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December 18, 2017

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

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

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination in the Less Than Fair Value Investigation of 100- To 150-Seat Large Civil Aircraft from Canada

I. SUMMARY

We analyzed the comments of the interested parties in the less-than-fair-value (LTFV) investigation of 100- To 150-seat large civil aircraft (aircraft) from Canada. Based on our analysis of these comments, we made no changes to our preliminary determination that aircraft from Canada is, or is likely to be, sold in the United States at LTFV, as provided in section 735 of the Tariff Act of 1930, as amended (the Act). We further determine that it is appropriate to continue to apply total adverse facts available (AFA) to Bombardier Inc. (Bombardier), the sole mandatory respondent, pursuant to sections 776(a) and 776(b) of the Act. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this LTFV investigation for which we received comments from interested parties:

Comment 1: Application of Adverse Facts Available
Comment 2: Whether Sales or Likely Sales Occurred During the POI
Comment 3: Adequacy of Petition
Comment 4: Revision of the Seating Capacity
Comment 5: Removal of Nautical Mile Range Criterion
Comment 6: Airbus-Bombardier Transaction

II. BACKGROUND

On October 13, 2017, the U.S. Department of Commerce (Department) published the *Preliminary Determination* of sales of aircraft from Canada at LTFV.[1] The period of investigation (POI) is April 1, 2016, through March 31, 2017. We invited parties to comment on the *Preliminary Determination*. On November 3, 2017, Bombardier, and Delta Air Lines Inc. (Delta), submitted case briefs, and on November 8, 2017, The Boeing Company (the petitioner) submitted a rebuttal brief.[2]

Additionally, on November 1, 2017, the Department placed on the record of the instant investigation and the companion countervailing duty investigation factual information regarding a planned transaction between Airbus and Bombardier.[3] The Department invited interested parties to provide views on the implications of this announced transaction, and submit rebuttal factual information pursuant to 19 CFR 351.301(c)(4). In November 2017, the petitioner, Bombardier, and Delta submitted rebuttal factual information,[4] comments,[5] and rebuttal

[1] *See 100- to 150-Seat Large Civil Aircraft from Canada: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 82 FR 47697 (October 13, 2017) (*Preliminary Determination*) and accompanying Memorandum, "Decision Memorandum for the Preliminary Determination in the Less Than Fair Value Investigation of 100- To 150-Seat Large Civil Aircraft from Canada," dated October 13, 2017 (Preliminary Decision Memorandum).

[2] *See* Bombardier's Case Brief, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Bombardier's Case Brief," dated November 3, 2017 (Bombardier's Case Brief); Delta's Case Brief, "100- to 150-Seat Large Civil Aircraft from Canada: Case Brief," dated November 3, 2017 (Delta's Case Brief); and Petitioner's Rebuttal Brief, "100- to 150-Seat Large Civil Aircraft from Canada: Rebuttal Brief," dated November 8, 2017 (Petitioner's Rebuttal Brief).

[3] *See* Memorandum, Antidumping and Countervailing Duty Investigations of 100- to 150-Seat Large Civil Aircraft from Canada: Opportunity to Comment on Proposed Transaction," dated November 1, 2017 (Press Release Memo).

[4] *See* Letter to Honorable Wilbur L. Ross, Secretary of Commerce, from the petitioner, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Rebuttal Factual Information on the Announced Airbus-Bombardier C Series Partnership," dated November 6, 2017; Letter to Honorable Wilbur L. Ross, U.S. Department of Commerce, from Bombardier, concerning, "Antidumping and Countervailing Duty Investigations of 100- to 150-Seat Large Civil Aircraft from Canada: Evidence on the Proposed Transaction," dated November 6, 2017; and Letter to Honorable Wilbur L. Ross, Secretary of Commerce, from Delta, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Rebuttal Factual Information in Response to the Department's November 1, 2017 Opportunity to Comment on Proposed Transaction," dated November 6, 2017.

[5] *See* Letter to Honorable Wilbur L. Ross, Secretary of Commerce, from the petitioner, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Brief on the Announced Airbus-Bombardier C Series Partnership," dated November 13, 2017 (Petitioner's Transaction Brief); Letter to Honorable Wilbur L. Ross, U.S. Department of Commerce, from Bombardier, concerning, "Antidumping and Countervailing Duty Investigations of 100- to 150-Seat Large Civil Aircraft from Canada: Brief on the Proposed Transaction," dated November 13, 2017 (Bombardier's Transaction Brief); and Letter to Honorable Wilbur L. Ross, Secretary of Commerce, from Delta, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Opportunity to Comment on Proposed Transaction," dated November 13, 2017 (Delta's Transaction Brief).

comments[6] regarding the planned transaction. The Government of Canada (GOC) also submitted timely comments and rebuttal comments regarding the planned transaction.[7]

Based on our analysis of the comments received, we made no changes to the *Preliminary Determination*.

III. SCOPE COMMENTS

In the *Preliminary Determination*, we did not modify the scope language as it appeared in the *Initiation Notice*.[8] On October 18, 2017, Bombardier submitted comments and factual information regarding the scope of the investigation.[9] On October 23, 2017, the petitioner submitted rebuttal comments and factual information regarding the scope.[10] As discussed in Comments 4 and 5, below, we made no changed to the scope language.

IV. SCOPE OF THE INVESTIGATION

The merchandise covered by this investigation is aircraft, regardless of seating configuration, that have a standard 100- to 150-seat two-class seating capacity and a minimum 2,900 nautical mile range, as these terms are defined below.

"Standard 100- to 150-seat two-class seating capacity" refers to the capacity to accommodate 100 to 150 passengers, when eight passenger seats are configured for a 36-inch pitch, and the remaining passenger seats are configured for a 32-inch pitch. "Pitch" is the distance between a point on one seat and the same point on the seat in front of it.

"Standard 100- to 150-seat two-class seating capacity" does not delineate the number of seats actually in a subject aircraft or the actual seating configuration of a subject aircraft. Thus, the

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[6] *See* Letter to Honorable Wilbur L. Ross, Secretary of Commerce, from Delta, concerning, "100- to 150- Seat Large Civil Aircraft from Canada: Rebuttal to Boeing's Brief Regarding Proposed Airbus-Bombardier Transaction," dated November 17, 2017 (Delta's Transaction Rebuttal Brief); Letter to Honorable Wilbur L. Ross, U.S. Department of Commerce, from Bombardier, concerning, "Antidumping and Countervailing Duty Investigations of 100- to 150-Seat Large Civil Aircraft from Canada: Rebuttal Brief on the Proposed Transaction," dated November 17, 2017 (Bombardier's Transaction Rebuttal Brief); and Letter to Honorable Wilbur L. Ross, Secretary of Commerce, from the petitioner, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Rebuttal Brief on the Announced Airbus-Bombardier C Series Partnership," dated November 17, 2017 (Petitioner's Transaction Rebuttal Brief).

[7] *See* Letter to Honorable Wilbur L. Ross, Secretary of Commerce, from the GOC, concerning, "Government of Canada's Comments on Proposed Bombardier Transaction: 100- to 150-Seat Large Civil Aircraft from Canada" dated November 13, 2017 (GOC's Transaction Brief); *see also* Letter to Honorable Wilbur L, Ross, Secretary of Commerce, from the GOC, concerning, "Government of Canada's Response to Boeing's Comments on the Proposed Airbus-Bombardier Transaction: 100- to 150-Seat Large Civil Aircraft from Canada," dated November 17, 2017 (GOC's Transaction Rebuttal Brief.

[8] *See 100- to 150-Seat Large Civil Aircraft from Canada: Initiation of Less-Than-Fair-Value Investigation*, 82 FR 24296 (May 26, 2017) (*Initiation Notice*).

[9] *See* Letter to the Honorable Wilbur L. Ross, Jr., U.S. Department of Commerce, from Bombardier, concerning, "Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Submission of New Scope Information," dated October 18, 2017.

[10] *See* Letter to the Honorable Wilbur L. Ross, Jr., Secretary of Commerce, from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Rebuttal Comments on Bombardier's Submission of New Scope Information," dated October 23, 2017.

number of seats actually in a subject aircraft may be below 100 or exceed 150.

A "minimum 2,900 nautical mile range" means:

(i) able to transport between 100 and 150 passengers and their luggage on routes equal to or longer than 2,900 nautical miles; or

(ii) covered by a U.S. Federal Aviation Administration (FAA) type certificate or supplemental type certificate that also covers other aircraft with a minimum 2,900 nautical mile range.

The scope includes all aircraft covered by the description above, regardless of whether they enter the United States fully or partially assembled, and regardless of whether, at the time of entry into the United States, they are approved for use by the FAA.

The merchandise covered by this investigation is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 8802.40.0040. The merchandise may alternatively be classifiable under HTSUS subheading 8802.40.0090. Although these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

V. DISCUSSION OF THE ISSUES

Comment 1: Application of Adverse Facts Available

Bombardier's Case Brief:

- The application of AFA to Bombardier is contrary to law and not supported by record evidence.
- AFA may not be used in the face of ambiguous questionnaires and unanswered requests for clarification.[11] Bombardier notified the Department of its difficulties in responding to the questionnaire, but the Department did not "meaningfully engage with" Bombardier on serious and substantial issues despite Bombardier's repeated requests for clarification and assistance.[12] The Department's clarification letters only created further confusion, and its denial of extension requests created further difficulties for Bombardier.[13] Because the Department failed to address Bombardier's difficulties, it was unreasonable and impossible to provide all of the data requested by the Department.[14] The CIT has held that the application of AFA is impermissible where the Department's response to clarification requests is "so ambiguous that it was not adequate" and where the ambiguities lack a "convincing reason."[15]

[11] See Bombardier's Case Brief at 35-36
[12] *Id.* at 44.
[13] *Id.* at 36-42.
[14] *Id.* at 42.
[15] *Id.* at 44-45 (citing, *inter alia*, *Ocean Harvest Wholesale Inc. v. United States*, 26 CIT 358, 368 (2002) (*Ocean Harvest*); *Kao Hsing Chang Iron & Steel Corp. v. United States*, 206 F. Supp. 2d 1297, 1303 (CIT 2002) (*Kao Hsing*); and *Carpenter Tech. Corp. v. United States*, 26 CIT 830, 835 (CIT 2002) (*Carpenter Tech.*).

- AFA is not warranted in a proceeding where the lack of data is because the exact data are not available due to the absence of production and sales of subject merchandise.[16] The courts have held the application of AFA impermissible where companies do not keep records in the ordinary course of business.[17] The Department incorrectly determined that the cost information it requested was maintained by Bombardier. Moreover, reporting costs using the methodology required by the Department would have been distortive.[18] The Federal Circuit has held that application of facts otherwise available is not permissible when a respondent has sufficiently clarified that its inability to provide requested data is based on a lack of the precise data available.[19] Additionally, the CIT has found that the application of AFA is impermissible where the lack of responsive information was the result of challenges inherent in the investigation and not willful non-cooperation.[20]
- Bombardier cooperated in the investigation to the best of its ability and in accordance with the deadlines set by the Department. Pursuant to Section 782(c)(1) of the Act, Bombardier met its statutory obligation to suggest an alternative form to provide information when it stated that the Department should terminate the investigation or issue a negative determination which would allow the Petitioner to refile its Petition after "a sale was made and after subject merchandise was produced."[21] The Department should find that substantial material provided by Bombardier reflects its best efforts to provide responsive information for products not yet sold or produced.[22] The Department's reliance on *Nippon Steel* is misplaced because the record indicates that Bombardier put forth its maximum effort in responding to the Department's Questionnaire.[23]
- CIT decisions clarify that reliance on AFA does not permit the Department to avoid analysis of a "threshold issue," such as whether a sale of subject merchandise has occurred.[24] A lack of record evidence (*i.e.*, a full response to the AD Questionnaire) does not provide a basis to ignore record evidence on the "threshold issue" of whether a sale occurred.[25] The Department may only apply facts available to fill gaps in the administrative record,[26] and may not ignore facts on the record even when AFA is applied.[27]

