

Public Document

ARTICLE 1904 BINATIONAL PANEL REVIEW

Pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF: Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value	Secretariat File No. USA-CDA-2017-1904-03
---	--

DECISION OF THE PANEL ON FIRST REMAND

PANELISTS:

Daniel B. Pickard (Chairman)

Cindy G. Buys

Maureen Irish

Pierre-Olivier Savoie

Christine M. Streatfeild

TABLE OF CONTENTS

- I. INTRODUCTION
- II. STANDARD OF REVIEW
- III. 2006 SLA TAX DEDUCTION
- IV. RESOLUTE START-UP COSTS
- V. DIFFERENTIAL PRICING
- VI. ORDER OF THE PANEL
- VII. SEPARATE OPINION – PANELIST IRISH

I. INTRODUCTION

This Panel was established pursuant to Article 1904(2) of the North American Free Trade Agreement (NAFTA) to review the Final Affirmative Less Than Fair Value Determination issued by the U.S. Department of Commerce (Commerce or DOC) in an antidumping investigation of certain softwood lumber products from Canada.¹ In its Decision and Order of October 5, 2023, the Panel affirmed certain aspects of Commerce's Determination and remanded three matters to Commerce for further explanation: **1.** the deduction of certain export taxes levied pursuant to the 2006 Softwood Lumber Agreement; **2.** the use of log inputs at the mill operated by Resolute FP Canada Inc. (Resolute) at Atikokan to measure production levels when determining whether a start-up adjustment was appropriate; **3.** Commerce's differential pricing analysis concerning the use of the Cohen's *d* test when certain statistical assumptions are not met, following the decision in *Stupp Corp. v. United States*, 5 F. 4th 1334 (Fed. Cir. 2021) (*Stupp I*), and the calculation of the Cohen's *d* denominator following the decisions in *Mid Continent Steel & Wire, Inc. v. United States*, 940 F. 3d 662 (Fed. Cir. 2019) (*Mid Continent I*) and *Mid Continent Steel & Wire, Inc. v. United States*, 31 F. 4th 1367 (Fed. Cir. 2022) (*Mid Continent II*).²

Commerce filed its Final Results of Redetermination on April 30, 2024.³ In the Redetermination, Commerce did not deduct the 2006 SLA export taxes from gross U.S. prices.

¹ *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 82 FR 51806 (November 8, 2017). The period of investigation (POI) was from October 1, 2015 to September 30, 2016.

² NAFTA Panel Report, *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value*, Decision and Order, Secretariat File No. USA-CDA-2017-1904-03, October 5, 2023 (Panel Report).

³ *Softwood Lumber from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, Secretariat file No. USA-CDA-2017-1904-03, Final Results of Redetermination Pursuant to Panel Remand Order, April 30, 2024 (Redetermination or Determination on Remand), following Panel extension orders of December 22, 2023, February 28, 2024, and April 2, 2024. On May 6, 2024, the DOC filed the Supplementary Remand Administrative Record: *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical*

Commerce further explained its reliance on log inputs to determine when the Atikokan mill reached commercial production levels. As well, Commerce provided explanation for its use of the Cohen's *d* test when certain statistical assumptions are not met and for its use of simple averaging in the Cohen's *d* denominator. Commerce recalculated the estimated weighted-average dumping margins for the mandatory respondents and for all other producers and exporters.

On May 23, 2024, the Panel issued an Order⁴ staying the briefing schedule, as requested in an Unopposed Motion filed by the Government of Canada (Canada or GOC), the Governments of Ontario and Québec, Canfor Corporation, Resolute, Tolko Marketing and Sales Ltd. and Tolko Industries Ltd., and West Fraser Mills Ltd. (the Canadian Parties) on May 14, 2024.⁵ The briefing schedule was stayed pending resolution of the Canadian Parties' Joint Motion for a Stay of Proceedings, also filed on May 14, 2024.⁶

In the Joint Motion for a Stay of Proceedings, the Canadian Parties requested a stay until the final decision of the U.S. Court of Appeals for the Federal Circuit in *Stupp Corp. v. United States*, Court File. No 23-1663. The GOC, Resolute and other participants had filed a joint *amicus* brief in that litigation.⁷ Commerce filed a Response in Opposition to the motion.⁸ On June 14, 2024, Commerce filed a Notice of Subsequent Authority containing a copy of a Memorandum and Order issued on June 13, 2024, in *Resolute v United States*, CIT Case No. 23-00095.⁹ On June 20, 2024, Resolute filed a Response to Commerce's Notice of Subsequent Authority.¹⁰

Circumstances, Secretariat File No. USA-CDA-2017-1904-03, Final Results of Remand Redetermination Record Submissions, May 6, 2024.

⁴ *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, Secretariat File No. USA-CDA-2017-1904-03, Order, May 23, 2024.

⁵ Canadian Parties' Unopposed Motion to Stay the Briefing Schedule on the Remand Determination, May 14, 2024.

⁶ Canadian Parties' Joint Motion for a Stay of Proceedings, May 14, 2024.

⁷ *Id* at 7.

⁸ DOC, Response in Opposition to Notice of Motion for a Stay of Proceedings, May 24, 2024.

⁹ DOC, Notice of Subsequent Authority, June 14, 2024.

¹⁰ Resolute, Response to the U.S. Department of Commerce's Notice of Subsequent Authority, June 20, 2024.

On July 1, 2024, the Panel granted the Canadian Parties' Joint Motion for a Stay of Proceedings until the issuance of the decision by the U.S. Court of Appeals for the Federal Circuit in *Stupp Corp. v. United States*, Court File No. 23-1663. As requested in the Joint Motion, the Panel ordered the participants to submit a Joint Status Report within 30 days following the decision.¹¹ On April 28, 2025, Resolute filed a Notice of Subsequent Authority¹² containing copies of two decisions of the U.S. Court of Appeals for the Federal Circuit: *Marmen v. United States*, Court File No. 2023-1877, decided April 22, 2025,¹³ and *Stupp Corp. v. United States*, Court File No. 2023-1663, decided April 23, 2025.¹⁴ Resolute stated that these two decisions rejected Commerce's argument that it may use the Cohen's *d* test when the underlying statistical assumptions are not met. On May 2, 2025, the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (COALITION) filed a Response to Resolute's Submission of Subsequent Authority.¹⁵ The COALITION argued that the Court of Appeals' decisions in *Marmen* and *Stupp II* were relevant to whether there was a pattern of export prices that differ significantly, but not to whether any such differences could be taken into account using the A – A method of calculation. On May 5, 2025, Commerce filed a Response to Resolute's Subsequent Authority Submission, including Judge Stark's additional views in *Stupp II*, which were not included in Resolute's submission.¹⁶ Commerce argued that *Marmen* expressly permits Commerce to re-perform a differential pricing analysis without the Cohen's *d* test.

¹¹ *Softwood Lumber from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, Secretariat File No. USA-CDA-2017-1904-03, Order, July 1, 2024.

¹² Resolute, Rule 68 Notice of Subsequent Authority, April 28, 2025.

¹³ *Marmen Inc. v. United States*, 1134 F. 4th 1334 (Fed. Cir. 2025) (*Marmen*).

¹⁴ *Stupp Corp. v. United States*, No. 2023-1663, 2025 WL 1178392 (Fed. Cir. 2025) (*Stupp II*).

¹⁵ COALITION, Rule 68(3) Response to Resolute's Submission of Subsequent Authority, May 2, 2025.

¹⁶ DOC, Investigating Authority's Response to Resolute's April 28, 2025 Subsequent Authority Submission, May 5, 2025.

