A-122-857
Administrative Review
POR: 1/1/2021 – 12/31/2021
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July 26, 2023

**MEMORANDUM TO:** Abdelali Elouaradia
Deputy Assistant Secretary
for Enforcement and Compliance

**FROM:** James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Issues and Decision Memorandum for the Final Results of the 2021 Administrative Review of the Antidumping Duty Order on Certain Softwood Lumber Products from Canada

## I. SUMMARY

On January 27, 2023, the U.S. Department of Commerce (Commerce) published its *Preliminary Results* in the 2021 administrative review of the antidumping duty (AD) order of certain softwood lumber products (softwood lumber) from Canada.[1] The period of review (POR) is January 1, 2021, through December 31, 2021. This administrative review covers two mandatory respondents, Canfor[2] and West Fraser,[3] and 289 non-selected producers/exporters that we did not individually examine. Based on our analysis of the comments received, we made certain changes to our margin calculations for Canfor, West Fraser and the non-selected producers/exporters. 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 for which we received comments:

Comment 1: Particular Market Situation (PMS) Allegation
Comment 2: The Cohen's *d* Test is Not Contrary to Law
Comment 3: Whether Commerce Failed to Consider Qualitative Factors in Determining Whether Price Differences Were Significant in Differential Pricing Analysis

[1] *See Certain Softwood Lumber Products from Canada: Preliminary Results of Antidumping Duty Administrative Review*, 88 FR 5306 (January 27, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).
[2] As described in the PDM at 5, we have treated Canfor Corporation, Canadian Forest Products Ltd. (CFP), and Canfor Wood Products Marketing Ltd. (CWPM) (collectively, Canfor) as a single entity.
[3] As described in the PDM at 5-6, we have treated West Fraser Mills Ltd., Blue Ridge Lumber Inc., Manning Forest Products Ltd., and Sundre Forest Products Inc. (collectively, West Fraser) as a single entity.

Comment 4: Whether Commerce Erred in Finding a Pattern of U.S. Prices that Differ Significantly Among Purchasers, Regions, or Periods of Time
Comment 5: Whether the A-to-A Method Accounts for the Identified Price Differences in Applying the "Meaningful Difference" Test
Comment 6: Zeroing
Comment 7: Whether the Cohen's d Test Results in Double Counting
Comment 8: Whether it was Proper not to have Adjusted U.S. Price by Countervailing Duties
Comment 9: Whether Commerce Should Adjust West Fraser's General & Administrative (G&A) Expense Ratio
Comment 10: Whether Commerce Should Make Certain Revisions to West Fraser's Byproduct Offset Calculation
Comment 11: Whether Commerce Should Further Adjust West Fraser's COM to Account for Inputs Obtained From Affiliated Parties
Comment 12: Whether Commerce Should Disallow West Fraser's Claimed Adjustment for "Other Freight Charges" Incurred in Canada
Comment 13: Whether Commerce Used the Proper Market Price for Canfor's Wood Chip Sales
Comment 14: Whether Commerce Should Adjust the Reported Cost of Electricity at Canfor's Prince George (PG) Sawmill
Comment 15: Whether Commerce Properly Determined Canfor's G&A Expense Ratio
Comment 16: Whether Commerce Should Correct the Rate Assigned to Non-Selected Respondents

## II. BACKGROUND

As noted above, on January 27, 2023, Commerce published its *Preliminary Results*.[4] On May 4, 2023, Commerce extended the deadline of these final results until July 26, 2023.[5]

On February 27, 2023, nine parties submitted either case briefs or letters in lieu of case briefs.[6] On March 9, 2022, nine parties submitted rebuttal briefs.[7] Several parties requested hearings, but all hearing requests were withdrawn.

[4] *See Preliminary Results*.
[5] *See* Memorandum, "Extension of Deadline for Final Results of Antidumping Duty Administrative Review," while dated May 24, 2023, the memorandum was uploaded May 4, 2023.
[6] *See* Canfor's Letter, "Canfor's Case Brief" (Canfor's Case Brief); *see also* Government of Canada's (GOC) Letter, "Case Brief of the Government of Canada" (GOC's Case Brief); Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (the petitioner)'s Letter, "Case Brief" (Petitioner's Case Brief); Carrier Forest Products Ltd. and Carrier Lumber Ltd. (Carrier)'s Letter, "Letter in Lieu of Case Brief"; Conseil de l'Industrie forestière du Québec, the Ontario Forest Industries Association, and the individual members of the two Associations' (Central Canada) Letter "Central Canada's Case Brief" (Central Canada's Case Brief); Sierra Pacific Industries (Sierra Pacific)'s Letter, "Case Brief" (Sierra Pacific's Case Brief); West Fraser's Letter, "Case Brief of West Fraser Mills Ltd." (West Fraser's Case Brief); Tolko Marketing and Sales Ltd., Tolko Industries Ltd., and Gilbert Smith Forest Products Ltd.'s Letter, "Letter in Lieu of a Case Brief"; and Olympic Industries, Inc. and Olympic Industries ULC's (Olympic) Letter "Letter in Lieu of a Case Brief"; all dated February 27, 2023.
[7] *See* Canfor's Letter, "Rebuttal Brief of Canfor Corporation" (Canfor's Rebuttal Brief); Carrier's Letter, "Letter in Lieu of Rebuttal Brief" (Carrier's Rebuttal Brief); Central Canada's Letter, "Central Canada's Rebuttal Brief"

## III. SCOPE OF THE ORDER[8]

The merchandise covered by this order is softwood lumber, siding, flooring and certain other coniferous wood (softwood lumber products). The scope includes:

- Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, whether or not sanded, or whether or not finger-jointed, of an actual thickness exceeding six millimeters.
- Coniferous wood siding, flooring, and other coniferous wood (other than moldings and dowel rods), including strips and friezes for parquet flooring, that is continuously shaped (including, but not limited to, tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded) along any of its edges, ends, or faces, whether or not planed, whether or not sanded, or whether or not end-jointed.
- Coniferous drilled and notched lumber and angle cut lumber.
- Coniferous lumber stacked on edge and fastened together with nails, whether or not with plywood sheathing.
- Components or parts of semi-finished or unassembled finished products made from subject merchandise that would otherwise meet the definition of the scope above.

Finished products are not covered by the scope of this order. For the purposes of this scope, finished products contain, or are comprised of, subject merchandise and have undergone sufficient processing such that they can no longer be considered intermediate products, and such products can be readily differentiated from merchandise subject to this order at the time of importation. Such differentiation may, for example, be shown through marks of special adaptation as a particular product. The following products are illustrative of the type of merchandise that is considered "finished" for the purpose of this scope: I-joists; assembled pallets; cutting boards; assembled picture frames; garage doors.

The following items are excluded from the scope of this order:

- Softwood lumber products certified by the Atlantic Lumber Board as being first produced in the Provinces of Newfoundland and Labrador, Nova Scotia, or Prince Edward Island from logs harvested in Newfoundland and Labrador, Nova Scotia, or Prince Edward Island.
- U.S.-origin lumber shipped to Canada for processing and imported into the United States if the processing occurring in Canada is limited to one or more of the following: (1) Kiln drying; (2) planing to create smooth-to-size board; or (3) sanding.

(Central Canada's Rebuttal Brief); GOC and the Governments of Alberta, British Columbia, Ontario and Québec; and the British Columbia Lumber Trade Council's (Canadian Parties) Letter, "Rebuttal Brief of the Canadian Parties" (Canadian Parties' Rebuttal Brief); Fontaine Inc.'s Letter, "Letter in Lieu of Rebuttal Brief," (Fontaine's Rebuttal Brief); Olympic's Letter, "Letter in Lieu of Rebuttal Brief" (Olympic's Rebuttal Brief); Petitioner's Letter, "Rebuttal Brief" (Petitioner's Rebuttal Brief); Sierra Pacific's Letter, "Rebuttal Brief" (Sierra Pacific's Rebuttal Brief); and West Fraser's Letter, "West Fraser Mills Ltd. Rebuttal Brief" (West Fraser's Rebuttal Brief), (collectively, Rebuttal Briefs) all dated March 9, 2023.

[8] *See Certain Softwood Lumber Products from Canada: Antidumping Duty Order and Partial Amended Final Determination*, 83 FR 350 (January 3, 2018).

- Box-spring frame kits if they contain the following wooden pieces--two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails must be radius-cut at both ends. The kits must be individually packaged and must contain the exact number of wooden components needed to make a particular box-spring frame, with no further processing required. None of the components exceeds 1'' in actual thickness or 83'' in length.
- Radius-cut box-spring-frame components, not exceeding 1" in actual thickness or 83" in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantially cut so as to completely round one corner.

Softwood lumber product imports are generally entered under Chapter 44 of the Harmonized Tariff Schedule of the United States (HTSUS). This chapter of the HTSUS covers "Wood and articles of wood." Softwood lumber products that are subject to this order are currently classifiable under the following ten-digit HTSUS subheadings in Chapter 44:

4406.11.0000; 4406.91.0000; 4407.10.0101; 4407.10.0102; 4407.10.0115; 4407.10.0116; 4407.10.0117; 4407.10.0118; 4407.10.0119; 4407.10.0120; 4407.10.0142; 4407.10.0143; 4407.10.0144; 4407.10.0145; 4407.10.0146; 4407.10.0147; 4407.10.0148; 4407.10.0149; 4407.10.0152; 4407.10.0153; 4407.10.0154; 4407.10.0155; 4407.10.0156; 4407.10.0157; 4407.10.0158; 4407.10.0159; 4407.10.0164; 4407.10.0165; 4407.10.0166; 4407.10.0167; 4407.10.0168; 4407.10.0169; 4407.10.0174; 4407.10.0175; 4407.10.0176; 4407.10.0177; 4407.10.0182; 4407.10.0183; 4407.10.0192; 4407.10.0193; 4407.11.0001; 4407.11.0002; 4407.11.0042; 4407.11.0043; 4407.11.0044; 4407.11.0045; 4407.11.0046; 4407.11.0047; 4407.11.0048; 4407.11.0049; 4407.11.0052; 4407.11.0053; 4407.12.0001; 4407.12.0002; 4407.12.0017; 4407.12.0018; 4407.12.0019; 4407.12.0020; 4407.12.0058; 4407.12.0059; 4407.19.0500; 4407.19.0600; 4407.19.1001; 4407.19.1002; 4407.19.1054; 4407.19.1055; 4407.19.1056; 4407.19.1057; 4407.19.1064; 4407.19.1065; 4407.19.1066; 4407.19.1067; 4407.19.1068; 4407.19.1069; 4407.19.1074; 4407.19.1075; 4407.19.1076; 4407.19.1077; 4407.19.1082; 4407.19.1083; 4407.19.1092; 4407.19.1093; 4409.10.0500; 4409.10.1020; 4409.10.1040; 4409.10.1060; 4409.10.1080; 4409.10.2000; 4409.10.9020; 4409.10.9040; 4418.50.0010; 4418.50.0030; 4418.50.0050 and 4418.99.1000.

Subject merchandise as described above might be identified on entry documentation as stringers, square cut box-spring-frame components, fence pickets, truss components, pallet components, flooring, and door and window frame parts. Items so identified might be entered under the following ten-digit HTSUS subheadings in Chapter 44:

4415.20.4000; 4415.20.8000; 4418.99.9005; 4418.99.9020; 4418.99.9040; 4418.99.9095; 4421.99.7040; and 4421.99.9780.

Although these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

## IV. DISCUSSION OF THE ISSUES

### Comment 1: PMS Allegation

*Sierra Pacific's Comments*[9]

- The Government of British Columbia (GBC) directly distorts the British Columbian (B.C.) stumpage market, because the GBC controls the majority (*i.e.*, over 94 percent) of provincial land[10] on which 88 percent of B.C.'s total timber harvest is sourced in B.C.,[11] and because the GBC determines stumpage fees for all Crown-origin standing timber harvested in B.C.,[12] resulting in stumpage prices in B.C. that are not determined by the market.[13]
- Further, the GBC and GOC impose log export restrictions (LERs)[14] that were in force during the POR, and record evidence, including the *Mosaic Affidavit*[15] and the petitioner's average unit values (AUVs) of U.S. exports of softwood logs (minus exports to Canada) clearly demonstrates the distortive effects that these LERs have on the B.C. log prices.[16]
- Commerce applied a new and incorrect standard to its PMS analysis in the *Preliminary Results*,[17] *i.e.*, whether log export authorizations were denied or "blocked"[18] during the POR,[19] because the relevant question is whether "the cost of materials and fabrication of

[9] *See* Sierra Pacific's Case Brief at 2 through 7.
[10] *See Certain Softwood Lumber Products from Canada: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 82 FR 19657 (April 28, 2017), and accompanying PDM (*Lumber V CVD Preliminary Determination*) at 20; *see also Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017), and accompanying Issues and Decision Memorandum (IDM) (*Lumber V CVD Final Determination*) at 139 ("As an initial matter, by law, unless provided a specific exemption to export logs in British Columbia are by default not allowed to be exported from the province.").
[11] *See Lumber V CVD Preliminary Determination* PDM at 20.
[12] *See* Petitioner's Letter, "Particular Market Situation Allegation Regarding Respondents' Cost of Production," dated July 11, 2022 (PMS Allegation) at 9 and Exhibit 4; *see also* GBC's Letter, "Government of British Columbia's Initial Questionnaire Response (Volume 1)," dated June 30, 2022, at Exhibit BC AR4-S-3.
[13] *See Lumber V CVD Preliminary Determination* PDM at 36.
[14] *See Forest Act*, R.S.B.C. 1996, Ch. 157 (*Forest Act*) at subsection 127 (Section 127); *see also Export and Import Permits Act*, R.S.C., 1985, c. E-19 (April 1, 2021) (*Export and Import Permits Act*).
[15] *See Mosaic Forest Management Corporation, Timberwest Forest Company and Island Timberlands Limited Partnership v. The Minister of Foreign Affairs and Her Majesty the Queen in Right of Canada (Mosaic v. Canada)*, "Notice of Application," Court File No. T-773-20 (July 17, 2020) (*Mosaic Affidavit*).
[16] *See* PMS Allegation at 29-30 and Exhibits 20 and 23 (citing *Mosaic Affidavit*); *see also Mosaic Affidavit*.
[17] *See Certain Softwood Lumber Products from Canada: Preliminary Results of Antidumping Duty Administrative Review*, 88 FR 5306 (January 27, 2023) (*Preliminary Results*), and accompanying PDM at 6; *see also* Memorandum, "Preliminary Decision Memorandum on Particular Market Situation Allegations," dated January 23, 2023 (Preliminary PMS Memorandum).
[18] "Blocking" and "blockmail" refer to the phenomena in which domestic mills place or threaten to place bids on logs subject to the surplus test and waiting export approval. If the bid is deemed fair, this effectively "blocks" the exporter from being able to export the logs. *See* PMS Allegation at Exhibit 1; *see also* Preliminary PMS Memorandum at 9, n. 55.
[19] *See* Preliminary PMS Memorandum at 10 and 11.

other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade."[20]

- Commerce's analysis in its Preliminary PMS Memorandum is flawed because Commerce's practice is to consider the totality of evidence on the record in determining whether a PMS exists,[21] which it did not do in the instant case by ignoring record evidence that: (1) that provincial Crown land accounts for the majority of B.C. timber harvest;[22] and (2) the stumpage fees for Crown-origin standing timber is based on B.C. Timber Sale auctions, in which the GBC imposes government restrictions on participation and competition through a "three-sale" limit that prevents entities from bidding for more than three timber sale licenses.[23]
- By treating the existence of log export denials during the POR as dispositive in its analysis that a PMS did not exist in B.C. during the POR, Commerce rendered the AUV benchmark comparison and the GBC's control of timberlands and stumpage prices on Crown-origin lands as irrelevant.[24]
- Commerce's determination that the petitioner did not provide adequate support for finding that government export restrictions in B.C. impacted provincial log prices in its *Preliminary Results*[25] is unreasonable and arbitrary, because it relied on evidence predating the POR in *Lumber AR3 Final*;[26] however, it refused to consider evidence sourced from prior to the POR indicating that LERs distorted log costs in B.C. in the *Preliminary Results*.[27]
- The *Mosaic Affidavit* demonstrates a pattern of the distortive effects of LERs on log prices in B.C. from 2014 through 2020,[28] indicating that the effects of LERs are

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[20] *See* Sierra Pacific's Case Brief at 3 (citing Section 773(e) of the Tariff Act of 1930, as amended (the Act)); section 771(15) of the Act; and *Urea Ammonium Nitrate Solutions from Trinidad and the Tobago: Final Affirmative Determination of Sales at Less Than Fair Value*, 87 FR 37824 (June 24, 2022) (*UAN from Trinidad and Tobago*), and accompanying IDM at 9.

[21] *See UAN from Trinidad* and accompanying IDM at 7.

[22] *See* GBC's Letter, "Government of British Columbia's Initial Questionnaire Response (Volume 1)," dated June 30, 2022, at Exhibit BC-AR4-S-3.

[23] *See Lumber V CVD Final Determination* IDM at 54; *see also Certain Softwood Lumber Products from Canada; Preliminary Results, Partial Rescission, and Preliminary Intent to Rescind, in Part, the Countervailing Duty Administrative Review, 2020*, 87 FR 6500 (February 4, 2022) (*Lumber V CVD AR3 Preliminary Results*), and accompanying PDM at 21-23 (noting that the GBC maintains a three-sale limit for submitting log bids in the BCTS auctions, which bars companies that hold three timber sales licenses from directly submitting bids in the BCTS auctions).

[24] *See* Preliminary PMS Memorandum at 10 and 11 ("{W}e find that a simple comparison of log prices to the mandatory respondents' costs of production does not necessarily demonstrate that LERs impacted log costs for the mandatory respondents during the POR. Specifically, the petitioner alleges that West Fraser's and Canfor's reported log costs during the POR are … below the benchmark it provided of the U.S. log export prices to the world, minus Canada. However, there is no evidence on the record of this review concurrent with the POR that demonstrates that a significant portion of log export authorizations during the POR were actually denied by the GBC or GOC.").

[25] *Id.* at 11.

[26] *See Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments*; *2020*, 87 FR 48465 (August 9, 2022) (*Lumber AR3 Final*), and accompanying IDM at 17.

[27] *See Anderson v. U.S. Secretary of Agriculture*, 462 F. Supp. 2d 1333, 1339 (CIT 2006) (*Anderson*) (noting that the CIT held that an agency decision is arbitrary when it "treat{s} similar situations in dissimilar ways").

[28] *See Mosaic Affidavit* at 13-24.

persistent. Therefore, it is unreasonable to conclude that LERs suddenly stopped affecting the B.C. log market in 2021, especially given the fact that the *Mosaic Affidavit* is dated only four months prior to the instant POR (*i.e.*, September 10, 2020),[29] as well as the fact that LERs continue to be imposed in B.C. during the instant POR.[30]

- The *Mosaic Affidavit* discusses "blockmail" (*i.e.*, the phenomenon in which domestic log buyers threaten to block exports if the exporter does not sell the volume of logs requested by the log buyer in the British Colombia Timber Sales (BCTS) auction system)[31] and contains claims that blockmail is "far more common than actual blocking."[32] Therefore, Commerce's reliance on analyzing whether the actual blocking occurred during the POR pursuant to its PMS analysis in this review does not capture the distortive effect that the threat of blockmail may have on provincial log prices in B.C.[33]

*Petitioner's Comments*[34]

- Commerce failed to consider evidence not previously considered in the prior administrative review that the vast majority of logs used to produce softwood lumber originate from standing timber on Crown lands,[35] and Commerce's *Preliminary Results* is contrary to law.
- Commerce's analysis of the PMS Allegation with respect to B.C. unduly focused on LERs and ignored other record evidence demonstrating the cumulative effects that government intervention has on lumber prices in B.C., *i.e.*, that Crown-origin timber accounts for the vast majority of Canadian harvest volumes of timber in B.C.,[36] that the GBC determines stumpage fees that lumber producers pay for timber harvesting rights,[37] and that a subsidy affecting a substantial portion of the market, such as B.C.'s LERs, has an effect throughout the entire market.[38]
- Commerce put undue emphasis on the date of the supporting evidence provided in the *Mosaic Affidavit* that blocking and the threat of blocking (blockmail) has on lumber prices in B.C. and disregarded the fact that the LERs are still in effect and legally restrict the export of logs.

[29] *Id.*
[30] *See Forest Act*; *see also* PMS Allegation at 20 and 21 and Exhibit 14.
[31] *See Mosaic Affidavit* at 10.
[32] *Id.*
[33] *Id.* at 21 and 23.
[34] *See* Petitioner's Case Brief at 21-26.
[35] *See* PMS Allegation at 6-10.
[36] *Id*. at 7.
[37] *See Lumber V CVD Preliminary Results* PDM at 21.
[38] *See*, *e.g.*, *Welded Carbon Steel Standard Pipes and Tubes from India: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 85 FR 2715 (January 16, 2020) *(WCSSPT from India*), and accompanying IDM at Comment 1 (noting that "Commerce considered the components of the PMS Allegation as a whole, based on the cumulative effect").

