fault Ilias's counsel—her client was badly injured, and Dunbar was underinsured. She is seeking as great a recovery for him as the legal theories permit. But to contend that a $10,000 tender issue caused this $5 million-plus jury verdict—and would have prevented it had USAA acted slightly differently—is not plausible to any realistic Florida personal injury lawyer.

The undisputed evidence establishes that Furman never made a demand for the policy limits; never expressed to USAA that she intended to settle; never followed up with USAA when she did not receive information about possible (nonexistent) umbrella coverage; and did not settle after confirming Dunbar had no coverage beyond his USAA policy. Considering all this, no reasonable jury could conclude that Ilias's injury claim would have settled had USAA properly executed and mailed the coverage form Furman requested.

IV. CONCLUSION

There is no genuine dispute as to material fact: USAA's actions did not constitute bad faith and did not cause the excess verdict against its insured. USAA's Motion for Summary Judgment is therefore **GRANTED**.

DONE AND ORDERED at Tampa, Florida, on June 24, 2021.

MARMEN INC., Marmen Énergie Inc., and Marmen Energy Co., Plaintiffs,

and

Wind Tower Trade Coalition, Consolidated Plaintiff,

v.

UNITED STATES, Defendant,

and

Wind Tower Trade Coalition, Marmen Inc., Marmen Énergie Inc., and Marmen Energy Co., Defendant-Intervenors.

Slip Op. 21-148
Consol. Court No. 20-00169

United States Court of International Trade.

October 22, 2021

Background: Exporters filed suit challenging final determination of Department of Commerce in antidumping duty investigation on utility scale wind towers from Canada. Exporters moved for judgment on agency record.

Holdings: The Court of International Trade, Jennifer Choe-Groves, J., held that:

(1) decision to weight-average product-specific plate costs was supported by substantial evidence;

(2) rejection of additional cost reconciliation information was abuse of discretion;

(3) differential pricing analysis was not supported by substantial evidence;

(4) date of sale determination was supported by substantial evidence;

(5) reliance on exporter's home market sales reporting was supported by substantial evidence; and

(6) decision not to apply adverse facts available (AFA) was supported by substantial evidence.

Sustained in part and remanded in part.

1. Customs Duties ⇐21.5(1)

Before calculating a dumping margin, Department of Commerce must identify a suitable foreign like product with which to compare the exported subject merchandise. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677(16).

2. Customs Duties ⇐21.5(1)

To identify a foreign like product in order to calculate a dumping margin, Department of Commerce employs a model match methodology consisting of a hierarchy of certain characteristics used to sort merchandise into groups; each group is assigned a control number (CONNUM), used to match home market sales with United States sales. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677(16).

3. Customs Duties ⇐21.5(5)

The antidumping statute requires that reported costs must normally be used only if (1) they are based on the records kept in accordance with the generally accepted accounting principles (GAAP) and (2) reasonably reflect the costs of producing and selling the merchandise. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(f)(1)(A).

4. Customs Duties ⇐21.5(5)

In antidumping proceedings, Department of Commerce is not required to accept an exporter's records. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(f)(1)(A).

5. Customs Duties ⇐21.5(5)

In antidumping proceedings, Department of Commerce may reject a company's records if it determines that accepting them would distort the company's true costs. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(f)(1)(A).

6. Customs Duties ⇐21.5(3)

In antidumping proceedings, physical characteristics are a prime consideration when Commerce conducts its analysis of the costs of production. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(f)(1)(A).

7. Customs Duties ⇐21.5(3)

In antidumping proceedings if factors beyond the physical characteristics influence the costs of production, Department of Commerce will normally adjust the reported costs in order to reflect the costs that are based only on the physical characteristics. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(f)(1)(A).

8. Customs Duties ⇐21.5(3)

To determine whether the subject merchandise was sold in the United States at less than fair value under the antidumping statute, Department of Commerce first considers all products produced and sold by the exporter during the period of investigation for the purpose of determining the appropriate product comparisons to United States sales. Tariff Act of 1930 § 731, 19 U.S.C.A. § 1673.

9. Customs Duties ⇐21.5(3)

Department of Commerce's stated practice is to adjust costs to address distortions when cost differences are attributable to factors beyond differences in the physical characteristics of such products, as required by the antidumping statute. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(f)(1)(A).

10. Customs Duties ⇐21.5(3)

Department of Commerce's decision, in antidumping duty investigation on utility scale wind towers from Canada, to determine exporter's costs of production using weighted average of reported steel plate costs, comported with antidumping statute and Commerce's stated practice and was supported by substantial evidence

including Commerce's determination that exporter's records did not reasonably reflect costs associated with production and sale of its merchandise, as differences in plate prices were related to timing of production and factors other than differences in physical characteristics, and higher priced control numbers (CONNUMs) were sold earlier in period of investigation. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(f)(1)(A).

11. Customs Duties ⚿21.5(5)

In antidumping proceedings, Department Commerce has the right to reject information that is untimely or unsolicited. 19 C.F.R. § 351.302(d).

12. Customs Duties ⚿21.5(3)

Department of Commerce has a duty to determine dumping margins as accurately as possible.

13. Customs Duties ⚿21.5(5)

Department of Commerce is obliged to correct any errors in its calculations during the preliminary results stage to avoid an imposition of unjustified antidumping duties.

14. Customs Duties ⚿21.5(5)

Department of Commerce is free to correct any type of importer error that is clerical, methodology, substantive, or one in judgment, in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final determination and adequately proves the need for the requested corrections. 19 C.F.R. § 351.301(c).

15. Customs Duties ⚿84(6)

Court of International Trade reviews whether Department of Commerce abused its discretion when rejecting submitted information in antidumping proceedings. 19 C.F.R. § 351.302(d).

16. Customs Duties ⚿84(6)

When reviewing Department of Commerce's determination to reject corrective information, Court of International Trade may consider factors such as Commerce's interest in ensuring finality, the burden of incorporating the information, and whether the information will increase the accuracy of the calculated dumping margins. 19 C.F.R. § 351.301(c).

17. Customs Duties ⚿21.5(5)

Department of Commerce's decision to reject exporter's supplemental cost reconciliation information as untimely and unsolicited new information was abuse of discretion, in antidumping duty investigation on utility scale wind towers from Canada; information submitted by exporter in its response corresponded directly to prior cost reconciliation information submitted in exporter's prior response and stated that it updated purchase information that had not been properly converted to Canadian dollars, Commerce itself also stated that exporter's submission was correction, information was submitted five months before publication of final determination so was not filed too late to be considered, and submitted information was not inaccurate. 19 C.F.R. §§ 351.301(c)(5), 351.302(d).

18. Customs Duties ⚿21.5(5)

Department of Commerce must accept corrections when there is sufficient time for Commerce to consider the submission prior to the final antidumping determination. 19 C.F.R. §§ 351.301(c)(5), 351.302(d).

19. Customs Duties ⚿21.5(3)

Department of Commerce ordinarily uses an average-to-average (A-to-A) comparison of the weighted average of the normal values of subject merchandise to the weighted average of export prices and constructed export prices for comparable merchandise when calculating a dumping

margin. Tariff Act of 1930 § 777A, 19 U.S.C.A. § 1677f-1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1).

20. Customs Duties ⇐21.5(3)

In contrast to the average-to-average (A-to-A) method of calculating a dumping margin, which may mask dumped sales at low prices by averaging them with sales at higher prices, the average-to-transaction (A-to-T) method allows Department of Commerce to identify a merchant who dumps the product intermittently, sometimes selling below the foreign market value and sometimes selling above it. Tariff Act of 1930 § 777A, 19 U.S.C.A. §§ 1677f-1(d)(1)(A)(i), 1677f-1(d)(1)(B)(i)-(ii); 19 C.F.R. § 351.414(c)(1).

21. Customs Duties ⇐21.5(3)

The antidumping statute does not set forth the analysis for how Department of Commerce is to identify a pattern of price differences that would allow Commerce to use the average-to-transaction (A-to-T) comparison of the weighted average of normal values to the export prices and constructed export prices of individual transactions for comparable merchandise. Tariff Act of 1930 § 777A, 19 U.S.C.A. § 1677f-1(d)(1)(B)(i)-(ii).

22. Customs Duties ⇐84(6)

Court of International Trade affords Department of Commerce deference in antidumping determinations involving complex economic and accounting decisions of a technical nature.

23. Customs Duties ⇐21.5(5)

In antidumping proceedings, Department of Commerce must explain cogently why it has exercised its discretion in a given manner.

24. Customs Duties ⇐21.5(3)

In antidumping proceedings, Department of Commerce uses a differential pricing analysis to determine if a pattern of significant price differences exist and whether the difference can be taken into account using the average-to-average (A-to-A) method. Tariff Act of 1930 § 777A, 19 U.S.C.A. § 1677f-1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1).

25. Customs Duties ⇐84(6)

The standard of review for considering Department of Commerce's differential pricing analysis in antidumping proceedings is reasonableness.

26. Customs Duties ⇐21.5(3)

In antidumping proceedings, the "Cohen's *d* test" is a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group.

See publication Words and Phrases for other judicial constructions and definitions.

27. Customs Duties ⇐21.5(3)

In antidumping proceedings, the Cohen's *d* test relies on assumptions that the data groups being compared are normal, have equal variability, and are equally numerous; applying the Cohen's *d* test to data that do not meet these assumptions can result in serious flaws in interpreting the resulting parameter.

28. Customs Duties ⇐21.5(3)

Department of Commerce's decision, in antidumping duty investigation on utility scale wind towers from Canada, to use average-to-transaction (A-to-T) method based on its differential pricing analysis relying on Cohen's *d* test, was not supported by substantial evidence, since Commerce failed to explain whether data applied to Cohen's *d* test were normally distributed or contained roughly equal variances. Tariff Act of 1930 § 777A, 19 U.S.C.A. § 1677f-1(d)(1)(B)(i)-(ii).

29. Customs Duties ⚿21.5(3)

In antidumping proceedings, Department of Commerce must conduct a fair comparison of normal value and export price in determining whether merchandise is being, or is likely to be, sold at less than fair value. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(a).

