BOEING V. BOMBARDIER:
MATERIAL INJURY ANALYSIS AT THE INTERNATIONAL TRADE COMMISSION

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TABLE OF CONTENTS

I. INTRODUCTION & BACKGROUND ................................................................. 68
   A. Introduction .......................................................................................... 68
   B. Legal Authority & Process of the Action .............................................. 69
   C. Imposition of Antidumping Duties ...................................................... 70
   D. Countervailing Duties and Subsidization ............................................ 71
   E. Material Injury Determination Process .............................................. 72

II. SUBJECT IMPORTS: BOMBARDIER’S CSERIES PROGRAM ...................... 73
    A. Bombardier Background .................................................................. 73
    B. Government Subsidization of the CSeries Program ......................... 74
    C. Delta Campaign & Dumping Allegations .......................................... 75

III. DOMESTIC INDUSTRY: BOEING, A DOMESTIC INDUSTRY OF ONE .......... 76
     A. Domestic Industry & Like Product ................................................. 76
     B. Boeing’s Past Trade Disputes ....................................................... 77
     C. Boeing’s Sale to United ................................................................. 77

IV. THE ITC’S MATERIAL INJURY ANALYSIS ............................................... 78
    A. Volume of Subject Imports .............................................................. 78
       1. The ITC’s “Significant” Volume Standard .................................. 78
       2. Boeing Claims a Significant Increase in Imports ...................... 79
       3. Bombardier Claims No Volume Impact .................................... 79
       4. ITC Finds No Evidence of Domestic Industry Displacement .... 80
    B. Price Effects .................................................................................. 81
       1. The ITC’s Multi-Factor Standard for Finding Price Effects ...... 81
       2. Boeing Claims Underselling Supports Finding of Price Effects ... 82
       3. Bombardier Disputes Evidence of Price Depression .............. 83
       4. ITC Finds No Evidence of Price Effects ................................... 84
    C. Adverse Impact on the Domestic Industry .................................. 84
       1. The ITC’s Vulnerability Standard ............................................. 84
       2. Boeing Claims Adverse Impact on Development of the Max 7 .... 85
       3. Bombardier Disputes Vulnerability & Development Claims ..... 86
       4. ITC Finds Imports Are Unlikely to Have an Adverse Impact .... 86
       5. Conclusion as to Material Injury ................................................ 87

V. IMPACT OF THE DECISION ON THE INDUSTRY AND TRADE POLICY ....... 87
   A. Fallout From the Ruling ................................................................. 87
I. INTRODUCTION & BACKGROUND

A. Introduction

The victimization of the United States as a losing party in international trade has emerged as a common theme in the articulation of President Donald Trump’s economic policy. On February 13, 2018, however, the U.S. International Trade Commission (ITC) unanimously determined that a U.S. industry is not materially injured, or threatened with material injury, by reason of imports of 100- to 150-seat large civil aircraft (LCA) from Canada.\(^1\) As a result of this determination, Canadian aircraft manufacturer Bombardier would avoid nearly 300% in antidumping and countervailing duties that the U.S. Commerce Department had levied on their aircraft. Within an hour of the decision, Bombardier posted pictures on its corporate Twitter account of its CEO and the CEO of its new business partner, Airbus, toasting glasses of champagne in their Montreal offices.\(^2\) With the tariff now rescinded, Bombardier’s sale to Delta Airlines would proceed as planned and U.S. manufacturer Boeing would gain a new competitor in the U.S. market.

The ITC’s final decision on material injury marked the end of a trade dispute between Bombardier and Boeing that Bombardier set off when it agreed to sell its CSeries jets to Delta in April 2016. Boeing accused Bombardier of dumping its aircraft on the U.S. market at artificially low prices, in addition to being illegally subsidized by the Canadian government.\(^3\) This dumped product,

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Boeing claimed, also depressed the price at which Boeing was able to sell their competing aircraft, the 737-Max 7, to United Airlines. The harm that Boeing incurred from the alleged loss of the Delta sale, combined with the alleged loss of revenue from the sale to United, caused Boeing to petition for the imposition of duties on Bombardier that would have effectively blocked its deal with Delta. Despite these claims, the ITC determined that Bombardier’s pricing and subsidization did not adversely impact Boeing. This came as a shock to many observers, given that antidumping and countervailing duties have been frequently used by the U.S. government as a tool of U.S. trade policy. However, a closer look at the ITC’s material injury analysis reveals that the potential damage to Boeing from the importation of Bombardier’s aircraft was indeed illusory.

This article will examine the analysis that the ITC used to determine that Bombardier’s pricing and subsidization did not cause or threaten to cause material injury to the domestic industry. Although the ITC’s cases do not have precedential value, examining the rationale behind this particular decision sheds light on the future of the commercial aircraft industry, the independence of the Commission, and the impact that its decisions can have on overall U.S. trade policy. Part I will introduce the case and provide background on the ITC’s antidumping and countervailing determinations. Part II will introduce the subject importer, Bombardier, describe the development and subsidization of its CSeries aircraft, as well as describe the terms of its sale to Delta Airlines. Part III will give background on Boeing’s trade practices, discuss the Boeing aircraft that compete with the CSeries, and describe the terms of Boeing’s deal with United Airlines. Part IV will break down the three prongs of the material injury analysis used by the ITC to determine whether a material injury to domestic industry, or the threat of one, actually exists. Finally, Part V will examine how the dispute resulted in a consolidation of the global commercial aircraft industry and reflected the political independence of the ITC.

B. Legal Authority & Process of the Action

The imposition of antidumping and countervailing duties on importers has long been a valued tool to shield vulnerable domestic industries from unfair foreign competition. The Tariff Act of 1930, which was amended in 1994 to conform its remedies to those permitted by the World Trade Organization (WTO), gives the U.S. Commerce Department the legal authority to impose these duties. Upon receipt of a petition for antidumping and countervailing duties, the ITC initiates a preliminary investigation coordinated with the Commerce Department’s International Trade Administration (ITA) to determine whether there is a “reasonable indication” that the imports in question “materially injure”

or threaten to materially injure a domestic industry. If such a reasonable indication exists, the case is passed over to the ITA, which then determines the dumping rate and the countervailing duty rates that will be applied to the offending products. After the duty rate has been set, the ITC conducts a further investigation and makes a final determination as to whether the domestic industry has been materially injured or is threatened with materially injury “by reason of” the subject imports. If the decision is affirmative, antidumping or countervailing duties are levied on the imports at the rates specified by the ITA. If the ITC makes a negative determination, however, the case is dismissed pending appeal.

The ITC adjudication process involves discovery and trial before an administrative law judge, who issues the final determination that goes to the full commission for review. The commission consists of six different commissioners who have their own dedicated inside counsel in addition to the Office of the General Counsel that advises the commission on the facts, law, and policy issues. In the past, the President or cabinet officials have intervened prior to the making of a final determination in order to broker a “suspension agreement” that would reduce or eliminate the duties in exchange for concessions from the foreign importer. Such an intervention is necessary because the statutory nature of the remedy means that neither the President nor any other Executive branch officials may deter the imposition of duties once the ITC has rendered their decision.