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[16] *Id.* at 45.
[17] *Id.* (citing *F.lli De Cecco Di Fillipo Fara s. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000) (*De Cecco*); and *Borden, Inc. v. United States*, 4 F. Supp. 2d 1221, 1247 (CIT 1998) (*Borden*)).
[18] *Id.*
[19] *Id.* at 46 (citing *Allied-Signal Aerospace v. United States*, 996 F.2d 1185, 1192 (Fed. Cir. 1998) (*Allied-Signal*)).
[20] *Id.* (citing *Tung Fong Indus. Co. v. United States*, 318 F. Supp. 2d 1321, 1334-35 (CIT 2004) (*Tung Fong I*).
[21] *Id.* at 48.
[22] *Id.* at 47.
[23] *Id.* at 49 (citing *Nippon Steel v. United States*, 337 F.3d 1373 (Fed. Cir. 2003) (*Nippon Steel*).
[24] *Id.* at 33-35 (citing, *inter alia*, *Gerber Food (Yunnan) Co., Ltd. Green Fresh (Zhangzhou) Co., Ltd.*, 491 F. Supp. 2d 1326, 1333 (CIT 2007) (*Gerber II*); *Gerber Food (Yunnan) Co., v. United States*, 387 F. Supp. 2d 1270, 1281-1283, 1288 (CIT 2005) (*Gerber I*); *Nippon Steel*, 337 F.3d 1373, 1381-1382 (Fed. Cir. 2003); and *China Kingdom Imp. & Exp. Co. v. United States*, 507 F. Supp. 2d. 1337, 1360-61) (CIT 2007) (*China Kingdom*).
[25] *Id*. at 32.
[26] *Id*. at 33 (citing, *inter alia*, *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F. 3d 1333, 1348 (CAFC 2011) (*Zhejiang Dunan*).
[27] *Id.* (citing, *inter alia*, *Gerber II*, 491 F. Supp. 2d 1326, 1333 (CIT 2007) ("Because Commerce is empowered to use adverse inferences only in 'selecting from the facts otherwise available,' it may not do so in disregard of

Petitioner's Rebuttal Brief:

- The Department properly applied total AFA in the *Preliminary Determination* after Bombardier repeatedly failed to provide information requested by the Department.
- Bombardier's claim that its "no sale" argument is a "threshold issue" that must be addressed by the Department is contrary to law and unsupported by record evidence.[28] Because Bombardier deprived the Department of the ability to calculate a dumping margin by withholding necessary sales and cost data, the Department need not address Bombardier's alternative "no sales" argument.[29]
- Bombardier cannot be excused from failing to comply with the Department's reasonable information requests. The Department's instructions to Bombardier were clear.[30] Record evidence indicates that Bombardier could have provided the information requested by the Department.[31] However, Bombardier responded to Sections B, C and D of the Department's AD Questionnaire with unsolicited arguments and related materials rather than questionnaire responses.[32] At a minimum, Bombardier should have provided the cost data requested by the Department.[33]
- Bombardier's conduct in this investigation is distinguishable from cases where the application of AFA was found to be unwarranted because Bombardier failed to comply with straightforward requests for information.[34]

Department's Position:

We continue to find it appropriate to base Bombardier's dumping margin on total AFA because it withheld requested information, failed to provide requested information by the established deadline, significantly impeded the proceeding, and failed to cooperate by not acting to the best of its ability in supplying requested information. 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

information of record that is not missing or otherwise deficient….") (emphasis in the original)).

[28] *See* Petitioner's Rebuttal Brief at 5-7 (citing, *inter alia*, section 1677e(a) and 1677e(b)(1) of the Act; *Finished Carbon Steel Flanges from Italy: Final Determination of Sales at Less Than Fair Value*, 82 FR 29481 (June 29, 2017) and accompanying Issues and Decision Memorandum (IDM) at Comment 2; *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 81 FR 49953 (July 29, 2016), and accompanying IDM at comments 12, 15, and 19; and *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 33396 (June 12, 2008)).

[29] *Id*. at 19-20 (citing *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 36656 (July 24, 2009) and accompanying IDM at Comment 7; and *Stainless Steel Bar from India: Final Results of Antidumping Duty New Shipper Review*, 72 FR 72671 (December 21, 2007) and accompanying IDM at Comment 3 ("As the Department is applying total AFA to Ambica for the final results, the Department does not need to address Ambica's arguments on this issue.").

[30] *Id*. at 11.

[31] *Id*.

[32] *Id*. at 17.

[33] *Id*. at 18-19.

[34] *Id*. at 15-17 (citing *Tung Fung I*, 318 F. Supp. 2d 132; *Kao Hsing*, 206 F. Supp. 2d 1297, 1303 (CIT 2002); *Allied-Signal Aerospace*, 996 F.2d 1185, 1192 (CIT 1998)*; Borden, Inc.*, 4 F. Supp. 2d 1221 (CIT 1998); and *F.lli De Cecco*, 216 F.3d 1027 (CAFC 2000)).

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 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.[35]

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.[36] 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.[37]

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

[35] *See* Memorandum, "Application of Adverse Facts Available to Bombardier Inc.," dated October 4, 2017 (Preliminary AFA Memorandum) at 8-9.
[36] *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.
[37] *See Applicability Notice*, 80 FR at 46794-95.

provided if the interested party had complied with the request for information.[38] 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.[39]

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.[40] 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.[41] Further, under the TPEA, the Department is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.[42]

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

As an initial matter, it is uncontested that Bombardier failed to provide the information requested by the Department. On the date that its sections B and C questionnaire response was due, Bombardier filed a submission that contained none of the requested home market and U.S. sales data and related information but instead contained Bombardier's claim 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.[43] Similarly, on the date that Bombardier's response to section D of the questionnaire was due—approximately three weeks after the Department issued its revised section D questionnaire—Bombardier filed a submission that contained none of the requested cost data and related information, but instead contained its newly raised claim that the section D questionnaire remained so unclear that Bombardier could not reasonably be expected to provide the requested data.[44] We disagree with Bombardier's rationale for why the Department should not apply adverse facts available.

First, Bombardier had ample notice that it would be required to provide sales and cost information related to the purchase agreements that it entered into during the POI because the Department initiated the investigation on the basis of such purchase agreements.[45] Additionally,

[38] *See* section 776(b)(1)(B) of the Act; TPEA, section 502(1)(B).
[39] *See* 19 CFR 351.308(c).
[40] *See* 19 CFR 351.308(d).
[41] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1 (1994) (SAA) at 870.
[42] *See* section 776(c)(2) of the Act; TPEA, section 502(2).
[43] *See* Letter to the Honorable Wilbur L. Ross, Jr., U.S. Department of Commerce, from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Bombardier Sections B and C Response," dated July 27, 2017.
[44] *See* Letter to the Honorable Wilbur L. Ross, Jr., U.S. Department of Commerce, from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Bombardier Section D Response," dated July 31, 2017.
[45] *See Initiation Notice*, 82 FR 24296, 24299 (citing *generally* Antidumping Duty Investigation Initiation Checklist: 100- to 150-Seat Large Civil Aircraft from Canada (Canada AD Initiation Checklist) and Letter to the Honorable Wilbur L. Ross, Jr., Secretary of Commerce, from the petitioner, concerning, "Petitions for the Imposition of

Bombardier even indicated in its first request for an extension of time to respond to the questionnaire that it had begun working on responding to the Department's questionnaire before the Department had even issued the questionnaire.[46]

Second, the Department's AD questionnaire,[47] as clarified in response to requests from Bombardier, was unambiguous in its request that Bombardier report cost and sales information related to contracts to sell the merchandise under investigation. The fact that the Department's AD Questionnaire was requesting information regarding sales contracts was clarified for Bombardier both in the questionnaire, and in two subsequent clarification letters issued by the Department.[48] When providing Bombardier with a second opportunity to respond to the full questionnaire, the Department specifically 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.[49] Thus, there was no ambiguity that Bombardier should provide the information requested in sections B and C of the questionnaire with respect to these firm orders. Moreover, although Bombardier claims that the reporting requirements were confusing and required the reporting of data on multiple bases, it made no credible showing that the requested sales and cost information was so great that reporting the information would create an undue burden.[50]

Assuming, *arguendo*, that Bombardier remained confused about specific questions in the Department's questionnaire after receiving clarifications regarding reporting requirements from the Department, its confusion does not serve as a basis to provide *none* of the sales and cost data requested by the Department. Nor did Bombardier suggest alternative methods of providing the information requested by the Department, as the statute describes.[51] Suggesting that the petitioner refile its petition after a sale was made is not a suggestion of an alternative method of providing the requested information, particularly given that this investigation is based on

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Antidumping and Countervailing Duties On 100- To 150-Seat Large Civil Aircraft from Canada -- Petitions for the Imposition of Antidumping and Countervailing Duties" (April 27, 2017) (the Petition) at Exhibit 42). *See also* Preliminary AFA Memorandum at 1-2 ("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 producer, Bombardier, for the purchase of Bombardier's CS100 series aircraft. 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." Citations omitted.)

[46] *See* Letter to the Honorable Wilbur L. Ross, Jr., U.S. Department of Commerce, from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Extension Request for Antidumping Questionnaire," dated June 29, 2017 ("While Bombardier has been working diligently to gather the necessary information to answer the Questionnaire since before the Department even issued it, Bombardier requires additional time to complete the Questionnaire.").

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

[48] *See* Department letter re: Less-Than-Fair-Value Investigation of 100- to-150 Seat Large Civil Aircraft from Canada: Questionnaire, dated August 7, 2017 (First Clarification Letter); Department letter re: Less-Than-Fair-Value Investigation of 100- to-150 Seat Large Civil Aircraft from Canada: Questionnaire, dated August 16, 2017 (Second Clarification Letter); *see also* Preliminary AFA Memorandum at 12.

[49] *See* Second Clarification Letter.

[50] *Id.*

[51] *See* Section 782(c)(1) of the Act.

whether aircraft are being, or are *likely to be sold* in the United States at less than fair value.[52] At a minimum, in its initial response to sections B and C of the questionnaire, Bombardier should have provided detailed information regarding its POI contract with Delta, such as terms of the agreement, agreed upon terms of payment, per-unit contract prices, and quantities, warranty arrangements, *etc*.[53] Furthermore, Bombardier could have discussed and developed methodologies for reporting requested information such as warranty expenses and the cost of various ancillary items related to its purchase agreements based on its prior experience.[54] Bombardier did none of this in its purported sections B and C questionnaire response. Rather, Bombardier responded to sections B and C of the questionnaire with arguments. Although the Department's regulations permit Bombardier to submit comments, including argument, during an investigation, the submission of arguments does not relieve Bombardier of its obligation to cooperate to the best of its ability to provide information requested by the Department. The CIT has held that "{i}t is Commerce, not the respondent, that determines what information is to be provided"[55] and "to ensure the agency's full consideration of their position and rights under the antidumping law, respondents must comply with procedural guidelines and thereby afford themselves the opportunity to respond and participate in the review in a meaningful manner."[56]

Third, contrary to Bombardier's claims, the Department provided adequate assistance in response to Bombardier's requests for clarification. After Bombardier informed the Department, in writing, of its difficulties in submitting information in response to the Department's AD Questionnaire, in accordance with 19 CFR 351.301(c)(1)(iii), Department officials met with representatives of Bombardier to discuss its alleged difficulties.[57] During this meeting, Bombardier requested clarification of the terms "sales," and "contract sales/contracted sales" in reporting sales of foreign like product and subject merchandise, as well as clarification regarding how to report the constructed value of subject merchandise and the cost of production of the foreign like product.[58] In response to Bombardier's request for clarification and to address its alleged difficulties in providing the requested cost information, 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.[59] The Department also issued a clarification letter to Bombardier defining the terms "sales,"

[52] *See* Section 735(a)(1) of the Act.
[53] *See*, *e.g*, AD Questionnaire at C-20 – C-23.
[54] *Id*. at, for example, C-37 where the instructions for field 58 (Expenses Associated with Performance Guarantees) include the statement "{d}escribe the methodology used to report these costs and the methodology used to calculate these costs in the normal course of business (such as estimates based on the performance records of your delivered aircraft, estimates developed for financial reporting purposes, *etc*.).
[55] *See Ansaldo Components, S.p.A., v. United States*, 628 F. Supp. 198, 205 (CIT 1986) (*Ansaldo*).
[56] *Id*. at 206.
[57] *See Letter* to the Honorable Wilbur L. Ross, Jr., U.S. Department of Commerce, from Bombardier, concerning, "Antidumping Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Notification of Difficulties in Responding to Antidumping Questionnaire," dated June 23, 2017.
[58] *See* Memorandum, "Antidumping Investigation: 100- to 150-Seat Large Civil Aircraft from Canada: Meeting with Representatives of Bombardier, Inc.," dated July 5, 2017.
[59] *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," dated June 29, 2017 (Revised Section D Questionnaire).

"contract sales," and "contracted sales" in the initial antidumping duty questionnaire.[60] Specifically, the Department's clarification letter defined the term "contract sales" to mean firm orders of aircraft, exclusive of purchase options, which are not firm orders.[61] In this letter, the Department instructed Bombardier to report its contract sales figures in accordance with all such order/contract information that it maintains in the ordinary course of business. The letter also underscored that Bombardier's website indicated, *inter alia*, that U.S. customer Delta ordered 75 CS100 aircraft and home market customer Air Canada ordered 45 CS100 aircraft from Bombardier.[62]

After the Department clarified the sales reporting requirement, Bombardier claimed that it remained confused about the terms "sales" and "contract sales," and sought further clarification regarding these terms. The Department issued a second clarification letter to Bombardier that addressed Bombardier's claims of continued confusion regarding the Department's request for information.[63] This second clarification letter preceded the due date for Bombardier's sections B and C response by more than one week, and during that time Bombardier did not notify the Department that it remained confused as to the Department's reporting requirements.[64] Rather, Bombardier waited until the due date for its questionnaire response to file a non-responsive questionnaire response again claiming confusion which precluded it from responding.

