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Administrative Review
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August 3, 2022

MEMORANDUM TO: Ryan Majerus
Deputy Assistant Secretary
for Policy and Negotiations

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the 2020 Administrative Review of the Antidumping Duty Order on Certain Softwood Lumber Products from Canada

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I. SUMMARY

On February 4, 2022, the U.S. Department of Commerce (Commerce) published its *Preliminary Results* in the 2020 administrative review of the antidumping (AD) duty order of certain softwood lumber products (softwood lumber) from Canada.[1] The period of review (POR) is January 1, 2020, through December 31, 2020. This administrative review covers two mandatory respondents, Canfor[2] and West Fraser,[3] and 273 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 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: Whether Commerce's Application of the Cohen's *d* Test is 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*, 87 FR 6506 (February 4, 2022) (*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., and Canfor Wood Products Marketing Ltd. (collectively, Canfor) as a single entity.
[3] As described in the PDM at 6-7, 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 Average-to-Average (A-to-A) Methodology Accounts for the Identified Price Differences in Applying the "Meaningful Difference" Test
Comment 6: Zeroing
Comment 7: The Cohen's *d* and Ratio Test
Comment 8: Whether Commerce's Simple Average of Variances is Appropriate
Comment 9: Whether to Update J.D. Irving's Cash Deposit Rate
Comment 10: Whether it was Proper not to Select Respondents based on Sampling
Comment 11: Whether it was Proper not to have Adjusted U.S. Price by Countervailing Duties (CVD)
Comment 12: Whether to Correct the Names of Certain Companies under Review
Comment 13: Whether Commerce Should Include Restructuring and Impairment Costs in the Calculation of West Fraser's General & Administrative (G&A) Expense Ratio
Comment 14: Whether Commerce Should Make Certain Revisions to West Fraser's Byproduct Offset Calculation
Comment 15: Whether Commerce Should Rescind this Administrative Review for Companies with No Suspended Entries in the U.S. Customs and Border Protection (CBP) Data
Comment 16: Whether Commerce Used the Proper Market Price for Canfor's Wood Chip Sales
Comment 17: Whether the Costs Associated with Canfor's Mill Closures Should Be Excluded from the Mill Specific Cost of Production
Comment 18: Whether the Cost for Electricity Should be Based on Electricity Prices in Alberta Alone
Comment 19: Whether Commerce Should Adjust the Reported Cost of Electricity at the PG Sawmill

II. BACKGROUND

As noted above, on February 4, 2022, Commerce published its *Preliminary Results*.[4] On May 5, 2022, Commerce extended the deadline of these final results until August 3, 2022.[5]

[4] *See Preliminary Results*.
[5] *See* Memorandum, "Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated May 5, 2022.

On March 15, 2022, ten parties submitted either case briefs or letters in lieu of case briefs.[6] On March 28, 2022, seven parties submitted rebuttal briefs.[7] Several parties requested hearings, but hearing requests were withdrawn.

III. SCOPE OF THE ORDER

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.

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[6] *See* Canfor's Letter, "Case Brief," (Canfor's Case Brief); *see also* Government of Canada (GOC), the Government of Alberta, the Government of British Columbia, and the British Columbia Lumber Trade Council (Canadian Parties)'s Letter, "Case Brief of the Canadian Parties," (GOC's Case Brief); Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (the petitioner)'s Letter, "Case Brief On Behalf of the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations" (Petitioner's Case Brief); Carrier Forest Products Ltd. and Carrier Lumber Ltd. (Carrier)'s Letter, "Letter in Lieu of Case Brief; Governments of Ontario and Québec's Letter, "Letter Lieu of Case Brief of the Governments of Ontario and Québec; J.D. Irving Limited (J.D. Irving) 's Letter, "Case Brief," (J.D. Irving's Case Brief); Carrier's Letter, "Letter in Lieu of a Case Brief"; Resolute FP Canada Inc. (Resolute) and Central Canada's Letter (Resolute and 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), all dated March 14, 2022.

[7] *See* Canfor's Letter, "Rebuttal Brief of Canfor Corporation"; Canadian Parties' Letter, "Canadian Parties' Rebuttal Brief"; Fontaine Inc.'s Letter, "Letter in lieu of Rebuttal Brief"; Petitioner's Letter, "Rebuttal Brief On Behalf of the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations"; Resolute's Letter, "Resolute's Rebuttal Brief"; Sierra Pacific Industries' Letter, "Rebuttal Brief"; Olympic Industries, Inc. and Olympic Industries ULC (Olympic)'s Letter, "Letter in Lieu of a Rebuttal"; and West Fraser's Letter, "West Fraser Mills Ltd. Rebuttal Brief," all dated March 28, 2022.

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.
- 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; 4407.10.01.01; 4407.10.01.02; 4407.10.01.15; 4407.10.01.16; 4407.10.01.17; 4407.10.01.18; 4407.10.01.19; 4407.10.01.20; 4407.10.01.42; 4407.10.01.43; 4407.10.01.44; 4407.10.01.45; 4407.10.01.46; 4407.10.01.47; 4407.10.01.48; 4407.10.01.49; 4407.10.01.52; 4407.10.01.53; 4407.10.01.54; 4407.10.01.55; 4407.10.01.56; 4407.10.01.57; 4407.10.01.58; 4407.10.01.59; 4407.10.01.64; 4407.10.01.65; 4407.10.01.66; 4407.10.01.67; 4407.10.01.68; 4407.10.01.69; 4407.10.01.74; 4407.10.01.75; 4407.10.01.76; 4407.10.01.77; 4407.10.01.82; 4407.10.01.83; 4407.10.01.92; 4407.10.01.93; 4407.11.00.01; 4407.11.00.02; 4407.11.00.42; 4407.11.00.43; 4407.11.00.44; 4407.11.00.45; 4407.11.00.46; 4407.11.00.47; 4407.11.00.48; 4407.11.00.49; 4407.11.00.52; 4407.11.00.53; 4407.12.00.01; 4407.12.00.02; 4407.12.00.17; 4407.12.00.18; 4407.12.00.19; 4407.12.00.20; 4407.12.00.58; 4407.12.00.59; 4407.19.05.00; 4407.19.06.00; 4407.19.10.01; 4407.19.10.02; 4407.19.10.54; 4407.19.10.55; 4407.19.10.56; 4407.19.10.57; 4407.19.10.64; 4407.19.10.65; 4407.19.10.66; 4407.19.10.67; 4407.19.10.68; 4407.19.10.69; 4407.19.10.74; 4407.19.10.75; 4407.19.10.76; 4407.19.10.77; 4407.19.10.82; 4407.19.10.83; 4407.19.10.92; 4407.19.10.93; 4409.10.05.00; 4409.10.10.20; 4409.10.10.40; 4409.10.10.60; 4409.10.10.80; 4409.10.20.00; 4409.10.90.20; 4409.10.90.40; 4418.50.0010; 4418.50.0030; 4418.50.0050 and 4418.99.10.00.

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:

4415.20.40.00; 4415.20.80.00; 4418.99.90.05; 4418.99.90.20; 4418.99.90.40; 4418.99.90.95; 4421.99.70.40; and 4421.99.97.80.

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

Petitioner

- Commerce's reliance on the *Lumber V CVD AR2*[8] proceeding in its preliminary PMS Memorandum to determine that the Alberta log market was not distorted and, therefore, a cost-based PMS did not exist during the POR,[9] was misplaced, because the question at issue in *Lumber V CVD AR2* regarding the LER in Alberta was whether the agency could apply a "price effect" test to determine whether the same LER were indirect countervailable subsidies.[10]
- Commerce's consideration of record evidence is unreasonable as it improperly defers to the Government of Alberta's (GOA) characterization of the Alberta LER as a "simple" and "low-cost" log export permitting process and does not confront the actual language from the *Forests Act*.[11]
- Commerce is required to consider whether the respondents' costs are outside the ordinary course of trade in regards to the instant PMS Allegation,[12] and record evidence shows that the GOA exercises control over log pricing through its enforcement of the *Forest Act*, which results in pricing of logs in Alberta that cannot be competitively set.[13] Commerce should reconsider its preliminary finding that a cost adjustment for the mandatory respondents' cost of logs with respect to British Columbia (B.C.) is not warranted, and make an adjustment to constructed value (CV) using the average price-per-cubic-meter of U.S. log exports, or make an adjustment to CV using information on the record of the instant review that "B.C. logs sold at an average discount of 27% relative to their U.S. counterpart."[14]

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[8] *See Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017) (*Lumber V CVD AR2*), and accompanying Issues and Decision Memorandum (IDM).
[9] *See* Memorandum, "Antidumping Duty Administrative Review of Softwood Lumber Products from Canada: Preliminary Decision Memorandum on Particular Market Situation Allegations," dated January 28, 2022 (PMS Memorandum) at 14.
[10] *See* Petitioner's Case Brief at 26-28.
[11] *Id.* at 28.
[12] *See* Petitioner's Letter, "Certain Softwood Lumber Products from Canada: Particular Market Situation Allegation Regarding Respondents' Cost of Production," dated July 6, 2021 (PMS Allegation).
[13] *Id.* at 29.
[14] *Id.* at 31 (citing PMS Allegation at 19-24 and Exhibit 15).

- Commerce's rationale to decline a CV adjustment to the mandatory respondents' cost of logs with respect to B.C. based on a comparison of each mandatory respondent's log prices with the Washington State Department of Natural Resources (WDNR) price of 84.35 Canadian dollars is inadequate, because Commerce did not explain how it calculated the WDNR price, and fails to explain why the WDNR price is the best benchmark to use in its comparison to the mandatory respondents' log prices in B.C.[15]
- Commerce fails to address that an "overlap" exists between the WDNR data and the export data provided by the petitioner in the PMS Allegation, because the log species used to determine an average export price for logs are also reported in the WDNR data.[16]
- Commerce failed to address why it is reasonable to compare offer prices to the mandatory respondents' reported log prices.[17]
- Commerce failed to address the fact that the WDNR data upon which it calculated its benchmark price is only based on a small number of quotes.[18]
- The fact that Commerce did not cite to the Schuetz Report[19] does not mean that Commerce failed to consider the entire record, as claimed by the Canadian Parties in their case brief.[20]

Sierra Pacific

- Commerce erred in using the WDNR price as a benchmark to compare to the respondent's COP costs, because it did not explain how it derived a single price for B.C. logs based on the WDNR data for 2020,[21] and these proprietary calculations are not on the record of this review.[22]
- The WDNR data is unreliable to use as a benchmark, because, as Commerce has recognized in *Lumber V CVD AR2*,[23] offer prices or price quotes are less reliable than transaction prices because they may or may not have been agreed upon between the parties involved in the transaction or finalized.[24]
- Commerce should reconsider its determination that a cost adjustment to the mandatory respondents' CV with respect to log prices in B.C. is not warranted and use the U.S. log export prices in 2020 that was submitted by the petitioner in the PMS Allegation,[25] because the log export prices are in USD per cubic meter and can easily be converted to CAD per cubic meter.[26]

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[15] *Id.* at 31 and 32 (citing PMS Memorandum at 16 ("…the WDNR price benchmark is the best benchmark to use to determine a CV adjustment…because record evidence indicates that the Pacific-Northwest Region upon which the WDNR data are based most accurately reflects the stumpage market in B.C.")).
[16] *Id.* at 32.
[17] *Id.*
[18] *Id.* (citing the Canadian Parties' Letter, "Certain Softwood Lumber Products from Canada: Factual Information Responding to Petitioner's Allegation of a Particular Market Situation," dated August 20, 2021 (PMS Rebuttal) at Exhibit PMS-S-3).
[19] *See* Petitioner's Letter, "Certain Softwood Lumber Products from Canada: Surrebuttal to Canadian Parties' August 20, 2021 PMS Response," dated August 30, 2021 (PMS Surrebuttal) at Exhibit PMS-SR-01.
[20] *See* Canadian Parties' Case Brief at 37 and 44.
[21] *See* Sierra Pacific's Case Brief at 2.
[22] *Id.* at 3.
[23] *See Lumber V CVD AR2* IDM at 108.
[24] *See* Sierra Pacific's Case Brief at 3.
[25] *See* PMS Allegation at 23.
[26] *See* Sierra Pacific's Case Brief at 3.

Canadian Parties' Comments

- Commerce correctly determined that a PMS with respect to log prices in Alberta does not exist.[27]
- Commerce incorrectly determined that any level of distortion constitutes a PMS, when a PMS can only arise when a significant distortion prevents a proper comparison of CV with export price or constructed export price.[28]
- Commerce's determination runs counter to the statute,[29] which states that in order to allege that a PMS exists, Petitioner must demonstrate that distortions are present in the market such that these distortions "prevent a proper comparison of normal value with export price or constructed export price,"[30] which necessarily means that a PMS finding must be predicated on a distortion that is "significant."[31]
- The SAA accompanying the Uruguay Round Agreements Act (URAA) states that a PMS exists in situations in which government control over pricing exists "to such an extent" that home market prices cannot be considered to be competitively set,[32] indicating that Congress did not regard minimal distortion as sufficient to support a PMS finding.[33]
- The U.S. Court of Appeals of the Federal Circuit (CAFC) and the CIT have confirmed that subsidies must be significant in order to affect the price of an input,[34] and have concluded that Commerce must find a level of distortion that is sufficient to prevent a price-to-price comparison.[35]
- Commerce's claim that there is no specific threshold of market distortion to find that a PMS exists conflicts with its own practice, because Commerce has determined that a PMS finding requires a significant distortion to the costs of production as Commerce stated in *Lumber V AR2*,[36] *Oil Country Tubular Goods from Korea*,[37] and *Circular Welded Pipe from Oman* Post-Preliminary PMS Memorandum.[38]

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[27] *See* Canadian Parties' Case Brief at 32 and 33.
[28] *Id*. at 33 (citing *Nexteel Co. v. United States,* No. 2021-1334, 2022 WL 728512 (Fed. Cir. March 11, 2022) (*NEXTEEL*) at 5).
[29] *See* section 771(15)(C) of the Act.
[30] *Id*.
[31] *See* Canadian Parties' Case Brief at 33.
[32] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H. R. Doc. No. 103 316, Vol. 1 (1994) (SAA) at 822.
[33] *See* Canadian Parties' Case Brief at 34 and 35.
[34] *See NEXTEEL* (citing 773(e) of the Act); *see also Husteel Co. v. United States*, 471 F. Supp. 3d 1349, 1362 (CIT 2020) (*Husteel*).
[35] *See* Canadian Parties' Case Brief at 35.
[36] *Id.* at 35 and 36 (citing *Lumber V AR2* IDM at 8 and 9 (Section 771(15) of the Act "demonstrates that the circumstances in a market must be sever or significant enough to prevent a proper comparison with export price (EP) and constructed export price (CEP).)"); *see also* Canadian Parties' PMS Rebuttal at 17 and 18.
[37] *Id.* at 35 (citing *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Review; 2018-2019*, 86 FR 41015 (*Oil Country Tubular Goods from Korea*), and accompanying IDM at 26 and 27 (citing that subsidization "barely above *de minimis*" does not contribute to a PMS)).
[38] *Id.* at 36 (citing Circular Welded Pipe from the UAE Post-Preliminary PMS Memorandum at 9 (noting that rejecting PMS allegations that are based on distortions in the electricity market when "electricity accounts for a small percentage of the cost of production for CWP, and Commerce considers the totality of the market conditions when evaluating PMS allegations."); *see also* Memorandum, "Circular Welded Pipe from the Sultanate of Oman: Post-Preliminary Determination Regarding Particular Market Situation Allegation, Antidumping Administrative

- Commerce's PMS determination ignores the fact that the PMS provision is an exception to the preference of the Tariff Act of 1930, as amended (the Act) for using a company's actual books and records for calculating CV,[39] and the petitioner has not met its burden of proof that there is a basis for a PMS to exist in its PMS Allegation.[40]
- Commerce ignored most of the evidence submitted by the Canadian Parties and relied on "speculative" and "theoretical" effects of the log export permit (LEP) process, which goes against the CIT decision that states that any allegations must be substantiated in order to issue an affirmative PMS determination.[41]
- Commerce's focus on the impact of the LEP process on log volumes[42] ignores relevant evidence which demonstrates that unexported logs in B.C. that are otherwise available for export indicate that there is no remaining unmet net export demand for logs in the province.[43]
- Commerce's claim that log exporters may have unused log export authorizations due to the fear that future exports may be "blocked" by domestic processors[44] is nonsensical and impermissibly speculative, because domestic processors have no ability to block log exports once authorizations are issued, and it does not make sense that log exporters seeking a profit would not take advantage of log export approvals.[45]
- The World Trade Organization (WTO) ruled that the presence of significant unutilized export authorizations undermined Commerce's argument in *Lumber V CVD AR2* that exporters would be able to export more logs in the absence of the log export restrictions or blocking.[46] This ruling further undermines Commerce's determination in the instant case that log export restrictions (LERs) in B.C. create an artificial surplus of logs in the province, thereby distorting log prices.[47]
- Commerce's evidence of a pricing effect (*i.e.*, that LERs in B.C. create downward pressure on log prices by creating an artificial surplus of logs in the province) in its PMS determination is deficient, because the Canadian Parties provided evidence that a majority (*i.e.*, 97.4 percent, 3.142 million logs per meter cubed) of log export applications are authorized.[48]

Review of 2016-2017," dated March 8, 2019 (Circular Welded Pipe from Oman Post-Preliminary PMS Memorandum) at 5 and 6).

[39] *See* Circular Welded Pipe from Oman Post-Preliminary PMS Memorandum.

[40] *See* Canadian Parties' Case Brief at 37 (citing *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27357 (May 19, 1997) ("… the party alleging the existence of a 'particular market situation' … has the burden of demonstrating that there is a reasonable basis for believing that a 'particular market situation' exists.")).

[41] *Id.* (citing *Hyundai Steel Company v. United States*, 415 F. Supp. 3d 1293, 1301 (CIT 2019) (noting that the CIT rejected that "a collection of unsubstantiated allegations can be combined into a substantiated one" to support a PMS finding)).

[42] *See* PMS Memorandum at 11 ("B.C.'s LERs increased domestic log supply and suppress{ed} log prices, as well as materially impact{ed} the ability of domestic log suppliers to export logs from the province.").

[43] *See* Canadian Parties' Case Brief at 38 and 39 (citing PMS Rebuttal at 41, 43, 49, 51-53, 81-82, and Exhibit PMS-6).

[44] *See* PMS Memorandum at 13.

[45] *See* Canadian Parties' Case Brief at 40 (citing PMS Rebuttal at Exhibit PMS-1).

[46] *Id.* at 40 and 41 (citing WTO Panel on *Lumber V CVD AR2* IDM at paragraph 7.151).

[47] *See* PMS Memorandum.

[48] *See* Canadian Parties' Case Brief at 41 and 42 (citing PMS Rebuttal at page 52 of Exhibit PMS-6 and the PMS Memorandum at 12).