On May 23, 2025, the Canadian Parties filed a Joint Status Report on behalf of all participants in which the Canadian Parties requested that the Panel lift the stay.¹⁷ On June 5, 2025, the Panel lifted the stay, ordered that written submissions challenging the Department of Commerce’s Determination on Remand be filed by June 17, 2025 and written rebuttals and responses by the DOC and participants in support of the Determination on Remand be filed by August 18, 2025.¹⁸

On June 17, 2025, Canada, Resolute and the COALITION filed submissions on the Redetermination.^{19 20 21} On August 18, 2025, Commerce filed a response to Parties’ remand comments,²² the COALITION filed a submission in support of the Redetermination,²³ and Resolute filed a brief on the Redetermination.²⁴

II. STANDARD OF REVIEW

Article 1904(3) and Annex 1911 of the NAFTA require the Panel to apply the standard of review set out in § 516a(b)(1)(B) of the Tariff Act of 1930, as amended.²⁵ It provides that the Panel “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported

¹⁷ Canadian Parties, Joint Status Report, May 23, 2025. The Joint Status Report contains a copy of an Order from the Binational Panel for the first administrative review of the softwood lumber antidumping duty declining to defer consideration of *Marmen* or grant a stay until the end of the appeal period for *Marmen* and *Stupp II : Certain Softwood Lumber Products from Canada: Final Results of the Antidumping Duty Administrative Review: 2017-2018*, Secretariat File No. USA-CDA-2020-10.12-02, Order, May 8, 2025.

¹⁸ *Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, Secretariat File No. USA-CDA-2017-1904-03, Order, June 5, 2025.

¹⁹ GOC, Rule 73(2)(b) Comments on Remand Redetermination, June 17, 2025, distributed to the Panel on June 18, 2025.

²⁰ Resolute, Rule 73(3) Brief on Final Results of Redetermination Pursuant to Binational Panel Order, June 17, 2025, distributed to the Panel on June 18, 2025.

²¹ COALITION, Rule 73(3) Written Submission Challenging the Determination on Remand, June 17, 2025, distributed to the Panel on September 23, 2025.

²² DOC, Response to Parties’ Remand Comments, August 18, 2025, distributed to the Panel on September 8, 2025.

²³ COALITION, Rule 73(3) Written Submission in Support of the Determination on Remand, August 18, 2025, distributed to the Panel on September 8, 2025.

²⁴ Resolute, Rule 73(3)(b) Brief on Final Result of Redetermination Pursuant to Binational Panel Order, August 18, 2025, distributed to the Panel on September 8, 2025.

²⁵ 19 U.S.C. § 1516a(b)(1)(B).

by substantial evidence on the record, or otherwise not in accordance with law.”²⁶ The substantial evidence standard requires Commerce to base its determinations on a reasonable analysis of the record evidence. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁷

For several decades, U.S. courts reviewing federal agency decisions interpreting federal statutes applied the two-step process the U.S. Supreme Court set out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), commonly known as the “*Chevron* doctrine”. Under the *Chevron* doctrine, courts first consider whether “Congress has directly spoken to the precise question at issue.”²⁸ If Congress’ intent is clear, that ends the inquiry.²⁹ However, if the statute is silent or ambiguous with respect to the issue at hand, the court must defer to the agency’s interpretation as long as it is based on a permissible construction of the statute.³⁰

In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024), the U.S. Supreme Court overruled the *Chevron* doctrine. The Court determined that the deference owed by a reviewing court to agency action under the *Chevron* doctrine is inconsistent with the courts’ role in statutory interpretation and the Administrative Procedure Act (APA).³¹ Instead, courts should “use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.”³² The Court recognized that Executive Branch interpretations of statutes are entitled to respect, especially when the interpretation is issued contemporaneously with enactment of the statute and remains consistent over time.³³ The Court reasoned that a longstanding practice of

²⁶ *Id.*

²⁷ *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1340 (Fed. Cir. 2011) (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003)).

²⁸ *Id.* at 842.

²⁹ *Id.*

³⁰ *Id.* at 843.

³¹ *Id.* at 404-406.

³² *Id.* at 400.

³³ *Loper Bright*, 603 U.S. at 385-86.

government can inform a court's understanding of the law.³⁴ It further recognized that the interpretations and opinions of an agency based on its specialized expertise could provide guidance to a reviewing court even on legal questions.³⁵ The weight given to an agency's judgment in any particular case would depend on "the thoroughness evident in its consideration, the validity of its reasoning, the consistency with earlier and later pronouncements, and all other factors giving it power to persuade."³⁶ However, the Court emphasized that the judiciary must exercise its independent judgment, particularly with respect to questions of law.³⁷

When engaging in statutory interpretation, courts may continue to obtain aid from the administering agency responsible for implementing the relevant statute.³⁸ Some statutes may expressly delegate to an agency the authority to give meaning to a particular statutory term.³⁹ Other statutes may empower the agency to fill in the details of a statutory scheme or "to regulate subject to limits imposed by a term or phrase."⁴⁰ The *Loper Bright* Court further stated that, "When the best reading of the statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."⁴¹ "The Court fulfils that role by recognizing constitutional delegations, fix[ing] the boundaries of [the] delegated authority . . . and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries."⁴²

³⁴ *Id.* at 386.

³⁵ *Id.* at 388, citing *Skidmore*, 323 U.S. at 139-40.

³⁶ *Skidmore*, 323 at 140.

³⁷ *Loper Bright*, 603 U.S. at 392.

³⁸ *Id.* at 394.

³⁹ *Loper Bright*, 603 U.S. at 394.

⁴⁰ *Id.* 395.

⁴¹ *Id.*

⁴² *Id.*

The *Loper Bright* Court instructed future courts to apply their independent legal judgment using traditional tools of statutory construction when performing statutory interpretation.⁴³ While the Court abandoned the *Chevron* doctrine, it also stated that it did “not call into question prior cases that relied on the *Chevron* framework, stating that mere reliance on *Chevron* deference does not justify overruling a prior decision.”⁴⁴

By contrast, agency decisions with respect to questions of fact based on an agency’s specialized expertise continue to be entitled to more deference.⁴⁵ This judicial deference to an agency’s factfinding is codified in the APA, 5 U.S.C. § 706(A) & (C) and reaffirmed in *Loper Bright*.⁴⁶

Loper Bright thus made a clear distinction between questions of fact and questions of law for reviewing courts and this Panel. Applying *Loper Bright*’s guidance to the current dispute, the Panel will ask whether Commerce’s factual determinations are “unsupported by substantial evidence on the record” as directed by the Tariff Act. However, when determining whether Commerce’s decision is “otherwise not in accordance with law,” the panel will use its independent judgment and traditional tools of statutory construction to determine the best reading of the statute. In doing so, the Panel will consider whether the relevant statute provision expressly delegates to Commerce the authority to give meaning to a particular statutory term, or empowers Commerce to fill in the details of the statutory scheme, or to regulate subject to limits imposed by a term or

⁴³ *Id.*

⁴⁴ *Id.* at 412. In its Rule 73(3) Written Submission in Support of Remand Determination, the COALITION raised a question regarding the applicability of statutory stare decisis following *Loper Bright*, citing Amy C. Barrett, Statutory Stare Decisis in the Courts of Appeals, 73 Geo. Wash. L. Rev. 317 (2004-2005), at 327-328, including footnote 58 (discussing how different Federal Courts of Appeals, including the Federal Circuit, have applied in their circuits what Justice Coney Barrett called “the super-strong presumption against overruling statutory precedents”). As explained below, the panel finds it premature to address the applicability of the doctrine at this stage of the proceedings.

⁴⁵ See *Skidmore v Swift & Co.*, 323 U.S. 134 (1944).

⁴⁶ 603 U.S. 388.

phrase. The Panel also will take into account the extent to which Commerce has provided a thorough and persuasive explanation and one that is consistent with its past practice.⁴⁷

III. 2006 SFTWOORD LUMBER AGREEMENT TAX DEDUCTION

A. The Panel Sustains Commerce's Remand Determination Not to Deduct The 2006 SLA Export Taxes.

On remand, Commerce did not deduct export taxes paid by Resolute and the other mandatory respondents on exports of softwood lumber to the United States during a portion of the period of investigation pursuant to the terms of the softwood lumber agreement between the government of Canada and the government of the United States of America ("2006 SLA"). In this regard, the Panel sustains the determination.

