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MEMORANDUM TO: Edward C. Yang
Senior Director, Office VII
Antidumping and Countervailing Duty Operations
Enforcement and Compliance

FROM: Abdelali Elouaradia
Director, Office IV
Enforcement and Compliance

RE: Less-Than-Fair-Value Investigation of 100- to-150 Seat Large
Civil Aircraft from Canada

SUBJECT: Application of Adverse Facts Available to Bombardier Inc.

Summary

Based on record information, the Department of Commerce (Department) determines it is appropriate to preliminarily apply total adverse facts available (AFA) to Bombardier Inc. (Bombardier), pursuant to sections 776(a) and 776(b) of the Tariff Act of 1930, as amended (the Act). Bombardier is the sole mandatory respondent in the less-than-fair-value investigation of 100- to-150 seat large civil aircraft (aircraft) from Canada.

Background

On April 27, 2017, the Department received an antidumping duty (AD) petition covering imports of aircraft from Canada, which was filed in proper form by The Boeing Company (Boeing) (the petitioner).¹ The petitioner calculated the estimated dumping margin in the petition using a U.S. price obtained from future aircraft purchase commitments identified in Delta Air Lines, Inc.'s (Delta) financial statements that relate to a 2016 contract between Delta and the Canadian

¹ See Letter to The Honorable Wilbur L. Ross, Jr., Secretary of Commerce from the petitioner, concerning, "Petitions for The Imposition Of Antidumping And Countervailing Duties On 100- To 150-Seat Large Civil Aircraft From Canada" (April 27, 2017) (the Petition).



producer, Bombardier, for the purchase of Bombardier's CS100 series aircraft.² The petitioner based home market price information on an article in *The Globe and Mail* citing industry sources as to the price to be paid by Air Canada, after discounts, for aircraft purchased from Bombardier.³ The petitioner provided information indicating that sales of aircraft in the home market were made at prices below the cost of production and, as a result, calculated normal value based on constructed value.⁴ In the *Initiation Notice*, the Department stated that based on a comparison of export price to normal value (based on constructed value), in accordance with sections 772, and 773(a) and (e) of the Act, the estimated dumping margin for aircraft is 79.82 percent.⁵ The Department initiated this investigation on May 17, 2017.⁶

In the *Initiation Notice*, the Department notified the public that only one company from Canada, Bombardier, was identified in the Petition.⁷ The petitioner provided an independent source as support for its claim that there was only one exporter/producer of aircraft in Canada, and the Department knew of no additional Canadian producers/exporters of subject merchandise under consideration.⁸ Accordingly, the Department stated that it intended to examine the sole Canadian producer/exporter identified in the Petition, Bombardier. On June 12, 2017, the Department issued the AD Questionnaire to Bombardier.⁹

On June 23, 2017, in accordance with 19 CFR 351.301(c)(1)(iii), Bombardier informed the Department, in writing, of its difficulties in submitting information in response to the Department's AD Questionnaire.¹⁰ Bombardier requested a meeting with Department officials to discuss, in detail, Bombardier's difficulties in submitting the requested information.¹¹ On June 28, 2017, Department officials met with representatives of Bombardier.¹² During this meeting, Department officials discussed the difficulties Bombardier indicated it was having in responding to the Department's AD Questionnaire.¹³ The alleged difficulties encountered by Bombardier were identified in a handout (meeting materials), which Bombardier also submitted on the record of the instant investigation.¹⁴ These meeting materials indicate that Bombardier, requested, *inter alia*, clarification of the terms "sales," and "contract sales/contracted sales" in reporting sales of

² See *100- to 150-Seat Large Civil Aircraft from Canada: Initiation of Less-Than-Fair-Value Investigation*, 82 FR 24296, 24299 (May 26, 2017) (*Initiation Notice*) (citing generally Antidumping Duty Investigation Initiation Checklist: 100- to 150-Seat Large Civil Aircraft from Canada (Canada AD Initiation Checklist), dated May 17, 2017, and the Petition at Exhibit 42).

³ *Id.* (citing generally Canada AD Initiation Checklist, and the Petition, at Exhibit 42).

⁴ *Id.* (citing Canada AD Initiation Checklist at 6-7, and the Petition at 120-121).

⁵ *Id.* (citing generally Canada AD Initiation Checklist).

⁶ See generally *Initiation Notice*, 82 FR, at 24296.

⁷ *Id.*, at 24299-24300.

⁸ *Id.*

⁹ See Department Letter re: Antidumping Duty Questionnaire, dated June 9, 2017 (AD Questionnaire).

¹⁰ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Notification of Difficulties in Responding to Antidumping Questionnaire," dated June 23, 2017.

¹¹ *Id.*

¹² See Memorandum, "Antidumping Duty Investigation: 100- to 150-Seat Large Civil Aircraft from Canada, Meeting with Representatives of Bombardier, Inc.," dated July 5, 2017.

¹³ *Id.*

¹⁴ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Handout from June 28, 2017 Meeting with Department Officials," dated June 23, 2017.

foreign like product and subject merchandise.¹⁵ Bombardier's meeting materials further indicate that Bombardier, requested, *inter alia*, clarification regarding how to report the constructed value of subject merchandise and the cost of production of the foreign like product.¹⁶

On June 27, 2017, Bombardier submitted a request to terminate the instant investigation.¹⁷ In its request, Bombardier argued that the Petition does not provide an evidentiary basis on which to initiate an AD investigation because the only U.S. sale alleged in the petition was, in fact, not a sale.¹⁸ Specifically, Bombardier argued that one of the key facts asserted in the Petition—that the purchase agreement between Bombardier and Delta constituted a sale—is demonstrably false when considered in light of the totality of the evidence in the Petition including the evidence pertaining to the petitioner's own selling practices.¹⁹ On July 7, 2017, the petitioner submitted its response to Bombardier's request to terminate the instant investigation.²⁰ The petitioner argued that there is no legal or factual basis for terminating the investigation.²¹

On June 29, 2017, the Department issued a revised Section D questionnaire to Bombardier that contained detailed instructions for reporting the constructed value of subject merchandise and the cost of production of the foreign like product, which addressed Bombardier's alleged difficulties in providing cost information to the Department.²² On July 10, 2017, the Department issued a clarification letter to Bombardier defining the terms "sales," "contract sales," and "contracted sales" in the initial antidumping duty questionnaire.²³ Specifically, the Department's July 10, 2017 clarification letter defined the term "contract sales" to mean firm orders of aircraft, exclusive of purchase options, which are not firm orders.²⁴ This letter instructed Bombardier to report its contract sales figures in accordance with all such order/contract information it maintains in the ordinary course of business. The July 10, 2017 clarification also included the following:

Bombardier provides historical order information on its website (*see* Attachment 1 of this letter); Bombardier should report its total contract sales made pursuant to

¹⁵ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Handout from June 28, 2017," dated June 23, 2017.