*West Fraser's Rebuttal Comments*[39]

- The petitioner has the burden of supporting its claims that Commerce's calculations are outside the ordinary course of trade, and in the instant case, the petitioner did not meet its burden of proof that log costs are distorted such that a PMS exists in Alberta and B.C.[40]
- Commerce was correct in noting in the *Preliminary Results* that: (1) Commerce based its previous PMS finding on contemporaneous evidence with the POR;[41] (2) that almost all of the information submitted in the petitioner's PMS Allegation predates the POR; (3) that the petitioner did not respond to the Canadian Parties' claims that almost all export authorizations were authorized during the POR; and (4) that the *Mosaic Affidavit* did not include relevant evidence that log exports were denied during the POR. [42]
- The petitioner failed to provide new information that would cause Commerce to revisit its prior PMS determination that government ownership of timber does not provide a sufficient basis for an affirmative PMS determination.
- The petitioner's claim that West Fraser and Canfor received a subsidy for stumpage and, therefore, that Commerce should find a PMS exists on the same basis is inconsistent with legal precedent[43] and ignores statutory language that requires an affirmative PMS determination be based on alleged distortions that prevent a proper comparison of normal value with export price (EP) or constructed export price (CEP).[44]
- The petitioner failed to present any evidence that LERs in Alberta and B.C. actually cause distortions in Alberta and B.C., and the countervailing duty (CVD) proceedings indicate that either *de minimis* or minimal price effects were caused by the B.C.'s LER process that provide no basis for the level of "distortion" that warrants an affirmative PMS finding with respect to the mandatory respondents' cost of producing softwood lumber.
- The PMS Allegation does not explain how the collective impact of claimed market distortions are unique to the Canadian lumber market, and legal precedent indicates that the mere existence of trade remedies and subsidies does not constitute a "unique market phenomenon."[45]

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[39] *See* West Fraser's Case Brief at 12-18.

[40] *See Maverick Tube Corp. v. United States*, 107 F. Supp. 3d 1318, 1328 (CIT 2015) (citing *Murata Mfg. Co.* v. United States, 820 F. Supp. 603, 606 (CIT 1993) and *NSK Ltd. v. United States*, 416 F. Supp. 2d 1334, 1343 (CIT 2006)).

[41] *See* PMS Memorandum at 10 and 11; *see also Mannesmannrohren-Werke AG v. United States*, 120 F. Supp. 2d 1075 (CIT 2000) (*Mannesmannrohren*).

[42] *Id.*

[43] *See HiSteel Co. v. United States*, 547 F. Supp. 3d 1233, 1251 (CIT 2021) (noting that the CIT held that the Government of Korea's control over domestic electricity did not support finding a PMS existed in the Republic of Korea because Commerce failed to show that prices were outside the ordinary course of trade).

[44] *See* section 773(e)(3) of the Act (noting that a particular market situation is defined as existing "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade) and section 771(15) of the Act.

[45] *See NEXTEEL Co., Ltd. v. United States,* 28 F.4th 1226, 1234 (Fed. Cir. 2022) (*NEXTEEL*) *(*citing *SeAH Steel Corp. v. United States,* 513 F. Supp. 3d 1367, 1393 (CIT 2021)); *see also Garg Tube Exp. LLP v. United States*, 569 F. Supp. 3d 1202, 1214 (CIT 2022) (*Garg Tube*) (faulting Commerce for failing to explain "how the cumulative and

*Canfor's Rebuttal Comments*[46]

- Commerce has repeatedly found that LERs in Alberta have not influenced log prices harvested from Crown land,[47] that LERs in B.C. confer no measurable countervailable benefit to log manufacturers in B.C.,[48] and, therefore, the petitioner has provided insufficient evidence to support its claim that LERs distort log prices in B.C. that prevents a proper comparison of normal value (NV) with EP or CEP.[49]
- In *Nexteel*,[50] the U.S. Court of Appeals for the Federal Circuit ( Federal Circuit) rejected Commerce's PMS determination when based on evidence that was sourced from a time period outside the POR,[51] a finding which is consistent with the instant PMS Allegation because, as the petitioner itself concedes, the *Mosaic Affidavit* on which it relied to claim that a PMS exists in Alberta and B.C. pre-dates the POR.[52]
- The petitioner has failed to demonstrate how its proposed adjustment to remedy the PMS in B.C. and Alberta would not result in double counting.[53]

*Canadian Parties' Rebuttal Comments*[54]

- The petitioner's claims are inconsistent with Commerce's prior findings in the instant case and prior companion CVD reviews of the countervailing duty order with respect to Alberta. In *Lumber V CVD AR1*,[55] Commerce determined that there was "no information on the record that alleged LERs have affected prices for Crown-origin logs during the

collective impact of the market phenomena upon which it relies are unique to the Indian market and therefor constitute a PMS.").

[46] *See* Canfor's Rebuttal Brief at 20-22.

[47] *See Certain Softwood Lumber Products from Canada: Final Results of the Countervailing Duty Administrative Review, 2017-2018,* 85 FR 77163 (December 1, 2020), and accompanying IDM at 213 through 214; *see also Certain Softwood Lumber Products from Canada: Final Results of the Countervailing Duty Administrative Review, 2019,*86 FR 68467 (December 2, 2021), and accompanying IDM at 238; and *Certain Softwood Lumber Products from Canada: Final Results and Final Rescission, in Part, of the Countervailing Duty Administrative Review, 2020*, 87 FR 48455 (August 9, 2022), and accompanying IDM at 272.

[48] *See Certain Softwood Lumber Products from Canada: Preliminary Results, Partial Rescission, and Preliminary Intent to Rescind, in Part, the Countervailing Duty Administrative Review, 2021*, 88 FR 5302 (January. 27, 2023), and accompanying PDM.

[49] *See Husteel Co., Ltd. v. United States*, 471 F. Supp. 3d 1349, 1362 (CIT 2020) (requiring Commerce find "both that there are distortions present in the market and that those distortions prevent a proper comparison of normal value with export price or constructed export price"); *see also* section 773(a)(1)(B)(ii)(III) of the Act.

[50] *See NEXTEEL*, 28 F.4th at 1236-37.

[51] *Id.* (noting that the Federal Circuit rejected a factor of Commerce's PMS finding because the relevant PMS allegation "provide{s} no evidence of actual government interference during the POR").

[52] *See* Petitioner's Case Brief at 26; *see also* PMS Decision Memorandum at 10-11.

[53] *See Vicentin S.A.I.C. v. United States*, 466 F. Supp. 3d 1227, 1245 (CIT 2020); *see also Vicentin S.A.I.C. v. United States*, 404 F. Supp. 3d 1323, 1342 (CIT 2019) (noting that "Commerce has failed to explain, on the current record, why its rejection of Argentine soybean costs—part of its chosen methodology—is reasonable given that Commerce seems to have remedied the export tax regime in the CVD determination.").

[54] *See* Canadian Parties' Rebuttal Brief at 3-17.

[55] *See Certain Softwood Lumber Products from Canada: Final Results of the Countervailing Duty Administrative Review, 2017-2018,* 85 FR 77163 (December 1, 2020) (*Lumber V CVD AR1*), and accompanying IDM.

POR in Alberta."[56] Furthermore, in *Lumber V CVD AR2*,[57] *Lumber V CVD AR3*,[58] and the *Preliminary Results*,[59] Commerce determined that there was no information that LERs have affected prices for Crown-origin logs during the POR in the province of Alberta.

- Additionally, the petitioner's claims are inconsistent with Commerce's findings in *Lumber V CVD AR4 Preliminary Results*[60] with respect to British Columbia, in which Commerce found that the B.C.'s LERs did not confer a measurable benefit to either mandatory respondent in the province of B.C.
- The petitioner and Sierra Pacific erred in claiming that Commerce failed to consider record evidence provided by them in the PMS Allegation and their respective case briefs,[61] because Commerce explicitly stated in the *Preliminary Results* that it rejected the instant PMS Allegation "{b}ased on {the} totality of information provided by the petitioner, the Canadian Parties, and the mandatory respondents" on the record of the instant review.[62] Furthermore, in the *Lumber V Final Determination*,[63] Commerce found that the petitioner's PMS claim constituted insufficient evidence to make an affirmative PMS determination based on the totality of evidence on the record of the review.
- Commerce's determination in the instant review is consistent with the U.S. Court of International Trade's (CIT) finding in *Nexteel Co., Ltd.*, in which the CIT found that individual portions of a PMS allegation cannot be considered together to determine that there is sufficient evidence to support a PMS finding.[64]
- The petitioner failed to provide new information or novel arguments that would compel Commerce to come to reverse its *Preliminary Results* with respect to the instant PMS Allegation based on mere government control of Crown-origin timber in B.C.
- The petitioner failed to demonstrate in its PMS allegation how the market phenomena which petitioner claims causes distortions in the Canadian lumber market are significant enough to preclude Commerce from making a proper comparison of normal value and EP/CEP.
- The petitioner's and Sierra Pacific's assumptions that the mere existence of distortions created by LERs in B.C. and Alberta create a PMS that renders the market costs of logs

[56] *Id.* at 213 and 214.
[57] *See Certain Softwood Lumber Products from Canada, Final Countervailing Duty Results for Second Administrative Review, 2019*, 86 FR 68467 (December 2, 2021) (*Lumber V CVD AR2*), and accompanying IDM at 238.
[58] *See Certain Softwood Lumber Products from Canada, Final Results and Final Rescission, in Part, of the Countervailing Duty Administrative Review, 2020*, 87 FR 48455 (August 9, 2022) (*Lumber V CVD AR3*), and accompanying IDM at 272.
[59] *See* Preliminary PMS Memorandum at 9.
[60] *See Certain Softwood Lumber Products from Canada: Preliminary Results, Partial Rescission, and Preliminary Intent to Rescind, in Part, the Countervailing Duty Administrative Review, 2021*, 88 FR 5302 (January 27, 2023) (*Lumber V CVD AR4 Preliminary Results*), and accompanying PDM at 19 and 20.
[61] *See* Petitioner's Case Brief at 21 through 26; *see also* Sierra Pacific's Case Brief at 2 through 5.
[62] *See* Preliminary PMS Memorandum at 10.
[63] *See Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances,* 82 FR 51806 (November 8, 2017) (*Lumber V Final Determination*), and accompanying IDM at 49, n. 214.
[64] *See Nexteel Co., Ltd. v. United States*, 355 F. Supp. 3d 1336, 1351 (CIT 2019).

outside the ordinary course of trade[65] is incorrect, because the petitioner and Sierra Pacific failed to prove that: (1) LERs in B.C. and Alberta render the cost of producing softwood lumber in each province as outside the ordinary course of trade; and (2) price distortions caused by LERs in Canada prevent a proper comparison of NV with EP/CEP. These two findings are generally required in order to come to an affirmative PMS finding.[66]

- The alleged market phenomena in the PMS Allegation fail to meet the requirement for an affirmative PMS determination such that these market phenomena are "particular" to the Canadian market and not within the ordinary course of trade, because LERs and government control of forest land are common among other countries worldwide.[67] A party alleging that a PMS exists must find that the circumstances alleged to support an affirmative PMS finding are particular to producers of subject merchandise during the relevant period,[68] and global phenomena that are ongoing are not alone dispositive of a finding that costs are outside the ordinary course of trade.
- The purported B.C. and Canadian LERs are within the ordinary course of trade, and therefore do not create a PMS in B.C., because the B.C. LER has been in place for over 125 years.[69]
- Consistent with the Federal Circuit's findings in *NEXTEEL*,[70] Commerce was correct in rejecting evidence from the petitioner's PMS Allegation that predated the POR, *e.g.*, the *Mosaic Affidavit*, *etc*.
- Finding that a cost-based PMS exists in the instant proceeding would result in a prohibited double remedy with the concurrent CVD proceeding.

**Commerce's Position**: Section 504 of the Trade Preferences Extension Act of 2015 (TPEA) added language to sections 771(15) and 773(e) of the Act that expressly incorporates the concept of PMS into the statutory provisions concerning the ordinary course of trade and constructed value (CV), respectively. Section 771(15) of the Act now states that Commerce "shall consider the following sales and transactions, among others, to be outside the ordinary course of trade: …Situations in which {Commerce} determines that the particular market situation prevents a proper comparison with the export price or constructed export price."[71] The TPEA further amended section 773(e) of the Act to expressly permit Commerce to use an alternative calculation methodology when a PMS exists such that the cost of materials does not "accurately reflect the cost of production in the ordinary course of trade."

[65] *See* Petitioner's Case Brief at 25 (citing petitioner's claim that "common sense" leads to a conclusion that the existence of Crown-origin timber and the legal obstacles to export logs will result in log price suppression); *see also* Sierra Pacific's Case Brief at 3-4.
[66] *See Garg Tube,* 569 F. Supp. 3d at 1202, 1214; *see also Husteel Co., Ltd.,* 471 F. Supp. 3d at 1349 and 1362.
[67] *See* Canadian Parties' Letter, "Factual Information Responding to Petitioner's Allegation of a Particular Market Situation," dated December 6, 2022 (Canadian Parties' PMS Rebuttal) at Exhibit PMS-20 and PMS 21.
[68] *See NEXTEEL*, 28 F.4th at 1234 (citing *SeAH Steel Corp. v. United States*, 315 F. Supp. 3d 1367, 1393 (CIT 2021); *see also Garg Tube*, 569 F. Supp. 3d at 1214.
[69] *See Lumber V CVD AR1* IDM at 220.
[70] *See NEXTEEL*.
[71] *See* section 771(15)(C) of the Act.

Consistent with the *Preliminary Results*, Commerce continues to find that there is insufficient evidence that a PMS existed in Alberta and B.C. during the POR concerning the price of logs as a component of the COP for purposes of CV.

First, we disagree with the petitioner and Sierra Pacific that Commerce did not consider the totality of the information provided in the PMS Allegation.[72] Specifically, with respect to Alberta, in the *Preliminary Results* we stated:

> Almost all of the exhibits provided by the petitioner to substantiate its PMS claim with respect to Alberta…were provided in the PMS allegation of the prior review in which Commerce made a negative PMS finding. In *Lumber {V} {} AR3*,[73] whose record is nearly identical to the record of the instant review, Commerce determined that the petitioner did not provide sufficient evidence to warrant an affirmative PMS finding, and determined that a COP adjustment was therefore not warranted with respect to either mandatory respondent in Alberta. Furthermore, consistent with the prior review, record evidence indicates that the GOA has not denied any request for export of any unmanufactured timber products over the last twelve years, and all export authorizations requested were granted between 2017 and 2021.[74]

Furthermore, with respect to B.C., we stated:

> {I}n the current review all the information in the PMS Allegation predates the POR. For instance, the petitioner argues the Wilson Center Report demonstrates that the prices of logs in B.C. were depressed by up to 27 percent in comparison with world log prices. We note that the report is over six years old, and only reflects a three-month period in 2016. Further, in this review, the petitioner did not respond to the Canadian Parties' claims that almost all export authorizations were authorized during the POR, which undermines the petitioner's argument that LERs impacted the mandatory respondents' log prices in B.C. by creating an artificial surplus of logs available to domestic lumber producers in the province.[75]

Therefore, we did analyze all the information provided in the PMS allegation. As explained in the *Preliminary Results*, as stated above, not only did Commerce review the plain language of the laws which enforce the LERs in Alberta and B.C., but Commerce also reviewed, *inter alia*, the *Mosaic Affidavit*, the reports provided by the petitioner regarding the impact of LERs on the Province of B.C., such as the Wilson Center Report, and the Canadian Parties' comments regarding the authorization of all log exports in Alberta during the POR and most log exports in B.C. We examined and analyzed all the information on the record and have concluded that our analysis properly justifies our determination that there is insufficient evidence that a PMS existed during the POR.[76]

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[72] *See* Petitioner's Case Brief at 23 through 25; *see also* Sierra Pacific's Case Brief at 1 and 5.
[73] We inadvertently referenced the incorrect proceeding in the Preliminary PMS Memorandum. We intended to reference *Lumber AR3 Final*.
[74] *See* Preliminary PMS Memorandum at 8 and 9 (footnotes omitted).
[75] *Id.* at 10 (footnotes omitted).
[76] *Id.* at 10.

Further, we disagree with Sierra Pacific and the petitioner that Commerce put undue weight on the LERs in Alberta and B.C. in its analysis of the PMS Allegation. Specifically, we disagree that the weight provided to our analysis of the LERs is undue because, as we stated in the Preliminary PMS Memorandum, Commerce has discretion in weighing the evidence and may grant considerable weight to contemporaneous evidence when analyzing whether the alleged PMS had an actual effect on a respondent's cost of production.[77] Here, the petitioner did not provide contemporaneous evidence of government intervention in the log market through the denial of log exports and, thus, there was no evidence that the prices of logs in B.C. and Alberta were not being competitively set during the POR.[78] Consistent with the Federal Circuit's analysis in *NEXTEEL*, we placed considerable weight on the fact that there was no contemporaneous evidence of distorted prices. To the contrary, record evidence provided by the Canadian Parties, which Sierra Pacific and the petitioner did not rebut with information concurrent with the instant POR, indicates that all logs in Alberta and a majority of logs in B.C. were authorized for export during the POR, which contradicts Sierra Pacific and the petitioner's claim that government control of land is substantially impacting log prices in Alberta and B.C.[79]

We disagree with the allegations that Commerce did not weigh any of the non-LER factors in its preliminary analysis (*i.e.*, the petitioner's proposed benchmark prices for logs and government control of Crown-origin land in Alberta and B.C.).[80] As we stated in the *Preliminary Results* and consistent with the prior review, we find that the proposed AUV benchmark provided by the petitioner is insufficient in light of the benchmark price used to analyze the LER programs in the companion review of the countervailing duty order (*i.e.*, the Washington State Department of Natural Resources (WDNR) benchmark).[81] Specifically, we determined in *Lumber V CVD AR3* that the Pacific-Northwest Region upon which the WDNR data is based more accurately reflects the stumpage market in B.C. than the petitioner's AUV data.[82]

Additionally, we disagree with the petitioner and Sierra Pacific that government control of Crown-origin land in Alberta and B.C. is indicative that log prices in B.C. and Alberta are not within the ordinary course of trade, and that Commerce overlooked the significance of government ownership of Crown-origin land in coming to its determination in the Preliminary PMS Memorandum. Sierra Pacific and the petitioner claim that the following facts regarding government control of Crown-origin land result in log prices that are not within the ordinary course of trade: (1) the GOA and GBC control the vast majority of Crown-origin land from which the mandatory respondents sourced all or nearly all of their standing timber to produce subject merchandise;[83] (2) the government sets stumpage fees that lumber producers pay for the right to harvest standing timber;[84] and (3) the GBC limits competition for logs in B.C., because log exporters are subject to BCTS auctions through which exporters are restricted to a limit of

[77] *See* Preliminary PMS Memorandum at 10 and n. 56 (citing *NEXTEEL,*38 F.4th 1226).
[78] *Id.* at 10.
[79] *See* PMS Rebuttal at 8; *see also* Preliminary PMS Memorandum at 10.
[80] *See* Sierra Pacific's Case Brief at 4 and 5; *see also* Petitioner's Case Brief at 26.
[81] *See* Memorandum, "Preliminary Decision Memorandum on Particular Market Situation Allegations," dated January 28, 2022, at 16.
[82] *Id*.
[83] *See* Petitioner's Case Brief at 24; *see also* Sierra Pacific's Case Brief at 3 and 4.
[84] *See* Sierra Pacific's Case Brief at 4.

three sales, which results in government-controlled stumpage pricing.[85] However, there is insufficient information on the record to indicate that these facts amount to more than a permit process and impact prices to such an extent that they are outside the ordinary course of trade. In *Lumber AR3 Final*, the *Mosaic Affidavit* demonstrated the economic impacts of the LERs on domestic producers of softwood lumber during the POR, which contributed to our PMS analysis in that review.[86] There is no such contemporaneous evidence on the record of the instant review. Although the AUVs provided by the petitioner are contemporaneous, we rejected them for the above-stated reasons. Additionally, we note that in the investigation, Commerce examined a PMS allegation that included Provincial Governments' alleged intervention in downstream markets for lumber by-products as well as the impact of the Provincial Governments' stumpage programs, which included the governments' majority share of standing timber supplies in Canada.[87] In the investigation, Commerce found that the petitioner insufficiently alleged the existence of the Provincial Governments' interventions in the downstream market and, thus, also declined to find that the Provincial Governments' share of standing timber supplies caused a PMS.[88] In other words, in the investigation, Commerce found that the Provincial Governments' majority share of standing timber supplies was not a sufficient basis to find that a PMS existed, and the petitioner has provided no new information that would lead us to reach a different conclusion here. Therefore, we find there is insufficient evidence provided by the petitioner that government control (such as ownership of government land, the setting of stumpage fees by the GOA and GBC, and the setting of sales limits in the BCTS auctions) suppressed log prices in Alberta and B.C.

Commerce also notes that it considered not only the evidence provided by the petitioner regarding investigations and reviews of the instant AD proceeding, but the arguments put forward by the petitioner, the Canadian Parties, and the respondents regarding the companion CVD proceeding.[89] As noted by the Canadian Parties, in *Lumber V CVD AR4*,[90] we determined that the net countervailable subsidy calculated for West Fraser and Canfor for the LER program was not measurable. Consistent with our analysis of the petitioner's PMS allegation in *Lumber V AR3 Final*, because the petitioner and the Canadian Parties rely on findings in current and previous proceedings in *Lumber V CVD*, our findings in the companion CVD review are relevant and instructive in the instant review.[91] Therefore, we find the lack of measurable countervailing subsidies with respect to the LER program in Alberta and B.C. to be indicative that the LERs do not have a measurable effect on log prices in either province, and undermine the petitioner's PMS allegation.

