WILMERHALE

December 28, 2017

+1 202 663 6000 (t)
+1 202 663 6363 (f)
wilmerhale.com

Inv. Nos. 701-TA-578 and
731-TA-1368 (Final)
Total Number of Pages: 314

PUBLIC VERSION
Proprietary Information Deleted on Pages 2, 5, 8, 10-14; Attachment A Pages 1-11, 14, 16-20, 23-24, 26-28, 32, 35-36, 38, 41-42, 46-51, 65-69, 78-84, 86-89, 91; and Exhibits 11 & 13

BY EDIS AND HAND DELIVERY

The Honorable Lisa R. Barton
Secretary
U.S. International Trade Commission
500 E Street, SW.
Room 112A
Washington, DC 20436

Re: 100- To 150-Seat Large Civil Aircraft From Canada, Inv. Nos. 701-TA-578 & 731-TA-1368 (Final): *Boeing's Posthearing Brief*

Dear Secretary Barton:

On behalf of Petitioner The Boeing Company ("Boeing"), we hereby submit the public version of Boeing's Posthearing Brief in the above-referenced investigations.

In accordance with 19 C.F.R. § 201.6(b), Boeing requests confidential treatment for the business proprietary information contained in brackets on the pages and in the exhibits listed above. This information includes (i) business or trade secrets concerning the nature of a product or production process; (ii) data on production costs; (iii) terms of sale; (iv) prices of individual sales, likely sales, or other offers; (v) names of particular customers and information about sales campaigns; (vi) commercially sensitive financial, revenue, and profit information; (vii) information received from other parties pursuant to the administrative protective order ("APO"); and (viii) other commercially sensitive business information that is not otherwise publicly available. Disclosure of this information would cause substantial harm to the competitive position of Boeing and other companies providing the information, and would be likely to impair the Commission's ability to obtain such information in the future as is necessary to perform its statutory functions.

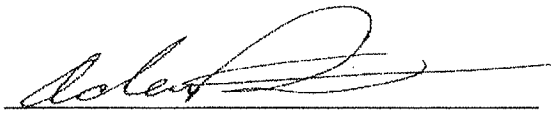
The requisite certification is enclosed in accordance with 19 C.F.R. §§ 201.6(b) and 207.3(a). Copies of this submission are being served on all parties as set forth in the attached certificate of service. Please contact us if you have any questions regarding this submission.

Respectfully submitted,

Robert T. Novick
Patrick J. McLain
Stephanie E. Hartmann
William Desmond
Counsel to The Boeing Company

COMPANY CERTIFICATION

I, Adam Deckinger, Senior Counsel, The Boeing Company, hereby certify that (1) I have read the attached submission, and (2) the information contained in the submission is, to the best of my knowledge, accurate and complete.



Adam Deckinger
Senior Counsel
The Boeing Company

Dated December 27, 2017

CERTIFICATION

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

I, Patrick J. McLain, counsel to The Boeing Company, certify that (1) I have read the enclosed submission dated December 27, 2017, and (2) to the best of my knowledge, the information contained in this submission is accurate and complete.

In accordance with section 201.6(b) of the Commission's rules, I also hereby certify that, to the best of my knowledge, information substantially identical to that for which business proprietary treatment has been requested is not available to the general public.

I certify that the foregoing statements are true and accurate. I am aware that the information contained above may be subject to verification or corroboration (as appropriate) by the U.S. International Trade Commission. I am also aware that U.S. Law (including, but not limited to 18 U.S.C. § 1001) imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. Government.

Patrick J. McLain

Subscribed and sworn to before me on December 27, 2017.

Notary Public

My Commission Expires: 7/31/21

JODY CARLSON NOTARY PUBLIC EXP. 7-31-21 DISTRICT OF COLUMBIA

PUBLIC CERTIFICATE OF SERVICE
100- To 150-Seat Large Civil Aircraft from Canada
Inv. Nos. 701-TA-578 & 731-TA-1368 (Final)

I, Patrick J. McLain of Wilmer Cutler Pickering Hale and Dorr LLP, hereby certify that a copy of this submission was served via hand delivery this 28th day of December 2017:

Shara Aranoff, Esq.
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956

Matthew J. Clark, Esq.
Arent Fox LLP
1717 K Street, NW
Washington, DC 20006-5344

Yohai Baisburd, Esq.
Dentons US LLP
1900 K Street, NW
Washington, DC 20006-1102

Daniel L. Porter, Esq.
Curtis, Mallet-Prevost, Colt & Mosle LLP
1717 Pennsylvania Avenue, NW
Washington, DC 20006

H. Deen Kaplan, Esq.
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Richard L.A. Weiner, Esq.
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

Sibylle Zitko, Esq.
European Union
2175 K Street, NW
Washington, DC 20037-1831

Eric C. Emerson, Esq.
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036

Thomas J. Trendl, Esq.
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036

Patrick J. McLain

PUBLIC VERSION

Proprietary Information Deleted on Pages 2, 5, 8, 10-14; Attachment A Pages 1-11, 14, 16-20, 23-24, 26-28, 32, 35-36, 38, 41-42, 46-51, 65-69, 78-84, 86-89, 91; and Exhibits 11 & 13

BEFORE THE

UNITED STATES INTERNATIONAL TRADE COMMISSION

IN THE MATTER OF

100- TO 150-SEAT LARGE CIVIL AIRCRAFT FROM CANADA

ITC Inv. Nos. 701-TA-578 and 731-TA-1368 (Final)

POST-HEARING BRIEF AND ANSWERS TO COMMISSION QUESTIONS OF PETITIONER THE BOEING COMPANY

J. Michael Luttig, Executive Vice President & General Counsel
Grant Dixton, Vice President & Deputy General Counsel
John Demers, Vice President & Assistant General Counsel
Lynda Guild Simpson, Vice President & Assistant General Counsel
Jeb Boatman, Chief Counsel
Padraic Fennelly, Chief Counsel
Adam Deckinger, Senior Counsel

THE BOEING COMPANY*
100 North Riverside, Chicago, IL 60606
(312) 544-200

Robert T. Novick
Patrick J. McLain
Stephanie E. Hartmann
William Desmond
WILMER CUTLER PICKERING HALE & DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006

Counsel to The Boeing Company

**These Boeing attorneys participated in the preparation of to this brief, however they did not have access to any other parties' proprietary information.*

December 28, 2017

TABLE OF CONTENTS

I. Introduction

At this point, the record is clear beyond any doubt that Boeing has been injured and faces a continuing threat of material injury from Bombardier's actions. Indeed, every statement made and every action taken by Bombardier, Delta, and Canada since the Commission's preliminary injury determination have confirmed for the Commission, many times over, the correctness of that determination. Remarkably, these open concessions continued right up to and through the entirety of the final hearing, where Respondents had no choice but to, and did, concede the critical issues in this case.

Bombardier's concessions—and powerful record evidence—have made the Commission's final determination straightforward. The C Series competes against the 737-700 (the "-700") and MAX 7 and no other Boeing airplane. Bombardier has illegally dumped its heavily subsidized airplanes into the U.S. at astonishingly-low, below-cost prices. This has materially harmed, and will continue to materially harm, the -700 and MAX 7 programs. And, absent duties, significant imports will come into the U.S. from Canada. Based upon these now-indisputable facts, Boeing respectfully requests an affirmative ruling in this case.

Bombardier's Hail-Mary "proposed" venture with Airbus to hijack this Commission's proceedings and circumvent U.S. trade laws, with its notional Alabama facility, itself constitutes an obvious concession that Respondents cannot win on the merits of this case. At this point, the proposed Airbus venture is the whole of Respondents' case. Respondents rely on the future possibility of an Alabama facility to contend there will be no—zero—subject imports and thus no harm to Boeing. But there is no Alabama facility at all and, indeed, it is highly unlikely there ever will be. The entire venture is, transparently, a sham to circumvent U.S. duties. There is quite literally, at this point, nothing more than a public announcement of this "proposed"

arrangement between Bombardier and Airbus.[1]

Under these circumstances, there is simply no cognizable evidence this Commission properly could even consider. In fact, ***Bombardier itself took this very position, that its proposed venture with Airbus is so remote and speculative that it could not even be considered relevant, before the Department of Commerce ("Commerce"), which has primary responsibility for determining the scope of these proceedings***. Commerce not only agreed, but ruled that the appropriate time and forum for such a consideration would be an anti-circumvention or scope proceeding after orders are entered.[2] Accordingly, the unconsummated venture between Bombardier and Airbus, and the entirely notional proposed Alabama facility, are irrelevant as a matter of law to these proceedings.[3]

Recognizing (and acknowledging) that Bombardier cannot succeed on the merits in this proceeding, Canada and the United Kingdom have now initiated a global campaign to punish Boeing for even having brought this case before the Commission. As the Commission is no doubt aware, Canada recently canceled a national security defense contract for Boeing F-18s valued at over five billion dollars. And, most recently, in an extraordinarily brazen letter—delivered to Boeing's Chairman, President, and CEO, literally while this Commission's hearing was taking place—Canada and the United Kingdom have threatened to deny Boeing ***all*** future

---

[1] [ ]. *See* Bombardier Brief, "*100-150 Seat Large Civil Aircraft from Canada—Inv. Nos. 701-TA_578 & 731-TA-1368 (Final): Pre-Hearing Brief* (Dec. 12, 2017) "Bombardier Prehearing Brief," Exhibit 4, [ ] at 10-12.

[2] *See 100- to 150-Seat Large Civil Aircraft from Canada: Final Affirmative Determination of Sales at Less Than Fair Value*, Fed. Reg. (Int'l Trade Admin.) and accompanying Issues and Decision Memorandum ("Commerce AD I&D Memo.") at 43.

[3] Since the final hearing, there have been public reports that Boeing is in discussions concerning a possible transaction with Embraer. These reports, too, are legally irrelevant to these proceedings, and for the same essential reasons. Should the Commission decide to consider the Airbus joint venture in any way, however, Boeing requests permission to fully brief the Embraer matter. To the extent the Embraer matter would be relevant here, it would be powerfully relevant, if not dispositive, in Boeing's favor and to such an extent that these proceedings would be rendered fundamentally unfair were this Commission to consider the Airbus joint venture and not the Embraer matter.

defense work in both nations, unless this case is withdrawn.[4] In judicial, quasi-judicial, and administrative tribunals across the United States, such efforts to interfere with the integrity of this Commission's proceedings through coercion and direct threats would, as they should here, alone give rise to dispositive adverse inferences on the merits of the instant proceeding.

II. As Bombardier Has Conceded and Commerce Has Ruled, the Mobile "Solution" Is Legally Irrelevant

At the final hearing, unsurprisingly, essentially the entirety of Respondents' argument was that Bombardier's proposed venture with Airbus and its proposed facility in Mobile, Alabama, will eliminate all subject imports, imminent or otherwise. This is a clear admission that Bombardier has no viable arguments left on the merits of this case. Indeed, the very reason and purpose of the hastily-completed, hastily-announced Mobile "plan" was to frustrate these proceedings, circumvent the U.S. trade laws, and prevent the imposition of duties.[5]

But not even a month ago, in its intentional and most significant record concession in the entire case, Bombardier urged Commerce to ***completely disregard*** the joint venture ("JV") in the AD/CVD proceedings, insisting that "it would be ***improper*** for the Department to consider the proposed transaction in making determinations in the LCA AD and CVD investigations," because the "proposed transaction has not been finalized yet and determinations based on it would be speculative."[6] Commerce of course agreed, ***ruling just last week*** that because there was not "detailed information regarding the production process that would result from the planned partnership between Bombardier and Airbus . . . it would be ***premature*** to conduct an analysis or reach a determination where relevant information is not on the record and the planned

[4] *See* Letter to Boeing from the Governments of Canada and the United Kingdom (Dec. 18, 2017), attached as Exhibit 1.
[5] *See* Alain Bellemare, President and CEO, & John Di Bert, Senior VP and CFO, Bombardier, "Partnering to Realize the C Series' Full Potential: Bringing Together Bombardier's Innovative Aircraft and Airbus' Global Reach and Scale," at slide 6 (Oct. 16, 2017) (Boeing 12/12 Prehearing Brief Exhibit 7).
[6] *See* Bombardier Brief, "Antidumping and Countervailing Investigations of 100- to 150-Seat Large Civil Aircraft from Canada: Brief on the Proposed Transaction" (Nov. 13, 2017), at 8.

partnership has yet to be finalized."[7] Instead, significantly for this proceeding, Commerce ruled that the appropriate forum to address the issue is a circumvention proceeding, after orders are entered, at which point Commerce can analyze the precise nature of what might occur in Mobile, if anything. Like Commerce, the Commission should refuse to consider the proposed Airbus venture until, at the earliest, a sunset review after orders are entered, at which point the Commission can consider actual facts, if any, rather than rank speculation.

The Commission should adhere to its longstanding practice of discounting a respondent's "tentative and indefinite" plans to establish a U.S. production facility.[8] By every measure—including Respondent's own admission—the Mobile scheme is "tentative and indefinite." In announcing the proposed JV, Bombardier and Airbus made clear that the transaction would not close, if at all, until the second half of 2018. In other words, the Commission will not know—for almost a year—whether there even will be a deal at all. Indeed, just two months ago, Bombardier warned the investing public that "{t}here are no guarantees that the transaction will be completed," "there can be no assurance that the proposed transaction will occur" and it listed over half a page of material risks that could completely derail the project. As Commissioner Broadbent pointed out, the regulatory approval process for the Airbus JV gives Bombardier a "huge out,"[9] if it even needs one for this proposed deal for which it will only be paid $1.

No litigant—including Bombardier—can be permitted to tell another agency of the U.S. Government in the very same proceeding (Commerce), regulators, and the investing public that the JV and Mobile are too speculative to be relied on, only to turn around and ask this Commission, literally days later, to base its entire ruling on the unsupported and insupportable

---

[7] *See* Commerce AD I&D Memo.at 43.
[8] *Certain Laser Light-Scattering Instruments from Japan*, Inv. No. 731-TA-455 (Final), USITC Pub. 2328 (Nov. 1990) at 24 n.90.
[9] Hearing Transcript, "100- to 150-Seat Large Civil Aircraft from Canada" (Dec. 18, 2017) at 295 (Broadbent) ("Hearing Tr.").

promise that Mobile will imminently not only come to be, but entirely eliminate any possibility of subject imports. As Commerce has already recognized at Bombardier's own urging, the JV and any follow-on Mobile plans are far too speculative to be afforded any legal significance.

Even if one were to assume extra-legally that the JV will eventually be finalized and would ultimately decide to place work in Mobile, it would take literally years even to prepare to build airplanes in Mobile. It takes years to plan and build an airplane production line. ***Notably, it took Airbus four years to begin only the finishing of airplanes in Mobile***. As Vice Chairman Johanson noted, there has not even been "movement of machines or dirt yet in Mobile as a result of the {proposed} joint venture." There hasn't even been a "ribbon cutting."[10] Nor will there be any time soon. Bombardier acknowledges that such steps are impossible at the very least until it obtains the necessary regulatory approvals for the JV.[11] And Bombardier characterized even the prospect of obtaining those approvals as "speculative."[12] As a result, it will literally be years from now—at the soonest—before any work could start in Mobile, if there ever is work performed there on the C Series.

It is no surprise of course that the inchoate Mobile scheme is, at this point, at best "tentative and indefinite." For, it will never be more than this. Both common and economic sense tell the Commission that a second-line production facility in Mobile will never be built. Bombardier already plans to ramp-up production to produce 120 units per year ***in Mirabel alone***. This production capacity is more than enough to produce the 250 not-at-risk C Series orders that exist today.[13] In fact, it is more than enough to meet the anticipated 20-year ***global*** demand for

---

[10] *Id.* at 280 (Johanson).
[11] *Id.* at 280 (Aranoff).
[12] *Id.* at 294 (Lichtenbaum) (explaining that Bombardier had described the joint venture as "speculative" at Commerce, because of "uncertainty related to the regulatory requirements, *i.e.*, the anti-trust approvals").
[13] *Id.* at 55 (Nickelsburg); Boeing Brief, "100- to 150-Seat Large Civil Aircraft from Canada, Inv. Nos. 701-TA-578 & 731-TA-1368 (Final): Boeing's Prehearing Brief, ("Boeing 12/12 Prehearing Brief") Exhibit 13, Affidavit of [ ], paras. 5-6.

the C Series.[14] Thus, a production line in Mobile would entail a wholly unjustified expenditure of hundreds of millions of dollars that will never be made. No business would ever build a second line in Mobile for production of the C Series—let alone Airbus.

In its prehearing brief, Bombardier argued that, in *Stainless Steel Plate from Belgium, Italy, Korea, South Africa, and Taiwan*, the Commission previously relied on a respondent's "planned investment in the United States to issue a negative determination."[15] That case is plainly inapposite. In *Plate*, the project in question was well underway at the time of the Commission's determination. Among other things, the first phase of construction was complete—indeed, respondents had already started production.[16] The ITC also found that the Italian respondent's U.S. operation did not "require{} (much less 'rel{y} on')" imports of subject merchandise from Italy for its production. Here, by contrast, not only is the project not underway and production not already started, there is not even a "project" yet; there is not even a deal that would entail a project. Moreover, unlike in *Plate*, Bombardier would have to import partially assembled aircraft from Canada for assembly in Alabama, if it ever does any work in Mobile. Last, *Plate* was not even an initial review of material injury or threat, as here; it was a sunset review, meaning that the Commission had five years of evidence regarding the respondent's actual market behavior under the shadow of the orders, as opposed to what the Commission would have here, were it to consider the Bombardier-Airbus JV.

III. Bombardier and Delta Concede That the C Series Competes with the -700 and MAX 7

The Commission's pointed questions at the hearing forced Respondents to concede—however reluctantly—that C Series aircraft compete with the -700 and MAX 7 in the 100- to

[14] *See* Boeing 12/12 Prehearing Brief at 41 n.183.
[15] Bombardier Prehearing Brief at 10 n.22.
[16] *See Stainless Steel Plate from Belgium, Italy, Korea, South Africa, and Taiwan*, Inv. Nos. 701-TA-379, 731-TA-788, 731-TA-790, 731-TA-791, 731-TA-792-793 (Second Review), USITC Pub. 4248 (Aug. 2011) at 16-17, II-4.

150-seat market.[17] Bombardier conceded that Boeing designed the MAX 7 "to be able to serve this {small single aisle} market"[18] and that "it is not unusual for an A-319 or a Max 7 to be in the discussion" for a competition with the C Series.[19] When Chairman Schmidtlein pressed Respondents, "I guess you're saying that the C Series never competes with the Max 7," counsel for Delta stated: "***No***," "what I'm saying is that the CS-100 is 109 seat plane . . . ."[20] In its pre-hearing brief, Bombardier admitted that airlines "cross shop" the C Series and the "737-700 or MAX 7."[21] And not even Bombardier disputes that the CS300 (for which Delta acquired rights to purchase up to ninety) and the MAX 7, separated by fewer than ten seats, directly compete.[22] These concessions eliminate any doubt that the -700 and MAX 7 compete with the C Series.[23]

These admissions are unsurprising. Record evidence indisputably shows that the CS100 and the -700 competed head-to-head at United Airlines, with Boeing winning—albeit at severely depressed prices. Bombardier agrees with this, admitting that the CS100 and -700 competed on price in the United campaign, with Bombardier's dumped pricing forcing Boeing to "use{} cut-rate pricing" to win the campaign.[24] Bombardier attempts to blunt the devastating implications of these facts by belatedly inventing a legally irrelevant "sweetheart deal" story. Bombardier contends that its CS100 offering was supposedly "in the lead and would be selected" until "out

---

[17] At the same time, Bombardier went to great lengths to distract from competition between the C Series and the 737-700 and MAX 7. At the Hearing, a Bombardier executive testified that he "made up the concept of the 100 to 150-seat segment for marketing purposes." This is incorrect. *Compare* Hearing Tr. at 185 (Mitchell), *with Global Competitiveness of U.S. Advanced-Technology Manufacturing Industries: Large Civil Aircraft*, USITC Pub. 2667 (Aug. 1993) at 4-3 ("Boeing competes in five LCA product niches.") *and id.* at n.17 ("These market segments can be defined roughly as 100-150 seats, 150-180 seats, 180-250 seats, 250-350 seats, and 350-500 seats.").
[18] Hearing Tr. at 227 (Dewar).
[19] *Id.* at 236 (Mitchell).
[20] *Id.* at 234 (Schmidtlein and Baisburd) (emphasis added).
[21] Bombardier Prehearing Brief at 62; *see also* Flight Ascend Expert Report, at 17 (Attachment A to Bombardier Prehearing Brief).
[22] *See id.*, Attachment A, FlightAscend Report at 9, 33.
[23] *See* Benjamin Katz, *Airbus Pledges to Put C Series Ahead of A319 in Sales Push*, Bloomberg (Oct. 18, 2017) (Boeing 12/12 Prehearing Brief Exhibit 5).
[24] *100-to 150-Seat Large Civil Aircraft from Canada*, Inv. Nos. 701-TA-578 and 731-TA-1368 (Preliminary), USITC Pub. 4702 (June 2017) ("Preliminary Determination, USITC Pub. 4702"), at 32 n.226.

of nowhere Boeing swooped in and offered United a deal too good to refuse on 737-700s."[25]

Bombardier's account is false. [

].[27] United switched its -700 orders to 737-800s and MAX 9s in November 2016 because it installed new management, with a new fleet strategy, in July 2016.[28] [

].[31]

In short, United ***did not*** get a sweetheart deal.[32] But the CS100 ***did*** depress 737-700 prices in a head-to-head competition.

Delta and Bombardier outright conceded other key facts as to the United campaign that further confirm that the -700, the MAX 7, and the CS100 all compete in the same market. Specifically, Delta's Senior VP admitted that United, after substituting out of its -700s, has "been out in the market looking at used aircraft, much as we were in this case, ***used A319s in particular***," with Bombardier's VP of Commercial Operations adding that United is also in

---

[25] Hearing Tr. at 187-188 (Mitchell).
[26] *See* [ ].
[27] *See id.*
[28] *See* David Koenig, *United Airlines Is on the Offensive Under New President Scott Kirby*, Skift (Feb. 27, 2017), attached as Exhibit 2; Attachment A, Response to Question 1.
[29] Affidavit of [ ], para. 9 (Petition Exhibit 101).
[30] *Id.*, para. 10.
[31] *See* Attachment A, Response to Question 1.
[32] Affidavit of [ ], paras. 8-9 (Petition Exhibit 101).

discussions with Bombardier "about what {United} would like to do in that space."[33] So, United has now competed three airplanes in the 100- to 150-seat market to fill the same need: the CS100, the -700, and now the A319. This actual competition is yet further proof that the CS100 and the -700 directly compete.[34]

IV. Bombardier's Concessions Prove That the Domestic Like Product Includes Only the -700 and MAX 7

Bombardier attempted at the hearing to confuse the Commission's like-product inquiry by arguing, on the one hand, that competition is attenuated between the C Series and the -700 and MAX 7, and on the other hand, that Boeing's MAX 8, 9, and 10 should somehow be included in the product that is "like or, in the absence of like, most similar in characteristics to," the C Series.[35] When pressed by Chairman Schmidtlein to reconcile the obvious inconsistency in these assertions, Bombardier's counsel tellingly had to admit that it was "a bit of a brain teaser," and "the wrong question to be asking."[36] Indeed, Bombardier's contradictory assertions are "a brainteaser," but Chairman Schmidtlein was not asking the wrong question. Bombardier's position is both irreconcilable and wrong, as the Chairman obviously understood.

As discussed above, Bombardier admits that the -700 and MAX 7 compete against the C Series. Bombardier likewise concedes that "the C Series presents no competitive threat whatsoever to the MAX 8, 9, and 10 . . . ."[37] By emphatically separating the C Series from Boeing's larger single aisle LCA, while simultaneously conceding that the -700 and MAX 7

---

[33] Hearing Tr. at 260 (Mitchell).
[34] The facts of the United campaign are consistent with the Preliminary Determination's conclusion that "there is a moderate-to-high degree of substitutability between domestically-produced 100- to 150-seat LCA and Canadian-produced 100- to 150-seat LCA." *See* Preliminary Determination, USITC Pub. 4702 at 26. It is also consistent with the evidence that price is an important factor in purchasing decisions, and that customers use net present value (NPV) calculations to monetize non-price differences between models and identify the price discounts necessary for producers to make the customer indifferent as to its purchase decision.
[35] *See* Hearing Tr. at 230 (Schmidtlein). *See also* 19 U.S.C. § 1677(10).
[36] *See* Hearing Tr. at 229, 231 (Aranoff).
[37] *See* Bombardier Prehearing Brief at 39; *see also* Bombardier Investor and Analyst Day, Bloomberg Transcript (Dec 14, 2017) ("There's a great strategic fit right now between the C Series, the CS100, CS300 and the A320, A321."), attached as Exhibit 3.

compete with the C Series, Bombardier itself has offered the Commission the proof that the -700 and MAX 7 are the only domestic products that are "like" the C Series.

