



C-122-860

Investigation

**Public Document**

POI: 01/1/2016 – 12/31/2016

E&C AD/CVD Office II: AMM, RRB,  
WAM, AKM

DATE: December 18, 2017

MEMORANDUM TO: P. Lee Smith  
Deputy Assistant Secretary for Policy and Negotiations

FROM: James P. Maeder  
Senior Director  
performing the duties of Deputy Assistant Secretary for  
Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in  
the Countervailing Duty Investigation of 100- to 150-Seat Large  
Civil Aircraft from Canada

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## **SUMMARY**

The Department of Commerce (Department) determines that countervailable subsidies are being provided to the producers of 100- to 150-seat large civil aircraft (aircraft) in Canada, as provided in section 705 of the Tariff Act of 1930, as amended (the Act). Below is the complete list of issues in this investigation for which we received comments from interested parties:

### Issues

#### Equity Infusions

1. Countervailability of the Caisse de dépôt et placement du Québec (CDPQ) Equity Infusion
2. Whether CDPQ is an Authority
3. Whether the Department Should Accept the Petitioner's<sup>1</sup> Rebuttal Factual Information Regarding the CDPQ Verification Report
4. Equityworthiness of Investissement Québec's (IQ's) Investment in the C Series Aircraft Limited Partnership (CSALP)
5. Whether to Revise the Calculation of the IQ Equity Infusion

#### International Consortia

6. Whether the International Consortia Provision of the Act Applies to this Investigation

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<sup>1</sup> The petitioner in this investigation is The Boeing Company.



### Creditworthiness

7. Creditworthiness of Bombardier, Inc. (Bombardier), Short Brothers PLC (Shorts), and the C Series Program

### Launch Aid

8. Whether the Government of the United Kingdom (U.K.) Launch Aid Provides a Market Rate of Return
9. Analyzing the U.K. Launch Aid Separately from the Government of Canada (GOC) and Government of Québec (GOQ) Launch Aid
10. The Appropriate Denominator for the GOC Launch Aid
11. Capping the Launch Aid Benefit Amounts
12. The Appropriate Benchmark for the U.K., GOC, and GOQ Launch Aid
13. Whether to Adjust the Benefit Streams for the U.K., GOC, and GOQ Launch Aid

### Land for Less Than Adequate Remuneration (LTAR)

14. The Appropriate Benchmark for the Land Provided at Mirabel for LTAR
15. Whether Aéroports de Montréal (ADM) is an Authority

### Other GOC and GOQ Programs

16. *Emploi-Québec* Grants: Specificity and Benefit Calculation
17. Whether GOQ and GOC Scientific Research & Experimental Development (SR&ED) Tax Credits are Countervailable
18. Bombardier's Federal SR&ED Tax Credit

### Other U.K. Programs

19. Specificity and Benefits of U.K. Tax Credits
20. Specificity of Invest Northern Ireland (INI), Resource Efficiency, Innovate UK and Aerospace Technology Institute ATI Grants

### Scope Issues

21. Removal of Nautical Mile Range Criterion
22. Revision of the Seating Capacity

### Bombardier-Airbus SE (Airbus) Merger

23. Airbus-Bombardier Transaction

## **BACKGROUND**

### **Case History**

The mandatory respondent in this investigation is Bombardier, Inc. On October 2, 2017, the Department published the *Preliminary Determination* in this investigation and aligned this final

countervailing duty (CVD) determination with the final antidumping duty (AD) determination, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4)(i).<sup>2</sup>

Between September 25, 2017, and October 27, 2017, we conducted verification at the offices of the GOQ, CDPQ, the GOC, the U.K., Shorts, and Bombardier, in accordance with section 782(i) of the Act.<sup>3</sup>

We invited parties to comment on the *Preliminary Determination*. In November 2017, we received case and rebuttal briefs from the GOC, the GOQ, CDPQ, the U.K., Bombardier, and the petitioner, The Boeing Company.<sup>4</sup> We also received case briefs from Delta Air Lines, Inc. (Delta) and the European Commission.<sup>5</sup>

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<sup>2</sup> See *100- to 150-Seat Large Civil Aircraft from Canada: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 82 FR 45807 (October 2, 2017), (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum (PDM).

<sup>3</sup> See Memorandum, “Verification of the Questionnaire Responses of Caisse de dépôt et placement du Québec (CDPQ, or Caisse),” dated October 17, 2017 (CDPQ Verification Report); Memorandum, “Verification of the Questionnaire Responses of the Government of Canada (GOC),” dated October 23, 2017 (GOC Verification Report); Memorandum “Verification of the Questionnaire Responses of the Government of Québec (GOQ),” dated November 3, 2017 (GOQ Verification Report); Memorandum, “Verification of the Questionnaire Responses of the Government of the United Kingdom (U.K.),” dated November 3, 2017 (U.K. Verification Report); Memorandum, “Verification of the Questionnaire Responses of Bombardier, Inc. Pertaining to Short Brothers PLC (Shorts),” dated November 1, 2017 (Shorts Verification Report); and Memorandum, “Verification of the Questionnaire Responses of Bombardier, Inc. and the C Series Aircraft Limited Partnership,” dated November 7, 2017 (Bombardier Verification Report).

<sup>4</sup> See GOC’s Case Brief, “Government of Canada Case Brief 100-to 150- Seat Large Civil Aircraft from Canada (C-122-860),” dated November 15, 2017 (GOC’s Case Brief); GOQ’s Case Brief, “Countervailing Duty Investigation of 100- To 150-Seat Large Civil Aircraft from Canada (C-122-860): Case Brief of the Government of Québec,” dated November 14, 2017 (GOQ’s Case Brief); CDPQ’s Case Brief “100- to 150- Seat Large Civil Aircraft from Canada: Case Brief of Caisse de dépôt et placement du Québec,” dated November 14, 2017 (CDPQ’s Case Brief); U.K.’s Case Brief “100- to 150-Seat Large Civil Aircraft from Canada: Case Brief of the Government of the United Kingdom,” dated November 14, 2017 (U.K.’s Case Brief); Bombardier’s Case Brief “Countervailing Duty Investigation of 100-10 150-Seat Large Civil Aircraft from Canada: Case Brief of Bombardier Inc. and C Series Aircraft Limited Partnership,” dated November 14, 2017 (Bombardier’s Case Brief); Petitioner’s Case Brief “100- To 150-Seat Large Civil Aircraft from Canada: Petitioner’s Case Brief,” dated November 14, 2017 (Petitioner’s Case Brief); see also GOC’s Rebuttal Brief “Government of Canada Rebuttal Brief for 100- to 150-Seat Large Civil Aircraft from Canada (C-122-860),” dated November 21, 2017 (GOC’s Case Brief); GOQ’s Rebuttal Brief “Countervailing Duty Investigation of 100- To 150-Seat Large Civil Aircraft from Canada (C-122-860): Rebuttal Brief of the Government of Québec,” dated November 21, 2017 (GOQ’s Case Brief); CDPQ’s Rebuttal Brief “100- to 150- Seat Large Civil Aircraft from Canada: Rebuttal Brief of Caisse de dépôt et placement du Québec,” dated November 20, 2017 (CDPQ’s Rebuttal Brief); U.K.’s Rebuttal Brief “100- to 150-Seat Large Civil Aircraft from Canada: Rebuttal Brief of the Government of the United Kingdom,” dated November 28, 2017 (U.K.’s Rebuttal Brief); Bombardier’s Rebuttal Brief “Countervailing Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Re-bracketed Case and Rebuttal Brief Pages of Bombardier Inc. and C Series Aircraft Limited Partnership,” dated November 28, 2017 (Bombardier’s Rebuttal Brief); Petitioner’s Rebuttal Brief “100- To 150-Seat Large Civil Aircraft from Canada: Petitioner’s Rebuttal Brief,” dated November 21, 2017 (Petitioner’s Rebuttal Brief).

<sup>5</sup> See Delta’s Case Brief “100- to 150- Seat Large Civil Aircraft from Canada: Case Brief,” dated November 14, 2017 (Delta’s Case Brief); European Commission’s Case Brief “Submission by the European Commission in Relation to the Preliminary Determinations,” dated November 16, 2017 (European Commission’s Case Brief).

We also invited parties to comment on the proposed Bombardier-Airbus merger on November 1, 2017.<sup>6</sup> We received rebuttal factual information from Boeing, Bombardier and Delta.<sup>7</sup> We received comments from Boeing, Bombardier, Delta, the GOQ, and the GOC.<sup>8</sup> We also received rebuttal comments from Boeing, Bombardier, Delta, the GOQ, and the GOC.<sup>9</sup>

### **Period of Investigation**

The period of investigation (POI) is January 1, 2016, through December 31, 2016.

### **Scope of the Investigation**

The product covered by this investigation is 100- to 150-seat large civil aircraft from Canada. For a full description of the scope of this investigation, *see* the accompanying *Federal Register* notice at Appendix I.

### **Scope Comments**

During the course of this investigation, the Department received numerous scope comments from interested parties. On November 8, 2017, the Department issued a Preliminary Scope Decision

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<sup>6</sup> See Memorandum, “Opportunity to Comment on Proposed Transaction,” dated November 1, 2017 (Press Release Memorandum).

<sup>7</sup> See Petitioner’s Letter, “100- To 150-Seat Large Civil Aircraft from Canada: Rebuttal Factual Information on the Announced Airbus-Bombardier C Series Partnership,” dated November 6, 2017; Bombardier’s Letter, “Antidumping and Countervailing Investigations of 100- to 150-Seat Large Civil Aircraft from Canada: Evidence on the Proposed Transaction,” dated November 6, 2017; Delta’s Letter, “100- to 150-Seat Large Civil Aircraft from Canada: Rebuttal Factual Information in Response to the Department’s November 1, 2017 Opportunity to Comment on Proposed Transaction,” dated November 6, 2017.

<sup>8</sup> See Boeing’s Proposed Transaction Case Brief, “100- To 150-Seat Large Civil Aircraft from Canada: Brief on the Announced Airbus-Bombardier C Series Partnership,” dated November 13, 2017 (Petitioner’s Proposed Transaction Brief); Bombardier’s Proposed Transaction Case Brief, “Antidumping and Countervailing Investigations of 100-to 150-Seat Large Civil Aircraft from Canada: Brief on the Proposed Transaction,” dated November 13, 2017 (Bombardier’s Proposed Transaction Case Brief); Delta’s Proposed Transaction Case Brief, “100- to 150- Seat Large Civil Aircraft from Canada: Opportunity to Comment on Proposed Transaction,” dated November 13, 2017 (Delta’s Proposed Transaction Case Brief); GOQ’s Proposed Transaction Case Brief, “100- To 150-Seat Large Civil Aircraft from Canada (C-122-860): Comments of the Government of Québec in Response to the Department’s Invitation to Submit Comments Regarding Proposed Transaction,” dated November 13, 2017 (GOQ’s Proposed Transaction Case Brief); GOC’s Proposed Transaction Case Brief, “Government of Canada’s Comments on Proposed Bombardier Transaction: 100- to 150-Seat Large Civil Aircraft from Canada,” dated November 13, 2017 (GOC’s Proposed Transaction Case Brief).

<sup>9</sup> See Petitioner’s Proposed Transaction Rebuttal Brief, “100- To 150-Seat Large Civil Aircraft from Canada: Rebuttal Brief on the Announced Airbus-Bombardier C Series Partnership,” dated November 17, 2017 (Petitioner’s Proposed Transaction Rebuttal Brief); Bombardier’s Proposed Transaction Rebuttal Brief, “Antidumping and Countervailing Investigations of 100-to 150-Seat Large Civil Aircraft from Canada: Rebuttal Brief on the Proposed Transaction,” dated November 17, 2017 (Bombardier’s Proposed Transaction Rebuttal Brief); GOQ’s Proposed Transaction Rebuttal Brief, “100- To 150-Seat Large Civil Aircraft from Canada (C-122-860): Government of Québec’s Response to Petitioner’s Comments Regarding the Proposed Transaction,” dated November 17, 2017 (GOQ’s Proposed Transaction Rebuttal Brief); GOC’s Proposed Transaction Rebuttal Brief, “Government of Canada’s Response to Boeing’s Comments on the Proposed Airbus- Bombardier Transaction: 100- to 150-Seat Large Civil Aircraft from Canada,” dated November 17, 2017 (GOC’s Proposed Transaction Rebuttal Brief).

Memorandum to address these comments and made no changes to the scope of the investigation as it appeared in the Initiation Notice.<sup>10</sup>

Interested parties also raised issues in their case briefs regarding the scope of this investigation. See Comments 22 and 23 in the “Analysis of Comments” section, below. In response to these comments, we did not change the scope of this investigation.

## **Subsidies Valuation Information**

### **A. Allocation Period**

The Department made no changes to, and interested parties raised no issues in their case briefs regarding, the allocation period or the allocation methodology used in the *Preliminary Determination*. For a description of the allocation period and the methodology used for this final determination, see the *Preliminary Determination*.

### **B. Attribution of Subsidies**

The Department made no changes to the attribution of subsidies. For a description of the methodologies used for this final determination, see the *Preliminary Determination*.

### **C. Denominators**

Interested parties raised issues in their case briefs regarding the denominators we used to calculate the countervailable subsidy rates for the subsidy programs described below. For information on the denominators used in the final determination, see the *Preliminary Determination*, the “Analysis of Comments” section below, and the Final Calculation Memorandum.<sup>11</sup>

### **D. Creditworthiness**

Interested parties raised issues in their case briefs regarding the “uncreditworthy” interest rates used by the Department in the *Preliminary Determination*. For information on the interest rates used in the final determination, see the *Preliminary Determination*, the “Analysis of Comments” section below, and the Final Calculation Memorandum.

### **E. Equityworthiness**

Interested parties raised issues in their case briefs regarding the equityworthiness findings made by the Department at the *Preliminary Determination*. For information on the equityworthiness

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<sup>10</sup> Memorandum, “100- To 150-Seat Large Civil Aircraft from Canada: Scope Comments Decision Memorandum for the Preliminary Determination,” dated November 8, 2017 (Preliminary Scope Memorandum).

<sup>11</sup> See the Department’s Final Calculation Memorandum, dated concurrently with this memorandum (Final Calculation Memorandum) at Attachment 2.

findings made in the final determination, *see* the *Preliminary Determination*, the “Analysis of Comments” section below, and the Final Equityworthiness Memorandum.<sup>12</sup>

## **F. Loan Benchmarks and Interest Rates**

Interested parties raised issues in their case briefs regarding the loan benchmarks and interest rates used by the Department in the *Preliminary Determination* as part of the Department’s creditworthiness analysis. For information on the loan benchmarks and interest rates used in the final determination, *see* the *Preliminary Determination*, the “Analysis of Comments” section below, and the Final Calculation Memorandum.

### **Analysis of Programs**

#### **A. Programs Determined To Be Countervailable<sup>13</sup>**

##### *Equity Infusion*

##### **1. Equity Infusion by *Investissement Québec***

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which are addressed below. The Department has modified its calculation of the subsidy rate for this program from the *Preliminary Determination*. For this final determination, we are using the denominator for all C Series sales during the POI, not only sales made by CSALP, for the reasons explained in Comment 5, below.

Bombardier: 127.22 percent *ad valorem*

##### *Launch Aid*

##### **2. Launch Aid by GOC**

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which are addressed below. The Department has not modified its calculation of the subsidy rate for this program from the *Preliminary Determination*.

Bombardier: 28.99 percent *ad valorem*

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<sup>12</sup> *See* Memorandum entitled, “Countervailing Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Final Analysis of the Equityworthiness of *Investissement Québec*’s (IQ’s) Equity Infusion in the C Series Aircraft Limited Partnership (CSALP) and Caisse de dépôt et Placement du Québec’s (CDPQ’s) Equity Infusion in Bombardier Transportation (Investment) UK Ltd (BT Holdco)” (Final Equityworthiness Memorandum), dated concurrently with this memorandum. This analysis relies on business proprietary information that cannot be discussed in this public memorandum.

<sup>13</sup> For additional information on the below subsidy rate calculations, *see* the *Preliminary Determination* and the Final Calculation Memorandum, dated concurrently with this memorandum.

### 3. Launch Aid by GOQ

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which are addressed below. The Department has not modified its calculation of the subsidy rate for this program from the *Preliminary Determination*.

Bombardier: 9.16 percent *ad valorem*

### 4. Launch Aid by the U.K.

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which are addressed below. The Department has modified its calculation of the subsidy rate for this program from the *Preliminary Determination*. For this final determination, we are using, as the benefit amount, the total outstanding loan balance, including principal and accrued interest. See Comments 8, 9, and 13, below.

Bombardier: 28.36 percent *ad valorem*

### *Québec Province Tax Programs*

#### 5. Tax Incentives and Other Support Provided by the City of Mirabel

No parties submitted comments regarding this program. The Department has not modified its calculation of the subsidy rate for this program from the *Preliminary Determination*.

Bombardier: 0.18 percent *ad valorem*

#### 6. PR@M Tax Credit

No parties submitted comments regarding this program. The Department has not modified its calculation of the subsidy rate for this program from the *Preliminary Determination*.

Bombardier: 0.01 percent *ad valorem*

#### 7. Tax Credits from the GOQ for the C Series

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which are addressed below. The Department has not modified its calculation of the subsidy rate for this program from the *Preliminary Determination*.

Bombardier: 9.68 percent *ad valorem*

## *U.K. Tax Programs*

### 8. U.K. R&D Tax Credits

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which are addressed below. The Department has modified its calculation of the subsidy rate for this program from the *Preliminary Determination*. As discussed in Comment 19, below, we observed, at verification, that a portion of the U.K. R&D tax credits are tied to production of the C Series; therefore, we have determined to countervail only the portion tied to the C Series and to use C Series sales as the denominator.<sup>14</sup>

Bombardier: 4.99 percent *ad valorem*

## *Canadian Federal Grant Programs*

### 9. Technology Demonstration Program (TDP)

No parties submitted comments regarding this program. The Department has not modified its calculation of the subsidy rate for this program from the *Preliminary Determination*.

Bombardier: 0.01 percent *ad valorem*

## *Québec Province Grant Program*

### 10. *Emploi-Québec*

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which are addressed below. The Department has modified its calculation of the subsidy rate for this program from the *Preliminary Determination*. We have corrected the calculation of the two *Emploi-Québec* grants for the C Series to allocate all disbursements over time.<sup>15</sup> Additionally, we determined that the other, smaller grants from *Emploi-Québec*, received in 2016 under different *Emploi-Québec* grant programs, provide no measurable benefit. For further discussion, see Comment 16, below.

Bombardier: 1.19 percent *ad valorem*

## *U.K. Grant Programs*

### 11. INI Grant for the C Series - Selective Financial Assistance (SFA)

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which are addressed in Comment 20, below. The Department has modified its calculation of the

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<sup>14</sup> See Final Calculation Memorandum and Shorts Verification Report at pages 2 and 9-10.

<sup>15</sup> See *CVD Preamble* at 65394 (“once the 0.5 percent test has been applied to the approved amount and the subsidy exceeds 0.5 percent of sales, all disbursements will be allocated over time”) and Final Calculation Memorandum.



subsidy rate for this program from the *Preliminary Determination*. We have corrected the calculation of the INI SFA grant for the C Series to allocate all disbursements over time.<sup>16</sup>

Bombardier: 2.60 percent *ad valorem*

## **B. Programs Determined Not To Provide Countervailable Benefits During the POI**

### **1. Equity Infusion by CDPQ**

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which are addressed below. The Department has not modified its determination that CDPQ's investment in BT Holdco is equityworthy and, thus, this program provided no benefit to Bombardier. Further, because we reached a final determination that there is no benefit from this program, the question of whether CDPQ is an "authority" within the meaning of section 771(5)(B) of the Act is moot.

### **2. Government Provision of Production Facilities and Land at Mirabel for LTAR**

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which are addressed below. The Department has modified its calculation of the subsidy rate for this program from the *Preliminary Determination*, and, determines that this program provided no measurable benefit to Bombardier.<sup>17</sup> Further, because we reached a final determination that there is no benefit from this program, the question of whether ADM is an "authority" within the meaning of section 771(5)(B) of the Act is moot.

### **3. Tax Credits from the Government of Canada for the C Series**

Interested parties submitted comments in their case and rebuttal briefs regarding this program, which is also known as the Federal SR&ED Tax Credit. The Department has determined that the transaction at issue does not provide a financial contribution or benefit to Bombardier during the POI. *See* Comment 18, below, for further discussion.

### **4. Other Programs Conferring No Measurable Benefit During the POI**

Bombardier and its cross-owned affiliates reported receiving benefits under various programs, some of which were specifically alleged and others of which were self-reported. Based on the record evidence, we determine that the benefits from the following 21 programs: 1) were fully expensed prior to the POI; 2) are less than 0.005 percent *ad valorem* when attributed to the respondent's applicable sales; 3) are only tied to the production of non-subject merchandise; or 4) in the case of export subsidies, were not tied to U.S. sales of subject merchandise. Consistent

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<sup>16</sup> *See CVD Preamble* at 65394 and Final Calculation Memorandum.

<sup>17</sup> *See* Final Calculation Memorandum at Attachments 2, 11a, and 11b.

with the Department's practice,<sup>18</sup> we determine that it is unnecessary for the Department to make a final determination as to the countervailability of the following programs and have not included them in our final subsidy rate calculations for Bombardier.

### **Canadian Federal Programs**

1. Export Development Canada Export Financing
2. Consortium for Aerospace Research and Innovation in Canada
3. Defence Industry Productivity Program
4. Green Aviation Research and Development Network
5. National Research Council
6. Natural Sciences and Engineering Research Council of Canada
7. Ontario Centers of Excellence
8. Regional Aircraft Credit Facility
9. Water Bomber (CL-215 Amphibious Aircraft) Nose Wheel Steering Kit Purchase Agreement

### **Québec Province Programs**

10. *Investissement Québec* Export Financing
11. Consortium for Research and Innovation in Aerospace Québec
12. Fuel Tax Refund
13. *Investissement Québec* Loan Guarantees for Non-Subject Aircraft
14. MESI Support for Events
15. Systemes Aeronautiques D'Avante-Garde Pour L'Environnement I
16. Systemes Aeronautiques D'Avante-Garde Pour L'Environnement II
17. Tax Credit for Investment (CR 85)
18. Tax Credit for Private Partnership Pre-Competitive Research (CR 79))

### **U.K. Programs**

19. INI Grants Tied to Non-Subject Merchandise
20. R&D Grants Expensed Prior to the POI
21. Aeronautical Engineering Transitional Funding Project

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<sup>18</sup> See e.g., *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (October 25, 2007) (*Coated Paper from the PRC*), and accompanying Issues and Decision Memorandum (IDM) at "Analysis of Programs, Programs Determined Not To Have Been Used or Not To Have Provided Benefits During the POI for GE;" *Certain Steel Wheels From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 77 FR 17017 (March 23, 2012), and accompanying IDM at "Income Tax Reductions for Firms Located in the Shanghai Pudong New District;" *Aluminum Extrusions from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2010 and 2011*, 79 FR 106 (January 2, 2014), and accompanying IDM at "Programs Used By the Alnan Companies;" and *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 FR 49935 (July 29, 2016), and accompanying IDM at "Tax Deduction for Research and Development Expenses."

### **C. Programs Determined Not To Be Used During the POI**

1. CDPQ Line of Credit
2. Innovation, Science, and Economic Development Canada Support for Aerospace R&D
3. Technology Partnerships Canada Program

### **D. Program Determined To Be Not Countervailable In This Investigation**

1. Tax Credit for On-the-Job Training Period (CR 9)

As discussed in the *Preliminary Determination*, we determined this program was not specific, based upon the information on the record.<sup>19</sup> No party has argued that this program should be specific for the final determination; thus, we have not changed our finding with regard to the specificity of the tax credit for on-the-job training period (CR 9) program for the final determination.

As discussed below in Comment 6, the Department is modifying its *Preliminary Determination* and not including the following programs in this investigation.

2. Skills Growth
3. Apprenticeships
4. Resource Efficiency Grants
5. Innovate U.K. and ATI Grants

## **ANALYSIS OF COMMENTS**

### **Equity Infusions**

#### **Comment 1: Countervailability of the CDPQ Equity Infusion**

Because the comments raised and our analysis of this issue largely consist of business proprietary information, we cannot discuss them here. Therefore, this information is discussed and analyzed in the Final Equityworthiness Memorandum.<sup>20</sup> As a result of our analysis, we continue to find that CDPQ's equity infusion in BT Holdco is consistent with the usual investment practices of private investors in Canada. Thus, we continue to determine that this program provided no benefit to Bombardier.

#### **Comment 2: Whether CDPQ is an Authority**

Because we determined that the CDPQ equity infusion is consistent with the usual investment practices of private investors in Canada and, as a result, did not confer a benefit to Bombardier, this issue is moot. Although we made a preliminary determination regarding the status of CDPQ as an authority and received comments on that preliminary determination, we did so in order to develop fully the record on this question, in case our final benefit determination

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<sup>19</sup> See PDM at 33-34.

<sup>20</sup> See Final Equityworthiness Memorandum at 20.

changed from the preliminary determination. Because the final benefit determination has not changed, the status of CDPQ is not relevant, and we have not addressed the question of whether CDPQ is an authority for this final determination.<sup>21</sup>

**Comment 3: Whether the Department Should Accept the Petitioner's Rebuttal Factual Information Regarding the CDPQ Verification Report**

*Petitioner's Case Brief*

- Following the publication of the Department's CDPQ verification report, the petitioner submitted information to rebut, clarify or correct the report. The Department rejected this submission as untimely new factual information pursuant to 19 CFR 351.301(c)(5) and removed it from the record. The Department erred in rejecting this submission and should reverse its decision for the final determination.<sup>22</sup>
- The Court of International Trade (CIT) in *US Magnesium* determined that the Department's rejection of an untimely submission in the underlying proceeding amounted to an abuse of discretion.<sup>23</sup> The Court further stated that *prima facie* evidence of fraud undermines the accuracy and fairness of a proceeding and, thus, the Department should have exercised its authority by addressing that evidence which was rejected as untimely in its analysis.<sup>24</sup>
- The facts of the present case are analogous to those of *US Magnesium* because: 1) the petitioner made its submission almost two months before the Department's final determination, while in *US Magnesium* the petitioner filed its submission three months before the final results; and 2) the rejected submissions in both cases were submitted while the proceedings were still open.
- Moreover, the Department itself subsequently reopened the record to solicit factual information and comments regarding the proposed transaction between Airbus and Bombardier.
- Finally, while the Department rejected the its submission because post-verification submissions of new factual information cannot be verified, the document may be viewed as self-verifying due to its origin. Alternatively, the Department could ask the GOC to authenticate the document.<sup>25</sup>

*CDPQ's Rebuttal Brief*

- The Department correctly rejected the petitioner's October 27 submission because it was untimely filed.<sup>26</sup>
- CDPQ disputes the petitioner's contention that the CIT's decision in *US Magnesium* compels the Department to accept the petitioner's unsolicited new factual information. The CIT

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<sup>21</sup> See Final Equityworthiness Memorandum.

<sup>22</sup> See Petitioner's Case Brief at 47-48 (citing Department Letter re: Countervailing Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada, dated October 31, 2017 (Rejection of Unsolicited New Factual Information)).

<sup>23</sup> *Id.* at 49 (citing *US Magnesium LLC v. United States*, 895 F. Supp. 2d 1319 (CIT 2013) (*US Magnesium*), where the petitioner challenged as an abuse of discretion the Department's rejection of a submission as untimely filed that allegedly showed that respondents had deliberately mislead the Department).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 50.

<sup>26</sup> See CDPQ's Rebuttal Brief at 19 (citing Rejection of Unsolicited New Factual Information).

reached its decision after considering whether the newly discovered evidence would have altered the dumping margin in that case.<sup>27</sup> The CIT considered whether the respondent “deliberately failed to report information to which it clearly had access,” in rendering its decision. Thus, the current case is not analogous as the petitioner had the opportunity to comment on this issue because CDPQ explicitly discussed it throughout its submissions in this investigation.<sup>28</sup> Moreover, even if it had not disclosed the issue allegedly raised in the petitioner’s submission, this information is not *prima facie* evidence of fraud and has no effect on the Department’s determination of the subsidy rate in this investigation.

- The Department’s solicitation of new factual information regarding the proposed transaction between Airbus and Bombardier has no bearing on whether the Department should accept the petitioner’s new factual information at issue here. The Department could not have investigated the proposed transaction until after the date of the *Preliminary Determination*, while the petitioner had ample opportunity to submit information rebutting CDPQ’s submissions.<sup>29</sup>

### **Department’s Position:**

We have not reversed our rejection of the petitioner’s October 27 submission as untimely filed new factual information.

In adopting its 1997 regulations, the Department stated the following in response to arguments that parties be allowed to submit new factual information in response to verification reports:

Parties are free to comment on verification reports and to make arguments concerning information in the reports up to and including the filing of case and rebuttal briefs (note that § 351.309(c)(2) provides that the case brief must present all arguments that a party wants the Department to consider in its final determination or final results of review). In making their arguments, parties may use factual information already on the record or may draw on information in the public realm to highlight any perceived inaccuracies in a report. *Though comment on the Department’s verification findings is appropriate, submission of new factual information at this stage in the proceeding is not, because the Department is unable to verify post-verification submissions of new factual information.*<sup>30</sup>

Thus, the preamble to *Antidumping Duties; Countervailing Duties* supports the Department’s longstanding practice not to permit interested parties to submit new factual information in response to verification reports.

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<sup>27</sup> *Id.* at 20 (citing *US Magnesium*).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 20-21.

<sup>30</sup> See *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27332 (May 19, 1997) (emphasis added).

Further, we find that the facts of *US Magnesium* are distinguishable from the present case. In *US Magnesium*, the CIT considered whether the Department's rejection of an untimely submission of factual information constituted an abuse of discretion.<sup>31</sup> In that case, the petitioner submitted *prima facie* evidence that the respondent committed fraud by knowingly misleading the Department during the underlying administrative review. Further, the information contained in the petitioner's submission was material to the Department's margin calculations.<sup>32</sup>

In the present case, the petitioner submitted heavily redacted information after the issuance of the CDPQ Verification Report regarding communication between CDPQ and the GOC. However, CDPQ had already informed the Department that it communicates with the GOC regarding its investments.<sup>33</sup> Thus, the petitioner's submission of such communication cannot be considered *prima facie* evidence of fraud. As a result, there is no basis to conclude that this information would have a material effect on the Department's subsidy calculations here.

We also disagree with the petitioner that we should accept its untimely submission because the Department itself reopened the record of this case regarding the proposed Airbus-Bombardier transaction. The proposed transaction was only announced on October 16, 2017, after the date of *Preliminary Determination*; thus, and in contrast to the information proffered by petitioner, the Department could not have investigated this issue earlier.<sup>34</sup> Moreover, the Department's regulations provide that it may place factual information on the record at any time in the course of a proceeding and solicit comments on that information.<sup>35</sup> In any event, the Department's solicitation of information regarding the Airbus-Bombardier transaction has no bearing on its decision to reject the petitioner's untimely filed October 27 submission. The two issues are unrelated and the petitioner's attempt to conflate them is unpersuasive. It would impede the timely completion of the investigation for the Department to reopen the record as to any other issue merely because it sought information on a single, discrete development that occurred after deadlines for submission of factual information had long passed.<sup>36</sup>

Finally, the petitioner's suggestion that the information should be accepted because it is self-verifying, or that the Department could simply ask the GOC to verify the authenticity of the submission, is contrary to the Department's regulations and practice. Section 351.307(b)(i) of the Department's regulations directs the Department to "... verify factual information upon which the Secretary relies in countervailing duty investigation{s}." The verification process involves examining documents that originated from the party being verified, discussing them, and tying them to supporting information. Thus, merely asking the GOC to verify the authenticity of the petitioner's submission would not qualify as verification.