- The reports[49] that Commerce relied on to determine that B.C. log prices are lower than non-distorted market prices do not relate to the POR and, therefore, are not a sound basis for supporting Commerce's preliminary PMS determination in the instant review.[50]
- The threat of blocking, in which domestic log producers threaten to bid for logs that are awaiting export approval in order to get preferential prices from potential log exporters, is not substantial, and therefore is not a sound basis for Commerce to determine that a PMS exists with respect to log prices in B.C., because the share of logs that are precluded from exportation through the LERs are small.[51]
- Commerce's determination that LERs in B.C. impact the entire province is not supported by record evidence that indicates that the B.C. interior, where the mandatory respondents' softwood lumber manufacturing operations are located, is a separate market than the Pacific Maritime Ecozone (PME) region near the B.C. coast.[52]
- Commerce failed to provide a basis for its conclusion that both respondents have mills located near timbermarks with volumes that are permitted for export,[53] and ignored affidavits[54] submitted by the Canadian Parties that establish the fact that log exports are not relevant to sawmills owned by the mandatory respondents.[55] The respondents do not export logs in "any significant quantity" from mills near timbermarks with volumes permitted for export, and the respondents' distance to these mills do not account for obstacles to log transport (*e.g.*, mountains, lack of transportation corridors and border crossings, differences in timber profile or log characteristics that differentiate modes of transport).[56]
- Commerce ignored the Schuetz report in coming to its preliminary determination in the PMS Memorandum, which concluded that it would be economically irrational for log owners in the B.C. Interior, such as the mandatory respondents, to export logs from the interior, based on data of log haul distances and truck haul cycle times from harvest sites throughout the B.C. Interior to adjoining U.S. States.[57]
- The petitioner's argument that blocking in the B.C. Interior indicates that LERs in B.C. distort the log market in B.C. has no merit, because the Reishus Report demonstrates that blocked exports had no economic impact on log supply or log markets in the B.C. Interior.[58]
- Commerce's PMS determinations in *Biodiesel from Argentina*[59] and *Biodiesel from Indonesia*[60] do not support finding a PMS exists in B.C., because both cases are "nothing like" the instant case, and in both of the biodiesel cases, the export restrictions were not the only basis for determining that a PMS exists in Argentina and Indonesia. Commerce

[49] *See* PMS Memorandum at 12.
[50] *See* Canadian Parties' Case Brief at 42 (citing *NEXTEEL* at 6).
[51] *Id.* (citing PMS Rebuttal at 9 and 10).
[52] *See* Canadian Parties' Case Brief at 42 and 43 (citing PMS Rebuttal at 9 and 10 and at Exhibits PMS-6, PMS-9, PMS-10, and PMS 11).
[53] *See* PMS Memorandum at 13.
[54] *See* PMS Rebuttal at Exhibits PMS-9 and PMS-10.
[55] *See* Canadian Parties' Case Brief at 44.
[56] *Id.* at 44.
[57] *Id.* at 45.
[58] *Id.*
[59] *See Biodiesel from Argentina* IDM at 15 and 22.
[60] *Id.* at 12-14.

noted in *Lumber V AR2* that *Biodiesel from Argentina* was an "inapt comparison for this case."[61]

- In *Chlorinated Isocyanurates from Spain*, [62] Commerce declined to initiate a PMS investigation because the case relied on government controls that Commerce determined were "not alleged or found on the record" of the case.[63]
- LERs in B.C. are within the ordinary course of trade, because they have been in place for over 125 years, which falls within Commerce's definition of "ordinary course of trade."[64] Commerce's PMS regulation requires that a PMS exists only when the respondents' actual costs of production do not "accurately reflect the cost of production in the ordinary course of trade"; therefore, Commerce's finding that a PMS exists in B.C. is unlawful.[65]
- In *Lumber V AR1*, Commerce denied the petitioner's previous allegation that a PMS exists in Canada, because the government programs which petitioner alleged caused a distortion in Canada were in place for a long enough amount of time to warrant finding them within the ordinary course of trade. These programs were in place for a shorter period, since 2009 and 2019, than the LERs alleged in the instant PMS Investigation.[66]
- If Commerce uses the LERs in B.C. to determine that a PMS exists in B.C., such a use of LERS would result in a double remedy because the same program is being reviewed in the concurrent CVD review of the *Order*.[67] This is contrary to the law, because there is nothing distinct about the AD and CVD proceedings in the instant case, because they are addressing the same unfair trade practice (*i.e.*, the existence of LERs in B.C.).
- In relying on facts from *Biodiesel from Argentina*[68] to find that a PMS exists in the instant review and that a double remedy does not exist between the AD and CVD reviews of the *Order*, Commerce ignores the fact that the CIT remanded Commerce's determination finding that a PMS existed in *Biodiesel from Argentina*, on the basis that Commerce did not provide a sufficient analysis to prove that the AD and CVD proceedings are sufficiently unique.[69] In the instant case, Commerce has likewise not provided a sufficient reason and analysis as to why the two proceedings are substantially different enough to not constitute a double remedy.
- It is the petitioner's burden to prove that a double remedy does not exist in the instant case between the AD and CVD cases in finding that a PMS exists with regards to the same program being reviewed in both the AD and CVD proceedings of the instant *Order*, which it has failed to do.[70]

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[61] *See* Canadian Parties' Case Brief at 46 and 47 (citing *Lumber V AR2* IDM at 8).
[62] *See Chlorinated Isocyanurates from Spain* IDM at 4.
[63] *See* Canadian Parties' Case Brief at 47 and 48 (citing *Steel Pipe and Tube from Korea* IDM at 30).
[64] *Id.* at 49 (citing section 771(15)(C) of the Act (noting that, under the statue, the definition for the ordinary course of trade includes "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.")).
[65] *Id.* at 48 (citing section 773(e)(3) of the Act).
[66] *Id.* at 49 and 50 (citing Memorandum, "First Antidumping Duty Administrative Review of Certain Softwood Lumber Products from Canada: Decision on Particular Market Situation Allegation," dated January 31, 2020 (AR1 PMS Memorandum) at 8).
[67] *Id.* at 50
[68] *See* PMS Memorandum at 14.
[69] *See* Canadian Parties' Case Brief at 52.
[70] *Id.* at 53.

Canfor

- LERs in B.C. have no discernible impact on log prices in B.C., the vast majority of logs are automatically authorized for export,[71] and Commerce noted that the PMS has zero effect on purchased log prices by the mandatory respondents;[72] thus, there lacks the necessary support required to determine that a PMS exists in B.C. in the instant case.[73]
- B.C.'s LERs are irrelevant to Canfor's Operations in the inland interior of B.C., where it exclusively operates, because it is not economically feasible for Canfor to transport logs to B.C.'s export markets.[74]
- B.C.'s LERs have been around for 125 years, and therefore constitute the normal conditions of the ordinary course of trade.[75]
- *Biodiesel from Argentina* and *Biodiesel from Indonesia* do not support an affirmative PMS finding, because in both cases, the PMS determination relied on extensive government control that distorted home market prices, and such extensive government control does not exist in the instant case.[76]
- In *Chlorinated Isocyanurates from Spain*, Commerce declined to initiate a PMS investigation based on export restraints alone, because it did not involve government price controls like those found in *Biodiesel from Indonesia*.[77]
- It would be a double remedy prohibited by U.S. law if Commerce were to determine that a PMS exists based on the existence of LERs in B.C., because the AD and CVD reviews both address the same LERs, and the CIT has remanded similar determinations by Commerce to investigate similar unfair trade practices in *Biodiesel from Argentina*.[78]
- In *NEXTEEL*, the CAFC remanded Commerce's determination that a PMS existed where Commerce made no finding that government subsidies passed through to the prices of the inputs that were purported to be distorted by the PMS.[79]

West Fraser

- The D'Arcy Affidavit proves that the alleged LER has no impact on the interior regions where the mandatory respondents operate,[80] and runs counter to Commerce's

[71] *See* Canfor's Case Brief at 26 and 27 (citing the Canadian Parties' PMS Response at Exhibits PMS-1, 6, 7, and 8; and the Reishus Report at 51-53, 81, and 82 (noting that B.C. log exporters did not fully utilize the authorized export volume available to them)).
[72] *Id.* at 27 (citing PMS Memorandum at 16).
[73] *Id.*
[74] *Id.* (citing Canadian Parties' PMS Response at 9 and 10 and Exhibit PMS-11 (noting that "…the location of the timber relative to export markets, the cost of transporting logs to the ultimate destination," and fiber shortages mean that Canfor must utilize all of its fiber to support its own operations)).
[75] *Id.* (citing section 771(15)(C) of the act (noting that the ordinary course of trade is defined as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.").
[76] *Id.* at 28 (citing, *e.g.*, *Biodiesel from Argentina* IDM at 22).
[77] *Id.* (citing *Chlorinated Isocyanurates from Spain* IDM at 4; and *Steel Pipes and Tubes from Korea* IDM at 30).
[78] *Id.* at 28 and 29 (citing *Vincentin S.A.I.C. v. United States*, 404 F. Supp. 3d 1323, 1337 (CIT 2019) (*Vincentin*) (noting that Commerce was remanded in *Biodiesel from Argentina* because "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.")).
[79] *Id.* at 21 (citing *NEXTEEL* at 17).
[80] *See* West Fraser's Case Brief at 5 and 6 (citing the D'Arcy Affidavit at 32-34 and 36-40).

determination that the D'Arcy Affidavit was unconvincing in the respondents' argument that B.C.'s LERs have no impact on the mandatory respondents.[81]

Rebuttal

Petitioner

- Record evidence that Commerce relied on in its PMS determination was neither speculative nor theoretical as claimed by the Canadian Parties in their case brief,[82] because it verifiably demonstrates the impacts of B.C.'s LERs on log market prices in the province.[83]
- The Canadian Parties' argument that the level of distortion caused by the LER is too minimal to rise to the level of a distortion required to determine a PMS exists[84] is without merit, because Commerce was provided "broad, flexible powers" to address distortions caused by an alleged PMS, and it is consistent with the statute and Congressional intent to find that there is no specific threshold of distortion in PMS situations.[85]
- Commerce's PMS finding does not result in double counting, as alleged by the Canadian Parties,[86] because Commerce's review of the AD order is separate from Commerce's review of the countervailing duty (CVD) order of softwood lumber from Canada.[87]
- Commerce was correct in finding that log sales in B.C. were "outside the ordinary course of trade" pursuant to its PMS analysis.[88] If Commerce considered government restraints that had existed for a specific period of time as within the ordinary course of trade, as suggested by the Canadian Parties,[89] then Commerce's ability to correct the cost of production (COP) in instances in which the restraints would otherwise be outside the ordinary course of trade and amount to a PMS would be significantly curtailed.[90]

Sierra Pacific

- The Canadian Parties are incorrect that the level of distortion found by Commerce in the B.C. log market as a result of B.C.'s LERs in its *Preliminary Determination* is insufficient to find that a PMS exists in B.C.,[91] because nothing in the statute[92] or regulations indicate that an alleged distortion must be "significant" with regards to the particular foreign producers' COP in order for a cost-based PMS to exist.[93]

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[81] *Id.* at 4 (citing PMS Memorandum at 11 (noting that Commerce determined that the D'Arcy affidavit was "unconvincing in arguing that B.C. LERs have no impact on the mandatory respondents.")).
[82] *See* Canadian Parties' Case Brief
[83] *See* COALITION's Rebuttal at 31 and 32.
[84] *See* Canadian Parties' Case Brief at 3.
[85] *See* COALITION's Rebuttal at 32 and 33 (citing section 773(e) of the Act).
[86] *See* Canadian Parties' Case Brief at 50; Canfor's Case Brief at 28 and 29.
[87] *See* COALITION's Rebuttal at 35 and 36 (citing *Biodiesel from Argentina* IDM at 26-28; *Vicentin SAIC*, 466 F. Supp. 3d 1227, 1242-45; and *Urea Ammonium Nitrate Solutions from the Republic of Trinidad and Tobago: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 87 FR 5783 (February 2, 2022), and accompanying PDM at 7 and 8).
[88] *Id.* at 37 (citing PMS Memorandum at 14).
[89] *See* Canadian Parties' Case Brief at 48 and 49.
[90] *See* COALITION's Rebuttal at 38.
[91] *See* Canadian Parties' Case Brief at 33.
[92] *See* section 773(e) of the Act and section 504 of the Trade Preferences Extension Act of 2015 (TPEA).
[93] *See* Sierra Pacific's Rebuttal at 13 and 14.

- The legislative history that the Canadian Parties cite to as support for their claim that a distortion to foreign producer COP must be "significant" to amount to a PMS relates to price-based and not cost-based PMS situations.[94]
- The Canadian Parties' reliance on *NEXTEEL* and *Husteel* is inappropriate in its argument that for a PMS to exist, a distortion in home market prices must be significant, because in *NEXTEEL* and *Husteel*, the U.S. Court of International Trade (CIT or the Court) did not hold in either case that a cost-based PMS finding must be based on a significant distortion of the respondents' COP.[95]
- The Canadian Parties' argument that Commerce's determination that there is no specific threshold of a distortion in the home market for finding a PMS exists is inconsistent with its own prior practice is erroneous.[96] Commerce practice is to determine whether a PMS exists based on a qualitative analysis of alleged market distortions, and only after determining a PMS exists does Commerce proceed to quantify the distortion.[97]
- The Canadian Parties' claim that Commerce's PMS determinations in *Biodiesel from Argentina* and *Biodiesel from Indonesia* are not relevant to the instant PMS allegation[98] ignore that in *Biodiesel from Argentina* and *Biodiesel from Indonesia* , Commerce analysis of the cost-based PMS allegations were based entirely on facts regarding Argentina's and Indonesia's government export tax regimes.[99] This is entirely consistent with the instant PMS allegation, in which Commerce preliminarily determined that a cost-based PMS exists based on government export restraints in B.C.[100]
- Commerce's decision not to initiate in *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea* and *Chlorinated Isocyanurates from Spain* is not relevant to the instant allegation, because both of these cases involved price-based PMS allegations, while in the instant allegation Commerce is analyzing a cost-based PMS allegation.[101]
- Commerce's preliminary PMS determination does not constitute a double remedy, because AD and CVD proceedings are conducted separately and have separate administrative records. Furthermore, section 773(e) of the Act does not require Commerce to address potential double remedies or double counting when using an

[94] *Id.* at 14 and 15 (citing Canadian Parties' Case Brief at 34 (in which the Canadian Parties refer to section 771(15)(C) of the Act and SAA at 822)).
[95] *Id.* at 15 and 16 (citing *Husteel*).
[96] *See* Canadian Parties' Case Brief at 35 and 36 (citing *Certain Oil Country Tubular Goods from the Republic of Korea*).
[97] *See* Sierra Pacific's Rebuttal Brief at 16 (citing, *e.g.*, *Forget Steel Fluid End Blocks from the Federal Republic of Germany: Final Determination of Sales at Less Than Fair Value*, 85 FR 80018 (December 11, 2020), and accompanying IDM at 20 and 21; and *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2019-2020*, 86 FR 30405 (June 8, 2021), and accompanying IDM at 8 and 9).
[98] *See* Canadian Parties' Case Brief at 46 (citing *Biodiesel from Argentina: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 83 FR 8837 (March 1, 2018) (*Biodiesel from Argentina*); *see also Biodiesel from Indonesia: Final Determination of Sales at Less Than Fair Value*, 83 FR 8835 (March 1, 2018) (*Biodiesel from Indonesia*)).
[99] *See* Sierra Pacific's Rebuttal at 17.
[100] *Id.* at 17 and 18.
[101] *Id.* at 18 (citing *Chlorinated Isocyanurates from Spain; Final Results of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 53607 (October 24, 2018) (*Chlorinated Isocyanurates from Spain*); *see also Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea, Final Results of Administrative Review; 2016-2017*, 84 FR 24471 (May 28, 2019) (*Steel Pipes and Tubes from Korea*)).

alternative calculation methodology to account for a respondents' distorted COP in a PMS.[102]

- There is no indication that Congress intended to curtail Commerce's authority under section 773(e) of the Act to adjust a respondent's reported COP to account for a PMS involving government subsidies.[103] Furthermore, in *Vincentin S.A.I.C. v. United States*, the court sustained Commerce's cost-based adjustment for a PMS involving subsidization and held that the adjustment was not "precluded as a matter of law."[104]

Canadian Parties

- There is no basis for Commerce to revisit its PMS determination with respect to Alberta, because; 1) Alberta's LER does not operate to restrict log exports from Alberta, which is supported by *Lumber V CVD AR1*,[105] and 2) the petitioner has provided no argument or information to refute Commerce's finding in *Lumber V CVD AR1* and *Lumber V CVD AR2* that LERs in Alberta have no effect on lumber prices in Alberta.[106]
- Commerce should not depart from the WDNR benchmark in determining a cost-based adjustment to offset the distortion caused by the PMS in B.C., because: 1) the petitioner and Sierra Pacific did not provide a sufficient basis to reject the WDNR benchmark prices;[107] and 2) the petitioner's proposed Wilson Center alternative log price benchmark is flawed because the logs in the Wilson Report are unrepresentative of those used by the mandatory respondents and the average unit values are anomalous.[108]

Commerce's Position:

Alberta

[102] *Id.* at 19 and 20 (citing, *e.g.*, *Forged Steel Fluid End Blocks from the Federal Republic of Germany: Final Determination of Sales at Less Than Fair Value*, 85 FR 80018 (December 11, 2020), and accompanying IDM at Comment 3; *Welded Carbon Steel Standard Pipes and Tubes from India: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 85 FR 2715 (January 16, 2020); and *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 84 FR 10784 (March 22, 2019), and accompanying IDM at Comment 1).

[103] *Id.* at 20 and 21 (citing *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1296 (Fed. Cir. 2020); *Int'l Trading Co. v. United States*, 110 F. Supp. 2d 977, 988 (CIT 2000); *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 84 FR 10784 9March 22, 2019), and accompanying IDM at Comment 1).

[104] *Id.* at 21 (citing *Vincentin*).

[105] *See* Canadian Parties' Rebuttal at 15-18 (citing Memorandum, "First Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada: Post-Preliminary Decision Memorandum for Entrustment and Direction of Crown-Origin Logs for Less than Adequate Remuneration Allegations," dated July 10, 2020 (Lumber V CVD AR2 Post-Preliminary Memorandum), at 13).

[106] *Id.* at 19 and 20 (citing *Lumber V CVD AR1* IDM at 213-14; and *Lumber V CVD AR2* IDM at 238).

[107] *Id.* at 21-24 (citing Canadian Parties' Case Brief at 32-53; Canadian Parties' PMS Response at 22-26; Canadian Parties' Letter, "Certain Softwood Lumber Products from Canada: Canadian Parties' Substantive Response to Petitioner's August 30, 2021 "Surrebuttal" PMS Submission," dated October 13, 2021 (PMS Surrebuttal Response) at Exhibits PMS-S-3, PMS-S-4 and PMS-S-5 at 26; Petitioner's Case Brief at 31-33; Sierra Pacific's Case Brief at 2 and 3; PMS Memorandum at 16; and *Lumber V CVD AR2* IDM at 108).