30. Customs Duties ⚿21.5(3)

Under the antidumping regulation, authorizing Department of Commerce to use a date other than the date of invoice as the date of sale in order to compare normal value and export price if Commerce is satisfied that a different date better reflects the date on which the exporter establishes the material terms of sale, the "material terms of sale" generally include the price, quantity, payment, and delivery terms. 19 C.F.R. § 351.401(i).

See publication Words and Phrases for other judicial constructions and definitions.

31. Customs Duties ⚿21.5(3)

Under the antidumping regulation, authorizing Department of Commerce to use a date other than the date of invoice as the date of sale in order to compare normal value and export price if Commerce is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale, the important factor to determine is when the parties have reached a meeting of the minds. 19 C.F.R. § 351.401(i).

32. Customs Duties ⚿21.5(3)

In antidumping proceedings, Department of Commerce will normally rely on the date provided on the invoice as recorded in a firm's records kept in the ordinary course of business, in comparing normal value and export price. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(a)(1)(A).

33. Customs Duties ⚿21.5(5)

In antidumping proceedings, Department of Commerce prefers to use a single and uniform source for the date of sale for each respondent, rather than determining the date of sale for each sale individually. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(a)(1)(A); 19 C.F.R. § 351.401(i).

34. Customs Duties ⚿21.5(3)

In comparing normal value and export price in antidumping proceedings, as a matter of commercial reality, the date on which the terms of a sale are first agreed is not necessarily the date on which those terms are finally established, because price and quantity are often subject to continued negotiation between the buyer and the seller until a sale is invoiced. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(a)(1)(A); 19 C.F.R. § 351.401(i).

35. Customs Duties ⚿21.5(5)

In comparing normal value and export price in antidumping proceedings, absent satisfactory evidence that the terms of sale were finally established on a different date, Department of Commerce will presume that the date of sale is the date of invoice; however, if Commerce is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, Commerce will use that alternative date as the date of sale. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(a)(1)(A); 19 C.F.R. § 351.401(i).

36. Customs Duties ⚿21.5(5)

In comparing normal value and export price in antidumping proceedings, the party seeking date other than invoice date bears burden of presenting Department of Commerce with sufficient evidence demonstrating that another date better reflects date on which exporter or producer establishes material terms of sale. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(a)(1)(A); 19 C.F.R. § 351.401(i).

37. Customs Duties ⚿21.5(3)

Department of Commerce's decision, in antidumping duty investigation on utility scale wind towers from Canada, to use exporter's reported invoice dates as date of sale for home market and United States sales in comparing normal value and export price, was supported by substantial evidence including that material terms of sale were not established prior to invoice date, as there were material changes to delivery, price, quantity, and payment terms between purchase order and invoice date. Tariff Act of 1930 § 773, 19 U.S.C.A. § 1677b(a)(1)(A); 19 C.F.R. § 351.401(i).

38. Customs Duties ⚿21.5(5)

Department of Commerce's decision, in antidumping duty investigation on utility scale wind towers from Canada, to rely on exporter's reporting of home market sales as sales of wind tower sections, was supported by substantial evidence including that Commerce determined that exporter's reporting was consistent with Commerce's instructions and with manner in which exporter actually invoiced its customer.

39. Customs Duties ⚿21.5(5)

When Department of Commerce can fill in gaps in the antidumping record independently, an adverse inference is not appropriate. 19 U.S.C.A. § 1677e(b)(1)(A).

40. Customs Duties ⚿21.5(5)

Department of Commerce's decision, in antidumping duty investigation on utility scale wind towers from Canada, not to apply facts otherwise available or adverse inference to exporter, was supported by substantial evidence including Commerce's determination that exporter was responsive to information requested, that its responses were submitted in timely manner, and that there was no missing information from record. Tariff Act of 1930 § 776, 19 U.S.C.A. §§ 1677e(a)(1), 1677e(a)(2)(B); 19 U.S.C.A. § 1677e(b)(1)(A).

Jay C. Campbell, Allison J.G. Kepkay, Ron Kendler, and Ting-Ting Kao, White & Case, LLP, of Washington, D.C., for Plaintiffs and Defendant-Intervenors Marmen Inc., Marmen Energy Co., and Marmen Energie Inc.

Alan H. Price, Daniel B. Pickard, Robert E. DeFrancesco, III, Maureen E. Thorson, and Laura El-Sabaawi, Wiley Rein, LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor Wind Tower Trade Coalition.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were Brian M. Boynton, Acting Assistant Attorney General, and Jeanne E. Davidson, Director. Of counsel on the brief were Kirrin A. Hough, Attorney, and Natalie M. Zink, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

CHOE-GROVES, Judge:

Plaintiffs Marmen Inc., Marmen Energy Co., and Marmen Energie Inc. (collectively, "Marmen") and Consolidated Plaintiff Wind Tower Trade Coalition ("WTTC") filed this consolidated action challenging the final determination published by the U.S. Department of Commerce ("Commerce") in the antidumping duty investigation on utility scale wind towers from Canada. See Utility Scale Wind Towers from Canada ("Final Determination"), 85 Fed. Reg. 40,239 (Dep't of Commerce July 6, 2020) (final determination of sales at less than fair value and final negative determination of critical circumstances; 2018–2019); see also Issues and Decision Mem. for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Canada

(June 29, 2020) ("Final IDM"), ECF No. 18-5. Before the Court are the Rule 56.2 Motion for Judgment on the Agency Record on Behalf of Plaintiffs Marmen Inc., Marmen Energie Inc., and Marmen Energy Co., ECF Nos. 23, 24, and Wind Tower Trade Coalition's Rule 56.2 Motion for Judgment on the Agency Record, ECF Nos. 25, 26. See also Mem. P. & A. Supp. Pls.' Rule 56.2 Mot. J. Agency R. ("Marmen's Br."), ECF Nos. 23-2, 24-2; Wind Tower Trade Coalition's Mem. Supp. Rule 56.2 Mot. J. Agency R. ("WTTC's Br."), ECF Nos. 25-1, 26-1. For the following reasons, the Court sustains in part and remands in part the Final Determination.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's determination to weight-average product-specific plate costs is supported by substantial evidence;
2. Whether Commerce's determination to reject Marmen's additional cost reconciliation information was an abuse of discretion;
3. Whether Commerce's determination to apply an average-to-transaction comparison method is supported by substantial evidence;
4. Whether Commerce's determination regarding the home market and the U.S. date of sale is supported by substantial evidence;
5. Whether Commerce's determination to treat Marmen's home market sales as being sales of tower sections rather than complete towers is supported by substantial evidence; and
6. Whether Commerce's determination not to apply facts otherwise available with an adverse inference is supported by substantial evidence.

BACKGROUND

In August 2019, Commerce initiated an antidumping duty investigation into wind towers from Canada for the period covering July 1, 2018 through June 30, 2019. Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam, 84 Fed. Reg. 37,992, 37,992–93 (Dep't of Commerce Aug. 5, 2019) (initiation of less-than-fair-value investigations). Commerce selected Marmen Inc. and Marmen Energie Inc. as mandatory respondents. See Decision Mem. for the Prelim. Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Canada (Feb. 4, 2020) ("Prelim. DM") at 1–2, PR 146.[1]

In the Final Determination, Commerce assigned weighted-average dumping margins of 4.94% to Marmen Inc. and Marmen Energie Inc.[2] Final Determination, 85 Fed. Reg. at 40,239. Commerce determined the all-others weighted average dumping margin of 4.94% based on Marmen's dumping margin. Id.

Commerce determined that Marmen's steel plate costs did not reasonably reflect the costs associated with the production and sale of the products and weight-averaged Marmen's reported steel plate costs. Final IDM at 4–6. Commerce rejected a portion of the supplemental cost reconciliation information submitted by Marmen as untimely, unsolicited new information. Id.

1. Citations to the administrative record reflect public record ("PR") document numbers.

2. The Court notes that, although Marmen Energy Co. was not included as a mandatory respondent alongside Marmen Inc. and Marmen Energie Inc., comments and questionnaire responses were submitted collectively by the three Plaintiffs during Commerce's investigation. The Court herein refers to their assigned weighted-average dumping margins collectively as "Marmen's dumping margin."

at 7–9. Commerce applied a differential pricing analysis, using the Cohen's *d* test, and determined that there was a pattern of export prices that differed significantly. Id. at 10–11. As a result, Commerce calculated Marmen's weighted-average dumping margin by using the alternative average-to-transaction method. Id. Commerce determined that Marmen complied with its instructions by reporting invoice dates as the home market and U.S. dates of sale and by reporting home market sales as sales of wind tower sections. Id. at 13–18. Further, Commerce determined that the record contained the necessary information to calculate Marmen's dumping margin and relied on the data provided by Marmen, declining to apply facts otherwise available or an adverse inference. Id. at 18–20.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final determination in an antidumping duty investigation. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Determination to Weight-Average Marmen's Steel Plate Costs

[1, 2] In order to determine whether certain products are being sold at less than fair value in the United States, Commerce compares the export price, or constructed export price, with normal value. 19 U.S.C. § 1677b(a)(1)(A). Export price or constructed export price is the price at which the subject merchandise is being sold in the U.S. market, while normal value is the price at which a "foreign like product" is sold in the producer's home market or in a comparable third-country market. Id. § 1677a(a)–(b). Before calculating a dumping margin, Commerce must identify a suitable "foreign like product" with which to compare the exported subject merchandise. A "foreign like product," in order of preference, is:

> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise —
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to the subject merchandise.
>
> (C) Merchandise —
>
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

Id. § 1677(16); see NSK Ltd. v. United States, 26 C.I.T. 650, 656, 217 F. Supp. 2d 1291, 1299–1300 (2002). To identify such merchandise, Commerce employs a "model match" methodology consisting of a hierarchy of certain characteristics used to sort merchandise into groups. See SKF USA, Inc. v. United States, 537 F.3d 1373, 1378–

80 (Fed. Cir. 2008). Each group is assigned a control number ("CONNUM"), used to match home market sales with U.S. sales. See Thuan An Prod. Trading & Serv. Co. v. United States, 42 CIT ——, ——, 348 F. Supp. 3d 1340, 1344 n.7 (2018).