Fourth, Bombardier could have provided information requested in section D of the questionnaire. The Department clearly requested information within Bombardier's control. Specifically, the Department instructed Bombardier to report the actual cost of aircraft produced and completed during the POI regardless of the market in which they were sold, as adjusted to account for physical differences between those aircraft and the aircraft subject to its home-market and U.S. sales agreements.[65] However, Bombardier elected not to provide this information.

Fifth, not only did the Department take reasonable steps to provide assistance to Bombardier within the meaning of 782(c)(1) of the Act, but it granted numerous extensions of the time for Bombardier to provide the requested information and a second opportunity to submit that information.[66] The Department issued the initial AD Questionnaire to Bombardier on June 12, 2017,[67] and issued the revised section D questionnaire to Bombardier on June 29, 2017.[68]

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[60] *See* Department letter re: "Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada," dated July 7, 2017.
[61] *Id*.
[62] *See* Preliminary AFA Memorandum at 3-4.
[63] *See generally* Second Clarification Letter.
[64] *See* Preliminary AFA Memorandum at 4-5 (noting that the Department's second clarification letter was issued on January 20, 2017 and that Bombardier submitted its response to sections B and C of the Department's AD Questionnaire on July 28, 2017).
[65] *See generally* Revised Section D Questionnaire.
[66] *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.
[67] *See* Department Letter re: Antidumping Duty Questionnaire, dated June 9, 2017 (AD Questionnaire).
[68] *See* Revised Section D Questionnaire.

Bombardier's deficiency questionnaire, which required Bombardier to respond in full to all these sections of the AD Questionnaire, was due on August 23, 2017.[69] Thus, Bombardier had 72 days to respond in full to sections A, B, and C of the Department's AD Questionnaire, and 55 days to respond the Department's revised section D questionnaire. The record indicates that Bombardier significantly impeded and delayed 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 and without ultimately providing the requested information.[70]

Thus, Bombardier withheld information requested by the Department, failed to provide information by the deadlines established by the Department, and significantly impeded the proceeding within the meaning of sections 776(a)(2)(A), (B), and (C) of the Act. Accordingly, the Department is applying facts available. None of Bombardier's claims provide a basis for a reversal of the Department's preliminary determination to use facts available.

Use of Adverse Inferences

Bombardier failed to cooperate by not acting to the best of its ability in this investigation within the meaning of section 776(b) of the Act. As noted above, 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. 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."[71] Further, the "best of its ability" standard requires the respondent to do the maximum that it is able to do.[72] 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.[73] 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.[74] The

[69] *See* Second Clarification Letter.
[70] *See* Letter to the Honorable Wilbur L. Ross, Jr., U.S. Department of Commerce, 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., U.S. Department of Commerce, 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., U.S. Department of Commerce, 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., U.S. Department of Commerce, 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., U.S. Department of Commerce, from Bombardier, concerning, "Extension Request for Antidumping Questionnaire Based on Difficulties with ACCESS," dated July 27, 2017.
[71] *See Nippon Steel*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).
[72] *Id.*
[73] *Id.* at 1380.
[74] *Id.* at 1382.

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.[75]

First, Bombardier incorrectly assesses its level of cooperation during the proceeding based on the page count of its responses to the Department's initial and supplemental questionnaires.[76] Specifically, Bombardier cites the number of pages of its section A response and its submissions responding to sections B, C, and D of the questionnaire.[77] However, Bombardier's responses to sections B, C, and D of the Department's questionnaire consist solely of arguments regarding why: (1) there were no sales of aircraft made during POI; (2) the material terms of the purchase agreement between the Bombardier and Delta purchase agreement have not been established, and (3) the Department should terminate the investigation or issue a negative determination.[78] Bombardier failed to provide the information requested in the questionnaire that the Department needed to perform its margin calculation.[79] In particular, Bombardier failed to respond to portions of the section A questionnaire with information regarding its contract sales, and failed to provide *any* of the information required in sections B, C, and D of the questionnaire.[80] Bombardier's submission of non-responsive information and argument, regardless of its page length, does not demonstrate that Bombardier put forth its maximum effort to provide the Department with full and complete answers to all inquiries in an investigation.

Second, Bombardier did not demonstrate that it put forth its maximum effort to suggest an alternative form or manner of providing the requested information.[81] Bombardier's proposal—termination of the investigation or issuance of negative determination—is not an alternative form of reporting and is contrary to the statutory intent of section 735(a)(1) of the Act, which provides the domestic industry relief from sales or likely sales of merchandise under investigation. To demonstrate "one's maximum effort," Bombardier should, at a minimum, have suggested possible alternative reporting methodologies for providing information requested by the Department. Instead, Bombardier chose to rely on its arguments that the Department should terminate the investigation, issue a negative determination, or the petitioner should refile the petition after aircraft were invoiced by Bombardier.

Third, record evidence indicates that it was reasonable to expect that "more forthcoming responses should have been made" by Bombardier, and, therefore, it is reasonable to conclude that Bombardier failed to act to the best of its ability to provide requested information.[82] For

[75] *Id.*
[76] *See* Bombardier's Case Brief at 46-47.
[77] *Id.* at 47 ("Our Sections B&C Response contained 366 pages of material and our Section D Response spanned 138 pages. This information was supplemented by the 807 pages in our Section A Response, the 956 pages of responsive material filed in our Supplemental QR Response, and the numerous other submissions filed on the record by Bombardier since the investigation was initiated.").
[78] *See* Letter to the Honorable Wilbur L. Ross, Jr., U.S. Department of Commerce, from Bombardier, concerning, "100- to 150-Seat Large Civil Aircraft from Canada: Bombardier Sections B and C Response," dated July 27, 2017.
[79] *Id.*
[80] *See* Preliminary AFA Memorandum at 10-18.
[81] *See* section 782(c)(1) of the Act.
[82] *See Nippon Steel*, 337 F.3d 1373, 1383 (Fed. Cir. 2003).

example, the Department's revised section D questionnaire instructed Bombardier to report costs using its cost records for each specific CS100 and CS300 aircraft produced and completed prior to the end of the POI, and to make appropriate adjustments to those costs.[83] These instructions both explicitly directed Bombardier to use *existing* cost data covering the POI, and allowed Bombardier flexibility to adjust those costs using a reasonable methodology.[84] Bombardier never attempted to do as instructed. The Department's sections B and C questionnaire instructed Bombardier to report information regarding its sales agreements covering U.S.-market sales of 75 CS100 aircraft and home-market sales of 45 CS300 sales that were reflected in its 2016 financial statement.[85] Bombardier provided none of this requested information in response to the Department's repeated requests. Significantly, as the petitioner notes, Bombardier professed its willingness to cooperate with the Department "only with respect to its 'no sale' argument."[86]

Thus, the record shows that Bombardier withheld information within its control that the Department requested (*i.e.*, cost and sales information) and selectively provided information it believed might result in the termination of the investigation or this issuance of a negative final determination. Considering the reasons described above, coupled with the other evidence contained in the Preliminary AFA Memorandum,[87] the Department finds that Bombardier failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information and, accordingly, the use of adverse facts available pursuant to section 776(b) of the Act is appropriate.[88]

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[83] *See* Revised Section D Questionnaire.

[84] *Id*. at D-1 ("For purposes of this proceeding therefore, we request that you report separately the detailed production costs for each specific CS100 and CS300 aircraft produced and completed prior to the end of the end of the period of investigation (POI), regardless of where it was sold. We request that you report the detailed aircraft-specific cost information in the format contained in the instructions for submitting the COP and CV datafile. We also request that you report on the cost datafile the "production costs" for the aircrafts sold to the U.S. and the HM sales, using the actual cost of the most similar aircraft produced to date, adjusted for costs associated with physical differences between the corresponding aircraft.").

[85] *See* Preliminary AFA Memorandum at 6.

[86] *See* Petitioner's Rebuttal Brief at 15 (citing Letter to the Honorable Wilbur L. Ross, Jr., U.S. Department of Commerce, 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 at 3, and 6, which states, in pertinent part, "Bombardier is today stating clearly its willingness to provide as, needed additional information to the Department pertaining to this lack of sale issue….Bombardier stands ready to provide the Department with additional information, if necessary, to demonstrate that no sale has occurred.")

[87] *See* Preliminary AFA Memorandum at 17-19 (stating, *inter alia*, that "Bombardier essentially refused to consider purchase agreements as a basis for reporting information required by sections B, C and D of the AD Questionnaire" and that Bombardier "failed to comply with unambiguous instructions contained in the Department's AD Questionnaire")

[88] *See Goldlink Indus. Co. Ltd. v. United States*, 431 F. Supp. 2d 1323, 1329-30 (CIT 2006) ("When {the Department} concludes that a party has not cooperated to the best of its ability and applies adverse inferences, it must make two showings. First, Commerce must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained. Second, Commerce must then make a subjective showing that the respondent not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation.").

Threshold Issue

Bombardier's assertion that this investigation presents a "threshold issue" that precludes the Department from applying AFA is incorrect. Specifically, Bombardier maintains that cases involving non-cooperative respondents in non-market economy proceedings establish that:

> where the record is sufficient for the Department to base a reasoned conclusion as to the threshold issue of whether a respondent is independent from {non-market economy (NME)} control, the Department must conduct such an analysis based on record evidence, even if the particular respondent is uncooperative with respect to other aspects of the AD or CVD investigation.[89]

Bombardier argues that the issue of whether it made a POI sale of subject merchandise is a "threshold issue" that is analogous to the issue of independence from NME government control and that imposes a barrier to the application of AFA in the instant investigation. In support of its "threshold issue" argument, Bombardier cites *Gerber I* (and subsequent decisions in the *Gerber* case), and analogous cases in which the CIT rejected the application of the NME-wide rate as AFA to a respondent found to be independent of government control.[90]

Bombardier's reliance on these cases is misplaced. First, none of these cases creates a distinct category of "threshold issues" that must be analyzed before the application of AFA is permissible. Second, Bombardier's argument that the Department is ignoring an alleged "threshold issue" and record evidence concerning whether a sale exists is mistaken because, as is evidenced by Comment 2 below, the Department has considered Bombardier's arguments concerning the existence of a sale or likely sale.[91] Furthermore, while Bombardier is permitted to make arguments about whether a sale or likely sale exists for purposes of the instant investigation, its arguments do not justify its decision to withhold information needed to calculate the dumping margin on sales or likely sales of merchandise under consideration. Moreover, despite Bombardier's claims to the contrary, this investigation presents no unique set of facts (*e.g.*, the CIT's consideration in *Gerber I* of eligibility for a separate rate) that are unrelated to the rate assigned as AFA.

The instant investigation may be readily distinguished from the cases cited, which involve NME proceedings in which the Department first determines that the application of AFA is warranted, and then must determine an appropriate AFA rate. In those cases, the record contained a distinct set of factual information (*i.e.*, separate-rate information) that the CIT found relevant to the Department's consideration of the appropriate rate. In the instant investigation, the Department lacks information that would permit it to measure the level of dumping on sales or likely sales of merchandise under investigation. In short, Bombardier's reliance on cases involving separate rate determinations is not relevant to the Department's application of AFA in this investigation.

Third, sound policy considerations support the rejection of Bombardier's overly-broad interpretation of the cases cited as creating a special category of issues that excuse parties from

[89] *See* Bombardier's Case Brief at 33-34.
[90] *Id*.
[91] For further discussion about the issue of whether a sale or likely sale occurred, see Comment 2, below.

cooperating fully in less-than-fair-value investigations. The adoption of Bombardier's "threshold issue" rule would permit parties to withhold requested information while requiring the Department to make determinations on the basis of an incomplete and selectively developed record. Such a "threshold issue" rule would stand at odds with the legislative intent of applying AFA to ensure that a party "does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[92]

Fourth, the application of facts available to fill in gaps in the record is warranted when a respondent withholds requested information, and that is no less the case after a party improperly draws its own factual and legal conclusion and determines that it need not submit the information. In *Ansaldo*, the CIT found that the application of "best information available" was appropriate when the respondent chose not to submit requested information after drawing "conclusions of both factual and legal significance on matters properly within {the Department's} domain."[93] In the instant investigation, Bombardier concluded that sales or likely sales made pursuant to a purchase agreement did not constitute sales within the meaning of the Act or the Department's regulations.[94] Bombardier further concluded that the cost reporting methodology, including the 12-month cost reporting period, would result in distortions. After drawing these conclusions, Bombardier determined that its failure to report requested sales and cost information was reasonable.[95] While Bombardier indeed may make arguments for the Department's consideration, it is for the Department, not Bombardier, to make determinations regarding the appropriate date of sale, cost reporting methodologies, and whether sales or likely sales of merchandise under consideration occurred during the POI. Consistent with *Ansaldo*, because Bombardier refused to provide requested information after impermissibly drawing

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[92] *See Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010) and accompanying IDM at Comment 8 (citing SAA, H.R. Doc. No. 103-316, vol 1 (1994) at 870).

