

**ARTICLE 1904
BINATIONAL PANEL REVIEW UNDER
THE NORTH AMERICAN FREE TRADE AGREEMENT**

IN THE MATTER OF:

**Certain Durum Wheat and Hard Red Spring
Wheat from Canada**, Final Affirmative
Countervailing Duty Determinations

USA-CDA-2003-1904-05

DECISION OF THE PANEL

**REVIEWING THE FINAL DETERMINATIONS OF THE
INTERNATIONAL TRADE ADMINISTRATION,
U.S. DEPARTMENT OF COMMERCE**

March 10, 2005

Before: Harry B. Endsley, Chairman
Gilbert R. Winham
Michael Wallace Gordon
David J. Mullan
Leonard E. Santos

Appearances:

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I. INTRODUCTION AND PROCEDURAL HISTORY

A. Initiation of this Chapter 19 Proceeding

This Binational Panel was constituted under Article 1904(2) of the North American Free Trade Agreement^{1/} (“NAFTA”) and Section 516A(g) of the Tariff Act of 1930, as amended (the “Tariff Act” or “Act”),^{2/} 19 U.S.C. § 1516a(g), in response to a request for panel review of the final affirmative countervailing duty determinations of the United States Department of Commerce (“Commerce”, “Department”, or “ITA”) published on September 5, 2003 in the matter of Certain Durum Wheat (Department file number C-122-846) and Certain Hard Red Spring Wheat (Department file number C-122-848) from Canada. The Department’s *Final Affirmative Countervailing Duty Determinations: Certain Durum Wheat and Hard Red Spring Wheat from Canada* (“Final Determinations”) were published in the Federal Register at 68 Fed. Reg. 52,747 (September 5, 2003) as a single administrative determination encompassing both the Durum Wheat and Hard Red Spring

^{1/} *North American Free Trade Agreement* (“NAFTA”), signed at Washington, Mexico City, and Ottawa, December 17, 1992; supplemental agreements signed September 14, 1993; reprinted in H. Doc. 103-159, Vol. I and in 32 I.L.M. 605 (1993) (entered into force January 1, 1994). NAFTA Article 1904(2) provides, in principal part, as follows:

An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

^{2/} 19 U.S.C. § 1516a pertains generally to judicial review in countervailing duty and antidumping duty proceedings, while paragraph (g) thereof involves review of countervailing duty and antidumping duty determinations involving “free trade area country merchandise,” contemplating the formation of binational panels as a substitute for judicial review. U.S. countervailing duty law appears in Title VII of the *Tariff Act of 1930*, Act of June 17, 1930, ch 497, as set out in 19 U.S.C. §§ 1671 *et seq.* (the “Tariff Act” or “Act”). The Tariff Act was amended significantly effective January 1, 1995 by the *Uruguay Round Agreements Act* (“URAA”), Pub. Law 103-465, 108 Stat. 4809. The Tariff Act, as amended by the URAA, is applicable to the instant proceeding.

Wheat countervailing duty investigations.^{3/} The net subsidy rate in the Final Determinations for both products was assessed at 5.29% covering the period of investigation, which is August 1, 2001 to July 31, 2002, this period coinciding with the fiscal year of the Canadian Wheat Board (“CWB”).

The Government of Canada (“GOC”) timely filed a First Request for Panel Review^{4/} under Rule 34 of the Rules of Procedure for Article 1904 Binational Panel Reviews (“NAFTA Panel Rules”)^{5/} on October 3, 2003. Second Requests were timely filed on the same date on behalf of the CWB, the Government of Saskatchewan (“GOS”), and the

3/ The administrative records for the Durum Wheat and Hard Red Spring Wheat investigations were submitted by the Department to the NAFTA Secretariat, U.S. Section, on January 13, 2004. The actual administrative records were submitted in CD-ROM format but were accompanied by official indexes to the administrative records in paper format. There is no material difference between the Durum Wheat and the Hard Red Spring Wheat administrative records and thus all citations to the administrative record in this Opinion will be to the Hard Red Spring Wheat record, which is entitled “USA-CDA-2003-1904-05 In the Matter of Hard Red Spring Wheat from Canada C-122-848 POI 01/02.” The administrative record is divided into two portions, one of which is labeled “Public” and the other of which is labeled “Non-Public” and/or “Proprietary”. The “Public” section consists of copies of all documents in the record of this action, with all confidential information redacted. The “Non-Public” or “Proprietary” section consists of complete, unredacted copies of only those documents that include confidential information. Documents bearing the latter designation are kept under seal. In this opinion, the Panel will cite documents as “A.R.”, referencing the administrative record. Unless otherwise noted, all A.R. cites are to public documents. All page numbers will refer to the original, internal pagination of the documents.

The Final Determinations, as published in the Federal Register, are contained in the administrative record at A.R. 201. Incorporated into the Final Determinations are (i) the August 28, 2003 Issues and Decision Memorandum (“I&D Memo”) from Jeffrey May to James J. Jochum, A.R. 194; (ii) the August 28, 2003 Memorandum entitled “Calculation of Preliminary Determination for the Canadian Wheat Board” (the “Calculations Memo”), A.R. 196; (iii) the August 28, 2003 Memorandum entitled “Scope Exclusion and Clarification Requests: Khorasan Wheat, Canadian Eastern Soft Red Winter Wheat, Canadian Eastern Hard Red Winter Wheat, Organic Wheat, and Canadian Feed Wheat”, A.R. 197; and (iv) the March 3, 2003 Memorandum entitled “Analysis of Provision of Government-owned and leased Railcars as Indirect Subsidies” (“Railcars Memo”), A.R. 99 and 21 (Proprietary).

4/ On file at the NAFTA Secretariat, U.S. Section (“Secretariat”).

5/ The Rules of Procedure for Article 1904 Binational Panel Reviews (“NAFTA Panel Rules”) were published in the Federal Register on February 23, 1994 (59 Fed. Reg. 8,686).

Government of Alberta (“GOA”), respectively.^{6/} These Requests for Panel Review covered both the Durum Wheat and the Hard Red Spring Wheat investigations. As suggested above, both investigations involved the same Department decision published in the Federal Register and were based on the same administrative record. Upon receipt of the requests, the NAFTA Secretariat assigned Case Number USA-CDA-2003-1904-05 to this Chapter 19 proceeding.

In accordance with Rule 39 of the NAFTA Panel Rules^{7/}, each of GOC, GOS, GOA and CWB (collectively, the “Canadian Complainants”) timely filed on November 3, 2003 their Complaints^{8/} setting out their entitlements to file as well as their specific allegations of error of fact or law in the Final Determinations. The allegations and averments set out in the several Complaints are extensive and are deemed by the Panel to fulfill the Rule 39 requirements.

Pursuant to Rule 40 of the NAFTA Panel Rules^{9/}, the North Dakota Wheat Commission, the U.S. Durum Growers Association and the Durum Growers Trade Action Committee (collectively, the “U.S. Parties”) filed on November 17, 2003 their Notice of Appearance^{10/} in this proceeding.

The products at issue in the underlying countervailing duty investigation were imports of:

- all varieties of durum wheat from Canada, including the variety commonly referred to as Canada Western Amber Durum, and

6/ On file at the Secretariat.

7/ Under Rule 39, a Party or interested person may challenge the final determination in whole or in part by filing a Complaint within 30 days after the filing of the first Request for Panel Review. Paragraph 39(2)(b) requires that such a Complaint set out “the precise nature of the Complaint, including the applicable standard of review and the allegations of errors of fact or law, including challenges to the jurisdiction of the investigating authority;...”

8/ On file at the Secretariat.

9/ Under Rule 40, a Party, the investigating authority, or an interested party that does not file a Complaint but that intends to appear in support of or opposition to all or a portion of the subject final determination may participate by filing a Notice of Appearance within 45 days after the filing of the first Request for Panel Review.

10/ On file at the Secretariat.

- all varieties of hard red spring wheat from Canada, including but not limited to, varieties commonly referred to as Canada Western Red Spring, Canada Western Extra Strong, and Canada Prairie Spring Red.^{11/}

Due to the developments noted in the following paragraphs, the products at issue in this Chapter 19 proceeding are at the present time limited to the imports from Canada of Hard Red Spring Wheat.

B. Related Cases

On September 5, 2003, the Department also published the final results of its companion antidumping case: *Notice of Final Determinations of Sales at Less than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 52,741.^{12/} In that case, the Department found that durum wheat and hard red Spring wheat from Canada were sold in the United States below normal value during the period of investigation. The weighted-average dumping margins for durum wheat and hard red Spring wheat were set at 8.26% and 8.87%, respectively. Subsequently, with respect to hard red spring wheat, the Department responded to ministerial error allegations and published its

^{11/} The Department's Final Determinations reference the appropriate subheadings of the *Harmonized Tariff Schedule of the United States* ("HTSUS") in order to further identify the scope of the merchandise subject to the two investigations, while at the same time indicating that the Department's written description of the scope of the proceeding, and not the identified HTSUS subheadings, is dispositive.

^{12/} The countervailing duty and antidumping cases had commenced one year previously, on September 13, 2002, when the North Dakota Wheat Commission and the U.S. Durum Growers Association filed their petition with the Department and the United States International Trade Commission ("USITC" or "Commission") alleging that a domestic industry was being materially injured and threatened with material injury by reason of imports of durum wheat and hard red spring wheat from Canada that were being subsidized and sold at less than fair value. In October, 2002, the Department initiated both countervailing duty and antidumping investigations. The Department, therefore, actually initiated four specific and separate investigations: one countervailing duty and one antidumping investigation for each type of wheat. In November, 2002, the Commission made a preliminary determination that there was a reasonable indication that an industry in the United States was materially injured by reason of subject imports of durum wheat and hard re spring wheat from Canada. *See Durum and Hard Red Spring Wheat from Canada*, Inv. Nos. 701-TA-430A and 430B and 731-TA-1019A and 1019B (Preliminary), USITC Pub. 3563 (Dec. 2002). Thereafter, the Department made a final affirmative determination in all four investigations. *See* 68 Fed. Reg. 52,747 (Sept. 5, 2003) (final countervailing duty determination) and 68 Fed. Reg. 52,741 (Sept. 5, 2003) (final less than fair value determination).

Notice of Amended final Determination of Sales at Less than Fair Value: Hard Red Spring Wheat from Canada, 68 Fed. Reg. 57,666 (October 6, 2003). In that Notice, the Department set the final weighted-average dumping margin for hard red spring wheat at 8.86%.

In its parallel investigations of durum wheat and hard red Spring wheat from Canada, the United States International Trade Commission (“USITC” or “Commission”) issued its final determinations on October 20, 2003, publishing a Federal Register notice on October 23, 2003 (68 Fed. Reg. 60,707). On the basis of the record before it, the Commission determined that an industry in the United States was materially injured by reason of imports from Canada of hard red spring wheat, but that an industry in the United States was neither materially injured nor threatened with material injury by reason of imports from Canada of durum wheat.^{13/}

Based upon the USITC determinations, the Department thereupon published its *Notice of Antidumping Duty Order: Hard Red Spring Wheat from Canada* (8 Fed. Reg. 60,641 Oct. 23, 2003), imposing weight averaged ad valorem dumping margins on hard red spring wheat from Canada at 8.86%, and its *Notice of Countervailing Duty Order: Hard Red Spring Wheat from Canada* (68 Fed. Reg. 60,642 Oct. 23, 2003), imposing a net subsidy rate of 5.29% on such wheat.

These actions resulted in several appeals, including the instant Chapter 19 proceeding bearing Secretariat File No. USA-CDA-2003-1904-05 which appealed the Department’s final countervailing duty determinations on both durum wheat and hard red spring wheat from Canada. A second appeal, also under Chapter 19 of the NAFTA, has been brought by the CWB and by the North American Millers Association Ad Hoc AD/CVD Committee and is directed toward the Commission’s finding of injury to U.S. hard red spring wheat farmers. That case bears the Secretariat File No. USA-CDA-2003-1904-06. As of this writing, a binational panel has been constituted and the date of June 7, 2005 has been set for the issuance of its opinion.

Finally, on November 21, 2003, the North Dakota Wheat Commission and the U.S. Durum Growers Association filed an appeal before the U.S. Court of International Trade (“CIT”) contesting the Commission’s finding of no material injury or threat of material

^{13/} *Durum and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 6,070 (Oct. 23, 2003); *Durum and Hard Red Spring Wheat from Canada*, Inv. Nos. 701-TA-430A and 430B and 731-TA-1019A and 1019B (Final), USITC Pub. 3639 (Oct. 2003).

injury to U.S. durum wheat farmers.^{14/} The Commission promptly moved to dismiss the complaint on technical grounds, arguing that the complainants had failed to commence their action within the window of time permitted by section 516a(a)(5) of the Tariff Act (19 U.S.C. § 1516a(a)(5)).^{15/} On July 29, 2004, Judge Judith M. Barzilay of the CIT upheld the Commission's position and granted its motion to dismiss.^{16/} As a result of this dismissal, which has not been further appealed, the Commission's negative injury determination with respect to durum wheat has become final, which has made the Final Determinations, insofar as they applied to durum wheat, moot. At the present time, therefore, the instant Chapter 19 proceeding is concerned only with that portion of the Final Determinations, and the subsequent countervailing duty order, pertaining to hard red spring wheat from Canada.

Although not directly related to the antidumping and countervailing duty investigations referenced above, the United States on March 6, 2003 requested the establishment of a World Trade Organization ("WTO") panel to consider perceived impediments to U.S. wheat entering Canada, focusing particularly on its alleged discriminatory grain handling and rail transportation systems, and on practices of the CWB asserted to be in violation of applicable WTO rules on state trading enterprises.^{17/} These

^{14/} The Durum Growers Trade Action Committee was subsequently added to the U.S. Court of International Trade ("CIT") case as a complainant by amendment.

^{15/} Under the statutory scheme, judicial review of Commission determinations in countervailing duty and antidumping duty proceedings is governed by section 516a(a) of Title 19, 19 U.S.C. § 1516a(a). In the case of determinations made with respect to free trade area merchandise, this provision must be read in conjunction with subsection 516a(a)(g), 19 U.S.C. § 1516a(g). Under the latter provision, if a request is to be filed for binational panel review under Article 1904 of the NAFTA, such request must be filed within 30 days following the date of publication of the final determination in the Federal Register. *See* NAFTA Art. 1904:4; 19 U.S.C. § 1516a(g)(2). To allow this period to pass, section 516a(a) was amended to prohibit the commencing of an action for judicial review under section 516a(a) until the 31st day after publication in the Federal Register, which then initiates a second 30-day filing period. In the CIT appeal, the complainants had filed for judicial review on the 29th day following publication in the Federal Register.

^{16/} *North Dakota Wheat Commission, U.S. Durum Growers Association and Durum Growers Trade Action Committee vs United States and Canadian Wheat Board*, 2004 Ct. Int'l Trade LEXIS 93 (July 29, 2004).

^{17/} Article XVII of the *General Agreement on Tariffs and Trade 1994* requires that State Trading Enterprises (STEs) act in a manner consistent with the general principles of non-discriminatory treatment, unless such discrimination is based on commercial considerations. As to the treatment of imported grains, the United States contested four distinct measures of Canadian import practices, arguing that they were inconsistent with GATT Article III - National Treatment:

(continued...)

proceedings led to an April 6, 2004 WTO Panel report entitled *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R,^{18/} and to a WTO Appellate Body report on August 30, 2004, WT/DS276/AB/R.^{19/}

C. The Underlying Investigations and the Administrative Record

The instant case commenced with a countervailing duty petition filed on September 13, 2002 by the North Dakota Wheat Commission and the U.S. Durum Growers Association. See A.R. 1. The petition alleged, first, that the GOC's borrowing guarantee and lending (export credit sales) guarantee programs were countervailable subsidies to the CWB, but the petitioners then subsequently claimed that another guarantee program, by which the

17/ (...continued)

- ? The conditions surrounding the receipt of foreign grain into Canadian grain elevators under Section 567(c) of the *Canada Grain Act*;
- ? Rules governing the mixing of certain grain in Canadian transfer elevators (rules which were used to exclude certain classes and grades of U.S. wheat from importation) under section 56(1) of the *Canada Grain Regulations*;
- ? The imposition of a revenue cap on certain railways for the transportation of Western Canadian grain but not for foreign imported grains under Sections 150(1) and 150(2) of the *Canada Transportation Act*; and
- ? Section 87 of the *Canada Grain Act* which allows for domestic producers of grain to apply for a railway car to receive and carry the grain to a grain elevator for a consignee while precluding the same degree of access to producers of foreign grain.

18/ The WTO Panel held that the CWB's trading practices did not violate the WTO rules for state trading enterprises, a position later upheld by the Appellate Body, but agreed with the first three U.S. allegations concerning the treatment of imported U.S. grains by Canada. The Panel found that the U.S. had failed to establish the charges made under the fourth import treatment measure concerning access to railway cars. Canada did not appeal the Panel's findings on the rail revenue cap, grain segregation and entry authorization requirements, and thus the Appellate Body focused solely on the STE-related issues.

19/ The WTO Panel and Appellate Body reports are available on the WTO disputes database at: [//www.wto.org/english/tratop_e/disp_e/distabase_e.htm](http://www.wto.org/english/tratop_e/disp_e/distabase_e.htm).

GOC guaranteed the initial payments by the CWB to farmers, was also countervailable. *See* A.R. 2 (Proprietary). The Final Determinations collectively describe these three programs as the “Borrowing, Lending, and Initial Payment Guarantees.” *See* I&D Memo at 4. The original petition also alleged that the CWB received various transportation subsidies through the provision of railcars to Canadian National (“CN”) railway and Canadian Pacific Railway (“CPR”) (collectively, the “Railways”) for use in their common fleets.

The Department formally initiated the investigation of the above allegations on October 23, 2002. *See* Initiation Checklist, A.R. 36; Notice of Initiation, A.R. 38. The initiation of the investigation of the initial payment guarantee took place on February 11, 2003. *See* Feb. 11, 2003 Department memorandum entitled “New Subsidy Allegation,” A.R. 73. The GOC objected to the initiation of investigation of these programs pursuant to its October 2, 2002 Consultation Paper. *See* A.R. 22.

The Period of Investigation (“POI”) was established as running from August 1, 2001 through July 31, 2002, which reflects the CWB financial year. The Department issued its principal and supplemental questionnaires which were timely responded to by the Canadian parties.^{20/} From May 5-15, 2003, the Department conducted verifications of the questionnaire responses, visiting the GOC in Ottawa, the CWB in Winnipeg, the GOS in Regina, and the GOA in Edmonton. In the course of the verifications the Department collected additional documentary information which it attached to its verification reports as exhibits. The Department also visited private commercial bankers from the Royal Bank of Canada in Toronto. The Department’s verification visits generated a series of verification reports with appended exhibits in June, 2003 which reviewed its findings.^{21/} The GOC subsequently submitted a list of factual corrections to the GOC Verification Report. *See* A.R. 155.

^{20/} The Department issued its principal questionnaire on November 4, 2003. *See* A.R. 39. The GOC and provincial governments submitted their main response on January 13/14, 2003. *See* A.R. 4 (Proprietary). The CWB submitted its main response on January 12, 2003. *See* A.R. 3 (Proprietary). The GOC, with provincial governments as relevant, submitted supplemental responses on February 12, 13 (two responses), and March 27, 2003. *See* A.R. 10 (Proprietary), 11 (Proprietary), 13 (Proprietary), and 112 (Public). The CWB submitted supplemental responses on February 12, 13, 25 (two separate submissions), March 28, and April 14, 2003. *See* A.R. 9 (Proprietary), 13 (Proprietary), 16 (Proprietary), 17 (Proprietary), 24 (Proprietary), and 25 (Proprietary).

^{21/} *See* A.R. 33 and 50 (Proprietary) (GOC Verification Report and Exhibits), A.R. 32 and 35 (Proprietary) (CWB Verification Report and Exhibits), A.R. 30 and 34 (Proprietary) (GOA Verification Report and Exhibits), A.R. 31 and 36 (Proprietary) (GOS Verification Report and Exhibits), A.R. 145 (Memo on Discussions with Commercial Bankers).

The questionnaire responses and the verification reports constitute the basic factual record of this case.

D. The Preliminary Determinations

The Department issued two Preliminary Determinations, one on March 3, 2003^{22/} covering all investigated programs except the initial payment guarantee, and one on May 5, 2003^{23/} for the initial payment guarantee. In these Preliminary Determinations, the Department analyzed each of the three guarantee programs – the borrowing guarantee, the lending (export credit sales) guarantee, and the initial payment guarantee – separately and found only the borrowing guarantee to be countervailable. Insofar as that program was concerned, the Department applied its loan guarantee regulation, 19 C.F.R. § 351.506, and preliminarily determined that, in the absence of the GOC guarantee of its borrowings (the benchmark),^{24/} the CWB would pay interest rates equal to the average of second-tier commercial paper rates and prime rates. At the same time, the Department encouraged the parties to submit more detailed information which would allow it to more accurately estimate the credit rating of CWB in the absence of the GOC loan guarantee. *See* Prelim. Det., 68 Fed Reg. at 11,377.

With respect to the lending (export credit sales) guarantee, the Department preliminarily determined that the benefit of that program, if any, would be tied to the

^{22/} *Preliminary Affirmative Countervailing Duty Determinations and Alignment of Final Countervailing Duty Determinations with Final Antidumping Duty Determinations: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 11,374 (March 10, 2003). *See* A.R. 98 and 103. The Preliminary Determinations incorporated a decision memorandum on the railcar issue. *See* Railcars Memo, A.R. 99 and 21 (Proprietary). A second decision memorandum explained the Department's calculations in more detail. *See* March 3, 2003 Department Memo entitled "Calculation of Preliminary Determination for the Canadian Wheat Board, A.R. 22 (Proprietary).

^{23/} *See* May 5, 2003 Department Memo entitled "Preliminary Determination for the Initial Payment Guarantee Program", A.R. 135 and 29 (Proprietary).

^{24/} The benefit methodology set out in the loan guarantee regulation requires a measurement of the difference between the amount the CWB actually paid on its borrowings and the amount that the Department believed it would have paid absent the GOC's government guarantee. Since the CWB had no non-guaranteed borrowings that could serve as the benchmark rate for the guaranteed borrowings, the Department focused on the use of national average interest rates for comparable borrowings as the benchmark.

particular export markets in which the CWB made credit sales under the Credit Grain Sales Program (“CGSP”) and AgriFood Credit Facility (“ACF”) program. *See* Prelim. Det., 68 Fed. Reg. at 11,380. Because no sales were made under these programs to the United States, the Department applied its attribution of benefit rules found in 19 C.F.R. § 351.525(b)^{25/} and determined that there were no countervailable subsidies on exports to the United States under the export credit sales guarantee program.

Insofar as the initial payment guarantee was concerned, the Department preliminarily determined that the GOC’s guarantee of the CWB’s initial payments to producers did not confer a measurable subsidy on either hard red spring wheat or durum wheat. In reaching that conclusion, the Department considered that the guarantee amounted to the provision of a financial service, applied its provision of goods or services regulation, 19 C.F.R. § 351.511, and determined that because initial payment levels were set at levels substantially below projected market prices for wheat, the guarantee had essentially no value as a form of put option.^{26/} Thus, this particular “financial contribution” conferred no “benefit” on the CWB.

