

2024-1556

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MID CONTINENT STEEL & WIRE INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellee,

and

PT ENTERPRISE INC., PRO-TEAM COIL NAIL ENTERPRISE INC.,
UNICATCH INDUSTRIAL CO., LTD., WTA INTERNATIONAL CO., LTD.,
ZON MON CO., LTD., HOR LIANG INDUSTRIAL CORPORATION,
PRESIDENT INDUSTRIAL INC., and LIANG CHYUAN INDUSTRIAL CO.,
LTD.,

Defendants-Appellants

Appeal from the United States Court of International Trade in
Case Nos. 15-cv-00213 and 15-cv-00220, Judge Claire R. Kelly

CORRECTED PRINCIPAL BRIEF OF DEFENDANTS-APPELLANTS

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Date: June 3, 2024

FORM 9. Certificate of Interest

Form 9 (p. 1)
March 2023

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 24-1556

Short Case Caption Mid Continent Steel & Wire, Inc. v. US

Filing Party/Entity PT Enterprise Inc., Pro-Team Coil Nail Enterprise Inc., Unicatch Industrial Co., Ltd., WTA International Co., Ltd., Zon Mon Co. Ltd., Hor Liang Industrial Corporation, President Industrial Inc., and Liang Chyuan Industrial Co. Ltd.

Instructions:

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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 06/03/2024

Signature: /s/ Ned H. Marshak

Name: Ned H. Marshak

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1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☒ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☒ None/Not Applicable
PT Enterprise Inc.		
Pro-Team Coil Nail Enterprise Inc.		
Unicatch Industrial Co., Ltd.		
WTA International Co., Ltd.		
Zon Mon Co., Ltd.		
Hor Liang Industrial Corporation		
President Industrial Inc.		
Liang Chyuan Industrial Co., Ltd.		

☐ Additional pages attached

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4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☒ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☒ No ☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF RELATED CASES

In accordance with Rule 47.5 of the Rules of the U.S. Court of Appeals for the Federal Circuit, counsel for Defendants-Appellants PT Enterprise Inc., Pro-Team Coil Nail Enterprise Inc., Unicatch Industrial Co., Ltd., WTA International Co., Ltd., Zon Mon Co. Ltd., Hor Liang Industrial Corporation, President Industrial Inc., and Liang Chyuan Industrial Co. Ltd. (collectively, “PT”), state the following:

- (a) Yes, this case was previously before this Court:
 - 1. *Mid Continent Steel & Wire Inc. v. US*, 2018-1229, -1251.
 - a. Date of Decision: October 3, 2019.
 - b. Composition of Panel: Judges Newman, O’Malley, and Taranto.
 - c. *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662 (Fed. Cir. 2019).
 - 2. *Mid Continent Steel & Wire Inc. v. US*, 2021-1747.
 - a. Date of Decision: April 21, 2022.
 - b. Composition of Panel: Judges Newman, Lourie, and Taranto.
 - c. *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367 (Fed. Cir. 2022).
- (b) There are no directly related appeals before the U.S. Court of International Trade.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(5). The Court of International Trade’s (“Trial Court” or “CIT”) final judgment, from which this appeal was taken, was entered on February 12, 2024. Appx22-24. Appellants filed their Notice of Appeal on March 4, 2024, within 60 days of entry of judgment in accordance with Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue in this appeal is the same as in the previous two times this case has been before this Court: Was Commerce’s differential pricing methodology which determines whether there is a “significant difference” between pricing patterns in a Test Group and a Comparison Group supported by substantial evidence in the record and in accordance with law?

Commerce’s differential pricing analysis is commonly referred to as the *Cohen’s d* test. For product groupings of comparable merchandise, Commerce initially calculates the difference between the weighted average (“WA”) prices in a Test subgroup and a Comparison subgroup. It then calculates the weighted average standard deviation (“SD”) in prices in each subgroup and combines these two standard deviations into a standard deviation of the sales in both subgroups. Finally, Commerce divides the price difference numerator by the combined standard deviation denominator. If the result is 80 percent or more, Commerce

concludes that the prices in the two subgroups “differ significantly” from each other. The specific issue for this Court is whether Commerce’s calculation of the standard deviation denominator based on the simple average (“SA”) of the SDs of the WA prices in each subgroup is supported by substantial evidence and in accordance with law.

STATEMENT OF THE CASE

A. HISTORY OF THIS LITIGATION

This is the third time this issue has been before this Court. In *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662 (Fed. Cir. 2019) (“*Mid Continent III*”), Appx449-458, this court reversed the Trial Court’s decision in *Mid Continent Steel & Wire, Inc. v. United States*, 219 F. Supp. 3d 1326 (CIT 2017) (*Mid Continent I*), Appx418-440,¹ which had affirmed Commerce’s determination in the initial less than fair value (“LTFV”) determination. Appx96. In *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367 (Fed. Cir. 2022) (“*Mid Continent V*”), Appx974-984, this Court reversed the Trial Court’s decision, in *Mid Continent Steel & Wire, Inc. v. United States*, 495 F. Supp. 3d 1298 (Ct. Int’l Trade 2021) (“*Mid Continent IV*”), Appx965-973, which had affirmed Commerce’s first remand determination. Appx806-854. In *Mid Continent Steel &*

¹ *Mid Continent I* was affirmed after remand on an unrelated issue. *Mid Continent Steel & Wire, Inc. v. United States*, 273 F. Supp. 3d 1161 (CIT 2017) (“*Mid Continent II*”). Appx441-448.

Wire, Inc. v. United States, 628 F. Supp. 3d 1316 (CIT 2023) (“*Mid Continent VP*”), Appx1719-1728, the Trial Court reversed Commerce’s second remand determination, in which Commerce applied a new theory to support the SA methodology. Appx1659-1718. In its third remand determination, Commerce continued its recalcitrance by applying yet another new theory to justify reliance on SA. Appx2401-2467. In *Mid Continent Steel & Wire, Inc. v. United States*, Court No. 15-213, Slip Op. 24-15 (CIT February 12, 2024) (“*Mid Continent VIP*”), the Trial Court affirmed. Appx1-21.

Commerce’s justification for relying on SA to calculate the denominator of the Cohen’s *d* equation has been rejected twice by this Court - *Mid Continent III and V* - and once by the Trial Court - *Mid Continent VI*. Now, in its third remand determination, Commerce advances a fourth, new rationale as to why SA should be used. Appx1659-1718. In this appeal, Appellants challenge this fourth attempt.

B. TARGETED DUMPING AND “SIGNIFICANT DIFFERENCES” IN PRICES

1. Targeted Dumping Defined

In antidumping duty (“ADD”) investigations, Commerce determines whether foreign exporters are selling subject merchandise (here, steel nails) into the United States at LTFV prices. 19 U.S.C. § 1673. “Sales at less than fair value are those sales for which the ‘normal value’ . . . exceeds the ‘export price’ (the price of the product in the United States)” *Union Steel v. United States*, 713

F.3d 1101, 1103 (Fed. Cir. 2013). The statute directs Commerce to calculate dumping margins by using an average to average (“AA”) methodology. 19 U.S.C. § 1677f-1(d)(1)(A). Under AA, Commerce compares a foreign producer’s weighted-average normal values (“NV”) to its weighted-average export prices to the United States, after adjusting NV and export prices, as required by law. The comparison is made by creating “comparable merchandise” product groups, commonly known as CONNUMs,² and comparing NVs and export prices within each designated CONNUM. Commerce determines the dumping margin and extended dumping margin (*i.e.*, per unit dumping margin multiplied by sales quantity to the United States) for each CONNUM. Margins are positive if NV is greater than adjusted U.S. price and are negative if adjusted U.S. price is greater than NV. The CONNUM-specific dumping amounts are summed and then divided by the total U.S. sales value to determine the total WA dumping margin. Under AA, negative dumping in individual sales in a CONNUM can offset positive dumping of sales within that same CONNUM and negative dumping in one CONNUM can offset positive dumping in another CONNUM.

An exception to the AA methodology is authorized by 19 U.S.C. § 1677f-1(d)(1)(B), whenever Commerce determines that an alternative methodology is needed to remedy “targeted dumping.” Targeted dumping occurs when an

² See *Union Steel*, 713 F.3d at n.4; 19 C.F.R. § 351.414(d).

exporter's sales prices of "comparable merchandise" sold to the United States "differ[s] significantly among purchasers, regions, or periods of time." *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1359 (Fed. Cir. 2010) (quoting 19 U.S.C. § 1677f-1(d)(1)(B) (2012)). In these circumstances relying on AA could "conceal targeted dumping"; that is, where "an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions." STATEMENT OF ADMINISTRATIVE ACTION, H.R. Doc. No. 103-316, at 842 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4178.

To remedy targeted dumping, 19 U.S.C. § 1677f-1(d)(1)(B) authorizes Commerce to use an average-to-transaction ("AT") methodology to calculate dumping margins, when certain statutory requirements, discussed below, are satisfied. Under AT, Commerce compares each *individual* U.S. sales price of merchandise within a given CONNUM with the weighted average NV calculated for that same CONNUM. The dumping amounts for each individual U.S. transaction within a CONNUM are summed to determine the amount of dumping for that CONNUM, and any negative dumping margins for a sale are "zeroed" out when summing the dumping amount within a CONNUM; i.e., negative dumping amounts cannot offset positive dumping amounts. The dumping amounts for each CONNUM are then summed to determine the WA dumping margin.

Commerce cannot rely on the AT methodology unless two statutory criteria are satisfied:

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using {AA or TT}.

19 U.S.C. § 1677f-1(d)(1)(B). The issue in this Appeal is whether, in light of the record in this case, Commerce used a reasonable methodology to determine whether there is a pattern of significant price differences. The statute does not require that Commerce rely on any particular methodology.

2. The Differential Pricing (“DP”) Analysis

a. Commerce Uses the “Cohen’s d test” to Identify “Significant Differences” in Pricing Patterns

Commerce currently relies on the Cohen’s d test, also known as the Differential Pricing (“DP”) analysis, to determine whether price differences are significant, as the term significant is used in the statute. This analysis compares the quantity-weighted average prices of test and comparison subgroups within a CONNUM, and then, after taking into account the quantity-weighted standard deviations of price within each subgroup, determines whether the price differences between the two subgroups are “significant” (i.e., whether a pattern of significant price differences exists). By law, the analysis addresses three different sales

categories where prices may differ: (1) purchasers (i.e., customers whose prices are used to calculate export price); (2) regions (i.e., North, South, Midwest, West); and (3) periods (i.e., calendar quarters).

Commerce determines whether there is a pattern of significant price differences – by purchaser, region, or period – by analyzing prices within each reported CONNUM in which there are sales to the United States. To administer this test, Commerce separates prices within each CONNUM into two subgroups: Test Group and Comparison Group. Commerce initially determines the difference between the WA prices of each subgroup.

Then, to measure the typical amount by which prices deviate *within either group* – i.e., the yardstick - Commerce computes the standard deviation (“SD”) of each subgroup. The SD assesses a degree of price fluctuation within each subgroup relative to the WA of transaction prices within that subgroup. It shows the typical amount by which prices deviate above or below that WA *within that group*. As a general rule, about two-thirds of all quantities will be priced within one SD and almost all will be priced within two SDs of their group average.

Commerce then squares each SD, resulting in the (weighted) variances. Next, Commerce combines the variances of the two subgroups by simple

averaging them, and takes the square root of this simple average variance. Finally, Commerce divides the price difference numerator by the SD denominator.

The methodology for calculating the denominator is the sole issue in this appeal: specifically, how to calculate the yardstick. In its *Third Redetermination*, Commerce applied the same methodology to calculate the yardstick denominator as it had applied in its three prior decisions; that is, Commerce simple averaged the variances of the two subgroups without regard to transaction quantities within each subgroup.³ It simply summed them and divided that result by two. In this appeal, as it has in the two prior appeals, PT argues that the SA methodology is not supported by substantial evidence and is contrary to law. PT submits that Commerce should have used a quantity-weighted average (of the subgroup variances) to calculate the denominator.⁴ Alternatively, as suggested by this Court in *Mid Continent V*, Commerce could have relied on the standard deviation of the entire population (Test Group and Comparison Group). Appx982. The WA methodology and the SD

³ In its Second Redetermination after *Mid Continent V*, Commerce noted that it “has not used the ‘pooled standard deviation’ as the term is meant in the academic literature to calculate the denominator of the Cohen’s *d* test. Rather, Commerce has used the simple average of the actual standard deviations of the populations of the test and comparison groups as set forth in Dr. Cohen’s equation 2.3.2.” Appx1671.

⁴ The Test Group variance is multiplied by the total quantity of all Test Group transactions; the Comparison Group variance is multiplied by the total quantity of all Comparison Group transactions; and the sum of those two results is divided by the total quantity of all transactions in the two groups. The square root of this quantity-weighted variance is the pooled standard deviation (“PSD”) as computed by the weighted average method.

of the entire population methodology accord equal importance to each kilogram of nails being sold; in contrast, Commerce's SA methodology accords greater importance to those nails in the subgroup with the lesser weight.

Once the denominator is found, Commerce uses it to calculate a Cohen's d coefficient. This measures an "effect size" for the difference in average prices between the Test and Comparison groups. The value of d is the difference between the WA prices of the Test Group and Comparison Groups, divided by the yardstick denominator. As such, d is not a price, but rather it is a price difference expressed as a multiple of the yardstick denominator. It is not, by itself, a representation that the actual price differences are large or small, either in absolute terms or as percentages of the prices themselves. It can be a negative or a positive number depending on whether the Test Group price is lower or higher than the Comparison Group price. The denominator is the "yardstick" – unit of measurement – for gauging the significance of price differences.

Commerce deems the Test Group to have "passed" the Cohen's d test when the size of d (whether negative or positive) is 0.8 or greater. See Appx456, Appx978. "Passing" the test means the weighted average price in the Test Group is different enough from the weighted average Comparison Group price to be deemed "significant," as that term is utilized in 19 U.S.C. § 1677f-1(d)(1)(B)(i). Significance is a precondition for concluding that targeted dumping exists, which

then allows Commerce to rely on the AT methodology. Commerce considers a transaction significant if it passes *any* one of the three statutory tests: region, time period, or purchaser.

b. Ratio Test

After Commerce performs its Cohen's *d* test on all sales transactions on a CONNUM-by-CONNUM basis, it looks at the percentage of the respondent's sales that have "passed" the test. This review is referred to as the "ratio test." Appx434, Appx456. In this case, the percentage of PT's sales that passed the test was between 33% and 66% of the total sales, which resulted in Commerce applying AT to "passed" sales and AA to non-passed sales ("mixed method"). *See* Appx96. PT is not challenging this methodology in this Appeal.

c. Meaningful Difference Test

After Commerce performs the "ratio test", it determines whether applying AT to the sales with significant price differences (i.e., the sales that "passed" Cohen's *d*) is needed to account for "such differences" as compared to using AA. In this case, Commerce first determined that PT's average dumping margin would be *de minimis* (i.e., below 2%) if the AA method was applied to all sales, Appx338, and 2.24% under the mixed method, Appx341, Appx416, which was reduced to 2.16% after the first Remand Redetermination. Appx591-614. Because the mixed method resulted in an above *de minimis* margin, Commerce considered

the difference to be “meaningful.” Appx96. PT agrees, since if this Court accepts PT’s argument, PT’s dumping margin would be *de minimis*.

STATEMENT OF FACTS

A. ISSUES RESOLVED IN MID CONTINENT III, V, AND VI

In Mid Continent III and *V* this Court expressly rejected the rationales Commerce advanced to justify its reliance on SA to calculate the Cohen’s *d* denominator. In *Mid Continent III*, this Court reasoned:

First, Commerce said that it was simply using a widely accepted statistical test; yet it did not acknowledge that the only cited literature source for the relevant aspect of the test itself calls for the use of weighted averages.