[3–7] When determining costs of production, the statute states that:

> [c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such record are kept in accordance with the generally accepted accounting principles ["GAAP"] of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

19 U.S.C. § 1677b(f)(1)(A). The statute requires that "reported costs must normally be used only if (1) they are based on the records ... kept in accordance with the GAAP *and* (2) reasonably reflect the costs of producing and selling the merchandise." See Dillinger France S.A. v. United States, 981 F.3d 1318, 1321 (Fed. Cir. 2020) (emphasis in original) (internal quotation marks and citations omitted). Commerce is not required to accept the exporter's records. Thai Plastic Bags Indus. Co. v. United States, 746 F.3d 1358, 1365 (Fed. Cir. 2014) (citing 19 U.S.C. § 1677b(f)(1)(A)). Commerce may reject a company's records if it determines that accepting them would distort the company's true costs. See Am. Silicon Techs. v. United States, 261 F.3d 1371, 1377 (Fed. Cir. 2001). Commerce is directed to consider all available evidence on the proper allocation of costs. 19 U.S.C. § 1677b(f)(1)(A). Physical characteristics are a prime consideration when Commerce conducts its analysis. Thai Plastic Bags, 746 F.3d at 1368. If factors beyond the physical characteristics influence the costs, however, Commerce will normally adjust the reported costs in order to reflect the costs that are based only on the physical characteristics. See id.

[8] To determine whether the subject merchandise wind towers from Canada were sold in the United States at less than fair value under section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673, Commerce first considered all products produced and sold by Marmen in Canada during the period of investigation for the purpose of determining the appropriate product comparisons to U.S. sales. Prelim. DM at 13; see also Final IDM at 2–3, 5–6. Commerce determined that there were no sales of identical merchandise in the ordinary course of trade in Canada that could be compared to U.S. sales. Prelim. DM at 13; see also Final IDM at 5–6. Instead, Commerce applied a hierarchy of characteristics, matching foreign like products based on physical characteristics reported by Marmen in the following order of importance: type (tower or section), weight of tower/section, height of tower/section, total sections, type of paint or coating, metalizing, electrical conduit – bus bars, electrical conduit – power cable, elevators, number of platforms, and other internal components. Prelim. DM at 13 (citing Product Characteristics for the Antidumping Duty Investigation of Utility Scale Wind Towers from Canada (Sept. 17, 2019) ("Model Matching Questionnaire"), PR 77); see also Final IDM at 5–6.

Commerce did not dispute whether Marmen's records were kept properly, noting that "the record is clear that the reported costs are derived from the Marmen Group's normal books and records and that those books are in accordance with Canadian GAAP." Final IDM at 5; see also Utility Scale Wind Towers from Canada: Resp. to Question 14.g of Suppl. Section Questionnaire (Dec. 13, 2019) ("Marmen SDQR") at 2–4, PR 123–25. Commerce focused on the second prong of 19 U.S.C.

§ 1677b(f)(1)(A), calling into question whether Marmen reasonably reflected the costs of producing and selling the merchandise. Commerce reviewed evidence submitted by Marmen, concluding that the evidence demonstrated steel plate cost differences between CONNUMs unrelated to the products' physical characteristics, and Commerce weight-averaged the reported steel plate costs for all reported CONNUMs, except the CONNUM for the thickest plate. See Final IDM at 5.

Marmen argues that differences in its reported costs were related to differences in physical characteristics and that Commerce's determination that Marmen's records did not reflect the costs associated with the production and sale of products is not supported by substantial evidence. Marmen's Br. at 15–16. Marmen asserts that Commerce incorrectly determined that Marmen's costs did not reasonably reflect the costs associated with the production and sale of products. See id. Marmen argues that Commerce should have used Marmen's reported costs and should not have weight-averaged the reported costs. Id.

Commerce determined that the most significant physical characteristics in differentiating costs of steel plate were type, thickness, weight, width, and height. See Final IDM at 5. Commerce reviewed Marmen's questionnaire response and determined that Marmen's suppliers did not charge different prices for plates of different grade, thickness, width, or length. Id. (citing Utility Scale Wind Towers from Canada: Resubmission of Second Suppl. Section D Resp. (Feb. 28, 2020) ("Marmen RSSDQR") at 2, Ex. D-2, PR 162–65). Commerce excluded the CONNUM for the thickest plates because the record indicated that there was a surcharge applied to high thickness plates that was not applied to lower thickness plates. Id. at 5–6; see Cost of Production and Constructed Value Calculation Adjustments for the Final Determination—Marmen Inc. and Marmen Energie Inc. (June 29, 2020) ("Marmen Final Cost Calculation Mem.") at 2, PR 194. Commerce explained that there should be little difference in plate costs for different dimensions and grade based on record evidence on a per-unit weight basis, and that reported differences in plate costs are based on factors other than physical differences, such as timing of production. See id. (citing Marmen RSSDQR Ex. D-2). Commerce determined that most of the higher-priced CONNUMs were sold earlier in the period of review, citing information in Marmen's Final Cost Calculation Memorandum. Id. at 6 (citing Marmen Final Cost Calculation Mem. at 1). In the Marmen Final Cost Calculation Memorandum, Commerce relied on record evidence showing that Marmen's steel suppliers did not charge different prices for plates of different grade, thickness width, or length. Marmen Final Cost Calculation Mem. at 2 (citing Marmen RSSDQR at 2, Ex. D-2). Commerce determined, therefore, that differences in plate prices were related to timing of production and factors other than differences in physical characteristics. Final IDM at 6.

Based on its determination that differences in plate costs were related to factors other than differences in the physical characteristics of the plates, Commerce determined that Marmen's records did not reflect the costs associated with the production and sale of products. Id. As a result, Commerce determined costs of production using the weight-average of the reported steel plate costs. Id.; see Marmen Final Cost Calculation Mem. at 1–3.

[9, 10] Commerce's stated practice is to adjust costs to address distortions when cost differences are attributable to factors beyond differences in the physical characteristics of such products, as required by

statute. See Final IDM at 6; Welded Carbon Steel Standard Pipe and Tube Products from Turkey, 82 Fed. Reg. 49,179 (Dep't of Commerce Oct. 24, 2017) (final results of antidumping duty admin. review and final determination of no shipments; 2015–2016). The Court notes that the relevant statute and Commerce's stated practice focus on whether reported costs reasonably reflect the costs of producing and selling the merchandise—without requiring examined CONNUMs to be nearly identical. See id.; 19 U.S.C. § 1677b(f)(1)(A). The Court concludes, therefore, that Commerce's weight-averaging of Marmen's steel plate costs is consistent with the relevant statute and Commerce's stated practice.

The Court observes that Marmen's questionnaire response and record documents cited by Commerce, including one of Marmen's supplier agreements, indicate that plate costs did not vary for plates of different thickness, length, width, and weight. See Marmen RSSDQR Exs. D-1, D-2. Record documents reviewed by Commerce support the determination that Marmen's suppliers did not charge different prices for plates of varying physical characteristics, except to apply an upcharge for plates over a certain thickness. See id. Ex. D-2. The Court notes that record documents cited by Commerce support Commerce's determination that a majority of the higher-priced CONNUMs were sold earlier in the period of investigation. See Marmen Final Cost Calculation Mem. Attachs. 1, 2. Because record evidence cited by Commerce indicates that Marmen's plate costs did not differ between plates of varying physical characteristics and that higher priced CONNUMs were sold earlier in the period of investigation, the Court concludes that Commerce's determination that differences in plate prices were related to timing of production and factors other than differences in physical characteristics is supported by substantial evidence.

The Court concludes that Commerce followed statutory requirements and Commerce's stated practices, and supported with substantial evidence its determination that Marmen's records did not reasonably reflect the costs associated with the production and sale of Marmen's merchandise. The Court sustains Commerce's determination to weight-average Marmen's steel plate costs.

II. Commerce's Rejection of Marmen's Additional Cost Reconciliation Information

Commerce determined that a portion of Marmen's cost reconciliation information in Marmen's February 7, 2020 response constituted untimely and unsolicited new information and rejected Marmen's submission. See Final IDM at 8–9. Marmen argues that the information was corrective, and not new, and that Commerce abused its discretion by rejecting the correction. Marmen's Br. at 26–27.

[11] A party may submit factual information to rebut, clarify, or correct questionnaire responses. 19 C.F.R. § 351.301(c). The regulations state that

> [i]f the factual information is being submitted to rebut, clarify, or correct factual information on the record, the submitter must provide a written explanation identifying the information which is already on the record that the factual information seeks to rebut, clarify, or correct, including the name of the interested party that submitted the information and the date on which the information was submitted.

19 C.F.R. § 351.301(b)(2). The regulations outline time limits for submissions of information to Commerce. See id. § 351.301(c). Section 351.301(c)(1)(v) discusses time lim-

its for factual information submitted to correct or clarify questionnaire responses by "an interested party other than the original submitter." Id. § 351.301(c)(1)(v). Section 351.301(c)(5) requires that miscellaneous new factual information must be submitted either 30 days before the scheduled date of the preliminary determination in an investigation, or 14 days before verification, whichever is earlier. Id. § 351.301(c)(5). Commerce has the right to reject information that is untimely or unsolicited. See 19 C.F.R. § 351.302(d).

[12–16] Nevertheless, Commerce has a duty "to determine dumping margins as accurately as possible." See NTN Bearing Corp. v. United States, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (internal quotation marks and citation omitted). "[A]ntidumping laws are remedial not punitive." Id. (citation omitted). The U.S. Court of Appeals for the Federal Circuit has stated that "Commerce is obliged to correct any errors in its calculations during the preliminary results stage to avoid an imposition of unjustified duties." Fischer S.A. Comercio, Industria & Agricultura v. United States, 471 F. App'x 892, 895 (Fed. Cir. 2012) (citation omitted). Further, "Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final determination and adequately proves the need for the requested corrections." Timken United States Corp. v. United States ("Timken"), 434 F.3d 1345, 1353 (Fed. Cir. 2006). The Court reviews whether Commerce abused its discretion when rejecting submitted information. See Papierfabrik August Koehler SE v. United States, 843 F.3d 1373, 1384 (Fed. Cir. 2016) ("Commerce abused its discretion in refusing to accept updated data when there was plenty of time for Commerce to verify or consider it.") (citations omitted). When reviewing Commerce's determination to reject corrective information, this Court may consider factors such as Commerce's interest in ensuring finality, the burden of incorporating the information, and whether the information will increase the accuracy of the calculated dumping margins. Bosun Tools Co. v. United States, 43 CIT ——, ——, 405 F. Supp. 3d 1359, 1365 (2019) (citations omitted).