[108] *Id.* at 24-28 (citing PMS Allegation at 23 and 24; Sierra Pacific's Case Brief at 2 and 3; Petitioner's Case Brief at 31-33; Canadian Parties' Surrebuttal Response at Exhibit PMS-S-5 at 26 through 28 PMS Response at 22-26 and Exhibits PMS-1 at 18-21, 23, and 24, PMS-9 at 2 and 8-10; and *NEXTEEL* at 6).

The main issue with respect to Alberta is whether Commerce correctly determined in the *Preliminary Results* that there was insufficient evidence to find a cost-based PMS . We disagree with the petitioner that Commerce's reliance on its analysis in *Lumber V CVD AR2* proceeding in its *Preliminary Results* was misplaced in coming to this determination.[109]

First, we disagree with the petitioner that Commerce's reliance on certain aspects of the CVD review are misplaced with respect to log prices in Alberta.[110] In particular, the petitioner relies on specific evidence from Commerce's analysis in *Lumber V CVD AR2*[111] as support for its own argument that a PMS exists with respect to the mandatory respondents.[112] Therefore, in arguing that Commerce's analysis from the companion CVD review of the *Order* is misplaced, the petitioner appears to claim that its own arguments based on Commerce's analysis in *Lumber V CVD AR2* are relevant to its argument that a PMS exists in Alberta, while Commerce's reliance on the same facts and analysis is misplaced. Thus, Commerce continues to find its analysis in *Lumber V CVD AR2* as relevant and instructive in the instant review.

Second, in arguing that Commerce did not properly confront the language of the *Forests Act*, the petitioner appears to suggest that because the GOA has *de jure* restrictions on log prices through the *Forests Act*, that it *de facto* restricts log exports, thereby artificially suppressing the price of logs available to the mandatory respondents in Alberta. In coming to a PMS determination, Commerce looks at not only the plain language of the applicable laws underlying the LER[113] that support finding a cost-based PMS exists with respect to the mandatory respondents, but also the actual effects that the purported restrictions have on log prices.

In the instant case, the Canadian Parties provided record evidence that the GOA's LER does not create an artificial surplus of low-cost logs to domestic log producers in Alberta. For example, the Canadian Parties provided all export authorizations that were requested and granted for coniferous logs for the years 2016 through 2020, indicating that the GOA has not denied any log export requests for coniferous logs during the POR[114] or during any time between 2016 through 2020.[115] Thus, because there is evidence on the record showing that no log export requests were denied during the relevant POR, any evidence that log prices are lower in Alberta than to comparable benchmarks cannot be attributed to the LER, because log exports were not actually restricted due to the GOA's *Forest Act*.

Furthermore, as stated in the preliminary PMS Memorandum,[116] Commerce continues to find that comparing the AUV data provided by the petitioner with West Fraser's COP does not necessarily lead to an affirmative PMS conclusion, because the arguments raised by the Canadian Parties (*e.g.*, that all export authorizations during the POR were approved,[117] and that

[109] *See* Petitioner's Case Brief at 26-28.
[110] *Id.*.
[111] *See Lumber V CVD AR2* IDM at 237 and 238.
[112] *See, e.g.*, PMS Allegation at 6.
[113] *See Forests Act*, R.S.A. 2000, c. F-22, § 31(1), amended by S.A. 2009, cA-26.8 (Can. Alta.) (*Forests Act*); *see also* PMS Allegation at Attachment 2.
[114] *See* PMS Rebuttal at 6 and Exhibit 4.
[115] *See* PMS Rebuttal at 6 and 7 and Exhibit 4.
[116] *See* PMS Memorandum at 6.
[117] *See* PMS Rebuttal at 5 and Exhibit 5.

the Canadian Parties' export authorization process in Alberta is flexible, simple, and low-cost for exporters to apply for a log export permit[118]) were not refuted by the petitioner. Unlike in the petitioner's refutation of the Government of British Columbia's (GBC) argument that most log export authorizations were granted in B.C., in which it provides concrete evidence in the form of the *Mosaic* court filings detailing actual instances of denied log exports and the effects that such denials had on log exports in B.C.,[119] in the instant case, the petitioner has cited to no record evidence indicating that the log exports have been restricted during the POR or that the cost of logs in Alberta has been distorted because of these LER, but simply relies on the plain language of the law to argue that such export restrictions have a material impact on log prices in Alberta.

Therefore, for the final results, for the reasons stated above, we continue to find that the petitioner's PMS allegation with respect to Alberta lacks sufficient evidence to support finding that a PMS exists in Alberta, and we determine that a PMS adjustment is not warranted with respect to either mandatory respondent in Alberta.

B.C.

We agree with the petitioner that LERs in B.C. distort the cost of logs in the province, and therefore a cost-based PMS exists with respect to B.C., however, as discussed below, we disagree that a cost-based adjustment is warranted. With respect to B.C., at issue is (1) whether Commerce correctly determined that a PMS existed in B.C., and (2) whether Commerce correctly picked the WDNR log price data for the POR as an accurate benchmark for log prices in B.C.

First, we disagree with the Canadian Parties, Canfor, and West Fraser's claim that Commerce ignored evidence that demonstrates that the existence of a surplus of non-exported logs in B.C. indicates that there is no unmet net export demand for logs in the province,[120] and that a majority of log export applications are authorized in B.C.[121] In our PMS Memorandum, Commerce analyzed all the reports, data, and record evidence provided by the GOC, Canfor, and West Fraser in their initial PMS rebuttal and surrebuttal response comments.[122] In the PMS Memorandum, we found the record evidence to be unpersuasive that a PMS in B.C. does not exist because other record evidence provided by the petitioner and in *Lumber V CVD AR2* indicated that prices were distorted and that LERs in B.C. had tangible, documented impacts on B.C. sawmills in the inland interior, such as the *Mosaic Documents*.

In particular, the *Mosaic Documents* undermine the GOC's claim that the manufacturing operations of the mandatory respondents are irrelevant because they are located in the B.C. Interior. As we stated in the *Preliminary Results*, the *Mosaic Documents* include an affidavit from a B.C. Interior sawmill manufacturer that discussed at great lengths the significant costs to its log operations as a consequence of B.C.'s LERs, because the LER process allows for

[118] *Id.* at 6-8 and Exhibits 4 and 12 (pages 6 and 7).
[119] *See* PMS Surrebuttal at PMS-SR-01 at 3, 9, and 12.
[120] *See* Canadian Parties' Case Brief at 38 and 39.
[121] *Id.* at 41 and 42.
[122] *See* PMS Memorandum at 11-15.

domestic parties to "block" potential export licenses from being approved.[123] Specifically, the *Mosaic Documents* documented 28 denied log export applications from the B.C. Interior as a result of blocking during the POR,[124] which undermines the arguments in the rebuttal briefs provided by the Canadian Parties and Canfor that, *inter alia*, the Schuetz Report,[125] the Reishus Report,[126] and the D'Arcy Affidavit[127] demonstrate that (1) LERs in B.C. have no impact on the B.C. Interior, and (2) that unused export authorizations indicate that LERs have no impact on B.C. log exporters.[128] Therefore, we find that these denials impact the exporters based on record evidence that domestic log exports were blocked from the B.C. Interior which increased log manufacturing costs on domestic log exporters.[129]

Moreover, Commerce has determined in a previous CVD review of this proceeding that the *entire* B.C. province is impacted by these LERs, since they pertain to the entire province, and not solely the B.C. coast where the Canadian Parties claim the most log trade opportunities exist.[130] Therefore, in accordance with record evidence on this review, our analysis of B.C.'s LERs in the *Lumber V CVD AR2* proceeding, and our review of information provided throughout the course of this review, we continue to find that B.C.'s LERs impact the entire province, including the B.C. Interior where Canfor and West Fraser's manufacturing operations are located.[131]

Second, Commerce disagrees with the GOC, Canfor, and West Fraser that the level of distortion found in the *Preliminary Results* was not significant enough to warrant an affirmative PMS finding with respect to B.C. Congress has explicitly acknowledged Commerce's discretion to apply its PMS analysis flexibly pursuant to the TPEA, stating in particular:

> where a particular market situation exists that distorts pricing or cost in a foreign producer's home market, {Commerce} has flexibility in calculating a duty that is not based on distorted pricing or costs.[132]

Commerce's determination that a PMS exists in the instant case is consistent with Congress' intent on the PMS amendment in the TPEA, because there is no stipulation in the statute that a specific threshold of distortion exist to support an affirmative PMS determination. The Canadian Parties argue that the PMS statute at section 771(15)(C) of the Act refers only to situations where there is "government control over pricing to such an extent that home market prices cannot be considered to be competitively set."[133] However, we note that, pursuant to section 773(e) of the Act, in coming to an affirmative PMS determination, Commerce must find that costs incurred by the mandatory respondents do not accurately reflect the cost of production in the ordinary course of trade. In finding that costs are incurred outside the ordinary course of trade, Commerce does

[123] *Id.* at 12; *see also* PMS Surrebuttal at PMS-SR-13 at 4 and 5.
[124] *See* PMS Surrebuttal at PMS-SR-01 at 3.
[125] *See* Canadian Parties' Case brief at 44
[126] *Id.* at 45.
[127] *See* West Fraser's Case Brief at 5 and 6 (citing the D'Arcy Affidavit at 32-34 and 36-40).
[128] *See* PMS Rebuttal at Exhibit 11 at 6.
[129] *See* PMS Memorandum.
[130] *See Lumber V CVD AR2* IDM at 247 and 248.
[131] *Id.* at 247 and 248.
[132] *See* S. Rep. No. 114-45 at 37 (2015).
[133] *See* Canadian Parties' Case Brief at 34 (citing SAA at 822).

not have a specific threshold for determining that costs are distorted by a PMS, and such as in the instant case, any evidence of such a distortion is enough to warrant finding that a PMS exists. In the absence of a threshold of distortion required to substantiate a PMS claim, in the instant case, Commerce relied on the totality of information provided by the petitioner, the Canadian Parties, and the mandatory respondents, including substantial qualitative analysis of the multiple reports and affidavits[134] on the record of this review, and determined that a PMS exists because record evidence indicates that log prices are distorted due to government restrictions on log exports.[135]

Regarding the Canadian Parties' argument that it would result in a "double remedy" if Commerce were to continue to find that a PMS exists, Commerce disagrees. As stated in the PMS Memorandum, the AD and CVD reviews of the instant order are conducted in accordance with two separate subtitles of the Act and with entirely independent administrative records.[136] While Commerce used specific aspects of our analysis in the CVD review of the instant order in addressing the instant PMS allegation because both the Canadian Parties and the petitioner used our analysis in *Lumber V CVD* in their respective arguments,[137] the rates that we determined in *Lumber V CVD AR2* or any other CVD proceeding do not supersede our analysis of the instant PMS allegation. As stated in our *Preliminary Results*, LERs could suppress prices and cause a distortion to the mandatory respondents' COP of lumber in B.C., regardless of whether the LERs causing the distortion are a countervailable subsidy or not.[138]

Furthermore, we disagree with the Canadian Parties' argument that *Biodiesel from Argentina* is "nothing like" the record of this review because: (1) the export restrictions were not the sole basis for determining a PMS exists in Argentina and Indonesia, (2) Commerce found that *Biodiesel from Argentina* was an "inapt comparison for this case," and (3) the CIT remanded Commerce's determination finding that a PMS existed in *Biodiesel from Argentina* on the basis that its original analysis did not prove that the AD and CVD proceedings were sufficiently distinct to not result in a double remedy.[139]

In relying on *Biodiesel from Argentina* in our affirmative PMS determination with respect to the log market in B.C., we noted that *Biodiesel from Argentina* involved an export restriction on an input into subject merchandise that was also being analyzed in a companion CVD proceeding, similar to the LERs in B.C. in the instant PMS. While Commerce may have relied on other evidence in its analysis of the PMS allegation in *Biodiesel from Argentina*, the relevant facts are that in *Biodiesel from Argentina*, we found that government intervention in the soybean market resulted in soybean prices that "can no longer be considered competitively set,"[140] and that an export tax on soybeans was designed to "generate a low-cost surplus of soybeans for domestic use, thereby artificially depressing prices."[141] Likewise, in the instant allegation, the GOC and GBC maintain LERs that are designed to artificially depress the log market in B.C., similar to the

[134] *See, e.g.,* PMS Allegation at Exhibit PMS-11 at 5; PMS Rebuttal at 9 and 10 and Exhibits 1, 6 (pages 6-23), and 9-11; PMS Surrebuttal Response at 5 and Exhibit PMS-6 (pages 6-23+ and PMS 10 (pages 31-40).
[135] *See* PMS Memorandum at 15.
[136] *Id.* at 14 and 15.
[137] *See, e.g.*, PMS Allegation at 6; and PMS Rebuttal at 5, 6, and 22.
[138] *See* PMS Memorandum at 12.
[139] *See* GOC's Case Brief.
[140] *See Biodiesel from Argentina* IDM at 21.
[141] *Id* at 21.

artificial depression of soybean prices in the Argentinian market due to the government-regulated soybean tax. Therefore, in the *Preliminary Results* and here, we continue to find that our analysis in *Biodiesel from Argentina* is relevant to the instant case.

Furthermore, while Commerce found *Biodiesel from Argentina* to be inapposite in the context of the previous review,[142] we note that the PMS allegation in *Lumber V AR2* was of a different nature than that alleged in the instant review. In the previous review of the *Order*, the petitioner alleged that GOC industrial planning strategies designed to "transform lumber residuals into bioenergy" had distorted input costs for large lumber producers in Canada, and therefore distorted the overall cost of lumber production.[143] However, in *Lumber V AR2*, Commerce found that the petitioner "did not present evidence of any significant market distortions or any significant distortions to the COP for softwood lumber,"[144] and therefore found that *Biodiesel from Argentina* was inapposite because in *Biodiesel from Argentina*, the government control over pricing was "so pervasive and impactful that prices could not be considered competitively set."[145] In contrast to the previous review, Commerce finds that the petitioner has provided sufficient evidence that government-intervention in the log market distorts the price of logs in B.C. such that they are not competitively set, and therefore finds Commerce's PMS analysis in *Biodiesel from Argentina* to be relevant in the context of the current allegation.

Finally, we continue to find that the statutes regulating this AD review and the concurrent CVD review are distinct and remedy different unfair trade practices, and that the CVD remedy imposed to countervail a subsidy is not intended to address the differential between U.S. price and normal value in an AD proceeding.

Next, we address the petitioner's and Sierra Pacific's argument that we should rely on a different benchmark for determining a cost adjustment. In particular, the petitioner and Sierra Pacific claim that the WDNR data that Commerce used as a benchmark in the *Preliminary Determination* to compare to the respondent's costs of production is not reliable, as the offer prices or price quotes reported in the WDNR data are less reliable than transaction prices.[146]

We disagree with both the petitioner and Sierra Pacific. Specifically, in selecting the WDNR survey prices, we rejected the pricing data the petitioner placed on the record of this review, including the AUVs provided by petitioner of U.S. log exports to the world minus Canada (2020).[147] The Canadian Parties argue that using the AUVs calculated by the petitioner is unreliable because, in part, retaliatory tariffs for part of 2020, market disruptions due to the COVID-19 pandemic, as well as a failure to adjust for unit conversion factors, means that the AUVs calculated by the petitioner are overstated.[148] The petitioner did not address these arguments in its comments on its PMS allegation.[149]

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[142] *See Lumber V AR2* IDM at 8.
[143] *See* Memorandum, "Second Antidumping Duty Administrative Review of Certain Softwood Lumber Products from Canada: Decision on Particular Market Situation Allegation," dated May 20, 2021, at 2.
[144] *See Lumber V AR2* IDM at 8.
[145] *Id.*
[146] *See* Sierra Pacific's Case Brief at 2 and 3.
[147] *See* PMS Allegation at 23 and Exhibit 19.
[148] *See* Canadian Parties' Rebuttal at 25.
[149] *See* Petitioner's PMS Surrebuttal; *see also* Petitioner's Case Brief and Petitioner's Rebuttal Brief.

Moreover, in the *Preliminary Results*, we selected the WDNR data because they were the best data on which to base our benchmark log price, because extensive evidence on the record of the review indicates that the Pacific-Northwest Region upon which the WDNR data are based has been determined by Commerce in *Lumber V CVD* to be the most accurate reflection of B.C.'s stumpage market.[150] There is no evidence on the record of this review that would lead Commerce to change its conclusion from the preliminary results.

Therefore, for the final results, Commerce continues to find that the WDNR benchmark is the best available benchmark to determine a CV adjustment for the mandatory respondents. Furthermore, because the data points that form the basis of our comparison of the mandatory respondents' price of logs to the benchmark have not changed,[151] we continue to find that there is a non-measurable (*i.e.*, zero) effect on the mandatory respondents' log prices during the POR and an adjustment to CV for the mandatory respondents with respect to B.C. is not warranted.[152]

Comment 2: Whether Commerce's Application of the Cohen's *d* Test is Contrary to Law

Canadian Parties[153]

- Commerce has a statutory obligation to engage in reasoned decision-making based upon record evidence, along with an explanation of the basis of its decision making. However, Commerce failed to do so when applying its differential pricing methodology (DPM) in the *Preliminary Results.*
- Specifically, Commerce's application of the Cohen's *d* test, to determine whether prices were significantly different among purchasers, regions or time periods, was unlawful. In applying the Cohen's *d* test, Commerce used data that did not meet the three statistical 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 CAFC in *Stupp*, the Cohen's *d* test relies on the assumption that "the populations being compared are normal and with equal variability, and conceive them further as equally numerous."[154]
- The CAFC noted, in *Stupp*, 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, dumping margins.[155]
- In the *Preliminary Results*, there is no evidence that Commerce examined the criteria required in *Stupp.* Otherwise, Commerce would have seen that the comparisons of Canfor's and West Fraser's data do not satisfy the *Stupp* criteria, *e.g.*, nonnormal distributions, insufficient observations and unequal variances.

[150] *See Lumber V CVD AR2* IDM at 107
[151] *See* PMS Memorandum at 16.
[152] *Id.*
[153] *See* Canadian Parties' Case Brief at 7-16.
[154] *Id*. at 7.
[155] *Id*. at 8.

- Pursuant to *Stupp*, Commerce must test whether normal distributions, sufficient observations and equal variances are satisfied before applying the Cohen's d test to respondents' sales data. If these factors are not satisfied for a particular test group, then the Cohen's *d* should not be administered to test that group.
- 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 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 the *Preliminary Results*, Commerce applied the Cohen's *d* test to unsuitable data and failed to identify a pattern or practice "for comparable merchandise that differ significantly among purchasers, regions, or time periods." In the final results, Commerce must analyze whether the assumptions of the Cohen's *d* test are satisfied before applying the test to respondents' sales data and must not use the test when those assumptions fail.

Canfor and West Fraser[156]

- Canfor and West Fraser endorse and incorporate, by reference, the Canadian parties' position in its brief that Commerce's application of its DPM has been found contrary to law by the CAFC.