Second, Commerce’s language of “skew{ing}” is a mere conclusion where, as here, it is unaccompanied by an explanation of why the right result, consistent with the relevant statutory purpose, should be different. Third, although Commerce determined that PT’s charge that simple averaging “distorts” the outcome rests on an assumption that is not always true, that determination is both unsupported and, in any event, not itself an explanation of why weighted averaging is actually distortive in a relevant sense or, more affirmatively, why simple averaging is preferable. Fourth, Commerce asserted that simple averaging was more “predictab{le}” than weighted averaging, but the only expressed reason seems to be a concern about manipulation in how sales are reported, and that concern seems to assume that weighted averaging must be done by counting numbers of transactions, rather than quantity sold within transactions.

Appx458.

On remand, Commerce reaffirmed its initial decision to rely on SA, advancing multiple additional arguments in support of its position. Appx806-854,

Appx49, Dkt144. PT appealed that decision to the CIT. Appx49-52, Dkt145-169. In *Mid Continent IV*, Appx965-973, the CIT affirmed Commerce’s remand determination. Appx973.

In *Mid Continent V*, Appx974-985, this Court again reversed the CIT, rejecting all of the reasons why Commerce had continued to rely on SA. First, this Court concluded that “the fact that the seller is acting rationally and genuinely in its pricing choices in both the test and comparison groups provides no apparent reason for assigning equal weight to each group’s standard deviation when computing the pooled standard deviation.” Appx983. Second, this Court reasoned that “Commerce has not provided a reasonable explanation for this predictability assertion.” Appx983. Finally, this Court rejected Commerce’s “abstract effect” rationale, reasoning that “that section does not call for simple averaging for unequal size groups in the denominator of Cohen's d or in the formula for the related f figure.” Appx983-984. This Court continued:

More broadly and fundamentally, **Commerce has not explained why** the fact that the focus is being placed on the difference between the groups distinguishes the teaching of the cited literature—which, as discussed, uses the Cohen's d coefficient precisely to provide a yardstick for determining the significance of the difference in group means. Thus, **Commerce has not explained why** that focus calls for a simple-averaging yardstick figure for determining the significance of the difference when calculating Cohen's d (or, even, the f statistical measure) for different-size groups.

Appx984 (emphasis added).

On remand, Commerce acknowledged that *Mid Continent V* precluded Commerce from relying on its previously articulated rationale. Appx1664-1665. Commerce then admitted that its Second Redetermination was based on a “new approach.” Appx1694.

In *Mid Continent VI*, Appx1719-1728, the Trial Court rejected Commerce’s “new approach.” It summarized Commerce’s reliance on academic literature as follows:

Commerce argues that the simple average is supported because it uses the full population of sales, and does not estimate means or standard deviations for the test and comparison groups. Remand Results at 14. Therefore, because the literature only contemplates using the weighted average approach when the standard deviations are estimates, Commerce argues that the simple average is supported, and the weighted average is not.

Appx1726. The Trial Court disagreed with Commerce’s analysis:

Commerce also asserts that the differential pricing analysis does not involve sampling, but uses full populations, and thus concludes that weighted averaging is inappropriate in light of this distinction. Remand Results at 14. **However, Commerce's premise does not lead to its conclusion.** That weighted averaging is supported when sampling is present does not mean that it is unsupported when sampling is absent.

Appx1726 (emphasis added). The Trial Court continued.

Additionally, Commerce's assertion that the literature provides no support for the weighted average appears to contradict Cohen, Ellis, and Coe at a number of points, as the Court of Appeals has already observed. . . . None of Cohen's many illustrative examples show using simple averaging with unequal samples. . . . Therefore, as the Court

of Appeals found in *Mid Continent V*, Commerce's claim that academia supports the simple average appears to be contradicted by the literature itself.

Appx1727.

As this history reveals, in *Mid Continent III*, *V*, and *VI*, this Court and the Trial Court have agreed that the academic literature does not support any of the reasons advanced by Commerce for its chosen SA methodology.

B. THE ACADEMIC LITERATURE

Commerce's test for determining whether there is a pattern of prices "for comparable merchandise that differ significantly among purchasers, regions or periods of time" is based on its analysis of academic literature: *Cohen*, *Coe*, and *Ellis*.⁵ In *Mid Continent VI*, the Trial Court held that "Commerce's claim that academia supports the simple average appears to be contradicted by the literature itself." Appx1727.⁶

Moreover, in *Mid Continent V*, this Court concluded that "the cited literature makes clear that one way to form the more general data-pool dispersion figure for the denominator—seemingly the preferred way if the full set of

⁵ Jacob Cohen ("Cohen") (Appx523-561), Robert Coe ("Coe") (Appx563-573), and Paul D. Ellis ("Ellis") (Appx478-521).

⁶ See also Appx678-732 (excerpts from additional literature reasoning that weighted averaging and not simple averaging should be used when group size is not the same).

population data is available—is to use the standard deviation for the entire population.” Appx982. In support of this conclusion, this Court quoted *Ellis*:

To calculate the difference between two groups we subtract the mean of one group from the other ($M_1 - M_2$) and divide the result by the standard deviation (SD) *of the population from which the groups were sampled*. The only tricky part in this calculation is figuring out the population standard deviation. If this number is unknown, some approximate value must be used instead.

Appx982. And *Coe*:

The “standard deviation” is a measure of the spread of a set of values. Here it refers to the standard deviation *of the population from which the different treatment groups were taken*. In practice, however, this is almost never known, so it must be estimated either from the standard deviation of the control group, or from a “pooled” value from both groups (emphasis added).

Appx982. And *Cohen*:

Cohen similarly indicates that the ideal denominator is the full population's standard deviation, which may be approximated by a pooled estimate. *See Cohen* at 27 (dividing by “the common within-population standard deviation”); *Cohen* at 67 (noting that the denominator is “the usual pooled within sample estimate of the population standard deviation”—indicating that the pooling method, based on the standard deviations of each of the two groups, aims to estimate the standard deviation of the overall population). When the full population data set is unavailable, all of the cited literature points to use of a “pooled standard deviation” of the two particular groups at issue to form the denominator. *Cohen* at 67; *Ellis* at 10, 26–27; *Coe* at 6.

Appx982.

Cohen’s views on relying on simple averages to calculate the yardstick

denominator were discussed extensively at the *Mid Continent V* Oral Argument.

Appx2391-2400. In *Mid Continent V* the court reasoned:

The section of *Cohen* (at 359–61) cited by Mid Continent and Commerce for its “abstract effect” language is no exception. It nowhere recites use of a simple average for calculating a pooled standard deviation from groups of unequal size. . . . It expressly sets forth a simple average formula for when the groups are equal in size but a weighted average formula for when the groups are of different size. . . . Nothing in the section applies simple averaging to pooled standard deviation estimates for different-size groups.

Appx982-983.⁷

The fact that the literature upon which Commerce relies in its differential pricing analysis – *Cohen*, *Coe*, and *Ellis* – expressly concludes that the Cohen’s *d* denominator should be based on the full population’s standard deviation, and should never be based on simple averaging of unequal sized groups, creates an extraordinarily high bar for Commerce to overcome in this fourth bite at the apple. To succeed, Commerce needs to establish why and how its SA rationale is supported by substantial evidence when the academic literature upon which Commerce has relied throughout this litigation, and which was used to create Commerce’s Cohen’s *d* test, does not support reliance on simple averaging.

⁷ See Reply Brief of Defendants-Appellants at Attachment 1, *Mid Continent Steel & Wire Inc. v. US*, Case No. 2021-1747 (Fed. Cir. Sept. 3, 2021), ECF No. 23.

C. COMMERCE'S REDETERMINATION

In the Redetermination subject to this appeal, “Commerce respectfully disagree{d}” with the *Mid Continent V* and *Mid Continent VI* holdings, but nevertheless concludes that “Commerce’s use of the simple average in the Cohen’s *d* test is reasonable when the data under analysis are the full populations of sale prices in the test group and of sale prices in the comparison group.” Appx2409.

Commerce justifies its new rationale as follows:

Because the sample sizes are equal in size and reliability, the estimated standard deviation for each of the sampled groups also has the same “reliability” (or precision) of a sample value {which} is the closeness with which it can be expected to approximate the relevant population value.” Consequently, a simple average of the standard deviations of the two groups is appropriate because the reliability of each value of the standard deviation is equal. In other words, when the sample sizes of the two groups are equal, then the reliability of the estimates of the standard deviations are the same, and it is appropriate to give equal weights, *i.e.*, a simple average, when averaging the two standard deviations to calculate the denominator of the Cohen’s *d* coefficient.

Appx2411.⁸ Commerce claims that its “equally reliable” rationale is consistent with the academic literature.

To follow the logic to its conclusion, the academic literature teaches that weight averaging is appropriate when the reliability of the samples is different; the literature also teaches that the reliability increases as the sample size increases. Therefore, when using a full population, *i.e.*, a “sample size” of 100%, and regardless of the number of observations in the sample, the reliability reaches 100%,

⁸ See also Appx2412-2413, Appx2424.

and it is appropriate to weight the values equally, *i.e.*, to calculate a simple average.

Appx2425.⁹

In sum, in its Redetermination, Commerce argues that it has now, after eight years and three failed attempts, found a rationale which adequately explains why SA is reasonable and WA is not. The Trial Court affirmed. Appx1-21.

SUMMARY OF ARGUMENT

Commerce's reliance on an SA methodology to calculate the denominator yardstick used to determine whether there is a significant difference in pricing patterns of a Test Group and a Comparison Group is not supported by substantial evidence and is contrary to law.

First, *Cohen*, *Coe*, and *Ellis* – the authority upon whom Commerce relies in adopting the Cohen's *d* test - have all opined that the yardstick denominator when applying the Cohen's *d* test to full populations should be the combined standard deviation of all units in the Comparison Group and Test Group. They also expressly recognize that simple averaging cannot be used when test and comparison groups are different in size. Commerce cannot use Cohen/Coe/Ellis to create its Cohen's *d* test, and then ignore this literature's mandate that the

⁹ See also Appx2456.

denominator yardstick cannot be based on a simple average of the two groups being compared.

Second, the reason why the academic literature does not allow Commerce to rely on simple averaging is graphically illustrated in the data reproduced in this Brief. The five referenced examples show that simple averaging elevates the importance of small quantity sales over their actual impact on the overall data. When these sales fall into groups with large price spreads (i.e., large standard deviations) a pass (which means that price differences between the groups are significant) is turned into a no pass, by artificially increasing the yardstick denominator. By setting a small quantity price in this manner, an exporter could readily exploit the flaw inherent in simple averaging, enabling substantial targeted dumping to go undetected. In contrast, the graphic illustrations reveal that small quantity sales in groups with small price spreads result in Commerce determining that significant price differences exist when, in fact, there is no discernable difference between pricing patterns in the Test Group and Comparison Group.

Third, both Commerce and the courts have repeatedly and correctly recognized that relying on weighted averaging of data leads to accurate results, while simple averaging does not. This general principle applies to this case, since using a simple average elevates low quantity groups as equivalent to groups with much larger quantities. This results in low quantity sales, which can be aberrational

and distortive, to become the norm and trigger affirmative findings of significant price differentials or mask their presence. Thus, simple averaging cannot be used when data needed to calculate a weighted average is readily available, as in this case.

Fourth, in its differential pricing analysis, Commerce compares weighted average prices in a Test Group with weighted average prices in a Comparison Group, and also calculates weighted average standard deviations of each Group. However, inexplicably, to calculate the denominator yardstick Commerce relies on a simple average of the data for each group. Reliance on a simple average at this stage of Commerce's analysis is internally inconsistent with the remainder of Commerce's analysis, and, therefore, contrary to law.

Fifth, simple averaging skews critical factors influencing pricing behavior, most notably quantities sold and spreads between prices. An accurate analysis requires that Commerce consider these factors. Consideration of quantity is particularly important to this case, since Commerce's differential pricing methodology places each sale in multiple groups. Simple averaging results in a sale having one weight when assigned to one arbitrary group and a second, totally different weight when assigned to another group. In weighted averaging, the impact of an individual sale stays the same regardless of its assignment. Thus,

weighted averaging conforms to basic statistical principles; simple averaging does not.

Sixth, courts have thrice rejected Commerce's reliance on simple averaging, and Commerce's fourth attempt to justify its SA methodology fares no better than Commerce's prior attempts. Commerce's claim that relying on SA "is appropriate because the reliability of each value of the standard deviation is equal" does not make sense. Equality in reliability is not relevant in determining whether the Cohen's d denominator should be based on WA or SA. The fact that the Test Group and Comparison Group of a full population may be equally reliable does not constitute a reason for assigning equal weight to each group's standard deviation when computing the yardstick denominator.

Finally, this Court is considering three alternative methodologies for calculating the Cohen's d denominator: (1) weighted average pooled standard deviation, as requested by PT; (2) standard deviation of the entire population (Test Group and Comparison Group), without pooling, as suggested by this Court in *Mid Continent V*; and (3) simple average standard deviation, as applied by Commerce. In its Redetermination, Commerce rejected this Court's *Mid Continent V* proposal because, according to Commerce, this proposal did not properly consider the "between spread." In relying on this rationale, Commerce fails to recognize that its simple average methodology is similarly flawed. It also ignores the fact that both

the WA pooling methodology and the SD of the entire population methodology accord equal importance to each kilogram of nails being sold; in contrast, Commerce’s SA methodology accords greater importance to those nails in the subgroup with the lesser weight. Thus, the WA methodology and the SD methodology without pooling are reasonable; relying on a simple average of two groups of unequal size and unequal standard deviations is not.

ARGUMENT

A. STANDARD OF REVIEW

When reviewing Commerce determinations, this Court “applies anew the standard of review applied by the {CIT} in its review of the administrative record. . . . In doing so, {this Court will} uphold Commerce’s determination unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a (b)(1)(B)(i) (1994).” *F.Lii De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1031 (Fed. Cir. 2000). “{S}ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Corp. v. NLRB*, 305 U.S. 197, 229 (1938)).

PT is not challenging Commerce’s use of Cohen’s *d* or the differential pricing analysis *in general* to determine whether targeted dumping is occurring and

whether the criteria of 19 U.S.C. § 1677f-1(d)(1)(B) are satisfied.¹⁰ The statute, however, contains the mandatory directive requiring that Commerce determine whether “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time.” The differential pricing methodology selected by Commerce must satisfy this directive in every application. *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int’l Trade 1986), *aff’d* 810 F.2d 1137, 1139 (Fed. Cir. 1987). A methodology can be unreasonable if it is internally inconsistent, distortive or fails to achieve the statutory purpose, in light of the facts and circumstances in a particular case. *See LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 460-461 (Fed. Cir. 1990) (reversing Commerce decision which was “internally inconsistent” and contrary to a respondent’s “usual and reasonable commercial behavior”).

In *Yangzhou Bestpak Gifts & Crafts Co.*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) this Court discussed Commerce’s responsibility as follows:

Nevertheless, ‘{w}hile various methodologies are permitted by the statute, it is possible for the application of a particular methodology to be unreasonable in a given case.’ . . . {F}orm should be disregarded for substance and the emphasis should be on economic reality.’. . . Although Commerce may be permitted to use a simple average methodology to calculate the separate rate, the circumstances of this

¹⁰ This issue is being litigated in *Stupp Corp. v. United States*, Appeal No. 23-1663 (Fed. Cir. docketed Mar. 27, 2023).

case renders a simple average of a *de minimis* and AFA China-wide rate unreasonable as applied. Similarly, a review of the administrative record reveals a lack of substantial evidence showing that such a determination reflects economic reality.

