

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

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Date: October 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 2024-1556

Short Case Caption Mid Continent Steel & Wire Inc., v. United States et al.

Filing Party/Entity PT Enterprise Inc., et al.

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Date: 10/03/2024

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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 Enterprises		
Pro-Team Coil Nail Enterprise, Inc.		
Unicatch Industrial Co., Ltd.		
WTA International Co., Ltd.		
Zon Mon Co., Ltd.		
Hor Liang Industrial Corp.		
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☐ Additional pages attached

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This Reply Brief responds to briefs filed by defendant-appellee, United States (“Government” and “Gov. Br.”) and plaintiff-appellee, Mid Continent Steel & Wire, Inc. (“Mid Continent” and “MidCon. Br.”), replying to the Principal Brief filed by PT Enterprises Inc., et. al. (“PT” and “PT Br.”), the Amicus Curiae Brief filed by the Government of Canada, et. al. (“Canada” and “Canada Br.”), and the Amicus Curiae Brief filed by the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (“COALITION” and “COALITION Br.”). The Government and Mid Continent have failed to justify the Department of Commerce’s (“Commerce”) decision to calculate the denominator of the Cohen’s d equation by simple averaging (“SA”) the standard deviations (“SD”) of the weighted average prices in the Test Groups and the Comparison Groups subject to analysis, rather than weighted averaging (“WA”) the SDs, as proposed by PT, or relying on the SD of the entire population (Test Group and Comparison Group) as proposed by the Court of Appeals for the Federal Circuit in *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367 (Fed. Cir. 2022) (“*Mid Continent V*”), Appx974-984.

I. STANDARD OF REVIEW

In its Principal Brief, PT argued that relying on an SA methodology to calculate the Cohen’s d denominator is unreasonable, internally inconsistent,

distortive, and fails to achieve the statutory purpose of determining whether there is a significantly different pattern of prices in two groups. PT also asks that this Court hold that even if SA normally conforms to law, it nevertheless is unreasonable when applied to PT's data, since the results of Commerce's calculation are neither supported by substantial evidence nor reflective of economic reality. PT further argues that Commerce's decision should be accorded less deference than is normally the case because Commerce's analysis subject to this Appeal represents the agency's fourth attempt to justify reliance on SA and is inconsistent with rationales expressly rejected by the courts in *Mid Continent V*, *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662 (Fed. Cir. 2019) ("*Mid Continent III*"), Appx449-458, and *Mid Continent Steel & Wire, Inc. v. United States*, 628 F. Supp. 3d 1316 (Ct. Int'l Trade 2023) ("*Mid Continent VI*"), Appx1719-1728.

In reply, the Government claims that "Commerce must only demonstrate that a simple average is reasonable, not that it is the only reasonable option, or even that it is the most reasonable option," Gov.Br.2, directing the Court's attention to *Mid Continent III*, wherein this Court reasoned that "{i}n carrying out its statutorily assigned tasks, Commerce has discretion to make reasonable choices within statutory constraints," Appx453. The Government also relies on *Borusan*

Mannesmann Boru Sanayi Ve Ticaret A.S. v. Am. Cast Iron Pipe Co., 5 F.4th 1367, 1374–75 (Fed. Cir. 2021) (“*Borusan*”).

Significantly, *Mid Continent III*’s reasonableness rationale was based on *Nucor Corp. v. United States*, 927 F.3d 1243, 1248 (Fed. Cir. 2019), which, in turn, relied on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and its progeny. *Chevron*, however, has been overruled by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) (“*Loper Bright*”), and Courts are now required to “exercise their independent judgment in deciding whether an agency has acted within its statutory authority,” *Id.* at 2273.

Borusan’s deference discussion reflected its conclusion that because “factual determinations supporting antidumping margins are ‘best left to the agency’s expertise,’ . . . we review those determinations for substantial evidence, 19 U.S.C. § 1516a(b)(1)(B)(i).” 5 F.4th at 1375. However, even prior to *Loper Bright*, review of whether Commerce may rely on SA as part of its test for significant differences was not based on substantial evidence, since *Stupp Corp. v. United States*, 5 F.4th 1341, 1353 (Fed. Cir. 2021) (“*Stupp*”) held that “the relevant standard for reviewing Commerce’s selection of statistical tests and numerical cutoffs is reasonableness, not substantial evidence.”

Under *Loper Bright*, this Court no longer is required to affirm Commerce’s methodological choice intended to give effect to statutory language merely because

it is reasonable; rather, this Court must determine in light of its own independent analysis of the relevant statutory language - in this case whether Commerce's reliance on a miscalculated version of Cohen's *d* (because it is based on SA) is consistent with the best interpretation of the statutory requirement to identify U.S. prices that differ significantly. 19 U.S.C. § 1677f-1(d)(1)(B)(i).