[93] *See Ansaldo*, 628 F. Supp. 198, 205 (CIT 1986) ("Of equal concern to the Court is plaintiff's propensity to draw conclusions of both factual and legal significance on matters properly within Commerce's domain. The administrative record discloses several instances in which Ansaldo chose not to submit the information requested because Ansaldo had concluded such information could not serve as a basis for Commerce's administrative review. It was Ansaldo that concluded all its home-market customers were related parties and thus refused to submit home-market sales data. It was Ansaldo that concluded the administrative review should proceed on the basis of third country sales. It was Ansaldo that concluded the only comparable transformer sales were of units with a rating of 100 MVA or higher when Commerce requested information on units with a rating of 10 MVA or higher. Finally, it was Ansaldo that concluded furnishing home-market and U.S. sales price data imposed an "unreasonable and unnecessary burden on the company." Such conclusions, reached unilaterally with no foundation in statute or administrative practice, are inherently flawed. It is Commerce, not the respondent, that determines what information is to be provided for an administrative review. The net effect of Ansaldo's failure to submit the requested information, based on its own conclusory assertions, was to preclude Commerce's analysis and consideration of the merits of Ansaldo's arguments.")

[94] *See, e.g.*, Bombardier's Case Brief at 7 ("As such, the Department must apply its regulatory presumption and determine that sales of {aircraft} occur at the time of invoicing and further determine that because none of the {aircraft} have been invoiced there have been no sales of {aircraft} during the POI").

[95] *Id*. at 46 ("In the instant investigation, lack of responsive data is not the fault of Bombardier's failure to cooperate. It is instead due to Boeing's premature petition, the Department proceeding with an investigation in the absence of sales and produced subject merchandise, and the Department's unwillingness to provide Bombardier with meaningful clarification or assistance.")

factual and legal conclusions, the application of facts available to fill the gap left in the record is warranted.[96]

Lastly, assuming, *arguendo*, that there is a threshold issue, Bombardier has inappropriately decided that issue on its own and, by not providing the requested information, prevented the Department from calculating an estimated weighted average antidumping duty based on information from Bombardier in the event the Department reached a determination different from Bombardier's conclusion. Bombardier argues that the issue of whether a sale occurred is a "threshold issue" that must be analyzed by the Department even in the absence of a completed AD Questionnaire Response.[97] The apparent premise of Bombardier's argument is that the Department's analysis in this less-than-fair-value investigation is limited to invoiced, delivered sales because only those sales can properly be considered sales within the meaning of the Act and Department's regulations.[98] However, section 735(a)(1) of the Act directs the Department to determine whether subject merchandise *is being, or is likely to be sold* in the United States at less than its fair value.[99] Furthermore, section 772(a) of the Act defines export price to mean the price at which the subject merchandise is first sold or agreed to be sold in the United States. Accordingly, Bombardier's argument, which is based on the notion that the Department may only examine invoiced sales in this investigation, is not supported by the Act.[100]

Rather, pursuant to section 735(a)(1) and 772(a) of the Act, the Department appropriately sought information from Bombardier regarding sales or likely sales of merchandise under consideration. Bombardier failed to provide the requested information, and as a result of this failure, information necessary to calculate the margins on sales or likely sales is missing from the record.[101] Thus, Bombardier's argument that the record of this less-than-fair-value investigation is complete because it contains sufficient evidence to determine that no sales occurred during the POI is based on an inaccurate reading of the Act and mistaken presumption that the scope of this investigation is limited to invoiced sales of merchandise under consideration. As explained above, a gap exists in the record (*i.e.*, information regarding Bombardier's sales or likely sales of merchandise under investigation), and, accordingly, the application of facts available to fill this gap is warranted.

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, the Department continues to find that the application of AFA to Bombardier is warranted. Specifically, the Department has assigned to Bombardier, as AFA, a dumping margin of 79.82 percent, which is the highest rate on the record of this proceeding.[102]

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[96] Although *Ansaldo* involved an earlier version of the facts available statute, the CIT's findings in *Ansaldo* are relevant to the instant investigation.
[97] *Id.*
[98] *Id.*
[99] Emphasis added.
[100] *See* Comment 2, below, for further discussion of whether sales or likely sales occurred during the POI.
[101] *See generally* Preliminary AFA Memorandum.
[102] Although Bombardier challenges the Department's application of total AFA, no interested party, including Bombardier, has commented on the selection of the Petition rate as AFA or the Department's corroboration of this AFA rate. Thus, the Department's analysis of the AFA rate and corroboration to the extent practicable has not changed from the *Preliminary Determination*. *See* Preliminary AFA Memorandum at 19-22.

Comment 2: Whether Sales or Likely Sales Occurred During the POI

Bombardier's Case Brief

- The Department must terminate the investigation or issue a negative determination because: (1) no sale of subject merchandise occurred during the POI; (2) the final determination should not be based on a "likely sale; and (3) the aircraft in question are outside the scope of the investigation.

No Sale Occurred

- Pursuant to 19 CFR 351.401(i), a sale occurs when the material terms of sale are established, which the Department presumes to be at the time of invoicing.[103] The CIT has affirmed the regulatory presumption for invoice date as the date of sale unless there is evidence that material terms of sale are established on a different date.[104]
- Record evidence indicates that none of the aircraft covered by the Delta purchase agreement have been invoiced.[105] Consistent with industry practice and U.S. Generally Accepted Accounting Principles, Bombardier's aircraft are invoiced after they are fully produced and accepted by customers.[106]
- Record evidence supports a determination that the purchase agreement does not establish the material terms of sale. The Department has recognized that preliminary written agreements do not constitute a sale in an industry such as the aircraft industry where written agreements are commonly renegotiated.[107]
- Record evidence indicates that for Bombardier, the Petitioner, and the aircraft industry in general, material terms of sale, including, *inter alia*, price and quantity, change after the purchase agreements are signed.[108] Moreover, the record indicates that the material terms of the Bombardier-Delta purchase agreement changed after parties signed the initial agreement.[109]
- The Department improperly rejected from the record information regarding the petitioner's assertions about the appropriate date of sale filed in the companion CVD investigation.[110]

[103] *See* Bombardier's Case Brief at 5.
[104] *Id.* at 6 (citing *Allied Tube and Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001) (*Allied Tube*)).
[105] *Id*.
[106] *Id.* at 6-7.
[107] *Id.* at 5-6 (citing, *inter alia*, *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27348-49, and *Large Power Transformers from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 77 FR 40857 (July 11, 2012)).
[108] *Id.* at 8-14.
[109] *Id.* at 14 ("For example, since the terms of the purchase agreement were first reduced to writing, numerous contract amendments have been executed.")
[110] *Id.* at 9-10.

The Department Should Not Reach a Final Determination Based on a "Likely Sale"

- The Department has no basis, especially at this late stage of the proceeding, to convert this investigation to a "likely sales" investigation. The Department's AD Questionnaire did not indicate that the Department intended to investigate likely sales. If the Department planned to investigate likely sales, it should have notified Bombardier.
- The Act's legislative history indicates that the Department will only base a determination on likely sales 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."[111] In the instant investigation, there is no evidence that meaningful relief cannot be provided if the Department delays the investigation until after importation.[112]
- "Likely sale" should be interpreted to apply to merchandise such as commodity products with predictable prices to avoid calculating dumping margins that are speculative rather than applied to aircraft, which have unpredictable costs and prices.[113] The Department refrains from calculating dumping margins based on speculative future deliveries like the aircraft subject to this investigation because such calculations are unreliable.[114]
- Adopting a permissive interpretation of "likely sales" would risk opening the floodgates for premature petitions, and inaccurate dumping margins.[115]

The Aircraft Described in the Delta Purchase Agreement are Outside the Scope of the Investigation

- Record evidence indicates that the aircraft subject to the Delta purchase agreement fall below the 2,900 nautical mile range requirement.[116] The Department subjected Bombardier to procedural disadvantages regarding the development of the record regarding this range requirement, and relied on inadequate information to find that the aircraft in the purchase agreement meet the nautical mile requirement.[117]
- There is no evidentiary basis to conclude that the aircraft covered by the Delta purchase agreement meet the FAA type certificate requirement indicated in the scope.[118] Moreover, FAA type certificates do not specify the nautical mile range of the aircraft.

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[111] *Id*. at 17 (citing H.R. Rep. No. 98-725 (1984) at 11).
[112] *Id.* at 17-18.
[113] *Id.* at 18.
[114] *Id.* (citing *Notice of Preliminary Determination of Sales at Less Than Fair Value: Low Enriched Uranium from the United Kingdom; Preliminary Determinations of Sales at Not Less Than Fair Value: Low Enriched Uranium from Germany and the Netherlands; and Postponement of Final Determinations*, 66 FR 36748, 36748 (July 13, 2001) (*Low Enriched Uranium Prelim Determination*), and *Notice of Final Determinations of Sales at Not Less Than Fair Value: Low Enriched Uranium from the United Kingdom, Germany and the Netherlands*, 66 FR 65886 (December 21, 2001) (*Low Enriched Uranium Final Determination*)).
[115] *Id.* at 20 (citing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, (Fed. Cir. 1994), and *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990))
[116] *Id.* at 22
[117] *Id.* at 23-29.
[118] *Id*. at 29-30.

Delta's Case Brief

- The Department should not consider the purchase agreement as the date of sale because purchase agreements covering large civil aircraft do not establish the material terms of sale.[119]
- Determining that the purchase agreement establishes the date of sale is contrary to legislative intent[120] and Department practice, as affirmed by the CIT.[121]
- Consistent with *Uranium from the United Kingdom*, the Department should refrain from calculating an unreliable dumping margin based on undelivered sales.[122] The Department should find that there were no POI sales for importation.

Petitioner's Rebuttal Brief

- The Department should reject Bombardier's baseless "no sale" arguments.
- Record evidence shows Bombardier sold subject C series aircraft to Delta during the POI.
- The Act encompasses Bombardier's sale to Delta. Section 735(a)(1) of the Act directs the Department to determine whether subject merchandise is being, or is likely to be sold in the United States. Section 772(a) of the Act defines export price to mean the price at which the subject merchandise is first sold or agreed to be sold in the United States. The aircraft at issue were first sold or agreed to be sold when Bombardier and Delta concluded the purchase agreement in April 2016.[123]
- 19 CFR 351.102(b)(43) defines a "sale" to include "a contract to sell." The "firm agreement" between Bombardier and Delta constitutes a contract to sell.[124]
- 19 CFR 351.102(b)(43) expressly permits the selection of a date other than invoice date as the date of sale. The *Preamble* to the Department's regulations states that the Department will use a date of sale other than invoice date in cases involving "large custom-made machinery in which the parties engage in formal negotiation and contracting," and long-term contracts.[125] Department precedent, including *Large Newspaper Printing Presses from Japan*, support selection of contract date as the date of sale.[126]

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[119] *See* Delta's Case Brief at 6.
[120] *Id*. (citing *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27348 (May 19, 1997) (*Antidumping Duties; Countervailing Duties*).
[121] *Id*. at 7 (citing, *inter alia*, *Yieh Phui Enter. Co. v. United States*, 791 F. Supp. 2d 1319, 1326 (CIT 2011); *Hornos Electricos De Venez., S.A. v. United States*, 285 F. Supp. 2d 1353,1367-68 (CIT 2003); and *Seah Steel Corp. v. United States*, 25 C.I.T. 133, 136-137 (CIT 2001).
[122] *Id*. at 8 (citing *Notice of Final Determinations of Sales at Not Less Than Fair Value: Low Enriched Uranium from the United Kingdom, Germany and the Netherlands*, 66 FR 65886 (December 21, 2001) (*Uranium from the United Kingdom*) and accompanying IDM at Comment 13).
[123] *See* Petitioner's Rebuttal Brief at 22.
[124] *Id*.
[125] *Id*. at 22-23 (citing *Antidumping Duties; Countervailing Duties*, 62 FR at 27349).
[126] *Id.* at 23-24 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan*, 61 FR 38139 (July 23, 1996) and accompanying IDM at Comment 4) (*Printing Presses from Japan*).