PT submits that Commerce's SA rationale is unreasonable as a matter of law.

However, even if this Court disagrees, Commerce's decision cannot be sustained unless this Court also concludes that Commerce has established that based on the facts in this case, simple averaging of the Cohen's *d* denominator leads to a reasonable result and is supported by substantial evidence. In other words, Commerce needs to establish how and why, based on this administrative record, simple averaging constitutes a reasonable method of determining whether PT's Test Group prices are, or are not, substantially different from PT's Comparison Group prices. And in deciding whether Commerce has met this burden, this Court should consider the fact that Commerce's rationale for relying on SA has changed from one redetermination to the next. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n. 30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("The consistency of an agency's position is a factor in assessing the weight that position is due."); *Tung Mung Dev. Co. v. United States*, 25 C.I.T. 752 (2001) ("The case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.").

B. COMMERCE’S RELIANCE ON SA IS CONTRARY TO THE ACADEMIC LITERATURE ON WHICH COMMERCE’S COHEN’S D TEST IS BASED

As discussed above, this court, in *Mid Continent V*, reasoned that *Cohen*, *Coe*, and *Ellis* – the authority upon whom Commerce relies in adopting the Cohen’s *d* test – believed that when analyzing full populations the yardstick denominator should be based on the standard deviation of that population. The court cited *Ellis* for the proposition that “to calculate the difference between two groups we subtract the mean of one group from the other ($M_1 - M_2$) and divide the result by the standard deviation (SD) of the population from which the groups were sampled,” which according to *Ellis* is “tricky” when “this number is unknown.” Appx982. The Court then cited *Coe* for the identical proposition, i.e., that when the full population is known, the denominator should be “the standard deviation of the population from which the different treatment groups were taken,” but *when unknown*, “it must be estimated either from the standard deviation of the control group, or from a “pooled” value from both groups.” Appx982. Finally, the *Mid Continent V* court stated that “*Cohen* similarly indicates that the ideal denominator is the full population’s standard deviation, which may be approximated by a pooled estimate.” Appx982. It concluded that “*when* the full population data set is unavailable, all of the cited literature points to use of a ‘pooled standard deviation’ of the two particular groups at issue to form the denominator”. Appx982.

In *Mid Continent VI*, the Trial Court concluded that “the Court of Appeals has already held that literature does not suggest simple averaging for unequal-sized groups.” Appx1726.¹¹

This Court’s analysis in *Mid Continent V* constitutes the law of this case. See *Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1097 (Fed. Cir. 1996), citing *Arizona v. California*, 460 U.S. 605, 618 (1983) (“{T}he {law of the case}” doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.”); *Robinson v. McDonough*, No. 2021-1784, 2022 WL 499845, at *2 (Fed. Cir. Feb. 18, 2022) (“Under the law-of-the-case doctrine, courts generally refuse to reconsider questions of law and fact that have already been decided during litigation to ‘prevent relitigation of issues.’ . . . The doctrine extends to both explicit findings and ‘things decided by necessary implication.’”).

Moreover, Commerce cannot use *Cohen/Coe/Ellis* to create its Cohen’s *d* test, and then to justify its reliance on SA ignore *Cohen/Coe/Ellis*’ mandate that the denominator yardstick cannot be based on a simple average of the two groups being compared. Commerce’s fourth redetermination is based, in large part, on Dr. Cohen’s statement that “the larger the sample size, other things being equal, the

¹¹ See also Appx675-732 (citations to additional literature).

smaller the error and the greater the reliability or precision of the results.”

Appx2410. However, after relying on Dr. Cohen’s analysis to support its continued decision to use an SA methodology to calculate the yardstick denominator, Commerce ignores *Cohen/Coe/Ellis* conclusions that the standard deviation of the entire group should be used as the yardstick denominator when analyzing full populations and that an SA methodology should never be used when comparing groups of unequal sizes with unequal standard deviations.

In sum, as a matter of law, Commerce cannot base its targeted dumping methodology on *Cohen/Coe/Ellis* and then turn around and calculate the yardstick denominator based on an SA methodology which *Cohen/Coe/Ellis* expressly reject.

C. COMMERCE’S DECISION LEADS TO UNREASONABLE RESULTS

Nowhere in its redetermination does Commerce even attempt to explain how and why SA is a reasonable methodology when applied to the facts of this case. While this failure constitutes sufficient reason for this court to remand this case for further redetermination, this Court should take the additional step of precluding Commerce from once again relying on SA for the fifth time in what will be its fourth redetermination.

The record in this litigation contains graphical illustrations of five price comparisons: One hypothetical which was the focus of the oral argument in *Mid*

Continent III and four actual comparisons found in PT's database. See Appx1807-1813. Commerce has accepted the factual accuracy of these data and has acknowledged that these data reveal that relying on WA leads to results which differ from relying on SA.

When the weights are based on the sales quantities of each group, the smaller group will have less weight than the larger group, and the value being averaged (*i.e.*, the standard deviation) will have a smaller impact on the calculated average, and conversely the value of the larger group will have a larger impact. If the standard deviation of the smaller group is small, then the calculated average will be larger and the Cohen's *d* coefficient will be smaller. If the standard deviation for the smaller group is larger, then the calculated average will be smaller and the Cohen's *d* coefficient will be larger.

Appx2452-2453.

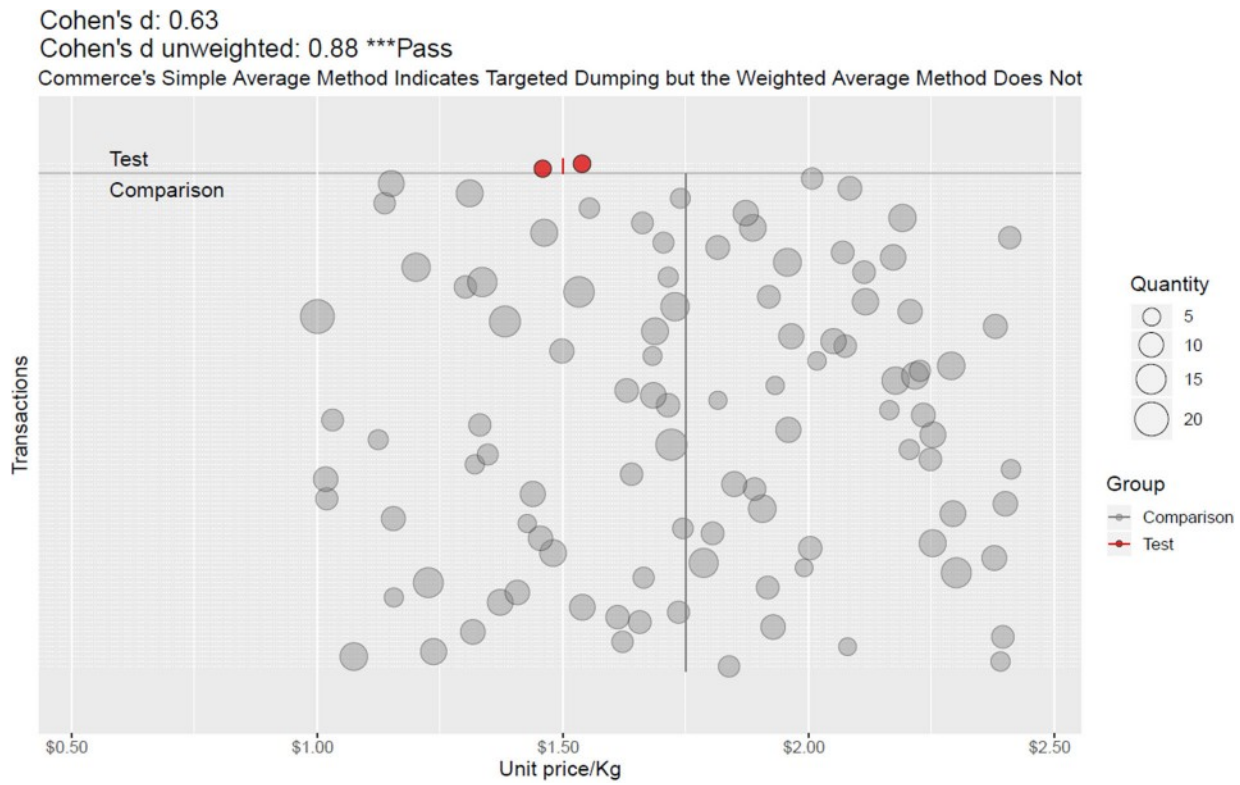
The existence of these differences, and the impact of large and small groups and standard deviations on the result of the applying the Cohen's *d* test – *i.e.*, whether the comparison results in a “pass” (affirmative finding of targeting) or “no-pass” (negative finding of targeting) – is not in dispute. PT submits that these examples illustrate how and why WA is reasonable, while SA is not. In response, Commerce claims that PT's argument is an “arithmetic tautology.” Appx2452.

As Commerce acknowledges, when WA is used, if the Test Group and Comparison Group have different quantities, the group with the larger quantity will have a greater impact on the ultimate result. In this manner, each kilogram (or each nail) has an equal impact on the result, whether in the Test Group or the

Comparison Group. In contrast, when SA is used, each group has the identical weight, regardless of its size, and a kilogram in the smaller group has a greater impact on the results than a kilogram in the larger group. Moreover, when the smaller group has a small standard deviation, the denominator of the Cohn's d calculation is smaller than it would be when the small group has a large standard deviation. The smaller the denominator, the greater the " d " and the more likely that the ultimate result will be a pass (signifying targeted dumping) than a no-pass (signifying no targeted dumping).

Cohen's d also is affected by how its numerator is computed. The numerator—whose calculation is not disputed—is the difference of two *quantity weighted* means. Thus, in Commerce's SA methodology each kilogram affects the numerator of Cohen's d in one way but affects the denominator in a different way. In contrast, the WA methodology uses consistent weights for each kilogram sold in both the numerator and the denominator.

These results are depicted in the graphs of five representative pricing examples which PT placed on the record. These examples are set forth below. The first example shows hypothetical data. The other four show sales in PT's database.

Figure 1 - Hypothetical Example Discussed in *Mid Continent III***DATA AND METHODOLOGY¹²**

1	2	3	4	5	6	7	8	9
Q Test	Q Comp	WA Price Test	WA Price Comp	Price Diff.	Price Range Test	Price Range Comp	SD Test	SD Comp
10	1000	\$1.50	\$1.75	\$0.25	\$1.46 - \$1.54	\$1.00 - \$2.46	\$0.04	\$0.40

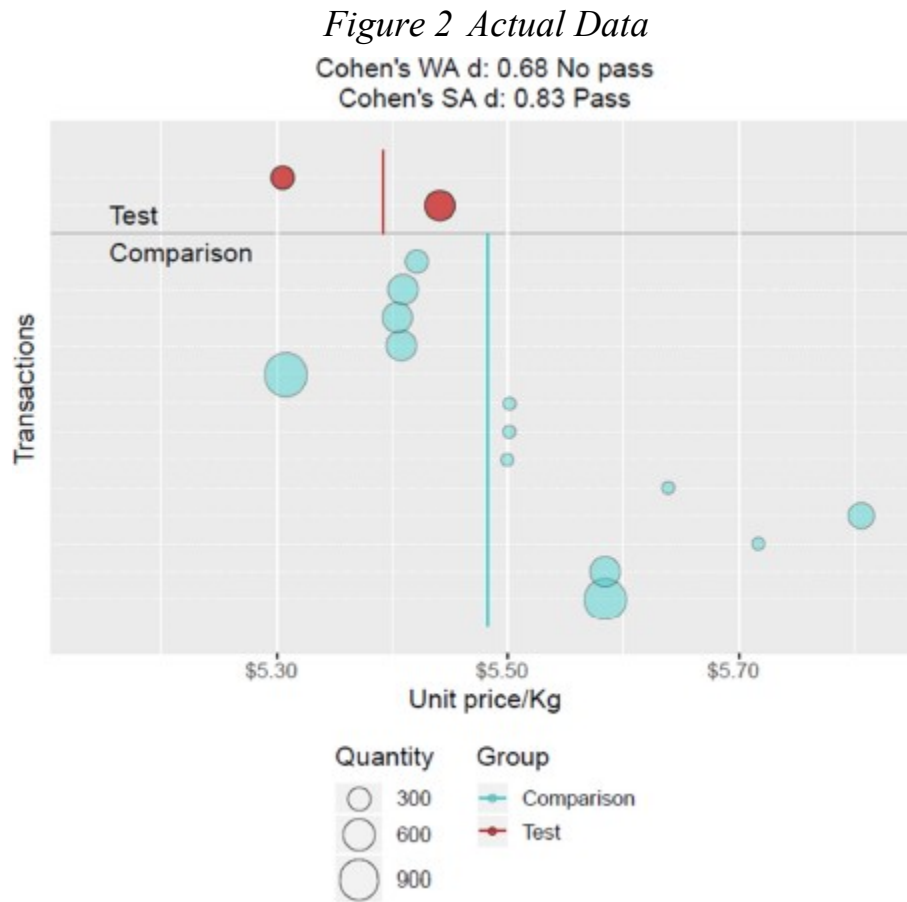
¹² The columns in this table and the four other tables set forth below contain the following information: **(1-2)** “Q Test and Q Comp”: quantity, in kilograms (kg), in the Test Group and the Comparison Group. **(3 – 4)** “WA Price Test” and “WA Price Comp”: weighted average price, in \$/kg, in the Test Group and the weighted average price, in \$/kg, in the Comparison Group. **(5)** “Price Difference”: Difference in price, in \$/kg, between the WA Price Comp and WA Price Test (5 = 4 – 3). **(6 – 7)** “Price Range Test” and “Price Range Comp”: high and low prices, in \$/kg, in the Test Group and the Comparison Group. **(8-9)** “SD Test” and “SD Comp”: standard deviation, in \$/kg, in the Test Group and the Comparison Group. **(10)** “PSD”: pooled standard deviation, in \$/kg, computed by simple averaging and weighted averaging (this is the only step in computing Cohen’s *d* where SA and WA differ). The PSD for SA is obtained by summing the squares of the \$0.04 and \$0.40 SDs, dividing by two, and taking the square root. The PSD for WA is obtained by (a) multiplying the square of \$0.04 by 10kg; (b) multiplying the square of \$0.40 by 1000 kg; (c) dividing the sum of these results by 1000 + 10 kg; and (d) taking the

	10	11	12	13
	PSD	d calculation	d	Pass
Simple average	\$0.284	0.25/0.284	0.88	yes
Weighted average	\$0.398	0.25/0.398	0.63	no

Source: Appx866; Appx1808-1809; Oral Argument at 11:07 – 17:55 (PT) and 25:27 – 35:52 (Government), *Mid Continent III*.

square root. **(11)** “ d Calculation”: to calculate Cohen’s d , the numerator is the Price Difference (5) and the denominator is the PSD (10). **(12)** “ d ”: the value of “ d ” used to determine whether there is a “pass” or “no pass”. **(13)** “Pass” is “yes” when d is greater than 0.80, taken as an indication of targeted dumping in this CONNUM; “Pass” is “no” when d is less than 0.80, which means that there is no indication of targeted dumping.