Finally, *Stupp* reasoned that the substantial evidence test did not apply to that case since "SeAH was free to make factual arguments regarding why it was inappropriate to apply the ratio test in this case, but it chose not to do so." 5 F.4th at 1360. In contrast, PT has challenged Commerce's reliance on SA as being both contrary to law and not supported by substantial evidence

In sum, *Loper Bright* requires that this Court reject SA unless it is satisfied that SA is the best methodology. While the Cohen's *d* methodology arguably is reasonable, and while the reasonableness standard may continue to apply to Commerce's methodological choice, Commerce's application of that methodology to the statutory language "significantly different" no longer can merely be reasonable to be affirmed. Moreover, Commerce does not have license to rely on any methodology it wants and to claim that its methodology conforms to academic literature, in this case, Cohen's *d*. Thus, regardless of whether this Court ultimately decides that *Loper Bright* establishes a new standard of review, it should reach the same decision as *Mid Continent III*, *V*, and *VI*, and hold that reliance on

SA is contrary to law, and based on the facts of this case, not supported by substantial record evidence.

II. COMMERCE’S “EQUALLY RELIABLE” RATIONALE DOES NOT MAKE SENSE

The linchpin of Commerce’s fourth attempt to justify reliance on SA are its claims that: (1) SA is appropriate when the sample sizes of two groups are equal in size because the SD of each group is equally reliable; (2) the SD of a full population is always 100% reliable, so the SDs of any two populations are equally reliable; (3) the Test Group and Comparison Groups subject to Commerce’s Cohens’ *d* test are full populations and thus equally reliable; and (4) *accordingly*, SA is appropriate to calculate the denominator in Commerce’s analysis.

The Government’s Brief merely restates Commerce’s equal reliability rationale, without adding “meat” to the “bone.” *See* Gov.Br.9-11, 12, 20-24 25-35. These arguments fail in turning Commerce’s equally reliable rationale into a reasonable justification for relying on SA.

First, the academic literature arguably supports the proposition that SA is a mathematically sound methodology for calculating Cohen’s *d* when the two groups being compared are of equal size. Moreover, the SDs of two groups of equal size **may** be equally reliable. But it does not follow that SA is a sound methodology

because the statistics in two sample groups are equally reliable. `As Canada succinctly states:

This explanation begins with an inferential leap that simply has no basis in the literature or logic. . . . Of course, neither Cohen nor any other source makes this connection, which should not be surprising because it makes no sense. When dealing with two groups of the same size, a simple average is the same as a weighted average based on size. Cohen is weighting by size, not by reliability. Commerce has no support for its inferential leap that size serves as a proxy for reliability.

Canada \Br.24-25.

Equally unavailing is Commerce’s belief that the principle of equal reliability applies when analyzing a full population. To again quote Canada:

Commerce’s inferential leap is, in fact, contrary to the general principles of statistics on which Commerce purports to rely because it depends on the erroneous premise that reliability has any meaning when used to describe a statistic in a single group of data (including a population). Reliability measures “the extent to which one can generalize from an instrument administered under one circumstance at one point in time to other circumstances at other points in time.” Cohen explains that the relationship between an observed effect size and true effect size “is a simple function of reliability.” Reliability speaks to the accuracy of inferences that can be made about a population based on samples drawn from that population. This is a peculiar concept for Commerce to invoke given that Commerce insists that its use of Cohen’s *d* has nothing to do with drawing inferences based on sampled data. But reliability can describe a statistic only in *sampled data* and is a tool in drawing inferences from that sampled data. The concept of reliability simply does not apply when working solely with full populations.

CanadaBr.25-26. While the Government and Mid Continent insist that a standard deviation calculated using a “full population” is 100% reliable because reliability is

based on sample size, Gov.Br.29; MidConBr.36, they do not respond to Canada's observation that reliability is actually a relationship measure that requires a comparison between a sample value and a population value. CanadaBr.24-26. Commerce's use of populations in its calculation of Cohen's d makes reliability a meaningless concept.

The Government attempts to support Commerce's position by claiming that "*all* statistical tests depend on the general concept of reliability." Gov.Br.31. To the contrary, Cohen is clear that his discussion of reliability is limited the variables used in conducting a power analysis. *See* Appx1924 ("The power of a statistical test depends upon three parameters: the significance criterion, the reliability of the sample results, and the 'effect size,' that is, the degree to which the phenomenon exists."). Reliability is one distinct parameter in a power analysis, while effect size—which is what Cohen's d measures—is another, distinct parameter. Indeed, the passage on which the Government relies belies its point because the passage indicates that reliability is relevant only when considering samples. *See* Appx1925 ("However, {reliability} is *always* depending upon the *size of the sample*."). (second emphasis added)). The Government has not demonstrated how reliability is relevant to Commerce's calculation of the denominator.