¹⁶ *Id.*, at 3.

¹⁷ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Request to Terminate the Investigation," dated June 27, 2017.

¹⁸ *Id.*, at 4-5.

¹⁹ *Id.*, at 5.

²⁰ See Letter to the Honorable Wilbur L. Ross, Jr. from the petitioner, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Boeing's Response to Bombardier's Request to Terminate the Investigation," dated July 7, 2017.

²¹ *Id.*

²² See Department Letter re: "Antidumping Duty (AD) Investigation of 100- to-150 Seat Large Civil Aircraft (Aircraft) from Canada, covering the period April 1, 2016, through March 31, 2017" (Revised Section D Questionnaire), dated June 29, 2017.

²³ See Department letter re: "Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada," dated July 7, 2017. Although this letter is dated July 7, 2017, it was not available to interested parties *via* ACCESS until July 10, 2017.

²⁴ *Id.*

contracts effective as of the last day of the period of investigation (*e.g.*, March 31, 2017). Bombardier should report each contract only once.²⁵

Attachment 1 to the Department's July 10, 2017 clarification letter contained information from Bombardier's website. The attachment included a "Program Status Report" for Bombardier's subject C Series aircraft, dated March 31, 2017, which indicated, *inter alia*, that U.S. customer Delta ordered 75 CS100 aircraft and home market customer Air Canada ordered 45 CS100 aircraft from Bombardier.²⁶

On July 10, 2017, Bombardier submitted its response to section A of the Department's AD Questionnaire.²⁷ However, Bombardier's submission did not provide significant information requested by the Department in section A of the AD Questionnaire.²⁸ For example, despite the Department's instructions to Bombardier to report the total quantity and value of contract sales made to the United States and in the home market during the period of investigation (POI), Bombardier did not provide this information.²⁹ Rather than providing quantity and value for contract sales as requested by the Department, Bombardier argued that the Department's regulations presume that sales occur at the time of invoicing, and limited its reported quantity and value information to "aircraft delivered and final invoices issued by {its affiliate, C Series Aircraft Limited Partnership} CSALP during the POI."³⁰ Bombardier claimed that it was not able to respond to information regarding "contract sales," until the Department provided clarification of the term, but that once Bombardier received clarification it intended "to provide the Department with the requested information to the greatest extent possible."³¹

On July 13, 2017, Bombardier submitted a request for further clarification of the Department's explanation of the terms "sale" and "contract sales."³² Specifically, Bombardier requested that the Department clarify its statement that "in the context of the {AD} questionnaire to Bombardier, the term 'sale' or 'contract sale' are used interchangeably."³³ Bombardier further requested that the Department "explain precisely what questions in the questionnaire should be reported on a 'contract' basis."³⁴ On July 20, 2017, the Department issued a second clarification letter to Bombardier that addressed Bombardier's claims of continued confusion regarding the Department's request for information.³⁵ In its July 20, 2017 letter, the Department included the following:

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Bombardier's July 10, 2017 Section A Questionnaire Response (Bombardier July 10, 2017 AQR).

²⁸ *Id.*

²⁹ The Department's AD Questionnaire instructed Bombardier to "{s}tate the total quantity and value of the merchandise under investigation that you sold (or contract sales) during the {POI} in (or to):

i. the United States, ii. the home market, and iii. each of the three largest third-country markets." *Id.* at A-1.

³⁰ *Id.* at 9-10.

³¹ *Id.* at 10.

³² See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: AD Questionnaire Clarification and Extension Request," dated July 13, 2017, at 4-5.

³³ *Id.* at 5.

³⁴ *Id.*

³⁵ See Department letter re: "Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada," dated July 20, 2017.

First, the sentence quoted in item 1 above, was meant to convey the fact that the term “sale,” as used in the context of the Department’s antidumping duty questionnaire, encompasses a contract to sell, such as a purchase agreement, or a firm order (these two examples of contracts are not meant to be considered an exhaustive list of the types of contracts encompassed by the term “sale”).

Second, because the term “sale” includes a contract to sell (19 CFR 351.102(b)(43)), Bombardier should respond to each request for sales information in the Department’s antidumping duty questionnaire by supplying complete information regarding sales of the merchandise under investigation during the {POI}, including, but not necessarily limited to, sales that have been invoiced to the customer and contracts during the POI to sell the merchandise under investigation (*e.g.*, purchase agreements, firm orders, *etc.*).³⁶

On July 21, 2017, the petitioner filed comments on Bombardier’s section A questionnaire response arguing that Bombardier was refusing to cooperate in the investigation and significantly impeding the proceeding by flouting the Department’s requests for information.³⁷ In its submission, the petitioner stated that this investigation is based on the firm agreement between Bombardier and Delta for the purchase of 75 CS100 aircraft with options for an additional 50 CS100 aircraft that are reflected in Delta’s 2016 annual report.³⁸ The petitioner argued that Bombardier’s assertions in its section A response that it did not make any sales of aircraft in the United States were inconsistent with its public statements to the securities markets and its shareholders.³⁹

On July 28, 2017, Bombardier submitted its response to sections B and C of the Department’s questionnaire; however, Bombardier did not provide any of the information required by these sections of the questionnaire.⁴⁰ Specifically, Bombardier did not provide any of the requested information that should be reported in the home market and U.S. sales databases which the Department analyzes in the ordinary course of an antidumping duty investigation and uses to determine whether a respondent has made sales of merchandise under investigation at less than fair value.⁴¹ Rather, Bombardier argued that sections B and C of the AD Questionnaire, as amended by the Department, remained so unclear that Bombardier could not reasonably be expected to provide the requested data.⁴² Additionally, Bombardier submitted further arguments and factual information to support its claim that it did not sell subject merchandise during the POI because the material terms of sale had not been established regarding the aircraft under the

³⁶ *Id.*

³⁷ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, “100- to 150-Seat Large Civil Aircraft from Canada: Comments on Deficiencies in Bombardier’s Section A Response,” dated July 21, 2017.

