in almost all of the companies within the Hytek group. Regardless of its ownership level in these group companies, however, each company is run as if it is 100 percent owned by Hytek (with the exceptions noted in the Final Attribution Issues Memo). Most sales of the group companies are made to Hytek on a fixed-contract basis. Production and supply among group companies is captive based on long-term, exclusive contracts; most Hytek group companies sell their production to, or purchase their supplies from, Hytek and do business only with companies in the Hytek group. (The distribution companies are one exception to this.) Most of the major inputs (including genetics, feed, maintenance services, trucking, administration, and utilities) are purchased from Hytek. Hytek makes all management decisions regarding the operations of the companies in the group, including what genetics are used, where and when the pigs move throughout the group, how they are raised and fed, and what veterinary services are used. Hytek manages and directs the operations of each of the barns, and most group company employees are Hytek employees and are on Hytek's payroll. Each company has the same benefits package. The addresses for the companies are the same, and almost all of the companies' records are kept by Hytek. Hytek is also on the boards of each of these companies.

Financial management of the companies within the group is largely centralized at the Hytek headquarters. A common accounting system for the companies is maintained on the Hytek server, with most of the books and finances managed by Hytek. All financial and company records are kept by Hytek, and Hytek has signing authority for each of the companies. Employees throughout the group are paid through Hytek's payroll system. Hytek is the primary bank contact and arranges for all of the loans for the company.

Hytek by itself accounts for most of the group's value and has the majority of the operations and barns, with its operations including sow barns, nurseries, finishers, multiplier barns, boar studs, feed mills, a distribution center, a workshop, and a truck wash. In addition to its own production and that of the other swine production companies within the Hytek group, Hytek also uses several contract suppliers (e.g., leased barns) in its production and sales of live swine. Hytek has no ownership in these companies, which provide products or services to Hytek on a contract basis. Hytek has no control over these barns and does not handle their accounting like it does for Hytek companies. Hytek is also not on the boards of these companies.

Whether we treat the Hytek group companies individually or collectively would not affect the results in this final determination because, either way, the countervailable subsidy rates for the companies in the Hytek group are de minimis. Therefore, we have accepted Hytek's characterization of these companies as a group for attribution purposes under 19 CFR 351.525(b) without further scrutiny. Hytek reported its responses that almost all production in the Hytek system was sold to Hytek and/or its marketing companies for resale. Therefore, we are attributing any subsidies received by the Hytek group companies only to the combined sales of Hytek and its marketing companies. See also Final Attribution Issues Memo.

Premium Pork Inc. ("Premium"): Premium consists of a group of companies organized into one system dedicated primarily to the production and sale of live swine. This production system has the following units: operations, multiplication, genetics, and commercial sow barns. The companies of the Premium group are contractually bound to each other through management contracts with Premium and production contracts with the operating companies of the Premium group. In addition, certain group companies manage the overall operations, sales, logistics, customer relations, exports, invoicing, accounting, and financing for the group. Premium is related to each of the of the companies in the group through direct ownership and/or common shareholders, officers, and directors. The details of these relationships are proprietary and are discussed further in the Final Attribution Issues Memo.

Whether we treat the Premium group companies individually or collectively would not affect the result in this final determination because, either way, the countervailable subsidy rates for the companies in the Premium group are de minimis. Therefore, we have accepted Premium's characterization of these companies as a group for attribution purposes under 19 CFR 351.525(b) without further scrutiny and have attributed subsidies received by the Premium group companies to the reported Premium group sales. See also Final Attribution Issues Memo.

Bujet Sow Group ("BSG"): BSG is a production cooperative made up of ten family-owned farms organized around a local management company, Sureleen-Albion Agra Inc. ("Sureleen"). There is no common ownership or shared board members among the BSG companies and Sureleen. There are no contracts or agreements establishing the terms of the BSG arrangement. Instead, BSG's operations are conducted based on verbal agreements among the members.

The members of BSG use a common genetic line and multiplier barn, which ensures a uniform stock of swine among the farms of BSG. As noted above, the members of BSG are linked by common management under Sureleen. Specifically, Sureleen coordinates production, distribution, marketing, and pricing on behalf of the group. Sureleen organizes all bulk purchases of vaccines and makes available to the other BSG members goods such as feed ingredients, tattoo supplies, and other farm supplies. Sureleen also works with the other BSG members to fill in open spaces in the farrowing schedule. Sureleen collects the revenue from sales and allocates the pooled profits to each member on the basis of pigs supplied.

Whether we treat the BSG companies individually or collectively would not affect the results in this final determination because, either way, the countervailable subsidy rates for the BSG companies are de minimis. Therefore, we have accepted BSG's characterization of these companies as a group for attribution purposes under 19 CFR 351.525(b) without further scrutiny and have attributed subsidies received by the BSG group companies to those companies and Sureleen's combined sales.

Hart Feeds Ltd. ("Hart"): Hart is primarily engaged in the manufacture and marketing of livestock feed and, as discussed further below, is also involved in the production of live swine. Hart is a wholly-owned subsidiary of Unifeed Limited ("Unifeed"), which is also primarily a livestock feed producer. Unifeed, in turn, is a wholly-owned subsidiary of the United Grain Growers Inc., a grain handling and merchandising, crop production services, and livestock feed and services company which operates under the name of Agricore United ("AU"). Hart was owned by the Rempel family until 1983, at which point it was sold to Unifeed. Similarly, Unifeed was owned by the Rempel family until it was purchased by AU in 1995. AU also has an equity ownership interest in the Puratone Corporation ("Puratone"), a commercial hog and feed producer. Hart, Unifeed, and Puratone together comprise AU's livestock division.

Neither Hart nor Unifeed received subsidies during the POI. Therefore, there are no benefits to these companies that require attribution.

With regard to Puratone, Hart claims that cross-ownership does not exist with this company. AU has a minority equity interest in Puratone, and no other AU company has an equity interest in Puratone. Similarly, Puratone has no equity interest in any AU companies. AU has only two of six representatives on Puratone's six-person board. Neither AU nor any other company in the AU group supplies feed or live swine to, or purchases swine from, Puratone. Finally, Puratone's operations are in open competition with Hart's operations. Based on the above information, we determine that cross-ownership does not exist with regard to Puratone because there is no indication that Hart, Unifeed, or AU can use or direct the assets of Puratone in the same way in which they can use their own assets (see 19 CFR 351.525(b)(6)(vi); see also Fabrique de Fer at 603).

The swine sold by Hart are produced by two swine production groups, the Pro Vista Group and the Russ Fast Group. Companies within the Pro Vista Group are in the business of producing weanlings.

The Russ Fast Group companies are dedicated to feeding weanling pigs. Hart does not have an equity interest in any of the ProVista or Russ Fast group companies and does not share or appoint managers or board members for either one of these groups. Instead, their relations are governed by long-term contracts and other mechanisms. The details of these relationships are proprietary and are discussed further in the Final Attribution Issues Memo.

Whether we treat the Hart group companies individually or collectively would not affect the result in this final determination because, either way, the countervailable subsidy rates for the companies in the Hart group are de minimis. Therefore, we have accepted Hart's characterization of these companies as a group for attribution purposes under 19 CFR 351.525(b) without further scrutiny and have attributed subsidies received by the Hart group companies to the combined sales of those companies.

Park View Colony Farms Ltd. ("Park View"): Park View, a producer of the subject merchandise, has responded on behalf of itself and the other companies in its group, i.e., the Park View Colony of Hutterian Brethren Trust ("Park View Trust"), Mountain View Holding Co. Ltd., Beresford Creek 93 Ltd., and P.V. Hogs Ltd. All of the Park View companies are wholly-owned by the Park View Trust. We have thus attributed the subsidies received by these entities to their combined sales. See 19 CFR 351.525(b)(6).

Willow Creek Colony Ltd. ("Willow Creek"): Willow Creek, a producer of the subject merchandise, has responded on behalf of itself and the other companies in its group, i.e., Willow Creek Colony of Hutterian Brethren Trust ("Willow Creek Trust"), Willow Creek Holding Co. Ltd., Stoney Hill 93 Ltd., and Canuck Trailer Manufacturing Ltd. All of the Willow Creek companies are wholly-owned by the Willow Creek Trust. We have thus attributed the subsidies received by these entities to their combined sales. See 19 CFR 351.525(b)(6).

Benchmarks for Loans

Companies being investigated in the instant proceeding reported receiving both long-term fixed and variable-rate loans that were denominated in Canadian currency under certain of the programs being investigated (with the exception of the STHLP, noted below).

Pursuant to 19 CFR 351.505(a), the Department will use the actual cost of comparable borrowing by a company as a loan benchmark, when available. According to 19 CFR 351.505(a)(2), a comparable commercial loan is one that, when compared to the loan being examined, has similarities in the structure of the loan (e.g., fixed interest rate v. variable interest rate), the maturity of the loan (e.g., short-term v. long-term), and the currency in which the loan is denominated. In instances where a respondent has no comparable commercial loans to use as a benchmark, 19 CFR 351.505(a)(3)(ii) allows the Department to use a national average interest rate for comparable commercial loans.

Where we relied on national average interest rates as benchmarks for long-term fixed-rate loans, we used as our base rate a simple average of the GOC's benchmark bond yields (using a simple average of the four time-period average yields) as published by the Bank of Canada ("BOC") for the year in which the government loan was approved. We added to this base rate a spread of two percentage points. According to the private commercial bankers with whom we met at verification, this rate reflects what a farmer in Canada would typically pay in a fixed-rate loan from commercial sources. See the December 1, 2004 memorandum entitled "Private Commercial Bank Verification Report" ("Bank Verification Report"), which is on file in the Department's CRU.[1]

For a national average interest rate for long-term variable-rate loans, we used as our base rate the BOC's target overnight rate plus 1.75 percentage points (which was equal to the prime business rate as published by the BOC during the POI). According to the Bank Verification Report, banks in Canada typically add a spread to this base rate for long-term loans. This spread varied from zero to 2.5 percent. We used the mid-point of this spread, 1.25 percent. Thus, our national average benchmark rate for long-term, variable-rate loans was the BOC's target overnight rate plus 1.75 percentage points (equal to the prime business rate) plus a spread of 1.25 percent.

For the mature hog loans and the unconsolidated weanling hog loans given under the STHLP, consistent with our treatment of these loans in the Preliminary Determination, we have treated the amounts outstanding under this program during the POI as series of short-term loans (see Comment 5, below). To measure the benefit from these loans, consistent with past proceedings, we used the prime business rate as published by the BOC (which, as noted above, was equal to the BOC's target overnight rate plus 1.75 percentage points during the POI) as our short-term benchmark. See, e.g., Final Affirmative Countervailing Duty Determinations: Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 FR 52747 (September 5, 2003). Under 19 CFR 351.505(a)(2)(iv), we will normally use an annual average of short-term rates as our benchmark. However, because these loans are advances on individual lines of credit throughout the POI, we have determined that use of monthly benchmarks will yield a more accurate calculation of the benefits.

As discussed below in Comment 5 and in the program-specific section, because the weanling hog loans were consolidated as of July 1, 2003 and went into continuous repayment as long-term, variable rate loans at that time, we used the national average long-term, variable-rate benchmark discussed above to measure the benefit from the consolidated weanling hog loans.

Green Box Claims

According to section 771(5B)(F) of the Tariff Act of 1930, as amended by the Uruguay Round

[1] No party in this proceeding commented on the contents of the Bank Verification Report.

Agreements Act effective January 1, 1995 ("the Act"), domestic support measures that are provided with respect to products listed in Annex 1 of the World Trade Organization ("WTO") Agreement on Agriculture ("Agriculture Agreement"), and that the Department determines conform fully to the provisions of Annex 2 of that same agreement, shall be treated as noncountervailable. Under 19 CFR 351.301(d)(6), a claim that a particular agricultural support program should be accorded noncountervailable or "green box" status under section 771(5B)(F) of the Act must be made by the competent government with the full participation of the government authority responsible for funding and/or administering the program.