In the original Final Determination, Commerce deducted such export taxes from gross prices in its calculation of export price ("EP") and constructed export price ("CEP").⁴⁸ The GOC and Resolute asserted that the 2006 SLA export taxes were intended to offset countervailable subsidies and therefore Commerce was prohibited by statute from deducting the charges. On review, this Panel found that there is no dispute that the export taxes were paid in accordance with the 2006 SLA, and, that the United States and Canada entered into the SLA in 2006 to resolve various ongoing disputes relating to U.S. domestic industry claims of unfair subsidization in Canada of softwood lumber production. Pursuant to the 2006 SLA, both governments, as well as all represented parties and participants, agreed to terminate the legal actions related to softwood

⁴⁷ *Skidmore*, 323 U.S. at 140.

⁴⁸ See *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 82 FR 51806 (Dep't Commerce Nov. 8, 2017), P.R. Doc 915 (Final Determination) and accompanying Issues and Decision Memorandum (IDM), P.R. Doc 892.

lumber; the United States agreed to revoke its countervailing and antidumping duty orders on softwood lumber from Canada, effective retroactive to May 22, 2002; and Canada agreed that for a period of seven years after the 2006 SLA's effective date, it would impose export taxes on certain softwood lumber exported to the United States.⁴⁹

This Panel found on October 5, 2023 that Commerce misapplied the statutory framework with respect to its treatment of the 2006 SLA export taxes and instructed Commerce to examine the intent of the 2006 SLA export taxes in view of the statutory language that prohibits the deduction of “export taxes, duties or other charges ... specifically intended to offset the countervailable subsidy received[.]”⁵⁰ The Panel instructed Commerce to explain its determination with respect to “whether an export tax could be specifically intended to do more than one thing,” Panel Order at 37.

Commerce issued a draft remand redetermination on February 20, 2024, to interested parties and provided them with an opportunity to comment.⁵¹ On April 30, 2024, Commerce released its final remand redetermination, in which it determined to not deduct the 2006 SLA export tax from gross U.S. price.⁵² On remand, Commerce responded to the Panel's instructions and ultimately concluded that it sees “no authority for the proposition that ‘specifically intended’ must mean a singular intent.”⁵³ Commerce further found “[t]hat the setting of the offsets does not relate to how Commerce measures countervailable subsidies is not evidence that contradicts that

⁴⁹ *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less than Fair Value*, Secretariat File No. USA-CDA-2017-1904-03, Decision and Order (Oct. 5, 2023).

⁵⁰ 19 U.S.C. §§ 1677a(c)(2)(B), 1677(6)(C).

⁵¹ See Draft Results of Redetermination Pursuant to Binational Panel Order, *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less than Fair Value*, Secretariat File No. USA-CDA-2017-1904-03 (Feb. 20, 2024) (Draft Redetermination).

⁵² Final Results of Redetermination Pursuant to Binational Panel Order, *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less than Fair Value*, Secretariat File No. USA-CDA-2017-1904-03 (Apr. 30, 2024) (Remand Redetermination).

⁵³ *Id.* at 10.

one of the intents of the SLA export tax was to offset Canada's countervailable subsidies to its lumber producers."⁵⁴ In re-examining the issue, Commerce reasonably concluded "based on the text of the {2006 SLA}, that the SLA export taxes were specifically intended to offset the countervailable subsidies that Commerce found to exist in the Canadian lumber industry" and therefore did not deduct the export taxes from gross price.⁵⁵

Following comments from interested parties on the draft remand, Commerce emphasized that it expressly found that the intent of the 2006 SLA must be inferred from the text of that agreement, and that Commerce undertook that examination, specifically concluding that "Article II of the SLA read in conjunction with Article VII 'make clear that Canada's application of these export taxes was conditioned on the United States' elimination of its revocation of its lumber CVD and AD orders.'"⁵⁶ This supported Commerce's conclusion that the export taxes were intended to offset the countervailable subsidies, as at least one intended purpose. Commerce further expressly considered, in response to the COALITION's comments, that these export taxes may have had additional purposes such as to offset dumping and address other outstanding issues covered by the 2006 SLA, but that it does not detract from the reasonableness of the inference under the language of the 2006 SLA that they were "in part, specifically intended to offset the countervailable subsidies received."⁵⁷

⁵⁴ *Id.* at 11.

⁵⁵ Remand Redetermination at 7, 10-12.

⁵⁶ DOC Response to Parties' Comments (Aug. 18, 2025) at 22. The Panel notes that there is a typographical error in DOC's Response to Parties' Comments (Aug. 18, 2025), and the citation to Article II should be to Article III.

⁵⁷ Remand Redetermination at 10.

IV. RESOLUTE START UP COSTS

A. The Panel Sustains Commerce’s Remand Determination Denying Resolute’s Start-Up Adjustment for the Atikokan Mill

In its Redetermination, Commerce has maintained that the Atikokan Mill did not meet, during the POI, the second statutory criteria for a start-up adjustment under section 773(f)(1)(C)(ii) of the Tariff Act.

The Panel remanded this issue to Commerce to provide a better explanation as to why measuring log inputs at the Atikokan Mill satisfied the requirement to measure “production levels” using “units processed” when determining whether a start-up adjustment is appropriate.⁵⁸

Commerce has now provided an explanation consistent with the requirements of the statutory language and based on substantial evidence, to reject the start-up adjustment. For the reasons below, the Panel sustains Commerce’s redetermination.

The question before the Panel is whether Commerce properly interprets and applies the following terms of Section 773(f), *i.e.*, whether “production levels were limited by technical factors associated with the initial phase of commercial production.”

As noted by the Panel in its Decision and Order, the statute does not define the phrase “production levels.” The Panel thus has to exercise its independent judgment in determining the best reading of the statute and deciding whether Commerce has acted within its statutory authority. Careful attention to the judgment of the Executive Branch may help inform that inquiry.

The SAA, approved by Congress, provides guidance on how to determine whether production levels are limited by technical factors associated with the initial phase of commercial production. As noted by the Panel in its Decision and Order, the SAA states:

⁵⁸ Panel Decision and Order at 41-50.

To determine when a company reaches commercial production levels, Commerce will consider first the actual production experience of the merchandise in question. Production levels will be measured based on units processed. To the extent necessary, Commerce also will examine other factors, including historical data reflecting the same producer's or other producers' experiences in producing the same or similar products. A producer's projections of future volume or cost will be accorded little weight, as actual data regarding production are much more reliable than a producer's expectations. ³⁷

Thus, the SAA directs Commerce to consider the "actual production experience of the merchandise in question" as measured by the "units processed" to determine whether "commercial production levels" have been reached, indicating the end of the start-up period.

Furthermore, the SAA instructs that "the attainment of peak production levels will not be the standard for identifying the end of the start-up period, because the start-up period may end well before a company achieves optimum capacity utilization."⁵⁹

In its application of Section 773(f) of the Tariff Act, the Panel further held in its Decision and Order of October 5, 2023, that Commerce must explain why, in essence, only measuring production experience through log inputs, in the light of other factors to be taken into account, as may be necessary, would satisfy the language of the SAA. The Panel remanded accordingly.

i. The Redetermination

In its Redetermination, Commerce maintained that it "continue[s] to find that an analysis of Resolute FP's log inputs (production starts) at the Atikokan Mill was the best measure of determining when the mill achieved commercial production."⁶⁰ However, to reach its conclusion that the Atikokan Mill had achieved commercial production by the time of the POI, and thus should not benefit from a start-up adjustment, Commerce offered a more complex and detailed analysis of the Atikokan Mill's production levels than only log inputs, taking into consideration other

⁵⁹ SAA at 836.