[85] *Id*.
[86] *See Lumber AR3 Final* IDM at 16 and 17.
[87] *See Lumber V Final Determination* IDM at Comment 17.
[88] *Id*. at 49 and n. 214.
[89] *See* Petitioner's Case Brief at 24; *see also* Sierra Pacific's Case Brief at 4.
[90] *See Certain Softwood Lumber Products from Canada: Preliminary Results, Partial Rescission, and Preliminary Intent to Rescind, in Part, the Countervailing Duty Administrative Review, 2021*, 88 FR 5302 (January 27, 2023), and accompanying PDM at 19 through 20, unchanged *Certain Softwood Lumber Products from Canada: Final Results and Final Rescission, in Part, of the Countervailing Duty Administrative Review; 2021*, (unpublished) and accompanying IDM dated concurrently with this memorandum.
[91] *See Lumber AR3 Final* IDM at 15.

Finally, we disagree with Sierra Pacific that Commerce applied an incorrect standard in analyzing the instant PMS allegation.[92] Pursuant to section 773(e) of the Act, our analysis directly addresses the question of whether the cost of production of subject merchandise accurately reflects the cost of production in the ordinary course of trade. Specifically, the absence of any indication of widespread denial of export applications during the POR implies that there were not *de facto* restrictions on the stumpage market. Moreover, we disagree that our analysis of the PMS Allegation was inconsistent with our PMS determination in *Lumber AR3 Final* because, unlike in the previous POR, there is no record evidence concurrent with the instant POR that indicates that LERs in Alberta and B.C. created significant restrictions to log exports in either province that would potentially indicate that a PMS exists. Therefore, for the final results, we continue to find that there is insufficient evidence that LERs in Alberta and B.C. created a PMS during the POR. Lastly, because Commerce determines that there is insufficient evidence to support an affirmative PMS finding, we regard the Canadian Parties' arguments regarding double remedy as moot.

**Comment 2: The Cohen's *d* Test is Not Contrary to Law**

*GOC*[93] *and Central Canada*[94]

- Commerce failed its statutory obligation to engage in reasoned decision-making based upon record evidence, along with an explanation of the basis of its decision making when applying its differential pricing analysis in the *Preliminary Results.*
- Commerce unlawfully calculated weighted-average dumping margins for the mandatory respondents using the average-to-transaction (A-to-T) methodology which Congress only intended for use to address "targeted" dumping.
- Specifically, Commerce's application of the Cohen's *d* test was unlawful and flawed. In applying the Cohen's *d* test, Commerce used data that did not meet the three assumptions on which the Cohen's *d* test is based: whether the data in the comparison groups fall within a normal distribution, whether the data contain a sufficient number of observations, and whether the groups have roughly equal variances. Commerce failed to test or control to ensure that any of these three conditions were met.
- As has been recognized by the Federal Circuit in *Stupp II,*[95] the Cohen's *d* test relies on the assumption that the groups being compared contain normally distributed data, are sufficiently large, and of roughly equal variances.
- The Federal Circuit noted, in *Stupp II*, that the Cohen's *d* test is only appropriate and reasonable when the two populations that are being compared are assumed to have equal variances and size, as well as an adequate number of observations. Otherwise, it would tend to inflate pass rates, and consequently, weighted-average dumping margins.
- In the *Preliminary Results*, had Commerce examined the criteria required in *Stupp II,* it would have seen that the comparisons of Canfor and West Fraser's data do not satisfy the required assumptions of the Cohen's *d* test, *e.g.*, the respondents' prices have a non-normal distribution, insufficient observations and unequal variances.

[92] *See* Sierra Pacific's Case Brief at 3.
[93] *See* Government of Canada's Case Brief at 5-30.
[94] *See* Central Canada's Case Brief at 5-24.
[95] *See Stupp Corp. v. United States*, 5 F.4th 1341 (Fed. Cir. 2021) (*Stupp II*).

- Central Canada specifically notes that there is a report from a qualified statistician, Professor Larry Hedges, on the record of this proceeding where he examines whether Commerce's use of Cohen's *d* can be reliable in identifying significant price differences in international trade analysis when the underlying statistical assumptions upon which the Cohen's *d* test were developed, *e.g.*, are not satisfied.
- Central Canada also specifically argues that Commerce has incorrectly taken a behavioral sciences test, *i.e.*, Cohen's *d* test, and applied it to economic and commercial facts.
- In the *Preliminary Results*, Commerce interpreted the results of the Cohen's *d* test as though the required statistical assumptions (distribution, size and variance), were met, even though they were not. Therefore, Commerce's reliance on the results of the Cohen's *d* test is unreasonable as applied to West Fraser and Canfor's data.
- Commerce can test for these assumptions in the following ways through the following types of SAS programming: eliminating test groups that do not have a sufficient observation size, eliminating test groups without roughly equal variances, eliminating test groups when either the test group or matching control group does not demonstrate a normal distribution, and testing for normal distribution by looking to the data that fall within standard deviations from the mean in each group.
- In other proceedings, Commerce has explained its use of the Cohen's *d* test by saying that Commerce does not estimate the Cohen's *d* coefficient, but calculates the coefficient based on the population of sales prices. However, Commerce is comparing samples in the Cohen's *d* test, not populations and, regardless, the statistical assumptions would still be required to be met.
- Further, in other proceedings, they allege that Commerce has claimed that violating assumptions of normality and equal variances does not impact its application of the Cohen's *d* test. However, this alleged claim is incorrect as even minor deviations from statistical assumptions can impact the accuracy of the Cohen's *d* test.
- Rather than using a simple average, Commerce should also recalculate the Cohen's *d* denominator using a weighted average when the test groups are of unequal size. A simple average calculation disregards the comparative sizes of test and control groups and gives undue weight to the group producing less accurate standard deviations. The Federal Circuit has rejected Commerce's explanation for simple averaging in *Mid Continent III* and *Mid Continent V*.[96]
- The consequences of Commerce's differential pricing analysis impact more than the mandatory respondents because if the *Preliminary Results* are adopted in the final results without modification to the differential pricing analysis, then a large number of Canadian lumber companies will have to post unwarranted cash deposits.
- In the final results, Commerce must analyze whether the assumptions of the Cohen's *d* test are satisfied before applying the test, must not use the test when those assumptions fail or provide an explanation as to why reliance on the Cohen's *d* test is reasonable in light of the required assumptions not being met.

[96] *See Mid Continent Steel & Wire, Inc. v. United States,* 940 F.3d 662 (Fed Cir. 2019) (*Mid Continent III*); *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367 (Fed. Cir. 2022) (*Mid Continent V*).

*Canfor and West Fraser*[97]

- Canfor and West Fraser endorse and incorporate, by reference, the Canadian parties' position in their brief that Commerce's application of its differential pricing analysis has been found contrary to law by the Federal Circuit.

*Rebuttal*

*Petitioner*[98]

- Commerce's differential pricing analysis is an important tool to address masked dumping. The Federal Circuit, in *Stupp II*, recognized that there is no statutory language telling Commerce how to detect patterns of significantly differing export prices or how to aggregate and quantify pricing comparisons across product groups.
- Canfor, West Fraser, Central Canada and the GOC argue that the Cohen's *d* test violates the assumptions of sufficient number of observation, size, normality and equal variance and that Commerce has never provided a reasonable explanation for using Cohen's *d* test when these assumptions are not met. These Canadian parties also argue that the differential pricing analysis is inconsistent with Federal Circuit precedent, and that this precedent requires different results for the final results.
- Contrary to these arguments, there is no judicial precedent that limits Commerce's ability to apply the Cohen's *d* test. *Stupp II* does not require that Commerce cease using the Cohen's *d* test, nor does any court decision limit Commerce's ability to apply its Cohen's *d* test.
- The Canadian parties and the GOC mischaracterize the Federal Circuit's holding in *Stupp II*. The Federal Circuit merely requested further explanation as to why Commerce's application of the Cohen's *d* test did not require the underlying data to satisfy the statistical criteria. On remand, Commerce found that the statistical criteria of normality of distribution, the sufficient number of observations and the homogeneity of variances are not relevant to Commerce's Cohen's *d* test. The CIT affirmed Commerce's remand determination and noted that Congress delegated authority to Commerce to determine where prices differ significantly.[99]
- In the recent *Steel Nails from India* final determination,[100] Commerce addressed arguments regarding the same statistical criteria identified in this review by the Canadian parties and Commerce found that normality of distribution, number of observations and equal variances are not relevant to the Cohen's *d* test.
- The statistical criteria with respect to sample size, equivalent variances and normal distribution are not relevant to the Cohen's *d* test in this POR, as the calculated effect size is based on the entire universe of the respondents' U.S. sale prices and is not an estimate based on sampled data.

[97] *See* Canfor's Case Brief at 13-20; *see also* West Fraser's Case Brief at 1-12.
[98] *See* Petitioner's Rebuttal Brief at 14-23.
[99] *See Stupp Corp. v. United States,* 619 F. Supp. 3d 1314 (CIT 2023) (*Stupp III)*, appeal docketed Federal Circuit No. 2023-1663 (March 27, 2023).
[100] *See Certain Steel Nails from India: Final Affirmative Determination of Sales at Less Than Fair Value*, 87 FR 78937 (December 23, 2022).

- Commerce should reject arguments regarding the Cohen's *d* test, as well as the GOC's proposed changes to the SAS programming that would undermine Commerce's practice for determining the significance of price differences.
- Commerce should reject arguments calling for the denominator of the Cohen's *d* coefficient to be calculated using a weighted average as unwarranted. The arguments for a weighted average are rooted in the Federal Circuit's decision in *Mid Continent V*, where the Federal Circuit remanded Commerce's adoption of simple averaging for further explanation. On remand, Commerce continued to rely on a simple average to calculate the denominator of the Cohen's *d* coefficient when sampling is not used, the standard deviations of the full populations are known, and the standard deviations of both populations are not equal.

**Commerce's Position:** We disagree with the GOC, Central Canada Canfor, and West Fraser on this issue. For the final results, we have continued to apply the Cohen's *d* test as part of our differential pricing analysis in our calculations.

As an initial matter, we note that there is nothing in section 777A(d) of the Act that mandates how Commerce measures whether there is a pattern of prices that differ significantly or explains why the A-to-A method cannot account for such differences. On the contrary, carrying out the purpose of the Act[101] requires a gap filling exercise properly conducted by Commerce.[102] As explained in the *Preliminary Results*, as well as in various other proceedings,[103] Commerce's differential pricing analysis, including the use of the Cohen's *d* test, is reasonable and not contrary to the law.[104]

In carrying out the statutory objective, Commerce determines whether "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and … explains why such differences cannot be taken into account using {the A-to-A comparison method}."[105] Commerce finds that the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method is the appropriate

[101] *See Koyo Seiko Co. v. United States,* 20 F.3d 1156, 1159 (Fed. Cir. 1994) ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as 'masked dumping.' By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently--sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result." (internal citations omitted)).

[102] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842-43 (1984) (recognizing deference where a statute is ambiguous and an agency's interpretation is reasonable); *see also Apex Frozen Foods Private Limited v. United States*, 37 F. Supp. 3d 1286, 1302 (CIT 2014) (applying Chevron deference in the context of the Commerce's interpretation of section 777A(d)(1) of the Act).

[103] *See, e.g*., *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015-2016,* 83 FR 17146 (April 1, 2018), and accompanying IDM at Comment 8; *Welded Line Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2017-2018,* 85 FR 76517 (November 30, 2020), and accompanying IDM at Comment 4; and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 32937 (June 10, 2015), and accompanying IDM at Comments 1 and 2.

[104] *See Preliminary Results*.

[105] *See* section 777A(d)(1)(B) of the Act.

method to determine if, and if so, to what extent, a given respondent is dumping the subject merchandise in the U.S. market.[106]

A. The Statistical Criteria

We disagree that the Federal Circuit findings in *Stupp II* require Commerce to change its application of the Cohen's *d* test. The Federal Circuit in *Stupp II* did not find that Commerce's use of the Cohen's *d* test is unlawful. Specifically, in *Stupp II*

> {Plaintiff} challenges Commerce's use of the 0.8 cutoff for determining whether particular results "pass" the Cohen's *d* test. {Plaintiff} has two arguments: First, {Plaintiff} argues that Commerce's selection of the 0.8 cutoff was arbitrary. Second, {Plaintiff} argues that Commerce's application of the 0.8 cutoff in this case was unsupported by evidence because Professor Cohen's suggestion that "0.8 could be considered a 'large' effect size" was limited to comparisons involving data that met certain restrictive conditions — "in particular, that the datasets being compared had roughly the same number of data points, were drawn from normal distributions, and had approximately equal variances." According to {Plaintiff}, none of those conditions were satisfied in this case.[107]

The Federal Circuit dismissed the first argument that the 0.8 threshold was arbitrary as it had already spoken to that question:

> We addressed the crux of {Plaintiff's} first argument in our decision in Mid Continent … We held that "the 0.8 standard is 'widely adopted' as part of a 'commonly used measure' of the difference relative to such overall price dispersion . . . . {I}t is reasonable to adopt that measure where there is no better, objective measure of effect size."[108]

Concerning Plaintiff's second argument, the Federal Circuit held:

> We agree that there are significant concerns relating to Commerce's application of the Cohen's *d* test in this case and, more generally, in adjudications in which the data groups being compared are small, are not normally distributed, and have disparate variances. Our concerns raise questions about the reasonableness of Commerce's use of the Cohen's *d* test in less-than-fair-value adjudications, warranting further supporting explanation from the Department.[109]

Accordingly, the Federal Circuit remanded the issue to Commerce, directing the agency:

> to explain whether the limits on the use of the Cohen's d test prescribed by Professor Cohen and other authorities were satisfied in this case or whether those limits need not be

[106] *See* 19 CFR 351.414(c)(1).
[107] *See Stupp II*, 5 F.4th at 1356 (internal citations omitted).
[108] *Id.* 5 F.4th at 1356-57 (internal citations omitted).
[109] *Id.* 5 F.4th at 1357.

> observed when Commerce uses the Cohen's *d* test in less-than-fair-value adjudications. In that regard, we invite Commerce to clarify its argument that having the entire universe of data rather than a sample makes it permissible to disregard the otherwise-applicable limitations on the use of the Cohen's *d* test.[110]

The Federal Circuit's was concerned that:

> Commerce's application of the Cohen's *d* test to data that do not satisfy the assumptions on which the test is based may undermine the usefulness of the interpretive cutoffs. In developing those cutoffs, including the 0.8 cutoff, Professor Cohen noted that "we maintain the assumption that the populations being compared are normal and with equal variability, and conceive them further as equally numerous."[111]
>
> While Commerce is correct that it does not "sample" data, that observation does not address the fact that Professor Cohen derived his interpretive cutoffs under the assumption of normality. Nor does it address {Plaintiff's} representation that Commerce's analysis in this case violated Professor Cohen's other assumptions, homogeneity-of-variances and the number of observations being compared. {…} Violating those assumptions can subvert the usefulness of the interpretive cutoffs, transforming what might be a conservative cutoff into a meaningless comparator.[112]

In *Stupp II*, based on the panel's understanding that Dr. Cohen based his proposed thresholds, including the large, 0.8 threshold, using the three statistical criteria, the Federal Circuit concluded that an analysis which is dependent on those thresholds would require data which would also satisfy those three statistical criteria. However, the plaintiff asserted that its sale price data in the test and comparison groups used in the Cohen's *d* test did not meet those three statistical criteria. Accordingly, the Federal Circuit remanded the issue for Commerce to explain whether the plaintiff's sale prices meet these statistical criteria, or to explain whether it is permissible to disregard the statistical criteria in its application of the Cohen's *d* test.

Likewise, Canadian parties in the instant review claim that respondents' sale prices do not meet the three statistical criteria.[113] Therefore, Canadian parties assert that Commerce is not permitted to use the Cohen's *d* test as part of the differential pricing analysis, and, consequently, Commerce may not resort to the application of the alternative, average-to-transaction method to calculate the weighted-average dumping margins in the final results of this review.

Commerce finds that the academic literature,[114] and specifically Dr. Cohen's *Statistical Power Analysis for the Behavioral Sciences*, does not support the proposition that Dr. Cohen developed

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[110] *Id.* 5 F.4th at 1360.
[111] *Id.* 5 F.4th at 1357 (citing *Cohen* at 21).
[112] *Id.* 5 F.4th at 1360.
[113] See GOC Case Brief at 8 ("The Department did not ensure that the assumptions on which the reliability of the interpretive cutoffs of the Cohen's *d* coefficient depend were satisfied.")
[114] *See* GOC Submission, "Submission of Factual Information," dated December 27, 2022 (GOC NFI Submission). This submission includes at Exhibit 7 Cohen, Jacob, *Statistical Power Analysis for the Behavior Sciences*, Second

his thresholds to interpret his *d* coefficient of effect size using the assumptions of normality, similarity of variances, and sufficient number of observations. Dr. Cohen proposed his small, medium, and large thresholds as a convention where he expected that, while "arbitrary," the thresholds "will be found to be reasonable by reasonable people."[115] The actual numerical values for Dr. Cohen's proposed thresholds (*i.e.*, 0.2, 0.5, and 0.8 for small, medium, and large effects, respectively) were not based on calculated results or statistical analyses, but were threshold numbers that Dr. Cohen proposed because he considered that they will be found reasonable by others.[116] Having reviewed Dr. Cohen's text, we find no basis to conclude that the statistical criteria, which raised concerns before the Federal Circuit in *Stupp II*, were part of Dr. Cohen's selection of these proposed conventions.

On the other hand, the purpose of the statistical criteria is to determine whether the analysis results (*e.g.*, the mean), which are based on sampled data, are representative of the results if the analysis had been based on the full population of data. The role of the statistical criteria (*i.e.*, the type of distribution, variance(s) and number of observations) is to be part of the analysis to determine the "reliability of {the} sample results."[117] Commerce's application of the Cohen's *d* test, including Dr. Cohen's large, 0.8, threshold, do not require addressing the statistical criteria. Because the prices used in the Cohen's *d* test include all prices of comparable merchandise for the test and comparison groups, there is no role for the statistical criteria to examine whether the calculated results are reliable and representative of the results if calculated on the full populations of data.

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Edition, Lawrence Erlbaum Associates (1988) (*Cohen*); Exhibit 19: Ellis, Paul D., *The Essential Guide to Effect Sizes: Statistical Power, Meta-Analysis, and the Interpretation of Research Results*, Cambridge University Press, 2010 (*Ellis*); Exhibit 8: Coe, Robert, "It's the Effect Size Stupid: What Effect Size Is and Why It Is Important," paper presented at the Annual Conference of the British Educational Research Association (September 2002) (*Coe*); Exhibit 5: Grissom, Robert J. and Kim, John J., *Effect Size for Research, Univariate and Multivariate Applications*, Second Edition, San Francisco State University (2012) (*Grissom*); Exhibit 1: Hedges, Larry V., "Review and Analysis of the Cohen's *d* Test as Used in the U.S. Department of Commerce's Differential Pricing Methodology" (Hedges Report); Exhibit 3: Algina, James, Keselman, H.J., and Penfield, Randall D., "An Alternative to Cohen's Standardized Mean Difference Effect Size: A Robust Parameter and Confidence Interval in the Two Independent Groups Case," Psychological Methods, Volume 10, Number 3, pp. 317-328 (2005) (*Algina*).

[115] *See Cohen* at 13.

[116] *See Mid Continent III* ("{T}he 0.8 standard is 'widely adopted' as part of a 'commonly used measure' of the difference relative to such overall price dispersion; and it is reasonable to adopt that measure where there is no better, objective measure of effect size. We agree with the Trade Court that this rationale adequately supports Commerce's exercise of the wide discretion left to it under {section 777A(d)(1)(B) of the Act}." (citing *Certain Steel Nails from Taiwan: Final Determination of Sales at Less Than Fair Value*, 80 FR 28959 (May 20, 2015), and the accompanying IDM at 25-26 ("In 'Difference Between Two Means,' the author states that 'there is no objective answer' to the question of what constitutes a large effect. Although {respondent} focuses on this excerpt for the proposition that the 'guidelines are somewhat arbitrary,' the author also notes that the guidelines suggested by Cohen as to what constitutes a small effect size, medium effect size, and large effect size 'have been widely adopted.' The author further explains that Cohen's *d* is a 'commonly used measure{}' to 'consider the difference between means in standardized units.'" (quoting *Lane* at 1-2)))); *see* also *Stupp II*, 5 F.4th at 1357 ("We held that 'the 0.8 standard is 'widely adopted' as part of a 'commonly used measure' of the difference relative to such overall price dispersion . . . . {I}t is reasonable to adopt that measure where there is no better, objective measure of effect size.'" (internal citations omitted))

[117] *See Cohen* at 6.

Dr. Cohen presents the concept of a "power analysis,"[118] which tests the null hypothesis to determine whether a phenomenon in a population exists based on sample data.[119] In Commerce's Cohen's *d* test, the "phenomenon" is the difference in prices between the test and comparison groups, and the null hypothesis is that the difference in prices is equal to zero (*i.e.*, identical). Rejection of the null hypothesis would indicate that there is a non-zero difference in the prices between the two groups.

A power analysis is dependent on three parameters: (1) the significance criterion;[120] (2) the reliability of the sampled data;[121] and (3) the effect size.[122] The first two parameters of the power analysis, the significance criterion and the reliability of the sample data, evaluate whether the results based on sampled data reliably represent the phenomenon in the full population of data.[123] This "statistical inference" is dependent on the probability of rejecting a true null hypothesis (*i.e.*, significance criterion), the sample size, and for the difference of the means analysis, the shape of the population distribution (*i.e.*, normality and variance).[124] In Commerce's Cohen's *d* test, statistical inferences are not relevant to determine whether the results of the analysis are representative because each test and comparison group include all of the respondent's prices of comparable merchandise during the period of investigation or review that are used to calculate the weighted-average dumping margin for the respondent.

The effect size is the "*degree* to which the phenomenon is present in the population,"[125] where the "larger this value, the greater the *degree* to which the phenomenon under study is manifested."[126] In the Cohen's *d* test, if the null hypothesis is rejected, then the result of the analysis is that the prices differ by some non-zero amount. The extent that the prices differ between the two groups is measured by the effect size.