On May 3, 2004, the Government of Canada ("GOC") notified the Department that certain programs under investigation in this proceeding qualified for green box treatment. Specifically, the GOC requested green box treatment for the following programs: the Canadian Farm Income Program ("CFIP")/AIDA Program, the Alberta Hog Industry Development Fund, the Producer Assistance 2003 Program/Canadian Agricultural Income Stabilization ("CAIS") Program, and a portion of the Transitional Assistance/Risk Management Funding ("RMF") Program.

Because we have determined that the Alberta Hog Industry Development Fund and the Producer Assistance 2003 Program/CAIS Program were not used during the POI, we have not addressed the issue of whether these two programs should be accorded green box status. With respect to the CFIP/AIDA Program and the Transitional Assistance/RMF program, because we have determined that the programs are not countervailable, we do not need to evaluate the green box claims for these programs.

Analysis of Programs

Based upon our analysis of the petition and the responses to our questionnaires, we determine the following:

I. Programs Determined to Be Countervailable

A. <u>Farm Credit Canada Financing ("FCC"): Flexi-Hog Loan Program ("FHLP")</u>

The FHLP, administered by the FCC, was established in May 2000. This program offered hog producers fixed or variable-rate long-term loans with flexible repayment terms. Specifically, swine producers had the option of deferring principal repayment for these loans for as much as one year up to three separate times during the life of the loan. These deferrals helped the swine producers to deal with market fluctuations and to manage temporary downturns. Interest payments were required to be made during these "principal holidays" and could not be deferred under the program. FHLP loans were available for terms of up to fifteen years for new facilities construction. The FHLP was merged into the FCC's Flexi-Farm program in December 2003.

Both Hart and BSG companies reported that they had loans through this program that were outstanding during the POI.

We determine that these loans are a direct transfer of funds within the meaning of section 771(5)(D)(I) of the Act. These loans are also specific as a matter of law within the meaning of section 771(5A)(D)(I) of the Act because they are limited to producers of live swine.

Finally, we determine that a benefit exists for these loans pursuant to section 771(5)(E)(ii) of the Act and 19 CFR 351.505. To determine the existence and amount of the benefit, we used our long-term fixed-rate or variable-rate loan methodology, depending on the terms of the reported loans. For long-term fixed-rate loans given under this program, we found a benefit in the difference between what the recipient would have paid on a benchmark loan during the POI and the amount paid on the government-provided loan (see 19 CFR 351.505(a)(1)). For long-term variable-rate loans, in accordance with 19 CFR 351.505(a)(5), we first compared the benchmark interest rate to the rate on the government-provided loan for the year in which the government loan terms were established, i.e., the origination year. This comparison showed that the government loan provided a benefit. To calculate the benefit from these loans, we computed the difference between the amount that would have been paid on the benchmark loans to the amounts actually paid on the government loans (see 19 CFR 351.505(c)(2) and (c)(4)). Accordingly, we find that these loans confer countervailable subsidies pursuant to section 771(5) of the Act.

In order to calculate the countervailable subsidy rates, we divided the benefit received by each company during the POI by each company's total sales during the POI. On this basis, we determine the countervailable subsidy from the FHLP loans to be 0.11 percent *ad valorem* for Hart and 0.02 percent *ad valorem* for BSG.

B. Manitoba Agricultural Credit Corporation ("MACC") Financing: Diversification Loan Guarantee ("DLG") Program and Enhanced Diversification Loan Guarantee ("EDLG") Program

MACC administers both the DLG and the EDLG programs. The DLG program was introduced in December 1995 and was terminated on March 31, 2001. The EDLG program replaced the DLG program on April 1, 2001. Both programs assist producers in diversifying their current operations and/or adding value to commodities produced on the farm.

The DLG program was initially open to all Manitoba individuals, corporations, partnerships, limited partnerships, and cooperatives engaged in agricultural production. In 1998, eligibility was extended to include non-residents of Manitoba that were Canadian citizens or permanent residents as long as the majority of care and control of the project was held by Manitoba agricultural producers. Under the DLG program, the Government of Manitoba ("GOM"), through MACC, provided a loan guarantee for 25 percent of the principal provided by private sector lenders for the lesser of the term of the loan or 15 years. The maximum amount of money that a participant could borrow under this program was C$3,000,000. Additionally, the maximum number of shareholders permitted per project was 25.

The EDLG program operates in much the same manner as the DLG Program with a few differences. Under the EDLG program, there are no limits on the amount of money that a participant in the program can borrow, and the limitation on the number of shareholders per project was eliminated. However, applications for guarantees in excess of C$750,000 (25 percent of a C$3,000,000 loan) are subjected to additional review.

Hytek, Premium, and Hart companies all reported that they had loans that were guaranteed under these programs outstanding during the POI.

The GOM reported that hog farmers received approximately 62 to 81 percent of all guarantees given under the DLG and EDLG programs from 2000 through 2003. Based on this, we determine that the swine industry was a dominant user of these programs from 2000 through 2003 when compared to other industries within the agricultural sector, and, consequently, that these programs are specific under section 771(5A)(D)(iii)(II) of the Act.

A loan guarantee is a financial contribution, as described in section 771(5)(D)(I) of the Act. Furthermore, these guarantees provide a benefit to the recipients equal to the difference between the amount the recipients of the guarantee pay on the guaranteed loans and the amount the recipients would pay for a comparable commercial loan absent the guarantee, after adjusting for guarantee fees. <u>See</u> section 771(5)(E)(iii) of the Act and 19 CFR 351.506. To determine the existence and amount of benefit conferred by these programs, we used our long-term, fixed-rate or variable-rate loan methodology (depending on the terms of the reported loans) as specified in 19 CFR 351.505. <u>See</u> 19 CFR 351.506(a). These comparisons showed that these guarantees provided a benefit. Therefore, we determine that these loan guarantees are countervailable subsidies within the meaning of section 771(5) of the Act.

To calculate the POI subsidy amount, we divided the total POI benefit from these loan guarantees for each company by each company's total sales during the POI. On this basis, we determine the countervailable subsidy from these programs to be 0.00 percent *ad valorem* for Hart, 0.02 percent *ad valorem* for Hytek, and 0.01 percent *ad valorem* for Premium.

C. <u>Farm Improvement and Marketing Cooperatives Guaranteed Loans ("FIMCLA")</u>

Under FIMCLA, the GOC provides guarantees on loans extended by private commercial banks and other lending institutions to agricultural producers and processors across Canada. Enacted in 1987, the purpose of this program is to increase the availability of loans for the improvement and development of farms, and the marketing, processing, and distribution of farm products by cooperative associations. Pursuant to FIMCLA, any individual, partnership, corporation, or cooperative association engaged in the above-noted agricultural activities in Canada is eligible to receive loan guarantees covering 95 percent of the debt outstanding for projects that are related to farm improvement or increased farm production. The maximum amount of money that an individual can borrow under this program is C$250,000. For farming cooperatives, the

maximum amount is C$3,000,000; however, any amount above C$250,000 is subject to prior approval by the GOC.

BSG and Premium companies had loans outstanding during the POI that were guaranteed under FIMCLA.[2]

A loan guarantee is a financial contribution, as described in section 771(5)(D)(I) of the Act. Furthermore, these guarantees provide a benefit to the recipients equal to the difference between the amount the recipients of the guarantee pay on the guaranteed loans and the amount the recipients would pay for a comparable commercial loan absent the guarantee, after adjusting for guarantee fees. See section 771(5)(E)(iii) of the Act and 19 CFR 351.506. In order to determine whether this program conferred a benefit, we used our long-term fixed-rate or variable-rate loan methodology (depending on the terms of the reported loans) to compute the total benefit on the reported loans. See 19 CFR 351.505 and 19 CFR 351.506(a). We determine that the guaranteed loans under this program taken out in 1999, 2000, 2002, and 2003 did not provide a benefit to the respondent companies. Therefore, we determine that the FIMCLA loan guarantees issued on loans taken out in these years do not provide a countervailable subsidy according to section 771(5)(B) of the Act. Because the loan guarantees on the subject loans from the above-noted years did not confer a benefit on live swine from Canada during the POI, there was no need for the Department to further examine whether these guarantees were specific within the meaning of section 771(5A) of the Act during these years.

The only other years for which respondents had FIMCLA-guaranteed loans were 1996, 1997, 1998, and 2001. Using the above-noted methodology, we have determined that a benefit was conferred upon the recipients of certain FIMCLA-guaranteed loans in 1996, 1997, and 1998. Moreover, in the Final Negative Countervailing Duty Determination; Live Cattle from Canada, 64 FR 57040, 57042 (October 22, 1999) ("Cattle from Canada"), the Department determined that FIMCLA loan guarantees were specific under section 771(5A)(D)(iii) of the Act between 1994 and 1998 because the beef and hog industries received a disproportionate share of benefits under this program during that time.[3] In the instant proceeding, based upon the same facts, we find that the loan guarantees provided

[2] Certain companies reported by Maple Leaf/Elite also had outstanding FIMCLA-guaranteed loans during the POI. However, we have determined that these companies were not cross-owned by Maple Leaf/Elite and, hence, that any subsidies received by these companies would not be attributed to Maple Leaf/Elite.

[3] At the time of the Cattle from Canada investigation, the GOC did not maintain FIMCLA usage data separately for cattle and hogs. Therefore, the Department's specificity analysis necessarily aggregated cattle and swine. However, since 1999, the GOC has kept separate FIMCLA usage data for cattle and hogs.

under this program in 1996, 1997, and 1998 are specific within the meaning of section 771(5A) of the Act.

For FIMCLA-guaranteed loans taken out in 2001, we determine that these guarantees are not specific with regard to the swine industry under section 771(5A)(D) of the Act. As described above, the FIMCLA program is available to any individual, partnership, corporation, or cooperative association that is engaged in the above-noted agricultural activities in Canada. According to 19 CFR 351.502(d), the Department will not regard a domestic subsidy as being specific under section 771(5A)(D) of the Act solely because it is limited to the agricultural sector. Moreover, the guarantees under this program were neither export subsidies nor import substitution subsidies according to sections 771(5A)(B) and (C) of the Act, nor is there any basis to find that these guarantees were *de jure* specific within the meaning of section 771(5A)(D) of the Act.

Next, we examined whether this program was *de facto* specific with regard to the swine industry in 2001 according to section 771(5A)(D)(iii) of the Act. According to record information, thousands of Canadian farmers across many different agricultural sectors received guarantees under this program. Thus, recipients of these guarantees were not limited in number within the meaning of section 771(5A)(D)(iii)(I) of the Act. Eligibility was based on established criteria and was automatic as long as the eligibility criteria were met. Thus, the criteria in section 771(5A)(D)(iii)(IV) of the Act are also not met.

Finally, we examined the sectoral distribution of benefits within the agricultural community in accordance with sections 771(5A)(D)(iii)(II) and (III) of the Act. <u>See</u> <u>also</u> Comment 1, below. According to data on the distribution of benefits under this program to producers of different agricultural products, we find that the live swine industry was not a predominant user of the FIMCLA program in 2001, nor did it receive a disproportionately large share of the guarantees under the FIMCLA program in 2001. <u>See</u> sections 771(5A)(D)(iii)(II) and (III) of the Act. <u>See</u> <u>also</u> the March 4, 2005 proprietary memorandum entitled "Final Determination Specificity Issues for Certain Programs: Canadian Farm Income Program, Agricultural Income Disaster Assistance Program, Transitional Assistance/Risk Management Funding, and Farm Improvement and Marketing Cooperatives Guaranteed Loans" ("<u>Final Specificity Memo</u>"), which is on file in the Department's CRU. Furthermore, as discussed in the <u>Preliminary Determination</u>, while swine producers collected 10.54 percent of total agricultural cash receipts in 2001, their share of FIMCLA guaranteed loans in 2001 was less than that (5.44 percent). Thus, the FIMCLA program is not *de facto* specific with regard to the live swine industry in 2001 under section 771(5A)(D)(iii) of the Act.