³⁸ *Id.* at 2.

³⁹ *Id.* at 3.

⁴⁰ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, “100- to 150-Seat Large Civil Aircraft from Canada: Bombardier Sections B and C Response,” dated July 27, 2017.

⁴¹ *Id.*

⁴² *Id.* at 9-11.

Delta purchase agreement.⁴³ Bombardier also argued that the Department must either announce its intention to rescind the investigation or issue a negative preliminary dumping determination.⁴⁴

On July 31, 2017, Bombardier submitted its response to section D of the Department's questionnaire; however, once again, Bombardier did not provide any of the information required by this section of the questionnaire.⁴⁵ Specifically, Bombardier did not provide any of the requested information that should be reported in the cost database that the Department analyzes in the ordinary course of an antidumping duty investigation and uses in its margin calculation to determine whether a respondent has made sales of merchandise under investigation below the cost of production.⁴⁶ Nor did Bombardier provide any constructed value information.⁴⁷ Rather, similar to its July 28, 2017 submission, Bombardier argued that section D of the AD Questionnaire, as amended by the Department, remained so unclear that Bombardier could not reasonably be expected to provide the requested data.⁴⁸ Additionally, Bombardier argued that the Department's request for cost data based on a 12-month period is an inappropriate basis on which to analyze Bombardier's pricing behavior.⁴⁹

On August 16, 2017, the Department issued a letter to Bombardier that addressed Bombardier's claims that the Department's requests for information remained unclear, and provided additional clarification to assist Bombardier in fully responding to the AD questionnaire.⁵⁰ The August 16, 2017 letter noted that the Department had already provided guidance and multiple clarifications to Bombardier.⁵¹ Additionally, the letter emphasized that “{i}n press releases dated April 28, 2016, and June 28, 2016, Bombardier announced ‘firm orders’ from {Delta} for 75 CS100 aircraft and from Air Canada for 45 CS300 aircraft.”⁵² The letter further indicated that Bombardier also reported these firm orders in its 2016 financial statement.⁵³ The Department instructed Bombardier to provide complete responses to sections B and C of the Department's AD Questionnaire based on these firm orders.⁵⁴ With respect to section D of the AD Questionnaire, the Department noted that it had already addressed Bombardier's concerns regarding reporting cost information.⁵⁵ The Department referred Bombardier to specific instructions for reporting cost information that were contained in the revised section D questionnaire issued to Bombardier on June 29, 2017.⁵⁶ Specifically, this revised section D questionnaire instructed Bombardier to report the cost of the U.S. and the home market sales

⁴³ *Id.* at 11-22, and Exhibits 1-35.

⁴⁴ *Id.* at 23-24.

⁴⁵ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, “100- to 150-Seat Large Civil Aircraft from Canada: Bombardier Section D Response,” dated July 31, 2017.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 9-11.

⁴⁹ *Id.* at 9-15.

⁵⁰ See Department Letter re: Less-Than-Fair-Value Investigation of 100- to-150 Seat Large Civil Aircraft from Canada: Questionnaire, dated August 16, 2017.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

based on the actual cost of other aircraft produced and completed, and to adjust those costs for physical differences between those aircraft and the aircraft sold to the United States and the home market.⁵⁷ In its August 16, 2017 letter, the Department also informed Bombardier that its prior submissions in response to sections B, C, and D of the Department's AD Questionnaire constitute argument, and not the information requested by the Department.⁵⁸ The Department informed Bombardier that any future response to the questionnaire must provide the information requested in the questionnaire.⁵⁹ Finally, the Department provided Bombardier with an additional opportunity to respond to the AD Questionnaire, and established a deadline of August 23, 2017.⁶⁰

On August 23, 2017, Bombardier responded to the Department's August 16, 2017 letter stating that "{d}espite the purported additional clarification included in the August 16 Supplemental Questionnaire, the Department's request for information pertaining to the remainder of the AD Questionnaire continues to be sufficiently unclear such that it remains unreasonable to expect Bombardier to respond to this request for information."⁶¹ With the exception of certain purchase agreements, Bombardier did not provide the information requested in the Department's AD Questionnaire.⁶²

During this investigation, Bombardier requested a number of extensions of the deadlines to submit its response to the various sections of the AD Questionnaire.⁶³ Based on a consideration of the reasons given by Bombardier in its extension requests, the Department granted Bombardier multiple extensions of the deadlines to submit its AD Questionnaire response.⁶⁴ None of Bombardier's extension requests stated that Bombardier was unable to provide the information requested in the Department's AD Questionnaire, in the form and manner requested

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Response to August 16 Supplemental Questionnaire," dated August 23, 2017.

⁶² *Id.*

⁶³ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Extension Request for Antidumping Questionnaire," dated June 29, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Second Extension Request for Antidumping Questionnaire," dated July 6, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: AD Questionnaire Clarification and Extension Request," dated July 13, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: AD Questionnaire Clarification and Extension Request—Correction," dated July 13, 2017; and Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Extension Request for Antidumping Questionnaire Based on Difficulties with ACCESS," dated July 27, 2017.

⁶⁴ See Department Letter re: Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Extension Request for Antidumping Questionnaire, dated June 30, 2017; See Department Letter re: Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada, dated July 20, 2017; and Department Letter re: Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Extension Request for Antidumping Questionnaire, dated July 28, 2017.

by the Department, or that it intended to submit argument in lieu of the information requested by the Department (under the cover letter of a questionnaire response).⁶⁵

Between July 21, 2017, and September 5, 2017, the petitioner submitted comments on Bombardier's submissions. In its September 5, 2017 submission, the petitioner argued that the Department should apply facts otherwise available on the record, and draw adverse inferences due to Bombardier's persistent failure to comply with the Department's requests for information.⁶⁶ Specifically, the petitioner argued that the Department should base Bombardier's preliminary dumping margin on total AFA. The petitioner further argued that as AFA, the Department should revise the estimating dumping margin contained in the Petition. Regarding its argument that the Department should revise the Petition dumping margin, the petitioner stated the following:

In relying on Petition information, however, the Department should account for the strategic choice Bombardier has made in preferring obstruction and noncompliance over cooperation. The Department should infer that Bombardier's refusal to cooperate reflects its belief that obstruction will yield a lower dumping margin than compliance with the Department's requests. Bombardier's intransigence is egregious, and the Department cannot permit Bombardier to game the investigative process in this manner. In the interests of inducing compliance, the Department should make an upward adjustment to Boeing's conservative estimate of a 79.82 {percent} dumping margin for Bombardier.⁶⁷

