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## Railcars From Canada: A Misapplication of the Countervailing Duty Law

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# Railcars From Canada: A Misapplication of the Countervailing Duty Law

Rhonda G. Kirschner

## **Abstract**

This Note examines the countervailing duty law and how it was applied in Railcars. Part I discusses the MTA's decision to award the subway car contract to Bombardier, Inc., a Canadian corporation. The countervailing duty proceeding and other legal actions initiated in response to the allegedly subsidized contract are also described. Part II provides a general background on the Act. Part III explains the procedure for conducting a countervailing duty proceeding under the Act. After each step in a countervailing duty proceeding is outlined, its application in Railcars is discussed. Finally, Part IV analyzes how the Act was misapplied in Railcars.

# RAILCARS FROM CANADA: A MISAPPLICATION OF THE COUNTERVAILING DUTY LAW

## INTRODUCTION

Title VII of the Tariff Act of 1930<sup>1</sup> (Act) requires that countervailing duties<sup>2</sup> be imposed on merchandise imported into the United States when a foreign subsidy<sup>3</sup> is provided and an

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1. The countervailing duty provisions of Title VII of the Tariff Act of 1930 are codified at 19 U.S.C. §§ 1671-1671f (1982) [hereinafter cited as the Act]. For related statutory provisions, see also, 19 U.S.C. §§ 1516a, 1675, 1677, 2413-2416, 2501-2582 (1982). For general background on the Act, see 1 P. FELLER, U.S. CUSTOMS AND INTERNATIONAL TRADE GUIDE § 17.06 (1979); 2 R. STURM, CUSTOMS LAWS AND ADMINISTRATION § 58 (1983).

2. The term "countervailing duty" was not defined in the Act, but has been defined in the international agreement on which the Act was based: "The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of off-setting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of the General Agreement." Agreement on Interpretation and Application of Articles VI, XVI, XXIII of the General Agreement on Tariffs and Trade, *done* Apr. 12, 1979, art. 1 n.4, 31 U.S.T. 513, T.I.A.S. No. 9619, 18 I.L.M. 579, *reprinted* in H.R. Doc. No. 153, 96th Cong., 1st Sess. pt. I (1979) [hereinafter cited as the GATT Agreement]. See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 520 (1976).

*Webster's* defines a countervailing duty as:

[A] duty or surtax imposed on imports to offset an excise or inland revenue tax put upon articles of the same class manufactured at home; a duty imposed to offset the advantage to foreign producers derived from a subsidy that their government offers for the production or export of the article taxed.

*Id.*

3. "Subsidy" is defined at 19 U.S.C. § 1677(5) (1982) as follows:

The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title, and includes but is not limited to, the following:

- (A) Any export subsidy described in Annex A to the [GATT] Agreement (relating to illustrative list of export subsidies).
- (B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
  - (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
  - (ii) The provision of goods or services at preferential rates.
  - (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
  - (iv) The assumption of any costs or expenses of manufacture, production, or distribution.

*Id.*; see *infra* notes 123-44 and accompanying text.

industry<sup>4</sup> in the United States is materially injured<sup>5</sup> by reason thereof.<sup>6</sup> The duty is equal to the amount of the net subsidy.<sup>7</sup> The purpose of the countervailing duty is "to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments."<sup>8</sup> While the Act protects the profits of United States industries and the jobs of United States workers against unfair foreign subsidies, the imposition of a countervailing duty often results in increased prices for consumers of subsidized imported goods.

4. "Industry" is defined as: "[T]he domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." 19 U.S.C. § 1677(4) (1982). See *infra* notes 78-98 and accompanying text.

5. "Material injury" is defined as: "[H]arm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982). See *infra* notes 99-112 and accompanying text.

6. 19 U.S.C. § 1671(a) (1982). The Act provides, in part:

(a) General rule—

If

(1) The administering authority determines that—

(A) A country under the Agreement, or

(B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country, is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and

(2) The Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

*Id.* The "administering authority" is the United States Department of Commerce (Commerce). See *infra* note 54. The "Commission" is the United States International Trade Commission. See *infra* note 53.

The Act applies to merchandise produced in countries that are signatories to the GATT Agreement, *supra* note 2, and countries that have assumed equivalent obligations. 19 U.S.C. § 1671(a), (b) (1982). The countervailing duty provisions which apply to imports from all other countries are codified at 19 U.S.C. § 1303 (1982).

7. 19 U.S.C. § 1671(a) (1982). For information on calculation of the net subsidy, see STATEMENTS OF ADMINISTRATIVE ACTION (1979), reprinted in H.R. Doc. No. 153, 96th Cong., 1st Sess. pt. II, at 433; 1979 U.S. CODE CONG. & AD. NEWS 665, 698-99 [hereinafter cited as STATEMENTS]. See also *Michelin Tire Corp. v. United States*, 2 Ct. Int'l Trade 143 (1981) (calculation of subsidy in the form of a low interest rate loan); see *infra* notes 145-59 and accompanying text (calculation of the subsidy).

8. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978) (citing 30 CONG. REC. 1674, 2205, 2225 (1897)).

In *Railcars From Canada*,<sup>9</sup> a highly controversial countervailing duty determination, the issue was whether to impose a countervailing duty on the allegedly subsidized import of components for 825 subway cars which the Metropolitan Transportation Authority of New York<sup>10</sup> (MTA) had ordered from a Canadian corporation.<sup>11</sup> A countervailing duty of over U.S.\$91 million would have been imposed<sup>12</sup> if the proceeding had not been terminated.<sup>13</sup> The subway riders and taxpayers of New York would have paid this duty.

*Railcars* appears to have misapplied the Act by imposing a countervailing duty even though no United States industries or workers were materially injured by the alleged subsidy.<sup>14</sup> Furthermore, the rulings raise doubts about whether the net subsidy in the form of export credit financing was properly calculated.<sup>15</sup> The case was never appealed to the United States Court of International Trade.<sup>16</sup> *Railcars* may thus have established a precedent which will discourage other governmental units in the United States from seeking foreign governmental financing at preferential rates.<sup>17</sup>

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9. 48 Fed. Reg. 6569 (Dep't of Com., Int'l Trade Admin. 1983) (final determination finding subsidies had been provided for imported merchandise); Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042 (U.S. Int'l Trade Comm'n 1982) (preliminary determination finding domestic industry had been materially injured by reason of allegedly subsidized imports).

10. The Metropolitan Transportation Authority of New York (MTA) is a public benefit corporation created by the New York State Legislature. N.Y. PUB. AUTH. LAW § 1263 (McKinney 1982). Its purpose is to develop and improve commuter transportation and other services and to implement a unified mass transportation policy for the 12-county metropolitan commuter transportation district which includes New York City. *Id.* §§ 1262, 1264.

11. *Railcars From Canada*, 47 Fed. Reg. 31,415 (U.S. Dep't of Com., Int'l Trade Admin. 1982) (initiation of countervailing duty investigation).

12. *Railcars From Canada*, 48 Fed. Reg. 6569, 6570 (U.S. Dep't of Com., Int'l Trade Admin. 1983). Commerce determined the net subsidy to be U.S.\$110,565 per subway car. *Id.* The total duty was calculated as follows: U.S.\$110,565 (net subsidy per subway car) multiplied by 825 (number of cars purchased) equals U.S.\$91,216,125. See *infra* notes 146-59 and accompanying text (calculation of the subsidy).

13. On February 9, 1983, the ITC terminated its countervailing duty investigation before reaching a final determination. See *Rail Passenger Cars and Parts Thereof From Canada*, 48 Fed. Reg. 6793, 6794 (U.S. Int'l Trade Comm'n 1983).

14. See *infra* notes 160-217 and accompanying text.

15. See *infra* notes 145-55 and accompanying text.

16. An "interested party" in a countervailing duty proceeding may obtain judicial review of countervailing duty determinations pursuant to 19 U.S.C. §§ 1516-1516a (1982). Because *Railcars* was terminated, no appeal was filed.

17. See [Jan.-Mar.] U.S. IMPORT WEEKLY (BNA) No. 18, at 600 (Feb. 9, 1983). In announcing Commerce's final determination in *Railcars*, Commerce Secretary Malcolm Baldrige asserted that the affirmative determination "should be a warning to other potential

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## I. BACKGROUND: RAILCARS FROM CANADA

### A. Award of the Contract

In 1981, the MTA solicited bids for the production of 1150 subway cars for New York City's deteriorating public transportation system.<sup>18</sup> In March 1982, the MTA awarded a contract for the initial 325 cars to the Nissho-Iwai American Corporation, repre-

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foreign suppliers, especially of large capital equipment projects, who think that government subsidized financing is the way to get a competitive advantage." *Id.* See also Note, *Export Subsidies: Predatory Financing and the MTA-Bombardier Contract*, 9 BROOKLYN J. INT'L L. 385, 408 (1983).

18. See U.S. Int'l Trade Comm'n, Report to the Commission on Investigation No. 701-TA-182 (Final) Rail Passenger Cars and Parts Thereof From Canada, at A-18 to A-19 (Jan. 31, 1983) (available from the U.S. Int'l Trade Comm'n, Wash., D.C.) [hereinafter cited as ITC Final Rep.]. In April 1981, the MTA solicited bids to purchase 325 subway cars with options to purchase up to a total of 1150. See *id.* at A-18. At that time, the MTA planned to finance the subway cars with funds from the Urban Mass Transportation Authority of the United States Department of Transportation. See *id.* The MTA later considered a combination of safe-harbor leasing and its own bond issue to finance the subway cars. *Id.* at A-19. However, the MTA questioned whether it could market over U.S.\$1 billion of bonds in the time frame required to fund the purchase of the planned order of 1150 cars. See MTA Memorandum Regarding MTA-Bombardier Subway Car Contract Award 1 (1982), reprinted in ITC Final Rep., *supra*, at A-54 [hereinafter cited as MTA Memorandum]. In the summer of 1981, the MTA received competitive bids for 325 subway cars. The MTA believed that the low bid of U.S.\$895,000 per car was excessive. See *id.* The MTA realized that it could achieve substantial savings by negotiating the purchase of the cars instead of using the competitive bidding process required by state law. See *id.* In order to reduce the cost of the cars and to attract sufficient vendor-related financing, the New York Legislature enacted legislation to authorize the negotiated purchase of subway cars. N.Y. PUB. AUTH. LAW § 1209(2), (3) (McKinney 1982). On November 15, 1981, the MTA resolicited bids, offering a contract for all 1150 cars. See ITC Final Rep., *supra*, at A-19.

The order for 1150 subway cars was part of a U.S.\$7.9 billion program by the MTA to rebuild the New York City public transportation system over five years. See MTA Memorandum, *supra*, at 1. See also N.Y. PUB. AUTH. LAW § 1269-b(1) (McKinney 1982) (requiring the MTA to develop a five-year capital program for New York City's mass transit facilities).

senting Kawasaki Heavy Industries of Japan.<sup>19</sup> For the remaining 825 cars, the MTA negotiated with three other subway car-builders:<sup>20</sup> Bombardier, Inc. (Bombardier), a Canadian railcar manufacturer;<sup>21</sup> Budd Company (Budd), a United States producer of railcars;<sup>22</sup> and Francorail, a consortium of French industrial companies.<sup>23</sup>

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19. ITC Final Rep., *supra* note 18, at A-21. Nissho-Iwai offered financing through the Export-Import Bank of Japan on 46% of the contract price for 325 cars at an effective interest rate of 12.25%. *Id.* at A-20. The Japanese government loan was not challenged as a subsidy because it was above the Japanese commercial interest rates and within the parameter set for Japan under the Org. for Economic Cooperation and Dev. Trade Directorate, Arrangement on Guidelines for Officially Supported Export Credits, OECD Doc. TD/Consensus/78.4 (1st Rev.) (Feb. 22, 1978) [hereinafter cited as OECD Arrangement]. *Id.* See [Apr.-Sept.] U.S. EXPORT WEEKLY (BNA) No. 410, at 309 (June 1, 1982). In October 1982, the MTA announced that because of a favorable response to its issuance of bonds at an average rate of 9.7%, it had decided to cancel its loan from the Export-Import Bank of Japan. See ITC Final Rep., *supra* note 18, at A-21 n.1.