Based on the above analysis, we find that FIMCLA loan guarantees received in 1999 through 2003 did not confer a countervailable subsidy on live swine from Canada during the POI. However, for loan guarantees received in 1996, 1997, and 1998, we determine that the FIMCLA program did confer a countervailable subsidy on live swine from Canada during the POI within the meaning of section 771(5) of the Act.

To calculate the POI subsidy amount, we divided the total company-specific POI benefit from these loan guarantees by the company's total sales during the POI. On this basis, we determine the countervailable subsidy from this program to be 0.00 percent *ad valorem* for BSG and 0.00 percent *ad valorem* for Premium.

D. Saskatchewan Short-Term Hog Loan Program

The STHLP was created by the Government of Saskatchewan ("GOS") in October 2002 to assist Saskatchewan swine producers facing high feed prices brought on by a severe drought in 2001 and 2002, and low market prices in 2002 and 2003. In order to receive loans through this program, producers of weanlings or mature hogs (defined as slaughter hogs or breeding hogs) were required to complete a single application for a loan similar to a line of credit. Once approved, these producers could then submit invoices on hogs marketed monthly between September 2002 and April 2003 to draw down on their approved loan, with interest on the draw-down amounts accumulating monthly. The individual draw-down amounts were per-hog amounts based on sales of either weanlings or mature hogs only, with the loan amount differing depending on whether it was a mature or a weanling hog. The last date that a company could apply for loans under the program was June 15, 2003, in connection with hogs sold prior to April 30, 2003.

According to program regulations, loans under this program did not have to be repaid until either 1) hog prices rose above C$150 per hundred kilograms or 2) no later than May 1, 2004. Program rules for weanling hogs stipulated that loans for weanlings would be consolidated and enter into continuous repayment the first time the above-noted trigger price was reached. For mature hog loans, repayments also had to be made if prices went above the base rate of C$150 per hundred kilograms. However, after prices went back below the base rate, mature hog producers were again allowed to defer payments until the next time prices exceeded the base rate or until May 1, 2004. According to program rules in effect during the POI, as of May 1, 2004, the mature hog loans would also be consolidated and enter into continuous repayment. Prior to entering into continuous repayment, although no principal or interest payments were required (except as noted above), interest began accumulating on each draw starting on the day on which it was received and was continuously rolled into the outstanding loan totals. Once the loans entered into continuous repayment, they became long-term, variable-rate loans that had to be repaid within three years of the consolidation date.

Repayment was triggered only once during the POI for a two-week period, from June 1, 2003 to June 15, 2003, when market prices for slaughter hogs exceeded the base of C$150 per hundred kilograms. Thus, no payments were made on these loans by producers of mature hogs during the POI except during a single two-week period in June 2003. Loans for weanling producers, however, were required to go into continuous repayment following the June 2003 trigger period. Starting in July 2003, all outstanding weanling loans were consolidated, and the weanling loans went into continuous repayment based on the pre-established three-year repayment schedule.

Only companies that were part of the Hytek group had outstanding loans through this program during the POI.

We determine that the loans under this program are a direct transfer of funds within the meaning of section 771(5)(D)(I) of the Act. These loans are also specific as a matter of law within the meaning of section 771(5A)(D)(I) of the Act because they are limited to producers of mature and weanling hogs.

Finally, for the mature hog loans and the unconsolidated weanling hog loans, as further discussed below in Comment 5, because the recipients of these loans might have had to begin repayment whenever the price of weanling or mature hogs rose above the pre-established trigger prices, we are treating the drawdowns and interest accruals during the POI as short-term loans that were rolled over each time new amounts were taken out or interest accumulated. Comparing the interest accrued on these loans to the interest on a short-term benchmark loan, we determine that the STHLP conferred a benefit on the recipients (see 19 CFR 351.505(a)(1)). As for the consolidated weanling hog loans, as noted above, all of the weanling hog loans were consolidated as of July 1, 2003, and went into continuous repayment as long-term, variable rate loans. Using our long-term, variable-rate loan methodology as specified in 19 CFR 351.505, we also determine that the consolidated loans under the STHLP conferred a benefit on the recipients during the POI.

To calculate the POI subsidy amount, we divided the total POI benefit from these loans by Hytek's total sales of subject merchandise in the POI. On this basis, we determine the countervailable subsidy from the STHLP loans to be 0.00 percent *ad valorem* for Hytek.

E. Saskatchewan Livestock and Horticultural Facilities Incentives Program

The LHFIP was created by the GOS in June 1997 to rebate the provincial sales tax ("PST") paid on construction materials and equipment for livestock and horticultural facilities. Specifically, this program allowed for an annual refund of the PST (which was called the education and health tax at the time of the program's creation) paid on building materials and stationary equipment used in livestock operations, greenhouses, or storage facilities for vegetables, raw fruits, medicinal plants, herbs, and spices. The purpose of this program was to assist in the diversification of Saskatchewan's rural economy by encouraging investment and job creation.

In order to receive this tax rebate, producers in the above industries had to submit applications to the GOS along with all purchase receipts to verify the types of materials purchased and the amount of the PST paid at the time of the purchase. Once the GOS confirmed that the application was for materials for eligible facilities and that the PST had been paid, the GOS then refunded to the producer the amount of the PST paid. The LHFIP expired on December 31, 2003, and the last date on which a producer could apply for benefits under this program was June 30, 2004.

Only companies that were part of the Hytek group reported receiving assistance through the LHFIP during the POI.

The Department found that LHFIP tax rebates were countervailable subsidies in Cattle from Canada, 64 FR 57040, 57047. Specifically, the Department found that the tax benefits under this program were financial contributions as described in section 771(5)(D)(ii) of the Act which provided a benefit to the recipient in the amount of the tax savings. Also, because the legislation establishing this program expressly limited the tax benefits to the livestock and horticulture industries, we determined that the program was specific under section 771(5A)(D)(I) of the Act. The facts on the record with respect to this program are the same as in Cattle from Canada.

In the instant proceeding, the GOS has claimed that the LHFIP is integrally linked to the tax exemptions permitted under the Provincial Sales Tax Act. According to 19 CFR 351.502(c), unless the Department determines that two or more programs are integrally linked, the Department will determine the specificity of a program under section 771(5A)(D) of the Act solely on the basis of the availability and use of the program in question. This section of the Department's regulations states that the Department may find two or more programs to be integrally linked if 1) the subsidy programs have the same purpose; 2) the subsidy programs bestow the same type of benefit; 3) the subsidy programs confer similar levels of benefits on similarly situated firms; and 4) the subsidy programs were linked at inception. See 19 CFR 351.502(c).

In the Preliminary Determination, we preliminarily found that the LHFIP and the tax exemptions permitted under the Provincial Sales Tax Act were not integrally linked. First, we found that the two programs did not have the same purpose. Under the Provincial Sales Tax Act, all agricultural producers are exempt from paying the PST on select inputs (e.g., machinery and fertilizer) used in their production. In addition, pursuant to the LHFIP, livestock and horticultural operators receive PST refunds for materials used in the construction of new facilities. According to the GOS, this additional tax relief is given to livestock and horticultural operators because they do not benefit as much as other agricultural producers from the more broadly available tax exemption. Furthermore, the GOS deemed that it was too difficult to require that the vendors of construction materials identify whether such purchases were for agricultural or non-agricultural use. Thus, according to the GOS, the LHFIP was created to provide PST tax refunds on materials used to construct facilities for livestock and horticultural operators without requiring vendors to identify if the end-use of such facilities was for agricultural purposes. Because the LHFIP provides tax refunds to a subset of users for an activity that does not qualify for a tax exemption in the Provincial Sales Tax Act (i.e., the construction of facilities), we preliminarily found that the programs have different purposes.

Second, we found that similarly situated firms did not receive similar benefits under the program. Under the LHFIP, tax refunds are available for livestock and horticultural operators who make specified purchases in conjunction with building facilities. While PST exemptions are available to numerous consumers for purchases of specified items, there are no exemptions or rebates of the PST for other companies purchasing construction materials. Thus, we found in the Preliminary Determination that similarly-situated firms, i.e., those undertaking construction, are not receiving similar levels of benefits.

Based on the above analysis, we found in the Preliminary Determination that these programs are not integrally linked in accordance with 19 CFR 351.502(c). As discussed further in Comment 6, below, we continue to find for this final determination that these programs are not integrally linked.

Consistent with our findings in Cattle from Canada, discussed above, the current record indicates that the tax benefits under this program are financial contributions as described in section 771(5)(D)(ii) of the Act which provide a benefit to the recipient in the amount of the tax savings. Also, the legislation establishing this program expressly limited the tax benefits to the livestock and horticulture industries. Thus, we find that LHFIP tax rebates are countervailable subsidies within the meaning of section 771(5) of the Act.

In calculating the benefit, consistent with 19 CFR 351.524(c)(1), we treated the tax savings as a recurring benefit and divided the tax savings received during the POI by Hytek's total sales during the POI. On this basis, we determine that a countervailable benefit of 0.00 percent *ad valorem* exists for Hytek for this program.

II. Programs Determined to Be Not Countervailable

A. Canadian Farm Income Program/Agricultural Income Disaster Assistance Program

The AIDA program and the CFIP were created to provide income support to agricultural producers in Canada who were facing more serious income problems than the minor income fluctuations already being addressed by the Net Income Stabilization Account ("NISA") program.[4] The AIDA program was in effect for the 1998 and 1999 tax years. Following complaints from farmers relating to the program's administration and operation, the AIDA program was revamped and re-christened as the CFIP. The CFIP provided assistance for the 2000, 2001, and 2002 tax years. The programs were

[4] The Department examined the NISA program in both Cattle from Canada, 64 FR 57040, 57054, and Live Swine from Canada; Final Results of Countervailing Duty Administrative Reviews, 61 FR 52408, 52410 (October 7, 1996) ("Live Swine 91/92, 92/93, 93/94 Review") and found that this program was neither *de facto* nor *de jure specific* in accordance with section 771(5A) of the Act separately with respect to the cattle and live swine industries and, thus, not countervailable. As described in Cattle from Canada, NISA is designed to stabilize an individual farm's overall financial performance through a voluntary savings plan. Farmers can deposit a portion of the proceeds from their sales of eligible, enrolled NISA commodities (up to three percent of net eligible sales) into individual savings accounts, receive matching government deposits, and make additional, non-matchable deposits, up to 20 percent of net sales. A producer can withdraw funds from a NISA account under a stabilization or a minimum income trigger. The stabilization trigger permits withdrawal when the gross profit margin from the entire farming operation falls below an historical average, based on the previous five years. If poor market performance of some products is offset by increased revenues from others, no withdrawal is triggered. The minimum income trigger permits the producer to withdraw the amount by which income from the farm falls short of a specific minimum income level.

essentially the same, but with the CFIP alleviating some administration and operational problems of the AIDA program. The CFIP and the AIDA program were national programs that were available in all provinces. They were jointly funded by the federal and provincial governments, with the GOC providing 60 percent of the funds and the provinces 40 percent. The GOC directly administered these programs for producers in some provinces; in the remaining provinces, the provincial governments administered the programs on behalf of their own province (or another province) and the GOC. The last date that a company could apply for an AIDA program payment was September 29, 2000; the last date that a company could apply for a CFIP payment was October 13, 2003.

The purpose of the AIDA program and the CFIP was to provide short-term income support to eligible applicants who, due to circumstances beyond their control, experienced a dramatic reduction in their farming income relative to previous years. To be eligible for these benefits, a producer's farming income for the year had to fall below 70 percent of the producer's average farming income level in a historical reference period (consisting of either the producer's average farming income over the three preceding years, or the average farming income in three of the preceding five years after eliminating the high and low years). Payments under the AIDA program and the CFIP were intended to bring the producer's farming income back to 70 percent of the historical average, and were calculated by subtracting program year farming income from 70 percent of the historic average. If producers were also participating in the NISA program, program payments under these programs were reduced by an amount equivalent to three percent of the applicant's claim year eligible net sales in order to eliminate duplicate support payments.