C. Imposition of Antidumping Duties

Dumping is typically described as international price discrimination. The Tariff Act defines the dumping of imports as the sale of goods at “less than its fair value.” Thus, if an importer sells its goods at a lower price in a particular

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6 Id.
8 Id.
10 Id.
export market than it does in its home or other foreign markets (the “foreign market value”), it is said to be dumping. The ITA’s formula for determination of the dumping margin is essentially comparing the “foreign market value” of such goods to the “United States price.” If the former exceeds the latter, the importer is said to be dumping.

In its complaint, Boeing argued that Bombardier had sold its aircraft to Delta at the price of $19.6 million, when the production cost had been an estimated $33.2 million. Here, the production cost of the jets served as a reasonable estimate for their foreign market value. The ITC’s investigation revealed public estimates of Delta’s purchase price for the CS-100s as being between $19.6 million and $23 million per aircraft, which were not disputed by Bombardier or Delta. Given these estimates, the ITC issued a preliminary finding that Bombardier’s aircraft had been “dumped” on the U.S. market. Following this finding, in December 2017, the Commerce Department announced a calculated dumping margin of 79.82% to be imposed immediately on the subject aircraft.

D. Countervailing Duties and Subsidization

Countervailing duties are levied as a remedy for illegal foreign government subsidization of imports. A subsidy can be simply defined as any “financial contribution by a government.” The Subsidies and Counter Measures (SCM) Agreement of 1994 is considered the generic agreement on subsidies and countervailing duties under the WTO. It permits WTO member states to impose an increased tariff on importers in response to subsidization by a foreign

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15 Campbell, supra note 13, at 5.
16 RALPH FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL, 551 (10th ed. 2016).
17 Id.
18 Petitions for the Imposition of Antidumping, supra note 3, at 2–3.
21 Michelle DiPuma, Why the Recent “Boing Case” Will Not Ultimately Limit a State’s Ability to Provide Incentives to Attract Business, 66 TAX LAW. 873, 879 (2013).
government that allows those importers to sell at artificially low prices. \textsuperscript{23} Since government financial support often allows companies to sell their goods at below-market prices, the remedy is intended to “level the playing field” by correcting these market distortions. \textsuperscript{24} In theory, the countervailing duty will proportionately offset the unfair subsidy, however, critics have charged that there is no coherent standard for the assessment of such duties, and that it is difficult to differentiate between export subsidization and general government industrial policy.\textsuperscript{25}

After the ITC announced its affirmative preliminary finding that Bombardier had received countervailable subsidies, the ITA then calculated a subsidy rate of 212.39%. \textsuperscript{26} Of the several subsidies determined to be countervailable, the equity infusion from the provincial government of Quebec was the biggest offender, and thus formed the biggest portion of the subsidy rate at 127.22%. \textsuperscript{27} So-called “launch aid” from the Canadian and U.K. governments also constituted significant portions of the subsidy rate, at approximately 29% each. \textsuperscript{28} When the 212.39% countervailing duty rate was combined with the 79.82% dumping rate, it amounted to a duty of nearly 300% to be levied on the imported Bombardier aircraft. The levy effectively tripled the price of the aircraft and brought Bombardier’s deal with Delta to a screeching halt.

\textbf{E. Material Injury Determination Process}

Once the ITC has made an affirmative preliminary determination and the ITA has assessed the duty rate, the ITC must then determine if this unfair competition has caused or threatens to cause material injury to the U.S. domestic industry. The Tariff Act of 1930 defines material injury as “harm which is not inconsequential, immaterial, or unimportant.”\textsuperscript{29} The statute directs the ITC to examine several factors to determine whether this material injury to the domestic industry will occur “by reason of” subject imports, but does not explicitly define what standard of causation should be applied.\textsuperscript{30} Material injury analysis rests on

\begin{itemize}
\item \textsuperscript{23} DiPuma, \textit{supra} note 21, at 877.
\item \textsuperscript{25} FOLSOM, \textit{supra} note 12, at 175.
\item \textsuperscript{26} Final Affirmative Determination of Sales at Less Than Fair Value, \textit{supra} note 20.
\item \textsuperscript{27} Memorandum from James P. Maeder, Senior Director for Antidumping and Countervailing Duty Operations performing the duties of Deputy Assistant Secretary, on Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada, 6-7 (Int’l Trade Admin, Dec. 18, 2017) (on file with Dep’t of Com.), https://enforcement.trade.gov/frn/summary/canada/2017-27874-1.pdf.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} 19 U.S.C. § 1677(7)(A) (2018).
\end{itemize}
three prongs, which are (1) an increase of the volume of subject imports, (2) a decrease or suppression of prices of domestic like-products, and (3) an adverse impact.\textsuperscript{31} In Part IV, this article will examine in depth the relevant factors of the material injury analysis as they relate to the alleged harm that Boeing has suffered from Bombardier’s alleged dumping and illegal subsidization practices.

The ITC is obligated to conduct a broad investigation under the statute in which it amasses a great deal of information and analyzes a wide array of micro and macro economic factors.\textsuperscript{32} The issues that the ITC examines are often more factual than legal in nature.\textsuperscript{33} In addition, its decisions are \textit{sui generis}, which means they have no precedential value.\textsuperscript{34} These aspects of the ITC’s decision-making process create an unpredictability in the commission’s determinations, making it necessary to understand the factual background of the dispute before proceeding with the injury analysis. Thus, the next part of this article will provide a background on Bombardier’s CSeries aircraft program, Boeing’s domination of the U.S. aircraft market, as well as a description of the two sales campaigns that are relevant to the material injury analysis.

\section{Subject Imports: Bombardier’s CSeries Program}

\subsection{Bombardier Background}

In their petition before the ITC, Boeing effectively named Bombardier as the subject importer, and Bombardier’s CSeries aircraft, exported from Canada, as the subject imports of the investigation.\textsuperscript{35} Bombardier is a Canadian manufacturer of commercial and business aircraft that first entered the aerospace industry with its acquisition of Canadair in 1986, and later became parent company of the largest U.S. manufacturer of business jets, Learjet.\textsuperscript{36} Although the corporate headquarters and principal manufacturing facility of Bombardier are located in Dorval, Canada (outside of Montreal), the supply chain of the CSeries is multinational.\textsuperscript{37} More than 50\% of the components for the CSeries come from

\textsuperscript{31} Michael J. Fanizzo, \textit{Unpacking Import Injury}, 18 OR. REV. INT’L L. 1, 6 (2016).
\textsuperscript{32} Campbell, \textit{supra} note 13, at 40.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} Fanizzo, \textit{supra} note 31, at 3.
\textsuperscript{35} Petitions for the Imposition of Antidumping, \textit{supra} note 3, at 27.
U.S. suppliers and the wings are made in Northern Ireland. Bombardier is the third-largest manufacturer of civil aircraft in the world, but does not typically compete with the two largest players in the aircraft industry, Boeing and Airbus, because of its exclusive focus on smaller jets. Industry analysts have even gone so far as to label the company a “niche player with a small domestic market.” Bombardier’s CSeries aircraft is a large civil aircraft (LCA) that seats only 109 passengers. However, it was produced from an innovative “clean-sheet” design that has made it one of the quietest, most environmentally friendly, and most fuel-efficient aircrafts on the market.