Other record evidence—including significant differences in price, operating parameters, demand, competitive landscape, and physical characteristics—only buttresses this conclusion.[38] Indeed, the ITC has never before expanded the domestic like product where there are only two models of a large capital good that meet the scope definition, each developed at great expense to be used differently by different customers, and separated from out-of-scope domestic products by million-dollar price differences. It should not do so now.

V. Bombardier's Concessions Easily Meet the Non-Negligible-Imports Criterion

The Commission "shall not treat imports as negligible if it determines that there is a ***potential***"—not a certainty; merely a possibility[39]—"that imports . . . will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States."[40] The facts here easily clear this hurdle.

For starters, Bombardier admitted in its questionnaire responses that it will export [ ] units of the subject merchandise to the U.S. in 2018, [ ] in 2019, [ ] in 2020, [ ] in 2021, and [ ] in 2022.[41] In its pre-hearing brief, Bombardier tried to renege on these crucial concessions, saying that they were based on "expectations before the Airbus deal."[42] ***But Bombardier made these admissions to the Commission over a month after it announced its JV with Airbus and the Mobile scheme***. Given that, there is every reason for the Commission to consider them.[43] These admissions alone firmly establish a ***potential*** for non-negligible imports.

---

[38] *See* Boeing 12/12 Prehearing Brief at 20-39; Flight Ascend Expert Report, at 9, 44 (Attachment A to Bombardier Prehearing Brief).
[39] *See* Oxford English Dictionary (3d 2006) (defining "potential" as "possible as opposed to actual").
[40] *See* 19 C.F.R. 1677(24)(A)(iv).
[41] Bombardier Foreign Producers'/Exporters' Questionnaire Response (Final), Question II-11a.
[42] Bombardier Prehearing Brief at 15.
[43] In any event, for the reasons outlined above, this Commission should totally discount Bombardier's argument that its notional Mobile plans absolutely ensure that there will never be imports from Canada. There is no joint venture.

Second, Bombardier conceded at the hearing that the C Series planes designated for Delta are either currently in production or already completed, ***and Delta confirmed that it has no legal right to refuse their delivery***. That too establishes *per se* a possibility of non-negligible imports.

Third, even if Delta and Bombardier renegotiate their contract in an attempt to game the Commission yet again, the Commission should ignore this petition-induced change, as it has in the past and for the reasons it has in the past.[44] A contract that can be renegotiated to defer deliveries can just as easily be re-renegotiated to revert to the original delivery schedule once the threat of duties has passed.

Fourth, Bombardier has admitted that it is in talks with several U.S. airlines for C Series sales, including [ ].[45] [ ].[46] JetBlue and Spirit have even told this Commission they are interested in buying C Series airplanes absent duties.[47] The Commission has no assurances—none—from those airlines that they will not seek deliveries from Canada in the imminent future, especially in the absence of duties. And of course, they would.

Finally, Bombardier has now told the Commission that it intends to import large portions of the aircraft—including fully assembled sections of the fuselage—into the U.S. Since the orders in these cases will cover "partially assembled airplanes," there is, as a matter of stipulation, a "potential" that Commerce will conclude that such imports fall within the scope of orders, meaning the negligibility threshold is easily satisfied on that basis alone.

There is no Mobile facility. There is no Mobile line. Nothing. To base a negligibility finding on assurances about Mobile—especially when Bombardier has told Commerce and the investing public that its joint venture with Airbus may never happen—would be nothing short of reversible error.

[44] *See, e.g.*, *Hand Trucks and Certain Parts Thereof from China*, Inv. No. 731-TA-1059 (Final), USITC Pub. 3737 (Nov. 2004) at 18 n.127.

[45] Boeing 12/12 Prehearing Brief at 92.

[46] [ ].

[47] JetBlue Letter to the Commission (Sept. 24, 2017); Spirit Airlines Letter to the Commission (Aug. 8, 2017).

VI. The Act's Threat Provisions Require a Remedy in this Case

The record shows that Boeing is suffering material injury ***right now***, ***at this moment***, because of the C Series' adverse price effects, both within and beyond the United and Delta campaigns.[48] The record also shows that, unless orders are issued, material injury will occur as subject imports increase to significant levels in the imminent future, beginning in spring 2018.[49] This easily satisfies the requirements for an affirmative threat of material injury determination.

Canada's argument to the contrary[50] rests on the spurious notion that Bombardier's "plan" to "produce" the C Series in Alabama—a "plan" admittedly devised to circumvent duties in this case —will preclude significant subject imports within a timeframe that all parties agree is imminent.[51] Moreover, Canada's argument is based on a misinterpretation of the statutory language that, if accepted, would fundamentally transform the statutory scheme, by writing the "sales for importation" provision out of the Act, and deny manufacturers of large capital goods relief under the AD/CVD laws. Canada's position is meritless, and it should be rejected for the reasons detailed in response to Question 24.

VII. The Record Overwhelmingly Supports an Affirmative Threat Determination

In its questionnaire responses, Bombardier admitted that it will export [

] of C Series aircraft to the U.S. market starting in [ ], giving it dominant U.S. market share from 2018-2022. It admitted to having excess, and growing, near-term capacity in Mirabel.[52] It admitted that the U.S. market is critical to achieving its planned production ramp-up.[53] And it admitted that the MAX 7 program is vulnerable, describing it as having "fail{ed} to

---

[48] *See* Affidavit of [ ], paras. 8-14 (Boeing 12/12 Prehearing Brief Exhibit 2).
[49] *See* Boeing 12/12 Prehearing Brief at 69-70.
[50] Government of Canada Brief, "100- to 150-Seat Large Civil Aircraft from Canada Inv. Nos. 701-TA-578 and 731-TA-1368 (Final): Prehearing Brief of the Government of Canada," at 18-26 ("GOC Prehearing Brief").
[51] *See infra* Section II; Attachment A, Response to Question 24.
[52] Preliminary Determination, USITC Pub. 4702 at 24-25.
[53] *See id.*

achieve commercial success"[54] in an industry where "credible assurance" of an aircraft program's longevity is necessary to attract "prospective purchasers" who "fear orphan aircraft and low residual values."[55] What's more, Commerce has now conclusively determined that Bombardier is illegally dumping at astonishingly low, below-cost prices, imposing a final dumping margin of nearly 80%—a margin rarely seen except in the most egregious of cases.

And, as proven in confidential information, those dumped prices are already causing Boeing customers to demand steep price reductions on the MAX 7,[56] a market fact that will not only continue, but increase in frequency. Specifically, after the C Series depressed 737-700 prices in the high-profile United campaign, [

].[57] After Bombardier pushed market prices even lower at Delta, [

].[59] As the Commission recognized, the only alternative to such price reductions for the MAX 7 is to lose sales[60]—a very real possibility, given Bombardier's aggressive ongoing U.S. sales campaigns.

---

[54] Bombardier Prehearing Brief at 94. *See also id.* at 93 ("The Boeing 737 MAX 7 is the least efficient variant of the Boeing 737 Max family and its current poor market performance is driven by the aircraft design and relatively uncompetitive performance in the market generally.") (citing Flight Ascend Expert Report at 50).
[55] Bombardier Prehearing Brief at 13.
[56] *See* Affidavit of [ ], paras. 8-14 (Boeing 12/12 Prehearing Brief Exhibit 2).
[57] *See* Affidavit of [ ], para. 10 (Petition Exhibit 101); Attachment A, Question 11.
[58] *See* Affidavit of [ ] (Boeing 12/12 Prehearing Brief Exhibit 2).
[59] Purchaser Views, Declaration of [ ], paras. 2-4 (Boeing 12/12 Prehearing Brief Exhibit 3).
[60] Preliminary Determination, USITC Pub. 4702, at 33 ("Boeing will likely be forced to either reduce its own prices

These concessions and powerful record facts leave nothing in dispute. In the absence of orders, Boeing is absolutely certain to suffer additional material harm in the form either of lost sales campaigns or sales won at severely depressed prices. Bombardier tries to avoid this inescapable conclusion by claiming that its extreme dumping is only "launch" and "marquee." As a matter of indisputable aerospace industry practice, that is wrong. The AD laws contain no exception for strategic dumping, however named. In any event, Bombardier's illegal dumping was not "launch" or "marquee" pricing. ***"Launch pricing" is not below-cost pricing. But that is what Bombardier did; it sold commercial aircraft to Delta at millions of dollars below its own cost of manufacture.***[61] This is what is illegal.

Bombardier also questioned the certainty and frequency of the price transmission mechanism, which facilitates and hastens the harm to Boeing. But Bombardier and its own experts contradicted this argument at the hearing. Delta's Senior VP testified that he routinely hears "whispers in the market" about airline pricing, and that Delta "heard the rumored price that United was going to pay for the 700 . . ."[62] In the United campaign, [

].[63]

Bombardier's consultants at FlightAscend touted their ability to estimate the "typical delivery price for new aircraft."[64] [ ].[65]

What's more, as the Commission noted, "Boeing was able to estimate [ ] Delta's price

---

to win sales, thereby causing a significant depressing or suppressing effect on domestic prices, or else lose the sales.").

[61] *See* Hearing Tr. at 132-135 (Nickelsburg); Attachment A, Response to Question 12.

[62] Hearing Tr. at 239-240 (May).

[63] Affidavit of [ ], paras. 5-9 (Petition Exhibit 101).

[64] *See* Flight Ascend Expert Report, at 44 (Attachment A to Bombardier Prehearing Brief).

[65] [

]. *See* [

]; Affidavit of [ ], para. 6 (Boeing 12/12 Prehearing Brief Exhibit 2).

per aircraft on its purchase of CS100s from Bombardier using public information, as were other market participants."[66] These sources make clear the obvious: price transmission exists in this market, as it does in every other competitive market for large capital goods.

The notional Mobile plan does nothing whatsoever to undermine the threat; in fact, it confirms the threat. The Commission must base its threat determination on "whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."[67] In this case, absent orders, Bombardier would revert to its pre-petition plan of meeting U.S. demand with C Series aircraft from the Mirabel facility. Bombardier's assertion that U.S. airlines will not purchase airplanes from Canada absent orders is unbelievable and uncorroborated and, if accepted, would apply to every case that comes before the Commission.

Section 1677(7)(I) allows the Commission to discount, in its threat determination, "artificially low demand for subject imports" where the change "is related to the pendency of the investigation." The legislative history of this provision makes clear Congress intended for the Commission to presume that any change in data concerning imports or their effects subsequent to the filing of the petition is related to the pendency of the investigation.[68] In this case, Bombardier and GOC are ***disingenuously*** arguing that the Mobile scheme will in fact depress demand for subject imports to ***zero***. Consistent with the statutory scheme, the Commission should—and must—simply ignore that asserted reduction as unquestionably related to the filing of this case.

Respectfully submitted,

Robert T. Novick
WILMER CUTLER PICKERING HALE & DORR LLP
Counsel to The Boeing Company

[66] Preliminary Determination, USITC Pub. 4702, at 28.
[67] 19 U.S.C. § 1677(7)(F)(ii).
[68] Statement of Administrative Action, H.R. Doc. No. 103–316, at 853-54 (1994); H.R. Rep. 103-826(I), at 75-76 (1994).

List of Exhibits

Exhibit Number	Description
Attachment A	Responses to Questions from Commissioners and Staff
1	Letter to Boeing from the Governments of Canada and the United Kingdom (Dec. 18, 2017)
2	David Koenig, *United Airlines Is on the Offensive Under New President Scott Kirby*, Skift (Feb. 27, 2017)
3	Bombardier Investor and Analyst Day, Bloomberg Transcript (Dec 14, 2017)
4	Boeing Letter, "*100- to 150-Seat Large Civil Aircraft from Canada*: Rebuttal Factual Information on the Announced Airbus-Bombardier C Series Partnership" (Nov. 6, 2017) ("Boeing 11/6/17 Factual Submission") Exhibits 6 and 15
5	*Republic Airways to sell Frontier for $145 million*, Reuters (Oct. 1, 2013),
6	U.S. Answers to First Set of Panel Question in *United States – Investigations of the International Trade Commission in Softwood Lumber from Canada* (Sept. 24, 2003)
7	Press Release, Bombardier, "Bombardier's all-new CS100 Aircraft Awarded Transport Canada Type Certification," (Dec. 18, 2015)
8	Sandrine Rastello, *Quebec Touts Airbus Sales Power, Jobs Saved in CSeries Deal*, Bloomberg (Oct. 17, 2017)
9	Julien Arsenault, *Bombardier unions expect protracted C Series dispute*, The Globe and Mail (Dec. 14, 2017)
10	Department of Commerce Memorandum, "Application of Adverse Facts Available to Bombardier Inc." (Oct. 4, 2017)
11	APO – Boeing Delivery Data
12	Ascend Data
13	APO – 737 MAX 7 Layout
14	*The Changing Scope Clause Environments*, mba (July 11, 2017)
15	Boeing Current Market Outlook, 2017-2036

ATTACHMENT A

Table of Contents

Questions from Chairman Schmidtlein

1. **Well, my question really is now about when United converted to those larger aircraft did the fact that you -- you know you allege that there was lost revenue from the downward pricing pressure from the Delta sale on this United campaign. Did that flow through to what United had to pay in terms of -- you know they paid more for the bigger plane? Did that have an effect on what United paid for those larger planes? (Tr. at 92:15-22)**

The extraordinarily low pricing that Boeing was forced to offer United on 737-700s [ ] through to the larger airplanes when United later chose to convert to 737-800s and 737 MAX 9s. Bombardier contends that Boeing gave United a "sweetheart deal on larger planes in exchange for keeping out the C Series," describing the timing of United's conversion to larger single aisle LCA as "highly suspect."[1] The record evidence directly contradicts these allegations. United ordered a total of 65 737-700s in January and March 2016 at a per-aircraft price of [ ]. Pursuant to a decision announced in November 2016, United substituted from -700s to 4 737-800s and 61 737 MAX 9s at [ ], respectively. The prices for the substituted 737-800s and 737 MAX 9s were determined according to [ ].

Boeing's involvement in the United campaign began in [

[1] Bombardier Prehearing Brief at 61-62.

[2] *See* Affidavit of [ ], para. 6 (Petition Exhibit 101).

].[3]

Boeing made its first offer [

].[5]

By [

].[7] It is Boeing's understanding that [

], contrary to Bombardier's assertion that United only wanted a plane with 100 seats.[8] The combination of the [ ], together with a price depressed by competition with the CS100, led United to conclude that Boeing's offer for the 737-700 was more attractive than Bombardier's offer for the CS100, and it ordered the Boeing aircraft. Had the C Series not competed for the United sale, Boeing expects that [

]. Boeing

---

[3] *See id.*

[4] *See* Boeing U.S. Producers' Questionnaire Response (Preliminary), Question IV-6.

[5] *See* Affidavit of [ ], para. 7 (Petition Exhibit 101).

[6] *See id.*, paras. 7-8.

[7] *See id.*, para. 8.

[8] *See* Hearing Tr. at 187 (Mitchell) ("United told us that the CS100 was too big for its needs. In response, we offered a smaller version, the CS100 lite."); *id.* at 257 (Aranoff) ("Well you'll remember that Boeing, from what Mr. Mitchell testified earlier this afternoon, that when Bombardier went in to United, United told them that they were looking for – that the CS100 was too big, that they were looking for a 100 seater and Bombardier offered a CS100 lite that was, you know, configured with 100 seats . . .").

also would have avoided [

]. And that was before Bombardier depressed market prices further with its even more aggressive pricing at Delta a few months later.

Bombardier is now attempting to rewrite history by framing the United campaign as a competition solely between itself and Embraer.[9] Contrary to Bombardier's assertions, Boeing did not "swoop in" at the last minute to block Bombardier from the U.S. market.[10] Tellingly, Bombardier has failed to specify when it first became involved in the United campaign, let alone provide any evidence proving that it made an offer to United prior to Boeing's [

] offer of 737-700s. [

].[11]

Moreover, Bombardier's assertions that the timing of United's subsequent decision to convert the 737-700 order to larger planes was "highly suspect" is ridiculous and has no connection to reality.[12] Boeing and United finalized the 737-700 firm orders in January and March 2016.[13] Five months later, in August 2016, United hired a new President, who began implementing a new strategy of up-gauging United's fleet to focus on different product

[9] *See* Hearing Tr. at 187 (Mitchell); *id.* at 257 (Aranoff).

[10] *See* Hearing Tr. at 187 (Mitchell) ("In the United sales campaign, Boeing had not been on anyone's radar. Bombardier's competition from the start was Embraer. . . . We believed we were in the lead and would be selected. Then out of nowhere we heard that Boeing swooped in and offered United a deal too good to refuse on 737-700s, an older airplane far too large to satisfy United's request for a 100-seater."); *id.* at 258 (Aranoff) ("Boeing had swooped in out of nowhere, made a very low-priced offer, and that United had signed a contract for 737-700s.").

[11] *See* [ ].

[12] *Cf.* Bombardier Prehearing Brief at 61-62.

[13] *See* Boeing U.S. Producers' Questionnaire Response (Preliminary), Question IV-6.

markets.[14] [

]. In November 2016, United announced that it was substituting out of the sixty-five 737-700s into four 737-800s and sixty-one 737 MAXs,[15] at [ ].[16]

Bombardier's argument also completely ignores Airbus' role in the market, as Airbus [ ][17] and United has since been looking for used A319s to fill the hole left by its decision to up-gauge to larger aircraft, which Delta confirmed at the Hearing.[18] No one disputes that the A319 and the Boeing 737-700 and MAX 7 directly compete. Moreover, Bombardier confirmed at the Hearing that United is in the market to refill its need for 100- to 150-seat aircraft and that it is in discussions with Bombardier about the C Series.[19]

In sum, Bombardier's "sweetheart deal" story is a fiction; the extremely low pricing that Boeing was forced to offer for the 737-700 [ ] the pricing of the larger Boeing airplanes that United ended up taking. This is demonstrated by the fact that [

---

[14] *See, e.g.,* David Koenig, *United Airlines Is on the Offensive Under New President Scott Kirby*, Skift (Feb. 27, 2017), attached as Exhibit 2 ("Delta and American Airlines Group Inc. have been adding flights, often on bigger planes, between major cities. Not United. 'We've been shrinking and our competitors have been growing at our expense,' says Scott Kirby, who jumped from president of American Airlines to the same job at United in August. 'We're going back on offense.'"); Mark Nensel, *United Airlines converts 737-700s order to -800s, -MAX versions*, Air Transport World (Nov. 15, 2016) (Petition Exhibit 39) ("'The realignment of our order book shifts our focus to ensuring our capital investments support earnings growth,' United EVP and CFO Andrew Levy said. . . . United's initiatives announced during the Investor Day presentation were designed to '{improve} network connectivity and revenue management, {broaden} product segmentation and {introduce} additional customer enhancements,' the company said."); Boeing U.S. Producers' Questionnaire Response (Final), Question II-12.

[15] *See* Mark Nensel, *United Airlines converts 737-700s order to -800s, -MAX versions*, Air Transport World (Nov. 15, 2016) (Petition Exhibit 39). [ ].

[16] *See* Affidavit of [ ], para. 10 (Petition Exhibit 101).

[17] *See* Affidavit of [ ], para. 6 (Petition Exhibit 101).

[18] Hearing Tr. at 259 (May).

[19] Hearing Tr. at 260 (Mitchell) ("It's certainly the case that since the conversion of those 737 hundreds, United has been in the media discussing the 100-seat aircraft requirement. And they have had discussions with the manufacturers, both us and Embraer, about what they would like to do in that space.").

].[20]

2. **So I {want to} go back to this question of imminence and I {want to} careful that we separate the discussion of injury and when the injury is occurring from this question of when the imports may occur. So I feel like it's been a little bit conflated at points. But the question about whether or not there are going to be subject imports from Canada imminently exceeding the negligibility standard, if we accept, for the sake of argument, that the Delta planes are going to be built in Alabama, and they're not going to be imported from Canada, regardless of the outcome of this case. Let's say we accept that for the sake of argument. What is the substantial evidence that there will be other imports from Canada that will imminently exceed the threshold, the negligibility threshold? So if you take Delta off the table, what do you point to? (Tr. at 119:16 – 120:6)**

The statute states that the Commission "shall not treat imports as negligible if it determines that there is a *potential* that imports from {a subject country} will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States. . . ."[21] The Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act ("URAA") explains that, in threat of material injury analyses, the Commission is to "examine 'actual' as well as '*potential*' import volumes."[22] Thus, the question before the Commission is whether there is a "*potential*" that 100- to 150-seat LCA from Canada will imminently account for more than 3% of the total volume of imports.

Confidential evidence on the record demonstrates that there is a potential that imports of 100- to 150-seat LCA from Canada will imminently exceed the negligibility threshold of 3% of total imports. The [

---

[20] *See* Affidavit of [ ], para. 10 (Petition Exhibit 101).

[21] *See* 19 U.S.C. 1677(24)(A)(iv) (emphasis added).

[22] Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 1027, reprinted in 1994 U.S.C.C.A.N. 4040, 4314 (hereinafter "SAA"); 19 U.S.C. § 3512(d) ("The statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

].[23] Specifically, [

].[24] Given that [

],[25] the data show that subject C Series imports will account for [ ] of total 100- to 150-seat LCA imports in [ ]. Bombardier acknowledged as much in its discussion of volume effects in its pre-hearing brief, stating: "{t}he market share of subject imports is zero and will remain zero until at least [ ]—and indefinitely ***if*** Delta's planes are produced at the U.S. {final assembly line}."[26] The Commission should ignore Bombardier's self-serving assertion that "{t}he projections for U.S. deliveries from Quebec that {it} provided in its {questionnaire} were based on the company's expectations before the Airbus deal."[27] In reality, Bombardier filed its questionnaire response on November 17th, which was a full month *after* it announced the deal with Airbus (October 16th).

The Commission should also disregard Bombardier's, Delta's, and GOC's claims that Delta and Bombardier are in ongoing discussions to renegotiate the contract to defer the deliveries currently scheduled for [ ].[28] There is no evidence on the record that the negotiations will ever be finalized.[29] Prior to the preliminary Commerce determinations, Delta's

---

[23] [

]; Boeing 12/12 Prehearing Brief. at 70.

[24] [ ].

[25] [ ].

[26] Bombardier Prehearing Brief at 82 (emphasis added).

[27] Bombardier Prehearing Brief at 15 (emphasis omitted).

[28] *Cf.* Bombardier Prehearing Brief 15; Delta Prehearing Brief at 3; GOC Prehearing Brief at 12.

[29] Hearing Tr. at 200-201 (May) ("Shortly after Delta learned of this opportunity we began working to renegotiate our CS100 orders to allow U.S. production, although the final details have not been finalized . . .").

CEO confirmed in July 2017 that the airline had no intentions to "slow down any of the deliveries . . . planned for the C Series."[30] Delta's motivation to defer deliveries is plainly a function of this case and will evaporate unless there are AD/CVD orders in place, notwithstanding the alleged, undocumented, and obviously immaterial benefits of taking delivery of aircraft in Mobile.[31] Notably, Mr. May stated at the Hearing that "{i}t's much easier to ship seats and in-flight entertainment equipment to Mobile, Alabama than *Hamburg, Germany*"[32]; Mr. May did not testify to the relative ease of shipping such equipment to Mirabel, Canada.[33]

Moreover, Delta admitted at the Hearing that it is contractually obligated to accept the aircraft scheduled for delivery in [ ]. Mr. May testified: "It is true, what Bombardier has indicated. We do not have a current commercial right to refuse, but {we've} made it clear what our desires are and it is an open negotiation."[34]

Furthermore, even if Delta and Bombardier do finalize their negotiations and place evidence to that effect on the record in January, as suggested at the Hearing,[35] a contract can just as easily be renegotiated to revert to the original delivery schedule, if there are no AD/CVD orders in place. As such, the Commission should not treat any petition-induced modifications to the deliveries as probative to how either Delta or Bombardier will act in a world without the

---

[30] *See* Event Brief of Q2 2017 Delta Air Lines Inc. Earnings Call – Final (FD Wire), at 17 (July 13, 2017) (Boeing 12/12 Prehearing Brief Exhibit 9).

[31] *Cf.* Hearing Tr. at 201 (May) ("Given the choice we would prefer to take delivery of aircraft in Alabama. There are several advantages. The logistics of arranging for buyer furnished equipment, for installation into the delivered aircraft are significant. It's much easier to ship seats and in-flight entertainment equipment to Mobile, Alabama than Hamburg, Germany. The logistics of aircraft inspections and the involvement of senior management are made substantially easier when we take delivery in Alabama.").

[32] *Id.* (emphasis added).

[33] *See id.*

[34] Hearing Tr. at 262 (May).