[17] Marmen argues that the information submitted was a minor correction and not new information. See Marmen's Br. at 26–27. Marmen contends that Commerce abused its discretion by rejecting the information. See id. Commerce determined that the information was not responsive to its questionnaire and was new factual information that had not been requested. See Final IDM at 8 (citing Utility Scale Wind Towers from Canada: Second Suppl. Section D Resp. (Feb. 7, 2020) ("Marmen SSDQR") Ex. D-9, PR 151–54).

The Court notes that the cost reconciliation information submitted by Marmen in its February 7, 2020 response corresponded directly to prior cost reconciliation information submitted in Marmen's October 11, 2019 response. See Marmen SSDQR Ex. D-9; Utility Scale Wind Towers from Canada: Sections B, C, and D Resp. (Oct. 11, 2019) ("Marmen SBCDR") Ex. D-14, PR 89–97. The Court observes that Marmen's submission stated that the information updated purchase information that had not been properly converted to Canadian dollars. See Marmen SSDQR Ex. D-9. Commerce itself called Marmen's submission a "correction." See Final IDM at 8–9. Because of Commerce's own characterization of the submission, and because the information directly corresponds to a prior submission, the Court concludes that Commerce's determination that the additional cost reconciliation information submitted by Marmen was new factual information is

not supported by substantial evidence. The Court concludes that Marmen's submission is a correction and reviews whether Commerce abused its discretion when rejecting Marmen's submission.

[18] When rejecting Marmen's corrective submission, Commerce stated that because it was submitted after the preliminary determination, the information was submitted too late for Commerce to use. Id. at 9. This Court and the U.S. Court of Appeals for the Federal Circuit have repeatedly held that Commerce must accept corrections when there is sufficient time for Commerce to consider the submission prior to the final determination. See, e.g., Timken, 434 F.3d at 1353–54 (holding that the court did not err by remanding a case to Commerce for analysis of corrective evidence that was submitted after the preliminary results but before the final results); Pro-Team Coil Nail Enter. v. United States, 43 CIT ——, ——, 419 F. Supp. 3d 1319, 1332 (2019) (finding that finality concerns were not implicated when the information was submitted eight months prior to publication of the final results).

The information was submitted on February 7, 2020, approximately five months before publication of the Final Determination. See Marmen SSDQR at 1. The Court notes that Commerce cites no other reason for there being insufficient time to consider Marmen's submission other than the fact that the submission was made after the preliminary determination. See Final IDM at 8–9. Because the information was submitted to Commerce five months prior to the Final Determination, the Court concludes that finality concerns are not implicated in this case and rejects Commerce's determination that the information was filed too late to be considered.

The Court notes that Commerce stated summarily that Marmen's submission was "not supported by factual information on the record," but did not point to record evidence that contradicts the supplemental information submitted. See Final IDM at 9. Absent record evidence indicating a reason to question the veracity of Marmen's cost reconciliation information, concerns over the accuracy of the calculated dumping margin favor accepting Marmen's submitted cost reconciliation information. See Pro-Team Coil Nail, 43 CIT at ——, 419 F. Supp. 3d at 1332. Record documents cited by Commerce indicate that Marmen's cost reconciliation worksheet stated prices in Canadian dollars. See Marmen SSDQR Ex. D-9. The Court observes that record documents also indicate that, prior to Marmen's supplemental submission, Marmen had not converted one line of the cost reconciliation sheet from U.S. dollars to Canadian dollars. See id. The Court notes that Marmen explained that its submission corrected one line of the cost reconciliation worksheet to properly list prices in Canadian dollars. See id. In light of record evidence that supports Marmen's corrective submission and its explanation, and absent evidence questioning the veracity of the submission, the Court concludes that Commerce has not supported with substantial evidence its determination that Marmen's supplemental cost reconciliation information is inaccurate and, therefore, that Commerce abused its discretion by failing to consider Marmen's corrective submission.

The Court holds that Commerce's determination to reject Marmen's supplemental cost reconciliation information was an abuse of discretion. The Court remands Commerce's determination for further explanation or consideration in accordance with this opinion.

III. Commerce's Use of an Average-to-Transaction Methodology

Commerce determined that its differential pricing analysis showed a pattern of

prices that differed significantly for Marmen's U.S. sales of five CONNUMs that justified the use of an alternative average-to-transaction ("A-to-T") methodology to calculate Marmen's dumping margin. See Final IDM at 11. Marmen argues that Commerce's application of its differential pricing analysis methodology is unreasonable because there is not a significant difference in Marmen's U.S. prices and that, therefore, Commerce's determination to use an A-to-T method to calculate Marmen's dumping margin is unreasonable and not supported by substantial evidence. See Marmen's Br. at 32–34.

[19, 20] Commerce ordinarily uses an average-to-average ("A-to-A") comparison of "the weighted average of the normal values [of subject merchandise] to the weighted average of export prices (and constructed export prices) for comparable merchandise" when calculating a dumping margin. See 19 U.S.C. § 1677f-1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1). The statute allows Commerce to depart from using the A-to-A methodology and instead use an A-to-T comparison of the weighted average of normal values to the export prices and constructed export prices of individual transactions for comparable merchandise when: (1) Commerce observes "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time;" and (2) "[Commerce] explains why such differences cannot be taken into account using [the A-to-A methodology]." 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). In contrast to the A-to-A method, which may mask dumped sales at low prices by averaging them with sales at higher prices, the A-to-T method allows Commerce "to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it." Apex Frozen Foods Priv. Ltd. v. United States, 862 F.3d 1337, 1341 (Fed. Cir. 2017) (citation and internal quotation marks omitted).

[21–23] The statute does not set forth the analysis for how Commerce is to identify a pattern of price differences. See 19 U.S.C. §§ 1677, 1677f-1; see also Apex Frozen Foods, 862 F.3d at 1346; Dillinger France S.A., 981 F.3d at 1325. The Court affords Commerce deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature." See Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (citation omitted). However, Commerce still "must [ ] explain [cogently] why it has exercised its discretion in a given manner." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (citation omitted).

[24, 25] Commerce uses a differential pricing analysis to determine if a pattern of significant price differences exist and whether the difference can be taken into account using the A-to-A method. See Final IDM at 11. The standard of review for considering Commerce's differential pricing analysis is reasonableness. Stupp Corp. v. United States, 5 F.4th 1341, 1353 (Fed. Cir. 2021). The U.S. Court of Appeals for the Federal Circuit and this Court have held the steps underlying the differential pricing analysis as applied by Commerce to be reasonable. See e.g., Mid Continent Steel & Wire, Inc. v. United States, 940 F.3d 662, 670–74 (Fed. Cir. 2019) (discussing zeroing and the 0.8 threshold for the Cohen's *d* test); Apex Frozen Foods Priv. Ltd. v. United States, 40 CIT ——, ——, 144 F. Supp. 3d 1308, 1314–35 (2016) (discussing application of the A-to-T method, the Cohen's *d* test, the meaningful difference analysis, zeroing, and the "mixed comparison methodology" of applying the A-to-A method and the A-to-T method when 33–66% of a respondent's sales pass

the Cohen's *d* test), aff'd, 862 F.3d 1337; Apex Frozen Foods Priv. Ltd. v. United States, 862 F.3d 1322 (Fed. Cir. 2017) (affirming zeroing and the 0.5% *de minimis* threshold in the meaningful difference test). However, the U.S. Court of Appeals for the Federal Circuit has stated that "there are significant concerns relating to Commerce's application of the Cohen's *d* test . . . in adjudications in which the data groups being compared are small, are not normally distributed, and have disparate variances." Stupp, 5 F.4th at 1357.

[26, 27] The Cohen's *d* test is "a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group." Apex Frozen Foods, 862 F.3d at 1342 n.2. The Cohen's *d* test relies on assumptions that the data groups being compared are normal, have equal variability, and are equally numerous. See Stupp, 5 F.4th at 1357. Applying the Cohen's *d* test to data that do not meet these assumptions can result in "serious flaws in interpreting the resulting parameter." See id. at 1358.

In Stupp Corp. v. United States, 5 F.4th 1341 (Fed. Cir. 2021), the U.S. Court of Appeals for the Federal Circuit remanded Commerce's use of the Cohen's *d* test for further explanation because the data Commerce used may have violated the assumptions of normality, sufficient observation size, and roughly equal variances. Id. at 1357–60. The Court addressed Commerce's argument that it does not need to worry about normality because it is using a population instead of a sample, stating that Commerce's argument "does not address the fact that Professor Cohen derived his interpretive cutoffs under the assumption of normality." Id.

Marmen contends that the price differences of its U.S. sales of five of the seven CONNUMs used in the differential pricing analysis were less than one percent and were not significant. See Marmen's Br. at 32. Marmen argues that Commerce's application of its differential pricing analysis in this case was unreasonable. Id.

[28] Commerce applied its two-step differential pricing methodology to determine if a pattern of significant price differences existed and whether the difference could be taken into account using the A-to-A method. See Final IDM at 11. Commerce chose the Cohen's *d* test "to evaluate the extent to which the prices to a particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise." Prelim. DM at 10. Commerce applied the Cohen's *d* test and determined that 68.29% of Marmen's U.S. sales passed. Final IDM at 11; Analysis for the Final Determination of Utility Scale Wind Towers: Final Margin for Calculation for the Marmen Group (June 29, 2020) ("Marmen Final Margin Calculations Mem.") at 3, PR 195. Based on the results of its Cohen's *d* test and its meaningful difference test, Commerce determined that a pattern of prices that differed significantly among purchasers, regions, or time periods existed, that the A-to-A method could not account for the pattern of price differences, and that the A-to-T method was appropriate to calculate Marmen's dumping margin. Final IDM at 11; Marmen Final Margin Calculations Mem. at 3.