⁶⁰ Remand Redetermination at 15.

factors, notably production yields. It is such factual analysis provided by Commerce, and to which deference is given, which convinces the Panel. Such analysis comes within how Commerce was to determine when “production levels” are “limited by technical factors associated with the initial phase of commercial production” under the statute, as per the Panel’s independent interpretation.

ii. The Parties’ Positions

Commerce relies on what it says is a long-standing practice of using production inputs or starts as the key indicator of when a company has exited the start-up phase of production.⁶¹

It then clarifies its position adopted in *Agro-Dutch*, providing references to inputs in that case and how Commerce used them to measure units processed as indicative of production levels.⁶² Commerce also cited to six other cases which would show a consistent interpretation of “units processed” as being production starts or inputs.⁶³ It noted that its practice showed that quality of the subject merchandise was not a relevant consideration, nor were later improvements in output yield,⁶⁴ referring notably to its interpretation of the SAA. Commerce further referred to inputs as the “primary indicator,” following the SAA, to determine whether commercial production levels had been reached.⁶⁵ Commerce nonetheless disagreed that yield improvements in relation to output should be considered as metrics relevant to its determination.⁶⁶

In its review of evidence, Commerce concluded that during the POI, the Atikokan Mill posted saleable production yields that were comparable to the other Resolute FP mills regarding saleable logs.⁶⁷

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 16-19.

⁶⁴ *Id.* at 30.

⁶⁵ *Id.* at 26, 28, 31.

⁶⁶ *Id.* at 34.

⁶⁷ *Id.* at 20.

Commerce noted that Resolute did not defer the costs associated with the claimed start-up adjustment of the Atikokan facility in its normal books and records. This action would show such expenses as current expenses that were thus not capitalized and allocated only post-start-up under generally accepted accounting principles.⁶⁸

Commerce rejected Resolute's position that the fact it was not operating at "targeted production speed, nor operating at full capacity"⁶⁹ were relevant factors to its determination. Commerce noted the SAA stated "little weight" should be given to Resolute's own production forecasts.⁷⁰

Commerce noted that during Q4 of 2015, the first three months of the POI, Atikokan was operating within the range of Resolute FP mills producing the same products at commercial production levels.⁷¹ Commerce concluded that Atikokan was experiencing chronic production problems rather than still being in the start-up phase.⁷²

Commerce noted a significant increase in output from April 2015 to September 2015 at Atikokan, prior to the start of the POI.⁷³ It also compared the time to reach commercial production levels at Atikokan, which was of more than 2 years, while in another Canadian lumber case such time had been three months.⁷⁴

Resolute's position is that during the POI the new mill at Atikokan had not yet overcome the impediments that prevented it from producing at the level expected of a commercially operational softwood lumber mill⁷⁵ and that there was an unsteady transition to commercial levels

⁶⁸ *Id* at 23.

⁶⁹ *Id* at 30.

⁷⁰ *Id* at 25, 30, citing SAA at 838.

⁷¹ *Id* at 30-31.

⁷² *Id* at 32.

⁷³ *Id* at 34.

⁷⁴ *Id*.

⁷⁵ Resolute's Rule 73(3) Brief on Final Results of Redetermination Pursuant to Binational Panel Order at 25.

of production.⁷⁶ Resolute identified specific issues, notably one particularly critical mill system which caused the biggest slowdown to the mill, and a high-speed planer which became a bottleneck for production.⁷⁷ Resolute states that these issues were discovered only in August 2016, one month before the end of the POI, and thus lasted until then. Resolute criticized Commerce's reliance on a prior softwood lumber case for the purposes of establishing the time needed to reach commercial production levels (stated at 3 months in the other case, by comparison to some 2 years at Atikokan).⁷⁸ For Resolute, that was another case with different facts and thus not an appropriate comparison.⁷⁹ Resolute also criticized Commerce's dismissal of its evidence on capacity utilization.⁸⁰ Resolute also argued that Commerce's comparison of yields between different Resolute mills was inadequate because yields would be dependent on many factors including mill equipment, technology and the timber available for production.⁸¹

The COALITION supported Commerce's redetermination.⁸²

iii. The Panel's Analysis

The first issue for the Panel is the proper interpretation of the statute. Following *Loper Bright*, the Panel holds that Commerce cannot only consider production inputs to establish whether commercial production levels have been achieved and thus whether a start-up adjustment applies. In any event, Commerce has stated that production inputs were only the "primary factor" for its redetermination.⁸³

⁷⁶ *Id* at 26.

⁷⁷ *Id* at 25-26.

⁷⁸ *Id* at 27.

⁷⁹ *Id*.

⁸⁰ *Id* at 27-28.

⁸¹ *Id* at 29.

⁸² COALITION's Rule 73(3) Written Submission in Support of Remand Redetermination at 10-19.

⁸³ Remand Determination at 26, 28, 31.

The Panel finds that in the absence of any definition of “production levels”, then the SAA, as the authoritative executive statement adopted at the time the law was enacted, and approved by Congress, provides important and convincing guidance on how production levels in respect of the initial or subsequent phase of commercial production should be interpreted. Moreover, all parties cite to the SAA and Commerce has specifically been guided by at least part of the SAA in its approach, *i.e.*, the statement that “[p]roduction levels will be measured based on units processed.” If part of the SAA applies as appropriate interpretative guidance, then the entire SAA should as well, which includes its following sentence: “To the extent necessary, Commerce also will examine other factors, including historical data reflecting the same producer’s or other producers’ experiences in producing the same or similar products.” The logical consequence of this sentence is that Commerce must always provide a justification on whether it finds “other factors” (without limitation to what such other factors may be) “necessary” to examine. This requires addressing such other potentially relevant factors, at least to assess their relevance, on a case-by-case basis. This, in the Panel’s view, is the best interpretation of section 773(f)(1)(C)(ii) of the Tariff Act, in the light of *Loper Bright*. This is also the approach Commerce has in fact taken.

Commerce practice that does not align with the guidance of the SAA is entitled to less weight. Whether “interpretations and opinions” of Commerce have “weight” “depend[s] upon ... the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U. S. 134, at 140 (1944). In the Panel’s view, the SAA must be read as a whole. Any practice by Commerce which avoids considering other factors than inputs into evaluating production levels, is necessarily less persuasive.

In its Redetermination, Commerce now relies on substantial evidence that inputs and yields at Atikokan did show that the mill had reached commercial production by the beginning of the POI.

Commerce has now also compared Atikokan's production yields during the POI to yields of other Resolute mills and found that they were comparable. Commerce has considered Resolute's position that there were issues, including with the planer, which Commerce agrees with, but characterizes as chronic issues, rather than issues that belong to the start-up phase. Commerce has also compared how long it takes for softwood lumber producers to reach commercial production. This is all in addition to the primary consideration of Commerce, *i.e.*, the log inputs as units processed, as required. Commerce has thus reached a reasonable conclusion on the basis of substantial evidence. The Panel thus sustains Commerce's redetermination rejecting the start-up adjustment for the Atikokan Mill.

V. DIFFERENTIAL PRICING

A. The Redetermination

In its Decision, the Panel remanded for further explanation Commerce's differential pricing analysis concerning use of the Cohen's *d* test when the assumption that the test group and the comparison group are "normally distributed, of sufficient size and of roughly equal variances"⁸⁴ is not met, following the decision in *Stupp I*. The Panel also remanded for further explanation Commerce's choice for the Cohen's *d* denominator, "either simple averaging or an alternate choice,"⁸⁵ following the decisions in *Mid Continent Steel & Wire, Inc. v. United States*, 940 F. 3d

⁸⁴ *Stupp I* at 1357.

⁸⁵ Panel Report at 32.

662 (Fed. Cir. 2019) (*Mid Continent I*) and *Mid Continent Steel & Wire, Inc. v. United States*, 31 F. 4th 1367 (Fed. Cir. 2022) (*Mid Continent II*).

In the Redetermination, Commerce provided explanation for its continued use of the Cohen's *d* formula for differential pricing in the absence of the three statistical criteria and for its continued use of simple averaging in the denominator of that formula. As these arguments are no longer central after the decision in *Marmen*, they are outlined only briefly here.