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<sup>31</sup> See *US Magnesium* at 6.

<sup>32</sup> *Id.* at 5-6.

<sup>33</sup> See CDPQ's September 5, 2017 Supplemental Questionnaire Response (CDPQ September 5, 2017 SQR) at 8, *see also* CDPQ's July 24, 2017 Initial Questionnaire Response (CDPQ July 24, 2017 IQR) at 31-32.

<sup>34</sup> See Memorandum, "Opportunity to Comment on Proposed Transaction," dated November 1, 2017.

<sup>35</sup> See 19 CFR 351.301(c)(4).

<sup>36</sup> In any event, if the Department were to accept the petitioner's submission, the Department's regulations at 19 CFR 351.301(c)(5) require that parties be permitted to submit rebuttal factual information in response to it. Such information would also be subject to verification, further impeding the timely completion of this investigation.

#### **Comment 4: Equityworthiness of IQ's Investment in CSALP**

Because the comments raised and our analysis of this issue largely consist of business proprietary information, we cannot discuss them here. Therefore, this information is discussed and analyzed in the Final Equityworthiness Memorandum.<sup>37</sup> As a result of our analysis, we continue to find that IQ's equity infusion in CDPQ was inconsistent with the usual investment practices of private investors in Canada. Thus, we continue to determine that this program provided a countervailable benefit to Bombardier.

#### **Comment 5: Whether to Revise the Calculations of the IQ Equity Infusion Subsidy Rate**

##### *Bombardier's Case Brief*

- The Department incorrectly calculated the sales denominator and discount rate for IQ's equity infusion in CSALP. If the Department makes a final determination that the equity infusion conferred a countervailable benefit, it should revise its calculations.
- In the *Preliminary Determination*, the Department used CSALP's sales as the denominator of the IQ equity infusion calculation.<sup>38</sup> However, the equity infusion was not directly tied to CSALP. Rather, CSALP was the investment vehicle for the equity infusion.<sup>39</sup> Because IQ's equity infusion was directed to the C Series program as a whole, the Department should use all 2016 C Series sales in the denominator of its subsidy rate calculation.
- The data on which the Department based its calculation of the 18.87 discount rate used to allocate the benefit for IQ's equity infusion are flawed. Specifically, the Department used cumulative default rate data with a five-year time horizon. However, the IQ equity infusion had a time horizon of at least 20 years.<sup>40</sup> Therefore, the 15-year default rates on the record of this investigation are closer to Bombardier's actual 2015 cost of capital of 8.75 percent.<sup>41</sup>
- Additionally, the Department should use the cumulative default rates for BB-rated, rather than CCC-rated companies in its discount rate calculation, in order to match the company's actual credit rating at the end of 2015.<sup>42</sup>
- Finally, given that IQ obtained an interest in less than half of CSALP, treating the equity investment as if it were a grant grossly overstates the benefit to CSALP. This result violates the SCM Agreement, which requires that a subsidy must be measured based on the benefit to the recipient.<sup>43</sup>

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<sup>37</sup> See Final Equityworthiness Memorandum at 1.

<sup>38</sup> See Bombardier's Case Brief at 23 (citing *Preliminary Determination*, and accompanying PDM at 15).

<sup>39</sup> *Id.* at 23 (Bombardier's July 25, 2017 Initial Questionnaire Response (Bombardier July 25, 2017 IQR) at Exhibit GEN-03).

<sup>40</sup> *Id.* at 25 (citing Bombardier July 25, 2017 IQR at Exhibit GQ-IQINV-07).

<sup>41</sup> *Id.* at 25 (citing Verification Exhibit BVE6 at 44; Bombardier July 25, 2017 IQR at Exhibit FS-21, and at 133, 165, and 186).

<sup>42</sup> *Id.* at 25 (citing Bombardier's September 5, 2017 Supplemental Questionnaire Response (Bombardier September 5, 2017 SQR) at Exhibit 7A; and Bombardier July 25, 2017 IQR at 31 and Exhibit FS-21).

<sup>43</sup> *Id.* at 25 (citing SCM Agreement at Article 14).

### *GOC's Case Brief*

- The Department should correct its calculations of the sales denominator and the discount rate for IQ's equity infusion, both of which inflate the subsidy rate.<sup>44</sup>

### *Petitioner's Rebuttal Brief*

- Bombardier's argument that the Department should have used the default rates for BB-rated bonds should be rejected because it contradicts the language of 19 CFR 351.505(a)(3)(iii).<sup>45</sup>
- The Department should continue to use Canadian five-year default data to calculate the uncreditworthy discount rate for all benefit allocation periods of five years or more.<sup>46</sup>

### **Department's Position:**

For the final determination, we revised our calculation of the IQ equity infusion subsidy rate to use all C Series sales during the POI as the denominator. As CSALP's financial statements demonstrate, CSALP acquired the assets and liabilities of the C Series program, including the sale made by Bombardier before the June 30, 2016 date of IQ's first disbursement of equity to CSALP.<sup>47</sup>

Furthermore, we continue to find that the C Series program was uncreditworthy using a project-specific analysis, pursuant to 19 CFR 351.505(a)(4). Therefore, we continue to calculate an uncreditworthy discount rate, pursuant to 351.505(a)(3)(iii), which we have used in our benefit calculation for this program. *See* Comments 7 and 12 below, discussing the creditworthiness of Bombardier, Shorts, and the C Series Program, for further discussion.

### **International Consortia**

#### **Comment 6: Whether the International Consortia Provision of the Act Applies to this Investigation**

#### *The European Commission's Brief*

- In the *Preliminary Determination*, the Department found subsidies provided by the U.K. to Shorts countervailable under the international consortium provision of section 701(d) of the Act. The Department applied the international consortium provision because: 1) Shorts is a wholly-owned subsidiary of Bombardier; 2) The U.K. financing provided to Shorts is an integral part of the C Series project, and; 3) the launch aid packages from the

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<sup>44</sup> See GOC's Case Brief at 40.

<sup>45</sup> See Petitioner's Rebuttal Brief at 74.

<sup>46</sup> *Id.* at 79 (citing *Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 70961 (November 21, 2008), and accompanying IDM at 10).

<sup>47</sup> See Bombardier July 25, 2017 IQR at Exhibit FS-10.



U.K., the GOC and GOQ were all provided in the same time period to help Bombardier launch the C Series aircraft.

- Any alleged subsidies provided by the U.K. to Shorts to produce wings are outside the scope of this investigation. The Repayable Launch Investment (RLI) can only be used to fund the design and the development of wings in Northern Ireland before being shipped to Canada, where the aircraft is assembled.<sup>48</sup>
- The alleged subsidies provided by the U.K. and Northern Ireland to Shorts are exclusively to support production and related activities in the U.K., not Canada, a fact on which the European Commission's state aid analysis relied.<sup>49</sup>

#### *GOC's Case Brief*

- The Department's precedent demonstrates that the international consortium provision requires a formal and cooperative relationship among participating governments and companies. That relationship must be sufficient to warrant a determination that a subsidizing government, as a member of a consortium, intended to provide subsidies to that consortium to assist it in achieving its objective.<sup>50</sup> In the present case there is no such separate "consortium" entity.<sup>51</sup>
- The record shows that each company received financial support from its government for activities performed solely within the country where it is located; accordingly, U.S. CVD law does not permit countervailing alleged subsidies provided by the U.K. to Shorts.

#### *U.K.'s Case Brief*

- Section 701(d) of the Act requires that an international consortium have a separate existence independent of the individual companies, which is made clear by the following language of the Act: 1) the phrase "enable their participation in that consortium;" and 2) the statement that the subsidies that may be countervailed include "countervailable subsidies provided directly to the international consortium."<sup>52</sup> In addition to having an independent existence, a consortium must also be formed "to promote a common objective or engage in a project."<sup>53</sup>
- An examination of the Airbus case is instructive for examining the "Airbus consortium" that Congress considered when drafting section 701(d) of the Act. The WTO panel report demonstrates that the U.S. understood Airbus as an entity of "formal and institutionalized industrial policy," with "systematic and coordinated" governmental support.<sup>54</sup>

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<sup>48</sup> See European Commission's Case Brief at 1.

<sup>49</sup> *Id.*

<sup>50</sup> See GOC's Case Brief at 40-41 (citing *Notice of Preliminary Affirmative Countervailing Duty Determinations and Alignment with Final Antidumping Duty Determinations: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 82 FR 45807 (May 14, 2001) (*LEU Preliminary Determination*); *Low Enriched Uranium from Germany, the Netherlands and the United Kingdom*, 66 FR 65903 (December 21, 2001) (*LEU Final Determination*) and accompanying IDM).

<sup>51</sup> *Id.* at 31.

<sup>52</sup> See U.K.'s Case Brief at 20.

<sup>53</sup> *Id.*

<sup>54</sup> See U.K.'s Case Brief at 21-22 (citing *Panel Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, DSR 2011:II p. 685 (*Large Civil Aircraft*)).

- Section 701(d) of the Act is an exception to the general rule that a government only provides subsidies to support production and employment within its own borders. However, due to the nature of the Airbus project, Congress decided that the general rule would not apply because support was provided with the express purpose of working on a specific project.<sup>55</sup>
- In *LEU*, the Department relied specifically on the existence of a separate consortium entity and the structured cooperation between the three participating governments, codified in a treaty, in finding that the Urenco Group (Urenco) constituted an international consortium.<sup>56</sup>
- Unlike in Airbus and *LEU*, there is no basis to determine that an international consortium exists in this case. There is no paperwork similar to the treaty which created the Urenco Group, nor the international agreements that existed in the Airbus case, for the C Series Program. The U.K. provided no funding for any part of the C Series Program, INI did not support activities outside of the U.K., nor was there any statement in any C Series document by which the U.K. or INI express the intent to support activities outside of the U.K.
- Shorts' relationship to Bombardier regarding the C Series is as a subcontractor. The fact that Shorts' status as a subcontractor makes it part of an international consortium would mean that millions of companies are potentially members of such consortia.<sup>57</sup>
- For the Department to investigate any subsidies provided to Shorts for the C Series, the petitioner must meet the requirements of section 771A of the Act. As the Preamble states, 19 CFR 351.523(a)(iii) requires "a demonstration of the significance of prior-stage subsidies in order for the Department to initiate an upstream subsidy investigation."<sup>58</sup>
- The requirement of "significance" is not satisfied by merely alleging that a subsidy is for an affiliated supplier's production of a product used for the subject merchandise. Section 351.523(a)(iii) of the Department's regulations requires the petitioner to demonstrate that the subsidy rate on the input product, multiplied by the proportion of the total production costs of the subject merchandise accounted for by the input product, is at least one percent. The petitioner has neither alleged that subsidies provided to Shorts are upstream subsidies, nor has the petitioner made any allegation of significance in relation to the subsidies Shorts received. Because the petitioner has not alleged an upstream subsidy, the Department's investigation of U.K. funding provided to Shorts must be terminated.<sup>59</sup>

#### *Bombardier Case Brief*

- The Department did not explain what facts led the Department to state in the *Preliminary Determination* that section 701(d) of the Act "is intended to address precisely the type of situation presented by {RLI to Shorts}." Section 701(d) of the Act was not drafted to

<sup>55</sup> *Id.* at 22 (citing 133 Cong. Rec. 17525 (1987)).

<sup>56</sup> *Id.* at 25 (citing *LEU Preliminary Determination* and *LEU Final Determination*).

<sup>57</sup> See U.K.'s Case Brief at 11, FN 9.

<sup>58</sup> *Id.* at 12 (citing *Countervailing Duties: Final Rule*, 63 FR 65348 (November 25, 1998) (*CVD Preamble*)).

<sup>59</sup> See U.K.'s Case Brief at 12-13.

permit the Department to countervail subsidies across borders simply because companies produce aircraft.<sup>60</sup>

- The legislative history of section 701(d) of the Act makes clear that multilateral cooperation is an important element of the provision.<sup>61</sup> In the years leading up to the drafting of section 701(d) of the Act, four European aerospace companies were brought together to form Airbus Industrie GIE as a result of multilateral governmental cooperation.<sup>62</sup> This process was coordinated through a series of treaties between France, Germany, Spain, and the U.K.<sup>63</sup>
- In *LEU*, which is the only other case in which the Department had applied the international consortium provision, the Department countervailed subsidies provided to a consortium of companies formed as a result of formal cooperation between the governments of Germany, the Netherlands, and the U.K. Similar to Airbus, in *LEU*, three independent companies were brought together through the Treaty of Almelo to create a new company, Urenco, which coordinated all consortium activity.<sup>64</sup>
- Bombardier's relationship with Shorts is very different from that of Airbus and *LEU*. Shorts was purchased by Bombardier in 1989, and there is no evidence to suggest that this relationship was created by an agreement between governments.
- Also unlike Airbus and *LEU*, where the participating governments created a separate consortium entity, there is no such entity present in this case. Record evidence demonstrates that Bombardier and Shorts are distinct companies with their own business practices.
- The Department improperly relied on the cross-ownership provision to countervail transnational input subsidies. The regulation that concerns transnational subsidies, 19 CFR 351.527, establishes a rule that transnational subsidies provided for a project are not countervailable, except for subsidies provided to international consortia and upstream subsidies. This regulation shows that the Department intends to address transnational input subsidies through an upstream subsidy analysis.<sup>65</sup>
- The fact that cross-ownership is not mentioned in the transnational subsidies regulation is compelling evidence that the cross-ownership regulation is not excluded from the general rule against countervailing transnational subsidies. Therefore, the Department cannot countervail transnational subsidies via the cross-ownership regulation.<sup>66</sup>
- Section 351.525(b)(7) of the Department's regulations is the only portion of this regulatory provision that provides for the attribution of subsidies across borders. Therefore, because the Department did not discuss attributing subsidies across borders

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<sup>60</sup> See Bombardier's Case Brief at 54.

<sup>61</sup> *Id.* at 55 (citing 133 Cong. Rec. S8715 (daily ed. June 25, 1987) (statement of Sen. Adams)).

<sup>62</sup> *Id.* at 55-56.

<sup>63</sup> *Id.* at 56.

<sup>64</sup> *Id.* at 58 (citing *Preliminary Results of Countervailing Duty Administrative Review: Low Enriched Uranium from Germany, the Netherlands and the United Kingdom*, 70 FR 10986, 10989 at FN 2 and *LEU Final Determination* at 24331).

<sup>65</sup> *Id.* at 64 (citing *CVD Preamble* at 65400).

<sup>66</sup> *Id.*

with respect to the cross-ownership regulations, this shows that the cross-ownership regulations does not apply to subsidies across borders.<sup>67</sup>

- This interpretation of the cross-ownership regulation is confirmed by the *CVD Preamble*, which does not discuss transnational subsidies in relation to cross-ownership. Rather, the *CVD Preamble* only discusses countervailing transnational subsidies through an upstream subsidy analysis. The *CVD Preamble* discussion of the upstream subsidy regulation confirms that this provision can only be applied transnationally when an international consortium is present.<sup>68</sup>
- While an examination of upstream subsidies is the proper basis to use the transnational subsidy provision, the petitioner failed to allege an upstream subsidy in this investigation. Thus, because the Department never initiated an upstream subsidy investigation, it lacks the necessary information for such an examination here.<sup>69</sup>

#### *Petitioner's Rebuttal Brief*

- The Department properly applied the international consortium provision of section 701(d) of the Act. In fact, the C Series presents the exact situation that the legislative history indicates that this section of the Act is intended to address.<sup>70</sup>
- Bombardier's production model for the C Series is similar to Airbus' production model, which motivated Congress to create section 701(d) of the Act. Airbus spread its production across Germany, France, the U.K., and Spain and handled final assembly in either Germany or France. Similarly, Bombardier has spread its production of the C Series across different geographical locations, with final assembly in Canada. Another similarity between Airbus and Bombardier is that, for both companies, individual governments provided launch aid to entities located in each respective country to support aircraft production activities.<sup>71</sup>
- Shorts and Bombardier's parent-subsidiary relationship meets the definition of an international consortium because the companies have a clear, legally-defined relationship and are engaged in a common project.<sup>72</sup>
- Press releases issued by Bombardier demonstrate that Bombardier coordinated with Shorts and the GOC, GOQ, and U.K. to obtain financing for the development of the C Series.<sup>73</sup>
- The contention that either section 701(d) of the Act or the legislative history requires a formal agreement among the governments providing subsidies is incorrect. *LEU*, where the

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<sup>67</sup> *Id.* at 65. Bombardier's Case Brief acknowledged that 19 CFR 351.525(b)(7) provides for the attribution of subsidies across borders, but states that this provision applies when the Department can attribute subsidies of a multinational company to multinational production where the company that received the subsidy has production facilities in more than one country and the subsidy was tied to more than domestic production, circumstances which are different from the present case. See Bombardier's Case Brief at 65, FN 214.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 67.

<sup>70</sup> See Petitioner's Rebuttal Brief at 81 (citing *Preliminary Determination* at 18).

<sup>71</sup> *Id.* at 81-82 (citing Petition at 99-100).

<sup>72</sup> *Id.* at 82 (citing U.K.'s July 25, 2017 Initial Questionnaire Response (U.K. July 25, 2017 IQR) at Exhibit RLI-5, RLI-2).

<sup>73</sup> See the Petitioner's Rebuttal Brief at 83-84 (citing Letter from the petitioner, "In the Matter of 100- to 150-Seat Large Civil Aircraft from Canada – Petitions for the Imposition of Antidumping and Countervailing Duties" (April 27, 2017) (the Petition) at Exhibit 16 (Press Release, Bombardier, "Bombardier Announces Location of Final Assembly Site and Work Package for the C Series" (May 13, 2005)); and the Petition at Exhibit 20 (Press Release, Bombardier, "Bombardier Launches C Series Aircraft Program" (July 13, 2008)).

Department stated that Congress intended “a broad application” of the international consortium provision, demonstrates that Congress enacted section 701(d) of the Act out of a concern with multi-country subsidies.<sup>74</sup> The fact that the launch aid was provided by different governments at the same time, and for the same purpose, is sufficient evidence to apply the international consortium provision.<sup>75</sup>

- The U.K.’s allegation that the Department may only countervail subsidies provided to Shorts if the petitioner has first alleged an upstream subsidy in accordance with section 701(e) of the Act is also incorrect. The plain language of the first clause of section 701(d) of the Act suggests that Congress had the opposite of what the U.K. proposes in mind when drafting this section. While Congress enacted the upstream subsidy provision in 1984, it did not draft the international consortium provision until 1988. Therefore, if Congress had intended that the international consortium provision be used after the upstream subsidy provision, it would have simply added it as a sub-clause to section 701(d) of the Act instead of as a standalone provision.<sup>76</sup> As explained in the *CVD Preamble*, while the Department interprets section 701(d) of the Act to include situations involving upstream subsidies, the international consortium provision is not limited solely to such situations.<sup>77</sup>
- The U.K. incorrectly characterizes the EU’s subsidization of Airbus regarding the application of section 701(d) of the Act. The only evidence for the U.K.’s argument that the United States understood Airbus existing as the result of a formal process with coordinated governmental support is a WTO dispute settlement panel’s report, not statements by Congress when it enacted this provision of the Act in 1988.<sup>78</sup> Because the WTO did not exist in 1988, its descriptions are not relevant to interpreting Congressional intent.
- The U.K.’s argument that section 701(d) of the Act only applies where there are formal agreements among governments is also bereft of evidentiary support other than the WTO dispute settlement panel’s description of the agreements. Furthermore, assuming *arguendo* that Congress was aware of the agreements concerning certain Airbus airplanes when it enacted section 701(d) of the Act in 1988, then one must also assume that Congress was aware that similar agreements were not in place for other Airbus planes that were launched before 701(d) was enacted.<sup>79</sup>
- The U.K.’s interpretation of section 701(d) of the Act as it relates to *LEU* is also misguided. Although the U.K. discusses the facts of *LEU* at length, it does not cite anything in the text of the statute itself to support the argument that section 701(d) of the Act requires formal, coordinated support from the participating governments. This is because Congress enacted section 701(d) of the Act because it was concerned with “vertically-integrated international organizations benefitting from subsidies bestowed at different stages of production,” not formal and cooperative support between governments.<sup>80</sup>

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<sup>74</sup> *Id.* at 85 (citing *LEU Final Determination* and accompanying IDM at Comment 2).

<sup>75</sup> *Id.* at 85-86.

<sup>76</sup> *Id.* at 88, FN 391 (citing 19 USC §§ 1671(d), (e); 1677-1).

<sup>77</sup> *Id.* at 88 (citing *CVD Preamble*, 63 FR at 65,390, 65,405).

<sup>78</sup> *Id.* at 88-89.

<sup>79</sup> *Id.* at 90 (citing *Large Civil Aircraft* at para. 7.290).

<sup>80</sup> *Id.* at 91 (citing *LEU Final Determination* and accompanying IDM at Comment 2).

## Department's Position:

We continue find that it is appropriate to apply the international consortium provision of section 701(d) of the Act to this investigation. Section 701(d) of the Act provides the following:

(d) Treatment of International Consortia. For purposes of this subtitle, if the members (or other participating entities) of an international consortium that is engaged in the production of subject merchandise receive countervailable subsidies from their respective home countries to assist, permit, or otherwise enable their participation in that consortium through production or manufacturing operations in their respective home countries, then the administering authority shall cumulate all such countervailable subsidies, as well as countervailable subsidies provided directly to the international consortium, in determining any countervailing duty upon such merchandise.

In the *Preliminary Determination*, we examined this provision of the Act and determined the following:

The legislative history indicates that this section of the Act is intended to address precisely the type of situation presented by this program. Specifically, the “international consortium” language was added in response to Airbus Industrie’s subsidies from various European Union member nations to manufacture sections of the aircraft in their home countries before final assembly. The legislative history further provides that the Department “administer the provision by collapsing its subsidy analysis so that the consortium members would be treated as one company for purposes of determining the level of multi-country subsidization attributable to the final product manufactured and exported by the consortium and its members.”

We preliminarily find that Bombardier’s situation is similar. Shorts, as Bombardier’s wholly-owned subsidiary, is the same company and should be treated as one company for purposes of the Department’s analysis of multi-country subsidization of subject merchandise. Bombardier was formally involved in obtaining the U.K. launch aid, acting as Shorts’ guarantor. The law defines an international consortium as consisting of “members” and “other participating entities,” which may encompass a broad set of relationships, including among them, as in this case, a clearly defined legal relationship in which the companies in question have common ownership and a common project in the C Series.<sup>81</sup>

For the final determination, we continue to find that it is appropriate to apply the international consortium provision to Bombardier and Shorts’ joint production of the C Series.

We disagree that the finding of an international consortium requires a formal agreement between the cooperating governments. The U.K. and Bombardier argue that, because there is no such formal agreement between the GOC, GOQ, and the U.K., the Department may not apply section

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<sup>81</sup> See *Preliminary Determination*, and accompanying PDM at 18 (citations omitted).

701(d) of the Act. As support for this contention, the U.K. and Bombardier point to the examples of Airbus and *LEU*, noting that both cases involved a formal agreement between cooperating governments. However, the statute imposes no such requirement. Section 701(d) of the Act requires only that member or participating entities of an international consortium “receive countervailable subsidies from their respective home countries.” Furthermore, the conference report explaining this amendment to the CVD statute references only Congress’ concern that “U.S. manufacturers are increasingly confronting unfair competition from international consortia receiving subsidies from multiple foreign governments.”<sup>82</sup>

Bombardier and the U.K. attempt to rely on a single statement from the *Congressional Record*, in which a co-sponsor of the international consortium amendment, Senator Adams, refers to the problem of foreign governments that “seek to cooperatively provide subsidized assistance to international production and marketing ventures.”<sup>83</sup> However, a requirement of “cooperative” government assistance is conspicuously absent from the statute, and neither does the conference report mention this concept. That Congress was aware of Airbus’ legal structure but did not limit the international consortium provision by including any such requirements indicates an intent that the provision have a broader application. Indeed, the Department addressed this issue in *LEU*, noting that:

While it is true that the legislative history uses the example of Airbus and its cascading subsidies, the provision is not limited to those facts. Indeed, the legislative history goes on to discuss the concerns and intent of Congress. The legislative history makes clear that Congress intended a broad application of this provision to situations “in which foreign governments provide subsidized assistance for participation in international marketing ventures both within and beyond traditional customs union frameworks.”<sup>84</sup>

It is clear that in this case the GOC, GOQ, and the U.K. provided “subsidized assistance” to Bombardier and Shorts for the C Series.<sup>85</sup> We agree with the petitioner that Bombardier’s production model for the C Series is similar, in all respects relevant under the statute, to that employed by Airbus, which similarly located production and final assembly of its planes across multiple countries. Moreover, for both Bombardier and Airbus, individual governments have provided launch aid to entities located in each respective country to support aircraft production activities. Therefore, the fact that there is no formal agreement between the GOC, GOQ, and the U.K. does not preclude our application of the international consortium provision here. Although such a formal agreement was present in *LEU*, nothing in *LEU* suggested that the Department considered the international consortium provision to be limited to the circumstances of that case.

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<sup>82</sup> Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 100-576, pt. B, at 589 (1988) (Conf. Rep.).

<sup>83</sup> 133 Cong. Rec. 17525 (June 25, 1987).

<sup>84</sup> See *LEU Final Determination* and accompanying IDM at Comment 2.

<sup>85</sup> In addition, there is evidence on the record regarding the interrelationship of the subsidies provided by the GOC and GOQ, however, that information is business proprietary information (BPI) and we cannot discuss it here. See GOQ’s July 24, 2017 Initial Questionnaire Response (GOQ July 24, 2017 IQR) at Exhibit QC-IQLA-2 at 9-10; GOC’s July 24, 2017 Initial Questionnaire Response (GOC July 24, 2017 IQR) at Exhibit GOC-CSERIES-4 at 3-4; and GOQ’s July 24, 2017 IQR at Exhibit QC-IQLA-2 at 1.

Rather, the Department rejected the respondents' argument that section 701(d) of the Act addressed *only* the international production activities of vertically integrated companies that receive cascading subsidies, such as the subsidies at issue here.<sup>86</sup>

We also disagree that we cannot apply the international consortium provision in this case because Bombardier and Shorts have not formed a separate legal entity. As an initial matter, we note that Shorts is wholly-owned subsidiary of Bombardier; thus, the companies already have a clear legal relationship.<sup>87</sup> Therefore, the "international consortium" consists of the Canadian parent company and its U.K. subsidiary to produce the C Series, which, because the two companies were already vertically integrated, did not require the creation of a new legal entity. Examining section 701(d) of the Act, we again find that Congress intended the provision to be interpreted broadly. Rather than limit the identity of a "consortium" to joint ventures and potentially induce companies to utilize legal relationships outside of the scope of the provision, section 701(d) of the Act refers to a "consortium" as consisting of "members" and "other participating entities" "engaged in the production of subject merchandise."

Moreover, record evidence demonstrates that the two companies are acting in concert to produce subject merchandise, in particular. Shorts competed against other companies to receive the contract to produce the C Series' wing, and Shorts produces wings and other aerostructures for companies other than Bombardier.<sup>88</sup> Bombardier's and Shorts' joint C Series project is consistent with the U.K.'s argument that a consortium is a "group of companies formed to promote a common objective or engage in a project of benefit to all the members."<sup>89</sup> At the same time, Shorts is not merely a "subcontractor," as the U.K. suggests, because, unlike other suppliers of components of the C Series, Bombardier owns Shorts, assisted Shorts in securing U.K. subsidies, and acted as its guarantor for its receipt of the RLI. At verification, U.K. officials noted that: 1) the success of the C Series wing required the success of the C Series project;<sup>90</sup> and 2) "Bombardier was involved in demonstrating the viability of the program overall, because the launch aid relied upon the sales of the aircraft, not the sales of the wings."<sup>91</sup> Similarly, Shorts' officials "stated that Bombardier was involved in the review process for the {U.K.} RLI application even before Shorts was selected to provide the C Series wing," and Bombardier was a joint signatory to the U.K. RLI.<sup>92</sup> In any event, there is nothing in the text of the statute or the legislative history of the Act that requires the existence of an independent legal entity in order for the Department to countervail subsidies that are provided to distinct members or participating entities of an international consortium.<sup>93</sup>

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<sup>86</sup> See *LEU Final Determination* and accompanying IDM at 25.

<sup>87</sup> We disagree that it is Shorts' status as a subcontractor that permits our application of the international consortium provision in this case. As noted above, Shorts is Bombardier's wholly-owned subsidiary, as well as the producer of the wings used for the C Series. It is this combination of factors that makes the application of the international consortium provision permissible in this case.

<sup>88</sup> See Bombardier's September 5, 2017 Supplemental Questionnaire Response (Bombardier September 5, 2017 SQR) at 5; see also Shorts Verification Report at 4.

<sup>89</sup> See U.K.'s Case Brief at 20 (citing Dictionary of Finance and Investment Terms (2010)).

<sup>90</sup> See U.K. Verification Report at 5.

<sup>91</sup> *Id.*

<sup>92</sup> See Shorts Verification Report at 6.

<sup>93</sup> See section 701(d) of the Act.



The GOC and U.K. also argue that this case is distinguishable from *LEU* because, in *LEU*, the relevant governments specifically intended that its subsidies support the consortium. However, there is no factual distinction between the two cases on this point, as the U.K. subsidies relate directly to the joint Bombardier-Shorts C Series project, and not merely Shorts' production of C Series wings in Northern Ireland. The wings that Shorts produces are designed specifically for the C Series and are not interchangeable with other aircraft. With respect to the RLI, its repayment is based on C Series aircraft sales, rather than sales of wings.<sup>94</sup> INI's Selective Financial Assistance grant was interdependent with the RLI and included many similar terms, but was designed to fund capital costs of Shorts' work for the C Series not covered by the RLI.<sup>95</sup> These U.K. subsidies secured Shorts' place as part of the consortium and thereby ensured that a portion of the C Series' production occurred in Northern Ireland. Therefore, we find that the U.K. subsidies served "to assist, permit, or otherwise enable" Shorts' participation in the consortium "through production or manufacturing operations" in the U.K.<sup>96</sup>

Furthermore, we disagree that the Department may only countervail subsidies provided to Shorts if the petitioner makes an upstream subsidy allegation pursuant to section 701(e) of the Act. The U.K. does not cite any statutory provision in support of this contention and neither the international consortium provision of section 701(d) of the Act, nor the upstream subsidy provision of section 701(e) of the Act, imposes such a requirement. In fact, the language of section 701(d) of the Act, as well as the legislative history (which does not refer to section 701(e) of the Act), makes clear that it applies "for purposes of this subtitle," not only for purposes of section 701(e) of the Act. Furthermore, we note that the upstream subsidy provision predates the international consortium provision of the Act, which demonstrates that, had Congress intended that the international consortium provision be used in conjunction with the upstream subsidy provision, it would have clearly linked the two provisions, instead of placing the international consortium provision separately.<sup>97</sup> Finally, as the *CVD Preamble* makes clear, the upstream subsidy provision applies when the companies at issue are mere affiliates.<sup>98</sup> When the companies at issue meet the higher standard of cross-ownership, then the cross-ownership rules apply.