Budd had submitted a competing bid for this contract. See ITC Final Rep., *supra* note 18, at A-20. Budd had obtained offers of financing from the Brazilian and Portuguese governments by agreeing to produce certain components in those countries. The foreign financing enabled Budd to offer the MTA financing for about 17% of the value of the contract. *Id.*

20. See ITC Final Rep., *supra* note 18, at A-22.

In addition to the three bidders with whom the MTA negotiated, Pullman-Standard Co. of Chicago, a prime contractor of rail passenger cars, had begun preparations to submit a bid for the contract. Pullman decided not to submit a bid because of its inability to compete with the reported availability of foreign government financing at 9.5%, the onerous nature of the design specifications, and its unwillingness to assume certain liability risks. See *id.* at A-20.

Nissho-Iwai, which had won the earlier MTA contract for 325 subway cars, did not bid because it did not have the production capacity to fill this order. U.S. Int'l Trade Comm'n, U.S.I.T.C. Pub. No. 1277, Certain Rail Passenger Cars and Parts Thereof From Canada, at A-44. (Aug. 1982) (available from the U.S. Int'l Trade Comm'n, Wash., D.C.) [hereinafter cited as ITC Prelim. Rep.].

21. ITC Final Rep., *supra* note 18, at A-22. Bombardier, Inc. (Bombardier) assembles rail passenger cars in the United States and Canada. The subway car shell is the only major component it produces. Bombardier has rail passenger plants in Quebec, Canada and Barre, Vermont. It subcontracts for railcar components and subassemblies from numerous suppliers in the United States and elsewhere. ITC Prelim. Rep., *supra* note 20, at A-7.

22. ITC Final Rep., *supra* note 18, at A-22. Budd, a wholly-owned subsidiary of the West German firm Thyssen AG, is the only United States firm to have independently bid as a prime contractor for rail passenger car contracts since 1979. *Id.* at A-11. Budd is a large, diversified, multinational manufacturing corporation with plants in several United States and foreign locations. *Id.* In addition to offering services as a prime contractor for rail passenger cars, Budd assembles rail passenger cars and manufactures two major rail passenger car components, the shell and the truck. Budd's assembly and shell manufacturing facilities are at its Red Lion Plant in Philadelphia, Pennsylvania. *Id.* at A-12.

In February 1981, the MTA awarded Budd a contract for the production and delivery of 130 commuter railcars with an option to purchase an additional 208 cars. *Id.* at A-18. In April 1982, the MTA exercised its option for the additional 208 cars. However, production of some of the additional cars was contingent upon the availability of safe-harbor leasing. *Id.*

23. ITC Final Rep., *supra* note 18, at A-22. Francorail is a prime contractor of rail

Section 1209(3) of the New York State Public Authorities Law authorized the MTA to award the subway car contracts by negotiation, instead of on the basis of sealed bids, provided that certain specified factors were considered in the negotiations.<sup>24</sup> The MTA, therefore, based its decision to award the contract on the following statutory and other criteria:<sup>25</sup> availability and cost of financing, price of the subway cars,<sup>26</sup> delivery schedules,<sup>27</sup> quality of design, engineering, and performance,<sup>28</sup> possible overdependence on one

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passenger cars. During the period 1977 to 1982, it bid on two United States rail passenger car contracts, but won neither. *Id.* at A-11.

24. N.Y. PUB. AUTH. LAW § 1209(3) (McKinney 1982). "The factors subject to negotiation shall include, but need not be limited to, financing, cost, delivery schedules, and performance of all or a portion of the contract at sites within the state of New York or using goods produced and services provided within the state of New York." *Id.* § 1209(3)(a). Section 1209(3) authorized the MTA to award a contract by negotiation without competitive bidding provided certain standards and procedures were followed. *Id.* § 1209(3). Section 1209(2) authorized the MTA to declare that competitive bidding is inappropriate in certain circumstances. *Id.* § 1209(2). The MTA had sought this legislation because it believed that by negotiating the contracts it could reduce the price of the cars and attract vendor related financing on favorable terms. MTA Memorandum, *supra* note 18, at 1.

25. ITC Final Rep., *supra* note 18, at A-22. *See also* MTA Memorandum, *supra* note 18, at 1-2.

26. Bombardier's final price per car was U.S.\$798,770 for a total contract price of U.S.\$658,985,250. *See* Summary of Negotiations and Proposed Agreement Between the MTA and Bombardier Inc., 825 IRT Subway Cars 1 (June 8, 1982) (available at the office of the MTA, New York) [hereinafter cited as Summary of Negotiations]. Budd's final price per car was U.S.\$770,768. The MTA, however, believed that certain contractual provisions for final payment and the requirement to use certain New York State components would raise Budd's price to U.S.\$799,885. *See* ITC Final Rep., *supra* note 18, at A-23 to A-24. Francorail's final price per car was U.S.\$814,000. *See* Summary of Negotiations, *supra*, at 3.

27. Bombardier planned to deliver a ten car test train in July 1984 and all cars by May 1987. *See* Summary of Negotiations, *supra* note 26, at 1. The MTA found that Bombardier's recent delivery record had been impressive. *See* ITC Prelim. Rep., *supra* note 20, at A-38. *See also* Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,048 (U.S. Int'l Trade Comm'n 1982) (preliminary determination) (Stern, Comm'r, dissenting). Budd promised to deliver all cars by October 1986. *See* Summary of Negotiations, *supra* note 26, at 3. Budd was behind in current orders with a backlog of more than 1000 cars. *See* ITC Prelim. Rep., *supra* note 20, at A-38. Budd proposed to assemble the MTA cars at a new facility in Hornell, New York. The MTA was concerned that the facility would require substantial capital investment and the hiring and training of a new work force. *See id.* Furthermore, Budd insisted that liquidated damages be waived for the first two months of delay in the event the New York assembly facility was used. *See* Summary of Negotiations, *supra* note 26, at 3.

28. Bombardier had entered into a licensing agreement with Kawasaki Heavy Industries, so that the Bombardier cars had the advantage of being compatible with the 325 cars the MTA had already ordered from Nissho-Iwai. ITC Final Rep., *supra* note 18, at A-30. *See also* Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,048 (U.S. Int'l Trade Comm'n 1982) (preliminary determination) (Stern, Comm'r, dissenting). The MTA expected



supplier,<sup>29</sup> and New York State content.<sup>30</sup> The availability of financing was an important factor in the MTA's decision,<sup>31</sup> but not necessarily the determinative one.<sup>32</sup> To support Bombardier's final bid, the Export Development Corporation of Canada<sup>33</sup> (EDC) offered financing at an interest rate of 9.7% per annum to cover 85% of the contract price.<sup>34</sup> Bombardier's financing was equivalent to

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that this similarity of design would substantially reduce maintenance costs. ITC Final Rep., *supra* note 18, at A-30. In general, the MTA decided that Bombardier had made the best offer with respect to car quality and overall confidence in carbuilder engineering. MTA Memorandum, *supra* note 18, at 1.

29. The MTA wanted to increase the number of sources for its equipment. ITC Final Rep., *supra* note 18, at A-30. By ordering from Bombardier, the MTA increased its number of suppliers for equipment in general and for cars following the Nissho-Iwai design in particular. *Id.*

30. Bombardier offered a minimum New York State content of U.S.\$125,000 per car (16% of car price) excluding transportation and on-site staffing, with a promise to try to increase the New York content to U.S.\$160,000 per car (20% of car price). See Summary of Negotiations, *supra* note 26, at 2. Budd offered a New York State content of 12% of the car cost. *Id.* at 3. However, Budd contended that if it used New York Air Brake Co. components, its New York State content would have been approximately 19%. See ITC Final Rep., *supra* note 18, at A-29. Francorail offered a New York State content of 8% of the car cost. See Summary of Negotiations, *supra* note 26, at 3.

It was estimated that the Bombardier contract would generate 2384 years of employment in New York State; the Budd contract would generate 2340 years of employment. See ITC Final Rep., *supra* note 18, at A-29.

31. Rail Passenger Cars From Canada, 47 Fed. Reg. at 36,043; ITC Final Rep., *supra* note 18, at A-24; ITC Prelim. Rep., *supra* note 20, at A-9, A-50.

32. "The MTA, in its contract with Bombardier, has agreed that if a countervailing duty order should be issued the financing agreement with [the] Canadian Government will be modified in such a way as to offset or eliminate any net subsidy which is found to exist. According to the MTA, it is willing to take such steps to offset a subsidy because it believes Bombardier's proposal is worth accepting even at a higher cost." ITC Final Rep., *supra* note 18, at A-30 (footnotes omitted). "[B]ased upon the Treasury Department's inquiry into this matter, I have concluded that Bombardier would be awarded the contract even if Budd were able to offer matching financing." ITC Prelim. Rep., *supra* note 20, at A-43. "[T]he record indicates that even if Budd had obtained equivalent financing, it would not have been awarded the contract." Rail Passenger Cars From Canada, 47 Fed. Reg. at 36,048 (Stern, Comm'r, dissenting) (footnote omitted).

33. The Export Development Corporation of Canada (EDC) is a Canadian Crown Corporation wholly owned by the government of Canada. Canadian Export Development Act, CAN. REV. STAT. ch. E-18 (1970) (amended 1981). The EDC was formed to facilitate and develop Canada's export trade within the framework of the Canadian Export Development Act by providing insurance, guarantees, loans, and other financial facilities. *Id.*

34. Railcars from Canada, 48 Fed. Reg. 6569, 6571 (U.S. Dep't of Com., Int'l Trade Admin. 1983) (final determination). On May 11, 1982, shortly before the MTA announced its decision to award the contract to Bombardier, EDC issued a "Management Letter" to the MTA indicating its willingness to consider providing export credit financing to the MTA of up to 85% of United States costs incurred by Bombardier, subject to satisfaction of EDC's Canadian content criteria, final approval of EDC's Board of Directors and the government of

that offered by Francorail and significantly more favorable than that offered by Budd.<sup>35</sup> The MTA estimated that it would save U.S.\$36 million in net present value and U.S.\$241 million in future payments by choosing Bombardier's bid instead of Budd's.<sup>36</sup> The MTA concluded that Bombardier's final offer was superior to the other bids based on all the criteria considered, with the possible exception of subway car price.<sup>37</sup> Consequently, the MTA awarded Bombardier a U.S.\$660 million contract to produce 825 subway cars.<sup>38</sup>

### B. Legal Actions Pursued by Budd

Budd strongly opposed the award of the contract to Bombardier, contending that the award was illegal and would cause harm to a United States industry.<sup>39</sup> Even before the contract was signed, Budd initiated legal actions in an effort to wrest the contract away from Bombardier.