Commerce argued that the three statistical criteria are not the basis for Dr. Cohen's thresholds that determine significance and are not relevant for analysis that uses the full population of data rather than samples.⁸⁶ To analyze for differential pricing, Commerce compared a test group of the exporter's sales to all its other sales, comparing purchasers, regions and time periods. Commerce noted that the groups reflect the full population of the exporter's sales during the period of investigation, not samples.⁸⁷ Commerce argued that Dr. Cohen's 0.8 threshold indicating a large effect size was derived from real-world observations, not from statistical analysis of non-overlap between groups that depended on certain assumptions.⁸⁸ Commerce responded to excerpts of academic literature cited by the Federal Circuit in *Stupp I* (at 1357-58). As these involved sampled data, Commerce argued they were not relevant to Commerce's use of the Cohen's *d* formula which does not produce estimates from samples, but calculates the actual coefficient based on the full population of sales data.⁸⁹ In response to Resolute's argument that Commerce turned the exception into the general rule by finding that at least one company had 33% or more of its sales passing the Cohen's *d* test in 87% of the investigations and reviews during the POI, Commerce argued that an

⁸⁶ Determination on Remand at 38.

⁸⁷ *Id* at 42-44.

⁸⁸ *Id* at 44-47.

⁸⁹ *Id* at 47-54.

exception is not necessarily rare, but merely an alternative that is available when the requirements are met.⁹⁰

Commerce explained its practice concerning the denominator of the Cohen's *d* formula, which is calculated as the simple average of the standard deviations of the test group and the comparison group.⁹¹ Commerce argued that there is support in the academic literature for simple averaging if the two groups are not samples but cover the full population, if the standard deviations of each group are known and if those standard deviations are unequal. Commerce referred to examples of weighted averaging of standard deviations that involved sampled data.⁹² Based on academic literature, Commerce argued that a requirement of equal group size for the use of simple rather than weighted averaging applies to some analyses of sampled data, but is not relevant for the measurement of effect size in the full population of data.⁹³ In the alternative, Commerce argued that use of simple averaging is supported as reasonable and lawful given the greater reliability of full population data over estimates based on samples.⁹⁴

The Determination on Remand summarizes Comments from Interested Parties on the Draft Redetermination. The COALITION supported Commerce's analysis in the Draft Redetermination. The Canadian Parties and Resolute contested Commerce's arguments.

The Canadian Parties contended that if the three statistical criteria are not met, then the Cohen's *d* formula does not produce a meaningful result. They noted that the issue concerning simple averaging in the denominator is related, as the problem does not arise if the criteria are met.⁹⁵ The Canadian Parties argued that Dr. Cohen's calculations assumed normal distributions,

⁹⁰ *Id* at 60-61. See *Id* at 148-57.

⁹¹ Actually, the square root of the simple average of the variances of the two groups. See *Id* at 62, note 247.

⁹² *Id* at 62-69.

⁹³ *Id* at 73-77.

⁹⁴ *Id* at 78-82.

⁹⁵ *Id* at 83.

equal size and roughly equal variances for both samples and a full population, as well as for the establishment of interpretive thresholds.⁹⁶ Commerce had discussed hypothetical examples with prices close together that would nevertheless pass the Cohen's *d* test. Commerce argued that this was not problematic because application of the meaningful difference test would prevent use of the A-T method for determining dumping.⁹⁷ In response, the Canadian Parties contended that if the Cohen's *d* test does not operate as it should, the test is unreasonable and the failure cannot be remedied by application of the ratio test or the meaningful difference test.⁹⁸

Concerning use of simple averaging in the denominator of the Cohen's *d* formula, the Canadian Parties argued that Commerce has incorrectly reduced the requirement of equal sample size to an issue of the reliability of the data. If the criteria of equal size and roughly equal variances are not met, the Canadian Parties argued that the reliability of the standard deviations is meaningless.⁹⁹ The Canadian Parties also argued that Commerce's meaningful difference test fails to explain why significant price differences between time periods "cannot be taken into account"¹⁰⁰ in instances of seasonality and price variations over the period of investigation.

Resolute argued that the A-T method is to be used rarely, when the statutory conditions are met. Resolute argued that the statistics cited in the Redetermination by Commerce in an attempt to show that use is uncommon are flawed, as they over-include certain investigations and ignore use in administrative reviews.¹⁰¹

Commerce responded to the comments from the Canadian Parties and Resolute. Commerce maintained that the three statistical criteria are not relevant to its Cohen's *d* test and argued that

⁹⁶ *Id* at 86-89.

⁹⁷ *Id* at 54-60.

⁹⁸ *Id* at 91-93.

⁹⁹ *Id* at 95-99.

¹⁰⁰ 19 U.S.C. § 1677f-1(d)(1)(B)(ii).

¹⁰¹ *Id* at 103-04.

simple averaging to calculate the denominator of the Cohen's *d* formula was reasonable.¹⁰² In particular, Commerce disagreed with the comments from Resolute that Commerce's use of differential pricing had turned the exception into the rule. Resolute surveyed investigations and reviews in the POI and concluded that in 87% of the determinations Commerce found a significant pattern of price differences for at least one respondent. Commerce asserted that differential pricing analysis has not led to impermissible reliance on the A-T method. The Cohen's *d* test is only one step in the possible use of the alternative methodology and must be followed by the ratio test and the meaningful difference test. Commerce criticized Resolute's findings which included preliminary determinations as well as final determinations, thus double- or triple-counting the same file. Of the final determinations in investigations in 2015, Commerce stated that the A-T method was used for only 22% of respondents with calculated results. For 2021, the number was 21%. Of the final determinations published during the POI, the A-T method was used for only 28% of respondents.¹⁰³ In response to arguments by the Canadian Parties and Resolute, Commerce asserted that it is not required to consider seasonality or price variability over time when looking for significant price differences over periods of time. Commerce argued that it is not required to use shorter periods of time to account for alleged price volatility or to identify reasons why price differences exist.¹⁰⁴

¹⁰² *Id* at 106-48.

¹⁰³ *Id* at 148-57. See *Id* at 60-62.

¹⁰⁴ *Id* at 158-60.

B. The Arguments Presented After the Lifting of the Stay

On June 17, 2025, after the lifting of the stay and after the decisions in *Marmen* and *Stupp II*, the GOC and Resolute filed submissions relating to differential pricing. The GOC states that both *Marmen* and *Stupp II* find the use of Cohen’s *d* unreasonable when the statistical criteria are not met. The GOC argues that a remand is required and that, on remand, Commerce may revert to the A-A methodology or may analyze for differential pricing. The GOC contends that there is no need for Commerce to address differential pricing and the Panel should not direct it to do so. The GOC argues that the Panel should direct Commerce to “either apply A-A or explain why price differences that are consistent with market volatility are ‘significant’ for purposes of identifying targeted dumping.”¹⁰⁵ Resolute argues that *Marmen* and *Stupp II* require a remand as Commerce’s use of the Cohen’s *d* formula does not follow the essential statistical criteria. Resolute notes the statute does not set the length of the time period for the comparison of normal and export values, but does require that such comparisons be “fair” and “at a time reasonably corresponding to the time of the sale used to determine the export price” (19 U.S.C. § 1677b(a)(1)(a)). Commerce’s standard practice is to use averages weighted for the entire period of investigation. Resolute notes that Commerce may calculate weighted averages for shorter periods when prices differ significantly over the POI. Resolute argues that the Panel should remand to Commerce for an explanation consistent with the statute of why any export price differences by time cannot be taken into account using the A-A method or the T-T method.¹⁰⁶

On August 18, 2025, Commerce and the COALITON filed submissions relating to differential pricing. Commerce accepts that it would be appropriate for the Panel to remand the

¹⁰⁵ GOC, Rule 73(2)(b) Comments on Remand Redetermination, June 17, 2025 at 2.