Rebuttal

Petitioner[157]

- Canadian Respondents mischaracterize the CAFC's holding in *Stupp v United States.* The CAFC merely requested further explanation as to why Commerce's real-world application of the Cohen's d test did not require the underlying data to satisfy certain prerequisites.
- By overstating the breadth of the CAFC's holding in *Stupp*, Canadian Respondents ignore the fact that the actual purpose of the Cohen's *d* test is to evaluate the extent by which the prices to a particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise.[158]
- Commerce is not engaged in an analysis of sampled data that would require an analysis of statistical significance, as Canadian parties suggest, but rather, is concerned with measuring the practical significance of price differences among purchasers, regions, or periods of time.
- Data reported by West Fraser and Canfor cover the entire universe of these companies' U.S. sales rather than a sample or subset of their U.S. sales.
- Contrary to Canadian Respondents' arguments, Commerce's use of the Cohen's *d* test fulfills the requirements of the statute by allowing the agency to consider the pricing behaviors of the test group separate from the pricing behavior of the comparison group.

[156] *See* Canfor's Case Brief at 20-25; *see also* West Fraser's Case Brief at 1-4.
[157] *See* Petitioner's Rebuttal Brief at 11-15.
[158] *Id.* at 14.

- The statistical criteria with respect to sample size, equivalent variances, and normal distribution are not relevant to the differential analysis conducted by Commerce in this review as the calculated parameters, including the Cohen's *d* coefficient, are not estimates based on sampled data, but rather, are the actual parameters based on the entire universe of respondents' U.S. sales data.
- Commerce should reject Canadian Respondents' arguments regarding the Cohen's *d* test as well as the proposed changes to the SAS programming that would, without any rational basis, fundamentally undermine Commerce's consistent practice for determining the significance of price differentials.

Commerce's Position: We disagree with the Canadian Parties, Canfor and West Fraser. We continue to apply the Cohen's *d* test as part of our differential pricing analysis in our calculations for the final results. 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 statute here is a gap filling exercise properly conducted by Commerce.[159] As explained in the *Preliminary Results*, as well as in various other proceedings, Commerce's differential pricing analysis, including the use of the Cohen's *d* test, is reasonable and not contrary to the law.[160]

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}."[161] 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 method to determine if, and if so, to what extent, a given respondent is dumping the subject merchandise in the U.S. market.[162]

We disagree with the Canadian parties, West Fraser and Canfor that the CAFC findings in *Stupp* require Commerce to change its application of the Cohen's *d* test. Specifically, in *Stupp*, the CAFC remanded the underlying administrative review to Commerce to provide further explanation; the CAFC did not find Commerce's use of the Cohen's *d* test unlawful. Therefore, *Stupp* is a ruling issued as part of ongoing litigation and did not reach a final conclusion regarding Commerce's use of the Cohen's *d* test. Moreover, Commerce's Cohen's *d* test is based on the full universe of respondents' U.S. sales data. Therefore, the statistical criteria discussed in *Stupp* are not relevant in this review. Thus, in accordance with our practice and

[159] *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).
[160] *See Preliminary Results*.
[161] *See* section 777A(d)(1)(B) of the Act.
[162] *See* 19 CFR 351.414(c)(1).

prior precedent, we will continue to apply the Cohen's *d* test in the same manner for the final results.[163]

Further, the Canadian parties, West Fraser and Canfor allege that the Cohen's *d* test is improper because the groups that Commerce compared do not follow normal distributions and do not have substantially equal variances or a substantially equal number of data points. We disagree. The Cohen's *d* coefficient is based on the difference between the means of the test and the comparison groups relative to the variances within the two groups, *i.e.*, the pooled standard deviation. When the difference in the weighted average sale prices between the two groups is measured relative to the pooled standard deviation, then this value is expressed in standardized units, and is based on the dispersion of the prices within each group. In other words, the "significance" of differences between the average prices of the test group and the comparison group (*i.e.*, between a specific purchaser, region or time period and all other purchasers, regions, or time periods, respectively) is measured relative to how widely the individual prices differ within these two groups. When there is little variation in prices within each of these groups (*i.e.*, not between the two groups), then a small difference in the mean prices of the test and comparison groups will be found to be significant. Conversely, when there are wide variations in prices within each of these groups, then a much larger difference in the mean prices of the test and comparison groups will be necessary in order to find that the difference is significant. We thus rely on the Cohen's *d* coefficient as a measure of effect size to determine whether the observed price differences are significant. In this application, the difference in the weighted average (*i.e.*, mean) U.S. price to a particular purchaser, region, or time period (*i.e.*, the test group) and the weighted-average U.S. price to all other purchasers, regions, or time periods (*i.e.*, the comparison group) is measured relative to the variance of the U.S. prices within each of these groups (*i.e.*, all U.S. prices). Commerce explained in *Thermal Paper from Germany* that we use the differential pricing analysis to examine all U.S. sales, rendering inapposite concerns regarding the statistical significance of differences whether based on sample size or sample distribution.[164]

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

Canadian Parties[165]

- 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 best available information" to establish a weighted-average dumping margins.[166]
- In the *Preliminary Results*, Commerce ignored relevant evidence on the record and failed to fulfill its legal obligations. Specifically, in applying the Cohen's *d* test, Commerce did

[163] *See Certain Oil Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019-2020*, 87 FR 20815 (April 8, 2022), and accompanying IDM at Comment 2.
[164] *See Thermal Paper from Germany: Final Affirmative Determination of Sales at Less than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 86 FR 54512 (September 30, 2021) (*Thermal Paper from Germany*), and accompanying IDM at 6-8.
[165] *See* Canadian Parties' Case Brief at 16-20.
[166] *Id.* at 16-17.

not consider evidence of swings in the market that rebut the presumption that the Cohen's *d* comparisons are indicative of "targeted dumping."

- The record contains evidence establishing the fluctuation of the lumber market 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.
- 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 CAFC 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.'"[167]
- 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."[168]

Canfor[169]

- 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.
- Furthermore, evidence on the record supports the observation that the Covid-19 pandemic drastically altered economic conditions in 2020 and affected lumber pricing, as a decline in demand and revenue was followed by an increase in lumber prices toward the end of the year.

Resolute and Central Canada[170]

- The average-to-transaction (A-to-T) method may result in higher dumping margins than the A-to-A method due to price volatility and not from "masking" dumping among customers, regions, or time periods.
- However, the A-to-T method cannot distinguish such seasonal fluctuation from "masked dumping." In contrast, the A-to-A method, by comparing weighted averages monthly accounts for the changes in price over time during the POR.
- Commerce did not consider whether market changes over the POR were the cause for sales passing the Cohen's *d* test, or whether the monthly comparisons used in the A-to-A method could not account for those quarterly differences in administrative reviews.

[167] *Id*. at 19.
[168] *Id*. at 19-20.
[169] *See* Canfor's Case Brief at 22-24.
[170] *See* Resolute and Central Canada's Case Brief at 6-10.

- Commerce's A-to-A method in administrative reviews compares the prices on a "monthly basis." Even if the U.S. prices in Quarter 1 were to differ significantly from Quarter 2 a particular CONNUM, neither one would mask the other because the monthly A-to-A comparisons are walled off in Commerce's calculations.

Rebuttal

Petitioner[171]

- The CAFC 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 CAFC 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."[172]
- Thus, any arguments regarding Commerce's consideration of qualitative factors must fail.
- Moreover, the COVID-19 pandemic has impacted sectors of the economy well-beyond softwood lumber. Thus, were Commerce to accept the arguments presented that the agency must consider the impact of the COVID-19 pandemic on the observed pattern of price differences, Commerce's DPM 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 DPM and "create a tremendous burden on Commerce that is not required or suggested by the statute." [173]
- 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.[174]

Commerce's Position: We disagree with the Canadian Parties, Canfor, Resolute and Central Canada. As noted by the petitioner, the CAFC 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."[175] 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.[176] Therefore, given that both the CIT and the CAFC have determined that Commerce is not required to look at other factors for determining a pattern of prices that differ significantly, we will continue to employ the differential pricing analysis unchanged for the final results.

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[171] *See* Petitioner's Rebuttal Brief at 22-23.
[172] *Id*.
[173] *Id*. at 23.
[174] *Id.*
[175] *See JBF RAK LLC v. United States*, 790 F.3d 1358, 1368 (Fed. Cir. 2015) (quoting *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1355 (CIT 2014)).
[176] *See Nan Ya Plastics Corp. v. United States,* 128 F. Supp. 3d 1345, 1358 (CIT 2015).

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

Canadian Parties[177]

- Section 777A(d)(1)(B)(i) of the Act directs Commerce to determine whether there is a "pattern of . . . prices . . . that differ significantly among purchasers, regions, or periods of time." Commerce interprets this phrase as allowing it to find a single pattern of prices that exists across the three listed categories (purchasers, regions, or periods of time) and that includes prices that are both significantly higher and lower than other prices. Treating sales with these disparate characteristics as part of a single pattern is inconsistent with the plain meaning of the statute.
- In the *Preliminary Results*, Commerce found that 76.57 percent of the value of Canfor's U.S. sales and 73.35 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 and the inclusion of sales that were high-priced or low-priced 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."[178]
- 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.
- Reasoned decision-making requires more than simply discounting the reasoning as nonbinding. The ratio test that Commerce applied in this case to assess 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 differences in prices." However, "extent" merely refers to an amount. Quantifying "extent" is unrelated to identifying a pattern.
- 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 purported "pattern" captures random price variations and does not reflect a singular reliable and observable set of characteristics. This flawed approach to identification of a "pattern" simply cannot support the inference that targeted dumping is occurring, and this is contrary to the legislative intent referenced in the SAA.

[177] *See* Canadian Parties' Case Brief at 20-26.
[178] *Id*. at 21.

- 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 WTO decisions.

Canfor[179]

- 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.

Resolute and Central Canada[180]

- 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.
- Specifically, 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, yet Commerce makes no adjustment to avoid double counting or counting the same significant differences multiple times. These overlaps distort the analysis and are not adequately explained.

Rebuttal

Petitioner[181]

- The respondents' arguments against Commerce's DPM have been appropriately dismissed by the CAFC.
- In *Dillinger France S.A.*, the CAFC 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 of prices that differ significantly.
- The CAFC 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.'" 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 CAFC have squarely considered and rejected this argument.
- Accordingly, both the CIT and the CAFC have squarely considered and rejected this argument. In *Dillinger France S.A.*, the CAFC also considered the argument advanced by the GOC 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 Anti-Dumping Agreement.

[179] *See* Canfor's Case Brief at 24-25.
[180] *See* Resolute and Central Canada's Case Brief at 10-13.
[181] *See* Petitioner's Rebuttal Brief at 23-25.

- The CAFC 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 Commerce violated the plain meaning of the statute in maintaining its consistent practice in the interpretation of the term "pattern."

Commerce's Position: We disagree with the Canadian Parties, Canfor, Resolute and Central Canada. As noted above, both the CAFC and the CIT have found that there is nothing barring Commerce from aggregating the value of sales whose prices differ significantly for various purchasers, region and time periods. 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

Canadian Parties[182]

- Commerce must adequately explain why the use of an alternative comparison methodology based on 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 methodology may be explained by external factors, including changes in the supply and demand for lumber and market fluctuations in North America due to the COVID-19 pandemic, rather than "targeted dumping."
- In this review, 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 method, and 4.63 percent and 4.92 percent respectively, under the A-to-T method, with zeroing. When Commerce used the A-to-A method, 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 average-to-average comparison method and the average-to-transaction 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.
- For the final results, should Commerce continue to apply the A-to-T method, Commerce must explain why the A-to-A or T-T method could not account for the alleged significant price differences.

[182] *See* Canadian Parties' Case Brief at 26-32.

- Commerce's unlawful application of the DPM 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, as is consistent with U.S. law, re-calculate the weighted-average dumping margin for the non-examined companies.

Canfor[183]

- Commerce likewise 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.
- For the final results, Commerce should explain, based the data in 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.

Resolute and Central Canada[184]

- Commerce failed to demonstrate, as statutorily required, why the A-to-A method is inadequate in accounting for price differences before resorting to an alternative price comparison method, *e.g.,* the A-to-T method.
- Commerce uses the meaningful difference test to determine whether the A-to-A method can account for price differences.
- The "meaningful difference" test does not meet the statutory requirement for explanation because it does not explain whether the calculated difference in the margins results from the "significant price differences" or from the mathematical truism that once positive dumping values are zeroed, the dumping margin goes up. The difference confuses cause with effect.
- That A-to-A margins are different from A-to-T margins is a conclusion, not an explanation for why the A-to-A method does not already take into account the "significant" price differences found by the Cohen's d test.

Rebuttal

Petitioner[185]

- Resolute, the GOC, and Canfor each challenge Commerce's meaningful difference test. These parties argue that Commerce's meaningful difference test fails to fulfill the statutory obligation in section 777A(d)(1)(B) of the Act, which requires that Commerce explain why the A-to-A comparison method cannot account for the pattern of price differences found in the first stage of Commerce's DPM.

[183] *See* Canfor's Case Brief at 24-25.
[184] *See* Resolute and Central Canada's Case Brief at 6-7
[185] *See* Petitioner's Rebuttal Brief at 17-19.

- 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 significantly differing export prices "cannot be taken into account using" the A-to-A method.
- Most recently, the CAFC considered the issue of whether Commerce's meaningful difference test satisfies the statutory requirement in *Stupp*. In its opinion, the CAFC, relying on its earlier decision in *Apex II*,[186] held that the meaningful difference test reasonably achieves the statutory aim of addressing targeted or masked dumping.
- Importantly, *Apex II* held that the "rationales {provided by Commerce} in support of its meaningful difference analysis to be reasonable."[187] *Stupp* 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 CAFC'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."[188]
- 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."[189]
- For these reasons, Commerce should continue to apply its "meaningful difference" test as part of the agency's DPM consistent with judicial precedent and Commerce's practice (including in prior segments of this proceeding).

Commerce's Position: We disagree with the Canadian Parties, Canfor, Resolute and Central Canada. We have made no changes for the final results. As has been upheld by the CAFC, Commerce's meaningful differences test reasonably addresses the "meaningful difference" requirement in section 777A(d)(1)(B)(ii) of the Act. Specifically, in *Stupp*, the CAFC 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 meaningful difference test is sufficient to satisfy that directive.[190] Further, citing its ruling in *Apex II*, the *Stupp* court 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

[186] *Apex Frozen Foods Pvt. Ltd. v. United States*, 862 F.3d 1337, 1341 (Fed. Cir. 2017) (*Apex II*).
[187] *See* Petitioner's Rebuttal Brief at 18; *see also Apex II*, 862 F.3d at 1346.
[188] *See NEXTEEL Co. v. United States*, 355 F. Supp. 3d 1336, 1357 (CIT 2019).
[189] *See The Stanley Works (Langfang) Fastening Systems Co. v. United States*, 333 F. Supp. 3d 1329, 1556 (CIT 2018).
[190] *See Stupp v. United States*, 5 F.4th 1341 (Fed. Cir. 2021) (*Stupp*) (as support for its argument, the *Stupp Court* cited *Apex II*, 862 F.3d at 1348-49).

addressing targeted or masked dumping."[191] Accordingly, in *Stupp*, the CAFC 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 CAFC's ruling regarding the appropriateness meaningful difference test. Therefore, Commerce will continue to apply the meaningful difference test for the final results.

Comment 6: Zeroing

Canadian Parties[192]

- In the *Preliminary Results*, Commerce applied the A-to-T method with zeroing to all of West Fraser's and Canfor's U.S. sales. The use of zeroing in the A-to-T method violates the international obligations of the United States.
- Commerce's methodology of zeroing is not required by statute, and Commerce should change its practice to comport with the United States' obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement).
- In addition, Commerce is not required to zero in order 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.
- 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.

Resolute and Central Canada[193]

- Zeroing is not the result of any formal rulemaking with notice and public opportunity to comment. Thus, Commerce is not constrained from meeting its international obligations to not use zeroing in its final results.
- Since 2004, the WTO Appellate Body and WTO dispute settlement panels consistently have held, in a variety of contexts, that Commerce's zeroing is inconsistent with Articles 2.4 and 9.3 of the AD Agreement. The Appellate Body observed in *United States – Washing Machines* that the first sentence of Article 2.4.2 of the AD Agreement requires "that dumping and margins of dumping have to be established for the product under investigation 'as a whole.'"[194] Zeroing ignores a significant part of the whole, the values that are not dumped.
- The continuation of zeroing is inconsistent with the WTO obligations of the United States and is contrary to law.
- Commerce continued reliance on zeroing further violates its "ultimate statutory obligation … to calculate margins as accurately as possible."[195]

[191] *Id.*
[192] *See* Canadian Parties' Brief at 28-31.
[193] *See* Resolute and Central Canada's Case Brief at 18-31.
[194] *See* Resolute's Case Brief at 32.
[195] *See* Resolute's Case Brief at 34.

Canfor[196]

- Commerce fails to explain why it has continued to ignore the international obligations of the United States by continuing to set to zero any negative results generated by using the A-to-T method.
- Zeroing has been repeatedly found to be inconsistent with Article 2.4.2 of the WTO AD Agreement as well as with the "fair comparison" requirement in Article 2.480 and Commerce fails to explain why it chooses to act inconsistently with the international obligations of the United States.

Rebuttal

Petitioner[197]

- As an initial matter, in directing Commerce to various WTO materials that question Commerce's use of zeroing, Resolute omits reference to the WTO materials that do not support its argument.
- Most fatal to Resolute and the GOC's argument regarding Commerce's use of 'zeroing' in conjunction with its A-to-T comparison method is, however, that Commerce's determination is governed by U.S. law.
- In the April 2019 decision *Lumber from Canada-Panel Report*,[198] a WTO panel concluded that WTO rules do not prohibit zeroing. Further, numerous holdings of the CAFC have expressly and repeatedly held that Commerce's application of an alternative comparison methodology, with zeroing, is consistent with U.S. law when the statutory requirements of section 777A(d)(1)(B) of the Act are met.
- Lastly, contrary to Resolute's assertion, Commerce is acting in accordance with and full respect for the law. Thus, as is reflected by Commerce's consideration of this issue in the final results of the second administrative review of this proceeding, Congress did not intend for WTO reports, like those cited by Central Canada and the GOC, to supersede Commerce's ability to exercise its discretion in applying the statute.
- Accordingly, Commerce should reject the arguments presented by Canfor, Resolute, and the GOC and continue to apply "zeroing" in calculating dumping margins for Canfor and West Fraser in the final results.

Commerce's Position: We disagree with the Canadian Parties, Canfor and Resolute. WTO findings are not self-executing under U.S. law.[199] The CAFC 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.[200] In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.[201] Indeed,

[196] *See* Canfor's Case Brief at 25.
[197] *See* Petitioner's Rebuttal Brief from 25-28.
[198] *See United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS534/R (April 9, 2019) (*Lumber from Canada-Panel Report*).
[199] *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* at 1343, 1349.
[200] *See Corus Staal* at 1343, 1347-49, *cert. denied* 126 S. Ct. 1023 (2006); *accord Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).
[201] *See, e.g.*, 19 U.S.C. 3533, 3538 (sections 123 and 129 of the URAA).

