

# **CERTAIN RAIL PASSENGER CARS AND PARTS THEREOF FROM CANADA**

Determination of the Commission  
in Investigation No. 701-TA-182  
(Preliminary) Under the Tariff Act  
of 1930, Together With the  
Information Obtained  
in the Investigation

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**UNITED STATES INTERNATIONAL TRADE COMMISSION**

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UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

Investigation No. 701-TA-182 (Preliminary)

RAIL PASSENGER CARS FROM CANADA

Determination

Based on the record 1/ developed in investigation No 701-TA-182 (Preliminary), the Commission determines (Commissioner Stern dissenting) that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, 2/ by reason of imports of rail passenger cars, assembled or unassembled, finished or unfinished, components and parts and accessories thereof and/or to be used therewith, which are allegedly subsidized by the government of Canada.

Background

On June 24, 1982, the Budd Co., Troy, Michigan, completed the filing of a petition with the U.S. International Trade Commission and the U.S. Department of Commerce (Commerce) alleging that imports from Canada of certain parts for subway cars to be delivered to the Metropolitan Transportation Authority of New York City will receive subsidies from the Canadian Government and that, by reason of these imports, an industry in the United States is being materially injured and threatened with material injury. Accordingly, on July 2, 1982, the Commission instituted a preliminary countervailing duty investigation (No. 701-TA-182) under section 701(a) of the Tariff Act of 1930. Notice of the institution of the investigation and conference therefor was given by posting

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1/ The "record" is defined in sec. 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(i)).

2/ Commissioner Haggart determining only that there is a reasonable indication that an industry in the United States is threatened with material injury.

copies of the notice in the Office of the Secretary, U.S. International Trade Commission and by publishing the notice in the Federal Register on July 14, 1982 (47 F.R. 30667). A second notice amending the scope of the Commission's investigation to conform with the scope of Commerce's investigation was published in the Federal Register on July 20, 1982 (47 F.R. 31449). A public conference was held in Washington, D.C. on July 21, 1982, at which all interested parties were afforded the opportunity to present information for consideration by the Commission.

VIEWS OF CHAIRMAN ALFRED E. ECKES AND COMMISSIONERS MICHAEL J. CALHOUN,  
EUGENE J. FRANK, AND VERONICA A. HAGGART

In this preliminary investigation, we determine that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury 1/ by reason of imports of components of rapid transit rail passenger cars (subway cars) which are allegedly subsidized by the Government of Canada. 2/ In a preliminary investigation, the statute requires that a reasonable indication of material injury or threat thereof be found to exist. 3/ Thus, if a petitioner in its pleadings or the Commission in its investigation raises sufficient legal issues or develops sufficient factual information to support a reasonable indication of material injury or threat thereof, then the investigation should be continued. 4/ 5/

In conducting a preliminary 45-day investigation, the Commission is not charged with undertaking an abbreviated version of a final investigation, nor must all the information developed in a final investigation be present. The Senate Committee on Finance addressed the nature of a Commission preliminary investigation:

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1/ Commissioner Haggart determines only that there is a reasonable indication that an industry in the United States is threatened with material injury.

2/ Material retardation of the establishment of an industry is not at issue in this investigation.

3/ 19 U.S.C. § 1671b(a).

4/ See H.R. Rep. No. 96-317, 96th Cong., 1st Sess., 52 (1979).

5/ Commissioner Frank notes that only a low-threshold test applies to preliminary determinations. An overview on this is found in his views in Frozen French Fried Potatoes From Canada, Inv. No. 731-TA-93, USITC Pub. 1259 (1982), at 12-15.

While the committee recognizes that the ITC cannot conduct a full-scale investigation in 45 days, it expects the Commission to make every effort to conduct a thorough inquiry during that period. The nature of the inquiry may vary from case to case depending on the nature of the information available and the complexity of the issues.

S. Rep. No. 96-249, 96th Cong., 1st Sess., 49 (1979) (emphasis added).

#### Domestic industry

As an initial matter, the statutory framework under which the Commission conducts countervailing duty investigations calls upon the Commission to define the domestic industry against which to assess the impact of imports. Section 771(4)(A) of the Tariff Act of 1930 defines the domestic 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 domestic production of that product." 6/ "Like product" is defined in section 771(10) 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 . . . ." 7/

Most of the items to be imported, with the exception of the subway car shells, cannot currently be identified. However, the financing offered by the Canadian government, which is alleged to constitute a subsidy in this case, is conditioned upon a minimum Canadian content of 60 percent of the total value of the contract. 8/ At present, the record indicates that the subway car

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6/ 19 U.S.C. § 1677(4)(A).

7/ 19 U.S.C. § 1677(10).

8/ Report at A-7.

shells 9/ will be produced in Canada and imported into the United States. 10/ In addition, certain other components, the identities of which cannot be ascertained at this time, will be imported from Canada. 11/

The Budd Company, the petitioner in this investigation, is a producer of subway car shells in the United States. 12/ In addition, there are a number of other domestic producers of components for subway cars. 13/ Thus, for purposes of this preliminary investigation, there is a reasonable basis for finding the like products to consist of shells and certain other components for use in producing subway cars, and defining the relevant domestic industry as including the domestic producers as a whole of those articles. In any final investigation, the Commission will seek to elicit further information in making its decision regarding the scope of the industry.

This preliminary investigation presents the Commission with issues of first impression. The allegedly subsidized imports involved in this investigation are components for subway cars. 14/ Bombardier, Inc., of Quebec, Canada, has been awarded a contract for 825 subway cars by the Metropolitan Transit Authority (MTA) of New York City. 15/ Bombardier, as

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9/ The shell generally consists of a floor, sides, top, ends, an underframe, and some wiring, and constitutes a significant portion of the overall value of a rail car. Report at A-3.

10/ Id. at A-7.

11/ Id. at A-7 to A-8.

12/ There are other companies with the capacity to produce shells. We note that Budd did not intend to produce shells in the United States for the MTA contract.

13/ Report, Appendix D.

14/ Subway cars, or rapid transit rail cars, are self-propelled rail passenger vehicles used in subways or elevated rail systems in urban areas or connecting urban and neighboring suburban areas. They are larger, heavier in construction, and designed to be connected in greater numbers than light rail vehicles such as trolleys and streetcars. They differ from other rail cars by being self-propelled, smaller, less heavily constructed, and designed to be connected in fewer numbers. Report at A-3.

15/ The MTA contract is the largest U.S. subway car contract ever awarded to a single contractor. Id. at A-9.

prime contractor with the MTA, will not import finished rail cars, but has represented that it will assemble the cars at Barre, Vermont, allegedly from parts and components to be obtained from both U.S. and foreign subcontractors.

The petitioner in this investigation is the Budd Co., the unsuccessful U.S. prime contractor bidding on the MTA contract, and a producer of rail car shells. The impact of the loss of the MTA contract falls initially on Budd as a prime contractor. However, there 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. 16/ Thus, Budd, as a prime contractor, may not constitute an "industry in the United States." 17/ 18/ 19/ The products of Budd, as a U.S. manufacturer of shells, as well as the products of other producers of components similar to those which will be

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16/ 19 U.S.C. § 1677(10).

17/ 19 U.S.C. § 1677(4)(A).

18/ Commissioner 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. The traditional approach to defining "like" product and "industry" for purposes of assessing injury appears to be consistent with Congressional intent. See, S. Rep. 96-249, 96th Cong., 1st Sess. 90-91 (1979); MTN Studies: Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva, Part I, section 2.1.6(1).1, USITC Inv. No. 332-101, printed in Sen. Fin. Comm. Print 96-27, 96th Cong., 1st Sess., 152-153 (1979); Report of the U.S. Tariff Commission to the Senate Committee on Finance on S. Con. Res. 38, Sen Fin. Comm., Hearing on International Antidumping Code, 90th Cong., 2d Sess. 57 (1968). If this case is returned for final consideration, the parties are encouraged to further address this concern.

19/ Chairman Eckes notes that the Senate Finance Committee in discussing the reasons for the like product provision cautioned: "The requirement that a product be 'like' the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and the article are not 'like' each other, nor should the definition of 'like product' be interpreted in such a fashion as to prevent consideration of an industry adversely affected by imports under investigation." S. Rep. 96-249, 96th Cong., 1st Sess. 90-91 (1979).

imported, do meet the "like" product test. This raises a further question as to whether resultant injury to component producers is cognizable under the statute when a prime contractor, such as Budd, bids unsuccessfully against a foreign bidder having the benefit of an alleged subsidy from a government.

Material injury or threat of material injury by reason of allegedly subsidized imports

The components which are the subject of the Bombardier contract will be sourced both abroad and domestically with the benefit of alleged subsidization by the Canadian government in the form of financing. The petitioner has presented evidence that the alleged subsidy from the Canadian government enabled Bombardier to offer the New York City MTA more advantageous financing than Budd was able to offer in its bid. With the alleged subsidy, Bombardier was able to offer a financial package that would save the MTA \$36 million in net present value. 20/ Furthermore, there is evidence on the record that financing was crucial in the MTA contract decision and an important factor explaining Budd's failure to win the contract. 21/ Richard Ravitch, Chairman of the MTA, told the Senate Finance Committee on May 28, 1982, that "the absence of sufficient financing associated with the Budd offer made its

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20/ Report at A-9 to A-10. Bombardier offered to finance 85 percent of the total contract price of \$560 million at 9.7 percent over 10 1/2 years. The entire loan is being supplied by the Export Development Corporation (EDC), the Government of Canada's official export credit agency. These terms were far more favorable than those which Budd was able to offer without government assistance. In addition, the terms of the financing are in violation of the OECD's International Arrangement on Guidelines for Officially Supported Export Credits. Id. at A-15.

21/ Id. at A-9.

proposal noncompetitive." 22/ As further evidence of the critical importance of financing to awarding of the contract, Budd notes that the MTA and Bombardier entered into a stipulation before a federal judge providing for a resumption of negotiations with Budd if U.S. Export-Import Bank financing were obtained at the 9.7 percent rate offered by the Canadians. 23/ In addition, Pullman Standard Co. of Chicago, Illinois, which also has the capacity to assemble railcars, began preparations to submit a bid, but became discouraged from doing so when it learned of the financing arrangements being offered by foreign bidders. 24/

Indeed, because the financing was so important to Budd's competitive position in this contract, it actually sought financing abroad and proposed to source certain major components, including shells, offshore. This is especially significant because Budd has the capability of producing rail car shells domestically, and it presently produces them in this country to fulfill other contracts. Budd's decision to source this major component in Portugal would have resulted in diminished employment at its U.S. facilities and also a decreased utilization of those domestic facilities. At least for the purposes of this preliminary investigation, we conclude that the adverse consequences of a decision to source offshore in order to be competitive within the context of the MTA bid process is cognizable under section 771(7)(B).

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22/ Testimony of Richard Ravitch, Chairman of the MTA, before the Senate Committee on Finance, May 28, 1982.

23/ Petitioner's post-conference brief at 1-2.

24/ Report at A-9. Commissioner Frank notes that other potential manufacturers of rail car shells or other components probably were discouraged from preparing bids which allegedly could not compete with Bombardier's bid proposal.

Because imports will approximate 60 percent of the value of this contract, many domestic producers of components stand to lose the potential production, profits, and employment that would come from awarding the subcontracts domestically. 25/ We find a reasonable indication that both Budd and the manufacturers of components "like" the articles to be imported are materially injured or are threatened with material injury by reason of the allegedly subsidized imports. In any final investigation, the Commission staff would have greater opportunity to ascertain the impact of these lost contracts on the domestic industry.

MTA's decision to award the 825-subway car contract to Bombardier has a serious present and ongoing impact on Budd as a prime contractor. Budd accounts for about half of the rail passenger cars assembled in the United States. In the bidding process, Budd employed designers, engineers and other personnel, expending a significant amount of money. The record shows that Budd's future production levels and revenues will be adversely affected as a result of the contract being awarded to Bombardier. At the present time, however, we do not determine whether the alleged injury to Budd as a prime contractor is of the type contemplated by the statute. 26/

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25/ The issue of subsidized financing raised in the MTA contract has consequences for the future health of the domestic industry. From 1982 to 1988, it is expected that between 2,400 and 2,800 cars will be ordered by several cities across the United States. Bombardier has indicated that, because of capacity limitations, it does not intend to bid on any major contracts for subway cars while fulfilling its obligations to the MTA. The information available to the Commission in this investigation does not permit us to assess Bombardier's ability to produce subway cars for future contracts.

26/ See note 18, supra.



## ADDITIONAL VIEWS OF COMMISSIONER MICHAEL J. CALHOUN

In joining the majority opinion, I fully and completely embrace the views expressed therein. I submit these additional views only to amplify matters of particular significance to me.

The prior investigation we had some two and a half years ago on imports of subway cars, investigation number 731-TA-5 and 6, was my fifth vote as a member of this body. In large part, my vote was based on a strict and literal interpretation of the statutory language. I continue to believe that the strict application of the language of the statute together with the understanding offered by the legislative history is the most effective way to assure the dispassionate and even-handed discharge of our responsibilities under the laws we administer. What, perhaps, has changed with the experience of the past two years is my greatly expanded appreciation of the broad range of domestic industries and the extent to which domestic industries can have differing functional characteristics and structural features.

If the trade laws we administer were drafted, as I believe they were, in light of the full array of commercial activity that exists in this country, then the application of law to fact must be undertaken not only within the strictures of the plain language but also in view of the diverse characteristics and features of the many and differing domestic industries that exist. It is from this perspective that I have approached my analysis in this investigation.

In the first place, as I have observed before 1/ and as alluded to in the majority views, the standard for preliminary determinations is by the plain terms of the language, lower than that for a final. But simply to say the standard is lower conveys little understanding of how the standards differ from that of the final. The language "reasonable indication of material injury...." to me connotes acceptance of a measure of uncertainty of conclusion and an insufficiency of information. While what is reasonable is hard to quantify in the abstract and certainly will vary from case to case, the understanding I have is that information in a preliminary investigation must demonstrate the allegation by petitioner is more than frivolous, but something less than a conclusive showing. The legal theories offered must be arguably cognizable under the law, but need not in every preliminary investigation be able to survive close and detailed scrutiny. As well, the factual information and the legal arguments raised must offer a measurable potential for an affirmative final determination.

Thus, although much of the information relied upon in the majority opinion may be less than that we have traditionally relied upon in preliminary cases and the legal theories, perhaps, somewhat more tenuous, it seems to me that they well meet these minimal standards for reaching a sound preliminary affirmative. This is so largely because much of the structure and operation of the production of subway cars, as presented here, are new to our experience under the Trade Act of 1979, and present some significant legal issues of first impression. This novelty thereby certainly compels a greater tolerance, at the preliminary stage, in applying law to fact.

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1/ See Supplemental Views of the Commission, Rail Passenger Cars and Parts Thereof, Inv. No. 731-Ta-5 and 6, Additional Views of Vice Chairman Michael J. Calhoun and Commissioner Paula Stern, at p. 17.

In this connection, since January 1980 the Commission has typically considered investigations in which the focal points of our analysis were an imported article and the domestic producers of a competing like product. These previous investigations easily fit within the literal statutory language, which refers to products and merchandise as opposed to intangibles. We have never been called upon, to consider, for example, issues such as the applicability of the statute to imports of services; whether the protection from unfair competition provided by the law is available to suppliers to the companies seemingly most directly affected by the imported merchandise; and the scope of the "other factors" under section 771(7)(B) of the Trade Act of 1979. 2/ to consider in analyzing the impact of imports.

But this investigation presents, inter alia, exactly these novel and mixed questions of law and fact as well as others. Indeed, as an initial matter, we have before us the mixed question of what exactly is being imported. Is it only components? In view of the structure and operation of the industry and considering that the imported components are exclusively dedicated not only to use in subway cars, but also to use in the cars under the MTA, are the component imports tantamount to imports of completed cars? Or could the imported article be the technological expertise of Bombardier? These factual questions, if they are to be considered, must be addressed along with the underlying legal question of whether the imports referred to under section 703 as "merchandise" include service functions. In this regard, although 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?

As a further example of the novelty of this case and the mixed questions of law and fact it presents, there have been and are produced in the United States car shells and every other component of subway cars which might be imported. However, according to the proposal submitted by Budd as the prime contractor, its shells for the MTA contract were to be produced offshore and the production of the other parts was to be subcontracted. This factual situation raises a legal question as to the significance of a decision by a domestic producer to source offshore and whether harm under the statute has been suffered by those who made that decision.

Another example exists with regard to the question of causality and the measure of requisite harm. Can the impact of the planned imports from Canada be illustrated by the experience of Budd and Pullman-Standard as prime contractors? 3/ Pullman Standard, which ceased bidding on rail passenger cars in 1979 decided to try to reenter the market by bidding on the MTA contract. Engineers and designers were hired and an initial proposal was submitted. 4/ However, after conversations with MTA, during which Pullman-Standard was made aware that offshore financing was required, 5/

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3/ Any prime contractor bidding on a MTA contract puts together a package for production of rail cars, when necessary arranges for financing and takes the risks of loss, late deliveries from suppliers, quality control, etc.

4/ There is no information on the record to indicate what, if any, U.S. production would have been undertaken by Pullman-Standard. It is generally known that in the 1970's they often produced shells themselves at their facility. It is reasonable to assume they would have done likewise for the MTA contract.

5/ Additionally, it was generally known that no U.S. private or public financing was available to meet the terms offered by other countries. The truth of this belief was underlined by the denial of Budd's request for competitive financing by the Export-Import Bank of the United States.

the company decided to proceed no further. It, subsequently, released the designers and engineers and sold its assets. It is reasonable to infer that the withdrawal from bidding on the MTA contract in view of the subsidized competition resulted, in part, in the U.S. industry's failure to hire employees and use its production facilities. But how does this square with our recent decision in Commuter Aircraft, 701-TA-174/175, in which we found the domestic industry had not taken sufficient steps to compete? Does this circumstance reveal a reasonable indication of nexus between the subsidized imports and this domestic "producer"?

In light of these and other considerations, it strikes me that there are at least four serious legal issues of first impression which arise from the facts on the record and from the nature of prime contracting:

1. Are the adverse consequences of a sound business decision by a prime contractor to source offshore in order to compete with a subsidized foreign prime contractor one of the "other factors" under section 771(7)(B) which the Commission may consider in analyzing whether material injury or threat exists with regard to a domestic industry?
2. Under what circumstances, if any, can prime contracting be considered a domestic industry, as defined in section 771(4)(A) of the Act?
3. Are the consequences referred to in 1 above and their impact on domestic suppliers of component parts cognizable under Title VII of the Act?
4. Is the failure of a domestic prime contractor one of the "other factors," under section 771(7)(B), which the Commission may consider

in analyzing whether material injury or threat exists with regard to domestic suppliers of component parts?

It may be argued that what I characterize as novel issues may well not be before us. They certainly were not argued by petitioner in this investigation, perhaps for good reason in view of our earlier determination or perhaps for other reasons. But, it is my view that the Commission has an obligation to consider not only traditional, but also innovative methods of analysis particularly when a putative industry does not easily fall within our usual analytical methodology. I consider it to be primarily the obligation of a petitioner to present, in support of the position, rational legal argument and facts sufficient to support a reasonable indication of the requisite harm and causation. When, as in this investigation, the petitioner meets this burden with regard to some but not all of the possible arguments, I think the Commission, sua sponte, can and, indeed ought to make the more complete analysis if the facts presented allow.

In sum, for the reasons expressed here and in the majority opinion, the legal issues presented by this case are of such significance and are sufficiently supported by reason and by fact as to render, in my mind, a denial of an opportunity for closer scrutiny of this matter not only harsh, but poor policy in the application of section 703.

## VIEWS OF COMMISSIONER PAULA STERN

Summary

This investigation concerns allegedly subsidized articles imported from Canada which will be used for manufacturing in this country 825 subway cars for the Metropolitan Transit Authority of New York (MTA) pursuant to a contract awarded to a Canadian manufacturer, Bombardier, Inc. No finished cars will be imported. Bombardier, Inc., will manufacture the finished cars in a Barre, Vermont facility. None of the Canadian parts which will eventually be used in the domestic production of subway cars will be imported until some time in the future.

A few unusual but major issues were involved in this investigation, all resulting from the principal roles played in this case by the winning bid and the unsuccessful bid. The Commission had to determine whether the parts which the Canadian prime contractor, Bombardier, Inc., presently intends to import will injure domestic producers of those articles. All of the major components of the Bombardier subway cars, except one, the shell, will be sourced in the United States. If the petitioner, the Budd Company (Budd), had been awarded the MTA contract, it would not have manufactured the shell in the United States either. Additionally, the Commission encountered in the countervailing duty investigation the distinction between trade in goods and trade in services. Moreover, the Commission had to consider the likelihood that Bombardier could change its plans to source certain components in the United States and might, instead, import them from Canada. Finally, the Commission confronted the issue of whether it was foreseeable that the Budd Company would lose other rail transit procurements to Bombardier on the basis of

Bombardier's ability to employ subsidized imported parts. In considering this possibility, an evaluation was required of the probability that the Budd Company might produce in the United States the shells for any such contract bid.

The Commission determined on August 3, 1982, by a vote of four to one that there was a reasonable indication that an industry in the United States is materially injured, or threatened with material injury, by reason of the imports of the allegedly subsidized merchandise subject to this investigation. In casting the dissenting vote in this preliminary case, I carefully considered the statutory provisions for determining the scope of the domestic industry and for analyzing any material injury which the award of the MTA contract may have caused or threatened to cause to a domestic industry. Underlying my negative determination was the statutory purpose of preliminary investigations.