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[118] *Id.* at 1 (Dr. Cohen's purpose is "to provide a self-contained comprehensive treatment of statistical power analysis from an 'applied' viewpoint" where the "power of a statistical test is the probability that it will yield statistically significant results.").

[119] *Id.* (In general, the result that is sought is based on a test of the null hypothesis, "*e.g.*, 'the hypothesis that the phenomenon to be demonstrated is in fact absent'" but whereas a researcher "typically hopes to 'reject' this hypothesis and thus 'prove' that the phenomenon in question is in fact present." (internal citation omitted)) and 4 ("*The power of a statistical test of a null hypothesis is the probability that it will lead to the rejection of the null hypothesis*, *i.e.*, the probability that it will result in the conclusion that the phenomenon exists." (emphasis in the original)).

[120] *Id.* at 4 ("{T}he significance criterion represents the standard of proof that the phenomenon exists, or the risk of mistakenly rejecting the null hypothesis." "{I}t is the rate of rejecting a true null hypothesis," *e.g.*, a Type I error.)

[121] *Id.* at 6 ("The reliability (or precision) of a sample value is the closeness with which it can be expected to approximate the relevant population value. It is necessarily an estimated value in practice, since the population value is generally unknown. Depending upon the statistic in question, and the specific statistical model on which the test is based, reliability may or may not be directly dependent upon the unit of measurement, the population value, and the shape of the population distribution. However, it is *always* dependent upon the size of the sample." (emphasis in the original))

[122] *Id.* at 9-10 (the "effect size {means} 'the *degree* to which the phenomenon is present in the population,' or 'the degree to which the null hypothesis is false.'" (emphasis in the original)).

[123] *Id.* at 1-2 (One cannot ignore "the necessarily probabilistic character of *statistical inference*" and that the "{r}esults from a random sample drawn from a population will only approximate the characteristics of the population." (emphasis added)).

[124] *Id.* at 19-20.

[125] *Id.* at 9 (emphasis in original); *see also Ellis* at 4-5 ("An effect size refers to the magnitude of the result as it occurs, or would be found, in the population.").

[126] *See Cohen* at 10 (emphasis in original).

"To this point, the {effect size} has been considered quite abstractly as a parameter which can take on varying values (including zero in the null case). In any given statistical test, it must be indexed or measured in some defined unit appropriate to the data, test, and statistical model employed."[127] Dr. Cohen prompts the researcher to respond to the question, "How large an effect do I expect *exists in the population*?"[128] "{The researcher} may initially find it difficult to answer the question even in general terms, *i.e.*, 'small' or 'large,' let alone in terms of the specific {effect size} index demanded."[129] The answer to such a question may depend upon resources available to the researcher. Alternatively, Dr. Cohen proposed "*as a convention*, {effect size} values to serve as operational definitions of the qualitative adjectives 'small,' 'medium,' and 'large.' This is an operation fraught with many dangers: The definitions are arbitrary, such qualitative concepts as 'large' are sometimes understood as absolute, sometimes as relative; and thus they run a risk of being misunderstood."[130] Nonetheless, Dr. Cohen emphasizes that "{a}lthough arbitrary, the proposed conventions will be found to be reasonable by reasonable people."[131]

Dr. Cohen's presents the layout of his presentation of effect size as a component of a power analysis:

> Each of the Chapters 2-10 will present in some detail the {effect size} index appropriate to the test to which the chapter is devoted. Each will be translated into alternative forms, the operational definitions of 'small,' 'medium,' and 'large' will be presented, and examples drawn from various fields will illustrate the test. This should serve to clarify the {effect size} index involved and make the methods and tables useful in research planning and appraisal.[132]

Specifically, as "seen in Chapter 2, the {effect size} index for *differences between population means* is standardized by division by the common within-population standard deviation (σ)."[133] Thus, Dr. Cohen's *d* coefficient is a standardized, unitless ratio of the difference in the means divided by some measure of the dispersion of the data,[134] all of which represent a phenomenon in the population.

For an analysis based on the difference of the means, Dr. Cohen proposed that numerical thresholds define a small, medium, and large effect, *i.e.*, 0.2, 0.5, and 0.8 respectively.[135] As discussed above, these numerical thresholds are arbitrary, but Dr. Cohen expected that they

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[127] *Id.* at 11.
[128] *Id*. at 12 (emphasis added) and at 20-21.
[129] *Id.*
[130] *Id.* (emphasis in original).
[131] *Id.* at 13.
[132] *Id.* at 13-14.
[133] *Id.* at 11 (emphasis added); *see* also *Id.* at 20 ("σ = the standard deviation of either population (since they are assumed equal)").
[134] *Id.* at 21 ("Since both numerator and denominator are expressed in scale units, these 'cancel out,' and *d* is a pure number (here a ratio), freed of dependence upon any specific unit of measurement.").
[135] *See Cohen* at 24-27.

would be found reasonable by reasonable people.[136] Indeed, these thresholds have been "widely accepted" as recognized in *Mid Continent III*, and "Cohen's cut-offs provide a good basis for interpreting effect size and for resolving disputes about the importance of one's results."[137] Further, the academic literature provides no evidence that the values themselves or their use are dependent on statistical analysis or the application of the statistical criteria as argued by the plaintiff in *Stupp II*. Indeed, their usefulness is based on their acceptance within the academic community.

Dr. Cohen provided different approaches to illustrate his proposed small, medium and large effect size thresholds. Dr. Cohen's first approach is based on the concept of "percent nonoverlap," where Dr. Cohen posits:

> If we maintain the assumption that the populations being compared are normal and with equal variability, and conceive them further as equally numerous, it is possible to define measures of nonoverlap (U) associated with *d* which are intuitively compelling and meaningful.[138]

For the percent non-overlap, Dr. Cohen conceives two bell curves (*i.e.*, two normal distributions) where the difference in the means is the difference between the peaks of each bell curve.[139] The area underneath one bell curve that is not also underneath the second bell curve is the percent nonoverlap. Dr. Cohen's assumptions that each population be normally distributed, have equal variances, and be equally numerous (rather than a probability function) is to permit the calculation of the area of the nonoverlap of the two bell curves. A normally distributed bell curve is defined by a specific probability function, which when the variance of the bell curve is known, allows for the calculation of the area underneath that curve. Likewise, when two bell curves are placed over one another, and both bell curves are normally distributed with equal variances, then the percent non-overlap, just like the percent overlap (*i.e.*, the area common under both curves) can be calculated. The assumptions of normality and homoscedasticity are required to enable the calculation of the percent (*i.e.*, area) of non-overlap as one approach to illustrate different effect size values.[140] These limitations do not apply to Dr. Cohen's development of his proposed thresholds themselves. The percent non-overlap does not define the small, medium or large thresholds, but only serves to illustrate in a very understandable

[136] *See Ellis* at 41 ("Cohen's effect size classes have two selling points. First, they are easy to grasp. You just compare your numbers with his thresholds to get a ready-made interpretation of your result. Second, although they are arbitrary, they are sufficiently grounded in logic for Cohen to hope that his cut-offs 'will be found to be reasonable by reasonable people'" (internal citation omitted)).
[137] *Id.* at 40.
[138] *Id.* at 21-23.
[139] Note that because Dr. Cohen's assumptions to calculate the non-overlap of the two curves require normal distributions and equal variances, the areas underneath each curve is equal and the only difference between the two curves is the mean of each normal distribution.
[140] *Id.* at 22 and Table 2.2.1 (which presents the percent nonoverlap for various values of the Cohen's *d* coefficient. For example, for $d = 0$, the percent nonoverlap is 0.0 percent, *i.e.*, the bell curves lie completely on top of each other. For $d = 0.8$, the percent nonoverlap is 47.4 percent, or, in other words, almost half of the area under each of the bell curves is not common to both distributions).

visual presentation of the difference in two groups of data which represent different degrees of effect size.[141, 142]

Dr. Cohen second approach is to provide "operational definitions" to illustrate small, medium, or large effects. The first is an observational description, where, for example, a "medium effect size is conceived as one large enough to be visible to the naked eye"[143] and a large difference is "grossly perceptible."[144] To illustrate these operations definitions, Dr. Cohen provides real-life situations where small, medium and large effect sizes have been found to exist. These involve the differences in the IQs of various groups of people or the differences in the heights of various ages of teenage girls.[145] These illustrative examples do not link Dr. Cohen's thresholds with the statistical criteria, as the 0.8 effect, which has been observed is for the population of, for example, all Ph.D. holders and college freshmen. Certainly, when the data on the IQs of these two groups of people were collected, it was not collected from everyone who met those group definitions, but it would have been collected from a selected sample from each group. The results of the analysis would have been calculated based on the sampled data from each group, and also, through statistical inferences, the representativeness of those results for the entire populations would have been determined. If the statistical analysis of the sampled data demonstrated that the sample-based results are representative of the population, then the sample-based results would be applied to the entire populations of Ph.D. holders and college freshmen. This use of statistical inference, however, is necessary to ensure that the sample is representative of the full universe of data, but it was not part of Dr. Cohen's proposed small, medium, and large thresholds, which are numerical values that have been widely accepted in the academic community.

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[141] Similar to the measure of the percent non-overlap, we note that the Federal Circuit also raised the measure of the "percentile standing." *See Stupp II*, 5 F.4th at 1358 (quoting *Grissom* at 66 ("When the distribution of scores of a comparison population is not normal, the usual interpretation of a $d_G$ or $d$ in terms of estimating the *percentile standing* of the average-scoring members of another group with respect to the supposed normal distribution of the comparison group's scores would be" (emphasis added)). As with the measure of the percent non-overlap, the calculation of the percentile standing is dependent on the normal distribution and equal variances of the two groups to permit the calculation of the areas beneath the bell curves. *See Grissom* at 62.

[142] Dr. Hedges critiques Commerce's conclusion, stating that "when the assumptions of normality and equal standard deviations are not met, Cohen's interpretations of *d*, including his conventions for small, medium, and large effect sizes (which are based on those assumptions) cannot be relied upon." *See* Hedges Report, Appendix II, at (iii). Commerce does not disagree with Dr. Hedges statements that normality and equal variances are assumptions underpinning both *Cohen*'s percent non-overlap and *Grissom*'s percentile standing. Indeed, these assumptions are required in order to quantify the measures of non-overlap ($U_1$) and percentile standing ($U_3$). However, while each of these measures may be used to interpret a given value for Dr. Cohen's *d* coefficient, these measures were not used by Dr. Cohen in the development of his proposed thresholds of small, medium and large. Nor does Commerce rely on these measures to support its use of Dr. Cohen's large, 0.8, threshold, which, as discussed above, is based on Dr. Cohen's "operational definitions" of these thresholds. *See Cohen* at 24-27.

[143] *See Cohen* at 26.

[144] *Id.* at 27.

[145] For example, a large effect "is represented by the mean IQ difference estimated between holders of the Ph.D. degree and typical college freshmen, or between college graduates and persons with only a 50-50 chance of passing in an academic high school curriculum. These seem like grossly perceptible and, therefore, large differences, as does the mean difference in height between 13- and 18-year-old girls, which is of the same size ($d = 0.8$)." *Cohen* at 27 (internal citation omitted).

It is important to note that Dr. Cohen's assumptions that are required to calculate the percent non-overlap is the source of the quote by the Federal Circuit in *Stupp II*:

> Commerce's application of the Cohen's *d* test to data that do not satisfy the assumptions on which the test is based may undermine the usefulness of the interpretive cutoffs. In developing those cutoffs, including the 0.8 cutoff, Professor Cohen noted that "*we maintain the assumption that the populations being compared are normal and with equal variability, and conceive them further as equally numerous*."[146]

As discussed above, the assumptions which the Federal Circuit links with Dr. Cohen's development of his proposed thresholds properly relate to the calculation of the percent non-overlap, not with Dr. Cohen's 0.2, 0.5 and 0.8 numerical thresholds for small, medium and large effects, respectively. Dr. Cohen realized that his proposed thresholds were arbitrary, and foresaw that these thresholds may be questioned, but believed that they would be found to be reasonable by reasonable people. Indeed, in practice, Dr. Cohen's thresholds have found been widely accepted, and the Federal Circuit has also accepted that these thresholds are not arbitrary and reasonable:

> {T}he 0.8 standard is "widely adopted" as part of a "commonly used measure" of the difference relative to such overall price dispersion; and it is reasonable to adopt that measure where there is no better, objective measure of effect size.[147]

The statistical criteria that are at issue in *Stupp II* are not relevant to Commerce's use of the Cohen's *d* test. As presented in the academic literature, Dr. Cohen's development of his effect size thresholds was not based on the statistical criteria. Further, because the sale prices used in Commerce's Cohen's *d* test encompass the full universe of sale prices for each test and comparison group,[148] the parameters calculated based on the test and comparison groups are not estimates of the population values but are the actual values of the population parameters; therefore, statistical inference is not relevant to the calculations performed in Commerce's Cohen's d test. Accordingly, we find no evidence to support the Canadian parties' arguments that Commerce must account for the statistical criteria when it uses the Cohen's *d* test.

Moreover, the Cohen's *d* test is only one part of Commerce's differential pricing analysis, which also includes the ratio test and the meaningful difference test. The Cohen's *d* test determines whether prices differ significantly, the ratio test determines whether there is a pattern, and the meaningful difference test determines whether the average-to-average method can account for the price differences in the respondent's pricing behavior in the U.S. market. In *Stupp III*, based

[146] *See Stupp II*, 5 F.4th at 1357 (quoting *Cohen* at 21) (emphasis added).
[147] *See Mid Continent III*, 940 F.3d at 673 (internal citation omitted).
[148] As noted above, the sale prices in each test and comparison group encompass all of the sale prices of comparable merchandise during the period of investigation or review to each purchaser, region or time period, and these sale prices encompass all of the U.S. prices which are the basis for the calculation of the respondent's weighted-average dumping margin.

on that further explanation, Commerce's use of the Cohen's *d* test was affirmed as lawful.[149] Although the GOC and Central Canada may disagree with the CIT's analysis in that opinion, their disagreement does not render the decision invalid.

Nothing in the Canadian parties' case briefs or the Hedges Report demonstrates that Dr. Cohen developed his thresholds based on the assumptions of normality, similarity of variances and sufficient number of observations.[150] The Federal Circuit remanded this issue and provided "Commerce an opportunity to explain whether the limits on the use of the Cohen's *d* test prescribed by Professor Cohen and other authorities were satisfied in this case or whether those limits need not be observed when Commerce uses the Cohen's *d* test in less-than-fair-value adjudications."[151] Commerce has explained that the statistical criteria were not part of Dr. Cohen's development of his proposed thresholds, nor are they relevant to Commerce's calculation of the Cohen's *d* coefficient as those calculations include the full universe of prices in each of the test and comparison groups and thus no statistical inferences are required to establish that the calculated results represent the actual parameters, including the effect size, of the full populations of prices.[152] Thus, in accordance with our practice and prior precedent, we will continue to apply the Cohen's *d* test in the same manner as in the *Preliminary Results* for the final results of this review.[153]

Similarly, the Canadian parties' reliance on certain opinions, such as *NEXTEEL*, *SeAH*, and *Marmen,* is misplaced.[154] In *NEXTEEL*, the Federal Circuit remanded the issue concerning the relevance of the statistical criteria in Commerce's use of the Cohen's *d* test. *NEXTEEL* is not a final and conclusive decision and is part of ongoing litigation. Moreover, the Federal Circuit in *NEXTEEL* did not find that Commerce's use of the Cohen's *d* test is unlawful or that the statistical criteria must be addressed as part of the Cohen's *d* test; rather, relying on *Stupp II*, the Federal Circuit in *NEXTEEL* remanded Commerce's decision for further explanation or reconsideration of the statistical criteria. Commerce has issued a remand redetermination in that proceeding, which is in ongoing litigation.

In *SeAH*, the CIT did not find that Commerce's use of the Cohen's *d* test was unlawful or that the statistical criteria must be addressed.[155] Moreover, in Commerce's redetermination, the issue concerning the application of the differential pricing analysis, including the Cohen's *d* test, was rendered moot as a result of changes in calculations following reconsideration of another

[149] *See Stupp III,* 619 F. Supp. 3d 1314 (CIT 2023), appeal docketed Federal Circuit No. 2023-1663 (March 27, 2023); *see also SeAH Steel Corp. v. United States*, 619 F. Supp. 3d 1309 (CIT 2023) (denying motion for reconsideration despite arguments that *Stupp II* applied).
[150] As a general matter, we considered the contents of the Hedges Report and how it relates to the academic literature on this topic. *See Samsung Int'l v. United States*, 887 F. Supp. 2d 1330, 1338 n.18 (CIT 2012) ("Expert opinions are merely advisory, however, and are given weight only to the extent they are consistent with lexigraphic and other reliable sources.").
[151] *See Stupp II*, 5 F.4th at 1360.
[152] We note that much of Commerce's explanation above was before the CIT when it sustained Commerce's redetermination in *Stupp III*.
[153] *Id.*
[154] *See, e.g.,* Central Canada's Case Brief at 3, 10-12 (citing *NEXTEEL*, 28 F.4th 1226 (Fed. Cir. 2022); *SeAH Steel Corp. v. United States*, 539 F. Supp. 3d 1341 (CIT 2021) (*SeAH*); *Marmen Inc. v. United States,* 545 F. Supp. 3d 1305 (CIT 2021) (*Marmen*).
[155] *See* SeAH, 539 F. Supp. 3d at 1351.

issue,[156] and, thus, Commerce did not provide a further explanation that that the statistical criteria are not relevant for its application of the Cohen's *d* test.

Further, in *Marmen*, the CIT remanded "the issue of Commerce's use of the Cohen's *d* test for Commerce to explain further whether the limits on the use of the Cohen's *d* test were satisfied in this case in the context of the *Stupp II* case."[157] On remand, Commerce further explained that because Commerce applied the Cohen's *d* test to a population rather than a sample, doing so sufficiently negates the relevance of the statistical criteria and questionable understanding about Dr. Cohen's thresholds that were raised in *Stupp II*.[158] The CIT sustained Commerce's redetermination, and held that Commerce's application of the Cohen's *d* test to determine whether there was a significant pattern of differences was reasonable.[159]

B. Simple Average or Weighted Average

We disagree with the GOC, Central Canada, and the Canadian respondents regarding the use of simple averaging to calculate the denominator of the Cohen's *d* coefficient. Regarding the concerns expressed by the Federal Circuit in *Mid Continent V*, the Court stated that "Commerce needs a reasonable justification for departing from what the acknowledged literature teaches about Cohen's *d*."[160] Thus, the Federal Circuit remanded the issue stating "Commerce must either provide an adequate explanation for its choice of simple averaging or make a different choice, such as use of weighted averaging or use of the standard deviation for the entire population."[161] The *Mid Continent* litigation is still ongoing, and Commerce is conducting a redetermination regarding the Federal Circuit 's remand order. However, the Federal Circuit did not find that Commerce's use of a simple average to calculate the denominator of the Cohen's *d* coefficient was unlawful, and Commerce continues to use a simple average in the final results of this review.

Dr. Cohen presented effect size as part of his concept of power analysis,[162] where effect size is one element of Dr. Cohen's power analysis and represents "the degree to which the phenomenon is present in the population."[163] In Dr. Cohen's general formulation of "the effect size (ES) we wish to detect," he defines the "*d*" coefficient as the "standardizing of the raw effect size as expressed in the measurement unit of the dependent variable {*i.e.*, the difference in the means} by dividing it by the (common) standard deviation of the measures in their respective populations, the latter also in the original measurement unit."[164] Mathematically, Dr. Cohen expressed the effect size as,

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[156] *See SeAH Steel Corp. v. United States*, 589 F. Supp. 3d 1288, 1293 (CIT 2022) ("SeAH agrees with Commerce that the differential pricing analysis has been rendered moot because without the particular market situation adjustment, the dumping margin for SeAH would be de minimis regardless of which comparison method is used by Commerce." (internal citations omitted)).
[157] See *Marmen,* 545 F. Supp. 3d at 1320.
[158] *See Marmen Inc. v. United States*, 627 F. Supp. 3d 1312 (CIT 2023) (appeal docketed).
[159] *Id*.
[160] *Mid Continent III,* 31 F.4th at 1381.
[161] *Id.*
[162] *See Cohen* at 1 ("The purpose of this book is to provide a self-contained comprehensive treatment of statistical power analysis from an 'applied' viewpoint.").
[163] *Id.* at 9.
[164] *Id*. (referencing *Cohen* at 20).

$$d = \frac{m_A - m_B}{\sigma}$$

for a one-tailed case, or as

$$d = \frac{|m_A - m_B|}{\sigma}$$

for a two-tailed case,[165] where $m_A$ and $m_B$ are the "population means" and σ is "the standard deviation of either population (since they are assumed equal)."[166] Dr. Cohen repeated this definition of effect size for a population in his discussion of the "power tables," where "σ is the common within-population standard deviation (i.e., $\sigma_A = \sigma_B = \sigma$)."[167] Thus, the common within-population standard deviation is defined in the academic literature as equal to the standard deviation of population A or the standard deviation of population B, which are equal.