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."[202] 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.[203] 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. Lastly, contrary to Resolute's assertion, Commerce is acting in accordance with and full respect for the law.

Commerce also disagrees with Resolute'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,[204] where the A-to-A comparison method cannot take into account the significant differences in U.S. prices.[205] Accordingly, for the final results, because we are applying the A-to-T method, we will continue to apply zeroing in calculating West Fraser and Canfor's weighted-average dumping margins consistent with the statute, regulations and Commerce's practice.[206]

Comment 7: The Cohen's *d* and Ratio Tests

Resolute and Central Canada[207]

- Commerce applies a ratio test "to evaluate price differences" which unreasonably "includes in the numerator sales values that are not significantly different from each other, and only {are} different from aberrant groups of sales, resulting in an inflated total value of sales passing the Cohen's *d* test and causing a false positive of a pattern."[208]
- Commerce's sum of the values of all sales from test groups passing the Cohen's *d* test is "distorted because Commerce includes the values of sales groups found to have significant price differences when they do not."[209]
- "One group with significant price differences triggers all other groups to pass with each Cohen's *d* test rotation."[210] "For example, in the context of regions, were an exporter to sell in one state at significantly higher or lower prices, on average, the Cohen's *d* test could create the appearance of significantly different prices in more than one state, even though the different prices appeared in only one state."[211]

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[202] *See* SAA at 659.
[203] *See, e.g.*, 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary).
[204] *See* SAA at 842-43.
[205] *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.
[206] *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*).
[207] *See* Resolute and Central Canada's Case Brief at 14-15.
[208] *Id.* at 14.
[209] *Id.*
[210] *Id*.
[211] *Id*.

- "In theory, {Commerce} could adjust for the multiplier effect of the Cohen's *d* test in the ratio test but, instead, it considers sales values of all groups passing the Cohen's *d* test, as measured from all perspectives, to exhibit a pattern, regardless whether those differences are meaningful or attributable to only certain groups being different."[212]
- Adding the sales value of groups of transactions that are not significantly different from appropriately defined control groups is contrary to law.

Rebuttal

Petitioner[213]

- The CAFC considered the reasonableness of Commerce's use of the ratio test as part of the agency's DPM in *Stupp* and, in so doing, emphasized 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 in order to select a statutorily defined comparison method."[214]
- Commerce's application of the Cohen's *d* test and the ratio test have repeatedly been sustained by the courts as a reasonable method for determining a pattern of price difference and should continue to be employed in the final results.

Commerce's Position: We disagree with Resolute and Central Canada. We have made no changes to the Cohen's *d* and ratio tests, and continue to rely on the differential pricing analysis for the final results.

As an initial matter, there is nothing in section 777A(d) of the Act that mandates how Commerce measures whether there is a pattern of prices that differs significantly or explains why the A-to-A method cannot account for such differences. On the contrary, carrying out the purpose of the statute[215] here is a gap-filling exercise properly conducted by Commerce.[216] As explained in the *Preliminary Results*, as well as in various other proceedings,[217] Commerce's differential pricing

[212] *Id*. at 15.
[213] *See* Petitioner's Rebuttal Brief at 15-17.
[214] *Id*. at 15.
[215] *See Koyo Seiko Co., Ltd. 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)).
[216] *See Chevron*, 467 U.S. 837, 842-43 (recognizing deference where a statute is ambiguous, and an agency's interpretation is reasonable); *see also Apex*, 862 F.3d at 1330 (applying *Chevron* deference in the context of Commerce's interpretation of section 777A(d)(1) of the Act).
[217] *See, e.g.*, *Large Diameter Welded Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 84 FR 6374 (February 27, 2019), and accompanying IDM at Comment 5; *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015-2016*, 83 FR 17146 (April 18, 2018), and accompanying IDM at Comment 8; *Welded Line Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015), and accompanying IDM at Comment 1; *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,

analysis (including the use of price differences and control groups) is reasonable, including the use of the Cohen's *d* test as a component in this analysis to determine whether prices differ significantly and the ratio test to determine whether the U.S. sales with prices that have been found to differ significantly amount to a pattern, and it is in no way contrary to the law.

The first statutory requirement, section 777A(d)(1)(B)(i) of the Act, requires that there be a pattern of prices for comparable merchandise that differ significantly among purchasers, regions or periods of time. To consider whether the pattern requirement is met, Commerce has applied the Cohen's *d* and ratio tests.[218] The purpose of the Cohen's *d* test is to determine whether, for comparable merchandise, the prices to a given purchaser, region or time period differ significantly from the prices of all other sales of comparable merchandise. The results of the Cohen's *d* test do not determine whether a pattern existed during the period under examination. Separately, the purpose of the ratio test is to evaluate whether the extent of the significant price differences, found as a result of the Cohen's *d* test, constitute a pattern of prices that differ significantly. As stated in the *Preliminary Results*, if the value of sales which pass the Cohen's *d* test accounts for at least 33 percent of the total value of U.S. sales, then this is evidence that there exists a pattern of prices that differ significantly.[219]

Resolute and Central Canada argue that the results of the ratio test are flawed because:

(1) prices which have been found to differ significantly by the Cohen's *d* test are not significantly different, and
(2) the results of the ratio test are inflated due to a "multiplier effect."

Commerce disagrees with Resolute and Central Canada that the Cohen's *d* test does not reasonably identify sale prices that differ significantly. As described in the *Preliminary Results*, the Cohen's *d* coefficient is "a generally recognized statistical measure of the extent of the difference between the mean (*i.e.*, weighted-average price) of a test group and the mean (*i.e.*, weighted-average price) of a comparison group."[220]

In the final determination for *Xanthan Gum*, Commerce explained that "{e}ffect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone."[221] In addressing respondent Deosen's comment in *Xanthan Gum*, Commerce continued:

> {e}ffect size is the measurement that is derived from the Cohen's *d* test. Although Deosen argues that effect size is a statistic that is "widely used in meta-analysis," we note that the article also states that "{e}ffect size quantifies the size

2015), and accompanying IDM at Comments 1 and 2; and *Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 46647 (July 18, 2016), and accompanying IDM at Comment 4.
[218] *See Preliminary Results* PDM at 9.
[219] *Id.*
[220] *See Preliminary Results* PDM at 9; *see also Dillinger*, 981 F.3d at 1324 ("The Cohen's *d* coefficient is a 'generally recognized statistical measure' of the extent of the difference between the weighted-average price of a test group and the weighted-average price of a comparison group.").
[221] *See Xanthan Gum* IDM at Comment 3.

> of the difference between two groups, and may therefore be said to be a true measure of *the significance of the difference*." The article points out the precise purpose for which {Commerce} relies on the Cohen's *d* test to satisfy the statutory language, to measure whether a difference is significant.[222]

The Cohen's *d* coefficient is based on the difference between the means of the test and the comparison groups relative to the variances within the two groups, *i.e.*, the pooled standard deviation. Furthermore, as originally stated in *Xanthan Gum*:

> {i}n "Difference Between Two Means," the author states that "there is no objective answer" to the question of what constitutes a large effect. Although Deosen 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."[223]

Commerce thus relies on the Cohen's *d* coefficient as a measure of effect size to determine whether the observed price differences are significant. Nonetheless, Resolute and Central Canada simply asserts that the price differences found to be significant as a result of the Cohen's *d* test for this review nonetheless "are not significantly different from each other" perhaps because they are "only different from aberrant groups of sales."[224] Resolute and Central Canada provide no further argument or evidence to support such claims, and Commerce finds that Resolute and Central Canada's conclusions are unsupported and without merit.

Further, Resolute and Central Canada appear to presume, as part of their argument, that there is a "multiplier effect" that inflates the results of the ratio test. We believe Resolute and Central Canada make this presumption based on a concern that the price for a given sale which is found to differ significantly by more than one group, *e.g.*, by both purchaser and time period, is double counted when aggregating the results of the ratio test. However, we do not believe that there is reason for Resolute and Central Canada to be so concerned. If a given sale is found to be at a significant different price by more than one group, then the value of that sale will only be included once in the total value of sales which pass the Cohen's *d* test, *i.e.*, the numerator of the ratio test. Thus, Commerce disagrees with Resolute and Central Canada's presumption that there is a "multiplier effect" when aggregating the results of the Cohen's *d* test.

Lastly, Resolute and Central Canada assert that Commerce's approach in the Cohen's *d* test is flawed because the comparison group includes sales from test groups which have already been found to include prices that differ significantly. If one were to extend Resolute and 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

[222] *Id.* (emphasis in original, internal citations omitted).
[223] *Id*. (internal citations omitted); quoting from David Lane, *et al*., Chapter 19 "Effect Size," Section 2 "Difference Between Two Means."
[224] *See* Resolute and Central Canada's Case Brief at 14.

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.

Again, Resolute and 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 which 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.

We find that the Cohen's *d* test reasonably reflects the statutory requirement to determine whether prices differ significantly "among purchasers, regions or periods of time." Each comparison involves the prices to a given purchaser, region or time period with all other prices of comparable merchandise to other purchasers, regions or time periods. To be clear, the purpose of the Cohen's *d* test is to examine whether the prices of merchandise to a distinct purchaser, region, or time period differ significantly with the prices of comparable merchandise to all other purchasers, regions or time periods, respectively. The ratio test then follows, and it is the ratio test which discerns whether or not a pattern exists based on the existence of those significant price differences.

Therefore, for the reasons set forth here, we disagree with Resolute and Central Canada's arguments and continue to apply the Cohen's *d* and ratio tests in these final results.

Comment 8: Whether Commerce's Simple Average of Variances is Appropriate

Resolute and Central Canada[225]

- In the *Preliminary Results*, Commerce calculated pooled variances in the denominator of the Cohen's *d* coefficient by using the simple average of the variances.
- The pooled variance is an average of the two variances of two separate groups. Commerce calculates a simple average of the variances that disregards the comparative sizes of test and control groups. Simple averaging creates a bias in outcomes.
- The CAFC vacated the use of a simple average rather than weighted average to calculate the pooled standard deviation.[226] Commerce should use a weighted average to calculate the pooled standard deviation or explain why it should not.

[225] *See* Resolute and Central Canada's Case Brief at 15-18.
[226] *See Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 673-75 (Fed. Cir. 2019) (*Mid Continent CAFC I*).

- More recently, the CAFC in *Stupp* raised serious concerns with Commerce's use of simple average pooled variances instead of weighted average pooled variances when running the Cohen's *d* test.
- For the final results, Commerce should recalculate the Cohen's *d* coefficient using a weighted average for pooled variance.
- Commerce's use of a simple averaged pooled variance in the denominator of the Cohen's *d* test formula is not in accordance with law and is not supported by substantial evidence. Commerce calculates a simple average of the variances that disregards the comparative sizes of test and control groups.
- The more transactions examined in a population, the more accurate is the measure of dispersion. By weighing the smaller tested population and the larger control population's standard deviations equally, Commerce inappropriately gives equal weight to the population producing less accurate standard deviations.

Rebuttal

Petitioner[227]

- The CAFC in *Stupp* did not hold that Commerce's methodology with respect to using a simple average was unreasonable, but rather remanded for the agency to provide further explanation. Also, the CIT has affirmed Commerce's continued use of a simple averaging formula in the *Mid Continent CIT*[228] opinion.
- Commerce's rationale on remand in *Mid Continent CIT*, and the CIT's affirmance of that rationale, demonstrate that use of a simple average is a reasonable approach to calculate the pooled standard deviation and does not result in distortion.
- In arguing that Commerce's use of a simple average in the denominator of the Cohen's *d* coefficient is distortive, Resolute fails to address the CIT's opinion sustaining Commerce's continued use on remand of a simple average in calculating the pooled standard deviation in *Mid Continent CIT*.
- Accordingly, because no error or distortion in Commerce's analysis has been demonstrated, and because the use of a simple average is a consistent, predictable approach that considers all pricing behavior equally, Commerce should continue to use a simple average to calculate the pooled variance in the denominator of the Cohen's *d* coefficient.

Commerce's Position: We disagree with Resolute and Central Canada. First, Commerce's use of simple averaging to calculate the pooled standard deviation is in accordance with law and is reasonable. As Commerce explained on remand in the on-going *Mid Continent* litigation, weight-averaging variances creates problems that do not exist if we use simple averages of variances:

> {w}eighting, by volume, the average of the variances for the test and comparison groups creates a wide variation, from 0.04 to 0.59, as to the importance of the pricing behavior of the given group vis-à-vis all other groups when each pricing

[227] *See* Petitioner's Rebuttal Brief at 19-21.
[228] *See Mid Continent Steel & Wire, Inc. v. United States*, 495 F. Supp. 3d 1298 (CIT 2021) (*Mid Continent CIT*).

> behavior is equally valid. In contrast, a simple average does not introduce such wide swings in the predominance of one of the pricing behaviors over the other, and is predictable because the importance given to each pricing behavior will be the same for all products. Thus, Commerce's use of a simple average addresses Commerce's expressed concern to use a consistent, predictable approach, where each pricing behavior is equally taken into account when gauging the significance of the difference in the mean prices of the test and comparison groups. Use of a weighted average, however, would inject an unpredictable, widely varying and seemingly random accounting of the two pricing behaviors when each of these pricing behaviors are equally representative of the prices to a given purchaser, region, or time period and the prices to all other purchasers, regions, or time periods.[229]

Further, Commerce also explained in the same redetermination that using a weight average creates additional problems as well:

> {u}sing a weighted average (whether by volume, value, or number of transactions) would improperly give preference to one pricing behavior over another, and this preference would vary wildly for the same purchaser, region or time period for different products. Commerce's approach removes this bias and instability, and ensures the consistency and objectivity in evaluating the pricing differences between purchasers, regions, or time periods, consistent with the purpose of the Cohen's *d* test.[230]

However, the CAFC found that despite Commerce's explanations for the superiority of using a simple average over a weighted average in this context, academic literature on the record of that proceeding seemed to suggest that, in fact, a weighted average was preferable.[231] Accordingly, the CAFC remanded to Commerce for either further explanation supporting the simple average or an alternative approached to calculate the denominator of the Cohen's *d* coefficient, and Commerce is in the process of preparing that redetermination.[232]

It is important to note that there are differences between the records in the *Mid Continent CAFC II* litigation and this review. Specifically, in *Mid Continent CAFC II*, there was academic literature on the record of that proceeding that the CAFC believed undermined Commerce's simple average preference. No such literature is on the record of this proceeding. Further, although we understand the concerns expressed by the CAFC in *Mid Continent CAFC II* with respect to the use of a simple average, that litigation is not concluded and it remains possible that once it is completed, Commerce will continue to apply a simple average even in that proceeding. Accordingly, Commerce has continued to use a simple average for these final results, as the use of a simple average is superior to a weighted average for the reasons that we have explained.

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[229] *See Final Results of Redetermination Pursuant to Court Order, Mid Continent Steel & Wire, Inc. v. United States*, Court No. 15-00213, dated June 16, 2020, available at https://access.trade.gov/Resources/remands/index.html at 14-15.
[230] *Id*. at 16.
[231] *See Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367, 1377-80 (Fed. Cir. 2022) (*Mid Continent CAFC II*).
[232] *Id.*, 31 F.4th at 1381.

Furthermore, as noted above, in *Stupp,* the CAFC remanded for Commerce to address the issue of whether certain statistical criteria are relevant to Commerce's application of the Cohen's *d* test.[233] The CAFC in *Stupp* recognized the ongoing, parallel litigation in *Mid Continent* as it also involves Commerce's Cohen's *d* test, but each judicial proceeding involves a distinct issue related to Commerce's application of that analysis.[234] Accordingly, we do not find that the CAFC's analysis in *Stupp* is key to the issue of simple or weighted average to calculate the denominator of the Cohen's *d* coefficient.

Therefore, because we find that the use of simple averaging to calculate the denominator of Cohen's *d* is superior to the use of a weighted average, and has not been rejected by the CAFC in the ongoing *Mid Continent* litigation, we have determined to continue using a simple average of the standard deviations of the test and comparison groups to calculate the denominator of the Cohen's *d* coefficient in our application of the Cohen's *d* test for the final results.

Comment 9: Whether to Update J.D. Irving's Cash Deposit Rate

J.D. Irving[235]

- J.D. Irving is not subject to this review. Nevertheless, in accordance with section 751(a)(2)(C) of the Act, Commerce's regulations, and Congressional intent, J.D. Irving's AD cash deposit rate must be updated to reflect the company's dumping margin established for the year 2020. Unless Commerce takes appropriate action, final ADs will be assessed on J.D. Irving imports of subject merchandise entered during the 2020 POR at dumping rates established in 2020, while AD cash deposits will continue to be collected at a dumping rate calculated for 2019.
- The plain language of section 751(a)(2)(C) of the Act requires Commerce to use the same dumping margin as the basis for both the assessment of ADs and the collection of AD cash deposits for future entries, stating: "the determination under {751(a)(2)(C)} shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." Section 751(a)(2)(C) of the Act's requirement applies equally to assessment and deposit rates for unreviewed entries, which are subject to the automatic assessment provision under 19 CFR 351.212(c)(1).
- The courts have affirmed this principle, noting that section 751(a)(2)(C) of the Act "requires that both the deposit rate and the assessment rate be derived from the same dumping margin differential . . . ."[236]

[233] *See Stupp*, 5 F.4th 1341, 1360 (Fed. Cir. 2021).
[234] *Id.*, 5 F.4th at 1356-57.
[235] *See* J.D. Irving's Case Brief at 1-9.
[236] *See* J.D. Irving's Case Brief at 3 (citing *Koyo Seiko Co. v. United States*, 110 F. Supp. 2d 934, 942 (CIT 2000), *aff'd* 258 F.3d 1340, 1342 (Fed. Cir. 2001) (citation omitted) ("Commerce uses the dumping margin to assess antidumping duties on merchandise imported during the review period, and also to calculate 'cash deposits of estimated duties for future entries' of the subject merchandise."); and *Torrington Co. v. United States*, 44 F.3d 1572, 1578 (Fed. Cir. 1995) ("Section {751(a)(2)} . . . requires that PUDD, the difference between foreign market value and United States price, serve as the basis for both assessed duties and cash deposits of estimated duties.")).