Similarly, the argument that the Department's regulation concerning transnational subsidies prevents the Department from using the cross-ownership provision to reach subsidies provided to Shorts is incorrect. Shorts is not only a cross-owned affiliate of Bombardier, but also a member of an international consortium with Bombardier for the production of the C Series. The language of 19 CFR 351.527 is expressly inapplicable to subsidies provided to international consortia. Thus, the transnational subsidies regulation does not prohibit our examination of the subsidies provided to Shorts related to the C Series.<sup>99</sup>

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<sup>94</sup> See U.K. Verification Report at 5. See also U.K. July 25, 2017 IQR at Exhibit RLI-2 (RLI Agreement and amendments) at Schedule 1, paragraph 13 ("Securing of Whole Project Financing") (providing evidence summarized at pages 4-5 of the proprietary version of the U.K. Verification Report that the RLI was linked to the C Series aircraft).

<sup>95</sup> See U.K. Verification Report at 4; and Shorts Verification Report at 6-7, 13.

<sup>96</sup> See section 701(d) of the Act.

<sup>97</sup> *Id.* at 88, FN 391.

<sup>98</sup> See *CVD Preamble*, 63 FR at 65390.

<sup>99</sup> See 19 CFR 351.523, 351.527.

Finally, we determine that it is appropriate in this case to countervail only those subsidies which, in the language of the Act, were provided to Shorts “to assist, permit, or otherwise enable {Short’s} participation in {the} consortium through production or manufacturing operations” in the United Kingdom. As a result, we did not include the following grant programs in the calculation of the final subsidy rate for Bombardier because they do not have a direct relationship to the consortium’s production of subject merchandise: Skills Growth, Apprenticeships, Resource Efficiency, and Innovate UK and Aerospace Technology Institute (ATI) grants. *See* Comment 19 for further discussion. We also included in our subsidy calculations only the U.K. R&D tax credits that, based upon Shorts’ submissions to the U.K. Government, reflected R&D for the C Series<sup>100</sup> and attributed them to sales of the C Series. *See* Comment 18 for further discussion.

### **Creditworthiness**

#### **Comment 7: Creditworthiness of Bombardier, Shorts, and the C Series Program**

##### *Bombardier’s and GOC’s Case Brief*

- In the *Preliminary Determination*, the Department conducted a project-specific analysis of the C Series program and found it to be uncreditworthy. Therefore, the Department calculated uncreditworthy interest rates for the launch aid programs, the *Investissement Québec* equity infusion, and for the *Emploi-Québec* allocated grants using the formula specified in 19 CFR 351.505(a)(3)(iii).
- The Department’s regulations and practice provide that the Department only investigates creditworthiness when the petitioner has made a specific allegation and provided a reasonable basis to believe that the respondent was uncreditworthy.<sup>101</sup> Although, in the *Preliminary Determination*, the Department claimed<sup>102</sup> that the petitioner alleged Bombardier to be uncreditworthy, the petitioner made no such allegation and the Department never initiated an investigation of the uncreditworthiness issue. Therefore, the Department acted contrary to its regulations and practice in undertaking a creditworthiness investigation; consequently, the Department should decline to make any finding regarding creditworthiness for the final determination.
- Bombardier and the C Series program were creditworthy in 2009. The GOC, GOQ, and U.K. carefully considered the business case for the C Series program when making their decisions to provide the repayable advances. The Department’s regulations direct the

<sup>100</sup> *See* Shorts Verification Report at 9.

<sup>101</sup> *See* Bombardier’s Case Brief at 33 and the GOC’s Case Brief at 7 (citing 19 CFR 351.505(a)(6)(i)); *Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Solar Cells II from the PRC*), and accompanying IDM at Comment 17; *Lightweight Thermal Paper from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 57323 (*LWTP from PRC CVD Final*); *Changzhou Trina Solar Energy Co., Ltd. v. United States*, Slip Op. 17-122, 2017 WL 4125008, F. Supp. 3d (CIT, September 8, 2017) (*Changzhou Trina Solar*); *Allegheny Ludlum Corp. v. United States*, 25 CIT 816, 827 (CIT 2001) (*Allegheny Ludlum 2001*); and *CVD Preamble*, 63 FR at 65368).

<sup>102</sup> *See* Bombardier’s Case Brief at 33-34 (citing *Preliminary Determination*, and accompanying PDM at 8).

Department to analyze the loan recipient's ability to repay the loan at issue.<sup>103</sup> Bombardier and Shorts had more than sufficient liquidity to cover the additional debt provided by the GOC, GOQ, and U.K. Further, the GOC and U.K. had experience with Bombardier and Shorts, respectively, obtaining launch aid financing and repaying it; the GOQ relied upon the GOC's analysis to assess the likelihood of Bombardier's repayment. Thus, given Bombardier and Shorts' demonstrated ability to repay, the Department should not find them uncreditworthy in this investigation.

- Analyses by the credit rating agencies (*i.e.*, Moody's, Fitch, and Standard & Poor's) indicate that Bombardier was creditworthy in 2009, especially with respect to the C Series program.<sup>104</sup> These positive assessments by the credit rating agencies of Bombardier's ability to finance the C Series program were further affirmed by KPMG's analysis of the project, undertaken by the U.K. as it considered whether to provide funds through its RLI program (also referred to in this investigation as U.K. Launch Aid).
- Bombardier's BB credit rating suggests a far lower probability of default than that for CCC rated firms, even though the Department considered the CCC default rate in determining Bombardier's risk premium. Thus, in determining whether Bombardier was creditworthy, the Department significantly exaggerated Bombardier's risk of default and relied upon a risk measure not supported by the evidence on the record.

#### *Bombardier's Case Brief*

- "While the {financial} ratios for Bombardier that the Department considered were not ideal" (*see* Attachment 7a of the Preliminary Calculation Memorandum), these ratios are "mitigated by the positions of the credit rating agencies..., which made it clear that Bombardier had sufficient liquidity to cover its existing debt and to meet the needs of the C Series program."<sup>105</sup> Thus, the Department's conclusion in the *Preliminary Determination* that Bombardier's quick ratios and current ratios in the relevant years indicated that it could not cover 100 percent of its upcoming obligations is proven wrong by Bombardier's liquidity information—a position which was confirmed by all three credit rating agencies. Moreover, Bombardier's interest coverage ratio, at 3.42 percent for the year ended January 2009, demonstrates that Bombardier was well-positioned with respect to its ability to pay its existing interest obligations.<sup>106</sup>
- Under its practice, the Department considers the existence of long-term debt when evaluating creditworthiness; in this case, there was none issued in the relevant years. However, had Bombardier chosen to issue debt during this period, Bombardier's credit rating indicates that it would have been able to borrow at rates applicable to a BB-rated company, rather than at rates applicable to a CCC-rated company.<sup>107</sup>

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<sup>103</sup> *See* Bombardier's Case Brief at 36 and the GOC's Case Brief at 8-9 (citing 19 CFR 351.505(a)(4)(i) and *Archer Daniel Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1346 (CIT 2013) (*ADM*)).

<sup>104</sup> *See* Bombardier's Case Brief at 39-41 (citing rating reports from Moody's, Standard & Poor's, and Fitch in Bombardier September 5, 2017 SQR at Exhibits 7B, 7C, and 7D, respectively).

<sup>105</sup> *Id.* at 43.

<sup>106</sup> *Id.* at 43. Bombardier also notes that the Department incorrectly calculated its debt-to-equity ratio for the year ended January 2009 as 2.41; based on the company's financial statements, the correct debt-to-equity ratio is 1.55.

<sup>107</sup> *Id.* at 44. Bombardier also asserts that the Department exaggerates the European Commission's report on the U.K. launch aid, arguing that the report does not state that Bombardier and Shorts were "unable" to obtain financing from commercial banks (citing U.K.'s September 5, 2017 Supplemental Questionnaire Response (U.K. September 5,

- The Department also considers the financial health of a company as part of its creditworthiness analysis; in this case, the financial indicators demonstrate that Bombardier had more than adequate liquidity and the credit rating agencies were uniformly positive on Bombardier's trends, in general, and the C Series program, in particular. As such, the evidence indicates that Bombardier and the C Series program were creditworthy when the GOC, GOQ, and U.K. made their decisions to provide repayable advances.
- Bombardier and the C Series program were creditworthy in 2016, as well as in 2015, the key year for determining the creditworthiness for the IQ equity investment. Specifically, in 2015, Bombardier implemented a strategic financial plan to ensure that its resources remained adequate and to improve its credit rating. Bombardier developed a three-part strategy to: 1) issue equity (raising \$868 million U.S. dollars through a public share offering in February 2015); 2) raise new long-term debt capital (issuing \$2.25 billion U.S. dollars in new debt in the form of senior notes in March of 2015); and 3) reduce debt by selling off a portion of its transportation business (entering into a definitive agreement with CDPQ for a \$1.5 billion U.S. investment in the transportation business). These actions substantially improved Bombardier's overall financial picture and demonstrated that Bombardier was able to attract investment and generate liquidity. Therefore, Bombardier should be considered creditworthy at the time of the investment by IQ.
- The Department's preliminary decision to determine the creditworthiness of the C Series, as opposed to Bombardier as a whole, is not consistent with how large corporations raise funds in the marketplace. Accordingly, there is no basis for the Department's assertion in the *Preliminary Determination* that Bombardier's unrelated bonds are not dispositive as to the C Series program's creditworthiness.<sup>108</sup>
- Further, the Department incorporated corporate bond rates into its calculation of the uncreditworthy risk premium. If the difference in likelihood of default between investment grade and CCC/C grade corporate bonds is relevant to the Department's calculation of how much risk is incurred in loaning to an uncreditworthy company, then the issuance of corporate bonds at a higher credit rating (in Bombardier's case, BB) must be relevant to the Department's consideration that the firm is not uncreditworthy.
- Not only were Bombardier and the C Series program creditworthy, but also Shorts was individually creditworthy. Shorts was profitable in all three years prior to the RLI. Moreover, if the Department were to conduct a creditworthiness analysis of Shorts, it would find the relevant financial ratios indicate its creditworthy status in 2009.<sup>109</sup> Shorts had more than adequate liquidity to cover its debts.

#### *U.K.'s Case Brief*

- At the time the U.K. was considering the RLI for Shorts, Bombardier's financing structure consisted of a mixture of long-term corporate bonds and credit facilities. In fact, Bombardier's bonds were trading at 400 basis points over U.S. government benchmark bonds at the time, equating to a yield in line with Bloomberg's generic BB spread for U.S. industrial corporations. This is dispositive evidence of Bombardier's creditworthiness.<sup>110</sup>

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2017 SQR) at Exhibit 3, European Commission, State Aid N 654/2008 – United Kingdom, Large R&D Aid to Bombardier (June 17, 2009)).

<sup>108</sup> *Id.* at 46-47 (citing PDM at 9).

<sup>109</sup> *Id.* at 47 and Attachment A.

<sup>110</sup> See U.K.'s Case Brief at 38 (citing 19 CFR 351.505(a)(2)(i) and (a)(4)(iii)).

Specifically, Bombardier's corporate bonds are comparable to the RLI in that: 1) the interest rates were fixed; 2) the debt instruments were both long-term; and 3) both were denominated in British pounds. While Bombardier did not issue new debt in 2008 or 2009, relying on this fact would be inconsistent with 19 CFR 351.505(a)(4)(i) and with commercial logic, as Bombardier's debt was being traded in the secondary market.

Moreover, the reason that Bombardier was not issuing new debt at the time is because it was pursuing a deliberate strategy of lowering its corporate debt to increase its credit rating.<sup>111</sup>

- Bombardier was financially healthy and able to meet its fixed financial obligations with its cash flow. The Department did not take certain key financial indicators into account which are mentioned in the KPMG report and evince significant positive improvements in Bombardier's financial viability, including increased profitability, increased order backlog, improved cash flow, and significant customer prepayments.<sup>112</sup>
- While it is true that Bombardier's credit rating was lower than its peers and "speculative grade," this is not indicative of an uncreditworthy company and does not mean that Bombardier could not get a commercial loan. In fact, speculative grade companies routinely receive commercial loans in the high yield market. A speculative grade rating simply means that investors expect a higher yield than for investment grade debt and certain institutions with very conservative investing restrictions, such as pension funds, may not be allowed to purchase the debt. Moreover, the evidence suggested that Bombardier's credit rating was likely to be upgraded in the near future. In January 2008, Fitch upgraded Bombardier to BB from BB-, bringing it in line with Standard and Poor and Moody's, both of which continued to keep Bombardier on positive watch.
- By choosing to treat Bombardier as "uncreditworthy," the Department is assessing Bombardier as being virtually certain to default, which is not reflective of its actual BB rating.
- In 2009, when the RLI agreement was executed, Bombardier's current and quick financial ratios were just below the Department's benchmarks. Further, Bombardier had a revolving credit facility which it did not use; this is an indication the company had sufficient short-term liquidity to meet its obligations. Further, it is the Department's usual practice to look not only at the absolute value of these ratios, but also the trend of the ratios.<sup>113</sup> Data from Infionals suggest that, for the transportation industry as a whole, there is a requirement for a substantial level of debt and that the industry average ratios are well below the Department's benchmarks.<sup>114</sup> Thus, for the transportation industry, it does not make sense to apply the Department's one-size-fits-all benchmark. Otherwise, the Department may determine that all transportation and aerospace companies are uncreditworthy.
- The Department's regulations indicate that it will consider market studies and other evidence of a firm's future financial position.<sup>115</sup> The KPMG report, which was prepared

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<sup>111</sup> *Id.* at 39 (citing U.K. July 25, 2017 IQR at Exhibit RLI-6, KPMG Report at 69).

<sup>112</sup> *Id.* at 40 (citing U.K. July 25, 2017 IQR at Exhibit RLI-6, KPMG Report at 20-23).

<sup>113</sup> *Id.* at 43 (citing *Certain Frozen Warmwater Shrimp from Indonesia: Negative Preliminary Countervailing Duty Determination*, 78 FR 33349 (June 4, 2013) (*Shrimp from Indonesia*), and accompanying PDM at 12).

<sup>114</sup> *Id.* at 43 (citing Preliminary Calculation Memorandum at Attachment 7a).

<sup>115</sup> *Id.* at 44 (citing 19 CFR 351.505(a)(4)(i)).

prior to the agreement, constitutes such evidence, projecting free cash flow growth and increases in earnings before interest and tax (EBIT).<sup>116</sup>

- Despite the Department's statement that it was conducting a project-specific analysis of creditworthiness focused on the C Series project, its analysis focused almost exclusively on the creditworthiness of Bombardier. First, the Department's conclusion that the C Series did not receive any commercial loans ignores record evidence that industry participants found the project to be creditworthy at the time of the RLI; additionally, a private entity was willing to loan Bombardier assets for the production of the C Series.<sup>117</sup> Second, with respect to the Department's statement that the European Commission found that Bombardier and Shorts were unable to obtain loans or other commercial financing for the C Series, the U.K. asserts that the European Commission's findings were not as broad as the Department suggests. The European Commission focused on whether Bombardier could have obtained project financing or used debt financing for the remaining portion of the C Series funding that was not already obtained from other sources, including financing already obtained from private lenders.<sup>118</sup> The European Commission did indicate that Bombardier likely would not be able to obtain project financing and that debt financing was not a reasonable option; however, in concluding that Bombardier could not rely on debt financing, the European Commission pointed only to Bombardier's credit rating. As noted above, such a rating does not mean that a company cannot obtain financing; rather, it simply means that any financing obtained will have a higher yield. According to the KPMG report, the cost of debt to Bombardier at the time was below the interest rate agreed with the U.K.; thus, it was not the cost of the debt for Bombardier that prevented its use of debt financing, but rather that Bombardier was attempting to reduce its debt load to improve its credit rating.<sup>119</sup>
- The Department does not cite any evidence for its assumption regarding the financial health of the C Series project relative to the financial health of Bombardier; thus, this unsupported assumption does not meet the legal standard for "substantial evidence." Moreover, as explained above, Bombardier was in good and improving financial health. Therefore, its financial position cannot be used to cast doubt on the creditworthiness of the C Series project. Consequently, the Department's limited analysis of the creditworthiness of the C Series project is not dispositive and a thorough examination of the evidence demonstrates that the project was, in fact, creditworthy.
- From the perspective of the U.K., the risk of the investment was substantially reduced through various protections in the RLI agreement negotiated with Shorts, which provide only a single scenario under which the U.K. will not receive full repayment. Thus, because of the structure of the RLI, there were no project-specific risks that could prevent repayment.
- The facts of the instant case do not warrant a project-specific creditworthiness analysis. The *Preamble* has three distinct prongs which must be satisfied for the Department to conclude that it is appropriate to make a project-specific, rather than company-wide, analysis of creditworthiness.<sup>120</sup> Contrary to the prongs established in the *CVD Preamble*, the U.K.

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<sup>116</sup> *Id.* at 40 (citing U.K. July 25, 2017 IQR at Exhibit RLI-6, KPMG Report at 25).

<sup>117</sup> *Id.* at 46 (citing U.K. July 25, 2017 IQR at Exhibit RLI-6, KPMG Report at 58-59).

<sup>118</sup> *Id.* at 46 (citing U.K. September 5, 2017 SQR) at Exhibit 3, European Commission, State Aid N 654/2008 – United Kingdom, Large R&D Aid to Bombardier (June 17, 2009) at paragraphs 122, 125-126).

<sup>119</sup> *Id.* at 46-47 (citing U.K. July 25, 2017 IQR at Exhibit RLI-6, KPMG Report at 59).

<sup>120</sup> *Id.* at 49 (citing *CVD Preamble*, 63 FR at 65366-67).

contends that: 1) the financing for the C Series was not provided on the basis of project financing, but was provided to Shorts corporately; 2) the RLI loan was not linked solely to the success of the C Series project; and 3) the Department did not cite any evidence that the risk of the C Series project was higher or lower than the average of the company's existing operations. Thus, because the facts in this case do not meet the standard for conducting a project-specific analysis, the Department should focus its creditworthiness analysis on Bombardier.<sup>121</sup>

#### *Petitioner's Rebuttal Brief*

- Bombardier is mistaken that the petitioner did not make a specific allegation about the creditworthiness of the C Series. The petitioner specifically alleged that the C Series project was uncreditworthy and supported the allegation with substantial record evidence.<sup>122</sup> Additionally, the cases Bombardier cites in support of its position are inapposite; for example, in *Solar Cells II from the PRC*, the Department declined to assess the respondent's creditworthiness, because the petitioners had merely referred to a prior investigation, instead of providing requisite evidence.<sup>123</sup>
- The Department properly focused its creditworthiness analysis on the C Series project.<sup>124</sup> Section 351.505(a)(4)(i) of the Department's regulations provides that the Department "will determine uncreditworthiness on a case-by-case basis, and may, in appropriate circumstances, focus its creditworthiness analysis on the project being financed rather than the company as a whole." Looking solely at the creditworthiness of Bombardier as a whole would be inappropriate because the risk associated with the C Series was much higher than the average risk of Bombardier's existing operations, as demonstrated by record evidence.<sup>125</sup> Nonetheless, the Department also properly took into account Bombardier's own financial indicators because, at the time of the launch aid in 2009, the C Series was a newly-developed project with no track record of financial performance.

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<sup>121</sup> *Id.* at 55 (citing *Stainless Steel Sheet and Strip in Coils from France*, 64 FR 30774 (June 8, 1999) (*SSSSC from France*), where the Department did not perform a project-specific creditworthiness analysis, even though a loan was given for development of a new type of steel, and repayment was solely contingent upon sales of the product resulting from the project exceeding a set amount).

<sup>122</sup> See Petitioner's Rebuttal Brief at 53-54 (citing the Petition at 8-9, 63-64, 96, and Exhibit 14; and Petitioner's Pre-Prelim Comments at 18-29).

<sup>123</sup> *Id.* at 54 (citing *Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination*, 72 FR 17484, 17490 (April 8, 2007) (*CFS Paper from the PRC*), where the Department rejected respondent's objection to a preliminary determination of uncreditworthiness because there was adequate time to consider the allegation and petitioners had submitted financial ratios for the companies and pointed to other evidence on the record).

<sup>124</sup> *Id.* at 54-55 (citing *CVD Preamble*, 63 FR at 65366-67).

<sup>125</sup> *Id.* at 55 and 58 (citing Petitioner's September 6, 2017 Pre-Prelim Comments at 9-11; Gompers Report at paragraphs 87-92; Nickelsburg Report at paragraphs 99-10; and U.K. September 5, 2017 SQR at Exhibit 3, "European Commission, State Aid N 654/2008 – United Kingdom Large R&D Aid to Bombardier" (June 17, 2009) (EC State Aid Report) at paragraphs 113-119).

- The U.K. cites no legal authority for its assertion that the Department has a “three-prong” “standard” to determine when it will apply a project-specific analysis.<sup>126</sup> Moreover, the evidence on the record contradicts the U.K.’s analysis of the three factors it identified.<sup>127</sup>
- Record evidence demonstrates that Bombardier failed to obtain any commercial long-term loans for the C Series, let alone loans on terms comparable to the launch aid. Specifically, GOC and European Commission evaluations concluded that if launch aid had not been available to Bombardier, the product would have been delayed, compromised, or abandoned.<sup>128</sup>
- Bombardier’s financial indicators demonstrate it was virtually insolvent from 2005 to 2009; Bombardier’s current ratio was never above 2 and its quick ratio was never above 1; both benchmarks were used by the Department in *Solar Cells I from the PRC* where the Department stated that “either the respondents have liquid funds to cover upcoming obligations or they do not.”<sup>129</sup> Therefore, Bombardier fails the Department’s critical test with regard to these ratios.
- In addition to poor liquidity ratios, Bombardier’s solvency and capital structure were poor in the years in question, which limited its ability to borrow and repay funds. In particular, Bombardier had high debt-to-equity ratios, over 2.0 in every year except 2008. As the Department explained in *Solar Cells I from the PRC*, “the risk of being repaid increases with these expanding debt levels and lenders would accordingly demand a premium for lending.”<sup>130</sup>
- Additionally, Bombardier had low interest coverage ratios, less than 2.5 in every year except 2009, indicating it was barely able to cover its interest payments at the time the GOC committed to provide launch aid. Bombardier’s poor financial health is confirmed by its abysmal credit rating, always below investment grade and in the range of marginally speculative (*i.e.*, Ba2 for Moody’s and BB for Standard and Poor’s). Further, contemporary evidence casts serious doubt on Bombardier’s future financial prospects. Bombardier’s 2009 Annual Report (covering the fiscal year from February 1, 2008, through January 31, 2009) predicted that “{i}n the near future, the current recession should... negatively impact {Bombardier Aerospace’s} revenues, EBIT margin and free cash flow, and delay the achievement of our global leverage metric targets,” further supporting a finding that the C Series project was uncreditworthy in 2009, in accordance with the factors in 19 CFR 351.505(a)(4).<sup>131</sup>
- Bombardier’s arguments that both it, and the C Series project, were creditworthy and had sufficient liquidity in 2009 rely largely on pre-financial crisis data that predate the provision

<sup>126</sup> *Id.* at 56 (citing U.K.’s Case Brief at 49).

<sup>127</sup> *Id.* at 56-58 (citing U.K. July 25, 2017 IQR at Exhibit RLI-2 at 26-31; Nickelsburg Report at paragraphs 99-10; and EC State Aid Report at paragraphs 113-119).

<sup>128</sup> *Id.* at 59 (citing GOC July 24, 2017 IQR at Exhibits GOC-CSERIES-3 and GOC-CSERIES-4; Petition Exhibit 21 at 13; U.K. July 25, 2017 IQR at Exhibit RLI-5; EC State Aid Report, paragraph 170; and U.K. September 5, 2017 SQR at Exhibit 3).

<sup>129</sup> *Id.* at 60 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63799 (October 17, 2012) (*Solar Cells I from the PRC*) and accompanying IDM at 56).

<sup>130</sup> *Id.* at 60-61 (citing *Solar Cells I from the PRC* and accompanying IDM at 58).

<sup>131</sup> *Id.* at 61-62 (citing Bombardier September 5, 2017 SQR at Exhibit 6B (Bombardier 2009 Annual Report) at 38).



of launch aid. What Bombardier and the U.K. attempt to obscure is that, halfway through 2008, the global financial crisis froze credit worldwide. The GOC, GOQ, and U.K. committed to provide launch aid to the C Series project in 2009, at a time when no commercial lender was willing to provide funding. The European Commission's state aid decision states that, in 2009, Bombardier's credit rating was "lowest among its peers" and that debt financing "was not a credible solution" for Bombardier.<sup>132</sup>

- The Department's definition of uncreditworthiness is a firm or project that "could not have obtained long-term loans from conventional commercial sources;" thus, the C Series project clearly meets this standard.<sup>133</sup> The "informed industry participants" referenced by the U.K. do not meet the Department's standard of "*conventional commercial sources*," as they do not operate as commercial lenders.<sup>134</sup> Furthermore, there is no record evidence of any financing agreements to support the U.K.'s contentions, nor is there any basis for the Department to find this type of financing analogous to the cash payments of launch aid made by the GOC, GOQ, and U.K. or to standard commercial lending.
- Counter to the KPMG report cited by the U.K. are the Canadian government evaluation and the European Commission state aid decision. Specifically, Innovation, Science and Economic Development (ISED) Canada, Audit and Evaluation Branch concluded that, without government funding the C Series would have been delayed, design compromises would have been made, and the viability of the development of the aircraft would have been jeopardized.<sup>135</sup> Likewise, the European Commission stated that, "without public funding of this project {Bombardier} would have had to abandon it."<sup>136</sup> Thus, the GOC and U.K. both believed that no commercial lender would have provided loans for the C Series under any terms. Consequently, the Department should affirm its preliminary finding that the C Series project was uncreditworthy in 2009.
- The C Series project was not creditworthy in 2015-2016 and Bombardier was in a tailspin in the years leading up to the 2016 equity infusions. Bombardier's issuance of equity has no bearing on whether Bombardier could have obtained long-term loans from conventional commercial sources.<sup>137</sup> Additionally, Bombardier's raising of long-term debt capital in 2015 was not tied to any particular assets or security related to the C Series project. Finally, Bombardier's sale of a stake in its transportation business does not constitute evidence that either Bombardier, or the C Series, were creditworthy.
- In the months preceding *Investissement Québec's* equity commitment, the C Series program was on the brink of failure and threatening to bring down Bombardier. Although the program was still years away from production at normal levels, Bombardier had burned through the program's original USD \$3.2 billion budget, and needed an additional USD \$2 billion to get the program to production.<sup>138</sup> Bombardier had garnered only 243 orders for the aircraft—well short of its program target of 300—and 108 of those orders faced a

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<sup>132</sup> *Id.* at 63-64 (citing EC State Aid Report at paragraphs 126-127).

<sup>133</sup> *Id.* at 64 (citing 19 CFR 351.505(a)(4)(i)).

<sup>134</sup> *Id.* at 64-65 (citing U.K.'s Case Brief at 45 and 51).

<sup>135</sup> *Id.* at 67 (citing Petition Exhibit 21, ISED report titled "Evaluation of the Bombardier C Series Program" (September 2013) (ISED C Series Evaluation), at 13).

<sup>136</sup> *Id.* at 67 (citing EC State Aid Report at paragraph 170).

<sup>137</sup> *Id.* at 68 (citing the Department's practice in *Solar Cells I from the PRC* and accompanying IDM at 57).

<sup>138</sup> *Id.* at 69 (citing Petition Exhibit 15, Kristine Owrn, *How Bombardier's C Series dream got its wings clipped*, National Post (December 12, 2015)).

significant risk of delay or cancellation—and customer confidence was low.<sup>139</sup> Further, the lack of any new orders during the period September 2014 through October 2015 was an indicator of the market’s lack of faith that the program was technically and financially viable.<sup>140</sup> Thus, in the fall of 2015, Bombardier was in desperate need of a deep-pocketed investor to fund C Series development; Bombardier first turned to commercial investors, asking Airbus to invest in the C Series program. The two companies held talks, and Bombardier offered Airbus a stake in the program, but Airbus terminated negotiations in early October 2015. Following termination of negotiations, Credit Suisse issued a research note suggesting that the failure of the Airbus negotiations was the clearest affirmation “of the dire position of the {C Series} program.”<sup>141</sup>

- Other evidence of the C Series program’s poor financial prospects at the time of the 2015-2016 equity infusions includes the following:
  - According to Bombardier’s CEO, the company was on the brink of bankruptcy at the time.<sup>142</sup>
  - Bombardier announced the *Investissement Québec* equity infusion on the same day it announced its third-quarter 2015 financial results, which included a loss of nearly USD \$5 billion.<sup>143</sup> Bombardier wrote off USD \$3.235 billion in investments in the C Series program; in 2014 Bombardier took a charge of USD \$1.357 billion in conjunction with shutting down the Lear 85 program.<sup>144</sup>
  - Bombardier’s investment ratings in the time period prior to *Investissement Québec*’s commitment were extremely poor. According to Bombardier’s 2015 annual report, Bombardier’s credit rating was five notches below investment grade,<sup>145</sup> and all three major rating companies rated Bombardier as “non-investment grade: speculative” in 2014, the most recent fiscal year-end prior to the new equity commitments.
  - As Bombardier ramped up production of the C Series, it faced several years of large negative cash flows, and observers predicted it would need further infusion of funds.<sup>146</sup>
- Bombardier’s “highly speculative” credit rating in 2015 was even worse than in 2009, when it also could not obtain commercial loans. Accordingly, the Department should affirm its preliminary finding that the C Series project was uncreditworthy in 2015-2016.

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 70 (citing Petition at Exhibit 30, Robert Spingarn *et al.*, *Credit Suisse, Bombardier Inc.(SVS): Comment* (October 7, 2015)).

<sup>142</sup> *Id.* at 70 (citing Petition at Exhibit 25, Bertrand Marotte, *Bombardier was on ‘brink of bankruptcy,’ CEO says*, *Globe and Mail* (November 12, 2016)).

<sup>143</sup> *Id.* at 70 (citing Petition Exhibit 62, Press Release, Bombardier, “Bombardier Announces Financial Results for the Third Quarter Ended September 30, 2015; Government of Québec Partners with Bombardier for \$1 billion in C Series as Certification Nears” (October 29, 2015)).

<sup>144</sup> *Id.* at 71 (citing Petition at Exhibit 111, Bombardier Financial Report 2015, at 21).

<sup>145</sup> *Id.* at 70 (citing Petition at Exhibit 111, Bombardier Financial Report 2015, at 31).

<sup>146</sup> *Id.* at 71 (citing Petition at Exhibit 112, Kristine Ogram, *Bombardier Inc. may run out of cash by mid-2016: Scotiabank*, *Financial Post* (October 5, 2015); and Petition at Exhibit 113, Ross Marowits, *Bombardier may need more public funding after Quebec bailout: analysts*, *The Canadian Press* (November 2, 2015)).

## Department's Position:

We continue to find that the C Series program was uncreditworthy using a project-specific analysis, pursuant to 19 CFR 351.505(a)(4), and continue to calculate uncreditworthy interest rates based on the particular terms and disbursement dates of the various programs, pursuant to 19 CFR 351.505(a)(3)(iii).