¹⁰⁶ Resolute, Rule 73(3) Brief on Final Results of Redetermination Pursuant to Binational Panel Order, June 17, 2025.

use of the Cohen's *d* test for reconsideration consistent with the Federal Circuit decisions in *Marmen* and *Stupp II* and argues that the Panel should sustain the Redetermination in all other respects. Commerce contends that Congress gave it flexibility through use of open-ended language referring to prices that differ significantly. The claims by the GOC and Resolute that the A-A method should account for price volatility would make the mention of "periods of time" in the statutory language superfluous and inoperative, in Commerce's view. Commerce argues that the ratio test and the meaningful difference test have been sustained in Federal Circuit authority that remains binding. As well, Commerce notes that, in its Decision and Order of October 5, 2023, the Panel found that argument on seasonality had been waived.¹⁰⁷ The COALITION argues that the Panel is bound by Federal Circuit precedent on the ratio test and the meaningful difference test. The COALITION notes that there was no challenge to the meaningful difference test before the Panel in the first instance. As well, the COALITION argues that the GOC's request for a directed remand is not supported by general legal principles and that nothing in *Marmen* bars Commerce from continuing to apply the A-T method so long as it does not rely on the Cohen's *d* test.¹⁰⁸

C. The Panel's Analysis

The Panel hereby remands to Commerce its Redetermination of Differential Pricing, in accordance with the Federal Circuit's decision of 22 April 2025 in *Marmen*. The remand is not a directed one as requested by the GOC as this would be inconsistent with *Marmen*.

In its remand on Differential Pricing, the Panel addresses: 1) the scope of the remand required by *Marmen* ; and 2) what the Panel need and need not decide, taking into consideration the principle of efficiency of the proceedings.

¹⁰⁷ DOC, Response to Parties' Remand Comments, August 18, 2025.

¹⁰⁸ COALITION, Rule 73(3) Written Submission in Support of the Determination on Remand, August 18, 2025.

i. The Scope of the Remand Required by *Marmen*

The issue before the Panel is the methodology used by Commerce to determine whether the merchandise subject of the investigation is being sold at less than fair value pursuant to 19 U.S.C. 1677f-1(d). The text of 19 U.S.C. 1677f-1(d) provides:

(d) Determination of less than fair value

(1) Investigations

(A) In general

In an investigation under part II of this subtitle, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value—

(i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or

(ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(B) Exception

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—

(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 a method described in paragraph (1)(A)(i) or (ii).

In its investigation of Resolute and of the Canadian parties during the POI, to assess alleged dumping, Commerce used the exception of 19 U.S.C. 1677f-1(d)(1)(B) to make its determination that subject merchandise was sold in the United States at less than fair value.

As a general matter, to assess alleged dumping, Commerce compares export prices and normal values for the imported goods. In investigations, Commerce in principle determines

dumping margins by comparing the weighted average of normal values to the weighted average of export prices (A-A method)¹⁰⁹ or by comparing the normal values of individual transactions to the export prices of individual transactions (T-T method).¹¹⁰ Averaging is done over the period of the investigation, usually one year. After the initial order of antidumping duty, in annual reviews, the averaging of prices is limited to “the calendar month that corresponds most closely to the calendar month of the individual export sale.”¹¹¹

As an “[e]xception”,¹¹² under 19 U.S.C. 1677f-1(d)(1)(B), Commerce may compare the weighted average of the normal values to the export prices for individual transactions (A-T method) if two requirements are present: (i) there is a pattern of export prices that “differ significantly among purchasers, regions, or periods of time,”¹¹³ and (ii) Commerce explains “why such differences cannot be taken into account” under the A-A method or the T-T method.¹¹⁴ In the A-T method, Commerce zeroes out any sales that fail to show a dumping margin, *i.e.* where the export price is higher than the averaged normal values. Commerce does not use zeroing for the A-A method or the T-T method.

There are three steps in Commerce’s differential pricing analysis.¹¹⁵ First, test groups of export prices are compared to groups of all other export prices for sales to a purchaser, sales to a region and sales in a time period. If the Cohen’s *d* formula produces a result of 0.8 or higher, the difference between the two groups is considered significant and the test group sales are said to have “*passed*” Cohen’s *d*. Second, the ratio test determines whether there is a pattern of such sales according to the percentage of the exporter’s sales that they represent. Depending on the ratio,

¹⁰⁹ 19 U.S.C. § 1677f-1(d)(1)(A)(i).

¹¹⁰ 19 U.S.C. § 1677f-1(d)(1)(A)(ii).

¹¹¹ 19 U.S.C. § 1677f-1(d)(2).

¹¹² 19 U.S.C. § 1677f-1(d)(1)(B).

¹¹³ 19 U.S.C. § 1677f-1(d)(1)(B)(i).

¹¹⁴ 19 U.S.C. § 1677f-1(d)(1)(B)(ii).

¹¹⁵ See Panel Decision and Order at 18-20. This description applies to the approach prior to recent amendments.

Commerce considers using the A-T method for none, some or all of the sales. Third, Commerce compares the A-T calculations to calculations under either the A-A method or the T-T method. If the A-T results are 25% higher or if the dumping margin would move above the *de minimis* threshold, then Commerce concludes that there is a “meaningful difference” and applies the A-T method to some or all of the exporter’s sales.

In its April 2025 decision in *Marmen*, the Federal Circuit recalled Commerce’s approach and use of Cohen’s *d* test in the following way:¹¹⁶

When calculating a weighted average dumping margin, Commerce typically uses the average-to-average comparison method. 19 C.F.R. § 351.414(c)(1); see also 19 U.S.C. § 1677f-1(d)(1).” *Stupp*, 5 F.4th at 1345. But when “(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) [Commerce] explains why such differences cannot be taken into account using [the A-to-A method],” § 1677f-1(d)(1)(B), Commerce may then use the A-to-T method. *Stupp*, 5 F.4th at 1345; see also U.S. Br. 48–49.

Cohen’s *d* test is used as the first step in the differential pricing analysis to calculate the dumping margin. **First, Cohen’s *d* test is used “to measure whether the United States prices to a particular purchaser, region, or time period differ significantly from the prices for all other purchasers, regions, and time periods.”** U.S. Br. 49–50 (citing *Stupp*, 5 F.4th at 1346). “If the Cohen’s *d* value is equal to or greater than 0.8 for any test group, the observations within that group are said to have ‘passed’ the Cohen’s *d* test, i.e., Commerce deems the sales prices in the test group to be significantly different from the sales prices in the comparison group.” *Stupp*, 5 F.4th at 1347. “Commerce applies Cohen’s *d* test to each test group within the regional, purchaser, and time-period categories.” *Id.*

“Second, the ratio test calculates the proportion of respondent’s United States sales, by value, that ‘pass’ the Cohen’s *d* test, to determine whether a ‘pattern’ exists.” U.S. Br. 50 (citing *Stupp*, 5 F.4th at 1347). Together, steps one and two determine, in accordance with the statute, whether “a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time.” § 1677f-1(d)(1)(B)(i). Based on the outcome of these tests, Commerce selects which dumping margin calculation to use—either the A-to-A method or the A-to-T method (or some hybrid of the two). 3 See U.S. Br. 47–52.

[emphasis added]

¹¹⁶ *Marmen*, pp. 15-16.

In *Marmen*, the Federal Circuit held it was “unreasonable” to use the Cohen’s *d* test “to determine whether prices differ significantly when the underlying data is not normally distributed, equally variable and sufficiently numerous.”¹¹⁷ The Federal Circuit explained in detail why Commerce’s reasoning for not respecting the assumptions was unconvincing.¹¹⁸

In this case, it is established that these assumptions are not met either. Both Resolute and the Government of Canada explained how these assumptions are not met.¹¹⁹ Both Commerce and the COALITION had the opportunity to rebut these statements but did not.¹²⁰ Moreover, Commerce accepts the remand should require it not to use Cohen’s *d* test.¹²¹

Further, in *Marmen*, the Federal Circuit held that if the initial input for the Cohen’s *d* test is incorrect, then anything that flows from the initial input cannot yield a result that can be given legal recognition. In this respect, the Federal Circuit held:¹²²

¹¹⁷ *Marmen*, p. 23.

¹¹⁸ *Marmen*, pp. 19-21.