All agricultural producers who filed a tax return with the Canada Customs and Revenue Agency ("CCRA"), had been actively engaged in farming for six consecutive months in the province for which they were applying, and had completed one production cycle for an agricultural product could apply to receive funds under the CFIP and the AIDA program. In order to receive funds, producers were required to submit an application each time they wanted to receive a program payment. However, approval was automatic as long as the applicants met the eligibility criteria and the program requirements noted above and discussed in the program handbooks.

Hytek, Maple Leaf/Elite, BSG, and Park View companies all received funds through the CFIP during the AUL period. Hytek, Maple Leaf/Elite, BSG, Premium, Hart, and Park View companies all received payments under the AIDA program during the AUL period.

We first examined whether the AIDA program and the CFIP were specific within the meaning of section 771(5A) of the Act. As noted above, any agricultural producer who filed a tax return with the CCRA, had been actively engaged in farming for six consecutive months in the province for which it was applying, had completed one production cycle for an agricultural product, and whose farming income for the year fell below 70 percent of its average farming income level in a historical reference period could receive funds under the AIDA program and the CFIP. According to 19 CFR 351.502(d), the Department will not regard a domestic subsidy as being specific under section

771(5A)(D) of the Act solely because it is limited to the agricultural sector. Moreover, the funds provided under the AIDA program and the CFIP were neither export subsidies nor import substitution subsidies according to sections 771(5A)(B) and (C) of the Act. Finally, as discussed further in Comment 1, below, the mere fact that producers of processed agricultural products are ineligible for benefits under an agricultural subsidy program does not, *per se*, render that program *de jure* specific. Both of these programs are available to any producer of crops and livestock. Consequently, we find that assistance provided under the AIDA program and the CFIP is not *de jure* specific within the meaning of section 771(5A)(D) of the Act.

We next examined whether assistance provided under the AIDA program and the CFIP was *de facto* specific according to section 771(5A)(D)(iii) of the Act. Based on record information, thousands of Canadian farmers across many different agricultural sectors received benefits under the AIDA program and the CFIP. Thus, AIDA program and CFIP recipients were not limited in number within the meaning of section 771(5A)(D)(iii)(I) of the Act. As noted above, eligibility was based on established criteria and receipt was automatic as long as those requirements were met. Thus, the criteria in section 771(5A)(D)(iii)(IV) of the Act are also not met. These same findings were made in the Department's Preliminary Determination and were not challenged by any party in this proceeding.

We also examined the sectoral distribution of benefits under these programs within the agricultural community in accordance with sections 771(5A)(D)(iii)(II) and (III) of the Act. Based on our analysis of the usage data for the AIDA program and the CFIP (which is proprietary and is further discussed in the Final Specificity Memo), we find that the live swine industry was neither a predominant user of the AIDA program or the CFIP nor did it receive a disproportionately large share of the benefits under the AIDA program or the CFIP when compared to other agricultural sector recipients. See sections 771(5A)(D)(iii)(II) and (III) of the Act. See also the Final Specificity Memo and Comment 1, below. Moreover, as discussed in the Preliminary Determination, according to data from Statistics Canada, swine producers collected 9.94 percent of total agricultural cash receipts in 2003, 9.07 percent in 2002, 10.54 percent in 2001, and 10.18 percent in 2000. Because the AIDA program and the CFIP were available to all agricultural producers, it may be reasonable to assume that the producers would receive benefits in amounts proportional to their role in the overall agricultural economy. In fact, based on the GOC's usage data, the swine industry actually receives less than the above-noted percentages of the total benefits provided under the CFIP, and less than or similar levels of benefits under the AIDA program.

Thus, based on the above analysis, benefits provided under the AIDA program and the CFIP are not *de facto* specific according to section 771(5A)(D)(iii) of the Act. Consequently, because assistance under the AIDA program and the CFIP is not specific as a matter of law or fact, we determine that neither the AIDA program nor the CFIP confer countervailable subsidies on live swine from Canada.

B. Transitional Assistance/RMF Program

The Transitional Assistance/RMF program, which was created in 2002, was a GOC-funded program that provided C$1.2 billion in stop-gap assistance to the Canadian agricultural sector to transition producers from prior expiring programs (e.g., CFIP and the AIDA program) to the CAIS Program, which was still in the process of being implemented. Transitional Assistance/RMF was provided to producers in two equal installments of C$600 million, each using a different delivery method. Most of the first tranche of funds was deposited into new or existing accounts held for producers under the NISA program (or the Compte de Stabillisation des Revenus Agricole program ("CSRA"), which is Quebec's version of NISA);[5] the remainder of the first tranche went to non-NISA/CSRA participating producers in Quebec as direct payments. The second tranche of payments was made directly to producers.

All agricultural producers were eligible to receive Transitional Assistance/RMF except those whose products are subject to supply management (dairy and poultry producers), who chose not to participate in the Transitional Assistance/RMF program. Producers with existing NISA accounts did not need to apply to receive benefits because the information needed to calculate the Transitional Assistance/RMF could be obtained from the NISA database. NISA account holders automatically received their payments under tranches one and two. Producers that did not have NISA accounts had to open one to receive benefits, except for producers in Quebec without NISA/CSRA accounts, who received payments directly from the government, also without having to file an application. Producers without NISA accounts could also apply to receive Transitional Assistance/RMF benefits.

The payment amounts for all producers were calculated as a percentage of eligible net sales (as computed under NISA) for the previous five years; for tranche one, the payment was 4.25 percent of the average of eligible net sales from 1997 through 2001, and for tranche two, the payment was 3.85 percent of the same sales for 1998 through 2002. Approval for benefits under this program was automatic. The last date that a company could apply for or claim a payment under this program was December 31, 2003.

Hytek, Maple Leaf/Elite, BSG, Premium, Willow Creek, Hart, and Park View companies all reported receiving funds through the Transitional Assistance/RMF program during the AUL period.

As described above, producers of virtually all agricultural products were eligible to receive funds under this program. According to 19 CFR 351.502(d), the Department will not regard a domestic subsidy as being specific under section 771(5A)(D) of the Act solely because it is limited to the agricultural sector. Moreover, the Transitional Assistance/RMF funds were neither export subsidies nor import substitution subsidies according to sections 771(5A)(B) and (C) of the Act.
Finally, as discussed further in Comment 1, below, the mere fact that producers of processed

[5] The CSRA distribution operated in the same manner as did the NISA, except that CSRA calculated its own eligible net sales based on its own databases, and based on this, the GOC provided the funds to Quebec which in turn deposited it into the CSRA accounts.

agricultural products are ineligible for benefits under an agricultural subsidy program does not, *per se*, render that program de jure specific. This program was available to virtually any producer of crops and livestock. Consequently, we find that assistance provided under the Transitional Assistance/RMF program is not *de jure* specific within the meaning of section 771(5A)(D) of the Act.

Next, we examined whether Transitional Assistance/RMF was *de facto* specific according to section 771(5A)(D)(iii) of the Act. According to record information, thousands of Canadian farmers across many different agricultural sectors received Transitional Assistance/RMF. Thus, recipients of Transitional Assistance/RMF were not limited in number within the meaning of section 771(5A)(D)(iii)(I) of the Act. As noted above, eligibility was based on established criteria and receipt was automatic. Thus, the criteria in section 771(5A)(D)(iii)(IV) of the Act are also not met. These same findings were made in the Department's <u>Preliminary Determination</u> and were not challenged by any party in this proceeding.

Finally, we examined the sectoral distribution of benefits under these programs within the agricultural community in accordance with sections 771(5A)(D)(iii)(II) and (III) of the Act. According to data on the distribution of benefits under this program across producers of different agricultural products (which is proprietary and is further discussed in the <u>Final Specificity Memo</u>), we find that the live swine industry was neither a predominant user of the Transitional Assistance/RMF program nor did it receive a disproportionately large share of the benefits under the Transitional Assistance/RMF program when compared with other agricultural sector recipients. <u>See</u> sections 771(5A)(D)(iii)(II) and (III) of the Act. <u>See</u> <u>also</u> the <u>Final Specificity Memo</u> and Comment 1, below. Also, as noted above and discussed in the <u>Preliminary Determination</u>, while swine producers collected 9.94 percent of total agricultural cash receipts in 2003 and 9.07 percent in 2002, their share of Transitional Assistance/RMF benefits was less than or similar to that. Thus, the Transitional Assistance/RMF program is not *de facto* specific under section 771(5A)(D)(iii) of the Act.

Consequently, because assistance under the Transitional Assistance/RMF Program is not specific as a matter of law or fact, we determine that this program does not confer a countervailable subsidy on live swine from Canada. <u>See</u> section 771(5A) of the Act.

III. Programs Determined Not To Have Been Used

We determine that no responding companies applied for or received benefits under the following programs during the POI:

A. <u>Producer Assistance 2003 Program/Canadian Agricultural Income Stabilization Program</u>

B. <u>Farm Credit Canada Financing: Enviro-Loan Program</u>

C. <u>Alberta Agricultural Financial Services Corporation Financing: Developing Farmer Loan</u>

Program

D. Alberta Disaster Assistance Loan Program

E. Alberta Hog Industry Development Fund Program

F. Alberta Livestock Industry Development Fund Program

G. Ontario Bridge Funding Program

In October 2002, the Government of Ontario ("GOO") established the Ontario Bridge Funding Program to provide one-time transition funding to Ontario producers to assist them in making the transition from the former set of safety-net programs to the new CAIS program. All agricultural producers participating in NISA in 2001 were eligible for payments as long as their eligible net sales totaled at least C$2,985. Payments were made automatically to NISA participants; no application was required to receive funding under this program. Payments were made for all commodities except for supply-managed commodities (dairy and poultry) and were calculated at a rate of 0.335 percent of eligible net sales. Maple Leaf/Elite, Premium, and BSG companies received funds under this program in 2002.

Pursuant to 19 CFR 351.524(b)(2), the Department will normally expense non-recurring benefits to the year in which benefits are received if the total amount approved under the program is less than 0.5 percent of relevant sales during the year in which the subsidy was approved. Moreover, according to 19 CFR 351.524(a), the Department will allocate (expense) a recurring benefit to the year in which the benefit is received. If benefits under this program were treated as recurring benefits, they would have been allocated to 2002, the year in which the benefits were received, and would not have provided a benefit during the POI. If the Department treated these grants as non-recurring, because the amount of the bridge funding grants approved by the GOO for these companies under this program was less than 0.5 percent of each company's total sales in the year in which the grants were approved, these grants would be expensed prior to the POI in accordance with 19 CFR 351.524(b)(2). Thus, regardless of whether they were treated as recurring or non-recurring, no countervailable benefit was provided to Maple Leaf/Elite, Premium, or BSG during the POI under this program.

Analysis of Comments

Comment 1: Specificity

Petitioners' Arguments: The petitioners contend that, contrary to the findings in the Preliminary Determination, the Department should find the CFIP, the AIDA program, and Transitional Assistance/RMF program to be specific and countervailable for the final determination.

The petitioners argue that these programs are *de jure* specific because they are limited to the livestock and crop sectors. According to the petitioners, Annex 1 of the WTO Agriculture Agreement includes both "primary" (crops and livestock) and "processed" agricultural products. The petitioners contend that 19 CFR 351.502(d), which states that the Department will not regard a domestic subsidy as being specific solely because it is limited to the agricultural sector, should be interpreted to contain the same agricultural products as Annex 1 of the WTO Agriculture Agreement given the absence of qualifying language in the regulation. The petitioners claim that, because only primary and not processed agricultural products are eligible to receive funds under these programs, the programs are *de jure* specific according to section 771(5A)(D)(I) of the Act.