As an initial matter, we note that the petitioner did allege that the C Series program was uncreditworthy, supporting its allegation with information establishing a reasonable basis to believe or suspect that the firm (or project) was uncreditworthy, pursuant to 19 CFR 351.505(a)(6)(i).<sup>147</sup> Neither the Department's regulations, nor the *CVD Preamble*, requires that the Department separately initiate a creditworthiness investigation, and the Department has performed creditworthiness analyses in other cases without such a formal initiation.<sup>148</sup> Thus, we find that the Department properly analyzed the creditworthiness of the C Series program as part of the *Preliminary Determination*. As a result, the cases Bombardier and the GOC cite in support of their arguments that the Department inappropriately examined the creditworthiness of the C Series program in this investigation are inapposite.<sup>149</sup>

As explained in the *Preliminary Determination*, when making a creditworthiness determination in accordance with 19 CFR 351.505(a)(4)(i), the Department may examine, among other factors, the following four types of information: (1) the receipt by the firm of comparable commercial long-term loans; (2) present and past indicators of the firm's financial health; (3) present and past indicators of the firm's ability to meet its costs and fixed financial obligations with its cash flow; and (4) evidence of the firm's future financial position.<sup>150</sup> Based upon our analysis of these factors, we preliminarily determined that Bombardier's C Series program was uncreditworthy, including during the following relevant periods: 1) the time when the launch aid was provided in 2009; 2) the periods in which the equity infusions were provided; and 3) the periods in which Bombardier received non-recurring grants tied to the C Series which were allocable.<sup>151</sup>

Bombardier and the GOC argue that, because both Bombardier and Shorts had sufficient liquidity to cover the additional debt of the launch aid, the Department should not find them to be

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<sup>147</sup> See the Petition at 8-9, 63-64, 96, and Exhibit 14; Petitioner's August 28, 2017 NFI Submission, at Exhibit 1 (Infinitals financial ratios for Bombardier); and Petitioner's Pre-Prelim Comments at 18-29, 35-39, 49-53, and Exhibit 1.

<sup>148</sup> See, e.g., *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Preliminary Affirmative Determination*, 80 FR 68842 (November 6, 2015), unchanged in *Final Affirmative Determination of Countervailing Duty Investigation, and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35310 (June 2, 2016).

<sup>149</sup> Specifically, Bombardier and the GOC cite *Solar Cells II from the PRC*, *LWTP from PRC CVD Final*, *Changzhou Trina Solar*, *Allegheny Ludlum 2001*, cases where the Department declined to assess the respondent's creditworthiness because the petitioner did not properly allege and/or provide support for its allegation. In fact, the situation in the instant investigation mirrors that of *CFS Paper from the PRC*, where the Department rejected respondent's objection to its preliminary determination of uncreditworthiness when there was adequate time to consider the allegation and the petitioners submitted financial ratios and pointed to other evidence on the record supporting it.

<sup>150</sup> See PDM at 8.

<sup>151</sup> *Id.* at 9.

uncreditworthy.<sup>152</sup> However, as explained above, the Department undertook a *project* creditworthiness analysis of the C Series program.<sup>153</sup> This type of analysis is explicitly contemplated by the *CVD Preamble* in the case of large projects which may not have been able to otherwise garner commercial funding:

Another commenter argued that the Department should not limit itself to examining the creditworthiness of firms as a whole, but should also give itself the flexibility to examine the creditworthiness of individual projects. This commenter argued that some foreign manufacturers, though creditworthy *per se*, are able to carry out new development projects only because they obtain government financing. The commenter argued that these manufacturers would not have been able to secure financing from commercial sources for their huge development projects because these projects are not commercially viable and would be impossible to finance without government subsidies. The commenter noted that, under the Department's traditional approach, the Department would analyze the creditworthiness of the company as a whole, not the creditworthiness of the specific project. Hence, the Department would be likely to find the foreign manufacturer creditworthy, regardless of the commercial viability of the project. The commenter argued that, in this type of situation, the Department should focus on the creditworthiness of the project, not the firm. We share this commenter's concern and have amended the 1997 Proposed Regulations to allow for a project specific analysis in determining creditworthiness. For example, for loans that are provided to fund a large investment project into new products, processes, or capacity (*e.g.*, a plant expansion or new model or product line, where repayment of a loan is contingent upon the success of the particular project being funded), our traditional analysis focusing primarily on the creditworthiness of the company as a whole may be inappropriate because the risk associated with a new project may be much higher or lower than the average risk of the company's existing operations. In these situations, we would expect commercial lenders to place

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<sup>152</sup> Bombardier also argues that the Department should separately analyze the creditworthiness of Shorts. However, we have not done so here because, as discussed further below, we analyzed the creditworthiness of the C Series program, not that of Bombardier and Shorts as a whole.

<sup>153</sup> The U.K. also cites to *SSSC from France*, and argues that the C Series program does not meet the standards set forth in the *CVD Preamble* to conduct a project specific analysis. We disagree on all counts. The C Series meets each prong of the test identified by the U.K. Specifically, the launch aid financing was provided for development of the C Series; repayment was tied to sales of C Series aircraft; and there was significant risk surrounding the C Series project. The C Series was a complex and highly sophisticated product with high capital needs and significant technical and marketing challenges (*i.e.*, winning customers for a brand-new jet in an aircraft segment that Bombardier did not have experience in). The EC State Aid Report, issued in 2009, clearly states that “[f]inancial partners (potential and existent) recognize the risk involved in the project, which are further reinforced by the fact that Bombardier has secured a limited amount of sales of the C Series aircrafts.” See EC State Aid Report at paragraph 123. By the end of 2015, Bombardier had garnered only 243 orders for the aircraft—well short of its program target of 300—and 108 of those orders faced a significant risk of delay or cancellation—and customer confidence was low. See Petition Exhibit 15, Kristine Ogram, *How Bombardier's C Series dream got its wings clipped*, National Post (December 12, 2015). Further, Moody's July 2009 analysis for Bombardier considered the “C Series development costly, with prospects uncertain,” highlighting the significant development and financial risks involved with the undertaking. See Bombardier Verification Report at Verification Exhibit 6, page 4 of Moody's July 2009 Corporate Finance Report on Bombardier.

greater emphasis on the expected return and risk of the project because the success or failure of the project would be the most important indicator of the borrowing firm's ability to repay the loan. This is not to say that the financial position of the firm as a whole would be irrelevant to the lender's decision, only that the primary focus would be on the project itself. Therefore, paragraph (a)(4) now allows for the possibility of focusing the creditworthiness analysis on the project being financed rather than the company as a whole.<sup>154</sup>

We continue to find this guidance from the *CVD Preamble* to be directly applicable to this case, in which Bombardier sought the financing at issue specifically for a large investment project into a new product line, and repayment of the financing was contingent upon the success of that product line. Accordingly, the primary focus of our creditworthiness analysis continues to be the C Series project.

The record demonstrates that Bombardier/Shorts did not obtain any commercial financing (*e.g.*, bank loans or issuances of debt) specifically for the C Series;<sup>155</sup> thus, the companies received no commercial financing comparable to the launch aid. Moreover, as noted in the *Preliminary Determination*, Bombardier and Shorts did not have any long-term commercial loans at all during the AUL.<sup>156</sup> Bombardier and the U.K. argue that Bombardier's commercial bonds and available credit facilities should be taken into account as evidence of Bombardier's creditworthiness. We disagree on two counts. First, as discussed above, we are making a project-specific creditworthiness assessment for of the C Series, not a company-specific assessment for Bombardier's creditworthiness. Unlike the launch aid, the bonds and credit facilities were backed by Bombardier's entire corporate operations and were not specifically tied to the performance of the C Series; additionally, Bombardier's bonds were senior to both the launch aid debt and to equity.<sup>157</sup> Second, the bonds and credit facilities held by Bombardier are not comparable to long-term commercial loans, as contemplated by 19 CFR 351.505(a)(4)(i)(A). The credit facility is a short-term revolving borrowing facility, so it does not constitute a long-term loan. Additionally, while Bombardier's bonds are issued on the market and traded, they are not structured in a manner comparable to the launch aid, and they are not tied to the success of the C Series.

The record also demonstrates that Bombardier, as a whole, was in a very weak financial situation for the duration of the C Series program. Therefore, in the absence of financial ratios for the C Series program itself, the Department examined Bombardier's financial ratios. Bombardier itself acknowledges that its financial ratio ratios "were not ideal."<sup>158</sup> In fact, when

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<sup>154</sup> See *CVD Preamble*, 63 FR at 65366-67.

<sup>155</sup> See EC State Aid Report at paragraph 132 ("financing the new project through debt financing was not really a possible option for the company faced with a sub-investment rating grade").

<sup>156</sup> See PDM at 9.

<sup>157</sup> See U.K. Verification Report at 8 ("U.K. officials stated that, in the case of a default or bankruptcy filing by Bombardier/Shorts, secured creditors rank first, followed by unsecured creditors (including the U.K.'s RLI), while equity holders rank last.").

<sup>158</sup> See Bombardier's Case Brief at 43. The U.K. also acknowledges that "Bombardier's credit rating was lower than its peers and was 'speculative grade.'" See U.K.'s Case Brief at 41. This fact is also echoed in the EC State Aid Report at paragraph 126 ("its credit rating remains the lowest among its peers").

compared with similar companies and the financial ratios which the Department has used as benchmarks in its creditworthiness analysis in past cases, Bombardier's financial ratios alone indicate that it is a company struggling to maintain liquidity.<sup>159</sup> Bombardier claims that, based on the positions of the rating agencies, the Department was incorrect to conclude in the *Preliminary Determination* that Bombardier's quick ratios and current ratios indicated it could not cover 100 percent of its obligations.<sup>160</sup> We disagree that the Department's interpretation of Bombardier's financial ratios was incorrect. The Department has, in many other cases, relied on a benchmark of 1.0 for quick ratios and 2.0 for current ratios to indicate financial health.<sup>161</sup> Financial ratios below those levels are indicative of potential liquidity issues.<sup>162</sup>

Furthermore, we disagree with Bombardier's claims that the credit rating agency's assessments of the company were positive. To the contrary, Bombardier's credit rating from all three rating agencies over the AUL period never exceeded non-investment grade, marginally speculative ratings of Ba2 (Moody's) or BB+ (Standard & Poor's and Fitch). In 2009, Moody's acknowledged the risks involved with the C Series and Bombardier's constrained cash position, which was partially attributed to the C Series development.<sup>163</sup> In 2015-2016, at the time of the *Investissement Québec* equity infusion, Bombardier's credit rating tumbled to the highly speculative level of B2 (Moody's) or B- (Standard & Poor's).<sup>164</sup>

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<sup>159</sup> See PDM at 9-10, discussing the financial ratios and citing *Solar Cells I from the PRC*. In *Solar Cells I from the PRC*, the Department noted that the benchmark for a quick ratio is 1.0, or funds available to cover 100 percent of upcoming obligations, and a current ratio of 2.0. We calculated quick ratios for Bombardier below 1.0 for the entire AUL, with only two instances (for the years ending January 31, 2009, and January 31, 2010) where Bombardier's quick ratio was above 0.70. Similarly, Bombardier's current ratio only rose above 1.50 during the same two years noted above and was near 1.0 for much of the AUL. In *Solar Cells I from the PRC*, the Department also considered a debt-to-equity ratio above 1.0 to be "high." Bombardier's debt-to-equity ratio was consistently high or very high during the AUL, dipping to a low of 1.10 in 2010 and 1.84 in 2007-2008, but remaining above 2.0 throughout the remainder of the AUL. See also Final Calculation Memorandum at Attachment 7a and Petitioner August 28, 2017 New Factual Information at Exhibit 1 (Infinancials data for Bombardier and "peer" companies covering the AUL period). Based on the Infinancials data, compared to the average ratios for its peers covering the AUL, Bombardier's current ratio, quick ratio, interest coverage ratio, and funded capital ratio were all significantly lower than average, with Bombardier's highest ratios during the AUL never reaching the lowest average ratios during the AUL.

<sup>160</sup> See *Preliminary Determination* at 10.

<sup>161</sup> See e.g., *Shrimp from Indonesia*, and accompanying PDM at "Central Proteinaprima's Creditworthiness;" *Sugar from Mexico: Final Affirmative Countervailing Duty Determination*, 80 FR 57337 (September 23, 2015) at Issue 2; and *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014-2015*, 82 FR 42792 (September 12, 2017) at "D. Creditworthiness."

<sup>162</sup> Additionally, we note that Bombardier had negative free cash flow usage in the year ending January 2010 and in the years ending December 2011 through December 2016. See Final Calculation Memorandum at Attachment 7a.

<sup>163</sup> See Verification Exhibit 6 at pages 4-5 of Moody's July 2009 Corporate Finance Report on Bombardier ("Bombardier's cash flows and cash position are critical elements to its rating given that the company lacks committed bank operating lines for funded borrowing purposes. The recent reduction in balance sheet cash and potential for further cash erosion were factors that contributed to us lowering the company's liquidity rating to SGL-3 (adequate) from SGL-2 (good) on July 2, 2009.").

<sup>164</sup> See Final Calculation Memorandum at Attachment 7a; see also Bombardier September 5, 2017 SQR at Exhibit 7A.

In the *Preliminary Determination*, we found that Bombardier’s financial ratios did not meet the standard for creditworthiness and also served as a “conservative proxy for the likely worse financial ratios of the C Series project.”<sup>165</sup> This conclusion is supported by contemporary record evidence which indicated that, in 2015: 1) Bombardier was on the brink of bankruptcy, due, in part, to losses, delays, and budget overruns on the C Series program;<sup>166</sup> and 2) Bombardier wrote-off USD \$3.235 billion in investments in the C Series program.<sup>167</sup> Earlier in the program development, the C Series was no less risky an undertaking. For example, in its June 2009 report on state aid, the European Commission concluded that “it is clear from the documents produced that Bombardier, without public funding of this project would have had to abandon it.”<sup>168</sup>

Therefore, consistent with the *Preliminary Determination* and as described further above, we continue to find the C Series program to be uncreditworthy during 2009 (when the launch aid and INI SFA grant for the C Series were provided); 2010 and 2012 (when the *Emploi-Québec* grants were provided); and 2015-2016 (when the *Investissement Québec* equity investment was made).<sup>169</sup> As a result, we have continued to calculate uncreditworthy benchmark interest rates for Bombardier during these time periods, in accordance with 19 CFR 351.505(a)(3)(iii).

We also disagree that the Department should take Bombardier’s actual credit rating (Ba2 – B2 range) grade into account, rather than apply the Caa to C-rated category specified in 19 CFR 351.505(a)(3)(iii) for firms which are found to be uncreditworthy. As explained above, the Department performed a project-specific creditworthiness analysis of the C Series program and determined that it was not creditworthy. Thus, Bombardier’s actual credit rating does not control because the Department is calculating an uncreditworthy interest rate for programs tied to the C Series. Although, under the guidance provided by the *CVD Preamble*, Bombardier’s financial condition is not irrelevant, we find that its substantial weakness, as summarized above, makes it unlikely that Bombardier could have obtained long-term loans from conventional commercial sources for the extraordinarily risky C Series project.

Finally, we disagree that the analysis in the KPMG report is dispositive as to either: 1) the financial health of Bombardier and the C Series; or 2) the ability of Bombardier to obtain financing for the C Series program. The U.K. notes the existence of a private entity willing to lend Bombardier assets for production of the C Series, as well as other funding sources that Bombardier had already obtained for the C Series.<sup>170</sup> However, these sources of funding are not

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<sup>165</sup> See PDM at 10. Bombardier does not prepare project-specific financial reports or ratios and CSALP did not come into existence until concurrent with the equity infusion; hence, there are no C Series-specific financial statements to analyze.

<sup>166</sup> See Petition at Exhibit 25 (“Bombardier was on ‘brink of bankruptcy,’ CEO says,” *Globe and Mail*, November 12, 2016).

<sup>167</sup> See Petition at Exhibit 111, Bombardier Financial Report 2015, at 21.

<sup>168</sup> See U.K. September 5, 2017 SQR at Exhibit 3 (EC State Aid Report, at paragraph 170).

<sup>169</sup> *Id.* at 9-10.

<sup>170</sup> See U.K.’s Case Brief at 46, citing U.K. July 25, 2017 IQR at Exhibit RLI-6, KPMG Report at 58-59 and EC State Aid Report at paragraphs 122, 125-126. To the contrary, the EC State Aid Report indicates that Shorts was unable to obtain any commercial funding for the C Series and that it was further constrained as a subsidiary of Bombardier. The European Commission stated that “[d]ebt financing option was not a credible solution” and that even Shorts’ proposals for sale and lease-back of property “have drawn little interest from financial institutions”

the same as “comparable commercial long-term loans,” as contemplated by 19 CFR 351.505(a)(4)(i)(A), and, in fact, the U.K.’s comments in this regard are misleading. None of the funding Bombardier obtained for the C Series was, as far as the record demonstrates, provided by commercial lenders who are in the business of providing financing to companies or projects. Additionally, the positive developments cited in the KPMG report are not tied to the C Series and do not outweigh Bombardier’s substandard credit ratings or the lack of commercial lending for the C Series.<sup>171</sup> Thus, the information contained in the KPMG report does not support finding that the C Series program is creditworthy.

Finally, Bombardier and the GOC cite *ADM*, where the Department analyzed the creditworthiness of a Chinese company and found it to be uncreditworthy. We find that *ADM* is consistent with our finding that the C Series program is uncreditworthy. In *ADM*, the CIT upheld the Department’s uncreditworthiness finding, which was based upon a similar level of detailed analysis as in the instant case. In *ADM*, the CIT stated that “19 CFR 351.505(a)(4)(i)... grants to Commerce the authority to make that determination, and to make it on ‘a cases-by-case basis,’ guided by, ‘among other factors,’ the considerations articulated in 19 CFR 351.505(a)(4)(i)(A)-(D).”<sup>172</sup> Although the CIT in *ADM* paraphrased the inquiry under 19 CFR 351.505(a)(4)(i) as an inquiry into the loan recipient’s ability to repay the loan, it took this paraphrasing from the petitioner’s brief in that case and not from the regulation. In any event, the CIT actually examined and affirmed the Department’s finding in that case based on the multiple factors and the standard in the regulation. In the instant case, we also have analyzed multiple factors regarding the C Series program under the Department’s regulations; as explained above, the record evidence supports a finding of uncreditworthiness for the C Series program.

## **Launch Aid**

### **Comment 8: Whether the U.K. Launch Aid Provides a Market Rate of Return**

#### *U.K.’s Case Brief*

- In the *Preliminary Determination*, the Department treated RLI from the U.K. as an interest free contingent liability loan under 19 CFR 351.505(d). While the Department was correct to conclude that RLI was a loan, rather than a grant,<sup>173</sup> the RLI is not interest free. Under the terms of the RLI, although Bombardier/Shorts is not currently due to repay principal and interest, interest is accruing nonetheless. In contrast, in all but one case where the Department applied 19 CFR 351.505(d), no interest was accruing.<sup>174</sup> Further,

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(i.e., even for tangible property assets, there was little appetite on the part of lenders and institutions to work with Bombardier or Shorts on the C Series program). See EC State Aid Report at paragraphs 123-132.

<sup>171</sup> See U.K.’s Case Brief at 4, citing U.K. July 25, 2017 IQR at Exhibit RLI-6, KPMG Report at 20-23.

<sup>172</sup> See *ADM v. U.S.*, 917 F. Supp. 2d 1331, at 1346.

<sup>173</sup> See U.K.’s Case Brief at 34 (citing *Final Affirmative Countervailing Duty Determination: Certain Steel Flat Products from Austria*, 58 FR 37217 (July 9, 1993) (*Steel Flat Products from Austria*), and accompanying IDM at Comment 13; *Cut-to-Length Carbon Steel Plate from Belgium; Final Results of Countervailing Duty Administrative Review*, 64 FR 12982, 12985 (March 16, 1999) (*CTL Plate from Belgium*)).

<sup>174</sup> *Id.* at 34-35 (citing *Welded Line Pipe from Korea: Final Negative Countervailing Duty Determination*, 80 FR 61365 (October 13, 2015), and accompanying IDM at 8 (*WLP from Korea*); *SSSSC from France*, 64 FR at 30778;



Bombardier/Shorts is on track to make its first interest payment. Thus, the initial repayment deferral during the POI does not constitute a benefit.

- As explained on the record of this investigation, commercial lenders readily provide royalty-based financing where interest payments are not initially required until a certain level of sales is reached.<sup>175</sup>
- Additionally, although repayment of the RLI may occur based on aircraft deliveries, it is not contingent solely on sales of the C Series.

#### *European Commission's Case Brief*

- The RLI cannot be considered an interest-free loan. The RLI takes the form of a loan repayable to the U.K. via a levy linked to future aircraft deliveries. Like a market lender, the U.K. requires repayment of principal and interest such that the government is properly compensated for the risks involved. The Department's focus should be on the market rate of return that a commercial investor would have demanded over the term of the loan, not on denying the commercial basis of the entire transaction. Thus, the RLI financial instrument is subject to repayment at a market rate of return which potentially removes, or at least minimizes, any element of subsidy.

#### *Petitioner's Rebuttal Brief*

- The U.K. has failed to demonstrate that royalty-based financing would have been readily available to Bombardier/Shorts from commercial lenders on terms comparable to launch aid.<sup>176</sup> To the contrary, evidence on the record demonstrates that no commercial lenders were willing to provide financing for the C Series project.<sup>177</sup> Further, there is no evidence on the record that commercial lenders provided royalty-based financing on terms comparable to launch aid.<sup>178</sup>
- Additionally, the U.K. failed to provide any evidence in support of its assertions that the RLI is not contingent solely upon sales of the C Series; rather, the record evidence shows that repayments are dependent entirely on deliveries of the C Series aircraft.
- The U.K.'s reliance on *CTL Plate from France* is misplaced. In that case, the Department found that: 1) a reimbursable advance was a contingent liability loan because repayment was contingent on the success of the project; but 2) also found that the loan did not confer a benefit during the POI because it had been disbursed during the POI and the first interest payment on a comparable commercial loan would not have been due until after the POI.<sup>179</sup> In this case, Bombardier first received launch aid seven years prior to the POI (in 2009). Accordingly, the Department properly found that launch aid constitutes a contingent liability, interest-free loan, and calculated the benefit as the amount of interest foregone during the POI.

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*CTL Plate from Belgium*, 64 FR at 12985; and *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from France*, 64 FR 73277 (December 29, 1999) (*CTL Plate from France*)).

<sup>175</sup> *Id.* at 35-36 (citing U.K.'s August 25, 2017 NFI Submission at Exhibit 2).

<sup>176</sup> See Petitioner's Rebuttal Brief at 49 (citing U.K.'s Case Brief at 35-36).

<sup>177</sup> *Id.* at 49-50 (citing EC State Aid Report at paragraphs 109, 127, 131, 142, 143, and 170).

<sup>178</sup> *Id.* at 50-51. The petitioner explains that the governments lack certain recourse actions under the launch aid contracts and provides proprietary examples of failures on the U.K.'s part to make the case that commercial lenders offer royalty-based financing on similar terms.

<sup>179</sup> *Id.* at 52 (citing *CTL Plate from France*, 64 FR at 73284).

## Department's Position:

For the final determination, we continue to treat RLI from the U.K. as an interest-free contingent liability loan under 19 CFR 351.505(d). As the U.K. acknowledges, while the U.K. agreed to provide the RLI to Shorts in April 2009 and began disbursements thereafter, Bombardier/Shorts did not make payments of any interest, or principal, on the RLI during the POI because the contingency for payments did not occur.<sup>180</sup> We disagree with the U.K. and European Commission that, just because interest was theoretically accruing on the RLI during the POI, the Department should not consider RLI to be an interest-free loan. Further, as the Department observed at verification: 1) Bombardier/Shorts tracks the liability with accrued interest;<sup>181</sup> and 2) the RLI repayment is tied to future aircraft deliveries.<sup>182</sup> Thus, while Bombardier/Shorts may in the future make repayments to the U.K., during the POI the loan was an interest-free contingent liability and it should be treated as such, consistent with 19 CFR 351.505(d)(1).

There is no record evidence which indicates that similar launch aid, with similar payment deferral terms and at similar rates of return, was available to Bombardier from commercial lenders at the time the U.K. agreed to provide the RLI. Moreover, there is no record evidence regarding any other commercial (or comparable) financing available during this time frame for the C Series.<sup>183</sup> To the contrary, record evidence indicates that Bombardier/Shorts was unable to garner any commercial loans for the C Series project.<sup>184</sup>

Regarding the cases cited by the U.K., it cites *WLP from Korea* and *SSSSC from France* as examples of cases where interest was not accruing on a contingent liability and the Department treated the liability as an interest-free loan, under 19 CFR 351.505(d)(1). However, this is not the fact pattern at issue in this investigation, where the interest that Shorts ultimately owes the U.K. on the RLI is accruing. Further, the U.K. points to: 1) *CTL Plate from France* as a case where the Department included interest in its benefit calculations because the respondent would have been required to pay interest on a comparable commercial loan; and 2) *CTL Plate from Belgium* as the sole exception where interest was accruing but the Department treated the loan as a contingent liability interest-free loan, because it was not a normal commercial practice to defer interest payments for five years. We disagree that *CTL Plate from France* is on point, given that the respondent in that case was required to repay principal and interest in the year following disbursement of the loan; thus, the loan at issue in that case was not interest free and operated in a typical commercial manner, when compared with other commercial loans in that country and at

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<sup>180</sup> See U.K.'s Case Brief at 34 and U.K. Verification Report at 3-8.

<sup>181</sup> See Shorts Verification Report at 7.

<sup>182</sup> See European Commission's Case Brief at 2. See also Shorts Verification Report at 8 and U.K. Verification Report at 7.

<sup>183</sup> Although the U.K. points to certain other financing agreements for the C Series mentioned in the KPMG report commissioned by the U.K., there is nothing on the record regarding the terms of these agreements. In any event, nothing on the record indicates that these agreements operated in a manner similar to RLI.

<sup>184</sup> The EC State Aid Report makes clear that Bombardier was unable to obtain financing from commercial sources for the C Series and required government funding. See EC State Aid Report at paragraphs 109, 127, 131, 142, 143, and 170. Additionally, ISED Canada's, Audit and Evaluation Branch concluded that, without government funding the C Series would have been delayed, design compromises would have been made, and the viability of the development of the aircraft would have been jeopardized. See ISED C Series Evaluation at 13.

that time. Finally, we find that *CTL Plate from Belgium* supports the Department's treatment of the RLI as an interest-free contingent liability in this investigation, as the loan in that case was a similarly structured investment with a delayed repayment schedule.

### **Comment 9: Analyzing the U.K. Launch Aid Separately from the GOC and GOQ Launch Aid**

#### *Bombardier's Case Brief*

- The RLI provided by the U.K. is a separate alleged subsidy provided to a different party, and should be analyzed entirely separately from the launch aid provided by the GOC and GOQ. The record evidence demonstrates that the U.K. RLI was a separately negotiated agreement with terms independent from those of the launch aid provided by the GOC and GOQ. Further, RLI repayment is structured differently than the GOC and GOQ repayment obligations.

The petitioner did not comment on this issue.

#### **Department's Position:**

In the *Preliminary Determination*, the Department analyzed the three launch aid programs provided by the GOC, GOQ, and U.K. separately, and conducted separate benefit calculations for each program.<sup>185</sup> We calculated an *ad valorem* subsidy rate for each program based upon the amounts disbursed (*i.e.*, the outstanding balance), the agreement date, and the currency of the launch aid provided. We found that each of the launch aid programs was an interest free, contingent liability under 19 CFR 351.505(d)(1), and we derived the uncreditworthy interest rate used in our calculations based on the formula outlined in 19 CFR 351.505(a)(3)(iii).

For this final determination, we continue to examine each program separately and calculate separate and distinct benefits, based upon each government's launch aid program, using an uncreditworthy interest rate, as discussed in Comment 7, above. Nonetheless, we note that, although the each of the launch aid programs is different, the technology development under all three programs was for Bombardier to bring the C Series aircraft to market. Moreover, repayment under all three programs is tied to sales and deliveries of the C Series aircraft on a royalty basis, per aircraft delivered.

Finally, based upon our findings at verification, we modified our calculations for the U.K. launch aid to include accrued interest as part of the outstanding balance.<sup>186</sup> For further discussion, *see* Comment 13, below.

### **Comment 10: The Appropriate Denominator for the GOC Launch Aid**

#### *GOC's Case Brief*

- The Department calculates an *ad valorem* subsidy rate by dividing the amount of any measured benefit by the sales value of the product or products to which it attributes the

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<sup>185</sup> See PDM at 15-20 and Preliminary Calculation Memorandum at Attachments 4, 5, and 6.

<sup>186</sup> See U.K. Verification Report at 8.

subsidy. In the case of domestic subsidies, the Department will attribute the subsidies to all products sold by a firm. Only where a subsidy is tied to the production or sale of a particular product will the Department attribute that subsidy to that product.<sup>187</sup> The Department makes tying decisions based on the stated purpose of the subsidy at the time of bestowal and does not trace the use of subsidies through a company's books to inform its tying decision.<sup>188</sup> Accordingly, the Department erred in the denominator it used to calculate a portion of the benefit provided by the GOC's launch aid.

- Specifically, the GOC initiated the Bombardier C Series Program (BCP) in September 2008 to provide repayable contributions to Bombardier for the development of new commercial aircraft technologies under two distinct tranches: 1) generic technologies, including advanced materials, technologies and manufacturing processes, which are applicable to a variety of aircraft platforms and other commercial applications; and 2) technologies specific to the Bombardier C Series aircraft. The GOC established separate projects and funding streams, based on distinct contribution agreements.
- The Generic Technologies Contribution Agreement demonstrates that the funds provided under this agreement were intended to develop technology and production much broader than C Series aircraft.<sup>189</sup> The Department confirmed the separate contribution agreements at verification. Therefore, it would be contrary to Department practice to allocate the generic technology portion of the GOC's launch aid over the sales of the C Series aircraft. Instead, the generic technology contribution should be allocated over Bombardier's total aerospace sales.

#### *Petitioner's Rebuttal Brief*

- The evidence on the record demonstrates that the Generic Technologies program is tied to the C Series project. The GOC provided launch aid to Bombardier through two projects, the Generic Technologies project and the C Series Technology project, that it administered under a single program, the Bombardier C Series Program (BCP). BCP provided a total of C\$350 million to Bombardier under this program, the repayment of which is tied solely to sales of C Series aircraft. Because the programs were linked at inception, and repayment is tied solely to deliveries of the C Series, the Department should continue to tie the benefits from the Generic Technologies project to C Series sales.
- The Generic Technologies program was created to benefit development and production of the C Series, notwithstanding its titular reference to "generic technolog{y}." The *CVD Preamble* makes clear that the Department analyzes tying claims with an appropriate level of skepticism.<sup>190</sup> The Department should not allow Canada to circumvent CVD law simply by funneling some of the launch aid subsidies through a so-called "generic" program.

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<sup>187</sup> See GOC's Case Brief at 12-13 (citing 19 CFR 351.525(a), (b)(3), and (b)(5)(i)).

<sup>188</sup> *Id.* at 13 (citing *CVD Preamble*, 63 FR at 65403).

<sup>189</sup> See GOC's Case Brief at 14 (citing GOC July 24, 2017 IQR at Volume IV, Exhibit GOC-CSERIES-3, Generic Technologies Contribution Agreement).