There are three analytical phases in making a preliminary determination. First, the scope of the domestic industry must be established within the framework of statutory guidelines. Second, the Commission must determine whether the domestic industry is materially injured or threatened with material injury. Third, the Commission must determine whether the material injury or threat of material injury is caused by the allegedly subsidized imports. I will consider each of these in turn.

#### Statutory guidelines

Subsection 771(4)(A) of the Tariff Act provides--

In general. The term 'industry' means 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. [Emphasis added.]

Discretionary departures from this general rule are permitted in circumstances which conform to other subsections of section 771(4). The statute allows the exclusion of domestic producers from the domestic industry where the producers are "related" to exporters or importers of the subsidized product under investigation or are themselves importers of the subsidized product. 1/ The statute 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. 2/ Finally, the statute provides for situations in which data on the "like product" cannot be separated from the broader industry's production or profit information. In such cases, the Commission may frame the industry in terms of the narrowest possible group or range of products which include the like product. 3/

The key concept in the selection of the domestic producers which comprise the appropriate domestic industry in a given investigation is the "like product." The Act defines the term "like product" in the following manner.

The term 'like product' means 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 title. 4/

In order to determine whether a domestic industry is materially injured, therefore, the statute directs the Commission to identify the imported products. Once the imported products are identified, the Commission's investigation focuses on identifying the domestic producers of those products. The domestic manufacturing facilities of those producers which are employed in

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1/ Subsection 771(4)(B).

2/ Subsection 771(4)(C).

3/ Subsection 771(4)(D).

4/ Section 771(10).

the production of the like product constitute the domestic industry against which the impact of the imports subject to investigation is measured, data permitting.

This scheme for the development of a domestic industry on a case-by-case basis in both antidumping and countervailing duty investigations is modeled after similar provisions of the 1979 version of the so-called International Antidumping Code 5/ and the 1979 international agreement on subsidies and countervailing measures. 6/ The latter agreement specifically provides that--

[i]n determining injury, the "domestic industry shall . . . be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products . . . [References to related producers and regional industries omitted.] 7/

The agreement further provides that--

[t]hroughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration. 8/

Although the wording of the United States law is not identical to that of the international agreement, it was legislated with the knowledge that it would further restrict the discretion of the Commission in administering the

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5/ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, done Apr. 9, 1979, MTN/NTM/W/232, reprinted in, Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiations, H.R. Doc. No. 153, 96th Cong., 1st Sess. (1979).

6/ Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, done Apr. 12, 1979, MTN/NTM/W/236, reprinted in H.R. Doc. No. 153, 96th Cong., 1st Sess. (1979).

7/ Id., at Article 6, paragraph 5.

8/ Id., at Article 6, paragraph 1, note 2.

antidumping and countervailing legislation which it had exercised prior to the passage of the Trade Agreements Act of 1979. In a 1979 report to the Senate Finance Committee on the agreement, the Commission stated that--

[i]n its administration of the injury provisions in both the Antidumping Act, 1921, and the duty-free provision of the countervailing duty statute, the U.S. International Trade Commission has not considered a domestic industry to be limited to the producers of a "like product" . . . . 9/

Although the United States did not implement the code standard of "identical" as the definition of like, it did adopt the standard of "characteristics and uses." In the words of the Senate Finance Committee Report--

Reason for the provision.--The definition of "like product" in the bill has the effect of delimiting the U.S. industry to be examined by the ITC in making its determinations of whether an industry in the United States is experiencing the requisite degree of injury. The ITC will examine an industry producing the product like the imported article being investigated, but if such industry does not exist and the question of the material retardation of establishment of such an industry is not an issue before the ITC, then the ITC will examine an industry producing a product most similar in characteristics and uses with the imported article. The requirement that a product be "like" the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not "like" each other, nor should the definition of "like product" be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation. 10/

Therefore, the expansion beyond "identical" in section 771(10) of the Act must be said to go only to minor variations in characteristics and uses. For example, the law does not authorize the Commission to equate the production of

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9/ Subcomm. on International Trade of the Senate Comm. on Finance, 96th Cong., 1st Sess., 6 MTN Studies, Pt. 1: Agreements Being Negotiated At The Multilateral Trade Negotiations in Geneva--U.S. International Trade Commission Investigation No. 332-101, at 152 (Comm. Print 1979).

10/ S. Rept. No. 96-249, 96th Cong., 1st Sess., at 90-91.

a finished rail car with the production of a component part. It is apparent also that the Commission cannot equate the award of a prime contract with the production of a component part.

The function of the like product provision in the countervailing duty law is to identify as specifically as possible the domestic producers of products comparable to the imports in terms of their characteristics and their uses. This approach has two consequences. Although it can increase the likelihood of an affirmative material injury determination, it does so by requiring domestic producers to limit their petitions for countervailing duty relief to only those imports for which a statistical impact on domestic production and consumption can be shown. To the degree that domestic producers are successful in obtaining countervailing duty relief, the duties are imposed on very narrowly described categories of products.

#### Facts of this case.

The allegedly subsidized imports in this investigation involve components for subway cars to be imported from Canada. Bombardier, Inc., of Quebec, Canada, the only Canadian producer of rail passenger cars, has been awarded a contract to produce 825 rail passenger cars for the Metropolitan Transit Authority of New York. The company will assemble the rail passenger cars at its plant in the United States, at Barre, Vermont. Accordingly, no finished rail cars will be imported for the MTA contract. There are two types of parts, components, or accessories which may be used in the assembly of a rail passenger car. The first are those made to transit authority specifications and are produced on order. The other type, which will be discussed below, consists of fungible products which are produced for multiple uses.

There is no continuing market for rail passenger components independent of the transit authority orders. Production takes place when an order is received. A potential subcontractor will not produce products dedicated to the transit authority specification and maintain an inventory of the products in anticipation of being awarded a subcontract. Until a specific order is received, a producer's facilities will be used producing other products unrelated to rail passenger cars. In the absence of an order for specific components, there are no domestic producers of the like product. Even though the sources of Bombardier's components will become known in the coming years as it completes negotiations on the subcontracts, the identities of the suppliers who might have received subcontracts from Budd can never be known.

Although a rail passenger car consists of approximately 5,000 components, six of these components account for a very significant amount of the total cost of manufacturing a rail passenger car. 11/ The following are the six components: 1) the shell; 2) the truck assembly (including sideframes, bolsters, wheels and axles); 3) the coupler assembly (including coupler, electrical head, yoke and draft gear); 4) the propulsion system; 5) the brakes; and, 6) the air-conditioning system. Of these six component systems, Bombardier will source all but the shell in the United States. The shell will be imported from Canada. With regard to the other five major component systems, no domestic industries within the meaning of section 771(4) of the Act can be subjected to material injury from allegedly subsidized imports from Canada because there will be no imports under the MTA contract.

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11/ These components will account for well over half of the material and component cost of filling the MTA contract. With the possible exception of the door operators and controls, no other components will account for more than about 1 percent of the total value of the contract. Report at A-3.

The domestic producers of shells which competed with Bombardier for the MTA contract were the petitioner, the Budd Company, and the Pullman-Standard Company. 12/ Pullman-Standard announced in March, 1979, that it would no longer bid on rail passenger car contracts. 13/ In 1981, the firm was contacted by the Commission staff during the course of a supplementary antidumping proceeding. 14/ A company official attributed the firm's withdrawal from the market to difficulties in negotiations with transit authorities, not to foreign competition. 15/ Subsequently, the firm was acquired by the Wheelabrator-Frye Company, Hampton, N.H. The firm attempted to re-enter the rail passenger market in October, 1981, by negotiating with MTA for the production and delivery of 325 cars, with options for an additional 825. The company abandoned the negotiations in December, 1981, and Nissho Iwai Corporation was awarded a contract for 325 cars in March, 1982. It was the opinion of both the former contract manager and the President of Pullman-Standard that the negotiations were abandoned because the company did not have access to any foreign financing and because the contract terms and

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12/ Boeing-Vertol Company, a division of Boeing Co., and General Electric Co., Erie Pa., assemble rail passenger cars under subcontract with other firms. They do not manufacture shells or compete for transit authority procurements as prime contractors. Report, at A-6, note 1. The withdrawal of the Budd Company's domestic competition from prime contracting predated the arrival of significant competition from foreign railcar assemblers. Rail Passenger Cars and Parts Thereof Intended for Use as Original Equipment in the United States from Italy and Japan, Investigation Nos. 731-TA-5 and 6 (Preliminary), USITC Pub. 1034 (February 1980), at 6, finding 8.

13/ Supplemental Views of the Commission with Respect to the Importation of Components and Parts of Rail Passenger Cars, March 23, 1981, at 8.

14/ The Budd Co. Ry. Division v. United States, et al., 507 F. Supp. 997 (1980). The case was dismissed in 1981 in response to a motion filed jointly on behalf of the Budd Company and the Government.

15/ See, supra, note 13, at 8.

technical specifications were onerous. 16/ The decision was not related to imports from Canada within the meaning of section 703 of the Act.

The Budd Company negotiated for the initial contract for 325 cars and the subsequent contract awarded to Bombardier. Budd, unlike Pullman-Standard, would not have produced the shell in the United States. The company does, however, produce shells domestically for other contracts at its Red Lion, Pennsylvania, plant.

Budd would have sourced the shell for the MTA contract in Portugal. The company's reasons for the decision to source the shell in Portugal included: the availability of government-supported export financing in the form of buyer's credits; 17/ the lack of capacity to manufacture additional shells at its Red Lion plant; 18/ and the cost savings from the offshore sourcing. 19/ Having decided to produce the shells in Portugal and finish the cars in a yet-to-be refurbished U.S. facility at Hornell, New York, unrebutted testimony indicates that the company planned to use the second facility for leverage in negotiations with the United Automobile and Aerospace Workers (UAW), the union which represents about 1300 production workers and about 300 white collar workers at the Red Lion plant. 20/ There is nothing on the record to support an inference that the Budd Company would have reconsidered the decision to source the shell in the United States had it been able to secure domestic financing equivalent to that received by Bombardier or, for that matter, had

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16/ July, 1982, telephone conversations with Commission staff.

17/ Report, at A-10.

18/ Post Conference Brief of MTA, at Exhibit B; Conference transcript, at 106-107, 128.

19/ Id., at 128.

20/ Id., at 132. The plant at Hornell, New York, would not have been represented by the UAW.

it been awarded the contract by MTA. Rather, another inference is obvious. The company would have sourced the shell in Portugal because it was more profitable than manufacturing it in the United States. 21/ Thus, there is no foundation for treating the Budd Company as a "domestic" producer of shells in analyzing its negotiations with the MTA. Had the Budd bid been successful, its domestic shell manufacturing capability would not have been utilized.

The Budd Company will be affected by the loss of the MTA contract; however, this injury will affect its role as a prime contractor, not its role as a producer of shells. The award of 825 cars is the largest single order in history. The company claims that it may have to lay-off 30 to 40 persons on its engineering staff if it does not win a new contract for the initial work involved in an order. 22/ The very nature of a prime contractor is to provide design, engineering, technological, testing, and warranty services. These are services which are not protected by section 771(4) of the Act. 23/ 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.

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21/ In the investigation of Certain Iron-Metal Castings from India, Investigation No. 303-TA-13 (Final), domestic producers of the like products were also responsible for nearly one-third of the imports subject to investigation. In that case, however, the producers imported in order to remain competitive with other importers to maintain their ability to supply the market from their domestic facilities. See, Statement of Reasons of Commissioner Paula Stern, USITC Pub. 1098 (September 1980), at 19-20.

22/ Transcript, at 12-13.

23/ International trade in services is only now coming to the forefront of international trade policy. The topic of international standards of conduct for trade in services has been proposed for the agenda for the November, 1982, ministerial meeting in Geneva under the auspices of the General Agreement on Tariffs and Trade. The present investigation might well provide a useful case study for such discussions.

In concluding my considerations of the definition and condition of the domestic industry, I wish to emphasize that my findings have not turned on obscure technicalities in the law. The differences between various components and those between shells and completed cars are not the "minor differences" about which the Senate Report cautions. The distinctions between domestic and foreign production on the one hand, and goods and services on the other, are equally crucial.

#### Causation.

Assuming that a reasonable indication could be demonstrated that Budd is somehow materially injured, or threatened with material injury, within the meaning of the United States countervailing duty law, the Commission must determine if there is material injury "by reason of" the allegedly subsidized imports from Canada.

Both the legislative history 24/ and case law 25/ support the position that the language "by reason of" is a contributing cause standard. The Commission is not to weigh the various causes of material injury. However, it is necessary to examine other causes of material injury to determine whether subsidized imports are causally related to any injury. If all of the material injury is caused by factors other than subsidized imports, the Commission must make a negative determination. 26/ I have demonstrated that there is no material injury to a domestic industry producing a like product in this

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24/ Compare, S. Rept. No. 96-249, at 57-58.

25/ See, Pasco Terminals, Inc. v. United States, 477 F. Supp. 201 (1979), aff'd, 634 F.2d 610 (1980) ("by reason of" in the Antidumping Act, 1921).

26/ See, e.g. Certain Commuter Airplanes from France and Italy, Investigation No. 701-TA-174, USITC Pub. 1269, July 1982.

investigation, I will now address factors other than the allegedly subsidized financing of imports which caused the loss of the MTA contract to Budd.

There is un rebutted testimony on the record indicating that Bombardier's delivery record is nearly perfect, but that Budd's delivery problems with MTA (on previous contracts) could become the subject of litigation. 27/ Budd's delivery problems have been reflected in its revenues. 28/ Against a background of delayed deliveries, with a backlog of over 1,000 cars, 29/ and an annual average production of only approximately 60 cars a year over the last five years, 30/ Budd's contract proposals included an unproven "start-up" plant in Hornell, New York. Moreover, its request in its bid for a waiver of liquidated damages for delays in delivery would not have enhanced its reputation for dependability. 31/ The record also discloses that Bombardier is licensed to take advantage of the Nissho Iwai know-how which influenced MTA's award of the first 325 cars. 32/ MTA's evaluation of the Nissho Iwai/Kawasaki work in progress has been favorable. 33/ At the same time MTA is of the view that some Budd models purchased under other contracts "have still not performed in a satisfactory manner." 34/

I do not intend to imply that the MTA requirements for vendor financing did not influence its selection of Bombardier or, for that matter, the nature

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27/ Transcript, at 168, 133, respectively.

28/ Report, A-17.

29/ Post Conference Brief of MTA, at 16.

30/ Id.

31/ Transcript, at 131.

32/ Id.

33/ See MTA Memorandum Re: MTA - Bombardier Subway Contract Award, reprinted in U.S. Department of the Treasury, Financing of Subway Cars for the Metropolitan Transportation Authority of New York, July 13, 1982.

34/ Transcript, at 134.

of the negotiations between MTA and the contestants. Nor do I wish to imply that the current interest rates in the United States would not influence a decision to seek government export credits abroad. The important point is that the record indicates that, even if Budd had obtained equivalent financing, it would not have been awarded the contract. 35/

#### Threat of material injury

The analysis of material injury has focused on the results of the MTA contract. During the course of this investigation, there has been speculation on a number of issues, including the possibility that Bombardier might change its sourcing of the major components and the potential impact that the MTA contract might have on other domestic component manufacturers.

The discussion of the six major components of a rail passenger car rests on the assumption that Bombardier will not change its present plans for sourcing these components for the MTA contract. Bombardier will not receive a formal notice to proceed under the MTA contract until the Canadian government formally approves the financing arrangements. This approval is expected this month. Once the notice to proceed is issued, full scale production of cars for the MTA contract is not scheduled to begin for approximately 28 months. 36/ Could Bombardier change its sourcing plans for the other five major components? It is doubtful. The timing of such a decision would be inopportune for the firm. Bombardier will not enter into final negotiations

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35/ See, transcript, at 184. Budd's presence in the negotiating process was instrumental to MTA in fostering a credit competition among the Bombardier, Francorail, and Budd. It is apparent that the presence of the Budd Company in the negotiations was a significant factor in MTA's price negotiations with Bombardier.

36/ Report, at A-7.

with prospective subcontractors until it receives the formal notice to proceed. It will then take months to negotiate the subcontracts.

Bombardier's flexibility to adjust sourcing will decline dramatically as time proceeds. Announcing the sourcing of these components in the United States and subsequently shifting the sourcing of these components to Canada would invite new countervailing duty investigations at a time when the company will have far less flexibility to change its sourcing.

What about the balance of the other 5,000-odd components? As the Commission majority may discover during a final investigation, there is no way for the Commission to find out. Many of these products will never be imported. Of those which are, many are not dedicated principally for use in the assembly and finishing of rail passenger cars. For example, consider items such as pipe, valves, wire, insulation, floor covering, and metal fasteners. 37/ None of the producers of these products is dependent upon an anticipated rail passenger car subcontract to schedule its production. In the absence of information indicating which companies would have secured a subcontract with Budd for each article which was imported, it is not possible to define an affected domestic industry. On the other hand, there can be no material injury to an identifiable domestic industry capable of producing those imported, non-fungible items produced to the specifications of the MTA contract because these producers only manufacture when an order is received.

Three domestic firms joined together as the Committee of American Subway Car Suppliers in support of the Budd Company's petition. All three firms allege that since they have been suppliers to Budd of subway car components of

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37/ See, transcript, at 109.

the kind involved in this investigation, they will be injured by imports of parts from Canada for the MTA contract. Standard Steel is a producer of wheels and axles. Bombardier will source these in the United States. Assuming that Standard Steel does not secure the subcontract, the domestic industries producing steel wheels and axles cannot be materially injured within the meaning of the countervailing duty law by the award of the contract to another U.S. firm. Coach and Car produces seats for rail passenger cars. There is no way to tell whether the company would have been awarded a subcontract had the Budd Company won the MTA contract. Finally, Allegheny Ludlum produces stainless steel sheet used in fabricating shells for rail passenger cars. This stainless steel sheet does not appear to be a part, component, or accessory to a rail passenger car within the scope of the Commerce Department notice issued pursuant to section 702 of the Act (47 F.R. 31415, July 20, 1982).

What about the impact of allegedly subsidized Canadian imports in other transit authority contracts? If we assume that the Budd Company works off enough of its present backlog to use its Red Lion plant or decides to forego the cost savings of sourcing its shells in Portugal and opens another domestic facility, Budd, as a domestic producer, could meet Bombardier in head-to-head competition for another prime contract. The record indicates that this is highly unlikely. Bombardier will not compete for steel-wheeled subway car contracts or commuter car contracts other than small orders it might be able to "tack-on" to orders of identical cars on an existing production run. 38/ Unrebutted testimony indicated that such "tack-on" orders are very difficult

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38/ Post Conference Brief, at 6.

to find. 39/ In addition, Bombardier has concentrated its marketing in so-called light-rail-vehicles which Budd does not currently produce. 40/ Bombardier, moreover, will have a backlog of its own until 1987 and will not increase its capacity in the foreseeable future. 41/ Those upcoming major orders on which Budd may bid will not be bid on by Bombardier. These include the MTA order for 226 cars, the Atlanta order, the Houston order, and the San Francisco order. 42/ There is no real threat of imminent injury by reason of allegedly subsidized Canadian imports. There is only speculation and conjecture, unsupported by any information on the record.

#### The role of a preliminary investigation

The potential consequences of the majority vote in this investigation become clear when it is set in contrast to the Congressional intent in directing preliminary investigations. During the Kennedy Round of trade negotiations, the British and Canadian governments accused the United States of having created antidumping investigative procedures which constituted a non-tariff barrier. At that time, the United States antidumping law provided for the Treasury Department to conduct and complete its pricing investigation prior to the Commission's beginning an injury investigation. The proceedings took months, during which importers had no idea whether they would ultimately owe any antidumping duties. As the provisions of the 1967 version of the International Antidumping Code were negotiated, the concepts of simultaneous

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39/ Transcript, at 187.

40/ Transcript, at 83. A close reading of the "confidential" letter received on July 30, 1982, from the Budd Company does not change this assessment.

41/ Post Conference Brief, at 6.

42/ Id.

investigations concerning pricing and injury within a reasonable period of time were formulated. 43/ The bifurcated jurisdiction between the Treasury Department and the Commission prevented simultaneous proceedings in the absence of amending legislation. Treasury, however, proceeded to implement the international code by requiring the Commissioner of Customs to conduct a summary investigation to determine whether investigations should be discontinued at a preliminary stage. 44/ Customs regulations were also amended to require that information concerning the importation of merchandise within the purview of the antidumping law be submitted on behalf of an industry in the United States and that the communication include information indicating that an industry in the United States is injured, or is likely to be injured. 45/

The promulgation of the Treasury regulations was without any real authority inasmuch as Congress had enacted a bifurcated procedure in which the determination of injury was delegated to the Commission. The amendment of the Antidumping Act, 1921, by the Trade Act of 1974 provided for a preliminary injury determination to be conducted by the Commission. 46/ The Senate Finance Committee Report on the bill which became the Trade Act stated that "this amendment is designed to eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade." 47/

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43/ See, Gerald and Victoria Curzon, "The Management of Trade Relations in the GATT," in Andrew Shonfield, International Economic Relations of the Western World, 1959-1971, Vol. I., at 247-248 (1976).

44/ 19 CFR 153.29 (1973).

45/ 19 CFR 153.27(e) (1973).

46/ Section 321 of the Trade Act of 1974, amending the Antidumping Act, 1921. The Antidumping Act, 1921, was repealed by the Trade Agreements Act and replaced by the antidumping provisions of Title VII of the Tariff Act.

47/ S. Rept. No. 93-1298, 93d Cong., 2d Sess., 171 (1974).