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Canada, and receipt of satisfactory evidence that Francorail was supported by equivalent financing. The terms were as follows: financing up to 85% of the sale price of Canadian equipment and services up to U.S.\$646 million, at an interest rate of 9.7%, repayable in 17 equal consecutive semi-annual installments commencing on the earlier of six months following final delivery of the cars or an outside date to be determined by the EDC. The May 11 letter also contained provisions for fees and expenses to be borne by the MTA and several conditions. *Id.*

35. Summary of Negotiations, *supra* note 26, at 1-3. Budd offered financing for 17% of the contract price. This represented a portion of the value of trucks and propulsion equipment manufactured in Brazil and car shells manufactured in Portugal. *See id.* at 2. The interest rate for the Brazil financing was 8.5% with repayment over nine years. The interest rate for the Portugal financing was 10.25% with repayment over five and one-half years. *See id.* at 2. Francorail offered financing for 85% of the contract price at a rate and repayment terms comparable to the Bombardier proposal. *See id.* at 3. *See also*, ITC Final Rep., *supra* note 18, at A-21.

36. ITC Prelim. Rep., *supra* note 20, at A-9 to A-10.

37. *See id.* at A-22.

38. Railcars From Canada, 47 Fed. Reg. 31,415, 31,415 (U.S. Dep't of Com., Int'l Trade Admin. 1982) (initiation of investigation). The MTA and Bombardier executed a binding agreement for 825 passenger railcars on June 10, 1982. *Id.* The effective date of the actual "award" of the contract was contingent upon Bombardier's entry into a specified financing agreement with the MTA, ratification of the contract by the MTA's Board of Directors, and approval of the contract by the New York State Public Authorities Control Board. Commerce concluded that each of these conditions was ministerial in nature and that the contract became effective within seven days after the conditions were satisfied (if satisfaction occurred on or before July 23, 1982). *Id.* This was the largest single order for railcars in United States history. Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,048 (U.S. Int'l Trade Comm'n 1982) (preliminary determination) (Stern, Comm'r, dissenting).

39. *See* [Apr.-Sept.] U.S. IMPORT WEEKLY (BNA) No. 129, at 221-22 (May 26, 1982).

On May 18, 1982, the same day the MTA announced its decision to award the contract to Bombardier, Budd requested financing pursuant to section 1912 of the Export-Import Bank Act Amendments of 1978<sup>40</sup> to match the financing offered by the EDC for Bombardier's bid.<sup>41</sup> The Secretary of the Treasury may authorize such financing if the availability of foreign "noncompetitive" financing<sup>42</sup> is "likely to be a determining factor" in a sale.<sup>43</sup> On June 8, 1982, Budd filed a complaint in the United States District Court for the Southern District of New York to enjoin final approval of the MTA-Bombardier contract until the Secretary of the Treasury could decide whether to authorize matching financing for Budd from the Export-Import Bank of the United States (Eximbank).<sup>44</sup> Budd, Bombardier, and the MTA, the principal parties to the action, stipulated that the MTA could cancel its agreement with Bombardier and resume negotiations with Budd if the Eximbank offered financing that matched EDC's terms.<sup>45</sup> In return, Budd agreed to withdraw its complaint after the Treasury Department ruled on Budd's application for financing.<sup>46</sup> The Secretary of the Treasury concluded that the EDC financing was "noncompetitive" but that it was not "likely to be a determining factor" in the MTA's

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40. See ITC Prelim. Rep., *supra* note 20, at A-43 to A-44. Export-Import Bank Act Amendments of 1978, Pub. L. No. 95-630, tit. XIX, § 1912, 92 Stat. 3724, 3726 (codified at 12 U.S.C. § 635a-3 (1982)). The act provides in part:

The Secretary of the Treasury shall only issue such authorization to the Bank to provide guarantees, insurance and credits to competing United States sellers, if he determines that: (1) the availability of foreign official noncompetitive financing is likely to be a determining factor in the sale, and (2) the foreign noncompetitive financing has not been withdrawn on the date the Bank is authorized to provide competitive financing.

12 U.S.C. § 635a-3(b) (1982).

41. ITC Prelim. Rep., *supra* note 20, at A-55.

42. Financing is "noncompetitive" if it exceeds "limits under existing standards, minutes, or practices to which the United States and other major exporting countries have agreed." 12 U.S.C. § 635a-3 (1982).

43. *Id.*

44. Budd Co. v. Metropolitan Transp. Auth., No. 82 Civ. 3744 (S.D.N.Y. July 16, 1982) (order of dismissal). Budd filed the complaint on June 8, 1982. *Id.* Budd sought to enjoin the MTA's submission of the contract to the New York State Public Authorities Control Board, the final step needed for approval.

45. *Id.* See ITC Prelim. Rep., *supra* note 20, at A-45. The MTA must exercise the option to cancel within seven days of the MTA's receipt of a copy of the commitment. *Id.*

46. Budd Co. v. Metropolitan Transp. Auth., No. 82 Civ. 3744 (S.D.N.Y. July 16, 1982) (order of dismissal).

decision.<sup>47</sup> The Secretary, therefore, refused to authorize Eximbank financing for Budd.<sup>48</sup> Thereupon, Budd's suit was dismissed.<sup>49</sup>

While the lawsuit and its request for Eximbank financing were pending, Budd filed a countervailing duty petition<sup>50</sup> which several labor unions joined as "interested parties."<sup>51</sup> The petition alleged

47. See ITC Prelim. Rep., *supra* note 20, at A-43. The Secretary of the Treasury determined as follows:

I have determined that the EDC financing offered in support of Bombardier's proposal exceeds allowable international limits on export credits, and that the EDC has refused to withdraw its noncompetitive financing despite repeated requests by officials of the Treasury Department. However, based upon the Treasury Department's inquiry into this matter, I have concluded that Bombardier would be awarded the contract even if Budd were able to offer matching financing. Thus, I am compelled to conclude that the noncompetitive financing offered by EDC is not likely to be "a determining factor" in MTA's decision.

*Id.* (footnote omitted).

48. *Id.* at A-44. The Secretary of the Treasury determined as follows: "Under these circumstances, section 1912 does not permit me to authorize Eximbank financing for Budd." *Id.*

49. *Budd Co. v. Metropolitan Transp. Auth.*, No. 82 Civ. 3744 (S.D.N.Y. July 16, 1982) (order of dismissal).

50. *Railcars From Canada*, 47 Fed. Reg. 31,415 (U.S. Dep't of Com., Int'l Trade Admin. 1982) (initiation of investigation). Budd filed the petition with Commerce and the ITC on June 3, 1982. ITC Final Rep., *supra* note 18, at A-1. On June 10, 1982, Budd advised Commerce and the ITC that it intended to supplement its petition, and requested that Commerce not consider the petition completely filed until that time. *Id.* Budd filed its supplement on June 24, 1982, which instituted a preliminary countervailing duty investigation. *Id.* 19 U.S.C. § 1671a(b)(1) (1982) authorizes amendments to a countervailing duty petition "at such time, and upon such conditions, as the administering authority and the Commission may permit." *Id.* Budd did not file for any other form of import relief in connection with the MTA contract. ITC Final Rep., *supra* note 18, at A-4.

51. "Interested party" is defined at 19 U.S.C. § 1677(9) (1982). On July 14, 1982, the Industrial Union Department, AFL-CIO, the United Automobile and Aerospace Workers, and the United Steel Workers of America requested status as co-petitioners in the proceeding. *Railcars From Canada*, 47 Fed. Reg. 53,760, 53,761 (U.S. Dep't of Com., Int'l Trade Admin. 1982) (preliminary determination). These labor organizations claimed to represent workers in the United States subway car manufacturing industry and supplying industries. See *id.* Commerce determined that Budd and the labor organizations were "interested parties" within the meaning of 19 U.S.C. § 1677(9) (1982). See *Railcars From Canada*, 47 Fed. Reg. at 53,761.

On June 3, 1982, several unions filed a petition with the United States Trade Representative pursuant to section 301 of the Trade Act of 1974 (19 U.S.C. §§ 2411-2414 (1982)). Industrial Union Dep't, AFL-CIO, 47 Fed. Reg. 31,764 (U.S. Trade Rep. 1982) (initiation of investigation). The following labor organizations filed the petitions: Industrial Union Department, AFL-CIO, United Automobile and Aerospace Workers, International Association of Machinists and Aerospace Workers, and Districts 19 and 31, United Steelworkers of America. *Id.* at 31,765. The petition requested "[t]hat the President take steps to restrict the importation of the Canadian subway cars built with the assistance of the low-cost export financing." *Id.* On July 19, 1982, the United States Trade Representative decided to initiate

that the EDC's export credit financing and federal and provincial regional grants provided by the Canadian government constituted a countervailable subsidy under the Act.<sup>52</sup>

The United States International Trade Commission<sup>53</sup> (ITC) and the Department of Commerce<sup>54</sup> (Commerce) both ruled in favor of Budd.<sup>55</sup> The ITC preliminarily determined that a domestic industry was materially injured or threatened with material injury by reason of the allegedly subsidized import of subway car components.<sup>56</sup> Commerce determined that the export credit financing and federal and provincial regional grants constituted subsidies<sup>57</sup> and

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an investigation pursuant to 19 U.S.C. § 2412(2) (1982). 47 Fed. Reg. at 31,764. On September 23, 1982, the Office of the United States Trade Representative announced that it was terminating without prejudice the section 301 investigation after the ITC issued its affirmative preliminary countervailing duty determination in the same matter. Industrial Union Dep't, AFL-CIO, 47 Fed. Reg. 42,059 (U.S. Trade Rep. 1982). As a matter of policy, the United States Trade Representative terminates its investigation when the same matter is subject to investigation under some other provision of law. *Id.*

52. Railcars From Canada, 47 Fed. Reg. at 31,415.

53. The Act places in the United States International Trade Commission (ITC or Commission) the authority and responsibility to conduct "material injury" investigations in countervailing duty determinations pursuant to 19 U.S.C. § 1671(a)(2) (1982). The federal regulations governing ITC countervailing duty investigations are codified at 19 C.F.R. §§ 207.1-.46 (1983). The ITC investigates the administration and fiscal and industrial effects of the customs laws, among other duties. 19 U.S.C. § 1332(a) (1982). The statutory provisions relating to the ITC's powers and structure are codified at 19 U.S.C. §§ 1330-1332 (1982). Formerly known as the United States Tariff Commission, the ITC's name was changed in the Trade Act of 1974, Pub. L. No. 93-618, § 171, 88 Stat. 1978, 2009 (codified at 19 U.S.C. § 2231 (1982)).

54. The Act places the authority and responsibility for its administration, other than injury determinations, upon the "administering authority" which is defined as: "[T]he Secretary of the Treasury, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law." 19 U.S.C. § 1677(1) (1982). Pursuant to the President's Reorganization Plan No. 3 of 1979, 3 C.F.R. 513-17 (1980), *reprinted in* 5 U.S.C. app. at 1170-72 (1982), and Executive Order No. 12,188, 3 C.F.R. 131-35 (1981), authority to administer the countervailing duty law was transferred from the Secretary of the Treasury to the Secretary of Commerce effective January 2, 1980. The exercise of that authority is under the general supervision of the Under Secretary for International Trade, and the immediate supervision of the Assistant Secretary for Trade Administration who, through the Deputy Assistant Secretary for Import Administration, supervises the administering agency, the International Trade Administration. *See Countervailing Duties*, [Reference File] U.S. IMPORT WEEKLY (BNA) 40:0102 (1983).

55. Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042 (U.S. Int'l Trade Comm'n 1982) (preliminary determination); Railcars From Canada, 48 Fed. Reg. 6569 (U.S. Dep't of Com., Int'l Trade Admin. 1982) (final determination).