<sup>190</sup> *Id.* at 73 (citing *CVD Preamble*, 63 FR at 65400, "[W]e are extremely sensitive to potential circumvention of the countervailing duty law. We intend to examine all tying claims closely to ensure that the attribution rules are not manipulated to reduce countervailing duties.").

## Department's Position:

We continue to attribute the full amount of the GOC launch aid, including both generic technologies and technologies specific to the C Series, to sales of the C Series by Bombardier/CSALP in the final determination. We disagree with the GOC that we should use two different denominators for the two different portions of the GOC launch aid. Verification at both the GOC and Bombardier demonstrated that Bombardier initially approached the GOC regarding its funding needs for the C Series in 2005.<sup>191</sup> Bombardier then put the C Series project on hold, but once again approached the GOC in 2008 regarding funding for the C Series, receiving a commitment the same year for the GOC launch aid. Bombardier finalized the launch aid agreements with the GOC in 2009 and immediately began receiving funds under the launch aid program. In order to administer the launch aid agreements, the GOC created a new program under ISED called the Bombardier C Series Program, or "BCP." The BCP program consisted of two portions: one related to generic technologies for the C Series that may have broader applications; and one related to technologies specific to the C Series.<sup>192</sup> Repayment of the GOC's launch aid commitments (under both the C Series and the "generic technologies" portions) was tied solely to sales and deliveries of C Series aircraft, based upon royalties on each C Series aircraft delivered.<sup>193</sup>

The Department's regulations provide that "[i]f a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product."<sup>194</sup> The Department in the past has stated that a subsidy is tied if its intended use is known to the subsidy grantor and so acknowledged prior to, or at the time of, bestowal.<sup>195</sup> Further, the *CVD Preamble* states the following with regard to tying:

{W}e are extremely sensitive to potential circumvention of the countervailing duty law. We intend to examine all tying claims closely to ensure that the attribution rules are not manipulated to reduce countervailing duties. If the Secretary determines as a factual matter that a subsidy is tied to a particular product, then the Secretary will attribute that subsidy to sales of that particular product, in accordance with paragraph (b)(5).<sup>196</sup>

Repayment of the GOC launch aid, from the program's inception, was tied solely to sales of the C Series. Under 19 CFR 351.525(b)(5)(i), this fact alone supports finding that the full amount of the GOC launch aid is tied to the C Series. No record evidence supports finding that the GOC would have provided the generic technologies funding to Bombardier absent the company's C Series program. Moreover, based upon the history of the launch aid agreements,

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<sup>191</sup> See GOC Verification Report at 2 and Bombardier Verification Report at 16.

<sup>192</sup> See GOC Verification Report at 2 and Bombardier Verification Report at 16. See also GOC July 24, 2017 IQR at Volume IV, GOC-CSERIES-1.

<sup>193</sup> See GOC Verification Report at 3-4. See also GOC July 24, 2017 IQR at Volume IV, GOC-CSERIES-2.

<sup>194</sup> See 19 CFR 351.525(b)(5)(i).

<sup>195</sup> See, e.g., *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017), and accompanying IDM at Comment 53.

<sup>196</sup> See *CVD Preamble*, 63 FR at 65400.

it is apparent that the GOC launch aid was intended entirely for the benefit of the C Series program. It is clear that this is so because the GOC created a new program called the “Bombardier CSeries Program” to administer both agreements, which proceeded on identical time frames.<sup>197</sup> Additionally, at verification, Bombardier officials admitted that, while the generic technologies were more broadly applicable to other aircraft, they were nonetheless “of use to the C Series.”<sup>198</sup> Given the connection of launch aid to sales of the C series and the entire design and structure of launch aid, we have not modified our calculations of the GOC launch aid for the final determination and we continue to attribute the entire amount of the GOC launch aid to sales of the C Series by Bombardier/CSALP.

## **Comment 11: Capping the Launch Aid Benefit Amounts**

### *GOC’s Case Brief*

- The Department’s treatment of repayable contributions as loans, to which it has applied an uncreditworthy benchmark, results in benefits that exceed the amounts which would be calculated had the repayable contributions been treated as grants in the year of receipt.
- The Department’s regulations evidence an intent to limit absurd or excessive measurements of benefit;<sup>199</sup> the Department has in prior cases applied a “grant cap” to any measured loan benefit, limiting the amount of the benefit to the amount that would have been calculated had the loan in question been treated as a grant.<sup>200</sup> In applying a “grant cap,” the Department has explained that it “will not impose greater countervailing duties for a subsidized loan (to a creditworthy or an uncreditworthy company) than for an outright grant in the amount of the loan principal, because a loan cannot be worth more to a company than an outright grant of the same amount.”<sup>201</sup> This rationale has been upheld by the CIT.<sup>202</sup> The same rationale should apply here for all repayable contributions. Thus, if the Department continues to find the C Series project uncreditworthy, then any measured benefit under the Department’s loan methodology for the POI should not exceed the amount that would have been calculated had the repayable contribution been treated as a grant.

### *Bombardier’s Case Brief*

- The Department should apply its practice of calculating a “grant cap” to ensure that the benefits it calculates for the launch aid provided by the GOC, the GOQ, and U.K. do not exceed the “grant cap” amount.<sup>203</sup> Typically, the Department applies a grant cap to its loan

<sup>197</sup> See ISSED C Series Evaluation at 3 and 13; although legally there may have been two separate contribution agreements, they functioned together as the “Bombardier CSeries program” and jointly enabled Bombardier to undertake development of the C Series.

<sup>198</sup> See Bombardier Verification Report at 16; see also ISSED C Series Evaluation at 3.

<sup>199</sup> See GOC’s Case Brief at 16 (citing 19 CFR 351.505(d)).

<sup>200</sup> See GOC’s Case Brief at 16 (citing *Prestressed Concrete Steel Wire Strand from France*, 47 FR 47031, 47041 (October 22, 1982) (*PC Steel Wire Strand from France*)).

<sup>201</sup> *Id.* (citing *Cold-Rolled Carbon Steel Flat Products from Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 49 FR 18006, 18016-20 (April 26, 1984) (*Cold-Rolled Steel from Argentina*)).

<sup>202</sup> *Id.* (citing *SSAB Svenskt Staal AB v. United States*, 764 F. Supp. 650, 658 (May 10, 1991) (*SSAB*)).

<sup>203</sup> See Bombardier’s Case Brief at 31 (citing *Countervailing Duty Order: Certain Steel Products from Sweden*, 58 FR 43758, 43759 (August 7, 1993) (*CVD Order on Certain Steel Products from Sweden*)).

and equity benefit calculations because, as the Department explained in *Certain Steel Products from Belgium*, “a loan cannot be worth more to a company than an outright grant of the same amount.”<sup>204</sup>

#### *Petitioner’s Rebuttal Brief*

- The Department should reject arguments regarding the grant cap. As an initial matter, neither the GOC nor Bombardier has cited to any instance where the “grant cap” in the aggregate has been exceeded in the Department’s launch aid calculations.
- Section 351.505(d)(1) of the Department’s regulations does not mention a year-by-year grant cap application, only that the present value of the amounts of the benefit, discounted back to the year of receipt of the loan, cannot exceed the loan principal. The use of the plural “amounts” implies that the aggregated benefit, adjusted for present value, must be compared to the total principal of the loan. Thus, the single year grant cap proffered by the GOC has no legal basis.
- Moreover, the Department cannot apply the grant cap separately for each year, as the periods for allocating the benefits from grants (the AUL) and loans (the life of the loan) are different. Thus, the benefits of launch aid may extend as long as the loan is outstanding.
- However, if the Department were to find that a grant cap should be incorporated into its launch aid calculation, it would need to be set as the present value of launch aid funds.

#### **Department’s Position:**

We disagree with the GOC and Bombardier that the Department should apply a “grant cap” to the launch aid programs for the final determination. As explained in Comments 8, 9, 12, and 13, the Department is treating the launch aid benefits as contingent liability interest-free loans under 19 CFR 351.505(d)(1). As contingent liability interest-free loans, we continue to calculate a benefit for the C Series launch aid programs by treating the “balance on the loan outstanding during {the} year as an interest-free ... loan,” and using “a long-term interest rate as the benchmark” because “the event upon which repayment of the loan depends will occur at a point in time more than one year after the receipt of the contingent liability loan.”<sup>205</sup> Further, the same section of the Department’s regulations provides that “{i}n no event may the present value (in the year of receipt of the contingent liability loan) of the amounts calculated under this paragraph exceed the principal of the loan.”<sup>206</sup> In the case of the launch aid to Bombardier from the GOC, the GOQ, and the U.K., the benefit amounts calculated under 19 CFR 351.505(d)(1) do not exceed the principal of the loans.<sup>207</sup> Therefore, there is no basis to apply the regulatory cap to the benefit amounts.

Additionally, the *CVD Preamble* makes no mention of a grant cap, nor does it identify any other situation in which a loan would be treated as a grant (or compared to a grant), other than that

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<sup>204</sup> See Bombardier’s Case Brief at 31 (citing *Final Affirmative Countervailing Duty Determinations; Certain Steel Products from Belgium*, 47 FR 39304, 39320 (September 7, 1982) (*Certain Steel Products from Belgium*)).

<sup>205</sup> Additionally, in accordance with the uncreditworthy finding for the C Series program (see Comment 7, above), we have calculated uncreditworthy interest rates for the GOC, GOQ, and U.K. launch aid programs.

<sup>206</sup> *Id.*

<sup>207</sup> See Final Calculation Memorandum at Attachments 4, 5, and 6.

identified in 19 CFR 351.505(d)(2). This section of the Department's regulations would only apply if a loan were forgiven, in which case we would "treat the entire unpaid principal of a forgiven loan and any accumulated interest, regardless of whether it is a contingent liability loan or a regular loan, as a grant bestowed at the time of the forgiveness."<sup>208</sup>

The GOC and Bombardier cite *PC Steel Wire Strand from France*, *Cold-Rolled Steel from Argentina*, *SSAB*, *CVD Order on Certain Steel Products from Sweden*, and *Certain Steel Products from Belgium* in support of their argument that the Department should apply a "grant cap" here. These cases, dated from the 1980s to 1993 discuss the "grant cap" methodology under the Department's prior loan calculation methodology and prior regulations, which were in effect before the Department modified its CVD regulations in 1998.<sup>209</sup> In fact, our research did not disclose a proceeding in which the Department applied its "grant cap" methodology after 1993, in *Certain Steel Products from Sweden*.

The Department's current calculation methodology for loans, as outlined in 19 CFR 351.505, requires that the benefit not exceed the principal of the loan. There is no requirement under the Department's current loan methodology to analyze the outstanding loan balance and compare it to how the program would be treated if it had been in a grant. This is for good reason, because the launch aid was provided to Bombardier as loans with an expectation of repayment; hence both Bombardier and Shorts treat the launch aid they received as contingent liabilities in their books.<sup>210</sup> Had the launch aid provided in this case merely been a grant, with no repayment obligation, we would have treated it as such. However, no party has argued that launch aid should be treated as a grant and, given the repayment expectations, there is no reason to treat it in this manner. In any event, if the Department later determines that "the event upon which repayment depends is not a viable contingency," we "will treat the outstanding balance of the loan as a grant received in the year in which the condition manifests itself," in accordance with 19 CFR 351.505(d)(2).<sup>211</sup>

## **Comment 12: The Appropriate Benchmark for Launch Aid**

### *U.K.'s Case Brief*

- Because Bombardier and the C Series are creditworthy, the Department may not use the uncreditworthy interest rate calculation under 19 CFR 351.505(a)(3)(iii); instead, the Department must select an appropriate commercial interest rate and determine whether the

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<sup>208</sup> See *CVD Preamble*, 63 FR at 65370.

<sup>209</sup> See *CVD Preamble*, 63 FR at 65369 ("We have decided to eliminate our old loan allocation formula described in the 1989 Proposed Regulations, as part of our effort to streamline methodologies, where possible.").

<sup>210</sup> See Bombardier Verification Report at 17-18 and Shorts Verification Report at 7.

<sup>211</sup> Additionally, and without prejudice to whether the "grant cap" might be still applicable in other lending situations, we determine that the policy behind the grant cap is not applicable to contingent liability loans such as the ones at issue in this case. Unlike most loans, these contingent liability loans do not have a fixed term. Because repayment is tied to sales of the C Series aircraft, it is unknown whether they will be paid off in, hypothetically, five years, 15 years, 25 years, or never. It would be speculative on the Department's part to estimate a term for the loan, and without a fixed term, the present value of the loan cannot be calculated in the manner that the present value of other variable repayment loans can be calculated. See, e.g., 19 CFR 351.505(c)(3)(i); see also *CVD Preamble*, 63 FR at 65369 (noting that when calculating the present value of a loan, using a different allocation period than the life of the loan "could mean that subsidy benefits would end even though the subsidized loan is itself still outstanding").



RLI confers a benefit based upon that benchmark. In this case, the appropriate interest rate benchmark is Bombardier's actual cost of long-term debt in British pounds of 6.75 percent.<sup>212</sup>

- Although the RLI carries some additional risk over standard commercial loans, the Department cannot claim that the standard loan benchmarks are inappropriate. In other cases, the Department has relied upon the company-specific cost for standard fixed rate loans or, where those are not available, national average interest rates, to calculate the benefit for contingent liability interest free loans.<sup>213</sup> The Department added no risk premium due to the fact that the loan was contingent and therefore carried some additional risk. In this case, since the RLI is not interest free, the determination of whether there is a benefit must involve a comparison of the RLI interest rate to the rate on the standard long-term debt issued by Bombardier. Bombardier's cost of debt is well below the interest rate for the RLI provided to Shorts. However, even if the Department were to attempt to create a hybrid benchmark that adds a risk premium to the interest rate on Bombardier's standard loan rates, such a rate should not be higher than the nominal rate associated with the RLI provided to Shorts.
- Because the rate of return for the RLI was set using commercial principles, applying a higher interest rate would be inappropriate. Specifically, the U.K. government assessed the project as an investor, and sought to charge a market rate of return based upon Bombardier's credit rating, the spread on Bombardier's bonds, and the risks associated with the project.

#### *Bombardier's Case Brief*

- While Bombardier agrees generally with the Department's treatment of the launch aid provided by the GOC, GOQ, and U.K. as repayable liabilities in the *Preliminary Determination*, by applying its "contingent liability" methodology, the Department failed to recognize that these repayable advances do not meet the Department's definition because they are not interest free.<sup>214</sup> As a result, the Department overstated the benchmark interest rate against which the terms of the repayable advances should be compared and failed to account for the interest accrued by the companies on the outstanding balances. Both of these errors resulted in an overstatement of the subsidy benefit by large margins.
- Both the launch aid agreements and Bombardier's and Shorts' accounting for the launch aid demonstrate that the loans are not interest free. The record demonstrates that interest is due on these advances and that it is accrued in Bombardier's and Shorts' accounts.
- It would be inappropriate to assume that no "interest" is paid until all the principal is repaid. Such an assumption would contravene the actual structure and flow of payments. The royalty payments are similar to a mortgage payment on a house; each payment contains elements of both the principal and the interest that will accrue over the life of the mortgage. The Department should acknowledge these specific circumstances of the royalty payments at issue in this case.
- The Department should find that the launch aid and RLI were provided on fully commercial terms. At a minimum, assuming the Department continues to apply a benchmark to determine whether a benefit exists, it must adjust its calculations for the accrued interest.

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<sup>212</sup> See U.K.'s Case Brief at 56 (citing 19 CFR 351.505(a)(2)(i) and (ii)).

<sup>213</sup> See U.K.'s Case Brief at 57 (citing *SSSSC from France*, 64 FR at 30778; and *CTL Plate from Belgium*, 64 FR at 12985).

<sup>214</sup> See Bombardier's Case Brief at 28-29 (citing *CVD Preamble*, 63 FR at 65396 and 19 CFR 351.505(d)).

Thus, the Department should deduct the interest that is accruing from the benchmark interest rate.

- Further, the Department overstated the uncreditworthy benchmark and departed from the instructions in its regulations and the *CVD Preamble*. According to 19 CFR 351.505(a)(3)(iii), the Department will normally use the spread in default rates between the average of Moody's study of historical bond issues for Caa to C-rated companies and the average cumulative default rates for Aaa-to-Baa-rated companies. The *CVD Preamble* explains that the Department, in such instances, will rely on "default information pertaining to the United States" unless data for the relevant country exists and are provided to the Department and that "default experience in the country in question differs significantly from that in the United States."<sup>215</sup> Contrary to these instructions, the Department used Moody's rates from Canada and the U.K., without conducting any analysis of whether those rates differed significantly from those in the United States. Nor did the Department consider that Bombardier obtains the majority of its debt offerings in the United States, not Canada or the U.K. Similarly, the Department chose to use only a 5-year window, contrary to the *CVD Preamble* which provides that the Department "will use the average cumulative default rate for the number of years corresponding to the length of the loan, as reported in Moody's study of historical corporate bond default rates."<sup>216</sup>
- The Department did not act consistently with its regulations in the *Preliminary Determination* and, therefore, it must instead rely upon the best available information on the record to support any analyses it undertakes. An evaluation of the best available information demonstrates that the Department vastly overstated the risk premium to be applied in constructing loan benchmarks and discount rates for Bombardier. Throughout both periods, Bombardier had bonds that were traded on the marketplace; thus, there is marketplace information regarding the premium that Bombardier paid for debt in relation to its riskiness.<sup>217</sup> The rates calculated by the Department are two to four times higher than the rates that Bombardier actually paid for the commercial paper that it issued.
- The Department should use Standard & Poor's historical U.S. default information which is on the record; such information also provides longer-term default rates that are more comparable to the maturity of the financial instruments in question (*i.e.*, 15-year default data). Additionally, while the Department established a spread by using the Caa/C rated bonds, the Department has evidence that Bombardier's bond ratings are above this level; thus, if the Department continues to find Bombardier uncreditworthy, it should use the default rates at its actual credit rating level of BB.
- Bombardier raises the following concerns with the Department's calculations of uncreditworthy discount rates in the Preliminary Calculation Memorandum:
  - Bombardier is unable to replicate the corporate bond data at Attachment 7c; the weblink provided does not appear to exist; and the data found by Bombardier do not appear to match perfectly the Department's data.
  - The Department does not appear to have provided any support for the default rates for "Investment Grade" bonds at Attachments 7c and 7d.

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<sup>215</sup> *Id.* at 48 (citing *CVD Preamble*, 63 FR at 65365).

<sup>216</sup> *Id.* at 49 (citing *CVD Preamble* 63 FR at 65365).

<sup>217</sup> *Id.* at 50.

### *Petitioner's Rebuttal Brief*

- The Department properly found that the launch aid provided the by the GOC, GOQ, and U.K. to Bombardier constitute contingent-liability interest-free loans, because the repayment obligations are contingent upon Bombardier achieving a certain number of deliveries of C Series aircraft and Bombardier is not obligated to pay any interest.<sup>218</sup>
- Unlike standard commercial loans with fixed principal and interest payment schedules, launch aid repayments have neither a fixed principal repayment requirement, nor a fixed interest rate; repayment is in the form of royalties paid on aircraft delivered. Therefore, the anticipated rate of return for launch aid depends entirely on the number of aircraft delivered, and it is factually inaccurate to characterize launch aid as accruing interest. Bombardier's and the U.K.'s arguments ignore two crucial aspects of launch aid: 1) that it is success dependent;<sup>219</sup> and 2) the structure of the repayment schedule.
- Even if the terms of the RLI agreement purport to provide for a return to the U.K. if certain conditions are met, they do not actually require Bombardier (or Shorts) to pay interest. Because launch aid is entirely success-dependent, the U.K., GOC, and GOQ provided the loans without requiring any return, even of principal. Further, even if it were appropriate to treat the scheduled launch aid repayments as including an interest component, there is no evidence that Bombardier paid interest during the POI.
- Bombardier's argument that the Department should make an adjustment for interest accrued but unpaid during the POI is contrary to the Department's practice and wholly unsupported by the law.<sup>220</sup> Given the circumstances,<sup>221</sup> and because the repayment of launch aid is entirely success-dependent, the Department properly treated GOC, GOQ, and U.K. launch aid as contingent liability, interest-free loans and found that a benefit exists in the amount of interest foregone during the POI.<sup>222</sup>
- When the Department finds a company to be uncreditworthy, 19 CFR 351.505(a)(3)(iii) provides a formula for adjusting the long-term interest rate to estimate the rate that an uncreditworthy borrower might pay; such rate is used as the uncreditworthy discount rate. The Department correctly calculated the uncreditworthy benchmark pursuant to the formula in its regulations and should not change the calculation for the final determination.
- The Department should reject Bombardier and the U.K.'s argument to use a BB default rate since that was Bombardier's actual credit rating; the regulations specify that, for a project deemed uncreditworthy, the Department will use the cumulative default based on junk bonds (*i.e.*, CCC rated).<sup>223</sup> Bombardier cites no precedent where the Department matched the default rate to a respondent's specific credit rating in an uncreditworthy calculation. Moreover, as the Department preliminarily found, the credit rating for the C Series project would likely be lower than Bombardier's overall credit rating. Further, the European

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<sup>218</sup> See Petitioner's Rebuttal Case Brief at 44 (citing 19 CFR 351.505(d)(1)).

<sup>219</sup> *Id.* at 47 (citing GOC July 24, 2017 IQR at GOC-CSERIES-17 and Exhibits GOC-CSERIES-3 and GOC-CSERIES-4; the petitioner asserts that Bombardier's repayment obligations for the GOC, GOQ, and U.K. launch aid are entirely dependent upon the success of the C Series program and that, if the program fails, the governments may not even recover the launch aid principal, much less receive any return).

<sup>220</sup> *Id.* at 48 (citing 19 CFR 351.505(d)(1) and *CTL Plate from Belgium*, 64 FR at 12985).

<sup>221</sup> *Id.* at 48; the petitioner provides a proprietary explanation regarding the specific circumstances in this case.

<sup>222</sup> *Id.* at 49 (citing *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review*, 77 FR 58512, 58515 (September 21, 2012)).

<sup>223</sup> *Id.* at 74 (citing 19 CFR 351.505(a)(3)(iii)).

Commission report provided by the U.K. states that Bombardier’s “credit rating remains the lowest among its peers.”<sup>224</sup> The Department has conducted such a comparison in other cases when conducting its creditworthiness analysis.<sup>225</sup>

- The Department should continue to use Canadian default data to determine the applicable uncreditworthy rates. Bombardier’s argument ignores the reasoning found in the *CVD Preamble* to use U.S. default data—primarily, that such data may be difficult to locate and lacking in comprehensive detail.<sup>226</sup> The GOC has provided information on Canadian default rates that is detailed, comprehensive, and from Moody’s (*i.e.*, the same source the Department typically uses for U.S. default rates).<sup>227</sup>
- The Department did not self-identify the default rate on investment grade bonds; rather it simply utilized the information from page 8 of the Moody’s publication submitted by the GOC. Further, there is ample support for the conclusion that the Canadian default rates “differ significantly” from both the U.S. and global default rates.<sup>228</sup> The record establishes that Canadian Caa-C rated bonds are far more likely to default than U.S. Caa-C rated bonds. Thus, in addition to the fact that the Canadian default data provided by the GOC are detailed and comprehensive, the data also establish that the Canadian default experience differs significantly from that in the United States.
- The Department appropriately used the Canadian 5-year default data, and should continue to do-so for the final for all loans or benefit allocations with periods of five or more years. The Department’s practice, when the term of the loan or benefit allocation period exceeds the term of the default data, is to use the final year of the available benchmark.<sup>229</sup> In this case, the final year of the Canadian default data provided by the GOC is year five.

#### *Bombardier’s Rebuttal Brief*

- The Department overstated the benchmark for its uncreditworthy interest rate calculations because it used default rates with a 5-year horizon rather than default rates with a period closer to the maturity of the loans being investigated, *i.e.*, the repayable advances. Based upon the maturity ranges for the repayable advances, the correct benchmark would be based on the 15-year data available from Standard & Poor’s rather than the 5-year Moody’s data used in the preliminary calculations.<sup>230</sup> The calculations presented at Attachment 1 to the

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<sup>224</sup> *Id.* at 75 (citing EC State Aid Report at paragraph 126).

<sup>225</sup> *Id.* at 75 (citing *Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment with the Final Antidumping Duty Determinations: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 FR 20251, 20254 (April 20, 2001)).

<sup>226</sup> *Id.* at 76 (citing *CVD Preamble*, 63 FR at 65365).

<sup>227</sup> *Id.* at 76 (citing GOC August 25, 2017 NFI at Exhibit 2).

<sup>228</sup> *Id.* at 77-78 (citing GOC August 25, 2017 NFI at Exhibit 2 and Bombardier Verification Report at Verification Exhibit 6; Moody’s shows that Canadian Caa-C bonds are 71.57 times more likely to experience a default than investment-grade Canadian bonds; whereas globally, Caa-C bonds are only 44.73 times as likely to experience a default when compared with global investment-grade rated bonds; likewise for U.S. default rates, based upon information submitted by Bombardier, Caa-C bonds are only 43.85 times more likely to experience default than investment-grade U.S. bonds.).

<sup>229</sup> *Id.* at 79 (citing *Circular Welded Carbon Quality Steel Line Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 70961 (November 21, 2008) (*CWP from the PRC*), and accompanying IDM at 10).

<sup>230</sup> See U.K.’s Case Brief at 57 (citing *SSSSC from France*, 64 FR at 30778, and *CTL Plate from Belgium*, 64 FR at 12985).

petitioner's case brief support Bombardier's argument to use the 15-year data available from Standard & Poor's because they rely on periods that much more closely correspond to the maturity of the repayable advances. The petitioner's own calculations confirm the degree to which the Department's rates in the *Preliminary Determination* were overstated.<sup>231</sup> By basing its calculation on a longer period, the petitioner has recognized that any calculation of uncreditworthy interest rates must properly reflect the maturity of the repayable advances in question.

- While the petitioner's calculations correctly reflect the maturities of the repayable advances in question, they incorrectly apply the longer maturities to the same 5-year Canadian default rates used by the Department. In order for the petitioner's calculation to accurately reflect whether Bombardier received a benefit, the Department should use the available default rates with the maturities closest to the repayable advances in question, *i.e.*, the 15-year Standard & Poor's U.S. cumulative default rates and the default rates for Bombardier's actual credit rating during the relevant periods (*i.e.*, BB) as opposed to the CCC/C rates.

### **Department's Position:**

As discussed in Comment 7, above, we continue to find the C Series project uncreditworthy. Thus, in the final determination, we continue to calculate uncreditworthy benchmark discount rates for Bombardier during the relevant time periods, in accordance with the formula provided in 19 CFR 351.505(a)(3)(iii).

Further, we continue to treat the GOC, GOQ, and U.K. launch aid as contingent liability interest-free loans in accordance with 19 CFR 351.505(d)(1). Section 351.505(d)(1) states that:

In the case of an interest-free loan, for which the repayment obligation is contingent upon the company taking some future action or achieving some goal in fulfillment of the loan's requirements, the Secretary normally will treat any balance on the loan outstanding during a year as an interest-free, short-term loan in accordance with paragraphs (a), (b), and (c)(1) of this section. However, if the event upon which repayment of the loan depends will occur at a point in time more than one year after the receipt of the contingent liability loan, the Secretary will use a long-term interest rate as the benchmark in accordance with paragraphs (a), (b), and (c)(2) of this section.<sup>232</sup>

The launch aid which the GOC, GOQ, and U.K. provided to Bombardier and Shorts was given as loans, structured in the form of royalties to be repaid per aircraft delivered. Bombardier did not

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<sup>231</sup> See Bombardier's Rebuttal Brief at 17 (citing Petitioner's Case Brief at Attachment 1; As seen in its calculations for the GOC launch aid, the petitioner calculates an uncreditworthy interest rate using the same March 25, 2009, creditworthy rate (5.46 percent), the same investment grade default rate (0.70 percent) and the same Caa-C default rate (50.10 percent) as in the Department's calculations at Attachment 7b of the Department's Preliminary Calculations Memorandum. However, the uncreditworthy interest rates that the petitioner calculates for each of the repayable advances is far lower than the 21.02 percent calculated by the Department. This is because the petitioner uses a term in years that corresponds to the maturity of the repayable advances in question. The petitioner makes similar calculations for the GOQ launch aid and the U.K. RLI).

<sup>232</sup> See 19 CFR 351.505(d)(1).

begin delivering aircraft until 2016, during the POI, and made no repayments of the launch aid until after the POI. Thus, during the POI, Bombardier's and Shorts' repayment obligations were "contingent upon the company taking some future action or achieving some goal in fulfillment of the loan's requirements."<sup>233</sup> Therefore, during the POI, the launch aid met the definition of contingent liability interest-free loans for which Bombardier and Shorts benefited by owing money but for which they did not, in fact, repay any principal or interest during the POI. We disagree with Bombardier's argument that, just because the launch aid may have been accruing a hypothetical amount of interest, that we should somehow deduct that as part of our launch aid calculations. To the contrary, because Bombardier and Shorts did not pay any interest during the POI, we did not attempt to compare any interest that may be accruing on the launch aid to the uncreditworthy benchmark interest rate calculated in accordance with 19 CFR 351.505(a)(3)(iii).

Moreover, we find the arguments regarding the benchmarks used in other cases and other possible benchmark rates to use in this case to be moot,<sup>234</sup> because, as explained in Comment 7, above, we have found the C Series project to be uncreditworthy. Therefore, in accordance with the Department's regulations, we calculate an uncreditworthy benchmark interest rate using the formula provided in 19 CFR 351.505(a)(3)(iii):<sup>235</sup>

(iii) Exception for uncreditworthy companies. If the Secretary finds that a firm that received a government-provided long-term loan was uncreditworthy, as defined in paragraph (a)(4) of this section, the Secretary normally will calculate the interest rate to be used in making the comparison called for by paragraph (a)(1) of this section according to the following formula:

$$i_b = [(1 - q_n)(1 i_f)^n / (1 - p_n)]^{1/n} - 1,$$

where:

$n$  = the term of the loan;

$i_b$  = the benchmark interest rate for uncreditworthy companies;

$i_f$  = the long-term interest rate that would be paid by a creditworthy company;

$p_n$  = the probability of default by an uncreditworthy company within  $n$  years; and

$q_n$  = the probability of default by a creditworthy company within  $n$  years.

"Default" means any missed or delayed payment of interest and/or principal, bankruptcy, receivership, or distressed exchange. For values of  $p_n$ , the Secretary will normally rely on the average cumulative default rates reported for the Caa to C-rated category of companies in Moody's study of historical default rates of corporate bond issuers. For values of  $q_n$ , the Secretary will normally rely on the average cumulative default rates reported for the Aaa to Baa-rated categories of

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<sup>233</sup> *Id.*

<sup>234</sup> The U.K. cites to *SSSSC from France* at 64 FR 30778 and *CTL Plate from Belgium* at 64 FR 12982, 12985. Neither case is applicable here because in the instant case, we have found the C Series program to be uncreditworthy, and therefore we have calculated an uncreditworthy benchmark, as directed by our regulations.