- Because the deposit rate is an estimate of the respondent's future dumping behavior, the requirement that the deposit and assessment rates be consistent also means that the AD deposit rate should reflect the assessment rate established for the most recent POR.[237]
- Commerce has previously stated that the lack of a request for a review constitutes a determination under section 751 of the Act.[238]
- The CIT has found in *Federal-Mogul Corp* that in a situation where a company's entries are unreviewed, the prior cash deposit rate . . . becomes the assessment rate, which must in turn become the new cash deposit rate for that company.[239] Accordingly, section 751(a)(2)(C) of the Act's requirement that the AD deposit rate going forward must be based on the same dumping margin used for the assessment rate applies equally to unreviewed foreign producers/exporters that receive assessment and deposit rates by operation of law under 19 CFR 351.212(c)(1).
- Failing to update J.D. Irving's AD cash deposit rate to the company's dumping margin for the 2020 POR would also violate Congressional intent – which was to prevent Commerce from having to conduct administrative reviews when petitioners and respondents alike are satisfied with existing AD rates. Moreover, failing to update J.D. Irving's cash deposit rate would be arbitrary because it would apply AD cash deposit rates for companies subject to the review based on dumping margins calculated for 2020, but not updating AD cash deposit rates for unreviewed companies with agreed-upon dumping margins for 2020.
- Originally, Commerce was required under section 751(a) of the Act to conduct annual reviews of all outstanding AD and CVD orders; there was no provision for interested parties to request reviews.[240] That changed with enactment of the Trade and Tariff Act of 1984 by which Congress amended section 751(a) to require Commerce to conduct annual reviews only "if a request for such a review has been received."[241] The corresponding legislative history explains that the "purpose of amending the annual review requirement {was} to reduce the administrative burden on {Commerce} of automatically reviewing every outstanding order even though circumstances do not warrant it or parties to the case are satisfied with the existing order."[242] Congress also intended for the request-for-review requirement to "limit . . . the burden on petitioners and respondents, as well as the

[237] *Id.* (citing section 736(a)(3) (requiring "the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited"); *Large Power Transformers from Italy; Final Results of Administrative Review*, 52 FR 48606, 48610 (December 10, 1987) ("We believe the margin for the most recently reviewed period is generally the best estimate we have of the producer's current behavior."); *Steel Jacks from Canada: Final Results of Administrative Review*, 50 FR 42577, 42579 (October 21, 1985) ("{I}t is Commerce's practice to establish its estimated duty deposit rate based upon the weighted-average margin for all sales during the most recent period reviewed. We do this because the most recent period should be the best indicator of future marketing practices".); and *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (Fed. Cir. 2003) ("{W}e discern a congressional intent that cash deposit rates be accurate and current; we see no congressional intent indicating how Commerce should accomplish that goal.")).
[238] *Id.* at 4 (citing *Antidumping Duties*, 54 FR 12742, 12756 (March 28, 1989) (*Preamble to Regulations*).
[239] *Id.* (citing *Federal-Mogul Corp. v. United States*, 822 F. Supp. 782 (CIT 1993) (*Federal-Mogul Corp*)).
[240] *Id.* at 6 (citing *Trade Agreements Act of 1979* (Pub. L. 96-39, 93 STAT. 144, 175, July 26, 1979), *codified at* 19 U.S.C. 1675(a)(1) (1982 edition)).
[241] *Id.* (citing *Trade and Tariff Act of 1984* (Pub. L. 98-573, 98 STAT. 2948, 3031, October 30, 1984), *codified at* 9 U.S.C. 1675(a)(1) (1988 edition)).
[242] *Id.* (citing *H.R. Report 98-725*, 98th Cong., 2nd Sess., at 22-23 (May 1, 1984)).

administering authority."[243] In *Federal-Mogul*, the CIT held that Congress's purpose for amending section 751(a) would be undermined if Commerce were arbitrarily to change an AD cash deposit rate from the dumping rate to which interested parties agreed by not requesting a review.[244]

- Here, neither J.D. Irving nor any U.S. producer requested a review of J.D. Irving for this POR, signifying that both sides were satisfied that the AD cash deposit rates in effect during that period reflected J.D. Irving's dumping margin in 2020. Despite this, Commerce later assigned J.D. Irving an AD cash deposit rate based on a dumping margin calculated for 2019, the prior POR. By assessing ADs on entries at an agreed upon dumping rate for one year, while collecting AD cash deposits at a dumping rate calculated for an earlier year, Commerce all but compels parties to request reviews even when they are satisfied with existing AD rates. Without certainty that, in the absence of a request for review, the existing AD cash deposit rate would continue to apply until completion of an administrative review for a subsequent period, parties are unable to make an informed decision of whether to request a review. As recognized by the CIT, injecting uncertainty into the review-request-decision-making process violates congressional intent and increases the burden on Commerce and parties alike with unnecessary reviews.
- Upon conclusion of the 2020 POR, Commerce will update the AD cash deposit rates for companies subject to the review to reflect their 2020 dumping margins but intends to keep J.D. Irving's cash deposit rate at the 2019 level. Such disparate treatment of companies subject to the review and companies not subject to the review is arbitrary and impermissible.

Petitioner[245]

- In the *Preliminary Results*, based on Commerce's consistent practice as stated in 19 CFR 351.212(c)(ii) and section 751(a)(2)(C) of the Act, Commerce announced that "for merchandise exported by companies not covered in this review but covered in a prior segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period."[246] J.D. Irving's argument that Commerce should not follow this practice is that the liquidation instructions Commerce issued in April 2021 liquidating all entries not under the 2020 POR review constitutes a determination that requires Commerce to change J.D. Irving's cash deposit rate. J.D. Irving is mistaken. The automatic liquidation instructions referenced by J.D. Irving do not constitute a "determination" for purposes of establishing future cash deposits. As explained by Commerce in the second AD review of this order (AR2), "{b}y its very name, the issuance of automatic liquidation instructions is a passive, automatic action requiring no analysis nor decision other than to follow the law and our regulations."[247]

[243] *Id.* (citing *H.R. Report 98-1156*, 98th Cong., 2nd Sess., at 181 (October 5, 1984)).
[244] *Id.* at 7 (citing *Federal-Mogul*, 822 F. Supp. at 788; *see also OKI Elec. Indus. Co. v. United States*, 669 F. Supp. 480, 486 (CIT 1987) (stating that, through the 1984 amendment to section 751(a) of the Act, "Congress sought to avoid unnecessary 751 reviews where the parties to the case were satisfied.")).
[245] *See* Petitioner's Rebuttal Brief at 56-63.
[246] *Id.* at 57 (citing the *Preliminary Results* at 6507).
[247] *Id.* at 61-62 (citing *Lumber AR2 Final* IDM at Comment 10).

Indeed, the Federal Circuit has explained that a "decision" must involve "analysis and adjudication":

> "decisions" of Customs are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty. Indeed, prior case law indicates that Customs must engage in some sort of decision-making process in order for there to be a protestable decision.[248]

- Accepting J.D. Irving's argument would upend Commerce's consistent practice and present immense administrability concerns. As such, Commerce should reject J.D. Irving's arguments and decline to 'update' the cash deposit rate collected on merchandise produced and exported by J.D. Irving.

Commerce's Position: We disagree with J.D. Irving. As it does here, in AR2 J.D. Irving relied on misinterpretations of the law, Commerce practice, and Congressional intent in arguing that it should retain the cash deposit rate calculated at the end of the first AD review of this order (AR1). As we did here, in AR2 we applied the same treatment to J.D. Irving that we have to thousands of companies prior to that review and, as is the case here, J.D. Irving could not cite to one example where Commerce had assigned cash deposit rates in the manner it requested. Our actions in the instant review follow long-established precedent for the treatment of companies, such as J.D. Irving, that are not under review. Section 351.212(c)(ii) of Commerce's regulations state: "{i}f the Secretary does not receive a timely request for an administrative review of an order . . . the Secretary, without additional notice, will instruct the Customs Service to continue to collect the cash deposits previously ordered." As it acknowledged, J.D. Irving is not under review in this review, but was under review in AR2, and so consistent with Commerce practice cited above, J.D. Irving's entries have been entering under the final AR2 cash deposit rate since that rate went into effect on December 2, 2021.[249] J.D. Irving raises no valid legal reasons why Commerce should be obligated to change this practice.

J.D. Irving notes that section 751(a)(2)(C) of the Act states that "the determination under this paragraph shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." J.D. Irving argues that automatic liquidation constitutes such a determination, and so because its entries at the end of the POR were liquidated consistent with its rate determined in the final results of AR1, its cash deposit rates should also be revised to be consistent with its rate assigned in the final results of AR1.

J.D. Irving's argument relies on its misinterpretation of the law and court decisions — a misinterpretation that J.D. Irving argued in AR2 as well — that an automatic liquidation amounts to a determination. Just as it did in AR2, J.D. Irving latches on to the word "determination" in the statement in the *Preamble to Regulations*, stating:

[248] *Id.* at 62 (citing *United States Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997).
[249] *See Lumber AR2 Final.*

> {b}ecause the cash deposit (or bond) rate is the basis for each interested party's decision whether to exercise its right to request a review, it would make no sense to change the rate after the time for request has expired. Interested parties that believe the assessment level should be higher or lower than the estimated antidumping duties deposited at the time of entry can request an administrative review. In addition, the use of the cash deposit rate required at the time of entry is in accordance with the purpose of the entire review-upon-request mechanism, *i.e.*, to reduce unnecessary burdens . ... In any event, the failure of an interested party to file a timely request for review constitutes a determination under section 751 of the dumping margin for the entries made during the review period.[250]

J.D. Irving misconstrues this passage to mean that a determination with regard to whether an updated cash deposit rate should apply to sales going forward was made in this review when its entries were automatically liquidated. No review of J.D. Irving was undertaken covering its sales during the 2020 POR. Additionally, during the last three decades (i.e., for as long as the current system has been in place) Commerce has never updated a company's cash deposit rate when a review request of a particular company had not been made for that company and automatic liquidation instructions have been issued.

The CAFC affirmed this view in *United States Shoe Corporation* that ministerial actions, such as the issuance of automatic liquidation instructions, do not constitute a determination for the purpose of updating a cash deposit rate.[251] Specifically, in *United States Shoe Corporation,* the CAFC found the Harbor Maintenance Tax to be a tax on exports akin to customs duties that are stipulated by law, and as such, the act of collecting the Harbor Maintenance Tax involved no analysis. Accordingly, the CAFC held that the collection of the Harbor Maintenance Tax was not the result of a "decision" by CBP, but rather a mere passive collection of money required by law.[252] Similar to *United States Shoe Corporation*, our issuance of automatic liquidation instructions was an automatic, ministerial action done pursuant to 19 CFR 351.213©. By its very name, the issuance of *automatic* liquidation instructions is a passive, automatic action requiring no analysis nor decision other than to follow the law and our regulations. Thus, contrary to J.D. Irving's claims, automatic liquidation instructions do not constitute a determination within the context of section 751(a)(2)(C) of the Act.

J.D. Irving also misinterprets a quotation from *Federal-Mogul Corp.* where the Court held that "in a situation where a company's entries are unreviewed, the prior cash deposit rate . . . becomes the assessment rate, which must in turn become the new cash deposit rate for that company."[253] Any plain reading of *Federal-Mogul Corp.* would conclude that J.D. Irving has misinterpreted the ruling. *Federal-Mogul Corp.* involved a situation where,

> for companies which were not investigated in the LTFV investigation and therefore received the LTFV "all others" cash deposit rate and were also not

[250] *See* J.D. Irving's Case Brief at 3-4 (citing *Preamble to Regulations*).
[251] *See United States Shoe Corporation v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997) (*United* States Shoe Corporation).
[252] *Id.*, 114 F.3d at 1569.
[253] *See Federal-Mogul Corp.*

> investigated during this administrative review, the ITA used the new "all others" rate calculated in this administrative review as the new cash deposit rate for those companies.[254]

The CIT held,

> that in cases where a company makes cash deposits on entries of merchandise subject to antidumping duties, and no administrative review of those entries is requested, the cash deposit rate automatically becomes that company's assessment rate for those entries.[255]

With regard to the cash deposit rate, the CIT held that,

> {i}n a situation where a company's entries are unreviewed, the prior cash deposit rate from the LTFV investigation {the decision concerned the first administrative review of the order} becomes the assessment rate, which must in turn become the new cash deposit rate for that company.[256]

The use of "new" by the Court would appear to be a response to Commerce's attempts to apply to companies not under review the "new" all others rate calculated in that review. As even quoted by J.D. Irving, "the prior cash deposit rate . . . becomes the new assessment rate." Just as the rate of the company not under review in *Federal-Mogul Corp.* maintained its "prior cash deposit rate," J.D. Irving, which is likewise not under review, has maintained its prior cash deposit rate.

We also disagree with J.D. Irving's argument that because of Commerce's actions parties are unable to make an informed decision of whether to request a review and that injecting uncertainty into the review-request-decision-making process violates Congressional intent and increases the burden on Commerce and parties alike with unnecessary reviews. As detailed above, Commerce has followed its long-held practice of not updating the cash deposit instructions for companies not under review. Because we continue to follow our long-held practice, all parties, including J.D. Irving, knew that Commerce would not update J.D. Irving's cash deposit rate or any company's cash deposit rate not under review. The only way to insert uncertainty and generate the results J.D. Irving supposedly fears is for Commerce to change its practice and approach.

J.D. Irving returns to *Federal-Mogul Corp.*, where it cites the CIT holding that:

> {i}f {Commerce} is allowed to arbitrarily change this cash deposit rate for unreviewed firms, which are presumably unreviewed because the parties are happy with assessments and future cash deposits being made at that cash deposit rate, in many cases the parties will be required to request administrative reviews of all entries of the subject merchandise. Importers and foreign producers will

[254] *Id.*, 822 F. Supp. at 784.
[255] *Id.*, 822 F. Supp. at 787-88.
[256] *Id.*, 822 F. Supp. at 788.

> make the request so their future entries will not be subject to a potentially higher "all others" cash deposit rate. Likewise, the domestic industry will request reviews to ensure that future entries will not be subject to a potentially lower "all others" cash deposit rate. This will have the effect of increasing the number and complexity of administrative reviews thereby defeating the express purpose of the 1984 amendment.[257]

In *Federal-Mogul Corp.*, the CIT is warning about the negative impact if Commerce were to revise the assessment and cash deposit rates of a company for which no review has been requested. Here, by contrast, we are *not* revising the cash deposit rate of a company — J.D. Irving — for which no review has been requested. Accordingly, for the final results, we have not altered the assessment rates from the cash deposit rates in effect for J.D. Irving and we have not changed J.D. Irving's cash deposit rate. As we have detailed above, this treatment is consistent with our long-time treatment of all respondents in J.D. Irving's situation.

Comment 10: Whether it was Proper not to Select Respondents based on Sampling

Petitioner[258]

- Commerce has recognized that continually selecting respondents for individual review based on the volume of exports (*i.e.*, in accordance with section 777A(c)(2)(B) of the Act) effectively excludes smaller exporters and producers from individual review.[259] As a result, concerns raised in the *Sampling Notice* that non-selected respondents will continue to believe that they are "excluded from individual examination" and "may decide to lower their prices as they recognize that their pricing behavior will not impact the AD rates assigned to them"[260] are present here. Supporting this concern is the fact that of the nearly 200 entities specifically requesting a review of themselves, only Canfor, West Fraser, Resolute and Tolko Marketing and Sales Ltd., Tolko Industries Ltd., and Gilbert Smith Forest Products Ltd. (Tolko) sought to have their individual sales and costs individually reviewed.[261]
- Much of Commerce's justifications for not using sampling to select mandatory respondents is merely copied from the previous softwood lumber reviews and fails to engage with the evidence presented in the petitioner's sampling request.
- Commerce's claim that the "unique time constraints of this administrative review" made sampling "unfeasible,"[262] ignores the fact that having to delay respondent selection until after the 90-day period for withdrawal of review requests is present in all reviews and is thus not unique present in all administrative reviews.
- Commerce's justification for not sampling on the grounds that sampling may "result in the review of one or more previously unexamined companies that are unfamiliar to Commerce" is also an unreasonable response to the petitioner's sampling request. The

[257] *Id.*
[258] *See* Petitioner's Case Brief at 14-22.
[259] *Id.* at 14 (citing *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963, 65967 (November 4, 2013) (*Sampling Notice*)).
[260] *Id.* (citing *Sampling Notice*, 78 FR at 65967).
[261] *Id.* at 22; *see also* RSM at 9.
[262] *Id.* at 8 (citing RSM at 5).

purpose of using sampling for respondent selection purposes is to limit the "enforcement concerns" that arise when Commerce selects only the largest respondents.[263] Of the nearly 300 respondents included in this review, only four have been individually examined by Commerce in prior segments of this proceeding. By choosing to review West Fraser and Canfor – companies that were previously examined in the investigation and both AR1 and AR2 – Commerce ignored the main purpose of its sampling methodology which is to generate a dumping margin that is representative of the entire Canadian softwood lumber industry.

- In choosing the "reasonable basis to believe or suspect" language, Commerce intentionally set a relatively low bar for selecting respondents based on sampling.[264]
- The petitioner included evidence in its sampling request showing that while several small mills faced closures or bankruptcies, Canfor and West Fraser were able to improve their position in the marketplace because of their ability to weather volatility in prices and production costs of softwood lumber caused by the COVID-19 pandemic.[265]
- West Fraser and Canfor specifying their predictions of dumping duties in their financial statements[266] suggest that these companies may have adjusted their pricing behavior in response to this antidumping order. No evidence of similar efforts to monitor pricing and cost information for companies that have not been selected for individual review can be identified on this administrative record. By declining to address record evidence and electing to continue selecting the largest exporters or producers for individual review, Commerce has failed to investigate dumping margins that are representative of the actual production experience of any exporters or producers beyond the two companies that have been selected for individual investigation for all segments of this order.

Canadian Parties[267]

- Selecting respondents through sampling at this stage of the review where the final results are due shortly would be both impractical and a waste of Commerce's resources.
- One of the requirements for Commerce to rely on sampling is that it has the resources to investigate at least three companies. Here, Commerce has stated that it does not have sufficient resources to meet this requirement,[268] specifying that "the office to which this administrative review is assigned{} is conducting numerous concurrent AD and CVD proceedings," and that "other offices do not have additional resources to assist."[269]
- Sampling is not the preferred respondent selection methodology for Commerce. As noted in the respondent selection memorandum (RSM), sampling is employed only in "rare cases."[270]

[263] *Id.* at 8-9 (citing *Sampling Notice*, 78 FR 65963, 65967.
[264] *Id.* at 21 (citing *China Nat'l Machinery Imp. & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334, 1338 (CIT 2003) (*China National Machinery*) (discussing the "believe or suspect" standard in context of valuing factors of production), *aff'd* 104 Fed. Appx. 183 (Fed. Cir. 2004)).
[265] *Id.* (citing Petitioner's Sampling Letter at 10 and 17).
[266] *Id.* at 22 (citing Canfor's Letter, "Section A Initial Questionnaire Response," dated May 14, 2021 (Canfor's Section A Response) at Exhibit A-16; *see also* West Fraser's Section A Response at Exhibit A-22).
[267] *See* Petitioner's Rebuttal Brief at 4-14.
[268] *Id.* at 6 (citing Memorandum, "Respondent Selection," dated May 2020 (RSM) at 10).
[269] *Id.* at 7 (citing RSM at 3).
[270] *See* Canadian Parties' Rebuttal Brief at 10 (citing RSM at 9).