- Record evidence indicates that Bombardier entered into a long-term agreement that establishes the material terms of sale.[127]
- Information about industry practice, in general, is not relevant to the Department's date of sale determination. The Department has clarified that date of sale determinations for a particular respondent will be based on that respondent's selling processes.[128]
- At a minimum, the Bombardier-Delta agreement constitutes a likely sale.
- Bombardier deprived the Department of the opportunity to investigate likely sales by withholding requested information.
- Finding that the Bombardier-Delta agreement constitutes a likely sale is consistent with Congressional intent which offers a remedy from irreparable injury to the domestic industry prior to importation of the merchandise under investigation.[129] The Petition indicates that the domestic industry faces such irreparable injury.[130]
- The "likely sales" provision was designed for "cases involving large capital equipment."[131] Bombardier's claim that this provision should be limited to commodity products is not supported by law.[132] Moreover, Bombardier's claim that aircraft costs are unpredictable is contrary to record evidence.[133]
- Bombardier's reliance on *Uranium from Germany* is misplaced and its assertion that a finding of likely sales will open the floodgates for incomplete petitions lacks merit. [134]
- The scope of the investigation includes the C series aircraft covered by the Bombardier-Delta purchase agreement. Record evidence, including a Bombardier, press release indicates that the Delta aircraft have a range of over 3,000 nautical miles, and are covered by an FAA type certificate that also covers aircraft with a minimum 2,900 nautical mile range.[135]

Department's Position:

We disagree with Bombardier's and Delta's assertion that there is no sales transaction to be examined during the POI. Bombardier's and Delta's argument is based on the proposition that invoice date is the appropriate date of sale and, because Bombardier did not issue an invoice for the subject aircraft during the POI, there is no sale for the Department to examine during the POI. Bombardier's date of sale argument focuses on invoiced transactions, whereas the statute and legislative history make clear that the Department may also consider in its investigation whether the merchandise under consideration *is likely to be* sold at less than fair value. Therefore, the issue of whether Bombardier made a completed sale during the POI is not dispositive of the issue of whether the investigation should proceed to the final phase, or whether

[127] *Id.* at 24-28.
[128] *Id.* at 28 (citing *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27349).
[129] *Id.* at 29.
[130] *Id.* at 30-31.
[131] *Id.* at 31.
[132] *Id*.
[133] *Id*.
[134] *Id.* (citing *Low Enriched Uranium Prelim Determination*, 66 FR at 36748; *Low Enriched Uranium Final Determination*, 66 FR at 65886).
[135] *Id*. at 33-35.

Bombardier made sales or likely sales of merchandise under investigation during the POI.[136] Similarly, the issue of whether aircraft industry purchase agreements are subject to change is not dispositive of whether Bombardier made sales or likely sales of merchandise under investigation during the POI.

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.[137]

Similarly, section 735(a) of the Act states the following:

> Within 75 days after the date of its preliminary determination under section 733(b) {of the Act, the Department} shall make a final determination of whether the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value.[138]

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*. Section 773(a)(1)(B) of the Act states that normal value is the price at which:

> 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.[139]

Legislative history 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.[140] The House Report explained that "{a}ntidumping law has, since its inception, applied not only to imports, but to sales or likely sales.[141] This report additionally explained that the amendment (including the phrase "or sold (or likely to be sold) for importation" in section

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[136] Additionally, we disagree with Bombardier's claim that the Department improperly rejected Bombardier's comments regarding the petitioner's submission in the companion countervailing duty case. As the Department explained to Bombardier, the comments constituted untimely filed factual information. *See* Department letter re: "Less-Than-Fair-Value Investigation of 100- to-150 Seat Large Civil Aircraft from Canada: Rejection of Untimely Filed New Factual Information," dated October 13, 2017. Therefore, the Department appropriately rejected Bombardier's submission that contained these comments.
[137] Emphasis added.
[138] Emphasis added.
[139] Emphasis added.
[140] H.R. Rep. No. 98-725, at 11 (1984).
[141] *Id*.

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."[142] The logic described in the House Report is relevant in this antidumping duty investigation. The subject of this antidumping duty investigation is a product that may be fairly described as large capital equipment. Furthermore, record evidence suggests that the loss of a single sale can cause immediate economic harm. Specifically, the Petition indicates demand for aircraft in the U.S. is "concentrated in a handful of customers," and "after purchasing a new Aircraft type, customers are far more likely to place follow-on orders for the same Aircraft than to order another producer's competing product."[143] It is reasonable to conclude, therefore, that Bombardier's imminent sale of aircraft to Delta has the potential to cause immediate economic harm to the domestic industry and that it may be impossible to provide meaningful relief if this investigation is delayed until importation has taken place.

Bombardier argues that "there is no basis at this late point in the investigation for the Department to convert this proceeding into an investigation of likely sales … ."[144] However, as noted above, the Act does not describe a "likely sales" investigation as a distinct proceeding that requires special notice, but indicates that it is part of the fundamental decision rendered by the Department in antidumping duty proceedings, namely 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.[145] Moreover, there is no need to convert anything. From the beginning, this proceeding has been an investigation of sales and likely sales. In its *Initiation Notice,* the Department made the following announcement:

> Based upon our examination of the AD Petition on aircraft from Canada, we find that the Petition meets the requirements of section 732 of the Act. Therefore, we are initiating an AD investigation to determine whether imports of aircraft from Canada *are being, or are likely to be, sold* in the United States at less-than-fair value.[146]

Thus, Bombardier had adequate notice that the instant investigation encompasses sales or likely sales of the merchandise under consideration.

Additionally, the Department clearly stated that it was seeking information in this investigation regarding Bombardier's sales agreements and not just invoiced sales. The Department requested the total U.S. and home market quantity and value of contract sales during the POI in its

[142] *Id.*
[143] *See* the Petition at 16-17.
[144] *See* Bombardier's Case Brief at 15.
[145] *See* sections 733(b) and 735(a) of the Act; s*ee also* section 701(a)(1) of the Act, which addresses the imposition of antidumping duties when, among other factors, the Department determines that a class or kind of foreign merchandise "is being, or is likely to be" sold in the United States at less than fair value.
[146] *See Initiation Notice*, 82 FR 24296, 24299. (emphasis added).

questionnaire,[147] and later explained that "contract sales" mean firm orders of aircraft.[148] We instructed Bombardier to report its contract sales figures in accordance with all such order/contract information it maintains in the ordinary course of business. In the July 10, 2017 letter containing that instruction, the Department also stated 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 contracts effective as of the last day of the period of investigation (*e.g.*, March 31, 2017). Bombardier should report each contract only once.[149]

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.[150] Furthermore, 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.[151] The August 16, 2017, 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."[152] The letter further indicated that Bombardier also reported these firm orders in its 2016 financial statement.[153] The Department instructed Bombardier to provide complete responses to sections B and C of the Department's AD Questionnaire based on these firm orders.[154] These firm orders are evidence of a sale, or, at a minimum, a likely U.S. sale, of merchandise under investigation. Hence, Bombardier was given ample notice that the instant investigation encompassed likely sales, not just invoiced sales.

We disagree with Bombardier's reasons as to why an investigation of likely sales is inappropriate in this case. Bombardier's argument that the "likely sales" provision should be "interpreted narrowly to apply to merchandise such as commodity products where prices and costs are highly predictable" is contrary to legislative intent.[155] As explained above, the legislative history expressly stated that the "likely sales" provision "is particularly important in cases involving large capital equipment."[156] Furthermore, we disagree with Bombardier's claim that the "likely

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[147] 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.
[148] *Id*.
[149] *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.
[150] *Id*.
[151] *See* Second Clarification Letter.
[152] *Id*. at 3.
[153] *Id*.
[154] *Id*.
[155] *See* Bombardier's Case Brief at 18.
[156] *See* H.R. Rep. No. 98-725, at 11 (1984).

sales" provision should not apply because there is no evidence that meaningful relief cannot be provided to the petitioner unless an antidumping duty investigation is initiated prior to importation of aircraft.[157] During the initiation phase of this proceeding, the Department found adequate evidence that material injury existed, despite the fact that the aircraft that are the subject of this investigation have not yet been imported.[158] Also, in testimony at the ITC staff conference on May 18, 2017, Boeing reported, among other things, that "the confidential materials we have submitted clearly establish the direct price harm that the CS100 caused to Boeing prices."[159] Aircraft are large capital equipment requiring significant lead time between order and delivery, with deliveries that could occur over many years. To wait until delivery and importation would thwart the statutory mandate to provide the relief requested by a petitioner. The Department does not find that waiting until the importation of the aircraft in Bombardier's and Delta's purchase agreement to conduct the investigation constitutes providing meaningful relief in accordance with the statute and legislative history.[160] Lastly, we disagree with Bombardier's contention that examining likely sales in this investigation would lead to inaccurate dumping margins. Bombardier neither reported the information needed to calculate a dumping margin nor suggested alternative methodologies for providing any of that information. Consequently, there is no basis for evaluating the reliability of such information—which Bombardier did not provide--for calculating dumping margins. Additionally, because legislative intent indicates that the likely sales provision applies to cases involving large capital equipment (like aircraft) where sales are imminent, the Act contemplates the calculation of an estimated weighted-average dumping margin for such merchandise based on sales that have not yet been completed, invoiced, or delivered.[161]

We further disagree with Bombardier that the aircraft covered by the Delta purchase agreement are outside the scope of the investigation. Bombardier asserts that "the evidence on which the Department relied to find that the aircraft meet the nautical mile range requirement is wholly inadequate" and that the record is devoid of any evidence that the aircraft covered by the Delta purchase agreement meet these requirements" (the nautical mileage range and/or the FAA certificate requirements).[162] Bombardier argues that the Department singled out certain promotional materials to conclude that the C series aircraft meet the nautical mileage range requirement, and that any mileage references in these materials are estimates, subject to change because the aircraft are in the development phase. Bombardier also contends that these materials

[157] *See* Bombardier's Case Brief at 18.
[158] *See Initiation Notice*, 82 FR 24296, 24298 ("The petitioner contends that the threat of material injury is illustrated by the domestic industry's vulnerability, existing unused production capacity available to imminently and substantially increase exports of subject merchandise to the United States, significant increase in the market penetration of subject imports and likelihood of further increase in the volume and market penetration of subject imports, adverse price effects on domestic prices, and negative effects on product development and production. We have assessed the allegations and supporting evidence regarding threat of material injury and causation, and we have determined that these allegations are properly supported by adequate evidence, and meet the statutory requirements for initiation." (internal citations omitted)).
[159] *See* Letter to the Honorable Wilbur Ross Jr., Secretary of Commerce, from the petitioner "100- To 150-Seat Large Civil Aircraft from Canada: Petitioner's Rebuttal Comments on Scope," dated June 29, 2017 (Petitioner Scope Rebuttal Comments) at Exhibit 2 .
[160] *See* H.R. Rep. No. 98-725, at 11 (1984).
[161] *Id.*
[162] *See* Bombardier's Case Brief at 21-23.

do not provide the "specific characteristics of the aircraft covered by the Delta purchase agreements."[163] Therefore, Bombardier concludes that "these promotional materials do not demonstrate that the C Series aircraft generally, or the aircraft covered by the Delta purchase agreement specifically meet the 2,900 nautical mile range requirement in the scope of the investigation."[164]

First, the promotional materials that identify the nautical mileage ranges do not consist of broad descriptions of the aircraft with generalities, but are Bombardier's product brochures which list, in detail, the specifications of the aircraft, including nautical mileage ranges of 3,300 for CS300 aircraft and 3,100 for CS100 aircraft.[165] While the product brochures contain a note indicating that they do not constitute a warranty and the performance of the aircraft may differ from the images shown, Bombardier has publicly confirmed these mileage ranges in various venues.[166] The petitioner placed on the record a press release regarding the Bombardier-Delta agreement which includes this statement: "{t}he C Series aircraft's maximum range has also been confirmed to be up to 3,300 NM (6,112 km), some 350 NM (648 km) more than originally targeted."[167] Delta placed on the record an article regarding Bombardier's delivery of CS100 aircraft to Swiss International Airlines which includes the statement: "{p}owered by Pratt & Whitney PurePower PW1500G engines, Bombardier is claiming a maximum range of 3,300 nautical miles (6,112 km/3,798 mi) for the aircraft."[168] Bombardier's website additionally identified a nautical mile range of 3,100 per 108 passengers for CS100 aircraft and a 3,300 nautical mile range for 130 passengers for CS300 aircraft.[169] Consequently, Bombardier declared on its website that both "the CS100 and the CS300 possess a range of over 3,000 nautical miles," which meets the nautical mile requirement of the scope of the investigation."[170]

Even if the promotional materials are considered unreliable, there is other information on the record supporting the nautical mile ranges of the CS100 and CS300 aircraft. The record contains Bombardier's 2015 Financial Report which includes the statement: "The *C Series* aircraft's maximum range has been confirmed to be 3,300 NM (6,112 km), some 350 NM (648 km) more than originally targeted."[171] Additionally, Bombardier certified to the Department during the investigation that both the CS100 and CS300 aircraft meet the nautical range requirement in the scope. Specifically, in response to the Department's question to "provide a description of the types of merchandise under investigation produced and/or sold by your company" Bombardier reported that it "sells two aircraft models: the CS100 and the CS300.… The CS300 also has higher design weights allowing it to carry extra payload as compared to the CS100 and the standard range of the CS300 is 3300 nautical miles, whereas the standard range for the CS100 is 3100 nautical miles."[172] Although Bombardier argues that the Department relied on "inadequate

[163] *Id*. at 29.
[164] *Id*.
[165] *See* Petition at Exhibits 68, 86 and 87.
[166] *See* Bombardier's July 10, 2017 Section A questionnaire response at Exhibit A-6.C.
[167] *See* Petition at Exhibit 63.
[168] *See* Delta's June 19, 2017 submission to the Department at Exhibit 22.
[169] *Id*.
[170] *See* Petition, at Exhibit 68.
[171] *See* Bombardier's July 10, 2017 Section A questionnaire response at Exhibit A-6.C (2015 Financial Report at page 66).
[172] *Id*. at 36.

information" to conclude that the CS100 and CS300 aircraft meet the nautical mile requirement, we considered Bombardier's certified statements that the CS100 and CS300 aircraft meet the nautical mile requirement in making our determination.