[35] Hearing Tr. at 251 (Aranoff) ("But we do encourage you if you want the latest information on which to base your determination that this is changing by the day, ask us before the record closes in January and we'll give you everything that's gone on since.").

discipline of duties that comes from a pending case or the imposition of AD/CVD orders. The Commission reached a similar conclusion in its investigation into *Hand Trucks and Certain Parts Thereof from China*, when it found that the domestic purchasers who had paused planned imports of subject merchandise during the pendency of the antidumping investigation would likely resume their plans if the Commission reached a negative determination.[36]

Even assuming, *arguendo*, that Delta does defer all its deliveries, Bombardier is already producing, or has completed, a number of aircraft scheduled for delivery starting in [ ],[37] and there are other U.S. customers lined up to buy the C Series. JetBlue, which has stated its interest in the C Series[38] and [ ].[40] Spirit similarly told the Commission that it is interested in purchasing the C Series.[41] Bombardier also admitted at the Hearing that it is discussing the C Series with United.[42] Any of those airlines could take delivery of the aircraft that Bombardier is producing for Delta right now in Mirabel, without the typical minimum two-year lag between order and delivery.[43] Bombardier stated at

---

[36] *See Hand Trucks and Certain Parts Thereof from China*, Inv. No. 731-TA-1059 (Final), USITC Pub. 3737 (Nov. 2004) at 17-19.

[37] [ ]; Hearing Tr. at 252, 298 (Commissioner Broadbent: "For Bombardier, are you currently producing the aircraft that you owe to Delta under the 2016 agreement for first delivery in 2018?" Mr. Dewar: "Yes, as I testified earlier, those aircraft will be delivered now to non-U.S. customers . . .").

[38] Frederic Tomesco, *Airbus Puts Price Tag on 'Made-in-USA' Label for C Series Jet*, Bloomberg (Oct. 20, 2017) ("Bombardier is already in talks with several potential U.S. customers for the C Series, CEO Alain Bellemare said Friday in Montreal. In addition to the deal with Delta, JetBlue Airways Corp. is another possible customer, Bregier said earlier this week.") (Boeing 12/12 Prehearing Brief Exhibit 1); JetBlue Letter to the Commission (Sept. 24, 2017).

[39] [ ].

[40] [ ].

[41] Spirit Airlines Letter to the Commission (Aug. 8, 2017).

[42] Hearing Tr. at 260 (Mitchell) ("It's certainly the case that since the conversion of those 737 hundreds, United has been in the media discussing the 100-seat aircraft requirement. And they have had discussions with the manufacturers, both us and Embraer, about what they would like to do in that space.").

[43] *See* Boeing 12/12 Prehearing Brief at 59-60.

the Hearing that it is attempting to sell those aircraft to non-U.S. customers,[44] but if there are no orders in place, there will be nothing to prevent Bombardier from selling them directly to U.S. customers instead.

Furthermore, if Delta defers all of its deliveries scheduled for 2018 and 2019, Bombardier will have even more excess capacity and the ability to make more near-term delivery slots available to U.S. customers.[45] In the Preliminary Determination, the Commission found that "Bombardier is likely to aggressively pursue additional sales in the U.S. market in the imminent future."[46] The Commission's finding was correct, and it has only become more certain in the intervening months. If the Commission were to reach a negative determination in this proceeding, it would terminate its investigation without the imposition of AD/CVD orders. At that point, *every* U.S. airline—including all of the airlines discussed above—will know that it can buy the already-manufactured Delta C Series aircraft and import them into the United States with *zero* risk of antidumping and countervailing duties, because it would take several months at a minimum before Boeing could prepare a new AD/CVD petition, file it and, assuming the Department was willing to initiate new investigations, obtain affirmative preliminary determinations of dumping, subsidization, and material injury or threat. The airlines will also know that, if they want the C Series in their fleets, it will not be possible to obtain even a single

---

[44] Hearing Tr. at 261 (Levesque) ("I think the uncertainty in the planning horizon today, we're planning to deliver those aircraft out of Alabama, and we are taking steps, as my colleague said, to place the aircraft that were started under a planning for Delta next year to be sold to non-U.S. airlines. So that's the plan."). Bombardier may have been referring to another apparent circumvention scheme being developed. According to a recent Reuters report, "Aeromexico AEROMEX.MX has held preliminary talks to take some Bombardier BBDb.TO CSeries jets orders from Delta Air Lines Inc DAL.N, which owns a stake in the Mexican carrier, to avoid possible U.S. trade duties levied on the planes, two sources familiar with the matter said." Allison Lampert & Christine Murray, *Aeromexico eyes Delta's C Series jet order amid U.S. trade spat: sources*, Reuters (Dec. 4, 2017) (Boeing 12/12 Prehearing Brief Exhibit 46).

[45] *See* Boeing 12/12 Prehearing Brief at 85-89. The Delta orders account for [
]. *See id.* at 84, 88.

[46] Preliminary Determination, USITC Pub. 4702 at 30.

C Series aircraft from the non-existent Mobile plant for at least [ ] years, if ever. And Bombardier will know that if it is unable to fill its production skyline in Mirabel, the program will fail. Given all of these facts, it is undeniable that there is, at a minimum, a "potential that imports . . . will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States. . . ."[47]

Finally, if Bombardier acts contrary to its economic incentives independent of this case and does follow through on its promises to build a final assembly line in Mobile to begin deliveries to Delta in [ ], it will have to import in-scope merchandise to do so. The scope covers 100- to 150-seat LCA whether imported fully or *partially* assembled.[48] Bombardier stated at the Hearing that it plans to copy its Mirabel final assembly line in Mobile.[49] Boeing notes that it appears Bombardier has not placed any evidence on the record explaining its final assembly line and processes in Mirabel; but Bombardier has asserted that assembly operations in Mobile will consist of eight steps that result in a fully assembled aircraft.[50] If this happens, the Mobile operations will likely involve the importation of "fully stuffed" fuselage sections, meaning sections already completely manufactured (*i.e.*, wires, insulation, paneling, flooring, stowage, etc.), with only final integration of these sections performed in Mobile. Although Bombardier testified at the Hearing that C Series aircraft that undergo final assembly in Alabama

---

[47] *See* 19 U.S.C. 1677(24)(A)(iv). The Commission should dismiss Bombardier's and Delta's attempts to transfer the Mirabel-built Delta CS100s to Delta's affiliate Aeromexico as a transparent petition effect that will evaporate if this case goes negative. The companies admit that their effort is petition-driven, and it is nonsensical to posit that, absent orders, Delta would prefer to incur the costs of extending its existing fleet of used aircraft for an additional two years, just so it can take deliveries from Mobile rather than Mirabel.

[48] *See 100- to 150-Seat Large Civil Aircraft from Canada: Final Affirmative Determination of Sales at Less Than Fair Value*, 82 Fed. Reg. ____ (Int'l Trade Admin. Dec. 18, 2017) and accompanying Issues and Decision Memorandum at 4 ("Commerce AD I&D Memo.").

[49] Hearing Tr. at 182 (Dewar) ("These components arrive at our production facilities in Mirabel, Quebec where we assemble an aircraft in eight key steps."); *id.* at 193 (Levesque) ("The plan is to build a full-scale, high tech manufacturing facility. The production process in Alabama will replicate the production steps that Bombardier performed in Quebec, which my colleague, Roy Dewar, described earlier").

[50] *Id.*

will not be worked on in Mirabel,[51] some aircraft sections of the C Series are in fact manufactured and assembled in Canada prior to the completion of aircraft assembly in Mirabel. In particular, Bombardier's Saint Laurent Facility in Montreal, Canada currently manufactures the aft fuselage and cockpit for the C Series and performs certain assembly operations, including joining the forward fuselage (which is manufactured by SACI in China) with the cockpit.[52] It is Boeing's position that these sections of the C Series manufactured and assembled in Canada would be covered within the scope as "partially assembled" aircraft.[53] If Bombardier intends to deliver CS100s assembled in Mobile to Delta in [ ], it will be importing subject merchandise within the next [ ].[54] Because there will be [ ], Bombardier's imports of partially assembled aircraft would satisfy the negligibility requirement.[55]

The evidence on the record thus demonstrates that, under any conceivable imminence timeframe (let alone the 4- to 5-year period appropriate for this industry),[56] there *is* a potential that subject imports will imminently exceed the negligibility threshold, and that is all that is required under the statute.

---

[51] *Id.* at 272 (Dewar); *see* Bombardier Prehearing Brief Exhibit 4.

[52] *See* Boeing Letter, "*100- to 150-Seat Large Civil Aircraft from Canada*: Rebuttal Factual Information on the Announced Airbus-Bombardier C Series Partnership" (Nov. 6, 2017) ("Boeing 11/6/17 Factual Submission") Exhibits 6 and 15, attached as Exhibit 4; European Commission, State aid N 654/2008 – United Kingdom, Large R&D aid to Bombardier, C(2009)4541 final (June 17, 2009), para. 25 ("Fuselage and cockpit will be manufactured at a Bombardier facility in Saint Laurent, Montreal;") (Petition Exhibit 22).

[53] *See* Boeing Brief, "*100- to 150-Seat Large Civil Aircraft from Canada*: Brief on the Announced Airbus-Bombardier C Series Partnership" (Nov. 13, 2017) ("Boeing JV Brief") at 11.

[54] *See* Boeing 12/12 Prehearing Brief at 59-60.

[55] *See* Boeing 12/12 Prehearing Brief at 84 (table of U.S. shipments and market shares showing projected subject and non-subject import levels).

[56] *See infra,* Response to Question 19.

3. **I wanted to follow up on this question about like product. And Mr. Anderson, you mentioned wire rod and pipe, but a more recent case that I had in my mind is the washing machine case, right, which is a retail product. There we found that there was a single like product, that there was a continuum. {. . .} So we had a number of tires cases here at the Commission in the last year or so and there are clearly different classes and tiers of tires. Now who is selling in each of those tiers was a question, but there are expensive, high-end tires and then there are cheap tires, right? And again, we found that there was a continuum of product. So here where you have airplanes that there's a little bit of overlap in the seats that you could put in it, you know, they're obviously being used for the same purpose, so how do I distinguish those other cases from here? (Tr. at 88:11-89:15)**

To further clarify Boeing's response at the Hearing, the 100- to 150-seat LCA industry bears no resemblance to the industries under consideration in *Large Residential Washers from Korea and Mexico* and *Off-the-Road Tires from China*. With respect to *Large Residential Washers from Korea and Mexico*, the Commission "found that the U.S. washer market comprises a continuum of washer products, *with substantial cross-shopping* between different segments."[57] This cross-shopping factored heavily into the Commission's analysis to find a single like product spanning the proposed dividing line at capacities of greater than 3.7 cubic feet.[58] In contrast, both Boeing and Bombardier are in agreement that no such cross-shopping exists in the commercial aircraft industry between 100- to 150-seat LCA and Boeing's larger single aisle offerings due to different physical characteristics that impose physical and economic constraints on uses and interchangeability.[59] This limited interchangeability did not exist for residential washers.

In the recent *Off-the-Road Tires from China* investigation, the Commission was again faced with an industry structured very differently than the 100- to 150-seat LCA industry. Tires

---

[57] *Certain Large Residential Washers from Korea and Mexico*, Inv. Nos. 701-TA-488 and 731-TA-1199-1200 (Final), USITC Pub. 4378 (Feb. 2013) at 44 (emphasis added).

[58] *Id.*

[59] *See* Bombardier Prehearing Brief at 39 ("Even if the Commission were to conclude . . . that there is meaningful competition between the C Series and the 737 MAX 7, the C Series presents no competitive threat whatsoever to the MAX 8, 9, and 10 . . . .").

exist "in an industry in which there are literally thousands of products, each . . . designed for a specific use."[60] For that reason, the Commission found "the lack of interchangeability does not provide strong guidance as to whether a clear dividing line exists."[61] Here, in contrast, the Commission is not being asked to slice the market into several product categories containing numerous sub-categories based on minor differences. There are only four Boeing single aisle aircraft models, each with significant differences in size, price, and purpose. This is not the type of continuum the Commission found for either *Large Residential Washers from Korea and Mexico* or *Off-the-Road Tires from China*, or any other case for that matter. Indeed, whereas Bombardier admits that airlines "cross shop" the C Series and the "737-700 or MAX 7,"[62] there is no record evidence that airlines cross shop between the 737-700 and MAX 7, on the one hand, and larger 737 models, on the other. To the contrary, clear dividing lines separate the 737-700 and MAX 7 from those larger models, as reflected in Bombardier's emphatic statement that the "C Series presents no competitive threat whatsoever to the MAX 8, 9, and 10 . . . ."[63]

The investigation into small diameter electrodes is also instructive. There, a clear dividing line was drawn between the small and large categories, despite an overlap in amperage carrying capacity.[64] The Commission even framed the products as "forming a continuum" along

---

[60] *Certain Off-the-Road Tires from China*, Inv. Nos. 701-TA-448 and 731-TA-1117 (Final), USITC Pub. 4031 (Aug. 2008) at 9.

[61] *Id.*

[62] Bombardier Prehearing Brief at 62.

[63] *Id.* at 39.

[64] *Small Diameter Graphite Electrodes from China*, Inv. No. 731-TA-1143 (Final), USITC Pub. 4062, at I-8 (Feb. 2009) ("SDGE typically have lower current carrying capacity ranging from 15,000 to 60,000 amps, but do not exceed 70,000 amps. LDGE can carry from 60,000 to 160,000 amps, with the majority of modern EAFs operating over 100,000 amps. Respondents note that there is an overlap in current carrying capacity among adjacent sized electrodes but no overlap among electrodes of more diverse size.").

that range,[65] which demonstrates that a continuum finding in terms of size does not necessitate a finding of a single domestic like product consisting of all single aisle LCA.

4. So for the 319s that are scheduled to be delivered in the United States soon, I suppose, and I know there's a chart and the staff might be able to flip to it quickly, but did Boeing compete for this sale? (Tr. at 125:7-11)

Yes, Boeing competed for this sale. [

].[66]

For purposes of responding to this question, Boeing referred to publicly-available Ascend data, attached as Exhibit 44 to the Petition, which shows that the A319s scheduled for U.S. delivery in 2019-2020 were ordered by Frontier in 2011.[67] In 2011, Frontier was owned by Republic Airways Holdings.[68] Boeing competed for these orders via a sales campaign in 2011 with Republic Airways Holdings. At the time, Republic Airways was also placing orders for C Series aircraft. When Republic Airways Holdings sold Frontier in 2013, the A319 orders went with Frontier, while the order for 40 CS300s remained with Republic Airways. In October 2016, Republic and Bombardier reached a settlement providing for deferral of all C Series deliveries,[69] although [ ].[70] To the extent that Republic or

---

[65] *Id.* at 9 ("There are a number of ways in which SDGE and LDGE might be viewed as forming a continuum, including that price, current carrying capacity, and premium needle coke content all tend to increase with the size of the electrode and electrodes of adjacent sizes are most comparable with respect to these attributes. Nevertheless, there are several salient features of graphite electrodes that we find establish a clear dividing line between SDGE and LDGE at 16 inches in diameter.").

[66] *See* [ ].

[67] *See* U.S. & Global 100- to 150-Seat Large Civil Aircraft Actual & Projected Deliveries & Market Share Charts, Ascend Data, & Ascend Backlog Data (Petition Exhibit 44).

[68] Republic sold Frontier to private equity firm Indigo Partners in 2013. *See Republic Airways to sell Frontier for $145 million*, Reuters (Oct. 1, 2013), attached as Exhibit 5.

[69] *See* Karen Walker, *Republic SEC filing confirms CSeries deferrals*, Air Transport World (Oct. 27, 2016) (Petition Exhibit 65).

[70] [ ].

another U.S. airline takes delivery of these orders, the result will be further material injury to the domestic industry.

5. Are you arguing that the injury {Boeing} suffered at the time of that sale is enough to constitute injury for threat purposes? (Tr. at 161:10-12)

The injury suffered at the time of the Delta sale is sufficient on its own to sustain an affirmative threat determination. As Mr. Novick testified at the Hearing, Bombardier's sale of C Series aircraft to Delta caused injury to the domestic industry at the time of sale, in the form of a lost opportunity to capture Delta's demand for new 100- to 150-seat LCA, and that sale will continue to adversely affect the domestic industry in the imminent future due to continuing price and volume effects (such as depressed prices Boeing is able to charge in future campaigns).[71]

The Commission can and has found threat of material injury predicated on sales during the POI, even where those sales did not support a finding that material injury had already occurred.[72] In prior cases, the Commission relied on "evidence of underbidding on both a price and a performance basis, coupled with the increasing number of transactions for which the subject imports are competing" to find that subject imports would "result in significant suppressive and depressive effects in the future."[73] The Commission has also found a threat of material injury where, in an industry with years between order and delivery, the full adverse impact of prior lost sales may not be reflected in the domestic industry's financial condition until

[71] Hearing Tr. at 161-162 (Novick).

[72] *See Vector Supercomputers from Japan*, Inv. No. 731-TA-750 (Final), USITC Pub. 3062 (Oct. 1997) at 19; *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany or Japan*, Inv. Nos. 731-TA-736 and 737 (Final), USITC Pub. 2988 (Aug. 1996) at 32-35.

[73] *Vector Supercomputers from Japan*, Inv. No. 731-TA-750 (Final), USITC Pub. 3062 (Oct. 1997) at 19.

years after the sale.[74] The injury from the Delta sale has been locked-in and is sufficient to sustain an affirmative threat determination as a matter of law, even if the effects have yet to fully materialize.

The record also contains evidence that the suppressive price effects of the Delta sale have already begun to impact [ ]. As a direct result of the extremely low-priced C Series aircraft that Bombardier sold to Delta, [

].[75]

These price effects will continue to harm the domestic industry in future sales campaigns, and thus further injury will materialize in the imminent future. As explained by Professor Nickelsburg, "industry participants, including potential buyers of the aircraft, will typically discover previously negotiated prices, as well as other contract provisions previously agreed upon, and use that information during the negotiation process."[76] Professor Nickelsburg testified at the Staff Conference that, for this reason, "after a manufacturer lowers its price to a certain level, it is virtually impossible to raise it back up again."[77] Ray Conner similarly testified that

---

[74] *See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany or Japan*, Inv. Nos. 731-TA-736 and 737 (Final), USITC Pub. 2988 (Aug. 1996) at 35; *Certain Laser Light-Scattering Instruments and Parts Thereof from Japan*, Inv. No. 731-TA-455 (Final), USITC Pub. 2328 (Nov. 1990) at 19 ("{B}ecause of the long sales cycle, when a producer seeks to encourage sales by underselling competitors, the effects on both the underselling producer and the competitors are unlikely to be immediately discernable.").

[75] Affidavit of [ ], paras. 8-12 (Boeing 12/12 Prehearing Brief Exhibit 2); Declaration of [ ], para. 4 (Boeing 12/12 Prehearing Brief Exhibit 3).

[76] *See 100- to 150-Seat Large Civil Aircraft from Canada*, Inv. Nos. 701-TA-578 & 731-TA-1368 (Preliminary), "Post-Conference Brief, Petitioner: The Boeing Company" (May 24, 2017) ("Boeing 5/24 Post-Conference Brief"), Exhibit 8 ("Nickelsburg Report"), para. 71.

[77] Revised and Corrected Transcript of May 18, 2017 Preliminary Staff Conference ("5/18 Staff Conference Tr.") at 39 (Nickelsburg).

competing airlines will demand comparable pricing so as not to disadvantage themselves in the downstream market.[78]

The low prices like those in the Delta sale transmit through the market, and impact the prices other manufacturers can charge for their competing products. And price transmission is real, as shown in the record evidence here. At the Hearing Delta's Senior Vice President testified that Delta "heard the rumored price that United was going to pay for the 700 . . ."[79] In the United campaign, [

].[80] As the Commission noted, "Boeing was able to estimate [

] Delta's price per aircraft on its purchase of CS100s from Bombardier using public information, as were other market participants."[81] Bombardier's consultants at FlightAscend touted their ability to estimate the "typical delivery price for new aircraft."[82] [

].[83] This undeniable price transmission mechanism has, in turn, enabled aggressive C Series pricing to drive down prices for the domestic like product and forced Boeing to choose between losing sales or accepting injurious price cuts for the domestic like product.

Consistent with this, [

]. Responding customers

---

[78] 5/18 Staff Conference Tr. at 30 (Conner).

[79] Hearing Tr. at 239-240 (May).

[80] Affidavit of [ ], paras. 5-9 (Petition Exhibit 101).

[81] Preliminary Determination, USITC Pub. 4702, at 28.

[82] *See* Bombardier Prehearing Brief, Attachment A, FlightAscend Report at 44.

[83] [

]. *See* [

]; Affidavit of [ ], para. 6 (Boeing 12/12 Prehearing Brief Exhibit 2).

indicated that [ ].[84] For example, [ ] stated in its questionnaire response that [ ].[85] Regarding price expectations, [ ].[86] Further, [ ].[87] [ ].[88] There is simply no credible evidence that the sale to Delta will not impact pricing in future sales campaign with U.S. customers.

6. If you could put on the record, and maybe you already have and I just haven't, I'm not recalling it, evidence of where other airlines are using that {Delta} sale. I know I recall in your brief there's some. But if you have it already, if you could put that on the record. (Tr. at 162:5-10)

The evidence on the record of other airlines using the Delta sale includes [

[84] [ ] U.S. Importers' and/or Purchasers' Questionnaire Response (Final), Question III-13a.

[85] [ ] U.S. Importers' and/or Purchasers' Questionnaire Response (Final), Question III-13a.

[86] [ ] U.S. Importers' and/or Purchasers' Questionnaire Response (Final), Question III-4b.

[87] [ ] U.S. Importers' and/or Purchasers' Questionnaire Response (Final), Question III-4b.

[88] [ ] U.S. Importers' and/or Purchasers' Questionnaire Response (Final), Question III-4a.

[89] *See* Affidavit of [ ], paras. 8-14 (Boeing 12/12 Prehearing Brief Exhibit 2); Boeing U.S. Producers' Questionnaire Response (Final), Question II-12.

].[92]

[

].[96]

Accordingly, the C Series threat is [

[90] *See* Affidavit of [ ], para. 8 (Boeing 12/12 Prehearing Brief Exhibit 2).

[91] *See* Affidavit of [ ], para. 9 (Boeing 12/12 Prehearing Brief Exhibit 2).

[92] *See id.*; Boeing U.S. Producers' Questionnaire Response (Final), Question II-12.

[93] *See* Affidavit of [ ], paras. 5-8, 12, 14 (Boeing 12/12 Prehearing Brief Exhibit 2).

[94] *See id.*, paras. 7, 12-14 (Boeing 12/12 Prehearing Brief Exhibit 2).

[95] *See id.*, para. 7 (Boeing 12/12 Prehearing Brief Exhibit 2).

[96] *See id.*, paras. 7, 12, 14 (Boeing 12/12 Prehearing Brief Exhibit 2); Boeing U.S. Producers' Questionnaire Response (Final), Question II-12.

[97] *See* Affidavit of [ ], paras. 8, 10, 12, 14 (Boeing 12/12 Prehearing Brief Exhibit 2); Boeing U.S. Producers' Questionnaire Response (Final), Question II-12.

].[98]

Similar harm is unfolding [ ]. In a declaration attached to Boeing's prehearing brief, [

].[99]

Thus, other U.S. airlines are using the Delta price to demand lower pricing from Boeing on the 737-700 and MAX 7, and this threat is not limited to the aforementioned examples. Bombardier has stated that it is "in talks with several potential U.S. customers for the C Series,"[100] including JetBlue and, as stated at the Hearing, United Airlines.[101]

---

[98] *See* Affidavit of [ ], paras. 11, 12 (Boeing 12/12 Prehearing Brief Exhibit 2).

[99] Purchaser Views, Declaration of [ ], paras. 2-4 (Boeing 12/12 Prehearing Brief Exhibit 3).

[100] Frederic Tomesco, *Airbus Puts Price Tag on 'Made-in-USA' Label for C Series Jet*, Bloomberg (Oct. 20, 2017) (Boeing 12/12 Prehearing Brief Exhibit 1).

[101] Hearing Tr. at 260 (Mitchell) ("It's certainly the case that since the conversion of those 737 hundreds, United has been in the media discussing the 100-seat aircraft requirement. And they have had discussions with the manufacturers, both us and Embraer, about what they would like to do in that space.").