- Commerce's analysis of this issue is similar to its analysis in previous reviews for the unsurprising reason that the pertinent facts of this review are similar to those of prior reviews. As Commerce noted, examining the responses of respondents in this review would be "complex," consistent with prior segments of this proceeding.[271] It is entirely logical that if the issues raised in two prior reviews had been particularly complex, Commerce would believe that this administrative review would continue to be so. In both prior segments and this one, Commerce noted that sampling would result in the selection of respondents that are both "unfamiliar to Commerce" and unfamiliar themselves with the review process, which would add delay and complication to an already complex review.[272] Nothing would have changed this reasoning between administrative reviews.
- The petitioner has also failed to provide Commerce with evidence providing "a reasonable basis to believe or suspect that the average export prices and/or dumping margins for the largest exports differ from such information that would be associated with the remaining exporters." At the time Commerce made its respondent selection decision, there had only been one completed prior review. And the evidence before Commerce at that time was that the margins of all three respondents were within one percent of each other, despite differences in size.[273] The petitioner has failed to provide Commerce with any other "reasonable basis to believe" that dumping margins differ between larger and smaller exporters.
- The petitioner's assertion that "while several small mills faced closures or bankruptcies, Canfor and West Fraser were able to improve their position in the marketplace"[274] says nothing about differences between the prices at which Canfor and West Fraser sold softwood lumber in the United States and those of smaller exporters, much less any differences in alleged dumping margins.
- The fact that Canfor and West Fraser estimated their AD deposit rates in their financial statements says absolutely nothing about them changing any pricing practice, much less about the pricing practices of smaller competitors.
- The petitioner's claims that smaller producers are not incentivized to adjust their pricing behavior because Commerce' selection methodology will only lead to larger respondents being examined is mere speculation.
- The basis for the petitioner's claim that the standard for Commerce to select respondents on the basis of sampling is a "relatively low bar" is a misinterpretation of *China National Machinery*.[275]

Commerce's Position: We disagree with the petitioner. Pursuant to section 777A(c)(2) of the Act, Commerce may limit its examination to: (A) a sample of exporters, producers, or types of products that Commerce determines is statistically valid based on the information available to

[271] *Id.* at 6 (citing RSM at 9).
[272] *Id.*
[273] *Id.* (citing the RSM at 9).
[274] *Id.* at 10 (citing Petitioner's Case Brief at 23).
[275] *Id.* (citing Petitioner's Case Brief at 20 (citing *China National Machinery*, 293 F. Supp. 2d at 1338. *China National Machinery* was about valuing factors of production in the non-market economy context, and the CIT held that the "reason to believe or suspect" standard still requires that "the agency point{} to substantial, specific, and objective evidence in support of its suspicion," and is only a lower threshold than "what is required to support a firm conclusion.").

Commerce at the time of selection, or (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that Commerce determines can be reasonably examined. Thus, the Act specifies no preference with regard to selecting respondents based on either export volume or sampling.

In general, Commerce will only rely on sampling for respondent selection purposes in AD administrative reviews when the following conditions are met:

> (1) There is a request by an interested party for the use of sampling to select respondents;
> (2) Commerce has the resources to examine individually at least three companies for the segment;
> (3) the largest three companies (or more if Commerce intends to select more than three respondents) by import volume of the subject merchandise under review account for normally no more than 50 percent of total volume; and
> (4) information obtained by or provided to Commerce provides a reasonable basis to believe or suspect that the average export prices and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters.[276]

As detailed in the RSM and in the previous comment, we only have the resources to examine two respondents.[277] The petitioner has not attempted to argue to the contrary. The petitioner did note that we did not cite to a "surge in the filing of new AD and CVD petitions" or a delay of several days in the release of CBP data, as we did in the previous review, for support of our statement that we lack the resources to select more than two mandatory respondents. Nevertheless, we are experiencing a very large workload during the administration of this POR.[278] Clearly, this is a result of the continued surge in AD and CVD petitions filed. In addition, as we stated in the RSM that

> the unique time constraints of this administrative review make sampling an unfeasible approach to respondent selection. If Commerce were to conduct sampling, it would need to offer interested parties an opportunity to comment on the proposed sampling methodology and conduct the sampling at the conclusion of the 90-day period for withdrawal of review requests (*i.e.*, June 1, 2021), further delaying respondent selection and the issuance of the questionnaire. The sampling process, therefore, would leave Commerce insufficient time to review the complex responses of the respondents in this review. This is a particular concern here, where the use of sampling may result in the review of one or more previously-unexamined companies that are unfamiliar to Commerce.[279]

Rather than address the content of our declared reasons for not sampling and why it would strain our available resources, the petitioner notes that we gave the same reasons for not selecting respondents based on sampling from the previous reviews. Noting that we are repeating certain

[276] *See Sampling Notice*, 78 FR at 65965.
[277] *See* RSM at 3-4 and 7-11.
[278] *Id.* at 3.
[279] *Id.* at 9-10.

concerns stated in the previous review does not make our concerns invalid. The petitioner also notes that these time constraints, contrary to our assertions, are not unique to this review, but would be faced by any administrative review. However, our concerns here are no different than concerns that would be present in other proceedings, does not make such concerns invalid.

Further, we have explained that the complex responses and issues raised in this proceeding make the AD softwood lumber proceeding highly challenging to administer. This is a concern unique to this proceeding. It is common knowledge that the sales and costs under review here represent one of the largest cases in U.S. dollar amounts before Commerce and that Canadian softwood lumber companies often consist of multiple mills. The lengthy IDMs of the previous reviews[280] and investigation,[281] and this review attest that the very large amount of sales and costs under review cause significant complexities. Thus, we have cause here to be particularly concerned that significantly delaying the selection of companies to be individually examined, which would be the result of selecting respondents based on sampling, may lead to a situation where, based on our available resources, we are unable to examine more than two companies and administer this review. Thus, one of the conditions for relying on sampling is not met, which the petitioner has not contested. All four of the conditions for relying on sampling must be met before Commerce will typically consider sampling.[282]

While the above is a sufficient reason for not selecting respondents on the basis of sampling, another of the four conditions for sampling identified in our *Sampling Notice* is not met because the record lacks a reasonable basis to believe or suspect that the average dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters. As we stated in the RSM, it is rare for Commerce to rely on sampling and we typically only rely on sampling when multiple reviews have been completed that we can draw upon for evidence of margin differentials attributable to size. When we rejected sampling for this POR, only the first administrative review had been completed and the margins for the mandatory respondents were between 1.18 percent and 1.99 percent.[283] This narrow range of margins among companies of varying size was also seen in the underlying investigation when margins of the individually examined respondents were between 3.20 percent and 7.22 percent.[284] Thus, not only has the condition that Commerce have the resources to examine at least three respondents not been met, the only existing information from this proceeding fails to meet another criterion for relying on sampling, which is that such information provides a reasonable basis to believe or suspect that the average export prices and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters.

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[280] *See 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; *see also Lumber AR2 Final* IDM.
[281] *See Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstance*, 82 FR 51806 (November 8, 2017) (*Lumber Investigation*), and accompanying IDM.
[282] *See Sampling Notice*, 78 FR at 65965.
[283] *See Certain Softwood Lumber Products from Canada: Preliminary Results of Antidumping Duty Administrative Review and Rescission of Review, in Part; 2017–2018*, 85 FR 7282 (February 7, 2020).
[284] *See Softwood Lumber Order.*

While the petitioner has cited to volatility during the POR and several Canadian government programs intended to aid small and medium-sized enterprises and further cited to difficulties at one smaller company, the petitioner has not linked any of these instances to a different impact on the margins of small and medium-sized enterprises than on the larger Canadian respondents. In fact, the petitioner's own submissions included one article identifying the economic difficulties experienced by four of the largest Canadian lumber companies during the POR,[285] and another article placed on the record identified economic hardship experienced by Canfor and West Fraser, the two companies with the largest volume of shipments of softwood lumber throughout this proceeding.[286] We also note that the petitioner never attempted to demonstrate that the larger Canadian exporters did not also receive government assistance.

We also disagree with the petitioner that the fact that none of the smaller respondents requested voluntary treatment is indicative that their pricing behavior is different than the larger companies. Rather, it is just as likely that no smaller respondents requested voluntary treatment because Commerce typically selects companies based on shipment volume and smaller respondents are unlikely to be selected.

The petitioner also cites to the annual reports of Canfor and West Fraser stating that each had estimated their dumping margins[287] and interprets this as evidence that the two mandatory respondents are adjusting their pricing behavior based on their knowledge that they will be selected as mandatory respondents, while the non-selected respondents do not have to consider the impact of their pricing decisions on their margin. However, the petitioner has pointed to no linkage between the fact that Canfor and West Fraser are likely to be selected mandatory respondents and these companies' pricing behavior.

The petitioner alleges that the CIT in *China National Machinery* set a relatively "low bar" regarding the criteria stated in our *Sampling Notice* for determining whether there is a reasonable basis to believe that the average export prices and/or dumping margins for the largest exporters differ from those that would be associated with the remaining exporters.[288] First, we disagree that *China National Machinery* set a low bar. Rather, *China National Machinery* requires that, in reaching a reasonable basis to believe, we rely on "substantial, specific, and objective evidence in support of {our} suspicion," which is only a lower threshold than "what is required to support a firm conclusion."[289] Second, even if we employed this lower bar for finding a reasonable basis to believe that the average export prices and/or dumping margins for the largest exporters differ from those that would be associated with the remaining exporters, as discussed above, the petitioner has failed to cite to any "substantial, specific, and objective evidence" indicating pricing behavior differences that would pass even the lowest threshold for selecting respondents based on sampling.

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[285] *See* Petitioner's Letter, "Comments on CBP Data and Request for Sampling," dated March 23, 2021 at Exhibit 12.
[286] *Id.* at Exhibit 9.
[287] *See* Petitioner's Case Brief at 21-22 (citing West Fraser's Section A Response at Exhibit A-22; *see also* Canfor's Section A Response at Exhibit A-16).
[288] *See* Petitioner's Case Brief at 20 (citing *China National Machinery*, 293 F. Supp. 2d at 1338; and *Sampling Notice*, 78 FR at 65966).
[289] *See China National Machinery*, 293 F. Supp. 2d at 1338.

By not even challenging our determination that we lack the resources to examine at least three companies individually, and by not demonstrating that the margins of the larger respondents differ from those of the smaller respondents, the petitioner has failed to meet two of the four criteria that we state must be met before we will consider selecting respondents based on sampling. Further, as we noted in the RSM, sampling is employed only in "rare cases."[290] We have also stated that these "rare cases" occur only "when there are multiple, and often numerous, prior reviews to draw upon for evidence of margin differentials attributable to size."[291] This is only the third review of this order and thus the record lacks such information.

Comment 11: Whether it was Proper not to have Adjusted U.S. Price by CVDs

Petitioner[292]

- 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 countervailing duty 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 are inconsistent with section 772(c) of the Act.
- In the previous segment of this proceeding, Commerce refused to adjust U.S. price to account for CVDs. However, Commerce did not fully consider whether CVDs are costs attributable to bringing the softwood lumber merchandise from the original place of shipment to the place of delivery in the United States. Accordingly, because CVDs are costs, Commerce should remove countervailing duty costs from the starting price used to calculate softwood dumping margins.

Canadian Parties[293] *and Canfor*[294]

- 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.
- Commerce has never deducted CVD deposits or CVDs from U.S. price.[295]
- Commerce clarified its practice concerning this issue in 2004, after formal notice and comment procedures.[296] In adopting that policy, Commerce received and considered "extensive comments" from parties and members of the trade bar, including the precise

[290] *See* RSM at 9.
[291] *Id*.
[292] *See* Petitioner's Case Brief at 33-39.
[293] *See* Canadian Parties' Rebuttal Brief at 28-32.
[294] *See* Canfor's Rebuttal Brief at 7-10.
[295] *See* Canadian Parties' Rebuttal Brief at 24 (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.")).
[296] *See* Canfor's Rebuttal Brief at 8 (citing *Low Enriched Uranium from France*).

argument that the petitioner makes here.[297] Since then, it has remained Commerce's unbroken practice that neither countervailing duty deposits nor CVDs are deducted from U.S. price. Commerce considered all comments received and determined not to deduct CVDs from U.S. price.[298]

- Further, as the CIT in *Ad Hoc Shrimp*[299] and *Apex Exports*[300] 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,"[301] which should not be deducted from U.S. prices in calculating dumping margins under the statute.[302]
- 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."[303]

Commerce's Position: We disagree with the petitioner. Commerce has deducted and will continue to deduct where applicable CVDs from entries into the United States. However, this is performed in the context of the countervailing duty proceeding of softwood lumber from

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[297] *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.'").
[298] *Id.*, 69 FR at 46505, 46504-08).
[299] *See* Canadian Parties' Rebuttal Brief at *d.* at 30 (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}.'"
[300] *Id.* (citing *Apex Exports v. United States*, 37 CIT 1823, 1832 (2013) (*Apex Exports*), *aff'd* 777 F.3d 1373 (Fed. Cir. 2015).
[301] *Id.* (citing *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 494 F. Supp. 3d 1365, 1372 (CIT 2021) (*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)). As courts have held, "Congress has not defined or explained the meaning or scope of 'United States import duties' as set forth in 19 U.S.C. § 1677a(c)(2)(A)" and therefore, the statute is ambiguous, and step two of Chevron applies. *Ad Hoc Shrimp*, 925 F. Supp. 2d at 1373 n.18 (quoting *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359-60 (Fed. Cir. 2007)); *see* generally Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984).
[302] *Id.* (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) (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.")).
[303] *Id.* at 30-31 (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)).

Canada.[304] Meanwhile, in dumping proceedings, 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."[305] Commerce has never deducted CVDs from U.S. price in an AD proceeding.[306] Our determination not to deduct CVDs from U.S. price in an AD proceeding has been upheld by both the CIT and CAFC.[307]

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." 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.'"[308] 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 12: Whether to Correct the Names of Certain Companies under Review

Petitioner[309]

- Commerce should correct the following names in the final results to ensure the accurate assessment of ADs and the collection of cash deposits:
- 752615 B.C Ltd. Fraserview Remanufacturing Inc., (dba Fraser1view Cedar Products) should be corrected to 0752615 B.C Ltd./752615 B.C Ltd./Fraserview Remanufacturing Inc, DBA Fraserview Cedar Products.
- Arbec Lumber Inc. should be corrected to Arbec Lumber Inc. (aka Arbec Bois Doeuvre Inc.).
- Bois Daaquam Inc. should be corrected to Bois Daaquam inc. (aka Daaquam Lumber Inc.)
- Les Chantiers de Chibougamau Ltee should be corrected to Les Chantiers de Chibougamau Ltd./Ltee.

[304] *See Certain Softwood Lumber Products from Canada: Notice of Amended Final Results of the Countervailing Duty Administrative Review, 2019*, 87 FR 1114, 1115 (January 10, 2022) (*2019 CVD Review of Softwood Lumber*); *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 (February 4, 2022), 87 FR 6500.

[305] *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)).

[306] *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.")).

[307] *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 Group* at 898-900.

[308] *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.*

[309] *See* Petitioner's Case Brief at 7-10.

- Produits forestiers Termex, s.e.c. should be corrected to Produits forestiers Temrex, s.e.c. (aka Temrex Forest Products LP).
- Scott Lumber Sales should be corrected to Scott Lumber Sales/Scott Lumber Sales Ltd.
- Taan Forest Limited Partnership should be corrected to Taan Forest Limited Partnership (aka Taan Forest Products)

Commerce's Position: We agree in part and for the final results, as we have noted in Attachment II of the final results federal register notice, we have updated certain respondents with the corresponding English or French names. These companies include:

- Arbec Bois Doeuvre Inc. updated to Arbec Lumber Inc.; Arbec Bois Doeuvre Inc.,
- Bois Daaquam Inc. updated to Bois Daaquam Inc.; Daaquam Lumber Inc.,
- Les Chantiers de Chibougamau Ltee updated to Les Chantiers de Chibougamau Ltee; Les Chantiers de Chibougamau Ltd.,
- Produits forestiers Termex, s.e.c. updated to Produits forestiers Temrex S.E.C.; Temrex Forest Products LP

However, we have not updated for this POR the names of Scott Lumber Sales and Taan Forest Limited Partnership because the information indicating the names specified by the petitioner is not on the record of this 2020 POR.

Comment 13: Whether Commerce Should Include Restructuring and Impairment Costs in the Calculation of West Fraser's G&A Expense Ratio

Petitioner[310]

- Commerce should include certain restructuring and impairment costs that were excluded from West Fraser's G&A expense ratio in the *Preliminary Results*.
- West Fraser claimed that it did not have any significant mill closures or impairments during the POR, however, its non-consolidated financial statements contained a line item for restructuring and impairment charges during the POR.
- Commerce typically treats restructuring and impairment costs as "ordinary costs" that should be included in the calculation of the G&A expense ratio. West Fraser has not demonstrated that the restructuring and impairment expenses on the non-consolidated financial statements represent an extraordinary expense that is not related to the general operations of the company.
- Commerce should apply its standard treatment of restructuring and impairment costs and include the reported restructuring and impairment charges in West Fraser's G&A expense ratio calculation.

West Fraser[311]

- In the second administrative review of this proceeding, Commerce determined that restructuring and impairment costs were properly excluded from the calculation of the

[310] *See* Petitioner's Case Brief at 12-14.
[311] *See* West Fraser's Rebuttal Brief at 2-4.

G&A expense ratio because the costs were not related to the ordinary operations of the company since they were due to the permanent closure of a mill.

- In the second administrative review of this proceeding, Commerce found that West Fraser had provided sufficient documentation to demonstrate that the mill had closed.
- The fact that West Fraser did not permanently close any mills during the POR in 2020 does not mean that it did not incur restructuring and impairment costs in 2020 related to the permanent closure of its mill in 2019.
- West Fraser's 2020 Annual Report demonstrates that the effects of the closure of the Chasm mill carried into 2020. Specifically, the 2020 Annual Report explains that West Fraser's 2020 review of its reforestation and decommissioning obligations "increased the liability by $5 million, which was primarily related to the decommissioning of our Chasm, B.C. mill site and a landfill closure on Vancouver Island (2019 - an increase of $2 million)."
- Given this information, Commerce should continue to exclude these restructuring and impairment costs from the calculation of West Fraser's G&A expense ratio.

Commerce's Position: We agree with West Fraser. First, as acknowledged by both parties, Commerce's long-standing practice is to exclude costs or gains that are related to the permanent closure or sale of entire production facilities, as they no longer relate to the normal, ongoing operations of a company.[312] In the second administrative review of this proceeding, Commerce determined that West Fraser had permanently closed one of its mills.[313] As a result, Commerce did not recalculate the G&A expense ratio to include the associated restructuring and impairment costs that West Fraser had excluded from its G&A expense ratio.[314] Similarly, in the *Preliminary Results* of this current administrative review, Commerce did not make an adjustment to West Fraser's G&A expense ratio to include the restructuring and impairment costs that West Fraser excluded. As reported in West Fraser's 2020 annual report, West Fraser incurred decommissioning expenses that were related to "the decommissioning of our Chasm, B.C. mill site and landfill closure on Vancouver Island." Given that we have previously substantiated the closure of the Chasm mill site in the prior review, we find this statement in West Fraser's 2020 Annual Report to be evidence of the fact that these restructuring and impairment expenses were related to a permanent closure and properly excluded from the calculation of the G&A expense ratio. Therefore, for the final results, we have not included the associated restructuring and impairment costs in West Fraser's G&A expense ratio.