Second, we do not find that the materials provided in Exhibits 1B and 2B of Bombardier's August 23, 2017, Supplemental Questionnaire Response (SQR) demonstrate conclusively that the aircraft do not meet the 2,900 nautical mile requirement. Bombardier explained that the nautical mile figures listed in the exhibits were derived using its own proprietary software program for assessing aircraft performance characteristics based on parameters, including specific characteristics of the aircraft, which are either optimal (in which case manipulating them would only decrease the range), mandated by law, or provided for in the Delta purchase agreement."[173] Bombardier argues that there is no record evidence suggesting that the parameters input into the software program could be changed to "mechanically, commercially, or legally increase the range of the aircraft subject to the Delta purchase agreement."[174] The Department has re-examined the materials provided in Exhibits 1B and 2B of Bombardier's August 23, 2017, Supplemental Questionnaire Response (SQR) in light of Bombardier's claims and determines the information presented in these exhibits does not adequately support Bombardier's claim that "{r}ecord evidence demonstrates conclusively that the aircraft covered by the Delta purchase agreement do not meet the 2,900 nautical mileage requirement."[175] Based on its examination of record evidence, the details of which may not be publicly disclosed, the Department finds that the information presented in these exhibits is insufficient to refute Bombardier's public statements and statements made in the instant investigation about the capabilities of its aircraft.[176]

Furthermore, even if the specific Bombardier CS100 aircraft covered by the Delta purchase agreement and the CS300 aircraft covered by the Air Canada purchase agreement had actual ranges that fell below 2,900 nautical miles, record evidence indicates that they would nevertheless be covered by the scope. The scope of the investigation covers aircraft with ranges below 2,900 nautical mile if they are covered by a FAA type certificate or supplemental type certificate that also covers other aircraft with a minimum 2,900 nautical mile range. Record evidence indicates (1) that Bombardier's CS100 and CS300 aircraft are covered by FAA Type Certificate TY00008NY,[177] and (2), as explained above, Bombardier's CS100 and CS300 aircraft have ranges that exceed the 2,900 nautical mile minimum range specified by the scope of this investigation. Therefore, even though Bombardier may produce specific CS100 or CS300 aircraft with ranges that fall below the 2,900 nautical mile minimum range specified by the scope, these aircraft would still be covered by the scope because they are covered by FAA Type Certificate TY00008NY, which covers CS100 and CS300 that have ranges that exceed 2,900 nautical miles.

Lastly, while Bombardier argues that any lack of clarity with respect to product coverage was because it was procedurally disadvantaged due to multiple rejections of its information (and

[173] *See* Bombardier's Case Brief at 26.
[174] *Id*. at 28.
[175] *Id*. at 22.
[176] *See* Memorandum, "Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Proprietary Information Considered for the Final Determination," dated concurrently with this memorandum.
[177] *See* Bombardier's July 10, 2017 Section A questionnaire response at Exhibit A-7.E.

resubmissions) by the Department, Bombardier was given multiple opportunities to comment on the scope; these opportunities extended beyond the initial deadline for submitting scope comments.[178] Moreover, for the reasons explained in separate letters to Bombardier,[179] we find the rejections were appropriate.

For the foregoing reasons, the Department determines that terminating this investigation is not warranted. As explained above, record evidence indicates that Bombardier made sales or likely sales of subject aircraft. The Department requested information from Bombardier necessary to examine these sales or likely sales; however, Bombardier failed to cooperate with respect to these requests for information. Accordingly, as explained in the section entitled "Adverse Facts Available" above, the Department finds that the continued application of total AFA to Bombardier for this final determination is warranted.

Comment 3: Adequacy of Petition

Bombardier's Case Brief

- The petition failed to demonstrate that a sale of subject merchandise occurred; as a result, the Department should have terminated the investigation consistent with the international obligations of the U.S. under the WTO AD agreement.[180]
- Specifically, the Petition contains evidence that United Airlines Inc.'s order of 65 737-700 aircraft from Boeing changed in a post-purchase agreement, and "Delta has flexibility under the purchase agreement" with Bombardier.[181] This evidence demonstrates that purchase agreements in the aircraft industry do not provide an adequate basis upon which the Department can initiate an investigation.
- Prior to initiation, Bombardier attempted to notify the Department that an investigation was unwarranted because no sale was made, but the Department improperly rejected Bombardier's request to comment pursuant to section 732(b)(3)(B) of the Act.
- This section of the statute (732(b)(3)(B)) has singled out Bombardier as a non-domestic interested party and prohibited Bombardier from providing the Department with comments on the adequacy of the Petition. This discriminatory treatment lacks any rational basis, and has violated equal protection principles.[182]

[178] *See, e.g.*, Memorandum, "Antidumping Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada: Response to Clarification on Submission of New Scope Information," dated September 29, 2017.
[179] *See* Memorandum, "Less-Than-Fair-Value Investigation of 100- to-150 Seat Large Civil Aircraft from Canada: New Scope Information," dated August 25, 2017; and Memorandum, "Less-Than-Fair-Value and Countervailing Duty Investigations of 100- to-150 Seat Large Civil Aircraft from Canada: October 4, 2017 Submissions of New Scope Information by Bombardier Inc.," dated October 13, 2017.
[180] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 5.3; art 5.8; *see also* Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, 8.75, WTP. WT/DS156/R (adopted Oct. 24, 2000); *see also* Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, 7.61, WTO Doc. WT/DS331/R (adopted June 8, 2007).
[181] *See Petition* at Exhibit 3.
[182] *See Hodel v. Indiana*, 452 U.S. 314, 331 (1981); *see also Romer v. Evans*, 517 U.S. 620, 633, 116 (1996).

Petitioner's Rebuttal Brief

- Bombardier's arguments are contrary to the statute which provides that the Department shall initiate an antidumping investigation where industry support is sufficient, which Bombardier does not contest, and the Petition (a) "allege{s} the elements necessary for the imposition" of antidumping duties, and (b) is supports those allegations with "information reasonably available" to the petitioner.[183]
- The Petition contains evidence that the Bombardier-Delta purchase agreement constitutes a sale and otherwise met the statutory requirements for initiation.
- The Department's discretion to terminate an investigation is limited under the Act to certain situations, such as inadequate industry support or fraud, and Bombardier has not alleged that such situations existed.
- The Act plainly states that {t}he administering authority shall not accept any unsolicited oral or written communication from any person other than an interested party described in section {771}(9)(C),(D),(E),(F), or (G) of this title {referring to domestic interested parties} before the administering authority makes its decision whether to initiate an investigation…"[184]
- The Federal Circuit confirmed that *ex parte* communications during the pre-initiation phase are prohibited under the statute,[185] noting "it is not the intent of Congress to have an ongoing advocacy proceeding" before the initiation of an investigation" and that "petitions or information seeking to rebut the allegations should not be considered by the administering authority."[186]
- Bombardier's constitutional objection that the statutory prohibition on non-domestic parties submitting comments before an investigation is a denial of equal protection is misplaced. Economic legislation is subject to a rational basis review,[187] and Congress has a rational basis for distinguishing between domestic and non-domestic parties during the pre-initiation phase of an investigation. The Department's refusal to entertain Bombardier's comments before initiation of this investigation did not prejudice Bombardier in any manner.

Department's Position:

We disagree with Bombardier's argument that the petition must demonstrate a completed sale of subject merchandise and that the petition failed to demonstrate such a sale, and, as a result, the Department should have terminated the investigation. A petitioner must allege, and support with information reasonably available to them, that merchandise is being sold, or is likely to be sold, in the U.S. at less than fair value. The petition in this investigation did allege the same and supported its allegation with information reasonably available. Specifically, the petitioner alleged that aircraft are being sold or are likely to be sold in the U.S. at less than fair value and as support for U.S. price, used the U.S. price from purchase commitments identified in the U.S.

[183] *See* Petitioner's Rebuttal Brief at 44 (citing Section 732 of the Act).
[184] *Id.* at 47 (citing Section 732 of the Act).
[185] *Id.* at 48 (citing *United States v. Roses, Inc.*, 706 F.2d 1566-68 (Fed. Cir. 1983) (*Roses*).
[186] *Id.* at 48 (citing *Roses*, 706 F.2d at 1566-68; 125 Cong. Rec. 20172 (1979)).
[187] *Id.* at 49 (citing *SKF USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337, 1360 (Fed. Cir. 2009)).

customer's financial statements that relate to a 2016 contract between the customer and the Canadian producer, Bombardier, for the purchase of Bombardier's CS100 series aircraft.[188]

Section 732(b)(1) of the Act states:

> An antidumping proceeding shall be initiated whenever an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 771(9) files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 731, and which is accompanied by information reasonably available to the petitioner supporting those allegations.

Additionally, section 731 of the Act states:

> If—
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
> (2) the Commission determines that—
> (A) an industry in the United States—
> (i) is materially injured, or
> (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded,
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

Thus, the statute is clear regarding the initiation phase of a proceeding. The Department *shall* initiate an antidumping duty proceeding on the basis of a petition which alleges the elements necessary for the imposition of the duty imposed under section 731 of the Act. One of the elements listed under section 731 of the Act is a determination by the Department that "a class or kind of foreign merchandise is being, *or is likely to be*, sold in the United States at less than its fair value …." Therefore, we continue to find that the petition was supported with information reasonably available regarding merchandise that is "being, or is likely to be, sold in the United States" at less than fair value.

Furthermore, the Department disagrees that record evidence indicates that a purchase agreement is not an adequate basis on which to initiate an investigation. Regardless of industry practice or flexibility within a purchase agreement, as stated above, the statute directs the Department to consider not only sales, but also likely sales. Record evidence suggests that the purchase

[188] *See Initiation Notice*, 82 FR 24296 (May 26, 2017).

agreement between Bombardier and Delta was, at a minimum, indicative of a likely sale of merchandise under consideration.

Moreover, we "examined the accuracy and adequacy of the evidence provided in the Petition…and recommend{ed} determining the evidence is sufficient to justify the initiation of the requested antidumping duty investigation with regard to Canada."[189] As explained in the *Initiation Notice*:

> In accordance with section 731(b) of the Tariff Act of 1930, as amended (the Act), the petitioner alleges that imports of aircraft from Canada are being, or are likely to be, sold in the United States at less-than-fair value within the meaning of section 731 of the ACT, and that such imports are threatening material injury to an industry in the United States. Also, consistent with section 732(b)(1) of the Act, the Petition is accompanied by information that is reasonably available to the petitioner supporting its allegations.[190]

Therefore, the Petition satisfied the statutory requirements for initiating an investigation and there is no basis for terminating this investigation.

Furthermore, the Department did not improperly refuse to solicit comments from Bombardier prior to initiating the investigation.[191] Section 732(b)(3)(B) of the Act makes clear that the Department shall not accept any unsolicited oral or written communication from any person other than an interested party described in sections 771(9)(C)-(G) of the Act before the administering authority makes its decision whether to initiate an investigation, except as provided in section 732(c)(4)(D) of the Act (which provides for comments on industry support). Bombardier is not an interested party within the meaning of sections 771(9)(C)-(G) of the Act. Thus, solicitation of such comments is contrary to legislative intent, which indicates that the Department should limit its review of petitions to "only to the four corners of the petition—the pleading—and the information filed supporting the allegations and not elsewhere."[192] Moreover, compelling administrative reasons exist to limit the review of the petition to the allegations and supporting information contained therein, as supplemented. Pursuant to, section 732(c)(1)(A) of the Act, the Department must make a determination within 20 days after the date a petition is filed. Thus, the statute provides only a brief amount of time to make a determination as to the adequacy of a petition. As the Federal Circuit has held, "the receipt of material during the 20 days, from the anticipated target, frustrates the intended statutory scheme. . . {and} whether the investigation would appear warranted if all the facts were known, rests primarily on the veracity of the petitioner."[193] Furthermore, the Supreme Court of the United States has stated:

> On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity . . . and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis

[189] *See AD Initiation Checklist* (May 17, 2017).
[190] *See Initiation Notice*, 82 FR 24296.
[191] *See* Bombardier's Case Brief at 59-62.
[192] *See Roses*, 706 F.2d 1563, 1566 (citing 125 Cong. Rec. 20172 (1979)).
[193] *Id*. at 1567.