The petitioner further argued that the Department should revise the Petition dumping margin by using Petition data on average costs over the periods of delivery for the Delta and Air Canada sales rather than data on average costs over the life of the C Series aircraft program.⁶⁸ In other words, the Petitioner argued that the Department should calculate costs by allocating them over a shorter period of time. This requested revision to the cost calculation contained in the Petition, which results in an increase in the normal value used to derive the estimated dumping margin, would increase the estimated dumping margin from 79.82 percent to 143.35 percent.⁶⁹

⁶⁵ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Extension Request for Antidumping Questionnaire," dated June 29, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Second Extension Request for Antidumping Questionnaire," dated July 6, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: AD Questionnaire Clarification and Extension Request," dated July 13, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: AD Questionnaire Clarification and Extension Request -- Correction," dated July 13, 2017; and Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Extension Request for Antidumping Questionnaire Based on Difficulties with ACCESS," dated July 27, 2017.

⁶⁶ See Letter to the Honorable Wilbur L. Ross, Jr., Secretary of Commerce, from the petitioner, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Comments on Bombardier's August 23 Submission," dated September 5, 2017.

⁶⁷ *Id.*, at 4.

⁶⁸ *Id.*, at 13.

⁶⁹ *Id.*, at 13-14.

On September 13, 2017, Bombardier submitted a written request for the Department to reject the petitioner's September 5, 2017 submission "because of procedural irregularities with the submission."⁷⁰ Specifically, Bombardier argued that the petitioner failed to meet the regulatory requirements for filing new factual information on the record, and, therefore, the Department must reject the submission from the record.⁷¹ Bombardier further argued that the Department should reject the petitioner's September 5, 2017 submission because portions of it were illegible. On September 14, 2017, the petitioner responded to Bombardier's allegations regarding the petitioner's September 5, 2017 submission.⁷² The petitioner stated that its September 5, 2017 submission contained no new factual information, and the submission was entirely legible.

Statutory Framework

Sections 776(a)(1) and (2) of the Act provide that, subject to section 782(d) of the Act, the Department shall apply "facts otherwise available" if necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

If an interested party, promptly after receiving a request for information from the Department, notifies the Department that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, section 782(c)(1) of the Act provides that the Department shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to avoid imposing an unreasonable burden to the party. Section 782(c)(2) of the Act provides that the Department shall take into account any difficulties experienced by interested parties, particularly small companies, in supplying information requested by the Department in connection with investigations and reviews, and shall provide interested parties any assistance that is practicable in supplying such information.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and shall, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the

⁷⁰ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Extension Request for Antidumping Questionnaire," dated June 29, 2017.

⁷¹ *Id.*

⁷² See Letter to the Honorable Wilbur L. Ross, Jr., Secretary of Commerce, from the petitioner, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Response to Bombardier's Request to Reject Boeing's September 5 Comments," dated September 14, 2017.

applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate.

On June 29, 2015, the Trade Preferences Extension Act of 2015 (TPEA) was signed into law and made numerous amendments to the antidumping and countervailing duty law, including amendments to section 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act.⁷³ The amendments to section 776 the Act are applicable to all determinations made on or after August 6, 2015 and, therefore, apply to this investigation.⁷⁴

Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. In doing so, and under the TPEA, the Department is not required to determine, or make any adjustments to, a weighted average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.⁷⁵ Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the countervailing duty or antidumping investigation, a previous administrative review under section 751 of the Act or determination under section 753 of the Act, or other information placed on the record.⁷⁶

Section 776(c) of the Act provides that, in general, when the Department relies on secondary information rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.⁷⁷ Secondary information is defined as information derived from the petition that gave rise to the investigation, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.⁷⁸ Further, under the TPEA, the Department is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.⁷⁹

Application of Facts Available

Bombardier Withheld Information That Had Been Requested and Failed to Provide Information by the Deadlines Established by the Department

⁷³ See TPEA, Pub. L. No. 114-27, 129 Stat. 362 (2015). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced applicability dates for each amendment to the Act, except for amendments contained to section 771(7) of the Act, which relate to determinations of material injury by the International Trade Commission. See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015) (*Applicability Notice*). The text of the TPEA may be found at <https://www.congress.gov/bill/114thcongress/house-bill/1295/text/pl>.

⁷⁴ See *Applicability Notice*, 80 FR at 46794-95.

⁷⁵ See section 776(b)(1)(B) of the Act; TPEA, section 502(1)(B).

⁷⁶ See also 19 CFR 351.308(c).

⁷⁷ See also 19 CFR 351.308(d).

⁷⁸ See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol 1 (1994) (SAA) at 870.

⁷⁹ See section 776(c)(2) of the act; TPEA, section 502(2).

Sections 776(a)(2)(A) and 776(a)(2)(B) of the Act provide that, subject to section 782(d) of the Act, the Department shall apply “facts otherwise available” if an interested party withholds information that has been requested or fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act. Record evidence indicates that Bombardier withheld information requested by the Department’s AD Questionnaire. Specifically, as discussed in the Background section above, 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.⁸⁰ 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.⁸¹ 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.⁸²

As noted above, despite being given a second opportunity on August 16, 2017, to respond to the AD Questionnaire, Bombardier failed to do so.⁸³ 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.⁸⁴ 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.⁸⁵ 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.⁸⁶ 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. Accordingly, record evidence indicates that Bombardier withheld information requested by the Department (*i.e.*, the information requested in the AD Questionnaire) within the meaning of section 776(a)(2)(A) of the Act. Furthermore, because Bombardier failed to respond to the Department’s AD Questionnaire by the deadlines established by the Department, Bombardier also failed to provide information requested in accordance with 776(a)(2)(B) of the Act. Accordingly, necessary information is not available on the record. In light of the facts mentioned above, we find that application of facts available is appropriate in this case pursuant to sections and 776(a)(1), 776(a)(2)(A), and 776(a)(2)(B) of the Act.⁸⁷

⁸⁰ See Bombardier July 10, 2017 AQR.

⁸¹ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, “100- to 150-Seat Large Civil Aircraft from Canada: Bombardier Sections B and C Response,” dated July 28, 2017.

⁸² See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, “100- to 150-Seat Large Civil Aircraft from Canada: Bombardier Section D Response,” dated July 31, 2017.