In Dr. Cohen's general formulation of effect size, the denominator of the ratio, *i.e.*, the "standard deviation," is the standard deviation of population A or the standard deviation of population B, which are assumed to be identical. Thus, when the standard deviations of population A and population B are equal, either of the standard deviations of the two populations is used as the denominator. However, when the standard deviations of population A and population B are not equal:[168]

> the definition of *d* will be slightly modified. Since there is no longer a common within-population σ, *d* is defined as above (formulas (2.2.1) and (2.2.2)), but instead of σ in the denominator, the formula requires the root mean square of $\sigma_A$ and $\sigma_B$, that is, the square root of the mean of the two variances:
>
> $$\sigma' = \sqrt{\frac{\sigma_A^2 + \sigma_B^2}{2}}$$

In other words, when the standard deviations of the two populations are not equal, then the denominator of the effect size should be the simple average of the two, unequal standard deviations of population A and population B. In this scenario, there is no common within-population standard deviation. Moreover, unlike a common within-population standard deviation where one of the population standard deviations is used as the denominator, the denominator in this scenario is defined as the root mean square, *i.e.*, the simple average, of the standard deviations of population A and population B.[169] Throughout *Cohen*, when the standard deviations of the two populations are known, the denominator of the effect size is either the common population standard deviation when the standard deviations of the two populations are

[165] *Id*. (referencing *Cohen* at 20 (equations 2.2.1 and 2.2.2, respectively)).
[166] *Id*. (referencing *Cohen* at 20).
[167] *See Cohen* at 27.
[168] *Id.* at 43-44 and equation 2.3.2.
[169] *Id.* at 44-45 ("Note that this value is not the standard deviation of either the population of men workers or that of women workers, but the root mean square of their respective population standard deviations, σ' (formula (2.3.2)).").

equal,[170] or the root square mean of the two standard deviations when the standard deviations of the two populations are unequal.[171]

Consistent with Dr. Cohen's general formulation of effect size based on means and standard deviations of two populations, Dr. Ellis recognized that:

> {t}he best way to measure an effect is to conduct a census of an entire population but this is seldom feasible in practice. Census-based research may not even be desirable if researchers can identify samples that are representative of broader populations and then use inferential statistics to determine whether sample-based observations reflect population-level parameters.[172]

However, given Dr. Cohen's general formulation of effect size and the *d* coefficient where the denominator of the ratio was defined as the "standard deviation," Dr. Ellis observed:

> {t}he only tricky part in this calculation is figuring out the population standard deviation. If this number is unknown, some approximate value must be used instead. When he originally developed this index, Cohen (1962) was not clear on how to solve this problem, but there are now at least three solutions. These solutions are referred to as Cohen's *d*, Glass's delta or Δ, and Hedges' *g*. As we can see from the following equations, the only difference between these metrics is the method used for calculating the standard deviation:
>
> $$Cohen's\ d = \frac{M_1 - M_2}{SD_{pooled}}$$
>
> $$Glass's\ \Delta = \frac{M_1 - M_2}{SD_{control}}$$
>
> $$Hedges'g = \frac{M_1 - M_2}{\mathrm{SD}\ *_{pooled}}$$
>
> Choosing among these three equations requires an examination of the standard deviations of each group.[173]

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[170] *Id.* at 20 and 27.

[171] *Id.* at 44, 60 ("The inequality of population σ values results only in a standardization of the difference in population means by the root mean square of the population variances (formula (2.3.2)) instead of the common population standard deviation."), 61 ("Since she is assuming that $\sigma_S^2 \neq \sigma_C^2$, the standardizing unit cannot be the common within-population standard deviation, but is instead the square root of the mean of the two variances, *i.e.*, $\sqrt{(\sigma_S^2 + \sigma_C^2)/2}$ (formula (2.3.2))."), 63 ("Note that $d_4'$ is simply the $m_P$ - $m_C$ difference, standardized by the common within-population standard deviation (or, if $\sigma_P^2 \neq \sigma_C^2$, their root mean square, σ', formula (2.3.2))."), and 65 ("where σ is either the common population standard deviation or σ' from formula (2.3.2)").

[172] *See Ellis* at 5.

[173] *Id.* at 10.

Thus, when the standard deviations of the two populations are unknown, Dr. Ellis and other academic authors provide alternatives with which to estimate the denominator of the effect size. As noted in the equations above, Dr. Ellis provides different formulations for the "pooled standard deviation" as an estimate for the denominator of the effect size:

For Cohen's *d*:[174]

$$SD_{pooled} = \sqrt{\frac{\sum(X_A - \bar{X}_A)^2 + \sum(X_B - \bar{X}_B)^2}{n_A + n_B - 2}}$$

For Hedges' *g*:[175]

$$SD *_{pooled} = \sqrt{\frac{(n_A - 1)SD_A^2 + (n_B - 1)SD_B^2}{n_A + n_B - 2}}$$

In each of these equations, the variable *n* represents the sample size of each group of data.

When based on sampled data, Dr. Cohen stated that "{g}enerally, we can define the effect size *in the sample* ($ES_s$) using sample statistics in the same way as we define it for the population, and a statistically significant $ES_s$ is one which exceeds an appropriate criterion value."[176] Dr. Cohen also provides an estimation of effect size when the analysis is based on sampled data:[177]

> {a}ccordingly, we redefine our ES index, *d*, so that its elements are sample results, *rather than population parameters*, and call it $d_s$. For all tests of the difference between means of independent samples,
>
> $$d_s = \frac{\bar{X}_A - \bar{X}_B}{s}$$
>
> where $\bar{X}_A$ and $\bar{X}_B$ = the two sample means, and
> s = the usual pooled within sample estimate of the population standard deviations, that is,
>
> $$s = \sqrt{\frac{\sum(X_A - \bar{X}_A)^2 + \sum(X_B - \bar{X}_B)^2}{n_A + n_B - 2}}$$

The equation to estimate the denominator of the effect size based on sampled data, the "pooled" standard deviation, is identical to that included by Dr. Ellis for the Cohen's *d* coefficient, *i.e.*, the "pooled standard deviation." This is not the equation which Commerce uses in the Cohen's *d*

[174] *Id.* at 26.
[175] *Id.* at 27.
[176] *See Cohen* at 17 (emphasis in the original).
[177] *Id.* at 66-67 and equations 2.5.1 and 2.5.2 (emphasis added).

test because it is based on the use of sampled data; Commerce's analysis encompasses the full population of data, *i.e.*, sale prices and, thus, it is appropriate for Commerce to use Dr. Cohen's simple average of the standard deviations of the test and comparison groups.

Commerce recognizes that in our prior proceedings, we used the term "pooled standard deviation" to denote the denominator of the "Cohen's *d* coefficient" used in the Cohen's *d* test. We clarify that our reference to a "pooled standard deviation" is not consistent with the use of that term in the academic literature and may have caused confusion. The "pooled standard deviation," as used by the academic authors, references some of the approaches to estimate the denominator of the effect size based on the actual standard deviations of the populations when such actual values are not known. Commerce has not used the "pooled standard deviation" as the term is meant in the academic literature to calculate the denominator of the Cohen's *d* test. Rather, Commerce has used the simple average of the actual standard deviations of the populations of the test and comparison groups as set forth in Dr. Cohen's equation 2.3.2. Commerce notes that if the two standard deviations are equal, then *Cohen* equation 2.3.2 simplifies into the identity $\sigma' = \sigma_A = \sigma_B = \sigma$, as used in Dr. Cohen's initial formulation of effect size in *Cohen* equations 2.2.1 and 2.2.2.

Professor Coe's discussion of effect size is consistent with that of Dr. Cohen and Dr. Ellis:

> {t}he 'standard deviation' is a measure of the spread of a set of values. Here it refers to the standard deviation of the population from which the different treatment groups were taken. In practice, however, this is almost never known, so it must be estimated either from the standard deviation of the control group, or from a 'pooled' value from both groups.[178]

In his discussion of "Which 'standard deviation'?," Professor Coe presents different arguments for and against using different approaches to provide the "best estimate of standard deviation." One option is the standard deviation of a "control group," *i.e.*, Glass Δ as presented by Dr. Ellis. A second option is a "'pooled' estimate of standard deviation," which is "essentially an average of the standard deviations of the experimental and control groups (Equation 4)."[179] Each of Professor Coe's approaches is an estimate of the actual standard deviation, σ, of Dr. Cohen's general formulation of effect size, and rely on sampled data rather than on the actual standard deviations of the populations for which the difference in the means is tested.[180]

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[178] *See Coe* at 2.

[179] *Id.* at 6-7. Equation 4 is identical to the $SD^*_{pooled}$ for Hedges' *g* in *Ellis* at 27.

[180] Dr. Hedges critiques Commerce's analysis stating that "this passage provides no evidence about the scientific literature referring to computing effect sizes from population data." *See* Hedges Report, Appendix II at (vii). Contrary to Dr. Hedges understanding, Commerce finds that the academic literature only provides for a weighted average of the standard deviations of the test and comparison groups when the "effect size must be estimated from sample data." *Id.* at (vi) ("Commerce's characterization of this passage asserts that when the effect size must be estimated from sample data, the scientific literature allows for unweighted average of the standard deviations as a possible option."). *See Cohen* at 67, equation 2.5.2, *Ellis* at 26-26, fn.8 and 9; *Coe* at 6, equation 4; the exception being Glass' Δ, *Ellis* at 10. However, Dr. Hedges does not address the simple average provided by Dr. Cohen in equation 2.3.2. *See Cohen* at 44. As discussed herein, equation 2.3.2 is for when the standard deviations of the populations differ and equations 2.2.1 or 2.2.2 are not appropriate because those equations define the denominator of the *d* coefficient to be "the standard deviation of either population (since they are assumed equal)." *See Cohen* at

In sum, the academic literature allows for Commerce's use of the simple average, *i.e.*, *Cohen* equation 2.3.2, as the denominator of the effect size, *i.e.*, the Cohen's *d* coefficient, when the actual standard deviation of each population is known and they are unequal. Commerce's calculation of the effect size in the Cohen's *d* test is based on the full population of sale prices of comparable merchandise to a given purchaser, region, or time period and the full population of all other sale prices of comparable merchandise (*i.e.*, the test and comparison groups, respectively).[181] Accordingly, Commerce's calculation of the Cohen's *d* coefficient is based on the actual means and standard deviations of the test and comparison groups. Commerce's calculation of the Cohen's *d* coefficient is not based on sampled data, and there is no estimation of the actual mean and standard deviation of the test group and of the comparison group. The academic literature provides for the use of a weighted average as a possible approach when estimating the denominator of the effect size when the actual standard deviations are not known, which is not the situation with Commerce's application of the Cohen's *d* test. Therefore, the academic literature allows for the use of the simple average to calculate the denominator of the effect size, and it does not necessarily require the use of a weighted average.[182]

**Comment 3: Whether Commerce Failed to Consider Qualitative Factors in Determining Whether Price Differences Were Significant in Differential Pricing Analysis**

*GOC*[183]

- Section 777A(d)(1)(B) of the Act directs Commerce to determine whether "targeted dumping" has occurred. In doing so, Commerce should base its findings on the entire record.[184]
- In the *Preliminary Results*, Commerce ignored record evidence and failed to fulfill its legal obligations. Specifically, in applying the Cohen's *d* test, Commerce did not consider evidence of swings in the market that rebut the presumption that the Cohen's *d* comparisons are indicative of "targeted dumping."

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20. Each of these three equations clearly involve the standard deviations of the two populations which are being compared, both from Dr. Cohen's text as well as by Dr. Cohen's use of $\sigma$ rather than *s* as the variable symbol. As recognized in *Algina*, the standard nomenclature for variable symbols is to use Latin letters for variables based on sampled data, and to use Greek letters for variables based on the full population of data. *See, Algina* at 318, fn.1 ("Cohen used the Latin letter *d* to refer to the population ES. Following more typical practice we use *d* to refer to the sample ES and the Greek letter δ to refer to the population ES.") Thus, the academic literature does not agree with Dr. Hedges conclusion that "this passage provides no evidence … referring to computing effect sizes from population data." See Hedges Report, Appendix II at (vii).

[181] *See Mid Continent V*, 31 F.4th at 1378 ("Indeed, in each test-group/comparison-group pair, the test and comparison groups together make up 'the entire universe, *i.e.*, population, of the available data,' because for each test group, the comparison group is all other sales data." (internal citation omitted)).

[182] We recognize that the CIT remanded some of the explanation above for Commerce to provide further explanation or reconsideration. *Mid Continent Steel & Wire, Inc. v. United States*, 628 F. Supp. 3d 1316 (CIT 2023). We note that the CIT's decision was issued as part of ongoing litigation that has not reached a final judgment on this issue, and that the explanation has not yet been presented before the Federal Circuit. Moreover, the decision is not binding. *See Algoma Steel Corp. v. United States*, 865 F.2d 240 (Fed. Cir. 1989). Commerce is in the process of addressing the CIT's remand order in that case.

[183] *See* GOC's Case Brief at 38-42.

[184] *Id.* at 38.

- The record contains evidence establishing the lumber market fluctuated during the POR and explaining how market fluctuations affected respondents' overall costs, earnings, and pricing patterns, *e.g.*, the COVID-19 pandemic drastically altered economic conditions in 2020 and 2021. These fluctuations were followed by an increase in inflation affecting costs and North American lumber prices.
- The evidence provided demonstrates that the price differences during the POR were a result of fluctuating market conditions and not targeted dumping. Commerce failed to consider this information in its determination and the law requires that Commerce address this matter in the final results of this review.
- The Federal Circuit has determined that the statute does not require Commerce to investigate the subjective reasons or "intent" a respondent may have for pricing its merchandise because gathering information of subjective intent would be unduly burdensome. However, this does not mean that Commerce is free to ignore record evidence. A clear distinction exists between asking Commerce to investigate subjective intent and situations where a respondent actually demonstrates that the price differences are not the result of targeting.[185]
- In the final results Commerce must examine all the evidence including evidence that "fairly detracts" from the presumption it makes with the Cohen's *d* comparisons, and it must also articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.[186]

*Canfor*[187]

- Commerce failed to consider certain qualitative factors when determining whether price differences were significant. Specifically, there is record evidence of market fluctuations that rebut the presumption that the prices differences observed with the Cohen's *d* test are indicative of targeted dumping. Commerce must address this evidence in the final results.

*Central Canada*[188]

- Price volatility over time is common for the lumber market because softwood lumber is a commodity whose price is susceptible market conditions such as pandemic disruptions, housing demand, weather, inflation, supply and demand, etc. Commerce fails to realize that not all differences are the same and that not all differences mean targeted dumping.

*Rebuttal*

*Petitioner*[189]

- Section 777A(d)(1)(B) of the Act does not require Commerce to explain the reasons for observed price differences or whether they result from external factors.

[185] *Id*. at 41.
[186] *Id*. at 41-42.
[187] *See* Canfor's Case Brief at 17-18.
[188] *See* Resolute and Central Canada's Case Brief at 6-10.
[189] *See* Petitioner's Rebuttal Brief at 22-23.

- The Federal Circuit has held that there is no intent requirement in the statute and that Commerce does not need to explain the reasons why there is a pattern of export prices that differ significantly.
- Applying this Federal Circuit precedent, the CIT has noted that, "{d}istilled to their essence, the Court of Appeals' holdings in *JBK RAK* and *Borusan* establish that Commerce is under no obligation to consider evidence that factors other than targeted dumping may account for price patterns that the agency identifies through targeted dumping analyses."[190]
- Commerce correctly applied this precedent in the previous administrative review and should continue to do so here as the precedents relied upon remain good law.
- Thus, any arguments challenging Commerce's consideration or non-consideration of qualitative factors must fail.
- Moreover, were Commerce to accept the arguments presented that the agency must consider the impact of the pandemic and changes to supply and inflation on the observed pattern of price differences, Commerce's differential pricing analysis could be challenged in nearly every proceeding based on whatever exogenous variable respondents may be able to identify as perhaps having an impact on the observed pattern of price differences.
- Such a result would frustrate the purpose of the Commerce's differential pricing analysis and create a tremendous burden on Commerce that is not required or suggested by the statute. [191]
- Accordingly, Commerce should reject arguments that the agency must conduct a qualitative analysis of any factors that might potentially have some bearing on an observed pattern of price differences.[192]

**Commerce's Position:** We disagree with the GOC, Canfor, and Central Canada. The Federal Circuit has found that Commerce is not required to "determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews."[193] The CIT has affirmed this finding by stating that Commerce is not required to consider factors when examining whether there exists a pattern of prices that differ significantly consistent with section 777A(d)(1)(B)(i) of the Act.[194] The salient finding is whether price differences exist, and, based on the Cohen's *d* test, whether such differences are significant. The GOC, Canfor and Central Canada provide no evidence that the price differences that Commerce identified do not exist; rather, they suggest different reasons as to why these differences exist and, therefore, are not relevant to finding that these price differences should be accounted for. However, these differences are factual record evidence that U.S. prices for the same product differ, just as there is factual record evidence that the price of subject merchandise sold in the U.S. market differs from normal value. Therefore, given that both the CIT and the Federal Circuit have determined that Commerce is not required to look at other factors for

[190] *Id*. at 30-31 (citing *JBF RAK LLC v. United States*, 790 F.3d 1358, 1368 (Fed. Cir. 2015) (*JBF RAK*); *Borusan Mannesmann Boru Sanayi v. Ticaret A.S. v. United States*, 608 F. App'x 948 (Fed. Cir. 2015) (*Borusan*)).
[191] *Id*. at 23.
[192] *Id.*
[193] *See JBF RAK*, 790 F.3d at 1368 (quoting *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1355 (CIT 2014)).
[194] *See Nan Ya Plastics Corp. v. United States,* 128 F. Supp. 3d 1345, 1358 (CIT 2015).

determining a pattern of prices that differ significantly, we will continue to employ the differential pricing analysis unchanged for the final results.

**Comment 4: Whether Commerce Erred in Finding a Pattern of U.S. Prices that Differ Significantly Among Purchasers, Regions, or Periods of Time**

*GOC*[195] *and Central Canada*[196]

- Section 777A(d)(1)(B)(i) of the Act uses the term pattern to identify circumstances where an exporter appears to engage in discriminating pricing behavior. To be consistent with the plain meaning of the term pattern in the Act, a pattern must be something that is readily identifiable and consists of interrelated data points. Commerce uses the ratio test to identify whether there is a pattern of significant price differences; however, Commerce fails to explain whether the price differences occur in an interrelated manner.
- In the *Preliminary Results*, Commerce found that 73.29 percent of the value of Canfor's U.S. sales and 75.41 percent of West Fraser's U.S. sales passed the Cohen's *d* test and, therefore, a "pattern of prices that differ significantly exists." However, Commerce's aggregation of U.S. sales that are differentially priced by purchasers, regions, and time periods into a single "pattern" is contrary to the ordinary meaning of the statute.
- Commerce has previously defined a pattern in this context as "{i}n the case of identifying a pattern of differing prices, 'a pattern' is a reliable sample of traits, acts, tendencies or other observable characteristics, with frequent or widespread incidences."[197]
- Commerce's aggregation of random price variations is also contrary to the plain meaning of the statute's requirement that Commerce conduct an inquiry into whether there is a pattern of prices that differ significantly "among purchasers, regions, or periods of time."
- The aggregation of U.S. sales that are differentially priced by purchasers, regions, and time periods into a single "pattern," and the failure to make any distinction between whether those sales were high-priced or low-priced, simply cannot support the inference that targeted dumping is occurring.
- Commerce's ratio test also contravenes the unambiguous statutory discretion to consider differences separate for each category as stated in section 777A(d)(1)(B)(i) of the Act: purchasers, regions or periods of time. A pattern must be found separately for one or more of the three categories; however, Commerce includes all sales that pass Cohen's *d* test in the numerator of the ratio test and does not separate the categories.
- Reasoned decision-making requires more than simply discounting the reasoning as nonbinding. The ratio test that Commerce applied in this case to discern a "pattern" violates the plain meaning of section 777A(d)(1)(B)(i) of the Act because it fails to find a "pattern" as defined according to its ordinary, dictionary meaning, or when further informed by the legislative purpose explained in the SAA.
- Commerce defends the test on the basis that it quantifies the extent of the significant price differences for all sales as measured by the Cohen's *d* test. However, extent merely refers to an amount. Quantifying extent is unrelated to identifying a pattern.

[195] *See* GOC's Case Brief at 30-36.
[196] *See* Central Canada's Case Brief at 24-27.
[197] *See* GOC Case Brief at 32, citing *Lumber V Final Determination* IDM at Comment 18.

- It defies the intent of Congress, as expressed in the SAA, to adopt a test in which there could be no sales available to mask the targeted sales. Further, Commerce's finding of a pattern of prices that differed significantly is contrary to the plain meaning of the term "pattern" in the statute because Commerce aggregates random price variations with no shared characteristics.
- For the final results, to be consistent with law, Commerce should follow the plain meaning of the pattern requirement, as reflected in the interpretations expressed in the SAA and the reasoning of relevant World Trade Organization (WTO) dispute settlement findings.

*Canfor*[198]

- While the statute mandates an inquiry into whether there is a "pattern of…prices…that differ significantly among purchasers, regions, or periods of time," Commerce has failed to distinguish such a pattern.
- Simply aggregating U.S. prices that differ by purchaser, region and time without making any distinction between and high and low prices does not demonstrate a "pattern" of prices differences and does not support an inference of targeted dumping.