B. Government Subsidization of the CSeries Program

While incurring substantial research and development costs of producing a “clean-sheet” design aircraft, Bombardier has relied heavily on government financial support. Subsidization is not uncommon in the aerospace industry. In most countries, the aerospace sector is closely tied with the defense industry and plays a quasi-public interest role, in part because governments are the most prominent consumers of aircraft. Industry and governments typically collaborate to mitigate the risks of large upfront costs and lengthy product life cycles. The cost of developing the CSeries was considerable and greatly exceeded the value of the company. It is estimated that Bombardier spent nearly $5.4 billion to develop the CSeries, while entire company is valued at approximately $3.4 billion. This situation is not dissimilar to Boeing’s development costs: development of the 747 cost three times more than what the company was worth, and the development of both the 757 and 767 models exceeded the company’s worth.

In 2008-09, when the CSeries was officially launched, Bombardier received government loans in the amount of $570 million from the Canadian province of Quebec as well as the United Kingdom. By 2015, however, delays, cost overruns, and slow sales caused Bombardier to fall into major financial

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38 Id.  
39 Gates, supra note 11.  
40 Id.  
41 Bombardier also manufacturers the CS-300 that seats 130 passengers. Zhang, supra note 37.  
42 Id.  
43 Chris Sorenson, Bombardier is a lightweight when it comes to taxpayer support, MACLEAN’S (Nov. 6, 2015), http://www.macleans.ca/economy/bombardier-is-a-lightweight-when-it-comes-to-taxpayer-support/.  
44 Gertz, supra note 24.  
45 Sorenson, supra note 43.  
46 Id.  
47 Id.  
48 Gates, supra note 11.
straits and write down $4.4 billion of debt as part of a deal to forestall bankruptcy.\textsuperscript{49} In order to save the CSeries program, the company took on a $1 billion equity investment from Quebec, and in return, the province received a 49.5\% stake in the program.\textsuperscript{50} Bombardier received subsidies because it is a major part of the workforce in the politically-important province of Quebec, providing an estimated 18,000 jobs and anchoring the province’s aerospace sector that provides 40,000 jobs.\textsuperscript{51} Bombardier’s workforce plays an important role in the provincial economy because they provide high-tech engineering and manufacturing jobs that have spin-off benefits to the rest of the local economy.\textsuperscript{52}

\subsection*{C. Delta Campaign & Dumping Allegations}

Prior to the Delta sale, Bombardier had yet to make a sale in the U.S. market. It had only successfully pitched the CSeries aircraft to regional European airlines.\textsuperscript{53} In order to keep the program viable, according to analysts, the company still needed a blue-chip customer to endorse the program.\textsuperscript{54} Bombardier finally landed a “marquee customer” when it announced a deal with Delta Airlines to purchase 75 of the CS-100 jets in April 2016.\textsuperscript{55} Although pricing information is generally confidential, it was widely understood in the industry that Delta received a large discount on this purchase as part of a “launch-pricing” deal. The launch-pricing discount was critical for Delta, because the CSeries jets will service regional routes, a segment of the industry that is more competitive and offers lower profit margins.\textsuperscript{56}

The generous terms at which the aircraft were sold to Delta led directly to Boeing’s allegations of dumping. Given that the launch-pricing deal was offered eight years after the official launch of the CSeries, Boeing was concerned that Bombardier would continue to offer this pricing long after the program was already established in the market. Bombardier contended, however, that the CSeries did not receive certification and enter service until 2016, rendering its

\textsuperscript{49} Zhang, supra note 37.
\textsuperscript{50} Id.
\textsuperscript{51} Sorenson, supra note 43.
\textsuperscript{52} Id.
\textsuperscript{55} Zhang, supra note 37.
\textsuperscript{56} Id.
sale to Delta as within the launch period. Despite these concerns, Boeing did not offer any of its own jets for sale to Delta during the campaign, but instead attempted to satisfy Delta’s needs by offering them used jets from the Brazilian company Embraer; Delta purchased the used jets and subsequently resold them.\(^{58}\) Bombardier’s sale to Delta put Boeing on notice that it was prepared to compete in the U.S. market, at severely discounted prices, if necessary.

III. **DOMESTIC INDUSTRY: BOEING, A DOMESTIC INDUSTRY OF ONE**

A. **Domestic Industry & Like Product**

In addition to defining the subject importer, the ITC must also define what constitutes the “domestic industry” and the “domestic like product” displaced prior to assessing material injury.\(^{59}\) The Tariff Act defines the relevant “domestic industry” as producers of the domestic like product that “constitute a major proportion of the total domestic production of the product.”\(^{60}\) In this investigation, the definition of the domestic industry was simple, as Boeing is the sole domestic producer of large civil aircraft in the United States.\(^{61}\) The Tariff Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to the investigation.”\(^{62}\) During preliminary ITC investigations, the domestic like product was defined as “100- to 150-seat LCA.”\(^{63}\) In its complaint, Boeing claimed a threat to the 737-Max 7 (which seats 138), and its smallest plane, the 737-700 (which seats 126).\(^{64}\) The Max 7 in particular, has sold poorly and has only two big customers, one of which has not yet taken delivery of any aircraft.\(^{65}\) Although Bombardier argued for expanding the scope of the like product to include all of Boeing’s LCA, the Commission ultimately concluded that Boeing’s 737-700 and Max 7 were the only domestic products substitutable for Bombardier’s CSeries aircraft.\(^{66}\)

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57 Id.
60 Id.
61 100- to 150-Seat Large Civil Aircraft from Canada, supra note 58, at 15.
63 100- to 150-Seat Large Civil Aircraft from Canada, supra note 58, at 4–6.
64 Petitions for the Imposition of Antidumping, supra note 3, at 15.
65 Gates, supra note 11.
66 100- to 150-Seat Large Civil Aircraft from Canada, supra note 58, at 14.
B. Boeing’s Past Trade Disputes

Boeing is certainly no stranger to using trade disputes to accomplish its corporate agenda. In fact, some see a similar strategy in Boeing’s actions against Bombardier. Boeing has long criticized the “launch aid” loans that European governments have used to help Airbus, Boeing’s biggest competitor. Boeing launched an action against Airbus at the WTO and, in 2011, the WTO Appellate Body ruled that the loans extended to Airbus did constitute unfair subsidies that caused Boeing to lose aircraft sales. A year later, however, the Appellate Body found that Boeing had been illegally subsidized through government procurement contracts and tax loopholes. In fact, over the last fifteen years, Boeing has received $13.5 billion in state and local subsidies, mostly in the form of special tax breaks.