⁸³ See Department Letter re: Less-Than-Fair-Value Investigation of 100- to-150 Seat Large Civil Aircraft from Canada: Questionnaire, dated August 16, 2017.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Revised Section D Questionnaire, dated June 29, 2017.

⁸⁷ See section 776(a)(2)(A)-(B) of the Act.

As noted in the Legal Framework section above, the Department's application of facts available is subject to section 782 of the Act. Specifically, section 782(c)(1) of the Act requires the Department to consider the ability of an interested party, such as a mandatory respondent in an investigation, to provide information upon a prompt notification by that party that it is unable to submit the information in the form and manner required, and that party also provides a full explanation for the difficulty and suggests an alternative form in which the party is able to provide the information. In the instant investigation, 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. Specifically, as the Department explained in its August 16, 2017 letter to Bombardier:

On June 28, 2017, Department officials met with Bombardier's representatives to discuss the difficulties it reported having in responding to the questionnaire. After that meeting, to address Bombardier's difficulties, the Department issued a revised section D questionnaire with specific instructions related to Bombardier's concerns (e.g., how to report costs for aircraft that have not yet been built). On July 7, 2017, in response to Bombardier's request, the Department clarified the meaning of the phrase "contract sales," noting that it means firm orders. In its clarification letter, the Department included an attachment identifying orders from Air Canada for 45 aircraft and {Delta} for 75 aircraft. On July 20, 2017, in response to Bombardier's claims that certain portions of the Department's definition of "contract sales" are unclear, the Department again provided guidance regarding what the term "sale" encompasses. Subsequent to receiving this additional guidance, Bombardier did not indicate that it did not understand the Department's clarification such that it would be unable to respond to the questionnaire. Instead, Bombardier failed to respond to portions of section A of the questionnaire and failed to respond completely to sections B, C, and D of the questionnaire.⁸⁸

Moreover, in 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.⁸⁹ Thus, Bombardier should have reported the requested information based on the existing terms of the firm orders. It failed to do so. Hence, despite Department officials meeting with counsel for Bombardier, granting extensions of the deadline for Bombardier to submit its responses to various sections of the AD Questionnaire, and providing numerous clarifications regarding the information requested in the Department's AD Questionnaire, Bombardier failed to provide the information requested by the Department in the

⁸⁸ See Department letter re: Less-Than-Fair-Value Investigation of 100- to-150 Seat Large Civil Aircraft from Canada: Questionnaire, dated August 16, 2017.

⁸⁹ *Id.*

form and manner requested by the Department, nor did it suggest an alternative form or manner of reporting. Accordingly, record evidence demonstrates that the Department adequately considered Bombardier's ability to submit the information requested in the AD questionnaire in the form and manner requested by the Department within the meaning of section 782(c)(1) of the Act, and that Bombardier failed to provide the information requested by the Department. Furthermore, record evidence indicates that the Department considered Bombardier's stated difficulties in responding to the Department's request for information, and provided such assistance that was practicable in supplying such information pursuant to section 782(c)(2) of the Act by meeting with counsel for Bombardier, revising its cost reporting requirements to allow Bombardier to report cost of production and constructed value information using its books and records maintained in the ordinary course of business, issuing letters of clarification, extending deadlines for the submission of requested information, and providing Bombardier with an additional opportunity to respond to the AD Questionnaire.

Additionally, pursuant to section 782(d) of the Act, the Department notified Bombardier that its response to the Department's AD Questionnaire did not comply with the Department's request for information.⁹⁰ In accordance with section 782(d) of the Act, the Department provided Bombardier the opportunity to remedy the deficiency when, on August 16, 2017, it provided Bombardier a second chance to submit a complete response to the Department's AD Questionnaire. Despite being given a second opportunity to respond to the Department's AD Questionnaire, Bombardier did not provide the requested information.

Furthermore, because Bombardier failed to provide the information requested by the Department in sections B, C, and D of the AD Questionnaire by the deadlines established by the Department, section 782(e) of the Act does not apply.

Bombardier Significantly Impeded the Proceeding

Section 776(a)(2)(C) of the Act provides that, subject to section 782(d) of the Act, the Department shall apply "facts otherwise available" if an interested party or any other person significantly impedes a proceeding. Record evidence indicates that Bombardier significantly impeded the instant 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. Specifically, as stated above, on July 10, 2017 Bombardier submitted a section A response that did not provide much of the information requested by the section A of the Department's AD Questionnaire.⁹¹ Rather than report quantity and value information on the basis of POI contract sales, as requested by the Department, Bombardier limited the reporting to third-country sales that were invoiced during the POI, since Bombardier argued that invoice date was the appropriate date of sale.⁹² 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.⁹³ Rather

⁹⁰ *Id.*

⁹¹ *See* Bombardier July 10, 2017 AQR.

⁹² *Id.*

⁹³ *See* Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "100- to 150-Seat Large Civil

than responding to the requests for information contained in the Department's AD Questionnaire, Bombardier submitted argument and documentation in support of its arguments.⁹⁴ 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.⁹⁵ Instead, Bombardier's response to section D of the AD Questionnaire contains argument regarding the appropriate methodology for reporting the cost of merchandise under consideration.⁹⁶ Bombardier did not submit a timely request to report cost data using a different period than the one specified in the Department's revised section D questionnaire, and chose instead to wait until the deadline for its section D response to state its objections to the Department's instructions.⁹⁷ Accordingly, record evidence supports a finding that Bombardier impeded this proceeding by refusing to provide information requested by the Department, and submitting other information and argument in response to the Department's AD Questionnaire.

Moreover, the record of the instant investigation indicates that Bombardier impeded this proceeding through its use of extension requests without notifying the Department that it continued to view the Department's requests for information as unclear. As stated in the Background section above, Bombardier requested a number of extensions of the deadlines to submit its response to the various sections of the AD Questionnaire.⁹⁸ In its first request for an extension to respond to the questionnaire, Bombardier even indicated that it had begun working on responding to the Department's questionnaire before the Department had issued the questionnaire.⁹⁹ In each case, the Department considered the reasons given by Bombardier in its extension request, and granted Bombardier an extension of the deadlines to submit its AD Questionnaire responses.¹⁰⁰ At the time that Bombardier submitted its extension requests to the

Aircraft from Canada: Bombardier Sections B and C Response," dated July 28, 2017.

⁹⁴ *Id.*

⁹⁵ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Bombardier Section D Response," dated July 31, 2017.