¹¹⁹ GOC’s Rule 73(2)(b) Comments on Remand Redetermination, June 17, 2025, p. 5 (“The record makes clear that Commerce applied its Cohen’s *d* test in this case to groups of data that pervasively violated the assumptions of normality, equal variability, and equal and sufficiently numerous data.²⁰ Commerce has never asserted otherwise, but instead has persistently insisted that the assumptions were not relevant.²¹” In turn, footnote 20 provides: “Memorandum, Antidumping Duty Investigation of Certain Softwood Lumber Productions from Canada : Analysis of Data Submitted by Resolute FP Canada, Inc. for the Final Determination, from Robert Galantucci to Robert Bolling (Nov. 1, 2017), Attach. II, at 159-221, Prop.R. 1512 (displaying multiple examples of Cohen’s *d* comparisons that, on their face, do not meet the requirements of equal variances, equal size, or have too few observations to be normally distributed.)” And, further, footnote 21 provides: “Final Remand Redetermination at 38.”); Resolute’s Rule 73(3) Brief on Final Results of Redetermination Pursuant to Binational Panel Order, June 17, 2025, pp. 2-3 (“The material facts in *Marmen* and *Stupp* apply equally to this case: Commerce’s version of the Cohen’s *d* test does not meet the essential underlying assumptions of normality, sufficient observation size, and roughly equal variances that would validate the DPM – not in the cases before the CAFC, and not here.” In turn, footnote 7 provides: “*Stupp*, 2025 U.S. App. LEXIS 9616, *7-*8; *Marmen*, 2025 U.S. App. LEXIS 9506, *34; Government of Canada’s Exhibits for Hearing, USA-CDA-2017-1904-03 (June 6, 2023), Exhs. 1-5, citing Antidumping Duty Investigation of Certain Softwood Lumber Productions from Canada: Analysis of Data Submitted by Resolute FP Canada, Inc. for the Final Determination, from Robert Galantucci to Robert Bolling (Nov. 1, 2017), Attach. II, Prop.R. 1512 (displaying multiple examples of Cohen’s *d* comparisons that do not meet the requirements of equal variances, equal size, or have too few observations to be normally distribution).”).

¹²⁰ In their submissions of August 18, 2025, neither Commerce nor the COALITION respond to the GOC and Resolute’s position on these points.

¹²¹ Commerce, Investigating Authority’s Response to Parties’ June 17 2025 Remand Comments, August 18, 2025, pp. 1, 10 (“it would be appropriate for the Panel to remand Commerce’s use of the Cohen’s *d* test to reperform the differential pricing analysis ... without using the Cohen’s *d* test” and “Even though Commerce is yet to reperform the differential pricing without relying on Cohen’s *d* test, as contemplated by *Marmen* and *Stupp II*...”).

¹²² *Marmen*, pp. 19-20.

As explained above, Cohen's *d* test is used as the first step in the differential pricing analysis. While we recognize that Cohen's *d* coefficient is not a direct input into calculating the dumping margin, its value is a basis for determining which methodology to use to calculate the dumping margin. If the output of Cohen's *d* test is incorrect, then the flawed output becomes a flawed input to the ratio test. That flawed input to the ratio test leads to a flawed output, and that flawed output will be used to determine whether a pattern of significant price differences exists. And if the ratio test determines there is a pattern when there is not, Commerce has then selected the wrong weight-averaged methodology as required under § 1677f-1(d)(1)(A)(i). **We decline to conclude that a flawed output in step one of a calculation can be transformed into meaningful data by further manipulating it.**

[emphasis added]

The question is now how the Panel should remand to Commerce on the differential pricing methodology (DPM) issue.

Because the facts are the same (*i.e.*, the assumptions for Cohen's *d* are not met), the Panel must remand in the same manner as the Federal Circuit remanded in *Marmen*.

On Commerce's *DPM*, the Panel thus remands consistent with the Federal Circuit's precedential opinion in *Marmen*.¹²³

We remand to Commerce in respect of its calculated dumping margin based on the unreasonable use of Cohen's *d* test to justify the A-to-T methodology. On remand, Commerce may re-perform a differential pricing analysis, and that analysis may not rely on Cohen's *d* test for data sets like those here. This conclusion, of course, does not preclude Commerce from fashioning and justifying a statistical analysis that uses some of the ideas underlying Cohen's analysis of group differences as long as the resulting analysis is itself justified as sound for gauging differences in the data sets at issue.

On remand, in its determination of less than fair value, while Commerce "may" re-perform a differential pricing (A-T) analysis under 19 U.S.C. 1677f-1(d)(1)(B), if it chooses to do so, it will have to explain, pursuant to 19 U.S.C. 1677f-1(d)(1)(B)(ii), why the determination of a "pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time" cannot be taken into account using a method (A-A

¹²³ *Marmen*, pp. 23-24.

or T-T) outlined in 19 U.S.C. 1677f-1(d)(1)(A)(i) or (ii). As something Commerce “may” do, conducting a differential pricing (A-T) analysis is done in the exercise of Commerce’s discretion, which must be justified and done in accordance with law.

ii. What the Panel Need and Need Not Decide, Taking into Consideration both Judicial Economy and the Principle of Efficiency of the Proceedings

Except from requiring Commerce to explain in full, and in the light of the statute’s requirements, which methodology it chooses to make a determination of less than fair value, the Panel finds it premature to make any other determinations at this stage because Commerce is to start anew following the principles established by the Federal Circuit in *Marmen*. The Panel does not know how Commerce will proceed and thus any further determination may reveal itself hypothetical or unnecessary. Also, *Marmen* is clear that if the initial input into the differential pricing analysis is faulty, then any further step related to Cohen’s *d* cannot be relied upon. The Panel thus believes it more appropriate not to directly address stare decisis and prior decisions on the ratio test,¹²⁴ the meaningful difference test and/or seasonality at this juncture. The parties are instead invited to re-argue, as appropriate, relevant issues following Commerce’s newly-established methodology upon redetermination.

Commerce and the COALITION have argued that several parts of Commerce’s differential pricing analysis must be analyzed on the basis of “reasonableness”,¹²⁵ rather than on the basis of

¹²⁴ The Panel notes authority brought to its attention by the COALITION which appears to indicate that the manner in which the Federal Circuit applies *Loper Bright* may be of special relevance to this Panel, should stare decisis issues arise: Amy C. Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317 (2004-2005), 327-328. The Panel notes no Federal Circuit case law on the application of *Loper Bright* was put to it by the parties.

¹²⁵ Commerce, Investigating Authority’s Response to Parties’ June 17 2025 Remand Comments, August 18, 2025, p. 13 (“*Loper Bright* did not disturb the standard for reviewing Commerce’s differential pricing analysis. In *Stupp I*, the Federal Circuit evaluated Commerce’s differential pricing analysis and all the tests within Commerce’s differential pricing analysis under a reasonableness standard. *Stupp I*, 5 F.4th at 1353 (“our precedents make clear that the relevant standard for reviewing Commerce’s selection of statistical tests and numerical cutoffs is reasonableness ... In *Marmen*,

the Panel’s “best” reading of the statute. As explained, because of the remand required by *Marmen*, it is premature to decide most, if not all such questions. Again, the Panel invites the parties to brief the issue as thoroughly as possible on remand if appropriate and relevant.

The Panel has also noted Resolute’s reminder that “the purpose of the NAFTA binational panel review system “is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904.”¹²⁶ The Panel is well-aware that the review of this final antidumping duty determination is now in its eighth year. The Panel therefore invites the parties to proceed as expeditiously as possible and to consider on remand whether the Panel has any relevant powers if a review becomes too long.