Figure 2 - Data Presented to CIT in *Mid Continent IV*
CONNUM 121012572121, REGION SOUTH

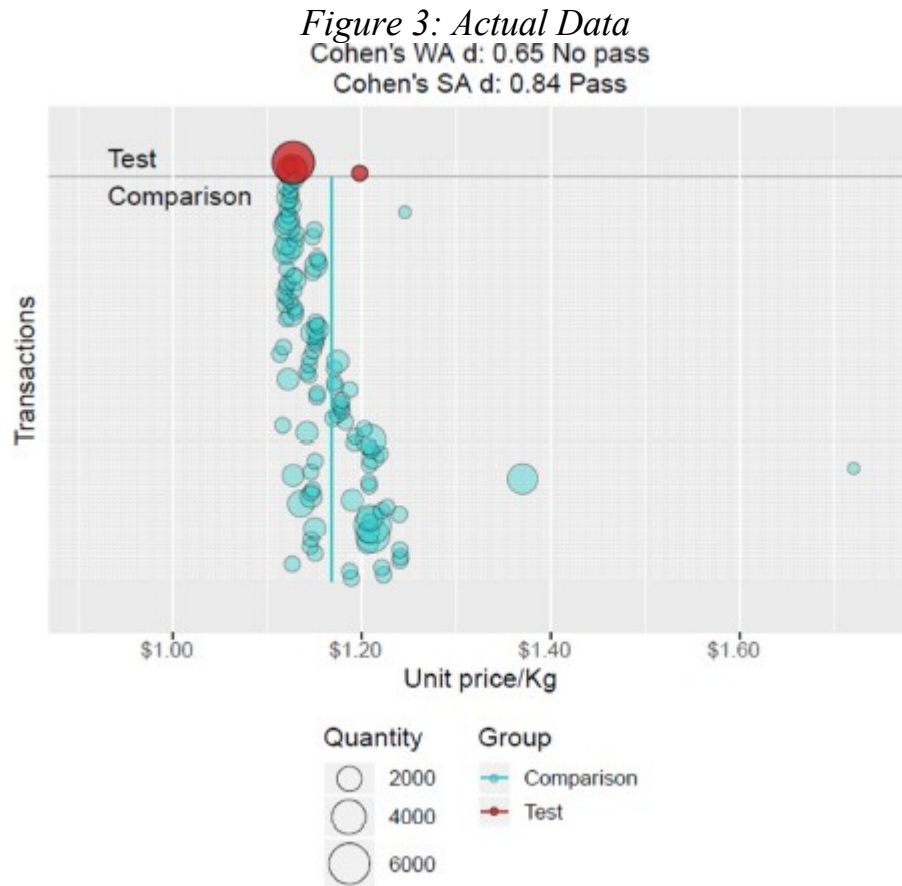


Q Test	Q Comp	WA Price Test	WA Price Comp	Price Diff	Price Range Test	Price Range Comp	SD Test	SD Comp
884.40	5673.60	5.392	5.483	0.091	5.305 – 5.441	5.308 – 5.806	0.07	0.14

	PSD	<i>d</i> calculation	<i>d</i>	Pass
SA	0.110	0.091/0.110	0.83	yes
WA	0.133	0.091/0.133	0.68	no

Source: Appx643-653, Appx869-871, Appx917-924, Appx1810.

Figure 3 – Actual Data; small quantity; small SD
 CONNUM 127014570111, West Region



Q Test	Q Comp	WA Price Test	WA Price Comp	Price Difference	Price Range Test	Price Range Comp	SD Test	SD Comp
11,252	125,623	1.13220	1.16903	0.03683	1.12508 – 1.19807	1.11335 – 1.72100	0.01831	0.05910

	PSD	d calculation	d	Pass
SA	0.043751	0.03683/0.043751	0.84	yes
WA	0.056863	0.03683/0.056863	0.65	no

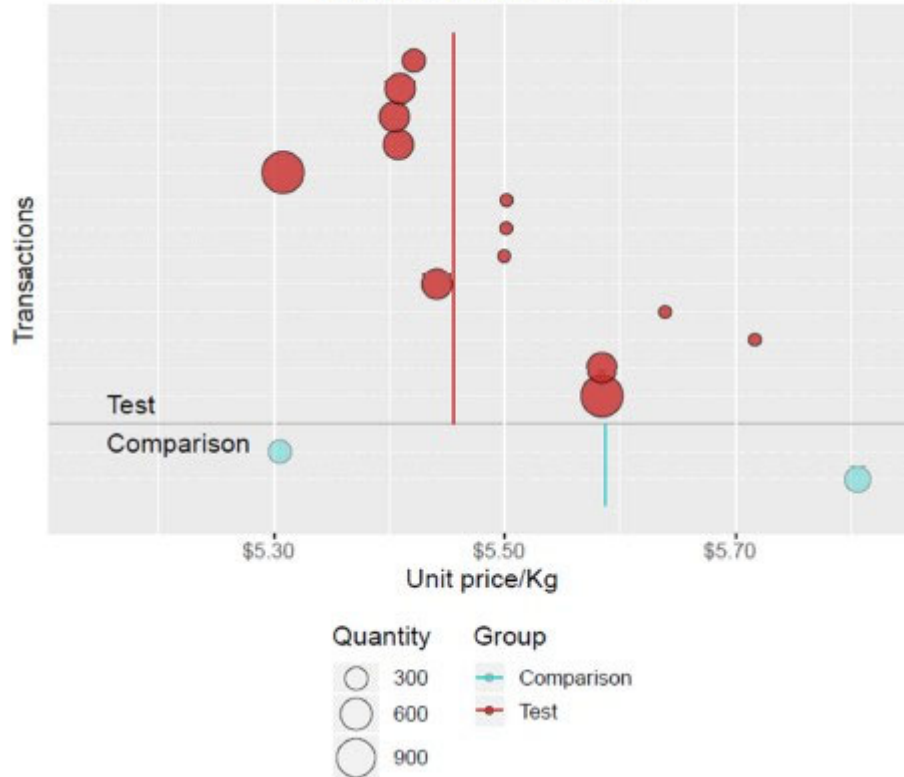
Source: Appx926-935, Appx1811.

Figure 4 – small quantity; large SD
 CONNUM 121012572121, Purchaser

Figure 4 Actual Data

Cohen's WA d: 1.01 Pass

Cohen's SA d: 0.69 No pass



Q Test	Q Comp	WA Price Test	WA Price Comp	Price Diff.	Price Range Test	Price Range Comp	SD Test	SD Comp
5822	736	5.45563	5.58696	0.13133	5.30769 - 5.71693	5.3049 - 5.80605	0.10686	0.24859

	PSD	D calculation	<i>d</i>	Pass
SA	0.19133	0.13133/0.19133	0.69	no
WA	0.13165	0.13133/0.13065	1.01	yes

Source: Appx948-954, Appx1812.

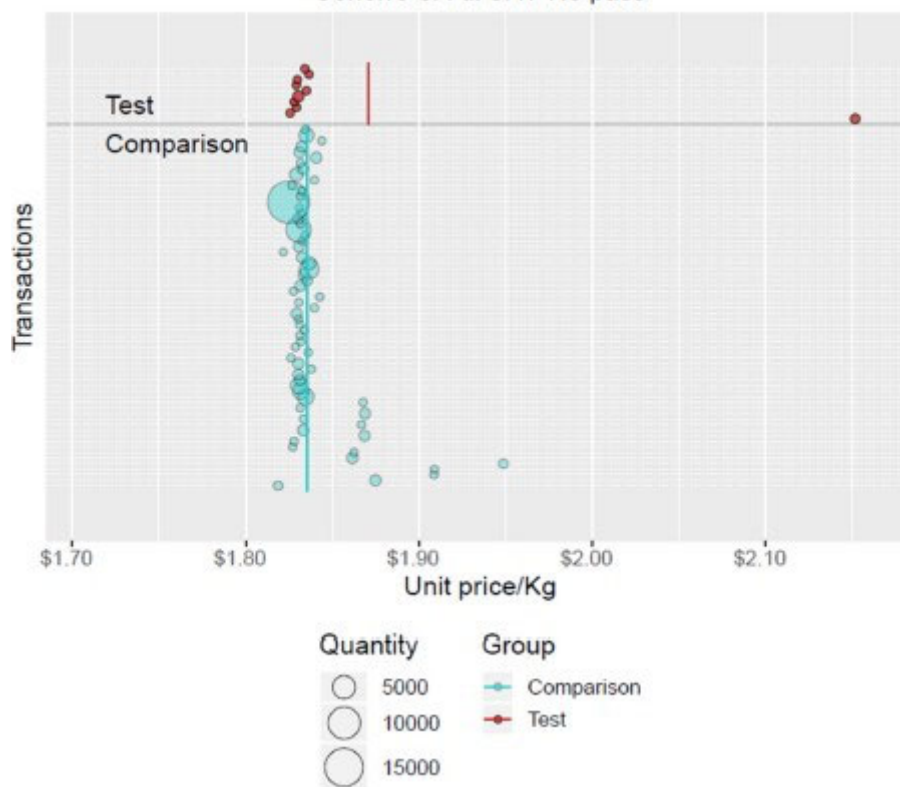
Figure 5 -small quantity with outlier sale; large SD

CONNUM 127033572121 MIDWEST Region

Figure 5 Actual Data

Cohen's WA d: 1.10 Pass

Cohen's SA d: 0.47 No pass



Appx1148.

Q Test	Q Comp	WA Price Test	WA Price Comp	Price Diff.	Price Range Test	Price Range Comp	SD Test	SD Comp
5757.50	78448.70	1.87084	1.83523	0.03561	1.82569-2.15165	1.82177 – 1.94873	0.10599	0.01742

	PSD	D calculation	d	Pass
SA	0.075955	0.03561/0.075955	0.4747	no
WA	0.032416	0.03561/0.032416	1.1010	yes

Source: Appx956-964, Appx1813.

These examples show the WA mean prices in each group and plot the data to reveal how the prices are spread within each group and what the transaction

quantities are. The unit prices are accurately indicated by the horizontal locations of the circular symbols. The transaction quantities are proportional to the areas of the same symbols. Two vertical-colored lines depict the weighted group means.

These visual displays of spreads and weights reveal how SA weights the smaller group (the one with lower total quantity; i.e., kilograms sold). When the smaller group has a small spread, the SA methodology *decreases* the yardstick denominator, resulting in an *increase* in Cohen's d . This can cause a low "no-pass" value of d to exceed Commerce's threshold of 0.80, resulting in a "pass." Visually, this phenomenon is assessed by comparing price differences to the degree of horizontal spreading in the price points: that is the meaning of Cohen's "relative effect size," of which Cohen's d is the prime example.

In the first three examples (Figures 1, 2, and 3), the differences in WA prices are \$0.25/kg, \$0.09/kg, and \$0.37/kg, respectively. These absolute differences do not (alone) establish whether the difference is significant. Nor is the significance of the difference determined by the percentage difference between these prices and a potentially normal price. Rather, by relying on a methodology based on Cohen's d , Commerce compares this absolute difference in prices to a calculated spread between sales prices in the CONNUM, and if so, whether the difference is large compared to the spread. This comparison can be made visually by assessing the differences in average group prices relative to the large horizontal dispersions of

the points within each group. In the first three examples, Test Group sales prices do not differ appreciably from Comparison Group sales prices. In fact, any of the Test Group red dots could have arisen by sampling the Comparison Group gray or blue dots—all red dots fit comfortably in the middle of the range of the Comparison Group prices—indicating the economic pricing patterns of the groups are similar. This visualization corresponds to the intended meaning and mathematical calculation of Cohen’s d .

In all the figures the total amount of a color (red, blue, or gray) indicates the total size of each group. WA respects these amounts; SA ignores them, allowing the spread within any small group to have an effect on the determination unrelated to the size of the group. SA steers the yardstick towards the value of the smaller group, *whether that is the higher or lower of the two group standard deviations*. The difference between WA and SA only has an impact on the result in comparisons in which the resulting d is near the 0.8 threshold. These examples were chosen to illustrate this impact. They were not “cherry picked” to present a biased perspective on the two methods; rather, they were chosen to illustrate this *predictable and visually evident* difference between the methods.

In contrast to the first three figures, Figures 4 and 5 display patterns of visually apparent price differences that WA detects but SA fails to find. In Figure 4 the smaller Comparison Group comprises two transactions (gray dots). These are

the lowest price and highest price for all sales in the CONNUM, a pattern characteristic of “masked dumping”: a sale at an unusually low unit price of \$5.31 is counterbalanced by another sale at an unusually high unit price of \$5.81. A procedure designed to identify masked dumping should flag this pattern.

Similarly, in Figure 5, the extreme price in the small Test Group led to a no-pass determination using SA because *that price alone* caused the SD of its group to be large. This is another predictable result of SA: whenever the total quantity in one group is small, a single small-quantity transaction at an unusual price will inflate the group’s standard deviation, decreasing the *d*. The same no-pass SA result also will occur when, hypothetically, the extremely high Test Group transaction price in Figure 5 is replaced by an extremely *low* Test Group price. Such an extremely low-priced sale should be treated as evidence of targeted dumping, but under Commerce’s SA methodology, it is not. Thus, the SA methodology allows small transactions at extremely unusual prices to hide within Cohen’s *d*.

This Court should not ignore these results. They are not cherry-picked isolated examples; rather, they are illustrations of the overall impact of the SA methodology on all of PT’s sales subjected to the Cohen’s *d* test. They show **why** *Cohen/Coe/Ellis* agree that SA cannot be utilized when the Test Group and Comparison Group differ in size and standard deviations. They show **why** WA is

reasonable to apply to the facts in this case to achieve the statutory goal of determining whether prices in two groups are significantly different, and why SA is not.

Notwithstanding these facts, the Trial Court claimed: “Plaintiff’s examples serve to illustrate how weighting would work; they do not undermine the reasonableness of Commerce’s use of a simple average.” Appx19. According to the Trial Court, these examples are of “little analytical value.” Appx19 at n.12. The Trial Court is wrong: (1) The examples confirm that a group with small quantity sales with abnormally high or low standard deviations will lead to substantially different results in SA and WA; (2) relying on SA leads to findings of significant differences when all Test Group sales prices fit comfortably in the middle range of the Comparison Group prices (Figures 1, 2, 3) and no significant differences when certain sales prices are undeniably outside the norm (Figures 4, 5); (3) Commerce did not present record evidence as to how SA is reasonable based on the facts of this case; and (4) *Cohen/Coe/Ellis* agree that SA should not be used when a Test and Comparison Group are not the same size and have different standard deviations.

Finally, methodologies are validated by results; examining the accuracy of results is the best method of confirming that a methodology is reasonable in the real world, in light of its statutory purpose. PT’s analysis shows that the SA

methodology leads to results which are not supported by substantial evidence, are contrary to economic reality and, in certain cases, are absurd. As such, that SA theoretically may be reasonable in certain circumstances does not mean that it is reasonable when applied to PT's database. *See Bestpak, supra*, 716 F.3d at 1378; *see also Sorrells v. United States*, 287 U.S. 435, 446 (1932) (statutory interpretation cannot be upheld "at the expense of the reason of the law and producing absurd consequences."); *Pitsker v. Off. of Pers. Mgmt.*, 234 F.3d 1378, 1383 (Fed. Cir. 2000) ("OPM's requirement also violates the canon of statutory construction that an interpretation that causes absurd results is to be avoided if at all possible."); *Timex V.I. v. United States*, 157 F.3d 879, 886 (Fed. Cir. 1998) ("statutory construction that causes absurd results is to be avoided if at all possible").