The enactment of Title VII of the Tariff Act in 1979 extended the preliminary investigation to the countervailing duty determinations in section 703. The Finance Committee stated:

A major objective of this revision of the countervailing duty law is to reduce the length of an investigation. Long investigations serve no purpose . . . . 48/

The Finance Committee also stated that the "reasonable indication" standard was to be applied in essentially the same manner as the "reasonable indication" standard in the 1974 amendment to the Antidumping Act, 1921.

The analysis of a claim for countervailing duty relief within the statutory guidelines for determining the appropriate scope of the domestic industry and assessing material injury in terms of economic, rather than any other, considerations is necessary to prevent two undesirable results: an inordinate and unnecessary expenditure of government resources, and unnecessary barriers to import trade stemming from uncertainty about potential liability for duties and from the expense of mounting defenses in two administrative proceedings.

The Commission may not rely on a "lower threshold" of injury for a preliminary determination as compared with the final determination. The Commission continues a case when the preliminary investigation shows a reasonable indication of material injury even though the data are inadequate to evaluate certain economic criteria. Examples of missing data that might prompt an affirmative preliminary determination include a lack of comparable transaction prices in a case where average prices or list prices do not reflect the actual competition and the inability of the Commission to gather

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48/ S. Rept. No. 96-249, at 49.

an adequate sample of domestic producers to provide profit and loss allocations on a like product within the 45 days. 49/

Neither type of case is present here. There are no market prices of "shells." Rather, there is an average price per finished car, of which there are no imports. Similarly, we do not need time to allow the domestic producer to improve a profit and loss allocation to a product which would have been made in Portugal. What then does the majority expect to see if the case returns for a final investigation in mid-September or, perhaps, late November? Bombardier will not have completed its subcontracts by that time. Budd will not be able to provide further information on subcontracts it will never negotiate. In short, the record of the present investigation is unusually complete. There is little else the Commission can expect to emerge in a final investigation.

Although the statutory standard for a determination in a preliminary investigation is different from that in a final investigation, the statutory guidelines for selecting the domestic producers which make up the domestic industry and the guidelines for assessing material injury are identical in preliminary and final investigations. Moreover, the statute requires that an affirmative determination be supported by a finding that material injury is "by reason of" the imports under investigation in both preliminary and final investigations. The difference between the preliminary and the final investigations is the factual information necessary to support an affirmative determination. In the preliminary investigation, the information available to the Commission need only indicate a reasonable indication of material injury

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49/ See, e.g., Countertop Microwave Ovens from Japan, Investigation No. 731-TA-4 (Preliminary), USITC Pub. No. 1033 (February 1980).

by reason of the imports subject to investigation. In a final investigation, an affirmative determination must be supported by substantial evidence on the record. 50/ Thus any determination in a final investigation of this case will essentially involve re-evaluating information which is already before the Commission in the record of this preliminary investigation.

#### Burden of proof

The Senate Finance Committee has stated: "The burden of proof under section 703(a) would be on the petitioner." 51/ The Commission has no "burden of proof" in the sense of a formal adjudication. The 45-day time limit does create a burden of coming forward with the information available to the petitioner which supports its claims of material injury. 52/ The statutory scheme clearly contemplates that the Commission evaluate petitioner's claims against the economic factors in section 771(7) of the Act. The Finance Committee Report supports this construction of the statutory scheme:

While the committee recognizes that the ITC cannot conduct a full-scale investigation in 45 days, it expects the Commission to make every effort to conduct a thorough inquiry during that period. 53/

The House report is no less exacting:

It is therefore intended that the ITC will investigate the allegations in the petition in as thorough a manner as possible using the information available within that time period, and will provide interested parties a reasonable opportunity to present their views. 54/

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50/ Compare, Additional Views of Commissioner Paula Stern, Carbon Steel Wire Rod from Brazil, Belgium, France, and Venezuela, Investigation Nos. 701-TA-148 through 150 (Preliminary), USITC Pub. 1230 (March 1982), at 32.

51/ S. Rept. No. 96-249 at 49.

52/ See, Additional Views of Vice Chairman Michael J. Calhoun and Commissioner Paula Stern, in Supplemental Views, supra, note 13, at 19-20.

53/ S. Rept. No. 96-249, at 66.

54/ H. Rept. No. 96-317, 96th Cong., 1st Sess. 61 (1979).

The Budd Company's burden of coming forward in this case was established to the satisfaction of the majority on the basis of a novel theory of an entitlement to contract awards. The 1980 proceeding was based upon the award of transit authority contracts which called for deliveries in 2-3 years. 55/ The best argument the Budd Company put forward for relief in that investigation was that as it worked off its backlog of 563 cars, the lack of new business between 1980 and late 1982-83 would result in lay-offs. During the judicial review of the Commission's unanimous negative determination in that investigation, the Commission, again unanimously, informed the U.S. Court of International Trade that the assumption Budd would be awarded no new business was "completely speculative." 56/

There are three basic distinctions between the 1980 findings of the Commission and the majority vote in this investigation. First, the Budd Company's backlog has now expanded to over 1,000 cars, while its average production over a 5-year period was only 62 cars per year. Second, the Commission has information on its record that Budd will not be confronted with competition from Bombardier in the foreseeable future. Third, in the 1980 antidumping proceeding, the Budd Company was a domestic producer within the meaning of section 771(4) of the Act. It cannot be viewed as any more than a provider of services in the present contract.

#### The consequences of the majority vote

Preliminary investigations conducted under the Act are record proceedings. Had the majority voted negative in this case, judicial review of

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55/ See, Rail Passenger Cars and Parts Thereof . . . , supra, note 12.

56/ Supplemental Views, supra, note 13, at 14.

the determination in the U.S. Court of International Trade would have been available--if the Court had found the Budd Company to have had standing. A negative determination would have been supported by more than substantial evidence on the record.

The consequences of the majority vote are far reaching, going beyond the effect on participants in this proceeding. Persons who appear before the Commission in antidumping and countervailing duty investigations ordinarily have difficulty predicting an outcome where there are no publicly available statistics for the domestic production of the like product and the size of the domestic market for imported and domestic articles. Before this majority vote, however, they could have found comfort in the presence of statutory guidelines for the determination of the scope of the industry. These guidelines at least indicate to all participants those producers whose output will be considered. In addition, an economic analysis of the impact of the complained-of imports on that market is also assured by the criteria in the statute. This apparently had not always been the case. 57/ The majority vote in this case throws into jeopardy the integrity of the carefully defined role of preliminary investigations created by Congress in its revisions of the law in 1979.

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57/ Prior to the enactment of Title VII, one domestic industry witness complained to the House Subcommittee on Trade that--

the Commission seems to be able to use nearly any criterion or any vague means it desires to determine whether there is injury or not. And we would like to know definitely what constitutes it.

Subcomm. on Trade of the House Ways and Means Comm., 95th Cong., 1st Sess., Hearings on the Adequacy and Administration of the Antidumping Act of 1921 (Serial 95-46), 95th Cong., 1st Sess., Nov. 8, 1977.

## INFORMATION OBTAINED IN THE INVESTIGATION

### Introduction

On June 3, 1982, the Budd Co., Troy, Mich. (Budd), filed a petition with the U.S. International Trade Commission and the U.S. Department of Commerce (Commerce) alleging that imports from Canada of certain parts for subway cars to be delivered to the Metropolitan Transportation Authority of New York City will receive subsidies from the Canadian Government and that, by reason of these imports, an industry in the United States is being materially injured and threatened with material injury. Budd filed its petition following an announcement by the Metropolitan Transportation Authority of New York City (MTA) on May 18, 1982, that it had awarded to Bombardier, Inc., Montreal, Quebec, Canada (Bombardier) a contract valued at nearly \$660 million for the production and delivery of 825 subway cars. Budd was an unsuccessful bidder for this contract.

On June 10, 1982, the petitioner advised Commerce and the Commission that it wished to submit a supplement to its petition and requested that Commerce not consider the petition completely filed until that time. The petitioner filed its supplement on June 24, 1982.

On July 2, 1982, the Commission instituted a preliminary countervailing duty investigation (No. 701-TA-182) under section 703(a) of the Tariff Act of 1930 (19 U.S.C. 1671b) to determine whether there is a reasonable indication 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 imports of unfinished rail vehicles and parts thereof provided for in part 6A, schedule 6, of the Tariff Schedules of the United States (TSUS). Section 703(a) directs the Commission to make its determination within 45 days of its receipt of the petition, or in this case by August 9, 1982. A public conference was held in Washington, D.C., on July 21, 1982, at which all interested parties were afforded the opportunity to present information for consideration by the Commission. 1/ The Commission voted on August 3, 1982.

Notice of the institution of the Commission's investigation and of the public conference to be held in connection therewith was duly given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, D.C., and by publishing the notice in the Federal Register on July 14, 1982 (47 F.R. 30667). A second notice amending the scope of the Commission's investigation to conform with the scope of Commerce's investigation was published in the Federal Register on July 20, 1982 (47 F.R. 31449). 2/ The amended scope of the investigation covers imports from Canada of all rail passenger cars, assembled or unassembled, finished or unfinished, components and parts and accessories thereof and/or to be used therewith.

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1/ A list of the participants in the Commission's conference is presented in app. A.

2/ Copies of the Commission's notices are presented in app. B. The Department of Commerce's notice of initiation of a countervailing duty investigation is presented in app. C.

On July 14, 1982, the Commission received a letter from the Industrial Union Department, AFL-CIO, the United Automobile & Aerospace Workers, and the United Steelworkers of America Districts 19 and 31 requesting that they be accepted as copetitioners with Budd in the instant investigation.

Rail passenger cars and parts thereof were the subject of two other investigations conducted by the Commission. In February 1980, the Commission determined in preliminary antidumping investigations 731-TA-5 and 731-TA-6 that there was no reasonable indication of injury or threat of injury to an industry in the United States from imports from Japan and Italy allegedly sold at less than fair value. Subsequently, the U.S. Court of International Trade remanded these cases to the Commission, and, in compliance with the court's order, the Commission issued a supplemental report in March 1981. Shortly thereafter, the court granted a joint motion of the parties to dismiss the appeal.

#### Nature and Extent of Alleged Subsidies

The source of the petitioner's complaint is the Canadian Government's decision to finance the contract for the MTA, an arrangement which the petitioner considers a subsidy within the meaning of section 701 of the Tariff Act of 1930. The arrangement provides for financing on 85 percent, or \$560 million, of the total contract price at an annual interest rate of 9.7 percent. (The contract is discussed in detail in a later section.)

The petitioner also alleges that Bombardier has received several grants from the Canadian Government through the Department of Regional Economic Expansion. The grants are alleged to have amounted to at least \$4.1 million and to have been awarded for primary and secondary expansion projects in several locations.

#### Other Petitions for Relief by Interested Parties

The Budd Co. has filed for no other forms of import relief in connection with the MTA contract; however, several labor organizations, including the Industrial Union Department, AFL-CIO, the United Automobile & Aerospace Workers, the International Association of Machinists & Aerospace Workers, and Districts 31 and 19 of the United Steelworkers of America, recently filed a petition with the United States Trade Representative (USTR) under section 301 of the Trade Act of 1974. The petition, which was filed on June 3, 1982, requested that the President take steps to restrict the importation of Canadian subway cars built with the assistance of subsidized financing. USTR accepted the petition on July 19, 1982, and its consideration of this matter continues.

Believing the subsidized financing to be a violation of Article 9 of the Subsidies Code and concerned that the MTA contract could become a precedent for subsidization of bids into the U.S. market, USTR, on June 18, 1982,

requested formal consultations with Canada under the General Agreement on Tariffs and Trade. On July 5, 1982, U.S. and Canadian delegations met in Geneva to discuss the alleged violation but no agreement was reached. The two parties have not resumed formal consultations.

## The Product

### Description and uses

The imported articles complained of are components of subway cars which, after importation, are to be assembled and delivered to the MTA under its contract with Bombardier.

Subway cars, also known as rapid-transit cars, are self-propelled rail passenger vehicles 1/ used in subways or elevated rail systems within a city or between a city and its neighboring suburbs. They differ from other types of self-propelled rail passenger vehicles, like trolleys and street cars, mainly in that they are larger, more heavily constructed, and designed to be connected in greater numbers. They differ from non-self-propelled rail passenger vehicles mainly in that they are smaller, less heavily constructed, and designed to be connected in fewer numbers.

The principal and most costly subway car subassemblies which are generally provided by a single manufacturer are (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 (casting(s) 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. Variations of these components are used in most types of rail vehicles. They are always manufactured, however, in accordance with the specifications of the buyer, and specifications from buyer to buyer may vary considerably. The MTA contract requires a propulsion system, a truck casting, and a coupler assembly that are highly specific to New York's needs.

Budd and Bombardier estimate that the above components will account for over \*\*\* percent of the material and component cost and for over \*\*\* percent of the total cost of fulfilling the MTA contract. It is estimated that, with the exception of the door operators and controls, no other component which may be provided by a single producer will account for more than about 1 percent of the total cost of the contract. 2/

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1/ All rail vehicles are generally classified into one of four major groupings: (1) locomotives, which provide propulsion for rolling stock; (2) rolling stock, designed to carry passengers or articles; (3) self-propelled rail vehicles, designed to carry passengers or articles; and (4) service vehicles.

2/ Budd estimates that the cost of the door operators and controls may account for about \*\*\* percent of the total cost of the contract.

U.S. tariff treatment

With the exception of the propulsion and air conditioning systems, all of the aforementioned articles are classified under subpart A (Rail Locomotives and Rolling Stock), Part 6 (Transportation Equipment), schedule 6 (Metals and Metal Products), of the TSUS. Axles and wheels are specifically provided for in subpart 6A under items 690.25 and 690.30, respectively. For axles, the column 1 rate of duty 1/ is 0.5 percent ad valorem, an LDDC rate 2/ is not prescribed, and the column 2 rate 3/ is 3 percent ad valorem. For wheels, the column 1 rate is free, and the column 2 rate is 1 cent per pound. Neither axles nor wheels are eligible for duty-free treatment under the GSP. 4/ Subway car shells, truck components, coupler assemblies, and brakes are classified under item 690.40, a basket provision for parts of locomotives and self-propelled rail vehicles. Currently, the column 1 rate of duty for this item is 4.9 percent ad valorem, the LDDC rate is 3.9 percent ad valorem, and the column 2 rate is 35 percent ad valorem. Under the GSP, imports under this item from designated beneficiary developing countries are eligible for duty-free treatment.

At least two TSUS items are applicable to subway car propulsion systems--one for motors of 200 or more horsepower and one for switches and control panels. For motors over 200 horsepower, provided for under item 682.50, the column 1 rate is 5.3 percent ad valorem, the LDDC rate is 4.2 percent ad valorem, and the column 2 rate is 35 percent ad valorem. For switches and control panels, provided for under item 685.90, the column 1 rate is 7.3 percent ad valorem, the LDDC rate is 5.3 percent ad valorem, and the column 2 rate is 35 percent ad valorem. Air-conditioning systems are provided for under item 661.20 and are subject to a column 1 rate of 4.3 percent ad valorem, an LDDC rate of 2.2 percent ad valorem, and a column 2 rate of 35 percent ad valorem. Both propulsion systems and air-conditioning systems are eligible for duty-free treatment under the GSP.

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1/ The rates of duty in rate of duty column 1 are most-favored-nation (MFN) rates, and are applicable to imported products from all countries except those Communist countries and areas enumerated in general headnote 3(f) of the TSUS. However, such rates would not apply to products of developing countries which are granted preferential tariff treatment under the Generalized System of Preferences (GSP) or under the "LDDC" rate of duty column.

2/ The rates of duty in rate of duty column "LDDC" are preferential rates (reflecting the full U.S. MFN concessions rate for a particular item without staging) and are applicable to products of the least developed developing countries designated in general headnote 3(d) of the TSUS which are not granted duty-free treatment under the GSP. If no rate of duty is provided in the "LDDC" column for a particular item, the rate of duty provided in column 1 applies.

3/ The rates of duty in rate of duty column numbered 2 apply to imported products from those Communist countries and areas enumerated in general headnote 3(f) of the TSUS.

4/ The GSP, under title V of the Trade Act of 1974, provides duty-free treatment of specified eligible articles imported directly from designated beneficiary developing countries. GSP, implemented by Executive Order No. 11888 of Nov. 24, 1975, applies to merchandise imported on or after Jan. 1, 1976, and is scheduled to remain in effect until Jan. 4, 1985.

# U.S. Producers

The Budd Co., a subsidiary of Thyssen AG, Dusseldorf, West Germany, accounts for about half of the self-propelled rail passenger cars and shells therefor currently assembled in the United States. 1/ Budd is a large, diversified, multinational corporation with manufacturing plants in several locations in both the United States and abroad. Overall sales for Budd in 1981 were in excess of \$1 billion. In addition to assembling self-propelled rail passenger cars and shells, the company assembles other types of rail passenger cars and shells and also manufactures automotive parts and assemblies, truck equipment, and other industrial products. Sales of rail passenger cars accounted for \*\*\* percent of Budd's overall sales in 1981.

Budd assembles all of its rail passenger cars and car shells in one plant in Philadelphia, Pa., although for the MTA contract, Budd indicated that it would also utilize a facility in Hornell, N.Y. It would be necessary for Budd to make certain improvements and modifications to the Hornell plant in order for the plant to produce subway cars. 2/ The shell is the only major rail passenger car component that Budd manufactures. 3/ Budd subcontracts all other major components to other domestic and foreign producers. The shell, too, may be subcontracted, depending on the nature of the contract and the company's needs. (A list of U.S. producers of major components is shown in app. D). Table 1 shows Budd's intended sources of these components for the MTA contract (based on preliminary price discussions and other considerations), Budd's estimates of the cost of these components in terms of the total contract, and Budd's estimate of the cost of final assembly and overhead. 4/ Budd intended to have the shell, the castings and bolsters, and

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1/ General Electric Co., Erie, Pa., and Boeing-Vertol Co., a Division of Boeing Co., Philadelphia, Pa., are currently assembling self-propelled rail passenger cars under subcontracts with Japanese firms. Unlike the petitioner, neither offers services as a prime contractor for supplying rail passenger cars.

2/ Budd has an option until the middle of September 1982 to lease this facility for 10 years from the Hornell Industrial Development Agency. Until recently, this facility was used by the General Electric Co. (GE) to rehabilitate locomotives and rail passenger cars.

3/ At one time, Budd also manufactured castings.

4/ The total value of the Budd proposal as shown in table 1 assumes that certain conditions in the contract allowing for price reductions would be satisfied. If, for example, the truck that Budd proposed for the MTA contract passed certain tests, the contract price would be reduced by \$23,337 per car. The final negotiated price, before these possible reductions, is \$799,885 per car, or a total contract value of \$660 million.

Table 1.--Rail passenger cars: Estimated MTA contract quantities and costs  
for the Budd Co. and sources of components, by components

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much of the propulsion system (together representing an estimated \*\*\* percent of Budd's total cost of fulfilling the MTA contract) subcontracted abroad. <sup>1/</sup> All of the other major components Budd intended to have produced in the United States.

Bombardier also assembles rail passenger cars in the United States. Its operations are discussed in the following section.

Another prime contractor for rail passenger cars, Pullman-Standard Co., Chicago, Ill., ceased bidding on contracts for such vehicles in 1979; however, the firm still retains the capacity for assembling such equipment.

#### The Canadian Producer

Bombardier also assembles rail passenger cars in the United States and Canada, and, like the petitioner, the shell is the only major component it produces. Its rail passenger car plants are in two locations, one in Quebec, Canada, and one in Barre, Vt. <sup>2/</sup> Like the petitioner, it subcontracts for major components and subassemblies from numerous suppliers in the United States and elsewhere. Table 2 shows Bombardier's intended sources of these major components for the MTA contract, which it will fulfill under license from Kawasaki Heavy Industries, and Bombardier's estimates of the cost of these components. The total value of the contract shown in table 2 reflects Bombardier's final negotiated price. Bombardier will fabricate the shells for the MTA contract in its facilities in Quebec. All of the other major components Bombardier intends to have produced in the United States. Final assembly is to take place in Bombardier's plant in Barre, Vt. The engineering and design of the cars is to be supplied by Kawasaki Heavy Industries under license. The Export Development Act of Canada, 1968-1969, under which the Canadian Government has provided funding for the MTA contract, requires a minimum Canadian content of 60 percent of the value of the contract. The major components which Bombardier intends to obtain in the United States account for \*\*\* percent of the total value of the contract, as currently estimated. At this time, Bombardier credits at least \*\*\* or about \*\*\* percent of the total contract, to the value of final assembly at Barre.

No prices or contracts have been finalized with any producer of a major component. According to Bombardier, however, preliminary price discussions have taken place with prospective subcontractors, and no sources outside the United States are being considered for the major subassemblies. Bombardier will not enter into final negotiations with its prospective subcontractors until it receives a formal notice to proceed from the MTA. This notice is not expected until early August, after the MTA and the Canadian Government draft the final details of the financing arrangement. Full-scale production on subway cars for the MTA contract are scheduled to begin approximately 28 months after the notice to proceed.

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<sup>1/</sup> The steel used in the construction of the shell will be of U.S. origin.

<sup>2/</sup> The Barre, Vt. facility went into operation in 1981. Bombardier has been assembling rail passenger cars in Canada since the mid-1970's.