7. **Well, no, but you're making the argument that not only is that the like product, but that we should expand the product beyond the scope, which I have a question about that. How many cases do we actually take a like product and sweep in more products than what is in the scope? (Tr. at 230:12-17)**

While the Commission has the authority to define the like product more broadly than the subject merchandise definition, it almost never does.[102] The scope determined by Commerce serves as the Commission's "departure point in determining the domestic like product."[103] And the Commission has declined to expand the domestic like product where respondents have argued for a product continuum that was not "seamless," and that would require the Commission to lump together discrete product categories.[104] Further, where the Commission has expanded the like product beyond the scope of investigation, it has been to capture products that are wholly additive in terms of physical characteristics and interchangeability. In *PET Film*, the Commission broadened the like product to include equivalent PET film, which was beyond the scope of investigation, because it could perform the same functions as other in-scope PET film.[105] This same rationale does not apply in the present investigation. As discussed in Boeing's prehearing brief, larger Boeing single-aisle LCA cannot perform the same functions as its in-scope aircraft.[106] Even assuming an overlap in some capabilities, the meaningful

---

[102] *See, e.g.*, *Small Diameter Graphite Electrodes from China*, Inv. No. 731-TA-1143 (Preliminary), USITC Pub. 3985 (Mar. 2008) at 9-10 & nn. 46-47 (defining the like product as coextensive with the scope where line between small and large variants of product is "clearly articulated in the scope of investigation" and where there are "clear distinctions" between the product categories); *Certain Tow-Behind Lawn Groomers and Parts Thereof from China*, Inv. No. 701-TA-457 and 731-TA-1153 (Preliminary), USITC Pub. 4028 (Aug. 2008) at 13-14.

[103] *Certain Aluminum Plate from South Africa*, Inv. No. 731-TA-1056 (Preliminary), USITC Pub. 3654 (Dec. 2003) at 10-11 n.59.

[104] *Certain Aluminum Plate from South Africa*, Inv. No. 731-TA-1056 (Final), USITC Pub. 3734 (Nov. 2004) at 17 ("Expanding the domestic like product to include all aluminum plate would encompass not a relatively seamless continuum, but rather one divided between heat-treatable and non-heat treatable plate.").

[105] *Polyethylene Terephthalate (PET) Film, Sheet, & Strip from Japan & Korea*, Inv. Nos. 731-TA-458 and 459 (Final), USITC Pub. 2383 (May 1991) at 15 (expanding the like product to include "a particularized type of PET film destined for the graphics market that contains the *essential characteristics discussed above common to all PET film, in addition to its specialized adhesive characteristics*" (emphasis added)).

[106] *See* Boeing 12/12 Prehearing Brief at 25-33.

differences in terms of interchangeability in end use as well as economic efficiency necessitate a finding of a distinct like product of the -700 and MAX 7.[107]

The Commission has shown an unwillingness to expand the like product where respondents have not proposed a clear and sensible alternative that more reasonably captures the relevant market.[108] As Chairman Schmidtlein highlighted at the Hearing,[109] Bombardier would like the Commission to adopt a broader like product definition that pulls in larger aircraft models that no party to this investigation contends compete with subject merchandise. When pressed, even respondents could not defend the inconsistencies in this proposal. That is because Bombardier's continuum argument is based on the false premise that the Commission must determine that the differences between the -700/MAX 7 and larger 737 variants are "decisively more significant than differences among the rest of the models in the family."[110] Bombardier is mischaracterizing the Commission findings that it cites in support of its assertion, which are inapposite to the facts here.[111] The comparison to the subject merchandise is at the heart of the

---

[107] *See Certain Tow-Behind Lawn Groomers and Parts Thereof from China*, Inv. Nos. 701-TA-457 and 731-TA-1153 (Preliminary), USITC Pub. 4028, at 11 (Aug. 2008) (excluding a product because, while it had the same technical capabilities as the domestic like product, it was "too large and expensive to substitute economically").

[108] *See Certain Kitchen Appliance Shelving and Racks from China*, Inv. Nos. 701-TA-458 and 731-TA-1154 (Preliminary), USITC Pub. 4035 (Sept. 2008) at 10-11 ("We note that the Commission's ability to consider Respondents' arguments for expanding the domestic like product is hindered by the lack of specificity in Respondents' proposal at this stage. . . . Although Respondents ask that the Commission find a like product broader than the scope of the imported products, it is unclear exactly what like product the Respondents are advocating.").

[109] Hearing Tr. at 229.

[110] Bombardier Prehearing Brief at 19.

[111] For example, in the *Lined Paper* case, the Commission stated the following:

> The Commission found that the physical characteristics, end uses, interchangeability, customer and producer perceptions, and common manufacturing processes, equipment, and employees were factors that weighed in favor of including other lined paper products in the same domestic like product. Moreover, the Commission found that many of the differences between other lined paper products and CLPSS, such as producer perceptions, price and practical interchangeability, also exist among the products contained within CLPSS. For these reasons, the Commission defined the domestic like product as lined paper products ("LPP"), which included CLPSS and other lined paper products with dimensions including and between 5 inches x 7 inches and 15 inches x 15 inches.

inquiry.[112] As such, the Commission should define the like product as coextensive with the scope of investigation, as it did in the preliminary.

Questions from Vice Chairman Johanson

8. Also, for your post-hearing brief, could you please comment on the confidential statement at the bottom of page 12 of Canada's brief? Specifically, I am referring to the last three lines of page 12, which are in brackets. (Tr. at 100:9-12)

Following with the Government of Canada, could you please comment on the Government of Canada's legal interpretation of our statutory guidance on imminence, especially, the passage on page 12 of its brief. (Tr. at 100:16-19)

Boeing addresses GOC's argument that the Commission cannot rely on the Delta sale to find there is a potential that imports will imminently exceed the negligibility threshold above in Question 2. Boeing also notes that GOC's argument is premised on its assertion that [

]

there is no legal impediment to Bombardier acting as the importer of record for C Series imported into the United States. Thus, [

See Certain Lined Paper Sch. Supplies from China, India, & Indonesia, Inv. Nos. 701-TA-442-443 and 731-TA-1095-1097 (Final), USITC Pub. 3884 (Sept. 2006) at 6 (emphasis added). Here, by contrast, there are only two LCA models within the proposed like product, the -700 and the MAX 7, which are successive generations of the single model that Boeing uses to serve the 100- to 150-seat market segment. There are clear differences between these LCA (e.g., number of seats, mission) and other, larger single aisle LCA.

[112] 19 U.S.C. § 1977(10).

[113] GOC Prehearing Brief at 12 n.32.

[114] [
].

[115] [

].

] is

baseless.[116]

9. And in particular, could you also comment on the special care standard for threat determinations that is mentioned in the legislative history as discussed in the Government of Canada's brief at page 34, footnote 103. (Tr. at 100:19-23)

Contrary to GOC's argument, there is no "standard for 'special care'" separate or distinct from the statutory basis for threat determinations set forth in 19 U.S.C. § 1677(f). The statute provides that, in making a threat determination, the Commission shall consider the factors set forth in 19 U.S.C. § 1677(f)(i), as a whole, to determine "whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued . . ."[117] The statute also provides that "{s}uch a determination may not be made on the basis of mere conjecture or supposition."[118] The statute does not establish an explicit requirement or standard for "special care."

The term "special care" appears in the WTO Antidumping Agreement ("AD Agreement') and Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[119] The Statement of Administrative Act ("SAA") accompanying the Uruguay Round Agreements Act ("URAA"), which implemented the AD and SCM Agreements into U.S. law, makes a passing reference to "special care":

> A threat of material injury determination is subject to *the same evidentiary requirements and judicial standard of review as a present material injury determination.* Because of the predictive nature of a threat determination, and to avoid speculation and

[116] *Cf.* GOC Prehearing Brief at 12-13 n.32.

[117] 19 U.S.C. § 1677(f)(ii).

[118] *Id.*

[119] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") art. 3.8; Agreement on Subsidies and Countervailing Measures ("SCM Agreement") art. 15.8.

> conjecture, the Commission will *continue* using special care in making such determinations as provided in the Agreements.[120]

Thus, the legislative history clarifies both that the URAA did not change the Commission's evidentiary requirements or legal standard in threat cases and that, as it did before enactment of the URAA, the Commission uses "special care" in threat cases by avoiding determinations made on the basis of mere conjecture or supposition, as required under the statute. To the extent GOC argues that the Commission must take special care above and beyond the statutory requirement to avoid a determination based upon mere conjecture or supposition, its argument is contrary to the law.

The U.S. Court of International Trade confirmed this interpretation in *Goss Graphic System, Inc. v. U.S.*, explaining that: "{d}ue to the predictive nature of a threat of material injury determination, the ITC must use special care in making such a determination *to avoid speculation or conjecture*."[121] This has also been the United States' position at the WTO:

> The covered Agreements do not state what constitutes "special care;" nor has any panel explicitly addressed this provision. The covered Agreements do not support Canada's attempt to interpret "special care" as a special review standard for either the Panel or the investigating authority. The United States understands the "special care" language to be a recognition that projections about the future must be based on present and past facts. While a threat analysis is a future-oriented analysis, it cannot be based on allegation, conjecture or remote possibility; rather it must be based on the facts.[122]

As such, the Commission need not apply any distinct "special care" standard beyond the statutory requirements for a threat determination.

---

[120] SAA at 855 (emphasis added).

[121] *Goss Graphic Sys., Inc. v. United States*, 33 F. Supp. 2d, 1082 (Ct. In'tl Trade 1998), *aff'd* 216 F.3d 1357 (Fed. Cir. 2000) (emphasis added) (citing the SAA).

[122] U.S. Answers to First Set of Panel Question in *United States – Investigations of the International Trade Commission in Softwood Lumber from Canada* (Sept. 24, 2003), para. 1, attached as Exhibit 6.

10. When considering imminence, how should we take into account the cutoff period for changing a manufacturer's skyline? That is, the last date for which flexibility for any conversion cease? Does Bombardier's estimate of 18 to 24 months mentioned at page 69 of their brief seem correct? (Tr. at 101:1-5)

Please refer to the response to Question 19 below.

11. And continuing with the issue of price transmission, could you all please comment on the Government of Canada's confidential discussion of price transmission at pages 44 to 45 of its brief? It may be interesting to join this discussion with a comparison of the material at page 101 of your own brief, which is also confidential. (Tr. at 130:11-16)

GOC misinterprets [

].

[

].

12. In Bombardier's brief at page 63, Bombardier may have provided some support for Boeing's view when it cites the example of the 787. Is it true that Boeing had to provide launch pricing to the 787? (Tr. at 132:4-7)

As an initial matter, it is important to clarify several points. First, Boeing does not provide launch pricing that is below its [ ] cost of production. Indeed, Boeing's experience has been that pricing for launch customers [ ].[123] As Mr. McAllister testified at the Hearing: "{o}bviously when Boeing wants to put an aircraft out in the market, we're very mindful of what the cost of that airplane is within the Boeing Company. We're always very mindful on what that future revenue stream returns to the company. So I don't think it's fair to make a comparison between what we've seen at the Bombardier C Series at Delta and what Boeing has done in its historical practices on other—of this airplane or any other airplane."[124]

The chart Bombardier displayed at the Hearing was created using publicly available information about Boeing's prices and cost overruns of the 787 program.[125] Incidentally, the fact that the authors were able to create this chart illustrates the existence of price transmission in this industry, a fact confirmed in the article: "{t}he diagram looks detailed, but the re-creation of order values is not difficult. The customers (airlines, leasing companies), OEMs and the deal

[123] *See* Boeing U.S. Producers' Questionnaire Response (Final), Question IV-6a.

[124] *See* Hearing Tr. at 132 (McAllister).

[125] Bjorn Fehrm, *How Boeing pays back the 787 debts*, Leeham News (July 27, 2017) (Bombardier Prehearing Brief Exhibit 35).

value experts (Certified Appraisers) meet several times a year to discuss the market and pricing."[126]

Nevertheless, the chart [ ] compares estimated historical sales prices to estimates of *actual* average COGS in 2017 dollars.[127] As Mr. McAllister stated in his testimony, revenue management is an important part of Boeing's sales process. [ ]. Boeing does not offer sales prices that are below an aircraft's [ ] COGS.

When Boeing launched the 787 program in 2004, it [ ]. The 787 program has since experienced numerous delays and cost overruns, as documented in Exhibits 35 and 38 to Bombardier's prehearing brief. As a result, the 787's [ ]. An *ex post* comparison of estimated Boeing 787 prices in 2004 to estimates of the program's actual average COGS, which reflects the aforementioned significant and unanticipated cost overruns, does not prove that Boeing offers its customers launch pricing below cost.

In contrast, Bombardier's sales price to Delta was more than $10 million per aircraft below the projected long-run average cost of production *at the time of the sale*, even under very conservative assumptions about a high number of lifetime program sales and associated cost savings from movement down the cost improvement curve.[128]

---

[126] *See id.* ("The net customer pricing for the initial orders for the 787 program has been widely publicized. Net order values of $65m-$75m were achieved by several customers in the time period 2004-2006, according to an analysis in 2010 by Flight International's *Flightblogger*. We have used this and other information (described below) to create the 787 revenue curves in Figure 2.").

[127] *See id.*

[128] *See* Petition at 122-126.

Second, the Delta sale was not launch pricing due to its timing.[129] As Professor Nickelsburg testified at the Hearing, launch pricing happens around the time that an aircraft manufacturer's board approves the aircraft for sale:

> What happens at that time is that the airlines who are ordering the aircraft are assuming delivery risk. They're assuming program risk because they don't know the exact performance of the airplane. They're assuming certification risks. So there are a number of risks that the airline is taking on. And to compensate the airline for taking on that risk, they get a lower price because risk is valuable.
>
> By the time you get to certification, which in this case happened in the calendar year prior to the Delta purchase, all of that was taken care of. So there was none of the launch risk involved in the Delta purchase. And so the idea that the Delta price may have been a launch price, that's just not the way the industry historically works and it's not related to the kind of program risk that you take at the launch of an aircraft . . .
>
> {The CS100} was certified in December 2015. The Delta purchase was in 2016. So the aircraft was—Delta, and everyone else, knew the performance characteristics of the airplane, knew when it was going to be certified, and knew the delivery schedule. So these are things you don't know at launch. You're given—right—and the launch was in 2008. So eight years previously and airline was ordering the C Series, you would expect a discount called "launch pricing" because they're taking considerable program risk. Once an aircraft is certified, there's no program risk that they're taking anymore, and so you wouldn't expect them to get a discount to assume that risk because the risk doesn't exist . . .
>
> Let me be clear. The risk is at time of launch you have a paper airplane. And when that airplane is finally created for flight test, you find out what the airplane really will do. And there are invariably differences. We spoke earlier about the Convair 990. This was a case where American Airlines took launch risk and the aircraft couldn't perform the mission that American Airlines wanted. So there's risk when you first order an airplane that is nothing more than some engineering drawings.

[129] *See* Hearing Tr. at 132 (McAllister) ("There's a big difference between what we call launch pricing and what we see at the Bombardier C Series at Delta. Not remotely close in terms of disparity between what a launch price would do.").

> That is quite different from an airplane that has been certified by an aviation authority that is flying and whose characteristics you know, and that is going into production. So those are very different times in the development of an airplane.[130]

Bombardier suggested at the Hearing that launch pricing was still relevant in 2016 because the C Series had not yet been certified by the FAA.[131] But the CS100 was certified by Transport Canada, the FAA's Canadian counterpart, in December 2015, as Professor Nickelsburg testified.[132] The C Series test flight program for certification "covered more than 5,000 hours."[133] And it was scheduled to enter service with Swiss International Air Lines in July 2016.[134] Thus, Delta and other potential customers had a very good idea of what the aircraft was capable of, and Delta assumed none of the program risk described by Professor Nickelsburg when it purchased the aircraft in 2016.

13. I would like to ask what has been the reaction of the Canadian public to formation of the joint venture, specifically given that the governments in Canada, the Canadian government and the Quebec government had taken a stake in this project, what has been the reaction to the fact that some of the better jobs are being moved out of Canada and to the United States? (Tr. at 243:12-18)

To provide an answer to the Commissioner's question, interested parties in Canada have expressed concerns about the Airbus partnership and its attendant Alabama assembly line. The deal has been criticized by Canadian politicians as a waste of Quebec's $1billion equity infusion

[130] Hearing Tr. at 132-135 (Nickelsburg).

[131] *See* Hearing Tr. at 188 (Mitchell).

[132] *See* Martin Patriquin, The inside story behind the bungled Bombardier C Series, Maclean's (Feb. 8, 2016) (Petition Exhibit 26); Press Release, Bombardier, "Bombardier's all-new CS100 Aircraft Awarded Transport Canada Type Certification," (Dec. 18, 2015), attached as Exhibit 7.

[133] Press Release, Bombardier, "Bombardier CS300 Aircraft Awarded Type Certification by Transport Canada" (July 11, 2016) (Petition Exhibit 149).

[134] *See* Aaron Karp, Bombardier still hopeful for United Airlines CSeries order, Air Transport World (Feb. 16, 2016) (Petition Exhibit 40); Press Release, Bombardier, "Bombardier CS300 Aircraft Awarded Type Certification by Transport Canada" (July 11, 2016) (Petition Exhibit 149).

and detrimental to the Quebec economy.[135] To appease these critics, Canadian officials are requiring "long-term promises from Airbus before signing off on the deal," including "keeping 100 per cent of those employed at Bombardier's main CSeries assembly plant in Mirabel{.}"[136] Likewise, members of the labor unions supporting Bombardier's workers have expressed discontent with the existence of the second assembly facility.[137]

This criticism is directly connected to the adverse effect on Canadian production these interested parties expect to occur if the Alabama facility were to materialize. Bombardier was already struggling to meet its production goals with only one assembly facility.[138] Even under an implausible scenario assuming an "exact replica" facility in Alabama,[139] Bombardier would need to significantly increase its order volume to sustain production capacity at both assembly lines, and even if this were achieved, splitting production between two facilities would reduce learning curve improvements and increase costs.[140] Absent duty orders, the pressure on the home front provides strong incentive for Bombardier to ensure it reaches its production goals at Mirabel above all else. The jobs commitment, combined with labor union considerations, make it likely that substantial C Series production will occur in Quebec. Based on current orders, that would necessarily minimize the amount of C Series work that could be performed at a U.S. facility, because those orders are far from meeting the production needs of the Canadian facility.[141]

---

[135] *See* Sandrine Rastello, *Quebec Touts Airbus Sales Power, Jobs Saved in CSeries Deal*, Bloomberg (Oct. 17, 2017), attached as Exhibit 8.

[136] *See* Boeing Brief on the Announced Airbus-Bombardier C Series Partnership (Nov. 13, 2017) at 4.

[137] *See* Julien Arsenault, *Bombardier unions expect protracted C Series dispute*, The Globe and Mail (Dec. 14, 2017), attached as Exhibit 9 (noting that labor union "Unifor isn't pleased with a proposed second C Series assembly line at Airbus SE's facility in Alabama").

[138] Hearing Tr. at 191 (Levesque).

[139] Hearing Tr. at 223 (Dewar).

[140] *See* Interviews and plant tour in Renton, Washington regarding *100- to 150-Seat Large Civil Aircraft from Canada:* Investigation Nos. 701-TA-578 and 731-TA-1368 (Final), Attachment 2, slide 16.

[141] *See* Boeing 12/12 Prehearing Brief at 86-89.

Again, these incentives further confirm that the Mobile "plan" makes no economic sense aside from a scheme to evade antidumping and countervailing duties.

14. Given that it is Bombardier's argument that the Alabama plant will negate the need for subject imports, thereby triggering negligibility under the statute and eliminating any potential threat of injury, what evidence can you provide that the Alabama plant would not be withdrawn or dissolved if the Commission were to reach a negative determination? (Tr. at 273:23-274:4)

Boeing notes as an initial matter that the "evidence" cited by Bombardier in response to this question does absolutely nothing to address the concerns expressed by Vice Chairman Johanson, or to convert the entirely notional Mobile "plan" into something upon which the Commission could properly rely in its determination. Indeed, the Commission should disregard the supposed Mobile production plans in its threat analysis for three reasons.

First, the statute requires the Commission to base its threat determination on "whether material injury by reason of imports would occur *unless an order is issued* or a suspension agreement is accepted."[142] In this case, if no order is issued and no suspension agreement is accepted, then Bombardier would revert to its pre-petition plan of meeting U.S. demand with C Series aircraft from the Mirabel facility.[143] For all the efforts to convince the Commission that it should disregard the record evidence, the original C Series purchase agreement between Delta and Bombardier remains in place.[144] And Bombardier's assertion that U.S. airlines will not purchase airplanes from Canada absent orders is not credible, as the Commission has recognized in past cases, as discussed below.

---

[142] 19 U.S.C. § 1677(F)(ii) (emphasis added).

[143] *See* [ ].

[144] Hearing Tr. at 262 (May) ("It is true, what Bombardier has indicated. We do not have a current commercial right to refuse, but we've made it clear what our desires are and it is an open negotiation."). *See also* Bombardier Press Release, "Delta Air Lines and Bombardier Sign Largest C Series order for up to 125 Aircraft" (Apr. 28, 2016) (Petition Exhibit 63) ("Bombardier Commercial Aircraft and Delta Air Lines, Inc. of Atlanta, Georgia (Delta Air Lines) announced today that the parties have executed a firm agreement for the sale and purchase of 75 CS100 aircraft with options for an additional 50 CS100 aircraft.").

Bombardier argues that this investigation caused a "permanent change in the pattern of trade."[145] However, Bombardier cites no evidence in support of this so-called "Boeing effect." As Professor Nickelsburg testified at the Hearing, it is likelier that if the Commission's determination is negative, then U.S. airline customers would interpret the Commission's determination as a "green light to import C Series aircraft from Canada."[146] This is consistent with the Commission's findings in past cases that when foreign companies with U.S. production subsidiaries are "free from the restraining effects" of duty orders, they are likelier "to rationalize" their U.S. and foreign "production operations, and supply the U.S. market by both importation and U.S. production, or importation alone."[147] In other words, even in cases involving actual, existing U.S. production facilities—as opposed to the entirely speculative Mobile plans—the Commission found that respondents would supply the U.S. market with imports. That conclusion is even more compelling here, where there is no existing U.S. production facility. Crediting Bombardier's "Boeing effect" argument would be contrary to the statute, which bars the Commission from basing its determination on "mere conjecture and supposition"[148]; unsupported by substantial evidence; and contrary to the Commission's practice. It would also, if accepted, create a precedent that would apply similarly to all future AD/CVD investigations involving high AD/CVD margins, as the "logic" of Bombardier's theory would apply equally to investigations involving other products.

Second, under 19 U.S.C. § 1677(7)(I), the Commission should discount "artificially low demand for subject imports" post-dating an investigation. Section 1677(7)(I) requires the

---

[145] Hearing Tr. at 215 (Aranoff). *See also id.* at 274 (Aranoff).

[146] Hearing Tr. at 56 (Nickelsburg).

[147] *Internal Combustion Industrial Forklift Trucks from Japan*, Inv. No. 731-TA-377 (Review), USITC Pub. 3287 (Apr. 2000), at 9.

[148] 19 U.S.C. § 1677(F)(ii).

Commission to consider whether "any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition . . . is related to the pendency of the investigation" and, if so, it may reduce the weight of such information in making its determinations of material injury and threat. The legislative history of this provision makes clear that Congress intended the provision to codify pre-existing case law that a petition can artificially depress demand for subject imports.[149] Congress also intended for the Commission to *presume* that any change in data concerning the imports or their effects subsequent to the filing of the petition is related to the pendency of the investigation.[150] In this case, Bombardier and GOC are arguing that the Mobile scheme depresses demand for subject imports to zero.[151] Thus, the Commission should presume that any such depression in demand is related to the filing of the petition, and should discount it accordingly.

Third, the Commission has rejected respondents' claims in past investigations that they would have no incentive to increase exports of subject merchandise to the United States, given "tentative and indefinite" plans to establish U.S. production facilities.[152] It should do the same here. By any measure, the Mobile scheme is "tentative and indefinite." As Commissioner Broadbent pointed out, the regulatory approval process for the Airbus joint venture gives Bombardier and Airbus a "huge out."[153] In addition, as Vice Chairman Johanson noted, there

---

[149] Statement of Administrative Action, H.R. Doc. No. 103–316, at 853-54 (1994) ("Courts have repeatedly recognized that the initiation of antidumping and countervailing duty proceedings can create an artificially low demand for subject imports, thereby distorting post-petition data compiled by the Commission."); H.R. Rep. 103-826(I), at 75-76 (1994).

[150] Statement of Administrative Action, H.R. Doc. No. 103–316, at 853-54 (1994); H.R. Rep. 103-826(I), at 75-76 (1994).

[151] Bombardier Prehearing Brief at 5; GOC Prehearing Brief at 11-12.

[152] *See, e.g.*, *Certain Laser Light-Scattering Instruments from Japan*, Inv. No. 731-TA-455 (Final), USITC Pub. 2328 (Nov. 1990) at 24 n.90 (stating that "the record simply fails to establish that {respondent} has made an ironclad commitment to U.S. production" and that its "plans remain tentative and indefinite"); *id.* at A-31 (noting that, unlike in the case of Bombardier, the respondent had already broken ground on its U.S. facility).