Should the Department not find these programs to be *de jure* specific, the petitioners argue that the Department should find these programs to be *de facto* specific for the final determination. According to the petitioners, the Department took too narrow an interpretation of the law in its *de facto* specificity analysis for these programs in the Preliminary Determination by examining the swine industry alone in comparison to other broader industry classifications. The petitioners contend that the legislative history of the specificity provision and past court proceedings (e.g., Cabot Corp. v. United States, 620 F. Supp. 722, 732 (CIT 1985)) dictate that the specificity requirements not be interpreted too narrowly. According to the petitioners, requiring that benefits be provided to only one industry (the swine industry by itself, in this case) in order to find specificity was never the intention of the law and would, in fact, violate the Court's mandate and legislative intent.

The petitioners contend that the Canadian federal and provincial governments have historically provided significant countervailable subsidies to the Canadian swine industry. See, e.g., Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 FR 25097 (July 1, 1985) ("Live Swine 1985") (where the petitioner notes the Department found several different programs to be *de jure* specific to swine alone or to benefit a group of nine industries that included swine). The petitioners claim that the same group of industries that benefitted under the old programs continues to receive the majority of the benefits under the programs in the instant investigation. The petitioners contend that the Department failed to recognize this fact in the Preliminary Determination because it used a flawed methodology in its *de facto* specificity analysis. Specifically, the petitioners contend that the Department compared the level of benefits received by the swine industry alone to the levels of benefits received by other categories comprised of numerous different commodities (e.g., "grains and oilseed" as a single category). The petitioners claim that record evidence indicates that these programs are all *de facto* specific based on several different types of analyses.[6]

Specifically, according to the petitioners, a subsidy can be found *de facto* specific pursuant to section 771(5A)(D)(iii) of the Act if it is predominantly used by a group of industries. The petitioners point to

[6] The petitioners also include FIMCLA in this argument.

Live Swine 1985, in which the Department found payments under the Agricultural Stabilization Act and Quebec Farm Income Stabilization Insurance Program to be *de facto* specific because the program was limited to a select group of agricultural products. The petitioners also note that the GOC itself in its own recent countervailing duty investigation of outdoor barbeques from China found that a group of industries was the beneficiary of a particular subsidy. According to the petitioners, the record in the current investigation shows that the CFIP, the AIDA program, and the Transitional Assistance/RMF program are provided disproportionately to a small group of agricultural industries in Canada, which includes the swine industry.

Alternatively, if the Department does not conduct a comparison based on a group of industries as described above, the petitioners contend that the Department should compare industry categories at the same level of industry concentration. The petitioners argue that the product categories utilized by the GOC to report its usage information (which were utilized by the Department in its Preliminary Determination analysis) differ from the North American Industry Classification System ("NAICS") based on changes made by the government to adjust for different reporting interests and, thus, should be examined with a critical eye. Further, the petitioners claim that just because the GOC uses certain product categories in the normal course of business does not mean that they are appropriate for the Department's specificity analysis.

The petitioners argue that comparable levels of concentration can be achieved by comparing hogs to other specific commodities (e.g., wheat instead of "grains and oilseed") or by comparing livestock to the existing broader classifications (e.g., "grains and oilseed" or "fruits and vegetables"). According to the petitioners, the ideal comparison would be at a more commodity-specific level. In this regard, the petitioners contend that, although the GOC did not create the classification system for purposes of this investigation, the GOC could have broken out the data into more specific categories. Because the GOC did not do this and withheld this information from the Department, the petitioners contend that the Department should rely on facts available and use record information on per-farm benefits to find the CFIP, the AIDA program, and the Transitional Assistance/RMF program to be *de facto* specific to swine.

As an alternative, because of these commodity-specific level data constraints, the petitioners contend that the Department should, at the very least, compare the combined livestock sector to the other broader categories of "grains and oilseed" and "fruits and vegetables." This comparison, the petitioners contend, shows that the livestock sector received a disproportionate share of the benefits under these programs based on usage level percentages found to be *de facto* specific in past proceedings.

The petitioners further object to the Department's use of cash receipts as an additional benchmark in the Preliminary Determination. The petitioners claim that such an approach is contrary to the Department's position in Cattle from Canada, 64 FR 57040, 57061, where the Department rejected the respondents' suggestion that the agency examine the level of cash receipts. If the Department does decide to use external benchmarks, the petitioners suggest that the Department could utilize additional factors, such as the debt-to-asset ratio of the swine industry or capital investment in the swine industry in comparison to other farm types, which both show disproportionality to the swine industry.

Finally, the petitioners urge the Department to examine the usage data on a per-farm basis, which would account for differences in categories with a large number of users versus ones with smaller numbers of users. According to the petitioners, hog farmers have received significantly larger grants under these programs than have non-hog farmers. The petitioners cite the Final Affirmative Countervailing Duty Investigation: Certain Stainless Steel Wire Rod from Italy, 63 FR 40474, 40485 (July 29, 1998) ("Italy Wire Rod") (where the Department stated that the respondent company received "far more than the average recipient" during the period in question) to support their contention.

Respondents' Arguments: The respondents disagree with the petitioners and contend that the Department conducted an appropriate analysis with regard to the specificity of these three programs in the Preliminary Determination.

First, the respondents argue that the CFIP, the AIDA program, and the Transitional Assistance/RMF program are not *de jure* specific. According to the respondents, crops and livestock encompass all primary agricultural products, with crops including everything that grows from the ground and livestock including the raising of any type of animal. The AIDA program and the CFIP were available to all primary agricultural producers, and the Transitional Assistance/RMF program was available to all primary agricultural producers except for supply managed commodities. According to the respondents, the Department has never held that, to avoid a specificity finding, agricultural sector policies must extend beyond the farm gate. The respondents contend that the fact that Annex 1 of the WTO Agriculture Agreement also includes processed agricultural products is not legally relevant, and that there is no automatic application of Annex 1 to U.S. law or to the WTO Agreement on Subsidies and Countervailing measures. According to the respondents, the focus of the WTO Agriculture Agreement, and the key requirement of reporting levels of domestic support, relates only to producer, not processor subsidies. According to the respondents, the widespread availability of these programs to agricultural producers shows that these programs are not *de jure* specific.

The respondents also contend that these programs (as well as the FIMCLA program) are not *de facto* specific. The respondents note that the Department found in its Preliminary Determination, and the petitioners did not challenge, that the recipients of these program benefits were not limited in number, and eligibility for these programs was based on established criteria with receipt being automatic as long as the program requirements were met. See sections 771(5A)(D)(iii)(I) and (IV) of the Act. As for the sectoral distribution of benefits according to sections 771(5A)(D)(iii)(II) and (III) of the Act, the respondents note that the percentages of payments to the swine sector were very small for each program. According to the respondents, it has been the Department's practice in a number of past cases (cited in the respondents' January 14, 2005 rebuttal brief at page 8) to find that such small percentages, on their face, evidence non-predominance and lack of disproportionality. Moreover, the respondents note that, for each of these programs, hog category usage was less than total agricultural cash receipts in the hog industry. Finally, when compared to other sectors, the respondents noted that hog payments were not disproportionate.

The respondents claim that the methodology used by the Department in its *de facto* specificity analysis in the Preliminary Determination was not erroneous, contrary to the petitioners' claims. The respondents first contend that the industries lumped together by the petitioners in their recommended "group" methodology ("grains and oilseed," "hogs," and "cattle") was arbitrary, was done to achieve the petitioners' desired level of specificity, and is inconsistent with the Department's statutory obligations. According to the respondents, this case is about swine, and any determination of countervailability must be made with respect to the subject merchandise only. Furthermore, the respondents contend that the petitioners' proposal that the Department "cherry pick" the farm types with the largest funding levels would always allow a non-specific program to be made specific to a "group" by simply lumping together enough program users. Citing the Preamble, 63 FR 65347, 65357, the respondents note that the concept of grouping industries to find specificity was never intended to permit turning what is otherwise a widely-available program, such as the programs in question in this case, into a specific program by arbitrarily selecting a subset of recipient industries, adding up their usage, and calling the program specific to them. The respondents argue that this approach would eliminate any principled analysis of specificity and would be entirely results-oriented.

The respondents also disagree with the petitioners' contention that the Department should resort to the use of facts available to determine specificity. According to the respondents, the farm-type categories used by the government to report its usage data reflect the reality of farms in Canada. The respondents note that hog farms tend to be very specialized, whereas grains and oilseed producers tend to grow a variety of different types of grains and oilseed and to rotate their crops frequently. Consequently, the respondents claim, data from grains and oilseed producers would not be statistically meaningful if it was not reported in a single category because no one crop would ever account for 50 percent of farm revenue. According to the respondents, as the Department found at verification, these classifications have been used in Canada for a long time and are used in the everyday normal course of business. The respondents contend that the GOC never withheld any requested information, and that the Department's specificity finding in the Preliminary Determination was based on long-standing farm-type categories that reflect the reality of farming in Canada.

Based on this same logic and the fact that this case is about swine, and not livestock, the respondents also disagree that the Department should lump farm categories into a single category, like livestock, for its *de facto* specificity analysis. The respondents contend that, in every instance when the Department has had available information for the product that is under investigation (including Live Swine 1985 and Cattle from Canada), the Department has used this information in its specificity analysis. The respondents contend that, because the data is available and this case is about swine and not livestock, it would be unlawful for the Department to use livestock, which includes non-subject merchandise, as a basis for finding specificity. However, the respondents note that, even if the Department were to create this "livestock" category, the Department would find that this category did not receive a disproportionate share of benefits under these programs based on a comparison of payment share to the share of livestock's farm cash receipts.

Finally, the respondents contend that the petitioners' per-farm approach is not meaningful because it ignores the differences in the sizes of farm operations which result in different size payments. The respondents also contend that Italy Wire Rod does not apply in this instance because that case involved a program found to be specific because it was limited to one company, which is not the situation in the instant proceeding.

Department's Position: We disagree with the petitioners that the CFIP, the AIDA program, and the Transitional Assistance/RMF programs are specific. As noted in the program-specific sections above, according to 19 CFR 351.502(d), the Department will not regard a domestic subsidy as being specific under section 771(5A)(D) of the Act solely because it is limited to the agricultural sector. The petitioners acknowledge this regulation but urge the Department to interpret "agricultural sector" to include all products listed in Annex 1 of the WTO Agriculture Agreement. We have not adopted the petitioners' approach.

Our practice in applying the agricultural specificity rule both prior to and following the adoption of the WTO Agriculture Agreement has been consistent. We have never interpreted "agricultural sector" for purposes of this rule to require the inclusion of producers of processed agricultural products such as those listed in Annex 1 of the WTO Agriculture Agreement. Importantly, we do not view the WTO Agriculture Agreement as changing that practice. As noted in the Preamble in response to a comment that the Department should abandon the special agricultural specificity rule because, under Section 771(5B)(F) of the Act, so-called "green box" agricultural subsidies would be non-countervailable, the Department stated that "{g}iven the absence of any indication that Congress intended the 'green box' rules to change the Department's practice or to overturn Roses,[7] we are retaining the special specificity rule for agriculture." See 63 FR 65348, 65358. Similarly, had the Congress intended for the Department to overturn its previous interpretation of "agricultural sector," it would have so stated.

The Department's agricultural specificity regulation is a codification of the Department's practice prior to the implementation of the green box disciplines. In commenting on the 1989 Proposed Subsidy Rules,[8] the Department stated that the agricultural specificity regulation "codifies existing practice with respect to agricultural programs. Under that practice, a program that is limited to the agricultural sector does not necessarily result in a finding of specificity." See 1989 Proposed Subsidy Rules at discussion of 19 CFR 355.43(b)(8). Prior to the Department's promulgation of the 1989 proposed agricultural

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[7] Roses Inc. v. United States, 774 F. Supp. 1376 (CIT 1991) ("Roses").