Table 2.--Rail passenger cars: Estimated MTA contract quantities and costs for Bombardier and source of components, by components

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## The MTA Contract

In April 1981, the MTA solicited bids for the production and delivery of 325 subway cars with options for the delivery of an additional 825. Four subway car builders responded: Bombardier; Budd; Francorail, a consortium of French industrial companies; and Kawasaki Heavy Industries of Japan. Pullman-Standard Co. considered submitting a formal proposal for this contract and began bid preparation; however, after discussions with the MTA and in view of the financing offered by the Canadian and French Governments, the firm decided to cancel its efforts. Nissho Iwai American Corp. representing Kawasaki, was awarded a contract for 325 subway cars in March 1982. Negotiations between the MTA and the other 3 bidders continued until May 1982, when a contract was awarded to Bombardier for the remaining 825 cars, the largest subway car contract ever to be awarded to a single contractor.

According to the MTA, its decision to award the contract to Bombardier was contingent upon 7 major factors:

1. The availability of Government-supported financing from the vendors;
2. The cost of the financing;
3. The price of the cars;
4. Delivery schedules, including reliability of delivery;
5. Quality of design, engineering, and performance, including compatibility with Japanese-built cars already ordered by the MTA;
6. Possible overdependence on a supplier, and;
7. New York state content.

The MTA considered Bombardier's final offer to be superior to Budd's on all seven criteria, with the possible exception of price, which, if certain provisions of Budd's offer were acceptable to the MTA, may ultimately have been lower, albeit marginally. The financing offered by Bombardier was a crucial factor in the MTA's decision. As early as February 1981, John D. Simpson, president of the New York City Transit Authority, expressed publicly the city's concerns in connection with funding the new subway cars. <sup>1/</sup> Bombardier's offer provided financing on 85 percent of the total contract price (\$560 million) at an interest rate of 9.7 percent per annum, to be repaid in 20 equal semiannual installments beginning 6 months after shipment of all cars. The entire loan is to be supplied by the Export Development Corporation of Canada. In contrast, Budd offered financing on only 17 percent of the contract price, part at 8.5 percent with repayment over 9 years and part at 10.25 percent with repayment over 5-1/2 years. In terms of a net present value of the cost of the respective proposals, a means of comparison utilized by the MTA in evaluating each proposal's merits, the MTA

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<sup>1/</sup> See Railway Age, Feb. 23, 1981.

would realize a savings of \$36 million in choosing Bombardier's proposal in lieu of Budd's. This represents a savings of about \$241 million in future payments. The calculation of net present value, a standard tool of weighing alternative investment proposals throughout industry, incorporates the price of the cars and all financial details, including rate of interest, and the size, timing, and number of payments. It also incorporates several assumptions.

Price.--Bombardier's price per car is \$798,770. Budd's offer price per car is \$770,768; however, MTA believes that certain other charges must be included in Budd's price. Two minor adjustments bring Budd's price to \$776,648 per car, 2.8 percent lower than Bombardier's price. MTA told all bidders that it wished to retain 3.0 percent of the total contract price until it had finally accepted all the cars. Budd's bid included a price increase of \$2,061 per car, if the MTA insisted on this provision. Furthermore, MTA asked each bidder for price quotes that included braking components from New York Air Brake. Bombardier stated that it would use New York Air Brake's components at no extra charge to the MTA. Budd stated that if it used New York Air Brake's components, its price would be \$3,819 higher per car.

Budd's offer price also assumes that the undercarriage that will be manufactured by Equipamentos Villares in Brazil will pass New York City Transit Authority (NYCTA) qualification tests. If the NYCTA does not accept the Villares truck, then Budd will increase its price by \$23,237 per car. This additional charge would bring Budd's price up to \$799,885, 0.1 percent higher than Bombardier's price. Villares, a licensee of Budd and Westinghouse Electric, has successfully supplied trucks for the Sao Paulo and Rio de Janeiro subway systems. Budd contends it has no doubt that NYCTA would find the Villares truck acceptable. 1/

Financing.--Both the availability and the terms of financing were important to the MTA. MTA plans to spend nearly \$8 billion over 5 years to improve its facilities. 2/ It feels that it may be unable to raise enough funding to finance these projects from the bond market. Therefore, the MTA encouraged all bidders to offer financing with their bids.

Bombardier offered to finance 85 percent of the value of the contract over a 10-1/2 year period at a 9.7-percent rate of interest. Budd offered financing of 17 percent of the value of the contract over a 9-1/2-year period at a weighted average interest rate of 9.2 percent. This financing represented buyer's credits from Brazil and Portugal for the components to be produced in those countries. 3/ Thus, Bombardier offered to finance a much larger part of the contract than did Budd.

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1/ Testimony of John Doane, Treasurer of Budd, at the MTA hearing, June 10, 1982, p. 115.

2/ Testimony of Richard Ravitch, chairman, Metropolitan Transit Authority, before the Senate Finance Committee, May 28, 1982.

3/ Testimony of John P. Doane, Treasurer, the Budd Co. before the Senate Finance Committee, May 28, 1982. The 9.2-percent interest rate is a weighted average of Brazil's 8.5-percent interest rate and Portugal's 10.25-percent interest rate.

Present value.--As previously stated, the MTA compared the costs of the Bombardier and Budd railcars by comparing present values. The present value is the amount of money that if paid today would be equivalent to a schedule of future payments, assuming that the firm faces a given rate of interest.

The calculation of present value is based on a weighted sum of a series of payments. Payments that are further away in time receive lower weights, because if a purchaser can postpone payments for its equipment, it may be able to reduce its other borrowings or to retain its earnings in interest-bearing accounts for a longer period of time. Thus, if other factors remain constant, purchasers will prefer financing packages that allow them to postpone payments for as long as possible. As a result, the full cost of a purchase will depend not only on the price and interest rate but also on other factors affecting the timing and size of the payments. The benefits of postponing payments depend on the market interest rates, because if payments were not postponed, then the purchaser would have to reduce its lending or increase its borrowing at these rates. Therefore, present value will also depend on the market interest rate.

The MTA and Morgan Bank, its financial advisor, calculated the present value of payments in the Budd and Bombardier contracts under a variety of different assumptions. The results of these calculations are shown in table 3. Given the financing terms in each firm's bid, the present value of Bombardier's contract was \$517 million dollars, 6.5 percent lower than the present value of Budd's contract. Had neither firm offered any financing, the present value of Bombardier's contract would have risen to \$598 million dollars, 5.1 percent higher than Budd's.

Table 3.--Subway cars: Present values of the Budd and Bombardier contracts under different assumptions concerning financing

Financing	Present value		Difference in present value	
	Budd	Bombardier	Value	Share
	-----Million dollars-----			
As in Bid-----	553	517	36	6.5
None-----	569	598	(29)	(5.1)
As in Arrangement <u>1/</u> -----	560	570	(10)	(1.8)

1/ "International Arrangement on Export Credits" of the Organization of Economic Cooperation and Development.

Source: Estimates done by the Metropolitan Transit Authority, Morgan Bank and the U.S. Department of the Treasury.

Had the financing offered by Budd and Bombardier conformed to the minimum terms of the "International Arrangement on Export Credits" of the Organization of Economic Cooperation and Development (OECD), Bombardier's financing would be limited to 85 percent of the Canadian content of the cars; its interest rate would be 11.25 percent, and repayment would be required in 8.5 years. Adherence to these terms would raise the present value of Bombardier's bid to \$570 million dollars and the present value of Budd's bid to \$560 million dollars. Thus, were the arrangement terms to be followed, the cost of the Bombardier contract would be 1.8 percent higher than the cost of the Budd contract.

Bombardier's financing package reduces the present value of its contract by \$81 million, or 13.5 percent, as shown by the data in table 3. However, if the MTA had to finance its purchase of the Bombardier subway cars through market rather than Bombardier's financing, total interest payments over the life of the contract would be \$241 million dollars higher. <sup>1/</sup> The apparent disparity between these two numbers is caused by the way present value is calculated. The total reduction in interest payments is the simple sum of the difference in interest payments in each year; the reduction in present values is the weighted sum of the differences in payments. The weights used in present-value calculations are all less than one, so their use reduces the absolute dollar amounts involved.

Present-value calculations are based on certain assumptions. The major assumptions involved in these calculations concern the price of the Budd cars, the market interest rate the MTA faces, and the amount of escalation in each contract.

The present values in table 3 are based on a Budd price of \$776,648. This price includes additional charges for the MTA's retention requirement and for the use of New York Air Brake components, but does not include the extra charge were the MTA to find the Villares truck unacceptable. If Budd were unable to use this truck, its price per car would increase by \$23,237, so the present value of its contract would rise by \$16 million. This increase does not include the effects of the loss of the Brazilian export credit on these trucks; that loss would further increase the present value of Budd's contract.

These present-value calculations also assume that the MTA faces a 14-percent rate of interest. The portion of each bid that is not financed by the seller is assumed to be financed by the issuing of bonds at 14 percent. However, if the MTA had to issue bonds to raise the large amount of additional financing needed for subway purchases, the interest rate on those bonds might increase. A higher rate of interest would make Bombardier's seller financing more valuable. For example, at a 15-percent interest rate, Budd's present value is \$537 million and Bombardier's present value is \$490 million, 8.8 percent lower than Budd's.

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<sup>1/</sup> This figure was calculated by the staff of the U.S. Department of the Treasury. Like the present-value calculations, this figure assumes the MTA faces a 14-percent market rate of interest.

The third assumption concerns the amount of escalation in each contract. Because delivery under both the Budd and Bombardier contracts will not be completed for several years, each contract contains an escalation clause that adjusts the final price of the cars upward with movements in U.S. Government indexes of wages and material prices. The escalation clauses in the two contracts are different. Budd's escalation clause applies to a slightly higher percentage of the contract value than Bombardier's, but Bombardier's escalation clause places comparatively greater weight on the labor-cost index. Wages will probably rise faster than material prices. The present value estimates assume that wages increase at an 8.5-percent annual rate while material costs increase at an 8.0 percent annual rate. The MTA's estimate of the present value of Budd's bid includes \$117 million in extra costs due to the escalation clause, 21.2 percent of the total value of \$553 million. The MTA's estimate of the present value of Bombardier's bid includes \$133 million in extra costs due to the escalation clause, 25.6 percent of the total value of \$520 million.

#### Other factors

The MTA considered several factors other than price and financing when choosing between Budd and Bombardier. These factors are delivery schedules, New York State content, compatibility with other MTA equipment, and a desire not to be overly dependent on any single supplier for major items of equipment that are critical to the operations of the transit system.

Budd promised both to start and to complete delivery before Bombardier. Budd promised to deliver all cars by October 1986, and Bombardier, by May 1987. The MTA officials, however, stated that they felt Bombardier was more likely to adhere to its delivery schedule, because Bombardier has recently been more reliable in delivering subway cars on time than has Budd. The MTA was particularly concerned that Budd's deliveries would be late, because Budd would assemble the cars in a plant at Hornell, N.Y., that had not previously been used to assemble railcars. 1/ Budd insisted that if the Hornell plant were used for assembling the cars, the MTA waive damages for the first two months of delay.

The MTA estimated that the New York State content of Budd's cars was 12 percent of their cost. The New York State content of Bombardier's cars was 16 percent of their cost, and Bombardier promised to try to raise that to 20 percent. In New York State, the Budd contract would generate 2,340 years of employment; the Bombardier contract would generate 2,384 years of employment. 2/ Budd contends that MTA's estimates of its New York State content are too low, because if it uses New York Air Brake components, its new York State content will be approximately 19 percent. 3/

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1/ Testimony of John Simpson, president of the NYCTA, before the MTA, June 10, 1982, pp. 29-36.

2/ Estimates of employment are from the New York State Department of Commerce.

3/ Testimony of John Doane, op. cit., pp. 116-117.

Bombardier's cars have the advantage of being compatible with 325 cars the MTA has already ordered from Kawasaki. Bombardier will produce its cars using a design licensed from Kawasaki. This similarity of design will reduce MTA's maintenance costs. 1/

The MTA also wants to increase the number of sources for its equipment. It recently made a substantial purchase of commuter cars from Budd. By ordering from Bombardier, the MTA increases its number of suppliers for equipment in general and for cars following the Kawasaki design in particular. A memorandum which the MTA submitted to the New York State Public Authorities Control Board summarizing its consideration of the proposals in terms of its most important criteria is shown in appendix E.

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 to offset or eliminate any net subsidy which is found to exist. 2/ 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. 3/

The factors on which the MTA based its decision were also the subject of a recent review and determination by the U.S. Department of the Treasury (Treasury). The results of this review are summarized in the following section.

#### Decision of the Secretary of the Treasury on the Financing of Subway Cars for the MTA

Consequent to the MTA's awarding of the subway-car contract to Bombardier, Budd formally requested Treasury to allow the Export-Import Bank of the United States (Eximbank) to match the Canadian financing under section 1912 of the Export-Import Bank Act. The act allows the Secretary of the Treasury to authorize special financial assistance by the Eximbank to any U.S. firm which has been placed at a competitive disadvantage for sales in the United States because of the availability of foreign export financing to a foreign competitor. In order for Treasury to authorize such assistance, three statutory conditions must be satisfied:

1. The financial assistance to the foreign competitor must exceed the limits allowable under the International Arrangement of Export Credits;
2. The foreign competitor must be asked to withdraw the financing and then refuse to do so; and
3. The financing offered by the foreign competitor must be a determining factor in the final award.

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1/ Testimony of John Simpson, President of NYCTA, op. cit., p. 26.

2/ Transcript of conference, p. 138.

3/ Ibid., p. 139.

On July 12, 1982, the Secretary of the Treasury concluded that although the Canadian Government's financing offered to Bombardier exceeded allowable international limits and that the Canadian Government refused to withdraw the offer despite repeated requests by Treasury, the financing offered by the Canadian Government was not likely to be a determining factor in the MTA's decision, because Bombardier would have been awarded the contract even if Budd were able to offer matching financing. The conclusion assumes that under a matching financial arrangement, other aspects of Budd's offer would have remained constant. Treasury's decision and findings are shown in appendix F. Budd's rebuttal to these findings is shown in appendix G.

#### The Question of Material Injury and Threat Thereof

Budd Co.

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Table 4.--Selected data for the Budd Co. on its U.S. rail passenger car operations, fiscal years 1979-81, October 1980-March 1981, and October 1981-March 1982

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Component suppliers

In an effort to ascertain the potential effect of future imports of major rail passenger car components from Canada, the Commission contacted by telephone all known U.S. producers of these products (see app. D for listing). Of the 24 producers of major rail passenger car components in the United States, 20 indicated that they would not be injured by imports of like products from Canada in connection with the MTA contract award. Several reasons were cited:

- 1) There is as much likelihood of winning (or losing) a subcontract with Bombardier as with Budd;
- 2) They are not interested in bidding on a subcontract;
- 3) The design specifications of the MTA contract preclude the use of their product; and
- 4) Sales of the product in question are a relatively small part of their overall operations.

The remaining 4 producers---\*\*\*---either stated or implied that they may be injured because they were less likely to receive a subcontract from Bombardier than from Budd. \*\*\*.

Wheels and axles.--At least 10 firms produce wheels and axles for rail passenger cars in the United States. Four firms--Abex Corp. New York, N.Y.; Edgewater Steel, Oakmont, Pa.; Griffin Wheel, Chicago, Ill.; and X-Tek, Cincinnati, Ohio--produce wheels only; 3 firms--Bethlehem Steel, Bethlehem, Pa.; Standard Forging, East Chicago, Ind.; and Timkin, Canton, Ohio--produce axles only; 3 firms--Penn Machine, Pittsburgh, Pa.; Standard Steel, Burnham, Pa.; and United States Steel, Pittsburgh, Pa., produce both wheels and axles. \*\*\*.

Truck castings and bolster.--Only one firm in the United States--Buckeye Steel Castings--currently produces truck castings for subway cars. \*\*\*.

Coupler assembly.--There are four U.S. producers of the complete coupler assembly and one, Dresser Industries Inc., Depew, N.Y., which manufactures the drawbar assembly only. The 4 which manufacture the complete assembly include the Ohio Brass Co., Mansfield, Ohio; Dellner-Schaku, Mt. Prospect, Ill.; Walton Products, Broomall, Pa., and Westinghouse Airbrake Co. (WABCO), Wilmerding, Pa. \*\*\*.

Brakes.--Two firms--New York Airbrake Co., Watertown, N.Y., and WABCO--produce brakes for rail passenger cars in the United States. \*\*\*

Propulsion system.--Three firms in the United States produce propulsion systems for rail passenger cars: GE, Erie, Pa.; Westinghouse Electric Corp., Buffalo, N.Y. and West Mifflin, Pa.; and the Garrett Corp., Torrance, Calif. \*\*\*

Air-conditioning system.--Four firms in the United States manufacture air-conditioning systems for rail passenger cars: Safety Electric, Wallingford, Conn.; the Trane Co., La Crosse, Wis.; Air Control Industries (ACI) Irvine, Calif.; and Lear Sigler Energy Products, Santa Ana, Calif. \*\*\*.

Producers of other components.--The Commission also contacted by telephone U.S. producers of other components which, although relatively marginal in terms of total value of the MTA contract, were specific to rail passenger cars. These components include the automatic door system (door operators and controls), the seats, and the windows (including sashes). It is estimated that the value of the automatic door systems will account for about \*\*\* percent of the total cost of the contract; seats and windows (including sashes) will each account for a little over \*\*\* percent.

Automatic door system.--there are three producers of automatic door systems for rail passenger cars in the United States: the Nycal Co., South Hackensack, N.J.; Vapor Corp., Chicago, Ill.; and Westcode, Inc., Frazer, Pa. \*\*\*.

Seats.--At least five firms in the United States produce or have the capability to produce seats for rail passenger cars: American Seating Co., Grand Rapids, Mich.; AMI Industries, Inc., Colorado Springs, Colo.; Coach & Car Equipment Corp., Elk Grove Village, Ill.; Seats, Inc., Reedburg, Wis.; and U.S. Seating Co., Inc., Topton, Pa. \*\*\*.

\* \* \* \* \*

Windows (including sashes).--Only one firm in the United States--Ellcon-National, Totowa, N.J.--is known to produce both windows and window sashes for rail passenger cars. \*\*\*.

It is estimated that all other components for subway cars to be delivered to the MTA would each account for less than 1 percent of the total cost of the contract. Moreover, unlike the major components, which are specific to rail passenger cars, these items are sold in many different markets for many different uses. For this reason, it would be extremely difficult to assess the impact of imports of these items on a U.S. industry. Neither Budd nor Bombardier can state at this time whether or not any of these items would be imported. However, in order to achieve 60 percent Canadian content, Bombardier would have to source many small-value items, such as fasteners, carpet, wiring, tile, and so forth, in Canada.

### Labor

Three labor unions--the United Automobile & Aerospace Workers (UAW), the United Steel Workers of America, and the Industrial Union Department of the AFL-CIO--testified at the Commission's conference that they were injured and were threatened with injury. <sup>1/</sup> The UAW represents 1,300 production workers, as well as 300 white-collar and clerical workers and draftsmen at Budd. The United Steel Workers represents several thousand workers employed by at least 16 firms which produce components for the subway car industry. No estimate was given by the AFL-CIO of the number of workers that would be affected. In addition to pointing out the immediate injury to Budd engineers and to workers of subway-car parts suppliers, representatives of these unions stressed that continued subsidies by foreign governments, such as the Canadian Government's support of Bombardier, would gradually eliminate Budd and U.S. component suppliers from the rail passenger car market.

### Future contracts

A similar view to that of the labor unions was expressed by \*\*\*. These firms indicated that, although they were not adversely affected by the MTA contract, they may be so affected by future contracts awarded to foreign car builders on the basis of government subsidies and expressed concern over this precedent.

Anticipated orders for rail passenger cars in the United States through 1988, by purchasers, are shown in table 5. From 1982 to 1988, it is expected that between 2,400 and 2,800 cars will be ordered by several cities in the United States. It should be noted, however, that contracts for well over half

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<sup>1/</sup> Transcript of the conference, pp. 49-50, 52-53, 58-61, 63-64, and 75-76.

<sup>2/</sup> Transcript of the conference, pp. 163-168.

of these cars have already been awarded. Bombardier has indicated to the Commission that, because of capacity limitations, it does not intend to bid on any major contracts for subway cars while fulfilling its obligations to the MTA. 1/ It may, however, bid on small orders for light rail vehicles, such as trolleys and street cars. It has no plans for expansion of its facilities in Canada.

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1/ Transcript of the conference, pp. 163-168.

Table 5.--Rail passenger cars: Anticipated orders in the U.S. market, by purchasers and by types of cars, 1982-88

Purchaser	Rapid-transit	Light rail vehicle	Commuter	Total
Atlanta (MARTA)-----:	30-100	-	-	30-100
Boston (MBTA)-----:	-	50-100	-	50-100
Cleveland (GCRTA) <u>1</u> /--:	60	-	-	60
Connecticut (CDOT)----:	-	-	100	100
Detroit (SEMTA)-----:	-	88	17-45	105-133
Honolulu-----:	85	-	-	85
Los Angeles (SCRTD)---:	120-132	-	-	120-132
New Jersey (NJ Transit)-----:	-	-	0-37	0-37
New York (NYCTA) <u>2</u> /--:	1,376	-	-	1,376
New York (MTA-Car rail) <u>3</u> /-----:	-	-	126	126
New York (MTA- LIRR) <u>3</u> /-----:	-	-	146	146
Philadelphia (SEPTA)--:	15	30	50	95
Pittsburgh (PAT) <u>4</u> /--:	-	55	-	55
Sacramento (STDA)----:	-	26-28	-	26-28
San Francisco (BART)--:	64-154	-	-	64-154
San Francisco (MUNI)--:	-	34-42	-	34-42
Total-----:	1,750-1,922	283-343	439-504	2,472-2,769

1/ Purchased 60 rapid-transit cars from Tokyo Car, Japan.