56. Rail Passenger Cars From Canada, 47 Fed. Reg. at 36,042.

57. Railcars From Canada, 48 Fed. Reg. at 6570. Commerce determined as follows:

Based upon our investigation, we have determined that certain benefits which

imposed a countervailing duty of U.S.\$91 million.<sup>58</sup> Before the ITC's final determination, Budd and the unions withdrew their petition and the ITC terminated the proceeding.<sup>59</sup> As a result, the MTA was not required to pay any countervailing duties.

## II. BACKGROUND ON THE ACT

Since 1897, countervailing duties have been imposed on imported merchandise that benefitted from foreign bounties or grants.<sup>60</sup> Until 1980, the United States countervailing duty law

constitute subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended, . . . are being provided to Bombardier, Inc. (Bombardier), a manufacturer and exporter in Canada of railcars. . . .

The following programs are found to confer subsidies.

- Export credit financing.
- Federal and provincial regional grants.

*Id.*

58. Railcars From Canada, 48 Fed. Reg. at 6570. Commerce determined the net subsidy to be U.S.\$110,565 per railcar produced by Bombardier for use by the MTA. *Id.* For calculation of the total subsidy, see *supra* note 12.

59. Rail Passenger Cars and Parts Thereof From Canada, 48 Fed. Reg. 6793, 6793-94 (U.S. Int'l Trade Comm'n 1983) (termination of countervailing duty investigation). Termination of a countervailing duty investigation on withdrawal of a petition is authorized by 19 U.S.C. § 1671c(a) (1982). Budd withdrew its countervailing duty petition because it felt it had established a precedent that would discourage improperly subsidized financing in the future. [Jan.-Mar.] U.S. IMPORT WEEKLY (BNA) No. 19, at 636-37 (Feb. 16, 1983). Budd maintained that it did not wish to subject New York or the MTA to the risk of countervailing duties. *Id.* at 637. Budd's hope that it would receive future contracts from the MTA significantly influenced its decision to withdraw its petition. *Id.* at 636-37.

60. For a comprehensive history of the United States countervailing duty law, see generally, S. METZGER, LOWERING NONTARIFF BARRIERS 101-04 (1974); Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT'L L. 82, 83-86, 96-97 (1968); Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 LAW & POL'Y INT'L BUS. 17, 19-26 (1969).

The idea of countervailing duties originated over 100 years before the first United States countervailing duty law was enacted. In 1776, economist Adam Smith condemned the artificial stimulation of exports. "The effect of bounties, like that of all the other expedients of the mercantile system, can only be to force the trade of a country into a channel much less advantageous than that in which it would naturally run of its own accord." A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 80 (J. Rogers ed. 1869). In 1791, Alexander Hamilton proposed that a special duty be imposed on certain subsidized commodity imports and that the resulting revenue be used in turn to fund a subsidy program for the domestic production of such commodities. A. HAMILTON, *Final Version of the Report on the Subject of Manufactures*, 10 THE PAPERS OF ALEXANDER HAMILTON 230, 300 (1966).

Congress enacted the world's first countervailing duty law in 1890 to offset export bounties on refined sugar. Tariff of 1890, ch. 1244, para. 237, 26 Stat. 567, 584. The Tariff

generally did not require a finding of injury to United States producers before a duty was imposed.<sup>61</sup>

The Trade Agreements Act of 1979<sup>62</sup> added a new countervailing duty provision to the Tariff Act of 1930. This provision applies only to exports from countries that are signatories to the Agreement

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of 1894 extended the countervailing duty provision to cover export bounties on raw as well as refined sugar. Tariff of 1894, ch. 349, para. 182½, 28 Stat. 509, 521.

Section 5 of the Tariff of 1897, ch. 11, § 5, 30 Stat. 151, 205, was the first general countervailing duty law in the United States and forms the basis of the current law. See Feller, *supra*, at 21. It imposed a countervailing duty on all dutiable merchandise for which a foreign government had paid or bestowed, directly or indirectly, a bounty or grant on exportation. Tariff of 1897, ch. 11, § 5, 30 Stat. 151, 205. The term "bounty or grant" was not defined in the statute but has been interpreted by the United States Supreme Court in *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978); *Nicholas & Co. v. United States*, 249 U.S. 34 (1919); and *Downs v. United States*, 187 U.S. 496 (1903). The law did not require proof of injury to a domestic industry before imposition of a duty. See Feller, *supra*, at 21-22. The Tariff of 1909, ch. 6, § 6, 36 Stat. 11, 85, and the Tariff of 1913, ch. 16, § IV(E), 38 Stat. 114, 193-94, reenacted the 1897 provision without substantial alteration.

In 1922, Congress broadened the scope of the countervailing duty law to cover bounties or grants bestowed upon the manufacture or production of goods as well as upon their exportation. Tariff Act of 1922, ch. 356, § 303, 42 Stat. 858, 935-36. It was also extended to cover subsidies granted by private sources. *Id.*

The Tariff Act of 1930 reenacted the 1922 countervailing duty provision without substantial change. Tariff Act of 1930, ch. 497, tit. III, § 303, 46 Stat. 590, 687.

The Trade Act of 1974 reenacted the 1930 countervailing duty provision with respect to dutiable merchandise. Trade Act of 1974, Pub. L. No. 93-618, sec. 331, § 303(a)(1), 88 Stat. 1978, 2049. The Trade Act of 1974 also authorized imposition of countervailing duties on nondutiable merchandise provided that, if required by the international obligations of the United States, the United States Tariff Commission first determined that a United States industry was injured or likely to be injured. *Id.* § 303(a)(2). The Trade Act of 1974 established time limits within which the Treasury Department was required to complete its determination. *Id.* § 303(a)(4). The Trade Act of 1974 also authorized the President, subject to Congressional approval, to negotiate tariff modifications and reductions in nontariff barriers, including countervailing duties. *Id.* § 102. These negotiations became known as the Tokyo Round of Multilateral Trade Negotiations. See *infra* note 62.

61. S. REP. NO. 249, 96th Cong., 1st Sess. 38, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381, 424 [hereinafter cited as S. REP. NO. 249]. Under prior law, duties were imposed merely upon a finding of the existence of an export subsidy. "No showing [of injury to a domestic industry] is required to impose countervailing duties under . . . [prior] U.S. law, unless the imported product is otherwise duty-free and international obligations of the United States require a showing of injury." *Id.* This injury requirement was added to United States law by the Trade Act of 1974. See *supra* note 60.

62. Pub. L. No. 96-39, §§ 701-707, 93 Stat. 144, 150-62 (codified at 19 U.S.C. §§ 1671-1671f (1982)).

[The Trade Agreements Act of 1979 was adopted to] make necessary and appropriate changes in United States law to implement the results of the Tokyo Round of Multilateral Trade Negotiations [Tokyo Round]. The Tokyo Round was the seventh round of trade negotiations held under the auspices of the General Agreement on

on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade<sup>63</sup> (GATT Agreement) or have accepted equivalent obligations.<sup>64</sup>

The new countervailing duty provision establishes a bifurcated procedure by which Commerce and the ITC share responsibility for determining whether to impose a countervailing duty on allegedly subsidized imported goods.<sup>65</sup> In accordance with prior law, Commerce determines whether a countervailable subsidy has been provided by a foreign government.<sup>66</sup> As a result of a significant and controversial change enacted in 1979,<sup>67</sup> before a countervailing

Tariffs and Trade [*opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]] since 1948. The first five rounds [of multilateral trade negotiations] were concerned solely with tariff reductions. As average tariff rates in industrial countries became progressively lower, the effects on trade of national laws and policies other than tariffs, "non-tariff barriers" (NTB's), became more apparent. At the same time, direct and indirect government intervention in economic matters became more pervasive and, therefore, the number of NTB's increased

. . . The principle object of the Tokyo Round was the elimination, reduction, or "harmonization", *i.e.*, uniformity, of certain NTB's . . .

S. REP. No. 249, *supra* note 61, at 1-2. For general background on GATT, see 1 W. SURREY & D. WALLACE, JR., A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 37-84 (1977). See also GATT Agreements, *supra* note 2. For background on the Tokyo Round, see generally NON-TARIFF BARRIERS AFTER THE TOKYO ROUND (J. Quinn & P. Slayton ed. 1982); A. Wolff, *The U.S. Mandate for Trade Negotiations*, 16 VA. J. INT'L L. 505-64 (1976).

63. GATT Agreement, *supra* note 2.

64. 19 U.S.C. § 1671(b) (1982).

65. *Id.* § 1671 (1982).

66. *Id.* § 1671(a)(1). Before January 2, 1980, the authority and responsibility for subsidy determinations were vested in the United States Treasury Department. See *supra* note 54.

67. S. REP. No. 249, *supra* note 61, at 38. "The most conspicuous change in current law required by the [GATT Agreement] and adopted by this title is the introduction of a material injury test before any countervailing duty may be imposed on products of countries which assume the obligations of the agreement relating to subsidies and countervailing measures." *Id.*

"Material injury" has been controversial and unclear since the Tokyo Round, as illustrated by the following story told by Richard Rivers, former General Counsel, Office of Special Representative for Trade Negotiations: During the implementation of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, former Secretary of State Cyrus Vance asked a Department of State staff member, "[W]hat's all this about material injury?" The staff member replied, "Well, Mr. Secretary, it's like 'consubstantiation' and 'transsubstantiation.' You can't really explain it, but people have fought wars over it." Introductory Remarks by R. Rivers, former General Counsel, Office of Special Representative for Trade Negotiations, at the Seventh Annual Judicial Conference of the United States Court of Customs and Patent Appeals (Apr. 11, 1980), *reprinted in* 88 F.R.D. 369, 476-77 (1980).

For discussion of the controversy regarding the material injury standard, see Note, *Implementing "Tokyo Round" Commitments: the New Injury Standard in Antidumping and Countervailing Duty Laws*, 32 STAN. L. REV. 1183 (1980).



duty can be imposed, the ITC must now determine that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of the subsidized imports.<sup>68</sup> The "material injury" requirement makes it more difficult for United States industries and unions to obtain relief under the countervailing duty laws; other provisions of the Act, however, strengthen the relief available to domestic producers.<sup>69</sup>

### III. PROCEDURE IN A COUNTERVAILING DUTY PROCEEDING

A countervailing duty proceeding<sup>70</sup> ordinarily begins when an "interested party"<sup>71</sup> files a satisfactory petition with Commerce and the ITC on behalf of an "industry."<sup>72</sup> If Commerce finds that the

68. 19 U.S.C. § 1671(a)(2) (1982). The ITC must determine that: "(A) an industry in the United States—(i) is materially injured, or (ii) is threatened with material injury, or (B) the establishment of an industry in the United States is materially retarded, by reason of imports [of merchandise subject to an investigation]." *Id.*

69. See Note, *supra* note 67, at 1183-84. For the provisions which strengthen relief available, see 19 U.S.C. §§ 1671a(c), 1671b(a), 1671b(b), 1671d (shortening time period within which determinations must be made); 1516, 1516a (providing judicial review) (1982).

70. The procedure for conducting a countervailing duty investigation is governed by 19 U.S.C. §§ 1671-1671f (1982). The statutory provisions roughly follow the chronology of a countervailing duty investigation. The regulations can be found at 19 C.F.R. §§ 207.1-.46, 355.0-.44 (1983). See generally S. REP. NO. 249, *supra* note 61, at 45-59; Office of Indus., Summary of Statutory Provisions Related to Import Relief, *reprinted in* Ninth Annual Judicial Conference of the United States Court of Customs and Patent Appeals, 94 F.R.D. 350, 503-06 (1982) [hereinafter cited as Summary of Statutory Provisions]; Cosgrove, *Technical Analysis of the Subsidies and Countervailing Measures Agreement*, 11 LAW & POL'Y INT'L BUS. 1497 (1979).