> which might support it" . . . Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . Thus, the absence of " 'legislative facts' " explaining the distinction "{o}n the record," . . . has no significance in rational-basis analysis. . . " 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.' "[194]

For this reason, Bombardier's claim that the Department's refusal to consider Bombardier's pre-initiation comments does not contain "any rational basis" and "violated equal protection principles," lacks merit.[195] Nevertheless, Bombardier did receive an opportunity to present its arguments regarding initiation. On June 21, 2017, Bombardier filed a request to terminate this investigation. Bombardier attached to this submission its pre-initiation comments which the Department had previously rejected. The June 21, 2017, submission is still on the record. Therefore, Bombardier was not denied an opportunity during this proceeding to make arguments that the Department should not have initiated, or that the Department should terminate, this investigation.

Comment 4: Revision of the Seating Capacity

Delta's Case Brief

- The Department should exclude single-aisle aircraft with a seating capacity of less than 125 seats (*i.e.*, CS100 aircraft) from the scope of the investigations. Delta specifically sought to purchase an aircraft with a seating capacity between 100 and 110 seats, not an aircraft with a capacity anywhere between 100 and 150 seats. If a carrier seeks to purchase a 100- to 110-seat aircraft to fill that niche within its fleet, larger aircraft are not viable alternative products.
- The petitioner acknowledged that it did not compete with Bombardier's offer of a CS100 aircraft and it does not produce such aircraft. The petitioner's smallest capacity 737-700 aircraft have 126 to 137 passenger seats whereas the maximum capacity of the CS100 is 124 seats. When comparing seating capacity, it is not appropriate to compare the minimum capacity of one type of aircraft (the 737-700 – 126 seats) with the maximum capacity of another aircraft (the CS100 124 seats) (the Department made this comparison in the preliminary determination).
- While the petitioner may have intended to include the CS100 aircraft in the scope, the petitioner's intention does not overrule the Department's authority to narrow[196] the scope of an investigation.

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[194] *See F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993) (internal citations omitted).
[195] *See* Bombardier's Case Brief at 61-62.
[196] *See, e.g., Investigation of Antidumping Duty Investigations: Spring Table Grapes from Chile and Mexico*, 66 FR 26,831, 26,833 (May 15, 2001) (citing *Torrington Co. v. United States*, 745 F. Supp. 718, 721 n.4 (CIT 1990) ("ITA's authority to modify the class or kind, where necessary, is not limited to expansion of the petition; ITA also may narrow the scope."))

- 100-110 seat aircraft should be excluded from the scope of the investigations because the petitioner does not produce this aircraft, as evidenced by the fact that the petitioner did not enter a bid to supply Delta with aircraft which it ultimately purchased from Bombardier. While the petitioner does not need to produce every type of product encompassed by the scope of an investigation, the scope should not include something that does not compete with the petitioner's products; the petitioner does not compete in the 100- to 125-seat large carrier aircraft market.
- The scope offered by the petitioner is merely a proposed scope - not the final scope. The Department has the inherent authority to "define and clarify" the scope of its investigations.[197]
- Given the unusual nature of this case - where there is only one domestic purchaser, one foreign producer/exporter, no domestic producer of the purchaser's desired product and no sales or imports - the Department should consider the expectations of the ultimate purchaser in defining the scope of the investigations.
- The scope is currently defective because it includes a product that has different physical characteristics from products produced by the petitioner. The Department has used its authority in the past to exclude certain products initially included in the petition,[198] and should modify the currently over-inclusive scope.

The Petitioner's Rebuttal Brief

- The Department should not exclude CS100 aircraft from the scope of the investigations as the petition establishes that the petitioner intended to cover CS100 aircraft. The dumping margin calculated in the petition was based on Bombardier's sale of 75 CS100s to Delta.
- The Department's practice is to accept the scope, as defined by the petitioner, even when the petitioner does not produce every type of product that falls inside the scope of an investigation.[199] The Department and ITC have initially determined that all products described in the scope constitute a single like product.
- The Department has also considered and preliminarily rejected Delta's arguments regarding the petitioner's 737 aircraft competing against CS100 aircraft and the unusual nature of this case.

Department's Position:

In determining whether a product falls within the scope of an investigation, the Department considers the plain language of the scope. Furthermore, the Department normally grants "ample

[197] *See Ad Hoc Shrimp Trade Action Cmte. v. United States*, 637 F. Supp. 2d 1166, 1175 (CIT 2009).
[198] *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China*: Initiation of Antidumping Duty Investigation, 74 FR 52744 (October 14, 2009) (*Seamless Pipe PRC Initiation*).
[199] *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances in Part: Prestressed Concrete Steel Wire Strand from Mexico*, 68 FR 42378 (July 17, 2003), unchanged in the final determination *see Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Mexico*, 68 FR 68350 (December 8, 2003).

deference to the petitioners" in defining the scope of an investigation.[200] Absent an "overarching reason to modify the scope" in the petition, the Department will accept the scope proposed by the petitioner. While the Department has ultimate authority to determine the scope of an investigation it "must exercise this authority in a manner which reflects the intent of the petition, and the Department should not use its authority to define the scope of an investigation in a manner that would thwart the statutory mandate to provide relief requested in the petition."[201]

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

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

> In the first place, Bombardier has been quite clear that the CS100 and the CS300 compete with Boeing and Airbus in the 100-150 seat market. The CS300 is very close in seat count and range capabilities to Boeing's "737-700" and "MAX 7" and importantly the price for both the "C Series" models affect Boeing prices. This is not theoretical but fact. Bombardier competed the CS100 against Boeing at United. We won that campaign but the confidential materials we have submitted clearly establish the direct price harm that the CS100 caused to Boeing prices. Then there is a direct downward pull on Boeing prices from the close connection between the price of the CS100 and the CS300. Because the CS300 is a larger sibling in the same market, the CS300's price is closely tied to that of the CS100. Dropping the CS100 price means dropping the CS300 price which in turn depresses the price for the "737-700" and "MAX 7." The Delta deal is a painful example of how this price transmission effect works.[202]

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

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

[201] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539* (April 2, 2002) and accompanying IDM, at Comment 49.

[202] *See* Petitioner Scope Rebuttal Comments at Exhibit 2.

Moreover, the Department, for initiation purposes, and the ITC, in its preliminary determination, have initially determined that all products described in the scope of the investigation constitute a single like product,[203]and that the petitioner manufactures products that fit into the like product description.[204] The statute does not require that the petitioner has to produce every type of product that is encompassed by the scope of the investigation.[205] Additionally, Delta has not argued, nor has it demonstrated, that aircraft with a seating capacity of less than 125 seats (*i.e.*, CS100 aircraft) are a different class or kind of merchandise.

Furthermore, we disagree that the scope of the investigations should be customized to exclude exactly the seating capacity that Delta specified. The ITC noted in its preliminary determination that the traditional definition of large civil aircraft are those aircraft having more than 100 seats.[206] Therefore, modifying the scope, as Delta proposes, to only cover aircraft with 125 or more seats is not consistent with the traditional definition of the class of products the petitioner intends to cover.

Delta relies on *Seamless Pipe PRC Initiation* to urge the Department to change the scope language regarding seating capacity. *Seamless Pipe PRC Initiation* is distinguishable from the instant investigation. In *Seamless Pipe PRC Initiation,* the Department explained that the change was due to an omission of one of the revisions that the petitioner in that investigation had suggested prior to the initiation.[207] Furthermore, the revision was to remove scope language related to end-use, which is the Department's preference. None of these circumstances are present in the instant investigation. The Petition intended to cover aircraft with a seating capacity of 100-150 and the seating capacity language is not related to end-use. Therefore, we find that the facts are different in this case and in *Seamless Pipe PRC Initiation.*

Delta's claim regarding the unusual nature of this case - where there is only one domestic purchaser, one foreign producer/exporter, no domestic producer of the purchaser's desired product and no sales or imports is not persuasive. The existence of limited market participants is

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[203] *See AD Initiation Notice,* 82 FR at 24298 and *ITC Preliminary Determination* at I-8.

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

[205]*See Final Determination of Sales a Less Than Fair Value: Certain Activated Carbon from the People's Republic of China,* 72 FR 9508 (March 2, 2007) and accompanying IDM at Comment 2 (finding respondent's products to be in scope despite allegations that the domestic industry did not produce them because the products were included in plain language of the scope, which is dispositive); *see also Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Final Determination of Sales at Less Than Fair Value,* 69 FR 53677 (September 2, 2004) and accompanying IDM at Comment 5 ("Although Prolamsa argues that pre-primed subject merchandise should be excluded because petitioners do not manufacture this product, the statute does not require that petitioners currently produce every type of product that is encompassed by the scope of the investigation."); *Notice of Final Determination of Sales at Less Than Far Value; Certain Hot-Rolled Carbon Steel Flat from The Netherlands,* 66 FR 50408 (October, 3, 2001) and accompanying IDM at Comment 6 (finding respondent's product within the plain language of the scope, and not accepting respondent's argument that Battery Quality Steel should be excluded from the scope because, inter alia, there was no qualified supplier of the Battery Quality Steel in the U.S. and only minimal interest in Battery Quality Steel by the U.S. producers) (*remanded on other grounds, Corus Staal* (CIT 2003)).

[206] *See ITC Preliminary Determination* at I-8 footnote 23.

[207] *See Seamless Pipe PRC Initiation.*

not a factor considered in determining whether scope language is appropriate. Also, as noted above, the petitioner does not need to produce every product in the class or kind of products covered by the scope. Delta has not provided an "overarching reason to modify the scope" in the petition, and thus we have not modified the scope as advocated by Delta for the final determination.

Comment 5: Removal of Nautical Mile Range Criterion

Bombardier's Case Brief

- Due to significant administrability and circumvention concerns, the Department should remove both the 2,900 nautical mile range and the Federal Aviation Administration (FAA) type certificate requirements in the scope. Assessing range capabilities, even for airline industry experts, is complex as it involves sophisticated mathematical formulae, assumptions regarding a series of environmental variables, and only results in range estimates, all of which are difficult for U.S. Customs and Border Protection (CBP) to administer.
- Contrary to the claims of the petitioner, FAA type and supplemental type certificates make no mention of nautical miles, and range capabilities cannot mathematically be extrapolated from the data contained on these certificates. Therefore, FAA type and supplemental type certificates cannot be used to determine whether an imported plane from Canada meets the range requirement of the current scope.
- These concerns are not overcome by presuming that the C Series Bombardier planes are mechanically capable of flying more than 3,000 nautical miles (and thus subject to the scope), regardless of conditions such as headwinds or other variables. Based on the example provided in Bombardier's August 23, 2017 SQR,[208] the C Series mileage range would be inconsistent with the nautical mileage range requirement in the scope.
- A nautical mileage range requirement is likely to encounter administrability issues because an aircraft's range can be mechanically altered. Aircraft can theoretically be taken out of scope if its range is reduced by altering thrust configurations, reducing fuel tank capacity, modifying fuel grade specifications, *etc*.
- The C Series FAA type certificate lacks any data relevant to range. Promotional materials providing notional performance characteristics cannot serve as a basis for determining whether C Series aircraft meet the range requirement.
- The 2,900 nautical mileage range requirement fails to serve its intended purpose (to exclude regional jets from the scope) because regional jets are not defined by nautical mile range. The existing seat requirements exclude regional jets. Therefore, there is no reason to include a nautical range requirement in the scope.
- The FAA, the petitioner, and Airbus, classify aircraft based on seat configurations, not nautical miles. The Harmonized Tariff Schedule (HTS) subheadings used in the scope do not reference nautical mile range. In proceedings before the World Trade Organization (WTO), the United States defined a large carrier using seating capacity and maximum take-off weight, not nautical mile range, to which parties to the counter-complaint agreed.

[208] *See* Bombardier August 23, 2017 SQR at Exhibit 1B.

- Removing the nautical mile range requirement would not impact the petitioner's stated intent of subjecting large carrier aircraft to this investigation, while excluding regional jets. Therefore, the range requirement can be removed without issue given the serious administrability and circumvention concerns listed above.

The Petitioner's Rebuttal Brief

- The Department should not eliminate the nautical mile range criterion from the scope. FAA type certificate No. T00008NY covers CS100 and CS300 aircraft, which possess nautical mile ranges over 3,000 nautical miles.
- The Department addressed Bombardier's administrability concern in the preliminary scope memorandum by stating that the certificate need not reference the actual mileage range, but merely that it be a type of certificate which covers other aircraft with a 2,900 nautical mile range.[209]
- The only risk of circumvention may refer to Bombardier as it is the only Canadian manufacturer of 100- to 150- seat large civil aircraft. Therefore, no modification of the scope is necessary.