[8] See Notice of Proposed Rulemaking and Request for Public Comments (Countervailing Duties), 54 FR 23366 (May 31, 1989) ("1989 Proposed Subsidy Rules").

specificity rule, the language of which is identical to the current regulation at 19 CFR 351.502(d), the Department treated agricultural subsidies as specific and, therefore, countervailable, only when such subsidies were limited to certain industries within the agricultural sector. In instances where agricultural subsidies were generally available within the agricultural sector, the Department did not treat such subsidies as specific. In many of these cases, programs that were available to producers of primary agricultural products were found not to be specific. See, e.g., Fresh Asparagus From Mexico: Final Negative Countervailing Duty Determination, 48 FR 21618 (May 13, 1983) (determining the provision of low cost water to agricultural producers was not countervailable); Fuel Ethanol from Brazil: Final Affirmative Countervailing Duty Determination, 51 FR 3361 (January 27, 1986) (determining that loans to sugar cane growers were specific but loans to a wide variety of agricultural producers were not specific); Fresh Cut Flowers from Canada: Final Affirmative Countervailing Duty Determination, 52 FR 2134 (January 20, 1987) (determining that loans made to farmers pursuant to Canada's Farm Improvement Loan Act of 1945 were not specific because they were available to the entire agricultural sector) ("Fresh Cut Flowers from Canada"); Lamb Meat from New Zealand: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 50 FR 37708 (September 17, 1985) (determining that various fertilizer benefits were available to and used by a wide variety of agricultural producers and, therefore, not specific, and also determining that weed control benefits were not limited to producers of any particular agricultural commodities, and, thus, also not specific); and Certain Fresh Cut Flowers from the Netherlands: Final Affirmative Countervailing Duty Determination, 52 FR 3301 (February 3, 1987) (where loan benefits were found not to be specific based on eligibility criteria under which virtually all farmers were eligible).

The Department continues to apply its current agricultural specificity regulation consistently with its prior practice. See, e.g., Certain In-Shell Pistachios and Certain Roasted In-Shell Pistachios from the Islamic Republic of Iran: Final Results of New Shipper Countervailing Duty Reviews, 68 FR 4997, 4999 (January 31, 2003) and Standard Chrysanthemums From the Netherlands; Final Results of Countervailing Duty Administrative Review, 61 FR 47888 (September 11, 1996) ("Chrysanthemums").

Given the Department's longstanding and consistent application of its agricultural specificity rule, which requires that specificity analysis be conducted within the agricultural sector, we disagree that these programs are *de jure* specific based on the argument that producers of processed agricultural products are ineligible for benefits. Rather, in the instant proceeding, the general availability of these programs to livestock and crops producers indicates that they are not specific. See, e.g., Fresh Cut Flowers from Canada; Certain Fresh Cut Flowers from Mexico: Final Negative Countervailing Duty Determination, 49 FR 15007 (April 16, 1984); and Certain Fresh Atlantic Groundfish from Canada: Final Affirmative Countervailing Duty Determination, 51 FR 10041 (March 24, 1986) (Comment 13 defining agricultural sector). See also the related analysis in the program-specific section, above.

Next, with regard to the petitioners' arguments relating to the *de facto* specificity analysis of the "whole farm" programs (the AIDA program, the CFIP, and the Transitional/RMF program),[9] no party has challenged the Department's Preliminary Determination findings that these programs are neither export subsidies nor import substitution subsidies according to sections 771(5A)(B) and (C) of the Act, nor has any party challenged the Department's Preliminary Determination findings that these programs were not specific within the meaning of sections 771(5A)(D)(iii)(I) and (IV) of the Act.[10] Thus, the Department continues to find these programs to be non-specific within the meanings of sections 771(5A)(B) and (C) and sections 771(5A)(D)(iii)(I) and (IV) of the Act for this final determination.

We turn next to the petitioners' contention that swine producers are part of a "group" of industries that are predominant users of these programs. In this regard, the petitioners refer to Live Swine 1985, in which the Department investigated the Agricultural Stabilization Act and Quebec Farm Income Stabilization Insurance Program. Contrary to the petitioners' claim, we did not find these programs to be specific in that case because a "group" of industries was a predominant user or because the "group" of industries received a disproportionately large share of the benefits. Instead, we found this program to be specific because the recipients were limited in number within the meaning of section 771(5A)(D)(iii)(I) of the Act.

We note further that the Department has in the past rejected a similar claim that separate industries should be grouped together in order to make a specificity finding. Specifically, in Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof (AFBs) From Singapore; Final Results of Countervailing Duty Administrative Reviews, 60 FR 52377, 52379 (October 6, 1995) ("AFBs"), the petitioner argued that three industry sectors (electronics, fabricated metal products (including antifriction bearings), and non-electrical machinery) were predominant users of a subsidy or received a disproportionately large amount of a subsidy because they received 71 percent of the benefits under an investigated program. The Department disagreed that it should aggregate those industries, and found that the program was not specific to the subject merchandise, antifriction bearings, because that sector received only 6.3 percent of the program benefits, while the other two sectors received the remainder of the 71 percent of benefits in that "group." A similar fact pattern to AFBs exists here. The swine sector receives a small percentage of the benefits under each program, specifically, less than six percent in each year from 2001 through 2003 under the CFIP, less than 16 percent under the AIDA program in each year from 2000 through 2003, and less than ten percent in 2002 and 2003 for the Transitional

[9] This analysis is also applicable to the FIMCLA program.

[10] Although the Preliminary Determination referred only to the CFIP in the *de facto* specificity analysis, because the CFIP and the AIDA program were essentially the same program as described in the program-specific section, above, the same facts and analysis would also apply to the AIDA program.

Assistance/RMF program. Further analysis relating to the levels of benefits received by other industries is proprietary and, thus, is discussed in greater detail in the proprietary Final Specificity Memo.[11]

The petitioners argue in the alternative that certain category classifications are either too broad (e.g., "grains and oilseed") or, alternatively, are too narrow (e.g., "swine") for an accurate apples-to-apples comparison to be conducted, and that the usage categories should either be broadened or narrowed in order to achieve the same level of industry concentration.[12]

Under our normal analyses of whether an industry is a predominant user of a subsidy or whether an industry receives a disproportionately large amount of a subsidy, we compare the use of a particular program by the industry being investigated (the swine industry, in this case) to the use of the program by recipients in other industries (recipients in the agriculture industry, in this case). As noted in the Preliminary Determination, in Cattle from Canada, we examined specificity for the FIMCLA program by looking at both hogs and cattle because, at that time, the FIMCLA administration did not keep separate records on the cattle industry and could not break out cattle separately. See Cattle from Canada, 64 FR 57040, 57042. Those categories are now separately broken out. Thus, our treatment of the FIMCLA program in Cattle from Canada should not be viewed as a preference for combining product categories and aggregating data. Indeed, as noted above, in that same case, the Department found that the NISA program was not *de facto* specific to cattle by examining cattle separately from other livestock. See Cattle from Canada, 64 FR 57040, 57054. Moreover, as also noted above, in a prior proceeding on live swine from Canada, the Department found that the NISA program did not benefit swine disproportionately. See Live Swine 91/92, 92/93, 93/94 Review, 61 FR 52408, 52410.

Based on the information on the record, the product categories used by the GOC to report usage data for these programs are the same product categories utilized by the government agencies that administer the programs to keep their program data. Moreover, these program categories were derived from the NAICS and the Standard Industrial Classification ("SIC") before it.[13] Although the program categories in certain respects have been slightly modified, the main categories in question, "grains and oilseed," "cattle," and "swine," are all identical to the NAICS categories and are all on the same three-digit level in the NAICS codes. The usage data based on categories derived from this three-digit NAICS codes level indicates that the swine industry was neither a dominant user of these programs nor did it receive a disproportionate level of benefits under these programs when compared to other agricultural sector

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[11] The data for the FIMCLA program also show a similar fact pattern.

[12] The petitioners favor narrower categories and fault the GOC for the manner in which it reported the usage data.

[13] The NAICS was adopted subsequent to the North American Free Trade Agreement as a harmonization effort by the United States, Mexico, and Canada in order to provide comparable statistics across all three countries. The NAICS replaced the SIC system, which was developed in the 1930s to create a classification system for statistical data by industries and to promote the general adoption of such classifications as a standard.

industries. See the Final Specificity Memo. See also, e.g., Final Affirmative Countervailing Duty Determination: Certain Hot- Rolled Carbon Steel Flat Products From Thailand, 66 FR 50410 (October 3, 2001) and the accompanying Issues and Decision Memorandum at section III.A.4 (where the Department found that debt restructuring recipients representing more than 9.2 percent of the debt being restructured were not specific); Cattle from Canada, 64 FR 57040, 57054 (where the Department found that 7.7 percent of total withdrawals by value from NISA by cattle producers was not disproportionate use); Final Affirmative Countervailing Duty Determination: Certain Pasta from Italy, 61 FR 30288, 30296 (June 14, 1996) (where the Department found that receipt of 4.9 percent of all benefits by the food processing industry was not predominant use); AFBs from Singapore, 60 FR 52377, 52378; and Final Affirmative Countervailing Duty Determination: Certain Steel Products from Belgium, 58 FR 37273, 37280 (July 9, 1993) (where the Department found that the steel industry's receipt of 13.5 percent and 15.6 percent of the benefits under a program was not disproportionate).

Furthermore, the record evidence, including information examined at verification, indicates that the types of category breakdowns used by the GOC in reporting its usage data are used in the everyday normal course of business (e.g., tax documents not related to these programs, program applications, annual reports, joint U.S.-Canadian agricultural documents, and other documents) and were not created for the purposes of this investigation. Thus, because the record evidence points to the fact that these categories are standard categories used in the everyday course of business, and that they are all on the same level of aggregation according to the NAICS codes, no further aggregation or disaggregation is necessary in order to accomplish an apples-to-apples comparison.

The petitioners have further objected to the Department's reliance in the Preliminary Determination on a comparison of farm receipts by hog farmers to their usage rates under these programs. We note that we have not based our finding of non-specificity on that comparison alone. Instead, we included that information in our analysis only to confirm our conclusion based on our normal analysis, as discussed above. As further discussed below, although the Department has used similar types of analyses to supplement and confirm its normal dominant user or disproportionate beneficiary specificity analysis, it is not the Department's practice to base its dominant user or disproportionate beneficiary specificity analyses solely on this type (or on any other type as suggested by the petitioners) of comparison.

Lastly, the petitioners contend that swine farmers are predominant users of these programs and receive a disproportionately large amount the benefits under these programs because swine farmers have received significantly larger benefits under these programs than have non-hog farmers on a per-farm benefits basis. The petitioners cite Italy Wire Rod as an instance where the Department has used such an analysis.

We disagree that Italy Wire Rod stands for this proposition. In that case, the Department based its *de facto* specificity finding on a number of factors unique to that proceeding, including the fact that the respondent received a much larger share of benefits in comparison to the total benefits awarded, as well as because the recipient was the largest single recipient. The fact that the recipient received more than the average recipients was simply one of several factors taken into consideration. Furthermore, the Department has rejected the argument that a program should be found specific because the respondent company received "several times the average benefit per company" under the program in question. In the Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy, 67 FR 3163 (January 23, 2002) and the accompanying Issues and Decision Memorandum at Comment 9, the Department stated that "{t}he petitioners base their assertion on a simplistic calculation of the amounts received by other enterprises, dividing the total amount of funds disbursed between 1995 and 1998 by the number of recipient firms. However, this simplistic approach is not consistent with the information on the record. At verification, the Department reviewed the lists of disbursements for each of the years 1995 through 1999. . .{A} review of this sample shows that the amounts disbursed to the various recipients varied widely, with some companies receiving very large amounts and other{s} small amounts."