*Rebuttal*

*Petitioner*[199]

- The arguments against Commerce's differential pricing analysis have been appropriately dismissed by the Federal Circuit.
- In *Dillinger France S.A.*, the Federal Circuit considered the argument that Commerce "improperly aggregated sales across categories (purchasers, regions, or time periods)" and evaluated whether, under section 777A(d)(1)(B) of the Act, Commerce could aggregate sales across categories to establish a pattern.[200]
- The Federal Circuit held that "{s}uch aggregation is not inconsistent with the statute," as section 777A(d)(1)(B) of the Act "is silent as to how Commerce must determine a 'pattern.'"[201] Applying this holding, the CIT has similarly held that Commerce's aggregation of price differences across the categories of purchasers, region, and time periods is reasonable. Accordingly, both the CIT and the Federal Circuit have squarely considered and rejected this argument.
- In *Dillinger France S.A*., the Federal Circuit also considered the argument advanced by the GOC and Central Canada that Commerce should not aggregate sales across categories because such aggregation may be inconsistent with some interpretations of the obligations established under the WTO's Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement).
- The Federal Circuit rejected this line of argument based on well-settled law establishing that views issued through the WTO dispute settlement process are not binding on U.S. courts. Accordingly, Commerce should also dismiss the GOC's argument that

[198] *See* Canfor's Case Brief at 18-19.
[199] *See* Petitioner's Rebuttal Brief at 27-29.
[200] *Id.* (citing *Dillinger France S.A. v. United States,* 981 F.3d 1318 (Fed. Cir. 2020)).
[201] *See Dillinger France S.A.,* 981 F.3d at 1325.

Commerce violated the plain meaning of the statute in maintaining its consistent practice in the interpretation of the term "pattern."
- Arguments regarding aggregation were rejected by Commerce in the previous POR and should continue to be rejected in this POR.

**Commerce's Position:** We disagree with the GOC, Canfor, and Central Canada. As noted above, both the Federal Circuit and the CIT have found that there is no law barring Commerce from aggregating the value of sales whose prices differ significantly for various purchasers, region and time periods.[202] Given that aggregating the value of these sales whose prices differ significantly is consistent with Commerce's past practice, as well as consistent with legal precedent, we will continue to employ this methodology for the final results.

**Comment 5: Whether the A-to-A Method Accounts for the Identified Price Differences in Applying the "Meaningful Difference" Test**

*GOC*[203] *and Central Canada*[204]
- Commerce must adequately explain why the use of the A-to-T method is a reasonable and necessary course of action to unmask "targeted dumping," particularly when the results of the application of the Commerce's differential pricing analysis may be explained by external factors like market conditions.
- In the *Preliminary Results*, Commerce concluded that there was a "meaningful difference" between the weighted-average dumping margins of both Canfor and West Fraser when the A-to-A method and the A-to-T method are applied to all sales. In particular, Commerce calculated West Fraser's and Canfor's weighted average dumping margins as 0.00 percent under the A-to-A methodology, and 6.9 percent and 5.25 percent respectively, under the A-to-T methodology, with zeroing. When Commerce used the A-to-A methodology, it found that no dumping exists. However, Commerce did not explain why it chose to apply the A-to-T method.
- Commerce simply stated that there was a "meaningful difference in the weighted-average dumping margins calculated using the A-to-A comparison method and the A-to-T comparison method when both methods {we}re applied to all sales" and therefore, the use of the A-to-T method was appropriate.
- Commerce's application of the "meaningful difference" test is contrary to the statute's instruction that Commerce explain why the A-to-A method cannot account for the pattern of significant price differences allegedly identified by Commerce. Commerce's failure to explain why also is contrary to the international obligations of the United States.

[202] *Id.* In considering whether Commerce can aggregate sales across categories to establish a pattern, the Federal Circuit held, "{s}uch aggregation is not inconsistent with the statute, which requires that Commerce determine that there is a pattern of export prices…for comparable merchandise that differ significantly among purchasers, regions, or time periods. The statute is silent as to how Commerce must determine a pattern….We find that Commerce's interpretation of pattern was reasonable." *Id.* (internal citations omitted). *See also Stupp II,* 5 F.4th at 1354-55 (holding that there is no statutory language telling Commerce how to detect patterns of significantly differing export prices, much less how to aggregate and quantify pricing comparisons across product groups, and affirming Commerce's general approach as reasonable).
[203] *See* GOC's Case Brief at 42-44.
[204] *See* Central Canada's Case Brief at 27-32.

- For the final results, should Commerce continue to apply the A-to-T method, and explain why the A-to-A or T-T method could not account for the alleged significant price differences.
- Commerce's unlawful application of the differential pricing analysis not only results in an inaccurate calculation of mandatory respondents dumping margins, but artificially inflates the rate calculated for the non-selected companies.
- In the final results, Commerce should correct the rates of the mandatory respondents and consistent with its practice, re-calculate the dumping margin for the non-examined companies.

*Canfor*[205]

- Commerce fails to explain why the preferred A-to-A method cannot account for the price differences it identifies, as required by the statute.
- Merely stating that there is a "meaningful difference" between the weighted-average dumping margin calculated using the A-to-A method and weighted-average dumping margin calculated under the A-to-T method results in a circular argument that does not satisfy the statutory requirement.
- The fact that there is a difference in the dumping margin under either the A-to-T method or the A-to-A method simply proves that the choice of methodology matters to the outcome of the review.
- The A-to-A method in administrative reviews does not permit masking by time periods that are longer than one month.
- For the final results, Commerce should explain, based on the data on the record, why a weighted-average dumping margin that is computed using the A-to-A method preferred by statute would not account for the price differences that have been identified.

*West Fraser*[206]

- Commerce based its determination in the *Preliminary Results* regarding whether there was a pattern in West Fraser's export prices almost entirely on the variation in West Fraser's prices over "periods of time." A comparison of West Fraser's price data and U.S. market price data on the record confirms that West Fraser's pricing simply reflected the significant changes in the POR lumber market conditions rather than targeted dumping.
- Consequently, there is no reasonable basis for Commerce to apply its differential pricing analysis to West Fraser's sales because the A-to-T methodology is intended to address targeted dumping.
- It is Commerce's position that the Cohen's *d* test reasonably reflects the statutory requirement to determine whether prices differ significantly among purchasers, regions or periods of time. However, Commerce's logic that one aberrational group can cause all other groups to be found significantly different illustrates the analytical error.

[205] *See* Canfor's Case Brief at 19-20.
[206] *See* West Fraser's Case Brief at 7-10.

*Rebuttal*

*Petitioner*[207]

- Parties argue that Commerce's meaningful difference test fails to fulfill the statutory obligation in section 777A(d)(1)(B)(ii) of the Act, which requires that Commerce explain why the A-to-A comparison method cannot account for the pattern of price differences identified by Commerce.
- According to the respondents, the meaningful difference test must fail as it is entirely circular and confuses cause with effect. Commerce should reject these arguments as the agency's meaningful difference test reasonably implements the Act's requirement that Commerce explain why the A-to-A method cannot take into account significant pattern of price differences.
- The Federal Circuit has held that the meaningful difference test satisfies the statutory directive that Commerce explain why the A-to-A method is inadequate in certain cases. In *Stupp II,*[208] the Federal Circuit, relying on its earlier decision in *Apex II*,[209] held that the meaningful difference test is reasonable.
- The Federal Circuit further explained that the holding in *Apex II* had two parts: (1) Commerce's meaningful difference test is a reasonable response to the statutory directive to explain why the {A-to-A} method is inadequate in certain cases; and (2) the meaningful difference test is sufficient to satisfy that directive.
- The CIT has applied the holding of *Apex II* in a number of decisions. For example, in an appeal from an administrative review of the AD duty order on *Oil Country Tubular Goods from Korea*, the CIT applied the Federal Circuit's holding in *Apex II* and sustained Commerce's meaningful difference analysis as reasonable, holding that Commerce explained why "the A-to-A method could not account for the significant price differences in {the respondent's} pricing behavior." [210]
- In another opinion, the CIT held similarly that the "meaningful difference test fulfills the statutory requirement that Commerce explain why the A-to-A method cannot account for the perceived pattern of pricing differences."[211]
- For these reasons, Commerce should continue to apply its "meaningful difference" test as part of its differential pricing analysis consistent with judicial precedent and Commerce's practice (including in prior segments of this proceeding).

**Commerce's Position:** We disagree with the GOC, West Fraser, Canfor, and Central Canada. As has been upheld by the Federal Circuit, Commerce's meaningful differences test reasonably addresses the "meaningful difference" requirement in section 777A(d)(1)(B)(ii) of the Act. Specifically, in *Stupp II*, the Federal Circuit explained that in one of its previous rulings it had determined that: (1) Commerce's meaningful difference test is a reasonable response to the statutory directive to explain why the A-to-A method is inadequate in certain cases, and (2) the

[207] *See* Petitioner's Rebuttal Brief at 32-34.
[208] *See Stupp II,* 5 F.4th at 1355-56.
[209] *See Apex Frozen Foods Pvt. Ltd. v. United States*, 862 F.3d 1337, 1341 (Fed. Cir. 2017) (*Apex II*).
[210] *See* Petitioner's Rebuttal Brief at 33 (citing *NEXTEEL Co. v. United States*, 355 F. Supp. 3d 1336, 1357 (CIT 2019).
[211] *See The Stanley Works (Langfang) Fastening Systems Co. v. United States*, 333 F. Supp. 3d 1329, 1556 (CIT 2018).

meaningful difference test is sufficient to satisfy that directive.[212] Further, citing its ruling in *Apex II*, the Federal Circuit stated "Commerce's methodology compares the {average-to-average} and {average-to-transaction} methodologies, as they are applied in practice, and in a manner this court has expressly condoned. . . . Commerce's chosen methodology reasonably achieves the overarching statutory aim of addressing targeted or masked dumping."[213] Accordingly, in *Stupp II*, the Federal Circuit unequivocally affirmed Commerce's use of the meaningful difference test. Moreover, no party in this proceeding has provided argument or information to dissuade Commerce from abiding by the Federal Circuit's ruling regarding the appropriateness meaningful difference test. Therefore, we have made no changes and will continue to apply the meaningful difference test for the final results.

**Comment 6: Zeroing**

*GOC, West Fraser, Central Canada and Canfor*[214]

- In the *Preliminary Results*, Commerce applied the A-to-T method with zeroing to all of West Fraser and Canfor's U.S. sales. The use of zeroing in the A-to-T methodology violates the international obligations of the United States as implemented through the Uruguay Round Agreements Act (URAA).
- Commerce's methodology of zeroing is not required by statute, and Commerce's use of zeroing is inconsistent with the United States' obligations under the AD Agreement. There is no provision for zeroing in Commerce's regulations, and it is not the result of any formal rulemaking with notice and public opportunity to comment.
- Commerce is not required to zero to identify "targeted dumping."
- Although WTO decisions are not authoritative interpretations of U.S. law, they are authoritative interpretations of the United States' international obligations that the relevant provisions of the Act were intended to implement. WTO decisions are a tool for discerning legislative intent and Commerce should consider them. The continuation of zeroing is inconsistent with the WTO obligations of the United States and is contrary to law.
- In the final results, even if Commerce continues to apply the A-to-T method, it should employ a WTO-consistent methodology and eliminate zeroing or explain why it chooses to act inconsistently with the international obligations of the United States.

*Rebuttal*

*Petitioner*[215]

- Commerce's determination to use zeroing is governed by U.S. law. Further, numerous holdings of the Federal Circuit have expressly and repeatedly held that Commerce's use of zeroing when applying an alternative comparison methodology is consistent with U.S. law when the statutory requirements of section 777A(d)(1)(B) of the Act are met.
- WTO findings are not self-executing under U.S. law.

[212] *See Stupp II*, 5 F.4th 1341 (as support for its argument, the *Stupp* Court cited *Apex II*, 862 F.3d at 1348-49).
[213] *Id.*
[214] *See* GOC's Case Brief at 44-48; West Fraser's Case Brief at 11-12; Canfor's Case Brief at 19-20; Central Canada's Case Brief at 33-37.
[215] *See* Petitioner's Rebuttal Brief from 34-37.

- Commerce is acting in accordance with and full respect for the law when using zeroing.

**Commerce's Position:** We disagree with the GOC, West Fraser, Central Canada and Canfor. WTO findings are not self-executing under U.S. law.[216] The Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.[217] In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.[218] Indeed, the SAA noted that "WTO dispute settlement panels will have no power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it."[219] As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically supersede the exercise of Commerce's discretion in applying the statute.[220] Commerce has not revised or changed its use of zeroing, nor has the United States adopted changes to its practice pursuant to the URAA's implementation procedure. Contrary to Central Canada's assertion, Commerce is acting in accordance with and full respect for the law.

Commerce also disagrees with Central Canada's concept that the use of zeroing precludes Commerce from calculating an accurate weighted-average dumping margin. To the contrary, the purpose of resorting to an alternative comparison method is to reveal masked dumping where higher-priced U.S. sales offset lower priced U.S. sales,[221] where the A-to-A comparison method cannot take into account the significant differences in U.S. prices.[222] Accordingly, for the final results, because we are applying the A-to-T method, we will continue to apply zeroing in calculating Canfor and West Fraser's weighted-average dumping margins consistent with the statute, regulations and Commerce's practice.[223]

[216] *See, e.g.*, SAA at 659 ("WTO dispute settlement panels will have no power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it."); *see also Corus Staal BV v. Dep't of Commerce,* 395 F.3d 1343, 1343, 1349 (Fed. Cir. 2005) (*Corus Staal*), *cert. denied* 126 S. Ct. 1023 (2006).
[217] *See Corus Staal*, 395 F.3d at 1343, 1347-49; *accord Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).
[218] *See, e.g.*, 19 U.S.C. 3533, 3538 (sections 123 and 129 of the URAA).
[219] *See* SAA at 659.
[220] *See*, *e.g.*, 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary).
[221] *See* SAA at 842-43.
[222] *See* section 777A(d)(1)(B)(ii) of the Act; *see also Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015-2016*, 83 FR 17146 (April 18, 2018), and accompanying IDM at Comment 8.
[223] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

**Comment 7: Whether the Cohen's *d* Test Results in Double Counting**

*Central Canada*[224]

- As Commerce searches for patterns of significant price differences it counts the same significant price differences multiple times.
- Commerce's double counting happens when Commerce administers the Cohen's *d* test using control groups that include test groups filled with sales already determined to be significantly different from control-group sales. Such double counting is contrary to law.
- Inaccurate margins result when an aberrant test group is reintroduced into the control group, causing other groups of sales to pass the Cohen's *d* test.

*Rebuttal*

*Petitioner*[225]

- The CIT considered arguments raised by Central Canada in *Timken Co.* and found the double counting argument to be unpersuasive by explaining that "even if some sales are included in a test group and later in a comparison group, their value is counted only once in the numerator of the ratio if they pass Cohen's *d*."[226]
- In its arguments that Commerce's methodology is contrary to law, Central Canada cites two cases that are unrelated to Commerce's differential pricing analysis, *Dupont Teinjin*[227] and *Rhone Poulenc.*[228] Also, these cases are not related to Commerce's differential pricing analysis, as *DuPont Teinjin* is the issue of whether Commerce double counted input costs in calculating normal value in a NME case and *Rhone Poulenc* did not consider the Cohen's *d* test.
- Commerce rejected this double counting argument in the previous POR and there has been no compelling arguments presented to explain why this conclusion was unreasonable.

**Commerce's Position:** We disagree with Central Canada. Central Canada asserts that Commerce's approach in the Cohen's *d* test is flawed because the comparison group includes sales from test groups that have already been found to include prices that differ significantly. If one were to extend Central Canada's logic that the flaw of the Cohen's *d* test is that the comparison group includes sales from each of the test groups, then under that presumption, the comparison group could be reduced to a nullity since each U.S. sale would at some point be part of a test group, and the sales which constitute each test group would either pass or fail the Cohen's *d* test.

[224] *See* Central Canada's Case Brief at 22-24
[225] *See* Petitioner's Rebuttal Brief at 25-27.
[226] *Id*. (citing *Timken Co. v. United States*, 179 F. Supp. 3d 1168, 1178-79 (CIT 2016)).
[227] *See* Petitioner's Rebuttal Brief at 26 (citing *DuPont Teijin Films China Ltd. v. United States*, 7 F. Supp. 3d 1338, 1345-46 (CIT 2014)).
[228] *See* Petitioner's Rebuttal Brief at 26 (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990)).

Central Canada's presumptions in this regard are unfounded. The Cohen's *d* test reasonably reflects the statutory requirement to determine whether prices differ significantly "among purchasers, regions or periods of time." Consistent with the statutory language, the purpose of the Cohen's *d* test is to evaluate whether sales of comparable merchandise to a particular purchaser, region or time period in each test group exhibit prices that are significantly different from sales to *other* purchasers, regions, or time periods, respectively. In other words, each time the Cohen's *d* test compares a group of sales defined by purchaser, region, or time period, the comparison group of sales must include all other U.S. sales regardless of whether they "Pass" or "Fail" the Cohen's *d* test or whether they have even been tested yet. It is that universe of sales that serves as the basis to determine whether prices differ significantly. Therefore, excluding any sales from the comparison group other than the sales within the test group would distort (rather than correct for) the universe of sales against which the test group is compared. Therefore, for the final results, for the reasons as discussed above, we disagree with Central Canada's arguments and will continue to apply the Cohen's *d* test.

**Comment 8: Whether it was Proper not to have Adjusted U.S. Price by Countervailing Duties**

*Petitioner*[229]

- Under section 772(c)(2)(A) of the Act, Commerce must adjust U.S. price to remove any portion of that price attributable to "any additional costs, charges, or expenses, and United States import duties which are incident to bringing the subject merchandise" into the United States. By failing to reduce the starting price the CVD costs incident to bringing the subject merchandise from the original place of shipment in Canada to the place of delivery in the United States, Commerce's actions fail to ensure a tax neutral comparison between the respondents' U.S. prices and the home market prices.
- While acknowledging that Federal Courts have upheld Commerce's refusal to deduct CVDs from U.S. price, these decisions recognize that the statute does not define the term "United States import duties."[230] Thus, Commerce is able to normalize its practice and deduct all import duties from the starting price.

*GOC and Canadian Parties,*[231] *West Fraser,*[232] *and Canfor*[233]

- Under U.S. law, Commerce's long-standing past practice, and court decisions, CVDs are not considered either "import duties" or "costs" within the meaning of section 772(c) of the Act.

[229] *See* Petitioner's Case Brief at 26-31.
[230] *Id.* at 31 (citing *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 494 F. Supp. 3d 1365, 1372 (CIT 2021) (*Borusan*)).
[231] *See* GOC and Canadian Parties' Rebuttal Brief at 20-23.
[232] *See* West Fraser's Rebuttal Brief at 19-21.
[233] *See* Canfor's Rebuttal Brief at 17-19.

- Commerce has never deducted CVD deposits or CVDs from U.S. price,[234] and has twice rejected arguments to do so in this proceeding.[235]
- Commerce clarified its practice concerning this issue in 2004, after formal notice and comment procedures.[236] In adopting that policy, Commerce received and considered "extensive comments" from parties and members of the trade bar, including the precise argument that the petitioner makes here.[237] Since then, it has remained Commerce's unbroken practice that neither CVD deposits nor CVDs are deducted from U.S. price. Commerce considered all comments received and determined not to deduct CVDs from U.S. price.[238]
- Further, as the CIT in *Ad Hoc Shrimp*[239] and *Apex Exports*[240] held, ADs are not considered "costs" under section 772(c) of the Act. Likewise, CVDs cannot be considered "costs."
- Both Commerce and U.S. courts have been explicit that ADs and CVDs belong in a separate and distinct category of "special duties,"[241] which should not be deducted from U.S. prices in calculating dumping margins under the statute.[242]

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[234] *See* GOC and Canadian Parties' Rebuttal Brief at 21 (citing *Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France*, 69 FR 46501, 46506 & n.26 (August 3, 2004) (*Low Enriched Uranium from France*) ("In the 23 years that Commerce has administered the AD law, it has never deducted AD duties or CVDs from initial U.S. prices in calculating dumping margins.")).

[235] *Id.* at 20 (citing *Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review; 2019*, 86 FR 68471 (December 2, 2021) (*Lumber AR2 Final*), and accompanying IDM at 29 and *Lumber AR3 Final* IDM at 53-54)).

[236] *See* Canfor's Rebuttal Brief at 18 (citing *Low Enriched Uranium from France*).

[237] *See Low Enriched Uranium from France*, 69 FR at 46505 ("A number of commenters argue that CVDs to offset domestic subsidies must be deducted as included in the term 'any costs, charges, or expenses of bringing the merchandise into the United States.'").

[238] *Id.* 69 FR at 46505, 46504-08.

[239] *See* GOC and Canadian Parties' Rebuttal Brief at 21 (citing *Ad Hoc Shrimp Trade Action Committee v. United States*, 925 F. Supp. 2d 1367, 1373 (CIT 2013) (*Ad Hoc Shrimp*) ("Commerce defends its decision not to deduct the paid deposits from the export prices calculated in this review by relying on its longstanding and judicially-affirmed statutory interpretation that antidumping duty deposits are not costs, expenses, or import duties within the meaning of {section 772(c)(2)(A) of the Act}.") (internal citations omitted)).

[240] *Id.* (citing *Apex Exports v. United States*, Slip Op. 13-158 (CIT 2013) (*Apex Exports*), *aff'd* 777 F.3d 1373 (Fed. Cir. 2015).

[241] *Id.* at 22 (citing *Borusan* (noting that a Senate Report provided by Commerce explained that "Congress intended that some duties implementing trade remedies, such as AD duties, are special duties to be distinguished from the normal duties that should be deducted from EP and CEP" (emphasis added)).