D. ADMINISTRATIVE PRACTICE AND JUDICIAL PRECEDENT SUPPORT RELYING ON WEIGHTED AVERAGING

Commerce's comparison of prices in two markets (i.e., Test Group and Comparison Group) in its differential pricing analysis is substantially similar to Commerce's comparison of prices in two markets (i.e., home market and U.S. market) in its determination of dumping margins. In its margin analysis in initial

investigations,¹³ Commerce calculates the weighted average U.S. price (e.g., \$986.36 for Product 1) and the weighted average home market (or third country) price (e.g., \$905.56 for Product 1) (known as Normal Value (“NV”)) of multiple distinct, equally reliable, full populations of U.S. sales and NV sales on a CONNUM-specific basis. Next, Commerce calculates the dumping margin for each CONNUM, by comparing the WA of NV prices and the WA of U.S. prices ($\$905.56 - \$986.36 = -\$80.80$). Commerce then calculates the absolute dumping margin for each CONNUM (i.e., WA margin ($-\$80.80$) multiplied by quantity of U.S. sales (1,100)) and adds these absolute CONNUM specific dumping margins ($-\$88,889$) together to calculate the potential uncollected dumping duty due (commonly known as “PUDD”) ($-\$88,889 + \$75,000 + \$24,375 = \$10,486$). Finally, Commerce divides this numerator ($\$10,486$) by the total value of U.S. sales (the denominator) ($\$2,407,500$) to calculate a WA dumping margin (0.44%).

Commerce’s Cohen’s *d* analysis is similar. Commerce calculates weighted average mean prices of a Test Group and a Comparison Group on a CONNUM specific basis. It then determines the difference in these WA prices. This is the Cohen’s *d* numerator. Commerce also calculates weighted average standard deviations of the sales in each group.

¹³ See *Union Steel v. United States*, 36 C.I.T. 288, 305 (2012), *aff’d*, 713 F.3d 1101 (Fed. Cir. 2013), at Appendix, page 1. The quantity and values in the text of this Brief track the data in Appendix, page 1, “Average-to-Average Comparisons (without Zeroing).”

Relying on a WA rather than an SA of the SDs for the Cohen's *d* denominator is consistent with the manner in which Commerce calculates ADD margins; relying on a SA of the SDs is not. In calculating ADD margins and Cohen's *d* percentages, sales quantity (i.e., kilograms sold) is a critical factor throughout the analysis. Commerce considers quantity in all phases of its margin analysis. In its Cohen's *d* pricing calculations, Commerce also considers quantity in all phases of the analysis – until the very end, at which point it inexplicably relies on simple averaging two groups of data which have been obtained by weighted average prices and weighted standard deviations of prices. As discussed, this abrupt change in methodology skews the results by according more weight to certain sales (and less weight to others) than they previously had been accorded throughout the analysis. It also leads to Commerce's Cohen's *d* analysis being inconsistent with its margin calculation methodology, and therefore unreasonable.

In its Redetermination, Commerce attempts to distinguish its margin calculation methodology from its Cohen's *d* methodology. It then claims that “none of the” cases cited by PT in support of relying on WA “involved the advanced statistical concepts at issue in this case.” Appx2454.

Commerce is wrong. There are no material differences between the two analyses. Both analyses compare weighted average prices of comparable merchandise in two groups. The purpose of both comparisons is to determine the

significance of a difference in prices. In both analyses “two distinct groups of data are compared” to determine whether the differences in prices are significant. As such, calculating the Cohen’s *d* numerical result is substantially similar to calculating weighted average dumping margins.

Indeed, Commerce itself has acknowledged that relying on WA is preferable to relying on SA.

The Department prefers a weighted-average because it more accurately reflects overall trade by accounting for relative import volumes; using a simple average to increase the impact of lower volume exporters necessarily distorts the margin by inflating the effect of a smaller amount of data.

Polyethylene Terephthalate Film, Sheet, and Strip From China: Final Results of Antidumping Duty Administrative Review, 77 Fed. Reg. 14,493 (March 12, 2012), IDM at 8.

Courts have agreed. *See, e.g., MacLean-Fogg Co. v. United States*, 100 F. Supp. 3d 1349, 1359–64 (CIT 2015) (holding that relying on an SA, rather than a WA, was “unreasonable in light of the statute's clear preference for the accuracy enhancing value of weight-averaging and the particular facts of this case.”); *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1096 (CIT 2001) (rejecting Commerce’s unreasoned reliance on simple average data in lieu of more accurate weighted average data); *Diamond Sawblades Manufacturers’ Coal. v. United States*, 2015 WL 5603898 at *5 (CIT 2015), *aff’d* 866 F.3d 1304 (Fed. Cir.

2017) (holding that simple averaging was permissible only because “the record contained no information about what portion of the PRC-wide entity ATM comprised.”). In *RZBC Grp. Shareholding Co. v. United States*, 100 F. Supp. 3d 1288, 1308–09 (CIT 2015), the court reasoned:

The choice to take simple averages was not just arbitrary in the abstract, however. The method also caused real distortions in the benchmarks Commerce created. A simple average, unlike a weighted average, gives equal weight to all prices regardless of the quantities sold. High prices from small transactions can balloon the average to absurd proportions, and that seems to be what happened here.

See also Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2015, 82 Fed. Reg. 47,479 (October 12, 2017), IDM at Cmt. 4 (“We find the use of a weighted -average price ensures that outlier prices do not skew the benchmark.”).

Finally, Commerce’s “advanced statistical concepts” argument can be easily dismissed. The decision to rely on SA or WA is no more complex or advanced in this case than it is any of the other analyses discussed above, in which the courts and Commerce have held that WA should be used instead of SA. Thus, Commerce’s decision to abandon its normal, accuracy enhancing choice of WA in the instant case constitutes support for PT’s position that reliance on the SA methodology is unsupported by substantial evidence and contrary to law.

E. RELYING ON SA DOES NOT MAKE ECONOMIC OR STATISTICAL SENSE

A sales price without a quantity is meaningless. Factoring quantity into the analysis is necessary to evaluate whether a price difference is significant. For example, assume that one kilogram of a good is sold at varying prices with a standard deviation of \$10/kg and 1,000 kilograms are sold at varying prices with an SD of \$1/kg. The variance of the first group of sales is $10 \times 10 = 100$ while the variance of the second group is only $1 \times 1 = 1$. Thus, the first group of sales, which is economically inconsequential, accounts for more than 99% of the Cohen's *d* denominator using Commerce's SA method, and could be used to establish a pattern of significant price differences. In contrast, with weighted pooling (or reliance on a single weighted SD for all sales in a CONNUM) the first group of sales accounts for only 9% of the denominator SD¹⁴, and the \$10/kg SD will have a minimal impact in determining whether the price difference is really significant. It is unreasonable that minuscule sales quantities could create an affirmative determination of significant price differences unrelated to the significance of the quantities.

¹⁴ Although the variance of the first group is 100 times the variance of the other group, it is associated with only 1/1001 of the total quantity in both groups, $1 + 1000 = 1001$ Kg. Its contribution to the weighted pooled variance is $100 \times 1/1001 = 100/1001$. The other group's contribution is $1 \times 1000/1001 = 1000/1001$. The pooled variance is the sum, $100/1001 + 1000/1001 = 1100/1001$. The proportion of this contributed by the first group therefore is $100/1001$ divided by $1100/1001$, equal to $100/1100$ or approximately 9%.

In contrast, because a weighted PSD or a combined SD removes distortions created by low quantities, relying on these methodologies allows Commerce to evaluate the actual economic impact of the price differentials by time period, region, and purchaser. This Court should require that Commerce calculate the Cohen' d denominator in this manner, in order to properly place "the emphasis . . . on economic reality." *United States v. Eurodif S.A.*, 555 U.S. 305, 317-18 (2009).

Moreover, Commerce's SA methodology ignores the fact that the Test Groups and Comparison Groups do not have independent existences. Each sale (i.e., count) is a member of multiple groups, both test and comparison. Reliance on SA results in the same kilogram, in the same sale, having a different impact on the result, depending on whether the sale falls within the Test Group or the Comparison Group. For example, in its Period test, Commerce subdivides each CONNUM into four calendar quarters. For each quarter it compares that quarter's sales (Test Group) to the sales in the other three quarters (Comparison Group). Thus, any first quarter sale falls within the Test Group for one test and in the Comparison Group for the other three tests. The composition of the Test Group and Comparison Group change from test to test. For quarter two, the Test Group consists of sales in Quarter 2 and Comparison Group consists of sales in quarters 1, 3, and 4; for quarter three, the Test Group consists of sales in Quarter 3 and the Comparison Group consists of sales in quarters 1, 2, and 4; and for quarter four, the Test Group

consists of sales in Quarter 4 and the Comparison Group consists of sales in quarters 1, 2, and 3. The numbers of sales and the total sales volumes in the Comparison Group change as sales in quarters 1, 2, 3, and 4 are variously grouped with sales in quarters 1, 2, 3 and 4. Thus, the impact of each sale in Commerce's SA analysis changes depending upon whether the sale falls with the Test Group or the Comparison Group, and upon which particular group is designated as the Test Group and the Comparison Group. In other words, under SA, a particular sale will receive more weight than other sales for certain comparisons, thereby strongly influencing the outcome, while in other comparisons the same sale will receive a low weight, thereby having little influence on the outcome. Query, how can the SA methodology lead to reliable results when each sale has a different effect on the result depending on the group in which it falls?

In contrast, in the WA methodology, each kilogram is treated equally relative to all other kilograms sold for all of the Period, Regional, and Purchaser tests. Because each kilogram is correctly treated on an equal basis throughout the analysis, regardless of whether it falls within a Test Group or a Comparison Group, relying on a weighted pooled SD leads to a reliable, consistent, and predictable comparison.

F. COMMERCE’S “EQUALLY RELIABLE” RATIONALE DOES NOT ADEQUATELY EXPLAIN ITS DECISION TO RELY ON SIMPLE AVERAGING

In its Redetermination, Commerce relies on a new theory to support its reliance on SA; that is, that “a simple average of the standard deviations of the two groups is appropriate because the reliability of each value of the standard deviation is equal.” Appx2411. This rationale fails.

First, Commerce’s rationale begins and ends with the proposition that SA is an appropriate methodology for determining the full population denominator because both the Test Group and the Comparison Group are equally reliable. This rationale, however, does not take the next essential step of providing an adequate and reasonable justification as to **why** an SA yardstick, rather than a WA yardstick or a combined SD yardstick, **should be** used. See Appx981-985.

Second, the reliability of a Test Group and a Comparison Group remains the same whether Commerce uses an SA, WA, or combined SD yardstick. Reliability considerations do not favor one methodology over the other. Thus, assuming that Commerce’s equal reliability rationale allows Commerce to rely on SA – and in our opinion it does not – equal reliability is not sufficient reason for this Court to affirm Commerce’s methodology as applied to the facts in this case.

Third, the linchpin of Commerce’s rationale is that both the Test Group and Comparison Group are equally reliable. Equal reliability, however, does not mean

that each group should be accorded equal weight in determining the size of the yardstick denominator. The Trial Court's conclusion in *Mid Continent VI* applies to Commerce's "equally reliable" rationale; that is, "Commerce's premise does not lead to its conclusion. That weighted averaging is supported when sampling is present does not mean that it is unsupported when sampling is absent." Appx1726. Similarly, Commerce's premise that the Test Group and Comparison Group of a full population are equally reliable does not mean that the Cohen's d denominator should be calculated using SA when there is a full population. Equality in size does not necessarily result in equality in reliability. And equality in reliability is not relevant in determining whether the Cohen's d denominator should be based on WA or SA.

Fourth, the Trial Court states that "Plaintiffs do not challenge . . . {Commerce's premise that} . . . it is appropriate to use a simple average for equal sample sizes because the two samples have equal reliability." Appx15. The Court is wrong. PT agrees that it may be appropriate to use a simple average when sample sizes are equal, since a simple average is identical to a weighted average of two groups of equal weight. PT also recognizes that two samples of the same size may be equally reliable. However, these two statements do not mean that equality in reliability **is the reason why** a simple average can be used when two sample sizes are equal. Rather, reliance on SA is appropriate when the sample size and

SDs of the two groups are the same, regardless of whether one sample is more reliable than the other.

Fifth, if *Cohen/Coe/Ellis* had based their acceptance of SA on reliability considerations, they would have expressly said so in their papers, and Commerce would have cited their claims in its first three decisions.

Sixth, the groups at issue in this case are not equal in size. The Cohen's *d* Test Group and Comparison Group do not have the same numbers of sales (i.e., counts) and do not have the same weight (i.e., number of kilograms). That the Cohen's *d* denominator in a sampled population can be calculated using SA when the Test Group and Comparison Group have the same number of counts does not mean that a denominator in a full population can be calculated based on SA when the Test Group and Comparison Group have a different number of counts and are not equal in weight. As the Trial Court succinctly reasoned in *Mid Continent VI*, "Commerce's premise does not lead to its conclusion." Appx1726.

Seventh, in their sampling analyses, *Cohen/Coe/Ellis* examine the number of counts in each group. For *Cohen/Coe/Ellis*' intended audience, counts normally consist of persons. In their examples the size of a count (e.g., weight of a person) is not a relevant factor, whether the person falls within a Test Group or a Comparison Group. In contrast, in Commerce's differential pricing analyses the analog of a count is the weight of the group (total quantity transacted), and not the number of

transactions. Commerce recognizes this by always computing group means and group standard deviations using transaction weights rather than count weights. Commerce's comparison of group mean prices (the numerator of Cohen's d) is based on dollars per kilogram ("\$/kg"), reflecting the weighted average of the different sized transactions in each group. The fact that each group may have the same number of sales (i.e., count of transactions) or a different number of sales does not control the comparison. Thus, Commerce's premise that equality in counts in a sampling analysis in which each count is equal in weight justifies relying on an SA methodology in a full population analysis – where each count has a different weight – does not support its conclusion.

Eighth, Commerce claims that the reliability of a sample is directly dependent on the sample count, and when those numbers are the same, each group is equally reliable. Commerce then claims that because SA can be used when each group in a sample is equally reliable, SA can be used in full populations because in that case, both groups are perfectly reliable. Commerce's analysis proves nothing. First, Cohn defines reliability as precision. Appx527. A sample's precision reflects its standard error; that is, the amount by which the sample mean is likely to deviate from the population mean. Precision depends on multiple factors, including sample size, the amount of variation in the population, the method by which the sample was obtained, the method used to estimate the population property from the sample

property, and other factors. Thus, the reliability of samples cannot be readily compared to the reliability of a full population, let alone be a reason why the standard deviation yardstick of a full population can be based on simple averaging of the SDs of two unequal groups.

Ninth, Commerce claims that because each group has zero errors, each group should be accorded equal weight. However, the fact that a group has zero errors is not related to the size of each group. And the fact that two groups in a sample are equal in size does not support the proposition that significant differences in two groups of a full population, with zero errors in each, can be identified by taking a simple average of the SD of each group.

Tenth, Commerce's equal reliability rationale suffers from the same defects as its "equally rationale" and "equally genuine" rationales. The *Mid Continent III* this Court reasoned that "the fact that the seller is acting rationally and genuinely in its pricing choices in both the test and comparison groups provides no apparent reason for assigning equal weight to each group's standard deviation when computing the pooled standard deviation." Appx983. Similarly, the fact that the Test Group and Comparison Group of a full population may be equally reliable "provides no apparent reason for assigning equal weight to each group's standard deviation when computing the pooled standard deviation." Appx983.

Commerce argues that *Mid Continent V* is inapposite because equal

reliability is “based on the characteristic of the data rather than the pricing behavior of the respondent” and “is not a function of the type of data under examination.”

Appx2427. Commerce is wrong. A respondent’s pricing behavior cannot be separated from the data which resulted from the behavior, or from the data which led to the behavior. Commerce fails in its attempt to create a distinction between reliability, rationality, and genuineness, since such distinction does not exist. And even if it did, equal reliability “provides no apparent reason for assigning equal weight to each group's standard deviation when computing the pooled standard deviation.” Appx983.