⁹⁶ *Id.*

⁹⁷ See Revised Section D Questionnaire, dated June 29, 2017 at D-2 ("If you have any questions regarding the appropriate cost calculation period for the merchandise under consideration, notify the Department in writing before preparing your response to this section of the questionnaire.")

⁹⁸ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Extension Request for Antidumping Questionnaire," dated June 29, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Second Extension Request for Antidumping Questionnaire," dated July 6, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: AD Questionnaire Clarification and Extension Request," dated July 13, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: AD Questionnaire Clarification and Extension Request -- Correction," dated July 13, 2017; and Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Extension Request for Antidumping Questionnaire Based on Difficulties with ACCESS," dated July 27, 2017.

⁹⁹ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Extension Request for Antidumping Questionnaire," dated June 29, 2017.

¹⁰⁰ See Department Letter re: Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Extension Request for Antidumping Questionnaire, dated June 30, 2017; Department Letter re: Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada, dated July 20, 2017; and Department Letter re: Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada:

Department regarding section B through D of the questionnaire, and during the period after the Department provided its last clarification but before Bombardier submitted its responses to those sections of the Department's AD Questionnaire, Bombardier did not inform the Department that it did not intend to, or remained uncertain as to how to, provide the information requested in the Department's AD Questionnaire, in the form and manner requested by the Department.¹⁰¹ Moreover, Bombardier did not inform the Department that Bombardier planned to use the full allotment of time granted by the Department in response to Bombardier's extension requests to ultimately submit argument and supporting factual information under the cover letter of questionnaire responses rather than providing the information requested by the AD Questionnaire. Thus, Bombardier's use of these extension requests delayed the progress of this investigation without resulting in any of the requested information being submitted to the Department. These actions impeded the administration of the instant investigation pursuant to section 776(a)(2)(C) of the Act.

For the foregoing reasons, the Department has met its requirements under section 782(c)(1), 782(d) and 782(e) of the Act, and finds that the application of facts available pursuant to sections 776(a)(1), 776(a)(2)(A), (B), and (C) of the Act is warranted.

Bombardier's Submission of Argument in Lieu of Information Requested by the Department Does Not Relieve Bombardier of the Requirement to Respond to the Department's Requests for Information

As an interested party in this investigation, Bombardier, is permitted to provide comments and timely-filed factual information for the Department's consideration; however, as a mandatory respondent in this investigation Bombardier is required to respond to the Department's requests for information within the deadlines established by the Department. In the *Initiation Notice*, the Department announced its intention to examine Bombardier as the respondent in this investigation,¹⁰² and issued its AD Questionnaire to Bombardier on June 12, 2017.¹⁰³ As the mandatory respondent, Bombardier was required to respond to the AD Questionnaire by providing complete information, in the form and manner requested by the Department, and, as discussed in detail above, Bombardier failed to provide this information. Bombardier insists that the Department should terminate the instant investigation or issue a preliminary negative determination based on the proposition that its purchase agreements do not reflect sales within

Extension Request for Antidumping Questionnaire, dated July 28, 2017.

¹⁰¹ See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Extension Request for Antidumping Questionnaire," dated June 29, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Second Extension Request for Antidumping Questionnaire," dated July 6, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: AD Questionnaire Clarification and Extension Request," dated July 13, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: AD Questionnaire Clarification and Extension Request -- Correction," dated July 13, 2017; and Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Extension Request for Antidumping Questionnaire Based on Difficulties with ACCESS," dated July 27, 2017.

¹⁰² See *Initiation Notice*, 82 FR at 24296, 24299-300.

¹⁰³ See AD Questionnaire, dated July 9, 2017.

the meaning of the Department's regulations. According to Bombardier, because its purchase agreements do not establish the final terms of sales, they do not reflect sales in accordance with the Department's regulations. This argument does not relieve Bombardier of its responsibility to provide the information requested by the Department in the questionnaire when the Department clearly notified Bombardier that it was seeking information about these purchase agreements (e.g., contracts) in the questionnaire.

Bombardier had ample notice that it would be required to provide information requested in the Department's questionnaire regarding orders of Bombardier's aircraft made by U.S. customer Delta, and home-market customer Air Canada. First, in the *Initiation Notice* the Department explained that it initiated this investigation on the basis of contracts to sell aircraft in the United States and Canada.¹⁰⁴ Second, in its questionnaire, the Department instructed Bombardier to report sales information related to contracts.¹⁰⁵ Third, in response to Bombardier's claims of confusion regarding the information requested in the Department's AD Questionnaire, the Department issued two letters indicating that Bombardier should respond to the questionnaire with information regarding contracts.¹⁰⁶ In one of these letters, the Department explained to Bombardier that under 19 CFR 351.102(b)(43) the term "sale" includes a contract to sell.¹⁰⁷ Fourth, the Department specifically instructed Bombardier to respond to the AD Questionnaire with information regarding its purchase agreements with Delta and Air Canada.¹⁰⁸

The Department initiated this investigation to determine whether imports of aircraft from Canada were being, or were likely to be, sold in the United States at less-than-fair value.¹⁰⁹ Section 733(b) of the Act, states that at the preliminary determination of an investigation, the Department:

shall make a determination, based upon the information available to it at the time of the determination, of whether there is a basis to believe or suspect that the merchandise is being sold, *or is likely to be sold* at less than fair value.¹¹⁰

Additionally, section 772 of the Act defines export price and constructed export price as the price at which merchandise under consideration is first sold *or agreed to be sold*. Moreover, 773(a)(1)(B) of the Act states that normal value is the price at which:

¹⁰⁴ See *Initiation Notice*, 82 FR at 24296, 24299 (citing *generally* Canada AD Initiation Checklist, and the Petition at Exhibit 42).

¹⁰⁵ See AD Questionnaire, dated July 9, 2017.

¹⁰⁶ See Department letter re: "Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada," dated July 7, 2017; Department letter re: "Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada," dated July 20, 2017.

¹⁰⁷ See Department letter re: "Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada," dated July 20, 2017.

¹⁰⁸ See Department letter re: Less-Than-Fair-Value Investigation of 100- to-150 Seat Large Civil Aircraft from Canada: Questionnaire, dated August 16, 2017.

¹⁰⁹ See *Initiation Notice*, 82 FR at 24299.