Commerce determined that Marmen's U.S. prices differed significantly and decided to use the A-to-T method based on its differential pricing analysis, which utilized the Cohen's *d* test. See Marmen Final Margin Calculations Mem. at 3–4. Commerce applied the Cohen's *d* test to data that showed differences that were not large in absolute terms, because the overall differences for five of the CONNUMs were less than one percent. See id. Attach. 2. The Court notes that Commerce did not explain whether the data applied to the

Cohen's *d* test were normally distributed or contained roughly equal variances. See Final IDM at 10–11. Because the record appears to indicate that the price differences were not large in absolute terms, the evidence before the Court calls into question whether the data Commerce used in its differential pricing analysis violated the assumptions of normality and roughly equal variances associated with the Cohen's *d* test.

The Court remands the issue of Commerce's use of the Cohen's *d* test for Commerce to explain further whether the limits on the use of the Cohen's *d* test were satisfied in this case in the context of the Stupp case. The Court remands Commerce's use of the A-to-T method for further explanation of Commerce's differential pricing analysis in accordance with this opinion.

IV. Commerce's Determination to Use Marmen's Invoice Dates as the Date of Sale for Marmen's Home Market and U.S. Sales

Commerce determined the date of sale for Marmen's home market and U.S. sales based on reported invoice dates. Final IDM at 15–16. WTTC argues that Commerce should use a date other than the invoice date when determining Marmen's home market and U.S. dates of sale. See WTTC's Br. at 18–19.

[29–31] Commerce must conduct a "fair comparison" of normal value and export price in determining whether merchandise is being, or is likely to be, sold at less than fair value. See 19 U.S.C. § 1677b(a); see also Smith-Corona Grp. v. United States, 713 F.2d 1568, 1578 (Fed. Cir. 1983). In doing so, normal value must be from "a time reasonably corresponding to the time of sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A). Commerce has promulgated the following regulation regarding the date that should be used as the date of sale for purposes of comparing normal value and export price:

> In identifying the date of sale of the subject merchandise or foreign like product, [Commerce] normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, [Commerce] may use a date other than the date of invoice if [Commerce] is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i). This Court has previously held that the material terms of a sale generally include the price, quantity, payment, and delivery terms. See, e.g., ArcelorMittal USA LLC v. United States, 42 CIT ——, ——, 302 F. Supp. 3d 1366, 1378 (2018); Nakornthai Strip Mill Pub. Co. v. United States, 33 C.I.T. 326, 337, 614 F. Supp. 2d 1323, 1333 (2009); USEC Inc. v. United States, 31 C.I.T. 1049, 1055, 498 F. Supp. 2d 1337, 1343 (2007); see also Viraj Grp., Ltd. v. United States, 343 F.3d 1371, 1377 n.1 (Fed. Cir. 2003). The important factor to determine is when the parties have reached a "meeting of the minds." Nucor Corp. v. United States, 33 C.I.T. 207, 249, 612 F. Supp. 2d 1264, 1300 (2009).

[32–36] In promulgating the implementing regulation, Commerce explained that it will normally rely on the date provided on the invoice "as recorded in a firm's records kept in the ordinary course of business." See Antidumping Duties; Countervailing Duties ("Preamble"), 62 Fed. Reg. 27,296, 27,348 (Dep't of Commerce May 19, 1997). Commerce prefers to use a single and uniform source for the date of sale for each respondent, rather than determining the date of sale for each sale individually. Id. Commerce stated that

"as a matter of commercial reality, the date on which the terms of a sale are first agreed is not necessarily the date on which those terms are finally established" because "price and quantity are often subject to continued negotiation between the buyer and the seller until a sale is invoiced." Id. Commerce explained that:

> absent satisfactory evidence that the terms of sale were finally established on a different date, [Commerce] will presume that the date of sale is the date of invoice .... If [Commerce] is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, [Commerce] will use that alternative date as the date of sale.

Id. at 27, 349. The party seeking a date other than the invoice date bears the burden of presenting Commerce with sufficient evidence demonstrating that "another date ... 'better reflects the date on which the exporter or producer establishes the material terms of sale.' " Viraj Grp., Ltd., 343 F.3d at 1377 n.1 (quoting 19 C.F.R. § 351.401(i)).

[37] WTTC argues that Commerce has stated that "in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, [Commerce] usually will use a date other than the date of invoice." WTTC's Br. at 19 (citing Preamble, 62 Fed. Reg. at 27,349). However, the Court notes that "[Commerce] emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed." Preamble, 62 Fed. Reg. at 27,349. The regulatory presumption exists that Commerce will use the date of invoice, and WTTC had the burden of proving to Commerce that another date better reflects the date on which the material terms of sale were established. See 19 C.F.R. § 351.401(i).

WTTC argues that Commerce should have used a date other than the invoice date as Marmen's date of sale for home market and U.S. sales. See WTTC's Br. at 18–19. WTTC asserts that the material terms of sale for Marmen's sales did not change between when purchase orders were issued and when invoices were issued. See id. at 21. Commerce determined that Marmen had reported the invoice dates as the date of sale for home market and U.S. sales, as instructed, and that Marmen had responded to Commerce's request for examples in which the terms of sale changed between the purchase order date and the invoice date. Final IDM at 15–16. Commerce reviewed Marmen's questionnaire responses and determined that the record supported that "changes to the material terms of sale occurred between the purchase order and the invoice date in both the home and U.S. markets." Id. (citing Utility Scale Wind Towers from Canada: Section A Resp. (Sept. 13, 2019) ("Marmen AQR"), PR 76; Utility Scale Wind Towers from Canada: Sections B, C, and D Resp. (Oct. 11, 2019) ("Marmen BCDQR"), PR 89–97; Utility Scale Wind Towers from Canada: Suppl. Sections A, B, and C Resp. (Feb. 6, 2020) ("Marmen First SABCQR"), PR 120–21; Utility Scale Wind Towers from Canada: Second Suppl. Sections A, B, and C Resp. (Feb. 6, 2020) ("Marmen Second SABCQR"), PR 181–83; Marmen SDQR). In support of using the invoice date as the date of sale for both home market and U.S. sales, Commerce cited the examples that Marmen provided of a change to the delivery terms in a home market sale and changes to the price, quantity, and payment terms in a U.S. sale. Id. at 16 (citing Marmen First SABCQR Exs. FSQ-6, FSQ-7, FSQ-12, FSQ-14).

The Court notes that Commerce's questionnaires requested that Marmen state the "date of sale (*e.g.*, invoice date, etc.)"

and provide an example of a change in the terms of sale between the purchase order and invoice date for both home market and U.S. sales. See Antidumping Duty Investigation Req. for Information for Marmen Inc., Utility Scale Wind Towers from Canada (Aug. 19, 2019) ("Initial Questionnaire") at A-8, PR 54; Antidumping Duty Investigation on Utility Scale Wind Towers from Canada: Suppl. Questionnaire for Marmen ("Nov. 20, 2019") ("Supplemental Questionnaire") at 5, PR 103. The Court observes that Marmen's responses complied with Commerce's requests, because Marmen reported the invoice date as the date of sale for its home market and U.S. sales, in line with Commerce's questionnaire. See Initial Questionnaire at A-8; Marmen AQR at A-20. The Court notes that Marmen also provided examples of changes to the material terms of sale between the purchase order and invoice date, consistent with Commerce's request. See Supplemental Questionnaire at 5; Marmen First SABCQR at 12–14.

The record evidence cited by Commerce supports a determination that the material terms of sale were not established prior to the invoice date, because the evidence shows changes to the terms between the purchase order and invoice date. The Court observes that record documents cited by Commerce show an example of a change in the delivery terms for one of Marmen's home market sales between the purchase order and invoice. See Marmen First SABCQR at 12 (stating that the change in delivery terms resulted in additional costs for the delivery of the sale). Record documents cited by Commerce also show a change in the terms of one of Marmen's U.S. sales, showing that price, quantity, and payment terms changed between the letter of intent and the invoice date. See id. at 13–14, Ex. FSQ-7. Because record evidence cited by Commerce show changes to delivery terms, price, quantity, and payment terms, and these terms are considered material, the Court concludes that Commerce's determination that there were changes to the material terms between the purchase order and invoice date is supported by substantial evidence.

Commerce has supported its determination that there were changes to the material terms of sale between the purchase order and invoice date, and the Court concludes that Commerce has supported with substantial evidence its determination that the invoice date best reflects when the material terms of sale were established. Therefore, the Court concludes that Commerce correctly applied the regulatory presumption to use the invoice date as the date of sale and that Commerce's determination to use Marmen's reported invoice dates as the date of sale for home market and U.S. sales is supported by substantial evidence.

V. Commerce's Use of Marmen's Reporting of Home Market Sales of Tower Sections

[38] Commerce determined that Marmen correctly reported its home market sales as sales of wind tower sections and relied on Marmen's reported information. Final IDM at 17–18. WTTC argues that Marmen incorrectly reported its home market sales as sales of sections and that Commerce should not use Marmen's reported home market sales information. WTTC's Br. at 34–37.

Commerce cited Marmen's questionnaire responses, which showed that Marmen issued invoices for each section of its home market sales. See Final IDM at 17–18 (citing Marmen AQR; Marmen BCDQR; Marmen First SABCQR Exs. FSQ-11, FSQ-12). Despite Marmen issuing purchase orders for whole towers, Commerce noted that Marmen issued invoices by section. See id.; see also Marmen First SABCQR Exs. FSQ-11, FSQ-12. Com-

merce determined, therefore, that Marmen's reporting was consistent with Commerce's instructions and with the manner in which Marmen actually invoiced its customer. See Final IDM at 17–18.