In sum, Commerce’s rationale fails in the same manner and for the same basic reasons that its first three rationales were rejected in *Mid Continent III*, *V*, and *VI*. Relying on SA is contrary to the academic literature and leads to unreasonable results. Equality in reliability does not magically allow Commerce to simple average two groups of unequal size and unequal standard deviations in determining the denominator yardstick of the Cohen’s *d* equation.

G. RELYING ON A SINGLE STANDARD DEVIATION IS A REASONABLE METHODOLOGY

In its Redetermination, Commerce concludes that relying on the standard deviation for the entire population in the denominator of the Cohen’s *d* coefficient in lieu of a simple average is not a “reasonable approach for Commerce’s Cohen’s *d* test.” Appx2417. Commerce’s conclusion rests in large measure on its claim that

such reliance “causes the denominator of the Cohen’s d coefficient to reflect not just the dispersion of the data within each group, but also the dispersion of the data between the two groups.” Appx2417. As a result, the single standard deviation increases “despite there being no change in the variances, i.e., the dispersion, in the data within each of the two groups.” Appx2417. Commerce reasons that because the denominator is extended by a “between group” dispersion, a single SD cannot be used in the Cohen’s d analysis.

Commerce’s analysis ignores the fact that in *Mid Continent V*, the Federal Circuit noted that *Cohen*, *Coe*, and *Ellis* each opined that “the ideal denominator is the full population's standard deviation,” and that “{w}hen the full population data set is unavailable, all of the cited literature points to use of a ‘pooled standard deviation’ of the two particular groups at issue to form the denominator.” Appx982. Commerce also fails to recognize that the Cohen’s d Test Group and Comparison Group are not distinctly different datasets. As discussed above, each sale (i.e., count) is a member of multiple groups, both test and comparison. Thus, the dispersion of the data between each group changes depending on the composition of the group. These differences are arbitrary (and unpredictable) factors in Commerce’s analysis. They have little or no economic meaning but are merely artifacts of the economically arbitrary splitting and re-splitting of one population of transaction data into various test and comparison

groups.

Moreover, relying on the standard deviation for the entire population is consistent with weighted averaging insofar as both methodologies accord equal weight to each kilogram of nails being analyzed regardless of the group in which the sale falls. Because of this equal treatment of each kilogram, and because both methodologies are otherwise consistent with Cohen's d methodology for determining whether there are significant differences between two groups of data, both methodologies are reasonable.

In contrast, in the SA methodology, a particular sale will receive more weight than other sales for certain comparisons, thereby strongly influencing the outcome, while in other comparisons the same sale will receive a low weight, thereby having little influence on the outcome. As a result, SA is an unreasonable and economically meaningless methodology for determining whether there are significant differences between prices, leading to unreasonable results.

H. SIMPLE AVERAGING DOES NOT PROPERLY ACCOUNT FOR THE BETWEEN SPREAD

Commerce's rationale for rejecting the standard deviation for the entire population as the denominator yardstick – that the “between group” data are not factored into the Cohen's d denominator – also applies to the SA methodology.

The impact of “between group” data to the denominator yardstick is found in the “Analysis of Variance” (“ANOVA”) formulas concerning relationships among

data “spreads” and related quantities. Appx662-665, Apppx699, Appx708, Appx891-896, Appx1078-1084, Appx1821-1827.

ANOVA exploits mathematical relationships between the spread of a batch of data (whether considered a “population,” “sample,” or something else) and the spreads within subgroups of that batch; *e.g.*, Test Group and Comparison Group transactions employed in the analysis. Its fundamental result is that when these spreads are expressed as “sums of squares,” or “SS,” the overall spread invariably equals the sum of three quantities: (1) SS *within* the Test Group; (2) SS *within* the Comparison Group; and (3) a value which depends on the difference *between* the subgroup averages (the “effect”). This mathematical equality requires that all three SSES (and thus the corresponding variances) must be computed with consistent weights. There is a universal algebraic relationship among sums of squared quantities; and those squared quantities have statistical meanings.

The basic ANOVA relation can be expressed as follows:

$$\text{OVERALL SPREAD} = \text{TEST SPREAD} + \text{COMPARISON SPREAD} + \text{BETWEEN SPREAD.}$$

The pooled SD “yardstick” in the denominator of Cohen’s *d* is a measure of the overall spread, expressed as a standard deviation, *from which the effect of the difference between the group averages (the “Between Spread”) has been removed* (see equation [2] below). Adjusting the overall spread in this way is termed

“pooling,” because the result is intended to reflect the combined spreads in the Test Group and the Comparison Group (equation [1] below). The pooled spread is always less than the spread in the overall data (unless the group averages are exactly equal; i.e., the between spread is zero).

The basic ANOVA equation (above) can be rearranged by subtracting the BETWEEN SPREAD to put the test and comparison spreads together on one side of the equation:

$$\text{OVERALL SPREAD} - \text{BETWEEN SPREAD} = \text{TEST SPREAD} + \text{COMPARISON SPREAD.}$$

This equation presents the following two mathematically equivalent expressions for the “pooled spread.”

POOLED SPREAD

$$= \text{TEST SPREAD} + \text{COMPARISON SPREAD} \quad [1]$$

$$= \text{OVERALL SPREAD} - \text{BETWEEN SPREAD.} \quad [2]$$

The dispute in this case concerns the meaning of the “+” in equation [1]: how are the test and comparison spreads to be combined mathematically (by simple averaging or weighted averaging)? This question can be answered by using the equivalent equation [2], since there is no choice as to how to *remove* an effect from the overall spread: the spreads must be expressed as *consistently weighted*

sums of squares. Also, the minus sign in [2] requires subtraction in the usual numerical sense.

Consider the two terms in equation [2]. Commerce computes the overall spread of the data by weighting unit prices by their quantities. The between spread is a unique, predictable function of the difference in weighted means of the Test Group and the Comparison Group.¹⁵ Commerce already computes and uses that difference in the numerator of its Cohen's *d* formula. Consequently, *Commerce has no discretion as to how to compute the pooled spread*: the bed is made and Commerce must lie in it.

An example as to how ANOVA applies to this case is discussed below with respect to CONNUM 121012572121, South Region, discussed above in Figure 2, for which data were presented by PT to Commerce, Appx1078-1085, Appx1821-1827, and the Trial Court, Appx891-896.

Table 1 ANOVA Statistics¹⁶ for Figure 2: CONNUM 121012572121, Commerce's "south region"

Group	Count	Quantity	Mean	SD	Variance	SS
All	15	6558 kg	\$5.470	\$0.137	0.0188	123.2

¹⁵ It is a multiple of the squared difference. The mathematics of ANOVA determines the multiple as shown for quantity weighting, presented to Commerce. That result applies regardless of the weights used.

¹⁶ Counts and Means are shown for reference only: they are not used in these ANOVA calculations. Variance is obtained by dividing SS by Quantity. The SD is the square root of the variance. The Pooled SS can be found by subtracting the Between SS from the "All" SS or, equivalently, by summing the SSES in the Comparison and Test groups. The "Between" mean is the difference between the Test and Comparison means. The raw data used to prepare this chart is found in Appx1191.

Between			\$-0.091	\$0.074	0.0054	6.3
Pooled	15	6558 kg		\$0.133	0.0178	116.9
Test	2	884 kg	\$5.392	\$0.066	0.0043	3.8
Comparison	13	5674 kg	\$5.483	\$0.141	0.0199	113.1

This Table presents some of data from Appx643-653, Appx869-871, Appx917-924, Appx1810 and Figure 2 above relating to CONNUM 12101257212, South Region and makes the corresponding sums of squares (SS) explicit¹⁷. The lines for “All,” “Test,” and “Comparison” present the calculations of quantity-weighted variances. According to ANOVA the sum of the Comparison, Test, and Between values of the SS must equal the SS for all data; and they do:

$113.1 + 3.8 + 6.3 = 123.2$. The Pooled SS of $116.9 = 113.1 + 3.8$ is the sum of the Test and Comparison SSES: that is what “pooling” means in this statistical application. The Pooled variance is, as always, computed by dividing its SS by its Quantity: $0.0178 = 116.9 \div 6558$; and the Pooled SD – the correct denominator in Cohen’s d – is its square root, $\sqrt{0.0178} = 0.133$.

In contrast, Commerce’s SA methodology is tantamount to: (1) not adding 113.1 and 3.8 correctly; or (2) changing the Between value¹⁸ from 6.3 to an

¹⁷ The SS value for any definite group (All, Test, or Comparison) is its Quantity times its Variance. For instance, for all the data (first line), $SS = 123.2 = 6558 \times 0.0188 = \text{Quantity} \times \text{Variance}$ (up to rounding error). The SS values for the Between and Pooled spreads are deduced from the additive ANOVA relationships.

¹⁸ As shown in the Huber Declaration, Appx639-658, the Between value is determined by the group quantities and the difference in weighted group means: the latter, which is the numerator of Cohen’s d , cannot be altered and is not in dispute.

unpredictable, arbitrary number, so that the three component SSES no longer sum to the SS for the entire group. That artifice creates an inconsistency in the mathematics, the statistics, and the meanings of the quantities used in the Cohen's *d* calculations. Whatever the SA standard deviation "yardstick" might be, it does not produce a correct value of Cohen's *d*. See Appx647-648. In sum, this decomposition of the overall spread into three separate, identifiable, meaningful spreads achieved by ANOVA explains why weighted pooling is a valid methodology to determine whether there is a significant difference between Test Group and Comparison Group prices.

In other words, the weighted average methodology proposed by PT conforms to the basic ANOVA equation; relying on SA or on the weighted standard deviation for the entire population does not. Thus, Commerce's rationale for rejecting this Court's proposed single standard deviation methodology is equally applicable to Commerce's SA methodology. Commerce cannot reasonably reject one methodology without rejecting the other.

However, while the single standard deviation methodology, like the SA methodology, does not strictly conform to ANOVA, the single standard deviation methodology, unlike the SA methodology, lead to a reasonable result. Like the WA methodology, this alternative methodology accords equal weight to each kilogram sold. In contrast, Commerce's SA methodology accords unequal weights to

quantities sold, leading to unreasonable results when small quantities are accompanied by particularly large or small standard deviations.

Just as significantly, as discussed above, the single standard deviation methodology is supported by academic literature; applying SA to the facts in this case is not. As a result, Commerce's continued reliance on SA is not supported by substantial evidence.

CONCLUSION

Relying on WA, rather than SA, results in PT's margin being reduced from 2.16% percent to *de minimis*. Relying on the standard deviation of the entire population leads to a similar *de minimis* margin, since including the "between spread" in the yardstick denominator increases that denominator, thereby reducing the "*d*" percentage. Thus, Commerce's choice of methodology has "a material impact on the results of the less-than-fair-value investigation."¹⁹

Accordingly, this Court should hold that Commerce's Redetermination is not supported by substantial evidence and does not conform to law. And in light of the fact that this litigation has been ongoing for nearly a decade, this Court should remand the Redetermination to the Trial Court to remand this matter to Commerce with express instructions to calculate the yardstick denominator by relying on a

¹⁹ *Stupp Corp. v. United States*, 5 F.4th 1341, 1360 (Fed. Cir. 2021); see also Appx96 (concluding that there is a "meaningful difference" between relying on A-A and A-T when relying on A-A leads to a *de minimis* margin, and relying on A-T does not).

weighted average methodology as proposed by PT or a combined standard deviation as proposed by this Court in *Mid Continent V.*²⁰

Respectfully submitted,

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Dated: June 3, 2024

²⁰ See *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1574–75 (Fed. Cir. 1990) (“Due to the passage of time, Extraco's 1981 exit from the production of bone glues, the lack of any evidence supporting the fictitious home market sales allegation, and in the interests of judicial economy, we remand this cause to the Court of International Trade with instructions to direct the ITA to assess antidumping duties in accord with the margins determined in the preliminary investigation for the years in question.”); *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1374 (Fed. Cir. 2016) (“Because the reason Commerce offers for using the packed weights is without record support, we find Commerce's choice to be unsupported by substantial evidence. We therefore reverse the Court of International Trade's affirmance of that choice and direct Commerce to use the manufacturer-reported weights in its calculation.”).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(a) or Federal Circuit Rule 28.1.
2. This brief contains 13,982 words, less than the 14,000 words permitted under Rule 28.1, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).
3. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Federal Circuit Rule 28.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).
4. This brief has been prepared in a proportionally spaced type face using Microsoft Word 2013 in Times New Roman 14 point font.

/s/ Ned H. Marshak

Ned H. Marshak

Counsel for Defendants-Appellants

Dated: June 3, 2024

Addendum

Slip Op. 24-15

UNITED STATES COURT OF INTERNATIONAL TRADE

**MID CONTINENT STEEL & WIRE,
INC. ET AL.,**

**Plaintiff and Consolidated
Plaintiffs,**

v.

UNITED STATES,

Defendant,

and

PT ENTERPRISE INC. ET AL.,

**Defendant-Intervenors and
Consolidated Defendant-
Intervenor.**

Before: Claire R. Kelly, Judge

Consol. Court No. 15-00213

OPINION AND ORDER

[Sustaining the Department of Commerce's Fourth Remand Redetermination.]

Dated: February 12, 2024

Adam H. Gordon, The Bristol Group PLLC of Washington D.C., for plaintiff and defendant-intervenor Mid Continent Steel & Wire Inc.

Bruce M. Mitchell, Andrew T. Schutz, Dharmendra N. Choudhary, Max F. Schutzman, and Ned H. Marshak, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP of New York for consolidated plaintiffs and defendant-intervenors PT Enterprise Inc., Pro-Team Coil Nail Enterprise Inc., Unicatch Industrial Co., Ltd., WTA International Co., Ltd., Zon Mon Co., Ltd., Hor Liang Industrial Corporation, President Industrial Inc., and Liang Chyuan Industrial Co., Ltd.

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Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for the defendant United States. Also on the brief were Brian M. Boynton, Principal Deputy Assistant Attorney General, and Patricia M. McCarthy, Director. Of counsel Vania Y. Wang, Attorney, Office of the Chief Counsel Civil Division Trade Enforcement & Compliance U.S. Department of Commerce, of Washington, D.C.

Kelly, Judge: Before the Court is the U.S. Department of Commerce’s (“Commerce”) Final Results of Redetermination Pursuant to Court Remand, Aug. 31, 2023, ECF No. 207-1 (“Fourth Remand Results”) in the antidumping duty investigation of certain steel nails from Taiwan, following the third remand redetermination made in accordance with the mandate of the U.S. Court of Appeals for the Federal Circuit in Mid Continent Steel & Wire, Inc. v. United States, 31 F.4th 1367, 1381 (Fed. Cir. 2022) (“Mid Continent V”) rev’g in part 495 F. Supp. 3d 1298 (Ct. Int’l Tr. 2021) (“Mid Continent IV”). Following this Court’s fourth remand order, see Mid Continent Steel & Wire, Inc. v. United States, 628 F. Supp. 3d 1316 (Ct. Int’l Tr. 2023) (“Mid Continent VI”), Commerce again contends its use of simple averaging is reasonable. For the following reasons, Commerce’s fourth remand redetermination is sustained.

BACKGROUND

The Court presumes familiarity with the facts of this case from this Court’s previous opinions, as well as the Court of Appeals’ decisions in Mid Continent Steel & Wire, Inc. v. United States, 940 F.3d 662 (Fed. Cir. 2019) (“Mid Continent III”) and Mid Continent V, and will discuss additional facts relevant to the Court’s review of the Fourth Remand Results. On June 25, 2014, Commerce initiated an antidumping

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duty investigation of certain steel nails from six countries, including Taiwan. See Certain Steel Nails from India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam, 79 Fed. Reg. 36,019 (Dep’t Commerce June 25, 2014) (initiation of less-than-fair-value investigations). On May 20, 2015, Commerce issued its final determination, which resulted in an antidumping duty order on subject nails from Taiwan. See Certain Steel Nails from Taiwan, 80 Fed. Reg. 28,959 (Dep’t Commerce May 20, 2015) (final determination of sales at less than fair value) (“Final Results”) and accompanying Issues and Decision Memorandum, May 13, 2015, ECF No. 17 (“Final Decision Memo.”).