As to the government-provided railcars issue, the Department relied on a theory of indirect subsidy and found that the governments had provided a financial contribution to the CWB by entrusting or directing the railway companies, CN and CPR, to provide rail service for the movement of western grain. *See* Prelim. Det., 68 Fed. Reg. at 11,378. This decision was based on the Department’s reading of the Operating and Alternate Use Agreements entered into between the governments and the Railways. As a related finding, the Department also preliminarily found that both CN and CPR were providing the railcars for “less than adequate remuneration”, which provided a “benefit” to the CWB.^{27/}

The total net subsidy assessed in the Preliminary Determinations was 3.94%, which consisted mainly of the net subsidies arising from the borrowing guarantee determination.

^{25/} This regulation requires that subsidies which are tied to a particular product or market be attributed only to that product or market.

^{26/} The Department’s analysis was based on the economic models submitted by the parties which attempted to calculate the theoretical cost of an insurance policy taken out against the risks covered by the initial payment guarantee. However, the initial payment levels were set so low that the cost of insuring the risk of such a low price was negligible.

^{27/} The Department concluded that the rates charged by CN and CPR to the CWB for railcar service were not “consistent with market principles,” because they did not “reflect the ownership costs of these cars.” *See* Prelim. Det., 68 Fed. Reg. at 11,378.

As will be seen below, most of this guarantee analysis was set aside in the Final Determinations in favor of a finding of a single “financial contribution” and a single “benefit.” The basic analysis concerning the provision of railcars to the Railways was, however, carried over into the Final Determinations.

E. The Final Determinations

Following publication of the Preliminary Determinations, the Department proceeded through various steps, including review of ministerial error allegations submitted by the petitioners, the issuance of supplemental questionnaires, the issuance of its May 5, 2003 memorandum entitled “Preliminary Determination for the Initial Payment Guarantee Program,” *see* A.R. 135, the verifications of questionnaire responses, the receipt and consideration of case and rebuttal briefs by the parties to the investigations, and the convening of a hearing on July 8, 2003.^{28/}

The Final Determinations themselves were issued on September 5, 2003, and all of the issues raised by the parties in their case and rebuttal briefs were addressed in the separate I&D Memo, which was formally adopted and incorporated into the Final Determinations. In the I&D Memo, the Department found two programs to be countervailable, the first being the “Provision of Government-Owned and Leased Railcars,” and the second being the “Comprehensive Financial Risk Coverage: The Borrowing, Lending, and Initial Payment Guarantees.”

1. Railcars

The Department addressed the railcars issue initially by noting the findings and determinations that it had reached at the Preliminary level, *first*, that through the operating and alternate use agreements, the federal and provincial governments (including the CWB) were entrusting the Railways to provide rail services for Western grain (a “financial contribution” within the meaning of section 771(5)(D)(iii) of the Act); *second*, that the rail services were being provided to a specific group (satisfying the “specificity” requirement of section 771(5A)(D)(iii)(I) of the Act); and *third*, that the Railways were providing these services for “less than adequate remuneration” (within the meaning of section 771(5)(E)(iv) of the Act). The Department then stated:

For the final determinations, we continue to find that the CP and CN have been entrusted or directed to provide rail service for the movement of Western grain, including grain shipped by the CWB, for

^{28/} *See* Case History section of the Final Determinations at 52,747-48.

less than adequate remuneration.

I&D Memo at 2

The Department then indicated that it measured the “benefit” received by the CWB by multiplying the total volume of grain the CWB shipped in government-owned and leased railcars during the POI by the estimated “ownership costs” of the railcars (which the Department considered were not reflected in the rates charged by the Railways to the CWB) to arrive at the aggregate benefit received by the CWB during that period. *See* I&D Memo at 3.

The Department also cited, but rejected, Canadian arguments^{29/} that (i) the provision of hopper car service by the Railways to the CWB were tied to export sales to countries other than the United States; (ii) the Operating and Alternate Use Agreements contained no legal mandate for the Railways to use the railcars, transport Western Grain, or transport such grain to the United States; and that (iii) there was no evidence that the Railways “passed through” the benefits they received from the Governments to the CWB. The Department rejected the first argument, finding that the provision of hopper car service to the CWB “is not tied to particular sales.” The Department rejected the second argument, finding an entrustment or directive under the Operating and Alternate Use Agreements despite the lack of a formal mandate. Finally, the Department rejected the lack of pass-through argument, noting the record evidence that supported its determinations.

2. Comprehensive Financial Risk Coverage

In its section entitled “Comprehensive Financial Risk Coverage: The Borrowing, Lending, and Initial Payment Guarantees,” the Department initially reviewed the history and status of the CWB and its constitutive documents, and then noted that the backing of the GOC allowed the CWB to enjoy a “comprehensive and multifaceted scheme of protection against financial risks.” *See* I&D Memo at 4. The three components of this “scheme” included the GOC’s coverage of the CWB’s initial payments to Western grain farmers, its coverage of the attendant risks involved in the CWB’s credit sales, and its coverage of the financial risks involved in the CWB’s borrowings from lenders. The Department then found all of these risk contingencies to be “fundamentally interrelated.”

Referencing its approach in the Preliminary Determinations, the Department indicated that since that time it had collected additional, pertinent information that prompted a reconsideration of that approach, resulting in its determination “that the many elements

^{29/} *See* I&D Memo at 3.

of risk coverage comprise an integrated program that is most appropriately analyzed as a single financial contribution that bestows a single benefit specific to the CWB.” *See* I&D Memo at 5.

Turning to the analysis required by the statute and regulations, the Department first indicated that “[n]either the statute nor the Department’s regulations provide explicit direction for how such multifaceted and uniquely inter-related support should be categorized or defined for purposes of a financial contribution.” Citing the Statement of Administrative Action to the Uruguay Round Agreements Act^{30/} (“SAA”), the Department noted that Section 771(5)(D) lists “the four broad generic categories of government practices that constitute a ‘financial contribution’”.^{31/} Through the use of such language, Congress in effect expressed a recognition that “a particular government program may not fit neatly into a ‘box’ or otherwise be compartmentalized.” *See* I&D Memo at 5.

The Department next noted that it had found as “useful guidance” its “integral linkage” regulation, 19 C.F.R. § 351.502(c), although on its face that regulation is directed toward the specificity requirement of the Act. Focusing on the specific elements of that regulation, the Department made finding that: (i) all aspects of the comprehensive risk coverage contributed to the same fundamental purpose (ensuring that “the CWB is able to pay out as high and timely a return as possible to the farmers without incurring the risk of longer term financial loss”); (ii) “the three guarantees” bestow the same type of benefit (all three guarantees shelter the CWB from risk); and that (iii) the elements of the program are linked at inception. *See* I&D Memo at 5-6.

The Department then added to this analysis by finding that, in this instance, the comprehensive financial risk coverage “provides a benefit by a means of a mechanism that does not generate a distinct benefit for each instance in which the risk guarantee can be invoked. The benefit derives from the joint impact of the guarantees on the recipient’s borrowing costs....” *See* I&D Memo at 6. Thus, the Department concluded that the three “elements” of the comprehensive financial risk coverage actually comprised “a single program” measured by “a single financial contribution in the form of a potential direct transfer of funds within the meaning of section 771(5)(D)(i) of the Act,” a transfer which could be invoked under any of the program’s three risk contingencies.

^{30/} H. Doc. 103-316, Vol. 1 (1994).

^{31/} *Id.* at 927.

Turning next to the statutory requirement of “benefit,”^{32/} the Department noted that the Act does not specifically define “benefit”, section 771(5)(E) merely setting forth “various examples of types of government programs and the appropriate measure of ‘benefits’ thereunder.” See I&D Memo at 6-7. The Department did grant that “[o]ur regulations direct that where the Act identifies a particular type of government program and sets forth a corresponding rule for the measurement of the ‘benefit’ thereunder, we must follow the specified methodology,”^{33/} but also cited to its companion provision which indicates that for “other government programs,” the Department will normally determine benefit on the basis of a firm paying less for its inputs than it otherwise would pay in the absence of the government program.

The Department then went on to note that while one element of the comprehensive financial risk coverage program had “characteristics similar to a loan guarantee,” it would be “simplistic[]” to apply the benefit measurement calculation called for by section 771(5)(E)(iii) of the Act to this particular subsidy program as to do so would “fail to accurately identify the benefit conferred by the comprehensive financial risk coverage program.” See I&D Memo at 7. The appropriate and full measure of benefit in this instance “is the difference between the CWB’s actual cost of debt financing and its cost of debt financing absent the comprehensive financial risk coverage. [Footnote omitted].” Id.

Based upon information provided in the questionnaires and received during verification, the Department then calculated the benefit of the comprehensive financial risk coverage program by reference to the prime rate as a measure of what the CWB should have paid to raise funds. On this basis, the Department determined that the CWB had received countervailable benefits of 4.94% ad valorem. See I&D Memo at 8.

F. Briefing, the Hearing, and Recent Panel Events

After the Panel was constituted, it received in a timely fashion both public and proprietary Rule 57(1)^{34/} briefs, including those filed by the CWB on March 15, 2004, addressing solely the guarantee issues, and those filed jointly by the Canadian Complainants, addressing both the guarantee and railcars issues. On May 14, 2004, the Department filed its public Rule 57(2) Response brief, as did the U.S. Parties (the latter filed

^{32/} See sections 771(5)(B)(i) and (iii) and 771(5)(E) of the Act.

^{33/} See I&D Memo at 7, *citing* 19 C.F.R. § 351.503(a) and (b).

^{34/} NAFTA Panel Rule 57 governs the filing of briefs by the parties in a Chapter 19 proceeding.

both public and proprietary Response briefs). Thereafter, on June 1-2, 2004, the CWB and the Canadian Complainants filed their public Rule 57(3) Reply briefs.

The Panel has issued three interim orders, the first dated September 20, 2004, setting October 29, 2004 as the date for oral argument on the merits of the Department's Final Determinations, the second dated December 3, 2004 ordering that a redacted version of the *in camera* hearing transcript be placed on the public record, and the third dated January 27, 2005 extending time for the issuance of its opinion.

Pursuant to the first order, a hearing was convened in Washington, D.C. on October 29, 2004 for oral argument. Arguments were made on behalf of the Canadian Complainants, the U.S. Parties, and the Department. Due to the significance of certain proprietary information, a significant portion of the hearing was held *in camera*. However, the parties promptly prepared and submitted a redacted version of that portion of the hearing transcript held *in camera* and filed with the Panel a consent motion requesting that this redacted version be placed upon the public record. The Panel agreed with this motion and signed the appropriate order on December 3, 2004.

II. Standard of Review

Article 1904(3) of the NAFTA requires that this Panel apply the “standard of review” and “general legal principles”^{35/} that a U.S. court would apply in its review of a Department determination.^{36/} The standard of review that must be applied by the Panel is dictated by § 516A(b)(1)(B) of the Act,^{37/} which requires the Panel to “hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law....”^{38/}

The question in an appellate review is whether the administrative record adequately supports the Department’s determination,^{39/} which must be adjudged only on the grounds and findings actually stated in its determination,^{40/} not on the basis of *post hoc* argumentation of counsel.^{41/} In carrying out its review of an agency determination, a reviewing court or binational panel must stay strictly within the confines of the

^{35/} These principles include “standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies.” *See* NAFTA Art. 1911.

^{36/} Under the NAFTA, an Article 1904 Binational Panel Review of a countervailable subsidy determination in a U.S. countervailing duty action must be conducted in accordance with U.S. law. *See* NAFTA Art. 1904(2). For purposes of such review, the “law” consists of “relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials...” *Id.*

^{37/} 19 U.S.C. § 1516a(b)(1)(B); *see* NAFTA Annex 1911.

^{38/} The “substantial evidence” standard mandated by the NAFTA is statutorily linked to that evidence which is “on the record,” 19 U.S.C. § 1516a(b)(2), and Article 1904(2) of the NAFTA expressly limits the Panel’s review to the “administrative record” filed by the Department.

^{39/} *Daewoo Electronics Co., Ltd. v. International Union*, 6 F.3d 1511, 1520 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994).

^{40/} *Hussey Copper, Ltd. v. United States*, 834 F. Supp. 413, 427 (Ct. Int’l Trade 1993), *citing* *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

^{41/} *Maine Potato Council v. United States*, 613 F. Supp. 1237, 1245 (Ct. Int’l Trade 1985) (“Counsel’s *post hoc* rationalization cannot substitute for a clear statement by the [agency] as to how it treated [a significant competitive factor].”).

administrative record already in existence.^{42/} Panels may not engage in *de novo* review^{43/} and, as a consequence, may not make new factual findings that would amend the agency record.

Indeed, the statutory requirement that review be “on the [administrative] record” means that the reviewing court or binational panel is limited to “information presented to or obtained by [the Department] ... during the course of the administrative proceeding....”^{44/}

A. Substantial Evidence

The contours of the substantial evidence standard are well established in United States case law. Substantial evidence has been defined by the Supreme Court^{45/} as “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”^{46/} In a later case the Supreme Court elaborated on this standard, stating that substantial evidence can be “something less than the weight of the evidence.”^{47/}

In assessing the substantiality of the evidence, a reviewing court or panel must take

^{42/} See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.... The task of the reviewing court is to apply the appropriate [] standard of review [] to the agency decision based on the record the agency presents to the reviewing court.”) (citations omitted).

^{43/} *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 965 (Ct. Int’l Trade 1986), *aff’d per curiam*, 810 F.2d 1137 (Fed. Cir. 1987).

^{44/} 19 U.S.C. § 1516a(b)(2)(A)(i).

^{45/} The Panel recognizes that decisions of the Supreme Court and the U.S. Court of Appeals for the Federal Circuit are binding on Article 1904 binational panels. See NAFTA Article 1904(2)-(3). In contrast, decisions of the CIT do not constitute binding precedent. See *Rhone Poulenc v. United States*, 583 F. Supp. 607, 612 (Ct. Int’l Trade 1984) (A decision of the CIT is “valuable, though non-binding, precedent unless and until it is reversed.”). Likewise, a decision of one Article 1904 binational panel is not binding on future panels. See *Certain Corrosion-Resistant Carbon Steel Products from Canada*, USA-93-1904-03 at 78 n. 254 (October 31, 1994).

^{46/} *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); see also *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

^{47/} *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

into account the entire record, including “whatever in the record fairly detracts from its weight.”^{48/} As stated in another decision, the court must “review the record as a whole, including evidence that supports as well as evidence that ‘fairly detracts from the substantiality of the evidence.’”^{49/} The binational panel in *New Steel Rails from Canada* indicated that the panel’s role is “not to merely look for the existence of an individual bit of data that agrees with a factual conclusion and end its analysis at that.”^{50/} Rather, the panel must also take into account evidence that detracts from the weight of the evidence relied on by the agency in reaching its conclusions.^{51/}

The Panel is, however, conscious of its obligation under the substantial evidence standard not to reweigh the evidence, or substitute its judgment for that of the Department.^{52/} It is well settled that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.”^{53/} The reviewing authority therefore may not “displace the [agency’s] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo.”^{54/} As the Supreme Court has noted, the substantial evidence standard effectively “frees the reviewing [authority] of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the

^{48/} *Universal Camera*, 340 U.S. at 488.

^{49/} *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984))

^{50/} *New Steel Rails from Canada*, USA-89-1904-09 at 9 (Aug. 13, 1990).

^{51/} *See Universal Camera*, 340 U.S. at 477, 488; *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States*, 818 F. Supp. 348, 353 (Ct. Int’l Trade 1993) (“In other words, it is not enough that the evidence supporting the agency decision is ‘substantial’ when considered by itself.”).

^{52/} *Fresh, Chilled and Frozen Pork from Canada*, USA-89-1904-11, at 8 (Aug. 24, 1990); *see also Metallwerken Nederland B.V. v. United States*, 728 F. Supp. 730, 734 (Ct. Int’l Trade 1989).

^{53/} *Consolo*, 383 U.S. at 620.

^{54/} *Universal Camera*, 340 U.S. at 488; *accord American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int’l Trade 1984), *aff’d sub nom., Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985).

administrative tribunal and it helps promote the uniform application of the statute.”^{55/}

B. Deference

The substantial evidence standard generally is seen to require the reviewing authority to accord deference to an agency’s factual findings and administrative determinations, its statutory interpretations, and the methodologies selected and applied by the agency. With respect to fact-finding, prior binational panels have noted that “deference must be accorded to the findings of the agency charged with making factual determinations under its statutory authority.”^{56/} Judicial decisions clearly accord with this view.^{57/} The Federal Circuit has specifically confirmed that the Department’s “administrative determinations are entitled to *Chevron* deference.”^{58/}

It is also clear that deference must be given to the methodologies selected and applied by the agency to carry out its statutory mandate,^{59/} which a court or panel may only review for reasonableness.^{60/} “As long as the agency’s methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency’s conclusions, the court will not impose its own views as to the sufficiency of the agency’s investigation or question the agency’s methodology.”^{61/}

^{55/} *Consolo*, 383 U.S. at 620.

^{56/} *Fresh, Chilled and Frozen Pork from Canada*, USA-89-1904-11 at 6 (citing *Red Raspberries from Canada*, USA-89-1904-01 at 18-19 (Dec. 15, 1989)).

^{57/} *See N.A.R., S.p.A. v. United States*, 741 F. Supp. 936, 939 (Ct. Int’l Trade 1990) (“[D]eference is given to the expertise of the administration agency regarding factual findings.”).

^{58/} *FAG Italia S.p.A. v. United States*, 291 F.3d 806, n. 14 (Fed. Cir. 2002), citing *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1346-47 (Fed. Cir. 2001).

^{59/} *See Brother Industries, Ltd. v. United States*, 771 F. Supp. 374, 381 (Ct. Int’l Trade 1991) (“Methodology is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion.”).

^{60/} *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1210-11 (Fed. Cir. 1995) (“[O]ur inquiry is limited to determining whether Commerce’s model-match methodology ... is reasonable.”)

^{61/} *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int’l Trade 1986), *aff’d*, 810 F.2d 1137 (Fed. Cir. 1987) (citations omitted).

On the important issue of statutory interpretation, “deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law.”^{62/} The Supreme Court specifically defined the approach to be taken by courts in reviewing an agency decision based on a statutory interpretation, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the Supreme Court required a two-step analysis. Under the first step (or “prong”), a court reviewing an agency’s construction of a statutory provision must determine whether “Congress has directly spoken to the precise question at issue.”^{63/} In order “to ascertain whether Congress had an intention on the precise question at issue, [the court or panel] may employ the ‘traditional tools of statutory construction.’”^{64/} “The first and foremost ‘tool’ to be used is the statute’s text, giving it its plain meaning. Because a statute’s text is Congress’s final expression of its intent, if the text answers the question, that is the end of the matter.”^{65/} Beyond the statute’s text, the tools of statutory construction “include the statute’s structure, canons of statutory construction, and legislative history.”^{66/}

If, after employing the first prong of *Chevron*, the reviewing court determines that the statute is silent or ambiguous with respect to the specific issue before it, the question then becomes whether the Department’s construction of the statute is permissible.^{67/} Essentially, this is an inquiry into the reasonableness of the Department’s interpretation.^{68/} Provided that Commerce has acted reasonably, the Court may not substitute its judgment for the agency’s.^{69/} “In determining whether Commerce’s interpretation is reasonable, the Court

^{62/} *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

^{63/} *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

^{64/} *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9).

^{65/} Id. (citations omitted).

^{66/} Id. (citations omitted).

^{67/} *Chevron*, 467 U.S. at 843.

^{68/} *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

^{69/} See *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992); see also *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (noting that “a court must defer to an agency’s reasonable interpretation of a statute even if the court might have preferred another”).

considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions and the objectives of the [statutory] scheme as a whole.”^{70/}

Deference to the Department’s interpretation and implementation of the antidumping laws can be seen to be grounded in express congressional intent. The United States Congress has stressed that in the antidumping field, it has “entrusted the decisionmaking authority in a specialized, complex economic situation to administrative agencies.”^{71/} As a result, reviewing courts have acknowledged that “the enforcement of the antidumping law [is] a difficult and supremely delicate endeavor. The Secretary of Commerce . . . has broad discretion in executing the law.”^{72/}

C. Limitations On Deference

Although court or panel review under the substantial evidence standard is – by Congressional intent and by law – limited, application of that standard clearly does not result in an abdication of the court’s or panel’s authority to conduct a meaningful review of the agency’s determinations.^{73/} Indeed, a contrary conclusion would eviscerate the function of the reviewing authority, rendering the appeal process superfluous. The deference to be accorded an agency’s findings and conclusions therefore is not unbounded.^{74/}

^{70/} *Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp. 2d 807, 813 (1998).

^{71/} S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 638.

^{72/} *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984); see also *Consumer Prod. Div., SCM Corp. v. Silver Reed America*, 753 F.2d 1033, 1039 (Fed. Cir. 1985).

^{73/} See *Al Tech Specialty Steel Corp. v. United States*, 651 F. Supp. 1421, 1424 (Ct. Int’l Trade 1986) (“This deference, however, should in no way be construed as a rubber stamp for the government’s interpretation of statutory provisions.”). See also *Smith-Corona Group*, 713 F.2d at 1571 (“The Secretary cannot, under the mantle of discretion, violate these standards or interpret them out of existence.”).

^{74/} See *Softwood Lumber from Canada (Injury)*, USA-92-1904-02 at 15 (July 26, 1993).

It is well established, for example, that an agency's determination must have a reasoned basis.^{75/} The reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning.^{76/} The extent of deference to be accorded depends on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements...."^{77/}

Furthermore, a rational connection must be present between the facts found and the choice made by the agency.^{78/} Although room exists to uphold an agency's decision of less than ideal clarity if its path of reasoning may reasonably be discerned,^{79/} there must nevertheless be an adequate explanation of the bases for the agency's decision in order for the reviewing authority to meaningfully assess whether it is supported by substantial evidence on the record. The Department, therefore, must articulate and explain the reasons for its conclusions.^{80/}

Deference to an agency's interpretation of the statute it is charged with implementing also is not unlimited. A reviewing authority may not, for instance, permit an agency "under the guise of lawful discretion or interpretation to contravene or ignore the

^{75/} *American Lamb Co.*, 785 F.2d 994, 1004 (citing S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 638); see also *Fresh, Chilled and Frozen Pork*, USA 89-1904-11 at 13 (Aug. 24, 1990).

^{76/} *Chr. Bjelland Seafoods A/C v. United States*, 14 ITRD 2257, 2260, 1992 Ct. Int'l Trade LEXIS 213 (Ct. Int'l Trade 1992); *USX Corp. v. United States*, 655 F. Supp. 487, 492 (Ct. Int'l Trade 1987).

^{77/} *Ceramica Regiomontana*, 636 F. Supp. at 965 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

^{78/} *Bando Chem. Indus. v. United States*, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992) (citing *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974), and *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *Avesta AB v. United States*, 724 F. Supp. 974, 978 (Ct. Int'l Trade 1989), *aff'd*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1308 (1991).