[153] Hearing Tr. at 295 (Broadbent).

has been no "movement of machines or dirt yet in Mobile as a result of the joint venture" (which has not yet been approved) and no "ribbon cutting ceremonies."[154] Indeed, Bombardier has confirmed that such steps are impossible until it obtains the necessary regulatory approvals for the joint venture, both in the U.S. and in an unspecified number of other countries.[155] And Bombardier itself characterized the prospect of obtaining the necessary regulatory approvals as "speculative."[156]

The Mobile scheme is so "tentative and indefinite" because it is contrary to economic logic. Bombardier plans to ramp up production to produce 120 units per year *in Mirabel alone*.[157] Bombardier confirmed at the Staff Conference that it was "forced" to achieve that ramp up schedule to make the program a financial success.[158] The Commission found in its preliminary determination that, based on its existing order book (which *included* the Delta orders), Bombardier is "far short" of achieving its production targets for Mirabel.[159] Thus, shifting the Delta orders to a U.S. facility would significantly undermine the economic viability of production at Mirabel and the C Series program in general.

Indeed, as Professor Nickelsburg testified at the hearing, Bombardier's existing production capacity in Mirabel is more than enough to make *all* of the 250 not-at-risk orders for the C Series that exist today, *including* the Delta orders.[160] It is also more than enough to meet

---

[154] Hearing Tr. at 280 (Johanson).

[155] Hearing Tr. at 280 (Aranoff).

[156] *Id.* at 294 (Lichtenbaum) (explaining that Bombardier had described the joint venture as "speculative" at Commerce, because of "uncertainty related to the regulatory requirements, i.e., the anti-trust approvals").

[157] *See* Stephen Trimble, "Bombardier details five-year CSeries ramp-up," FlightGlobal (Nov. 24, 2015) (Petition Exhibit 103).

[158] Preliminary Determination, USITC Pub. 4702 at 24-25 (citing Mullot).

[159] *See id.* at 29.

[160] Hearing Tr. at 55 (Nickelsburg); Affidavit of [ ], para. 6 (Boeing 12/12 Prehearing Brief Exhibit 13).

anticipated *global* demand for the C Series aircraft over the next 20 years.[161] The so-called "business case" that counsel for Bombardier alluded to during the hearing consists of nothing more than vague references to "synergies" and "savings" that may be relevant to the JV with Airbus, but in no way justify a second production line in Mobile.[162] In reality, the Mobile scheme is an unnecessary expenditure that is contrary to economic logic and will not happen absent antidumping and countervailing duty orders.[163]

In its prehearing brief, Bombardier argued that the Commission has relied on a respondent's "planned investment in the United States to issue a negative determination" in *Stainless Steel Plate from Belgium, Italy, Korea, South Africa and Taiwan.*[164] The facts in that case illustrate why it would be inappropriate for the Commission to do the same here. For example:

- Contrary to Bombardier's characterization, the investment in question was not merely "planned;" the Commission found that the construction of the U.S. production facility was well underway at the time of its determination. Among other things, the first phase of construction was complete, the respondent had already put its first cold-rolling line in place, and it had already started production.[165] Here, by contrast, the plans have not even been approved, and Bombardier has not yet broken ground.

- The Commission found sound business reasons for the U.S. production in that case, including a need to address U.S. customer demands for shorter lead times (which were difficult to satisfy from Italy) and avoid increased logistical costs resulting from ocean transport, both of which were creating competitive disadvantages for the Italian

---

[161] *See* Boeing 12/12 Prehearing Brief at 41 n.183 (showing Boeing's projected 20-year global demand); Affidavit of [ ], para. 6 (Boeing 12/12 Prehearing Exhibit 13) (indicating that the Mirabel facility is capable of producing 120 aircraft per year, or 2,400 aircraft over a 20-year period).

[162] Hearing Tr. at 191-192 (Levesque).

[163] S*ee Large Residential Washers*, Inv. No. TA-201-076, USITC Pub. 4745 (Dec. 2017) at 79-80 (finding in a safeguard investigation that, in the absence of safeguard relief, Korean respondents who were planning to operate new U.S. plants "would have less of an economic incentive to follow through fully on their planned investments, particularly in light of their substantial recent investments in LRW production for the U.S. market in Thailand and Vietnam.").

[164] Bombardier Prehearing Brief at 10. Bombardier failed to note in its prehearing brief that the negative determination in question only applied to Italy. The Commission reached affirmative determinations with respect to Belgium, Korea, South Africa and Taiwan.

[165] *Stainless Steel Plate from Belgium, Italy, Korea, South Africa, and Taiwan*, Inv. Nos. 701-TA-379 and 731-TA-788, 790-793 (Second Review), USITC Pub. 4248 (Aug. 2011) at 16.

respondent.[166] Here, by contrast, there are no sound business reasons for the Mobile plant; its only purpose is to circumvent the AD/CVD orders.

- The Commission found that the Italian respondent's U.S. operation did not "require{} (much less 'rel{y} on')" imports of subject merchandise from Italy for its production. Rather, the respondent was obtaining non-subject merchandise inputs from Germany.[167] Here, by contrast, even if Bombardier's plans were approved, its Mobile business plan envisions the importation of partially assembled aircraft—*i.e.*, subject merchandise—from Canada and the completion of assembly in Alabama.

Finally, Bombardier fails to note that the *Stainless Steel Plate* case was a sunset review, not an initial review of material injury or threat. As a result, the Commission had the benefit of a significant body of facts regarding the respondent's actual market behavior that it was able to consider in reaching its determination, as opposed to the speculative plans at issue here. Thus, to the extent it is relevant at all, the *Stainless Steel Plate* case suggests that the proper approach in this investigation would be for the Commission to issue an affirmative final determination, and then evaluate the relevance of any Mobile activities in the first sunset review, at which point it can consider actual facts rather than rank speculation.

15. And then I think I had just one more question for you. On Page 9 of Boeing's brief, it mentions that Bombardier did not cooperate in Commerce's antidumping investigation, which resulted in duties of almost 80%. Is there any relevant background to that decision, for you all not to cooperate in that investigation, which you wouldn't mind sharing here? (Tr. at 280:20-25, 281:1)

Mr. Lichtenbaum responded to this question from Commissioner Johanson as follows:

> I think it's somewhat of a mischaracterization. You know, essentially, without going into too much detail about dumping calculations, they were seeking information that is not really in existence, and therefore, Bombardier was not in a position to provide. The nature of a dumping calculation involves comparison of costs and if you haven't got an airplane yet, that is, sufficiently produced in order to calculate what the costs are, then it's not really possible to answer these questions. And so we felt, the

[166] *Id.* at 16, 18.

[167] *Id.* at 18.

> company felt, it was being asked to speculate and provide a number of different scenarios as to cost that it really couldn't stand behind what the answers might be.[168]

Contrary to Mr. Lichtenbaum's assertion, it is he—not Boeing—that is mischaracterizing the facts surrounding Bombardier's refusal to provide the information the Department needed to conduct its dumping analysis. Indeed, his response is highly misleading. Among other matters, the Department's preliminary adverse facts available memorandum in the antidumping investigation fully explains the extent of Bombardier's refusal to cooperate, including a refusal to provide the very sales and cost data that Bombardier [

]. The idea that the information was "really not in existence" has no basis in reality.

The following is a synopsis of Bombardier's repeated refusal to cooperate in the Department's antidumping investigation, as set forth in the preliminary adverse facts available memorandum:

- "Record evidence indicates that Bombardier withheld information requested by the Department's AD Questionnaire. Specifically . . . on July 10, 2017 Bombardier submitted a response to section A of the AD Questionnaire that lacked much of the information requested in section A of the Department's AD Questionnaire."[169]

- "Subsequently, on July 28, 2017, Bombardier submitted its response to sections B and C of the Department's AD Questionnaire, which failed to respond to any of the questions in the questionnaire."[170]

- "Similarly, on July 31, 2017, Bombardier submitted its response to section D of the Department's questionnaire, but this response did not provide any of the information required by this section of the questionnaire."[171]

---

[168] Hearing Tr. at 281 (Lichtenbaum).

[169] Department of Commerce Memorandum, "Application of Adverse Facts Available to Bombardier Inc." (Oct. 4, 2017), at 11, attached as Exhibit 10.

[170] *Id.*

[171] *Id.*

- "{D}espite being given a second opportunity on August 16, 2017, to respond to the AD Questionnaire, Bombardier failed to do so. The Department informed Bombardier that it should respond to sections B and C of the questionnaire with respect to firm orders from Delta for 75 CS100 aircraft and from Air Canada for 45 CS300 aircraft. Bombardier announced these firm orders in press releases and reported these firm orders in its 2016 financial statement. Therefore, the record indicates that Bombardier possessed the information requested by the Department."[172]

- "The Department further requested that Bombardier report cost data using its books and records maintained in the ordinary course of business for a 12-month period. Bombardier did not provide any of the requested information that belongs in the cost database. Because the cost data sought by the Department is the type of information that companies must use to create audited financial statements, in accordance with generally accepted accounting practices, it is reasonable to conclude that Bombardier possessed the cost information sought by the Department."[173]

- "Bombardier claimed that it was experiencing difficulties in responding to the AD Questionnaire, however it did not meet its statutory obligation to suggest an alternative form in which it was able to provide the information. Despite Bombardier's failure to meet its statutory obligations under section 782(c)(1) of the Act, the Department nevertheless provided Bombardier guidance and multiple clarifications regarding the AD Questionnaire."[174]

- "{I}n response to Bombardier's continued claims of confusion regarding the information requested by the Department in its AD Questionnaire, the Department made the additional step of identifying certain transactions for which Bombardier should provide the requested information. Specifically, the Department directed Bombardier to provide the requested information with respect to its firm orders for aircraft from Delta and Air Canada and reminded Bombardier that the Department provided specific cost reporting instructions in its revised section D questionnaire. Thus, Bombardier should have reported the requested information based on the existing terms of the firm orders. It failed to do so."[175]

Based on these facts, the Department properly found that Bombardier "withheld information that had been requested and failed to provide information by the deadlines

---

[172] *Id.*

[173] *Id.*

[174] *Id.* at 12.

[175] *Id.*

established by the Department"[176] and "significantly impeded the {} investigation by submitting incomplete information as well as submitting argument and factual information in support of its arguments in lieu of information requested by the Department in its AD Questionnaire."[177] Clearly, Bombardier believes it can refuse to cooperate before the Department of Commerce and still use the fanciful Mobile scheme to obtain a negative determination from the Commission.

Questions from Commissioner Williamson

16. Delta claims that you didn't lose the sale to Bombardier because they wanted 110-seat aircraft. And that Boeing doesn't make anything in that range. And so I'm really questioning how do you respond to their claim that you really didn't lose it because you didn't make anything in the size range that they particularly wanted? (Tr. at 73:13-2)

But I think the question I'm raising, because in a sense Delta almost implies it, there's a 100- to 110-seat category which I guess can be serviced by Embraer, maybe moving up--so that's the question I'm asking. If Delta says I want a 100- to 110-seat aircraft, you don't have one. (Tr. at 74:12-17)

As an initial matter, it is important to clarify that Respondents have tried to obscure the importance of the CS300 in the 2016 Delta sale. If Delta cared only about 100- to 110-seat aircraft in its deal with Bombardier, Delta would not have negotiated for the rights to end up with a C Series fleet composed overwhelmingly of CS300s. Yet, Delta's deal with Bombardier does exactly that—Delta can to take 90 CS300s out of the 125 total firm orders and options it obtained. Moreover, Delta CEO Ed Bastian has stated that "Delta is 'very interested' in the CS300 and has agreed to 'firm pricing' with Bombardier on the larger C Series model."[178] Accordingly, other U.S. customers must demand pricing from both Bombardier and Boeing that enables them to compete with Delta operating low-priced CS100s *and* low-priced CS300s.

---

[176] *Id.* at 10.

[177] *Id.* at 13.

[178] *See* Bombardier press release, "Delta Air Lines and Bombardier Sign Largest C Series order for up to 125 Aircraft" (Apr. 28, 2016) (Petition Exhibit 63); Aaron Karp, "Delta touts CSeries, eyes CS300 model," Air Transport World (Apr. 29, 2016) (Petition Exhibit 110).

At a broader level, most U.S. customers do not seek narrowly defined seating capacity such as 100- to 110-seats. As Mr. McAllister testified at the Hearing, "we don't see categories in the marketplace with customers that are as finitely defined as 100- to 110 seats. That's just not the reality in the market."[179] Indeed, [

].[180] Delta may [

] segment its fleet into very specific, narrowly-defined categories, but Boeing sells airplanes to all customers in the United States—indeed, across the globe—so its view of customer demand and the best airplane to meet that demand is necessarily much broader than Delta's perspective. As counsel for Boeing stated at the hearing, it is important that the Commission avoid overreliance on a single customer's – Delta's – characterization of the market.[181]

Moreover, the fact that Delta may utilize the CS100 on routes that do not exploit the aircraft's full range capability does not mean that the price Bombardier gave to Delta does not affect the price of the same and similar aircraft to other airlines, including airlines that would use the CS100 in a more typical manner, *i.e.*, flying a network that includes both transcontinental and shorter routes. The market does not price aircraft based on how the aircraft is used by a single airline, but rather on the overall demand of airlines in the 100- to 150-seat LCA market.

---

[179] Hearing Tr. at 74 (McAllister).

[180] *See* [ ].

[181] *See* Hearing Tr. at 306 (Novick) ("Delta's one airline, it has one perspective on how it manages its fleet and what it wants to buy on any given day. It is not representative of the airline industry and its testimony should be taken in exactly that context.").

In fact, Boeing makes aircraft that can be configured with 110 seats, including the 737-700 and 737 MAX 7.[182] In general, aircraft are highly customizable and the number of seats varies depending on customer preference. Boeing has delivered several 737-700's with fewer than 110 seats, although most customers choose to configure the aircraft with more seats.[183] In general, incremental seats on an aircraft are valuable to a customer because they represent potential additional revenue. Airlines have ordered the 737-700 configured to seat almost anywhere between 100-150 passengers – but not fewer than 100 or more than 150.[184]

The 737-700 and MAX 7 compete directly with the CS100. For example, the 737-700 competed head-to-head with the CS100 at the United campaign.[185] And the CS100 pricing Bombardier gave to Delta has impacted Boeing's pricing of the MAX 7.[186] As Mr. Anderson testified at the Hearing:

> {I}f the 100- to 110 segment were truly unique, then that Delta price would not have had an impact on future Boeing MAX 7 pricing and sales. And we've presented evidence that it does indeed have an impact on price, suggesting that it's not a distinct segment, again because airlines do have essentially a number of physical characteristics of the aircraft that they balance off against each other when arriving at purchasing decisions. So it's just not simply the number of seats.[187]

Bombardier and Delta both acknowledged at the Hearing that the C Series competes with the

---

[182] Boeing also notes that evidence on the record shows Bombardier [

]. Thus, the record does not support a finding that the CS100 would fit exclusively into a 100- to 110-seat market, if it existed.

[183] *See* Boeing Delivery Data, attached as Exhibit 11.

[184] *See* Boeing Delivery Data, attached as Exhibit 11 (showing customers have ordered the 737-700 configured with [ ] seats).

[185] *See, e.g.*, Boeing 12/12 Prehearing Brief at. 10-11 (citing Affidavit of [ ], paras. 8-9 (Petition Exhibit 101)).

[186] *See* Affidavit of [ ], paras. 8-13 (Boeing 12/12 Prehearing Brief Exhibit 2).

[187] Hearing Tr. at 76 (Anderson).

MAX 7.[188]

17. I'm still trying to figure out why somebody wants a 100- 110-seat plane to fly transcontinental. I mean it seems like, you know, I'm so used to hearing about the hub-and-spoke system, but what's the evidence or examples of why that is an important (Tr. at 76:18-23)

Transcontinental range differentiates regional jets from LCA. Bombardier is well aware of this distinguishing factor. Indeed, the C Series' transcontinental range is a key reason it is not just a large regional jet program, but a direct competitor to Boeing's 737-700 and 737 MAX 7.[189] As described in a memorandum from the Canadian Deputy Minister of Innovation, Science, and Economic Development to the Minister of Innovation, Science, and Economic Development discussing Canadian subsidies for Bombardier, Bombardier designed the C Series as "an all-new 'clean-sheet design' plane seating 110 to 160 people *with transcontinental range* and industry-leading operating and environmental performance" to "compete directly with aircraft produced by Airbus and Boeing," *i.e.*, the A319 and 737-700/MAX 7.[190] Bombardier's C Series brochure proclaims that "{t}he ultra-modern CS100 and CS300 aircraft offer unmatched performance and operational flexibility, thanks to their exceptional airfield capabilities and *transcontinental*

---

[188] Hearing Tr. at 235-36 (Chairman Schmidtlein: "Mr. Mitchell, what do you think? Do you compete with Boeing in any – with regard to any plane that you make?" Mr. Mitchell: "With respect to the C Series?" Chairman Schmidtlein: "No, any plane?" Mr. Mitchell: "Any plane?" Chairman Schmidtlein: "Any plane." Mr. Mitchell: "Any plane. You will see occasionally, Boeing 737 MAX 7 in a competition, but it is rare that it gets to the final step because it is not an adequate airplane for the small single aisle segment . . ." Chairman Schmidtlein: "But there are some campaigns that it competes in?" Mr. Mitchell: "They may start out looking at a broad spectrum of aircraft. As I pointed out in my testimony, it is not unusual for an A319 or a MAX 7 to be in the discussion early on . . ."); Hearing Tr. at 234 (Chairman Schmidtlein: "But it's one thing to say they didn't lost – I guess you're saying that the C Series never competes with the MAX 7, is that right or no?" Mr. Baisburd: No, what I'm saying is that the CS100 is a 109 seat plane and Joe and Greg can jump in, but they'll tell you what they were looking for at the time that they ordered the 75 C Series.").

[189] *See* Kristine Owram, *How Bombardier's CSeries dream got its wings clipped*, National Post (Dec. 12, 2015) ("Things were simpler before the CSeries was conceived. Bombardier inhabited a comfortable niche in the global aviation industry, making a range of popular business jets and commercial aircraft for short-haul flights. But its core CRJ family of regional jets was starting to age, and Bombardier latched onto the idea of something bigger: a rare opportunity *to catapult itself into the big leagues alongside industry giants Airbus Group SE and Boeing Co.* {...} For years, manufacturers had sensed a gap in the market for a 100- to 150-seat *transcontinental jet* that could be used on secondary routes (think: Portland, Ore., to Charlotte, N.C.).") (emphasis added) (Petition Exhibit 15).

[190] *See* John Knubley, Deputy Minister, "Advice to the Minister of Innovation, Science and Economic Development: Meeting with Bombardier, Inc." at 1-2 (emphasis added) (Petition Exhibit 88).

range."[191] Bombardier also submitted a report from AirInsight that states: "{t}he CSeries, originally designed for full transcontinental range, also competes against the shorter-range E-Jets and with the forthcoming E2 from Embraer, both designed for regional operations. *With limited range, these aircraft cannot fly transcontinental routes non-stop.*"[192] Thus, Bombardier cannot legitimately dispute that transcontinental range is a distinguishing factor that separates regional jets from 100- to 150-seat LCA, including the C Series and Boeing's 737-700 and MAX 7.

Transcontinental range is a necessary feature for small single aisle LCA because airline customers deploy aircraft across complex networks and require aircraft with the capability to fly their most challenging current and future possible routes over an in-service life that can last 20 years or longer.[193] As Professor Nickelsburg explained at the Hearing, an aircraft may begin the day flying a route from Los Angeles to Washington, and then tack on routes to other smaller cities on the East Coast.[194] The aircraft's average route length would be less than 2,900 nautical miles, but the aircraft must have transcontinental range to fly the first route in the network.[195] Airlines specifically demand *small* single aisle LCA, *i.e.*, aircraft with 100- to 150- seats and with transcontinental range greater than 2,900 nautical miles, because it is inefficient to operate

---

[191] Bombardier, "C Series," at 13 (2015) (emphasis added) (Petition Exhibit 68).

[192] *See* AirInsight, "Bombardier's CSeries at EIS: Regaining Momentum" (July 2016), at 24 (emphasis added) (Bombardier Prehearing Brief Exhibit 31).

[193] Hearing Tr. at 78 (Nickelsburg).

[194] Hearing Tr. at 146 (Nickelsburg) ("So if you need an airplane to fly let's say Los Angeles to Washington, D.C., then you need the range. But once you get to Washington, D.C., are you going to let that airplane which cost you tens of millions of dollars to sit on the tarmac? The answer is: No. You want to increase the utilization. So you fly to Washington, and then you fly to another local city on the East Coast, and another one, to finish out the day and increase the utilization.").

[195] *Id.* at 146-47 (Nickelsburg) ("Well in that example, which is pretty common and maybe too few tags relative to the average, you have two-thirds of the flights were less than transcontinental. But the mission you wanted that aircraft for was transcontinental. So those numbers are really misleading, that most of the—or the average stage length is not transcontinental and therefore it's not important. No, the long pole in the tent, the thing that makes the network work, is the transcontinental. And so you can't look at that average stage length, or the number of flights that are transcontinental versus the number of flights the stage length are shorter and conclude that transcontinental isn't important for the market. It has for 60 years been a defining characteristic of the market.").

aircraft with unfilled seats.[196] There may be insufficient demand on certain routes to consistently fill all the seats on a medium or large single aisle LCA, and passenger demand can vary by season, day of the week, and time of day.[197] Certain routes are also simply "right-sized" for small single aisle LCA, as Boeing explained in its pre-hearing brief.[198] Airlines can maximize revenue and minimize costs by operating small single aisle LCA on such routes. According to an article Delta attached to its pre-hearing brief, the C Series was designed precisely for this purpose: "It {referring to the C Series} has the potential to open up new direct flights on what the industry calls 'long, thin' routes: *destinations too far for a regional jet but with not enough travellers to justify a larger plane*. In short: it will make life easier for the average travelling business schmo."[199]

With respect to hub-and-spoke systems, airlines have moved away from complete hub-and-spoke networks to a combination of hub-and-spoke and non-stop. In addition to price, airlines also compete on frequency. As Southwest Airlines has demonstrated, high-frequency flights are an excellent selling point, particularly for valuable business travelers. Therefore, airlines often can charge higher prices for non-stop flights, than for one-stop transcontinental flights with an aircraft change in the airline's hub. However, because of the greater frequency, the non-stop flights typically have lower demand and are more profitably served with a 100- to 150-seat aircraft.

---

[196] Boeing 12/12 Prehearing Brief at 30; Nickelsburg Report, paras. 17-21 (Boeing 5/24 Post-Conference Brief Exhibit 8).

[197] Boeing 12/12 Prehearing Brief at 29 n.129; *See* Nickelsburg Report, para. 54 (Boeing 5/24 Post-Conference Brief Exhibit 8).

[198] Boeing 12/12 Prehearing Brief at 31-32.

[199] Philip Preville, *The Inside Story of Bombardier's $4-Billion Gamble on a Super Quiet Jet*, Canadian Business (Delta Prehearing Brief Exhibit 41) (emphasis added).

18. Okay. I was gonna say, post hearing, if you have any data readily available or something that you can substantiate -- 95%, 80% of the orders are, you know, or orders originally ordered, but it'd be helpful. I'm not asking you to create anything special, but if there's something that's available, that might be . . . that would go to this point." (Tr. at 110:3-13)

On average, approximately [ ] of Boeing's 737 aircraft are delivered as originally ordered; only about [ ] of deliveries involve a substitution to a different model.[200]

The following table shows the total percentage of substitutions for 737's by contracted delivery year from 2014-2022:

[ ]

Boeing's customers [ ] substitution rights to provide them the flexibility to adjust their order to their business and market needs closer to delivery. Substitutions typically occur [ ] prior to delivery [ ]. Boeing's customers typically order the model or models they know they will need (*e.g.*, buying a 737-700 for missions with insufficient demand to warrant a larger aircraft or for high/hot or constrained airfield needs) and make relatively small adjustments to their order. Substitutions provide Boeing's customers flexibility to adjust their order book for any number of reasons—they may up-gauge some aircraft to accommodate passenger growth, down-gauge with decreased demand or to open new routes, or choose a new model not available when they placed their order (*e.g.*, when Boeing launched the

[200] There tend to be more substitutions when a new model is launched. The table below provides the percentage of deliveries substituted both including and excluding product launches.