Boeing’s antidumping and countervailing duty petition can be seen as an effort to derail Bombardier before it made significant inroads in the U.S. market. The timing of the instant case suggests that Boeing may have seen a political advantage with the recent changes in trade policy by the Trump Administration, given that Boeing CEO Dennis Muilenburg served on President Trump’s American Manufacturing Council and is allegedly close with him. Boeing has disputed this claim, however, noting that it began preparing to file its petition before President Trump took office. Regardless of motive, this case provides an example in which the outcome of a government trade policy decision could restrict a foreign company’s ability to compete in the U.S. market by dramatically shifting the terms of competition in the domestic industry’s favor.

C. Boeing’s Sale to United

In addition to the Delta sales campaign, Boeing’s recent sale of its 737-700 aircraft to United Airlines in March 2016 is an important factor in the material injury analysis. Bombardier had initially pitched its CSeries jets to United, only to have Boeing beat out Bombardier for the bid by reportedly

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67 Gertz, supra note 24.
69 FOLSOM, supra note 12, at 179.
70 Sorenson, supra note 43.
71 Gates, supra note 11.
74 Petitions for the Imposition of Antidumping, supra note 3, at 3.
offering the aircraft at a 70% discount in what was dubbed by one analyst as a “black Friday sales price.” Although United originally ordered forty 737-700 jets in the deal, they later converted their order to four of the larger 737-800 jets and sixty-one of the 737-Max 8 jets. These larger aircraft are more profitable for Boeing, but have substantially more seating capacity than the CS-100 and do not traditionally compete with Bombardier’s CSeries. Aircraft manufacturers sometimes use the practice of “up-gauging”: converting orders for smaller aircraft into orders for larger ones. The practice allows airline customers to lock in a lower initial payment price for large aircraft while also allowing manufacturers, such as Boeing, to sell a jet with a higher profit margin. Up-gauging the United order to larger jets further underscored the narrative that Boeing was only trying to block Bombardier’s sale because United had initially told Bombardier that it was looking for jets even smaller than the CS-100. Although Boeing’s sale to United effectively blocked Bombardier from landing a marquee customer, the large discount that was required to secure this order was enough to convince Boeing that competition with Bombardier’s imports would depress prices for its own aircraft in the future. With these concerns in mind, Boeing petitioned the ITC for the imposition of antidumping and countervailing duties on Bombardier’s CSeries aircraft.

IV. THE ITC’S MATERIAL INJURY ANALYSIS

A. Volume of Subject Imports

1. The ITC’s “Significant” Volume Standard

The ITC’s material injury analysis consists of three prongs, the first of which is determining if there is a “significant” increase in the volume of subject imports. A finding of significant volume increase can be made in absolute terms, given a sizable increase in import volume alone, or in relative terms, given an increase in respect to domestic sales volume. In practice, domestic industries have satisfied the volume requirement by showing that subject imports...

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75 Zhang, supra note 37.
76 Id.
77 See id.
80 Petitions for the Imposition of Antidumping, supra note 3, at 14.
81 Id. at 7.
83 Fanizzo, supra note 31, at 7.
constituted the only increases in product volume during the period of investigation, or by showing an increase of subject–importer market share. In addition, the ITC will look at demand factors to see if the domestic industry had excess capacity with which it could have met the demand. If the domestic industry would have been unable to satisfy this demand, the subject imports will be deemed to not have displaced the domestic industry.

2. Boeing Claims a Significant Increase in Imports

In the hearing and briefs before the ITC, Boeing argued that Bombardier’s sale of CSeries aircraft to Delta has already caused significant volume increases, harming the domestic industry’s position in the U.S. market. According to Boeing, the order that Bombardier has received from Delta will give the CSeries a commanding lead in U.S. market share and commercial momentum for further sales. In addition, Boeing argued that Bombardier has excess production capacity that will allow it to significantly increase imports, creating a threat of future material injury. This is crucial to Boeing’s argument because they allege that Bombardier’s CSeries program is export-oriented and specifically targets the U.S. market. The willingness of Bombardier to buy market share with extremely low prices, Boeing concludes, amounts to a significant increase in the volume of subject imports that will continue into the foreseeable future.

3. Bombardier Claims No Volume Impact

In opposition, Bombardier argued that Boeing failed to establish a significant rate of increase in volume or threat of imminent market penetration.
In support of its position, Bombardier argued that there were, in fact, no subject imports during the period of investigation because the aircraft for the Delta sale would not be imported until early 2018.\(^{94}\) In addition, because Boeing did not compete for the Delta sale, there was no volume-related displacement of domestic like product.\(^{95}\) Bombardier also claimed that there is no imminent risk of future volume injury.\(^{96}\) Bombardier contended that it does not have the ability to increase imports to the U.S. market due to minimal unused production capacity at its facilities.\(^{97}\) Bombardier claimed that it has struggled to ramp up production to meet existing deadlines in recent years.\(^{98}\) Furthermore, Bombardier had yet to secure a single additional sale in the U.S. since the Delta purchase, so Boeing’s claims of imminent future U.S. imports were “pure speculation.”\(^{99}\) Finally, Bombardier asserted that even if they were able to secure additional orders, the multi-year time lag indicates that the orders would likely be delivered outside the period of investigation.\(^{100}\)

4. ITC Finds No Evidence of Domestic Industry Displacement

In their Final Report, the ITC determined that there is a likelihood of substantial volume increase, but that this increase would not come at the domestic industry’s expense.\(^{101}\) Delta’s order would increase the market share of Bombardier, but because Boeing’s 737-700 and Max 7 were unsuitable for Delta’s mission profile, the Commission found that Boeing did not “lose” this sale and it did not come at the domestic industry’s expense.\(^{102}\) In addition, the Commission was unable to conclude that Bombardier was likely to make additional sales at Boeing’s expense.\(^{103}\) Between the Delta sale and Boeing’s petition, the ITC noted that Bombardier had not made any additional sales in the

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\(^{94}\) *Id.*

\(^{95}\) Pre-Hearing Brief for Petitioner: Final Comments of Respondents, Re: 100- to 150-Seat Large Civil Aircraft from Canada, Inv. Nos. 701-TA-578 & 731-TA-1368, at 4-5, COVINGTON & BURLING, LLP (Jan. 24, 2018) [hereinafter Final Comments of Respondents], https://edis.usitc.gov/edis3-external/1256470-634668.pdf?sp=%ZH4sIAAAAAAASFvzoG1u 1jBND2%2FTK%2B0OLmKwa8ksSCIuKSoUj81Lz0zL1XPNSWzODg1uSQtqy84tagsMzk1LLE oMTe1LXoPxBqdrSzMTAT7MPA1ZKXJqmfimVLCIOCTIVwq%2BTmeu75Oif27tw8BZ DDHEM6WQoY6B0yBECoQkI8kppbEFqUWcLAB9GX1LqiHxrkav1RAHQbH0hlD2SUHtio 7icTzvQr32diYPRyYCI1LzCINrShiEEAo8ivNTUotalszVZZ7yoNuJgaGiglGEOBcr1MMspofzBP WEAsAALm%2D9AAAA.

\(^{96}\) *Id.* at 5.