^{79/} *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (citing *Bowman Transportation*, 419 U.S. at 286).

^{80/} See, e.g., *Mitsubishi Materials Corp. v. United States*, 820 F. Supp. 608, 621 (Ct. Int'l Trade 1993); *USX Corp.*, 655 F. Supp. at 490; *SCM Corp. v. United States*, 487 F. Supp. 96, 108 (Cust. Ct. 1980); *Maine Potato Council*, 613 F. Supp. at 1244-45; *Bando Chem. Indus.* 787 F. Supp. at 227.

intent of Congress.”^{81/} The Supreme Court itself has held that “no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.”^{82/} Moreover, the Department’s efforts at statutory interpretation must, when appropriate, take into account the international obligations of the United States.^{83/}

Even the methodology selected and applied by the agency to carry out its statutory mandate “still must be lawful, which is for the courts finally to determine.”^{84/}

Finally, although there is a presumption of good faith and conscientious exercise of the Department’s responsibilities in an investigation,^{85/} the Department has a legal obligation to observe the basic principles of due process and fundamental procedural fairness,^{86/} and to justify any departures it makes from settled practice with reasonable explanations that are themselves supported by substantial evidence on the record.^{87/}

^{81/} *Cabot Corp. v. United States*, 694 F. Supp. 949, 953 (Ct. Int’l Trade 1988).

^{82/} *Public Employees Retirement System of Ohio v. June M. Betts*, 492 U.S. 158, 171 (1989).

^{83/} *See Alexander Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Federal-Mogul Corp.*, 63 F.3d at 1581-82; Section 114, Restatement (Third) of the Foreign Relations Law of the United States.

^{84/} *Brother Industries*, 771 F. Supp. at 381. *See also Gifford-Hill Cement Co. v. United States*, 615 F. Supp. 577, 582 (Ct. Int’l Trade 1985) (“If the use of [a submarket] analysis was improper, then the Commission’s findings would not be supported by substantial evidence.”).

^{85/} *Saha Thai Steel Pipe Co. v. United States*, 661 F. Supp. 1198, 1202 (Ct. Int’l Trade 1987); *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959). *See also Takashima U.S.A., Inc. v. United States*, 886 F. Supp. 858, 861 (1995) (“A presumption of regularity attaches to the actions and conduct of government officials in the performance of their lawfully executed duties.”) (*citing Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993)).

^{86/} *See Sigma Corp. v. United States*, 841 F. Supp. 1255, 1267-68 (Ct. Int’l Trade 1993); *Usinor Sacilor v. United States*, 893 F. Supp. 1112, 1141 (Ct. Int’l Trade 1995); and *Creswell Trading Co. v. United States*, 15 F.3d 1054, 1062 (Fed. Cir. 1994).

^{87/} *See Western Conference of Teamsters v. Brock*, 709 F. Supp. 1159, 1169 (Ct. Int’l Trade 1989); *see also National Knitwear and Sportswear Ass’n v. United States*, 779 F. Supp. 1364, 1369 (Ct. Int’l Trade 1991).

III. SUMMARY OF THE DECISIONS OF THE PANEL

- A. The Panel decides that the Department's findings and determinations concerning the comprehensive financial risk coverage program are not in accordance with law and remands this issue to the Department for action consistent with this Opinion.

- B. The Panel upholds the Department's findings and determinations concerning the provision of government-owned and leased railcars in all respects and dismisses the appeal on this issue.

IV. DISCUSSION AND ANALYSIS

A. Whether the Department's Findings and Determinations Concerning the "Comprehensive Financial Risk Coverage" Program Are Supported By Substantial Evidence On The Record And Are In Accordance With Law

1. Contentions of the Parties

The Canadian Wheat Board (CWB)

The CWB's Rule 57(1) brief is limited to the financial guarantees issue which it characterizes as the "failure [of the Department] to determine the existence and amount of any subsidy benefits in accordance with the requirements of the statute and its own regulations."^{88/} In particular, CWB argues that in the Final Determinations the Department "took the unprecedented step of treating the three financial guarantees, each one plainly recognizable under the statute and its own regulations, as a single government program" which it then entitled "comprehensive financial risk coverage", a name created essentially from whole cloth.^{89/} The CWB insists that the Department's classification of the three financial guarantees as a single financial contribution — notwithstanding the fact that each is a separate type of financial contribution specified by the statute and the Department's own regulations — is clearly contrary to law.

In addition, the CWB argues that the Department's use of its "integral linkage" regulation in its Final Determinations was legally unsound and, based on record evidence, factually unsupportable.^{90/}

The CWB's Rule 57(1) brief provides an overview of the CWB itself, the findings

^{88/} CWB Rule 57(1) brief at 1.

^{89/} Id. The three guarantees referred to are the "borrowing guarantee" (the guarantee of the CWB's loan obligations to banks and other debt holders), the "export credit guarantee" (the guarantee of customer's obligations pursuant to the CWB's export credit sales programs), and the "initial payment guarantee" (the guarantee of the initial payments made by the CWB to farmers at the time they deliver wheat into the CWB "pool").

^{90/} Id. at 2.

and determinations of the Department in the Preliminary Determinations,^{91/} the responses by the CWB and the GOC to the Department's questionnaires,^{92/} and then sets out the legal issues of "particular relevance" to its brief.^{93/}

91/ The CWB notes particularly that in the Preliminary Determinations the Department analyzed each of the three guarantees separately, "as required by the Act, its regulations, and its past practice." *Id.* at 7. The borrowing guarantee was analyzed as a potential direct transfer of funds under Section 771(5)(1)(i) of the Tariff Act, the Department then preliminarily determining the measure of benefit – the amounts that the CWB would have paid on its borrowings absent the government guarantee – but also requesting additional information from the parties to attempt to refine that measure; the export credit guarantee was analyzed under the Department's export subsidy regulation, 19 C.F.R. § 351.514(a), but also under its tying regulation, 19 C.F.R. §351.525(b)(5)(i), and then preliminarily concluding that there were no countervailable subsidies on exports to the United States under this program; and the initial payment guarantee as a provision of a service under Section 771(5)(D)(iii) of the Tariff Act and 19 C.F.R. § 351.511, preliminarily concluding that the benefit of the subsidy was too small to be measurable.

92/ The CWB discusses particularly the information it and the GOC developed in response to the Department's questionnaires concerning "what the CWB's credit rating would be in the absence of the GOC borrowing guarantee." Third Supplemental Questionnaire (March 18, 2003), Question 5 (A.R. 107).

93/ The CWB defines those issues as:

- a. Whether the Department committed legal error when it applied measures of benefit other than those specified in 19 U.S.C. § 1677(5)(E)(i)-(iv) with respect to the types of financial contribution enumerated therein, in assessing the benefit of government measures that fell within the plain meaning of those types?
- b. Whether the Department committed legal error when it combined three of the types of financial contribution enumerated in 19 U.S.C. § 1677(5)(E)(i)-(iv) and the Department's regulations into a single "program" and applied a measure of benefit to the single "program" that was inconsistent with the measures of benefit specified in the statute and the Department's regulations for the three enumerated types of financial contribution examined individually?
- c. Whether the Department committed legal error by including within the single program described above a financial contribution that does not provide "a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported ... into the United States," 19 U.S.C. § 1671(a)(1).

- A. The Department's approach to benefit in the Final Determinations is contrary to the plain meaning of the statute

As to the Final Determinations, which of course it concedes are what are before this Panel, the CWB argues that the governing statute, 19 U.S.C. § 1677(5), is “a carefully constructed framework in which specific types of financial contributions have specific measures of benefit that Commerce must apply whenever they are plainly applicable, as they were in this case. Financial contribution and benefit are, in other words, two sides of the same coin.”^{94/}

As to the loan guarantee, for example, 19 U.S.C. § 1677(5)(E)(iii) states:

A benefit *shall* normally be treated as conferred where there is a benefit to the recipient, *including ... in the case of a loan guarantee*, if there is a difference ... between the amount the recipient of the guarantee pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no *guarantee* by the authority.

CWB Rule 57(1) brief at 13 (emphases added by CWB)

Thus, in the CWB's view, “it is clear that the statutory measure of benefit for a loan guarantee is the recipient's cost of funds for a commercial loan in the absence of the loan guarantee.”^{95/}

It is equally the case, in the CWB's view, that the statutory measure of benefit for the provision of a service — in this case the initial payment guarantee — is whether the service is provided for less than adequate remuneration, based upon prevailing market conditions. In particular, 19 U.S.C. § 1677(5)(E)(iv) states:

A benefit *shall* normally be treated as conferred where there is a benefit to the recipient, *including ... in the case where goods or*

^{94/} CWB Rule 57(1) brief at 4.

^{95/} Id. at 14. The CWB also quotes from the Statement of Administrative Action (“SAA”) that: “Section 771(5)(E) provides the standard for determining the existence and amount of a benefit conferred through the provision of a subsidy. It states that ‘a benefit shall normally be treated as conferred where there is a benefit to the recipient,’ providing examples of how a benefit *is to be established* under various types of subsidy instruments.” SAA at 257 (emphasis added by CWB).

services are provided, if such goods or services are provided for less than adequate remuneration....

(Emphases added by CWB)

The CWB notes that the Tariff Act does not itself directly address the measure of benefit for the third type of financial guarantee existing in this case — the export credit sales guarantee — but states that this type of program is covered by Item (J) of the Illustrative List of Export Subsidies, Annex I to the WTO *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”).^{96/} Item (J) provides that an export credit program gives rise to a countervailable subsidy if it is offered “at premium rates which are inadequate to cover the long-term operating costs and losses of the program .” This standard was incorporated by the Department into its own regulation on export credit programs. *See* 19 C.F.R. § 351.520.

Notwithstanding that the statute and regulations provide, clearly and with particularity, specific measures of benefit for the identified types of financial contribution, the CWB argues that the Department, under the guise of a finding of a single financial contribution, altered the measures of benefit that apply in all three cases. In the case of the borrowing guarantee, the Department measured the benefit by examining the CWB’s borrowing costs in the absence of not only the borrowing guarantee, but in the absence of all three guarantees. In the case of the initial payment guarantee, the Department did not measure the benefit by reference to the adequacy of remuneration but in relation to its impact on the CWB’s cost of funds. Finally, in the case of the export credit sales guarantee, the Department did not measure the benefit by the adequacy of the premium rates to cover long-term operating costs and losses, but by (once again) its impact on the CWB’s cost of funds.^{97/}

The CWB suggests that this is a straightforward question of statutory interpretation:

Under Commerce’s reading, it is allowed to rename and repackage the types of financial contributions that are specifically identified in the statute and apply different measures of benefit to whatever it chooses to call the resulting program or programs. Under this logic, ‘loan guarantees,’ the ‘provision of a service,’ and ‘export credit guarantees’ do not exist in any objective sense or have any plain meaning; it is only

^{96/} CWB Rule 57(1) brief at 15 n. 15.

^{97/} *Id.* at 15-16. “In short, Commerce did not apply the measures of benefit specified by the statute and its regulations that correspond to the types of financial contributions that were at issue.” *Id.* at 16.

when Commerce *chooses* to attach these labels to a program that it is required to apply the measures of benefit specified in the statute and its regulations. Moreover, even if Commerce acknowledges that these labels *do* apply to the programs under investigation – as it did in this case – it believes that the statute nonetheless permits it to package these programs together, attach a new label to the resulting combination, and apply a measure of benefit that is altogether different than the sum of its parts.^{98/}

The CWB argues that the Department’s “breathhtakingly expansive view of the statute” must fail for four reasons: (1) the statute is not in fact ambiguous and the application of the first prong of *Chevron* requires this Panel to apply the statute’s plain meaning; (2) it is directly contrary to the Department’s own regulations; (3) it is contrary to the Department’s consistent practice not to consider the impact of one program benefit upon other program benefits (as such inquiry is inherently arbitrary and speculative); and (4) it would permit the Department to countervail the benefit of programs that are clearly tied to markets other than the United States, in contravention of the statute, the regulations, and past practice.^{99/}

As to the basic issue of statutory interpretation, the CWB argues that the second prong of *Chevron* only applies if the Panel finds — using traditional methods of statutory interpretation — a “legitimate ambiguity in the statute,” and most especially, “Commerce may not create an ambiguity so as to expand its power under the statute.”^{100/} The CWB invites the Panel to consider several such rules of statutory interpretation:

- *When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode,*^{101/} a principle apparently recognized by the Department in its own

^{98/} Id. at 16-17 (emphasis in original).

^{99/} Id. at 17.

^{100/} Id.

^{101/} See *Christensen v. Harris County*, 529 U.S. 576, 583 (citation omitted); see also 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000) (“A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way.”). The CWB considers this principle to be an expression of the broader principle of *expressio unius est exclusio alterius* and cites *BMW Manufacturing Corp. v. United States*, 241 F.3d 1357, 1361 (Fed. Cir. 2001) (applying canon of *expressio unius est exclusio alterius* to find that existence of specified exemptions precluded possibility of additional, unspecified exemptions); *Cook v. Principi*, 318 F.3d 1334, 1339 (Fed. Cir. 2002) (applying same canon to find that exceptions to rule of finality precluded other possible exceptions); *Halverson v. Slater*, 129 F.3d 180, 185-186 (D.C. Cir. 1997) (grant of authority to delegate powers to Coast Guard precludes

(continued...)

regulations^{102/}

- *A statute should not be interpreted so as to render its substantive provisions superfluous or ineffective*^{103/}
- *Specific terms prevail over the general in the same or another statute which*

101/ (...continued)

delegation of authority to entities other than Coast Guard); *Independent Ins. Agents, inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000) (where the specification of one thing necessarily or at least reasonably implies the preclusion of others, canon of *expressio unius* has greatest effect). *Id.* at 18 n. 16.

102/ See *Countervailing Duties, Preamble*, 63 Fed. Reg. 65, 348 (Nov. 25, 1998) (“Preamble”). Observing that both the statute and the SCM Agreement contain specific measures of benefit for particular types of financial contributions, the Department stated that it need only “apply the test enumerated by the statute in order find that a benefit has been conferred.” *Preamble*, 63 Fed. Reg. at 65, 360. The Department then went on to note that “if a financial contribution has been provided, either directly or indirectly, in a form which is specifically identified in the statute or regulations ... *we will identify and measure the resulting benefit in accordance with the rules contained in the statute and regulations.*” *Id.* (emphasis added). The CWB argues from this that “Commerce has recognized that the statute identifies specific forms of financial contributions (grants, loan guarantees, etc.), each of which has a corresponding measure of benefit set forth in the statute....” CWB Rule 57(1) brief at 19. Similarly, the CWB asserts that:

“[u]ntil this case, Commerce had never even remotely suggested that it has the discretion to disregard the statute’s clear matching of specific forms of financial contribution to specific measures of benefit by renaming or repackaging the programs under investigation. This notion, if accepted, would render meaningless the statute’s obvious particularity concerning the identification and measurement of particular types of subsidy benefits.” *Id.*

103/ The CWB cites *Duncan v. Walker*, 533 U.S. 167, 174 (2001), and argues that Congress did not leave to the Department’s “broad discretion” the standards for measuring the existence and amount of a benefit arising from loan guarantees or others of the most common types of financial contributions encountered in subsidy law. “Rather, Congress enacted a legal regime in which Commerce is obligated to apply a specific measure of benefit whenever it encounters a government program that objectively fits the description of one of the enumerated types of financial contribution.” CWB Rule 57(1) brief at 20.

otherwise might be controlling^{104/}

The CWB also points to several Federal Circuit decisions mandating that the Department administer trade law statutes in accordance with their plain meaning and to refrain from “invent[ing] new categories or methodologies when the statute clearly directs Commerce how to proceed.”^{105/} In *AK Steel Corp. v. United States*, 226 F.3d 1361, 1370 (Fed. Cir. 2000), the Federal Circuit rejected the Department’s “functional” test for determining whether foreign producer sales in the United States are export price (EP) sales or constructed export price (CEP) sales and required it to apply the “plain language” of the statute. In *FAG Italia S.p.A. v. United States*, 291 F.3d 806 (Fed. Cir. 2002), the Federal Circuit rejected the Department’s conduct of a “duty absorption inquiry” in administrative reviews in contexts other than those specified in the statute. In *Thyssen Stahl AG v. AK Steel Corp.*, 1988 U.S. App. LEXIS 17064 (Fed. Cir. 1998), the Federal Circuit rejected the Department’s attempt to interpret a factual *increase* in the “U.S. Price,” of a type not permitted by the statute, as a statutorily allowed *reduction* in the U.S. Price by calling the increase a “negative expense[.]” This “linguistic artistry” was rejected by the court on the ground that it “contradict[ed] the statute’s unambiguous expression of congressional intent.”

The CWB argues that the present case falls squarely within these rules, which collectively deny the Department the authority “to treat a type of program expressly addressed by the statute — a loan guarantee — in a manner other than the manner prescribed by the statute.”^{106/} Citing *AK Steel*:

^{104/} The CWB cites *Ginsberg & Sons. v. Popkin*, 285 U.S. 204, 208 (1932), *United States v. Chase*, 135 U.S. 255, 260 (1890), *Gallenstein v. United States*, 975 F.2d 286, 290 (6th Cir. 1992) (“When construing a general enactment and, within the same statute, a more particular enactment, the more specific should be given effect.”), and *Lodge 1858, American Federation of Government Employees v. Webb*, 580 F.2d 496, 510 at n. 29 (D.C. Cir. 1978). On this basis, the CWB argues that 19 U.S.C. § 1677(5)(E)(i)-(iv) sets forth specific rules for determining the existence and amount of any benefit associated with specific types of financial contributions. Thus, “Commerce cannot apply a broader category of financial contribution and a more general measure of benefit when the statute specifically addresses the constituent elements of this broader category....” CWB Rule 57(1) brief at 21.

^{105/} *Id.* at 21-22.

^{106/} *Id.* at 23. The CWB also argues that “the statute is clear on its face – loan guarantees are loan guarantees, and Commerce *must* evaluate the existence and amount of any benefit from a loan guarantee based on the recipient’s cost of funds in the absence of the loan guarantee.” *Id.* (emphasis in original).

When Congress makes ... a clear statement as to how categories are to be defined and distinguished, neither the agency nor the courts are permitted to substitute their own definition for that of Congress, regardless of how close the substitute definition may come to achieving the same result as the statutory definition, or perhaps a result that is arguably better.

AK Steel, 226 F.3d at 1372

Again from a statutory interpretation standpoint, the CWB asserts that the Department cannot simply “repackage” and combine categories already addressed by the statute or regulations because the statute does not explicitly *prohibit* it from doing so.^{107/} The CWB points to *FAG Italia* wherein the Federal Circuit “rejected the notion that the absence of an express proscription allows an agency to ignore a proscription implied by the limiting language of a statute,” observing that such a presumption would give agencies “virtually limitless hegemony, a result plainly out of keeping with *Chevron*.”^{108/}

Applying this test to the case at hand, the CWB notes that the Department took three clearly defined programs and lumped them together under a “newly-minted category” of “comprehensive financial risk coverage”.^{109/} The CWB argues that if the Department is “free to ‘repackage’ the types of financial contributions that are plainly described and its regulations, and to attach new measures of benefit to the resulting combinations, there would no limits on how Commerce determines the existence and amount of subsidy benefits,”^{110/} offering illustrative examples of a:

- Comprehensive Import Adjustment Assistance Program^{111/}

^{107/} Id. at 24.

^{108/} *FAG Italia*, 291 F.3d at 816, quoting *Southern California Edison Co. v. FERC*, 195 F.3d 17, 24 (D.C. Cir. 1999) (internal citations omitted).

^{109/} CWB Rule 57(1) brief at 24 n. 20.

^{110/} Id. at 25.

^{111/} Worker training subsidies (19 C.F.R § 351.513) + Provision of production inputs for less than adequate remuneration (19 C.F.R. § 351.511) + Below-market loans to support diversification of product line (19 C.F.R. § 351.505). The measure of *benefit* would be the financial position the company would have been in had it faced imports without government assistance.

- Comprehensive Rationalization of Excess Capacity Program^{112/}
- Comprehensive Technology Development Program^{113/}
- Comprehensive Export Promotion Program^{114/}

Taking the view that these illustrations are no more fanciful than the Department's concoction of the Comprehensive Financial Risk Coverage Program in this case, the CWB asserts that the Department must not be permitted to ignore the plain meaning of the statute and that this Panel thus owes its findings and determinations no deference.^{115/}

B. The Department's approach is contrary to its own Regulations

In addition to these statutory interpretation considerations, the CWB argues that the Department's approach in this case is contrary to its own regulations which, in 19 C.F.R. § 351.503(a), provide that:

112/ Three-year tax holiday (19 C.F.R. § 351.509) + Debt forgiveness (19 C.F.R. § 351.508) + Purchase of manufacturing facilities for more than adequate remuneration (19 C.F.R. § 351.512). The measure of *benefit* would be the costs that the company would have incurred had the government not enabled it to shed excess capacity.

113/ Grants for technology research and development (19 C.F.R. § 351.504) + Equity investment in new plant (19 C.F.R. § 351.507) + Guarantee of loans (19 C.F.R. § 351.506). The measure of *benefit* would be the revenues received from the sale of the new technology.

114/ Export credit insurance (19 C.F.R. § 351.520) + Export freight subsidies (19 C.F.R. § 351.515) + Drawback of import charges upon export (19 C.F.R. § 351.519). The measure of *benefit* would be the premium on sales that the company is able to achieve by reaching export markets.

115/ The CWB urges the Panel not to permit another instance of “‘linguistic artistry’ designed to gloss over an obvious circumvention of the statute.” CWB Rule 57(1) brief at 26. “The statute clearly does not give Commerce unfettered discretion to call government programs whatever it likes and devise measures of benefit that produce results contrary to what the statute requires. The plainly mandatory nature of the benefit standards set forth under § 1677(5)(E)(i)-(iv) would be eviscerated if Commerce were allowed to bundle together distinct types of financial contributions, each one plainly identifiable under the statute and its regulations, and to treat the resulting ‘combination’ as anything other than the sum of its parts.” Id.

[i]n the case of a government program for which a specific rule for the measurement of a benefit is contained [in these regulations], the Secretary *will measure* the extent to which a financial contribution ... confers a benefit *as provided in that rule*.^{116/}

CWB Rule 57(1) brief at 27 (emphases added by CWB)

The CWB also points to 19 C.F.R. § 351.501 to argue that the reverse is true — the Department will not apply a general measure of benefit, such as it did in this case, unless its regulations do not cover the type of financial contribution at issue.^{117/} In this catch-all provision, the Department states that if the regulations do not “expressly deal with a particular type of subsidy, the Secretary will identify and measure the subsidy, if any, in accordance with the underlying principles of the Act and this subpart E.”