For information on how to file a countervailing duty petition, see generally *Countervailing Duties*, [Reference File] U.S. IMPORT WEEKLY (BNA) 40:0106-0115 (1983); DEKIEFFER, *When, Why, and How to Bring a Countervailing Duty Proceeding: A Complainant's Perspective*, 6 N.C.J. INT'L L. & COM. REG. 363 (1980-81). For information from the defense perspective, see generally Hemmendinger & Barringer, *The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 427 (1980-81).

71. For the definition of "interested party," see 19 U.S.C. § 1677(9) (1982).

72. 19 U.S.C. § 1671a (1982).

Countervailing duty investigations can be initiated by the Department of Commerce or by petition. Within 20 days after a petition is filed, Commerce determines whether the petition alleges the elements necessary for relief (material injury to a domestic industry by reason of subsidized imports) and includes information reasonably available to the petitioner supporting the allegations. If the determi-

petition alleges the elements necessary for imposition of a duty,<sup>73</sup> the ITC conducts its "material injury" investigation while Commerce investigates whether a "subsidy" has been provided.<sup>74</sup> If both reach affirmative determinations, Commerce must calculate the amount of the net subsidy and assess an equivalent duty.<sup>75</sup>

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nation is affirmative, Commerce begins an investigation to determine whether subsidization exists. If the determination is negative, the proceedings end.

Summary of Statutory Provisions, *supra* note 70, at 505. See also S. REP. NO. 249, *supra* note 61, at 45-47 (providing similar support).

A countervailing duty investigation shall be commenced whenever the administering authority determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 1671(a) of this title exist . . . [or] whenever an interested party . . . files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 1671(a) of this title . . . .

19 U.S.C. § 1671a(a), (b)(1) (1982).

If the investigation is initiated by petition, the petition must be filed on the same day with Commerce and the ITC. 19 U.S.C. § 1671a(b)(1), (2) (1982).

73. 19 U.S.C. § 1671a(b)(1) (1982).

74. 19 U.S.C. §§ 1671b, 1671d (1982). Both Commerce and the ITC must conduct their investigations and issue preliminary and final determinations within time periods specified by statute. The time periods are:

Within 45 days after a petition is filed or an investigation is initiated by Commerce, the Commission determines whether there is a reasonable indication that injury to a domestic industry exists by reason of subsidized imports. If the determination is negative, the proceedings end.

If the Commission's determination is affirmative, within 85 days after a petition is filed or an investigation is initiated, Commerce makes a preliminary determination, based on the best evidence available at the time, of whether there is a reasonable basis to believe or suspect that a subsidy exists. In extraordinarily complicated cases, this determination is made within 150 days.

If the preliminary determination is affirmative, Commerce (a) requires bonds or cash deposits to be posted for allegedly subsidized imports in an amount equal to the estimated net subsidy, and (b) continues its investigation. The Commission initiates an investigation to determine whether injury exists. If Commerce's preliminary determination is negative, the investigation simply continues.

Within 75 days after its preliminary determination, Commerce makes a final determination of whether a subsidy exists. If this determination is negative, the proceedings end.

If Commerce's final determination is affirmative (following an affirmative preliminary determination), the Commission makes a final determination of whether a domestic industry is being materially injured by reason of subsidized imports before the later of (1) the 120th day after Commerce makes its affirmative preliminary determination, or (2) the 45th day after Commerce makes its affirmative final determination. In a case where Commerce's preliminary determination is negative, the Commission's final determination on material injury is made within 75 days after Commerce's affirmative final determination on subsidy.

Summary of Statutory Provisions, *supra* note 70, at 505.

75. 19 U.S.C. § 1671e (1982). "If the final determination of the Commission is affirmative, a countervailing duty order requiring imposition of countervailing duties is issued within

### A. ITC "Material Injury" Determination

In its preliminary investigation, the ITC determines whether there are reasonable indications that an industry in the United States "is materially injured, or . . . is threatened with material injury, or . . . the establishment of an industry in the United States is materially retarded, by reason of" the allegedly subsidized imports.<sup>76</sup> To determine whether "material injury" has occurred, the ITC must conduct a three step investigation: (1) apply the statutory definition of "industry" to determine the scope of the industry at issue; (2) decide whether there was a material injury or threat of material injury to the defined industry or whether the establishment of an industry was materially retarded; and (3) determine whether any such material injury was in fact caused by the subsidized imports.<sup>77</sup>

#### 1. What is the Scope of the "Industry?"

To begin an investigation, the ITC delineates the scope of the industry in the United States that may be adversely affected by the allegedly subsidized imports.<sup>78</sup> Section 771(4)(A) of the Act defines "industry" as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."<sup>79</sup>

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7 days of notification of the Commission's determination." Summary of Statutory Provisions, *supra* note 70, at 505.

76. 19 U.S.C. § 1671b(a) (1982).

According to S. REP. NO. 249, *supra* note 70, the "reasonable indication" standard should be applied in the "same manner as the 'reasonable indication' standard under section 201(c)(2) of the Antidumping Act, 1921 . . . The burden of proof . . . would be on the petitioner." *Id.* at 49.

77. Note, *supra* note 67, at 1187; The three part procedure for determining material injury was also described in *Rail Passenger Cars From Canada*, 47 Fed. Reg. 36,042, 36,046 (U.S. Int'l Trade Comm'n 1982) (preliminary determination) (Stern, Comm'r, dissenting).

78. See Note, *supra* note 67, at 1198-1200.

79. 19 U.S.C. § 1677(4)(A) (1982). The Act allows the exclusion of domestic producers from the "industry" when the producers are "related" to exporters or importers of the subsidized product under investigation or are themselves importers of the subsidized product. *Id.* § 1677(4)(B). The Act also permits a determination of material injury based upon material injury to regional industries in situations where there is no material injury to the domestic producers as a whole. *Id.* § 1677(4)(C). In situations in which data on the "like product" cannot be separated from the broader industry's production or profit information, the Act directs the ITC to frame the industry in terms of the narrowest possible group or range of products which include the like product. *Id.* § 1677(4)(D). See generally S. REP. NO.

"Like product" is the key concept in identifying the domestic producers that comprise the industry in a given investigation.<sup>80</sup> Section 771(10) defines "like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle."<sup>81</sup>

In order to determine whether a domestic industry is materially injured, therefore, the Act directs the ITC to identify the imported products and then identify domestic producers of products like the imported goods.<sup>82</sup> The United States manufacturing facilities of producers of "like products" constitute the domestic industry against which the impact of allegedly subsidized imports is assessed.<sup>83</sup>

In *Railcars*, as a threshold matter, the ITC was required to determine whether the imported products consisted of finished subway cars, subway components or prime contractor services.<sup>84</sup> Bombardier planned to manufacture the subway car shells itself in Canada and subcontract the manufacture of the other components to United States and foreign manufacturers.<sup>85</sup> Thus, Bombardier bid on the MTA contract both as a producer of car shells and as a prime contractor of finished subway cars.<sup>86</sup> At the time of the ITC preliminary determination, Bombardier had not yet awarded the subcontracts.<sup>87</sup> Consequently, the ITC could not ascertain which components other than car shells would be imported.<sup>88</sup> Bombardier planned to assemble the finished cars at its plant in the United States from the foreign and domestically produced components.<sup>89</sup>

249, *supra* note 61, at 82-84. For discussion of definition of industry by product lines and regional industries, see generally Note, *supra* note 67, at 1198-1200. "What constitutes a major proportion of total domestic production will vary from case to case depending on the facts, and no standard minimum proportion is required in each case." S. REP. No. 249, *supra* note 61, at 83.

80. Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,046 (U.S. Int'l Trade Comm'n 1982) (preliminary determination) (Stern, Comm'r, dissenting).

81. 19 U.S.C. §1677(10) (1982). See generally S. REP. No. 249, *supra* note 61, at 90-91.

82. Rail Passenger Cars From Canada, 47 Fed. Reg. at 36,046 (Stern, Comm'r, dissenting).

83. *Id.*

84. Certain Rail Passenger Cars and Parts Thereof Imported From Canada, 47 Fed. Reg. 31,449, 31,449 (U.S. Int'l Trade Comm'n 1982) (notice of change in scope of investigation).

85. Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,043 (U.S. Int'l Trade Comm'n 1982) (preliminary determination).

86. See *id.*; ITC Prelim. Rep., *supra* note 20, at A-7.

87. See ITC Prelim. Rep., *supra* note 20, at A-7.

88. Rail Passenger Cars From Canada, 47 Fed. Reg. at 36,043.

89. See *id.*

Accordingly, no finished subway cars would be imported under the MTA contract.<sup>90</sup> Thus, the ITC preliminarily determined that the domestically produced “like products” consisted of subway car shells and other components used in producing subway cars and that the domestic producers of these articles constituted the relevant domestic “industry.”<sup>91</sup>

Budd, if it had won the MTA contract, did not plan to produce any subway car components itself but rather intended to subcontract the manufacture of all the components.<sup>92</sup> Budd would have provided design, engineering, technological, testing and warranty services.<sup>93</sup> Thus, the ITC concluded that Budd had bid as a prime contractor and that the loss of the MTA contract initially affected Budd as a prime contractor, not as a producer.<sup>94</sup> Because the services of a prime contractor are not “products,” the ITC found that Budd, in its role as a prime contractor, “may not constitute an ‘industry’ in the United States.”<sup>95</sup>

Although Budd produces subway car shells in the United States,<sup>96</sup> it planned to subcontract production of the shells to a manufacturer in Portugal if it had won the MTA contract.<sup>97</sup> Nevertheless, the ITC found that the products of Budd met “the ‘like’ product test” and that Budd was therefore part of an “industry” within the meaning of the Act.<sup>98</sup>

## 2. Was an Industry “Materially Injured?”

The second step in the ITC investigation is to determine whether the allegedly subsidized imports have materially injured or threaten to materially injure the identified industry.<sup>99</sup> Section 771(7)(A) defines “material injury” as “harm which is not inconsequential, immaterial or unimportant.”<sup>100</sup> The Act requires the ITC

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90. *See id.*; *see also id.* at 36,045 (Stern, Comm’r dissenting).

91. *Id.* at 36,043.

92. ITC Prelim. Rep., *supra* note 20, at A-5, A-7.

93. Rail Passenger Cars from Canada, 47 Fed. Reg. at 36,048 (Stern, Comm’r, dissenting).

94. *Id.* at 36,043. *See also id.* at 36,048 (Stern, Comm’r, dissenting).

95. *Id.* at 36,043.

96. ITC Prelim. Rep., *supra* note 20, at A-5.

97. Rail Passenger Cars From Canada, 47 Fed. Reg. at 36,043 n.14, 36,047-48 (Stern, Comm’r, dissenting).

98. *Id.* at 36,043.

99. 19 U.S.C. §§ 1671(a)(2), 1671b(a), 1671d(b) (1982).