2/ Purchased 325 rapid-transit cars from Nissho-Iwai America (Kawasaki Heavy Industries, Japan) and plans to purchase 825 rapid-transit cars from Bombardier, Inc., Canada.

3/ Purchased 130 commuter rail cars from Budd Co. and exercised an option for 186 additional cars for these systems; 316 cars purchased is greater than the 272 cars anticipated.

4/ Purchased 55 light rail vehicles from Siemens, Inc., West Germany.

Source: Railway Age, Jan. 11, 1982, p. 15, and the Urban Mass Transportation Authority.

APPENDIX A  
PARTICIPANTS IN THE COMMISSION'S CONFERENCE

CALENDAR OF PUBLIC CONFERENCE

Investigation No. 701-TA-182 (Preliminary)

CERTAIN RAIL PASSENGER CARS AND PARTS  
THEREOF IMPORTED FROM CANADA

Those listed below appeared as witnesses at the United States International Trade Commission's conference held in connection with the subject investigation on July 21, 1982, in the hearing room of the USITC Building, 701 E. Street N.W., Washington, D.C.

In support of the imposition of  
countervailing duties

Barnes, Richardson & Colburn--Counsel  
Washington, D.C.  
on behalf of

The Budd Company

Paul Sichert, Vice President, The Budd Co.  
Thomas I. Davenport, Corporate Counsel, The Budd Co.

James H. Lundquist) --OF COUNSEL  
Andrew P. Vance )

Collier, Shannon, Rill & Scott--Counsel  
Washington, D.C.  
on behalf of

The Committee of American Subway Car Suppliers  
Standard Steel Company  
Allegheny Ludlum Steel Corporation  
Coach and Car

David A. Hartquist) --OF COUNSEL  
Paul C. Rosenthal )

Industrial Union Department, AFL-CIO;  
United Automobile and Aerospace Workers; and  
United Steelworkers of America Districts 19 and 31

David Mallino, Legislative Representative  
United Steelworkers of America

Lee Price, International Trade Economist  
United Automobile and Aerospace Workers

Brian Turner, Executive Assistant to the President  
Director of Legislation and Economic Policy  
Industrial Union Department, AFL-CIO

In opposition to the imposition of  
countervailing duties

Dechert, Price & Rhoads--Counsel  
Philadelphia, Pa.  
on behalf of

Bombardier, Inc.

A. Carl Mawby, Vice President of Marketing, Bombardier, Inc.

William Kennedy       )  
Brett A. Schlossberg)--OF COUNSEL

Mudge Rose Guthrie & Alexander--Counsel  
Washington, D.C.  
on behalf of

Metropolitan Transportation Authority of New York City

Steven M. Polan, Special Counsel, MTA

John J. Kirby       )  
William N. Walker)--OF COUNSEL  
David A. Vaughan )



**APPENDIX B**  
**COMMISSION'S NOTICES**

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-104]

### Certain Card Data Imprinters and Components Thereof; Grant of Stipulated Motion of All Parties for Continued Suspension of Investigation

**AGENCY:** International Trade Commission.

**ACTION:** Grant of motion for continued suspension of investigation.

**SUMMARY:** Notice is hereby given that the Commission has granted a stipulated motion by complainants AM International, Inc., and Bartizan Corp., respondents National Business Systems, Inc. (Canada), and National Business Systems, Inc. (U.S.), and the Commission investigative attorney that the Commission continue its suspension of this investigation (Motion 104-189C).

**AUTHORITY:** The authority for the Commission's action is contained in section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and § 210.15 of the Commission's Rules of Practice and Procedure (19 CFR 210.15).

**SUPPLEMENTARY INFORMATION:** Upon receipt of a complaint filed by AM International, Inc., and Bartizan Corporation the Commission instituted investigation No. 337-TA-104 to determine whether there is a violation of section 337 of the Tariff Act of 1930 by reason of unfair methods of competition and unfair acts in the importation and sale of certain card data imprinters, alleged to infringe claim 7 of U.S. Letters Patent 3,272,120 and claim 12 of U.S. Letters Patent 3,340,800. Notice of the Commission's investigation was published at 46 FR 31094 (June 12, 1981).

On February 9, 1982, the Commission granted a motion by respondents National Business Systems, Inc. (Canada) and National Business Systems, Inc. (U.S.), for a limited suspension of the investigation until 10 days after completion of trial in United States district court litigation involving the patents that are at issue in this investigation. The present action of the Commission continues the suspension in effect until 10 days after the court rules on the matters at issue in the trial before it.

**FOR FURTHER INFORMATION CONTACT:** Michael P. Mabile, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0189.

Issued: July 2, 1982.

By order of the Commission.  
Kenneth R. Mason,  
Secretary.

[FR Doc. 82-19040 Filed 7-13-82; 8:45 am]  
BILLING CODE 7020-02-M

[Investigation No. 701-TA-182 (Preliminary)]

### Certain Imported Unfinished Subway Cars and Parts Thereof To Be Delivered to the Metropolitan Transportation Authority of New York City

**AGENCY:** International Trade Commission.

**ACTION:** Institution of preliminary countervailing duty investigation and scheduling of a public conference to be held in connection with the investigation.

**SUMMARY:** The U.S. International Trade Commission hereby gives notice of the institution of an investigation to determine whether there is a reasonable indication 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 imports of unfinished subway cars and parts thereof, to be delivered to the Metropolitan Transportation Authority of New York City, the purchase of which is alleged to be financed by the Export Development Corporation of Canada.

In making its determination for purposes of this preliminary investigation the Commission will examine information on unfinished rail vehicles and parts thereof provided for in part 6A of schedule 6 of the Tariff Schedules of the United States (TSUS).

**EFFECTIVE DATE:** June 24, 1982.

**FOR FURTHER INFORMATION CONTACT:** Mr. Larry Reavis, Office of Investigations, U.S. International Trade Commission; telephone 202-523-0296.

#### SUPPLEMENTARY INFORMATION:

**Background.**—This investigation is being instituted in response to a petition filed June 24, 1982, on behalf of the Budd Company of Troy, Michigan. A copy of this petition is available for public inspection in the Office of the Secretary, U.S. International Trade Commission Building, 701 E Street NW., Washington, D.C. The Commission must make its determination in this investigation within 45 days after the date of the filing of the petition or by August 9, 1982 (19 CFR 207.17). Persons wishing to participate in this investigation as parties must file an entry of appearance with the Secretary to the Commission

not later than July 21, 1982 (19 CFR 201.11). Any entry of appearance filed after this date will be referred to the Chairman, who shall determine whether to accept the late entry for good cause shown by the person desiring to file the notice. This investigation will be subject to the provisions of Part 207 of the Commission's Rules of Practice and Procedure (19 CFR Part 207, 47 FR 6190, February 10, 1982), particularly Subpart B thereof.

**Service of documents.**—The Secretary will compile a service list from the entries of appearance filed in this investigation. Any party submitting a document in connection with the investigation shall, in addition to complying with § 201.8 of the Commission's rules (19 CFR 201.8), serve a copy of each such document on all other parties to the investigation. Such service shall conform with the requirements set forth in § 201.16(b) of the rules (19 CFR 201.16(b)).

In addition to the foregoing, each document filed with the Commission in the course of this investigation must include a certificate of service setting forth the manner and date of such service. This certificate will be deemed proof of service of the document. Documents not accompanied by a certificate of service will not be accepted by the Secretary.

**Written submissions.**—Any person may submit to the Commission on or before July 23, 1982, a written statement of information pertinent to the subject matter of this investigation. A signed original and fourteen (14) copies of such statements must be submitted.

Any business information which a submitter desires the Commission to treat as confidential shall be submitted separately, and each sheet must be clearly marked at the top "Confidential Business Data." Confidential submissions must conform with the requirements of § 201.6 of the Commission's Rules of Practice and Procedure (19 CFR 201.6). All written submissions, except for confidential business data, will be available for public inspection.

**Conference.**—The Director of Operations of the Commission has scheduled a conference in connection with this investigation for 9:30 a.m., on July 21, 1982, at the U.S. International Trade Commission Building, 701 E Street NW., Washington, D.C. Parties wishing to participate in the conference should contact the supervisory investigator for the investigation, Ms. Vera Libeau, telephone 202/523-0368, not later than July 16, 1982, to arrange for their appearance. Parties in support of the

imposition of countervailing duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and B (19 CFR Part 207), and Part 201, subparts A through E (19 CFR Part 201), 47 FR 6182, February 10, 1982. Further information concerning the conduct of the conference will be provided by Ms. Libeau.

This notice is published pursuant to § 207.12 of the Commission's Rules of Practice and Procedure (19 CFR 207.12).

Issued: July 6, 1982.

Kenneth R. Mason,  
Secretary.

[FR Doc. 82-19042 Filed 7-13-82; 8:45 am]

BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-110]

##### **Certain Methods for Extruding Plastic Tubing; Termination of Respondent**

**AGENCY:** International Trade Commission.

**ACTION:** Termination of investigation as to respondent Sue Trading Co.

**SUMMARY:** The Commission has terminated the above-captioned investigation as to respondent Sue Trading Co. (Sue) on the basis of representations contained in a motion to terminate filed by respondent Sue.

**SUPPLEMENTARY INFORMATION:** This investigation is being conducted under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and 19 U.S.C. 1337a and concerns alleged unfair trade practices in the importation and sale of certain extruded plastic tubing and reclosable plastic bags allegedly made by a process which, if practiced in the United States, would infringe patents owned by complainant Minigrip, Inc.

The motion to terminate was based generally on the grounds that Sue's involvement in this investigation is *de minimus*, that it has not imported reclosable plastic bags since 1976, that it has nothing further to contribute to this adjudication, that continued participation in the investigation will create undue hardship and expense to respondent, and that the termination of the respondent would not affect detrimentally the conclusion of this investigation.

The motion was opposed by the complainant and the Commission

investigative attorney on the grounds that there is a conflict between the allegations of the complaint that Sue openly sells imported Taiwanese reclosable plastic bags and Sue's factual representation in its motion which should be resolved based on presentation of evidence at the trial. However, the trial has now been concluded and no evidence was offered to contradict Sue's representations. Complainant also filed no response to an order to show cause why Sue should not be terminated.

Copies of the Commission's Action and Order and all other non-confidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, Telephone 202-523-0161.

**FOR FURTHER INFORMATION CONTACT:** Eliza Patterson, Esq., Office of the General Counsel, Telephone 202-253-0480.

Issued: July 9, 1982.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

[FR Doc. 82-19044 Filed 7-13-82; 8:45 am]

BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-108]

##### **Certain Vacuum Bottles and Components Thereof; Termination of Respondent**

**AGENCY:** International Trade Commission.

**ACTION:** Termination of investigation as to respondent Progressive International Corp.

**SUMMARY:** The Commission has terminated the above-captioned investigation as to respondent Progressive International Corp. (Progressive) on the basis of a joint motion filed by complainant Union Manufacturing Co., respondent Progressive, and the Commission investigative attorneys.

**SUPPLEMENTARY INFORMATION:** This investigation is being conducted under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and concerns alleged unfair trade practices in the importation into and sale in the United States of certain vacuum bottles and components thereof. The joint motion to terminate the investigation as to Progressive included affidavits by Kevin Wold, president of Progressive, and Derek A. Dibble, executive vice president of Union. In his

affidavit, Mr. Wold stated that Progressive has not imported any vacuum bottles since service of the complaint, and Progressive has sold or otherwise disposed of all the bottles previously imported into the United States. Mr. Wold also stated that Progressive has agreed not to import or sell the allegedly infringing vacuum bottles in the United States, unless and until there is a final decision by the Commission or a court that the vacuum bottles do not infringe complainant's trademark. In his affidavit, Mr. Dibble agreed on behalf of Union to release Progressive from any and all claims for damages.

Copies of the Commission's Action and Order and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

**FOR FURTHER INFORMATION CONTACT:** William E. Perry, Esq., Office of the General Counsel, telephone 202-523-0359.

Issued: July 9, 1982.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

[FR Doc. 82-19045 Filed 7-13-82; 8:45 am]

BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-111]

##### **Certain Vacuum Cleaner Brush Rollers; Settlement Agreement, Recommended Termination of Party, and Request for Public Comments**

**AGENCY:** International Trade Commission.

**ACTION:** Request for public comments on the recommended termination of respondent Hornleon Co., Ltd. (Hornleon), based on a settlement agreement.

**SUMMARY:** Notice is hereby given that the presiding officer in this investigation has recommended that the Commission grant the motion of complainant Scott & Fetzer Co. to terminate this investigation as to respondent Hornleon on the basis of a settlement agreement. Before taking final action on the motion, the Commission seeks written comments on the proposed termination from interested members of the public.

**DEADLINE:** All comments must be received on or before August 13, 1982.

of jurisdiction to institute a proceeding on its own initiative or on complaint, to review this contract and to disapprove it.

Subject to compliance with these conditions, under 49 U.S.C. 10505(a) we find that the 30 day notice requirement in this instance is not necessary to carry out the transportation policy of 49 U.S.C. 10101a and is not needed to protect shippers from abuse of market power. Further, we will consider revoking this exemption under 49 U.S.C. 10505(d) if protests are filed within 15 days of publication in the Federal Register.

This action will not significantly affect the quality of the human environment or conservation of energy resources.

(49 U.S.C. 10505)

Dated: July 13, 1982.

By the Commission, Division 2,  
Commissioners Andre, Gilliam, and Taylor.  
Commissioner Taylor is assigned to this Division for the purpose of resolving tie votes. Since there was no tie in this matter, Commissioner Taylor did not participate.  
**Agatha L. Mergenovich,**  
*Secretary.*

[FR Doc. 82-19531 Filed 7-19-82; 8:45 am]

BILLING CODE 7035-01-M

#### [Ex Parte No. 137]

#### Contracts for Protective Services

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Extension of time to file comments to notice of proposed exemption.

**SUMMARY:** In the Federal Register notice of June 18, 1982 (47 FR 26463), the date comments were due in this proceeding on the proposed exemption of contracts for protective services against heat or cold provided to or on behalf of rail carriers and express companies and the related proposed removal of regulations was July 19, 1982. At the request of the Chessie System Railroads, the due date has been postponed to August 2, 1982. Parties who have already filed comments are free to file supplemental statements by that date; however, such comments cannot reply to previously filed comments. The proposed exemption and the proposed removal of regulations published at 47 FR 26409, June 18, 1982, will be considered in a single proceeding and parties need not file duplicating comments.

**DATE:** Comments are due August 2, 1982.

**ADDRESS:** Send original and 15 copies to: Ex Parte No. 137, Interstate Commerce Commission, Room 5340, Washington, D.C. 20423.

**FOR FURTHER INFORMATION CONTACT:** Douglas Galloway, (202) 275-7278.

Dated: July 15, 1982.

By the Commission, Reese H. Taylor, Jr.,  
Chairman.

**Agatha L. Mergenovich,**  
*Secretary.*

[FR Doc. 82-19684 Filed 7-19-82; 8:45 am]

BILLING CODE 7035-01-M

#### INTERNATIONAL TRADE COMMISSION

[Investigation No. 701-TA-182  
(Preliminary)]

#### Certain Rail Passenger Cars and Parts Thereof Imported From Canada

**AGENCY:** International Trade Commission.

**ACTION:** Changes in the scope of the preliminary countervailing duty investigation.

**SUMMARY:** The U.S. International Trade Commission hereby gives notice of changes in the scope of its investigation to determine whether there is a reasonable indication 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 allegedly subsidized imports from Canada of rail passenger cars, assembled or unassembled, finished or unfinished, components, and parts and accessories thereof and/or to be used therewith.

**EFFECTIVE DATE:** July 16, 1982.

**FOR FURTHER INFORMATION CONTACT:** Ms. Vera Libeau, Office of Investigations, U.S. International Trade Commission; telephone 202-523-0368.

**BACKGROUND:** The purpose of these changes in the scope of the Commission's investigation is to conform the scope of this investigation with that initiated by the Department of Commerce on July 14, 1982.<sup>1</sup>

This notice is published pursuant to § 207.12 of the Commission's rules of practice and procedure (19 CFR 207.12).

Issued: July 16, 1982.

**Kenneth R. Mason,**  
*Secretary.*

[FR Doc. 82-19767 Filed 7-19-82; 10:24 am]

BILLING CODE 7020-02-M

<sup>1</sup> Published elsewhere in this issue.

#### DEPARTMENT OF LABOR

#### Employment and Training Administration

#### Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for adjustment assistance issued during the period July 5, 1982—July 9, 1982.

In order for an affirmative determination to be made and a certification of eligibility to apply for adjustment assistance to be issued, each of the group eligibility requirements of Section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separate,

(2) That sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the decline in sales or production.

#### Negative Determinations

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-12,867; *Maid Lingerie, Inc.,*  
North Troy, NY

TA-W-12,866; *Chester County*  
*Sportswear, Henderson, TN*

TA-W-12,864; *Aurora Undergarments*  
*Co., Inc., Brooklyn, NY*

TA-W-12,863; *Anita Foundations, Inc.,*  
New York, NY

TA-W-12,850; *Urethane Rubber Corp.,*  
Port Huron, MI

TA-W-12,838; *Press Formed Products,*  
*Inc., Centerline, MI*

In the following cases the investigation revealed that criterion (3) has not been met. Increased imports did not contribute importantly to workers separations at the firm.

TA-W-12,853; *Solvent Finishers Inc.,*  
Westbury, NY

TA-W-12,857; *Charles M. Reeder & Co.,*  
*Inc., Highland Park, MI*

TA-W-12,672; *Ford Motor Co., Ford*  
*Export Div., Wixom, MI*

**APPENDIX C**

**COMMERCE'S NOTICE OF  
INITIATION OF COUNTERVAILING DUTY INVESTIGATION**

that the petition meets these requirements.

Therefore, we are initiating a countervailing duty investigation to determine whether manufacturers, producers, or exporters in Mexico of polypropylene film receive bounties or grants. If our investigation proceeds normally, we will make our preliminary determination by September 17, 1982.

#### Scope of the Investigation

The merchandise covered by this investigation is polypropylene film, which is a thin transparent film made from polypropylene resin. It is currently provided for in items 774.5590 and 771.4316 of the Tariff Schedules of the United States Annotated.

Polypropylene film is used for packaging a wide variety of articles and in the manufacture of pressure sensitive packaging tape, dielectric material in electrical capacitors, and for wrapping power and communication cables.

#### Allegations of Bounties or Grants

The petition alleges that manufacturers, producers, or exporters in Mexico of polypropylene film receive the following benefits that constitute bounties or grants: tax certificates under the Certificado de Devolucion de Impuesto ("CEDI") program on exports; tax certificates under the Certificates of Fiscal Promotion ("CEPROFI") program for "priority" industrial activities; and preferential financing under the Fund for the Promotion of Exports of Mexican Manufactured Products ("FOMEX").

Dated: July 14, 1982.

Judith Hippler Bello,  
Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 82-19570 Filed 7-19-82; 8:45 am]

BILLING CODE 3510-25-M

#### Initiation of Countervailing Duty Investigation; Railcars From Canada

**AGENCY:** International Trade Administration, Commerce.

**ACTION:** Initiation of Countervailing Duty Investigation.

**SUMMARY:** On the basis of a petition filed in proper form with the U.S. Department of Commerce, we are initiating a countervailing duty investigation to determine whether producers, manufacturers, or exporters in Canada of railcars receive benefits which constitute subsidies within the meaning of the countervailing duty law. We are notifying the U.S. International Trade Commission ("ITC") of this action so that it may determine whether imports of railcars are materially

injuring, or threatening to materially injure, a U.S. industry. If the investigation proceeds normally, the ITC will make its preliminary determination on or before August 9, 1982, and we will make ours on or before September 17, 1982.

**EFFECTIVE DATE:** July 20, 1982.

**FOR FURTHER INFORMATION CONTACT:** Paul Nichols, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, D.C. 20230, telephone: (202) 377-5497.

#### SUPPLEMENTARY INFORMATION:

##### Petition

On June 24, 1982, we received a petition from counsel for the Budd Company ("Budd") on behalf of the U.S. industry producing passenger railway cars. In compliance with the filing requirements of section 355.26 of the Commerce Regulations (19 CFR 355.26), the petitioner alleges that producers, manufacturers or exporters of railcars in Canada receive subsidies within the meaning of section 771(5) of the Tariff Act of 1930, as amended (19 U.S.C. 1677(5)) (the "Act"), and that these imports are materially injuring, or threatening to materially injure, a U.S. industry.

In addition, on July 14, 1982, we received a request from the Industrial Union Department, AFL-CIO, the United Automobile and Aerospace Workers, and the United Steelworkers of America (the "unions") to be co-petitioners in this proceeding. This request stated that these labor organizations represent members in the United States subway car manufacturing industry and supplying industries, and specifically the Budd Company and its suppliers for the construction of subway cars for the New York Metropolitan Transit Authority. Budd and the unions appear to be "interested parties" within the meaning of section 771(9) of the Act.

Since Canada is a "country under the Agreement" within the meaning of section 701(b) of the Act, Title VII of the Act applies to this investigation, and an injury determination is required.

##### Initiation of Investigation

Under section 702(c) of the Act, we must determine, within 20 days after a petition is filed, whether a petition sets forth the allegations necessary for the initiation of a countervailing duty investigation, and whether it contains information reasonably available to the petitioners supporting these allegations. We have examined the petition on

railcars and have found that it meets these requirements.