The CWB notes that all of the three programs at issue are identified in and governed by particular regulations:

- *Loan guarantees* are covered by 19 C.F.R. § 351.506 (*benefit* is measured by the difference between what the recipient paid in borrowing costs and what the recipient would have paid “absent the government-provided guarantee”)
- *Provision of services* is covered by 19 C.F.R. § 351.511 (*benefit* is measured by the amount that the actual remuneration is less than adequate remuneration)
- *Export insurance* is covered by 19 C.F.R. § 351.520 (*benefit* is measured by the amount that the actual premium rates charged are considered to be inadequate to cover the long-term operating costs and losses of the program)

In the face of statutory mandate that the Department “shall” measure the existence and amount of benefit in accordance with the standards set out in the statute, and the affirmative statement in the regulations that the Department “will measure” program benefits in accordance with any “specific rule”, the CWB argues that the Department is not free to

^{116/} The Preamble conforms to this view by stating that “[i]f a financial contribution has been provided, either directly or indirectly, in a form which is specifically identified in the statute or regulations ... *we will identify and measure the resulting benefit in accordance with the rules contained in the statute and regulations.*” Preamble, 63 Fed. Reg. at 65,360 (emphasis added by CWB).

^{117/} CWB Rule 57(1) brief at 28.

“rename and repackage” at will.^{118/}

- C. The Department’s approach to benefit violated Its consistently-stated principle that it will not consider the effect of one subsidy benefit upon another subsidy benefit

The CWB next asserts that neither the statute nor the regulations permit the Department to consider the impact or effect of one subsidy benefit upon another subsidy benefit, an exercise that would, at best, be “inherently arbitrary and speculative.”^{119/} Indeed, the Preamble states that “the impact of the benefit under one subsidy program should not be considered in calculating the benefit under a separate program.”^{120/}

Notwithstanding this language, the Department did consider “the impact of the initial payment and export credit guarantees upon the benefit resulting from the loan guarantee.”^{121/} The Department’s claimed measure of benefit — the CWB’s borrowing costs in the absence of all three guarantees — plainly had this effect.

Against the Department’s argument that “there is no general requirement that the Department ignore for purposes of identifying the benefit what have come to be known as secondary consequences,”^{122/} the CWB asserts that it has been a long-standing and consistent principle of the Department not to consider the impact of one program benefit upon another program benefit.^{123/} In making “creditworthiness” determinations, for example, the Department states in the Preamble, 63 Fed. Reg. at 65,368, that:

Our longstanding practice has been not to take current or prior subsidies into account when determining a company’s creditworthiness. We

^{118/} Id. at 29.

^{119/} Id. at 29-30.

^{120/} Preamble, 63 Fed. Reg. at 65,362.

^{121/} Id. at 30.

^{122/} I&D Memo at 42. The Department cites 19 C.F.R. § 351.503(e) to indicate that the principle against considering the impact of one subsidy benefit upon another subsidy benefit “is not codified in the regulations, except with respect to the tax consequences of subsidies.”

^{123/} CWB Rule 57(1) brief at 31.

believe that trying to adjust a company's financial ratios for previously received subsidies would be an extremely difficult and highly speculative exercise.

Thus, even if a company is creditworthy solely because of other government supports, the Department will nevertheless find that it was creditworthy and apply commercial rates of interest as the benchmark (rather than the "junk bond" rates of interest deemed applicable to uncreditworthy companies).^{124/}

The CWB expresses additional concern about the Department's assertion that the statute permits it to examine the "joint impact of the guarantees on [the CWB's] borrowing costs." If there is indeed a single financial contribution and a single measure of benefit arising out of the several financial guarantees, then clearly the Department must isolate and analyze the factors that are independently countervailable (other types of potentially countervailable subsidies) from those that are not independently countervailable (e.g., the business fundamentals of the company, or the effect of government actions that do not confer a countervailable subsidy). Otherwise, there is risk of the Department calculating a subsidy benefit based on non-countervailable characteristics of the company or non-countervailable governmental actions.^{125/} Calling this a "disentangling" exercise, the CWB argues that this speculative enterprise is far different than what the Department asserts is a "normal benefit calculation[] for loans and loan guarantees."^{126/}

The CWB argues that the Department's "joint impact" analysis was equally speculative here in that it made an essentially hypothetical assumption that if all three guarantees were removed, the CWB's borrowings (which were "almost exclusively for the purpose of financing its portfolio of credit receivables"^{127/} under the CGSP and ACF programs) would remain at the same level, despite the CWB's explanation that significant credit sales were "highly unlikely" if the export credit guarantee was removed, and the

^{124/} Id. at 31-32. The CWB notes that this inquiry is indistinguishable from that taken by the Department in the Preliminary Determinations and questionnaires: determining the CWB's borrowing costs in the absence of the borrowing guarantee but in the presence of other factors that influence the CWB's credit rating and therefore its borrowing costs.

^{125/} Id. at 33.

^{126/} I&D Memo at 42.

^{127/} CWB Rule 57(1) brief at 33.

further explanations of methods by which the asset-receivables could be wound down.^{128/}

The CWB summarizes its concerns as follows:

Once Commerce starts down the path of imagining what a company would look like in the absence of an array of different government programs, whether independently countervailable or not, it enters into a realm of unbounded speculation in which it has complete discretion concerning the types of assumptions that it will and will not make.... It is in the very nature of countervailing duty investigations that Commerce and other investigating authorities will routinely encounter different government programs that arguably have some effect upon each other. It is particularly the case that Commerce and other investigating authorities are likely to encounter government programs that have some direct or indirect effect on a company's credit rating and cost of funds — it is hard to conceive of financial contributions that do *not* have such an effect. If the drafters of the statute and the SCM Agreement had intended for this to be the touchstone of benefit, surely they would have said so. Likewise, if they had intended for Commerce and other investigating authorities to make new categories of financial contribution and benefit out of the categories that they specifically enumerated, they would have said that, as well. They did not.^{129/}

- D. The Department's interpretation of the statute would permit it to countervail the benefit of programs that are clearly tied to markets other than the United States

The CWB finally argues that the Department's contention that it is allowed to "fold different forms of financial contributions into new categories of its own creation" may result in another fundamental violation of the statute and its implementing regulations.^{130/} By its terms, the governing statute allows countervailing duties to be imposed only "with respect

^{128/} Id. at 34. The CWB states that "[i]n effect, what Commerce did was to make a hypothetical assumption that was adverse to the CWB – that all three guarantees were removed – without taking into account equally valid hypothetical assumptions about how the CWB would respond to those circumstances, and without considering whether the CWB's portfolio of assets and liabilities would have been fundamentally different in this purely hypothetical world. This is speculation of a particular sort – it is speculation in which all of [the] assumptions are adverse to one party, and no allowance is made for countervailing assumptions." Id. at 35.

^{129/} Id. at 35-36 (emphasis in original).

^{130/} Id. at 37.

to the manufacture, production, or export of a class or kind of merchandise imported ... *into the United States*,” 19 U.S.C. § 1671(a)(1) (emphasis added). This requirement has been implemented by the Department through its “tying” regulation, 19 C.F.R. § 351.525(b)(4). Under that regulation, if the Department finds that a subsidy is “tied to sales to a particular market,” it “will attribute the subsidy only to products sold by the firm to that market.”

The CWB notes that the record evidence is “overwhelming” that the export credit guarantee (covering the CGSP and ACF programs) is tied to markets other than the United States^{131/} and argues that:

Commerce cannot countervail a tied export credit program simply by holding up a mirror and countervailing the effect that the export credit program has on the recipient’s borrowing costs. Nor can Commerce convert a subsidy that is unquestionably tied to non-U.S. markets into one that is not tied to non-U.S. markets simply by bundling it into a broader category of financial contribution and evaluating it under a different measure of benefit. That is exactly what it did in this case.^{132/}

Governments of Canada, Alberta, and Saskatchewan

The Governments of Canada, Alberta, and Saskatchewan (the “Governments”) filed their joint Rule 57(1) brief dealing with both the financial guarantees and railcar issues. Summarizing their positions on the former, the Governments assert that:

- The “Single Program” finding departed from the statute
- The “Integral Linkage” regulation patently does not apply
- The record shows no “exceptional inter-relatedness”
- The decision does not follow precedent
- Individual program defenses should have been considered by the Department

A. The “Single Program” finding departed from the statute

^{131/} Id. at 38. (“There is simply no evidence that either program benefits the CWB’s exports to the United States.”)

^{132/} Id. at 39.

The Governments argue that the finding that three distinct government guarantees of the CWB constitute one “single”, rather than three separate, program is an impermissible departure from the plain text of the statute and is not in accordance with law:

The text of the countervailing duty statute is clear. Congress has explicitly identified the categories of financial contribution by which various kinds of subsidies are to be classified. The Department ignored those categories, creating another of its own invention. In so doing it failed to apply the plain meaning of the law. Its decision is owed no deference, and must fail under the first prong of *Chevron*.^{133/}

The Governments note that the statute contains no exception that allows separately recognizable types of financial contributions to be lumped together, referring to the determination of “a” subsidy, “a” financial contribution, and “a” benefit.^{134/}

The Department’s regulations confirm this statutory scheme:

The regulations identify particular types of financial contributions and associated benefit calculations. Separate regulations cover *eighteen* different kinds of financial contributions and associated benefit measures, including loans, loan guarantees, equity, debt forgiveness, provision of goods or services, export insurance, and other items. See 19 C.F.R. Part 351, Subpart E.^{135/}

The Governments assert that the SCM Agreement also “confirms this scheme,” identifying financial contribution by type and subtype, SCM Agreement, Art. 1.1(a)(1), and then providing mandatory guidelines for quantifying a benefit associated with the enumerated

^{133/} Id. at 46.

^{134/} Id. at 48, *citing* 19 U.S.C. § 1677(5)(A), (B), (D), (E).

^{135/} Id. (emphasis added). As did the CWB, the Governments also point to 19 C.F.R. § 351.503(a) (in “the case of a government program for which a specific rule for the measurement of a benefit is contained in this subpart E, the Secretary will measure the extent to which a financial contribution ... confers a benefit as provided in that rule”) and the Preamble (“[i]f a financial contribution has been provided, either directly or indirectly, in a form which is specifically identified in the statute or regulations ... we will identify and measure the resulting benefit in accordance with the rules contained in the statute and regulations”). *See* Preamble, 63 Fed. Reg. at 65348, 65360).

types of financial contribution. SCM Agreement, Art. 14.^{136/}

The clear purport of the statutory scheme, therefore, “is to require the Department to analyze a foreign government measure according to the most specific category of financial contribution the measure fits, and to use the corresponding measure of benefit.”^{137/} A loan guarantee must be assessed as a loan guarantee, a provision of services must be assessed as a provision of services, and so on. In this case, however, the Department “catapulted over specific, applicable categories of financial contribution and benefit, and instead landed on a type and measure of ‘subsidy’ found nowhere in the statute.”^{138/}

The impact of the Department’s decision was to ignore the specific categories for financial contribution and benefit set out in the statute and regulations and to apply a category — the “comprehensive financial risk coverage” category — which exists nowhere in the statute and regulations. Citing numerous Federal Circuit and CIT decisions, the Governments argue that this deviation from the “plain terms of the statute is legal error and cannot be sustained.”^{139/}

As did the CWB, the Governments also point to the well-known standards of statutory construction which require that the Department not to bypass clear statutory terms, to perform a function or activity in the manner required by the statute (not in an alternative way), to favor particular enactments over general ones where applicable, and to ensure that every clause and word of a statute is given effect if possible.^{140/}

B. The “Integral Linkage” regulation patently does not apply

The Department in this case cited to its “integral linkage” regulation, 19 C.F.R. § 351.502(c), not as a binding rule, but as “guidance.” *See* I&D Memo at 8, A.R. 194. This

^{136/} Id. at 49.

^{137/} Id. at 35 and 49 (“Precise identification of the category of financial contribution determines not only whether a financial contribution exists, but also the existence of and manner of measuring a benefit.”)

^{138/} Id. at 35. The Governments also point out if the measure under scrutiny fits no category – specific or even general – it is not a financial contribution for purposes of the countervailing duty statute. Id. at 50.

^{139/} Id. at 52.

^{140/} Id. at 53-55.

regulation^{141/} allows the Department to consider two or more separate measures together for purposes of the specificity analysis, if the programs are found to be “integrally linked.” However, the integral linkage regulation, by its own terms, applies only to specificity, which is an entirely separate inquiry from whether a program constitutes a “financial contribution” or a “benefit.”^{142/} Thus, the Governments argue that:

[a] finding that one of these element (sic) exists – financial contribution, benefit, or specificity – cannot be used to bootstrap the Department into a finding that another element exists. Indeed, the integral linkage regulation comes into play only *after* the existence of a financial contribution has been determined, when it is a given that the measures to be assessed are in fact separate programs.^{143/}

On its face, the regulation cannot apply.

C. The record shows no “exceptional inter-relatedness”

The Governments also argue that the factual record does not support the Department’s finding that the guarantees are exceptionally interrelated. The Department’s principal stated basis for its “single program” finding was factual, arguing that the guarantees are “exceptional in the degree of [their] inter-relatedness.” In making this finding, the Department reviewed three of the four factors identified in the integral linkage regulation: same purpose, same type of benefit, and linkage “at inception.”^{144/} However, the record as a whole demonstrates that

141/ 19 C.F.R. § 351.502(c) states in full:

“Unless the Secretary determines that two or more programs are integrally linked, the Secretary 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 particular program in question. The Secretary 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.”

142/ Governments Rule 57(1) brief at 56.

143/ Id. (emphasis in original).

144/ Id. at 57. The Governments note that the Department “never addressed the fourth criterion – that similar levels of benefits must be conferred on similarly situated firms – although the regulation requires all four criteria to be met before programs are found to be

(continued...)

the three government programs have different names, did not arise at the same time, do not address the same specific risks, depend on different conditions, have different administrations, and provide different types of benefits.^{145/}

Focusing first on the absence of a shared specific purpose, the Governments note that the Department asserted that the common purpose of the three guarantees is “to ensure the CWB is able to pay out as high and timely a return as possible to the farmers without incurring the risk of longer term financial loss.”^{146/} The Governments state that this “purpose” is nowhere in the record and that the record establishes that the specific purposes of the three guarantees “differ greatly”:

The borrowing guarantee protects *lenders* against the risk of the CWB’s inability to pay on its own obligations. The credit sales guarantee protects *the CWB* against the risk that a customer will be unable to pay the amounts that it owes to the CWB. The initial payment guarantee protects *farmers* against the risk of an unexpected and dramatic drop in grain prices during the course of a crop year.^{147/}

The Governments argue that the Department’s analysis suffers from two defects. First, it is “so broad as to be meaningless.”^{148/} In effect, all subsidies can be said to serve the purpose of increasing a firm’s financial return while reducing the risks to which it is exposed. If simple sheltering from risk was the appropriate standard, the Department would clearly have not separated its loan guarantee (19 C.F.R. § 351.506) and export insurance (19 C.F.R. § 351.520) regulations into two parts, each of which are separate types of financial contribution with different measures of benefit, but both of which act to shelter a company from financial risk.

The second criticism of the Department’s analysis is that it effectively mixes up the

^{144/} (...continued)
integrally linked.” Id.

^{145/} Id., at 32, 37 and 57 *et seq.*

^{146/} I&D Memo at 8, A.R. 194.

^{147/} Governments Rule 57(1) brief at 57-58 (emphases in original).

^{148/} Id. at 58.

“purposes” of the guarantees with their ultimate “effects.” The purposes of the guarantees depend on the specific risks against which each protects, while at least one effect of the guarantees is the payment of high and timely returns to farmers. The Governments point to *United Scenic Artists v. NLRB*, 762 F.2d 1027, 1033 & n. 17 (D.C. Cir. 1985) which stated that “[p]urpose, intent, and object language is distinguished under the [Labor] Act, *as it is in law generally*, from language describing activities which merely have a particular effect,” and the related holding that the effect of a labor union’s actions did not satisfy a statutory requirement related to the purpose of the union’s actions.^{149/}

Significantly, the Governments also point to the Department’s own language in its review of *Live Swine from Canada*, 61 Fed. Reg. 52,408 (Oct. 7, 1996). Arguing against an “overly broad exception” to its specificity analysis, the Department therein stated:

The [Government of Quebec’s] definition of purpose as ‘ultimate end’ is inappropriate for a more fundamental reason as well. The GOQ’s definition confuses the purpose of the program with the economic effects of the benefits bestowed by the program. Income stabilization is the economic goal of the Farm Income Stabilization Act, not the purpose of FIS, nor of Crop Insurance, nor of the Supply Management programs. The purpose of FIS and Supply Management on the one side and of Crop Insurance on the other is to protect farmers against two distinct risks, price fluctuations and weather-related disasters; income stabilization is the economic effect of that protection. In evaluating subsidies, the Department does not take into account the result or the economic effects of the subsidy.

61 Fed. Reg. 52,422 (emphases added by the Governments) (citations omitted).

The Governments also criticize the Department’s finding that the three guarantees are of the same “type” of benefit: “shelter[ing] the CWB from risk.” This finding suffers from the same purpose-effect dichotomy discussed above and in any event is not supported by the record. In the Governments’ view, the record “actually shows that the types of potential benefits from the guarantees differ.”^{150/} The borrowing guarantee potentially gives rise to an assumption of the CWB’s debt obligations, to the benefit of the CWB’s creditors; the export credit sales guarantee potentially gives rise to an assumption of a credit customer’s obligations to the CWB, to the benefit of the CWB; and the initial payment guarantee potentially gives

^{149/} Id. at 58-59 (emphasis added).

^{150/} Id. at 60.

rise to a payment in the amount of any deficit in a pool, to the benefit of farmers.^{151/}

The Governments next criticize the Department's finding that the three guarantees were linked "at inception" because they are currently authorized by the 1998 amendments to the Canadian Wheat Board Act.^{152/} The record establishes that those amendments were not the genesis of any of the three guarantees. Each program began at a different time: the borrowing guarantee at the inception of the CWB; the initial payment guarantee in the 1930s or 1940s; the CGSP in 1952 and the ACF in 1995. Thus, their "inception" clearly was not the 1998 amendments to the Canadian Wheat Board Act. The Governments note in this respect that the Department has established a high standard for a finding of two or more programs to be "linked at inception ." In the Preamble to the integral linkage regulation, the Department states that there must be evidence that "the government's clear and express purpose was to complement the other program." Preamble, 63 Fed. Reg. at 65,357. As the Final Determinations identify no such explicit statement of purpose by the GOC, and as indeed there is no such statement anywhere the record, the Department's finding on this point cannot be sustained.^{153/}

The Governments also criticize the Department's finding that the three guarantees each do not generate a "distinct benefit," the ultimate benefit deriving only from the "joint impact of the guarantees on the recipient's borrowing costs." *See* I&D Memo at 9, A.R. 194. The Governments argue that this "factor" is irrelevant as clearly not part of the integral linkage regulation on which the Department relies. Moreover, it is merely an example of an improper "secondary effects" benefit analysis being used to define a financial contribution. In the Preamble to the Department's benefit regulation (19 C.F.R. § 351.503), the Department specifically stated: "[T]he impact of the benefit under one subsidy program should not be considered in calculating the benefit under a separate program." Preamble, 63 Fed. Reg. at 65,362. The Governments argue that "cross-effects of claimed subsidies are not even relevant to a benefits analysis."^{154/}

Finally, the Governments point out the relevance under the Department's own

^{151/} Id.

^{152/} *See* I&D Memo at 9, A.R. 194.

^{153/} Governments Rule 57(1) brief at 60-61.

^{154/} Id. at 62.

regulations of the different program administration characteristics^{155/} and set out in detail how each of the borrowing guarantee, credit sales guarantees, and initial payment guarantees are administered, and note the failure of the Department to review that record evidence.^{156/}

D. The single program finding does not follow precedent

The Governments argue that until this case, the Department had “never before” overridden separate financial contribution categories and treated distinct programs as a single subsidy:

[U]ntil the Final Determinations in these cases, the Department had consistently and expressly declined to combine for specificity purposes separate programs that are under the same umbrella legislation and have a common ultimate economic effect but that address different specific types of risk.^{157/}

Live Swine from Canada (multiple programs existed under the statutory authority of the Farm Income Protection Act (FIPA) which the Department determined were not integrally linked in part because they insured the farmer against different types of risk: weather-related losses, market price fluctuations, or overall financial performance)^{158/}

New Steel Rail, Except Light Rail, from Canada (multiple programs existed under umbrella agreements stating general economic development goals (General Development Agreements (GDAs)) which the Department analyzed as separate entities, even though they shared the common root of the GDA).^{159/}

Various steel cases (multiple programs which were part of integrated legislative

^{155/} Preamble, 63 Fed. Reg. at 65,357, which suggests that similarities and differences in program administration may be relevant to the examination of the “purpose” or other named factors in the integral linkage analysis.

^{156/} Governments Rule 57(1) brief at 62-63.

^{157/} Id. at 37-38.

^{158/} *Live Swine from Canada*, 61 Fed. Reg. 52,408 at Comment 7 (Oct. 7, 1996) (final results).

^{159/} See 54 Fed. Reg. 31,991, 31,995 (Aug. 3, 1989) (final determination). This methodology was upheld by the CIT in *IPSCO, Inc. v. United States*, 687 F.Supp. 614, 631-32 (Ct. Int’l Trade 1988).

packages to aid in the restructuring and revitalization of the steel industries which the Department analyzed as separate financial contributions and benefits rather than as a single interrelated program designed to achieve a common purpose).^{160/}

In the Governments' view, these examples "evidence a long-standing, consistent Department practice of analyzing programs separately even if they serve common purposes, address similar risks, arise at the same time, and are included in a single legislative vehicle."^{161/}

- E. The borrowing guarantee and the lending guarantee are tied to non-U.S. markets and generate no benefit

As its final argument against the Department's single program analysis, the Governments assert that both the borrowing and lending guarantees are tied to non-U.S. markets and thus generate no "benefit."^{162/} The Department's tying regulation provides: "If a subsidy is tied to sales to a particular market, the Secretary will attribute the subsidy only to products sold by the firm to that market." 19 C.F.R. § 351.525(b)(4). Based upon this regulation, the Department will find that subsidies are not countervailable when they are tied to merchandise sold to particular destinations and those destinations are not the United States.^{163/}

The Department's "traditional position on the tying of benefits to a particular product is that a subsidy is 'tied' when the intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy."^{164/} The Governments

^{160/} See *Certain Steel Products from Germany*, 58 Fed. Reg. 37,315 (July 9, 1993); *Certain Steel Products from Italy*, 58 Fed. Reg. 37,327 (July 9, 1993).

^{161/} Governments Rule 57(1) brief at 65. The Governments do point to *Fresh Atlantic Salmon from Chile*, 53 Fed. Reg. 31,437 (June 9, 1998) as the "sole exception" to this practice but argue that "the structure of the law in question and its legislative history showed the government's intent to create an integrated scheme." *Id.* at n. 33. In this case, however, the guarantee programs that the Government has combined "do *not* share specific purposes, do *not* address the same risks, and did *not* arise at the same time." *Id.* at 66 (emphases in original).

^{162/} *Id.* at 67-71.

^{163/} See *Unprocessed Float Glass from Mexico*, 49 Fed. Reg. 7,264 (Feb. 28, 1984).