On March 23, 2017, this Court sustained Commerce’s determination, including its decision to use a simple average of standard deviations in the denominator of Cohen’s *d* test. See Mid Continent Steel & Wire, Inc. v. United States, 219 F. Supp. 3d 1326, 1351 (Ct. Int’l Tr. 2017) (“Mid Continent I”). On October 3, 2019, the Court of Appeals vacated this Court’s judgment and remanded in part to Commerce for further explanation of its decision to use a simple average of standard deviations in the denominator of Cohen’s *d* test. See Mid Continent III, 940 F.3d at 674–75. On remand, Commerce defended its decision to use the simple average, explaining that its use of the simple average was both accurate and in accord with statistical literature. See Final Results of Redetermination Purs. Ct. Remand at 4, 15–16, June 16, 2020, ECF No. 144-1 (“Second Remand Results”). On January 8, 2021, this Court

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again sustained Commerce's decision, concluding that Commerce had adequately explained how its use of simple averaging was more accurate, and thus a reasonable choice of methodology. See Mid Continent IV, 495 F. Supp. 3d at 1308.

On April 21, 2022, the Court of Appeals vacated this Court's judgment, remanding to Commerce for further explanation of its decision to use the simple average. See Mid Continent V, 31 F.4th at 1381; see also Mandate, June 13, 2022, ECF No. 177; Remand Order, June 14, 2022, ECF No. 178. The Court of Appeals held that Commerce inadequately explained its choice of the simple average of the standard deviations for the Cohen's *d* denominator. Mid Continent V, 31 F.4th at 1378–81. The Court of Appeals rejected Commerce's reasoning that the "equally rational" and "equally genuine" pricing choices warranted equal weighting in the Cohen's *d* denominator. Id. at 1379. The Court of Appeals explained that "Commerce needs a reasonable justification for departing from what the acknowledged literature teaches about Cohen's *d*." Id. at 1381. The Court of Appeals also suggested that the preferred way to establish the denominator was to "use the standard deviation of the entire population." Id. at 1377.

In the third remand redetermination, Commerce defended its decision to use the simple average with the Cohen's *d* test, explaining that its usage is consistent with statistical literature. See Final Results of Redetermination Purs. Ct. Remand at 42–43, 52, Nov. 10, 2022, ECF No. 186-1 ("Third Remand Results"). In Mid Continent VI, this Court remanded Commerce's third final results redetermination,

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concluding that Commerce had not complied with the Court of Appeals' mandate to provide a reasonable justification for departing from the academic literature and to explain its choice to rely upon a simple average of the standard deviations of the test and control groups to determine the denominator in its Cohen's *d* analysis. 628 F. Supp. 3d at 1322–23. More specifically, this Court found unjustified Commerce's position that the academic literature did not support use of a weighted average, concluding that Commerce's explanation "appears to contradict Cohen, Ellis, and Coe at a number of points, as the Court of Appeals has already observed." *Id.* at 1325 (citing *Mid Continent V*, 31 F.4th at 1378). In doing so, this Court instructed Commerce to either explain its reasoning or reconsider its choice. *Id.* at 1326.

Commerce issued its Fourth Remand Results on August 1, 2023. *See* Fourth Remand Results at 1. In the Fourth Remand Results, Commerce continues to rely on a simple average for the Cohen's *d* test, justifying its decision by contending the simple average incorporates equal reliability of the calculated standard deviations, and thus can be reasonably used to calculate the denominator of the Cohen's *d* coefficient. *Id.* at 10–13. Commerce also concludes that the Court of Appeals' proposed alternative, to use a single standard deviation of all sale prices in the test and comparison groups as the denominator, would not be appropriate in the context of its differential pricing methodology. *Id.* at 13–17.

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JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to Section 516A of the Tariff Act of 1930,¹ as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2012),² which grants the Court authority to review actions contesting the final determination in an antidumping duty order. The Court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” Xinjiamei Furniture Co. v. United States, 968 F. Supp. 2d 1255, 1259 (Ct. Int’l Tr. 2014) (quoting Nakornthai Strip Mill Pub. Co. v. United States, 587 F. Supp. 2d 1303, 1306 (Ct. Int’l Trade 2008)).³

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

² Further citations to Title 28 of the U.S. Code are to the 2012 edition.

³ Plaintiffs argue that Commerce “is not entitled to the same deference accorded [to it] when this Court analyzed its initial decision,” and that Commerce should “not be accorded another chance” to explain use of simple averaging if another remand is required. Consol. Pls.’ Cmts. On [Fourth Remand Results] at 2, Oct. 2, 2023, ECF No. 209 (“Pls. Cmts.”). Plaintiffs cite cases which do not support a new standard of review in this case. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (explaining that an agency is afforded less deference to an interpretation that conflicts with previous interpretation of the authority at issue); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) (affirming deference to agency decision that “closely fits the design of the statute as a whole and its object and policy” despite shifts in agency practice years prior (internal citations and quotations omitted)); Tung Mung Dev. Co. v. United States, 25 C.I.T. 752, 772 (2001) (remanding Commerce’s determination where its decision was “a clear reversal of its prior

(footnote continued)

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DISCUSSION

In a dumping investigation, Commerce typically compares the weighted average of normal values with the weighted average of export prices for comparable merchandise, unless it determines another method is appropriate. 19 U.S.C. § 1677f-1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1). Section 1677f-1, of Title 19, however, allows Commerce to compare “the weighted average of the normal values to export prices . . . of individual transactions for comparable merchandise if (i) there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account [with another method].”⁴ 19 U.S.C. § 1677f-

practice”); Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1574–75 (Fed. Cir. 1990) (ordering directed remand where International Trade Administration failed to comply with statutory and regulatory requirements in the interest of time, circumstances, lack of evidence and judicial economy); CS Wind Vietnam Co. v. United States, 832 F.3d 1367, 1374 (Fed. Cir. 2016) (remanding Commerce’s unsupported decision and directing it to weight calculations regarding dumping margins).

Commerce has not strayed from defending application of a simple average in its Cohen’s *d* test and has remained consistent in its underlying reasoning. See Fourth Remand Results at 10–13; Third Remand Results at 42–43, 52; Second Remand Results at 15–16, 39–40; Def.’s Resp. To [Pls. Cmts.] at 8–9, Nov. 15, 2023, ECF No. 212; [Def.-Int.] Reply To [Pls. Cmts.] at 2–3, Nov. 15, 2023, ECF No. 213 (“Def.-Int. Reply”). To the extent that the Court instructs Commerce to correct or otherwise address a deficiency in its decisionmaking, a court’s remand order represents a course correction to which the agency’s decisionmaking must comport when rendering a new determination that accords with its statutory obligations. SEC v. Chenery Corp., 332 U.S. 194, 199–201 (1947).

⁴ This subsection addresses targeted dumping, which occurs when an exporter sells

(footnote continued)

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1(d)(1)(B)(i)–(ii). To implement Section 1677f-1(d)(1)(B), Commerce performs a “differential pricing analysis” of a respondent’s sales to determine whether a “pattern of significantly different prices” exists.⁵ See Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. 26,720, 26,722 (Dep’t of Commerce May 9, 2014). This analysis contains three tests—the Cohen’s *d* test, the ratio test, and the meaningful difference test. See *id.*; Mid Continent V, 31 F.4th at 1371. Only the Cohen’s *d* test, which determines whether there is a “pattern of prices that differ significantly,” is at issue in this case. See Mid Continent V, 31 F.4th at 1369–70; Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. at 26,722.

As applied by Commerce, the Cohen’s *d* test involves comparing the prices of “test groups” of a respondent’s sales to a “comparison group” by region, purchaser, and time period. See Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. at 26,722. For each category, Commerce segregates sales into subsets, with one subset becoming the test group, and the remaining subsets being combined as the comparison group. *Id.* Commerce then calculates the means and standard deviations of the test and comparison groups. *Id.* Commerce finally calculates a *d* coefficient by

at a lower, “dumped” price to particular customers or regions, while selling at higher prices to other customers or regions, such that the higher-priced products mask the dumped products by increasing the overall average price. See Apex Frozen Foods Priv. Ltd. v. United States, 862 F.3d 1337, 1341 (Fed. Cir. 2017).

⁵ The Statement of Administrative Action of the Uruguay Round Agreements Act explains that Commerce should proceed “on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another.” Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 842–43 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4178.

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dividing the difference in the groups' means by the square root of the average of the squared standard deviations of each group.⁶ See Fourth Remand Results at 6 (citing Cohen at 20). Commerce finds the average of the squared standard deviations by adding them together and dividing by two, referring to the result as a "simple average." See id. Commerce does not account for the differences in the size of each group, i.e., use a "weighted average." Fourth Remand Results at 6.

Commerce tests each subset against the remaining subsets across each category and assigns a d coefficient. If the d value of a test group is equal to or greater than the "large threshold," or 0.8 (the difference in the means was at least 80% of the pooled standard deviation), the observations within that group are said to have "passed" the Cohen's d test. Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. at 26,722. If a sufficient quantity of sales by volume pass Cohen's d test, Commerce may compare the export prices of individual transactions to normal value, instead of comparing the average export prices to normal value. Id. at 27,622–23.

The Court determines whether Commerce's methodology is reasonable in light of considerations that run counter to its decision. See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Ceramica

⁶ Thus, $d = |m_A - m_B| / \sqrt{(\sigma_A^2 + \sigma_B^2)/2}$, where $|m_A - m_B|$ is the absolute value of the difference in means between the test and comparison groups, and $\sigma_A^2 + \sigma_B^2$ is the sum of the squared standard deviation of both groups. Standard deviation squared (σ^2) is also referred to as "variance." Commerce's formulation of what it calls the Cohen's d test is also known as Cohen's equation (2.3.2). See Cohen, Jacob, Statistical Power Analysis for the Behavioral Sciences, 44, (2d ed. 1988), A-580-876, PRRD 8, bar code 4181776-01 (Nov. 12, 2021) ("Cohen").

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Regiomontana, S.A. v. United States, 636 F. Supp. 961, 966 (Ct. Int'l Tr. 1986), aff'd, 810 F.2d 1137, 1139 (Fed. Cir. 1987); see also, e.g., Stupp Corp. v. United States, 5 F.4th 1341, 1354 (Fed. Cir. 2021) (stating the standard of review for components of Commerce's differential pricing methodology is reasonableness) (citing Mid Continent III, 940 F.3d at 667).

In the Fourth Remand Results, Commerce explains its choice to employ a simple average in the Cohen's d denominator, acknowledging as it must, the Court of Appeals' holding that the academic literature surrounding Cohen's d relies upon a weighted average. Fourth Remand Results at 9 (accepting the Court of Appeals finding that in the Cohen's d literature, simple averaging applies only when the sample sizes are equal); Mid Continent V, 31 F.4th at 1378 ("In making [its] choice to use simple averaging . . . Commerce departed from, rather than followed, the cited statistical literature"). Nonetheless, Commerce maintains the reasonableness of its use of a simple average for the Cohen's d denominator. To support its determination, Commerce explains that although the academic literature most often employs a weighted average when pooling the standard deviations of two samples, the literature uses a simple average when the sample sizes are equal. Fourth Remand Results at 12–13. Commerce reasons that the use of a simple average where sample sizes are equal stems from the equal reliability of standard deviations in samples of equal sizes. Id. at 13.

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Commerce's focus on reliability stems from the use of samples in the literature. Where samples are compared and a standard deviation for each sample is an approximate, the actual standard deviation for the group represented by the sample is not known. Fourth Remand Results at 10 (citing Cohen at 6); see also Mid Continent V, 31 F.4th at 1377. However, the larger the sample size, the more reliable that approximate. Fourth Remand Results at 10 (citing Cohen at 6). Thus, where two samples are compared, the value of the standard deviation as an approximate is necessarily a function of the sample size. Id. at 11–12. The larger sample size will be more reliable, and thus should play a greater role, in evaluating the difference between the means. Id.⁷

Using this reliability framework Commerce reasons that just as sample sizes of the same size share the same level of reliability, so do any two full populations. See id. Where a full population is examined, the standard deviation is not an approximate. Id. at 12. The standard deviation of a full population is in fact the

⁷ Logically, where there is more data upon which an estimate is based, the estimate should be more accurate. Yet, Plaintiffs reject Commerce's reference to the size of a sample in its reasoning, because in the academic literature, the size of the sample refers to counts, typically of people. Pls. Cmts. at 9–10. However, Commerce's practice is to base its analysis not on the number of transactions, but on the weights in kilograms of the product. Id. at 10. It is unclear to the Court the basis of Plaintiffs' argument given that Commerce's reference to counts is simply an example to illustrate its analysis. Commerce could easily have used weights rather than counts in explaining its reasoning. Commerce's point is that when the size of two samples is the same, whether by weight or count, the two samples will have equal reliability.

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actual standard deviation—it has 100% reliability.⁸ Thus, comparing the two standard deviations of two full populations is the same as comparing the standard deviations of two samples of equal size. Id. at 11. The reliability of equal sample sizes is the same and the reliability of two full populations is the same. Id. Although it is true that the academic literature does not support the use of a simple average for unequal sample sizes, Mid Continent V, 31 F.4th at 1378; Pls. Cmts. at 9 (arguing that the availability of the simple average mechanism when the groups are the same size does not support the use of the simple average when they are not), the Court of Appeals explicitly instructed Commerce that it is not limited to the literature in supporting its determination. Mid Continent V, 31 F.4th at 1381. Its methodology must be reasonable. Id. (“Commerce needs a reasonable justification for departing from what the acknowledged literature teaches about Cohen’s d ”).

⁸ Plaintiffs argue that the reliability of data does not control Commerce’s decision regarding the Cohen’s d denominator. Pls. Cmts. at 9. Plaintiffs invoke this Court’s prior rationale with respect to weight averaging, namely, that just because weight averaging is supported in sampling does not mean it is unsupported when sampling is absent. Pls. Cmts. at 9 (citing Mid Continent VI, 628 F. Supp. 3d at 1324). Plaintiffs use this rationale to argue that equality in size or reliability is not indicative of whether the denominator should be based upon a weighted average, or a simple average. Id. Plaintiffs are correct that this Court previously faulted Commerce’s logic in that its conclusion did not follow from its premise. Mid Continent VI, 628 F. Supp. 3d at 1324 (“Commerce’s premise does not lead to its conclusion. That weighted averaging is supported when sampling is present does not mean that it is unsupported when sampling is absent”). Here Commerce’s logic is sound. It assumes that simple averaging is appropriate where there is equal reliability; and therefore, concludes that because full populations have equal reliability that simple averaging is appropriate for full populations.

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Responding to the Court of Appeals, Commerce has provided an explanation that logically connects the relevance of full populations to the use of simple averaging. Commerce is not relying solely upon the academic literature to support its choice, but rather argues that the principle it derives from the academic literature leads to a logical conclusion that simple averaging in this case is a reasonable choice. Fourth Remand Results at 12–13, 22–25. Commerce identifies where simple averaging is supported by the literature, extrapolates a rationale for why simple averaging is appropriate, and then applies that rationale to the circumstances before Commerce. Although there may be other reasonable alternatives, the Court cannot find fault with Commerce’s logic here. Commerce’s reliability analysis is reasonable.