Finally, Commerce has not successfully linked equality in reliability to support simple averaging when calculating Cohen's d for two full populations.

Such link does not exist because it would violate basic principles of mathematics and statistics. Indeed, Commerce's "theory of reliability" did not surface as a rationale for Commerce's conclusion until after its three previous rationales had failed. It has been made-up over 10 years after Commerce began relying on Cohen's d by an agency desperate to find a rationale that it could defend without embarrassment. In short, it is pure sophistry.

III. COMMERCE'S "EQUALLY RELIABLE" RATIONALE IS CONTRARY TO THE ACADEMIC LITERATURE

Throughout this litigation, the courts have focused on the academic literature upon which Commerce's differential pricing analysis is based. In *Mid Continent III*, this Court noted that: (1) "Commerce adopted the Cohen's d test as a 'generally recognized' test;" (2) Commerce "later cited the 2002 Coe article as a source for that test;" and (3) the Government's position is that "the Cohen's d coefficient is a prominent and widely-accepted statistical measure that has been developed to evaluate practical significance." Appx457. The Court's refusal to affirm Commerce's use of an SA methodology was based, in part, on the fact that Commerce "did not acknowledge that the only cited literature source for the relevant aspect of the test itself calls for the use of weighted averages." Appx458. The Court has essentially found that what Commerce calls Cohen's d is not, in

fact, the Cohen's d that is described in the statistics literature. In other words, Commerce's calculations do not produce meaningful values for Cohen's d at all.

In *Mid Continent V*, the Federal Circuit again refused to affirm Commerce's second attempt to justify reliance on SA, expressly stating that Cohen, Ellis and Coe all indicated that "the ideal denominator is the full population's standard deviation, which may be approximated by a pooled estimate." Appx982. It then stated that "when the full population set is not available, all of the cited literature points to use of a 'pooled standard deviation' of the two particular groups at issue to form the denominator" and that Commerce declined to use the full population's standard deviation "even while recognizing that it had the full set of data for U.S. sales for the period Commerce was reviewing." Appx982. The Court concluded that "Commerce departed from, rather than followed, the cited statistical literature." Appx982. Accordingly, the Court held that "Commerce needs a reasonable justification from departing from what the acknowledged literature teaches about Cohen's d" Appx984.

Commerce's third attempt met the same fate. In *Mid Continent VI*, the Trial Court concluded that: (1) "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;" and (2)

“Commerce's claim that academia supports the simple average appears to be contradicted by the literature itself.” Appx1727.

Notwithstanding these three failed attempts and the Federal Circuit’s express statement that the cited statistical literature’s (Cohen, Coe, Ellis) “ideal denominator is the full population’s standard deviation,” Commerce is now trying a fourth time to justify relying on SA. As discussed in detail in PT’s Principal Brief and Canada’s Amicus Brief, this attempt also fails, since: (1) “Commerce has no support for its inferential leap that size serves as a proxy for reliability;” (2) “Commerce’s inferential leap is, in fact, contrary to the general principles of statistics on which Commerce purports to rely;” and, (3) “the concept of reliability simply does not apply when working solely with full populations.” CanadaBr.24-26.

Moreover, Commerce’s Redetermination analysis ends with its conclusion that SA is permissible; Commerce does not take the next essential step of establishing why SA is a reasonable methodology, much less that this methodology consistent with the best reading of the Tariff Act.

PT submits that it is neither. According to Commerce’s new rationale, SA is built on the inferences that reliability principles apply to full populations and that equality in reliability equates with equality in size. Even if these concepts are correct (and they are not), SA: (1) leads to irrational results; (2) is inconsistent with

general principles of statistics and mathematics; and (3) is directly contrary to Commerce’s recognition, in similar analyses, that relying on a simple average distorts results “by inflating the effect of a smaller amount of data.” PTBr.44. In other words, SA is not a mathematically sound methodology.

In any event, Commerce’s reliability justification is premised entirely on its conclusion that the literature does not provide for a method of calculating the Cohen’s *d* denominator for full populations. Appx2463, Appx2409. This is false. CanadaBr.20.

Finally, even if this Court were to conclude that SA is mathematically sound when two groups differ in size, which is not the case, the literature makes clear that using WA or a single SD provide more accurate results than using SA.