Therefore, in accordance with section 702(c) of the Act, we are initiating a countervailing duty investigation to determine whether manufacturers, producers or exporters in Canada of railcars receive benefits that constitute subsidies within the meaning of section 771(5) of the Act. If our investigation proceeds normally, we will make our preliminary determination by September 17, 1982.

#### Scope of Investigation

The merchandise covered by this investigation consists of rail passenger cars, assembled or unassembled, finished or unfinished, components, and parts and accessories thereof and/or to be used therewith. This merchandise appears to be currently classifiable under the following *Tariff Schedules of the United States* numbers, *inter alia*: 690.40, 688.06-688.07, 680.14-680.28, 647.01-10, 646.92, 646.95, 690.40, 690.30, 680.30-36, 690.40, 685.90, 690.40, 772.35, 772.36, 690.40, 653.41, 690.40, 640.71-640.72, 682.95-683.16.

The rail passenger cars named in this petition are primarily used as subway car.

#### Value of Imports

No imports of the railcars referred to in the petition have taken place up to this time. Information supplied in the petition indicates that deliveries to the U.S. market will begin in July, 1984. Nevertheless, a binding agreement for 825 passenger railcars was executed on June 10, 1982. Although the effective date of the actual "award" of the contract is apparently contingent upon the Canadian producer's entry into a specified financing agreement, ratification of the contract by purchaser's Board of Directors, and approval of the contract by a specified New York state agency, each of these conditions is essentially ministerial in nature. The contract becomes effective within seven days after the conditions are satisfied (if satisfaction occurs on or before July 23, 1982). Given the nature of this transaction and the peculiarities of the railcar industry, we determine that a sale to the United States of the subject merchandise has occurred. This industry, like others involved in manufacturing costly, technologically complex products, requires substantial lead time between the negotiation of a sale and actual delivery. Inventories of the finished merchandise are seldom or never maintained because of the frequent need to customize the product to meet the particular customer's

engineering and design specifications. Lead time is also required because such production involves large financial commitments which are seldom feasible in the absence of a binding agreement. Under these circumstances, the lack of actual entries of the subject merchandise will not deter our initiating an investigation. To do otherwise would effectively negate the intended effect of the countervailing duty law when expensive, high technology merchandise is being subsidized, but imported only once (or in very few shipments) long after the sales have occurred. If actual entries were a prerequisite to an investigation, domestic industries would receive no relief between the time the transaction is consummated and entry occurs. In the meantime, the relevant domestic industry could suffer material injury with no recourse available under this law. Furthermore, subsidized export financing like that alleged by petitioner would not be investigated until long after capital allocation has been distorted by foreign and domestic manufacturers' investment decisions made in reliance on, or in response to, such subsidies. Congress did not intend that the statute be interpreted so restrictively as to eviscerate its impact in such transactions. Thus, we conclude that for purposes of initiating this countervailing duty investigation, a sale exists because a contract mandating delivery of the subject merchandise in the United States has been executed. In the event that the issue of subsidized imports becomes moot because all conditions precedent to the "award" of the contract have not been satisfied by July 23, 1982, or the purchaser's right to cancel matures and is exercised prior to July 22, 1982, this investigation will terminate (assuming the terms of the agreement between the Canadian producer and the purchaser have not been changed).

#### Allegations of Subsidies

The petitioners allege that producers, manufacturers, or exporters in Canada receive the following benefits that constitute subsidies from the government of Canada: preferential financing and Department of Regional Economic Expansion grants ("DREE" grants).

#### Notification of ITC

Section 702(d) of the Act requires us to notify the ITC of this action and to provide it with the information used to arrive at this determination. We will notify the ITC and make available to it all nonprivileged and nonconfidential information. We will also allow the ITC access to all privileged and confidential

information in our files, provided it confirms that it will not disclose such information either publicly or under an administrative protective order without the written consent of the Deputy Assistant Secretary for Import Administration.

#### Preliminary Determination by ITC

The ITC will determine by August 9, 1982, whether there is a reasonable indication that imports of railcars from Canada are materially injuring, or threatening to materially injure, a U.S. industry. If its determination is negative, this investigation will terminate; otherwise, it will continue according to the statutory procedures.

July 14, 1982.

Judith Hippler Bello,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 82-19629 Filed 7-19-82; 8:45 am]

BILLING CODE 3510-25-M

#### National Oceanic and Atmospheric Administration

##### Caribbean Fishery Management Council and Its Administrative Subcommittee; Public Meetings

**AGENCY:** National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** The Caribbean Fishery Management Council, established by Section 302 of the Magnuson Fishery Conservation and Management Act (Pub. L. 94-265), has established an Administrative Subcommittee. The Council and its Administrative Subcommittee will hold separate public meetings. The Council will hold its 42nd regular meeting to consider status reports on fishery management plans (FMPs) under development; draft FMP framework for the shallow-water reef fish fishery; draft FMP for coastal pelagics resources; draft FMP for the fishery resources of the Puerto Rican and St. Croix Geological Platforms; elect a chair and vice-chair for the Council, as well as discuss other administrative and Council matters. The Administrative Subcommittee will meet to consider matter related to the Council's budget and to discuss regular administrative operations.

**DATES:** The Council's public meeting will convene on Wednesday, August 25, 1982, at approximately 9 a.m., adjourn at approximately 5 p.m.; reconvene on Thursday, August 26, 1982 at approximately 9 a.m., adjourn at approximately noon. The Council's

Administrative Subcommittee public meeting will convene on Tuesday, August 24, 1982, at approximately 1:30 p.m., and will adjourn at approximately 5 p.m.

**ADDRESS:** The public meetings will take place at the Conference Room of the St. Thomas Hotel and Marina, Long Bay, in St. Thomas, U.S. Virgin Islands.

**FOR FURTHER INFORMATION CONTACT:** Caribbean Fishery Management Council, Suite 1108, Banco de Ponce Building, Hato Rey, Puerto Rico 00918, telephone: (809) 753-4928.

Dated: July 15, 1982.

Robert K. Crowell,

Deputy Executive Director, National Marine Fisheries Service.

[FR Doc. 82-19619 Filed 7-19-82; 8:45 am]

BILLING CODE 3510-22-M

#### National Technical Information Service

##### Intent To Grant Exclusive Patent License

The National Technical Information Service (NTIS), U.S. Department of Commerce, intends to grant to Johnson-Matthey Inc., having a place of business at Wayne, Pennsylvania 19087 an exclusive right in the United States and in certain foreign countries to manufacture, use and sell products embodied in the invention, "A Short Total Synthesis of Dihydrothebainone, Dihydrocodeinone, and Nordihydrocodeinone and Preparation of Chiral 1-Benzyl-1, 2,3,4-Tetra-Hydroisoquinolines Optical Resolution, U.S. Patent Application Serial Nos. 6-165,600 and 6-265,469 (dated July 3, 1980 and May 20, 1981). Copies of the Patent Applications may be obtained from the Office of Government Inventions and Patents, NTIS, Box 1423, Springfield, VA 22151. The patent rights in this invention have been assigned to the United States of America, as represented by the Secretary of Commerce.

The proposed exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 41 CFR 101-4.1 The proposed license may be granted unless, within sixty days from the date of this Notice, NTIS receives written evidence and argument which establishes that the grant of the proposed license would not serve the public interest.

Inquires, comments and other materials relating to the proposed license must be submitted to the Office of Government Inventions and Patents, NTIS, at the address above. NTIS will maintain and make available for public inspection a file containing all inquiries,



APPENDIX D

U.S. PRODUCERS OF MAJOR RAIL-PASSENGER-CAR COMPONENTS

Current U.S. producers of Major Rail-Passenger-Car Components

- I. Shell the Budd Co., Troy, Mi.
- II. Wheels and axles
  - A. Both wheels and axles
    - 1. Penn Machine, Pittsburgh, Pa.
    - 2. Standard Steel, Burnham, Pa.
    - 3. United States Steel, Pittsburgh, Pa.
  - B. Wheels only
    - 1. Abex Corp. New York, N.Y.
    - 2. Edgewater Steel, Oakmont, Pa.
    - 3. Griffin Wheel, Chicago, Ill.
    - 4. X-Tek, Cincinnati, Ohio
  - C. Axles only
    - 1. Bethlehem Steel, Bethlehem, Pa.
    - 2. Standard Forging, East Chicago, Ind.
    - 3. Timken, Canton, Ohio
- III. Truck Castings and Bolster
  - A. Buckeye Steel Castings, Columbus, Ohio
- IV. Coupler Assembly
  - A. Complete assembly
    - 1. The Ohio Brass Co., Mansfield, Ohio
    - 2. Dellner-Schaku, Mt. Prospect, Ill.
    - 3. Walton Products, Broomall, Pa.
    - 4. Westington Airbrake Co. (WABCO), Wilmerding, Pa.
  - B. Drawbar assembly only Dresser Industries Inc., Depew, N.Y.
- V. Brakes
  - A. New York Airbrake Co., Watertown, N.Y.
  - B. Westinghouse Airbrake Co., (WABCO), Wilmerding, Pa.
- VI. Propulsion System
  - A. Produces system with either mechanical (CAM) or solid state controls.
    - 1. General Electric, Erie, Pa.
    - 2. Westinghouse Electric Corporation Buffalo, N.Y.  
West Mifflin, Pa.
  - B. Produces only system with solid state controls only
    - 1. The Garrett Corporation, Torrence, Calif.
- VII. Air Conditioning System
  - A. Safety Electric, Wallingford, Conn.,
  - B. The Trane Co., La Crosse, Wis.
  - C. Air Control Industries (ACI) Irvine, Calif.
  - D. Lear Sigler Energy Products, Santa Ana, Calif.

APPENDIX E

MTA'S MEMORANDUM REGARDING SELECTION

## MEMORANDUM RE:

MTA-BOMBARDIER SUBWAY CAR CONTRACT AWARD

The memorandum summarizes the basis of MTA's decision to award a subway car contract for 325 R-62 subway cars to Bombardier, Inc. This contract represents the largest single procurement in a largely locally funded, \$7.8 billion program to rebuild the New York public transportation system over the next five years.

In the summer of 1981 MTA received competitive bids for 325 IRT subway cars. The low bid was \$895,000 per car, which in MTA's judgment was excessive. Questions were also raised at that time as to MTA's ability to market bonds in excess of \$1.2 billion in the time frame required to fund the purchase of the full planned order of 1,150 cars. MTA then sought State legislation to authorize negotiation for the purchase of subway cars. It made this proposal for two principal reasons: first, to reduce the price of the cars, and second, to attract sufficient vendor related financing on favorable terms to assure that payments under any subway car contract could be met without sacrificing other elements of the capital program.

Over the past several months MTA negotiated with three subway carbuilders: Bombardier, a Canadian firm; Francorail, a consortium of French industrial companies; and the Budd-Co., a wholly owned subsidiary of the Thyssen Company of Germany. These negotiations followed the award of a negotiated contract for 325 R-62 subway cars to the Nissho Iwai American Corporation, representing Kawasaki Heavy Industries.

MTA's objectives in this negotiation, consistent with State law, were to purchase the highest quality car with the fastest possible delivery, to effect the greatest possible savings taking account of both car price and vendor related financing, to maximize the content of the car manufactured within the State of New York, consistent with considerations of manufacturing capacity, economic benefits and technical objectives, and to afford MTA the greatest protection against potential risks in contractor performance. MTA's ultimate decision to award to Bombardier was based on the Authority's judgement that Bombardier's offer was, with respect to each of the factors noted above, either superior to or the equivalent of the offers of its two competitors.

With respect to both price and financing, Bombardier offered the most advantageous terms. Its car price (\$788,770 per car) was below that of Francorail's and roughly equal to Budd's (based on equivalent contractual options). The amount of financing offered by Canada's Export Development Corporation (85% of total contract price with repayment over ten years) was the most favorable offer, and an extremely important consideration in MTA's willingness to commit to a contract of this magnitude. In contrast to the availability of financing, the favorable interest rate (9.7% p.a.), while providing substantial and important economic benefits to MTA, and providing the basis for Bombardier's equality with Francorail was not the central factor in choosing Bombardier. Given MTA's need to raise more than \$4 billion in public market financing over the next five years and the pressure this will place on all New York State and City agency borrowings, availability of the EDC financing offer is a most significant factor.

With respect to car quality and overall confidence in carbuilder engineering, MTA had a clear preference for the Bombardier offer, and this was a substantial factor in MTA's decision. Bombardier had entered into a licensing agreement with Kawasaki Heavy Industries, so that the Bombardier cars would be substantially identical to the Kawasaki cars the MTA has already committed to purchase. MTA's evaluation of Kawasaki's work thus far is extremely favorable, and similar engineering offers the MTA the advantage of compatibility with other new cars in the IRT fleet, with consequent beneficial impacts on maintenance and parts inventory requirements.

While Budd promised a slightly faster delivery schedule than Bombardier or Francorail (which were roughly equivalent), it was MTA's judgement that the Bombardier schedule was more likely to be met. Bombardier's recent delivery record is quite impressive, while Budd is behind in current orders, with a backlog swelling to more than 1,100 cars. In fact, because Budd's Red Lion (Philadelphia) plant is filled to capacity, Budd proposed to build this order at a new assembly facility, first planned for Martinsville, Virginia and then for Hornell, New York. This was cause for considerable concern by MTA, in that either facility would require substantial capital investment and the hiring and training of a new work force. In light of MTA's concern for reliability and performance, and its recent experience with the faulty manufacture of both rail cars and buses, assembly by Budd at an unproven facility was a manufacturing risk MTA was most reluctant to take.

Bombardier's offer was also preferred on the basis of New York State economic activity that would be stimulated by its production plan. The Bombardier offer included 16% in New York content (with a potential of 20%), while Budd proposed 12% (including Hornell assembly) and Francorall 8%. The New York State Department of Commerce has confirmed MTA's judgement in this regard; it reported that the Bombardier award will produce the greatest number of jobs for New York State and will likely result in greater long-term benefits through repeat orders generated by the initial component manufacture.

Finally, MTA, as a matter of prudent business judgement, was unwilling to rely on the financial and manufacturing capacity of any single company for the two largest procurements in the five year rebuilding program. MTA has already committed to Budd for the purchase of 316 commuter cars at a price expected to exceed \$350 million. Furthermore, Budd is competing for an additional subway car contract that will be awarded later this year. It is not in MTA's interest to rely so overwhelmingly on any single company, both from the short-term perspective of minimizing risks of delivery delays and the long-term perspective of generating competition within the car building industry for future MTA procurements.

In summary, while the economic analyses and negotiation process relating to this contract were extraordinarily complex, the ultimate decision as between the three bidders was clear. On the basis of all of the specified MTA objectives, Bombardier's offer was preferred.



APPENDIX F  
TREASURY'S DECISION AND FINDINGS

THE SECRETARY OF THE TREASURY  
WASHINGTON

July 12, 1982

Decision of the Secretary of the Treasury  
Pursuant to Section 1912  
of the Export-Import Bank Act Amendments of 1978

The decision set out in this memorandum is required by Section 1912 of the Export-Import Bank Act Amendments of 1978 (12 U.S.C. 635a-3), which empowers the Secretary of the Treasury, after making certain determinations of fact, to authorize special financial assistance by the Export-Import Bank of the United States (Eximbank). Assuming the appropriate findings of fact are made by the Secretary, such assistance may be authorized for a United States seller of goods who has been placed at a competitive disadvantage by the availability, to a foreign competitor for sales within the United States, of foreign export financing which exceeds permissible limits under prevailing international arrangements.

The matter before me is a request by The Budd Company of Troy, Michigan (Budd), for Eximbank assistance under Section 1912. The request arises out of competition among three companies -- including Budd -- to build subway cars for New York's Metropolitan Transportation Authority (MTA). The successful competitor thus far, Bombardier, Inc., a Canadian company, offered export financing by the Economic Development

Corporation of Canada (EDC) which, in Budd's view, exceeds the limits prescribed by the International Arrangement on Export Credits to which the United States and Canada, among others, are signatories.

As Secretary of the Treasury, I must make the following determinations of fact under Section 1912 before I may authorize matching Eximbank financing for Budd:

1. that the export credits offered by EDC exceed the limits allowable under the International Arrangement on Export Credits;

2. that the EDC has been asked to withdraw such "noncompetitive" financing and has refused to do so; and

3. that "noncompetitive" financing offered by EDC is "likely to be a determining factor" in the award of the contract to Bombardier.

As detailed in the analysis below, 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 non-competitive financing offered by EDC is not likely to be "a determining factor" in MTA's decision.

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\* As of the date of this decision, EDC's Board of Directors has not yet given final approval to the EDC financing.

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Under these circumstances, Section 1912 does not permit me to authorize Eximbank financing for Budd.

#### Background

In late 1981, MTA awarded, to Nissho Iwai American Corporation, a contract for the construction and delivery of 325 stainless steel self-propelled subway cars by Kawasaki Heavy Industries, a Japanese Company. Shortly thereafter, MTA requested proposals from interested manufacturers for an additional 825 similar cars. Kawasaki did not have the production capacity to fill this additional order, and three companies offered proposals: Budd; Francorail, a consortium of French companies; and Bombardier, a licensee of Kawasaki. As permitted under New York State law, MTA negotiated with each of the three companies in an effort to obtain the best possible terms.

On May 18, 1982, MTA announced that it would place the order for the 825 subway cars with Bombardier. MTA and Bombardier signed a contract for the subway cars on June 10, 1982, contingent upon the availability of EDC financing which would provide an interest rate of 9.7 percent, cover 85 percent of the contract price, and require repayment over a 10 year period beginning six months after delivery of the last car in 1987.

Shortly before the signing of the contract, Budd brought suit in the United States District Court for the Southern District of New York to enjoin MTA's submission of the contract

to the New York State Public Authorities Control Board for approval, until it was clear whether matching financing would be provided by Eximbank pursuant to Section 1912. By stipulation among Budd, Bombardier and MTA, the principal parties to this action, MTA was given the option to cancel the contract if, on or before July 15, 1982, Eximbank provides a commitment to match the terms of the financing offered by EDC and MTA exercises the option to cancel within seven days after its receipt of the Eximbank commitment. The stipulation was intended to permit the MTA contract approval process to proceed pending determination of whether matching financing would be provided under Section 1912 in this case.

The contract, with the option to cancel, was approved by MTA's Board of Directors on June 11, 1982, and by the New York State Public Authorities Control Board on June 30, 1982.

Steps Which Must Be Taken Before  
the Secretary of the Treasury Is Empowered  
by Section 1912 To Authorize Matching Financing

1. Determination that foreign financing is "noncompetitive". Paragraph (a)(1) of Section 1912, requires the Secretary to determine whether an official foreign export credit agency is in fact offering noncompetitive financing. According to Section 1912, financing is "noncompetitive" if it exceeds "limits under existing standstills, minutes, or practices to which the United States and other major exporting countries have agreed."

The International Arrangement on Guidelines for Officially

Supported Export Credits (the Arrangement) -- to which the United States and Canada, among others, are parties -- has been in place since 1978 and qualifies as "standstills, minutes or practices to which the United States and other major exporting countries have agreed." The Arrangement provides for certain limits (which are changed from time to time) on the terms of foreign official export credits. Thus, if financing offered by EDC (the official foreign export financing entity of Canada) exceeds Arrangement limits in effect at the time of the offer, it would, to that extent, be "noncompetitive" financing for purposes of Section 1912.

The Arrangement limits in effect at the time of the Bombardier proposal, for shipments to relatively wealthy countries such as the United States, included: (1) a maximum official cover of 85 percent of export value, and no direct credits for financing "local costs" (that is, costs incurred in the purchaser's country); (2) a maximum repayment period of 8.5 years, beginning with the mean date of receipt of the goods; and (3) minimum interest rates of 11 percent (for credits of 2 to 5 years) and 11.25 percent (for credits of 5 to 8.5 years).

Treasury officials, after communicating with Canadian and MTA officials, have confirmed that the financing offered by EDC in support of Bombardier's offer contravenes each of these limits. The EDC offered (1) direct credits for 85 percent of total contract value, of which the U.S. content was 40 percent; (2) a repayment term of 10 years, exceeding the Arrangement's 8.5 year maximum and including a "starting point" 6 months after

delivery of the last car, which may be inconsistent with the Arrangement's intent, and (3) a 9.7 percent interest rate, well below the Arrangement minimum of 11.25 percent for 5 to 8.5 year credits.

Thus, on the basis of my inquiry, I have determined that "noncompetitive financing," as that term is used in Section 1912, has been offered by EDC in support of the Bombardier proposal.

2. Requests for withdrawal. Pursuant to paragraph (a)(2) of Section 1912, if the Secretary of the Treasury determines that "noncompetitive" financing is being offered, he is required to request the immediate withdrawal of such financing by the foreign official export credit agency involved, in this case EDC.

On at least five occasions since this matter came to the attention of the Treasury Department in May 1982, Treasury officials have asked Canadian officials to withdraw the original EDC offer and to conform to Arrangement standards in the financing offered in support of the Bombardier proposal. On June 29, I met personally with Mr. Edward C. Lumley, the Canadian Minister of State for International Trade, and requested that the EDC's financing offer be withdrawn and replaced with an offer that is consistent with Arrangement levels. Despite these repeated requests, Canadian authorities have declined to withdraw the "noncompetitive" financing, stating that they are unable to do so without the permission of MTA.

3. Notification that Eximbank may be authorized to provide matching financing. Pursuant to paragraph (a)(3) of Section 1912, if an offer of noncompetitive financing is not withdrawn or

there is no immediate response to the withdrawal request, the Secretary of the Treasury is required "to notify the country offering such financing and all parties to the transaction that the Eximbank may be authorized to provide competing United States sellers with financing to match that available through the foreign official export financing entity."