The Panel therefore remands to Commerce in respect of its calculated dumping margin based on the unreasonable use of Cohen’s d test to justify the A-to-T methodology. On remand, Commerce may re-perform a differential pricing analysis, and that analysis may not rely on Cohen’s d test for data sets like those here. This conclusion, of course, does not preclude Commerce from fashioning and justifying a statistical analysis that uses some of the ideas underlying Cohen’s analysis of group differences as long as the resulting analysis is itself justified as sound for gauging differences in the data sets at issue. While Commerce may re-perform a differential pricing (A-T) analysis under 19 U.S.C. 1677f-1(d)(1)(B), if it chooses to do so, it must explain, pursuant to the terms of 19 U.S.C. 1677f-1(d)(1)(B)(ii), why the determination of a “pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time” cannot be taken into account using a method (A-A or T-T) outlined in 19 U.S.C. 1677f-1(d)(1)(A)(i) or (ii).

which post-dates *Loper Bright*, the Federal Circuit continued to use the reasonableness standard”)); COALITION, Rule 73(3) Written Submission in Support of Remand Redetermination, August 18, 2025, p. 22.

¹²⁶ Resolute’s Rule 73(3) Brief on Final Results of Redetermination Pursuant to Binational Panel Order, June 17, 2025, p. 3.

VI. Order of the Panel

For the reasons set out above, the Panel **AFFIRMS** Commerce's Remand Determination on:

1. The 2006 Softwood Lumber Agreement Tax Deduction, and
2. Resolute Start-Up Costs.

For the reasons set out above, the Panel **REMANDS** to Commerce the re-calculation of the dumping margin in conformity with this Decision.

The DOC shall file its Decision by April 30, 2026.

Issue date: February 19, 2026

Signed in the original by:

/s/ Daniel B. Pickard
Daniel B. Pickard, Chairman

/s/ Cindy G. Buys
Cindy G. Buys, Panelist

/s/ Pierre-Olivier Savoie
Pierre-Olivier Savoie, Panelist

/s/ Christine M. Streatfeild
Christine M. Streatfeild, Panelist

/s/ Maureen Irish
Maureen Irish, Panelist
(with separate opinion)

VII. Separate Opinion – Panelist Irish

I agree with the Decision of the Panel. This is my additional separate opinion.

I would remand to the DOC for an explanation of the application of Regulation 19 C.F.R. § 351.414(d)(3) which gives Commerce discretion to use shorter time periods for averaging when export prices differ significantly during the POI.

A. Pleadings

Over the course of the Panel proceedings, the focus of argument on differential pricing has shifted. At the time of the hearing, submissions generally related to the Cohen’s *d* test. The same focus was maintained in the DOC’s remand determination, although the meaningful difference test was also discussed.¹²⁷ After the decision in *Marmen*, attention has shifted to exporters’ arguments that price differences do not reflect targeted dumping and to the statutory requirement that the DOC “explain[...] why such differences cannot be taken into account”¹²⁸ using the A-A or T-T method of comparison. The DOC’s answer has been the meaningful difference test, as it was in the earlier administrative case when the DOC rejected a submission over the effect of seasonality on price changes.¹²⁹

In recent pleadings, the GOC argues that Commerce must address the feasibility of adjusting the A-A method of assessment to account for the price differences before it can proceed with further steps in the differential pricing analysis.¹³⁰ The GOC argues that the meaningful difference test is not designed to consider whether any differences can be taken into account using the A-A method.

¹²⁷ Redetermination at 59-60, 93, 100, 124-25.

¹²⁸ 19 U.S.C. § 1677f-1(d)(1)(B)(ii).

¹²⁹ Panel Report at 33, referring to Issues and Decision Memorandum, P.R. Doc 892 at 51, 60-61 (West Fraser).

¹³⁰ GOC, Rule 73(2)(b) Comments on Remand Redetermination, June 17, 2025.

Resolute maintains that since adjustments can be made, there is no need to address differential pricing. Resolute states that, without price differences identified according to periods of time, it would not be subject to dumping duty at all. It argues that instead of averaging over the full year of the period of investigation, Commerce can deal with such differences by using shorter periods for averaging. Commerce's regulation explicitly allows for this possibility, concerning differences according to periods of time:

When applying the average-to-average method in an investigation, the Secretary normally will calculate weighted averages for the entire period of investigation. However, when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate.¹³¹

In support of shorter periods for averaging, Resolute notes that for a "fair comparison,"¹³² the sale used for normal value is to be "at a time reasonably corresponding to the time of the sale used to determine the export price."¹³³ In contrast to investigations, administrative reviews use monthly averaging. Resolute contends that since Commerce conducts averaging on a monthly basis for reviews, it cannot be incapable of averaging for periods of time shorter than a year in an investigation. Both the GOC and Resolute argue that the Panel may no longer accord Commerce *Chevron* deference, but must apply its best interpretation of the law to the issues before it, as directed by the U.S. Supreme Court in *Loper Bright*.

While *Loper Bright* has overruled *Chevron* in instances of statutory silence or ambiguity, the DOC and the COALITION maintain that existing precedents are still binding unless there is something beyond mere reliance on *Chevron* that would call them into question. Concerning

¹³¹ 19 C.F.R. § 351.414(d)(3).

¹³² 19 U.S.C. § 1677b(a).

¹³³ 19 U.S.C. § 1677b(a)(1)(A).

differential pricing, the DOC relies particularly on *JBF RAK LLC v. United States*,¹³⁴ *Apex Frozen Foods Pvt. Ltd. v. United States*¹³⁵ and *Stupp I*.

In *JBF RAK*, the exporter argued that its sales practices prevented it from targeting specific customers, regions or periods of time, but the Court of Appeals for the Federal Circuit ruled that Commerce does not have to determine why there is a pattern of differing prices or prove an intent of targeted dumping.¹³⁶ In *Apex*, the appellant did not present commercial reasons to support its prices, but argued that while the A-T method with zeroing produced results that differed from the A-A results, the DOC had failed to explain why the A-A calculations could not be adjusted.¹³⁷ The Court of Appeals supported the DOC, ruling that its methodology reasonably met the goal of identifying targeted dumping that would otherwise remain hidden. In *Stupp I*, the Court confirmed its reasoning in *Apex*, ruling that the meaningful difference test “was a reasonable response to the statutory directive to explain why the average-to-average method is inadequate in certain cases”¹³⁸ and that “the meaningful difference test is sufficient to satisfy that directive.”¹³⁹

B. Regulation 19 C.F.R. § 351.414(d)(3)

If prices differ significantly among time periods, but much less so among purchasers or regions, the market appears complex. There could be several reasons for a relative absence of buyers who benefitted from the trade competition.

There might be isolated incidents that could call for protection of domestic producers, such as an exporter selling off surplus inventory or offering particular discounts to increase regional

¹³⁴ *JBF RAK LLC v. United States*, 790 F. 3d 1358 (Fed. Cir. 2015) (*JBF RAK*).

¹³⁵ *Apex Frozen Foods Private Ltd v United States*, 862 F. 3d 1322 (Fed. Cir. 2017) (*Apex*).

¹³⁶ *JBF RAK* at 1368.

¹³⁷ *Apex* at 1331.

¹³⁸ *Stupp I* at 1356.

¹³⁹ *Id.* The Court remanded on the Cohen’s *d* test. The appellant also challenged the ratio test as a matter of law, without success. The Court stated that the exporter “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.” (*Id.* at 1355).

market share, as the COALITION argued at the Panel hearing.¹⁴⁰ On the other hand, there may be long-term external factors affecting export prices and normal values for the product in the regular commercial cycle.

Commerce has the expertise to assess relevant market conditions. The DOC argued that its discretion relating to significant differences over time periods in 19 C.F.R. § 351.414 (d)(3) is “distinct and separate”¹⁴¹ from the analysis of differential pricing. Therefore, the Regulation is not covered by *JBF v RAK*, *Apex* or *Stupp I*. In my view, a remand is required for Commerce to explain the application of Regulation 19 C.F.R. § 351.414(d)(3).

C. Remand

I would remand to Commerce for an explanation of the DOC’s application of Regulation 19 C.F.R. § 351.414(d)(3).

¹⁴⁰ Transcript, June 6, 2023, at 268-70 (Mr. Yocis).

¹⁴¹ DOC, Response to Parties’ Remand Comments, August 18, 2025 at 15.