737 MAX 10). Nevertheless, [ ] of 737 aircraft orders for a specific model result in deliveries for that same model.

19. Continuing on that line and to this question of imminence and the question that you can't base a threat on conjecture or supposition and so my question is were orders of delivery are fluid and particular not in the 18 to 24-month period, but beyond that as we have many examples of people changing their orders or sometimes even people even getting out on them, given that fluidity isn't it kind of conjecture or speculation to say what orders are going to beyond I'll say 24 months out? (Tr. at 103:3-12) Post-hearing, can you maybe address examples where we've actually applied this in a period beyond two years? (Tr. at 105:13-15)

It is well established that the Commission's analysis of "imminence" depends on the conditions of competition in the industry. As the Court of International Trade has explained:

> No bright-line test exists to determine when injury is imminent. Congress, however, is presumed to have used words in their ordinary meaning, absent a contrary expressed intent.... Both the dictionary definition and case law from the CIT demonstrate that the statutory term "imminent" only means impending. The term does not necessarily mean . . . immediate, as the statute does not establish any specific time limit governing when a potential action can be characterized as imminent. *In each case the Commission should look at the facts and circumstances of the industry, product, and marketplace to determine if further dumped or subsidized imports are imminent.*[201]

The Commission has previously found the "imminent" future to be longer than 1-2 years, for example in *Frozen Concentrated Orange Juice from Brazil* and *Fresh Atlantic Salmon from Chile*, based on the time lag between production and deliveries. In *Large Newspaper Printing Presses from Germany and Japan*, the Commission assessed impact on the domestic industry over a two-year period, but also recognized that the full revenue impact of sales (or lost sales)

[201] *See Asociacion de Prod. de Salmon v Trucha de Chile AG v. USITC*, 180 F. Supp. 2d 1360, 1371-72 (Ct. Int'l Trade 2002) (internal citations omitted).

would not show up in the domestic producers' financial results for two *or more* years, because the contract delivery period was spread over several years.[202]

Unique conditions of competition are highly relevant to the ITC's consideration of "imminence," particularly in an industry like the 100- to 150-seat LCA industry. This industry is characterized by high value, low volume purchases with an *average* lag time of 4-5 years between order and delivery. Producers generally require at least 18-24 months' notice in advance of a delivery date, [

].[203] The delivery stream for a large order typically spans several years. At the same time, the critical point for the health of the domestic industry—the point at which material injury is most acutely felt—is the time of firm order; the outcome of firm order decisions is what determines whether a U.S. 100- to 150-seat LCA program succeeds or fails. Thus, firm orders in this industry generally remain "impending" for at least 4-5 years, and the "imminence" standard should be interpreted accordingly.

Moreover, it is necessary for the Commission to consider a period longer than two years in order to capture the full impact of injury. The commercial reality of the 100- to 150-seat LCA industry is that if a customer placed an order for 100 aircraft tomorrow, the very first delivery may not take place for approximately two years, and the stream of deliveries from that order would likely extend for several years thereafter. Thus, as in *LNPP from Germany and Japan*, the full financial impact of a lost sale or a sale at depressed prices in the immediate future cannot

---

[202] *See Goss Graphic System, Inc. v. United States*, 33 F. Supp. 2d 1082, 1103 (Ct. Int'l Trade 1998) (finding that the Commission reasonably found imminent harm to domestic industry when financial effects of dumped subject imports would not manifest themselves for two or more years).

[203] Declaration of [ ], para. 10, 12 (Boeing 12/12 Prehearing Brief Exhibit 42).

possibly be captured in Boeing's financial results in a 1-2 year period. The Commission must instead recognize that the unique conditions of competition in this industry dictate a longer timeframe for assessing the imminence of injury.

However, even if the Commission were to adopt a shorter imminence timeframe, the record still requires an affirmative threat determination. As [

] shows,[204] the C Series is causing the domestic industry to suffer material adverse impacts right now. In addition, Boeing is capable of [

].[205]

20. I guess the question I'm raising is, this goes to the interpretation that's speculative and conjecture, say, what's the standard there? And is that relevant here? (Tr. at 106:4-6) I'm just raising the question, was it not the fluidity and those changes? And it may not. But I'm just raising the question. (Tr. at 108:2-4)

The Commission has not defined a standard for "mere conjecture or supposition," but *Citrosuco Paulista v. United States* is instructive. There, the CIT upheld the Commission's finding that the planting of new orange trees in Brazil threatened imminent material injury, even though orange trees require several years to mature and bear fruit, because Brazilian production of oranges was already increasing and exporters had improved their capacity to produce orange juice.[206] The CIT also held that the Commission properly discounted evidence that Brazilian consumption of oranges would increase "because it was based upon speculations that orange prices in Brazil would drop dramatically under the new monetary regulation adopted by the

---

[204] *See* Affidavit of [ ], paras. 8-13 (Boeing 12/12 Prehearing Brief Exhibit 2).

[205] Declaration of [ ], para. 10 (Boeing 12/12 Prehearing Brief Exhibit 42).

[206] *See Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1094-96 (Ct. Int'l Trade 1988).

Brazilian government (*i.e.*, the 'cruzado plan'), which would then increase demand by Brazilian consumers for fresh oranges. The Commissioners expressed doubt about the likely success of the cruzado plan and, as a consequence, had reservations about the reliability of {the} uncharacteristically low predictions of {orange juice} production."[207]

In this case, no speculation or conjecture is required to find that subject imports will exceed the negligibility threshold, and increase to significant levels, in the imminent future. The [

].[208] Delta acknowledged at the Hearing that it is contractually obligated to accept delivery of the C Series aircraft it ordered.[209] That is sufficient evidence for the Commission to find there is a potential that imports will imminently exceed the negligibility threshold and increase to significant levels, in addition to the other evidence of potential imports discussed in response to Question 2 above.

21. Are there any examples of the 737-700/MAX 7 operating with 100-125 seats?

Boeing has yet to deliver its first MAX 7, but there are several airlines that operate the 737-700 with fewer than 125 seats. Boeing does not have internal data on the seating configurations of 737-700s as operated by customers. However, based on public Ascend data, there are currently 143 737-700s in operation that are configured with fewer than 125 seats, 40 of

---

[207] *Id.* at 1096.

[208] [

]; Boeing 12/12 Prehearing Brief at 70, 83-84.

[209] Hearing Tr. at 262 (May).

which are operated by United Airlines in the United States with a 118-seat configuration.[210] The smallest seating capacity for a 737-700 currently in operation is 112 seats.[211]

22. What number of orders do you need to make the MAX 7 a viable ongoing production model? And could those orders come primarily or overwhelmingly from overseas? (Tr. at 143:17-20)

When Boeing developed the business case for the current MAX 7 design, it forecasted that under conservative assumptions the MAX 7 would secure approximately [ ] orders over the program's [ ] lifespan. To date, however, the MAX 7 has only [ ] firm orders, despite the program being approximately six years old. As Boeing discussed in its pre-hearing brief, based on its 2017 Current Market Outlook, Boeing projects global demand for 100- to 150-seat LCA will be [ ] units over the next 20 years.[212] Approximately [ ] of that demand, or [ ] units, will come from U.S. customers.[213] Without any additional orders from U.S. customers, Boeing would need to capture approximately [ ] of total non-U.S. demand over the next 20 years in order to achieve the conservative goal for sales in the MAX 7 business case. Given Bombardier's and Airbus' aggressive sales tactics, Boeing does not consider that to be a realistic possibility.

[210] *See* Ascend Data, attached as Exhibit 12.

[211] *See id.*

[212] *See* Boeing 12/12 Prehearing Brief at 41 n.183.

[213] *See id.*

23. In regard to the thing you raised earlier and Chairman Schmidtlein raised about the scope and what it is, I was wondering if post-hearing you could take a look at footnote -- I'm sorry {footnote} 37 on page 17 of Bombardier's brief and if maybe they've got it wrong or something, or just -- so if there's any clarification you think needs to be -- needs. (Tr. at 167:24-168:5)

Bombardier suggests in its pre-hearing brief that Boeing is attempting to change the scope at a late stage in the investigation and that such a change would prevent the Commission from conducting an adequate investigation.[214] Bombardier ignores the reality that Boeing has not sought a scope change; the scope has always covered aircraft, whether fully or *partially* assembled.[215] It is Boeing's position that any antidumping or countervailing duty orders resulting from these investigations would cover articles imported to the United States to assemble the C Series in the United States as partially assembled aircraft.[216] Because Bombardier does not currently finish assembling the C Series in the United States, it has not yet imported any articles into the United States for the purpose of doing so. At this stage, Bombardier has no basis for asserting that its entirely notional "plan" for conducting C Series work in Mobile would preclude subject imports, since the Commerce Department has left open the question of whether that "plan" would itself entail the importation of in-scope partially assembled C Series aircraft. Specifically, the Commerce Department found that because there was not "detailed information regarding the production process that would result from the planned partnership between Bombardier and Airbus . . . it would be ***premature*** to conduct an

[214] *See* Bombardier Prehearing Brief at 17 n.37.

[215] *See Notice of Initiation of Less-Than-Fair-Value Investigation: 100- to 150-Seat Large Civil Aircraft from Canada*, 82 Fed. Reg. 24,296, 24,300 (May 17, 2017); Commerce AD I&D Memo. at 4.

[216] *See* Boeing Brief, "100- to 150-Seat Large Civil Aircraft from Canada: Brief on the Announced Airbus-Bombardier C Series Partnership" (Nov. 13, 2017), at 9-12.

analysis or reach a determination where relevant information is not on the record and the planned partnership has yet to be finalized." [217]

24. Boeing cites the I guess 1984 Act about purchasing for importation and you know, this definitely implied here no matter when the plane was imported -- I was wondering if you might want to comment on that post-hearing and your views of that -- what we should make of that provision? (Tr. at 302:25-303:5) So anything that can be added post-hearing on this from both sides I would appreciate, thank you. (Tr. at 305:4-6)

The Commission may, as a matter of law, base an affirmative threat determination on sales for importation that will result in imports beyond the imminent period. GOC argued in its pre-hearing brief and again during the Hearing that the Commission cannot, as a matter of law, base an affirmative threat determination on sales that will result in imports beyond the "imminent" time frame.[218] GOC's argument is based on a misinterpretation of the statutory language that, if accepted, would fundamentally transform the statutory scheme by writing the "sales for importation" provision out of the Act. It would also provide a roadmap for respondents to deny manufacturers of large capital goods access to the AD/CVD laws. GOC's position is without merit and the Commission should reject it.

A. Sections 701 and 731 of the Act Provide for the Imposition of Duties if a Domestic Industry Is Threatened with Material Injury by Reason of Sales of Subject Merchandise for Importation, Regardless of When the Imports Take Place

Sections 701 and 731 of the Act provide that antidumping and countervailing duties "shall" be imposed if the Commission determines that a domestic industry is "materially injured" or "threatened with material injury" "by reason of imports of {subject} merchandise *or by reason of sales (or the likelihood of sales) of that merchandise for importation.*"[219] Thus, as the

---

[217] *See* Commerce AD I&D Memo. at 43 (emphasis added).

[218] GOC Prehearing Brief at 18-26. While GOC devotes a significant portion of its pre-hearing brief to this issue, Bombardier clearly recognizes that the argument lacks merit, as it devotes a single footnote to the topic. *See* Bombardier Prehearing Brief at 68 n.271.

[219] 19 U.S.C. § 1671(a); 19 U.S.C. § 1673 (emphasis added).

plain language makes clear, the imposition of antidumping and countervailing duties is *mandatory* if there is a threat of material injury by reason of dumped or subsidized sales (or likely sales) for importation, even if importation has not yet occurred. Nothing in these operative provisions purports to impose a requirement that the subject merchandise be imported imminently. Rather, as relevant here, the key question is whether the domestic industry is "threatened with material injury" by "sales . . . . for importation."

The statutory threat provision, section 771(7)(F) of the Act, reflects this fact. It provides that the Commission shall consider certain factors in making the statutorily required determination "whether an industry in the United States is threatened with material injury by reason of imports *(or sales for importation)* of the subject merchandise."[220] Similarly, the final, catch-all statutory threat factor in section 771(7)(F)(i) further confirms that this is the critical determination under the statute; it instructs the Commission to consider "any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports *(or sale for importation)* of the subject merchandise *(whether or not it is actually being imported at the time)*."[221] Thus, under the plain language of the Act, the Commission is charged with determining whether the domestic industry is "threatened with material injury" by "sales . . . for importation," and it must reach an affirmative threat finding if the requisite sales for importation and threat exist, even if there have not been any imports of the subject merchandise at the time of the Commission's determination, and even if the imports at issue will occur beyond the "imminent" time frame.

[220] 19 U.S.C. § 1677(7)(F)(i) (emphasis added).

[221] 19 U.S.C. § 1677(7)(F)(i)(IX) (emphasis added).

The legislative history to section 701 of the Act confirms this interpretation, as it makes clear that Congress intended to ensure that a domestic industry that was threatened with material injury could obtain relief in cases where a product has not yet been imported into the United States. For example, the House Report for the Trade Remedies Reform Act of 1984, which added the "sold (or likely to be sold) for importation" language to the countervailing duty law, states that Congress added the new language in order to clarify that the countervailing duty and antidumping laws cover situations where there have been sales (or will likely be sales) even if imports have not yet taken place:

> Section 101 of H.R. 4784 clarifies the applicability of countervailing duty law to *situations where a product has been or is likely to be sold for importation but has not actually been imported.* Subsection (a) amends section 701(a) to include the phrase "or sold (or likely to be sold) for importation" after the present enabling language of the statute, which refers solely to merchandise imported. . . .[222]

In explaining the reasons for the change, the House Report not only reiterated this point, but also made clear that Congress was adding the provision in large part to address the types of large capital goods at issue here:

> Section 101 is intended to eliminate uncertainties about the authority of the Department of Commerce and the ITC to initiate countervailing duty cases and to render determinations in situations *where actual importation has not yet occurred but a sale for importation has been completed or is imminent.* Antidumping law has, since its inception, applied not only to imports but to sales or likely sales. However, there has been uncertainty as to the application of countervailing duty law to such situations because of the limiting language which refers solely to imports.
>
> The amendment is particularly important in cases involving large capital equipment, where loss of a single sale can cause immediate

[222] Trade Remedies Reform Act of 1984, H. Rep. 98-725, (HR 4784), at 11 (emphasis added) (Boeing 5/24 Post-Conference Brief Exhibit 2); *see also id.* at 6 (stating that "Section 101 clarifies that the countervailing duty and antidumping laws cover likely sales and certain leasing arrangements, as well as sales and imports that have already occurred").

> economic harm and where it may be impossible to offer meaningful relief if the investigation is not initiated until after importation takes place. In cases where injury or threat of injury from a subsidy may occur prior to actual importation, the investigation should not await such importation . . . ."[223]

GOC argues that the Commission cannot make a final affirmative threat determination unless actual imports are imminent because section 771(7)(F)(ii) of the Act states that the Commission shall consider the section 771(7)(F)(i) threat factors in determining whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued . . . ."[224] They further argue that "orders, sales and likely sales cannot be used as a substitute for imminent imports as the basis for an affirmative threat determination."[225] This argument conflicts with the text, history, and purpose of the statute.

As explained above, the key provisions of the statute that set forth the requirements for imposing duties specifies that the Commission must find only that the domestic industry "is threatened with material injury" from "sales" of the subject merchandise "for importation."[226] That is the standard that must be satisfied. There is no statutory requirement that the sales result in "imminent" importations. GOC's attempt to rely on a paragraph buried in the definitions section of the statute to fundamentally modify the statutory regime by imposing a brand new imminent importation requirement conflicts with well-established canons of statutory construction.

First, the Supreme Court has made clear that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say,

---

[223] *Id.* at 11 (emphasis added).

[224] GOC Prehearing Brief at 20 (emphasis omitted).

[225] *Id.*

[226] 19 U.S.C. § 1671(a); 19 U.S.C. § 1673.

hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). But that is precisely what GOC's interpretation of Section 771(7)(F)(ii) would do here. It would fundamentally change the statutory regime due to the operation of two words in an ancillary provision that does not itself set out the determination that the Commission must make. If Congress wanted to impose an imminent importation requirement, it would have done so in the provisions establishing the relevant standard.

Second, GOC's interpretation would effectively write the "sales" for "importation" provisions out of the Act, contrary to the Commission's duty "to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).[227] Specifically, section 771(7)(F)(ii) of the Act states that the Commission shall consider the section 771(7)(F)(i) threat factors in determining, *inter alia*, whether "further" dumped or subsidized imports are imminent. This necessarily implies that dumped or subsidized imports are already taking place at the time that the Commission is making its determination, or that they have taken place in the past. As noted above, however, it is incontrovertible that the countervailing duty and antidumping laws provide for relief in cases where sales (or likely sales) for importation threaten material injury, even if imports have *not* yet taken place, as GOC itself concedes.[228]

To state the obvious, if imports have not yet taken place at the time that the Commission is making its threat determination, then it is not possible for the Commission to make a finding that "further" imports are imminent. Therefore, if such a finding is a requirement for obtaining

---

[227] "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. Courts construe a statute to give effect to all its provisions, so that no part is inoperative or superfluous, void or insignificant, and so that one section does not destroy another, unless a provision is the result of obvious mistake or error." 2A Sutherland Statutory Construction § 46:6 (7th ed.)

[228] *See* section 701 (referring to threatened material injury by reason of imports or "sales (or the likelihood of sales) . . . for importation"); section 731 (stating the same), section 771(7)(F)(i) (referring to threatened material injury "by reason of imports (or sales for importation) of the subject merchandise . . . ."); *see also* GOC Prehearing Brief at 19-20.

relief, then a domestic industry *cannot* obtain an affirmative finding of threat of material injury in cases involving sales (or likely sales) for importation—even in cases where the first imports *would* occur during the imminent period—notwithstanding the clear statutory language to the contrary in sections 701, 731 and 771(7)(F)(i).[229] Thus, GOC's interpretation must be wrong.[230]

GOC's interpretation also conflicts with the legislative history of section 771(7)(F) and the purpose of the amendments to the statute to permit imposition of duties to address sales or likely sales that threaten material injury. Congress added the section 771(7)(F) threat criteria to the Act in 1984, the same year that it added the "sale for importation" language to section 701. Notably, the text of section 771(7)(F)(ii) when Congress added it in 1984 was different than the current text and referred to evidence of imminent *injury*; it did not require the Commission to consider whether *imports* were imminent:

> (ii) BASIS FOR DETERMINATION.—Any determination by the Commission under this title that an industry in the United States is threatened with material injury shall be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent. Such a determination may not be made on the basis of mere conjecture or supposition.[231]

The provision's focus on the imminence of injury—and the absence of any reference to the imminence of imports—is consistent with the overall structure of the Act. As noted above, for example, section 771(7)(F)(i) requires the Commission to determine, *inter alia*, whether a domestic industry is threatened with material injury by reason of "sales for importation" of the subject merchandise. Plainly, section 771(7)(F)(i) allows for an affirmative threat finding in

---

[229] The reference in section 771(7)(F)(ii) to material injury "by reason of imports" further supports this conclusion. In cases involving sales for importation, it is the sales, and not the imports, that matter.

[230] The GOC's interpretation also makes no sense as a practical matter. If the Commission finds that there have been sales for importation and that the sales are threatening to result in imminent material injury, why should it matter when the actual imports occur? The purpose of the statute is to remedy dumping or subsidization that is causing or threatening material injury, not to remedy dumping or subsidization that is causing imports.

[231] 19 U.S.C. § 1677(7)(F)(ii) (1988) (emphasis added).

cases where there have been sales for importation, but not actual imports. Indeed, as noted above, when Congress added section 771(7)(F) to the statute in 1984, it simultaneously added language to section 701 of the Act to clarify this very point.

Given Congress' intent to ensure that a domestic industry could obtain the imposition of duties in such cases, it would have made no sense to require the Commission to determine that imports, as well as material injury, were imminent at the time of its determination. This would have risked frustrating a primary purpose of the provision which—as noted above—was to provide for the possibility of a remedy in large capital goods cases in which the loss of the sale is the point at which injury occurs, and where the imports of the goods may occur years later. This can be seen most clearly in the Statement of Administrative Action on the House bill:

> *Sections 101(a)(1), (2) and (b)* amend sections 701(a) and 705(b)(1) of the Tariff Act of 1930 ("the Act") to explicitly permit countervailing duty ("CVD") investigations when there are present sales for future delivery, but no present imports. The Administration supports this proposal. As the CVD investigation of Railcars from Canada demonstrated, *in situations where the sale occurs* ***years before actual importation****, the loss of the bid (sale to a foreign competitor) is the point at which injury occurs.*[232]

In other words, it is the sale (or likely sale), not the imports that result from the sale, that is key.

As GOC notes, the current text of section 771(7)(F) dates to 1994, when the United States implemented the Uruguay Round agreements. The legislative history to the Uruguay Round Agreements Act specifically addresses the changes to the wording of section 771(7)(F) and explains that they were made to conform U.S. law to the text of the AD and SCM

[232] S. Hrg. 98-1043 at 177 (Section-by-Section Analysis of H.R. 4784) (emphasis added); *see also* Senate Congressional Record, August 10, 1984, Explanation of Committee Amendment to H.R. 3398, page 23895 (stating with respect to injurious sales for importation that "{t}his situation may arise particularly in transactions involving capital goods, *in which delivery times may be spread over several years but there is a large immediate loss to U.S. firms competing with the imports.*") (emphasis added).

Agreements.[233] However, there is no indication in the URAA Statement of Administrative Action or in the Senate and House Reports that, in making the changes, Congress intended to make substantive changes to the legal standard for an affirmative finding of threat. To the contrary, the legislative history indicates the opposite. According to the SAA, for example:

> Section 222(c) of the bill amends section 771(7)(F) of the Act regarding the basis for a threat determination and the list of statutory factors considered in threat of material injury determinations. *No substantive change in Commission threat analysis is required.* . . . This new language is fully consistent with the Commission's practice in making threat determinations, the existing statutory language which requires that threat determinations be based on 'evidence that the threat of material injury is real and that actual injury is imminent,' and judicial precedent interpreting the statute.[234]

Unable to deny this clear statement of Congressional intent, GOC asserts that:

> This statement in the SAA . . . makes absolutely clear that it was the shared view of the Congress and the Administration in 1994 that the pre-existing statutory provisions, including the 1984 statutory amendments adding the references to sales, the likelihood of sales and sales for importation, did not dispense with the statutory requirement that the existence of actual imports or imminent future imports is a legal prerequisite to a finding of threatened material injury.[235]

---

[233] GOC Prehearing Brief at 22. In trying to justify its position that the Commission must find that imports are imminent in cases involving sales for importation, the GOC argues that the drafters of the AD and SCM Agreements "clearly contemplated the possibility that civil aircraft – capital goods with a long time lag between order and import – could be subject to trade disputes." *Id.* at 23, n.67. In reality, the text it cites to support its assertion proves nothing of the sort. While the GOC purports to cite Article 6, n.15 of the AD Agreement, the text it is citing is actually from Article 6, n.15 of the SCM Agreement. *See* Boeing 5/24 Post-Conference Exhibit 20. There is no equivalent text in the AD Agreement. In addition, the language the GOC is citing appears in the now-defunct "dark amber" provisions of the SCM Agreement. Those provisions have nothing to do with antidumping or countervailing duty cases, and nothing to do with the legal standard for findings of threatened material injury. Moreover, the drafters included the reference to civil aircraft in the SCM Agreement because the provision the footnote is attached to – Article 6.1(a), which provides for findings of "deemed" serious prejudice in cases where the total ad valorem subsidization of a product exceeded 5 percent – was objectionable to the EU because their subsidies to Airbus (like the subsidies for the C Series) exceeded that threshold. Thus, the EU demanded the footnote as a condition of agreeing to the inclusion of Article 6.1(a) itself.

[234] SAA at 184 (emphasis added).

[235] GOC Prehearing Brief at 25.

GOC is turning the SAA's statement on its head.[236] As discussed above, it is incontrovertible that, prior to 1994, the statute did *not* require that actual imports or imminent future imports had to exist in order for the Department to reach an affirmative determination of material injury or threat. To the contrary, the statute explicitly stated that the Commission could reach an affirmative finding of threat on the basis of sales (or likely sales) *for importation*, and it did not refer to imminent *imports* at all.[237] This explains why GOC has failed to quote the text of this alleged pre-1994 "statutory requirement." In reality, no such requirement exists.

It is also clear that if Congress *had* intended to modify the legal standard as GOC asserts when it amended the statute in 1994, it would have been a simple enough matter to amend the core operative provisions in sections 701, 731 and the chapeau of 771(7)(F)(i) to limit the availability of duties in cases involving sales for importation to just those cases where the Commission finds a threat of serious injury by reason of sales (or likely sales) that will result in imminent imports.[238] But Congress did not do so, confirming again that GOC's interpretation is incorrect.

Contrary to the GOC's assertions, what the SAA actually makes clear is that it was the shared view of the Congress and the Administration that, notwithstanding their decision to conform the text of section 771(7)(F)(ii) to the equivalent text of the AD and SCM Agreements, they did not intend to make any substantive changes to the then-existing requirements under U.S.

---

[236] In addition, the GOC's assertion mischaracterizes the statute, which actually refers to "further" imports, not "future" imports. This is an important distinction for the reasons discussed above.

[237] *See* 19 USC §§ 1671(a), 1673, 1677(7)(F)(i)-(ii) (1988).

[238] For example, Congress could have amended section 701 to provide for affirmative determinations in cases where a domestic industry is threatened with material injury by reason of imports of the subject merchandise "or by reason of sales (or the likelihood of sales) that will lead to imminent imports of the subject merchandise."

law.[239] GOC's position that the Commission cannot reach an affirmative determination of threatened material injury unless it finds that actual imports will enter during the "imminent period"—even in cases involving sales (or likely sales) for importation—would be just such a substantive change.