Plaintiffs argue that the use of a simple average is not reasonable and suffers from the same defect as Commerce’s reasoning in Mid Continent V, 31 F.4th at 1379, in which it argued that the standard deviation of each group was equally rationale and thus should be given equal weight.⁹ Pls. Cmts. at 11. The Court of Appeals rejected that explanation because:

The fact that the seller is acting rationally and genuinely in its pricing choices in both the test and comparison groups provides no apparent reason for assigning equal weight to each group's standard deviation when computing the pooled standard deviation. The rationality and genuineness of the seller's pricing choices have no evident connection to the undisputed purpose of the denominator figure—to provide a dispersion figure for the more general pool that serves as a yardstick for

⁹ Plaintiffs cite to Mid Continent III in their comments to support their position. Pls. Cmts. at 11. However, the quoted portion of the cited opinion and the reporter number and abbreviation are to Mid Continent V. See 31 F.4th at 1379; Pls. Cmts. at 11.

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deciding on the significance of the difference in mean prices of the two groups. Both the numerator and denominator take the behavior as a given and form certain statistical measures from the objective data that are then related in the ratio that is Cohen's *d*. Commerce has not identified anything in the statistical measure at issue that depends on considerations of rationality and genuineness of the conduct that gave rise to the objective data. Indeed, Commerce has not shown that the numerous real-world examples used in Cohen to illustrate the methods taught are different in the respect Commerce now features, i.e., Commerce has not shown that the Cohen examples (generally or, perhaps, ever) involve sampled groups of data that reflect behavior that is not “rational” and “genuine.” Thus, Commerce has not adequately justified, through its central rationale, its departure from the statistical literature's description of the Cohen's *d* coefficient.

Mid Continent V, 31 F.4th at 1379. Here, Plaintiffs aver the arguments regarding reliability—similar to arguments about rationality—fail to justify giving equal weighting. Pls. Cmts. at 11–12. Although Defendant rejects the comparison, Fourth Remand Results at 6–7, there is a similarity between Commerce's earlier explanation and this one, but only insofar as each explanation stems from the fact that the standard deviation in the test and control group is drawn from a full population, and therefore is not an approximate. *Id.* at 12; Second Remand Results at 39–40. Commerce previously explained that the pricing behavior in each group was equally genuine, it was the separate, distinct, and rational pricing for that group and thus should be weighted equally. Second Remand Results at 8.

The point made by Commerce here is related but distinct. The pricing at issue reveals a standard deviation that is not an approximate because it is based upon the full population. Fourth Remand Results at 12. As Commerce elucidates, if the standard deviation was a guess, then the literature would dictate a weighted average

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because the guess would be dependent on the size of the sample. Id. at 14–16. Here, Commerce addresses the Court of Appeals’ mandate to provide a “connection to the undisputed purpose of the denominator figure.” Mid Continent V, 31 F.4th at 1379. It premises the use of a simple average where there are equal sized samples on the equal reliability of those samples, Fourth Remand Results at 12–13, a premise Plaintiffs do not refute. It explains that the use of weighted average is reasonable when sampled groups have unequal sizes because the standard deviation is simply an estimate, and therefore weighting the sample size is appropriate (the larger sample size would likely be more reliable than the smaller and therefore should be weighted more). Id. at 10 (citing Cohen at 6). But when each group is not a sample, but rather a full population, reliability concerns would not support greater weight to the deviation found in the larger size group. Id. at 23–24.

Plaintiffs do not challenge the premise upon which Commerce relies, i.e., that it is appropriate to use a simple average for equal sample sizes because the two samples have equal reliability. See generally Pls. Cmts. Rather, Plaintiffs argue that Commerce’s “analysis proves nothing.” Id. at 10. Plaintiffs state that reliability or precision is dependent on a number of factors, at least with respect to samples. Id. (“precision depends on multiple factors, including sample size, the amount of variation in the population, the method by which the sample was obtained, the method used to estimate the population property from the sample property, and other factors”). Plaintiffs contend that the reliability of a sample cannot be compared to

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the reliability of a full population.¹⁰ Id. at 10–11. However, Commerce is not comparing the reliability of a sample to the reliability of a full population, rather Commerce argues that samples of equal sizes have equal reliability and full populations have equal reliability. Fourth Remand Results at 12–14. Therefore, Commerce reasons that if it is appropriate to use a simple average where sample sizes are equal, because of the equal reliability, then it is appropriate to use a simple average where full populations are being used. Id. at 13.

Plaintiffs assert that Commerce’s past practice supports use of a weighted average in its differential analysis. Pls. Cmts. at 13. Specifically, Plaintiffs argue that Commerce uses a weighted average when evaluating home market and U.S. markets to calculate a respondent’s dumping margin. Id. at 13–14. This similarity in calculation, Plaintiffs reason, supports use of a weighted average in Commerce’s differential pricing analysis, rather than the simple average used here. Id. at 14. Plaintiffs contend that Commerce relies on weighted average for all phases of pricing calculations “until the very end, at which point it inexplicably relies on simple averaging of two groups of data which have been obtained by weighted average prices

¹⁰ Plaintiffs attempt to cast doubt on Commerce’s reliability framework, asserting that Commerce incorrectly claims “a perfectly reliable full population is 100% reliable.” Pls. Cmts. at 11. Instead, Plaintiffs contend that perfect reliability “should be expressed as having zero errors.” Id. However, Plaintiffs fail to explain in any further detail any actual distinction between the two descriptions. Moreover, Plaintiffs’ distinction does not undermine Commerce’s analysis, as Plaintiffs further fail to explain how the characterization of a perfectly reliable full population as having zero errors meaningfully alters the results.

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and weighted standard deviations of prices.” Id. Moreover, Plaintiffs state that substitution of simple averaging for weighted averaging at this phase of the calculations “skews the results by according more weight to certain sales (and less weight to others) than they previously had accorded throughout the analysis.” Id.

Plaintiffs’ argument is inapposite. Plaintiffs argue that because Commerce weight averages to determine dumping margins, that it should weight average in its differential pricing methodology. Id. at 15. Plaintiffs fail to acknowledge that Commerce’s task in its differential pricing methodology serves a diagnostic purpose. Fourth Remand Results at 55; 19 U.S.C. § 1677f-1(d)(1)(B). Congress’ grant of authority to Commerce dictates that diagnostic purpose. 19 U.S.C. § 1677f-1(d)(1)(B) (“[Commerce can compare] the weighted average of the normal values to export prices . . . of individual transactions for comparable merchandise if (i) there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account [with another method]”). Moreover, Commerce has significant discretion to establish a reasonable methodology. Mid Continent V, 31 F.4th at 1376 (“Commerce has discretion to make reasonable choices within statutory constraints” (citing Mid Continent III, 940 F.3d at 667)). Dumping margin calculations simply do not determine whether the difference in prices between the two groups is significant or “the degree to which the phenomenon is present in

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the population,” but rather the potential uncollected dumping duty due. See Fourth Remand Results at 55; Pls. Cmts. at 13.

Plaintiffs also point to a handful of examples they claim refute Commerce’s justification for use of simple averaging in its calculation.¹¹ Pls. Cmts. at 19–24. Plaintiffs claim the data in the examples, including both hypothetical numbers and sales from Plaintiff PT’s database, exhibit how the simple average skews the results by “over-weigh[ing] the smaller group,” causing “a low ‘no-pass’ value of d to exceed Commerce’s threshold of 0.80” and thus a false “pass” under Cohen’s d . Id. at 25. However, and as Commerce explains, Plaintiffs examples are inapposite. Fourth Remand Results at 41–43. Plaintiffs’ examples illustrate that when the averaging of two values changes from an identical average (with equal weights) to a weighted average (with unequal weights), the results will invariably change.¹² Id. at 52.

¹¹ Defendant-Intervenor offers its own example of the dangers entailed by Plaintiffs’ suggestion of use of a weighted average in Cohen’s d . See Def.-Int. Reply at 7–8. Defendant-Intervenor claims use of a “weighted average based on the physical weights of sales within each group as the denominator of [Cohen’s] d ,” as Plaintiffs suggest, “opens the door to manipulation.” Id. at 7. This approach gives more weight to the standard deviation from smaller groups when those smaller groups are from larger sales, and Defendant-Intervenor argues that a supplier can manipulate the measure of d by changing the relative volume even if the mean difference between the groups is relatively large. Id. at 7. Defendant-Intervenor argues that there is potential for manipulation “[g]iven the prevalence and sophistication of many respondents’ ‘dump-proofing’ activities.” Id. at 8.

¹² Plaintiffs’ five provided examples, which involve both hypothetical and discretely selected datasets, do nothing to undermine the reasonableness of Commerce’s use of simple averaging as a general practice. Plaintiffs’ examples show how the use of a weighted average lead to different results for these examples. Plaintiffs seem to

(footnote continued)

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Plaintiff's examples serve to illustrate how weighting would work; they do not undermine the reasonableness of Commerce's use of simple averages. Id. at 53.¹³

Finally, Commerce addresses the Court of Appeals suggestion that it could consider using the standard deviation of the full population. Commerce reasons that "the single standard deviation causes the denominator of the Cohen's *d* coefficient to reflect not just the dispersion of the data within each group, but also the dispersion of the data between the two groups." Id. at 17. However, Commerce views effect size,

contend that the visualizations of the data they provide in their five examples illustrate that their approach is correct, and that Commerce's use of a simple average is incorrect. Pls. Cmts. at 19–27. However, Commerce's use of Cohen's *d* in differential pricing calculations is not a visual analysis, but rather is a statistical methodology. See Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. at 26,722. That Plaintiffs can identify five examples that do not correspond to what they intuitively believe should be a visual representation of "a pattern of significant price differences" is of little analytical value. Pls. Cmts. at 28. Even assuming Plaintiffs' intuitive belief regarding an appropriate visual representation of "a pattern of significant price differences" is correct; Commerce is not tasked with developing a perfect methodology. It is tasked with developing a reasonable methodology. Furthermore, Commerce is not relying on a visual analysis to support the reasonableness of its methodology. It relies upon principles taken from the literature and logic.

¹³ Plaintiffs submit that even if Commerce's choice of methodology is reasonable, its determination in this case is unsupported by substantial evidence. More specifically, they argue the facts of this case warrant departure from the methodology because using it would lead to unreasonable results "contrary to economic reality." Pls. Cmts. at 29–30. However, and as Commerce explains, Plaintiffs fail to expound upon precisely what the economic reality is that warrants departure from simple averaging. Fourth Remand Results at 53. Without further explanation or record support, Plaintiffs' argument is unpersuasive.

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i.e., the d coefficient, as meant to quantify the difference in the mean prices of each group relative to the dispersion of prices within each group.¹⁴ Id. at 17.

The question before this Court is not whether the Court of Appeals' proposal is a reasonable one, as it would appear to be given the literature, but whether it detracts from the reasonableness of Commerce's proposal. Commerce has explained its rationale as based on the equal reliability of both full populations and equal sized samples. It has also explained that standard deviation is specific to the mean to which it relates. Id. at 14 (“[the standard deviation] in Dr. Cohen's equations 2.2.1 and 2.2.2, is either the standard deviation of population A or the standard deviation of population B, but it is not the standard deviation of populations A and B combined together”). Because it is evaluating full populations, Commerce explains that using

¹⁴ Plaintiffs reject the independent nature of these two groups. Pls. Cmts. at 12 (arguing that the test in comparison groups “do not have independent existences”). Plaintiffs make this point by noting that any sale might be in either a test group or control group depending on Commerce's focus. Id. at 12; see Fourth Remand Results at 5 (explaining that in its differential pricing analysis, Commerce uses the Cohen's d test to measure “whether the sale prices to a given purchaser, region, or time period differ significantly from the sale prices of comparable merchandise to other purchasers, regions, or time periods, respectively”). Plaintiffs argue that it is illogical for any sale to receive more weight depending upon whether it is in the test or comparison group, as it necessarily does if Commerce uses a simple average. See Pls. Cmts. at 12–13 (“how can the essay methodology lead to reliable results when each sale has a different effect on the result, depending upon the group in which it falls?”). Plaintiff's argument is without merit. Commerce explains it is comparing the prices to a given purchaser, region or time. The statute identifies these grouping as distinct. See 19 U.S.C. § 1677f-1(d)(B)(i) (instructing Commerce to determine whether “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time”); Fourth Remand Results at 55.

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the dispersion of the group as a whole would eliminate the relevancy of each individual standard deviation much in the same way that weighting the standard deviations would diminish the relevancy of one of the standard deviations. See id. at 14–18. Thus, Commerce has explained how its choice is reasonable and has addressed any evidence or arguments that might detract from the reasonableness of its choice. See Mid Continent V, 31 F.4th at 1381 (“Commerce must either provide an adequate explanation for its choice of simple averaging or make a different choice, such as use of weighted averaging or use of the standard deviation for the entire population”).

CONCLUSION

Commerce has provided a reasonable explanation for its use of a simple average as instructed by the Court of Appeals and this Court and its determination is sustained. Judgment will enter accordingly.

/s/ Claire R. Kelly
Claire R. Kelly, Judge

Dated: February 12, 2024
New York, New York

UNITED STATES COURT OF INTERNATIONAL TRADE

**MID CONTINENT STEEL & WIRE, INC.
ET AL.,**

**Plaintiff and Consolidated
Plaintiffs,**

v.

UNITED STATES,

Defendant,

and

PT ENTERPRISE INC. ET AL.,

**Defendant-Intervenors and
Consolidated Defendant-
Intervenors.**

Before: Claire R. Kelly, Judge

Consol. Court No. 15-00213

JUDGMENT

This case having been the subject of remands from the U.S. Court of Appeals for the Federal Circuit (“Court of Appeals”), see Mid Continent Steel & Wire, Inc. v. United States, 31 F.4th 1367 (Fed. Cir. 2022) (“Mid Continent V”), and the Court of International Trade, see Mid Continent Steel & Wire, Inc. v. United States, 628 F. Supp. 3d 1316 (Ct. Int’l Tr. 2023) (“Mid Continent VI”), now in conformity with those decisions, it is

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ORDERED that the final results of the antidumping duty investigation of certain steel nails from Taiwan, see Certain Steel Nails From Taiwan, 80 Fed. Reg. 28,959 (Dep't Commerce May 20, 2015) (final determination of sales at less than fair value) and accompanying Issues and Decision Mem. for the Affirm. Final Determination in the Less than Fair Value Investigation of Certain Nails from Taiwan, A-583-854, (May 13, 2015), ECF No. 17, are sustained, except for the matters remanded by Mid Continent Steel & Wire, Inc. v. United States, 219 F. Supp. 3d 1326 (Ct. Int'l Tr. 2017); and it is further

ORDERED that the remand results, see Final Results of Redetermination Pursuant to Court Remand, Jun. 21, 2017, ECF No. 95, are sustained, except for matters remanded by the Court of Appeals in Mid Continent Steel & Wire, Inc. v. United States, 940 F.3d 662 (Fed. Cir. 2019) rev'g in part 219 F. Supp. 3d 1326; and it is further

ORDERED that the fourth remand results pursuant to the Court's order implementing the Court of Appeals' mandate in Mid Continent V and consistent with remand instructions in Mid Continent VI, are sustained, see Final Results of Redetermination Pursuant to Ct. Order, Aug. 31, 2023, ECF No. 207-1; Order, Feb. 12, 2024, ECF No. 219, and judgment is accordingly entered for Defendant United States; and it is further

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ORDERED that the subject entries shall be liquidated in accordance with the final Court decision, including all appeals, as provided for in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (2012).

/s/ Claire R. Kelly
Claire R. Kelly, Judge

Dated: February 12, 2024
New York, New York