100. *Id.* § 1677(7)(A) (1982). *See generally* S. REP. NO. 249, *supra* note 61, at 86-89. There is a split of opinion regarding the degree of injury that must be shown to satisfy the

in making its determination to consider, among other factors, the volume of subsidized imports, the effect of subsidized imports on the prices in the United States of like products, and the impact of subsidized imports on domestic producers of like products.<sup>101</sup> Neither the presence nor absence of any one factor is decisive.<sup>102</sup>

The issue for the ITC in *Railcars* was whether the alleged subsidy would materially injure Budd and United States producers of subway components.<sup>103</sup> Bombardier planned to import the subway shells for the MTA contract from Canada.<sup>104</sup> If Budd had won the contract, it would also have imported the car shells.<sup>105</sup> Nevertheless, the ITC found that Budd, as a domestic producer of car shells, would be materially injured by reason of the allegedly subsidized import of car shells from Canada.<sup>106</sup>

The ITC found that the availability of subsidized financing was an important factor in the MTA's decision to award the contract to Bombardier.<sup>107</sup> The availability of subsidized financing to Bombardier and Francorail prompted Budd to seek foreign financing in order to remain competitive.<sup>108</sup> Portugal and Brazil agreed to provide financing at favorable terms if Budd would subcontract production of the car shells and other components to manufacturers in those countries.<sup>109</sup> The ITC found that Budd's decision to subcontract components abroad would result in diminished employment and diminished use of Budd's production facilities in the United States.<sup>110</sup> The ITC thus determined that the adverse consequences of Budd's decision to produce components abroad was a cognizable

statutory requirement of material injury. Some say the standard is the same "more than *de minimis*" standard applied in the pre-1979 antidumping laws that required a showing of injury. Others believe that the Act calls for a greater degree of harm than the previous standard. Seventh Annual Judicial Conference of the United States Court of Customs and Patent Appeals, 88 F.R.D. 369, 475 (1979).

101. 19 U.S.C. § 1677(7)(B), (C) (1982).

102. *Id.* § 1677(7)(E)(ii).

103. Certain Rail Passenger Cars and Part Thereof Imported From Canada, 47 Fed. Reg. 31,449 (U.S. Int'l Trade Comm'n 1982) (notice in change in scope of investigation).

104. See ITC Prelim. Rep., *supra* note 18, at A-7.

105. Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,043 n.14 (U.S. Int'l Trade Comm'n 1982) (preliminary determination).

106. *Id.* at 36,043.

107. See *id.* at 36,043-44.

108. See *id.* at 36,044.

109. See ITC Prelim. Rep., *supra* note 20, at A-10.

110. Rail Passenger Cars From Canada, 47 Fed. Reg. at 36,044.

injury under the Act.<sup>111</sup> The ITC found a reasonable indication that Budd and other component producers were materially injured or threatened with material injury by reason of the allegedly subsidized imports.<sup>112</sup>

### 3. Was an Industry Injured "By Reason Of" Subsidized Imports?

The Act requires imposition of a countervailing duty only if an industry in the United States is materially injured "by reason of" the subsidized imports.<sup>113</sup> Thus, the ITC's third step is to determine whether the subsidized import is an identifiable cause of the injury.<sup>114</sup> The Act retained the standard set forth by the United States Customs Court in *Pasco Terminals, Inc. v. United States* that the unfair foreign competition need not be "the sole cause, the major cause, or greater than any other single cause of injury."<sup>115</sup> The ITC need not weigh the effects of the subsidized imports against the effects of other factors that may be injuring the industry.<sup>116</sup> However, it is necessary to examine other possible causes of material injury to determine whether *any* injury was in fact caused by the subsidized imports.<sup>117</sup> If *all* of the material injury was caused by factors other than the subsidized imports, the ITC must make a negative determination.<sup>118</sup>

In *Railcars*, the ITC preliminarily determined that "both Budd and the manufacturers of components 'like' the articles to be imported [were] materially injured or [were] threatened with material injury *by reason of* the allegedly subsidized imports."<sup>119</sup>

In summary, the ITC reached an affirmative preliminary determination, finding that the "industry" consisted of subway com-

111. *Id.*

112. *Id.* at 36,042, 36,044.

113. 19 U.S.C. §§ 1671(a)(2), 1671b(a), 1671d(b) (1982). See also S. REP. NO. 249, *supra* note 61, at 57.

114. Note, *Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076, 1103 (1981). See S. REP. NO. 249, *supra* note 61, at 58.

115. 477 F. Supp. 201, 220 (Cust. Ct. 1979), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980).

116. See S. REP. NO. 249, *supra* note 61, at 57; H. REP. NO. 317, 96th Cong., 1st Sess. 47 (1979).

117. See *id.* at 58.

118. Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,048 (U.S. Int'l Trade Comm'n 1982) (preliminary determination) (Stern, Comm'r, dissenting) (citing Certain Commuter Airplanes From France and Italy, 47 Fed. Reg. 31,632 (U.S. Int'l Trade Comm'n 1982)).

119. *Id.* at 36,044 (emphasis added).

nent producers,<sup>120</sup> that component producers in the industry, including Budd, were "materially injured" or threatened with material injury,<sup>121</sup> and that the injury occurred "by reason of" the allegedly subsidized imports.<sup>122</sup>

### B. Commerce "Subsidy" Determination

If the ITC preliminarily determines that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury,<sup>123</sup> Commerce must determine whether a subsidy is provided, directly or indirectly, with respect to the "manufacture, production or exportation of a class or kind of merchandise imported into the United States."<sup>124</sup> If Commerce determines that a subsidy has been provided, it must estimate the amount of the net subsidy<sup>125</sup> and impose an equivalent duty on the imported merchandise.<sup>126</sup>

In *Railcars*, the issue for Commerce was whether the export credit financing and federal and provincial regional grants constituted "subsidies" within the meaning of the countervailing duty law.<sup>127</sup>

#### 1. Was a "Subsidy" Provided?

##### a. Does Export Credit Financing at Preferential Rates Constitute a Subsidy?

Section 771(5) defines "subsidy" as having the same meaning as the term "bounty or grant" under section 1303 of the Tariff Act of

120. *See id.* at 36,043.

121. *Id.* at 36,044.

122. *See id.* The ITC never made a final determination in *Railcars* because the proceeding was terminated. *Rail Passenger Cars and Parts Thereof From Canada*, 48 Fed. Reg. 6793, 6794 (U.S. Int'l Trade Comm'n 1983) (termination of investigation).

123. 19 U.S.C. § 1671b(a) (1982).

124. *Id.* § 1671b(b) (1982). Commerce must make its preliminary determination within 85 days after a petition is filed or Commerce commences an investigation under section 1671a(b). *Id.* However, Commerce makes its preliminary determination only if ITC has made an affirmative preliminary determination. *Id.* Commerce must also make a final countervailing duty determination before a countervailing duty can be imposed. *Id.* § 1671d (1982).

125. *Id.* § 1671e (1982).

126. *Id.*

127. *Railcars From Canada*, 47 Fed. Reg. 31,415 (U.S. Dep't of Com., Int'l Trade Admin. 1982) (initiation of countervailing duty investigation). For a description of the alleged subsidies, see *Railcars From Canada*, 48 Fed. Reg. 6569 (U.S. Dep't of Com., Int'l Trade Admin. 1982).



1930.<sup>128</sup> Therefore, every trade practice that has been considered a "bounty or grant" under section 1303 remains a subsidy under the Act.<sup>129</sup> Export credit financing at a rate below that commercially available to the recipient has been judicially determined to be a "bounty or grant" under section 1303 and therefore qualifies as a subsidy under the Act.<sup>130</sup>

The Act's definition of "subsidy" also includes any export subsidy described in the "Illustrative List of Export Subsidies" in Annex A to the GATT Agreement.<sup>131</sup> Export credit financing granted by a government at a rate below that which the government actually has to pay for the funds constitutes an export subsidy under item (k) of Annex A.<sup>132</sup> Item (k) exempts from consideration as a subsidy export

128. 19 U.S.C. § 1677(5) (1982). The term "bounty or grant" has been construed in three United States Supreme Court decisions. See *supra* note 60. See also *American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973).

129. See S. REP. No. 249, *supra* note 61, at 84. The following general classes of bounties and grants have been the subject of countervailing duty orders:

- (1) direct payments made to producers on their export sales
- (2) preferential income tax treatment through special tax rates, preferential depreciation allowances or deductibility of expenses
- (3) excessive rebates of indirect taxes
- (4) rebates of secondary indirect taxes on goods or services not directly related to production of the exported goods, such as overhead expenses
- (5) preferential interest rates on borrowings connected with exports
- (6) price support programs involving sales to exporters at prices below domestic market prices
- (7) subsidization of particular costs such as furnishing of transportation or promotion assistance below cost.

B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 399 (1978 & Supp. 1983) (footnotes omitted). For a discussion of eight categories of trade practices which have incurred countervailing duties, see Feller, *supra* note 60, at 38-50.

130. See S. REP. No. 249, *supra* note 61, at 84.

131. 19 U.S.C. § 1677(5)(A) (1982). The specific examples of export subsidies in Annex A are not intended to be exhaustive, but rather illustrate which trade practices are definitely subsidies. S. REP. No. 249, *supra* note 61, at 84.

GATT Agreement, *supra* note 2, at Annex. The Illustrative List of Export Subsidies annexed to the GATT Agreement sets out various trade practices which are considered export subsidies. See *id.*

132. GATT Agreement, *supra* note 2, at Annex. Item (k) provides as follows:

- (k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial

credit financing which conforms to the interest rate provisions of the Organization for Economic Cooperation and Development's Arrangement on Guidelines for Officially Supported Export Credits (OECD Arrangement).<sup>133</sup>

In *Railcars*, the EDC agreed to finance 85% of the MTA-Bombardier contract price up to U.S.\$750 million at an interest rate of 9.7% per annum.<sup>134</sup> In exchange, the MTA agreed to provide the EDC with MTA bonds.<sup>135</sup> The MTA also agreed to pay the EDC a loan commitment fee and other administrative costs.<sup>136</sup> Commerce determined that the EDC export credit financing constituted a subsidy within the meaning of the countervailing duty law<sup>137</sup> because the EDC rate was below the commercial benchmark for a comparable financing arrangement.<sup>138</sup> The interest rates and

institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rate provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

*Id.* (footnote omitted).

133. *See id.* The Organization for Economic Cooperation and Development's Arrangement on Guidelines for Officially Supported Export Credits (OECD Arrangement) minimum interest rate provisions in effect in 1982 were as follows:

Classification of Country		Number of years in Maximum Repayment Terms		
		2-5	Over 5-8.5	Over 8.5
I	Relatively Rich	11.0%	11.25%	N/A
II	Intermediate	10.5%	11.0%	N/A
III	Relatively poor	10.0%	10.0%	10.0%

OECD Arrangement, *supra* note 19, at 2. The OECD Arrangement is applicable among its Participants, in the form of guidelines, to officially supported export credits with a repayment term of two years or more. *Id.* at 1. The Participants are the ten countries of the European Economic Community, Australia, Austria, Canada, Finland, Japan, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United States. *Id.*

134. *Railcars From Canada*, 48 Fed. Reg. 6569, 6571 (U.S. Dep't of Com., Int'l Trade Admin. 1983) (final determination).

135. *Id.*

136. *Id.*

137. *Id.* at 6570, 6572.

138. *Id.*

repayment terms offered by the EDC were also below the minimum interest rate provisions permitted by the OECD Arrangement.<sup>139</sup>

b. Do Federal and Provincial Regional Grants  
Constitute Subsidies?

In *Michelin Tire Corp. v. United States*, the United States Court of International Trade affirmed a determination that governmental regional development programs can constitute countervailable bounties.<sup>140</sup>

In *Railcars*, Commerce found that Bombardier's Mass Transit Division had received grants from the Canadian Department of Regional Economic Expansion (DREE)<sup>141</sup> which provides grants to industries to encourage growth in various Canadian regions.<sup>142</sup> In addition, Bombardier's Mass Transit Division had received provincial grants from the Quebec Industrial Development Corporation to purchase equipment used to produce the railcars for the MTA contract.<sup>143</sup> Commerce determined that a portion of the DREE grants and the provincial grants from the Quebec Industrial Development Corporation constituted subsidies within the meaning of the countervailing duty law.<sup>144</sup>

2. Calculation of the Subsidy

Section 706(2)(1) requires Commerce to assess a countervailing duty "equal to the amount of the net subsidy" if both Commerce and the ITC issue final affirmative determinations.<sup>145</sup> Section 771(6) specifies what Commerce may subtract from the gross subsidy to calculate the "net subsidy."<sup>146</sup>

The Statements of Administrative Action provide that "[t]he value of a subsidy in the form of [a] low interest rate loan would be

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139. See ITC Prelim. Rep., *supra* note 20, at A-46. For a listing of the OECD Arrangement minimum interest rate provisions, see *supra* note 133.