<sup>235</sup> See Final Calculation Memorandum at Attachments 7b, 7c, 7d, and 7e.

companies in Moody's study of historical default rates of corporate bond issuers.<sup>236</sup>

Bombardier argues, on several points, that the Department did not correctly calculate the benchmark uncreditworthy interest rates. First, Bombardier claims that the Department should have used the default information pertaining to the United States, not Canada or the U.K.<sup>237</sup> Bombardier's argument ignores the reasoning found in the *CVD Preamble* to use U.S. default data, which is primarily because such data may be difficult to locate and lacking in comprehensive detail.<sup>238</sup> In this case, the GOC provided information on Canadian default rates that is detailed, comprehensive (*i.e.*, with an explanation of methodology, relevant context, and comparisons), and from Moody's, which is the same source the Department typically uses for U.S. default rates.<sup>239</sup> Thus, the Department relied on information that is more specific to Canada and Canadian companies from the same reliable source mentioned in the *CVD Preamble* and in the regulations—Moody's.<sup>240</sup> Second, rather than rely on detailed Moody's data, Bombardier asserts that the Department should rely on unsubstantiated data it provided at verification in summary form from Standard & Poor's.<sup>241</sup> Bombardier argues that the 15-year time period of the Standard & Poor's data better matches the time periods of the launch aid. However, the Standard & Poor's data are only in summary form, not the original publication, and do not include any supporting information. Moreover, the Department's preferred source for default data is Moody's, not Standard & Poor's. In any event, when the term of the loan or benefit allocation period exceeds the term of the default data, the Department's practice is to use the final year of the available benchmark.<sup>242</sup> In this case, the final year of the Moody's Canadian default data is year-five and we have continued to use this year-five data in the uncreditworthy interest rate calculation for the final determination.<sup>243</sup> Third, Bombardier suggests that the Department should determine the benchmark interest rate based on its actual

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<sup>236</sup> See 19 CFR 351.505(a)(3)(iii).

<sup>237</sup> We note that the Department only used Canadian, not U.K., default rates, in the *Preliminary Determination*; therefore, Bombardier's reference to U.K. default information is misplaced. While the Department did use British pound-denominated bond rates and long-term loan rates for the RLI and INI SFA grant uncreditworthiness calculations, respectively, no party made arguments regarding these rates or calculations. Therefore, we have not revised them for purposes of the final determination.

<sup>238</sup> See *CVD Preamble*, 63 FR at 65365.

<sup>239</sup> See GOC's Letter "Government of Canada's Submission of Factual Information 100-to-150 Seat Large Civil Aircraft from Canada (C-122-860)," dated August 25, 2017 (GOC NFI Submission) at Exhibit 2.

<sup>240</sup> Additionally, we note that 19 CFR 351.505(a)(3)(iii) does not specify that the default data be U.S. data, only that Moody's is the preferred source; the GOC itself put Canadian Moody's data on the record. Further, based on the record evidence, it appears that the likelihood of default for Caa-C rated bonds in Canada is higher than in the U.S. See Petitioner's Rebuttal Brief at 77-78, citing GOC August 25, 2017 NFI at Exhibit 2 and Bombardier Verification Report at Verification Exhibit 6.

<sup>241</sup> See Bombardier Verification Report at Verification Exhibit 6, at slide titled "Financial Health Assessment: Default Probabilities."

<sup>242</sup> See, *e.g.*, *CWP from the PRC*, and accompanying IDM at 10.

<sup>243</sup> As an initial matter, we note that the launch aid contributions are not typical loans and do not have a fixed repayment term; thus, using the fifth year of data is not unreasonable as the last year when calculating an uncreditworthy benchmark interest rate, as prescribed in 19 CFR 351.505(a)(3)(iii). Further, due to data limitations, we are not able to use a longer period due to limitations imposed by the available record evidence. However, we note that, if the data were available over, for example, a 20-year period, the likelihood of the result being significantly different is minimal because, as the number of years increases, the probability that a Caa-C rated company will default also increases, essentially mitigating the use of a longer period in the calculations.

credit rating (*i.e.*, BB), rather than using the interest rate calculated as a result of the Department's uncreditworthiness determination (*i.e.*, based on a Caa/C- credit rating). However, Bombardier's credit rating is inapposite because we found the C Series program to be uncreditworthy. 19 CFR 351.505(a)(3)(iii) directs that we use the "average cumulative default rates reported for the Caa to C-rated category of companies." Thus, we have continued to rely on the credit ratings determined for the C Series program as a result of our uncreditworthiness determination.

Furthermore, as we explained above at Comment 7, the mere fact that Bombardier had other commercial bonds does not demonstrate the creditworthiness of the C Series program. Repayment of the launch aid was tied solely to sales of the C Series, while Bombardier's bonds were issued with the backing of its entire corporate operations. Therefore, Bombardier's bonds are not an appropriate benchmark for the launch aid.

Bombardier also states that it was unable to replicate corporate bond data at Attachment 7c of the Preliminary Calculation Memorandum and that the default rates for investment grade bonds at Attachments 7c and 7d lack support. As noted on Attachment 7c, we used as the source of the corporate bond data at Attachment 7c information from the U.S. Federal Reserve for Moody's AAA rated bonds from the Bank of Canada. Bombardier does not point to another source of data on the record or to any record evidence that discredits these bond rates. Further, the source of the average cumulative default rates for investment grade bonds and for Caa-C bonds, found at Attachments 7b, 7c, 7d, and 7e of the Preliminary Calculation Memorandum, is Exhibit 2 of the GOC's August 25, 2017, factual information submission, at page 8 of the May 2014 report by Moody's Investors Service titled "Default and Recovery Rates of Canadian Corporate Issuers, 1989-2013."<sup>244</sup> Further, we disagree with Bombardier that there were errors in the calculation or that Bombardier's own risk premium is a more accurate measure of the risk level of the C Series program. Because we have found the C Series program to be uncreditworthy, we followed the guidance in 19 CFR 351.505(a)(3)(iii); thus, using Bombardier's own borrowing rate for corporate bonds not tied to the C Series would be counter to the Department's regulations.

Finally, we disagree with the U.K.'s contention that, because the rate of return for the RLI was set using commercial principles, it would be inappropriate to apply a higher benchmark interest rate. The U.K. is a government, not a market investor. The U.K. was concerned with developing Shorts as "a centre of excellence" and maintaining manufacturing jobs in Northern Ireland;<sup>245</sup> these are inherently governmental concerns. Unlike government investors, market investors are typically concerned with making a monetary return on their investment and do not put strictures on where a business can operate or employment levels.<sup>246</sup> That "Bombardier's cost of debt was well below the interest rate for the RLI provided to Shorts,"<sup>247</sup> only shows how desperate Bombardier/Shorts were for additional financing for the C Series project. Further, we note that, in the case of a company being uncreditworthy, 19 CFR 351.505(a)(3)(iii) provides the formula

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<sup>244</sup> See GOC's Letter "Government of Canada's Submission of Factual Information 100-to-150 Seat Large Civil Aircraft from Canada (C-122-860)," dated August 25, 2017 (GOC's NFI Submission) at Exhibit 2.

<sup>245</sup> See, e.g., EC State Aid Report at paragraphs 150, 151, and 166.

<sup>246</sup> See, e.g., U.K. Verification Report at 3 ("under the RLI program, the applicant must ... demonstrate that there will be a return on investment to the U.K. and wider benefits to the U.K. in general (*e.g.*, employment, centers of excellence, and overall economic impact)").

<sup>247</sup> See U.K.'s Case Brief at 57.



to use for calculating the uncreditworthy rate, and the Department does not rely upon other potential benchmark data.

### **Comment 13: Whether to Adjust the Benefit Streams for the Launch Aid Bombardier Received from the U.K., GOC, and GOQ**

#### *Petitioner's Case Brief*

- For the final determination, the Department should adjust the benefit stream of its launch aid benefit calculations to account for the time between when disbursements were received and when repayment begins. Unlike traditional financing, launch aid is provided years in advance for development of an entirely new product. Also unlike standard commercial loans with fixed principal and interest payments, launch aid repayments do not have fixed principal and interest repayment requirements. Thus, based upon language in the *CVD Preamble*, the Department should adjust the benefit streams so that they begin when commercial production begins.<sup>248</sup>
- The record establishes that the C Series launch aid is the precise type of development subsidy that the *CVD Preamble* envisioned as an exception under 19 CFR 351.524(d)(2)(iv). First, the C Series development required extensive research and development; total R&D costs were US\$5.4 billion. Second, the record establishes that these funds were spent prior to implementation of commercial production; Bombardier wrote off US\$3.2 billion in 2015, before the first commercial C Series rolled off the final assembly line. If the Department agrees that the countervailable benefit commences with the first commercial production, then it must adjust its benchmark loan calculation to capture the substantial subsidies associated with the time value of money received.
- Consistent with 19 CFR 351.505(d), the Department should calculate the benefit from the contingent launch aid as an interest-free loan based upon the entire principal amount, plus compounded interest. Absent this adjustment, the Department will not capture the full extent of the launch aid subsidies that Bombardier has received from the GOC, the GOQ, and the U.K.

#### *Bombardier's Rebuttal Brief*

- The petitioner's proposed benefit calculation lacks any basis in law, fact, or the Department's practice. Pursuant to 19 CFR 351.505(d)(1), the regulatory provision under which the Department is countervailing the repayable advances, a loan benefit is calculated based on the outstanding loan balance, which is created at the time the loan is received. Nothing in 19 CFR 351.505(d)(1) or any other provision of the Department's loan regulations provides that loan benefits should be calculated based on when the proceeds of the loan result in the commencement of production. Furthermore, the petitioner has not explained how its methodology is consistent with the "cap" set forth in 19 CFR 351.505(d)(1).
- There is no basis in the Department's regulations or the *CVD Preamble* to move the benefit stream for loans; the discussion in the *CVD Preamble* to which the petitioner cites only relates to grants. In any event, the record demonstrates that the launch aid was received after Bombardier and Shorts had already incurred the expenses. Further, the petitioner has

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<sup>248</sup> See Petitioner's Case Brief at 40-41 (citing *CVD Preamble*, 63 FR at 65396-97).

not cited any case in which the Department adjusted the benefit stream to begin at the time of the commencement of production for a grant calculation, let alone a loan calculation. Moreover, the Department has relied on its standard loan methodology in similar large capital cases and did not deviate from its standard methodology to move the benefit stream to when production commenced.<sup>249</sup>

- In any event, if the Department rejects the petitioner's argument to move the benefit stream to when production commences, then it does not need to consider the petitioner's argument regarding a compounding element. Nonetheless, the discussion in the *CVD Preamble* does not suggest that the calculation include a compounding element; to apply a compounding element as the petitioner suggests would elongate the benefit stream to countervail much more than the benefit conferred by the subsidy.<sup>250</sup>
- The RLI was provided to a separate company, Shorts, by a different government; the terms of the agreement were independently negotiated and, as such, it is not reasonable to apply the terms of the U.K. RLI to the GOC and GOQ agreements. Further, the Department should not add a compounding element to the U.K. RLI because the U.K. agreement already includes one and, thus, the petitioner's suggested adjustment would be gratuitous.
- Commercial lending agreements take many forms, based on a variety of variables and may or may not include a compounding element. Regardless, the launch aid agreements have their own terms and should not be revised to include a new one based on the petitioner's concept of commercial lending practices, as interest, in the form of royalties, is already included in the repayment terms. Moreover, the repayment terms of the launch aid agreements already reflect the governments' understanding of the time value of money.

#### *GOC's Rebuttal Brief*

- The Department should reject the petitioner's arguments regarding the timing of benefit streams for repayable contributions. The issue presented is not novel and the concerns raised by the petitioner are, in fact, addressed in the Department's regulations at 19 CFR 351.505.
- As the petitioner concedes, the commentary from the *CVD Preamble* and 19 CFR 351.524(d)(2)(iv) are addressed to grants, not repayable contributions. Repayable contributions fall under the Department's loan methodologies that measure benefits based on the difference between the cost of the financing paid by the respondent and its market cost; this benefit is allocated (or expensed) on an annual basis. Similarly, the Department has a specific rule on contingent liability interest free financing, which it has applied to the repayable contributions.<sup>251</sup> The Department's methodology addresses the petitioner's concerns regarding allocation of the benefit during periods of production and sale of the product under investigation; indeed, the Department will continue to allocate the benefit at

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<sup>249</sup> *Id.* at 22 (citing *Utility Scale Wind Towers from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 77 FR 33422, 33431-32 (June 6, 2012), unchanged in *Utility Scale Wind Towers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012) (*Wind Towers from PRC*), and accompanying IDM; and *Certain Carbon Steel Products from Mexico: Preliminary Affirmative Countervailing Duty Determinations*, 49 FR 5148, 5150 (February 10, 1984) (*Carbon Steel Products from Mexico Prelim*)).

<sup>250</sup> *Id.* at 23 (citing *CVD Preamble*, 63 FR at 65396-397).

<sup>251</sup> See GOC's Rebuttal Brief at 3 (citing 19 CFR 351.505(d)).

levels which will be shaped by the level of production and deliveries, given the terms of the repayable contributions.

- Additionally, the rate of return will depend on the number of aircraft deliveries; the financing does not have an annual interest component. The Department's methodology countervails this annual interest free aspect of the financing and expenses the measured benefit each year.
- Further, commercial lending takes place on many bases, with terms shaped by any number of variables. There is no fixed rule on the treatment of interest, and the petitioner has identified none. In effect, the petitioner wants the repayable contributions to be treated as both a grant and a loan, with simultaneous benefit streams, as if more than one transaction has taken place. However, only if the principal were to be forgiven at some future date would the Department need to address the issue of a grant.
- Also, the petitioner has failed to explain how its methodology (*i.e.*, adjusting the benefit stream) is consistent with the "cap" found at 19 CFR 351.505(d)(1). Similarly, the petitioner fails to consider that the Department's methodology is producing a benefit in excess of the benefit that would have been measured if the repayable contributions were treated as grants under a methodology that takes into account compounding time value of funds, which is contrary to the Department's practice.<sup>252</sup>
- Finally, the petitioner neglects an important aspect of the repayable contributions. Under the terms of the launch aid, Bombardier will continue to make payments upon each incremental delivery of aircraft even after the principal is repaid. This distinguishes repayable contributions from a simple grant scenario. Unlike a grant that is extinguished in a finite allocation period set at the time the grant is bestowed, repayable contributions represent an obligation that could far exceed the 10-year average useful life (AUL).

#### *U.K.'s Rebuttal Brief*

- The petitioner erroneously cites to the *CVD Preamble* to justify adjusting the benefit stream allocation for launch. The portion cited by the petitioner pertains to 19 CFR 351.524(d)(2)(iv), which governs benefits provided by grants, and does not apply to loans. The petitioner does not argue that the Department erred in determining that the U.K. RLI is a loan, rather than a grant. Thus, the calculation and allocation of benefits provided by loans is governed by section 19 CFR 351.505.
- The U.K. RLI should be covered by section 351.505(c), the only other provision dealing with the allocation of loan benefits. None of these long-term loan provisions provide for: 1) the shifting of the benefit stream to the date of the first sale; or 2) the addition of a compounding interest factor.
- Further, during the rule making process, the Department rejected suggestions to add an additional amount to reflect the present value of the benefit from a deferred loan, instead opting to match the allocation period with the life of the government-provided loan as a more predictable and transparent approach.<sup>253</sup> Thus, if the Department had intended the analysis in the *CVD Preamble* to apply not just to grants, but also to loans, it would have adopted an exception similar to 19 CFR 351.524(d)(2)(iv).

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<sup>252</sup> *Id.* at 4-5 (citing *Cold-Rolled Steel from Argentina*, 49 FR at 18016-020).

<sup>253</sup> See U.K.'s Rebuttal Brief at 5 (citing *CVD Preamble*, 63 FR at 65369).

- The petitioner has also failed to acknowledge the limitation of the Department’s loan regulations, which state that the present value of the benefits calculated may not exceed the principal of the loan.
- Even if the Department applies a grant methodology to the RLI loan, neither the legal authority cited by the petitioner nor record evidence supports the application of compounding interest in the manner the petitioner suggests.

### **Department’s Position:**

We disagree with the petitioner that we should adjust the launch aid benefit streams so that they begin at the time of the commercial production of the C Series, rather than when Bombardier received the launch aid. To support its proposed change to the launch aid benefit streams, the petitioner cites the *CVD Preamble* and the discussion therein of 19 CFR 351.524(d)(2)(iv).<sup>254</sup> However, the exception to the Department’s normal methodology for determining the benefit stream discussed in the *CVD Preamble* relates to the treatment of non-recurring benefits, not loans or royalty arrangements like the launch aid. We are treating the launch aid as interest-free contingent liabilities; thus, these are recurring benefits under 19 CFR 351.524(a) and (c). The petitioner cites no cases in which the Department has altered the benefit stream in the manner it proposes, either in situations when the subsidy at issue conferred a non-recurring benefit (consistent with the exception provided in the *CVD Preamble*) or a loan. In any event, in situations similar to those described in the *CVD Preamble* (i.e., “subsidies to develop certain new technologies, or to fund extraordinarily large development projects that require extensive research and development”) the Department’s practice has been to use its standard loan calculation methodology, and not to move the benefit stream to when production commenced.<sup>255</sup>

We also disagree that it would be appropriate to add compound interest to the GOC and GOQ launch aid benefit calculations, as the petitioner proposes. In general, the Department’s practice in calculating the benefit for interest-free contingent liabilities is to expense the benefit in the year of receipt at the time of the waiver of the interest (i.e., as a recurring benefit);<sup>256</sup> therefore, we would not accrue the interest in the manner suggested by the petitioner because the benefit is being expensed every year as it is received. Further, regarding the GOC and GOQ launch aid, these contingent liabilities are not accruing interest, but only require fixed royalty repayment amounts per aircraft sold.<sup>257</sup> Therefore, the outstanding balance Bombardier owes for the GOC and GOQ launch aid is not increasing. Consequently, were we to add compound interest to the GOC and GOQ launch aid, we would be artificially constructing an outstanding balance with a

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<sup>254</sup> See *CVD Preamble*, 63 FR at 65396-97.

<sup>255</sup> See, e.g., *Utility Scale Wind Towers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012).

<sup>256</sup> See, e.g., *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 76 FR 3613 (January 20, 2011), and accompanying IDM at items A and B.

<sup>257</sup> See Bombardier Verification Report at 18-19 (“for the GOC launch aid, the repayable contribution is a fixed royalty amount that is not dependent on when Bombardier received the reimbursements under the launch aid agreement or when Bombardier begins to make repayment” and “the terms of the repayable contribution ... were the same for the GOQ launch aid as for the GOC”).

hypothetical accrued amount of interest which Bombardier does not owe, thereby inappropriately inflating the benefit.

Finally, regarding the U.K. launch aid, we note that it is structured differently from the GOC and GOQ launch aid in that it is accruing interest as time passes.<sup>258</sup> Therefore, for the final determination, we revised our benefit calculations to include this accrued interest by using the actual amount of the outstanding U.K. launch aid balance at the end of the POI, rather than the total of the amounts disbursed, which were exclusive of the compounding interest assessed as part of the RLI.<sup>259</sup> Such treatment of the U.K. launch aid is consistent with our calculations for the GOC and GOQ launch aid, where we are using the actual outstanding balances to calculate the benefit under 19 CFR 351.505(d), as interest-free contingent liabilities.<sup>260</sup>

## **Land for LTAR**

### **Comment 14: The Appropriate Benchmark for the Land Provided at Mirabel for LTAR**

#### *Bombardier's and the GOC's Case Briefs*

- In the *Preliminary Determination*, the Department used as its land benchmark the average price of land at certain airports in the United States in 2013, 2015, and 2017 to calculate the benefit conferred by the provision of land by the GOC. The record of this investigation now contains benchmark information that demonstrates that Bombardier received no benefit from this land and the Department should use this information in its calculations for the Final Determination.<sup>261</sup>
- However, should the Department continue to use the U.S. benchmark data from the *Preliminary Determination*, the Department should correct certain mistaken conclusions that the petitioner drew in its benchmark submission related to: 1) the distinction between commercial and general aviation airports; and 2) the lower land price associated with a remote location and a large land parcel.<sup>262</sup> For these reasons, if the Department continues to rely on the petitioner's submission, it should use a benchmark rate based on the average rental rate of rural general aviation airports discounted by 36 percent to reflect the large size of Bombardier's land parcel.<sup>263</sup>

#### *The GOC's Case Brief*

- As part of its initial sublease with Bombardier, ADM obtained three land valuation studies from a third-party expert which establish that ADM subleased land to

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<sup>258</sup> See U.K. July 25, 2017 IQR at RLI-2 ("RLI is usually structured such that the principal amount is repaid with interest") and Shorts Verification Report at 8 ("interest keeps accruing until repayment and Shorts' repayment amounts are based on the amount of time between disbursement and repayment").

<sup>259</sup> See Final Calculation Memorandum at Attachment 6 and U.K. Verification Report at 8.

<sup>260</sup> See Final Calculation Memorandum at Attachments 4 and 5.

<sup>261</sup> See GOC's Letter, "Government of Canada's Submission of Additional Factual Information 100-to-150 Seat Large Civil Aircraft from Canada (C-122-860)," dated September 29, 2017 (GOC's Benchmark Submission).

<sup>262</sup> See GOC's Case Brief at 26-31 (citing the Petitioner's September 6 submission, at Exhibit 4); *see also* GOC's Case Brief at 68.

<sup>263</sup> See GOC's Case Brief at 36.

Bombardier at fair market value.<sup>264</sup> The Department should use these land studies as the benchmark for the final determination as they reflect the actual market value of the land Bombardier subleased.<sup>265</sup>

- ADM used these valuation studies to establish the fair market rental value of the land.<sup>266</sup> The petitioner's own land benchmark submission demonstrates that this approach was used by the Metropolitan Airport Commission in Minneapolis, Minnesota to establish market rental rates on long-term ground leases.<sup>267</sup>
- The land rental rate ADM negotiated with Bombardier was above the fair market value of the land in question as it was negotiated based on the first land evaluation it obtained, while the second land valuation it obtained lowered the estimated value of the property.
- Regarding the benchmark data the GOC provided regarding the sale of land in Mirabel by non-governmental entities, the data show that the per-unit price of land goes down as the amount of land being sold increases, and that therefore, the price of small parcels of land cannot be used as a reasonable benchmark for larger bulk sales of land.<sup>268</sup> These private commercial transactions are a reasonable alternative benchmark to the land studies, discussed above.
- Further, using the most appropriate U.S. benchmark, the 2016 sale of Willow Run Airport also shows the absence of a benefit to Bombardier from this land. The Willow Run Airport is an appropriate benchmark because it is: 1) a general aviation airport with no passenger traffic; 2) in a rural area close to a major city; and 3) involved a large parcel of land. Should the Department choose to use a tier three benchmark in the final determination, the Willow Run Airport is the most appropriate such benchmark on the record.
- Finally, if the Department continues to use the petitioner's tier three benchmark, the Department adjust this benchmark to reflect the Mirabel's location and the large amount of land Bombardier leased.

#### *Petitioner's Rebuttal Brief*

- The Department should continue to use the benchmark data from the *Preliminary Determination*.
- The Department cannot rely on the land lease fees charged by ADM as the benchmark under 19 CFR 351.511(a)(2).
- The GOC's alternative benchmark, the sale of Willow Run Airport, is inappropriate for two reasons: 1) it is a sale price, not a lease price for land near an airport; and 2) Willow Run Airport is not comparable to Mirabel Airport because it is a former General Motors plant that was purchased by a non-profit organization which was partially funded by the Government of Michigan.

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<sup>264</sup> See GOC's Brief at 25-26.

<sup>265</sup> *Id.* at 28.

<sup>266</sup> *Id.* at 27.

<sup>267</sup> *Id.* at 27 (citing the Petitioner's September 6, 2017 Submission, Exhibit 4).

<sup>268</sup> See GOC's Case Brief at 29.

## Department's Position:

To determine whether Bombardier received a benefit from the land it leased from ADM, we evaluated the potential benchmarks on the record of this investigation, in accordance with 19 CFR 351.511(a)(2) and section 771(5)(E)(iv) of the Act. First, we examined whether there are market-determined prices from actual transactions (referred to as tier-one prices in the LTAR regulation) within the country under investigation.<sup>269</sup> In the *Preliminary Determination*, we noted that no party had submitted benchmarks for leases of privately-owned land in Canada, or evidence of competitively-run government auctions; the only benchmark information the GOC had submitted was for leases in Canada governed by ADM. However, subsequent to the *Preliminary Determination*, we requested additional benchmark information and the GOC timely provided data regarding actual private land transactions in the city of Mirabel.<sup>270</sup> After evaluating this information, we determine that it constitutes an appropriate tier-one benchmark pursuant to 19 CFR 351.511(a)(2)(i). While these transactions are not for “airport” land, we find that they are comparable because Mirabel airport is not a commercial airport; rather, it is an airstrip, without a terminal, located in a rural area and is, therefore, similar to other land in Mirabel.

Because the Department now has appropriate tier-one information on the record, we are no longer relying on the tier-three benchmark information used in the *Preliminary Determination* (*i.e.*, U.S. commercial airport rental rates).<sup>271</sup> Additionally, while the GOC provided additional information related to Canadian land prices (*i.e.*, land surveys of the Bombardier land parcels at Mirabel airport and government land transactions in Mirabel), this information does not constitute “prices stemming from actual transactions between private parties” such that we may consider either price to be an appropriate market-determined tier-one benchmark pursuant to 19 CFR 351.511(a)(2)(i).

We used the benchmark information provided by the GOC regarding private land transactions in Mirabel to derive a rental rate using the formula provided by ADM, which it uses to calculate rental rates in the ordinary course of business.<sup>272</sup> Additionally, we inflated the benchmark prices to the POI using Producer Price Index data from the International Monetary Fund's International Financial Statistics.

To calculate the potential benefit, we calculated the difference between the price Bombardier paid for land in Mirabel and the Canadian benchmark described above (both converted to U.S. dollars using the Federal Reserve exchange rate for 2016). We determined that the benefit Bombardier received from this program was less than 0.005 percent *ad valorem* when attributed to Bombardier's 2016 sales of the C Series. Therefore, pursuant to 19 CFR 351.511(b) and (c),

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<sup>269</sup> See 19 CFR 351.511(a)(2)(i).

<sup>270</sup> See GOC's Letter, “Government of Canada's Submission of Additional Factual Information 100-to-150 Seat Large Civil Aircraft from Canada (C-122-860),” dated September 29, 2017 (GOC's Benchmark Submission).

<sup>271</sup> For the same reason, we did not evaluate the tier-three benchmark information the GOC placed on the record subsequent to the *Preliminary Determination*.

<sup>272</sup> See Final Calculation Memorandum; see also GOC's Benchmark Submission at Exhibit 5, GOC Verification at 9, Exhibit 5.

and our practice,<sup>273</sup> we determine that the land Bombardier leased from ADM at Mirabel provided no measurable benefit to Bombardier.

### **Comment 15: Whether ADM is an Authority**

Because we determined that the provision of land at Mirabel to Bombardier did not confer a measurable benefit, this issue is moot. Although we made a preliminary determination regarding the status of ADM as an authority and received comments on that preliminary determination, we did so because we preliminarily determined that the provision of land at Mirabel provided a measurable benefit to Bombardier. Because our final benefit determination has changed, the status of ADM is not relevant, and we have not addressed the question of whether ADM is an authority for this final determination.<sup>274</sup>

### **Other GOC and GOQ Programs**

#### **Comment 16: *Emploi-Québec* Grants: Specificity and Benefit Calculation**

##### *Bombardier and the GOQ's Case Briefs*

- In the *Preliminary Determination*, the Department found that: 1) the *Emploi-Québec Mesure de Formation de la Main d'oeuvre* (MFOR) and *Fonds de développement et de reconnaissance des compétences de la main d'oeuvre* (FDRCMO) grants are *de facto* specific under section 771(5A)(D)(iii)(III) of the Act because the aerospace products and parts industry received a disproportionate share of the benefits disbursed to the manufacturing sector; and 2) the *Emploi-Québec Projet économique d'envergure* (PÉE) grants are *de facto* specific under section 771(5A)(D)(iii)(I) of the Act because they are given to a limited number of enterprises.<sup>275</sup>
- The MFOR, FDRCMO, and PEE grants are worker training/skills development grants, and based on the Department's practice and regulations, such worker training and worker assistance are examples of recurring benefits which should not be countervailable.<sup>276</sup>
- In addition, the Department incorrectly determined that the *Emploi-Québec* grants are *de facto* specific for the following reasons:<sup>277</sup>
  - Record evidence demonstrates that the aerospace industry accounted for a small amount of assistance given under the MFOR and FDRCMO programs, and that the PEE program is not limited to an enterprise or industry.<sup>278</sup>

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<sup>273</sup> See e.g., *Coated Paper from the PRC*, and accompanying IDM at "Analysis of Programs, Programs Determined Not To Have Been Used or Not To Have Provided Benefits During the POI for GE" ("Where the countervailable subsidy rate for a program is less than 0.005 percent, the program is not included in the total CVD rate.").

<sup>274</sup> See Comment 14.

<sup>275</sup> See *Preliminary Determination*, and accompanying PDM at 26.

<sup>276</sup> See Bombardier's Case Brief at 75-76 (citing 19 CFR 351.524(c)(1)); see also GOQ Case Brief at 20 (citing *Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 FR 63535 (October 20, 2015); and *Welded Line Pipe From the Republic of Korea: Preliminary Negative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination*, 80 FR 14907 (March 20, 2015)).

<sup>277</sup> See Bombardier's Case Brief at 76.

<sup>278</sup> See GOQ's Case Brief at 20.



- The Department's specificity analysis is inconsistent with the Act because the Act requires that the Department find that an industry received a disproportionately large amount of a subsidy, not a disproportionately large amount of a subsidy within an industry.<sup>279</sup>
- The Department must find that the FDRCMO grant is not *de facto* specific because the Department never requested a standard questions appendix for the FDRCMO program and the GOQ did not provide information regarding the industries that used the program, the total amount of assistance provided, or the amount the manufacturing sector received for this program.<sup>280</sup>
- The Department did not explain how the PÉE program was specific to an enterprise or industry, but instead just stated that such grants were given to a limited number of enterprises.<sup>281</sup>

#### *Petitioner's Rebuttal Brief*

- *Emploi-Québec* grants should be treated as non-recurring benefits and the GOQ and Bombardier ignore the language of 19 CFR 352.524(c)(2), which states that the Department will examine claims that a subsidy on the recurring list should be treated as non-recurring.<sup>282</sup>
- It is also appropriate to treat *Emploi-Québec* grants as non-recurring because Bombardier: 1) required approval from the GOQ in order to receive these grants, which were limited in duration; and 2) cannot expect to receive additional subsidies under the PEE program on a yearly basis.<sup>283</sup>
- The Department properly determined that *Emploi-Québec* grants are *de facto* specific because record evidence demonstrates that either: 1) the aerospace sector received a disproportionate amount of the grants provided to the manufacturing sector; or 2) the grants are given to a limited number of enterprises.<sup>284</sup>

#### **Department's Position:**

After further examination of our preliminary determination calculations, we find that the combined benefits Bombardier received under the MFOR and FDRCMO programs are less than 0.005 percent *ad valorem* when attributed to Bombardier's POI sales. Therefore, consistent with our practice, we are not including these programs in our final subsidy rate calculations for Bombardier. As a result, the issues related to the specificity of the MFOR and FDRCMO programs are moot and we have not addressed them here.

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 21.

<sup>281</sup> *Id.* at 21-22.

<sup>282</sup> See Petitioner's Rebuttal Brief at 110.