¹¹⁰ Emphasis added.

the foreign like product is first sold (*or, in the absence of a sale, offered for sale*) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price.¹¹¹

In addition, as previously mentioned, under 19 CFR 351.102(b)(43), the term “sale” includes a contract to sell. Furthermore, a Ways and Means Committee report describes the reason for amending the countervailing duty law, along the lines of what already existed in the antidumping duty law, to make clear that the Department could initiate countervailing duty cases and render determinations in situations where actual importation had not yet occurred but a sale for importation had been completed or was imminent.¹¹² The House Report explained that “[a]ntidumping law has, since its inception, applied not only to imports, but to sales or likely sales.¹¹³ This report additionally explained that the amendment (including the phrase “or sold (or likely to be sold) for importation” in section 701(a) of the Act) was “particularly important in 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.” This logic described in the House Report is relevant in this antidumping duty investigation as well. For these reasons, the Department appropriately requested information related to Bombardier’s purchase contracts for merchandise under investigation in the United States and the home market.

Yet Bombardier only submitted arguments in response to sections B through D of the questionnaire. Bombardier never suggested alternative methodologies for reporting the requested information and never gave any indication that it was attempting to provide the requested information by, at a minimum, responding to some of the questions in the questionnaire (*e.g.*, questions related to per-unit selling expenses, and production costs) and indicating that it continued to require assistance in responding to the remaining questions. By failing to provide any of the requested information related to sales contracts, including those sales contracts specifically identified by the Department, in response to the AD Questionnaire, Bombardier impeded the Department’s investigation into whether Bombardier’s aircraft are being sold, or are likely to be sold, in the United States at less than fair value within the meaning of section 733 of the Act. Moreover, while, as an interested party, Bombardier may make alternative arguments to contend that the Department should terminate the investigation or make a negative preliminary determination, it was still required to submit the information request by the Department in its AD Questionnaire so the Department could consider their alternative arguments and, if the Department disagreed with those arguments, calculate an estimated weighted-average dumping margin based on Bombardier’s sales and cost data.

Application of Adverse Inferences

Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its

¹¹¹ Emphasis added.

¹¹² H.R. Rep. No. 98-725, at 11 (1984).

¹¹³ H.R. Rep. No. 98-725, at 11 (1984).

ability to comply with a request for information. The Department finds that an adverse inference in selecting the facts available is warranted in this case because Bombardier failed to cooperate by not acting to the best of its ability to comply with a request for information.¹¹⁴ The Federal Circuit, in *Nippon Steel*, provided an explanation of the failure to act to “the best of its ability,” provision stating that the ordinary meaning of “best” means “one’s maximum effort,” and that “ability” refers to “the quality or state of being able.”¹¹⁵ Further, the statutory mandate that a respondent act to the “best of its ability” requires the respondent to do the maximum that it is able to do.¹¹⁶ The Federal Circuit acknowledged, however, that while there is no willfulness requirement, “deliberate concealment or inaccurate reporting” would certainly be sufficient to find that a respondent did not act to the best of its ability, although it indicated that inadequate inquiries to respond to agency questions may suffice as well.¹¹⁷ Compliance with the “best of its ability” standard is determined by assessing whether a respondent has put forth its maximum effort to provide the Department with full and complete answers to all inquiries in an investigation.¹¹⁸ The Federal Circuit further noted that, while the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.¹¹⁹

Record evidence indicates that Bombardier has failed to cooperate by not acting to the best of its ability to comply with the Department’s requests for information. Specifically, the Department considers Bombardier’s failure to respond to portions of the section A questionnaire with information regarding its contract sales, and its failure to provide any of the information required by sections B, C, and D of the questionnaire as evidence that Bombardier did not put forth its maximum effort to provide the Department with full and complete answers to all inquiries in the instant investigation. Despite being instructed by the Department to respond to sections B and C of the Department’s questionnaire by providing information regarding its purchase agreements, Bombardier essentially refused to consider purchase agreements as a basis for reporting information required by these sections of the AD questionnaire. Rather than respond sections B and C of the Department’s questionnaire with the requested information regarding its purchase agreements, Bombardier claimed to be confused by these reporting requirements, even while it continued to argue that these purchase agreements are not the relevant transactions to be reported in response to those sections of the questionnaire. Instead of providing the information requested by the Department, with the exception of certain purchase agreements, Bombardier chose to only submit arguments without providing the information requested in sections B through D of the questionnaire. In fact, record evidence indicates that Bombardier failed to comply with unambiguous instructions contained in the Department’s AD Questionnaire. For example, the AD Questionnaire instructs respondents to repeat the question to which they are responding in their narrative submission and place their answer directly below it.¹²⁰ The Department’s AD Questionnaire also instructs parties to respond to each question, and further instructs them that if

¹¹⁴ See section 776(b) of the Act.

¹¹⁵ See *Nippon Steel Corporation v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel*).

¹¹⁶ *Id.*

¹¹⁷ *Id.*, at 1380.

¹¹⁸ *Id.*, at 1382.

¹¹⁹ *Id.*

¹²⁰ See AD Questionnaire, dated June 9, 2017.

a particular question does not apply, to state so and explain why in the questionnaire response.¹²¹ Bombardier failed to follow these instructions.¹²² This demonstrates that Bombardier failed to put forth its maximum effort in attempting to provide the information that the Department clearly stated it required to conduct the instant investigation. Even after the Department granted Bombardier extensions of the deadline to submit responses to various sections of the AD Questionnaire, Bombardier still only filed arguments, and factual information in support of its arguments, in lieu of responding to the questionnaire with the information requested by the Department. For the foregoing reasons, the Department preliminarily finds that Bombardier failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information, pursuant to section 776(b) of the Act, and, accordingly, the use of an adverse inference in selecting among facts available is warranted.

Selection of AFA Rate

Where the Department applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to base the AFA rate on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record.¹²³ In selecting a rate for AFA, the Department selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.¹²⁴

In selecting a rate based on AFA, the Department selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.¹²⁵ The Department's practice, in less-than-fair-value investigations, is to select, as an AFA rate, the higher of: (1) the highest dumping margin alleged in the petition, or (2) the highest calculated rate of any respondent in the investigation.¹²⁶

Consistent with the statute, court precedent, and its normal practice, the Department has assigned, as AFA, a rate of 79.82 percent to Bombardier. As noted above, this rate is the estimated dumping margin for aircraft from, and the only estimated dumping margin in, the Petition.¹²⁷ We disagree with the petitioner's suggestion that we should adjust this petition rate to reflect a revised cost calculation, and a correspondingly revised normal value (based on

¹²¹ *Id.*

¹²² See Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Bombardier Sections B and C Response," dated July 28, 2017; Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Bombardier Section D Response," dated July 31, 2017; and Letter to the Honorable Wilbur L. Ross, Jr. from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Response to August 16 Supplemental Questionnaire," dated August 23, 2017.