\(^{97}\) *Id.*

\(^{98}\) *Id.*

\(^{99}\) *Id.* at 83.

\(^{100}\) *Id.* at 84.

\(^{101}\) 100- to 150-Seat Large Civil Aircraft from Canada, *supra* note 58, at 35.

\(^{102}\) *Id.* at 36.

\(^{103}\) *Id.* at 37.
U.S. market, and the only other offer it made was rejected. Surveys reported that even if the airlines that Boeing identified as being in the market for a CSeries jet purchased one from Bombardier, the airlines themselves did not see the domestic product as a direct competitor for the sale. Therefore, the ITC reasoned not only that it would be speculative to conclude that Bombardier was likely to increase sales in the immediate future, but also that it is unlikely any such sales would displace domestic industry sales.

B. Price Effects

1. The ITC’s Multi-Factor Standard for Finding Price Effects

The second prong of the ITC’s material injury analysis is the existence of any price effects. The ITC uses a number of factors when considering the impact that unfairly traded imports have on the price of like product in the domestic market. The two preliminary factors to consider are whether imports and domestic products are substitutes, and whether purchasers view the product as price-sensitive.

Next, the ITC looks at the presence of underselling by the subject importer and considers the frequency and extent of the underselling to see if it can be deemed “pervasive.” Pervasive underselling of a price-sensitive product will lead the ITC to examine whether there is price depression or suppression. To find price depression, the ITC looks for domestic price reductions that correlate with subject import volume spikes. Price suppression, on the other hand, occurs when domestic sales prices decrease at the same time typical price indicators, such as the cost of goods, rise or persist. Even in the aircraft industry, where base prices are only one part of the product’s overall price, underselling on the base price will still cause the ITC to find price effects.

Finally, the ITC looks to see if the domestic industry has suffered any “lost sales.” A “lost sale” exists when purchasers switch from buying domestic products to buying subject imports. “Lost sales” are particularly important

104 Id.
105 Id. at 38.
106 Id. at 39.
107 FOLSOM, supra note 16, at 592.
108 Fanizzo, supra note 31, at 11.
109 Id.
110 FOLSOM, supra note 16, at 593.
111 Fanizzo, supra note 31, at 12.
112 Id.
113 Id. at 14.
114 Id. at 13.
because they show the impact of price effects. Without this impact, even significant evidence of underselling may not result in a finding of price effects.115

2. Boeing Claims Underselling Supports Finding of Price Effects

In hearings and briefs before the ITC, Boeing alleged that significant price effects exist to find material injury or the threat of material injury in the imminent future. Boeing argued that the heavily discounted CSeries was already harming prices for the domestic like product, and these adverse price effects would only intensify in the imminent future.116 Boeing first noted that, in the ITC’s preliminary investigation, the ITC had found that Boeing’s 737-700 and Max 7 were substitutable for the CSeries.117 Boeing also noted that responses to the industry questionnaires identified price as the most or second-most important factor to purchasers, making their choice of aircraft price-sensitive.118 Therefore, Boeing concluded, the preliminary factors for the existence of price effects were satisfied.

Next, Boeing argued that Bombardier is significantly underselling the domestic like product and will continue to do so in the near future.119 Bombardier’s strategy to heavily discount the CSeries to close the sale with Delta, Boeing claimed, is contrary to what one would expect from a producer with a supposedly superior, more technologically advanced product.120 Furthermore, underselling by Bombardier has forced Boeing to significantly lower its prices on like products to remain competitive with the CSeries, as most recently evidenced in the United sales campaign.121 Moreover, Boeing claimed, Bombardier’s pricing will cause potential future U.S. customers to demand similar pricing from both Bombardier and Boeing.122 Finally, Boeing alleged that Bombardier’s sale to Delta was a “lost sale” because it secured demand for planes that could have been fulfilled by Boeing’s 737-700 or Max 7.123 Therefore,
Boeing concluded, there was sufficient evidence for the ITC to find significant price effects.

3. Bombardier Disputes Evidence of Price Depression

In opposition, Bombardier claimed that the launch pricing offered to Delta is common practice in the industry, that the Delta campaign was not a “lost sale” for Boeing, and that pricing for the Delta deal would not have a depressing effect on future aircraft prices.\textsuperscript{124} In regards to launch pricing, Bombardier contended that the price offered to Delta was reasonable and justified in compensation for the risks inherent in being an early adopter of a “clean-sheet” design aircraft.\textsuperscript{125} Not only are manufacturers disciplined not to offer similar pricing once an aircraft is established in the market, but no other airline would reasonably expect to receive the same time-limited deal as Delta.\textsuperscript{126} In addition, Bombardier argued that the Delta campaign was not a “lost sale” because Boeing did not offer any new aircraft that fit Delta’s requirements.\textsuperscript{127} Furthermore, when Delta expressed interest in Boeing’s 737 models, Boeing had informed Delta that the 737s were “sold out” until 2020.\textsuperscript{128}

Finally, Bombardier disputed the existence of any price transmission or “lighthouse effect” that would impact domestic prices in the future.\textsuperscript{129} A “lighthouse effect” occurs when a publicized price given to a particular customer creates a mechanism where purchasers expect a similar price for future sales.\textsuperscript{130} Bombardier argued that the presence of a lighthouse effect rests on the flawed premise that airlines know the prices their competitors have paid for aircraft. However, in questionnaires supplied during the investigation, the airlines reported that they are not aware of the prices paid by their competitors.\textsuperscript{131} Moreover, Bombardier argued, any depressing or suppressing effect that the Delta sales campaign had on domestic prices could be attributed to the used jets offered by Boeing which, all things being equal, tend to exert downward pressure on prices.\textsuperscript{132} As further proof that the Delta pricing would not be offered to future customers, Bombardier reported the pricing as an “onerous contract provision” on financial disclosure forms, where the unavoidable costs of meeting obligations were expected to exceed the benefits received under the contract.\textsuperscript{133}

\textsuperscript{124} Pre-Hearing Brief for Respondents, \textit{supra} note 93, at 62.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at 64.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} 100- to 150-Seat Large Civil Aircraft from Canada, \textit{supra} note 58, at V-8.
\textsuperscript{131} Pre-Hearing Brief for Respondents, \textit{supra} note 93, at 6.
\textsuperscript{132} \textit{Id.} at 89.
\textsuperscript{133} 100- to 150-Seat Large Civil Aircraft from Canada, \textit{supra} note 58, at VII-5.
4. ITC Finds No Evidence of Price Effects

In the final report, the ITC found that the prices of subject imports were not likely to have a significant depressing or suppressing effect on domestic prices.\textsuperscript{134} The Commission first confirmed a moderate degree of substitutability between the subject imports with the domestic like product and confirmed that this type of product was indeed price-sensitive.\textsuperscript{135} The ITC agreed with Boeing that there is some degree of price transparency in the market, but found that purchase orders in the aircraft industry are confidential and that parties have strong incentives to maintain confidentiality of price terms.\textsuperscript{136}