Accordingly, a Cohen’s *d* coefficient calculated using SA when groups are of unequal size and exhibit disparate variances cannot constitute the best meaning of the statutory language “differ significantly.” Under any standard of review, *Loper Bright* or *Chevron* reasonableness, Commerce’s use of SA cannot be affirmed.

IV. PT’S GRAPHIC EXAMPLES SHOW THAT SIMPLE AVERAGING LEADS TO UNREASONABLE RESULTS

In its Principal Brief, PT argued that SA leads to unreasonable results by directing this Court’s attention to five graphic pricing examples (one hypothetical and four actual examples of PT data) comparing Test Group and Comparison

Groups relying on SA and WA. PTBr.28-41. These examples show that whenever a quantity of one group is small, a single small-quantity transaction in that group at an unusual price will inflate the group's standard deviation ("SD"), decreasing the d , and turning an obvious "pass" (i.e., outlier sales prices which are indicative of targeted dumping) into a "no pass". *Id.* at 35-36. Conversely, when the sales prices in the small group are close together, relying on SA will deflate the group's SD, increasing the d , thereby creating a "pass" for sales prices which fall squarely within the prices of the larger group (i.e., where there is no significant difference in prices). *Id.* at 31-34.

These examples illustrate, why WA leads to reasonable results, and SA does not, both in general and as applied to the specific facts of this case. In response, the Government argues that "there is no visual distinction between any of the graphical representations of the test and comparison group prices which would lead a reasonable observer to recognize that one difference in prices pass the Cohen's d test and another difference in prices does not pass the Cohen's d test, irrespective of whether a simple average or a weighted average is used." Gov.Br.40, citing Appx2452. Mid Continent argues that PT's illustrations are "self-selected examples of a miniscule fraction of the full universe of its sales," which "can hardly be considered reliable for purposes of drawing critically important conclusions." MidConBr.13. It then claims that "PT did not provide the total

number of sales observations considered within its four examples using actual data or other basic details (*e.g.*, whether the examples were based on comparison by customer, purchases, or time period), thus preventing a thorough and transparent analysis of its methodologies and results.” *Id.* at 14.

The Court should reject these arguments. First, contrary to Mid Continent’s claim, PT’s November 3, 2022, *Second Resubmission of Comments on Draft Redetermination*, contained “three Excel spreadsheets (period, purchaser, region) computing Cohen’s *d* using both the simple average and weighted average formulas for all PT’s U.S. sales during the POI,” which included the following information for all sales in each CONNUM subject to Commerce’s Cohen’s *d* analysis: number of transactions, sales quantity, sales value, weighted average prices, minimum price, maximum price, standard deviation, pooled standard deviation, Cohen’s *d*, and test results based on the competing SA and WA methodologies. Appx1377-1379; *see also* Appx1404-1610 (explanation of methodology and CONNUM specific datapoints); Appx855-964 (same). There was nothing more that PT could have submitted to allow Commerce to conduct a “thorough and transparent analysis of its methodologies and results.”

MidConBr.14. Notwithstanding the foregoing, neither Commerce nor Mid Continent have attempted to analyze PT’s data or to present competing examples; rather, they have merely claimed that the data submitted by PT should be ignored.

Second, the Government’s claim that the data fail to show a “visual distinction” between relying on SA and WA is belied by the data sets themselves. PTBr.31-36. In Figures 1, 2, and 3, the Test Group sales prices are not significantly different from each other and fit comfortably in the middle of the range of the Comparison Group prices. These data points indicate that the groups’ pricing patterns are similar. In contrast, in Figures 4 and 5 there is a wide divergence between prices of most sales in the smaller quantity group and one sale in that group, which is an obvious visual outlier from all other sales (in both groups). These data indicate that the pricing patterns of the Test Group and Comparison Group differ significantly. These examples should lead to no-passes (i.e., no significant differences) in Figures 1, 2, and 3, and passes (i.e., significant differences) in Figures 4 and 5. Relying on WA leads to these results; relying on SA, with its facially odd results, does not. *See* Appx1050 (referencing *Mid Continent III* Oral Argument at 25:54-26:08 (noting that application of the SA methodology to Figure 1 led to “facially odd” results)).

Third, the differences between applying SA and WA to these five “miniscule” examples are found in all CONNUMs subject to the Cohen’s *d* test. SA and WA lead to different passing rates in virtually all comparisons; in 707 comparisons, these differences did not change a pass into a no-pass, or vice versa; in fifty-eight comparisons, there was a change; forty-eight SA passes became no

passes under WA, and ten SA no passes became passes under WA. Appx1377-1379. In other words, these examples are representative of all of Commerce’s comparisons. They were not cherry picked; they were selected to graphically illustrate why WA is a reasonable methodology and SA is not.