<sup>283</sup> *Id.* at 111.

<sup>284</sup> *Id.* at 111-112 (citing *Coated Free Sheet Paper from the Republic of Korea: Notice of Final Affirmative Countervailing Duty Determination*, 80 FR 60639 (October 25, 2017), and accompanying IDM at 21; *Silicon Metal from Australia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 82 FR 37843 (August 14, 2017), and accompanying IDM at 8; and *Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (October 25, 2007), and accompanying IDM at 8).

However, we continue to treat the *Emploi-Québec* PÉE grants as non-recurring subsidies in accordance with 19 CFR 351.524(c)(1) and (2). While the Department’s regulations include an illustrative list of the programs “normally” treated as providing recurring benefits (*i.e.*, “[d]irect tax exemptions and deductions; exemptions and excessive rebates of indirect taxes or import duties; provision of goods and services for less than adequate remuneration; price support payments; discounts on electricity, water, and other utilities; freight subsidies; export promotion assistance; early retirement payments; worker assistance; worker training; wage subsidies; and upstream subsidies”), they also provide a test for determining whether a benefit is recurring. Specifically, 19 CFR 351.524(c)(2) states:

If a subsidy is not on the illustrative lists, or is not addressed elsewhere in these regulations, or if a party claims that a subsidy on the recurring list should be treated as non-recurring or a subsidy on the non-recurring list should be treated as recurring, the Secretary will consider the following criteria in determining whether the benefits from the subsidy should be considered recurring or non-recurring:

- (i) Whether the subsidy is exceptional in the sense that the recipient cannot expect to receive additional subsidies under the same program on an ongoing basis from year to year;
- (ii) Whether the subsidy required or received the government’s express authorization or approval (*i.e.*, receipt of benefits is not automatic), or
- (iii) Whether the subsidy was provided for, or tied to, the capital structure or capital assets of the firm.

Thus, consistent with the petitioner’s request,<sup>285</sup> we examined whether: 1) Bombardier expects to receive additional subsidies under this program on a yearly basis; and 2) this program required express approval from the GOQ. Record evidence demonstrates that Bombardier must apply for benefits under the PÉE grant program on a yearly basis and these applications must be approved each year by the GOQ.<sup>286</sup> Moreover, the PÉE grant was exceptional and unlikely to be received in this fashion on a yearly basis, because it supported a large one-time action.<sup>287</sup> Consequently, we determine that this program is properly treated as a non-recurring subsidy.

Furthermore, we continue to find that PÉE grants are *de facto* specific, pursuant to section 771(5A)(D)(iii) of the Act, which provides the following:

- (iii) Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:

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<sup>285</sup> See Petitioner’s Rebuttal Brief at 110.

<sup>286</sup> See Bombardier September 5, 2017 SQR at 17 (“The applicant company must build a case for the grant. The company must provide: a company description, information on the company project, a description of the training plan and resources, and the cost. The proposal is then reviewed by Emploi Quebec and can be accepted or rejected”).

<sup>287</sup> See Bombardier September 5, 2017 SQR at 18 and Exhibits 15A, 15B, 15 D.

- (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
- (II) An enterprise or industry is a predominant user of the subsidy.
- (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
- (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

In the *Preliminary Determination*, we found that, because the actual recipients of PÉE grants are limited in number on an enterprise basis, they are *de facto* specific pursuant to section 771(5A)(D)(iii)(I) of the Act. In determining *de facto* specificity, the Statement of Administrative Action (SAA) explicitly states:

The Administration intends that Commerce seek and consider information relevant to all of these factors. However, given the purpose of the specificity test as a screening mechanism, the weight accorded to particular factors will vary from case to case. For example, where the number of enterprises or industries using a subsidy is not large, the first factor alone would justify a finding of specificity, because the absurd results envisioned by *Carlisle* would not be threatened if specificity were found. On the other hand, where the number of users of a subsidy is very large, the predominant use and disproportionality factors would have to be assessed. Because the weight accorded to the individual *de facto* specificity factors is likely to differ from case to case, clause (iii) makes clear that Commerce shall find *de facto* specificity if one or more of the factors exists.<sup>288</sup>

Thus, the SAA makes clear that under the first factor in a *de facto* specificity analysis, when the number of recipients is not large, that can be a basis for specificity. In this case, we continue to find that record evidence demonstrates the number of enterprises that received the PÉE grants is small.<sup>289</sup> Consequently, we continue to find that the PÉE grants provided by the GOQ to Bombardier are *de facto* specific for purposes of the final determination.

### **Comment 17: Whether the GOQ's SR&ED Tax Credits are Countervailable**

#### *The GOQ's and Bombardier's Case Brief*

- In the *Preliminary Determination*, the Department determined that the GOQ's SR&ED tax credits are *de facto* specific, pursuant to section 771(5A)(D)(iii)(I) of the Act, because the number of recipients that received the credit, compared to the total corporate tax filers in the province of Québec, is limited in number on an enterprise basis. However, because the

<sup>288</sup> See *Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act*, H.R. Doc. No. 103-316, Vol. 1 at 931 reprinted at 1994 U.S.C.A.N. 4040, 4199 (1994) at 931.

<sup>289</sup> See GOQ's September 5, 2017 Supplemental Questionnaire Response (GOQ September 5, 2017 SQR) at 27 and Exhibits QC-SUPP1-38 through QC-SUPP1-45. For example, in the years in which Bombardier received PÉE (*i.e.*, in 2008-2009 and 2012-2013), there were only 47 projects and 21 projects, respectively, which received large funding grants under this program; in no year were more than 50 projects approved under the PÉE program.

Department's preliminary analysis did not determine whether the SR&ED tax credits are specific to an enterprise or industry, this finding is contrary to the Act. Therefore, the Department should determine that the SR&ED tax credits are neither specific nor a countervailable subsidy.

#### *The GOQ's Case Brief*

- The Department focused its specificity analysis on whether fewer than all of the corporations in Québec benefited from the SR&ED credit. This comparison is unreasonable because it assumes that all corporate tax filers applied for the SR&ED credit during the POI but only a limited number of them received the credit. However, this is a false assumption because not every corporation applies for every tax credit each year.
- Instead, the Department should focus its specificity analysis on whether the SR&ED tax credits were limited in number to an enterprise or industry when compared to the total number of companies that applied for the credit. However, the tax credit is designed to stimulate R&D and is available to all corporations, not limited to any industry.<sup>290</sup>
- Alternatively, the Department should analyze specificity by determining whether an enterprise or industry is a predominant user or receives a disproportionately large amount of the subsidy.<sup>291</sup> The aerospace industry did not account for a predominant share of accepted SR&ED tax credit allowances for the 2015-2016 fiscal year.<sup>292</sup>
- The Department's preliminary finding that the GOQ's SR&ED tax credits were *de facto* specific is not supported by the record of this case because the information the Department cited was not on the record at that time.<sup>293</sup>

#### *Petitioner's Rebuttal Brief*

- The Department's specificity finding is supported by record evidence and is consistent with the Act and the Department's practice.<sup>294</sup>
- Record evidence supports the finding that the SR&ED tax credit is *de facto* specific because the number of recipients of the tax credit is limited, on an enterprise basis.<sup>295</sup>

#### **Department's Position:**

We continue to find that the GOQ's SR&ED tax credits are *de facto* specific, under section 771(5A)(D)(iii)(I) of the Act. Section 771(5A)(D)(iii)(I) of the Act states that a subsidy is specific as a matter of fact if the actual recipients of the subsidy, whether considered

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<sup>290</sup> *Id.* at 19 (citing the GOQ Verification Report at 3, and the GOQ July 24, 2017 IQR at 112).

<sup>291</sup> *Id.* at 20 (citing sections 771 (5A)(D)(iii)(II) and (III) of the Act).

<sup>292</sup> *Id.* at 19 (citing the GOQ July 24, 2017 IQR at Exhibit QC-RQSRED-24).

<sup>293</sup> *Id.* at 17 (citing *Preliminary Determination*, and accompanying PDM at 23). The GOQ notes that did not provide this information to the Department until September 18, 2017.

<sup>294</sup> See Petitioner's Rebuttal Brief at 106 (citing to *Super Calendered Paper from Canada: Final Results of Countervailing Duty Expedited Review*, 82 FR 18896 (April 24, 2017) and accompanying IDM at Comment 28; *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination*, 81 FR. 49943 (July 29, 2016) and accompanying IDM at Comment 13; *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 64 FR 73176 (December 29, 1999)).

<sup>295</sup> *Id.* at 107-108 (citing the SAA and the GOQ's Case Brief).

on an enterprise or industry basis, are limited in number. Further, section 771(5A) of the Act states that “any reference to an enterprise or industry is a reference to a foreign enterprise or industry and includes a group of such enterprises or industries.” The SAA states that “[t]he Administration intends to apply the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy.”<sup>296</sup>

Under section 771(5A)(D)(iii)(I) of the Act, we may find a subsidy program *de facto* specific if the actual recipients of a subsidy, whether on an enterprise or industry basis, are limited in number. The SR&ED tax credits at issue in this investigation are tax incentives that are available to all types of businesses and corporations in Québec.

Thus, it is appropriate to include all corporate tax returns in our analysis of whether the SR&ED tax program is *de facto* specific. In order to determine whether these SR&ED tax credits are broadly available and widely used throughout an economy, we examined the number of recipients of the SR&ED tax credit, and compared that number to the actual number of corporate tax returns.<sup>297</sup> On this basis, we find that the actual recipients of the tax credits are limited in number, on an enterprise basis, and therefore the program is *de facto* specific.

Finally, we acknowledge that the Department erred in the *Preliminary Determination* by not citing the correct submission in which the GOQ provided the total number of corporate tax returns filed in the Province of Québec for tax year 2015. While the GOQ argues that this information was not provided prior to the *Preliminary Determination*, this is not so. In fact, the GOQ provided this information on September 25, 2017.<sup>298</sup> Therefore, we continue to rely on this information in our specificity analysis for the final determination.

## **Comment 18: Bombardier’s Federal SR&ED Tax Credit**

### *Petitioner’s Case Brief*

- At verification, Bombardier corrected its questionnaire responses by noting that in tax year 2015 it owed the GOC previously-accrued SR&ED tax credits upon the sale of certain assets. To pay this tax amount, Bombardier applied a small portion of its previously accrued SR&ED tax credits, reducing the overall value of Federal SR&ED tax credits available to the company. Therefore, the Department should determine that Bombardier benefited from this

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<sup>296</sup> See SAA at 929. The SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act...” 19 U.S.C. §1352(d).

<sup>297</sup> See GOQ July 24, 2017 IQR at Exhibits QC-RQSRED-23 and QC-RQSRED-24. See also GOQ’s letter, “Antidumping and Countervailing Investigations of 100- to 150-Seat Large Civil Aircraft from Canada: Evidence on Countervailing Duty Investigation of 100- To 150-Seat Large Civil Aircraft from Canada: Response of the Government of Québec to the Department’s May 19, 2017 Initial Questionnaire,” dated September 25, 2017 (GOQ September 25 Response) at 16. The exact number of recipients is business proprietary information and cannot be disclosed in this public document. For additional information on the SR&ED tax credit analysis, see the Final Calculation Memorandum.

<sup>298</sup> See GOQ’s September 25, 2017 Second Supplemental Questionnaire Response (GOQ September 25, 2017 SQR) at 16.

subsidy program during the POI and use C Series sales as the denominator of its benefit calculation.<sup>299</sup>

#### *Bombardier's Case Brief*

- Bombardier's use of the Federal SR&ED tax credit in 2016 is not a financial contribution under section 771(5)(D) of the Act. The GOC did not forgo any tax-related revenue from Bombardier as a result of this tax credit. Thus, this program provided no benefit to Bombardier and is not a countervailable subsidy.<sup>300</sup>
- As Bombardier explained at verification, the sale of assets for which Bombardier had accrued, but not used, Federal SR&ED credits in previous years triggered its use of this tax credit in the 2015 tax year.<sup>301</sup> Thus, Bombardier repaid a small portion of its accrued Federal SR&ED tax credits to the GOC, reducing the amount of the accrued Federal SR&ED tax credits available to the company in future years.<sup>302</sup>

#### *Petitioner's Rebuttal Brief*

- Using tax credits to offset an income tax obligation is a financial contribution that provides a benefit. The GOC allowed Bombardier to reduce its special federal income tax by granting it Federal SR&ED credits, thereby providing a financial contribution within the meaning of section 771(5)(D)(ii) of the Act.<sup>303</sup>
- Because this program meets the definition of a direct tax under 19 CFR 351.509, a benefit exists to the extent that the tax paid by the firm as a result of the program is less than the tax the firm would have paid in the absence of the program.

#### **Department's Position:**

For the final determination, we find that Bombardier's use of the Federal SR&ED tax credits to repay previously claimed tax credits does not constitute a financial contribution within the meaning of section 771(5)(D)(ii) of the Act. Section 771(5)(D)(ii) of the Act defines "financial contribution" as "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income." However, absent the Federal SR&ED tax credit program, Bombardier would neither have earned the SR&ED tax credits on certain assets, nor have had to reverse and repay these tax credits upon its sales of these assets. Thus, we find that, because there was no revenue forgone by the GOC from Bombardier during the POI, the tax accounting on this transaction does not constitute a financial contribution or benefit and we have not included it in our subsidy calculations for the final determination.

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<sup>299</sup> See the Petitioner's Case Brief at 47 (citing GOC July 24, 2017 IQR at Exhibit GOC-CSERIES-10).

<sup>300</sup> See also Bombardier's Rebuttal Brief at 25-26.

<sup>301</sup> See Bombardier's Case Brief at 72 (citing the Bombardier Verification Report at Verification Exhibit 1).

<sup>302</sup> *Id.* at 72 (citing the Bombardier Verification Report at 3).

<sup>303</sup> See Petitioner's Rebuttal Brief at 110.

## **Other U.K. Programs**

### **Comment 19: Specificity and Benefits of U.K. Tax Credits**

#### *The EU and U.K.'s Case Briefs*

- In the *Preliminary Determination*, the Department found that the R&D tax credit program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act because the number of recipients that received the U.K. R&D tax credits, compared to total corporate tax filers in the U.K., is limited in number on an enterprise basis. However, the Department's specificity finding is not supported by record evidence and these tax credits are not restricted to any particular company, industry or sector.
- In the 2015-2016 tax year, U.K. companies claimed R&D tax credits equaling 99 percent of R&D expenditures.<sup>304</sup> Thus, companies claimed R&D tax credits for virtually all R&D activities conducted in the U.K.
- The difference between the number of companies claiming R&D tax credits and those filing corporate tax returns is explained because some companies which could claim tax credits did not do so because they were not conducting R&D activities during that tax year. In prior cases with similar fact patterns, the Department has found such programs not to be *de facto* specific.<sup>305</sup>
- Most industrialized countries provide similar tax incentives for R&D, including the United States. Moreover, record evidence demonstrates that R&D tax incentives are significantly more concentrated in the United States than in the U.K.<sup>306</sup>
- The Department also erred by including service providers when analyzing the total number of tax filers. The inclusion of service providers is contrary to the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), which only applies to producers of goods.<sup>307</sup> The Department cannot assume that the same outcome would be reached had it excluded service providers from the analysis because the SCM Agreement requires that a determination of specificity be based on positive evidence.

#### *The EU's Case Brief*

- The R&D tax credit program is not *de facto* specific because not all companies in an area must benefit from a program in order for it not to be specific. The number of companies receiving this tax credit mean that it can be considered sufficiently broadly available under Article 2.1(c) of the SCM Agreement.
- The Department determined that the recipients of the R&D tax credits are limited in number on an enterprise basis. However, this is not the standard in Article 2.1(c) of the SCM Agreement, which refers to the use of a subsidy by a limited number of certain enterprises.<sup>308</sup>

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<sup>304</sup> See U.K.'s Case Brief, at 60 (citing U.K. Verification Report at 9).

<sup>305</sup> *Id.* at 61 (citing *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 FR 50410 (October 3, 2001) (*HRCs from Thailand*)), where the Department found that the recipients of a subsidy under a debt restricting program were not limited in number where there were "1,694 cases representing numerous industries identified during the POI".

<sup>306</sup> *Id.* at 61 (citing U.K. Verification Report at Verification Exhibit 10).

<sup>307</sup> *Id.* at 61-62 (citing to the U.K. Verification Report at 8).

<sup>308</sup> See European Commission's Case Brief at 3 (citing to *Panel Report, United States — Subsidies on Upland Cotton*, WT/DS267/R, DSR 2004 para. 7.1142).

### *Bombardier's Case Brief*

- In the *Preliminary Determination*, the Department found that the U.K. R&D tax credits conferred a benefit equal to the amount of Shorts' tax savings, pursuant to 19 CFR 351.509(a)(1).
- The finding is incorrect because the tax credit provisions are not specific. Furthermore, if the tax credits are specific, the Department overstated the benefits received by Shorts, based on the following:
  - Shorts did not use the total amount of tax credits that it earned in 2015 during in the POI. Further, the Department accounted for the entire amount of the tax credit as if it had been received in the POI.<sup>309</sup>
  - The Department incorrectly overstated the benefit that Shorts received during the POI by nearly three times because the amount calculated by Department was based on the amount of R&D tax credits Shorts earned during the POI, instead of the amount Shorts received in 2016.<sup>310</sup>

The petitioner did not comment on this issue.

### **Department's Position:**

We continue to find that the U.K.'s R&D tax credits are *de facto* specific, under section 771(5A)(D)(iii)(I) of the Act. Generally, section 771(5A)(D)(iii)(I) of the Act states that a subsidy is specific as a matter of fact if the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number. Further, section 771(5A) of the Act states that "any reference to an enterprise or industry is a reference to a foreign enterprise or industry and includes a group of such enterprises or industries." The SAA states that "{t}he Administration intends to apply the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy."<sup>311</sup>

Under section 771(5A)(D)(iii)(I) of the Act, we may find a subsidy program *de facto* specific if the actual recipients of a subsidy, whether on an enterprise or industry basis, are limited in number. The R&D tax credits at issue in this investigation are tax credits that are available to all types of businesses and corporations in the U.K.

Thus, it is appropriate to include all corporate tax returns in our analysis of *de facto* specificity. In order to determine whether the R&D tax credits are broadly available and widely used throughout an economy, we examined the number of recipients of the R&D tax credits, and compared that number to the actual number of corporate tax returns.<sup>312</sup> Specifically, 21,525 enterprises received the R&D tax credits for the 2015 tax year, out of 1,392,511 corporate tax filers during this period. On this basis, we find that this program benefitted only a limited

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<sup>309</sup> See Bombardier's Case Brief at 73.

<sup>310</sup> *Id.* at 74-75 (citing to the Preliminary Calculation Memorandum, at Attachment 14).

<sup>311</sup> See SAA at 929. The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act..." 19 U.S.C. §1352(d).

<sup>312</sup> See U.K. September 5, 2017 SQR at Exhibits 8 and 9.



number of users, and, therefore, it is *de facto* specific. Our *de facto* specificity analysis in this case is consistent with the approach utilized in *CRS from Korea* and *Bottom Mount Refrigerators from Korea*, where the Department compared the number of recipients that received the benefits under the programs in question to the number of companies that filed tax returns during the same period.<sup>313</sup>

Furthermore, we disagree with the U.K.'s argument that because U.K. companies claimed R&D tax credits equaling 99 percent of R&D expenditures, there is no specificity for this program. The Act instructs us to determine whether the actual recipients of the subsidy "are limited in number," and not whether those limited recipients represent all the entities eligible for the program or only some subset of all the entities eligible for the program. In other words, there is no requirement in the Act to find not only that the actual recipients of the subsidy are limited in number, but also that those actual recipients constitute a limited number out of all eligible recipients of the subsidy. In essence, the U.K. proposes finding "double" specificity.

In fact, the information above demonstrates that less than two percent of total taxpayers received this tax credit, which in turn further supports our finding that the recipients of this subsidy are limited in number. Moreover, we disagree that the Department erred in its analysis by considering not only the producers of goods, but also service providers, in the total number of U.K. tax filers, contrary to the SCM Agreement. The Act, which is consistent with the SCM Agreement, does not require that the Department exclude service providers from its specificity analysis.<sup>314</sup> Even assuming, *arguendo*, it was appropriate to make this adjustment, the number of service providers is not on the record of this investigation because even the U.K. does not segregate its tax data between producers and service providers. Finally, the U.K. tax data on the record includes service providers in both the numerator (the R&D tax claims) and in the denominator (the total number of tax returns filed) and, as result, their inclusion in our specificity analysis is not distortive.<sup>315</sup>

We disagree with the U.K. that the circumstances of this case are similar to those of *HRCs from Thailand*. As an initial matter, the program at issue in *HRCs from Thailand* was a debt restructuring program, not a tax credit program. Thus, in *HRCs from Thailand*, the Department examined the amount of debt restructuring obtained by each identified company and the industries to which these companies belonged. This differs from the specificity analysis performed in the instant investigation, where the Department compared the total number of enterprises that received the tax credit to the total number of corporate tax filers. However, because the Act does not mandate any specific methodology in conducting a *de facto* specificity analysis, the Department has discretion to apply any reasonable methodology in making a *de facto* specificity determination in light of the facts and circumstances of each particular case.<sup>316</sup> Consequently, the specific number of companies receiving debt restructuring in *HRCs from Thailand* has no bearing on the *de facto* specificity analysis performed in this investigation.

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<sup>313</sup> See *CRS from Korea*, and accompanying IDM at Comment 13; see also *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012) (*Bottom Mount Refrigerators from Korea*).

<sup>314</sup> See 771(5A)(D)(iii) of the Act.

<sup>315</sup> See U.K. Verification Exhibit 10. See also U.K.'s Case Brief at 62

<sup>316</sup> See SAA at 931.

Moreover, while the U.K. argues that most industrialized countries, including the United States, provide similar tax incentives for R&D, we are analyzing the U.K. R&D tax credit program, not that of other countries. The fact that other countries may provide benefits pursuant to similar programs is irrelevant to our analysis in this investigation.

As a result of the above analysis, we continue to determine that the R&D tax credit constitutes a countervailable subsidy to Bombardier/Shorts. However, as noted above in Comment 6, we find that the U.K. R&D tax credits which were not directly linked to the C Series do not have a direct relationship to the international consortium's production of subject merchandise; thus, these tax credits are not relevant to the calculation of Bombardier's final subsidy rate. Consequently, we are including in our subsidy calculations only the U.K. R&D tax credits which were directly linked to the C Series and attributing them to sales of the C Series. Any other R&D tax credits that Shorts received are not relevant to our analysis.

Finally, we disagree with Bombardier that we included amounts which were outside the POI and that we overstated the benefit Shorts received. The U.K. R&D tax credit program relates to income tax liabilities. The income tax is a direct tax, and treatment of tax credits for direct taxes is defined in 19 CFR 351.509(b)(1), which states:

In the case of a full or partial exemption or remission of a direct tax, the Secretary normally will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission. Normally, this date will be the date on which the firm filed its tax return.

Thus, we included in our benefit calculation the total amount of the U.K. R&D tax credits for Bombardier based upon the 2015 tax returns that it filed during the POI.

## **Comment 20: Specificity of INI, Resource Efficiency, Innovate UK, and ATI Grants**

### *The EU's Case Brief*

- In the *Preliminary Determination*, the Department found that the INI grants<sup>317</sup> are *de facto* specific under sections 771(5A)(D)(iii)(I) or 771(5A)(D)(iii)(III) of the Act because either the actual recipients on an enterprise basis are limited in number, or because Shorts received a disproportionately large amount of grant benefits when compared to other recipients. The Department also found that Innovate UK and ATI grants are *de jure* specific under section 771(5A)(D)(i) of the Act, because only the aerospace industry is eligible to receive these grants.
- Regarding the INI grants, the Department did not explain how Shorts received a disproportionate amount of the benefits and, therefore, it should not continue to find these grants *de facto* specific. In any event, the Department should take into account that Shorts is a large player in the economy of Northern Ireland and contributes a large part to the total gross domestic product (GDP) of Northern Ireland.

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<sup>317</sup> These include SFA, Skills Growth, Apprenticeships, and Resource Efficiency.

- Additionally, the fact that three sectors are not eligible for support under INI grants does not result in these grants being *de facto* specific.<sup>318</sup>

#### *The U.K.'s Case Brief*

- The INI grants (SFA and Skills Growth) are not *de facto* specific and should not be countervailable based on the following:
  - The Department provided no evidence to support the determination that Shorts received a disproportionately large amount of SFA benefits.
  - The SFA and Skills Growth support provided to Shorts was in proportion with the size and significance of the company and its number of employees.
  - The Department, when making its *de facto* specificity determination, needs to take into account the extent of diversification of economic activities in Northern Ireland.<sup>319</sup>
  - The Department must consider that the INI grants have been given to many sectors other than the transport Equipment sector, and while the European Union State aid rules prohibit INI from providing SFA grants to certain sectors, some of these sectors are absent in Northern Ireland.<sup>320</sup>
  - Shorts was not a predominant user of the Skills Growth program assistance, and the assistance given under the Skills Growth program is eligible to any company that is able to meet the criteria that INI uses when evaluating applications.<sup>321</sup>
- Regarding the Resource Efficiency grant, the number of recipients are sufficiently broad and therefore not *de facto* specific.<sup>322</sup> Moreover, in its analysis of the INI Apprenticeship and Resource Efficiency programs, the Department erred by including service providers when analyzing the total number of tax filers. The inclusion of service providers is contrary to the SCM Agreement, which only applies to producers of goods.
- The Innovate UK and ATI are not *de jure* specific because ATI grants are a subset of Innovate UK grants, which are available to all industries and sectors. Innovate UK is a government entity that provides grants through a competitive process for a wide range of goods and services.<sup>323</sup> Moreover, these grants are not *de facto* specific because Innovate UK grants are distributed across a wide range of industries. Also, the reason that the number of grant recipients is limited compared to the number of manufacturing companies in the U.K. is because the U.K. determined that its limited available funds for this program should be disbursed to the most qualified, highest-ranking candidates.<sup>324</sup>
- The Apprenticeship program does not constitute a financial contribution because the funds provided by the U.K. were payment for training services received, not a grant.

The petitioner did not comment on this issue.

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<sup>318</sup> See European Commission's Case Brief at 3.

<sup>319</sup> See U.K.'s Case Brief at 65-66 (citing *Certain Cold-Rolled Carbon Steel Flat Products from Brazil, Final Affirmative Countervailing Duty Determination*, (September 23, 2002); and *Notice of Final Negative Countervailing Duty Determination: IQF Red Raspberries from Chile*, 67 FR 35961 (May 22, 2002)).

<sup>320</sup> *Id.* at 66.

<sup>321</sup> *Id.* at 67-68.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 62-63.

<sup>324</sup> *Id.* at 63-64.

## Department's Position:

We continue to find that the INI SFA grant is *de facto* specific under section 771(5A)(D)(iii) (III) of the Act because Shorts received a disproportionately large amount of SFA benefits when compared to other recipients.<sup>325</sup>

We disagree with the European Commission's and U.K.'s arguments that the extent of economic diversification in Northern Ireland, and Shorts' alleged status as a large player in the economy of Northern Ireland which contributes a large part to the total GDP of Northern Ireland, indicate that this program is not *de facto* specific. Neither the European Commission nor the U.K. cited any support for its position. Even assuming *arguendo* that Shorts is major player in Northern Ireland's economy, this does not mean that the economy lacks economic diversification. Further, even if a company contributes to a large part of a country's GDP, this should not insulate the company from a specificity finding. As a result, we continue to find that the SFA grant program constitutes a countervailable subsidy to Bombardier/Shorts.

However, as noted above in Comment 6, we find that the remaining U.K. programs which were not directly linked to Shorts' production of the C Series (*i.e.*, Skills Growth, Apprenticeships, Resource Efficiency Grant, and Innovate UK and ATI grants) are not relevant to the calculation of Bombardier's final subsidy rate. Therefore, the issues related to the specificity of these programs are moot and we have not addressed them here.

## Scope Issues

### Comment 21: Removal of Nautical Mile Range Criterion

#### *Bombardier's Case Brief*

- Due to significant administrability and circumvention concerns, the Department should remove both the 2,900 nautical mile range and the Federal Aviation Administration (FAA) type certificate requirements in the scope. Assessing range capabilities, even for airline industry experts, is complex as it involves sophisticated mathematical formulae, assumptions regarding a series of environmental variables, and only results in range estimates, all of which are difficult for U.S. Customs and Border Protection (CBP) to administer.<sup>326</sup>
- Contrary to the claims of the petitioner, FAA type and supplemental type certificates make no mention of nautical miles, and range capabilities cannot mathematically be extrapolated from the data contained on these certificates. Therefore, FAA type and supplemental type certificates cannot be used to determine whether an imported plane from Canada meets the range requirement of the current scope.<sup>327</sup>

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<sup>325</sup> See U.K. July 25, 2017 IQR at Exhibits INI-3, INI-17, and the U.K.'s Verification Report at VE-3. The data regarding the recipients of SFA benefits are business proprietary information, and therefore, we cannot discuss them here. For additional information on the SFA grant analysis, see the Final Calculation Memorandum.

<sup>326</sup> See Bombardier's Case Brief at 77 (citing Bombardier's Letter, "Countervailing Duty Investigation of 100- To 150-Seat Large Civil Aircraft From Canada: Submission of New Scope Information," dated October 18, 2017 at Exhibit 4A (Bombardier's NSI)).

<sup>327</sup> *Id.* at 78 (citing Bombardier's NSI at Exhibit 1A).

- These concerns are not overcome by presuming that the C Series Bombardier planes are mechanically capable of flying more than 3,000 nautical miles (and, thus, subject to the scope), regardless of conditions such as headwinds or other variables. Based on the example provided in Bombardier's October 18, 2017 submission, the C Series mileage range would be inconsistent with the nautical mileage range requirement in the scope.<sup>328</sup>
- A nautical mileage range requirement is likely to encounter administrability issues because an aircraft's range can be mechanically altered. Aircraft can theoretically be taken out of scope if its range is reduced by altering thrust configurations, reducing fuel tank capacity, modifying fuel grade specifications, *etc.*<sup>329</sup>
- The C Series FAA type certificate lacks any data relevant to range. Promotional materials providing notional performance characteristics cannot serve as a basis for determining whether C Series aircraft meet the range requirement.<sup>330</sup>
- The 2,900 nautical mileage range requirement fails to serve its intended purpose (to exclude regional jets from the scope) because regional jets are not defined by nautical mile range. The existing seat requirements exclude regional jets. Therefore, there is no reason to include a nautical range requirement in the scope.<sup>331</sup>
- The FAA,<sup>332</sup> the petitioner, and Airbus,<sup>333</sup> classify aircraft based on seat configurations, not nautical miles. The Harmonized Tariff Schedule (HTS) subheadings used in the scope do not mention nautical mile range.<sup>334</sup> In proceedings before the World Trade Organization (WTO), the United States defined a large carrier using seating capacity and maximum take-off weight, not nautical mile range, to which parties to the counter-complaint agreed.<sup>335</sup>
- Removing the nautical mile range requirement would not impact the petitioner's stated intent of subjecting large carrier aircraft to this investigation, while excluding regional jets. Therefore, the range requirement can be removed without issue given the serious administrability and circumvention concerns listed above.<sup>336</sup>

#### *Petitioner's Rebuttal Brief*

- The Department should not eliminate the nautical mile range criterion from the scope. FAA type certificate No. T00008NY covers CS100 and CS300 aircraft, which possess nautical mile ranges over 3,000 nautical miles.<sup>337</sup>
- The Department addressed Bombardier's administrability concern in the preliminary scope memorandum by stating that the certificate need not reference the actual mileage range, but merely that it be a type of certificate which covers other aircraft with a 2,900 nautical mile range.<sup>338</sup>

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<sup>328</sup> *Id.* at 79 (citing Bombardier's NSI at Exhibit 4B).