According to the Commission, there was little evidence that Delta’s purchase price influenced price expectations in U.S. market or would influence prices on domestic products in the near future.\textsuperscript{137} The “launch-pricing” offered to Delta was similar to launch discounts offered by Boeing on its 787 models, after which it secured higher prices on subsequent orders.\textsuperscript{138} The ITC also found that Boeing did not lose revenue in the United campaign, because they were able to up-gauge United’s order into larger, more profitable aircraft.\textsuperscript{139} Ultimately, the Commission concluded that there was no evidence that any imminent purchases of domestic like product would occur at depressed or suppressed prices.\textsuperscript{140}

C. Adverse Impact on the Domestic Industry

1. The ITC’s Vulnerability Standard

The final, and arguably most important, prong of the ITC’s material injury analysis is finding whether subject imports have had an adverse impact on the domestic industry. In evaluating whether there has been an adverse impact, the ITC examines various economic performance indicators in the domestic industry to see if there has been a noticeable decline.\textsuperscript{141} Potentially relevant indicators include: domestic industry output, employment, shipments, operating losses, and margins.\textsuperscript{142} The Commission looks to see whether subject imports are responsible for the domestic industry’s negative performance indicators or if they can be explained by demand conditions.\textsuperscript{143} The ITC also attempts to rule out

\textsuperscript{134} Id. at 41.
\textsuperscript{135} Id. at 40.
\textsuperscript{136} Id. at 42.
\textsuperscript{137} Id. at 43.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 41.
\textsuperscript{140} Id. at 44.
\textsuperscript{141} Fanizzo, supra note 31, at 16.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 17.
whether non-subject imports (imports from another country), or non-business activity factored into the domestic industry’s performance.\textsuperscript{144}

Another important consideration in evaluating an adverse impact is whether subject imports have affected the domestic industry’s efforts to develop a derivative or more advanced version of the domestic like product.\textsuperscript{145} To make this determination, the industry must be in some distressed or vulnerable condition, and low price levels must be a factor in the industry’s condition.\textsuperscript{146} Although it is not necessary that an industry suffer actual loss, a negative determination on the adverse impact prong may be made in the face of declining profitability and increasing imports if the industry is in a healthy condition.\textsuperscript{147}

2. Boeing Claims Adverse Impact on Development of the Max 7

In the hearing and briefs before the ITC, Boeing alleged that the CSeries imports were having an adverse impact on a vulnerable domestic industry.\textsuperscript{148} In support of this argument, Boeing claimed that financial and production data showed the domestic industry’s vulnerable condition.\textsuperscript{149} Boeing pointed to declines in gross profit and operating income of their competing product, the 737 Max 7, as specific evidence of the industry’s deteriorating condition.\textsuperscript{150} In particular, they referenced the fact that Southwest Airlines had deferred 23 of the 30 Max 7s it ordered until 2023 and 2024.\textsuperscript{151} Boeing also claimed that a multi-year drought in orders for the Max 7 has caused it to be sidelined as a viable option for customers before it even entered service.\textsuperscript{152} Moreover, Boeing argued that subject imports were having an adverse impact on their ability to develop a derivative or more advanced version of the Max 7.\textsuperscript{153} Given that aircraft production is a capital-intensive industry, Boeing claimed that it was depending on the financial success of the Max 7 to fund the next generation of 100- to 150-seat LCA.\textsuperscript{154} According to Boeing, Bombardier’s unjustifiably low prices, enabled by subsidies, were the cause of these adverse impacts on the domestic industry.\textsuperscript{155}

\textsuperscript{144} Id. at 20.
\textsuperscript{145} FOLSOM, supra note 16, at 593–94.
\textsuperscript{146} Id. at 594.
\textsuperscript{147} Id.
\textsuperscript{148} Pre-Hearing Brief for Petitioner, supra note 88, at 104.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 105.
\textsuperscript{151} Novick, supra note 116, at 7.
\textsuperscript{152} Pre-Hearing Brief for Petitioner, supra note 88, at 107.
\textsuperscript{153} Id. at 108.
\textsuperscript{154} Id. at 111.
\textsuperscript{155} Pre-Hearing Brief for Respondents, supra note 93, at 110.
3. Bombardier Disputes Vulnerability & Development Claims

In contrast to Boeing’s claims of vulnerability, Bombardier argued that there was no adverse impact from subject imports that indicates a likelihood of material injury to the domestic industry.\(^{156}\) Although a company’s share price does not show a complete picture of the industry’s health, the continued increase in Boeing’s share price and strong performance of other 737 models demonstrated market confidence in the company and contradicted Boeing’s claims of vulnerability.\(^{157}\) Bombardier further argued that sales of CSeries do not pose a threat to research and development of 737 Max 7.\(^{158}\) Because the Max 7 had already entered production, the principal research and development costs had likely already been incurred.\(^{159}\) In addition, Bombardier claimed, Boeing could not have planned to finance development of the Max 7 using the pre-delivery payments from the potential sale to Delta because these revenues would not have been adequate for such a purpose.\(^{160}\) Finally, if Boeing still needed to finance development of the Max 7, the revenue from Boeing’s backlog of orders would be more than sufficient.\(^{161}\) Therefore, any retardation in the development or commercial success of the Max 7 was not attributable to the CSeries, but instead to Boeing’s decision to prioritize the larger, more profitable products of the 737 program.\(^{162}\)

4. ITC Finds Imports Are Unlikely to Have an Adverse Impact

In its final report, the ITC determined that subject imports were unlikely to have an adverse impact on the domestic industry.\(^{163}\) Although the vast majority of performance indicators used in the analysis were confidential, the Commission indicated that the data showed healthy operating income margins for Boeing’s like product which were consistent with the profitable operations for its larger aircraft.\(^{164}\) Furthermore, Boeing’s substantial order backlog prevented it from satisfying Delta’s demand for aircraft, which resulted in sales of Bombardier’s CSeries aircraft.\(^{165}\)

In addition, the ITC found no significant negative effects on the existing development and production of the 737-700 or Max 7, given that Boeing had

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\(^{156}\) Id. at 94.
\(^{157}\) Id.
\(^{158}\) Id. at 91.
\(^{159}\) Id. at 92.
\(^{160}\) Id. at 93.
\(^{161}\) Id.
\(^{162}\) Id. at 94.
\(^{163}\) 100- to 150-Seat Large Civil Aircraft from Canada, supra note 58, at 47.
\(^{164}\) Id. at 46.
\(^{165}\) Id. at 46–47.
largely completed its development of the Max 7 by the end of the period of investigation.\textsuperscript{166} This was evidenced by the lower amount of research and development costs currently expended on the Max 7 compared to costs incurred earlier in its production.\textsuperscript{167} Furthermore, the ITC found that Boeing is not necessarily likely to win orders in the absence of competition from Bombardier; any firm seeking to purchase similar aircraft in the imminent future is more likely to consider non-subject aircraft, including new or used aircraft from Airbus and Embraer.\textsuperscript{168} Therefore, contrary to Boeing’s theory that the CSeries adversely impacted the performance of the Max 7, the ITC concluded that the program’s performance reflects Boeing’s success at substituting larger, more profitable aircraft for Max 7 orders.\textsuperscript{169}