Finally, in *Stupp* this Court discussed how another hypothetical example calls into question Commerce’s reliance on SA.

Another source of concern arises from test groups containing sales prices that hover around the same value. Consider, for example, ten purchasers of a product, each of which purchases five units. Assume that the per-unit sales prices for a particular purchaser are not normally distributed and are all the same, or nearly the same (e.g., \$100.01, \$100.01, \$100.01, \$100.01, and \$99.99). Assume further that the per-unit sales prices across the entire set of purchasers are also very similar, falling within a relatively small range (such as between \$99.92 and \$101.01).

Applying Cohen's *d* to that hypothetical data seems problematic. . . . An objective examiner inspecting those export sales prices would be unlikely to conclude that they embody a “pattern” of prices that “differ significantly.” 19 U.S.C. § 1677f-1(d)(1)(B)(i). . . . {T}he problem in that situation is a function of Commerce's use of the simple average pooled standard deviation. . . .

5 F.4th at 1359.

In sum, in *Stupp*, this Court recognized the “problem” in applying SA which would make it unlikely that “an objective examiner inspecting those export sales prices would . . . conclude that they embody a ‘pattern’ of prices that ‘differ significantly.’” This problem for an objective examiner also is readily apparent in reviewing the representative examples in PT’s brief. This problem pervades all SA

based comparisons and is not confined to the examples discussed in detail by PT in its briefs and by this court in *Stupp*. Accordingly, relying on SA is not a reasonable methodology for determining whether there is a significant difference in pricing patterns between a Test Group and a Comparison Group.

V. THIS COURT SHOULD REJECT MID CONTINENT’S ARGUMENT THAT TRANSACTION SIZE IS NOT A RELEVANT FACTOR IN THE COHEN’S *D* ANALYSIS

Mid Continent’s primary argument is that WA cannot be used as the Cohen’s *d* denominator because “the statute does not contemplate, much less direct, Commerce to factor in the size (kilograms) of the sales associated with the prices it examines.” MidConBr.5-6. According to Mid Continent, “the statute directs Commerce to identify differences in prices *per se*, in the abstract and without regard to other aspects of the transactions, including the size of the sale (*i.e.*, how many kilograms cartons, etc. were sold at the price being examined){.}” MidCon Br.6. It argues that “the goal of Commerce’s differential pricing methodology is to compare the prices of two groups, irrespective of the total quantity in kilograms of the sales within each groups{.}” MidCon.Br.23. Mid Continent then posits that WA “skew{s} the outcome by weighting one group more than the other group.” *Id.* at 6. These arguments should be rejected.

In its Redetermination, Commerce did not take the position that the statute did not allow the agency to rely on a WA methodology. Commerce did not

conclude that quantity was an irrelevant factor to its Cohen's *d* analysis.

Additionally, Commerce merely concluded that relying on SA is reasonable because the Test Group and Comparison Group are both populations and thus equally reliable, without concluding that relying on WA was not supported by the statutory language or was not itself reasonable. *See* Appx44-50 (Taiwan Respondents' Comments) and Appx51-61 (Commerce's Position). Accordingly, Mid Continent's arguments constitute post-hoc rationalizations, which cannot support a decision by this Court to affirm the Redetermination. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“{W}e may not supply a reasoned basis for the agency’s action that the agency itself has not given.”); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001) (“In the second situation, in which the agency seeks to defend its decision on grounds not previously articulated by the agency, . . . we generally decline to consider the agency's new justification for the agency action. . .”).

Moreover, Mid Continent's “quantity isn't relevant” claim is not supported by the statutory language, judicial and administrative precedent, economic reality or common sense. Simply stated, quantity matters. First, Commerce's dumping margin analysis is based on a comparison of weighted average prices, as is Commerce's calculation of the Cohen's *d* numerator. These calculations are not based on the number of transactions (i.e., number of sales); rather, they are based

on quantity of kilograms sold. The mean price of 1000 kg in one group remains \$10/kg whether PT made 1000 sales of one kg each or 10 sales of 100 kg each. This mean price is then compared to the mean price of the second group. The difference in mean prices depends on the price per kilogram, and not a price per sale. Similarly, the standard deviation of each group is based on weighted average prices. This being the case, it is inconsistent for Commerce to ignore quantities in calculating the standard deviation of the Cohen's d denominator.