^{164/} Governments Rule 57(1) brief at 67, citing *Certain Steel Products from Austria* ("General Issues Appendix"), 58 Fed. Reg. 37,217, 37,231-33 (July 9, 1993).

assert that record evidence makes it clear that the GOC knew and the CWB understood that the uses of the borrowing guarantee included, as its principal purpose, borrowings to finance the CWB's credit sales receivables, none of which applied to the United States. Moreover, record evidence was entirely sufficient to permit the Department to separate or apportion U.S. from non-U.S. receivables.^{165/} The only proper conclusion, therefore, is that the borrowing guarantee is tied to non-U.S. markets and is not countervailable.

The Governments also point to verified and uncontradicted record evidence that the two credit sales guarantees under the CGSP and ACF programs "have never been used on U.S. sales."^{166/} This evidence also mandates a determination that the export credit sales guarantee program is not countervailable.

U.S. Department of Commerce

The Department's Rule 57(2) brief initially reiterates its fundamental determination that the GOC maintains, for the benefit of the CWB, an "integrated financial risk coverage program" in which the integrated program as a whole^{167/} represents the "financial contribution" element of the statute, such element taking the form of a "potential direct transfer of funds."^{168/} The Department then asserts that the statute and regulations "do not require that government programs be considered at a particular level of specificity for purposes of identifying the

^{165/} Citing *Certain Welded Carbon Steel Pipes and Tubes and Welded Carbon Steel Line Pipe from Turkey*, 62 Fed. Reg. 16,782, 16,785 (Apr. 8, 1997) (preliminary determination) (apportioning government-provided freight rebates between U.S. and non-U.S. shipments and calculating a benefit only with reference to the total rebate provided on U.S. Shipments), and *Kajaria Iron Castings Pvt. Ltd. v. United States*, 156 F.3d 1163, 1176 (Fed. Cir. 1998) ("when the party under investigation provides documentation that allows Commerce to *separate the portion* of the tax deduction based on [another subsidy] related to non-subject merchandise from the remainder of a countervailable tax deduction, Commerce should not countervail the portion of the tax deduction subsidy tied to non-subject merchandise") (emphasis added).

^{166/} Governments Rule 57(1) brief at 70.

^{167/} The Department styles the three financial risk coverages as "comprehensive, multifaceted, and integrated" and as "elements of a single governmental program." Department's Rule 57(2) brief at 19.

^{168/} Id. at 18.

‘financial contribution’ and that “an integrated analysis of an integrated government program is plainly reasonable.”^{169/}

The Department points out that it had made four key “investigative findings” regarding the interrelatedness of the financial risk coverages. *First*, it found that “all elements of the risk coverage provided to the CWB — regardless of whether they cover contingencies related to borrowing, initial payments, or credit sales — contribute to the same fundamental purpose, to ensure high and timely returns to farmers without risking long-term financial loss.”^{170/} *Second*, it found that “all elements of the risk coverage program bestow the same *type* of benefit, payments, to shelter the CWB from financial risk.”^{171/} *Third*, the Department found that “all elements of the program were linked at the inception of the CWB as a shared governance corporation.”^{172/} *Finally*, the Department found that “the mechanism generating benefits for the CWB under the risk coverage scheme does not lend itself to the identification of a distinct benefit for each element of the program.”^{173/}

The Department’s Rule 57(2) brief then addresses and disputes several of the arguments made by the Canadian parties. First, it indicates that it is, in fact, in agreement with

^{169/} Id.

^{170/} Id. at 19-20. The Department quotes from its I&D Memo, in part, as follows: “In effect, all aspects of the coverage work in tandem in providing the CWB a comprehensive financial risk coverage to ensure that the CWB remains financially ‘whole’ at the end of the crop year.” See I&D Memo at 10, which goes on to state that this finding is “strongly echoed” in the CWB’s own arguments (citations omitted).

^{171/} Id. at 20 (emphasis in original). The Department goes on to state that “each of the payments is contingent on a negative financial outcome for the CWB.” Id. at 20-21.

^{172/} Id. at 21. Pointing again to the I&D Memo, the Department notes that the Canadian Wheat Board Act was enacted in 1935 and the CWB was converted from a Crown Corporation to a shared-governance corporation in June 1998, and then quotes: “Under sections 19(5), 19(6)(b), and 7(3) of the Canadian Wheat Board Act, the borrowing guarantee, the lending guarantee, and the initial payment guarantee are conferred to cover the operations of the CWB as a shared-governance corporation. Thus, at the inception of the CWB as a shared-governance corporation, the guarantees are already in place. Further, the guarantees are promulgated in the same legislative action, i.e., the Canadian Wheat Board Act.” See I&D Memo at 10.

^{173/} Department Rule 57(2) brief at 21. The Department also quotes from the I&D Memo as follows: “The benefit derives from the joint impact of the guarantees on the recipient’s borrowing costs, analogous to the benefit from loan guarantees under section 771(5)(E)(iii) of the Act [19 U.S.C., § 1677(5)(E)(iii)].” See I&D Memo at 10.

Canada that the integral linkage regulation “is neither controlling nor even exhaustive of the facts that might be relevant to the analysis”^{174/} and points to its statement in the I&D Memo that the Department viewed that regulation merely as providing “some useful guidance” on the issue. In effect, the Department found only that “several of the factors required for an integral linkage analysis are relevant to the single program issue.”^{175/}

The Department then disputes Canada’s argument that the record “indicates no exceptional interrelatedness among the various financial risk protections” and suggests that Canada’s real intent is to invite “the Panel to ignore the standard of review and reweigh the evidence on the administrative record.”^{176/} The Department, however, also disputes certain specific points made by Canada, most fundamentally the claim that “each element of financial risk protection is associated with one, and only one distinct category of beneficiaries, that is, that the borrowing protection protects lenders, the credit sales protection protects the CWB, and the initial payment guarantees protect farmers.”^{177/} On this point, the Department continues to argue that all of the “various risk contingencies” are fundamentally interrelated and that it is the CWB that is ultimately benefitted by each.

The Department also rejects Canada’s claim that the Department has confused “purpose” and “effect”, arguing that record evidence supports its conclusion that the CWB’s stated mission is to maximize returns to Western Canadian farmers without risking longer-term losses.^{178/}

The Department finds Canada’s arguments that the various financial risk protections have different dates of inception is an elevation of form over substance.^{179/} Its argument is that “the CWB, in its current form, *came into existence* in late 1998 by means of amendments to the Canadian Wheat Board Act [as of which time] a complementary set of customized

^{174/} Id. at 23.

^{175/} Id.

^{176/} Id.

^{177/} Id. at 24.

^{178/} Id. at 25.

^{179/} Id.

financial risk protections was ready-to-hand for its use.”^{180/}

The Department also dismisses Canada’s argument that it has improperly taken into account so-called “secondary effects” in its benefit analysis, arguing that Canada’s assumption that there exists “more than one program” is simply a “bold maneuver” to create linkages between separate programs where separate programs do not exist.^{181/} The Department further notes that there is no legal prohibition with respect to the consideration of “secondary effects,” its regulations prohibiting only the consideration of secondary tax consequences. *See* 19 C.F.R. § 351.503(e).

In support of its next major finding – that the single financial risk program constitutes a “financial contribution” in the form of a “potential direct transfer of funds” — the Department asserts that both Canada and the CWB are arguing that Sections 771(5)(D) and 771(5)(E) establish a kind of “one-to-one correspondence between the types of government actions described in the definition of ‘financial contribution’ and the types of subsidy benefits described under ‘benefit conferred.’”^{182/} The Department, however, considers that a “financial contribution” is not defined in terms of a “benefit”:

The statutory language regarding ‘potential direct transfer[s] of funds’ does not incorporate the types of benefits set forth in section 771(5)(E) of the Act for illustrative purposes. The cross-reference between these provisions is at most tangential, lying in the fact that loan guarantees are mentioned in each of them, in the former as an example of a ‘potential direct transfer of funds or liabilities,’ and in the latter as one type of benefit.^{183/}

The Department also rejects the view that the statute “dictate[s] the level of specificity at which the ‘financial contribution’ analysis is to be conducted” and insists that Canada’s contention that “‘Congress has directed the Department to analyze a foreign government measure according to the most specific category of financial contribution that it fits’ is completely without foundation.”^{184/}

^{180/} Id. at 25-26.

^{181/} Id. at 26-27.

^{182/} Id. at 30.

^{183/} Id.

^{184/} Id. at 30-31, citing Governments Rule 57(1) brief at 47.

The Department further argues that Canada’s reliance on 19 C.F.R. § 351.503(a) is misplaced in that this regulation does not circumscribe how government programs should be identified in the first instance. It merely indicates that once identified, the Department will measure “benefit” for such a program in accordance with the applicable regulation.^{185/}

Finally, the Department disputes Canada’s view that each “sub-element” of the single financial risk coverage program is “plainly recognizable” under the governing statute and regulations and, hence, should be analyzed separately.^{186/} While a match between the borrowing guarantee, if considered on its own, could and would be made with the identified benefit under section 771(5)(E), “it is not true that the initial payment guarantees and the credit sales protections are each, on their own, plainly recognizable in a particular benefit example provided in the statute.”^{187/} The Department argues that either or both of these protections could be considered “services” of a financial nature under section 771(5)(E)(iv) of the Act or as a “potential direct transfer[s] of funds or liabilities” that “do not fall within the ambit of any of the statutory benefit examples.”^{188/}

As to general issues of statutory construction and interpretation, the Department first notes that the SCM Agreement provides no basis for inferring the existence of a “most specific category” requirement, arguing that it has no direct effect under the Supremacy Clause, Article VI of the U.S. Constitution, or indirect effect under 19 U.S.C. § 3512(a)(1) (“No provision of any of the Uruguay Round Agreements, nor the application of such provision to any person or circumstances, that is inconsistent with any law of the United States shall have effect.”) Finally, the Department urges the Panel to set aside Canada’s claim that the investigating authority will be able, in other cases, to combine and recombine program elements in an arbitrary fashion, insisting that the Panel “does not stand in the shoes of U.S. legislative authorities and is not empowered to take preventive action aimed at the possibility of arbitrary

^{185/} Id. at 31.

^{186/} Id.

^{187/} Id. at 32.

^{188/} Id. The Department cites the SAA which indicates that the benefit examples given in the statute are not intended to be exhaustive, SAA at 927, and to the Preamble which “makes it clear that the alternative methodologies are to be used even when a program or practice is ‘similar’ to, but not the same as, a specific benefit example.” See Preamble, 63 Fed. Reg. at 65,360. On the basis of this authority, the Department indicates that it “relied upon the alternative methodology set out in 19 C.F.R. § 351.503(b)(1) in determining the benefit from the financial risk protection program.” Department Rule 57(2) brief, at 32 n. 94.

determinations in cases not before it.”^{189/}

As to Canada’s claim that the Department’s analysis essentially runs roughshod over results that would be produced by the application of the Department’s tying regulation, 19 C.F.R. § 351.525(b)(4), the Department points to its basic finding in the I&D Memo:

[W]e are not analyzing the borrowing guarantee separately. Therefore, we do not reach the issue of whether any subsidy bestowed by the borrowing guarantee is tied to sales to a particular market. Moreover, there is no evidence that the comprehensive financial risk coverage provided by the GOC is tied to sales to particular markets.

I&D Memo at 34 (response to Comment 15)

The Department reiterates that what it found in this case was a single “financial contribution” and a single “subsidy.” *See* Section 771(5)(B) of the Act (19 U.S.C. § 1677(5)(B)). Thus, “where there is a single ‘financial contribution,’ there cannot be multiple subsidies, and the Department is not required in those circumstances to consider evidence regarding whether sub-elements of the subsidy are tied to non-U.S. markets.”^{190/}

Finally, addressing its benefit calculation methodology, the Department affirms that it “has the discretion to develop a benefit calculation methodology to fit the particular facts on the record of a case.”^{191/} In carrying out this responsibility, the Department relied on 19 C.F.R. § 351.503(b) and based its countervailable benefit calculation on the difference between the interest rate the CWB paid with respect to its borrowings and the interest rate the CWB would have paid “in the absence of the risk coverage scheme as a whole.”^{192/} As to Canada’s arguments that precedent indicates that the Department will not consider the impact of one subsidy program upon a separate subsidy program, the Department suggests that no such principle is codified in the regulations and, in any event, the Department did not find “separate programs” in this case – it found a single risk protection program.

As to the specifics of the calculation, the Department rejects Canada’s arguments about “hypothetical assumptions”, indicating that it was free, for purposes of its calculations,

^{189/} Id. at 35.

^{190/} Id. at 37.

^{191/} Id. at 38.

^{192/} Id.

to take the CWB as it found it, not as it might be in the case of hypothetical restructurings. Moreover, the Department asserts that it gave the CWB the “opportunity at verification to present any analysis it had performed of the potential effect on its credit rating of the removal of the totality of the risk protections” but that CWB failed to provide such information.^{193/}

North Dakota Wheat Commission, the U.S. Durum Growers Association, and the Durum Growers Trade Action Committee

The Rule 57(2) brief of the U.S. Parties fully supports the Department’s findings and determinations as respects the comprehensive financial risk coverage program. From a factual standpoint, their brief provides an extensive review of the record evidence underlying the Department’s single financial contribution finding,^{194/} and its findings concerning the existence and measurement of the countervailable benefit.^{195/} That record evidence is extensive and will not be re-summarized here.

The U.S. Parties also argue that the Department’s final determinations on this issue are clearly consistent with the statute and in accordance with law.^{196/} They begin by asserting that section 771(5)(E) of the Act provides only “examples of how to measure benefits. By providing examples and illustrations only, Section 771(5)(E) accords the Department broad discretion in determining whether a benefit exists and how to measure it.”^{197/} Like section 771(5)(E), the U.S. Parties also assert that the financial contribution section, 771(5)(D), “is not exhaustive.”^{198/} In effect, the U.S. Parties assert that “Congress intended Commerce to interpret the countervailing duty law in a broad, flexible, and creative manner.”^{199/}

^{193/} Id. at 39-40.

^{194/} U.S. Parties Rule 57(2) brief at 34-41.

^{195/} Id. at 41-51.

^{196/} Id. at 53 *et seq.*

^{197/} Id. at 53.

^{198/} Id. at 55. This view was repeated also on page 60 of the U.S. Parties’ brief (“[T]he financial contribution provision at section 771(5)(D) and the benefit-to-the-recipient provision at 771(5)(E) provide examples only.”) and on page 62 (“[T]he statute provides examples of financial contributions only and its categories are not exhaustive.”)

^{199/} Id. at 56.

Pointing to various principles of statutory interpretation, the U.S. Parties argue that the countervailing duty statute clearly confers general authority upon the Department to identify and impose countervailing duties against subsidies.^{200/} The U.S. Parties also invoke the “plain language” rule and the necessity of giving effect to every word, clause and sentence of a statute.^{201/} The U.S. Parties further point to the rule that the word “includes” in a statute is a “term of enlargement, and not of limitation.”^{202/}

Focusing on the issue of statutory ambiguity, the U.S. Parties also point out that the Department’s interpretation of the countervailing duty statute is relevant even if the Panel views the statute as unambiguous. Citing *National Federation of Federal Employees Local 1309 v. Dept of the Interior*, 526 U.S. 86, 93 (1999) and Federal Circuit decisions, the U.S. Parties note the rule that “even where there is no statutory ambiguity, an agency’s interpretation of a statute can only be rejected if the statute ‘necessarily exclude[s]’ the agency’s interpretation.”^{203/} In this case, the U.S. Parties observe that the countervailing duty statute does not specifically preclude consideration of other countervailable financial contributions or guarantees and thus, under these authorities, the Department’s interpretation is permissible.

The U.S. Parties also object to the Canadian argument that “each particular subsidy program must be examined and quantified on its own, independently from any other subsidy programs simultaneously in existence,” which they view as “opening a loophole in the countervailing duty law.”^{204/}

Finally, the U.S. Parties assert that the Department’s application of the “financial contribution” portion of the statute — determining that the three guarantees qualify as a direct

^{200/} Id. at 54 *et seq.*

^{201/} Id. at 56.

^{202/} Id. at 57.

^{203/} Id. at 60. The U.S. Parties cite *PPG Indus. v. United States*, 928 F.2d 1568, 1573 (Fed. Cir. 1991) and *Pine Products Corp. v. United States*, 945 F.2d 1555, 1559 (Fed. Cir. 1991).

^{204/} Id. at 58. The U.S. Parties go on to argue that such an approach “would encourage the provision of additional, overlapping subsidies, each just different enough to [be] considered separate programs, but each also contributing to a common benefit.” Id. Even if a single subsidy program is prohibited, “a government could escape the application of the countervailing duty law by simply creating additional subsidy programs that serve the same purpose.” Id.

transfer of funds under section 771(5)(D)(i) of the Act — is correct, and, moreover, that it complies with Art. 1.1(a)(1)(i) of the SCM Agreement as well.^{205/}

The U.S. Parties next turn their attention to the Department’s determination of the existence and amount of the “benefit”. In doing so, they state that “Commerce’s methodology for measuring the loan guarantee subsidy is consistent with its regulations and the Preamble to its 1998 Countervailing Duty regulations.”^{206/} While this statement refers only to the loan guarantee subsidy, the U.S. Parties then indicate that “the statute does not prohibit Commerce from considering other factors such as related guarantees when applying this test.”^{207/} Apparently, therefore, the U.S. Parties regard the Department’s methodology in this case as one of creating a new definition of benefit for loan guarantees and doing so because it is permitted under the statute to consider, and indeed did consider, other factors such as related guarantees. Citing 19 C.F.R. § 351.503, the U.S. Parties are of the view that the Department has “retained flexibility in its regulations dealing with the concept of ‘benefit.’”^{208/}

The U.S. Parties go on to argue that “[t]here is no explicit regulation that covers such a multifaceted program. Moreover, the Department is not required to squeeze its analysis of a program into one or more of the examples provided in the statute and regulations, as has been argued by the Canadian parties.”^{209/}

In contrast to the arguments made by government counsel in the Department’s Rule 57(2) brief, the U.S. Parties in their brief directly address the series of cases^{210/} and the series of Department precedents^{211/} offered by the Canadian side in support of their arguments. As to the former, the U.S. Parties argue that several important Federal Circuit decisions are “clearly distinguishable,” including *AK Steel Corp. v. United States*, 226 F.3d 1361 (Fed. Cir.

205/ Id. at 62. The U.S. Parties do note that the Panel “is tasked only with determining whether Commerce’s determination is consistent with the laws of the United States,” and not its consistency with the SCM Agreement. Id. at 63.

206/ Id. at 64.

207/ Id.

208/ Id.

209/ Id. at 65.

210/ Id. at 67-73.

211/ Id. at 73-82.

2000) (explicit statutory language which allowed no possibility of discretionary interpretation by the Department), *FAG Italia S.p.A. v United States*, 291 F.3d 806 (Fed. Cir. 2002) (statute contained explicit, restrictive language that did not confer general authority to conduct duty absorption inquiries), *Thyssen Stahl AG v. AK Steel Corp.*, 1998 U.S. App. LEXIS 17064 (Fed. Cir. 1998) (absence of broad authority for Commerce to make upward as well as downward price adjustments for currency hedging), *Delverde, SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000) (specific provision in the statute precluding the Department from making any presumptions concerning whether subsidies passed through to a purchaser). In essence, the U.S. Parties argue that all of these cases are properly distinguishable in that they involve an absence of general authority, as opposed to the instant case where “the statutory language confers broad authority on the agency.”^{212/}

The U.S. Parties argue that better precedent for the instant case is *Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1561-62 (Fed. Cir. 1984), wherein the Federal Circuit found that “broad statutory language (similar to the language at issue here) concerning review of countervailing duty orders authorized Commerce to suspend liquidation of such orders even though that authority was not specifically enunciated in the statute.”^{213/}

Insofar as the Canadian parties’ argument that the instant case cannot be squared with earlier Department precedents such as *Live Swine from Canada*, *New Steel Rail, Except Light Rail, from Canada*, *Certain Steel Products from Germany*, and *Certain Steel Products from Italy*, the U.S. Parties argue that these were specificity determinations and in any event were cases arising prior to the adoption by the Department of the integral linkage regulation.^{214/} Even if the legal reasoning should be considered to remain the same, the U.S. Parties support the Department’s view that the subsidy program at issue here is “exceptional, particularly to the degree to which its various elements are interrelated.”^{215/} Furthermore, the Department is not required to follow prior interpretations if new arguments or facts are presented that support a different conclusion. *See Citrosuco Paulista, S.A. v. United States*, 704 F.Supp. 1075, 1088 (Ct. Int’l Trade 1988).

In any event, the U.S. Parties argue that “none of the facts in Commerce’s earlier

^{212/} Id. at 71.

^{213/} Id. The U.S. Parties also cite *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983).

^{214/} Id. at 73.

^{215/} Id. at 74, citing I&D Memo at 42 (A.R. 194).

specificity determinations were present in the underlying wheat investigations” and that the “uniqueness” of the instant case clearly undermines any parallel with those earlier decisions.^{216/}

The U.S. Parties also point to the CWB’s status as a state trading enterprise (STE) with monopsony and monopoly powers. This “unique status” operates to “create an environment in which the three government guarantees operate in such an interrelated manner.”^{217/}

The U.S. Parties also dispute Canada’s view that the Department has violated its principle that the impact of the benefit of one subsidy should not be considered when reviewing the benefit of another program. As did the Department, the U.S. Parties argue that the scope of 19 C.F.R. § 351.503(e) is limited to the tax consequences of subsidies and is not a general requirement that the Department ignore secondary effects or consequences. In addition, since the Department did not find separate subsidies but “one single subsidy program with interrelated elements,” the issue, properly speaking, does not even arise.^{218/} In addition, “agencies are not bound by their previous practice” if new arguments or facts are presented that support a different conclusion.^{219/}

The final argument raised by the U.S. Parties concerns the Department’s practice of considering the effect of all subsidies, including subsidies nominally tied to non-U.S. markets.^{220/} While not mentioning the Department’s tying regulation, the U.S. Parties cite the Department’s determinations in *Industrial Nitrocellulose from France* and *Roses and Other Cut Flowers from Colombia*. In the former case, the Department stated:

[W]e will not allocate benefits tied to a product not under investigation over a product under investigation unless we have a clear reason to believe

^{216/} Id. at 77, citing I&D Memo at 7(A.R. 194) (“We believe that the facts and circumstances of operations of the CWB as they involve the GOC’s coverage of financial risks are unique [and] the various elements of the GOC’s risk guarantee in this case are clearly exceptional in the degree of their inter-relatedness.”).

^{217/} Id. at 79. See also the U.S. Parties brief at 80 (“The CWB’s unique status as a protected arm of the Canadian government, an STE, a monopsony and monopoly power creates a unique environment in which multifaceted comprehensive programs are developed and managed.”).

^{218/} Id. at 82.

^{219/} Id. at 83, citing *Citrosuco Paulista, S.A. v. United States*, 704 F.Supp. 1075, 1088 (Ct. Int’l Trade 1988).

^{220/} Id. at 84-86.

that such a benefit encourages the production or export to the United States of the product under investigation....

Furthermore, where there is a clear indication that a benefit tied to a product under review directly or indirectly affects merchandise subject to the review, we will find that benefit countervailable.