5. Conclusion as to Material Injury

The ITC voted unanimously on January 26, 2018, to find no material injury or threat of material injury to the U.S. domestic industry by reason of Bombardier’s imports.\textsuperscript{170} The investigation revealed that Boeing’s injury was not material, but was in fact illusory. Bombardier’s import volume did not displace Boeing’s product, not only because Boeing failed to make an offer to Delta, but also because Boeing’s production backlog would have made it impossible to deliver on Delta’s timeline. By up-gauging larger models to United, Boeing had also mitigated any injury from any alleged price depression caused by Bombardier’s “launch-pricing” deal for Delta. Additionally, there was scant evidence to prove that the Bombardier-Delta deal would set future pricing in the domestic market. Finally, Bombardier’s sale did not disturb Boeing’s healthy market position and there was no adverse impact to future Max 7 development. Because Boeing’s claims failed to survive the ITC’s scrutiny, the Commerce department lifted the tariffs imposed by the preliminary ruling and Bombardier was able to proceed with its sale to Delta.

V. IMPACT OF THE DECISION ON THE INDUSTRY AND TRADE POLICY

A. Fallout From the Ruling

The decision took many observers by surprise given the current U.S. political climate. It also impacted the commercial aircraft industry, as well as trade policy, in a number of significant ways. Bombardier celebrated the decision

\textsuperscript{166} Id. at 48.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 47.
\textsuperscript{169} Id. at 48.
\textsuperscript{170} Id.
at its Montreal offices with the CEO of Airbus while planning the future integration of the two companies. Boeing, on the other hand, immediately expressed its disappointment with the decision, but did not indicate whether it would appeal the decision in federal court. On March 23, 2018, the day following the deadline to file an appeal, Boeing announced that it would decline to exercise its right.\footnote{Jon Hemmerdinger, Boeing Will Not Appeal US Trade Panel’s Bombardier Tariff Vote, \textit{FlightGlobal} (Mar. 23, 2018), https://www.flightglobal.com/news/articles/boeing-will-not-appeal-us-trade-panels-bombardier-t-447027/} In the aftermath of the decision, both companies moved forward with new business strategies in a changed industry environment.

\textbf{B. Bombardier Secures Its Marque Customer}

For Bombardier, the ITC’s decision will go down as the defining moment that saved its CSeries program. Not only did the CSeries land the sought after marquee customer in the U.S. market, but it also acquired a major new partner in the process. As a marquee customer, Delta has the potential to dispel the remaining uncertainty around production of the CSeries, and potentially lead to more orders.\footnote{See Addison Schonland, ITC Rejects Damages to Boeing, \textit{AirInsight Group, LLC} (Jan. 26, 2018), https://airinsight.com/itc-rejects-damages-to-boeing/} Bombardier will likely see increased interest from US airlines, particularly Jetblue and Spirit Airlines, which wrote letters to the ITC expressing support for Bombardier’s position.\footnote{See Frederic Tomesco, Airbus Seals Bombardier C Series Deal in Challenge to Boeing, \textit{Bloomberg} (June 7, 2018), https://www.bloomberg.com/news/articles/2018-06-08/airbus-seals-deal-for-bombardier-c-series-in-challenge-to-boeing.
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However, the fact that the case provided the opportunity for Bombardier to partner with Airbus may be most significant outcome for the company. In October 2017, in the midst of the trade dispute, Airbus struck a deal with Bombardier to take control of the CSeries program, providing procurement, sales, and marketing expertise.\footnote{Siekierska, \textit{supra} note 2.} With Airbus as a partner, Bombardier can now offer product support arrangements and competitive pricing arrangements that could make the CSeries program even more successful.\footnote{Siekierska, \textit{supra} note 2.} Although Airbus has agreed to keep primary assembly of the CSeries in Quebec, the partnership also provides a source of U.S. jobs because assembly of some CSeries jets will take place at the Airbus facility in Mobile, Alabama.\footnote{Tomesco, \textit{supra} note 79.}
C. Boeing Faces Competitive Pressure, But Preserves Defense Deals

The ITC’s decision will likely have a significant impact on the future of Boeing as well. The failure to levy duties will help preserve Boeing’s lucrative defense contracts and pave the way for its purchase of Embraer, a Brazilian aircraft manufacturer. Although Boeing may be one of the world’s largest makers of commercial aircraft, contracts for military aircraft provide a significant portion of its profits. Both Canada and the U.K. are sources of defense contracts for Boeing. Upon Boeing’s initial petition for tariffs against Bombardier, the Canadian government suspended a $5.2 billion defense deal for military jets. The Canadian government is also in the market for P-8 anti-submarine jets and Chinook helicopters from Boeing, potential orders which could have been impacted by a decision adverse to Bombardier. Given that such a decision would have jeopardized jobs in Northern Ireland, the U.K. may have more closely scrutinized future defense contracts with Boeing. For this reason, some observers described the ITC’s preliminary decision to impose tariffs on Bombardier as a “tactical victory, but strategically a disaster” for the US aircraft giant.

While the ITC’s decision preserved Boeing’s defense contracts, the controversy has negative long-term implications for Boeing: the uncertainty the case created brought Airbus into a partnership with Bombardier. The case caused Bombardier to face a real possibility of financial ruin if it was denied a marquee customer in the U.S. market, and therefore, made it more receptive to a partnership offer from the more financially secure Airbus. As a result, Boeing’s longtime, major competitor gained a strategic foothold in the U.S. market. Although Boeing may be negatively impacted by having a new competitor in the U.S. market in the long-term, there are no immediate job losses expected to result from the ruling. The renewed viability of the CSeries did however put pressure on Boeing to counter Airbus by making a deal for Bombardier’s major competitor, Embraer. As anticipated, on July 5, 2018, Boeing struck a deal

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179 Id.
180 Id.
181 Id.
183 Schonland, *supra* note 173.
184 Id.
with Embraer to purchase a controlling stake in the Brazilian regional aircraft manufacturer.\textsuperscript{185}

Boeing’s acquisition of Embraer and Airbus’ partnership with Bombardier represent a massive consolidation of the commercial aircraft industry. While Boeing and Airbus have dominated the large commercial aircraft market, the market for smaller regional jets has traditionally been separated as its own market, which was controlled by Bombardier and Embraer.\textsuperscript{186} Boeing’s merger with Embraer is still subject to approval by U.S. antitrust regulators. If approved, it could create what one analyst has dubbed a “super duopoly” in the commercial aircraft industry, with the ability to effectively eliminate competition, increase consumer prices, and reduce incentives to invest in innovation.\textsuperscript{187} Although this outcome may not have been contemplated by the ITC before it began its investigation, it nevertheless shows how strategic competition can be heavily influenced by trade policy.