On each occasion that Canadian officials were asked to withdraw EDC's offer of noncompetitive financing, they were informed that, pursuant to Section 1912, Eximbank may be authorized to provide Budd with financing to match the "noncompetitive" financing available through EDC in support of the Bombardier proposal. Budd and MTA have also been made aware that, pursuant to Section 1912, Eximbank may be authorized to provide Budd with such matching financing.

4. Foreign noncompetitive financing as "a determining factor." After taking the steps outlined above, the Secretary of the Treasury is permitted to authorize Eximbank to provide matching financing only if he determines, in accordance with Section 1912(b), 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. (Emphasis supplied)

Since the noncompetitive financing offered by EDC has not been withdrawn, the only remaining question is whether it is "likely to be a determining factor" in the decision by MTA.

In this connection, I have been advised by the General

Counsel of the Treasury that this statutory term must be construed to mean that noncompetitive foreign financing is likely to be a decisive element in the award of the contract; although noncompetitive financing need not be the sole decisive factor, in order to be "a determining factor" it must be one of the factors upon which the decision ultimately turns. Thus, if I conclude that Budd would not be awarded the contract even if it were able to offer financing identical to the noncompetitive financing offered by EDC, then the EDC financing terms -- even though noncompetitive -- are not "likely to be a determining factor" in the sale. Conversely, should I determine that matching financing from Eximbank would be sufficient to alter the award to Bombardier, the EDC's noncompetitive financing would have to be considered a determining factor.

In its evaluation of the competing bids, MTA appears to have focused on and weighed the following seven factors:

1. Availability of government-supported financing from the vendors;
2. Cost of the financing;
3. Price of the cars;
4. Delivery schedules, including reliability of delivery;
5. Quality of design, engineering, and performance, including compatibility with Kawasaki cars already ordered by MTA;
6. Possible overdependence on a single supplier; and
7. New York State content.

The Treasury Department's analysis of MTA's decision --  
based on discussions with MTA officials and a review of

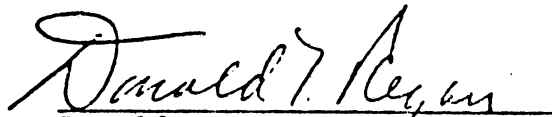
published and unpublished MTA documents -- indicates that Bombardier was judged superior to Budd on all seven criteria. The only possible exception was price, since The Budd Company's price per car could have been marginally better than Bombardier's under certain conditions.

The Treasury analysis also found that although the availability of foreign export financing was a very important factor for MTA and New York City, the cost difference between financing on Arrangement terms and financing on the terms actually offered by EDC was not a determining factor in MTA's decision. Other factors, including the availability of foreign export financing (competitive or noncompetitive), New York State content, quality of design, compatibility with cars from Kawasaki already on order, and reliability of delivery, were all considered to be in Bombardier's favor. These considerations, which confirm Treasury's conclusions, are best summarized in a memorandum which MTA submitted to the New York State Public Authorities Control Board and which is attached as an exhibit to this decision.

In my judgment, MTA would award the contract to Bombardier even if matching financing were to be offered by Eximbank in support of Budd's proposal. Thus, I cannot determine, as required by Section 1912, that the availability of EDC's noncompetitive financing is "likely to be a determining factor" in the decision of MTA to award the subway car contract to Bombardier.

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Under these circumstances, I am compelled to conclude that the authority provided in Section 1912 of the Export-Import Bank Act Amendments of 1978 cannot legally be invoked to authorize Eximbank to provide matching financing in support of The Budd Company's proposal under the facts and circumstances of this case.



Donald T. Regan  
Secretary of the Treasury

FINANCING OF NEW YORK CITY SUBWAY CARS:  
TREASURY DEPARTMENT INVESTIGATION  
UNDER SECTION 1912, EXPORT-IMPORT BANK ACT

Executive Summary

The Treasury has conducted an extensive review of the circumstances surrounding the purchase by the New York State Metropolitan Transportation Authority (MTA) of subway cars manufactured in Canada. The issue at hand was whether the Secretary of the Treasury should authorize the U.S. Export Import Bank to match the subsidized Canadian financing.

The inquiry found that the MTA's purchase decision hinged on seven major factors:

1. The availability of government-supported financing from the vendors;
2. The cost of the financing;
3. The price of the cars;
4. Delivery schedules, including reliability of delivery;
5. Quality of design, engineering, and performance, including compatibility with Japanese-built cars already ordered by the MTA;
6. Possible overdependence on a single supplier, and
7. New York state content.

The evidence shows that the Canadian bidder -- Bombardier, of Quebec -- has been judged superior to the U.S. bidder on all seven counts. The only possible exception was price, where the American bidder -- the Budd Company -- offered a price which was approximately the same as Bombardier's but could be marginally better under certain conditions. The French bidder offered a financing package equivalent to Bombardier's, but has been eliminated primarily because of inadequate New York State content.

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It is the judgment of the Treasury staff that The Budd Company has been eliminated because, in the opinion of the MTA Board of Directors, the weight of all seven selection criteria is against it. Among those criteria, the availability of officially supported export financing on favorable terms and conditions certainly was an important factor.

But for the Secretary of the Treasury to authorize matching financing by the U.S. Export-Import Bank, the availability of foreign "noncompetitive" financing must be adjudged "likely to be a determining factor" in the sale. "Noncompetitive" under Section 1912 means financing which exceeds limits prescribed by the International Arrangement on Export Credits. In the opinion of the Treasury staff, the contract would likely have been awarded to Bombardier even if Canada had offered financing the terms and conditions of which were strictly in accord with the Arrangement. Further, even if the U.S. Export-Import Bank were to offer financing for Budd to match the present Canadian offer, the contract still would likely be awarded to Bombardier. Therefore, the availability of "noncompetitive" financing, while certainly an element in Bombardier's favor, is not likely to be "a determining factor." The Canadian Government's export credit agency appears to have offered more generous financing than necessary to win the sale.

If you judge financing to have been a determining factor, the statute does not require you to authorize Eximbank to offer financing for Budd. You may do so, but it is a matter of your judgment whether financing is wise and appropriate.

Genesis of the Case

On May 18, 1982, the New York State Metropolitan Transportation Authority announced that it would place an order for 825 stainless steel self-propelled subway cars with the Canadian firm Bombardier, of Quebec. The cars were to be produced by Bombardier under license from Kawasaki Heavy Industries, of Japan, and were to be identical to 325 cars previously ordered from Kawasaki by the MTA. The Bombardier price was \$798,770 per car, or \$658,985,250 total, exclusive of escalation charges. The transaction was to be financed by a loan from the Export Development Corporation (EDC -- Canada's official export credit agency) at an interest rate of 9.7 percent, covering 85 percent of the contract price, to be repaid over a ten-year period beginning six months after delivery of the last car in 1987. These terms were much more favorable than those available on the New York capital markets.

A French consortium, Francorail, also bid on the project, offering similar financing.

On the same day, the Treasury Department received a telex from the Budd Company, of Troy, Michigan, one of the losing bidders on the contract. The Budd telex, and a letter which followed, stated Budd's belief that the Canadian financing was a determining factor in award of the contract since Budd declared its price to be lower, and its delivery schedule earlier, than Bombardier's. Budd consequently asked Treasury to invoke Section 1912 of the Export-Import Bank Act to allow Eximbank to match the Canadian financing. See Tab A for the Budd communications and Treasury's response.

Section 1912 requires the Secretary of the Treasury, on receipt of information that foreign sales to the United States are being offered involving foreign official export credits "which exceed limits under existing standstills, minutes or practices" to which the United States is a party, immediately to conduct an inquiry into the facts. If the Secretary determines that such "noncompetitive financing" is being offered, he is to request its immediate withdrawal. If the offer is not withdrawn or if there is no immediate response to his request, the Secretary shall notify all parties that Eximbank may be authorized to offer matching financing to competing U.S. sellers. The Secretary may authorize Eximbank to match only if he determines that the foreign financing "is likely to be a determining factor" in the sale, and if the foreign

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offer has not been withdrawn when the Eximbank is authorized to match. See Tab B for the text of Section 1912.

The undertakings on official export credits negotiated within the OECD, principally the International Arrangement on Guidelines for Officially Supported Export Credits, are covered by Section 1912's reference to "standstills, minutes or practices." The Arrangement calls for (a) maximum official cover of 85 percent of export value; (b) maximum term of 8.5 years, beginning with the mean date of receipt of the goods, for shipments to relatively wealthy countries such as the United States; and (c) minimum interest rates of 11 percent (for credits of 2 - 5 years) and 11.25 percent (for credits of 5 - 8.5 years). These minimum rates have prevailed since November 16, 1981; prior to that, the minima were 8.5 percent and 8.75 percent, respectively.

Immediately on receiving the Budd telex, Treasury requested the U.S. embassies in Ottawa and Paris to confirm that offers inconsistent with the Arrangement had been made. If such offers had been made, the embassies were asked to request withdrawal of the offers and report the results. The first two steps required by Section 1912 were thus encompassed in one instruction.

Over the ensuing two weeks the Treasury staff was in frequent telephone contact with the two U.S. embassies, as well as with French and Canadian government officials and with the staffs of their respective embassies in Washington. On June 3 a Canadian delegation visited Washington for discussions with Treasury and other U.S. Government agencies concerned with the case. On the same day, detailed telex messages were received from Paris giving the French view of events.

These investigations showed that, as alleged by Budd, the Bombardier offer benefits from heavily subsidized Canadian government financing. Moreover, the EDC offer represents a derogation from the terms of the Arrangement in three respects. First, the 9.7 percent interest rate lies well below the Arrangement minimum of 11.25 percent in effect at the time the offer was made. Second, the term of 10 years exceeds the Arrangement's 8.5 year maximum for relatively wealthy countries and the "starting point" of 6 months after delivery of the last car is arguably stretched beyond the Arrangement's intent. Third, EDC has offered to finance 85 percent of the contract value, including U.S. content amounting to 40 percent of the total; the Arrangement prohibits direct credits for such "local cost" financing.

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On June 14, Canada's Deputy Under Secretary of External Affairs contacted the Treasury to confirm that his government was in no position to consider raising its interest rate offer to MTA. He stated that the Canadian Government had attempted to convince the MTA management to accept terms and conditions consistent with the Arrangement, but that the MTA Chairman had refused. He added that Canada did not feel it could unilaterally change its financing offer, thereby risking both its credibility and a sale which is of great importance to Canada. Minister of State for International Trade Lumley conveyed the same message to the U.S. Embassy in Ottawa at the end of that week.

#### The French-Canadian Competition

The French and Canadian financing offers evolved as follows. In the autumn of 1981 the MTA requested bids for its first order of 325 cars. Upon learning that Japan would offer financing at 8.5 percent interest for five years, the French matched the offer and so notified Canada. According to the French, the Canadians responded that the Japanese offer applied only to the first installment, of 325 cars, and not to the second, of 825 cars (since Kawasaki apparently did not have the available capacity to bid on the remaining 825).

France thereupon replied that it would offer 8.5 percent at five years for no more than 325 - 400 cars, matching the Japanese offer. After inclusion of the standard guarantee fees and exchange risk insurance fees, the effective interest rate on the French offer for the first 325 cars was 9.7 percent. The French stated further that they would offer an interest rate of 11 percent at five years for the remaining 825 cars, as required by the Arrangement -- so long as Canada did the same. The French state that they repeatedly asked EDC to confirm its acceptance of this undertaking, but received no satisfactory answer.

Canadian Government officials maintain that they sought a "common line" with France throughout the course of the negotiation, and believed in February that they had agreement to offer no better than an 11 percent interest rate for five years. However, they also maintain that later in the spring they received indications from unnamed sources that the French were violating this common line by offering an interest rate of 9.7 percent. The Canadian officials stated they were "determined that the

French [not] be able to steal this project on the basis of cheap financing," and so offered 9.7 percent interest themselves. At some point in April or early May they also stretched their terms to 8.5 years, and finally to ten years.

By May the French had heard rumors of increasingly favorable Canadian financing offers, and requested confirmation from the EDC. When no reply was forthcoming, the French simply informed MTA that they would match any Canadian financing package, no matter how favorable. In the final evaluation of bids by the MTA, the French financing package is shown as identical to the Canadian.

Both Canada and France, therefore, claim that they sought a "common line" in good faith, and offered more favorable financing only when convinced that the other party was doing so. The evidence at hand consists of two detailed telexes from the French (at Tab C), notifications from the French and Canadians to the U.S. Eximbank that they were derogating from the guidelines of the Arrangement on Export Credits (Tab D), oral statements by Canadian officials in Ottawa and Washington which on occasion were either vague or incomplete, and a statement by MTA's Special Counsel on May 28 before the United States District Court for the Southern District of New York (Tab E).

The exchanges between Canada and France seem to have taken place at a time when the MTA was bargaining intensively with all bidders over terms (see below). Given the detailed documentation France has provided (Tab C) and the incomplete evidence on the Canadian side, the conclusion seems inescapable that the Canadians were the first to break ranks. They appear to have been pressured by MTA negotiators into offering progressively more favorable financing in order to forestall a possible loss of the contract to Francorail. The French, on the other hand, appear, on the basis of their detailed recitation of dates, telex numbers, and texts, to have made serious efforts to respect the Arrangement, derogating only when Canada did so.

It is clear that the French financial competition was never as severe as the Canadians believed, and that more scrupulous attention to the exchange of telex information with French authorities could have resulted in Canadian financing at no more favorable terms and conditions than those specified by the Arrangement.

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### Financial Evaluation

It now must be asked whether "noncompetitive financing" of the Bombardier offer "is likely to be a determining factor" in the MTA purchase, as specified by Section 1912. To answer this question, detailed information on all three offers was obtained from the MTA. A summary of the offers is presented at Tab F.

The discussion in this section, and in the section which follows, points to the conclusion that the availability of government-supported financing in sufficient amounts and on favorable terms was an important factor in MTA's evaluation of the competing bids. As will be shown, both foreign bidders were able to obtain sufficient government-supported financing to minimize MTA's need to resort to the capital markets and yet enable it to retain the use of "safe-harbor" leasing. By contrast, Budd was able to arrange officially supported financing at fixed and favorable rates (from Brazil and Portugal) for only about 17 percent of its total offer, and MTA would have had to go to the capital markets for the rest.

It will be shown that if officially supported financing for all three bids were at terms and conditions specified by the Arrangement on Export Credits, the differences among them would be small: Budd would have slightly more than a 2 percent advantage over Bombardier in Net Present Value terms, and would be on a level with Francorail. These NPV calculations assume that MTA has easy access to the capital markets at a fixed long- and short-term interest rate of 14 percent. In fact, there is considerable uncertainty as to the amount and cost of funds MTA could raise commercially.

Thus, it will be shown in the discussion which follows that the availability of sufficient financing on favorable terms and conditions was an important factor in Budd's loss of the contract. But the additional improvements in the Canadian financing which brought it below the limits specified by the Arrangement merely enhanced the attractiveness of the Bombardier bid from MTA's point of view, without conferring any additional advantage on Bombardier. Moreover, even were Budd able to offer matching financing, the contract would still likely be awarded to Bombardier for other reasons. Therefore, it is not possible to find that "noncompetitive financing" within the meaning of Section 1912 is likely to be "a determining factor" in the sale.

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Morgan Guaranty Trust, one of the MTA's financial advisors, conducted the financial analysis of the competing bids. A summary of their analysis is attached at Tab G. The central calculation is that of the Net Present Value (NPV), which is a measure of the market's evaluation of the total package over its lifetime, including net payments for both the product and its financing. This calculation assumes that the alternative for MTA would be to issue 25-year bonds at an interest rate of 14 percent -- an assumption which a survey of Treasury's contacts in the financial markets suggests is correct (although no such borrowings ever have taken place). Any calculation of Net Present Value is subject to considerable uncertainty regarding estimates of future market conditions and other factors; yet it is an important and commonly used tool for such purposes as evaluating the relative merits of competing bids which will extend over long periods of time.

Morgan obtained the NPV by summing the MTA's discounted monthly payments. The net monthly payments are derived by adding monthly progress payments, interest charges, and principal repayments, then subtracting the value of new finance drawn down for each month. (The progress payments schedule is sketched out in Tab F.)

Nonfinancial parameters of each bid, such as quality and delivery schedules, were not included in Morgan's calculations, but were left to the judgment of the MTA Board.

For the sake of comparison, the Morgan computations at Tab G show the NPVs at various discount rates in addition to the assumed borrowing rate of 14 percent. Clearly, as MTA's assumed borrowing rate falls from 20 percent, the advantage conferred on Bombardier by the 9.7 percent rate it is able to offer declines. The break-even point occurs somewhere around 12 percent. If MTA's market borrowing costs were to fall below the 12 percent region, the advantage resulting from Budd's lower price more than offsets the advantage of Bombardier's more favorable financing. (See subsequent discussion of price.)

According to Morgan's computation, the NPVs of the bids, without official financing packages, are:

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Table 1

Budd	\$569 million
Francorail	\$583 million
Bombardier	\$602 million

The NPVs with the official financing packages are:

Table 2

Francorail	\$516 million
Bombardier	\$520 million
Budd	\$553 million

Thus, Budd appears to enjoy a 5.8 percent financial advantage over Bombardier without Canadian Government support, and to suffer a 6.4 percent disadvantage with it. These are perceptible though not necessarily decisive differences in either case, since nonfinancial factors also were important in the decision, as will be shown.

A crucial question is how the ranking of bids would change if all participants abide by the limits set out in the International Arrangement on Export Credits, since this is the standard prescribed by Section 1912. The Treasury staff's analysis indicates that where Arrangement requirements as to interest rate, cover, and term are observed, the bids would be valued roughly as follows:

Table 3

Francorail	\$558 million
Budd	\$560 million
Bombardier	\$573 million

This shows Budd 2.3 percent ahead of Bombardier, and on a level with Francorail.

However, it is essential to note that an adjustment of bid evaluations derived from respecifying financial terms as done above cannot fully indicate which bid would have been best had the Arrangement on Export Credits been observed, for several reasons.

First, the final bid is the result of a simultaneous negotiation over price and financial terms; modification of any element of the package affects others. For example, in bidding on the first MTA contract Kawasaki lowered its

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financing rate for the sale but simultaneously raised its initial offer price to compensate. Another example is the earlier delivery forecast by Budd, which results in more rapid payment and thus a higher NPV, hurting the financial evaluation of its bid. (If Budd could delay all payments for a full year it would reduce its NPV by over \$60 million.) As a final example, Francorail complained on June 10 that its price could have been lower if it had had an opportunity to bid on a contract without MTA's requirement for indemnification against possible countervailing duty assessments.

Second, uncertainties of estimation are so large as to swamp the differences shown in Table 3. For example:

- a) Cost escalation provisions make up over 20 percent of the NPV of the bids, but depend on highly unreliable estimates of future price movements.
- b) Changes in delivery schedules can significantly affect the NPV, as already indicated.
- c) Budd's price per car could rise \$23,237 if some Brazilian components it proposes to use fail to pass New York City's qualification tests. This would raise Budd's NPV by around \$16 million even without considering the loss of the Brazilian export credit for the components.

There is considerable testimony that MTA's purchase is sensitive to the availability of official financial support. Morgan and others note that the MTA is considering embarking on a borrowing program of as much as \$1.6 billion over and above the requirements of financing subway car acquisition, at the same time that other New York City entities will have large borrowing requirements. A number of market sources suggest there may be some unwillingness to accept so much additional New York City-related paper.

At a June 10 hearing by the MTA, Felix Rohatyn, Chairman of New York's Municipal Assistance Corporation (MAC), praised the Kawasaki and Bombardier deals for relieving the market of over \$1 billion in demand for competing finance. Had the MTA gone to market with such high borrowing requirements, Rohatyn estimates that MAC's own borrowing costs would have risen by from 0.5 percent to 1 percent. Thus, it is quite possible that MTA's assumed borrowing cost of 14 percent does not reflect the difficulty it would face in borrowing a very large amount of money.

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During the May 28 Senate Finance Committee hearings the MTA Chairman, Mr. Richard Ravitch, made plain his desire to secure government-supported financing. He stated in the hearing that it was he who first urged Budd to seek financing from its parent firm, the German steel producer Thyssen, and to explore the possibility of obtaining Eximbank funding under Section 1912. He stated that the advantages of either source would have included "security of financing source, flexibility with respect to MTA's ability to enter the long-term market during more favorable market conditions, and a short-term reduction in the amount of overall New York public financing . . . competing for limited investor capital." (See Tab H.) He also told Budd on several occasions, and the Senate Finance Committee on May 28, that it was Budd's inability to finance more than about 17 percent of its proposal (from the governments of Brazil and Portugal) that rendered its proposal noncompetitive.

It is clear that the availability of adequate official financial support gave Bombardier (and Francorail) a financing advantage over Budd which they otherwise would not have had. It is not clear that the improvement in this advantage resulting from Canada's offer of terms and conditions exceeding Arrangement limits was necessary in order for Bombardier to win the contract.

#### Other Factors Behind MTA's Decision

Section 1912's requirement that noncompetitive financing be "a determining factor" in a sale raises the question of what other factors may have influenced MTA. The Treasury staff, in addressing this question, reviewed (a) the testimony of Mr. Ravitch before the Senate Finance Committee at Tab H; (b) the minutes of a hearing held by the MTA on June 10, 1982; (c) conversations between Treasury Deputy Assistant Secretary R. A. Cornell and Mr. Ravitch at the latter's office in New York June 9, 1982; and (d) the deposition by MTA's Special Counsel in the Southern District Court, found at Tab E.