[242] *Id.* at 23 (citing *U.S. Steel Grp. v. United States*, 15 F. Supp. 2d 892, 898-900 (CIT 1998) (*U.S. Steel Grp*) (finding that Commerce need not deduct either antidumping or CVDs from the starting price in the United States in calculating antidumping duties); *Hoogovens Staal BV v. United States*, 4 F. Supp. 2d 1213, 1220 (CIT 1998) (*Hoogovens*) (upholding Commerce's rational that finding that "deducting antidumping duties as costs or import duties from U.S. price would, in effect, double-count the margins."); *APEX Exps. v. United States*, 777 F.3d 1373, 1380 (Fed. Cir. 2015) ("Commerce's current position is consistent with its longstanding practice of treating antidumping duties as special, and not deducting them to calculate EP."); and *Low Enriched Uranium from France*, (noting that section 779 of the Act "provides that, '{f}or purposes of any law relating to the drawback of customs duties, {CVDs and AD duties} imposed by this subtitle shall not be treated as being regular customs duties.' While this is restricted in application to duty drawback, it certainly suggests that AD duties and CVDs are distinguishable from regular Customs duties.")).

- Commerce has explained that deducting CVDs from U.S. prices would be inconsistent with the context and logic of the statute and its legislative history and would result in a "double remedy."[243]
- The courts have stated that Commerce "has already corrected for the subsidies on the subject merchandise in the countervailing duty order, thereby granting the domestic industry a remedy. To deduct such countervailing duties from U.S. price would create a greater dumping margin, in effect a second remedy for the domestic industry."[244]

**Commerce's Position:** We disagree with the petitioner. Commerce has explained that deducting CVDs from U.S. prices in AD cases would be inconsistent with the context and logic of the statute and its legislative history and would result in a "double remedy."[245] Commerce has never deducted CVDs from U.S. price in an AD proceeding.[246] Our determination not to deduct CVDs from U.S. price in an AD proceeding has been upheld.[247]

We disagree with the petitioner's assertion that CVDs are included where section 772(c)(2)(A) of the Act specifies that Commerce will deduct from U.S. price any "costs, charges, or expenses, and United States import duties." The plain language of section 772(c)(2)(A) does not include CVDs and CVD deposits. Further, in explaining why CVDs are not covered by the term "any costs, charges, or expenses," we stated in *Low Enriched Uranium from France* that, "{w}hile CVDs are a special type of import duty, they are nevertheless a species of import duty, and are thus covered, *if at all*, by the phrase 'United States import duties.'"[248] Thus, we do not agree that under section 772(c)(2)(A) of the Act, CVDs would be considered costs that should be deducted from U.S. price. Therefore, for the final results, we have not deducted CVDs from the U.S. price.

**Comment 9: Whether Commerce Should Adjust West Fraser's G&A Expense Ratio**

*Petitioner*[249]

- Commerce's practice is to calculate separate G&A ratios for each producer within a collapsed entity and then apply the ratios to each company's respective CONNUM-specific cost of manufacturing (COM) COPs for the individual producers within the collapsed entity.

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[243] *Id.* at 22 (citing *Low Enriched Uranium from France*, 69 FR at 46506 ("{D}eduction of countervailing duties, whether export or non-export, from the U.S. price used to calculate the dumping margin, would result in a double remedy for the domestic industry." (quoting *U.S. Steel Grp*., 15 F. Supp. 2d at 900)).
[244] *Id.* at 23 (citing *U.S. Steel Grp.,* 15 F. Supp. 2d at 900 and *Hoogovens,* 4 F. Supp. 2d at 1220).
[245] *See Low Enriched Uranium from France*, 69 FR at 46506 ("{D}eduction of countervailing duties, whether export or non-export, from the U.S. price used to calculate the dumping margin, would result in a double remedy for the domestic industry." (quoting *U.S. Steel Grp.*, 15 F. Supp. 2d at 900)).
[246] *See Low Enriched Uranium from France*, 69 FR at 46506 ("In the 23 years that Commerce has administered the AD law, it has never deducted AD duties or CVDs from initial U.S. prices in calculating dumping margins.")).
[247] *See Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1362-64 (Fed. Cir. 2007); *AK Steel*, 988 F. Supp. 594, 607-08; *U.S. Steel Grp.* at 15 F. Supp. 2d at 898-900.
[248] *See Low Enriched Uranium from France*, 69 FR at 46505 (emphasis added). This citation also refutes the petitioner's argument that *Low Enriched Uranium from France* does not address whether CVDs should be deducted from U.S. price. Notably, Commerce also clarified that CVDs would not be deducted as United States import duties because they are not normal United States import duties. *Id.*
[249] *See* Petitioner's Case Brief at 13-14.

- Commerce should adjust the calculation of the G&A expense ratio to be consistent with this methodology.

No other party commented on this issue.

**Commerce's Position:** We agree with the petitioner, and consistent with Commerce's practice,[250] we have adjusted West Fraser's G&A expense ratio to be consistent with this methodology for the final results.[251]

**Comment 10: Whether Commerce Should Make Certain Revisions to West Fraser's Byproduct Offset Calculation**

*Petitioner*[252]

- In the *Preliminary Results,* Commerce made adjustments to the reported byproduct offset calculation so that the value of byproducts received by West Fraser's affiliates reflected market value. For the final results, Commerce should further revise West Fraser's byproduct offset calculation for certain byproduct(s) received by affiliates to ensure they reflect market value.

No other party commented on this issue.

**Commerce's Position:** We agree with the petitioner. For the final results, we have corrected certain byproduct offset calculations to ensure that they reflect market value. Due to the proprietary nature of this issue, for further detail, please refer to West Fraser's Final Analysis Memorandum, dated concurrently with this memorandum.[253]

**Comment 11: Whether Commerce Should Further Adjust West Fraser's COM to Account for Inputs Obtained From Affiliated Parties**

*Petitioner*[254]

- In applying the transactions disregarded and major input analysis, Commerce's preference for market value is a respondent's own purchases of the identical input from unaffiliated suppliers.
- West Fraser reported that it purchased/obtained seeds from two affiliated parties – Vernon Seed Orchard Company (Vernon Seed) and Huallen Seed Orchard Company Ltd. (Huallen Seed).
- For the final results, Commerce should apply the transactions disregarded rule to West Fraser's purchase of seeds from affiliated parties and adjust West Fraser's COM accordingly.

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[250] *See, e.g.*, *Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review*, 69 FR 13813 (March 24, 2004), and accompanying IDM at Comment 11.
[251] *See* Memorandum, "Final Results Analysis Memorandum – West Fraser.," dated concurrently with this memorandum (West Fraser's Final Analysis Memorandum).
[252] *See* Petitioner's Case Brief at 6-8.
[253] *See* West Fraser's Final Analysis Memorandum.
[254] *See* Petitioner's Case Brief at 9-12.

*Rebuttal*

*West Fraser*[255]

- Commerce should not make an adjustment to West Fraser's purchase of seeds from Vernon Seeds because the record evidence does not support the petitioner's allegation that West Fraser's seed purchase prices from Vernon Seed and Huallen Seed did not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration.
- Further, making an adjustment to account for the seeds West Fraser obtained from Huallen Seed would be double counting because, as a joint venture partner, West Fraser's proportional share of Huallen Seed's expenses have already been reflected in West Fraser's COM as an element of its log and harvest costs.

**Commerce's Position:** We agree with the petitioner and have applied the transactions disregarded rule to West Fraser's purchase of seeds from affiliated parties and have adjusted West Fraser's COM accordingly.[256] Section 773(f)(2) of the Act provides:

> {a} transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

Commerce generally compares a respondent's purchases of an input in question from its affiliate to the respondent's purchases of the same input from unaffiliated suppliers to determine whether the price charged by the affiliated party reflects "the amount usually reflected in sales."[257] In this case, we find that record evidence supports a finding that the transactions disregarded rule should be applied as it relates to seeds that West Fraser obtained from affiliated parties due to a comparison of purchase prices between West Fraser and affiliated parties and West Fraser and unaffiliated parties. Further, based on record evidence, we find that making such an adjustment would not lead to double counting based upon a comparison of the seed purchase prices and West Fraser's joint venture expenses. For further details, given the proprietary nature of certain aspects of the record evidence used by Commerce in its analysis, please *see* West Fraser's Final Results Analysis Memorandum for further detail.

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[255] *See West Fraser's Rebuttal Brief* at 3-7.

[256] *See* West Fraser's Final Analysis Memorandum.

[257] *See, e.g.*, *Certain Carbon and Alloy Steel Cut-To-Length : Final Results of Antidumping Duty Administrative Review,*88 FR 39229 (June 15, 2023) and accompanying IDM at Comment 5; *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of South Korea,* 77 FR 17413 (March 26, 2012) and accompanying IDM at Comment 17; *Certain Welded Stainless Steel Pipes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 75 FR 27987 (May 19, 2010) (*WSSP Korea*), and accompanying IDM at Comment 3; and *Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review*, 69 FR 13813 (March 24, 2004) (*Silicomanganese from Brazil*), and accompanying IDM at Comment 7.

**Comment 12: Whether Commerce Should Disallow West Fraser's Claimed Adjustment for "Other Freight Charges" Incurred in Canada**

*Petitioner*[258]

- Commerce should rely on partial adverse facts available (AFA) in calculating West Fraser's dumping margin because West Fraser failed to provide requested information regarding its claimed adjustment for "other freight charges" and failed to act to the best of its ability in doing so.
- West Fraser explained that it incurs miscellaneous freight expenses on home market sales. Although West Fraser was asked several times by Commerce to explain certain factors regarding these miscellaneous freight expenses, West Fraser continued to provide unreliable information that could not be substantiated.
- As a result of the unreliability of these reported miscellaneous freight expenses, Commerce should apply partial AFA by not including these expenses in the calculation of West Fraser's home market prices. The adverse inference is appropriate as Commerce asked West Fraser to correct its reporting regarding these expenses several times and West Fraser failed to do so.

*West Fraser*[259]

- West Fraser disagrees with the petitioner and argues that partial AFA should not be applied to these miscellaneous freight expenses because West Fraser provided the information requested by Commerce in each supplemental questionnaire regarding this matter.
- West Fraser notes that Commerce included these miscellaneous freight expenses in the calculation of its home market price in the *Preliminary Results* and should continue to do so for the final results.
- While West Fraser acknowledges that there were some misallocations with these reported miscellaneous freight expenses, it maintains that its total freight charges were not impacted by these misallocations because freight expenses are reported in one account in its normal books and records.
- In its supplemental questionnaires to West Fraser regarding these miscellaneous expenses, Commerce asked West Fraser to explain certain circumstances but never asked West Fraser to fix each instance where a misallocation occurred.
- Given that Commerce never asked West Fraser to fix its databases for the misallocations with regards to a portion of its miscellaneous freight expenses partial AFA should not be applied in this instance.
- Therefore, there is no basis for Commerce to conclude that West Fraser failed to provide requested information regarding its claimed adjustment for "other freight charges" or that West Fraser failed to act to the best of its ability in doing so.

**Commerce's Position:** We agree with the petitioner that partial facts available with an adverse inference is warranted.

[258] *See* Petitioner's Case Brief at 17-20.
[259] *See* West Fraser's Rebuttal Brief at 7-12.

As an initial matter, when an interested party is claiming an adjustment, the burden is on that party to substantiate the authenticity of that adjustment, and that the party is eligible for the adjustment.[260] In this case, West Fraser has not done so.

In its initial HM questionnaire response, West Fraser reported that it "sometimes incurs miscellaneous freight expenses on its shipments that are not captured elsewhere in the system."[261] In its first supplemental questionnaire to West Fraser, Commerce instructed West Fraser to further explain the nature of these miscellaneous freight expenses and to provide freight invoices to support the amount of these expenses as reported in its home market sales database for three sales observations.[262] In its supplemental questionnaire response, West Fraser noted that "the amounts recorded as 'other freight charges' for the three{sequence numbers} identified were recorded incorrectly" because they were "inadvertently counted twice."[263] West Fraser further noted that it "has corrected these 'other freight charge' amounts in the revised database submitted with this response."[264]

Because West Fraser's responses and reporting continued to be unclear, Commerce issued a second supplemental questionnaire, in which Commerce asked West Fraser to explain an apparent discrepancy between its reported other freight charges in Canadian dollars (OTHCHGH_CAD) for one home market sales observation and the inland freight charge for that same observation.[265] Commerce also asked West Fraser to identify each instance where this type of inconsistency occurred in its home market sales database and to provide an explanation for how this apparent inconsistency occurs.[266] In response, West Fraser explained that these alleged inconsistencies were actually "diversion charges that were applied in addition to the base freight charges" and that "these diversion charges were incurred in virtually all instances in connection with a highly unique event – the atmospheric river catastrophe in British Columbia at the end of 2021 which caused very significant and widespread highway closures across the province."[267] West Fraser submitted screen shots from its Oracle Transport System, for several home market sales observations identified by Commerce in its Second Supplemental QR, to support its claims.[268]

Section 776(a) of the Act provides that, if necessary information is not available on the record, or if an interested party: 1) withholds information requested by Commerce; 2) fails to provide such information by the deadlines for submission of the information, or in the form and manner

[260] *See* 19 CFR 351.402(b)(1) ("The interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment").
[261] *See* West Fraser's Letter, "Certain Softwood Lumber Products from Canada, Case No. A-122-857 Response to April 29, 2022 Section B, C, and D Initial Antidumping Duty Questionnaire" at B-48 (WF BCD Response).
[262] *See* Commerce's Letter, "West Fraser Mills Ltd. Sections A-D Supplemental Questionnaire," dated November 2, 2022, at 8.
[263] *See* West Fraser's Letter, "Response to November 2, 2022, Sections A-D Supplemental Antidumping Duty Questionnaire," dated November 22, 2022, at SABCD-29.
[264] *Id*.
[265] *See* Commerce's Letter, "West Fraser Mills Ltd. Sections A-D Supplemental Questionnaire," dated December 19, 2022, at 4 (Second Supplemental QR).
[266] *Id*.
[267] *See* West Fraser's Letter, "Response to November 2, 2022, Sections A-D Supplemental Antidumping Duty Questionnaire," dated January 5, 2023, at 7-8.
[268] *Id*. at 8.

requested; 3) significantly impedes a proceeding; or 4) provides such information but the information cannot be verified, Commerce shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination.

Section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available when a party has fails to cooperate by not acting to the best of its ability to comply with a request for information. In doing so, Commerce is not required to determine, or make any adjustments to, dumping margins based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.[269] In addition, the SAA explains that Commerce may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[270] Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.[271] It is Commerce's practice to consider, in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation.[272]

We find that necessary information regarding West Fraser's claimed adjustment is missing, and that the information West Fraser provided cannot be verified. As a threshold matter, as acknowledged by West Fraser, these miscellaneous freight expenses impact a small number of freight costs in West Fraser's home market sales database.[273] While Commerce did accept West Fraser's OTHCHGH_CAD charges as an adjustment to its home market price calculation for the *Preliminary Results*, upon further examination, it appears that inconsistencies remain with the reported data for these charges. Specifically, despite several opportunities to provide information and clarify discrepancies in the information it provided, some of the information West Fraser provided, relating to these "other charges," appears to be inconsistent. Thus, necessary information regarding this claimed adjustment is missing, and we find that the information West Fraser did provide regarding this claimed adjustment cannot be verified. For an analysis of these inconsistencies, which are business proprietary, refer to West Fraser's Final Analysis Memorandum.

As noted above, West Fraser provided screenshots from its Oracle Transport System to substantiate the diversion charges related to a small number of sales in its home market database. However, West Fraser also noted that the diversion charges "were incurred in virtually all instances" for sales that occurred around the time of the catastrophic event mentioned above. Because we cannot substantiate the information and there remain inconsistencies in the record

[269] *See* section 776(b)(1)(B) of the Act.
[270] *See* SAA, at 870; *see also Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007)
[271] *See, e.g.*, *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*); *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); and *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997).
[272] *See, e.g.*, *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying PDM at 4, unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014).
[273] *See* West Fraser's Rebuttal Brief at 11.

with the reported figures, pursuant to section 776(a) of the Act, we are not allowing this claimed adjustment. Further, we find that an adverse inference is warranted, pursuant to section 776(b) of the Act because, as noted above, Commerce instructed West Fraser to review and explain inconsistencies with information in its home market sales database as compared to other information on the record, but West Fraser did not do so and these inconsistencies still exist.[274] Therefore, for these final results, as adverse facts available, Commerce is disallowing the use of these reported "other freight charges" as an adjustment to West Fraser's home market price.[275]

**Comment 13: Whether Commerce Used the Proper Market Price for Canfor's Wood Chip Sales**

*Canfor*[276]

- In determining the market value for sales of wood chips to affiliated parties, Commerce should disregard sales made by Canfor's Radium and Elko sawmills made pursuant to a long-term supply contract that does not reflect the market condition during the POR.
- When Canfor purchased the Radium and Elko sawmills in 2012, a stipulation of this agreement obligated those sawmills to supply chips to under a long-term supply contract. The chip prices established in that agreement are not reflective of prevailing supply and demand conditions, but rather were set with an eye toward providing a beneficial arrangement and successfully completing the sawmill purchase.
- A comparison with the chip sales prices on the record demonstrates that the prices for chips sold by the Radium and Elko sawmills are substantially below the market prices for chips in B.C.[277]
- Commerce has held that it is not *per se* unreasonable to rely on prices set in long-term contracts as the market prices. However, that is because in Commerce's view "{l}ong-term contracts still allow for price fluctuations in line with market conditions."[278] The chip prices set in the agreement were fixed for a ten-year period with very limited possible adjustments based on the price of lumber and pulp. These potential adjustments do not consider market conditions for chips. The contract stipulates that the first price negotiation will take place ten years after the initial contract was signed.
- Commerce routinely states that it "seeks to find the market value that best represents the company's own experience in the specific markets in which it operates."[279] Chip prices set in 2012 as part of a broader transaction involving the purchase of the sawmills in question are not representative of the "specific market" at issue here – the market for wood chips in B.C. in 2021.
- Commerce has previously held that the terms of certain contractual arrangements can distort the sales price to unaffiliated parties, such that it cannot be deemed reflective of market price. In the 2001 Lumber Investigation, Canfor argued that "the nature of a proprietary contractual relationship," along with the effect of certain intra-company

[274] *See* West Fraser's Final Analysis Memorandum.
[275] *Id*.
[276] *See* Canfor's Case Brief at 1-8.
[277] *Id.* at 7 (citing Canfor's Letter, "Canfor's Sections B-D Initial Questionnaire Response," dated June 22, 2022 (Canfor's B-D Response) at Exhibit D-4).
[278] *Id.*
[279] *Id.* at 5.

transactions, distorted the price for chips sold to unaffiliated parties from its Alberta mills.[280]

- Therefore, Canfor argued, a comparison between those unaffiliated chip prices and the prices for chips sold to affiliated parties from its mills located in B.C. was not appropriate. Commerce agreed, noting that "the verified information shows that the fair market value that Canfor's mills obtain for sales of wood chips to unaffiliated purchasers is clearly distorted due to its contractual agreements."[281] Commerce, instead compared Canfor's sales of wood chips to affiliated parties in B.C. to the weighted average market price of the respondents' wood chip sales in B.C. Canfor's prices to unaffiliated purchasers in this review are similarly distorted by its contractual agreements and Commerce should make a similar determination that they cannot be used in a comparison to affiliated prices.

*Petitioner*[282]

- Commerce should reject Canfor's argument and maintain its determination made in the *Preliminary Results* and the *Lumber AR2 Final* and *Lumber AR3 Final*[283] that Canfor's sales of chips to unaffiliated party A[284] are not unrepresentative of a market price for a purpose of Commerce's transactions disregarded analysis.
- The mere fact that the contract in question was negotiated several years prior to the POR does not mean that the circumstances surrounding the sales reflect "unusual circumstances." Indeed, Canfor's argument would result in any long-term purchase or sale agreement being "unusual." In fact, the record shows that these particular sales are not unusual.
- Other proprietary conditions in the contract contradicts Canfor's claim that prices in the long-term contract in question cannot be adjusted to reflect market conditions.
- Canfor's citation to *2001 Lumber Investigation* where Commerce disregarded prices set in a long-term contract is not analogous to the situation here. Specifically, Commerce noted in the previous softwood lumber proceeding that,

  Record evidence shows that chip prices vary significantly by certain regions in Canada and that a comparison in the aggregate is not reflective of the inherent realities of the market under consideration. At each companies' verification, we obtained information that demonstrated that wood costs vary significantly by region due to different stumpage and harvesting costs, and that the wood chip market logically tends to follow the log market. In addition, the existence of local pulp mills also effect {sic} the price of wood chips. Supply and demand factors also tend to cause wide variances in regional wood chip markets, whereby one region could be a net importer of chips and another region a net exporter due to oversupply.

[280] *Id.* at 6.
[281] *Id.*
[282] *See* Petitioner's Rebuttal Brief at 9-14.
[283] *Id.* at 13 (citing *Lumber AR2 Final* IDM at Comment 11 and *Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020*, 87 FR 48465 (*Lumber AR3 Final*), and accompanying IDM at Comment 16).
[284] The identity of unaffiliated party A is proprietary and disclosed in the Petitioner's Rebuttal Brief at 10.