\textbf{D. Impact on Trade Policy}

The decision to refrain from imposing duties on Bombardier impacts trade policy by reducing tension in the U.S.-Canada trade relationship, showing the importance of a diversified supply chain, and affirming the political independence of the ITC. President Trump’s efforts to renegotiate the North American Free Trade Agreement (NAFTA) have resulted in rising tensions with Canada, the U.S.’s biggest trading partner.\textsuperscript{188} Imposing significant tariffs on a major Canadian company created another point of conflict that had the potential to disrupt NAFTA negotiations. Observers of the negotiations have described the resolution of Bombardier’s case as “one less irritant” in a U.S.-Canada trade relationship that is currently experiencing one of its most difficult periods in decades.\textsuperscript{189} However, the fact that Bombardier was targeted serves as a reminder to Canada that the NAFTA special dispute resolution mechanism, which allows

\begin{itemize}
  \item \textsuperscript{185} Brad Haynes & Tim Hepher, \textit{Boeing to Take Over $4.75 billion Embraer Unit, Targeting Airbus-Bombardier}, THOMSON REUTERS (July 5, 2018), https://www.reuters.com/article/us-embraer-m-a-boeing/boeing-to-take-over-4-75-billion-embraer-unit-targeting-airbus-bombardier-idUSKBN1JV1D2.
  \item \textsuperscript{187} Id.
  \item \textsuperscript{189} Cassella, supra note 72.
\end{itemize}
Canada to challenge an adverse ruling of the ITC, is more important than ever.\(^{190}\) Given that the Trump Administration has proposed eliminating this dispute settlement provision in recent NAFTA negotiations, the ITC’s preliminary imposition of duties on Bombardier will likely reinforce Canada’s insistence on retaining this provision.\(^{191}\)

In addition, this decision provides support for the role that global value chains (GVCs) play in shaping trade policy. Production supply chains that are spread across multiple countries complicate the country of origin designation of those goods.\(^{192}\) Because temporary tariff measures like antidumping and countervailing duties are based on the country of origin designation, policymakers may find it more difficult to target one particular country when applying these measures.\(^{193}\) This creates an incentive for corporations exporting to a particular market to incorporate the location of that market into their supply chain. In the present case, Bombardier’s supply chain includes Canada, Northern Ireland, and now, as a result of the partnership with Airbus, the U.S. In their final report, the ITC noted that if “sufficient production-related activities” occur in the U.S., the CSeries might qualify as domestically produced.\(^{194}\) If the bulk of CSeries production occurs in Canada, but jet wings are assembled in the U.K. and final assembly occurs in the U.S., should they still be considered Canadian imports?

By locating part of its supply chain in the U.S., Bombardier is also able to marshal U.S. political support in its opposition to tariffs because they could negatively impact U.S. jobs. The Canadian, U.K., and E.U. governments wrote briefs in support of Bombardier’s position. However, the most important support may have come from U.S. Congressman Bradley Bryne, whose Alabama district includes Mobile, where the new CSeries facility will be located.\(^{195}\) The fact that imposing tariffs would negatively impact U.S. jobs in Alabama created a political disincentive for the ITC to impose those tariffs. Had Bombardier not partnered with Airbus for final assembly of the CSeries in Mobile, the politics of Bombardier’s position may not have been as favorable.

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\(^{190}\) The special dispute resolution under Section 19 of NAFTA, allows Canada to appeal a decision of the ITC to a multi-national appellate body instead of appealing in U.S. federal court. Cassella, \textit{supra} note 72.

\(^{191}\) \textit{Id.}\n

\(^{193}\) \textit{Id.}\n
\(^{194}\) 100- to 150-Seat Large Civil Aircraft from Canada, \textit{supra} note 58, at 38.

Finally, the decision to refrain from imposing tariffs reinforced the ITC’s reputation for political independence. The election of President Trump has brought the use of tariffs back in vogue as a favored tool of trade policy. The Trump Administration’s imposition of tariffs on steel and aluminum have seemingly shown the willingness of U.S. policymakers to violate WTO rules, and even punish close trading partners like the European Union.\(^{196}\) Although the ITC is generally perceived as independent and fair-minded, its decision to reject tariffs on Bombardier has restored some faith in the U.S. commitment to abiding by global trade rules, which advocates of free trade had worried could be overcome by political calculations.\(^{197}\) Given that the ITC’s inquiry is “supposed to be based on facts and evidence and not the political environment,” some observers questioned whether the Trump Administration would try to push the ITC in a more protectionist direction.\(^{198}\) The outcome may have been different, however, had Trump appointed any of the current commissioners. Out of a potential six sitting commissioners, two seats are currently vacant, and none of the four sitting commissioners are Trump appointees.\(^{199}\) However, Trump’s decision to allow the case to move forward at the ITC, which is still a biased and unilateral forum, encourages countries like China, Russia, and Brazil to apply similar treatment in their home forums to Boeing in the future.\(^{200}\)

**CONCLUSION**

The dispute between Bombardier and Boeing at the ITC provides a textbook example of the power that trade policy has to alter the strategic competition between a domestic company and its international rival. Had the decision been reversed due to political pressure, Bombardier’s sale to Delta would have been effectively blocked, which may not only have prevented Bombardier from selling to future U.S. customers, but also may have lead to the bankruptcy of the CSeries program. Instead, the ITC rationally applied the facts of the dispute to the standards imposed by the Tariff Act and the WTO, reaching the reasonable conclusion that Boeing did not in fact suffer any material injury due to Bombardier’s pricing and subsidization practices.

Despite the fact that Bombardier’s Delta sale constituted a significant increase in import volume, the ITC found that those imports would not displace


\(^{198}\) Cassella, *supra* note 72.

\(^{199}\) Id.

\(^{200}\) Gates, *supra* note 11.
sales of Boeing’s like product because they did not compete in the same sales campaigns. In addition, although Bombardier did substantially discount its jets for sale to Delta, similar pricing would not be available or expected for future customers, and thus, the ITC did not find the existence of price effects. Finally, notwithstanding Boeing’s use of severe discounts to secure its United deal, the ITC found that there was no adverse impact on the Max 7 product line because of the Boeing’s overall financial health and that the Bombardier-Delta deal would not hamper future Max 7 development.

With a favorable decision in tow, Bombardier was able to secure the stability of its CSeries program with the support of its powerful new partner, Airbus. Although Boeing may now face competition with its biggest rival in its home market, the ruling allowed Boeing to maintain its defense contracts with Canada and the U.K. while providing the impetus to move forward with the acquisition of Embraer. The decision also has an important impact on trade policy by reducing conflict in the U.S.-Canada trade relationship, supporting the theory that multinational supply chains reduce incentives for tariffs, and showing the independence of the ITC.

Moreover, the decision may have a positive impact on global perceptions of U.S. trade policy at a time when many countries are questioning the U.S.’s commitment to the rules-based global trade system. Deputy United States Trade Representative Peter Allgeier once stated in Congressional testimony that, “A world where the United States steps away from the rules based, global trading system would be a world where international trade would be an additional source of strategic conflict rather than serving as a force for cooperation and strengthened ties among countries.”201 One can only hope that the fair and nondiscriminatory treatment of Bombardier by the ITC is a positive signal for future international cooperation, rather than the last gasp of independence from an executive branch intent on ushering in a new age of protectionism.

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