Industrial Nitrocellulose from France, 52 Fed. Reg. 833, 835 and 838

The U.S. Parties also cite to the Preamble, 63 Fed. Reg. at 65,400 (“If subsidies allegedly tied to a particular product are in fact provided to the overall operations of a company, the Secretary will attribute the subsidy to sales of all products by the company.”)

On the basis of these authorities, the U.S. Parties argue that “to the extent that the CWB incurs lower borrowing costs as a result of the GOC’s export credit guarantee, the export credit guarantee creates a benefit that affects the subject merchandise and thus is countervailable.”^{221/} In addition, “[s]ubstantial evidence supports Commerce’s finding that the lending guarantee benefits the overall operations of the CWB.”^{222/} Therefore, the countervailing of these subsidy benefits is fully appropriate.

2. Analysis and Decision of the Panel

Based on a careful review of the arguments, this Panel finds that the Department’s “comprehensive financial risk coverage” analysis is not in accordance with law and cannot be sustained.

A. Introduction

Section 1671 of the Act authorizes the Department to impose a countervailing duty if it determines that a countervailable subsidy is being provided.

A countervailable subsidy is, in turn, defined as follows in subsection 1677(5)(B):

- (B) Subsidy described. A subsidy is described in this paragraph in the case in which an authority--
- (i) provides a financial contribution,
 - (ii) provides any form of income or price support within the

^{221/} Id. at 84.

^{222/} Id. at 86.

meaning of Article XVI of the GATT 1994, or
(iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments,
to a person and a benefit is thereby conferred....

The only alleged form of countervailable subsidy in this case is the provision of a financial contribution. A financial contribution is defined in 19 U.S.C. § 1677 (5)(D) to include:

- (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,
- (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,
- (iii) providing goods or services, other than general infrastructure, or
- (iv) purchasing goods.

Section 1677 (5)(E)(iii) defines how the benefit of a loan guarantee under section 1677 (5)(D) (i) is to be measured.

The Department has implemented detailed regulations interpreting the statute. Specifically, 19 C.F.R. Part 351.503(a) stipulates that, where a rule for the measurement of the benefit of a government program is set out, the Department will follow that rule in determining whether a particular financial contribution confers a benefit. For other government programs, the Secretary is directed to use a different method for measuring the benefit. *See* 19 C.F.R. Part 351.503(b).

B. The Department's determination is inconsistent with the clear meaning of the Act and regulations

- 1. The "comprehensive financial risk coverage" analysis is contrary to law

In this case, the Department regarded the method for measuring the benefit of the government programs, although set out by the regulations, to be inadequate. Instead, the Department relied on the alternative method of measuring a benefit, by relying on 19 C.F.R. Part 351.503(b). It justified this approach by arguing that the loan guarantees it identified were, in fact, transformed by their combined impact into something other than a loan

guarantee, and in fact constituted a program (“comprehensive financial risk coverage”) whose benefit could not be measured pursuant to 19 C.F.R Part 351.503(a).^{223/}

The principal issue before this Panel is whether the Final Determination is “unsupported by substantial evidence on the record, or otherwise not in accordance with law”. Relevant laws, and the regulations implementing those laws, bind an administrative agency such as the Department. Regulations, while not as authoritative as the statute they implement, fulfill a critical role in the implementation of a statutory scheme. When regulations are finalized, they constitute an authoritative body of law, which the public may rely on.

In the case before this Panel, none of the parties has argued that the regulations are inconsistent with the statute or its legislative history. However, the Department argues that its action in finding that the three guarantees constitute a single governmental program that it called “comprehensive financial risk coverage” is permitted by the regulations, even though it has cited no specific provision of the statute or regulations explicitly permitting such an approach, nor has it pointed to any precedent for this approach. The Department conceded at the hearing before this Panel that it had reached a “unique, factual conclusion in this case.”^{224/}

While the reasoning of the Department on this issue is clear, the Panel does not believe that this reasoning is faithful to the plain meaning of the countervailing duty statute and the Department’s own regulations. Moreover, the Panel does not believe that this reasoning is faithful to commitments, clearly and expressly accepted by Congress, that are embodied in the SCM Agreement. For these reasons, the Panel remands this issue to the Department for action consistent with this Opinion.

The statutory and regulatory scheme does not allow the Department to relabel a well-known and already identified form of government program so as to measure its benefit in a different way than is provided by law. To hold otherwise would allow a “catch-all” provision to eviscerate the meaning of the individual provisions that preceded it.

The Department’s intention in 19 C.F.R. § 351.503(a) is plain. If the Department encounters a particular type of government program for which a specific measure of benefit is set out, the Department will follow that rule. What manifests itself upon the reading of the regulations is that the Department has, with utmost clarity and obvious particularity, dealt with over twenty different types of government programs, specifying what the

^{223/} Final Determinations, 68 Fed. Reg. 52,749 *et seq.*

^{224/} Transcript (*in camera* session) at 22.

measurement of benefit will be for each of those types.

U.S. law supports the logical proposition that “where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be taken to affect such cases with its general language as are not within the provisions of the particular enactment.”^{225/} Thus, where the Department encounters a loan guarantee, it must measure the benefit of the loan guarantee in the way mandated by subsection 1677(5)(E) of the Act and 19 C.F.R., subsection 351.503(a) of the regulations. The Department is not entitled to ignore the fact that the Act and regulations mandate how the benefit of a loan guarantee is to be measured, and instead to rely upon a more general provision of its regulations which mandates how other, unenumerated benefits are to be measured.

Furthermore, the Department is not entitled to combine a loan guarantee with another form of government program, in order to recharacterize a loan guarantee with another kind of financial contribution. This approach would obscure the unique statutory and regulatory characterization of loan guarantee, and, more importantly, such action would permit the department to evade its legal obligation to treat a loan guarantee as a loan guarantee, as required by subsection 351.506 of the regulations.

In the present case, the Department’s approach also enabled it to find that programs that benefit a product not exported or sold into the United States constituted a countervailable subsidy. This occurred when the Department included the lending (export credit sales) guarantee, which provides a benefit in respect of products destined for non-U.S. markets, within the comprehensive financial risk coverage program.

The administrative record confirms that neither of the two programs constituting the lending (export credit sales) guarantee has ever been used in respect of sales into the U.S. market.^{226/} The Department’s inclusion of the lending (export credit sales) guarantee in the comprehensive financial risk coverage program is thus inconsistent with subsection 1671 (1) of the Act, which includes in the definition of countervailable benefit the fact that:

^{225/} *US v. Chase, supra, note 28 at 260. See also AK Steel Corp. v. United States*, 226 F.3d 1361, 1370 (Fed. Cir. 2000) at 1372, “When Congress makes...a clear statement as to how categories are to be defined and distinguished, neither the agency nor the courts are permitted to substitute their own definition for that of Congress, regardless of how close the substitute definition may come to achieving the same result as the statutory definition, or perhaps a result that is arguably better.”

^{226/} See GOC Verification Report at 10-12, A.R. 33 (proprietary)

[A] country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States...

The Department has argued that where there is reason to treat separate programs as integrated, or as part of a comprehensive package, it is appropriate to include, within the package, those programs that affect goods not imported into the United States. Without deciding upon the applicability of the Department's arguments in circumstances other than those before it, the Panel is not persuaded that this argument can be used where it has aggregated separate programs that are covered by specific provisions in law.

Thus the Department may not redefine distinct governmental programs so as to include in its finding as to the existence of a countervailable subsidy, goods that are not imported or sold (or likely to be sold) for importation into the United States. Such latitude would permit the Department to do indirectly that which it is not permitted to do directly.

In summary, the Panel is of the view that the Department's comprehensive financial risk coverage determination should be set aside on the ground that the statute and regulations are "plain" and that they must be read and applied in their straight-forward fashion. Thus, the loan (borrowing) guarantee program that was before the Department in this case should have been treated as a loan guarantee under Sections 771(5)(D)(i) and 771(5)(E)(iii) of the Act and 19 C.F.R. § 351.506(a) of the Regulations. Similarly, the initial payment guarantee that was before the Department should, as a financial service, have been treated as the provision of a service under Sections 771(5)(D)(iii) and 771(5)(E)(iv) of the Act and 19 C.F.R. § 351.511(a) of the Regulations; and the lending (export credit sales) guarantee that was before the Department should have been (or reasonably could have been) considered as a government export insurance scheme under 19 C.F.R. § 351.520(a) of the Regulations. Neither the statute, the regulations, nor case law allows these well-known and existing types of programs, already set out in the statute and regulations, to be repackaged and relabeled.

In coming to this conclusion, the Department made use of the "integral linkage" regulation, 19 C.F.R. 351.502(c), which it claimed provided "some useful guidance" in determining whether the three programs of the GOC are parts or components of a single program. The Panel finds this use of the integral linkage regulation, even as "useful guidance," to be inappropriate and unreasonable.

The integral linkage regulation is a provision setting out circumstances in which the Department may, for the purposes of a specificity analysis, determine that two or more programs are integrally linked. The Department used this methodology to establish the

existence of a single subsidy program, a task that goes well beyond the scope of the methodology. The integral linkage regulation is based upon the premise that programs that are “integrally linked” are inherently separate programs. However, the Department has used the methodology set out in this regulation in an attempt to show that a single program exists.

The Panel is not suggesting that appropriate cases for the deployment of the “integral linkage” regulation may not exist. Where the regulation does not expressly deal with a particular type of alleged subsidy, the Secretary is obliged to “identify and measure the subsidy, if any, in accordance with the underlying principles of the Act” and the relevant subpart E. *See* 19 C.F.R. § 351.501. In the course of doing that, the Secretary may be entitled to use the “integral linkage” regulation at least by way of analogy. On that point, the Panel expresses no opinion.

However, what is not permissible in law is for the Department to use the “integral linkage” regulation as a basis for identifying a “comprehensive financial risk” program and then using that as a justification for ignoring the constraints imposed by the obligation to deal with particular species of subsidy in the manner prescribed for each of those forms of subsidy in the relevant provisions. Neither by the use of the “integral linkage” regulation nor generally is there room for the Department to ignore the constraints imposed by the relevant provisions and aggregate specifically provided for programs into some other form of subsidy justifying its own measurement methodology.

The Panel finds further support for its position that the “comprehensive financial risk” analysis is contrary to law in the history of the Uruguay Round Agreements Act. The introductory clause to Article 14 of the SCM Agreement, which is entitled “Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient,” provides:

For the purpose of part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained.

Art. 14, SCM Agreement

The Panel recognizes that the SCM Agreement is not a part of U.S. law.^{227/}

^{227/} *See* 19 U.S.C. § 3512(a)(1) (“No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States shall have effect.”).

Congress, nevertheless, has made it clear that it concurs with this language. In the SAA, Congress has stated:

Article 14 of the Subsidies Agreement provides that any method used to calculate the benefit to the recipient conferred pursuant to a subsidy must be provided for in national legislation or implementing regulations. To comply with this article, Commerce will issue regulations setting forth the details of the methodologies used to identify and measure the benefit of a subsidy.

SAA at 928^{228/}

The panel accepts Congress's expression of approval of the introductory language of Art. 14 of the SCM Agreement at face value. Congress has explicitly recognized that the countervailing duty regimes of all 148 Member countries of the SCM Agreement (including the United States) should be transparent and detailed, thereby allowing member countries to plan their affairs accordingly. In the Panel's view, the current countervailing duty statute, and particularly the implementing regulations, are exceptional in their clarity, their particularity, and their scope and coverage, fully meeting this Art. 14 commitment.

In the instant case, the Panel considers that the Department's methodology, if allowed to stand, would be a clear violation of that commitment. Not only is this method not set out in a regulation, its purported legal standard — namely, any series of government programs which are determined by the Department to be “comprehensive,” “multifaceted,” and “integrated” — is not a legal standard at all. The meaning of these terms is not clear to the Panel, and it is most unlikely that potential respondents in other countries would be able to understand them and use them to predict the legal consequences of their activities.

This problem cannot be dismissed as a “unique” or “one-off” issue that is not likely to be faced again. The primary legal trigger for this methodology — the finding that two or more programs are “comprehensive” — could become an inevitable “second track” for reviewing countervailable subsidies. Moreover, since the term “comprehensive financial risk coverage” has no legal definition, one presumes that the Department could, if it wished, conclude that 3 programs are more “comprehensive” than 2, 4 more than 3, and so on. Finally, at some level all programs are “integrated” or can be viewed as “interrelated.” This,

^{228/} This language first appears in the Chairman's second revised draft, dated Nov. 2, 1990, in the Negotiating Group on Subsidies and Countervailing Measures of the Uruguay Round and is available at www.worldtradelaw.net/history/urscm/urscm.htm.

too, is not an effective legal standard, reasonably predictable in advance.

2. Conclusion with respect to the “comprehensive financial risk coverage” analysis

The Panel finds that the Department erred in evaluating the three guarantees as a single financial contribution. Therefore, the Panel remands this issue back to the Department for action not inconsistent with the plain meaning of the countervailing duty statute and regulations as set out in this Opinion. The Panel’s primary basis for this conclusion is that the Department’s finding of a “comprehensive financial risk coverage” program avoids the specific measures of benefit set out in the statute and regulations and creates its own measure of benefit. Such an approach disregards the regulatory scheme and provides the public with little guidance on what is, and is not, a countervailable subsidy. Thus, the Department’s determination in this respect is not in accordance with law.

B. Whether the Department’s Findings and Determinations Concerning Government-Owned and Leased Railcars Are Supported By Substantial Evidence On The Record And In Accordance With Law

1. Contentions of the Parties

Governments of Canada, Alberta and Saskatchewan

The Governments initiate their argument^{229/} concerning the railcars by reference to the countervailing duty statute, 19 U.S.C. § 1677(5)(B), which provides that the Department may not impose a countervailing duty unless it determines that the government has provided a financial contribution to a person directly, or indirectly through a private entity that the government “entrusts or directs” to make a financial contribution. The listed forms of financial contribution, including one entrusted or directed to a private entity, include “providing goods or services.” 19 U.S.C. § 1677(5)(D)(iii). In the case of the government-provided railcars, a financial contribution to the CWB would not exist unless in providing the railcars the government “entrusted or directed” the Railways to provide hopper car service to the CWB. In the Governments’ view, “[t]he record evidence shows that no such

^{229/} The arguments of the Governments on this issue are fully endorsed by the CWB. See CWB Rule 57(1) brief at 1.

entrustment or directive existed, as to the United States or at all.”^{230/}

The arguments of all parties depend critically on proprietary language contained in so-called Operating Agreements and one or more Alternate Use Agreements entered into between, particularly, the GOC and CN and CPR covering railcars provided by the GOC. However, similar (but not necessarily identical) Operating and Alternate Use Agreements were entered into between GOA and GOS and the Railways with respect to railcars provided directly by those two provincial governments. Because such language is proprietary, references in this Opinion will necessarily be limited to the level of discussion permitted by the parties’ non-proprietary briefs.^{231/}

The first specific argument made by the Governments is that there is in fact no entrustment or directive on shipments of wheat to the United States.^{232/} In the Railcar Memo^{233/}, the Department’s review of Article V of the GOC Operating Agreement apparently led it to conclude that “the railways were *contractually required* to transport Western Division grain, to the United States and elsewhere.”^{234/} The Governments point out, however, that the same agreement defines “Grain Service” as movements along an east-west axis, not including shipments within Western Canada, Eastern Canada, or for export to the United States.^{235/} In fact, shipments outside the designated routes, such as shipments to the United States, require the payment of “alternate use” fees.^{236/} In the Governments’ view, the Department simply “did not address these plain geographic limitations” and, for that reason, its findings are not supported by substantial evidence on the record.^{237/}

The Governments additionally argue that, in this case, there was no entrustment or

230/ Governments Rule 57(1) brief (non-proprietary version), at 72.

231/ The Panel has considered all proprietary and non-proprietary information in reaching its decision and rendering its opinion in this matter.

232/ Id.

233/ See *supra* n. 3.

234/ Governments Rule 57(1) brief at 73 (emphasis in original). See also p. 74, citing Railcar Memo at 3.

235/ Id. at 74.

236/ Id. at 75.

237/ Id.

directive at all.^{238/} The Governments consider that the phrase “entrust or direct” must involve “some element of command”; nevertheless, even by the Department’s own definition, an entrustment or directive requires that “a government entity *affirmatively causes or gives responsibility to* a private entity or group of private entities to carry out what might otherwise be a governmental subsidy function of the type listed in subparagraphs (i) through (iv) of section 771(5)(D) of the Act.”^{239/} Even with this “reduced” standard, the Governments argue that the record of this case does not demonstrate such an entrustment or directive. “It is not enough that the government provided the cars to the railways and permitted them to use the cars; there must be an affirmative direction or entrustment to undertake a particular task.” In this case, there is no evidence that the governments have “affirmatively” either “caused” or “given responsibility” to the railways to do anything with the cars, including carrying grain.^{240/}

Pointing to various provisions of the GOC Operating and Alternate Use Agreements, the Governments conclude that “[w]hat this and other Operating Agreements do *not* do is require the railways to use the railcars, or to provide rail services at all.... [N]othing in the agreements affirmatively commands or compels the railways actually to use the cars for grain service or any other purpose.”^{241/} As to the Department’s observation in the I&D Memo that “[a]s a practical matter ..., the railways will transport wheat,” I&D Memo at 23, the Governments argue that “commercial realities in Canada ... have nothing to do with governmental action.”^{242/} Indeed, the Department’s observation may prove too much since if grain is being transported because of commercial realities, it is not then being transported because of a governmental entrustment or directive.

^{238/} Id. at 76-79.

^{239/} Id. at 76, *citing* I&D Memo at 22 (emphasis added).

^{240/} Id. at 76-77. The Governments favorably cite a WTO Panel decision in the case of *United States - Measures Treating Export Restraints as Subsidies*, WT/DS194/R (29 June 2001) wherein the Panel stated: “To our minds, both the act of entrusting and that of directing therefore necessarily carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party[;] and (iii) the object of which action is a particular task or duty. In other words, the ordinary meanings of the verbs ‘entrust’ and ‘direct’ comprise these elements – *something* is necessarily delegated, and it is necessarily delegated to *someone*; and, by the same token, *someone* is necessarily commanded, and he is necessarily commanded *to do something*.” Panel Decision at ¶ 8.29 (emphasis in original).

^{241/} Id. at 77 (emphasis in original).

^{242/} Id. at 79.

The Governments next major argument is that the Department should have found that any subsidy was tied to non-U.S. markets,^{243/} the basic point being that the “factual record unequivocally establishes that the essence of the claimed subsidy — ‘free’ use of the railcars — does not apply to shipments to the United States.”^{244/} The record is clear that the alternate use fees must be paid whenever the Railways use the railcars in question for shipments to the United States and elsewhere outside of the “Western Division.”

In addition to this basic factual point, the Governments argue that the statute, 19 U.S.C. § 1671(a)(1), and the Department’s tying regulation, 19 C.F.R. § 351.525(b), prohibit attribution of any railcar subsidy to the U.S. market.^{245/} As interpreted by the Department in *Certain Welded Carbon Steel Pipes and Tubes and Welded Carbon Steel Line Pipe from Turkey*, 62 Fed. Reg. 43,984, 43,987 (Aug. 18, 1997), the Department will attribute benefits to specific merchandise or particular destinations “when the benefit is tied at the point of bestowal to that merchandise or destination.” In this case, since verified evidence clearly establishes that the railways’ use of the railcars without “ownership charges” was explicitly limited to a geographic area that specifically excluded the United States, any alleged subsidy from the government-provided railcars “cannot be attributed to grain transported to the United States.”^{246/}

The Governments go on to dispute the Department’s stated reasons for not applying its tying regulation in this case, *first*, that it is the hopper car service itself that is the subsidy and the focus of the Department’s investigation, not the provision of the railcars to the Railways, and *second*, that the rail rates established or agreed to between the Railways and the CWB for this service were independent of, and not affected by, the question whether the Railways do or do not pay alternate use fees.^{247/}

As to the first point, the Governments find the Department’s analysis as the point of “bestowal” of the subsidy to be simply wrong. The source of the subsidy is the government-provided railcars, and the subsidy itself was not the Railways’ provision of

^{243/} Id. at 79-84.

^{244/} Id. at 79.

^{245/} Id. at 80. 19 C.F.R. § 351.525(b)(4) provides: “If a subsidy is tied to sales to a particular market, the Secretary will attribute the subsidy only to products sold by the firm to that market.”

^{246/} Id. at 81.

^{247/} Id.

transportation services but the entrustment or directive to provide that service, coupled with a benefit to the CWB. However, any such entrustment or directive had to be through the Operating Agreements between the Governments and the Railways. At this level, the Operating Agreements are clear in their intention not to provide “ownership-cost-free” cars on U.S. shipments; indeed, the relevant agreements require “above-market” cost payments to use the cars on U.S. shipments.^{248/}

The Governments add that the Department’s “subsidy” and “tying” analyses are mutually contradictory. As to the former, the Department’s analysis focuses on the government-railway relationship, while as to the latter, the Department’s analysis focuses on the railway-CWB relationship; as such, the Department’s argumentation lacks “internal consistency of analysis.”^{249/}

The Governments also argue that the Department’s finding of a lack of correlation between railcar service rates on particular routes and railway costs for those routes to be “not legally relevant.”^{250/} In effect, the Department is insisting that “unless it can be demonstrated that the railways charged higher rates on alternate use fee routes, the tying rules will not apply. But in analyzing tying, the Department looks at what was understood by the government and the recipient when the subsidy was provided, not how the recipient uses the alleged subsidy after it is given.”^{251/}

The Governments analogize to the provision of a subsidy to a steel mill to make certain steel products, which the Department would clearly find was tied to those products, but would do so without analyzing the prices charged by the mill for the subsidized products to see if the prices decreased in relation to the amount of the subsidy before it would say that the subsidy was tied to the specific products. They go to assert that they are aware “of no case in which the presence or absence of an effect on the prices of a subsidized market – here, by analogy, on the rates charged by the railway recipients of the government-provided railcars – has governed whether a subsidy is tied.”^{252/}

The Governments further observe that the Railways price their services on a

^{248/} Id. at 81-82.

^{249/} Id. at 82.

^{250/} Id.

^{251/} Id. at 83.

^{252/} Id.

competitive (and not cost) basis, which is not in the Governments' control. In short, "[t]he only relevant inquiry in the tying analysis is the government's understanding at the time of bestowal — here the alleged entrustment or directive. The effect of the alleged subsidy on rates is simply irrelevant and says nothing about tying."^{253/}

The next major argument made by the Governments is that the record and the law do not support a finding of a benefit to the CWB from the government-provided railcars, particularly that the record does not support the Department's basic finding that if the Railways saved money from the government-provided railcars, they must have shared these cost savings with the CWB.^{254/} The Governments argue that the Department must base its benefit determination on a demonstrated finding of a benefit to the CWB, not to the Railways.

The problem, however, in the Governments' view, is that even though the Railways may have enjoyed some cost savings as a result of the government-provided railcars, this is not equivalent to proof that the CWB received a benefit through inadequate remuneration for transportation services.^{255/} Without proof of benefit to the CWB, there can be no countervailable subsidy and, in this instance, the record does not support a finding of reduced rail rates resulting from the provision of government-owned and leased railcars.