Furthermore, GOC's interpretation is not the only way to read Section 771(7)(F)(ii). On its face, the provision simply provides guidance to the Commission in "making a determination of whether further dumped or subsidized imports are imminent." Such a determination might be relevant to the statutory standard of whether the domestic industry "is threatened with material injury," and thus is a determination the Commission might make. But the plain language of the provision does not say that there is no threat of material injury unless further imports are imminent. Nor does it say the Commission cannot impose duties absent such a finding.

The statutory interpretation that gives meaning to all of the terms of the statute—including the references to "sales" for "importation" in sections 701, 731, and 771(7)(F)(i)—is the Commission's own approach to interpreting section 771(7)(F)(ii), which is that the Commission must find that actual "injury" is imminent – *i.e.*, it must satisfy the legal standard of the pre-1994 version of section 771(7)(F)(ii) – notwithstanding the absence of any reference to imminent injury in the current text of the provision.[240] It would also be consistent with

---

[239] The AD and SCM Agreements do not address the scenario of material injury or threat as a result of sales (or likely sales) for importation (as opposed to injury or threat from actual imports). *See, e.g.*, AD Agreement, art. 3. Therefore, the texts of the agreements are worded in a manner that assumes imports are already occurring. *See, e.g.*, AD Agreement, art. 3.7. However, there is nothing in either agreement stating that a WTO Member cannot reach an affirmative threat finding in cases where there have been sales for importation, but not actual imports, and a conclusion that there must be actual imports in order for the Commission to reach an affirmative threat finding under U.S. law cannot be squared with the plain language of the Act. *See also* Uruguay Round Agreements Act, § 102(a) (stating that "{n}o provision of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.").

[240] *See, e.g., Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan*, Investigations Nos. 731-TA-736 and 737 (Final), Pub. 2988 (August 1996), at 34 n.220 (stating that, "{w}hile the language referring to imports being imminent (instead of 'actual injury' being imminent and threat being 'real') is a change from the prior provision, the SAA indicates that the ''new language is fully consistent with the Commission's practice, the existing statutory language and judicial precedent interpreting the statute. SAA at 184.'").

Congressional intent which, as noted above, was to provide for the possibility of relief "in situations where actual importation has not yet occurred but a sale for importation has been completed or is imminent."[241]

B. GOC's Interpretation of the Statute Would Lead to Absurd Results That Are Directly Contrary to Congressional Intent

If the Commission were to accept GOC's statutory interpretation, it would effectively deny the domestic 100- to 150-seat LCA industry – and other manufacturers of large capital goods with extended time lags between orders/sales and deliveries/shipments – access to the AD/CVD laws. Indeed, it would provide a roadmap for respondents to structure their transactions to insulate them from challenge. Moreover, it would have this effect even in cases where the Commission finds clear and convincing evidence of imminent material injury by reason of sales of the subject merchandise for importation – notwithstanding the repeated and explicit statements of Congressional intent to provide for the possibility of relief in such situations.

GOC implicitly admits this fact in its brief when it states that, "even if there were evidence that Bombardier had a signed contract *today* for the export of LCA from Canada to the United States, which there is not, the lead time from contract to delivery would mean that no LCA could be delivered for at least three and likely five years. As a result, even a new sale made today would not result in imminent imports."[242] The Commission should carefully consider the implications of this statement. If GOC's interpretation of the Act is correct:

- Bombardier or another manufacturer of large capital goods could make a massively dumped and subsidized sale of subject merchandise to a customer in the United States with the understanding that it would commence deliveries in three years. Under GOC's

[241] Trade Remedies Reform Act of 1984, H. Rep. 98-725 at 11 (Boeing 5/24 Post-Conference Brief Exhibit 2) (emphasis added).

[242] GOC Prehearing Brief at 15.

interpretation of the Act, if Boeing or the equivalent U.S. manufacturer of the domestic like product in question were to file AD and CVD cases, the Commission would be *compelled* to reach a negative determination, even if the evidence overwhelmingly demonstrated that the U.S. industry faced an imminent threat of material injury by reason of the sale.

- The only way for the domestic producer to avoid this result would be to wait at least a year to re-file its petition in order to ensure that at least some imports of the dumped and subsidized product would enter during the two-year "imminent period" that, according to Bombardier and GOC, is the maximum period that the Commission may consider under the law. And if the respondents reacted to the new filing by renegotiating the contract to delay the first deliveries by a few additional months, the Commission would be *compelled* to reach a negative determination again.

- Furthermore, during this mandatory one to two-year "waiting period," respondents could continue to target additional U.S. customers with massively dumped and subsidized sales, locking up even more of the domestic market. If first deliveries were set to take place in no less than two years, the domestic industry would be powerless to stop them. The outcome would be clear: in industries such as this, where there are a finite number of customers and infrequent opportunities to make sales, the domestic industry would suffer irreparable material injury before an AD/CVD case would even become ripe.

This is the very scenario that Congress sought to preclude when it added the "sales for importation" language to the Act.[243] But it is an unavoidable consequence of GOC's theory. Therefore, either GOC's interpretation is wrong, such that the Commission need not conclude that imports, as well as injury, must be imminent in cases involving sales for importation, or the Commission should interpret "imminent imports" in the context of this industry to encompass the 4-5 year period that is standard for deliveries of LCA, or both, as Boeing respectfully submits.

[243] Trade Remedies Reform Act of 1984, H. Rep. 98-725, (HR 4784), at 11 (explaining that Congress added the "sale for importation" language to address "cases involving large capital equipment, where loss of a single sale can cause immediate economic harm and where it may be impossible to offer meaningful relief if the investigation is not initiated until after importation takes place. In cases where injury or threat of injury from a subsidy may occur prior to actual importation, the investigation should not await such importation....") (Boeing 5/24 Post-Conference Brief Exhibit 2).

Questions from Commissioner Broadbent

25. Who's the customer that's alright with sitting at the end of an eight-year skyline or kind of being bumped or adjusted if you were all going to start a new production for a new contract? (Tr. at 84:3-7)

Boeing would like to clarify an apparent misconception about its skyline. Bombardier argues that Boeing cannot increase production, or even be injured, because it has an eight-year backlog, suggesting that in order to accommodate a new order, Boeing would have to bump an existing customer to the end of that backlog. This argument fundamentally misunderstands Boeing's skyline management practices.

Boeing produces approximately 42 737 aircraft each month. Boeing delivers those aircraft to a number of different customers who may have placed orders at very different points in time. As Mr. McAllister testified at the Hearing: "{t}ypically, customers are spread across the skyline. An individual customer's order will occur over a number of years and they do that in order to phase in airplanes in a non-disruptive way into the network versus being concentrated in the end."[244] Thus, Boeing's skyline reflects an intermingling of numerous multi-year order streams for individual customers, with no single customer sitting at the end of the skyline awaiting delivery of all the aircraft it ordered in a concentrated block. As explained in Exhibit 42 to Boeing's pre-hearing brief, [

] for those aircraft.[245]

There are several skyline management levers Boeing can use to rearrange customers' slots in its delivery schedule,[246] and moving a customer's contracted delivery date does not mean that a customer gets bumped to the back of the line. [

---

[244] Hearing Tr. at 84 (McAllister).

[245] Declaration of [ ], para. 8 (Boeing 12/12 Prehearing Brief Exhibit 42).

[246] *See id.*, para. 9.

].[248] It is absolutely not the case that Boeing would have to bump an existing customer to the end of an eight-year backlog to accommodate a new order for 737-700s or MAX 7s.

26. I'm really struggling with the domestic like product as the Commission looks at it. And I'm getting a tension in your arguments on domestic like product and interchangeability. So on domestic like product you rely largely on the idea of physical differences, particularly size and seat count limit the interchangeability between in-scope and out-of-scope aircraft. However, the seat count difference between the smallest and the largest in-scope aircraft really exceeds the difference between the craft's most similar out-of-scope aircraft. How can the Commission determine that there is limited interchangeability between the 138 seat 737 Max 7 and 162 seat 737 800? But then again moderate to high interchangeability between the 130 seat 737 Max 7 and the 108 seat CS 100? (Tr. at 79:17 – 80:7)

The record contains ample evidence demonstrating interchangeability between the CS100, CS300, 737-700, and MAX 7 and the lack of interchangeability between in-scope LCA and larger aircraft. First, the seat count difference between the CS100 and the 737-700/MAX 7 is not as stark as respondents would like the Commission to believe. As discussed above in response to Question 16, airlines can and have chosen to fly the CS100 with more than 108 seats and Boeing's 737-700/MAX 7 with fewer than 138 seats. Moreover, in the United campaign, Boeing competed its 737-700 in a [ ] configuration against the CS100 in a [ ] configuration—*i.e.*, a difference of only [ ] seats.[249]

---

[247] *See id.*, para. 10.

[248] *See id.*, paras. 12-18.

[249] *See* Affidavit of [ ] at para. 8 (Petition Exhibit 101); [ ].

Second, seat count difference alone fails to capture the significant differences between 100- to 150-seat LCA and Boeing's larger single aisle offerings. Just as seating capacity is linked to aircraft size, other capabilities are connected to the aircraft size as well. In order to accommodate 162 passengers, Boeing's 737-800 and MAX 8 have longer fuselages and therefore need to sacrifice some performance characteristics that the smaller CS100, CS300, 737-700 and MAX 7 possess due to the smaller size of those aircraft, as discussed extensively in our prehearing brief[250] and below. As such, Boeing's 100- to 150-seat LCA are not interchangeable with its other single aisle LCA because they are uniquely suited to address airline needs for certain routes and passenger loads in order to maximize profit.[251]

Third, these aircraft can serve airports with relatively short runways, thus increasing the number of locations that the aircraft can serve. It is an undisputed fact that there are at least [ ] U.S. airports that can only be served by the 737-700, not the 737-800, due to differences in capabilities.[252] Thus, from the perspective of airlines servicing flights to those airports (e.g., [ ]), it is similarly undisputed that the two aircraft are not interchangeable for those missions.[253] Larger aircraft such as the 737-800 and MAX 8 are performance-constrained at even more airports and suffer a competitive disadvantaged due to reduced performance capabilities.[254] Delta acknowledged at the hearing that the 737-700 is "well-suited for certain unique missions" and that it keeps 737-

[250] *See* Boeing 12/12 Prehearing Brief at 27-33.

[251] *See* Nickelsburg Report at paras. 17-21 (Boeing 5/24 Post-Conference Brief Exhibit 8). 100- to 150-seat LCA also tend to have lower pilot costs than larger aircraft as well as and fewer crew needs. *See* 14 C.F.R. § 121.391(a)(4) (requiring an additional flight attendant beyond 150 passengers).

[252] *See* Nickelsburg Report at paras. 22-24 (Boeing 5/24 Post-Conference Brief Exhibit 8); *see also* Boeing 12/12 Prehearing Brief at 28-29.

[253] *See* Nickelsburg Report at paras. 22-24 (Boeing 5/24 Post-Conference Brief Exhibit 8).

[254] Boeing 12/12 Prehearing Brief at 28-29.

700 aircraft in its fleet for this very reason.[255] Contrary to Delta's assertions, the limitations that these differences impose on airlines are not trivial given the intricate networks of connecting flights and transfers that airlines construct to maximize profitability.

This limited interchangeability is further reflected in the questionnaire data on the record. The Staff Report shows that 7 out of 9 customers view 100- to 150-seat LCA as only "somewhat" interchangeable with the 737-800 and MAX 8 and none indicated that they are "fully" interchangeable.[256] In contrast, four U.S. customers, including [

], reported that in-scope LCA produced in the United States (*i.e.*, 737-700 and MAX 7) were either "always" or "frequently" interchangeable with in-scope LCA produced in Canada (*i.e.*, CS100 and CS300).[257]

The evidence on the record confirms that 100- to 150-seat aircraft are complementary to larger single aisle aircraft and offer a distinct product to airline customers. At its December 2017 investor day, Bombardier CEO Alain Bellemare described the Airbus partnership as creating "a great, strategic fit . . . between the C Series, the CS100, CS300 and the A320, A321."[258] This framing of the C Series as a "strategic fit" with Airbus' A320 and A321 is consistent with Bombardier's own consultant report from FlightAscend and its assessment of the competitive landscape between the 737-700, MAX 7, and C Series. In that report, FlightAscend concludes

---

[255] Hearing Tr. at 198-199 (May). In their questionnaire responses, [ ] similarly acknowledged that larger LCA were incapable of servicing certain missions or routes. *See* [ ] U.S. Importers' and/or Purchasers' Questionnaire Response (Final), Question IV-1(b).

[256] *See* Staff Report at I-22, Table I-2. The Staff report notes that "U.S. importer/purchasers were nearly unanimous in viewing . . . interchangeability of 100- to 150-seat LCA as mostly or somewhat comparable to other single aisle LCA." *Id.* at I-20. However, unpacking this statement reveals that both [ ] as well as [ ] out of 9 responding importers/purchasers responded [ ]. *Id.* at I-22, Table I-2.

[257] *See* Staff Report at II-40; [ ] U.S. Importers' and/or Purchasers' Questionnaire Response (Final), Question III-23; [ ] U.S. Importers' and/or Purchasers' Questionnaire Response (Final), Question III-23; [ ] U.S. Importers' and/or Purchasers' Questionnaire Response (Final), Question III-23.

[258] Bombardier Investor and Analyst Day, Bloomberg Transcript (Dec. 14, 2017), attached as Exhibit 3.

that "complementing MAX 8 orders" was a leading reason for why airline customers have ordered the C Series, instead of the MAX 7.[259] For example, Air Canada's recent CS300 order (at a below-cost price[260]) was meant to fulfill "what would otherwise be a 'large gap' between the 76-seat regional jets . . . and the roughly 160-seat Boeing 737 MAX 8."[261] The fact that these airlines are filling gaps with the C Series, not the 737-700 and MAX 7, is a testament to the direct competition between Bombardier's and Boeing's 100- to 150-seat LCA models. And the fact that these airlines have continued to order MAX 8 and MAX 9 speaks to the lack of competition between those large single aisle aircraft and aircraft in the 100- to 150-seat market.

27. Okay. Mr. McAllister, is it true that Southwest Airlines plans to configure the {MAX} 7 to seat 155 passengers? (Tr. at 148:7-9)

Bombardier cited a news article in support of its assertion that Southwest Airlines plans to configure the 737 MAX 7 with 155 seats. That news article is [

]. This further demonstrates that 150 seats is a clear dividing line

[259] Bombardier Prehearing Brief, Attachment A, FlightAscend Report at 31.

[260] *See* Petition at 125.

[261] Bombardier Prehearing Brief, Attachment A, FlightAscend Report at 27.

[262] *See* 737 MAX 7 Layout, attached as Exhibit 13.

between LCA markets – not an arbitrary line between small single aisle LCA and larger single aisle LCA, as Bombardier erroneously argues.[263]

28. We got a statement on the record from a Darryl Jenkins of the American Aviation Institute saying, for years, Boeing has ignored the smaller-sized aircraft, which the large network carriers did not use due to scope-clause agreements with their pilot unions, the labor contracts. Basically the scope-clauses were used as economic arbitrage to let smaller regional airlines, which paid their pilots less, fly smaller aircraft from less populated areas to their hubs. Delta Airlines was the first major airline to have a 100-seat wages assigned to their mainline pilots. Could you please explain how the scope-clauses work in the airline industry, and if they have any relevance to the conditions of competition in this case? (Tr. at 112:15 – 113:4)

As discussed above, some U.S. airlines operate what are called hub-and-spoke networks that link smaller cities to the airline's network hub. These airlines typically have separate regional carriers that operate the routes feeding traffic into the network hub, and the regional carriers operate regional jets or turboprops. Most airline pilot groups in the United States are unionized and work under a collective bargaining agreement or a pilot working agreement with the "mainline" U.S. airlines. Their contracts include what are referred to as "scope clauses," which define the type of flying covered by the contract and under what circumstances the mainline airlines can use regional carriers to fly routes.[264] Scope clauses are intended to protect pilots by preventing the mainline U.S. carrier from outsourcing too many routes to low-cost, regional carriers.[265] Scope clauses are complex, and commonly dictate the number of regional jets that can be operated as a ratio of the number of LCA operated by airline.[266] Scope clauses also limit regional jets' maximum takeoff weight to 86,000 lbs and limit seating capacity to 76

[263] *See* Bombardier Prehearing Brief at 16.

[264] *See The Changing Scope Clause Environments*, mba, at 2 (July 11, 2017), attached as Exhibit 14.

[265] *See id.*

[266] *See id.* at 4.

seats.[267] Scope clauses primarily limit the interchangeability of regional jets and small single aisle LCA.

29. If there are no imports in the next 18 to 24 months, but there are sales made in that period, are subject imports negligible? (Tr. at 111:14-16)

No. As an initial matter, as discussed above in response to Question 2, the statute states that the Commission "shall not treat imports as negligible if it determines that there is a *potential* that imports . . . will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States."[268] Boeing explained in its response to Question 2 why there is no reasonable basis for the Commission to conclude that there is *no* potential for non-negligible imports in this case. As such, the premise of this question—that it is possible to state with certainty that there will be no imports in the next 18 to 24 months—is not well-founded.

With that said, even if one were to assume for the sake of argument that it was possible to conclude with certainty that there would be no such imports, it is still the case that subject imports would not be negligible. This question reflects GOC's argument that the Commission cannot make a negligibility determination in the threat context on the basis of sales (or likely sales) for importation, and that it must find instead that *imports* are existing or imminent.[269] The Commission addressed the GOC's arguments in its preliminary determination and properly rejected them.[270] It should do so again for purposes of its final determination.

---

[267] *See id.*

[268] See GOC Prehearing Brief at 16-19.

[269] See GOC Prehearing Brief at 16-19.

[270] *See* Preliminary Determination, USITC Pub. 4702 at 20-22 and n.90. Boeing agrees with the Commission's reasoning in the cited footnote, including its citation of the determination in the *Engineered Process Gas Turbo-Compressor Systems from Japan* investigation, *see id.*, and hereby incorporates the entirety of the discussion by reference.

As the Commission explained in its preliminary determination, "the statute makes clear that the Commission may base an affirmative threat determination on 'sales (or the likelihood of sales) of {subject} merchandise' or 'sales for importation,' which refer to sales of subject imports for importation in the future."[271] Indeed, Sections 701 and 731 of the Act explicitly state that antidumping and countervailing duties "shall" be imposed if the Commission determines that a domestic industry is "materially injured" or "threatened with material injury" "by reason of imports of {subject} merchandise *or by reason of sales (or the likelihood of sales) of that merchandise for importation.*"[272] Thus, as the plain language makes clear, the imposition of antidumping and countervailing duties is *mandatory* if there is a threat of material injury by reason of dumped or subsidized sales (or likely sales) for importation, even if importation has not yet occurred. Nothing in these operative provisions purports to impose a requirement that the subject merchandise must have already been imported, or that it must be imported in the imminent future. To the contrary, there need not even have been sales for importation, provided that such sales are likely. The statutory language pertaining to negligibility must be interpreted in light of this explicit statutory requirement.

GOC's argument on this topic is a variant of the argument it made with respect to the "imminent imports" language in section 771(7)(F)(ii), and it is wrong for the same reasons that Boeing discussed above in its response to Question 24. The record evidence shows that there has been a sale for importation, and Boeing has explained in detail why there is a threat of material

[271] *Id.* at n.90 (citations omitted).

[272] 19 U.S.C. § 1671(a); 19 U.S.C. § 1673 (emphasis added).

injury as a result of that sale. That is all the statute requires for an affirmative determination.[273] If there are additional sales for importation in the next two years—or a likelihood of sales for importation—that would serve only to buttress this conclusion.

30. Please respond to Bombardier's arguments on page 37 to 40 within your post-hearing brief. These arguments concern whether the domestic industry producing all single aisle large civil aircraft are threatened with material injury. (Tr. at 175:6-10)

Even if the Commission were to find that all single aisle LCA constitutes a single like product, it should nevertheless find that the U.S. industry is threatened with material injury by reason of dumped and subsidized imports or sales for importation of the subject merchandise. Notwithstanding the trends in the trade and financial data for all single aisle LCA categories in the aggregate, the loss of sales and/or depression of prices caused by unfair competition in the small single aisle LCA category will cause future injury that is material by any reasonable measure. Bombardier's argument implies that a historically successful domestic industry cannot be materially threatened. However, Congress has expressly made clear that an industry need not show it is actually losing money to establish vulnerability. Congress amended the ITC's injury

---

[273] In addition to the foregoing, Boeing respectfully submits that the purpose of the negligibility provision is to provide for negative determinations for particular countries in multi-country investigations when the country's producers are responsible for only a negligible portion of total imports from all of the countries under investigation. It is not meant to establish a threshold requirement that there must be actual imports, as opposed to sales for importation, in investigations involving a single country (*e.g.*, investigations such as this one where a single country is responsible for 100 percent of total imports of the subject merchandise, but the imports have not yet occurred). This conclusion is clear not only from the text of the provision itself—which provides for a comparison between the imports from the particular country in question and total imports of such merchandise into the United States—but also from the Act's legislative history. As the Senate Report explains:

> Section 222(d) amends the 1930 Tariff Act to add a new section, 771(24), which incorporates the Agreements' definitions of negligible imports in antidumping and countervailing duty investigations. New section 771(24) establishes the general rule, as set forth in Article 5.8 of the Antidumping Agreement, that imports *from a particular country* are negligible if they account for less than three percent of *total* imports of the product in question. . . . The Committee does not intend to mandate any particular method for estimating *the share of total imports held by each subject country*. . . .

S. Rep. 103-412 at 56-57 (emphasis added). The negotiating history of Article 5.8 of the AD Agreement also supports this conclusion, as it shows that the negligibility requirement reflected concerns raised by smaller countries that they were being included in investigations where their exporters had minimal market shares.

criteria in the Trade Preferences Extension Act of 2015 to make clear that profitable industries are entitled to relief from unfairly traded imports: "The Commission may not determine that there is no material injury or threat of material injury to an industry... merely because that industry is profitable or because the performance of that industry has recently improved."[274] This language makes clear that current profitability of a domestic industry cannot preclude a finding that the domestic industry is vulnerable to material injury from the subject imports.[275]

The imminent injury to Boeing's single aisle LCA will manifest itself in several ways. First, each lost sale represents tens of millions, if not hundreds of millions or even billions, of dollars of lost revenues and tens or hundreds of millions of dollars of lost profits. As Mr. McAllister testified at the Hearing, Boeing's 100- to 150-seat LCA have been responsible for over 1,200 orders and are expected to generate billions in revenue for Boeing over the next twenty years if competition is on fair terms.[276] Contrary to respondents' assertions, Boeing cannot simply replace MAX 7 revenue and sales lost to dumped C Series with its other aircraft, nor does it desire to do so. Without a healthy MAX 7 aircraft program, Boeing will be unable to compete for near-term sales opportunities for 100- to 150-seat aircraft as the fleet replacement cycle resumes for this type of aircraft, and by missing out on those near-term sales, it will also be shut out of tens of billions of dollars in additional sales over the longer term as the C Series locks up major customers now for follow-on orders later. As the Staff Report notes, the industry is dominated by a few very large orders to a few customers.[277] The Commission has found that in an industry with a small number of repeat customers, "even a modest rise in import penetration

---

[274] *See* Trade Preferences Extension Act of 2015, Sec. 503(a), codified at 19 U.S.C. § 1677(7)(J).

[275] The same conditions of competition that make the 100- to 150-seat LCA market vulnerable apply to Boeing's entire family of single aisle aircraft. *See* Petition at 17-25.

[276] Hearing Tr. at 45-46 (McAllister).

[277] Staff Report at II-5.

would cause a significant diminution of domestic producers' market share and profitability and cause material injury to the domestic industry."[278] Reductions in sales revenues and operating income associated with one lost sale in this industry exceed the total revenues and operating income of many industries before the Commission. Even under a broader "like product," this injury should be treated as material.

Second, Boeing has developed a multi-aircraft single aisle LCA strategy to compete with Airbus. The European consortium offers three discrete single aisle LCA models: the A319, A320, and A321. Boeing and Airbus compete fiercely for customers that are attracted to the family concept; *e.g.,* large volume customers like Southwest, Alaska, Spirit, and JetBlue that seek the operating cost advantages that accrue from flying different-sized aircraft from the same manufacturer. If competition with the C Series kills the MAX 7, Boeing will not be able to offer the same range of single aisle products that Airbus will offer. Its products will be less attractive to those large volume customers that embrace the single-aisle, same-manufacturer concept. Consequently, Boeing's future sales of larger LCA models would also suffer, even if those models don't compete directly with the C Series. This is perhaps the biggest threat that the C Series poses to the entire 737 program.