¹²³ See also 19 CFR 351.308(c); SAA, at 868-870.

¹²⁴ See SAA, at 870 (1994); accord *Ta Chen Stainless Steel Pipe Inc., v. United States*, 24 CIT 841, 848, 850 (CIT 2000).

¹²⁵ See SAA, at 870.

¹²⁶ See *Welded Stainless Pressure Pipe from Thailand: Final Determination of Sales at Less Than Fair Value*, 79 FR 31093 (May 30, 2014) and accompanying Issues and Decision Memorandum at Comment 3.

¹²⁷ *Id.* (citing Canada AD Initiation Checklist).

constructed value).¹²⁸ Prior to the initiation of this investigation, the Department examined both the factual information and methodology proposed by the petitioner to derive the estimated margin contained in the petition, and determined it was reasonable and reflective of accounting practices common to the aircraft industry. Further, while Boeing asserts that the revised calculation reflects a “unit cost” accounting methodology practiced by Bombardier in the normal course of business, there is no evidence on the record of this proceeding that explains exactly how Bombardier calculates costs under such a methodology. Moreover, the Department preliminarily determines that the unadjusted petition margin is adverse to Bombardier’s interests, and making the further adjustment suggested by the petitioner is not warranted for this preliminary determination. The Department is not aware of any new factual information that calls into question the accuracy of the petition margin, and for this reason the Department has not adjusted the petition margin of 79.82 percent, which it has preliminarily applied to Bombardier as AFA.

Corroboration

When using facts otherwise available, section 776(c) of the Act provides that, where the Department relies on secondary information (such as information in the petition) rather than information obtained in the course of an investigation, it must corroborate, to the extent practicable, that information from independent sources that are reasonably at its disposal.¹²⁹ Secondary information is defined as “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.”¹³⁰ Thus, because the 79.82 percent AFA rate applied to Bombardier is derived from the Petition and, consequently, is based upon secondary information, the Department must corroborate it to the extent practicable.

The SAA clarifies that “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value.¹³¹ The SAA and the Department’s regulations explain that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation.¹³² To corroborate secondary information, the Department will, to the extent practicable, determine whether the information used has probative value by examining the reliability and relevance of the information.¹³³

¹²⁸ See Letter to the Honorable Wilbur L. Ross, Jr., Secretary of Commerce, from the petitioner, concerning, “Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Comments on Bombardier’s August 23 Submission,” dated September 5, 2017. As discussed in the Background section above, Bombardier argues that the Department should reject the petitioner’s September 5, 2017 submission because the petitioner failed to meet the regulatory requirements for filing new factual information on the record, and portions of the submission are illegible. The petitioner stated that its September 5, 2017 submission contained no new factual information, and the submission is entirely legible. The Department has reviewed the record of this investigation in light of these claims and preliminarily determines that there is no basis to reject the petitioner’s September 5, 2017 submission.

¹²⁹ See also 19 CFR 351.308(d).

¹³⁰ See SAA at 870; see also 19 CFR 351.308(c)(1).

¹³¹ See SAA at 870; see also 19 CFR 351.308(d).

¹³² See SAA at 870; see also 19 CFR 351.308(d).

¹³³ See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller*

We determined that the Petition margin of 79.82 percent is reliable because, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the Petition during our pre-initiation analysis.¹³⁴ We examined evidence supporting the calculations in the Petition and have considered that analysis to determine the probative value of the dumping margin alleged in the Petition for use as AFA for this preliminary determination. For example, during our pre-initiation analysis, we examined the key elements of the export price and normal value calculations, including the constructed value calculations used in the Petition to derive normal value and the alleged dumping margin. Furthermore, during our pre-initiation analysis, we also examined information (to the extent that such information was reasonably available) from various independent sources provided either in the Petition or, on our request, in the supplements to the Petition that support certain elements of the export price and normal value calculations used in the Petition to derive the dumping margin alleged in the Petition.

Based on our examination of the information, as discussed in detail in the Canada AD Initiation Checklist, we consider the petitioner's export price and normal value calculations to be reliable. Because we obtained no other information that calls into question the validity of the sources of information or the validity of the information supporting the U.S. price or normal value calculations provided in the Petition, based on our examination of the aforementioned information, we preliminarily consider the export price and normal value calculations from the Petition to be reliable. Because we confirmed the accuracy and validity of the information underlying the derivation of the dumping margin alleged in the Petition by examining source documents and publicly available information, we preliminarily determine that the dumping margin alleged in the Petition is reliable for the purposes of this investigation.

In making a determination as to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a rate not relevant. In accordance with new section 776(d)(3) of the Act, when selecting an AFA dumping margin, the Department is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an "alleged commercial reality" of the interested party. In this case, as there are no other respondents in this investigation, we relied upon the dumping margin found in the Petition, which is the only reliable information regarding the aircraft industry reasonably at the Department's disposal. Furthermore, we preliminarily determine the petition rate to be relevant because it is derived from information about prices and accounting methodologies used in the aircraft industry.

Accordingly, the Department preliminarily determines that the dumping margin alleged in the

Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 62 FR 11825 (March 13, 1997).

¹³⁴ See Canada AD Initiation Checklist.

petition has probative value and has corroborated the AFA rate of 79.82 percent to the extent practicable within the meaning of section 776(c) of the Act by demonstrating that the rate: (1) was determined to be reliable in the pre-initiation stage of this investigation (and we have no information indicating otherwise); and (2) is relevant.¹³⁵

Recommendation

For the reasons set forth in detail above, and pursuant to 776(a)(1), 776(a)(2)(A)-(C) and 776(b) of the Act, we recommend that the Department preliminarily apply, as AFA, 79.82 percent, which is the highest rate on the record of this proceeding, to Bombardier.

Agree

Disagree

10/4/2017

X *Edward Yang*

Signed by: EDWARD YANG

Edward C. Yang
Senior Director, Office VII
Antidumping and Countervailing Duty Operations
Enforcement and Compliance

¹³⁵ See section 776(c) of the Act and 19 CFR 351.308(c) and (d); *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 73 FR 35652, 35653 (June 24, 2008), and accompanying Issues and Decision Memorandum at Comment 1.