The Court notes that Commerce's questionnaires requested that Marmen report its sales by wind tower section as invoiced. See Initial Questionnaire at B-2; Model Matching Questionnaire Attach. 1. The Court observes that record documents cited by Commerce show that Marmen invoiced customers by section. See Marmen First SABCQR Exs. FSQ-11, FSQ-12. Because Marmen invoiced customers by wind tower section and Commerce instructed Marmen to report its sales as they were invoiced, the Court agrees with Commerce's determination that Marmen accurately reported its sales as sales of wind tower sections, consistent with Commerce's requests.

The Court concludes that Commerce's reliance on Marmen's reported information as accurate and treatment of Marmen's home market sales as sales of tower sections is reasonable and supported by substantial evidence on the record.

VI. Commerce's Determination Not to Apply Facts Otherwise Available or an Adverse Inference to Marmen

Commerce determined that the record provided sufficient information to calculate Marmen's dumping margin and declined to apply adverse facts available to Marmen. See Final IDM at 19–20. WTTC contends that Marmen was not responsive to Commerce's questionnaires and that Marmen reported inaccurate and incomplete data. See WTTC's Br. at 37–44. WTTC argues that Commerce should have applied facts otherwise available or an adverse inference. Id. at 38.

[39] Section 776 of the Tariff Act of 1930, as amended, provides that if "necessary information is not available on the record" or if a respondent "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," then the agency shall "use the facts otherwise available in reaching" its determination. 19 U.S.C. § 1677e(a)(1), (a)(2)(B). If Commerce finds further that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" from the agency, then Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." Id. § 1677e(b)(1)(A). When Commerce can fill in gaps in the record independently, an adverse inference is not appropriate. See Zhejiang DunAn Hetian Metal Co. v. United States, 652 F.3d 1333, 1348 (Fed. Cir. 2011).

[40] WTTC asserts that Marmen's reporting was incomplete and that the record lacked necessary information. WTTC's Br. at 39–41. WTTC argues that Commerce should have applied facts otherwise available to calculate Marmen's dumping margin. See id. at 41. WTTC asserts that Marmen mischaracterized its home market date of sale and misreported its sales as sales of wind tower sections. See id. at 38–41. As a result, WTTC argues that Marmen's reporting did not comply with Commerce's requests and Commerce should have applied an adverse inference. See id. at 40–44. Commerce cited Marmen's questionnaire responses and determined that Marmen was "responsive to the information requested," that its responses were submitted in a timely manner, and that there was "no missing information from the record that is a condition necessary for applying facts available." Final IDM at 19–20. Commerce also determined that Marmen's reporting of its home market date of sale based on invoice date and its sales of

wind tower sections was consistent with Commerce's requests and Marmen's invoicing practices. Id. at 20. Because Marmen complied with Commerce's requests and the record contained sufficient information for Commerce's determination, Commerce declined to apply facts otherwise available or an adverse inference. Id. at 20.

The Court observes that Marmen's questionnaire responses, cited by Commerce, were consistent with Commerce's instructions. See Marmen AQR; Marmen BCDQR; Marmen First SABCQR. As discussed above, the Court concludes that Commerce's determinations that Marmen reported invoice dates as the date of sale for home market and U.S. sales and reported home market sales as sales of wind tower sections, in accordance with Commerce's questionnaire instructions, are supported by substantial evidence. See supra Parts IV & V. The Court concludes that Commerce's determination that Marmen's reporting was responsive to Commerce's requests and no information was missing from the record is supported by substantial evidence. The Court holds that Commerce's determination not to apply facts otherwise available or an adverse inference to Marmen is supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the Court sustains Commerce's determination to weight-average Marmen's plate costs; Commerce's use of invoice dates as the date of sale; Commerce's use of Marmen's reported sales of tower sections; and Commerce's decision not to apply facts otherwise available or an adverse inference. The Court remands Commerce's determination rejecting Marmen's additional cost reconciliation information and Commerce's use of the A-to-T methodology to calculate Marmen's dumping margin for further consideration in accordance with this opinion.

Accordingly it is hereby

ORDERED that the Final Determination is remanded to Commerce for further proceedings consistent with this opinion; and it is further

ORDERED that this action shall proceed according to the following schedule:

1. Commerce shall file the remand determination on or before December 17, 2021;
2. Commerce shall file the remand administrative record on or before January 14, 2022;
3. Comments in opposition to the remand determination shall be filed on or before February 11, 2022;
4. Comments in support of the remand determination shall be filed on or before March 4, 2022; and
5. The joint appendix shall be filed on or before March 25, 2022.

DIAMOND TOOLS TECHNOLOGY LLC, Plaintiff,

v.

UNITED STATES, Defendant,

and

Diamond Sawblades Manufacturers' Coalition, Defendant-Intervenor.

Slip Op. 21-151
Court No. 20-00060

United States Court of International Trade.

October 29, 2021

Background: Importer of diamond sawblades sought review of affirmative final

Marmen Inc. v. United States

627 F.Supp.3d 1312 (CIT 2023)

(Appx21-28)

627 F.Supp.3d 1312
United States Court of International Trade.

MARMEN INC., Marmen Énergie Inc., and Marmen Energy Co., Plaintiffs,
and
Wind Tower Trade Coalition, Consolidated Plaintiff,
v.
UNITED STATES, Defendant,
and
Wind Tower Trade Coalition, Marmen Inc., Marmen Énergie Inc., and Marmen Energy Co., Defendant-Intervenors.

Slip Op. 23-37
|
Consol. Court No. 20-00169
|
March 20, 2023

Synopsis

Background: Exporters filed action challenging final determination of Department of Commerce in antidumping duty investigation on utility scale wind towers from Canada. The Court of International Trade, Choe-Groves, J., 545 F.Supp.3d 1305, sustained in part and remanded in part exporters' motion for judgment on agency record.

Holdings: After remand, the Court of International Trade, Choe-Groves, J., held that:

Commerce's determination, rejecting exporters' cost reconciliation information concerning alleged discovery of their failure to convert currencies in records, was supported by substantial evidence, and

Commerce's application of Cohen's d test to determine whether there was significant pattern of differences was reasonable.

Sustained.

Procedural Posture(s): Review of Administrative Decision.

Attorneys and Law Firms

***1314** Jay Charles Campbell, Allison Jessie Gartner Kepkay, and Ron Kendler, White & Case, LLP, of Washington, D.C., for Plaintiffs and Defendant-Intervenors Marmen, Inc., Marmen Energy Co., and Marmen Energie Inc.

Alan Hayden Price, Derick G. Holt, Elizabeth Seungyon Lee, John Allen Riggins, Laura El-Sabaawi, Maureen Elizabeth Thorson, Robert Edward DeFrancesco, III, Tessa Victoria Capeloto, and Theodore Paul Brackemyre, Wiley Rein, LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor Wind Tower Trade Coalition.

Reginald T. Blades, Jr., Assistant Director, and Joshua Ethan Kurland, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were Brian M. Boynton, Principal Deputy Assistant Attorney General, and Patricia M. McCarthy, Director. Of counsel on the brief was Jesus N. Saenz, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Choe-Groves, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") remand redetermination in the antidumping duty investigation of utility scale wind towers from Canada, filed pursuant to the Court's Remand Order in Marmen Inc. v. United States ("Marmen I"), 45 CIT ——, 545 F. Supp. 3d 1305 (2021). See Final Results of Redetermination Pursuant to Court Remand ("Remand Redetermination"), ECF Nos. 61, 62; see also Utility Scale Wind Towers from Canada ("Final Determination"), 85 Fed. Reg. 40,239 (Dep't of Commerce July 6, 2020) (final determination of sales at less than fair value and final negative determination of critical circumstances; 2018–2019), accompanying Issues and Decision Mem. for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Canada, ECF No. 18-5 (June 29, 2020) ("Final IDM").

In Marmen I, the Court remanded for Commerce to reconsider the rejection of the cost reconciliation information of Plaintiffs Marmen Inc., Marmen Energy Co., and Marmen Energie Inc. (collectively, "Marmen") and Commerce's

use of the differential pricing average-to-transaction ("A-to-T") method to calculate Marmen's dumping margin. Marmen I, 45 CIT at ——, 545 F. Supp. 3d at 1315–20. On remand, Commerce reconsidered the additional cost reconciliation information and the use of the Cohen's *d* test in light of Stupp Corp. v. United States, 5 F.4th 1341 (Fed. Cir. 2021). See generally, Remand Redetermination. Marmen filed comments in opposition to the Remand Redetermination. Pls.' Comments Opp'n Final Results ***1315** of Redetermination Pursuant to Court Remand ("Pls.' Cmts."), ECF Nos. 66, 67. Defendant United States ("Defendant") responded to Plaintiffs' Comments. Def.'s Resp. Pls.' Comments Commerce' Remand Redetermination ("Def.'s Resp."), ECF Nos. 70, 71 (superseded by ECF Nos. 79, 80). Defendant-Intervenor Wind Tower Trade Coalition ("Defendant-Intervenor") filed comments in support of the Remand Redetermination. [Def.-Interv.'s] Comments Supp. Remand Redetermination ("Def.-Interv.'s Cmts."), ECF Nos. 72, 73. For the following reasons, the Court sustains the Remand Redetermination.

BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court's review of the Remand Redetermination. See Marmen I, 45 CIT at ——, 545 F. Supp. 3d at 1311–12. In August 2019, Commerce initiated an antidumping duty investigation into wind towers from Canada for the period covering July 1, 2018 through June 30, 2019. Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam, 84 Fed. Reg. 37,992, 37,992–93 (Dep't of Commerce Aug. 5, 2019) (initiation of less-than-fair-value investigations). Commerce selected Marmen, Inc. and Marmen Energie Inc. as mandatory respondents. See Decision Mem. for the Prelim. Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Canada (Feb. 4, 2020) ("Prelim. DM") at 1–2, PR 146. [1] In the Final Determination, Commerce assigned weighted-average dumping margins of 4.94 percent to Marmen, Inc. and Marmen Energie Inc. [2] Final Determination, 85 Fed. Reg. at 40,239. Commerce determined the all-others weighted average dumping margin of 4.94 percent based on Marmen's dumping margin. Id.