<sup>329</sup> *Id.* at 82 (citing Bombardier's NSI at 9).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 84.

<sup>332</sup> *Id.* at 84 (citing Bombardier's NSI at Exhibit 2A).

<sup>333</sup> *Id.* (citing Boeing's Scope Comments at Exhibit E).

<sup>334</sup> *Id.* at 85 (citing Preliminary Scope Memorandum at 3).

<sup>335</sup> *Id.* at 87 (citing Bombardier's NSI at Exhibit 3A).

<sup>336</sup> *Id.* at 85.

<sup>337</sup> See Petitioner's Rebuttal Brief at 114 (citing Boeing 5/9/17 Scope Clarification at Exhibit Supp.-15).

<sup>338</sup> *Id.* at 115 (Citing Preliminary Scope Memorandum at 9).

- The only risk of circumvention may refer to Bombardier as it is the only Canadian manufacturer of 100- to 150- seat large civil aircraft. Therefore, no modification of the scope is necessary.<sup>339</sup>

### Department's Position:

Although in most cases the Department will defer to the petitioner's proposed scope language, the Department will consider modifying that language when the proposed scope raises concerns regarding administrability or evasion with the Department and CBP.<sup>340</sup> During our review of the petition, we discussed the scope language with the petitioner and thoroughly considered the language to ensure that it did not present administrability or evasion issues with the Department or CBP.<sup>341</sup> We ultimately accepted the scope, as modified by the petitioner. We continue to find that the issues raised by Bombardier with respect to the 2,900 nautical mile range requirement are not sufficient to modify scope language specifically requested by the petitioner.

First, Bombardier continues to treat the nautical mile range requirement as an experiential figure which varies and is difficult to determine even for airline industry experts. However, as we found in the *Preliminary Determination*:

“...the minimum 2,900 nautical mile range is a mechanical capability rather than an experiential one. Thus, if the nautical mile range is not 2,900 miles in certain cases based on headwinds or other variables, but the plane is mechanically capable of transporting 100 to 150 passengers with their luggage on routes equal to or longer than 2,900 nautical mile range, the aircraft is covered by the scope. Hence, changes in the actual range of an aircraft based on various conditions would not provide an avenue for circumvention if an aircraft is mechanically capable of transporting between 100 and 150 passengers with their luggage on routes equal to or longer than a 2,900 nautical mile range.”<sup>342</sup>

Second, as we stated in the *Preliminary Determination*, the FAA certificate does not have to reference the actual mileage range of the aircraft, it merely needs to be a type certificate or supplemental type certificate that covers other aircraft with a minimum 2,900 nautical mile range.<sup>343</sup> This requirement is not subjective and can be applied based on facts regarding certificates and aircraft: specifications are available for the aircraft in various sources and websites.<sup>344</sup> Therefore, we do not view this as an administrability issue.

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<sup>339</sup> *Id.* at 116.

<sup>340</sup> See, e.g., *Narrow Woven Ribbons with Woven Selvage from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 7244, 7247 (February 18, 2010), *unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Narrow Woven Ribbons with Woven Selvage from Taiwan*, 75 FR 41804 (July 19, 2010) (*Narrow Woven Ribbons*); see also *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) (*Lumber IV Final Determination*), and accompanying IDM at “Scope Issues.”

<sup>341</sup> See Memorandum, “Telephone conversation with the petitioner,” dated May 17, 2017.

<sup>342</sup> See Preliminary Scope Memorandum at 8.

<sup>343</sup> See Preliminary Scope Memorandum at 9.

<sup>344</sup> See e.g., Petitioner's Letter, “100- To 150-Seat Large Civil Aircraft from Canada – Proposed Scope Clarification,” dated May 9, 2017 at Exhibit Supp.-15; Petition at Exhibit 68.

Third, notwithstanding any such difficulties claimed by Bombardier, its own website identifies a specific nautical mile range of 3,100 per 108 passengers for CS100 aircraft and a 3,300 nautical mile range for 130 passengers for CS300 aircraft.<sup>345</sup> While this may constitute promotional material, it is presumably accurate as it is the manufacturer that is making the claim, and thus it provides an indication that these aircraft are mechanically capable of flying these distances. Hence, the C Series mileage range is not inconsistent with the nautical mileage range requirement in the scope. Furthermore, despite Bombardier's claim that the FAA, the HTSUS, the petitioner, and Airbus do not classify aircraft based on mileage ranges, Bombardier's website demonstrates that mileage ranges are identified for aircraft and, therefore, the mileage range in the scope can be applied.

Fourth, Bombardier's example of administrability issues involves mechanically altering aircraft to take them out of the scope. This example does not demonstrate difficulties in applying the scope language (administering an order), rather it is a description of how one may attempt to avoid the order. The Department has specific statutory provisions to examine possible circumvention.

Fifth, we do not find that petitioner's description of the merchandise it seeks to have covered by this investigation need be bound by descriptions of large carriers at the WTO.

Finally, despite Bombardier's claim about the mileage range requirement not distinguishing regional jets, the petitioner provided detailed information as to why the mileage requirement was necessary to differentiate subject aircraft from non-subject regional aircraft. On page 29 of the petition, the petitioner stated that "{r}egional jets, such as those produced by Embraer of Brazil, do not have a minimum 2,900 nautical mile range, and therefore do not qualify as {subject merchandise}. ... The greater range capability of {subject merchandise} is commercially significant, since it enables airlines to operate {subject merchandise} on routes between the U.S. East and West coasts that are beyond the range of regional jets."<sup>346</sup> Hence, regardless of whether regional jets are typically defined by a nautical mileage range, the range requirement, nevertheless, seeks to ensure that the regional jets will be excluded from the scope of the investigation. While Bombardier claims other characteristics of regional aircraft would

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<sup>345</sup> See Preliminary Scope Memorandum at 9.

<sup>346</sup> See Petition, FN 90 on page 29. The petitioner also provided the following details in the footnote: *Compare* Bombardier, "C Series," available at <http://commercialaircraft.bombardier.com/content/dam/Websites/bca/literature/cseries/Bombardier-CommercialAircraft-CSeries-Brochure-en.pdf.pdf> ("Both the CS100 and the CS300 possess a range of over 3,000 nautical miles, meaning they can easily connect far-flung points."), attached as Exhibit 68, *with* Embraer website, "Specifications E 190", available at <http://www.embraercommercialaviation.com/Pages/Ejets-190.aspx> (last accessed Aug. 30, 2016) ("The Advanced Range (AR) version of the E 190 can carry a full load of passengers up to 2,400 nm (4,537 km)."), attached as Exhibit 69; Embraer website, "Specifications E 195", available at <http://www.embraercommercialaviation.com/Pages/Ejets-J 95.aspx> (last accessed Aug. 30, 2016) ("The Advanced Range (AR) version of the E 195 can carry a full load of passengers up to 2,300 nm (4,260 km)."), attached as Exhibit 70; Embraer website, "Specifications E 190-E2" & "Specifications E 195-E2" (showing that the maximum ranges of the E 190-E2 and E 195-E2 are 2,850 and 2,450 nautical miles, respectively), attached as Exhibit 71.

suffice to exclude them from the scope, it is not clear that is correct. Information provided in the petition indicates that the Embraer E 195-E2 has a multi-class seating capacity of 120 seats.<sup>347</sup>

For the reasons mentioned above, we have not eliminated the nautical mile requirement from the scope of the investigation for the final determination.

## **Comment 22: Revision of the Seating Capacity**

### *Delta's Case Brief*

- The Department should exclude single-aisle aircraft with a seating capacity of less than 125 seats (*i.e.*, CS100 aircraft) from the scope of the investigations. Delta specifically sought to purchase an aircraft with a seating capacity between 100 and 110 seats, not an aircraft with a capacity anywhere between 100 and 150 seats. If a carrier seeks to purchase a 100- to 110-seat aircraft to fill that niche within its fleet, larger aircraft are not viable alternative products.
- The petitioner acknowledged that it did not compete with Bombardier's offer of a CS100 aircraft and it does not produce such aircraft. The petitioner's smallest capacity 737-700 aircraft have 126 to 137 passenger seats whereas the maximum capacity of the CS100 is 124 seats. When comparing seating capacity, it is not appropriate to compare the minimum capacity of one type of aircraft (the 737-700 – 126 seats) with the maximum capacity of another aircraft (the CS100 124 seats) (the Department made this comparison in the preliminary determination).
- While the petitioner may have intended to include the CS100 aircraft in the scope, the petitioner's intention does not overrule the Department's authority to narrow<sup>348</sup> the scope of an investigation.
- 100-110 seat aircraft should be excluded from the scope of the investigation because the petitioner does not produce this aircraft, as evidenced by the fact that the petitioner did not enter a bid to supply Delta with aircraft which it ultimately purchased from Bombardier. While the petitioner does not need to produce every type of product encompassed by the scope of an investigation, the scope should not include something that does not compete with the petitioner's products; the petitioner does not compete in the 100- to 125-seat large carrier aircraft market.
- The scope offered by the petitioner is merely a proposed scope - not the final scope. The Department has the inherent authority to "define and clarify" the scope of its investigation.<sup>349</sup>
- Given the unusual nature of this case - where there is only one domestic purchaser, one foreign producer/exporter, no domestic producer of the purchaser's desired product and no sales or imports - the Department should consider the expectations of the ultimate purchaser in defining the scope of the investigation.
- The scope is currently defective because it includes a product that has different physical characteristics from products produced by the petitioner. The Department has used its

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<sup>347</sup> See Petition at Exhibit 71.

<sup>348</sup> See Delta's Case Brief at 3-4 (citing *Torrington Co. v. United States*, 745 F. Supp. 718, 721 n.4 (CIT 1990)).

<sup>349</sup> *Id.* at 5 (citing *Ad Hoc Shrimp Trade Action Cmte. v. United States*, 637 F. Supp. 2d 1166, 1175 (CIT 2009) and *Ad Hoc Shrimp Trade Action Cmte. v. United States*, 637 F. Supp. 2d 1166, 1175 (CIT 2009)).



authority in the past to exclude certain products initially included in the petition,<sup>350</sup> and should modify the currently over-inclusive scope.

#### *Petitioner's Rebuttal Brief*

- The Department should not exclude CS100 aircraft from the scope of the investigation as the petition establishes that the petitioner intended to cover CS100 aircraft. The dumping margin calculated in the petition was based on Bombardier's sale of 75 CS100s to Delta.
- The Department's practice is to accept the scope, as defined by the petitioner, even when the petitioner does not produce every type of product that falls inside the scope of an investigation.<sup>351</sup> The Department and ITC have initially determined that all products described in the scope constitute a single like product.
- The Department has also considered and preliminarily rejected Delta's arguments regarding the petitioner's 737 aircraft competing against CS100 aircraft and the unusual nature of this case.

#### **Department's Position:**

In determining whether a product falls within the scope of an investigation, the Department considers the plain language of the scope. Furthermore, the Department normally grants "ample deference to the petitioners" in defining the scope of an investigation.<sup>352</sup> Absent an "overarching reason to modify the scope" in the petition, the Department will accept the scope proposed by the petitioner. While the Department has ultimate authority to determine the scope of an investigation it "must exercise this authority in a manner which reflects the intent of the petition, and the Department should not use its authority to define the scope of an investigation in a manner that would thwart the statutory mandate to provide relief requested in the petition."<sup>353</sup>

The record indicates that modifying the scope as suggested by Delta would thwart the statutory mandate to provide the relief requested in the petition. Regardless of whether Boeing produces aircraft with a 100-124 seat capacity, or produces a product identical to the aircraft that Delta sought to purchase (e.g., with a seating capacity between 100 and 110 seats), Boeing was clear that CS100 and CS 300 aircraft compete with its products and it was seeking relief with respect to unfairly priced U.S. sales of those products.

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<sup>350</sup> *Id.* at 6 (citing *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 74 FR 52744 (October 14, 2009) (*Seamless Pipe PRC Initiation*)).

<sup>351</sup> See Petitioner's Rebuttal Brief at 118-119 (citing *Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances in Part: Prestressed Concrete Steel Wire Strand From Mexico*, 68 FR 42378 (July 17, 2003); see also *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products From Japan*, 65 FR 42985 (July 12, 2000), and accompanying IDM at Comment 1).

<sup>352</sup> See *Large Residential Washers From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination*, 81 FR 48741 (July 26, 2016) and accompanying PDM at 4, unchanged in the final determination see *Large Residential Washers From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances* 81 FR 90776 (December 15, 2016) and accompanying IDM at Comments 4 and 5.

<sup>353</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products From Canada*, 67 FR 15539 (April 2, 2002) and accompanying IDM at Comment 49.

In testimony at the ITC staff conference on May 18, 2017, Boeing reported the following:

In the first place, Bombardier has been quite clear that the CS100 and the CS300 compete with Boeing and Airbus in the 100-150 seat market. The CS300 is very close in seat count and range capabilities to Boeing's "737-700" and "MAX 7" and importantly the price for both the "C Series" models affect Boeing prices. This is not theoretical but fact. Bombardier competed the CS100 against Boeing at United. We won that campaign but the confidential materials we have submitted clearly establish the direct price harm that the CS100 caused to Boeing prices. Then there is a direct downward pull on Boeing prices from the close connection between the price of the CS100 and the CS300. Because the CS300 is a larger sibling in the same market, the CS300's price is closely tied to that of the CS100. Dropping the CS100 price means dropping the CS300 price which in turn depresses the price for the "737-700" and "MAX 7". The Delta deal is a painful example of how this price transmission effect works.<sup>354</sup>

Hence, record information indicates that Boeing wishes to cover this aircraft in the scope, believes it is being injured by CS100 aircraft, and it is seeking relief with respect to this aircraft. Therefore, we find that despite possible differences outlined by Delta, including difference in the maximum seating capacity of the 737-700 aircraft (137 seats) and the CS100 aircraft (124 seats), CS100 aircraft are appropriately covered by the scope of this investigation.

Moreover, the Department, for initiation purposes, and the ITC, in its preliminary determination, have initially determined that all products described in the scope of the investigation constitute a single like product,<sup>355</sup> and that the petitioner manufactures products that fit into the like product description.<sup>356</sup> The statute does not require that the petitioner has to produce every type of product that is encompassed by the scope of the investigation.<sup>357</sup> Additionally, Delta has not

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<sup>354</sup> See Petitioner's Letter "100- To 150-Seat Large Civil Aircraft from Canada: Petitioner's Rebuttal Comments on Scope," dated June 29, 2017 (Petitioner Scope Rebuttal Comments) at Exhibit 2.

<sup>355</sup> See *100- to 150-Seat Large Civil Aircraft From Canada: Initiation of Countervailing Duty Investigation*, 82 FR at 24292 (May 22, 2017) and *100- to 150-Seat Large Civil Aircraft from Canada*, Investigation Nos. 701-TA-578 and 731-TA-1368 (*ITC Preliminary Determination*) (June 2017) at I-8.

<sup>356</sup> Additionally, the scope of the investigation also covers CS300 aircraft, which has a standard configuration of up 135 seats and a high-density single class configuration of up 150 seats. Therefore, even if the scope covered 125- to 150-seat aircraft, CS300 would be covered by the scope. The scope of the investigation covers "standard 100- to 150-seat two-class seating capacity." Thus, CS300, also covered by the scope, fall within 125- to 150-seat capacity.

<sup>357</sup> See *Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 FR 9508 (March 2, 2007) and accompanying IDM at Comment 2 (finding respondent's products to be in scope despite allegations that the domestic industry did not produce them because the products were included in plain language of the scope, which is dispositive); see also *Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Final Determination of Sales at Less Than Fair Value*, 69 FR 53677 (September 2, 2004) and accompanying IDM at Comment 5 ("Although Prolamsa argues that pre-primed subject merchandise should be excluded because petitioners do not manufacture this product, the statute does not require that petitioners currently produce every type of product that is encompassed by the scope of the investigation."); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat From The Netherlands*, 66 FR 50408 (October, 3, 2001) and accompanying IDM at Comment 6 (finding respondent's product within the plain language of the scope, and not accepting respondent's argument that Battery Quality Steel should be excluded from

argued, nor has it demonstrated, that aircraft with a seating capacity of less than 125 seats (*i.e.*, CS100 aircraft) are a different class or kind of merchandise.

Furthermore, we disagree that the scope of the investigation should be customized to exclude exactly the seating capacity that Delta specified. The ITC noted in its preliminary determination that the traditional definition of large civil aircraft are those aircraft having more than 100 seats.<sup>358</sup> Therefore, modifying the scope, as Delta proposes, to only cover aircraft with 125 or more seats is not consistent with the traditional definition of the class of products the petitioner intends to cover.

Delta relies on *Seamless Pipe PRC Initiation* to urge the Department to change the scope language regarding seating capacity. *Seamless Pipe PRC Initiation* is distinguishable from the instant investigation. In *Seamless Pipe PRC Initiation*, the Department explained that the change was due to an omission of one of the revisions that the petitioner in that investigation had suggested prior to the initiation.<sup>359</sup> Furthermore, the revision was to remove scope language related to end-use, which is the Department's preference. None of these circumstances are present in the instant investigation. The petition intended to cover aircraft with a seating capacity of 100-150 and the seating capacity language is not related to end-use. Therefore, we find that the facts are different in this case and in *Seamless Pipe PRC Initiation*.

Delta's claim regarding the unusual nature of this case - where there is only one domestic purchaser, one foreign producer/exporter, no domestic producer of the purchaser's desired product and no sales or imports is not persuasive. Limited market participants is not a factor considered in determining whether scope language is appropriate. Also, as noted above, the petitioner does not need to produce every product in the class or kind of products covered by the scope. Delta has not provided an "overarching reason to modify the scope" in the petition, and thus we have not modified the scope as advocated by Delta for the final determination.

## **Bombardier-Airbus Merger**

### **Comment 23: Airbus-Bombardier Transaction**

#### *Bombardier's Case Brief*

- It is improper for the Department to consider the proposed transaction in making determinations in this investigation. First, if the transaction does occur, it will take place after the POI for this investigation. Secondly, the proposed transaction has not been finalized and is still depended on regulatory approvals. It would be speculation to base any decision on it.<sup>360</sup>

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the scope because, inter alia, there was no qualified supplier of the Battery Quality Steel in the U.S. and only minimal interest in Battery Quality Steel by the U.S. producers) (*remanded on other grounds, Corus Staal* (CIT 2003)).

<sup>358</sup> See *ITC Preliminary Determination* at FN 23.

<sup>359</sup> See *Seamless Pipe PRC Initiation*.

<sup>360</sup> See Bombardier's Proposed Transaction Case Brief at 1-2.

- The Department’s regulations direct the Department to conduct a retrospective analysis<sup>361</sup> limited to an established period. It is the Department’s well-established practice to not consider events that occur after the POI or after the POR.<sup>362</sup> This practice has been affirmed by the US Court of Appeals for the Federal Circuit and CIT.<sup>363</sup> Accordingly, the Department should wait for an administrative review to evaluate the proposed transaction in order to avoid any speculative analysis.

#### *GOC’s Case Brief*

- This proposed transaction was not announced until October 16, 2017 (after the POI), the deal has not been closed, and the operational aspects have not been finalized. There is nothing final or concrete for the Department to evaluate. The Department should take no action at this time and should address the proposed transaction in a subsequent administrative review.

#### *Delta’s Case Brief*

- In light of the information that has been placed on the record by the Department and the parties, the Department should find there was no sale for importation during the POI and terminate this investigation.<sup>364</sup>
- In the aircraft industry, a purchase agreement does not finally establish the material terms of a sale. The Department’s policy is long-standing; to reject the contract date as the date of sale where the material terms of sale were not “finally and firmly established on the contract date.”<sup>365</sup>

#### *Petitioner’s Case Brief*

- The proposed deal between Airbus and Bombardier has no bearing on the Department’s current investigation. There is no finalized deal in place to evaluate at this time.<sup>366</sup>
- The only reason to conduct C Series assembly in the U.S. would be to circumvent any antidumping or countervailing duties that may be imposed. However, any orders resulting from this and the concurrent AD investigation would cover fully or partially assembled C

<sup>361</sup> *Id.* at 3 (citing 19 CFR 351.212(a)).

<sup>362</sup> *Id.* at 12 (citing *Final Determination of Sales at Less Than Fair Value: Uranium from the Republic of Kazakhstan*, 64 FR 31179 (June 10, 1999); see also *Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review*, 82 FR 18896 and accompanying IDM at Comment 2 (April 24, 2017); see also *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 7708 and the accompanying IDM at 18 (February 11, 2008); see also *Final Negative Countervailing Duty Determinations: Standard Pipe, Line Pipe, Light-walled Rectangular Tubing and Heavy-walled Rectangular Tubing from Malaysia*, 53 FR 46904 (November 21, 1988); see also *Antidumping Duty Investigation of Low Enriched Uranium (“LEU”) from Germany, Netherlands and the United Kingdom*, 66 FR 65886 (*LEU Investigation*) and accompanying IDM at Comment 6 (December 21, 2001); see also *Notice of Initiation of Antidumping Duty Investigations: Ferrovandium from the People’s Republic of China and the Republic of South Africa*, 66 FR 66398 (December 26, 2001)).

<sup>363</sup> *Id.* at 4 (citing *USEC Inc. v. U.S.*, 34 Fed.Appx. 725, 729 (Fed. Cir. 2002); see also *General Elec. Co. v. United States*, 17 CIT 268, 271 (CIT 1993), *aff’d* after remand by 18 CIT 245 (1994); see also *Helmerich & Payne, Inc. v. United States*, 24 F. Supp. 2d 304, 310 (CIT 1998); *Shandong Rongxin Import & Export Co., Ltd. v. United States*, 203 F. Supp. 3d 1327, 1339 (CIT 2017)).

<sup>364</sup> See Delta’s Proposed Transaction Brief at 1.

<sup>365</sup> *Id.* at 2 (citing e.g., *Yieh Phui Enter. Co. v. United States*, 791 F. Supp. 2d 1319, 1326 (CIT 2011)).

<sup>366</sup> See Petitioner’s Proposed Transaction Brief at 2.

series imported into the United States and should apply whether or not a second C Series assembly line is located in the United States. Nevertheless, this is not an issue the Department needs to address in this investigation, as no C Series assembly is currently taking place in the U.S.<sup>367</sup>

- However, for reference, in other cases, the Department has used the phrase “partially assembled” to refer to articles imported in the form of multiple large components or parts.<sup>368</sup> In all these cases, the partially assembled article was subject to the orders.

#### *Bombardier’s Rebuttal Brief*

- There is broad agreement amongst parties that the proposed transaction should not impact this and the concurrent AD investigation, as the proposed transaction developed after the POI of these investigations.<sup>369</sup>
- However, the petitioner mischaracterizes, and unlawfully seeks to expand the scope by claiming it covers aircraft “articles” (components or parts) from Canada. The scope is specific to “aircraft from Canada” and the term “partially assembled” in the scope refers to aircraft, not “articles.”<sup>370</sup>
- The Department’s practice, as affirmed by the CIT, is not to expand the scope at such a late stage of an investigation.<sup>371</sup> There is insufficient evidence on the record to determine exactly what components or parts should be included within the scope of any eventual order.<sup>372</sup>
- Establishing a final assembly line for the manufacture of C Series aircraft in the United States does not constitute a form of circumvention; rather, it is motivated by significant business opportunities.<sup>373</sup>
- A production facility for aircraft in the U.S. does not meet the statutory definition of circumvention. Only one type of circumvention involves production in the U.S.; minor or insignificant assembly or completion in the U.S.<sup>374</sup> There is no question that a facility to produce aircraft is not minor or insignificant.<sup>375</sup>
- The scope of an AD or CVD order is determined during the investigation; it cannot be amended or expanded after the order is issued. As the petitioner has raised a question concerning the products covered by the scope, the Department must resolve these questions before any order might be established. Failing to resolve the issue will cause significant

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<sup>367</sup> *Id.* at 2-3.

<sup>368</sup> *Id.* at 10 (citing *Printing Presses from Japan*, 61 FR 38139 (July 23, 1996); see also *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete From Japan*, 61 FR 65013 (December 10, 1996); see also *Notice of Final Determination of Sales at Less Than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan*, 62 FR 24394 (May 5, 1997)).

<sup>369</sup> See Bombardier’s Proposed Transaction Rebuttal Brief at 2.

<sup>370</sup> *Id.* at 3 (citing Petitioner’s Proposed Transaction Case Brief at 9).

<sup>371</sup> See Bombardier’s Proposed Transaction Rebuttal Brief at 8 (citing *Smith Corona v. United States*, 796 F.Supp. 1532 (CIT 1992)).

<sup>372</sup> *Id.* at 9 (citing *Final Determination of Sales at Less Than Fair Value; Certain Internal-Combustion, Industrial Forklift Trucks from Japan*, 53 FR 12552 (April 15, 1988)).

<sup>373</sup> *Id.* at 12.

<sup>374</sup> *Id.* (citing section 781(a) of the Act).

<sup>375</sup> *Id.*

uncertainty. It is crucial the Department make clear that these investigations and any resulting orders would not apply to articles, components, or parts from Canada.<sup>376</sup>

- No record evidence suggests that C Series aircraft have been produced or delivered for sale into the United States. Ample evidence on the record demonstrates that the purchase agreement between Delta and Bombardier does not constitute a sale.<sup>377</sup>

#### *GOC's Rebuttal Brief*

- There is consensus among all parties that any proposed transaction between Bombardier and Airbus is irrelevant to this proceeding. Such events should only be addressed in later subsequent administrative reviews.<sup>378</sup>
- Should the Department entertain the petitioner's comments on whether the arrangement would constitute circumvention, and whether any duties resulting from the investigations would cover components or parts imported into the U.S., the GOC incorporates by reference the rebuttal comments submitted by Bombardier.<sup>379</sup>

#### *Delta's Rebuttal Brief*

- The Department should ignore the petitioner's comments regarding circumvention and reject any attempt to expand the scope of these investigations.<sup>380</sup>
- Any circumvention allegation is premature. The petitioner has not cited the statutory criteria for finding circumvention, not demonstrated that the U.S. manufacture of C Series aircraft will be minor or insignificant, and not demonstrated that any other statutory circumvention applies. The petitioner cannot make a circumvention allegation during an investigation; circumvention is clearly defined by the statute.<sup>381</sup>
- The scope of this and the concurrent AD investigation is limited to aircraft; it does not include parts, components, or subassemblies. Furthermore, when a scope does include parts or components or subassemblies it does so expressly.<sup>382</sup> The scope does not explicitly include parts, components, or subassemblies. The Department should reject any attempt to expand the scope.<sup>383</sup>

#### *Petitioner's Rebuttal Brief*

- Bombardier, the GOC and the GOQ all agree that the proposed deal between Bombardier and Airbus has yet to be finalized and does not impact the Department's current AD and CVD

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<sup>376</sup> *Id.* at 17 (citing *Mitsubishi Elec. Corp. v. United States*, 898 F.2d 1577, 1582-83 (Fed. Cir. 1990); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002)).

<sup>377</sup> *Id.* at 19.

<sup>378</sup> See GOC's Proposed Transaction Rebuttal Brief at 2.

<sup>379</sup> *Id.*

<sup>380</sup> See Delta's Proposed Transaction Rebuttal Brief at 1.

<sup>381</sup> See Delta's Proposed Transaction Rebuttal Brief at 2 (citing Section 781 of the Act).

<sup>382</sup> *Id.* at 5 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components hereof, Whether Assembled or Unassembled from Germany*, 61 FR 38166 (July 23, 1996); see also *Large Residential Washers from the Republic of Korea: Amendment to the Scope of the Countervailing Duty Investigation*, 77 FR 46715 (August 6, 2012)).

<sup>383</sup> *Id.* at 5.

investigations. Delta alone argues that the proposed transaction has an implication for the Department's investigations.<sup>384</sup>

- Delta's contention that the proposed transaction confirms that no sale has occurred is false. Delta and Bombardier's argument for no sale has already been rebutted, as their April 2016 "firm agreement for the sale and purchase" of subject merchandise was described by Bombardier as a "watershed moment" and made Delta "the C Series aircraft's largest customer."<sup>385</sup>
- Furthermore, any attempt by Delta to make a no sale argument in the CVD investigation is wrong. Delta relies on the preamble to the Department's regulations concerning date of sale in AD investigations, not CVD investigations.<sup>386</sup> Additionally Delta relies on evidence that is not in the record of the CVD investigation.<sup>387</sup>
- Section 701(a)(1) of the Act requires the imposition of countervailing duties where subsidies have been provided with respect to merchandise imported, or sold (or likely to be sold) for importation, into the United States.<sup>388</sup> Record evidence in the CVD investigation compels the conclusion that C Series aircraft were sold (or likely to be sold) for importation into the United States when Bombardier and Delta completed their purchase agreement.<sup>389</sup>

### **Department's Position:**

The Department agrees with interested parties that the information related to the planned partnership between Bombardier and Airbus does not impact the current investigation because it did not occur during the POI and has yet to be finalized. The press release details that the proposed transaction is subject to regulatory approvals and that there is no guarantee that the transaction will be completed, but that expectations are for completion in the second half of 2018.<sup>390</sup> Additionally, the record lacks detailed information regarding the production process that would result from the planned partnership between Bombardier and Airbus. In the absence of such information, the Department does not find it appropriate to make a scope or circumvention determination about whether activity conducted pursuant to the planned partnership, which has yet to be finalized, may render merchandise outside the scope of an order, should this investigation result in an order. A circumvention ruling under section 781(a) of the Act (merchandise completed or assembled in the United States), for example, requires an order (or a finding) and requires the Department to analyze the nature of the production process in the United States, processing in the United States, and patterns in trade, among other things. The record of this investigation lacks this information. Accordingly, it would be premature to conduct analysis or reach a determination where relevant information is not on the record and the planned partnership has yet to be finalized.

Finally, we disagree that the proposed transaction has any bearing on the conduct of this investigation. We are examining subsidies which Bombardier received during 2016, a period

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<sup>384</sup> See Petitioner's Proposed Transaction Rebuttal Brief at 2.

<sup>385</sup> *Id.* at 7.

<sup>386</sup> *Id.* at 8 (citing Delta's Proposed Transaction Case Brief at 2).

<sup>387</sup> *Id.* at 8 (citing Delta's Proposed Transaction Case Brief at 2-3).

<sup>388</sup> *Id.* at 8 (citing section 701(a)(1) of the Act).

<sup>389</sup> *Id.* at 8-10.

<sup>390</sup> See Press Release Memorandum at Attachment I.

which precedes the date of the proposed transaction. Therefore, we have not considered the proposed Airbus-Bombardier partnership for purposes of the final determination.

### **Conclusion**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If this recommendation is accepted, we will publish this final determination of this investigation and the final subsidy rates in the *Federal Register*.

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Agree

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\_\_\_\_\_  
Disagree

12/18/2017

X 

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Signed by: PRENTISS SMITH

**P. Lee Smith**  
Deputy Assistant Secretary  
for Policy and Negotiations