Department's Position:

Although in most cases the Department will defer to the petitioner's proposed scope language, the Department will consider modifying that language when the proposed scope raises concerns regarding administrability or evasion with the Department and CBP.[210] During our review of the petition, we discussed the scope language with the petitioner and thoroughly considered the language to ensure that it did not present administrability or evasion issues with the Department or CBP.[211] We ultimately accepted the scope, as modified by the petitioner. We continue to find that the issues raised by Bombardier with respect to the 2,900 nautical mile range requirement are not sufficient to modify scope language specifically requested by the petitioner.

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

> "…the minimum 2,900 nautical mile range is a mechanical capability rather than an experiential one. Thus, if the nautical mile range is not 2,900 miles in certain cases based on headwinds or other variables, but the plane is mechanically capable of transporting 100 to 150 passengers with their luggage on routes equal to or longer than 2,900 nautical mile range, the aircraft is covered by the scope. Hence, changes in the actual range of an

[209] *See* Preliminary Scope Memorandum, at 9.

[210] *See, e.g., Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 7244, 7247 (February 18, 2010), *unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Narrow Woven Ribbons with Woven Selvedge from Taiwan*, 75 FR 41804 (July 19, 2010) (*Narrow Woven Ribbons*); *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) (*Lumber IV Final Determination*), and accompanying Issues and Decision Memorandum at " "Scope Issues."

[211] *See* Memorandum, "Telephone conversation with the petitioner," dated May 3,2017.

> aircraft based on various conditions would not provide an avenue for circumvention if an aircraft is mechanically capable of transporting between 100 and 150 passengers with their luggage on routes equal to or longer than a 2,900 nautical mile range."[212]

Second, as we stated in the *Preliminary Determination*, the FAA certificate does not have to reference the actual mileage range of the aircraft, it merely needs to be a type certificate or supplemental type certificate that covers other aircraft with a minimum 2,900 nautical mile range.[213] This requirement is not subjective and can be applied based on facts regarding certificates and aircraft: specifications are available for the aircraft in various sources and websites.[214] Therefore, we do not view this as an administrability issue.

Third, notwithstanding any such difficulties claimed by Bombardier, its own website identifies a specific nautical mile range of 3,100 per 108 passengers for CS100 aircraft and a 3,300 nautical mile range for 130 passengers for CS300 aircraft.[215] While this may constitute promotional material, it is presumably accurate as it is the manufacturer that is making the claim, and thus it provides an indication that these aircraft are mechanically capable of flying these distances. Hence, the C Series mileage range is not inconsistent with the nautical mileage range requirement in the scope. Furthermore, despite Bombardier's claim that the FAA, the HTSUS, the petitioner, and Airbus do not classify aircraft based on mileage ranges, Bombardier's website demonstrates that mileage ranges are identified for aircraft and, therefore, the mileage range in the scope can be applied.

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

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

Finally, despite Bombardier's claim about the mileage range requirement not distinguishing regional jets, the petitioner provided detailed information as to why the mileage requirement was necessary to differentiate subject aircraft from non-subject regional aircraft. On page 29 of the petition, the petitioner stated that "{r}egional jets, such as those produced by Embraer of Brazil, do not have a minimum 2,900 nautical mile range, and therefore do not qualify as {subject merchandise}…. The greater range capability of {subject merchandise} is commercially significant, since it enables airlines to operate {subject merchandise} on routes between the U.S. East and West coasts that are beyond the range of regional jets."[216] Hence,

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[212] *See* Preliminary Scope Memorandum, at 8.
[213] *Id.* at 9.
[214] *See e.g.*, Petitioner's Letter, "100- To 150-Seat Large Civil Aircraft from Canada – Proposed Scope Clarification," dated May 9, 2017 at Exhibit Supp.-15; Petition at Exhibit 68.
[215] *See* Preliminary Scope Memorandum at 9.
[216] *See* Petition, footnote 90 on page 29. The petitioners also provided the following details in the footnote: *Compare* Bombardier, "C Series," *available at*

regardless of whether regional jets are typically defined by a nautical mileage range, the range requirement, nevertheless, seeks to ensure that regional jets will be excluded from the scope of the investigation. While Bombardier claims that other characteristics of regional aircraft would suffice to exclude them from the scope, it is not clear that is correct. Information provided in the petition indicates that the Embraer E 195-E2 has a multi-class seating capacity of 120 seats.[217]

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

Comment 6: Airbus-Bombardier Transaction

Bombardier's Case Brief

- It is improper for the Department to consider the proposed transaction in making determinations in these investigations. First, if the transaction does occur, it will take place after the POI for these investigations. Secondly, the proposed transaction has not been finalized and is still dependent on regulatory approvals. It would be speculation to base any decision on it.
- The Department's regulations direct the Department to conduct a retrospective analysis[218] limited to an established period. It is the Department's well-established practice to not consider events that occur after the POI or after the POR.[219] This practice has been affirmed by the CAFC and CIT.[220] Accordingly, the Department should wait for an

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

[217] *See* Petition at Exhibit 71.

[218] *See* Bombardier's Transaction Brief at 3 (citing 19 CFR 351.212(a)).

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

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

administrative review to evaluate the proposed transaction in order to avoid any speculative analysis.

Government of Canada's Case Brief

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

Delta's Case Brief

- In light of the information that has been placed on the record by the Department and the parties, the Department should find there was no sale for importation during the POI and terminate these investigations.
- In the aircraft industry, a purchase agreement does not finally establish the material terms of a sale. The Department's policy is long-standing; to reject the contract date as the date of sale where the material terms of sale were not "finally and firmly established on the contract date."[221]

Petitioner's Case Brief

- The proposed deal between Airbus and Bombardier has no bearing on the Department's current investigations. There is no finalized deal in place to evaluate at this time.
- The only reason to conduct C Series assembly in the U.S. would be to circumvent any antidumping or countervailing duties that may be imposed. However, any orders resulting from these investigations would cover fully or partially assembled C series imported into the U.S. and should apply whether or not a second C Series assembly line is located in the U.S. Nevertheless, this is not an issue the Department needs to address in these investigations as no C Series assembly is currently taking place in the U.S.
- However, for reference, in other cases, the Department has used the phrase "partially assembled" to refer to articles imported in the form of multiple large components or parts.[222] In all these cases, the partially assembled article was subject to the orders.

[221] *See* Delta's Transaction Brief at 2(citing *e.g., Yieh Phui Enter. Co. v. United States*, 791 F. Supp. 2d 1319, 1326 (CIT 2011)).

[222] *See* Petitioner's Transaction Brief at 10 (citing *Printing Presses from Japan*, 61 FR 38139 (July 23, 1996); *see also Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete from Japan*, 61 FR 65013 (December 10, 1996); *see also Notice of Final Determination of Sales at Less Than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan*, 62 FR 24394 (May 5, 1997)).

Bombardier's Rebuttal Brief

- There is broad agreement amongst parties that the proposed transaction should not impact these investigations as the proposed transaction developed after the POI of these investigations.
- However, the petitioner mischaracterizes, and unlawfully seeks to expand the scope by claiming it covers aircraft "articles" (components or parts) from Canada. The scope is specific to "aircraft from Canada" and the term "partially assembled" in the scope refers to aircraft, not "articles."
- The Department's practice, as affirmed by the CIT, is not to expand the scope at such a late stage of an investigation.[223] There is insufficient evidence on the record to determine exactly what components or parts should be included within the scope of any eventual order.[224]
- Establishing a final assembly line for the manufacture of C Series aircraft in the United States does not constitute a form of circumvention; rather, it is motivated by significant business opportunities.
- A production facility for aircraft in the U.S. does not meet the statutory definition of circumvention. Only one type of circumvention involves production in the U.S.: minor or insignificant assembly or completion in the U.S.[225] There is no question that a facility to produce aircraft is not minor or insignificant.
- The scope of an AD or CVD order is determined during the investigation; it cannot be amended or expanded after the order is issued. As the petitioner has raised a question concerning the products covered by the scope of these investigations, the Department must resolve these questions before any order might be established. Failing to resolve the issue will cause significant uncertainty. It is crucial the Department make clear that these investigations and any resulting orders would not apply to articles, components, or parts from Canada.
- No record evidence suggests that C Series aircraft have been produced or delivered for sale into the U.S. Ample evidence on the record demonstrates that the purchase agreement between Delta and Bombardier does not constitute a sale.

Government of Canada's Rebuttal Brief

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

[223] *See* Bombardier's Transaction Rebuttal Brief at 8 (citing *Smith Corona v. United States*, 796 F.Supp. 1532 (Ct. Int'l Trade 1992)).
[224] *Id.* at 9 (citing *Final Determination of Sales at Less Than Fair Value; Certain Internal-Combustion, Industrial Forklift Trucks from Japan*, 53 FR 12552 (April 15, 1988).
[225] *Id.* at 12 (citing Section 781(a) of the Act).

Delta's Rebuttal Brief

- The Department should ignore the petitioner's comments regarding circumvention and reject any attempt to expand the scope of these investigations.
- Any circumvention allegation is premature. The petitioner has not cited the statutory criteria for finding circumvention, not demonstrated that the U.S. manufacture of C Series aircraft will be minor or insignificant, and not demonstrated that any other statutory circumvention applies. The petitioner cannot make a circumvention allegation during an investigation; circumvention is clearly defined by the statute.[226]
- The scope of these investigations is limited to aircraft; it does not include parts, components, or subassemblies. Furthermore, when a scope does include parts or components or subassemblies it does so expressly.[227] The scope in these investigations does not explicitly include parts, components, or subassemblies. The Department should reject any attempt to expand the scope of these investigations.

Petitioner's Rebuttal Brief

- Bombardier, the GOC and the Government of Quebec (GOQ) all agree that the proposed deal between Bombardier and Airbus has yet to be finalized and does not impact the Department's current investigations. Delta alone argues that the proposed transaction has an implication for the Department's investigations.
- Delta's contention that the proposed transaction confirms that no sale has occurred is false. Delta and Bombardier's argument for no sale has already been rebutted, as their April 2016 "firm agreement for the sale and purchase" of subject merchandise was described by Bombardier as a "watershed moment" and made Delta "the C Series aircraft's largest customer."[228]
- Furthermore, any attempt by Delta to make a no sale argument in the CVD investigation is wrong. Delta relies on the preamble to the Department's regulations concerning date of sale in AD investigations, not CVD investigations.[229] Additionally Delta relies on evidence that is not in the record of the CVD investigation.[230]
- Section 701(a)(1) of the Act requires the imposition of countervailing duties where subsidies have been provided with respect to merchandise imported, or sold (or likely to be sold) for importation, into the United States. Record evidence in the CVD investigation compels the conclusion that C Series aircraft were sold (or likely to be sold)

[226] *See* Delta's Transaction Rebuttal Brief at 2 (citing Section 781 of the Act).
[227] *Id.* at 5 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components hereof, Whether Assembled or Unassembled from Germany*, 61 FR 38166 (July 23, 1996); *see also Large Residential Washers from the Republic of Korea: Amendment to the Scope of the Countervailing Duty Investigation*, 77 FR 46715 (August 6, 2012)).
[228] *See* the Petitioner's Transaction Rebuttal Brief at 7.
[229] *Id.* at 8 (citing Delta's Case Brief, "100- to 150- Seat Large Civil Aircraft from Canada: Opportunity to Comment on Proposed Transaction," dated November 13, 2017 at 2).
[230] *Id.* at 8 (citing Delta's Case Brief, "100- to 150- Seat Large Civil Aircraft from Canada: Opportunity to Comment on Proposed Transaction," dated November 13, 2017 at 2-3).

for importation into the United States when Bombardier and Delta completed their purchase agreement.

Department's Position:

The Department agrees with interested parties that the information related to the planned partnership between Bombardier and Airbus does not impact the current investigation because it did not occur during the POI and has yet to be finalized. The press release details that the proposed transaction is subject to regulatory approvals and that there are no guarantees that the transaction will be completed, but that expectations are for completion in the second half of 2018.[231] Additionally, the record lacks detailed information regarding the production process that would result from the planned partnership between Bombardier and Airbus. In the absence of such information, the Department does not find it appropriate to make a scope or circumvention determination about whether activity conducted pursuant to the planned partnership, which has yet to be finalized, may render merchandise outside the scope of an order, should this investigation result in an order. A circumvention ruling under section 781(a) of the Act (merchandise completed or assembled in the United States), for example, requires an order (or a finding) and requires the Department to analyze the nature of the production process in the United States, processing in the United States, and patterns in trade, among other things. The record of this investigation lacks this information. Accordingly, it would be premature to conduct an analysis or reach a determination where relevant information is not on the record and the planned partnership has yet to be finalized.

Finally, the Department has addressed Delta's comment that the proposed Airbus-Bombardier partnership is further evidence that no sale has occurred in its position to Comment 2.

[231] *See* Press Release Memo at Attachment I.

VI. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination and the final weighted-average dumping margins in the *Federal Register*.

☒	☐
Agree	Disagree

12/18/2017

X 

Signed by: PRENTISS SMITH