The Department rested its benefit determination — that the railway-CWB transportation service rates were for "less than adequate remuneration" — principally on reports that addressed the replacement costs to the Railways that would result from disposal of the government-provided railcars. These included a provision of the Canada Transportation Act (CTA), a 1999 "Paper on disposal of the Government Hopper Cars," and a portion of the 2000 "Canada/U.S. Port Competitiveness Study" (the Sparks Report). Based on their examination, however, the Governments argue that the CTA provision "contains no terms relating to shippers or shipper rates" nor even addresses the formula for quantifying the impact of the disposition of the government-owned railcars.^{256/} The 1999 Paper, prepared during the period when railway rates were still regulated, clearly "does not

^{253/} Id.

^{254/} Id. at 85-96.

^{255/} Id. at 86.

^{256/} Id. at 87.

relate to conditions in the POI,” which was after deregulation of those rates.^{257/} The Sparks Report does refer to shippers and in one short section addresses the incremental cost to the railways of having to replace the government cars. One passage in that section states that disposal of the railcars would add “to the railways’ and/or shippers’ costs.”^{258/} As stated in the Governments’ brief, “[b]ased on these four words — ‘and/or shippers’ costs’ — the Department concluded that shipper costs *would* increase, and that they would increase in the full amount of the railway costs.”^{259/}

In the Governments’ view, the Department attempted to bolster this slender reed by speculation as to the “CWB’s negotiating stance, negotiating power, and negotiation results”^{260/} but, in the end, simply presumed “that if the railways enjoyed cost savings from the government railcars, they must have shared these savings with shippers.”^{261/} Citing *Inland Steel Industries, Inc. v. United States*, 188 F.3d 1349, 1360 (Fed. Cir. 1999) and *LMC-La Metallurgica S.p.A. v. United States*, 912 F.2d 455 (Fed. Cir. 1990), the Governments argue that “presumptions not supported by the facts of record are not a legally sufficient basis for an agency determination.”^{262/} The statute requires the Department to “determine,” not infer or presume, that a countervailable subsidy is being provided, 19 U.S.C. §§ 1671(a)(1), 1677(5).

The Governments also review other record evidence, which suggests to them the absence of any particular incentive on the part of CN and CPR to give cost breaks to the CWB, or any unusual negotiating leverage on the part of the CWB versus the Railways; most particularly, the record establishes that the rates were entirely demand driven. “The government did not regulate rail rates, force the railways to charge any particular freight rate, or require them to pass through any given category of cost savings to the shippers. The railways were free to set the SCRs [single car tariff rates] at the levels the market would

^{257/} Id. at 88.

^{258/} Id., *citing* GOC Jan. 13/14, 2003 Response, GOC Exh. B-9, at 59-60, A.R. 4 (proprietary).

^{259/} Id. (emphasis in original).

^{260/} Id. at 89.

^{261/} Id. at 90.

^{262/} Id. at 90.

bear, and to negotiate reductions of those rates with shippers.”^{263/} The bottom line, therefore, is that “no substantial evidence supports the Department’s conclusion that an alleged ‘benefit’ to the railways from government-provided railcars equals a benefit to wheat shippers.”^{264/}

Citing *Potassium Chloride from Israel*, 49 Fed. Reg. 36,122, 36,125 (Sept. 14, 1984) and *Certain Softwood Lumber Products from Canada*, 48 Fed. Reg. 24,159, 24,169-70 (May 31, 1983), the Governments also argue that the Department’s recognition of the fact that the CWB-Railways’ negotiations were conducted on an arms-length basis should have led to a no benefit finding.^{265/} When transactions are between independent parties, a seller will always attempt to maximize its return in a transaction, in which case the buyer, for its part, will be receiving its new asset for fair market value “untainted” by any subsidy. “In short, the commercial reality is that in an arm’s length transaction, the buyer receives no benefit from the subsidy.”^{266/} In this case, the Railways negotiated rail rates with grain shippers at arm’s-length by charging the highest rates the market would bear. Clearly, therefore, no “benefit” was provided to the CWB through such negotiations.^{267/}

As their next major point, the Governments argue that the Department made material methodological errors in its benefit calculation which, taken together, “create[d] an overstated benchmark [exaggerating] the amount of the purported benefit to the CWB.”^{268/} The Governments first assert that the Department should not have used pre-POI leasing cost information as part of its “benchmark” to measure the ownership costs to the Railways of the government railcars and find it curious that the Department at one point in its I&D Memo stated that it would not use these lease costs and then subsequently stated that

^{263/} Id. at 93, citing GOC Jan. 13/14, 2003 Response at 29, A.R. 4 (proprietary). On page 94, the Governments further state that “[n]o reports or any other evidence stated that the railways [shared their cost savings from government-provided railcars with the shippers], that the railway rates reflected any actual sharing of cost savings, or that the provision of government-owned railcars had any specific effects on prices charged by the railways to shippers.” Id. at 94.

^{264/} Id. at 94.

^{265/} Id. at 95-96.

^{266/} Id. at 95.

^{267/} Id. at 96.

^{268/} Id. at 96-104.

it would use them.^{269/} The Governments note that the point of examining the leasing costs was to determine the rates at which the Railways would have leased railcars in the POI had the government cars not been available, this to determine the amount of the cost savings being generated thereby. The primary focus of the inquiry is to determine the cost to the Railways of obtaining an alternate supply of cars, not the cost to the CWB of its own cars. In the Preliminary Determinations this was indeed the methodology used, but in the Final Determinations “the benchmark analysis was expanded to pick up the CWB’s own lease costs.”^{270/} The leases in question, however, date from the early 1980s and mid-1990s, which the Governments assert “are inarguably not current” or, in the language of the statute, “prevailing.”^{271/}

The Governments assert that “the pre-POI CWB lease information was plainly aberrational and should have been disregarded as not indicative of ‘prevailing’ market rates.”^{272/} The mere fact that pre-POI leases continued to be paid by CWB during the POI does not make those lease costs “prevailing.” The Governments note, in this connection, record evidence establishing that actual “market conditions during the POI included hopper car oversupply and much lower capital costs,”^{273/} which results in much lower leasing rates.

Secondly, the Governments assert that the Department erred by rejecting, at

^{269/} Id. at 97, *citing* I&D Memo at 29 (emphasis added) (“We agree with the respondents that using the actual lease costs of the [CWB] railcars during the POI to determine the benefit of the government-provided railcars *would be inconsistent with our analysis of the government-provided railcars as an indirect subsidy... Therefore, we have not used the CWB’s lease rates as the basis of the benefit calculation.*”) and I&D Memo at 30 (emphasis added) (“We have determined that it is *appropriate to average the verified lease rates paid by the CWB* with the date from our Preliminary Determinations, which was also verified.... *Although the CWB lease rates were set years ago*, these are clearly lease rates paid during the POI.”)

^{270/} Id. at 98.

^{271/} Id. at 99. Section 771(5)(E)(iv) states that “the adequacy of remuneration [for a good or service] shall be determined in relation to prevailing market conditions for the good or service being provided ... in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.”

^{272/} Id. at 99.

^{273/} Id. at 100.

verification, relevant information submitted by the COG on POI lease rates.^{274/} The Governments point to 19 C.F.R. 351.301(b)(1), which states that “factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed” and argue that “[u]nder the plain terms of this regulation, the study was submitted on a timely basis and should have been accepted.”^{275/} Information responsive to requests at verification are still timely even if submitted up to seven days after verification closes, and the Department’s failure to accept this study constituted “plain legal error.”^{276/} As stated in *Fujian Machinery and Equipment Import & Export Corp. v. United States*, 178 F.Supp.2d 1305, 1319 (Ct. Int’l Trade 2001) (footnotes omitted):

The regulations are plainly written, and their meaning is clear: when verifying officials request information from a respondent, including data and documentary evidence in support of the respondent’s questionnaire responses, the respondent is not legally obligated to satisfy the request until a minimum of one week after the conclusion of that respondent’s verification.

Another methodological error cited by the Governments is the failure of the Department to weight average the CWB’s lease costs according to the number of railcars with which those costs were associated.^{277/} By using a simple-averaging calculation, the Department gave those rates a weight equivalent to one-quarter, rather than the actual one-tenth, of the total number of railcars in question. The Governments find the Department’s use of simple averaging in this connection to be inexplicable since it otherwise used a weight-averaging methodology for what it believed were the CWB lease rates.

The final major argument is one advanced by the GOS, to the effect that the GOS-

^{274/} Id. The principal information on this topic was railcar leasing companies’ price quotations for the POI, submitted by the GOC in its February 11/12, 2003 questionnaire response. However, during verification, GOC identified a 2002 study prepared for Transport Canada explicitly addressing the current leasing market for covered hopper cars. GOC offered this study to the Department and it was “accepted” as GOC Verification Exhibit 33. In the Final Determinations, the Department nevertheless decided not to use this exhibit, on the stated grounds that the report “was presented on the last day of verification and we were not able to examine it and ask follow-up questions.” I&D Memo at 30.

^{275/} Id. at 101.

^{276/} Id. at 102.

^{277/} Id. at 103.

provided railcars constitute a provision of service in the nature of infrastructure, which is not, under the statute, countervailable.^{278/} This exclusion is found in the statutory definition of financial contribution, 19 U.S.C. § 1677(5)(D)(iii), which enumerates the various types of financial contribution, including the provision of goods or services, and then explicitly states that such provision is intended to cover “other than general infrastructure.”

While not further defined in the statute, the Department’s regulation, 19 C.F.R. § 351.511(d), does distinguish infrastructure as “general” according to whether it “is created for the broad societal welfare of a country, region, state or municipality.” Under the Preamble to this regulation, the Department indicates that the “key issue is whether the infrastructure is developed for the benefit of society as a whole.” Preamble, 63 Fed. Reg. at 65378-79.

The Governments then review the record evidence concerning the central role that agriculture plays in the Saskatchewan economy and to “the production of crops suitable for transport in covered hopper railcars.”^{279/} They note that the Department did not consider any of this evidence in making its Final Determinations, the I&D Memo stating only that “[t]he railcars are hopper cars designed for the transportation of grain, and not for general uses. Therefore, the provision of these rail services could not be considered as general infrastructure.” I&D Memo at 26-27. The Governments urge the Panel to set aside this “conclusory reasoning” on the ground of the Department’s failure to account for “the entire record, including whatever fairly detracts from the substantiality of the evidence.” See *Atlantic Sugar*, 744 F.2d at 1562; *Universal Camera*, 340 U.S. at 488; and *Slater Steel Corp. v. United States*, 279 F.Supp.2d 1370, 1378.

U.S. Department of Commerce

The Department’s Rule 57(2) brief identifies each of the challenges raised by the Governments including, first, the argument that there can be no entrustment or directive, for purposes of the countervailing duty statute, if “the railway companies are not absolutely required to provide rail service to the CWB by means of the government-owned and leased hopper cars,” i.e., if they have legal alternatives.^{280/} In the Final Determinations, however, the Department found that, given the Railways’ agreements with the Governments, “they do not have *practical* alternatives to using the hopper cars to provide rail service for the

^{278/} Id. at 105-107.

^{279/} Id. at 106.

^{280/} Department Rule 57(2) brief at 42.

movement of Western grain,”^{281/} a finding which the Department asserts is an entirely sufficient basis to support its conclusion that the Governments use the Railways “as instruments for indirectly making contributions of rail service to the CWB.”^{282/}

The Department quotes from the I&D Memo to reiterate its interpretation that the phrase “entrusts or directs” means *affirmatively causing or giving responsibility* to a private entity to carry out what would otherwise be a governmental subsidy function and, further, identifies the particular facts upon which it relies.^{283/} Summarizing the situation, the Department states that:

by stipulating that the transport of Western grain is a proper use of the hopper cars and by imposing special fees on other uses, the governments affirmatively cause, or give responsibility to, the railways to use the hopper cars for the benefit of the CWB. While it is true that the railways may refuse to provide rail service by means of the hopper cars, or may make them available for alternative uses, the former does not make any commercial sense and the latter is discouraged by the fee structure.^{284/}

The Department finds this interpretation to be reasonable and fully consistent with Congressional intent which, in the SAA, indicates that the phrase “entrusts or directs” should be given a broad interpretation.^{285/} The Department also finds this approach to be consistent with the Preamble to the countervailing duty regulations, which suggest that governments may act through inducements as well as formal requirements:

Although the indirect subsidies that we have countervailed in the past have normally taken the form of a foreign government *requiring* an intermediate party to provide a benefit to the industry producing the subject merchandise, often to the detriment of the intermediate party, indirect subsidies could also take the form of a foreign government

^{281/} Id. (emphasis in original).

^{282/} Id.

^{283/} Id. at 43.

^{284/} Id. at 43-44.

^{285/} Id. at 44, *citing* SAA at 926 (“[T]he Administration intends that the ‘entrusts or directs’ standard shall be interpreted broadly.”) As to the reference in the SAA to a “formal, enforceable measure”, the Department suggests that “[t]he ‘formal, enforceable’ measures in the instant case are the operating and alternate use agreements.” Id.

causing an intermediate party to provide a benefit to the industry producing the subject merchandise in a way that is also in the interest of the intermediate party. We believe the phrase ‘entrusts or directs’ could encompass government actions that provide *inducements*, other than upstream subsidies, to a private party to provide a benefit to another party.

Preamble, 63 Fed. Reg. at 65350 (emphases added)

The Department finds such inducements in this case: “the hopper cars themselves, which are provided to the railways by the governments and which enable the railways to provide rail service to the CWB; and the fee structure, which rewards the railways for providing rail service for the movement of Western grain, including grain shipped by the CWB.”^{286/} At the same time, the Department rejects the Canadian argument that some element of command, or legal mandate, is required to support an entrustment or directive finding under the statute. The Department suggests that there is no basis in law for this requirement and that its own position is consistent with the statute, the legislative history, and the Department’s policies as stated in the Preamble to the regulations.^{287/}

The second major challenge responded to by the Department concerns the Canadian allegation that the rail service subsidy is not tied to particular sales under the Department’s own tying regulation.^{288/} The Canadians argued at the Preliminary Determinations and continue to argue that the use of the hopper cars at no cost to the railways is limited to the transportation of Western grain within Western Canada and does not apply to shipments to the United States.

The Department points to the I&D Memo at Comment 2 and the response to Comment 2 as its position on this issue, but argues also that Canada has simply misconstrued the tying regulation. Canada has focused on the fact that the free use of the hopper cars (i.e., the rail service *subsidy* itself) was tied to certain non-U.S. shipping routes, but the Department believes that the proper focus is whether the *benefit* is tied to a particular portion of the recipient’s sales^{289/} and insists that “[t]he indirect provision of rail service to the CWB by the federal and provincial governments benefits all of the CWB’s shipments,

^{286/} Id. at 45.

^{287/} Id. at 46.

^{288/} Id. at 47-50.

^{289/} Id. at 48.

not merely shipments made along certain routes.”^{290/} The Department cites to the Preamble to the tying regulation, 63 Fed. Reg. at 65400 (“subsidies are by these rules attributed, to the extent possible, to the sales for which costs are reduced....”), and suggests, in addition, its need to preserve flexibility and to avoid potential circumvention of the countervailing duty law (“[i]f subsidies allegedly tied to a particular product are in fact provided to the overall operations of a company, the Secretary will attribute the subsidy to sales of all products by the company.”).^{291/}

The Department suggests that its focus on “whether the rail service *benefit* is tied to certain shipping routes is entirely consistent with these principles.”^{292/} There is no argument, for example, that the CWB gets free use of the government-owned or leased railcars; rather, “CWB gets the benefit of lower shipping rates as a result of the provision of the hopper cars to the railways, and there is simply no evidence on the administrative record that this benefit is segregated to certain shipping routes.”^{293/} Dismissing an earlier determination as prior to the regulations, the Department indicates that in this case it “followed the practice described in the regulations and examined the evidence to determine whether it indicates that the *benefit* is tied to particular rail shipping routes. Having concluded that the benefit is not tied, the Department properly attributed it to all of the shipping routes.”^{294/}

The Department next defends its determination that the Railways provide rail service to the CWB for “less than adequate remuneration.”^{295/} In general, the Department argues that a thorough review of the evidence on the record led it to determine that the provision of government-owned and leased hopper cars had a discernible effect on the rail rates available to the CWB. In addition, the Department rejects Canada’s contention that because those rates were determined in arm’s-length negotiations, the government provision of hopper cars could not have had an impact on the CWB. In addition, the Department disagrees with Canada’s claim that the wrong datasets were considered for purposes of adjustments to the rail lease benchmark.

^{290/} Id.

^{291/} Id. at 48-49.

^{292/} Id. at 49 (emphasis in original).

^{293/} Id.

^{294/} Id. at 49-50 (emphasis in original).

^{295/} Id. at 50-60.

The Department initially points to the I&D Memo, response to Comment 6, wherein it cited to the Sparks Study, the Canada Transportation Act, and the 1999 paper as a proper and sufficient basis to “conclude that the rates charged by the railways for railway services do not reflect the ownership costs of the government-provided railcars.” This conclusion, and the Department’s detailed benefit calculations, were entirely consistent with the statutory standard of “adequate remuneration”, 19 U.S.C. § 1677(5)(D). That statute explains that adequacy of remuneration is to be “determined in relation to prevailing market conditions for the good or service being provided.... Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.” These considerations are amplified in 19 C.F.R. § 351.511(a)(2).

The Department suggests that the Sparks Study, the CTA, and the 1999 paper were the “best evidence available” to the Department regarding whether the price paid by the CWB for hopper car service was consistent with market principles.^{296/} Canada’s assertion that this evidence is not strong enough is simply an invitation to the Panel to re-weigh the evidence in Canada’s favor:

The question before the Panel is whether the evidence cited by the Department represents substantial evidence for the conclusion that the rail rates paid by the CWB would likely rise in the event that the governments dispose of their interests in the hopper cars.^{297/}

The problem for the Department was that no verifiable transactions were available for it to review or investigate (i.e., an actual sale or disposition by a government of its interests in hopper cars), nor were any econometric studies available to estimate the amount of the benefit that “passed through” in the sale of the rail service.^{298/} Simply put, the Department is not able to provide absolute certainty where none exists and must rely on the best evidence available to it to reach its conclusions.

The Department next addresses its determination that the railcar benefit was not extinguished by an arm’s-length negotiation between the Railways and the CWB.^{299/} Pointing to its language in the I&D Memo, response to Comment 6, the Department rejects

^{296/} Id. at 52-53.

^{297/} Id. at 53.

^{298/} Id. The Department cites *Daewoo Electronics Co., Ltd. v. United States*, 6 F.3d 1511, 1519 (Fed. Cir. 1993) (econometric studies of tax pass-through not required in antidumping cases).

^{299/} Id. at 54-56.

Canada's reliance "on the same old-law cases that were considered by the Department in the Final Determination and found to be irrelevant." Suggesting that pre-URAA countervailing duty law was much less well articulated than the current statutory scheme, the Department argues that it was "entirely reasonable for the Department to distinguish between the issues arising from the sale of a subsidized company or its assets, on the one hand, and the issues arising from the sale of a subsidized service, on the other. Unlike the sale of a subsidized company or its assets, there is not the slightest reason to believe that the buyer of a subsidized service might *pay more* for that service as a result of the subsidy."^{300/}

The Department next addresses the issue of the rejection at verification of the March 2002 data, which was offered for use in calculating the rail lease benchmark. The Department states that the question for the Panel is "whether the Department's rejection of the information proffered by the Government of Canada at the end of verification is consistent with the regulations that govern the timeliness of submissions."^{301/}

In particular, the Department cites to 19 C.F.R. § 351.301(b)(1), which provides that the time limit for the submission of factual information in a countervailing duty investigation is no later than "seven days before the date on which the verification of any person is scheduled to commence, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which verification is completed." The Department also cites to *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 276 F.Supp.2d 1371 (Ct. Int'l Trade 2003) as support for its position, although recognizing that the respondent in that case had attempted to offer documents after verification while in the instant case, Canada had offered the information just prior to the end of verification. Based on these authorities, the Department argues that it was "reasonable and appropriate for the Department to require that respondents adhere to the regulatory deadlines."^{302/}

The Department next addresses two ministerial error allegations made by GOC and by the CWB, both of which the Department had rejected on the ground that they were not in fact ministerial errors under 19 C.F.R. § 351.224(f), but instead were calculations made appropriately and with specific purpose and intent.^{303/}

^{300/} Id. at 55-56 (emphasis in original).

^{301/} Id. at 57.

^{302/} Id. at 58.

^{303/} Id. at 58-60.

The GOC's first error allegation was that the Department improperly calculated the railcar leasing costs through reliance on a simple average, as opposed to a weighted average, of four railcar lease rates. The Department argues that "the proper determination of averages is a difficult issue in the realm of statistical theory" and suggests that the Panel should not substitute its judgment for the considered judgment of the investigating authority. The Department believes that it properly "determined that simple averaging is the best approach to factoring price quotes into the lease rate benchmark calculation"^{304/} and notes that the CIT has not endorsed "any particular method of calculating averages," citing *Rhodia, Inc. v. United States*, 185 F.Supp.2d 1343, 1350 (Ct. Int'l Trade 2001) (CIT did reverse the Department's use of a weighted average to calculate certain dumping adjustments).

The applicable legal standard, however, is whether the Department's actions were reasonable and based on substantial evidence on the record, and the Department believes that its determination to use simple averaging with respect to the lease rates clearly satisfies this test.

The Department also rejects CWB's second error allegation – that the Department had erroneously relied on CWB's "total annual lease expenses" for purposes of adjusting the rail lease benchmark, rather than on the CWB's actual lease payments.^{305/} In rejecting this allegation, the Department notes that its objective was to capture all expenses associated with the CWB's lease of the railcars, not just lease payments. This decision is reasonable under the circumstances and based on substantial evidence on the record.

The Department also defends the final major challenge to its Final Determinations, this the argument by GOS that the provision of hopper cars to the railways was a part of "general infrastructure" within the meaning of the countervailing duty law.^{306/} The Department had rejected this argument in the I&D Memo, response to Comment 6. GOS had requested that the Department find that the rail service benefit in Saskatchewan was noncountervailable because, as "general infrastructure," it cannot represent a "financial contribution" within the meaning of the countervailing duty statute, 19 U.S.C. § 1677(5)(D)(iii), taking into account the importance and impact of agriculture in the province of Saskatchewan.

^{304/} Id. at 59.

^{305/} Id. at 60.

^{306/} Id. at 61-63.

The Department argues “that ‘general infrastructure’ must be available to everyone — and the rail service benefit was clearly not available to everyone in Saskatchewan.”^{307/} Although GOS points to 19 C.F.R. § 351.511(d), the Preamble to that regulation clarifies that “general infrastructure” must be general in the sense that it is available to everyone. The Department states that “[t]he ‘general infrastructure’ issue under the statute and regulations is plainly all-or-nothing, and Canada has not presented the Panel with any evidence of that (sic) the rail service benefit is available to ‘all.’”^{308/} Accordingly, the Department’s determination on this issue should be upheld by the Panel.