This threat would be amplified greatly by an Airbus takeover of the C Series program. As stated by Mr. Novick at the hearing, Airbus would be in a position to offer its A319 to legacy customers, but at the same time market its C Series in the same market to those customers that are less interested in the benefits of commonality.[279] Against that formidable product range, Boeing would be able to offer only a reduced family of 737s.

---

[278] *Certain Laser Light-Scattering Instruments and Parts Thereof from Japan*, Inv. No. 731-TA-455 (Final), USITC Pub. 2328 (Nov. 1990) at 23.

[279] Hearing Tr. at 123-124 (Novick).

Third, and finally, the research and development costs for the MAX 7 will not be recouped. Boeing spends at least hundreds of millions of dollars to develop each version of its 737 aircraft, including the 737 MAX7.[280] In addition, introducing a new aircraft into production requires substantial capital expenditures on tooling and equipment. The reduction of the MAX-7 to orphan or zombie aircraft status would severely impede Boeing's ability to fully recoup its investment in research and development, tooling and equipment. Once again, hundreds of millions of dollars is "material," whether it is lost revenues, or unrecovered investment in research and development.

The Government of Canada seemingly argues in its brief that Boeing will not experience material injury due to its strong financial position overall, without any qualifications to the like product definition.[281] However, the Commission has stated that it "does not examine the effects of subject imports on overall corporate operations, but only on the U.S. operations producing the domestic like product."[282] The Commission should consider "the effects of the subject imports on production of the like product only."[283] Even assuming it were possible to replace lost sales of the like product with sales of a different product, that does not mean the domestic industry would not suffer material injury. That Boeing may change its business strategy with respect to other aircraft products to compensate for dumped subject imports does not alter the Commission's like-product or injury analysis. In its investigation of Chinese and Vietnamese

---

[280] Boeing 12/12 Prehearing Brief at 111.

[281] *See* Government of Canada Prehearing Brief at 55-58.

[282] *Ferrovanadium from China and South Africa*, Inv. Nos. 731-TA-986 and 987 (Review), USITC Pub. 4046 (Nov. 2008) at 10; *see also* 19 U.S.C. § 1677(4)(D) ("The effect of dumped imports or imports of merchandise benefiting from a countervailable subsidy shall be assessed in relation to the United States production of a domestic like product if available data permit the separate identification of production in terms of such criteria as the production process or the producer's profits.").

[283] *Certain Colored Synthetic Organic Oleoresinous Pigment Dispersions from India*, Inv. Nos. 701-TA-436 and 731-TA-1042 (Preliminary), USITC Pub. 3615 (July 2003) at 16 n.112.

wind tower imports, the Commission found material injury to the domestic industry, although one domestic producer "shifted to production of 100 meter wind towers in response to competition from subject imports in the 80 meter segment."[284] This was true despite "the value of U.S. producers' net sales increas{ing}" in part due to "costs associated with the shift in product mix toward larger wind towers."[285] The financial condition of the Boeing 737 family is not relevant to the Commission's injury analysis of a properly defined domestic like product, one that includes only the 737-700 and 737 MAX 7.

31. On page 43 of Bombardier's brief and page 1 of Delta's brief, they describe Boeing and Airbus as having abandoned the low end of the single aisle market. Why do you think that Boeing and Airbus did this? And why did Bombardier see in this -- and what did Bombardier see in this part of the market that Boeing and Airbus did not? (Tr. at 227:1-6)

Bombardier responded to this question by referring to Boeing's (and Airbus') supposed sub-optimization of aircraft in the 100- to 150-seat market, in contrast to the supposedly optimized C Series and its allegedly "large operating advantage against those products."[286] It is necessary to clarify that Bombardier's response is both contradicted by the evidence and an attempt to convert the C Series' massive subsidization into a defense against an affirmative determination.

Bombardier contends that the C Series is so advanced and optimized for the small single aisle market that the 737-700 and MAX 7 are uncompetitive.[287] As an initial matter, this is an attempt to distract from the decisive role of Bombardier's aggressive pricing in the C Series'

---

[284] *Utility Scale Wind Towers from China and Vietnam*, Inv. Nos. 701-TA-486 and 731-TA-1195-1196 (Final), USITC Pub. No.4372, at 21 n.171 (Feb. 2013).

[285] *Utility Scale Wind Towers from China and Vietnam*, Inv. Nos. 701-TA-486 and 731-TA-1195-1196 (Final), USITC Pub. No.4372, at 25-26 (Feb. 2013).

[286] Hearing Tr. at 227 (Dewar).

[287] Hearing Tr. at 227 (Dewar); Bombardier Prehearing Brief at 58.

commercial fortunes. The C Series' supposed superiority in terms of design and technology meant very little for major U.S. sales of the C Series until Bombardier adopted its low-price strategy in 2015. Likewise, Delta did not need to see how the C Series performed in service with Swiss and airBaltic before ordering the C Series—it ordered when Bombardier offered brand-new aircraft at used aircraft prices.

Indeed, if Bombardier's position had merit, one would expect to see C Series prices that are so much higher than 737-700/MAX 7 prices that Boeing cannot offset the C Series value advantage with price discounts and still obtain a return sufficient to justify producing the aircraft for customers. In fact, [

].[288]

Moreover, the Commerce Department recently confirmed that the C Series has been dumped at the extreme level of 79.82% and massively subsidized at a rate of 212.39%.[289] These findings—the 212.39 CVD rate in particular—confirm that the C Series, and all the aircraft features that Bombardier cites as a competitive advantage, would not exist at all, and would be absent from the U.S. market, if fair trading conditions prevailed. As Bombardier indicated in its prehearing brief, C Series duties of this magnitude are "prohibitive" for any U.S. airline.[290]

In sum, the C Series is winning the competition against the domestic like product because Bombardier is using subsidies to price aggressively, not because it developed a better airplane.

---

[288] *See* Boeing 12/12 Prehearing Brief at 95-98.

[289] *See 100- to 150-Seat Large Civil Aircraft from Canada: Final Affirmative Determination of Sales at Less Than Fair Value*, 82 Fed. Reg. __ (Int'l Trade Admin. Dec. 18, 2017); *See 100- to 150-Seat Large Civil Aircraft from Canada: Final Countervailing Duty Determination*, 82 Fed. Reg. __ (Int'l Trade Admin. Dec. 18, 2017).

[290] *See* Bombardier Prehearing Brief at 13.

Additional Questions from Commissioners and Staff (Sent to Boeing on December 21, 2017)

32. Please explain why United chose to convert its 2015 order of 737-700s to 737-800s. Please also provide the list price and net price paid per plane for the original order of 700s as well as the converted order of 800s, and explain how the price for the 800s was determined.

Please see response to Question 1 above.

33. Please provide annual projected U.S. deliveries of all single aisle LCA, by model, through 2022.

Please see the chart below:

[

]

34. Why did Boeing increase the seating capacity from the 126 seats in the 737-700 to 138 seats in the MAX 7?

Boeing revised the 737-7's design to better compete with the C Series and A319neo, and

[

].

Within the 100-150-seat market, a model with a seating capacity advantage will typically offer more value to customers than competing models in that market, all else equal. Increasing

the 737-7's seating capacity [ ] Boeing to respond to the competitive challenges posed by the C Series and the A319neo.

The C Series challenge became clear when Bombardier targeted United and Delta with aggressively priced C Series airplanes in late 2015/early 2016. In addition, Airbus was marketing the A319neo with a typical 2-class capacity of 140 seats, despite the fact A319neo had the same fuselage length as the 124-seat A319ceo. [

].

Boeing also saw the potential to [

].

In sum, Boeing viewed the enhanced 737 MAX 7 design as [ ] to improve its competitiveness in the 100- to 150-seat market. In 2011, Boeing committed [

] to develop, in succession, the 737 MAX 8, 737 MAX 9, and 737 MAX 7 as advanced successors to the 737-800, 737-900ER, and 737-700, respectively. In late 2015 and early 2016, Boeing recognized that the C Series had used aggressive pricing to become a true threat throughout the U.S. market. [

]. In contrast, Boeing was able to justify the necessary investment to increase the 737 MAX 7's seating capacity, in conjunction with the 737 MAX 7's advanced CFM LEAP-1B engines and enhanced aerodynamics, to offer more value to customers and improve the MAX 7's competitiveness.

To date, however, Boeing [

]. Bombardier is still aggressively marketing the C Series to U.S. customers, and Boeing has yet to earn any significant orders since the enhanced 737 MAX 7 design was announced in mid-2016.

35. Regarding the skyline data that Boeing provided in spreadsheet form as a supplement to its producer questionnaire response, please explain why the production projections vary by month, as well as how those variations relate to your firm's total production capacity for both 100- to 150-seat LCA and other single aisle LCA. Please also provide a detailed explanation of how Boeing would increase its capacity should more orders for 100- to 150-seat LCA be added to this skyline.

While there are a few unique issues that will drive variations in Boeing's production projections, the biggest and simplest driver is the number of working days in a month. Boeing typically describes its production rate in the simple terms of "airplanes per month." However, production projections and the skyline profile they create are really a measure of output per working day. In 2017, Boeing's Renton facility was producing [

] 42 airplanes a month, and that is how Boeing describes its monthly production rate. In reality, the months of the year have different numbers of working days, based on the calendar and Boeing holidays. A dramatic comparison is December 2017, which has only [ ] working days, to October 2017, which has [ ] working days. So if the Renton facility produces [

]. This variation is reflected in the skyline Boeing submitted with its U.S. producers' questionnaire response.

Boeing has multiple levers it can use to address new customer interest in sales campaigns when its existing commitments already fill the current production plan, *i.e.*, the skyline is "sold out."[291] The first involves how Boeing manages its skyline and in particular its use of [

]. While most deliveries occur as originally scheduled (as discussed in Question 18), Boeing knows there will be some customers who, at a later date, seek to delay or cancel their orders. As a result, Boeing continues to sell airplanes [ ] its current planned production. [

]. In sum, Boeing's ability to sell and build additional airplanes for a new customer does not necessarily require increasing its production plan, even with the backlog of sold airplanes it currently has on its books.

[291] *See also* Boeing U.S. Producers' Questionnaire Response (Final), Questions II-11d, II-11e; Boeing 12/12 Prehearing Brief at 61-62; Declaration of [ ] (Boeing 12/12 Prehearing Brief Exhibit 42).

However, Boeing does continuously monitor market demand against its production plan and has processes in place to grow the production plan as needed, should there be significant increases in customer demand that its skyline management processes cannot address. In fact, Boeing has implemented increases in its production plan on a nearly annual basis because demand for the larger 737 models has warranted those increases.

An increase in the production plan begins with Boeing [

]. As an example, today Boeing's current production plan is to ramp up to 57 airplanes a month, [

], all associated actions needed are implemented with sufficient lead time to allow Boeing to match market demand.

The specific actions Boeing and its suppliers would take to increase the current production rate vary greatly by production facility and type of work involved. Actions may include: [

]. Within Boeing's final assembly facility in Renton, [

].

In short, Boeing has and will continue to grow capacity as needed to support market demand for the different 737 models, including the 737 MAX 7. By undertaking a capacity increase, Boeing would create additional delivery slots that could accommodate new orders and near-term delivery positions for the MAX 7, in addition to the delivery positions that could be made available through Boeing's skyline management practices. However, if Bombardier continues its aggressive pursuit of U.S. customers, the C Series will cement its position as the dominant 100- to 150-seat LCA program, and it will be very difficult for Boeing to win any

significant new orders for the MAX 7, resulting in lost sales, production, profits, and work for its employees.

36. At pages 264-265 of the hearing transcript, Mr. Mitchell of Bombardier describes jets with ranges of less than 2900 nautical miles as being able to fly from Washington DC to Los Angeles, and possessing the ability to cover "anywhere you want in North America and beyond." He also stated that the Embraer 190 E-2 and 195 E-2 can "definitely do transcon," and that airlines "very rarely" request transcon capability. How do you respond to these statements?

Boeing considers that 2,900 nautical miles ("nm") is an accurate approximate for true transcontinental range, and that Embraer's E-jets, including the 190-E2 and 195-E2, do not have true transcontinental range.[292]

Boeing believes that a generic range of approximately 2,900nm is a good proxy for transcontinental range capability. There are a number of factors that necessitate an aircraft having overall range capability that is significantly longer than the shortest distance between two geographical points, such as the distance between two cities on a route. Flying into headwinds is the biggest driver of this additional range requirement. Most east to west transcontinental flights face headwinds, which means an aircraft has to fly significantly further through the air than the ground distance. If an airplane faces 80 knot headwinds on a 5 hour flight, it is the effective equivalent of traveling an additional 400nm. For example, a flight from New York to Los Angeles is 2,200nm on the ground. But when you factor in the headwinds that an airplane will fly against during the winter, that airplane may need to routinely fly over 2,700nm through the air to complete the mission due to facing approximately 85 knot headwinds. Below is a chart

[292] To clarify, the 717 aircraft does not have transcontinental range. *Cf.* Hearing Tr. at 176-177 (Nickelsburg).

showing additional examples of East Coast to West Coast flights, estimating performance based on 85% probability winter winds:[293]

Track	Dist (nm)	Equivalent Still Air Distance (ESAD) (nm)	Added Distance (nm)	Cruise Altitude (100ft)	Cruise Wind (kt)
YUL to SFO	2,265	2,680	415	320/340/360	-70/-72/-71
JFK to SEA	2,160	2,600	440	320/340/360	-78/-79/-77
BOS to LAX	2,330	2,838	508	340/360/380	-83/-83/-81
BOS to SEA	2,226	2,664	438	320/340/360	-76/-77/-75
JFK to SFO	2,308	2,796	488	340/360	-81/-80
MIA to SEA	2,434	2,893	459	340/360/380	-73/-74/-72
MIA to SFO	2,308	2,784	476	320/340/360/380	-74/-78/-80/-80
JFK to LAX	2,209	2,710	501	320/340/360	-83/-85/-86
IAD to LAX	1,982	2,438	456	320/340/360/380	-83/-86/-87/-86
LAX to IAD	1,982	1,848	-134	350/370	33/36

Boeing and its customers consider that range capability over 2,900nm is required to consistently fly these transcontinental routes.

In addition to headwinds, there are several other elements which contribute to the 2,900nm generic range requirement for transcontinental flights. Airplanes often fly along "airways" in the sky or use non-direct routings that are longer than the shortest distance between two cities. Boeing typically adds an extra [ ] to the great-circle distance between two cities to model this impact, which can add [ ] to a 2,200nm trip. Older airplanes also burn more fuel, so an airline needs a margin on range so that when 15 years old the airplane will still be able to fly the required route. This can reduce the 2,900nm generic range by about 50nm. Additional weight will also reduce an aircraft's range, and airlines in the United States often assume heavier passenger and baggage weights than the standard generic assumptions of 225lbs per passenger. If an airline assumes 235lbs per passenger for a 138-seat aircraft, the extra

[293] 85% is a common generic assumption which means that winds will be equal to or more favorable 85% of the time, but worse 15% of the time.

1,380lbs can notably reduce the aircraft's range capability. In-flight entertainment systems and other airline configuration decisions can also add significant weight to the airplane. All of these factors mean that an airplane that is brand new needs the capability to fly 2,900nm in a given configuration in order to operate on transcontinental routes of 2,200nm between two cities during periods of strong winter winds, with heavy passengers, and when the aircraft is older and somewhat degraded.

[

]. Boeing also notes that the referenced Washington, DC to Los Angeles transcontinental route is 300nm shorter range than some of the more challenging transcontinental routes like New York to San Francisco.

Lastly – Boeing recognizes that average daily operations for small single aisle LCA will be on missions of around 500-1000nm. However, when airlines purchase aircraft they rely on being able to have the flexibility to serve a variety of routes across their networks, as discussed in response to Question 18. Flying transcontinental has become a requirement in the small single aisle LCA segment. When airlines make purchasing decisions, one of the areas they always focus is on the capabilities of the airplanes on their most challenging current and future possible routes. Even though transcontinental routes may be a small percentage of the overall routes an airline flies, these routes are critical both to an airline's profitability and to having a complete network for its passengers and airlines require this capability in the 100- to 150-seat LCA market.

37. Please provide the annual value (in USD) of aircraft parts for 100- to 150-seat LCA imported/projected to be imported into the United States by your firm from 2014 through 2022. Please separate into imports from Canada and imports from all other countries and provide a list of the type of parts contained therein.

Please see the charts below showing the values (in USD millions) and types of aircraft parts imported/projected to be imported for the 737-700 and MAX 7. [

].

Below is the list of parts imported for the 737-700 and MAX 7. [

]:

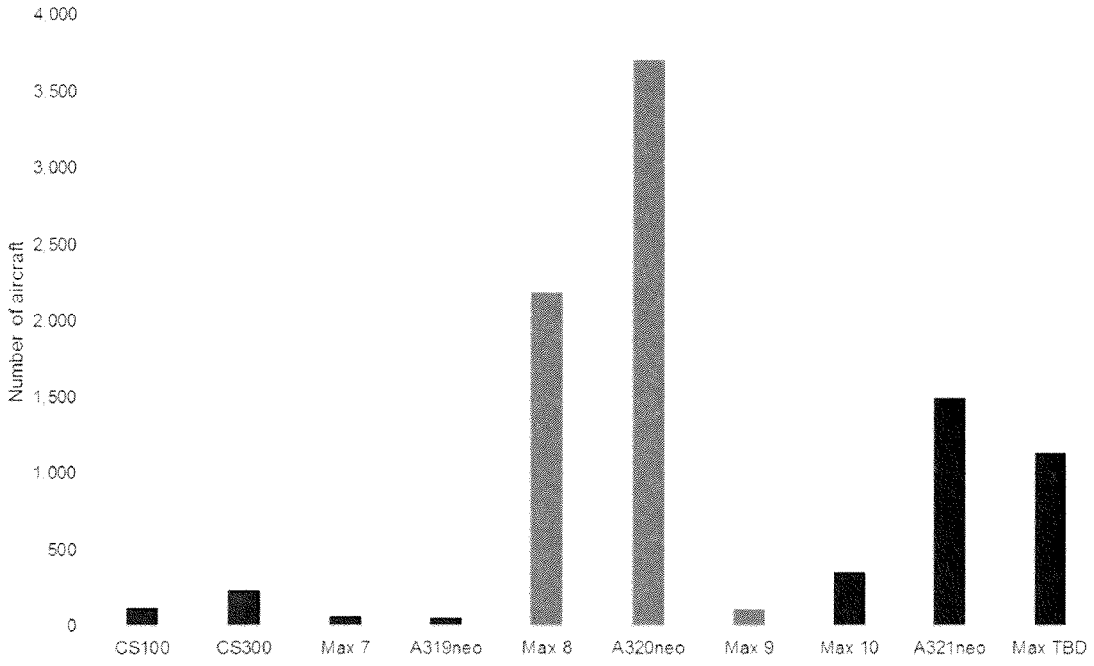
[ ]

38. If the Commission decides to define the domestic like product as all single aisle large civil aircraft, it will need to assess conditions of competition in that market as opposed to the narrower 100-to 150-seat market.

a. What key distinctions, if any, would you draw between the demand conditions in the market for in-scope 100- to 150-seat LCA and the market for all single aisle LCA?

While there are some common general drivers of demand that impact all single aisle LCA in the same or similar fashion, there nevertheless are clear differences in demand among the principal categories of single aisle LCA – differences which support a finding that there are clear dividing lines between 100-to 150-seat LCA and larger LCA. As the graph showing the global order outlook provided in the Flight Ascend report vividly demonstrates, demand levels for individual single aisle LCAs are not similar, nor does demand change by small gradations

between adjacent models. The graph, as depicted below, shows the total global order outlook for the C Series, the 737 MAX family, and the A319/A320/A321neo family:[294]



Source: Flight Fleets Analyzer @ 28 November 2017

If all single aisle LCA models were a true "continuum" product, as Bombardier incorrectly argues, one would expect to see similar, or only slightly different, levels of demand between adjacent models. Arbitrage would have a tendency to equalize order volumes over time. Indeed, if the MAX 7 and MAX 8 were being purchased by customers to serve the same end uses, you would expect to see far more MAX 7 orders. Because it is the cheaper alternative, in fact, it would make sense for airlines to choose this model over the MAX 8, if they truly were capable of performing the same mission for the airline customers. The graph, however, shows a huge difference in total orders for the MAX 7 and MAX 8.

[294] Flight Ascend Expert Report, Chart 9 at 26 (Attachment A to Bombardier Prehearing Brief).

What the graph clearly shows, however, is distinctly different demand levels that reflect three different markets for the following three major categories: 1) small (which corresponds exactly to the scope of these investigations); 2) medium; and 3) large.[295] Within each of these three categories, the level of demand for each model is much closer. This suggests that models within each of the three demand groups are substitutable. In addition, the graphic also demonstrates a far larger break in the demand conditions between the small and medium LCA categories than the medium and large LCA categories, suggesting that there is even less substitution between small and medium than there is between medium and large.

Demand, therefore, across all single aisle LCA categories is not uniform. As the graph shows, demand for medium LCA is much higher than demand in the small single aisle LCA aircraft. Those differences are a function of very different market conditions, including the following:

- ***Size of the Market:*** While the size of the 100- to 150-seat single aisle LCA market is significant and worth at least tens of billions of dollars over the next 20 years, it is smaller than the size of the markets for medium and large single aisle LCA market. The questionnaire responses of [ ] confirm this.[296]

- ***Place in the Replacement Cycle:*** Demand for 100- to 150-seat LCA was particularly high in the 2000s. Accordingly, order volumes have declined in recent years. However, demand is expected to increase in the imminent future as current aircraft fleets approach retirement age and need to be replaced with similarly sized aircraft. [297] By contrast, there is currently substantially higher order volume in the medium and large single aisle LCA categories.

---

[295] Upon further review, Boeing believes that the bar entitled "Max TBD" refers to announced MAX orders for which the specific model (-7, -8, or -9) has not been announced. Boeing believes that the majority of those airplanes when specific models are finalized, will be [ ] aircraft. Thus, the reclassification of the "Max TBDs" would [ ] the differences in demand levels.

[296] *See* [ ] U.S. Importers' and/or Purchasers' Questionnaire Response (Final), Question III-2b.

[297] Boeing 12/12 Prehearing Brief at 45-46; Nickelsburg Report, paras. 48-51 (Boeing 5/24 Post-Conference Brief Exhibit 8).

In sum, notwithstanding some common demand conditions, there are clear differences in demand. These clear breaks demonstrate unequivocally that the single aisle LCA market is not a continuum.

b. What key distinctions, if any, would you draw between the supply conditions in the market for in-scope 100- to 150-seat LCA and the market for all single aisle LCA?

Supply conditions in the 100- to 150-seat single aisle LCA category and other single aisle LCA categories are similar in some important respects.[298] In particular, whatever the category, LCA production is capital intensive, R&D intensive, and skilled labor intensive. The development of a new model takes years and hundreds of millions or billions of dollars. Private capital markets generally have been unwilling to fund the development of new aircraft programs. Thus, new model development is financed either through internal cash flows (Boeing) or by risk-indifferent governments willing to subsidize national champion manufacturers (Airbus and Bombardier). If the former, then the manufacturer must obtain large volumes of profitable sales to finance the next generation of aircraft. This is especially true at the end of a program's life, when tooling and inventoried costs have been expensed.

Another important supply condition, regardless of LCA category, is that manufacturers seek to ramp up production as quickly as possible after initial entry into service, in order to maximize cost efficiencies associated with getting down the learning curve.

Nonetheless, there are some meaningful differences between 100- to 150-seat LCA and larger LCA. Most importantly, there is a notable difference in the order/production rate equilibrium for 100- to 150-seat single aisle LCA versus other single aisle LCA categories. The only category with three bona fide manufacturers, as opposed to two, is the 100- to 150-seat

[298] *See* Nickelsburg Report at paras. 99-114 (Boeing 5/24 Post-Conference Brief Exhibit 8).

single aisle market segment due to Bombardier's entry. As such, that market segment has substantial unfilled production slots over the next few years, driven by Bombardier's lack of orders for its existing and contemplated assembly lines.[299] Because manufacturers want to sell out during for their production ramp up period, this unused capacity incentivizes Bombardier to price aggressively simply to fill production slots.

c. What conclusions should the Commission draw with respect to substitutability and the importance of price when looking at the market for all single aisle LCA?

With respect to substitutability, it is clear that, if all categories of single aisle LCA produced in the United States were considered a single like product, then substitution between the foreign like product and imports is somewhat limited. Because of the major differences in seat count, operating costs, and price, the foreign like product does not compete with the medium and large single aisle LCA models produced by Boeing. Because of these huge physical differences, the Bombardier C Series and the Boeing MAX-8, -9, and 10 are not economically comparable. In fact, in its prehearing brief, Bombardier concedes that "the C Series presents no competitive threat whatsoever to the MAX 8, 9, and 10."[300]

[299] *See* Boeing 12/12 Prehearing Brief at 74.

[300] Bombardier Prehearing Brief at 39.