140. 2 Ct. Int'l Trade 143, 169 (1981).

141. *Railcars From Canada*, 48 Fed. Reg. 6569, 6573 (U.S. Dep't of Com., Int'l Trade Admin. 1983) (final determination).

142. *Id.*

143. *Id.*

144. *Id.* But see notes 157-58 and accompanying text (DREE grant should not have been countervailed).

145. 19 U.S.C. § 1671e(a)(1) (1982).

146. *Id.* § 1677(6) (1982).

the difference between the interest rate of the loan and the interest rate which the particular enterprise receiving it would otherwise be reasonably expected to pay."<sup>147</sup>

The proper method for calculating a bounty or grant in the form of a low interest rate loan was discussed by the United States Court of International Trade in *Michelin Tire Corp. v. United States*.<sup>148</sup> The court found that the proper way to calculate the bounty or grant was to look at the "benefit experienced by the recipient" rather than the sacrifice made by the party supplying a financial resource.<sup>149</sup> The court also found that the proper date from which to measure the benefit to the recipient was when the recipient "became certain to receive the rate under scrutiny, not when he actually receive[d] the amount."<sup>150</sup>

In *Railcars*, Commerce calculated the subsidy conferred by EDC by comparing EDC's interest rate with the commercial market rates Bombardier would have paid on June 10, 1982, to offer the MTA comparable financing.<sup>151</sup> Commerce's calculation depended on two key determinations: that June 10, 1982, was the relevant date from which to calculate the benefits,<sup>152</sup> and that the interest rate which Bombardier, rather than the MTA, would have paid was the relevant benchmark rate.<sup>153</sup> Commerce found that the export credit financing included five different elements of economic benefit to Bombardier,<sup>154</sup> and determined that the net subsidy conferred upon Bombardier by the EDC financing equalled U.S.\$90.882 million, or U.S.\$110,160 per subway car.<sup>155</sup>

Commerce determined that the net subsidy conferred upon Bombardier by the federal and provincial regional grants equalled

147. STATEMENTS, *supra* note 7, at 433. The Statements summarize the changes in United States trade law made by the Trade Agreements Act of 1979 and describe the manner in which the law is to be administered. *Id.* at 389.

148. 2 Ct. Int'l Trade 143, 150-55 (1981).

149. *Id.* at 151.

150. *Id.* at 153.

151. *Railcars From Canada*, 48 Fed. Reg. 6569, 6572 (U.S. Dep't of Com., Int'l Trade Admin. 1983) (final determination).

152. *Id.*

153. *See id.*

154. *Id.* at 6571-73. The five elements of possible value bestowed by the EDC financing and of economic benefit to Bombardier were as follows: intrinsic value of the MTA's opportunity to finance at 9.7%, option value in the MTA's right to use or not use the EDC financing, commitment fee, interest charges Bombardier would have incurred to obtain comparable financing, and exchange rate exposure. *Id.*

155. *Id.* at 6572.

U.S.\$405 per railcar.<sup>156</sup> However, several months later, while considering an unrelated investigation which involved the same Canadian provincial grant program, Commerce found that the provincial grant provided in *Railcars* should not have been countervailed.<sup>157</sup> Commerce corrected its calculation of the subsidy in *Railcars* by deducting the U.S.\$173 per subway car attributed to the provincial grant.<sup>158</sup> Commerce then calculated that the total net subsidy in *Railcars* should have been U.S.\$110,392 per subway car, instead of U.S. \$110,565.<sup>159</sup>

#### IV. ANALYSIS OF HOW THE COUNTERVAILING DUTY LAW WAS APPLIED IN RAILCARS

##### A. Was the Scope of the "Industry" too Broadly Defined in Railcars?

In *Railcars*, the ITC preliminarily determined that the imported merchandise consisted of shells and other components of subway cars.<sup>160</sup> A subway car consists of seven major component systems that comprise a significant portion of the total cost of manufacture,<sup>161</sup> plus thousands of other components, none of which alone accounts for more than one percent of the total cost.<sup>162</sup> Since the component parts are not "like" one another,<sup>163</sup> come from separate sources,<sup>164</sup> and are manufactured by different domestic producers,<sup>165</sup> the producers of each major component part consti-

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156. *Id.* at 6573.

157. Certain Softwood Products From Canada, 48 Fed. Reg. 24,159, 24,173 (U.S. Dep't of Com., Int'l Trade Admin. 1983) (final negative countervailing duty determination).

158. *Id.* at 24,173-74.

159. *Id.*; *Railcars* From Canada, 48 Fed. Reg. at 6569.

160. Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,043 (U.S. Int'l Trade Comm'n 1982) (preliminary determination).

161. See ITC Prelim. Rep., *supra* note 20, at A-3. The seven major subway car subassemblies are the following: (1) the shell, which generally includes a floor, sides, top, ends, an underframe, and some wiring; the components of the truck, which include (2) the wheels and axles and (3) the truck frame and suspension (castings and bolsters); (4) the coupler assembly, including both mechanical and electrical coupler and draft gear; (5) brakes; (6) the propulsion system, including traction motors, gearing for motors, controls, and auxiliary electricals; and (7) the air conditioning system. These components are always manufactured in accordance with the specifications of the transit system purchaser. See Rail Passenger Cars From Canada, 47 Fed. Reg. at 36,047 (Stern, Comm'r, dissenting).

162. See Rail Passenger Cars From Canada, 47 Fed. Reg. at 36,047 (Stern, Comm'r, dissenting).

163. See ITC Prelim. Rep., *supra* note 20, at A-3.

164. See *id.* at A-7.

165. See *id.* at A-18 to A-20.

tute a separate "industry."<sup>166</sup> In *Railcars*, the ITC's definition of the "industry" as all producers of subway components<sup>167</sup> was too broad because the import of one component does not injure the domestic producers of a different component.<sup>168</sup>

Once the ITC had identified the imported products as subway car shells and components, it should have gone a step further and analyzed specifically which of the components would be imported and which would be domestically produced. This was crucial to the ITC's injury determination because under the Act, components manufactured in the United States cannot cause injury to other United States component producers.<sup>169</sup>

Of the seven major components which comprise a subway car, Bombardier planned to import only the shell from Canada.<sup>170</sup> All of the other major components will be manufactured in the United States.<sup>171</sup> The components to be produced in the United States are obviously not imported and, therefore, no domestic producers of those components could be injured "by reason of" subsidized imports as is required for imposition of a duty under the Act.<sup>172</sup> The ITC should have issued a negative determination with regard to the domestic producers of the six major components to be produced in the United States under the Bombardier contract.

At the time of the ITC determination, Bombardier had not yet awarded subcontracts for the thousands of other components to be used in the subway cars.<sup>173</sup> Therefore, it was impossible to know which components would be imported and which would be domes-

166. 19 U.S.C. § 1677(4)(A), (D) (1982).

The inclusion of producers of unlike products in the same industry is contrary to the statutory definitions of "like product," 19 U.S.C. § 1677(10) (1982), and "industry," *id.* § 1677(4)(A) (1982). See also *Certain Spirits From Ireland*, 46 Fed. Reg. 38,780 (U.S. Int'l Trade Comm'n 1981) (negative material injury determination in which the ITC narrowly defined the relevant domestic industries); S. REP. NO. 249, *supra* note 61, at 90.

167. *Rail Passenger Cars From Canada*, 47 Fed. Reg. at 36,043. See also *supra* notes 84-98 and accompanying text (how the ITC defined the industry in *Railcars*).

168. For example, the import of shells does not harm a United States producer of brakes, but the ITC's definition of industry in *Railcars* includes both. *Id.*

169. See 19 U.S.C. § 1677(4), (10) (1982).

170. See ITC Prelim. Rep., *supra* note 20, at A-7.

171. *Id.*

172. 19 U.S.C. § 1671(a) (1982) authorizes imposition of a countervailing duty only for unfairly subsidized merchandise "imported into the United States." *Id.*

173. ITC Prelim. Rep., *supra* note 20, at A-7.

tically produced.<sup>174</sup> The ITC assumed<sup>175</sup> that many of these components would be produced in Canada because the EDC financing was conditional on a minimum Canadian content of 60% of the value of the contract.<sup>176</sup> However, the ITC staff report acknowledged that the extent to which Bombardier would meet that condition was unknown.<sup>177</sup> The ITC has held that when an industry cannot be presently defined, or injury or threat of injury be established, an affirmative determination is premature.<sup>178</sup> Similarly in *Railcars*, the affirmative determination was premature for domestic producers of components whose sources were not known at the time of the ITC determination.

If the ITC had correctly determined that the domestic producers of all major components other than shells and that the domestic producers of the thousands of minor components did not constitute "industries" for purposes of this determination, it would have narrowly defined the industry as the domestic producers of shells. Budd is the only United States shell producer,<sup>179</sup> but it would not have used its United States shell manufacturing facilities if it had won the MTA contract.<sup>180</sup>

Thus, not only was the ITC's determination premature, but it is questionable whether under the MTA contract Budd, as a domestic producer of shells, would have suffered any injury because the Budd shells, like the Bombardier shells, would have been produced by a foreign manufacturer and imported into the United States.

### *B. Can a Prime Contractor Constitute an Industry Under the Act?*

A prime contractor is wholly responsible for implementing the provisions of a contract and assumes the risks.<sup>181</sup> Prime contracting

174. Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,043 (U.S. Int'l Trade Comm'n 1982) (preliminary determination). "Most of the items to be imported, with the exception of the subway car shells, cannot currently be identified." *Id.* Bombardier did not plan to enter final negotiations with its prospective subcontractors until it had received a formal notice to proceed from the MTA. See ITC Prelim. Rep., *supra* note 20, at A-7.

175. See Rail Passenger Cars From Canada, 47 Fed. Reg. at 36,043.

176. ITC Prelim. Rep., *supra* note 20, at A-7.

177. ITC Final Rep., *supra* note 18, at A-34.

178. Certain Commuter Airplanes From France and Italy, 47 Fed. Reg. 31,632 (U.S. Int'l Trade Comm'n 1982) (preliminary determination).

179. ITC Final Rep., *supra* note 18, at A-14; ITC Prelim. Rep., *supra* note 20, at A-36.

180. Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,043 n.14, 36,047 (U.S. Int'l Trade Comm'n 1982) (preliminary determination) (Stern, Comm'r, dissenting).

181. ITC Final Rep., *supra* note 18, at A-10.

firms often make substantial investments in engineering and design services and in drafting proposals for a contract bid.<sup>182</sup> Prime contractors of subway cars subcontract the manufacture of most, if not all, of the major components and often enlist other firms to assemble them.<sup>183</sup>

The Act requires subsidized merchandise to be imported into the United States before a countervailing duty can be imposed.<sup>184</sup> Prime contractor services are not considered merchandise.<sup>185</sup> Thus, if only prime contractor services, but no merchandise, were imported, the Act would not apply.