North Dakota Wheat Commission, the U.S. Durum Growers Association, and the Durum Growers Trade Action Committee

The U.S. Parties support all aspects of the Department’s Final Determinations on the railcar issue, stating that the Department’s application and interpretation of the phrase “entrusts or directs” is correct and that record evidence supports its finding that the Canadian government parties do use the Railways as instruments for indirectly making contributions of rail services to the CWB. As to the entrustment or directive issue, the U.S. Parties provide an extensive review of the record evidence establishing that the Railways have indeed been directed or entrusted to provide freight service to the CWB.^{309/} A significant portion of the record evidence reviewed by the U.S. Parties is proprietary but, in the view of the U.S. Parties, the record as a whole clearly establishes that:

- the government-owned and leased railcars constitute a significant portion of the Railways’ fleets^{310/}
- the operating and alternate use agreements require the Railways to transport Western grain, including CWB wheat^{311/}

The U.S. Parties address the Canadian argument that the phrase “entrust and direct” actually means “mandate” and that since the Railways do not have to use the railcars, there

^{307/} Id. at 62.

^{308/} Id. at 63.

^{309/} U.S. Parties Rule 57(2) brief at 87-96.

^{310/} Id. at 88-90.

^{311/} Id. at 90-96.

can be no “causal link or subsidy.”^{312/} They point to the Department’s holding in another case that “nothing in the statute directs the Department to consider the use to which the subsidies are put or their effect on the recipient’s subsequent performance...nothing in the statute conditions countervailability on the use or effect of a subsidy.” *See Industrial Phosphoric Acid from Israel*, 63 Fed. Reg. 13626, 13631 (March 20, 1998).

In addition, the U.S. Parties challenge the Canadian view that commercial realities, not government authority, dictate that the Railways will transport wheat, and do so simply by referencing the realities of the Operating and Alternate Use Agreements.^{313/}

The U.S. Parties next confirm that the Department did address the “geographical limitation” of the Operating and Alternate Use Agreements and suggest that the Canadian challenges on this point have no merit.^{314/} Specifically, the Canadian parties have argued that the benefit from the provision of railcars is tied to the east-west shipments of grain because for other shipments the railways must pay commercially determined alternate use fees. In the I&D Memo at 17, the Department stated that:

We have focused our analysis on whether the railway companies receive adequate remuneration when they provide hopper car service. No information has been provided to show that the rates charged by the railway companies for service to particular destinations varies because they pay (or don’t pay) an alternate use fee for the government provided hopper cars.

The U.S. Parties note that although the Department requested further information concerning whether transportation prices varied based on whether there were, or were not, alternate use fees, no such information was provided.^{315/} The U.S. Parties summarize their position as follows:

The Department was not concerned about any benefit conferred to the railways; it was concerned and did investigate whether the benefit was conferred to the CWB. To show that the [CWB] does not benefit from the government-provided railcars, the GOC and the CWB needed to show that the [CWB] pays a higher rate for transportation services

312/ Id. at 95.

313/ Id. at 95-96.

314/ Id. at 96-98.

315/ Id. at 96.

subject to the alternate use fees. They failed to demonstrate that rates differed, an indication that the savings to railways from not having to pay ownership costs are distributed to all the [CWB's] grain shipments....^{316/}

The U.S. Parties next turn their attention to the record evidence supporting the view that the CWB receives a “benefit” from the governments’ provision of railcars to the Railways, that there is the “requisite causal link between the governments’ actions and the benefit accruing to the CWB.”^{317/} They argue that the CWB must be benefitting from the provision of the railcars because:

the only way the Canadian government parties’ theory possibly could be correct is if the railroads are absorbing all the benefit from the free railcars, thereby making inordinate profits [on the] CWB’s grain shipments. There is nothing in the record to show that the railroads are currently making excessive profits on the CWB shipments, or that CWB shipments are in any way more profitable to the railways than other types of shipments.^{318/}

The U.S. Parties also find the Canadian argument illogical in the face of record evidence that the CWB was during this time purchasing hopper cars to fill an admitted business need. As to the claim that the relationship between the CWB and the Railways is “an arms-length commercial relationship,” the U.S. Parties find it “inconceivable that the prices that result from this alleged arms-length commercial relationship do not reflect the lower ownership costs.”^{319/} The only way that the CWB can, as it claims, maximize grower returns is for it to get a “price break” on the cars it, and the governments, provide the Railways. Finally, the U.S. Parties point to independent studies submitted by the Canadian parties that rail revenues would indeed need to increase if the Railways were forced to purchase hopper cars to replace the government-owned portions of their fleets.^{320/}

The U.S. Parties next challenge the Canadian argument that record evidence does not support the Department’s finding that railcar services were provided for “less than

316/ Id. at 97.

317/ Id. at 99-101.

318/ Id. at 99.

319/ Id. at 100.

320/ Id. at 101.

adequate remuneration.”^{321/} Rejecting the Canadian view that “the benefits are swallowed by the railways,” they point to the three documents cited by the Department in its Final Determinations: the Sparks Study, the provision of the CTA, and the 1999 paper entitled “Disposal of the Government Hopper Cars.” The U.S. Parties’ brief reviews the content of these documents in detail and notes that, collectively, they make a:

fundamental point that the Canadian government parties are doing their best to ignore: there is no financial incentive to own the cars unless ownership costs, including a profit, can be recouped. No business entity, in its right mind, would undertake the huge expense of purchasing railcars if it could not cover its costs and earn a profit. This fundamental point is acknowledged in the CTA, by Sparks, and by the author(s) of the Transport Canada rail policy study.... Conversely, no volume buyers of rail service, such as the CWB, which claims to maximize returns to growers, would knowingly pay rates that include hopper car ownership costs if the railway itself is not paying those costs.^{322/}

The U.S. Parties observe that even the GOC officials at verification appeared to acknowledge “the obvious link between ownership costs and revenue.”^{323/}

The U.S. Parties next address the Canadian challenge that any benefit received by the CWB is tied to non-U.S. shipments.^{324/} Specifically, the Canadians have argued that alternate use fees charged to the railways tie the benefit from the provision of railcars to non-U.S. markets, which effectively eliminates any benefit on wheat shipments into the United States. The U.S. Parties support the Department’s view that the proper focus is on the benefit to the CWB, not the benefit to the railways. “Because there is no difference in the rates charged by the railways based on alternat[e] use payments, the CWB benefits equally from the subsidized railcars on all of its shipment routes, including those to the

^{321/} Id. at 101-104.

^{322/} Id. at 103.

^{323/} Id. at 104, *citing* GOC Verification Memo of June 9, 2003 at 18 (A.R. 149). In effect, the GOC officials concurred with the view that “[t]he only way for the railways to cover the increase in ownership costs associated with purchasing the cars would be to raise prices.” Id.

^{324/} Id. at 104-06.

United States.”^{325/} Put another way:

The simple fact is that the government provided railcars to CP and CN so the railways could ship CWB grain. The free railcars lowered the railways’ costs, and resulted in lower shipping rates on all the CWB’s routes and shipments.^{326/}

Based on their own brief to the Panel, the U.S. Parties assert that the Governments have in fact admitted “that rates charged to the CWB do not vary based on the railways’ cost or savings.” However, they also point to other record evidence supporting the finding that the railcar benefit is not tied to non-U.S. shipments. First, during the POI, the CWB and CP had agreed upon a flat monthly alternate use fee. Second, the charges under the Alternate Use Agreements “do not apply to internal rail movements prior to movement into the U.S.” (i.e., movements within Canada up to the last reporting station in Canada). Thus, even with respect to U.S. shipments, some portion of those shipments benefits by not incurring any alternate use fees.^{327/}

The U.S. Parties’ brief also supports the details of the Department’s benefit calculations.^{328/} They first note that the Department, in its Final Determinations, modified its Preliminary Determinations’ costs estimates in three different ways. One of these was to include information from two actual lease transactions that occurred during the POI. This was challenged by the Canadians, who disagreed with the Department’s decision to use the information on actual transactions as well as its decision to use a simple average of four lease rates, instead of a weighted average, to calculate ownership costs.^{329/}

The U.S. Parties first note that these challenges “parallel [the Canadian] ministerial error submissions during the underlying investigation,” which had been rejected by the Department.^{330/} As to the issue of the use of actual market price transactions in the benefit calculations, the U.S. Parties point to 19 C.F.R. § 351.511(a)(2) and the Department’s “long-standing preference” for using actual market prices in such calculations and reject the

^{325/} Id. at 104.

^{326/} Id.

^{327/} Id. at 106.

^{328/} Id. at 106-109.

^{329/} Id. at 107.

^{330/} Id. at 107.

argument that because the actual leases were entered into prior to the POI, they are not representative of lease rates during the POI.^{331/} The U.S. Parties point out that these were the amounts *actually paid* during the POI and, indeed, that there is in fact no other record evidence of rates actually entered into or in effect during the POI on executed leases.

The U.S. Parties also reject the Canadian argument favoring weight-averaging over simple averaging of the lease rates. They point that out “[w]hile it is relatively easy to assign a weight to the actual leases (i.e., weight them by the number of cars covered by each lease), what weight should be assigned to each of the quoted rates that are for future leases of unknown numbers of railcars and are not found in any leases in existence during the period of investigation?”^{332/} Assigning a “weight” other than zero for the rate quotes would be entirely arbitrary and speculative. Since a simple average does not assign (arbitrary) weights to the various rates, it was logical for the Department to adopt that method in this instance.

The U.S. Parties final argument supports the Department’s determination that the provision of railcars by the GOS did not qualify as or constitute “general infrastructure.”^{333/} The U.S. Parties point also to 19 C.F.R. § 351.511(d), which defines that term as “infrastructure that is created for the broad societal welfare of a country, region, state or municipality,” and to the Preamble to the regulations indicating that such infrastructure must be “available to all citizens or to all members of the public.” *See* Preamble, 63 Fed. Reg. at 65378. In the U.S. Parties’ view, freight services for grain is not a benefit to society as a whole and the Department’s determination on this point was clearly correct.

2. Analysis and Decision of the Panel

After considering the arguments of the parties, the Panel has decided to uphold all aspects of the Department’s findings and determinations as respects the railcar issue. As the arguments of the parties have been fairly thoroughly summarized, the Panel’s discussion of this issue will be brief.

In the Final Determinations, the Department initially referenced the determinations that it had made at the Preliminary Determinations level and then indicated that it had adopted the same analysis at the Final Determinations level:

^{331/} Id. at 108.

^{332/} Id. at 108-109.

^{333/} Id. at 109-110.

[In the Preliminary Determinations, 68 Fed. Reg. at 11, 377], we determined that through the operating and alternate use agreements, the federal and provincial governments (including the CWB) are entrusting or directing the railway companies to provide rail services for Western grain. The provision of this rail service is a financial contribution within the meaning of section 771(5)(D)(iii) of the Tariff Act of 1930, as amended ('the Act'). We also found that the rail services are being provided to a specific group, within the meaning of section 771(5A)(D)(iii)(I) of the Act, the CWB and other users of hopper car services. Finally, we determined that the [Railways] are providing these rail services for less than adequate remuneration within the meaning of section 771(5)(E)(iv) of the Act.

For the final determinations, we continue to find that the [Railways] have been entrusted or directed to provide rail service for the movement of Western grain, including grain shipped by the CWB, for less than adequate remuneration.

I&D Memo at 3

In its "benefit" discussion,^{334/} the Department indicated its finding that the benefit did "pass through" from the Railways to the CWB and that it was measuring that benefit by the amount of the "added ownership costs" that were, in effect, not charged by the Railways in their service contracts with the CWB. See I&D Memo at 4.

The Department's brief and oral argument addressed the Canadian challenge to its finding on "entrustment and directive," arguing that this finding was consistent with the statute, the legislative history, and the Department's policies as contained in the Preamble to the countervailing duty regulations. The Panel agrees.

As quoted previously, the Preamble states as follows:

Although the indirect subsidies that we have countervailed in the past have normally taken the form of a foreign government *requiring* an intermediate party to provide a benefit to the industry producing the subject merchandise, often to the detriment of the intermediate party, indirect subsidies could also take the form of a foreign government *causing* an intermediate party to provide a benefit to the industry producing the subject merchandise in a way that is also in the interest of the intermediate party. We believe the phrase 'entrusts or directs' could encompass government actions that provide *inducements*, other

^{334/} See Final Determinations at 7 and Response to Comment 7, Final Determinations at 23.

than upstream subsidies, to a private party to provide a benefit to another party.

Preamble, 63 Fed. Reg. at 65,350 (emphases added)

Although the Canadian parties have argued that the phrase “entrusts or directs” must connote some element of command or mandate,^{335/} the Department clearly gives that phrase broader scope and the Panel finds the Department’s interpretation to be reasonable. Congress has indicated that “the ‘entrusts or directs’ standard shall be interpreted broadly,” SAA at 926, and there appears to be no reason that this issue should be required to rest on the presence or absence of legal commands or formalisms.

In the instant case, it is fair for the Department to conclude that the Governments are using the Railways “as instruments for indirectly making contributions of rail service to the CWB.” As the Department has noted, the *inducements* are “the hopper cars themselves, which are provided to the railways by the governments and which enable the railways to provide rail service to the CWB; and the fee structure, which rewards the railways for providing rail service for the movement of Western grain, including grain shipped by the CWB.”^{336/} These are the practical realities of the situation and the absence of a chain of formal mandates or requirements should not be considered to be dispositive. The Panel considers that the Department’s interpretation of the statute and regulation on this point is reasonable and in accordance with law.

The Department’s brief and oral argument also address the Canadian allegation that the rail service subsidy, if any, is “tied” to non-U.S. shipments of wheat under the Department’s tying regulation, 19 C.F.R. § 351.525(b)(4), which provides: “If a subsidy is tied to sales to a particular market, the Secretary will attribute the subsidy only to products sold by the firm to that market.” As noted in the contentions of the parties section of this Opinion, the Canadians have argued that the use of the hopper cars at no cost to the railways is limited to the transportation of Western grain within western Canada and does not apply to shipments to the United States.^{337/}

^{335/} Although the Canadian parties have noted that their view has been seconded by a WTO Panel decision, the Panel does not find that decision to be persuasive in view of the language of the Preamble and the SAA.

^{336/} See Department Rule 57(2) brief at 45.

^{337/} The U.S. Parties have in part challenged the factual basis for this claim, indicating that some Alternate Use charges will be imposed even on U.S. shipments, up until the point that the shipments reach, effectively, the U.S. border.

The Department, however, considers that the proper focus is not on the free use of the hopper cars – the benefit provided by the Governments to the Railways – but on the provision of the rail service by the Railways to the CWB. The issue is whether the rail service benefit is tied to certain shipping routes and on this point the Department found that “[t]he indirect provision of rail service to the CWB by the federal and provincial governments benefits *all* of the CWB’s shipments, not merely shipments made along certain routes.” *See* Department Rule 57(1) brief at 48 (emphasis added).

The Panel has carefully considered the arguments on both sides but is of the view that the Department’s interpretation is correct. In an entrustment or directive situation, the proper focus should be on the benefit indirectly provided by the governments to the respondent and not on the structure or characteristics of the initial entrustment or directive mechanism. In the instant case, the record is clear that the ultimate rail service benefit provided by the Railways to the CWB is not segregated to certain shipping routes.^{338/} Thus, the Panel considers that the Department’s legal interpretation and its factual finding is in accordance with law and supported by substantial evidence on the record.

The Canadian side also challenged the Department’s determination that the rail service benefit provided by the Railways to the CWB was for “less than adequate remuneration.” *See* Section 771(5)(D) of the Act and 19 C.F.R. § 351.511(a)(2). In its brief and arguments to the Panel, the Department suggests that the so-called Sparks Study (the 2000 “Canada/U.S. Port Competitiveness Study”), the Canada Transportation Act (CTA), and the 1999 “Paper on Disposal of the Government Hopper Cars” were the best evidence available to it to support its determination that the price paid by the CWB for the Railways’ hopper car service was not consistent with market principles (i.e., the rates charged by the Railways for those services did not reflect the ownership costs of the government-provided railcars). The Canadian side, with only brief citations to what it believes is relevant language, infers that these documents are too slender a reed upon which the Department’s finding can rest. The U.S. Parties, however, provide a much more

^{338/} Moreover, there was no evidence on the record that the rates for the rail service provided by the Railways were calibrated or segregated on the basis of whether or not the particular route was subject to alternate use fees. Indeed, as noted by the U.S. Parties in their Rule 57(2) brief at 104-05, the Governments had conceded in their Rule 5(1) brief at 96 (albeit for a different purpose) that the Department had appropriately not been able to “trace Alternate Use payments to rail rates.” *See* I&D Memo at 17-18. In addition, the U.S. Parties also took note that the Canadian side did not respond to a request by the Department for further information on this point.

thorough review of the content of these documents and the Panel is in fact persuaded that they rise to the level of substantial evidence in support of the Department's finding. As a practical matter, simple economic logic would also appear to dictate a link between ownership costs and revenue, which further suggests that the Department's factual finding is correct or at least reasonable.

As part of its analysis, the Department also rejected the Canadian argument that the rail service benefit would have logically been extinguished by the arm's-length negotiations for hopper car service entered into between the Railways and the CWB. Although the Canadian side cited previous administrative precedents in support of its argument,^{339/} the Department noted that these were pre-URAA countervailing duty law cases and that the current statutory scheme is far better articulated in this area than prior law. The Department also distinguishes the results of the recent privatization cases, as follows:

[It is] entirely reasonable for the Department to distinguish between the issues arising from the sale of a subsidized company or its assets, on the one hand, and the issues arising from the sale of a subsidized service, on the other. Unlike the sale of a subsidized company or its assets, there is not the slightest reason to believe that the buyer of a subsidized service might *pay more* for that service as a result of the subsidy.

Department Rule 57(2) brief at 55-56 (emphasis in original)

The Panel is aware of the extensive discussion given this general issue in the recent privatization cases, but finds itself unable to assert that the Department's interpretation and application of the statute to the concededly different issue addressed in this case is unreasonable. Therefore, the Panel upholds the Department's finding and determination on this point.

The Governments have complained that the Department refused to consider, for the calculation of lease rates purposes, a 2002 report which was offered by the Governments to the Department during verification.^{340/} The GOC had submitted the primary information concerning this topic in its February 11/12, 2003 questionnaire response, but this report was apparently not submitted at that time. In the I&D Memo, the Department stated:

^{339/} See n. 263 and accompanying text. The Governments state that the report was "accepted" by the Department but it may be more accurate to say that it was received and marked as a verification exhibit.

^{340/} See n. 273 and accompanying text.

We are not using the March 2002 data provided at verification because it was presented on the last day of verification and we were not able to examine it and ask follow-up questions. Thus, because we have verified data, we prefer to use that data.

I&D Memo at 24

The Governments point to 19 C.F.R. § 351.301(b)(1) which reads:

(b) *Time limits in general.* Except as provided in ...[omitted], a submission of factual information is due no later than:

(1) For a final determination in a countervailing duty investigation or an antidumping investigation, seven days before the date on which the verification of any person is scheduled to commence, except that *factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed....*

19 C.F.R. § 351.301(b)(1) (emphasis added)

The Governments apparently rely on the exception clause to argue that relevant data submitted one day prior to the end of verification must be accepted by the Department. However, what the Governments do not do is indicate that a “verifying official” requested this information during the verification process. If there was no request during the verification itself (neither the GOC Verification Report, A.R. 149, nor the Governments in their brief point to such a request having been made) and the GOC merely made a voluntary offer to submit additional information along the lines of information previously submitted in connection with a questionnaire response, the Panel does not read the exception clause as being applicable. Thus, the Department’s decision not to utilize the information volunteered by the GOC during verification is upheld.

The Governments have further complained about two additional decisions made by the Department in its benchmark calculations. The first of these involved the decision of the Department to use simple averaging as opposed to weighted averaging of several railcar lease rates.^{341/} The arguments of the Department and the U.S. Parties, previously set out in this Opinion, on this point are convincing and the Panel finds that the Department’s choice of methodology on this point was reasonable and in accordance with law.

The second issue concerns the Department’s decision to use actual market price

^{341/} See n. 276 and accompanying text.

transactions in its benefit calculations. The U.S. Parties have noted the Department's "long-standing preference" for using actual market prices in such calculations that the lease information obtained in this instance was representative of lease rates during the POI even if the leases in question had been entered into prior to the POI.^{342/} The U.S. Parties also point out that these were the amounts actually paid during the POI and that there was in fact no other record evidence of rates actually entered into or in effect during the POI on executed leases. The Panel is inclined, once again, to regard the Department's decision in this respect as within its discretion. The Department's choice of methodology on this point was reasonable and in accordance with law.

The final major challenge to the Department's Final Determinations on the railcars issue concerned the GOS's argument that the provision of hopper cars to the Railways was a part of "general infrastructure" within the meaning of the countervailing duty statute, Section 771(5)(D)(iii) ("The term 'financial contribution' means – (iii) providing goods or services, *other than general infrastructure*), and the regulations, 19 C.F.R. § 351.511(d). The GOS argument rests, of course, on the highly important role that agriculture plays in the province of Saskatchewan.

19 C.F.R. § 351.511(d) reads as follows:

(d) *Exception for general infrastructure.* A financial contribution does not exist in the case of the government provision of general infrastructure. General infrastructure is defined as infrastructure that is created for the broad societal welfare of a country, region, state or municipality.

The Preamble to the Regulations provides additional guidance as to the meaning of the term "general infrastructure":

Paragraph (d) defines "general infrastructure" as infrastructure that is created for the broad societal welfare of a country, region, state, or municipality. For example, interstate highways, schools, health care facilities, sewage systems, or police protection would constitute general infrastructure if we found that they were provided for the good of the public and were available to all citizens or to all members of the public....

Any infrastructure that satisfies this public welfare concept is general infrastructure and therefore, by definition, is not countervailable and not subject to any specificity analysis. Any infrastructure that does not satisfy this public welfare concept is not general infrastructure and is

^{342/} See n. 329 and accompanying text.

potentially countervailable. The provision of industrial parks and ports, special purpose roads, and railroad spur lines ... that do not benefit society as a whole, does not constitute general infrastructure and will be found countervailable if the infrastructure is provided to a specific enterprise or industry and confers a benefit.

Preamble, 63 Fed. Reg. at 65,378-79

Based upon the above standards, the Department determined that “general infrastructure” must be available to everyone and that the rail service benefit in this case was clearly not available to everyone in Saskatchewan. The Panel is of the view that the Department’s determination on this issue was correct. The Panel, therefore, upholds this determination as supported by substantial evidence on the record and in accordance with law.

V. ORDER OF THE PANEL

The Panel ORDERS the Department to make a remand determination consistent with the instructions and findings of this Opinion within ninety (90) days of the date hereof.

Issued: March 10, 2005

SIGNED IN THE ORIGINAL BY:

Harry B. Endsley
Harry B. Endsley, Chair

Michael Wallace Gordon
Michael Wallace Gordon

David J. Mullan
David J. Mullan

Leonard E. Santos
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Gilbert R. Winham
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