Second, Commerce's SA methodology treats each kilogram differently in calculating the Cohen's d numerator and denominator. It also treats each kilogram differently depending on whether that kilogram is in a Test Group or a Comparison Group. In contrast, the WA methodology uses consistent weights for each kilogram in both the Cohen's d numerator and the denominator, and in each Test Group and Comparison Group. The weight and price of a particular transaction remain the same throughout the period of investigation ("POI"). That is, every transaction remains the same fraction of the total quantities sold during the year.

Consequently, whenever a transaction appears in a statistical assessment of pricing behavior—whether in calculating antidumping duty margins, or whether appearing in a Test Group or Comparison Group or whether calculating the standard deviation of the Cohen's d numerator or denominator— that transaction should be treated with a consistent weight. WA conforms to this principle; SA does not.

Third, as discussed in detail in PT’s Principal Brief, at 28 – 41, the examples discussed by PT show how Commerce’s failure to consider quantity in calculating the Cohen’s *d* denominator leads to results that would render it unlikely that “an objective examiner inspecting those export sales prices would . . . conclude that they embody a ‘pattern’ of prices that ‘differ significantly’.” *Stupp*, 5 F.4th at 1359.

Fourth, Commerce itself has stated that it “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.” PTBr.44. When Commerce ignores that principle by relying on the SA methodology, it is guilty of inconsistent reasoning that cannot be affirmed.

Fifth, under SA, miniscule sales quantities could create an affirmative determination of significant price differences unrelated to the significance of the quantities. At the same time, massive, targeted dumping could be masked by one outlier small volume, high or low priced sale, engineered to change a pass into a no-pass. Thus, SA distorts economic reality. *Id.* at 46-47.

Sixth, the statutory language does not favor reliance on SA. The statutory authority for Commerce’s differential pricing analysis, and its reliance on the Cohen’s *d* test, is found in 19 U.S.C. § 1677f-1(d)(1)(B). There is nothing in this language that requires Commerce to rely on: (1) a differential pricing analysis

(rather than a holistic evaluation of all facts and circumstances, including intent and impact); (2) the Cohen's d statistical construct when applying a differential pricing analysis (rather than another statistical construct, e.g., Nails Test¹); or (3) a simple average of the SD of a Test Group and Comparison Group in determining the denominator of the Cohen's d test (rather than the weighted average of the SDs of the two groups or a single SD of the full population). However, once Commerce selects the Cohen's d test to determine whether there is a significant difference in pricing patterns, Commerce is required to apply that test in a manner which establishes whether a significant difference in pricing patterns, in fact, exists. As discussed in three prior judicial decisions, Commerce, to date, has been unable to justify why relying on SA conforms to law. Furthermore, Commerce has failed again to do so.

VI. RELYING ON SA OPENS THE DOOR TO MANIPULATION, RELYING ON WA DOES NOT

In its Comments on Commerce's draft redetermination, Mid Continent argued that relying on WA would allow a respondent to "manipulate the sales data and the outcome of the Cohen's d calculations by changing the relative volume of sales in the base and comparison groups." Appx62. In response, Commerce noted that it

¹ See *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1355 (Ct. Int'l Trade 2014), *aff'd*, 790 F.3d 1358 (Fed. Cir. 2015) (holding that the "Nails Test" constitutes a permissible construction of the statute).

“intends to remain vigilant in the prevention of opportunities for manipulation,” but then declined to adopt Mid Continent’s argument. Appx63. Thus, this Court’s decision cannot be grounded on Mid Continent’s, post-hoc manipulation argument. MidConBr.15-17.

Moreover, manipulation considerations favor relying on WA rather than SA. ADD margins are calculated on a weighted average basis, with each kilogram of imported merchandise subject to identical treatment, regardless of whether there is one sale of 1000 kilograms or 1000 sales of one kilogram each. *See* PTBr.41-42. One sale of 1000 kilograms with a 10 percent margin will have a greater impact on the final weighted average ADD margin and ADD assessment than 500 sales of one kilogram each at the same 10 percent margin.

Because the quantity of goods imported (in this case, kilograms of nails) – and not the number of sales – is the critical factor in determining ADD margins and ADD assessments, changes to the quantity of imports (which Mid Continent refers to as “relative volume of sales,” MidCon.Br.18, will have a significant impact on a party’s ADD margin. In contrast, one sale of one kilogram at an outlier price will have a miniscule (if any) impact on an ADD margin; however, when Cohen’s d is based on SA, this one otherwise inconsequential sale can turn a pass into a no pass. *See* PTBr.35-36, figures 4 and 5. This being the case, there is a significant potential for manipulation of the Cohen’s d significantly different test

under SA, and a much more limited potential for manipulation (if any at all) under WA.