Section 1209 of the New York State Public Authorities Law states that transit car purchase contracts can be awarded by negotiation, rather than on the basis of sealed bids, where "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 . . . within the state of New York."

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There is no doubt that financing availability was an important factor in the MTA's calculations, as already shown. Mr. Ravitch stated in his testimony before the Finance Committee that when MTA was initially considering its plans to purchase subway cars, he sought state legislative authority to award contracts by negotiation. His goals were to lower the price and to secure more vendor-related financing. Section 1209 was the result of his efforts.

It may be asked why the MTA did not use federal Urban Mass Transportation Administration (UMTA) grants to purchase the cars. There appear to be two reasons:

- 1) Ravitch testified to the Finance Committee that only about 18 percent of UMTA funds available for transit capital programs went to MTA in 1981. This would amount to something over \$300 million. While this was the lion's share of total UMTA funding in 1981, it would be insufficient to accommodate the \$660 million subway car program plus other rolling stock acquisitions and infrastructure improvements planned by MTA.
- 2) Use of UMTA funds would rule out the use of "safe-harbor leasing" for the cars so financed; but use of "safe-harbor leases" figures prominently in MTA's plans, permitting the acquisition of an additional 225 cars beyond those which otherwise would be possible, according to Ravitch.

In short, the MTA appears to have concluded that reliance on foreign government-subsidized financing represented its most promising method of riding out the current period of high interest rates. There is, of course, nothing to prevent MTA from refinancing its debt through a bond issue at some later date, when interest rates might have declined sufficiently to make the refinancing option attractive. Ravitch's Senate testimony -- quoted on page 9 of this paper -- strongly suggests that he intends to do just that.

A second issue of importance was price. Throughout the early months of 1982, MTA engaged in protracted negotiations with all bidders over price and financing of both its first order of 325 cars, and the second order of 825 cars. These negotiations resulted in

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- price reductions by Kawasaki of over \$50,000 per car, or 6 percent of its original low bid, to a price of some \$845,000 each for the 325 cars; and
- a final price by Bombardier of \$798,770 each for the 825 cars.

Budd asserted in its letter at Tab A that its price was lowest of the three, at \$770,768. To offer as low a price as this and obtain at least some government-subsidized financing, Budd planned to procure the car body in Portugal and obtain Portuguese export financing at 10.25 percent for ten years. Similarly, the undercarriages, motors, and gearboxes would be made by Westinghouse/Brazil, with Brazilian government export credits for six years at an interest rate of 8.5 percent. The Brazilian and Portuguese financing would cover about 17 percent of Budd's total bid.

The MTA analysis at Tab I revises the Budd price to \$799,885, making it slightly higher than Bombardier's price of \$798,770 per car. This change reflects three factors:

- (1) The largest is \$23,237 for undercarriages made in Ohio. The MTA invitation to bid specified these undercarriages, which are more expensive than Budd's Brazilian-made ones, and MTA assumes they will be used pending certification of the Brazilian equipment by its engineers.
- (2) MTA required all bidders to accept MTA retention of 3% of the contract price as a contingency fund until final acceptance of the cars. Budd made no allowance for this and requested a price increase of \$2,061 per car if the MTA insisted.
- (3) To increase New York content, MTA required each bidder to use New York Air Brake components. Budd said Westinghouse was cheaper and added \$3,819 per car if NYAB were to be used instead.

A third issue of importance was quality and performance. At the June 10 MTA hearing New York City Transit Authority President John Simpson, while acknowledging that all the competitors could produce an acceptable car, spoke in glowing terms of the superior design, engineering, and quality control demonstrated by the Japanese in work on the first order. He stated that Kawasaki had produced

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a "pre-prototype" car, beyond the requirements of their contract and at no extra charge, as part of their effort to solve New York's operational and engineering problems. He stated that Kawasaki's work is now three months ahead of schedule and that the quality is "unsurpassed" in the experience of his engineering staff. The fact that Bombardier will use Kawasaki's design and engineering under license "clearly was a major factor" in MTA's decision to go to Bombardier for the second order, according to Simpson.

That Bombardier's car will be identical to the Kawasaki car also will simplify New York's maintenance, parts procurement, inventory control, and personnel training problems -- contributing further to achievement of quality and performance objectives. Yet MTA will have a second source for the Kawasaki cars, avoiding overdependence on one supplier.

The possibility that MTA would be overdependent on Budd was another significant issue. Simpson, at the MTA hearing, and Ravitch before the Senate Finance Committee, both noted that the MTA already has placed orders for some 400 commuter rail cars with Budd, which apparently has an order backlog of over 1,000 cars. The firm's primary plant near Philadelphia now is said to be working to capacity, and deliveries for the Miami and Baltimore subways are said by Simpson to be a year behind schedule. Moreover, Budd may have some quality control problems: some of the cars built for other cities were said by Simpson to be 3,000 pounds overweight -- a serious problem for elevated rail.

Budd asserted in its letter at Tab A that it could complete its deliveries earlier than Bombardier. But the MTA Board appears to have discounted this claim. The MTA order would have had to be produced at plants converted by Budd from other uses, either in Martinsville, Virginia or Hornell, New York. Review of both facilities by MTA engineers showed that both would need extensive renovation, and that a labor force would have to be recruited and trained at either. Moreover, Budd asked the MTA Board for waiver of penalties for liquidated damages for the first two months of any delay which might occur. In light of these facts, plus the order backlog at Budd's main plant, the MTA appears to have concluded that it could not count on timely delivery if it were to order the 825 cars from Budd.

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Bombardier, on the other hand, already has a modern, functioning, and fully-staffed assembly plant in Barre, Vermont. It is doing quality work in timely fashion and could handle MTA's order, according to Simpson.

A final consideration related to New York content. There was extensive testimony at the June 10 hearing from Ravitch, the Mayor of New York, and various union leaders regarding the importance of providing as much subcontracting within the state as possible, particularly in high unemployment areas. With this in mind, MTA had specified that such suppliers as New York Air Brake (Watertown -- unemployment rate reportedly 11 percent) must be used. However, Budd's proposal indicated a preference for Westinghouse air brakes. Overall, Budd's offer was evaluated by MTA to include 12 percent New York content, while Bombardier offered about 16 percent with a best-efforts undertaking to raise the total to 20 percent. Francorail offered 8 percent New York content. Bombardier's offer appeared clearly superior, in the eyes of city and state political leaders. See MTA's evaluation of New York content at Tab J.

### Findings

A review of the major factors influencing the MTA to accept Bombardier's proposal indicates, therefore, that the availability of official financial support at below-market rates was an important factor in the sale. But Section 1912 refers not to below-market rates in themselves, but to "noncompetitive" financing, which in this context means financing exceeding the limits specified in the International Arrangement on Export Credits. (Recall that the financing for the Kawasaki purchase carried a dollar interest rate of 12.25 percent, compared to the Arrangement minimum of 11.25 percent. Section 1912 was not invoked in that case.)

For the purpose at hand, then, it must be asked whether the violation of Arrangement limits in the EDC financing package constituted "a determining factor." In answering this question, the opinion of the General Counsel of the Treasury Department at Tab K was consulted.

From Section 1209 of the New York State Public Authorities Law, and other sources, it is clear that MTA considered at least seven factors important, and possibly determining:

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- (1) Availability of vendor financing, permitting MTA to avoid resort to the capital market and yet retain the use of safe-harbor leasing;
- (2) Cost of financing;
- (3) Price of the cars;
- (4) Delivery schedules, including reliability of the schedules;
- (5) Quality of design, engineering, and performance, including simplification of maintenance, training, inventory, and other administrative requirements;
- (6) Overdependence on a single supplier; and
- (7) New York content.

In the estimation of the MTA Board, Bombardier was judged superior on all seven counts -- except possibly with respect to price, where Budd's evaluated price is essentially equal to Bombardier's but could be slightly lower if the Brazilian-made undercarriages were accepted. Francorail was judged inferior on all but (1) and (2), where its offer without official financing was better than Bombardier's and with official financing was rated the best of the three because its schedule of progress payments rendered the NPV of its bid lowest. If either or both aspects of financing were overriding, Francorail should have been more in the running than Budd. There is no evidence that it was. Indeed, Ravitch told the Senate Finance Committee that, compared to the Canadian offer, Francorail lost out because of its low New York State content.

The evidence indicates that both Budd and Francorail were rejected in part because the MTA Board developed a preference for Kawasaki based on experience with the first order of 325 cars. When Bombardier emerged as a contender for the second order, of 825 cars, the Board appears to have decided that by using Bombardier it could have the advantage of both (a) Kawasaki's superior design, engineering and quality control, and (b) multiple sourcing. The problem for the Board then would have been how to secure the best deal in terms of price and financing.

During the spring months of 1982, Ravitch engaged in extensive negotiations with all bidders over price and financing, demanding as much officially supported credit as possible and playing the bidders against each other to obtain the most advantageous terms. The political importance attached by the Canadians to securing a major contract for Quebec, and the Canadian determination not to "lose" the deal to subsidized French financing, made them particularly vulnerable to this approach. Viewed in this light, the extent of the Canadian subsidy appears to have been a result of MTA's bargaining tactics and of Canada's determination to win the deal literally at almost any cost.

Given the MTA Board's preference for the Kawasaki cars and need for alternative sources of financing, it appears highly likely that Bombardier could have won the deal at Arrangement terms and rates. France would have matched, but its offer still would have been deficient on other grounds. Budd would not have been able fully to match, and its offer also would have been deficient on other grounds, so the contract still would have gone to Bombardier. Moreover, even were Budd able to offer matching financing, the contract would still likely be awarded to Bombardier, for other reasons. Hence, it is not possible to conclude that "noncompetitive" financing is "likely to be a determining factor" in the sale.

#### Countervailing Duties

A separate issue, relevant to a full understanding of the financial provisions of the case although not directly relevant to a Section 1912 determination, concerns the countervailing duty petition filed by Budd June 3. Budd alleged that subsidized imports from Canada pose a threat of material injury to the U.S. industry.

The original Bombardier contract provided that Bombardier would indemnify the MTA for any countervailing duties which might be assessed. A contingent modification agreement was entered into by the parties June 10. It specified that, at any time up to or following the issuance of a "Final Decision" imposing countervailing duties as a result of Bombardier's subsidized financing, MTA will have the option either of canceling the financing agreement, or of modifying its terms to eliminate or offset any net subsidy determined to exist.

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It further provides that, if MTA has taken action to eliminate the subsidy but it is subsequently determined in a "Final Decision" that no countervailing or other duties are to be assessed, the terms of the financing will revert to those originally agreed upon.

Finally, if the MTA has taken action required of it under the contingent modification agreement to cancel the financing agreement, or to amend it in such a way as to eliminate the subsidy margin, and countervailing duties nevertheless are imposed, the duties will be paid by Bombardier.

For countervailing duties to be assessed, it must be shown that there is a "threat of material injury" to the U.S. industry. If such injury can be shown, duties equal to the amount of the subsidy will be assessed. Processing of a CVD case takes close to six months, even under expedited procedures.

#### Conclusion

Even if the Secretary were to authorize Eximbank financing for Budd to match the Bombardier financing, it appears the contract still would go to Bombardier for the other reasons discussed in this paper. The conditions of Section 1912 thus are not met. Therefore, the Secretary should decide that the availability of noncompetitive financing is not likely to be a determining factor in MTA's decision to award the subway car contract to Bombardier rather than to Budd.

If the Secretary decides that financing is likely to be a determining factor in the sale, the statute does not require him to authorize matching financing by Eximbank for Budd. He may do so, but it is a matter of his judgment whether financing is wise and appropriate.

#### Recommendation

That you decide that the availability of noncompetitive financing is not likely to be a determining factor in MTA's decision to award the subway car contract to Bombardier rather than to Budd. (If you decide that the availability of noncompetitive financing is not likely to be a determining factor, then you can not authorize matching financing to be made available by the Eximbank.):

Approve \_\_\_\_\_

Disapprove \_\_\_\_\_

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Other \_\_\_\_\_

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If you disapprove the above recommendation and decide that the availability of noncompetitive financing is likely to be a determining factor in MTA's decision to award the subway car contract to Bombardier rather than to Budd, then you must make the decision whether to authorize matching financing by Eximbank:

Authorize Eximbank matching financing\_\_\_\_\_

Do not authorize Eximbank matching financing\_\_\_\_\_

Other\_\_\_\_\_

**APPENDIX G**

**BUDD'S REBUTTAL TO TREASURY'S DECISION AND FINDINGS**

## THE BUDD COMPANY

JAMES H. MCNEAL, JR.  
PRESIDENT AND CHIEF EXECUTIVE OFFICER

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2145 WEST 210 BRAYER ROAD  
BOX 8001  
TROY, MICHIGAN 48064

July 16, 1982

The Honorable Donald T. Regan  
Secretary of the Treasury  
15th and Pennsylvania Ave., N.W.  
Washington, D.C. 20220

Dear Mr. Secretary:

I am sorry that our failure to obtain an appointment with you necessitates use of a letter to put before you The Budd Company reaction and response to your statement to the press of July 13, relative to the order for 825 subway cars placed by the New York Metropolitan Transit Authority (MTA) with a Quebec firm, Bombardier, Inc. Regrettably, we find your statement to be misleading and inaccurate in many ways. It is unfortunate that both the statement and your determination were made without direct consultation with Budd or Budd's counsel since we feel that consultation would have clarified the facts and, therefore, resulted in a very different finding.

Among the inaccuracies in the statement are the following:

1. The MTA did not award a contract to Kawasaki Heavy Industries in late 1981 for the building of 325 rapid transit cars. The facts are: In November, 1981, the MTA opened negotiations on a contract for the building of 1150 rapid transit cars. Kawasaki Heavy Industries and The Budd Company both offered bids on this contract by January 5, 1982. Subsequently, the MTA split off 325 cars from that original offer to negotiate and on March 17 awarded a contract for their construction to Kawasaki Heavy Industries of Japan. One of the determining factors in that award was a buyer's credit issued to MTA by the Ministry of International Trade and Industry (MITI), a Japanese government entity, for 9% per annum financing. This financing was not below the internationally agreed upon levels applicable to Japan, and we are informed was not even substantially below commercial rates available in Japan. Under the circumstances, The Budd Company did not challenge this rate as non-competitive financing.

## THE BUDD COMPANY

After the split off of these 325 cars, The Budd Company, Francorail, and Bombardier, Inc., of Canada, continued to negotiate with MTA for the remaining 825 cars.

2. In the third paragraph of your statement, you state that The Budd Company filed suit in the United States District Court for the Southern District of New York after MTA and Bombardier, Inc. had signed the contract for the construction of the 825 rapid transit subway cars on June 10, 1982. The facts are: The Budd Company filed suit on Tuesday, June 8, 1982, and a hearing was held on June 10 before Federal Judge Charles Brieant upon notice, and with the appearance of the MTA and its chairman. The purpose of the suit, and the outcome thereof, was the delay which allowed the Treasury Department the time to make a determination under Section 1912 of the Export-Import Bank Act, 12 U.S.C. 635 (a). This effect was achieved by the insertion in the contract between MTA and Bombardier, Inc. of a clause allowing the board of the MTA to re-open the contract if matching funds were made available to The Budd Company by the EXIM Bank on or before July 15, 1982. This clause was elaborated upon by a stipulation entered by the parties and approved by Judge Brieant. At the hearing in open court on this matter, counsel for the MTA stated that, if financing were made available to Budd, the MTA might actually have a better offer before it than it had from Bombardier, and characterized such an event as happy for Budd and, perhaps, happy for MTA. In affidavit to the Court, MTA Chairman Ravitch stated that the savings to MTA from the Canadian financing would be approximately \$92 million, and that, therefore, Budd could not be awarded the contract, as such award would result in a loss to the taxpayers of the State of New York of that amount.
3. It appears to us that you have ignored the effect of the stipulation entered into by MTA, Budd and Bombardier in Federal Court in New York in making your decision. That stipulation provided that, if matching financing were made available to Budd by the EXIM Bank, MTA would re-open the negotiations<sup>3</sup> in the matter.

## THE BUDD COMPANY

The question for your determination, therefore, was whether financing would be LIKELY to be a determining factor in the award of the contract. Both the statements of the MTA in Federal Court in New York and your determination indicate beyond a doubt that financing was a determining factor when MTA Chairman Ravitch made announcement in May of his recommendation of the contract award to Bombardier, Inc. and was a determining factor in the actual award of the contract to Bombardier, Inc. at a public hearing by the MTA Board on June 11, 1982, at which time Mr. Ravitch stated for the public record that all three bidders (Bombardier, Inc., The Budd Company, and Francorail) were fully qualified to build the 825 rapid transit cars.

Since the stipulation between the parties entered into and approved by Federal Judge Brieant contemplated complete reconsideration of new offers by Bombardier, Inc. and Budd, it is, in our view, highly inaccurate for you to determine what the result of said offers would be, both as regards design of the vehicles, using Japanese technology, or the New York State content which might be offered by Budd. (On the latter point, you will find that the record of the MTA hearing held on June 10, shows that Budd stated that its New York State content is 19% or approximately equal to that of Bombardier. As far as we know, that statement has not been refuted.) As for the supposed superiority of Japanese technology, it hardly seems likely that you or your advisors are competent to make any determination whatever on the question. It should have been left to the Board of the MTA who, as noted above, speaking through their Chairman, Mr. Ravitch, have stated that Budd was fully qualified to build the cars.

It is clear that the illegal non-competitive financing offered by Bombardier and the Canadian government was and is a determining factor in the award of this rapid transit car contract. The statute does not require you to determine whether such non-competitive financing is the or the only determining factor. The reason such a finding is not required or contemplated is clearly that Congress would then require that you enter into just such questions of technology as you have in this case. Moreover, you have done so with no input from The Budd Company.

Your statement and the decision indicate that of the seven factors you listed as determining, the first and second are (1) availability of the subsidized Canadian financing and (2) the cost of said financing. Thus, your determination that the financing is not a determining factor, when you yourself list it as TWO DETERMINING FACTORS is a travesty of the statute enacted by Congress to help American industry, not to hurt it by casting aspersions on its technology.

## THE BUDD COMPANY

Had you, or any of your delegates, made inquiry of The Budd Company before this determination was made, something which The Budd Company, both for itself and through counsel and other intermediaries requested repeatedly, your statements and findings might have been accurate at least on the facts of the matter. What you have done is to leave The Budd Company worse off than it would have been if it had not exercised its federal rights in this matter. If this is to be the interpretation of what Congress intended by enacting Section 1912, it seems certain that no United States company will ever try to use it again.

Some additional comments on the seven major factors cited in your statement:

Price of the cars. Budd maintains that its bid price for the total contract was \$27 million lower than the next lowest bidder. After the prices were disclosed, however, Bombardier was permitted the opportunity to improve its bid and did improve it by nearly \$5,000 per car. Budd was not offered this opportunity and instead its indicated bid price was increased by \$23,337 per car with the notation that a price reduction of that amount would be available if the truck manufactured by Budd's Brazilian supplier passed the NYCTA qualification test. During negotiations, the technical people of the NYCTA agreed that the proposed Brazilian supplier was fully qualified to produce the proven truck design and the MTA bid award announcement of May 18 made no mention of any qualification of the Budd price, which was listed as \$770,768.

Delivery schedules, including reliability of delivery. Budd's final delivery is scheduled to be October, 1986. Bombardier's final delivery is scheduled to be May, 1987. Apparently, the fact that Budd is running behind scheduled delivery on some current contracts is being used to bring into question Budd's reliability even though we have pointed out that the delay was caused by a 205-day strike of our brake supplier whose equipment, by the way, is specified by the NYCTA. It should be noted that the NYCTA has been equally hampered in obtaining parts for this same equipment for maintenance purposes. Neither you nor the MTA have any basis for a determination that Bombardier will be free of any strikes or factors beyond its control which might delay delivery. In addition, the contract contains a stiff penalty for late deliveries to which Budd will be subject if it fails to meet the schedule.

Quality of design, etc. We believe this point is answered with the statement by Mr. Ravitch that he considered Budd to be a fully qualified supplier.

## THE BUDD COMPANY

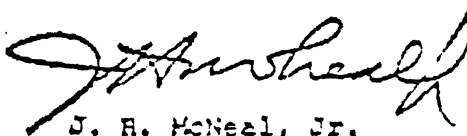
Possible overdependence on a single supplier. It would seem to be only reasonable to assume that if the MTA had any legitimate concern on this point that Budd would have been disqualified at the outset, not after weeks of negotiations during which time Budd was continually encouraged by MTA to persist in its efforts to win the contract award.

In conclusion, we have been forced to the realization that our government pretends to be the friend of American business but in reality is anything but. President Reagan has said that the country should look to the private sector to be the engine to pull us out of recession, but the rest of the administration seems not to hear. Instead of help and encouragement, we are maligned for all manner of alleged inadequacies despite the fact that we have built 11,000 railway passenger cars of stainless steel over the past 50 years and Bombardier has yet to build any. Perhaps you do not place any importance on the fact that all other American producers of this type of equipment have withdrawn from the field. Budd is the only one left and you may be sure that this type of unfair competition may very well result in our following the others, leaving the market totally to the foreigners.

In consideration of all of the above, we are requesting timely response to the following requests:

1. That the report be amended to reflect the correct statements of fact outlined in this letter.
2. That this amended report be forwarded to the Department of Commerce and the International Trade Commission so that the correct facts are used in the countervailing duty petition case.
3. That you review your decision on the basis of the facts presented.
4. That you furnish me with a letter which I may forward to our Unions and employees correcting the inference that Budd's American workers are producing unsatisfactory quality as compared to the Canadians.

Sincerely,



J. H. McNeal, Jr.