Thus, although the Department may have examined per-recipient information in order to supplement other record information in a *de facto* specificity analysis, this criterion alone has not served as a basis for finding specificity. Further analysis on this topic using proprietary information is also included in the Final Specificity Memo.

Comment 2: Green Box Claims

Petitioners' Argument: According to the petitioners, should the Department address the GOC's claims for green box treatment under section 771(5B)(F) of the Act and 19 CFR 351.522(a) for the CFIP, the AIDA program, or the Transitional Assistance/RMF program for the final determination, the Department should find that these programs do not qualify for green box treatment because they fail to satisfy the relevant policy-specific criteria and conditions set out in paragraphs 2 through 13 of Annex 2 of the WTO Agriculture Agreement.

According to the petitioners, contrary to the GOC's assertion, the CFIP and the AIDA program do not meet the policy-specific criteria for direct payments to producers under paragraph 7, Annex 2, of the WTO Agriculture Agreement. According to the petitioners, paragraph 7(c) of Annex 2 prohibits linking the amount of payments to the type of production undertaken by an agricultural producer. According to the petitioners, payments under the CFIP and the AIDA program fail to satisfy this condition and, therefore, do not warrant green box treatment because both programs limit the "amount" of payment based on the "type" of production that is undertaken. Specifically, according to the petitioners, the GOC prohibits producers of certain types of agricultural products from receiving payments under both the CFIP and the AIDA program because the programs are limited to crop and livestock producers only. The petitioners note that 19 CFR 351.522 defines agricultural products for purposes of examining green box claims as products listed in Annex 1 of the WTO Agriculture Agreement. Thus, according to the petitioners, because CFIP and AIDA program benefits are only available to primary producers and not producers of processed agricultural products, these programs would not qualify for green box treatment.

According to the petitioners, further evidence that the requirements in paragraph 7(c) of the WTO Agriculture Agreement were not met for the CFIP and the AIDA program is set forth in paragraph 11(b) and (e) of Annex 2. According to the petitioners, paragraph 11(b) stipulates that the amount of payments shall not relate to the type of production undertaken by a producer. However, paragraph 11(b) allows for the exception under paragraph 11(e) that "payments shall not mandate or in any way designate the agricultural products to be produced by recipients except to require them not to produce a particular product." According to the petitioners, paragraphs 11(b) and (e) provide for an exception to the general rule that the amount of payments may not be related to the type of production where the payments require recipients not to produce a particular product. According to the petitioners, this exception is not included in paragraph 7. According to the petitioners, by explicitly prohibiting payments under both the CFIP and the AIDA program to certain agricultural producers, the GOC linked the amount of payments under the programs to the type of production undertaken by the producers, inconsistent with the requirements of Annex 2, paragraph 7(c), of the WTO Agriculture Agreement. Moreover, the petitioners claim that the programs violate paragraph 7(c) because they are designed to benefit a specific type of production operation as discussed in Comment 1, above.

Similarly, the petitioners also claim that the applicable portion of the Transitional Assistance/RMF program does not meet the policy-specific criteria for direct payments under decoupled income support under paragraph 6, Annex 2, of the WTO Agriculture Agreement because the GOC linked the amount of payments made under the program to the type of production undertaken by the producers. Specifically, according to the petitioners, paragraph 6(b) of Annex 2 prohibits linking the amount of payments to the type of production undertaken by an agricultural producer. According to the petitioners, the GOC violated this criterion by prohibiting certain types of agricultural production in Annex 1 of the WTO Agriculture Agreement from receiving payments under the Transitional Assistance/RMF program on the same basis as the CFIP and the AIDA program.

<u>Respondents' Argument</u>: The respondents first contend that the Department need not reach the issue of whether these programs warrant green box treatment because the programs are neither *de jure* nor *de facto* specific. Should the Department address the issues of green box treatment for these programs, however, the GOC claims that each of the programs meets the relevant policy-specific criteria and conditions set forth in paragraphs 2 through 13 of Annex 2 of the WTO Agriculture Agreement.

According to the respondents, the petitioners incorrectly argue that, because these programs do not extend to processed agricultural products, they limit the amount of payment based on the type of production that is undertaken. The respondents contend that the petitioners overlook the fact that Annex 2 of the WTO Agriculture Agreement clearly differentiates between support for producers and support for processors in stating that there shall not be direct payments "to producers or processors." According to the respondents, paragraphs 6 and 7 of Annex 2 of the WTO Agricultural Agreement relate only to producers and are not relevant to processors. The respondents note that, as these provisions show, the WTO Agriculture Agreement provides that programs that involve only payments to producers and that do not include payments to processors, can qualify for green box treatment. Thus, according to the respondents, it is not necessary that all of the products listed in Annex 1 of the WTO Agricultural Agreement be included in a program for it to qualify for green box treatment. According to the respondents, each of the programs meets the general and policy-specific criteria of Annex 2, paragraphs 6 and 7 (as applicable), of the WTO Agriculture Agreement and, thus, qualify for green box treatment.

Department's Position: As noted above in Comment 1 and in the program-specific sections, we have determined that the CFIP, the AIDA program, and the Transitional Assistance/RMF program are not specific. Therefore, there is no need to address whether these programs (or components of these programs) qualify for green box treatment under section 771(5B)(F) of the Act and 19 CFR 351.522(a).

Comment 3: AIDA Program Recurring vs. Nonrecurring

Petitioners' Argument: The petitioners argue that record evidence, and an analysis of the AIDA program in accordance with 19 CFR 351.524(c)(2), shows that benefits under this program should be treated as non-recurring for the final determination, not recurring as in the Preliminary Determination.

According to the petitioners, record evidence shows that the AIDA program was exceptional, such that an individual producer should not expect to receive additional subsidies on an on-going basis. The petitioners note that, because the program was originally implemented as a two-year program covering the 1998 and 1999 tax years, farmers could not have anticipated at the time of its inception that the program would be ongoing. The petitioners also note that, although the GOC claimed at verification that the program's termination was not intended due to the political realities in Canada, the GOC provided no evidence to support this claim. Moreover, the petitioners note that the GOC reported this program to the WTO as one that would be terminated, and that the program has, in fact, been terminated. Additionally, the petitioners note that the AIDA program was designed as a disaster relief program according to the GOC. The petitioners contend that farmers, therefore, should not anticipate receiving payments on an annual basis, but should consider these grants income support for a discrete period.

The petitioners also claim that the payments under the AIDA program were not automatic and required government approval because program applications were required and had to be verified by the tax authorities and NISA program administrators before being approved by the AIDA administrators. The petitioners note that, although a farmer could expect to be approved if they met the program's eligibility requirements, each payment had to be authorized by program administrators.

According to the petitioners, non-recurring AIDA grants would continue to benefit subject producers during the POI. Thus, the Department should conduct a specificity analysis for this program and find the program countervailable in its final determination.

Respondents' Argument: The respondents disagree with the petitioners, stating that the Department correctly found in the Preliminary Determination that the AIDA program provided recurring benefits. According to the respondents, the factual basis for this determination has been verified, and the petitioners have offered no valid reason for changing this determination.

According to the respondents, since income support payments are not on the illustrative list of recurring or non-recurring subsidies under 19 CFR 351.524(c)(1), the Department properly applied 19 CFR 351.524(c)(2) to find that the AIDA program provided recurring benefits. First, the respondents pointed out that, as the Department correctly found in the Preliminary Determination, there is no information to suggest that agricultural support payments would terminate. The respondents contend that, because the AIDA program was extended into the CFIP, recipients could expect to receive payments on an ongoing basis from year to year. Moreover, the respondents argue that, regardless of the WTO notification and the characterization of the program, producers did expect to receive subsidies on an ongoing basis. According to the respondents, the Department learned at verification that "although each of the programs had termination dates at their time of inception, the GOC did not intend to allow the programs to expire based on political realities and producer demand for this ongoing assistance." Furthermore, the respondents contend that recurring farm disasters are inevitable due to largely uncontrollable factors such as weather and disease.

Second, according to the respondents, as long as producers met the pre-established criteria, they could expect to receive payments under the AIDA program by filing an application. According to the respondents, regardless of whether applications had to be filed and data verified, that is no different from what is required when applying for tax benefits. The respondents noted that, in the case of tax benefits, as long as the data is correct and the benefit criteria are met, the benefit is automatic. Thus, according to the respondents, although the AIDA program applications were checked against other data or verified, if the data were correct and the eligibility and payment criteria were met, the payment was automatic.

Department's Position: As noted above in Comment 1 and in the program-specific sections, we have determined that the CFIP, the AIDA program, and the Transitional Assistance/RMF program are not specific. Therefore, there is no need to address whether the AIDA program provides recurring or non-recurring benefits.

Comment 4: Quebec Farm Income Stabilization Insurance/Agricultural Revenue Stabilization Insurance Program

Petitioners' Argument: The petitioners allege that hog producers receive substantial subsidies under the Quebec Farm Income Stabilization Insurance/Agricultural Revenue Stabilization Insurance Program.

The petitioners contend that the Department, after initiating an investigation of this program, declined to investigate this program further based on the GOC's claim that exports from Quebec to the United States were extremely small. According to the petitioners, the information on which the Department based this decision was proven to be incorrect at verification.

Specifically, the petitioners contend that, although exports of all types of swine from Quebec to the United States were small, a particular size range of pig exports from Quebec was significant. According to the petitioners, pigs in this specific size range would have come from a limited group of hog farmers. Given that the premise underlying the Department's decision not to examine these sales was undermined by information obtained at verification, the petitioners contend that the Department should have further examined this program during the investigation. Thus, the petitioners contend that the Department should take this program into consideration for the final determination and should, as facts available, assume that the benefit received on hogs in Quebec was $15 per head and include this information when calculating an ad valorem rate for all Canadian exports.

Respondents' Argument: The respondents contend that the petitioners' assertion that the Department should rely on "facts available" to calculate a benefit under the Quebec Farm Income Stabilization Insurance program lacks a reasoned basis. According to the respondents, the petitioners support their assertion with the wholly incorrect statement that "the Canadians' claims concerning Quebec exports were essentially overturned at verification." To the contrary, the respondents state that the Department's verification confirmed the data on exports of live swine from Canada. According to the respondents, the verified export data shows that exports of live swine from the province of Quebec accounted for 0.63 percent of total live swine exports from Canada by number of head during the POI. According to the respondents, given this minuscule share, the Department correctly determined not to investigate further the Quebec Farm Income Stabilization Insurance program.

The respondents also note that the petitioners themselves argued in favor of the Department conducting a company-specific instead of an aggregate investigation, knowing that the Department would have to limit the number of respondents. The Department selected respondents based on the largest volume of subject merchandise exported from Canada, according to the respondents, and swine producers accounting for the largest volume of exports did not include any companies in Quebec.

According to the respondents, the countervailing duty statute requires that a countervailable subsidy rate relate to actual importations into the United States. The respondents contend that the petitioners ignore the lack of exports of live swine from Quebec and instead focus on the percentage of exports from Quebec in a single category, However, the respondents state that this case is not about live swine of a particular weight, and the petitioners have not asked the Department to investigate different classes or kinds of swine separately. The respondents state that the petitioners provide no legal support for their request that the Department now consider separately live swine of a particular weight. According to the respondents, the petitioners' arbitrary attempt to suggest that exports from Quebec are significant by subdividing the export data into swine of particular weights must fail. The respondents state that this investigation concerns all live swine (excluding breeding swine), and exports of all live swine from

Quebec are insignificant. Thus, according to the respondents, the Department properly decided not to further investigate the Quebec Farm Income Stabilization Insurance program and the petitioners' suggestion to the contrary must be rejected.