Comment 14: Whether Commerce Should Make Certain Revisions to West Fraser's Byproduct Offset Calculation

Petitioner[315]

- Commerce's adjustment to byproduct revenue from sales to affiliated parties requires further correction to address additional affiliate party sales.
- Commerce should correct certain byproduct quantities and value used in the calculation of West Fraser's byproduct offset.

[312] *See Lumber Investigation IDM* at Comment 31.
[313] *See* AR2 Lumber IDM at Comment 17.
[314] *Id.*
[315] *See* Petitioner's Case Brief at 6-8.

No party provided rebuttal comments.

Commerce's Position: We agree with the Petitioner. For the final results, we have corrected certain byproduct quantities and values. For further detail, please refer to West Fraser's Final Analysis Memorandum, dated concurrently with this memorandum.

Comment 15: Whether Commerce Should Rescind this Administrative Review for Companies with No Suspended Entries in the CBP Data

Petitioner[316]

- Commerce should rescind this administrative review for certain companies that had "no reviewable entries" during the POR and decline to revise their cash deposit instructions.
- Pursuant to 19 CFR 351.213(d)(3), an administrative review may be rescinded for an exporter or producer that does not have any "entries, exports, or sales of the subject merchandise" during the POR.
- Commerce has a policy of rescinding administrative reviews for companies that have "no reviewable entries" of subject merchandise.

No party provided rebuttal comments.

Commerce's Position: We disagree with the Petitioner. We have previously determined that "the information from the CBP data queries alone is not sufficient to reliably conclude that there were no entries of subject merchandise from a company under review during the POR."[317] Because of this, Commerce's long-standing policy is to require a company under review which claims that it had no shipments to submit a claim of no-shipments. This allows Commerce to confirm the claim over the course of the review and to "issue supplemental questionnaires, do further research into CBP data, allow time for parties to comment and submit further information, and ultimately consider and weigh potentially conflicting data and, where necessary or appropriate, scheduling and conducting verification of the respondent's claims of no shipments."[318] Further, when Commerce determines that a given company had no shipments, the review for that company is not rescinded but rather Commerce makes a final determination of no shipments and issues appropriate liquidation instructions.[319]

Consistent with this practice, the *Initiation Notice* for the instant review notified all respondents that "{i}f a producer or exporter named in this notice of initiation had no exports, sales, or entries during the {POR}, it must notify Commerce within 30 days of publication of this notice in the *Federal Register*."[320] Aside from Pacific Lumber Remanufacturing, Riverside Forest Products, Inc., Halo Sawmill, and Careau Bois, no party submitted a no-shipment claim. Based

[316] *See* Petitioner's Case Brief at 40-42.
[317] *See, e.g.*, *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 14th Antidumping Duty Administrative Review*, 75 FR 34976 (June 21, 2010), and accompanying IDM at Comment 2.
[318] *Id*.
[319] *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019-2020,* 86 FR 69620 (December 8, 2021), and accompanying IDM at Comment 8.
[320] *See Initiation Notice*.

upon information on the record, we have determined that certain companies had shipments despite their claims, while others had no shipments.[321]

Accordingly, consistent with our practice, we determine that the CBP data query alone is not sufficient to reliably conclude that there were no entries of subject merchandise, *i.e.*, "no shipments," from certain non-examined companies during the POR. Further, even if a non-examined company had made a claim of "no shipments" and Commerce concluded that this claim has value, then the review initiated for that company would not be rescinded. Therefore, we continue to base the weighted-average dumping margin in the final results of this review for certain non-examined companies on the weighted-average dumping margin for the respondents for whom we calculated a weighted-average dumping margin for the final results of review, *i.e.*, West Fraser and Canfor.[322]

Comment 16: Whether Commerce Used the Proper Market Price for Canfor's Wood Chip Sales

Canfor[323]

- 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.
- 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."[324] 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 in 2022, which is 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."[325] Chip prices set in 2012 as part of a broader transaction involving the purchase of the sawmills in

[321] *See* Memorandum to the File "No Shipments," dated concurrently with this IDM.
[322] *See* Memorandum, "Calculation of the Rate for Non-Selected Respondents," dated concurrent with this memorandum.
[323] *See* Canfor's Case Brief at 1-8.
[324] *Id.* at 6.
[325] *Id.* at 5.

question are not representative of the "specific market" at issue here – the market for wood chips in B.C. in 2020.

- 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 transactions, distorted the price for chips sold to unaffiliated parties from its Alberta mills.
- 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."[326] 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[327]

- Commerce should reject Canfor's argument and maintain its determination made in the final results of AR2 that Canfor's sales of chips to unaffiliated party A 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,

> {r}ecord 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

[326] *See* Canfor's Case Brief at 1-8.
[327] *See* Petitioner's Rebuttal Brief at 50-56.

> 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. Consequently, a meaningful comparison that recognizes these differences must be done on a regionally consistent basis.[328]

- 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,"[329] 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 (NRV) calculation even though the sales price was dictated by a long-term contract.[330]

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 review, where Canfor raised these precise arguments.[331]

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.[332] 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.[333] Here, because the sales revenue of

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[328] *Id.* at 53-54 (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).

[329] *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).

[330] *Id.*

[331] *See Lumber AR2 Final* IDM at Comment 11.

[332] *See* Memoranda, "Canfor Preliminary Sales Analysis Memo," dated January 28, 2022 (Canfor Prelim Cost Analysis Memorandum) at 1.

[333] 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*

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 demonstrate that there are unusual circumstances surrounding" the sales to unaffiliated party A.[334] 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.[335] 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.[336]

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.[337] 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 17: Whether the Costs Associated with Canfor's Mill Closures Should Be Excluded from the Mill Specific Cost of Production

Canfor[338]

- In the *Preliminary Results*, Commerce revised Canfor's G&A expenses ratio to include the closure costs relate to the Mackenzie sawmill while continuing to exclude costs related to the Vavenby and Isle Pierre sawmills.
- The mill closure and restructuring costs related to the Mackenzie sawmill are also extraordinary, non-recurring expenses of the company that are not reflective of either the cost of producing subject softwood lumber during the POR or the general operations of the company. Accordingly, they should not be included in Canfor's current period sawmill costs for purposes of the below-cost test.

Korea, 77 FR 17413 (March 26, 2012) (*Refrigerator-Freezers from Korea*), and accompanying IDM at Comment 17.

[319] Canfor Case Brief at 1-8.

[335] *Id.*

[336] *Id* at 2.

[337] *See* Canfor's Letter, "Section D Initial Questionnaire Response," dated June 14, 2021, at Exhibit D-14.

[338] *See* Canfor's Case Brief at 8-11.

- In the underlying investigation, Commerce excluded costs associated with permanent shutdowns of Resolute's Fort Frances mill and Tolko's Nicola Valley and Manitoba facilities. Commerce reiterated that its "longstanding practice has been to exclude costs that are related to the permanent closure or sale of entire production facilities, as they no longer relate to the normal, ongoing operations of a company."[339] These are the exact same circumstances that occur in this review.
- Lumber production at the Mackenzie sawmill was indefinitely curtailed effective July 18, 2019, and the sawmill never operated during any portion of the 2020 POR. Similar to the closures of Vavenby and Isle Pierre, the curtailment of the Mackenzie sawmill constitutes the permanent end to production at that facility. It is certainly not a "routine" disposal of a fixed asset. Canfor's management characterized the closure as "*permanent* capacity reductions and indefinite curtailments."[340]
- Due to these mill closures and curtailments, restructuring, mill closure and severance costs were recognized during 2020. Canfor's closure of these production facilities in 2019 and 2020 are significant changes in operations of the company that are not normal business operations related to either the general operations or the production of lumber. Accordingly, the resulting costs are appropriately excluded from Canfor's G&A ratio.

No party provided rebuttal comments.

Commerce's Position: We disagree with Canfor and have continued to include certain closure and restructuring costs related to the company's Mackenzie sawmill in the G&A expense rate calculation, consistent with our decision in both the *Preliminary Results* in this proceeding and in the prior 2019 administrative review, where Canfor raised these very arguments in connection with the Mackenzie curtailments.[341]

Commerce has an established practice of excluding gains or losses related to the permanent closure or sale of an entire facility.[342] The sale of an entire production facility is a significant transaction, and the resulting gain or loss generates non-recurring income or losses that are not part of a company's normal business operations and are unrelated to its general operations. However, where a shutdown consists of the closure of some production lines at a facility while other production lines at the same facility continue to operate, Commerce's approach has been to include the associated gains or losses as part of G&A expenses.[343]

According to Canfor, production at the Mackenzie sawmill was indefinitely curtailed effective July 18, 2019, and the sawmill never operated during any portion of the 2020 POR. Canfor asserts that, similar to the closures of Vavenby and Isle Pierre, the curtailment of the Mackenzie sawmill constitutes the "permanent end" to production at that facility. There is nothing on the record to support Canfor's characterization of the Mackenzie curtailment as a permanent closure.

[339] *Id.* at 10.
[340] *Id.*
[341] *See Lumber AR2 Final* IDM at Comment 14.
[342] *See Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstance*, 82 FR 51806 (November 8, 2017) (*Lumber Investigation*), and accompanying IDM at Comment 31.
[343] *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73437 (December 12, 2005), and accompanying IDM at Comment 8.

In fact, certain information in the company's 2020 financial statements suggests that such production curtailments are indeed temporary in nature. Notably, the financial statements include the following discussion relating to the Mackenzie sawmill:

> {t}he contract with the Public and Private Workers of Canada ("PPWC"), which represents workers at Canfor's Mackenzie operation, expired on June 30, 2019. As the sawmill was *indefinitely curtailed* before the contract expired, an agreement was reached with the PPWC to postpone negotiations *until the status of the sawmill changes*.[344]
>
> … In response, the Company has taken various steps to mitigate its exposure to these impacts, by modifying manufacturing and harvesting operations as follows: repurposing manufacturing facilities (*e.g.*, the Prince George, Houston, Chetwynd, Fort St John, Plateau and Polar sawmills) to optimize harvest of greener, non-pine leading stands and to better align with existing timber supply; and by *closing certain other manufacturing facilities indefinitely (Mackenzie sawmill) or permanently (Isle Pierre and Vavenby sawmills)*.[345]

Because the record does not support that the facility was permanently closed during the POR, we find that the costs at issue do not qualify for exclusion under our practice, and we have continued to include in Canfor's G&A expenses the restructuring costs recorded by the company in 2020 related to the Mackenzie curtailment.

Comment 18: Whether the Cost for Electricity Should be Based on Electricity Prices in Alberta Alone

Canfor[346]

- In the *Preliminary Results*, Commerce revised the valuations provided by Canfor and determined that the total value of the materials provided by Grand Prairie was less than the value of the electricity. Commerce's methodology, particularly the valuation of electricity, overstated the cost of electricity and input A in Alberta.
- Throughout this case and in the previous softwood lumber proceeding, Commerce has consistently determined that input and by-product prices in different provinces are not comparable. Commerce has done so because costs for logs and chips vary by provincial market, stumpage costs are charged by each provincial government, and other supply and demand factors. For the same reasons, Commerce should not deviate from its practice and should decline to compare electricity prices across provincial lines. Like the prices of logs and by-products, the prices of electricity in B.C. are not usable to determine the market value of electricity in Alberta.
- Within Canada, sales of electricity are confined within the provincial markets, or at the least, are no sold outside the respective power grids. Electricity is not available,

[344] *See* Canfor's Section A Response at Exhibit A-16 (page 7 of the introductory notes accompanying the 2020 Financial Statements).
[345] *Id.* at Exhibit A-16 (page 11) (emphasis added).
[346] *See* Canfor's Case Brief at 11-14.

marketable, or transportable from one province to another except through limited inter-provincial transmission corridors.

- Regulatory bodies in Alberta and B.C. set the prices for sale of electricity. Therefore, B.C. and Alberta's regulations in each market affect the supply and demand of electricity in each province.
- The differences in the supply and demand for electricity between B.C. and Alberta are demonstrable and significant, as evidenced by the price differential.
- The significant weighted average price for electricity confirms that the market price for electricity between the markets are not comparable for purpose of determining the actual market value in either.
- The purpose of comparing Canfor's prices to market is to "to find the market value that best represent the company's own experience in the specific markets in which it operates."[347] The prices of Canfor's electricity transactions in one province thus are not reflected in the prices of electricity in another province.
- Electricity prices are charged by governmental entities that manage their respective provincial power grids similar to the stumpage costs charged by each provincial government. For the purposes of determining the market price in Alberta, Commerce should confine its analysis to the province.

Petitioner[348]

- Canfor's argument lacks merit and Commerce should continue to calculate a market price for electricity consistent with the final results of AR2. Commerce should reject Canfor's argument and decline to make any change in how the agency determines market value.
- As Canfor itself has acknowledged, in determining market price, Commerce's first preference is a respondent's own unaffiliated purchases. Consistent with this policy, Commerce properly considered Canfor's purchases of electricity from unaffiliated parties, as Canfor's purchases of electricity from unaffiliated parties.

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 electricity provided by an affiliate. This is consistent with our decision in the prior administrative review in this case, where the underlying facts and arguments raised were the same.[349] 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.[350] Where the transfer price of an input or service is below its market price, Commerce normally will adjust the respondent's reported costs to reflect the market values on the record.

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[347] *Id.* at 14.
[348] *See* Petitioner's Rebuttal Brief at 42-45.
[349] *See Lumber AR 2* IDM at Comment 12.
[350] 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.*, *Refrigerator-Freezers from Korea* IDM at Comment 17.

During the POR, one of Canfor's sawmills provided by-products to an affiliate in exchange for electricity and steam. Because this is an even exchange, in the *Preliminary Results*, we compared the market value of the wood by-products that the sawmill provides and the market value of the steam and electricity that the affiliate returned. We valued this exchange of wood chips for electricity (which took place in Alberta) using prices of sales of excess electricity to the electricity company in Alberta[351] and purchases of electricity from the unaffiliated electricity company in B.C.

Canfor argues that the value of electricity should be based on Alberta electricity prices alone. We note that there are two market prices on the record for electricity. The first is the price of Canfor's purchases of electricity from its unaffiliated supplier in B.C., and the second is the price associated with affiliate's sales to its unaffiliated customers in Alberta. We disagree that the electricity prices between both provinces are not comparable in determining market value. Both reflect unaffiliated transactions within the market under consideration (*i.e.*, Canada) for an identical input, electricity. As both are acceptable market prices, we calculated a weighted-average market price from the two sources for use in our analysis.[352]

Comment 19: Whether Commerce Should Adjust the Reported Cost of Electricity at the PG Sawmill

Canfor[353]

- In the *Preliminary Results*, Commerce applied the transactions disregarded rule to transactions between Canfor's PG sawmill and Affiliate A and, in doing so, adjusted Canfor's electricity costs paid to Affiliate A by the PG sawmill to reflect a market price. Commerce was incorrect to do this because the PG sawmill was supplied electricity by the unaffiliated party and not by Affiliate A.
- Canfor's Prince George (PG) sawmill purchases power from unaffiliated party. However, the PG Sawmill is one of four facilities located in the same Northwood area and unaffiliated supplier sends the consolidated electricity invoice to Affiliate A, the identity of which is proprietary, to which the PG sawmill pays its share and then Affiliate A 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 party unaffiliated party, and it is unaffiliated party – not the Affiliate A – 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 unaffiliated party. There is thus no basis for Commerce to adjust these actual electricity costs paid to an unaffiliated supplier.
- 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

[351] Canfor had no purchases of electricity from Alberta, only sales of excess electricity to it.
[352] *See* Canfor Prelim Cost Analysis Memorandum at Attachment 1.
[353] *See* Canfor's Case Brief at 14-19.

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.
- Canfor has made additional proprietary arguments that it argues in support of its claim that it directly receives the electricity from unaffiliated supplier and that there is no way for the PG sawmill to directly pay unaffiliated supplier for the electricity it consumes.
- Alternatively, should Commerce continue to adjust the PG sawmill's purchases of electricity from the unaffiliated supplier by Affiliate A, Commerce should at a minimum modify the adjustment to consider the ministerial nature of the activity being performed by the Affiliate A.
- 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."[354] Instead, Commerce used the actual costs incurred for providing plus and amount for the affiliate's general and administrative (G&A) expenses. Here, Commerce should not adjust the price of electricity from the unaffiliated supplier by costs that cannot possibly be related to the purported electricity transaction, such as intangible assets amortization.

Petitioner[355]
- 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 the unaffiliated supplier is incorrect. This is because affiliated A's handling of electricity charges goes beyond administrative necessity and affects the G&A expenses of Canfor's PG sawmill.
- Commerce should also reject Canfor's secondary argument that the total adjustment to its COM should be modified and should consider the amortization of equipment, machinery, other PP&E and amortization on buildings and equipment. Accordingly, in the final results, Commerce should continue to adjust the cost of electricity at Canfor's PG sawmill.

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 decision in the 2019 administrative review.[356] 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 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

[354] *Id.* at 19 (citing *Bottom Mount Refrigerator-Freezers from Mexico* IDM at Comment 28).
[355] *See* Petitioner's Rebuttal Brief at 45-49.
[356] *See Lumber AR2 Final* IDM at Comment 13.

input (*i.e.*, the affiliate's average acquisition cost plus the affiliate's SG&A costs). 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.

The record in this case demonstrates that a transaction for electricity took place between the PG sawmill and Affiliate A rather than directly between the sawmill and unaffiliated supplier.[357] Therefore, Affiliate A acts as an affiliated reseller of electricity from 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 Affiliate A are separate legal entities and both manufacture products (Affiliate A produces non-subject merchandise).[358] Affiliate A 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 the unaffiliated supplier of electricity unaffiliated supplier.[359] While Affiliate A 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 Affiliate A 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. Accordingly, we consider it appropriate for the final results to continue to include Affiliate A's SG&A expenses in the electricity market price computation to account for the services Affiliate A is providing. Our approach here is consistent with our treatment of a highly similar pattern of payments in the underlying investigation and previous reviews of this proceeding.[360]

Canfor argues that if we continue to make this adjustment, we should revise the calculation of the Affiliate A's SG&A rate to exclude certain amortization expenses (*e.g.*, on intangible assets). However, Canfor has provided no evidence that the amortization expenses in question are not related to the Affiliate A's selling and administration activities. We note that we already excluded from the numerator of the affiliate's SG&A calculation depreciation and amortization related to manufacturing activities (*e.g.*, that related to property, plant, and equipment, etc.).[361] Therefore, for the final results, we continue to include these amortization expenses in the selling and administration expense calculation for Affiliate A.

[357] *See* Canfor's Letter, "Supplemental Sections A-D Questionnaire Response," dated July 28, 2021 at 13.
[358] *Id.*
[359] *Id.*
[360] *See Lumber AR2 Final* IDM at Comment 13.
[361] *See* Canfor Prelim Cost Analysis Memorandum at Attachment 3.

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

8/3/2022

X

Signed by: RYAN MAJERUS

Ryan Majerus
Deputy Assistant Secretary
for Policy and Negotiations