For the purpose of its preliminary determination, the ITC did not consider prime contractors of subway cars an "industry."<sup>186</sup> The ITC recognized that, in general, a prime contractor may not meet the statutory definition of "industry" under the Act.<sup>187</sup> The ITC left open final resolution of the question of whether and under what circumstances a prime contractor would be considered an "industry."<sup>188</sup>

182. *See id.*

183. *See id.*

184. 19 U.S.C. § 1671(a)(1) (1982).

185. *See supra* notes 92-98 and accompanying text.

186. Rail Passenger Cars From Canada, 47 Fed. Reg. 36,042, 36,043 (U.S. Int'l Trade Comm'n 1982) (preliminary determination).

187. *Id.*

188. The views of ITC Chairman Alfred Eckes and ITC Commissioners Michael Calhoun, Eugene Frank and Veronica Haggart are as follows: "[T]here is a legal question as to whether Budd, as a prime contractor, can claim to be materially injured by reason of the imports under investigation inasmuch as Budd is not literally a producer of a product 'like' those products being imported." *Id.*

Commissioner Veronica Haggart notes that "the current U.S. countervailing duty law, as it traditionally has been interpreted and applied, does not appear to permit the granting of relief to a prime contractor under the facts of this case." *Id.* at 36,043 n.20.

Commissioner Michael Calhoun questioned whether the imports referred to under section 703 as 'merchandise' include service functions. . . . [A]lthough it seems rather clear that for the statute to be applicable there must be imports of merchandise and not services, can the domestic industry be those who produce a like product by performing more of a service than actual manufacturing? . . . Under what circumstances, if any, can prime contracting be considered a domestic industry, as defined in the Act?

*Id.* at 36,045 (Calhoun, Comm'r, additional views).

Commissioner Paula Stern opined that prime contractor services "are not protected" by the definition of "industry" in the Act. "The countervailing duty laws cover such services only to the extent that they are inseparably connected to the importation of a product like the imported article subject to investigation." *Id.* at 36,048 (Stern, Comm'r, dissenting).



*C. Material Injury and Budd's Standing to Sue*

The ITC must consider the impact of subsidized imports on the volume of imports in assessing material injury.<sup>189</sup> If Budd had won the contract, it would have imported the shells from a manufacturer in Portugal.<sup>190</sup> Since Budd's shell manufacturing facilities in the United States would not have been used, the volume of imported shells would have been exactly the same whether the contract had been awarded to Bombardier or Budd.<sup>191</sup> Only the Portuguese manufacturer, not Budd, was injured by the importation of shells from Canada for the MTA contract.<sup>192</sup> Therefore, Budd did not have standing to complain that it was injured or threatened with material injury by the importation of shells from Canada.<sup>193</sup>

In *Railcars*, the ITC determined that as a domestic producer of shells, Budd was materially injured by the allegedly subsidized imported shells.<sup>194</sup> This conflicts with the ITC's earlier determination in *Snow-Grooming Vehicles, Parts Thereof and Accessories Therefor From the Federal Republic of Germany*.<sup>195</sup> In that case, the ITC found that the increased imports from the country under investigation merely displaced imports from another country.<sup>196</sup>

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189. 19 U.S.C. § 1677(7)(B), (C) (1982). See also S. REP. No. 249, *supra* note 61, at 86-87.

190. See *Rail Passenger Cars From Canada*, 47 Fed. Reg. 36,042, 36,044 (U.S. Int'l Trade Comm'n 1982) (preliminary determination). See also, ITC Prelim. Rep., *supra* note 20, at A-5.

191. Budd planned to subcontract the shells from Portugal and import them. *Rail Passenger Cars From Canada*, 47 Fed. Reg. at 36,044. Bombardier planned to manufacture the shells in Canada and import them. ITC Prelim. Rep., *supra* note 20, at A-7. Therefore, the volume of imports would have been 825 shells whether Budd or Bombardier had received the contract.

192. Since Budd did not plan to act as a "domestic producer" of shells, it did not meet the statutory definition of "industry." *Id.* § 1677(4)(A) (1982). Imposition of a countervailing duty requires "material injury" to an "industry." *Id.* § 1671(a)(2) (1982). Since Budd is not an "industry," it cannot be injured within the meaning of the Act.

193. When a countervailing duty investigation is initiated by petition, the petition must be filed "on behalf of an industry." *Id.* § 1671a(b) (1982). Since Budd is not an "industry," no countervailing duty petition may be filed on its behalf. See *id.*

194. *Rail Passenger Cars From Canada*, 47 Fed. Reg. at 36,042, 36,044 (U.S. Int'l Trade Comm'n 1982) (preliminary determination).

195. 46 Fed. Reg. 1049 (U.S. Int'l Trade Comm'n 1981) (preliminary determination).

196. *Id.* at 1052 (Stern, Comm'r, views). In *Snow-Grooming Vehicles*, an antidumping investigation of imported snow-grooming vehicles from West Germany, the ITC found that Kassbohrer of West Germany and Bombardier Limited of Canada (coincidentally, the same company at issue in *Railcars*) were the only foreign producers known to have exported snow-grooming vehicles to the United States. *Id.* at 1052 n.24. Kassbohrer's increased market share

Consequently, the ITC found no reasonable indication of material injury or threat of material injury.<sup>197</sup> Similarly, in *Railcars*, the shells to be imported from Canada will merely displace shells which would have been imported from Portugal. Consequently, a negative determination should have been made.

#### D. Causation

In addition to defining the industry and determining whether there is material injury, the ITC is required to find that the injury occurred "by reason of" the subsidized imports.<sup>198</sup> The Statements of Administrative Action<sup>199</sup> that implement the Act require that "[a] written statement of the reasons for the [ITC's] decisions on all material issues of law or fact presented shall be available to the parties and the public."<sup>200</sup> The importance of a statement of reasons given in support of an administrative determination has been clearly recognized by the United States Supreme Court.<sup>201</sup> Departing from its usual practice, the ITC in *Railcars* failed to separately state the basis for its finding of causation, which is a material issue in a countervailing duty proceeding. The ITC merely stated in conclusory fashion that material injury was caused "by reason of" subsidized imports.<sup>202</sup> A written statement of its reasons was particularly important in this case because the causation analysis was unusually complicated. The ITC was faced with the question of

in the United States had apparently resulted from a sharp decline in Bombardier's exports to the United States. *Id.* at 1052 & n.24.

197. *Id.* at 1049, 1051.

198. 19 U.S.C. § 1671 (1982).

199. STATEMENTS, *supra* note 7. Approval of the Statements, which implement the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 2(a), 93 Stat. 144, 147, is codified at 19 U.S.C. § 2503(a) (1982).

200. STATEMENTS, *supra* note 7, at 398.

201. *Securities and Exch. Comm'n v. Chenery*, 332 U.S. 194 (1947). The Court held: If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *Id.* at 196-97 (quoting *United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499, 511 (1935)).

202. *Rail Passenger Cars From Canada*, 47 Fed. Reg. 36,042, 36,044 (U.S. Int'l Trade Comm'n 1982) (preliminary determination).

whether injury to Budd as a component producer is cognizable under the Act when the foreign subsidy is provided not to a competing foreign producer but to a foreign prime contractor.<sup>203</sup> The ITC found that the result of Budd's decision to import shells from Portugal would have been decreased employment in and decreased utilization of its United States manufacturing facilities.<sup>204</sup> The ITC majority reasoned that Budd's decision to subcontract from Portugal was a result of EDC financing.<sup>205</sup> The ITC concluded that the adverse consequences to the United States component industry of Budd's decision to import rather than domestically produce components in order to be competitive is cognizable under section 771(7)(B).<sup>206</sup>

Two ITC commissioners expressed reservations about the ITC's finding of causation.<sup>207</sup> Commissioner Michael Calhoun, who voted with the majority, questioned whether the case revealed a reasonable indication of nexus between the subsidized imports and the domestic producers.<sup>208</sup> Dissenting Commissioner Paula Stern concluded that Budd would have subcontracted the shells from Portugal even if it had obtained matching financing because it was more profitable than manufacturing the shells in the United States.<sup>209</sup> Both Commissioners Calhoun<sup>210</sup> and Stern<sup>211</sup> expressed the belief that *Railcars* might conflict with the ITC's earlier determination in *Certain Commuter Airplanes from France and Italy*.<sup>212</sup> In that case, the ITC concluded that the domestic industry's failure to take sufficient steps to compete, rather than subsidized imports, had caused the material injury.<sup>213</sup> Consequently, the ITC issued a

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203. *Id.* at 36,043.

204. *Id.* at 36,044.

205. *See id.*

206. *Id.*; 19 U.S.C. § 1677(7)(B) (1982).

207. *Id.* at 36,045 (Calhoun, Comm'r, additional views); 36,048 (Stern, Comm'r, dissenting).

208. *Id.* at 36,045 (Calhoun, Comm'r, additional views).

209. *Id.* at 36,048 (Stern, Comm'r, dissenting).

210. *Id.* at 36,045 (Calhoun, Comm'r, additional views).

211. *Id.* at 36,048 (Stern, Comm'r, dissenting).

212. *Certain Commuter Airplanes From France and Italy*, 47 Fed. Reg. 31,632 (U.S. Int'l Trade Comm'n 1982) (preliminary determination).

213. The ITC issued a negative determination after finding that the limited nature of the United States industry's marketing efforts restricted its market and prevented it from competing for sales, rather than the imports. *Id.* at 31,634. Consequently, the ITC found that "the record does not provide a reasonable indication of a causal link between the allegedly subsidized sales of [the imported planes] in the United States and any difficulties [the domestic industry] may be experiencing in becoming established as a producer of a competitive aircraft." *Id.*

negative determination and refused to impose a countervailing duty.<sup>214</sup>

In *Railcars*, the MTA averred that Budd was aware that the availability of financing was one of the factors which state law required the MTA to consider in awarding the contract.<sup>215</sup> Budd was also aware that it might qualify for Eximbank financing.<sup>216</sup> However, Budd failed to apply for matching Eximbank financing until after the MTA had announced its award of the contract to Bombardier.<sup>217</sup> Since it was not addressed by the ITC, the question remains whether Budd's failure to take sufficient steps to compete by applying for Eximbank financing earlier in the negotiations caused any material injury.

### CONCLUSION

The ITC misapplied the countervailing duty law in *Railcars* and reached a decision which contravenes the intent of the Act. The *Railcars* determinations failed to protect United States industry or workers. The question remains whether *Railcars* will be followed as precedent or whether it will stand as an isolated aberration. Since the case was terminated, there will be no opportunity for judicial review to correct the ITC's ruling.

At its first opportunity, the ITC must make it clear that neither United States producers of domestically produced merchandise nor prime contractors will be defined as an "industry" under the Act. The ITC must clarify that injury to domestic producers who manufacture abroad, as Budd planned to do, is not cognizable under the Act. Furthermore, the ITC must decide that subsidized imports which merely displace other imports do not materially injure any domestic industry. The ITC must state reasons for its decisions before it issues affirmative determinations.

Rhonda G. Kirschner

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214. *Id.* at 31,632.

215. Brief for Defendant at 4, *Budd Co. v. Metropolitan Transp. Auth.*, No. 82 Civ. 3744 (S.D.N.Y. July 16, 1982) (order for dismissal). As early as October 1981, the MTA informed Budd that in order to be competitive in the negotiations for this contract, they would have to offer vendor-related financing. *Id.* Budd was informed repeatedly that it was in a difficult competitive position due to its lack of competitive financing terms. *Id.*

216. *Id.* at 4-5. Richard Ravitch, former MTA Chairman, and Steven Polan, Special Counsel to the MTA, repeatedly pointed out that financing might be available through the Eximbank. *Id.*

217. *Id.* at 5.