Finally, in *Mid Continent Steel & Wire, Inc. v. United States*, 219 F. Supp. 3d 1326 (Ct. Int'l Trade 2017) (“*Mid Continent I*”), Appx418-440, the Trial Court reasoned that “Commerce’s argument that weighted-averaging is inferior due to the possibility of manipulation . . . seems problematic,” after the Government conceded “at oral argument that it would not be possible to manipulate by quantity of sales.” Appx434 at n.23. Similarly, in *Mid Continent V*, Appx974-984, this Court reasoned that “in our earlier opinion, we recognized that Commerce had criticized weighting by the number of transactions as susceptible to manipulation, and we noted that weighting by quantity appears to address that issue.” Appx984 at n. 6.

VII. THIS COURT SHOULD CONSIDER ALL OF THE ARGUMENTS SUBMITTED BY AMICUS CURIAE, THE GOVERNMENT OF CANADA

The Government claims that this Court should reject any of Canada’s *amicus* brief argument that was not presented in PT’s opening brief, because “Commerce did not have an opportunity” to address them, and the *amicus* brief contains materials that were not on the administrative record. Gov.Br.48-54. The Court should reject these claims.

Federal courts not only accept *amicus* briefs containing arguments not found in the parties' brief, but they also encourage *amici* to provide novel arguments. See *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (noting that *amicus* briefs assist “judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs”); *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).

Federal courts also regularly encourage *amici* to submit information and “data that are not found in the briefs of the parties.” *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 762 (7th Cir. 2020); *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1175 (10th Cir. 2021) (provisionally granting leave to *amici* to file a brief even though the brief “rel{ied} on extra-record evidence”). The sources Canada relies on are not adjudicative facts that constitute the “facts of the particular case” such that they must either be on the record or subject to judicial notice; rather, they reflect principles of statistics bearing on Commerce's generally applicable methodology. Indeed, this Court has emphasized the importance of the statistics literature in evaluating Commerce's use of Cohen's *d* and in its review of Cohen's *d* has considered statistics literature not found on the administrative record. See *Mid Continent V*, 31 F.4th at 1381; *Stupp*, 5 F.4th at 1357–60.

In sum, this Court should consider all of Canada's arguments when making its determination.

VIII. RELYING ON A SINGLE STANDARD DEVIATION LEADS TO A MORE REASONABLE RESULT THAN RELYING ON SIMPLE AVERAGING

The Government and Mid Continent argue that the *Mid Continent V* court's suggestion that the Cohen's d denominator should be based on a single standard deviation "is not appropriate." Gov.Br.35-38; MidCon.Br.19-27. The linchpins of the Government's claim are that: (1) the single SD methodology does not account for the difference in prices between the two groups (the "between spread"); and (2) the SD "will increase when the difference in the means between the two groups increases despite there being no change in the variances within the two groups." Gov.Br.36. Mid Continent's argument is focused on the same rationale MidCon.Br.23.

These arguments are not sufficient for this Court to reject reliance on a single SD denominator. First, Mid Continent is correct that relying on a single SD accounts for quantity in the analysis in the same manner as relying on WA accounts for quantity. However, Mid Continent is wrong in asserting that Method 1 (See CanadaBr.1) is inappropriate in failing to account for "the difference between {the} respective means" of the two groups because it is relying on Commerce's faulty assumption that the single standard deviation (Method 4) will increase "as

the difference in the means between the two groups increases.” Appx2417. In Method 1, the denominator does not increase, even if the means of the Test Group and the Comparison Group do. CanadaBr.32-33. Neither Mid Continent nor Commerce have provided a reason to reject Method 1.

Second, the Government and Mid Continent’s attack on the single SD methodology ignores the fact that, as discussed by this Court in *Mid Continent V, 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. “Indeed, when the entire population is known, the cited literature points toward using the standard deviation of the entire population as the denominator in Cohen's *d*. . . .” Appx984; *see also* CanadaBr.12, 20. In other words, the academic literature clearly favors relying on a single SD when determining whether there is a significant difference between price for full populations.

In that vein, the Government avers that Canada ignored Coe’s warning that:

The use of a pooled estimate of standard deviation depends on the assumption that the two calculated standard deviations are estimates of the same population value. . . . Where this assumption cannot be made (either because there is some reason to believe that the standard deviations are likely to be systematically different, or if the actual measured values are very different), then a pooled estimate should not be used.