In the Final Determination, Commerce determined that Marmen's steel plate costs did not reasonably reflect the costs associated with the production and sale of the products and weight-averaged Marmen's reported steel plate costs. Final IDM at 4–6. Commerce rejected a portion of the supplemental cost reconciliation information submitted by Marmen as untimely, unsolicited new information. Id. at 7–9. Commerce applied a differential pricing analysis using the Cohen's *d* test and determined that there was a pattern of export prices that differed significantly. Id. at 10–11. As a result, Commerce calculated Marmen's weighted-average dumping margin by using the alternative average-to-transaction method. Id.

The Court remanded for Commerce to explain its use of the Cohen's *d* test in light of Stupp Corp. v. United States, 5 F.4th 1341 (Fed. Cir. 2021), and for Commerce to further explain or consider Marmen's supplemental cost reconciliation information. Marmen I, 45 CIT at ——, 545 F. Supp. 3d. at 1317–21.

On remand, Commerce accepted the previously rejected information from Marmen. Remand Redetermination at 4−11. Commerce examined the additional cost reconciliation information together with ***1316** other information on the record, and Commerce determined that the purported corrections were already reflected in Marmen's audited financial statements. Id. Commerce did not adjust Marmen's cost of manufacturing or cost of production. Id. Commerce also reconsidered the differential pricing analysis and determined that the assumptions of normality and roughly equal variances at issue in Stupp were not relevant to Commerce's application of the Cohen's *d* test on remand. Id. at 12−50.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final determination in an antidumping duty investigation. The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court's remand order. Ad Hoc Shrimp Trade Action Comm. v. United States, 38 CIT ——, ——, 992 F. Supp. 2d 1285, 1290 (2014), aff'd, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Commerce's Rejection of Marmen's Additional Cost Reconciliation Information

In order to determine whether certain products are being sold at less than fair value in the United States, Commerce compares the export price, or constructed export price, with normal value. 19 U.S.C. § 1673. Export price and constructed export price are the price at which the subject merchandise is being sold in the U.S. market, while normal value is the price at which a "foreign like product" is sold in the producer's home market or in a comparable third-country market. Id. §§ 1677a(a)–(b), 1677b(a)(1)(B). Before calculating a dumping margin, Commerce must identify a suitable "foreign like product" with which to compare the exported subject merchandise. See § 1677b(a)(1)(B). A "foreign like product," in order of preference, is:

> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise —
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise —
>
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16); NSK Ltd. v. United States, 26 C.I.T. 650, 657–58, 217 F. Supp. 2d 1291, 1299–1300 (2002).

When determining costs of production, 19 U.S.C. § 1677b states that:

> costs shall normally be calculated based on the records of the exporter or producer ***1317** of the merchandise, if such records are kept in accordance with the generally accepted accounting principles ["GAAP"] of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

19 U.S.C. § 1677b(f)(1)(A). The statute requires that "reported costs must normally be used only if (1) they are based on the records ... kept in accordance with the GAAP *and* (2) reasonably reflect the costs of producing and selling the merchandise." See Dillinger France v. United States, 981 F.3d 1318, 1321 (Fed. Cir. 2020) (emphasis in original) (internal quotation marks and citations omitted). Commerce is not required to accept the exporter's records. Thai Plastic Bags Indus. Co. v. United States, 746 F.3d 1358, 1365 (Fed. Cir. 2014). Commerce may reject a company's records if it determines that accepting them would distort the company's true costs. See Am. Silicon Techs. v. United States, 261 F.3d 1371, 1377 (Fed. Cir. 2001). Commerce is directed to consider all available evidence on the proper allocation of costs. 19 U.S.C. § 1677b(f)(1)(A). Physical characteristics are a prime consideration when Commerce conducts its analysis. Thai Plastic Bags, 746 F.3d at 1368. If factors beyond the physical characteristics influence the costs, however, Commerce will normally adjust the reported costs in order to reflect the costs that are based only on the physical characteristics. See id.

To determine whether the subject merchandise wind towers from Canada were sold in the United States at less than fair value under section 733 of the Tariff Act of 1930, Commerce first considered all products produced and sold by Marmen in Canada during the period of investigation for the purpose of determining the appropriate product comparisons to U.S. sales. Prelim. DM at 13. Commerce determined that there were no sales of identical merchandise in the ordinary course of trade in Canada that could be compared to U.S. sales. Id.

Commerce did not dispute whether Marmen's records were kept properly, noting that "the record is clear that the reported costs are derived from the Marmen Group's normal books and records and that those books are in accordance with Canadian GAAP." Final IDM at 5; see also Marmen's Utility Scale Wind Towers from Canada: Response to Question 14.g of the Supplemental Section Questionnaire (Dec. 13, 2019) at 2–4, PR 123–25. Commerce focused on the second prong of 19 U.S.C. § 1677b(f)(1)(A), calling into question whether Marmen reasonably reflected the costs of producing and selling the merchandise. Final IDM at 5.

In Marmen I, this Court remanded for Commerce to reconsider the rejection of Plaintiffs' cost reconciliation information. Marmen I, 45 CIT at ——, 545 F. Supp. 3d at 1315–17. On remand, Commerce accepted and reconsidered Marmen's cost reconciliation information that Commerce had previously rejected. See Remand Redetermination at 4–11. Commerce explained that on remand it evaluated the information provided by Plaintiffs and determined that one portion of the information should be rejected because the information adjusted for amounts already accounted for in the costs that were reported to Commerce. Id. Commerce determined that Plaintiffs' overall cost reconciliation difference remained outstanding and attributed the amount to Marmen's cost of production. Id. Defendant-Intervenor supports Commerce's determination. See Def.-Interv.'s Cmts. at 10–16.

Marmen argues that Commerce's rejection of the information was unreasonable because the information was a "minor correction ***1318** to Marmen Inc.'s cost reconciliation worksheet based on incorrect and confused claims that are unsupportable." Pls.' Cmts. at 2. Marmen challenges Commerce's characterization that the information would double count an exchange rate adjustment already reflected in the audited cost of goods sold and reported cost of production. Id.

A party may submit factual information to rebut, clarify, or correct questionnaire responses. 19 C.F.R. § 351.301(c). The regulations state that

> [i]f the factual information is being submitted to rebut, clarify, or correct factual information on the record, the submitter must provide a written explanation identifying the information which is already on the record that the factual information seeks to rebut, clarify, or correct, including the name of the interested party that submitted the information and the date on which the information was submitted.

Id. § 351.301(b)(2).

Commerce has a duty "to determine dumping margins as accurately as possible." See NTN Bearing Corp. v. United States, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (internal quotation marks and citation omitted). "[A]ntidumping laws are remedial not punitive." Id. (citation omitted). The U.S. Court of Appeals for the Federal Circuit ("CAFC") has stated that "Commerce is obliged to correct any errors in its calculations during the preliminary results stage to avoid an imposition of unjustified duties." Fischer S.A. Comercio, Industria & Agricultura v. United States, 471 Fed. App'x 892, 895 (Fed. Cir. 2012) (citation omitted). Further, "Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections." Timken United States Corp. v. United States ("Timken"), 434 F.3d 1345, 1353 (Fed. Cir. 2006). The Court reviews whether Commerce abused its discretion when rejecting submitted information. See Papierfabrik August Koehler SE v. United States, 843 F.3d 1373, 1384 (Fed. Cir. 2016) ("Commerce abused its discretion in refusing to accept updated data when there was plenty of time for Commerce to verify or consider it.") (citations omitted). When reviewing Commerce's determination to reject corrective information, this Court may consider factors such as Commerce's interest in ensuring finality, the burden of incorporating the information, and whether the information will increase the accuracy of the calculated dumping margins. Bosun Tools Co. v. United States, 43 CIT ——, ——, 405 F. Supp. 3d 1359, 1365 (2019) (citations omitted).

On remand, Commerce accepted and considered the numerous revisions presented by Marmen. Remand Redetermination at 4–11, 38–46. Marmen argues that the information submitted consisted of minor corrections and

not new information. See Pls.' Cmts. at 2. Commerce agreed that several of the revised reconciliations were "minor errors," such as cell formatting errors and other small clerical errors, which Commerce accepted because they did not alter the data presented in the audited financial statements. Remand Redetermination at 6–7. Commerce stated in the Remand Redetermination, however, that "there was one non-clerical revision that Marmen explained it found while reviewing its records for purposes of preparing the revised cost reconciliations. This revision resulted from an alleged discovery of certain expenses that Marmen claims were not converted from [U.S. dollars] to ***1319** [Canadian dollars]." Id. at 7 (citing Marmen's Utility Scale Wind Towers from Canada: Second Supp. Section D Resp. (Feb. 7, 2020) ("Marmen's Second Supplemental Section D Response") at 14, PR 151–54). Commerce determined that:

> In short, the increase to the [cost of manufacturing] (*i.e.*, the increase in the unreconciled difference) driven by the restatement of the audited financial statements was offset by this new change to Marmen's cost reconciliation. According to Marmen, this new reconciling item represents non-booked exchange losses that Marmen Inc. incurred on purchases of wind tower sections from affiliate Marmen Energie. This explanation is parallel to the adjusting entry to restate Marmen Inc.'s other purchases to the [Canadian dollar] equivalent values, as discussed above, as an auditor amendment to the financial statements.

Id. (citing Marmen's Utility Scale Wind Towers from Canada: Request for Additional Information Concerning Second Supp. Section D Resp. (Dec. 8, 2021) ("Marmen's Second Supplemental Remand Section D Response") at Attachment 1), PRR 2. Commerce rejected Marmen's cost reconciliation information because "Marmen did not further explain how, if at all, this error and correction related to the restated financial statements, or whether it was one of the adjustments brought up by the external auditor, Deloitte. The record does not provide any actual support that this new change is required, nor that it is not already accounted for within Marmen's normal books." Id.

Defendant asserts that the new cost reconciliation information had the effect of duplicating the adjustments for exchange gains and losses already reflected in Marmen's financial statements. Def.'s Resp. at 24. Defendant contends that Commerce correctly determined that the information in the cost reconciliation spreadsheet, viewed in conjunction with Marmen's representations regarding its auditor's adjustments, indicated that Marmen's auditor had already made any necessary adjustment in restating Marmen's financial statements that produced the cost of goods sold figure used in the reconciliation. Id.