Consequently, a meaningful comparison that recognizes these differences must be done on a regionally consistent basis.[285]

- Here, Canfor merely points to the fact that the prices reported for the Elko and Radium sawmills are below the market prices for chips in B.C. To that end, Commerce's decision in the *2001 Lumber Investigation* is not relevant to the current issue because the issue in question in the previous investigation did not address wood chips sold pursuant to a long-term contract.
- Canfor points to *Ultra-High Molecular Weight Polyethylene from Korea* to note that it is Commerce's view that "{l}ong-term contracts still allow for price fluctuations in line with market conditions,"[286] while Canfor's contract supply wood chips to unaffiliated party A allowed for no such adjustments during the POR. *Ultra-High Molecular Weight Polyethylene from Korea* is unavailing because it concerned a situation unrelated to here. In *Ultra-High Molecular Weight Polyethylene from Korea* Commerce determined that the actual sales value of certain co-products generated during the production of the merchandise under consideration should be used for the net-realizable value calculation even though the sales price was dictated by a long-term contract.[287]

**Commerce's Position:** For the final results, Commerce continues to find that an adjustment of Canfor's reported costs is necessary to reflect the market price of wood chips in B.C. sold to an affiliate. As an initial matter, we note that the underlying facts, our analysis, and our conclusions here are consistent with those in the immediately preceding 2019 and 2020 reviews, where Canfor raised these precise arguments.[288]

In the *Preliminary Results*, Commerce adjusted Canfor's wood chip revenue received from sales to affiliates in B.C. to prices that reflect market value.[289] According to section 773(f)(2) of the Act, Commerce may disregard transactions between affiliated persons if those transactions do not fairly reflect the value in the market under consideration (*i.e.*, if they are not made on an arm's-length basis). In applying the "transactions disregarded" provision of the statue, Commerce compares the average transfer price for an input or service paid to an affiliated supplier with the market price for that input or service.[290] Here, because the sales revenue of

[285] *Id.* at 12 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) (*2001 Lumber Investigation*), and accompanying IDM at Comment 11).
[286] *Id.* at 55 (citing *Ultra-High Molecular Weight Polyethylene from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 86 FR 11497 (February 25, 2021) (*Ultra-High Molecular Weight Polyethylene from Korea*), and accompanying IDM at Comment 6)).
[287] *Id.*
[288] *See Lumber AR2 Final* IDM at Comment 11 and *Lumber AR3 Final* IDM at Comment 16.
[289] *See* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Canfor Corporation, Canadian Forest Products Ltd., and Canfor Wood Products Marketing Ltd.," dated January 23, 2023 (Canfor Prelim Cost Analysis Memorandum) at 1.
[290] Commerce's preference for establishing a market value is a respondent's own purchases of the input or service from unaffiliated suppliers, and when no such purchases are available, Commerce looks to the affiliated supplier's sales to unaffiliated parties. *See, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17413 (March 26, 2012) (*Refrigerator-Freezers from Korea*), and accompanying IDM at Comment 17.

wood chips is used as an offset to cost, Commerce seeks to ensure that the offset is valued at the lower of the transfer or market price.

At issue is the calculation of the market price to be used in the comparison. In analyzing whether Canfor's transactions with affiliated parties were at arm's length, Commerce included in its analysis wood chips sold by Canfor's Elko and Radium sawmills to unaffiliated party A. Canfor argues that Commerce should not consider the sales of wood chips from its Elko and Radium mills to unaffiliated party A for purpose of evaluating whether its by-product sales with affiliated parties were made at arms-length, because the "record demonstrates that there are unusual circumstances surrounding the sales of chips from certain Canfor mills to unaffiliated purchasers."[291] Specifically, according to Canfor, the value of these sales does not reflect market conditions during the POR because they were made pursuant to a long-term contract entered into in 2012.[292] Canfor argues that the terms of this contract are no longer relevant because the market conditions during the POR did not reflect those conditions when it entered into the contract.[293]

We disagree with Canfor that the prices paid to unaffiliated party A are not appropriate for use in our comparison. Canfor suggests that the chip prices set in the agreement represent unusual circumstances by virtue of the fact that it was negotiated several years prior to the POR. In analyzing the record, however, the contract appears to allow for periodic adjustments to the wood chip prices by reference to industry publications.[294] Therefore, even if the contract was executed in 2012, the provisions permit revisions in response to changes in market conditions. As such, the sales made to unaffiliated party A pursuant to the contract are a reasonable basis for a market price for wood chips. We do not consider the sales at issue to be unrepresentative of a market price for purposes of our transactions disregarded analysis, and we continue to find that an adjustment of Canfor's reported costs is necessary to reflect the market price of wood chips including the sales from its Elko and Radium mills.

**Comment 14: Whether Commerce Should Adjust the Reported Cost of Electricity at Canfor's Prince George (PG) Sawmill**

*Canfor*[295]

- In the *Preliminary Results*, Commerce applied the transactions disregarded rule to transactions between Canfor's PG sawmill and Canfor Pulp Products Inc. (CPPI) and, in doing so, adjusted Canfor's electricity costs paid to CPPI by the PG sawmill to reflect a market price. Commerce was incorrect to do this because the PG sawmill was supplied electricity by BC Hydro and not by CPPI.
- Canfor's PG sawmill purchases power from BC Hydro. However, the PG Sawmill is one of four facilities located in the same Northwood area and BC Hydro sends the consolidated electricity invoice to CPPI to which the PG sawmill pays its share and

[291] *See* Canfor's Case Brief at 3.
[292] *Id.* at 1-8.
[293] *Id* at 2.
[294] *See* Canfor's Letter, "Section D Initial Questionnaire Response," dated June 14, 2021, at Exhibit D-14.
[295] *See* Canfor's Case Brief at 8-13 and Canfor's Rebuttal Brief at 16.

then CPPI sends the total cost of the electricity invoice to unaffiliated supplier. Thus, Commerce should make no adjustment to the PG sawmill's manufacturing costs.

- Commerce's methodology distorts Canfor's costs. The purpose of the statutory transactions disregarded test is to ensure that actual costs are not understated by less than arm's length dealing among affiliated parties. Here, there is no possibility of the PG Sawmill's costs being understated because the record is clear that the supplier of the electricity is the unaffiliated supplier BC Hydro, and it is BC Hydro – not CPPI – that sets the price for the electricity consumed by the PG Sawmill; and the PG Sawmill actually paid the exact price for the electricity that was set by BC Hydro. There is thus no basis for Commerce to adjust these actual electricity costs paid to BC Hydro.
- Commerce has declined to apply the transactions disregarded rule in similar circumstances. When the record shows that an affiliate acts only as a purchase agent and is in fact not the supplier of the input, Commerce has found that the respondent only transacts with the unaffiliated input supplier, and not with the affiliate.[296]
- CPPI never takes possession or title to the electricity. Rather, the electricity flows directly from BC Hydro to the PG Sawmill. BC Hydro maintains the single power line to the Northwood area by which electricity flows to all the facilities at the location.[297] The energy then flows through Canfor's, not CPPI's, internal meters so that the electricity usage may be read and allocated between PG Sawmill and CPPI. Thus, there is no *quid pro quo* because Canfor is not exchanging money for electricity from CPPI. In other words, no transaction is taking place between the PG Sawmill and CPPI that may be disregarded pursuant to section 773(f)(2) of the Act. Rather, if Canfor and CPPI did not split the bill using Canfor's meters, then either Canfor or CPPI would have to pay the invoice total. CPPI thus acts for its own benefit by working with Canfor using Canfor's meters to allocate the bill and is not performing services for Canfor.
- Should Commerce continue to adjust the PG sawmill's purchases of electricity from BC Hydro by CPPI, Commerce should at a minimum modify the adjustment to consider the ministerial nature of the activity being performed by CPPI.
- In *Bottom Mount Refrigerator-Freezers from Mexico*, where Commerce adjusted the price of inputs purchased from an affiliate, Commerce found it "not appropriate to increase the cost of {} inputs by the amount of the affiliate's overall selling, general and administrative expenses (SG&A) expenses."[298] Instead, Commerce used the actual costs incurred for providing the services plus and amount for the affiliate's G&A expenses. Here, Commerce should not adjust the price of electricity from BC Hydro by costs that cannot possibly be related to the purported electricity transaction, such as intangible assets amortization.
- The nature of the adjustment the petitioner argues for – the impairment of building, machinery and equipment - is entirely unrelated to the general and administrative costs of electricity billing just as CPPI's general business, which is the manufacture of wood pulp,

[296] *Id.* at 11 (citing *Chlorinated Isocyanurates from Japan: Final Determination of Sales at Less Than Fair Value*, 79 FR 56059 (September 18, 2014) (*Chlorinated Isocyanurates from Japan*), and accompanying IDM at Comment 4.
[297] *Id.* (citing Sections B-D Response at Exhibit D-34, page 19).
[298] *Id.* at 19 (citing *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico,* 77 FR 17422 (March 26, 2012) (*Bottom Mount Refrigerator-Freezers from Mexico*), and accompanying IDM at Comment 28).

is unrelated to the administrative costs of electricity billing. Further adjusting the PG sawmill's electricity costs as argued by the petitioner would further compound the already nonsensical treatment of these purchases.

*Petitioner*[299]

- Commerce should maintain its analysis from prior segments in this review and find that Canfor's argument lacks merit.
- Additionally, Canfor's claim that "the substance of the transaction would be exactly the same" if the PG sawmill purchased electricity from BC Hydro is incorrect. This is because CPPI's handling of electricity charges goes beyond administrative necessity and affects the G&A expenses of Canfor's PG sawmill.
- Canfor's argument that "{t}he Department has declined to apply the transactions disregarded rule in similar circumstances"[300] should be rejected as *Chlorinated Isocyanurates from Japan* is factually distinct and irrelevant to the issue presented here. In that case, Commerce declined to apply the transactions disregarded rule to the respondent's purchases of an input through an affiliated purchase agent.[301]
- Commerce should also reject Canfor's secondary argument that the total adjustment to its COM should be modified. Inclusion of the "intangible asset amortization" was appropriate as G&A expenses, by definition, relate to the general operations of a company. Thus, there is no basis to remove the expenses in question in calculating CPPI's G&A expense ratio.
- Commerce should have additionally adjusted CPPI's G&A ratio used to adjust the cost of electricity purchases from it by the PG sawmill in applying the transactions disregarded rule. CPPI recorded an asset impairment of CAD95mn for 2021.[302] Commerce's practice is to treat gains and losses related to impairment as general expenses.[303]

**Commerce's Position:** For the final results, Commerce continues to find that transactions between the PG sawmill and its affiliate should be subject to an analysis under section 773(f)(2) of the Act (the transactions disregarded rule), consistent with our decisions in all administrative reviews and underlying investigation of this proceeding.[304] For purposes of the transactions disregarded rule, when the respondent purchases inputs from an affiliated supplier, we test the transfer price between the affiliated supplier and the respondent with the available market prices for the input. Available market prices may relate to a respondent's purchases of the same input

[299] *See* Petitioner's Case Brief at 7-8 and Petitioner's Rebuttal Brief at 3-14.
[300] *Id.* at 8 (citing Canfor's Case Brief at 11 (citing *Chlorinated Isocyanurates from Japan* IDM at Comment 4).
[301] *Id.*
[302] *Id.* (citing Canfor's Section A Response at Exhibit A-10, notes 5 and 14).
[303] *Id.* (citing *Certain Oil Country Tubular Goods from Ukraine: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 79 FR 41969 (July 18, 2014) (*OCTG from Ukraine*), and accompanying IDM at Comment 8; *see also Large Diameter Welded Pipe from Canada: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 FR 6378 (February 27, 2019) (*Large Welded Pipe from Canada*), and accompanying IDM at Comment 8 ("Commerce normally makes a distinction between gains and losses on the routine disposition of production equipment and gains or losses associated with the permanent shutdown of an entire production facility.").
[304] *See Lumber Investigation IDM* at Comment 27; *see also Certain Softwood Lumber Products from Canada*: *Final Results of Antidumping Duty Administrative Review; 2017–2018*, 85 FR 76519 (November 30, 2020) (*Lumber AR1 Final*), and accompanying IDM at Comment 6; *Lumber AR2 Final* IDM at Comment 13; *Lumber AR3 Final* IDM at Comment 19.

directly from unaffiliated suppliers, and/or an affiliated reseller's average acquisition price plus the affiliated reseller's SG&A expenses.

Commerce's established practice when the respondent purchases inputs from an affiliated reseller is to value the input at the higher of the transfer price or the adjusted market price for the input (*i.e.*, the affiliate's average acquisition cost plus the affiliate's expenses). Commerce has explained that the inclusion of the affiliate's SG&A expenses ensures that the adjusted market price reflects the affiliates' cost of providing the services. Further, Commerce has applied the transactions disregarded rule in instances where the affiliated services were limited to document handling and acting as the payment intermediary, as is the case here.

In the instant case, the record demonstrates that a transaction for electricity took place between the PG sawmill and CPPI rather than directly between the sawmill and the unaffiliated electricity supplier.[305] Therefore, CPPI acts as an affiliated reseller of electricity from an unaffiliated supplier to the PG sawmill, and the analysis of the transactions between the mill and its affiliate is appropriate. In the current proceeding, Canadian Forest Products (of which the PG sawmill is part) and CPPI are separate legal entities and both manufacture products (CPPI produces non-subject merchandise).[306] CPPI also functions as a middleman between all the facilities in what it terms the Northwood area (the entities in this area include Canfor's PG sawmill) and BC Hydro.[307] While CPPI does not generate the electricity, it is the payment intermediary. While Canfor may consider these transactions to be only a pass-through to its affiliated Northwood area facilities, the fact remains that CPPI provided services to the Northwood area facilities by acting as the document handler (*e.g.*, providing documentation for allocating the costs to the different facilities, invoicing each of the Northwood area facilities, processing the receipt of payments from the Northwood area facilities, *etc.*) and acting as the payment intermediary.[308] Accordingly, we consider it appropriate for the final results to continue to include CPPI's SG&A expenses in the electricity market price computation to account for the services CPPI is providing. As noted above, our approach here is consistent with our treatment of the payments in the underlying investigation and previous administrative reviews of this proceeding.[309]

Canfor argues that if we continue to make this adjustment, we should, consistent with *Bottom Mount Refrigerator-Freezers from Mexico,* revise the calculation of CPPI's SG&A rate to exclude certain amortization expenses (*e.g.*, intangible assets) because they are unrelated to the electricity purchases. CPPI's financial statements identify its intangible assets as "{s}oftware development costs relate to major software systems purchased or developed by the Company."[310]

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[305] *See* Canfor's Letter, "Supplemental Sections A-D Questionnaire Response," dated July 28, 2021 at 13.
[306] *Id.*
[307] *Id.*
[308] The situation here where CPPI performs numerous tangible services for the transaction in question contrasts with the transaction in *Chlorinated Isocyanurates from Japan* cited to by Canfor where Commerce determined not to apply the transactions disregarded rule because the transaction involved an affiliated commission agent for which Commerce determined it had no meaningful role and thus Commerce determined that the purchases in question "to be transactions between {the respondent} and unaffiliated suppliers, rather than transactions with {the affiliated commission agent}." *See Chlorinated Isocyanurates from Japan* IDM at Comment 4.
[309] *See Lumber Investigation* IDM at Comment 27; *Lumber AR1 Final* IDM at Comment 6; *Lumber AR2 Final* IDM at Comment 13; *Lumber AR3 Final* IDM at Comment 19.
[310] *See* Canfor's Section A Response at Exhibit A-10, page 16.

Canfor has provided no evidence that these software systems are not related to CPPI's general and administrative activities. Therefore, Commerce's adjustment to certain prices paid in *Bottom Mount Refrigerator-Freezers from Mexico* does not apply to the facts of this record, and for the final results we will continue to include these amortization expenses in the SG&A expense calculation for CPPI.

In addition, we agree with the petitioner that in performing our transactions disregarded analysis we should include in CPPI's G&A expenses impairment gains and losses of building, machinery and equipment. It is Commerce's established practice with respect to impairment gains and losses to treat them as general expenses that relate to the general operations of the company as a whole, and to include them in the G&A calculation.[311]

**Comment 15: Whether Commerce Properly Determined Canfor's G&A Expense Ratio**

*Petitioner*[312]

- Instead of relying on a non-existent entity, *i.e.*, Canfor Legal, which consists of Canfor Corporation less CPPI for calculating Canfor's G&A expense ratio, consistent with its practice of relying on a legal entity-specific basis, Commerce should have relied on the operating entity responsible for Canfor's production of softwood lumber in Canada, which is CFP,[313] in calculating Canfor's G&A expense ratio.
- In *Solar Cells from Taiwan*, Commerce stated that its policy was to calculate G&A and financial expenses on a company specific basis unless two collapsed respondents are reported in the same consolidated financial statements.[314]
- Additionally, in calculating the numerator of its G&A expense ratio, Canfor excludes the expenses of CWPM Ltd., CWP Sweden, and Canfor Southern Pine, Inc.
- Moreover, Canfor Corporation's tax return indicates that Canfor Corporation earned almost no revenue itself, rendering a Canfor Corporation-specific G&A expense ratio calculation impossible. Therefore, Canfor Corporation's G&A expenses must be included with CFP's G&A expenses.
- For the final results, Commerce should calculate Canfor's G&A expense ratio based on CFP's standalone trial balance reconciled to its 2021 tax return. This is consistent with Commerce's practice and will ensure that the numerator of the ratio corresponds to the denominator.

[311] *See, e.g., Stainless Steel Bar from France: Preliminary Results of Antidumping Duty Administrative Review*, 65 FR 17411, 17415 (April 6, 2005); *OCTG from Ukraine* IDM at Comment 8; *Large Welded Pipe from Canada* IDM at Comment 8.
[312] *See* Petitioner's Case Brief at 4-7.
[313] *Id.* at 5 (citing Canfor's Section A Response at 8).
[314] *See Certain Crystalline Silicon Photovoltaic Products from Taiwan: Final Results of Antidumping Duty Administrative Review; 2014-2016*, 82 FR 31555 (July 7, 2017) (*Solar Cells from Taiwan*), and accompanying IDM at Comment 15.

*Canfor*[315]

- The petitioner has argued throughout this proceeding that Commerce should calculate Canfor's G&A rate based on expenses related only to CFP. All of these arguments by the petitioner have been rejected by Commerce and should again be rejected in this review.
- As in all previous reviews, because there is no stand-alone audited financial statement for CFP, Canfor calculated its G&A expense ratio using the expenses from the internal financial statement for the lumber segment of Canfor Corporation, which excludes CPPI and that Canfor designates as "CFP Legal." Thus, the only G&A expenses excluded from the calculation relate to non-subject merchandise.
- If Commerce were to limit the G&A expenses to only CFP as the petitioner suggests, then the G&A expenses relevant to subject merchandise that are charged directly to CWPM Ltd. and Canfor Corporation would not be included in the resulting G&A ratio.

**Commerce's Position:** We disagree with the petitioner. The petitioner argues that we should calculate the G&A ratio based entirely on CFP's G&A expenses in the numerator and CFP's total cost of production in the denominator. However, if we were to do so, we would be excluding G&A expenses recorded by Canfor Corporation and CWPM Ltd., which are G&A expenses incurred during the production of subject merchandise.[316] Thus, we have included all three companies' G&A expenses in the numerator of the calculation of Canfor's G&A expense ratio.[317]

The petitioner asserts that Commerce was incorrect to exclude expenses identified for CWPM Ltd., Canfor Sweden and Canfor Southern Pine, but the removed expense amounts for all three companies were identified as relating to selling, rather than general and administrative expenses, and so were properly excluded.[318]

The petitioner cites to a case in which we stated it was our policy to calculate G&A and financial expenses on a company-specific basis, unless two collapsed respondents are reported in the same consolidated financial statements.[319] Here, there are consolidated financial statements for the collapsed entities that comprise the respondent. As we have done in the underlying investigation and the three subsequent administrative reviews, we have collapsed Canfor Corporation, CWPM Ltd, and CFP into one entity.[320] Canfor Corporation's financials include the costs of the other two entities included in the Canfor collapsed entity, as well as its own costs and those of CPPI.[321] The only changes made to the Canfor Corporation's reported G&A and total costs are that the G&A and total costs of CPPI, which relate entirely to the production to non-subject merchandise, were removed from the G&A ratio calculation.[322]

[315] *See* Canfor's Rebuttal Brief at 6-16.
[316] *See* Canfor's Section A Supplemental Response at 6-7 and Exhibit A-36-A-38.
[317] *See* Canfor's Section D Supplemental Response at Exhibit D-37.
[318] *Id*. at tab "Summary - G&A 2021," tab, column G; *see also* Canfor's Section A Response at 6-7
[319] *See Solar Cells from Taiwan* IDM at Comment 15.
[320] *See Preliminary Results* PDM at 5.
[321] *See* Canfor's Section A Response at Exhibit A-9 and Canfor's Section D Supplemental Response at Exhibit D-37
[322] *See* Canfor's Section D Supplemental Response at Exhibit D-37.

**Comment 16: Whether Commerce Should Correct the Rate Assigned to Non-Selected Respondents**

*Petitioner*[323]

- Commerce should assign the non-selected respondents a rate based upon the simple-average of the dumping margins determined for mandatory respondents as this rate more closely reflects the weighted-average dumping margin that Commerce would apply absent "concern over disclosing business-proprietary information."
- For the final results, Commerce should select as the non-selected companies rate the rate that is closest to the overall weight average rate calculated using Canfor and West Fraser's actual net U.S. sales values.

No other party comment on this issue.

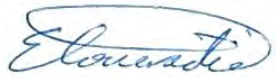
**Commerce's Position:** We agree that we made an error in selecting the rate for the non-selected respondents in the *Preliminary Results*. For the final results, we have selected, as the non-selected companies' rate, the rate that is closest to the overall weighted-average rate calculated using Canfor and West Fraser's actual net U.S sales values, *i.e.*, a rate based on the ranged public sales values of West Fraser and Canfor.[324]

## V. 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 results in this administrative review and the final weighted-average dumping margins in the *Federal Register*.

☒ Agree ☐ Disagree

7/26/2023

X 

Signed by: ABDELALI ELOUARADIA

Abdelali Elouaradia
Deputy Assistant Secretary
for Enforcement and Compliance

[323] *See* Petitioner's Case Brief at 32-34.
[324] *See* Memorandum to the File, "Calculation of the Rate for Non-Examined Companies," dated concurrently with this memorandum.