Department's Position: As we stated in the Preliminary Determination, "in our questionnaire that was issued to the GOC on May 5, 2004, we indicated that, because the company respondents' operations were located only in Manitoba, Ontario, Saskatchewan, and Alberta according to record information, we were limiting our requests for information to GOC programs, joint federal/provincial programs, and provincial programs relating to these four provinces only and were not requesting information about programs administered by New Brunswick, Prince Edward Island ("PEI"), or Quebec which were included in our initiation." Thus, our basis for not further investigating the alleged subsidy programs from Quebec (including the Quebec Farm Income Stabilization Insurance/Agricultural Revenue Stabilization Insurance Program) was that no companies being investigated had operations in Quebec, not because exports from Quebec to the United States were extremely small. As further discussed in the Department's May 4, 2004 memorandum to Jeffrey May entitled "Respondent Selection or Aggregation," which is on file in the Department's CRU, the petitioners themselves requested that the Department conduct this investigation by selecting individual company respondents.

For the final determination, we continue to find, as we did in the Preliminary Determination, that no company under investigation has operations or cross-owned affiliates in Quebec (or New Brunswick or PEI). See the "Attribution of Subsidies" section, above, and the Final Attribution Issues Memo. Thus, there is no legal basis for the Department to include subsidies in our calculations that would not have been received by the companies under investigation.

Comment 5: Saskatchewan Short-Term Hog Loan Program

Petitioners' Argument: The petitioners argue that the Department understated the benefit from the loans received by Hytek under the STHLP in its Preliminary Determination and ask that the benefit calculation be revised for the final determination.

As noted by the petitioners, under the STHLP, participants received loans for sales of either weanling hogs or mature hogs and were required to begin repayments on the loans when certain trigger prices were reached. During the POI, Hytek made continuous repayments on its weanling loans after June, but only made repayments on its mature hog loans for a two-week period in early June 2003.

According to the petitioners, under 19 CFR 351.505(b), the Department "normally will consider a benefit as having been received in the year in which the firm otherwise would have had to make a payment on a comparable commercial loan." In the Preliminary Determination, however, the petitioners contend that the Department treated interest accumulated on the loans as interest paid, in contradiction with its regulations. The petitioners claim that comparable commercial loans would have required that Hytek begin repayment of the loans after receipt and would not have allowed interest deferrals for over a year. Thus, according to the petitioners, Hytek essentially received an additional benefit from the

STHLP loans by deferring interest payments until June 2003 for weanling loans and almost the whole POI for mature hog loans.

The petitioners claim, therefore, that, in its final determination, the Department should revise the benefit calculation methodology for this program by comparing actual payments made by Hytek on its STHLP loans with the payments that would have been made on similar loans at the benchmark interest rate.

Respondents' Argument: The respondents disagree with the petitioners and support the Department's STHLP benefit calculation methodology from the Preliminary Determination.

According to the respondents, the petitioners' allegation is without evidentiary support in the verified record and is based only on inapplicable information relating to long-term loans. According to the respondents, the Department verified that the STHLP "essentially acted as a line of credit for the producers," that "the interest that was accrued on the loans was continuously rolled into the outstanding loans," and that a change in market prices would trigger repayment.

The respondents contend that, contrary to the petitioners' allegation, the Department did not treat interest accumulated on the loans as interest paid in the Preliminary Determination. According to the respondents, accumulated interest was rolled into the outstanding loan balance, along with any additional drawdown, and was analyzed accordingly. Citing to several past cases, the respondents point out that the Department's treatment of the roll-overs as a new series of loans is entirely consistent with the Department's past practice. See, e.g., Certain Cut-to-Length Carbon Steel Plate from Mexico: Final Results of Countervailing Duty Administrative Review, 69 FR 1972 (January 13, 2004) and the accompanying Issues and Decision Memorandum at Comment 4 ("Carbon Steel Plate from Mexico"). Therefore, the respondents concur with the Department's preliminary analysis of the STHLP program as a series of short-term loans, and argue that the Department should continue to follow this methodology in the final determination.

Department's Position: With regard to the unconsolidated loans, we disagree with the petitioners that we have understated the benefit to Hytek by treating these loans as short-term loans and treating "unpaid" interest as being rolled over into the next loan. This methodology accurately captures the concessionary interest rate provided under this program. Each time the interest accumulates and is rolled over into principal, it is as if Hytek borrows the interest that should have been paid, makes the concessionary interest payment, and now has a new, bigger loan at the concessionary rate. To treat this interest as unpaid, as the petitioners urge, ignores the reality that the interest has been capitalized back into the loan and will be repaid under the required repayment terms.

The regulation cited by the petitioners, 19 CFR 351.505(b), addresses the timing of the receipt of the benefit, not how to calculate the benefit. We have timed the benefits for these loans at least

at monthly intervals. This is consistent with 30-day commercial bank loans, which would be repaid or rolled over every month.

With regard to the consolidated weanling hog loans, however, we confirmed at verification that these loans were consolidated as of July 2003 and went into continuous repayment as of that time. As noted above in the program-specific section, once the loans entered into continuous repayment, they became long-term, variable-rate loans that had to be repaid within three years of the consolidation date. Thus, for the final determination, we are treating the consolidated weanling hog loans as long-term, variable-rate loans and are calculating the benefit for these loans in accordance with the long-term, variable-rate loan methodology specified in 19 CFR 351.505(c)(4).

Comment 6: Saskatchewan Livestock and Horticultural Facilities Incentives Program

Respondent's Argument: The GOS disagrees with the Department's finding in the Preliminary Determination that the LHFIP is not integrally linked to the tax exemptions permitted under the Provincial Sales Tax Act. The GOS claims that all four of the integral linkage criteria required under 19 CFR 351.502(c) are met in this case, and that the Department should revise its integral linkage finding for the final determination.

Specifically, the GOS argues that both the PST exemptions and the LHFIP are intended to exempt from PST most agricultural inputs to production and, thus, have the same purpose. The GOS also contends that the PST exemptions and the LHFIP both bestow the same type of benefit: the Provincial Sales Tax Act by exempting agricultural producers from paying the tax when making an initial purchase of most agricultural inputs to production, and the LHFIP by rebating the tax paid on agricultural construction materials to agricultural producers after purchase. The GOS further claims that the programs confer similar levels of benefits (the amount of the tax assessed) on similarly situated firms (agricultural producers). According to the GOS, the only difference between the PST exemptions and the LHFIP rebate is that the goods that are exempt as PST exemptions are readily identifiable as inputs to agricultural production and, thus, are exempt at the point of purchase. However, because the LHFIP goods are multi-purpose and their intended use is not readily identifiable by the vendor, the tax must be paid at the point of purchase and then rebated.

The GOS contends that the Department's preliminary finding that the programs have different purposes is not supported by record evidence. According to the GOS, for intensive livestock and horticultural operations, as compared to other agricultural producers, construction materials and equipment are significant production inputs, and the LHFIP program is designed to ensure that livestock and horticultural producers do not end up paying PST on those inputs.

The GOS also argues that the Department's preliminary finding that the programs did not provide similar levels of benefit misses the point by focusing on the fact that not all agricultural producers could participate in the LHFIP. According to the GOS, the key point is that most agricultural producers do not undertake significant construction projects. The GOS argues that it would be "inherently unfair" to allow a PST exemption for specialized equipment used in a hog barn while not recognizing the actual facility itself as a major component in the hog producer's production process. According to the GOS, without the LHFIP, livestock and horticultural operations would be at a disadvantage in terms of PST paid for significant inputs.

Citing to Chrysanthemums, the GOS also takes the position that the Department has previously found similar rebate programs to be noncountervailable. According to the GOS, in Chrysanthemums, the Department found a value added tax ("VAT") rebate program operated by the Dutch government to be not countervailable. The GOS explained that Dutch farmers were entitled to pay a reduced VAT rate for all purchased goods and services, just as Saskatchewan farmers are exempt from the PST for purchases of most agricultural inputs to production. However, Dutch farmers paid the standard VAT rate when purchasing natural gas, mineral oils, and bulk bottled gas for use in heating greenhouses. They then applied for a rebate, providing proof that their purchases would be used for this agricultural purpose, just as farmers in Saskatchewan document the use of construction materials for agricultural purposes when applying for rebates under the LHFIP. According to the GOS, the Department found this VAT rebate program to be not specific and, thus, not countervailable because the reduced VAT rate for which producers were entitled under this rebate program was the same as the reduced VAT rate "paid by all farmers on virtually all of their purchases of goods and services under the Dutch Tax Law," and that the application required under the rebate program is "merely a mechanism which enables farmers to receive the reductions to which they are entitled under the Dutch National Tax Law." See Chrysanthemums, 61 FR 47888, 47890. The GOS contends that the Department should make the same kind of finding as it did in Chrysanthemums for the LHFIP and argues that, in both cases, the governments involved have established a rebate scheme so that agricultural producers requiring these inputs are not disadvantaged by paying a tax that is not assessed for other goods purchased for agricultural use.

Petitioners' Argument: The petitioners disagree with the GOS and contend that the Department should affirm its preliminary finding on integral linkage and the countervailability of the LHFIP in the final determination.

According to the petitioners, the GOS in its arguments misconstrues the record evidence when it argues that the LHFIP and the Provincial Sales Tax Act exemptions serve the same purpose and provide similar benefits to similarly situated firms, allowing exemptions for "significant" agricultural inputs. The petitioners contend that none of the "evidence" provided by the GOS in support of its argument contradicts the Department's preliminary finding that livestock and horticultural farms are allowed an exemption that other agricultural producers are not. The petitioners point out that the Department verified that the "the LHFIP was created as an exemption separate from the PST." The petitioners conclude that, while the purpose of the Provincial Sales Tax Act includes exemptions for a range of agricultural inputs for all agricultural producers, the purpose of the LHFIP was to create a separate set of exemptions for a select group of agriculture producers. Moreover, the petitioners argue that, for example, if a grain farmer purchases lumber to build a barn in which to store his grain harvesting equipment, he would have to pay the PST and would not be eligible for the rebate under the LHFIP. Thus, all agricultural producers (similarly-situated enterprises) do not receive the same benefits, as was preliminarily found by the Department.

The petitioners further contend that the issue faced by the Department in Chrysanthemums was whether there was "any limitation within agriculture to provide benefits to specific commodities under the program." See Chrysanthemums, 61 FR 47888, 47890. According to the petitioners, the Department found that there was not any special subset of agriculture producers that received more benefits. Thus, the petitioners contend that the GOS omitted the most relevant part of this prior finding, that the VAT rebate program was available to all agricultural producers, not just the flower growers. The petitioners contend that, in contrast, only livestock and horticultural farmers are entitled to benefits under the LHFIP.

Therefore, the petitioners argue that the Department should reject the GOS' claim that the exemptions under the Provincial Sales Tax Act and LHFIP are integrally linked and should continue to find in the final determination that the LHFIP provides specific benefits to a select subset of agricultural commodities.

Department's Position: We agree with the petitioners and have continued to find for this final determination that the LHFIP is not integrally linked to the tax exemptions permitted under the Provincial Sales Tax Act. Pursuant to the Provincial Sales Tax Act, although certain agricultural inputs to production (such as machinery, fertilizer, seed, chemicals, and livestock) are exempt from paying the PST, the PST continues to be levied on construction materials and equipment for all agricultural products that could be used for both agricultural and non-agricultural purposes. Although the LHFIP created an exemption from the PST for livestock and horticultural producers, the PST on construction materials is still levied on other agricultural producers not related to livestock and horticulture production. Accordingly, because the LHFIP provides tax refunds to a subset of users for an activity that does not qualify for a tax exemption in the PST Act (i.e., the construction of facilities), the programs have different purposes. Furthermore, we disagree with the GOS' interpretation of the Department's determination in Chrysanthemums. In Chrysanthemums, the Department determined that a reduced VAT rate for agriculture was not specific because it was available to the agricultural sector. See Chrysanthemums, 61 FR 47888, 47890. However, in the instant proceeding, a special subset of agriculture producers are entitled to apply for benefits under the rebate program.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final determination in the Federal Register.

________ ________
Agree Disagree

____
Joseph A. Spetrini
Acting Assistant Secretary
 for Import Administration

____
Date