In support of its determination that the new cost reconciliation information was already accounted for in Marmen's costs, Commerce cited record evidence comparing an Excel spreadsheet in the Supplemental Remand Section D Response at Attachment 1 with Marmen's Initial Section D Response at pages D-15 and D-33 and Exhibit D-3.[3] Remand Redetermination at 8–9; see Marmen's Second Supplemental Remand Section D Response at Attachment 1; Marmen's Utility Scale Wind Towers from Canada: Sections B, C, and D Response (Oct. 11, 2019) ("Marmen's Initial Section D Response") at D-15, D-33, PR 89–97; Marmen's Utility Scale Wind Towers from Canada: Supplemental Section D Response (Dec. 6, 2019) ("Marmen's December 6, 2019 Supplemental Section D Response") at Ex. Supp. D-3, PR 114–19. Marmen's Initial Section D Response reviewed by Commerce shows that Marmen recorded amounts in its normal books and records in its home currency of Canadian dollars using an alternative exchange rate. Remand Redetermination ***1320** at 8–9 (citing Marmen's Initial Section D Response at Exhibit D-3). Citing Marmen's Initial Section D Response at page D-15, for example, Commerce determined that for purchases in U.S. dollars, Marmen reported that its normal books reflected a cost system conversion from U.S. dollar purchases to Canadian dollars at specific conversion rates. Id. at 8–9. Commerce cited Marmen's December 6, 2019 Supplemental D Response at D-17 and D-18 to support its determination that Marmen's auditors periodically adjusted the already converted purchases, and that in preparing Marmen's original 2018 audited financial statements, the auditors had already made adjustments to reflect actual exchange rates during 2018. Id. at 9; see Marmen's December 6, 2019 Supplemental Section D Response at D-17–D-18. Based on its review of these record documents, Commerce determined that Marmen's prior statements and reported calculations established that the exchange gains and losses

were already accounted for in Marmen's costs. Remand Redetermination at 9, 38–46. Thus, Commerce determined that "the record evidence thereby demonstrates that the reported costs, including those of the sections purchased from Marmen Energie, were, in fact, already correctly inclusive of exchange rate differences, and it would be inappropriate to adjust them again for those exchange gains and losses." Id. at 11.

Because record evidence, including Marmen's Initial Section D Response with exhibits, Marmen's December 6, 2019 Supplemental Section D Response with exhibits, and Marmen's Second Supplemental Remand Section D Response at Attachment 1, shows that Marmen's auditors already adjusted the reported costs to account for exchange rate differences, the Court concludes that Commerce's determination that another adjustment would be inappropriate is supported by substantial evidence. The Court holds that Commerce did not abuse its discretion by rejecting Marmen's proposed corrective information, recognizing that Commerce has an interest in ensuring finality and increasing the accuracy of the calculated dumping margins. Bosun Tools, 43 CIT at ——, 405 F. Supp. 3d at 1365.

II. Commerce's Use of the Cohen's *d* Test

In Stupp, the CAFC directed the Court to remand Commerce's use of the Cohen's *d* test for further explanation because the data Commerce used may have violated the assumptions of normality, sufficient observation size, and roughly equal variances. 5 F.4th at 1357–60. Before the CAFC, Commerce argued that concerns of normality and population were misplaced because, unlike sampling data used in determining probability or statistical significance, Commerce's review considered a complete universe of data. Id. at 1359–60. The CAFC expressed concern with Commerce's explanation because it failed to "address the fact that Professor Cohen derived his interpretive cutoffs under the assumption of normality." Id. at 1360.

On remand, Commerce reconsidered the use of the Cohen's *d* test in light of Stupp as this Court directed in Marmen I. See Remand Redetermination at 12–37, 46–50; Marmen I, 45 CIT at ——, 545 F. Supp. 3d at 1320. The standard of review for considering Commerce's differential pricing analysis is reasonableness. Stupp, 5 F.4th at 1353. The CAFC and the U.S. Court of International Trade have held the steps underlying the differential pricing analysis as applied by Commerce to be reasonable. See e.g., Mid Continent Steel & Wire, Inc. v. United States, 940 F.3d 662, 670–74 (Fed. Cir. 2019) (discussing zeroing and the 0.8 threshold for the Cohen's *d* test); ***1321** Apex Frozen Foods Priv. Ltd. v. United States, 40 CIT ——, ——, 144 F. Supp. 3d 1308, 1314–37 (2016) (discussing application of the A-to-T method, the Cohen's *d* test, the meaningful difference analysis, zeroing, and the "mixed comparison methodology" of applying the A-to-A method and the A-to-T method when 33–66% of a respondent's sales pass the Cohen's *d* test), aff'd, 862 F.3d 1337 (Fed. Cir. 2017); Apex Frozen Foods Priv. Ltd. v. United States, 862 F.3d 1322, 1330–34 (Fed. Cir. 2017) (affirming zeroing and the 0.5% *de minimis* threshold in the meaningful difference test); Stupp Corp. v. United States, 47 CIT ——, ——, 619 F.Supp.3d 1314, 1322-28 (2023) (discussing the reasonableness of the Cohen's *d* test as one component of Commerce's differential pricing analysis). However, the CAFC has stated that "there are significant concerns relating to Commerce's application of the Cohen's *d* test ... in adjudications in which the data groups being compared are small, are not normally distributed, and have disparate variances." Stupp, 5 F.4th at 1357.

The Cohen's *d* test is "a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group." Apex Frozen Foods, 862 F.3d at 1342 n.2. The Cohen's *d* test relies on assumptions that the data groups being compared are normal, have equal variability, and are equally numerous. See Stupp, 5 F.4th at 1357. Applying the Cohen's *d* test to data that do not meet these assumptions can result in "serious flaws in interpreting the resulting parameter." See id. at 1358.

Commerce determined on remand that "the assumptions of normality and roughly equal variances" are not relevant to Commerce's application of the Cohen's *d* test. Remand Redetermination at 18. Commerce explained that its dumping analysis in this case assessed the pricing behavior of Marmen in the entire United States market, stating:

> The U.S. sale price data on which this analysis is based constitute the entire population of sales data and are not a sample of a respondent's sales data (*i.e.*, the data are for

> *all* sales in the United States of subject merchandise by a company during the period of investigation or review). The basis for this analysis is the respondent's U.S. sales of the subject merchandise for a given period of time. By definition, these U.S. sales comprise the universe of sales on which the respondent's weighted-average dumping margin depends. The Differential Pricing Analysis examines all sales to determine whether the A-to-A method is the appropriate approach on which to base this calculation. Therefore, in the context of the calculation of the weighted-average dumping margin, the data used are not a sample, but rather constitute the entire population of a respondent's sales of subject merchandise during the period under examination for the calculation of the weighted-average dumping margin.

Id. at 22.

Commerce determined on remand that the statistical criteria, such as the number of observations, a normal distribution, and approximately equal variances, are related to the statistical significance of sampled data and establish the reliability of an estimated parameter based on the sample data. Id. at 23. Commerce explained further that:

> However, for the Cohen's *d* test applied in the context of the Differential Pricing Analysis, there is no estimation of the parameters (*i.e.*, mean, standard deviation, and effect size) of the test group or of the comparison group as the calculation of these parameters is based on the ***1322** complete universe of sale prices to the test and comparison groups. Unlike with a sample of data where the estimated parameters will change with each sample selected from a population, each time these parameters would be calculated as part of Commerce's Cohen's *d* test, the exact same results would be found because the calculated parameters are the parameters of the entire population and not an estimate of the parameters based on a sample. Accordingly, the means, standard deviations, and Cohen's *d* coefficients calculated are not estimates with confidence levels or sampling errors as would be associated with sampled data, but, rather, are the actual values which describe a company's pricing behavior. Consequently, the statistical significance of the results of the Cohen's *d* test is not relevant in Commerce's application of the differential pricing analysis, which measures practical significance.

Id. at 23–24. Commerce determined, therefore, that:

> [i]n Commerce's application of the Cohen's *d* test, such additional analysis is not relevant because the data in both the test group and the comparison group use the full population of sales in each group and are not determined based on controlled random and independent samples of the population. Rather, the results of the Cohen's *d* test are based on the entire population of sale price data for comparable merchandise for the test and comparison groups.

Id. at 26.

The Court concludes that Commerce's use of a population, rather than a sample, in the application of the Cohen's *d* test sufficiently negates the questionable assumptions about thresholds that were raised in Stupp. Based on Commerce's explanation, this Court concludes that Commerce's application of the Cohen's *d* test to determine whether there was a significant pattern of differences was

reasonable because Commerce applied the Cohen's *d* test to a population rather than a sample. Because Commerce adequately explained how its methodology is reasonable, the Court holds that Commerce's use of the Cohen's *d* test applied as a component of its differential pricing analysis is in accordance with law.

CONCLUSION

For the foregoing reasons, Commerce's remand results are supported by substantial evidence, are in accordance with law, and comply with the Court's Order, Oct. 22, 2021, ECF No. 51, and are therefore sustained. Judgment will enter accordingly.

All Citations

627 F.Supp.3d 1312

Footnotes

1 Citations to the administrative record reflect public record ("PR") and public remand record ("PRR") document numbers filed in this case, ECF Nos. 46, 75.

2 The Court notes that, although Marmen Energy Co. was not included as a mandatory respondent alongside Marmen, Inc. and Marmen Energie Inc., comments and questionnaire responses were submitted collectively by the three Plaintiffs during Commerce's investigation. The Court herein refers to their assigned weighted-average dumping margins collectively as "Marmen's dumping margin."

3 Exhibit D-3 to Marmen's Initial Section D Response is not included in the record before the Court. Exhibit Supp. D-3 to Marmen's December 6, 2019 Supplemental Section D Response appears to correspond to the information referenced by Commerce in the Remand Redetermination. See Marmen's Utility Scale Wind Towers from Canada: Supplemental Section D Response (Dec. 6, 2019) ("Marmen's December 6, 2019 Supplemental Section D Response") at Ex. Supp. D-3, PR 114–19.