Gov.Br.48 (quoting Appx1965). The reason why Coe does not contemplate using a population standard deviation at this point in his paper is because, at the outset, Coe clarifies that the population standard deviation “is almost never known” in practice. Appx1961. Contrary to the Government’s claim, Coe’s later discussions of standard deviations and his “warning” do not undermine Coe’s recommendation that the ideal denominator is the “the standard deviation of the population from which the different treatment groups were taken.” Appx1961.

Finally, the Government’s claim the single SD methodology is fatally flawed because of its failure to account for the between spread ignores the fact that the between spread is not a relevant factor when this methodology is used. *See* CanadaBr.32. In the single SD methodology, the denominator includes all sales in the full population before the observations are separated into two groups. *Id.* at 14 (“Method 1”). Since all sales in both groups are used to calculate the denominator, before separation, there is no between spread. In the absence of a between spread, the single SD remains the same regardless of which sales fall within the Test Group and Comparison Group. Thus, the second prong of the Government’s argument, that the SD “will increase when the difference in the means between the two groups increases despite there being no change in the variances within the two groups”) also fails. Gov.Br.36

Further, the Government's position undermines Commerce's rationale for rejecting Method 4. The Government is correct that the mean of Method 4 ($\bar{X}_{E\&C}$) is "the mean of the commingled group of both the test and comparison group, or in other words, the mean of all U.S. sales." *Id.* at 59. Because the mean in Method 4 is the mean of the comingled group, the mean will not change in different iterations of calculating Method 4 so long as the comingled group (i.e., the Test and the Comparison Groups combined) remains constant. But this contradicts Commerce's reason for rejecting Method 4: "{A}s the difference in the means between the test and comparison groups increases, {the denominator calculated in Method 4} will also increase despite there being no change in the variances." Appx2417. In other words, Commerce rejects Method 4 because any change in means of the Test Group or the Comparison Group will affect the calculation of Method 4 despite the comingled group remaining constant. It is simply impossible that the Government and Commerce are both correct. Either Method 4 is not affected by changes in Test and Comparison Groups when the comingled group remains the same (as the Government claims) nor it is affected by changes in the Test and Comparison Groups (as Commerce claims). And, even if Commerce is correct that Method 4 increases despite the comingled group remaining constant, that is not the case for Method 1. Canada Br.32.

Similarly, the Government and the COALITION contend that it would be inappropriate to use Method 1 to calculate the denominator because there is no “broader group” from which the test and comparison groups are selected.

GovBr.54-55; *see* COALITION Br. at 6. The Government and the COALITION appear to fundamentally misunderstand how Commerce’s Cohen’s *d* test works. Commerce takes observations that are part of a single data set (all U.S. sales for a particular CONNUM), and divides them into two separate groups (a Test Group and a Comparison Group). Regardless of how the Government, Commerce, or the COALITION want to characterize that single data set, it is the broader group of data from which the Test and Comparison Groups are selected.

Next, the COALITION contends that “the standard deviation of the whole population of U.S. sales prices increases when there is a large amount of variation in such prices, and therefore, it is not helpful to measure whether such variation—whether large or small—is attributable to a pattern of significant price differences.” COALITION Br. at 7-8. The first problem with this argument is that the Cohen’s *d* test is not intended to identify a pattern—that takes place in Commerce’s ratio test. Second, the COALITION’s argument is essentially that greater price disparity will increase the standard deviation. But that is not a problem, that is what the standard deviation is—a measurement of the average variances between observations in a

dataset. It is not clear from the COALITION's argument why an accurate standard deviation is problematic.

In sum, the Government, Mid Continent and the COALITION have failed in their attempts to discredit reliance on the single SD methodology. After careful consideration of the competing denominators, PT currently believes that the Cohen's *d* denominator can be based on either the single SD methodology or the WA methodology. This Court, however, need not consider this issue in this appeal; rather, it should remand this matter to the Trial Court with instructions that Commerce recalculate PT's dumping margin by relying on either of these methodologies, but under no circumstances by relying on SA.

CONCLUSION

Accordingly, this Court should hold that Commerce's Redetermination is not supported by substantial evidence and does not conform to law. Since 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 Cohen's *d* denominator by relying on a weighted average methodology as proposed by PT or a single standard deviation methodology as proposed by this Court in *Mid Continent V*.

Respectfully submitted,

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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 6,894 words, less than the 7,000 words limit for Reply Briefs, 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.

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Dated: October 3, 2024

CERTIFICATE OF SERVICE

On this 3rd day of October, 2024, a copy of the foregoing **REPLY BREIF OF DEFENDANTS-APPELLANTS** was filed electronically. I understand that notice of this filing will be sent electronically to all parties by operation of the Court's filing system. Parties may access this filing through the Court's system.

/s/ Ned H. Marshak

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