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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Certain Pasta from Turkey: Issues and Decision Memorandum for the Final Results of the 14th Antidumping Duty Administrative Review

SUMMARY

We have analyzed the case brief from the sole respondent, Marsan Gida Sanayi ve Ticaret A.S. (Marsan), and the rebuttal brief received from petitioners[1] for the 14th antidumping duty administrative review of the antidumping duty order on certain pasta (pasta) from Turkey. As a result of our analysis, we have not made any changes to the Preliminary Results.[2] The period of review (POR) is July 1, 2009, through June 30, 2010.

We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comments from interested parties.

List of Company Specific Comments

1. **Whether Marsan is affiliated with Birlik/Bellini**
2. **Whether the review covered Marsan and its affiliates**
3. **Whether the application of the reseller policy was unlawful**

[1] New World Pasta Company, American Italian Pasta Company, and Dakota Growers Pasta Company (collectively, petitioners).

[2] See Certain Pasta From Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review, 76 FR 23974 (April 29, 2011) (Preliminary Results)

Comment 1: Whether Marsan is affiliated with Birlik/Bellini

1.A Whether there is affiliation under the statute

Marsan's Comment

Marsan argues that it is affiliated with Birlik Paz. San. Ve Tic. A.S. (Birlik) and Bellini, an Ulker group company formerly known as Olkusan, pursuant to section 771(33)(A) through (G) of the Tariff Act of 1930, as amended (the Act). Marsan claims that the existence of affiliation by reason of subparagraphs (A) through (E) makes it unnecessary to consider whether affiliation exists by reason of control under subparagraph (F) and/or (G). However, Marsan argues that analysis under subsections (F) and (G) of section 771(33) of the Act further buttresses the conclusion that Marsan and Birlik/Bellini are subject to common control by third parties.

Marsan argues that the Preliminary Results ignore subsections 771(33)(A) through (E) of the Act. Specifically, Marsan argues that:

- Under subparagraph (A), M. Latif Topbas, owner of Marsan, is affiliated with those of his brothers who have corporate holdings in Ulker group companies. Thus, Marsan is affiliated with the Ulker group companies.

- Under subparagraph (B), M. Latif Topbas is affiliated with Marsan, BIM Birlesik Magazalar A.S. (BIM), and numerous companies in the Ulker group. In turn, each of these companies is also owned in part either by an Ulker individual or by an Ulker group company. Therefore, these companies are affiliated with BIM, Marsan and with each other.

- Under subparagraph (C), Mr. Tevfik Arikan, vice chairman of Marsan's board of directors, is affiliated with Marsan, and also affiliated with the Ulker group via his position as general manager. Mr. Zeki Ziya Sozen and Mr. Yalcin Oner, members of the board of directors of BIM, are affiliated with M. Latif Topbas by virtue of their common directorship of BIM, and thus affiliated with Ulker Biskuvi (an Ulker group company) that has ownership in BIM. In addition, M. Latif Topbas and his brothers (Topbas family) are affiliated as partners with the Ulker family because both families have significant shares in the same Ulker group companies.

- Under subparagraph (D), the Ulker group is affiliated with Mr. Tevfik Arikan, member of the Marsan board of directors, and with Mr. Zeki Ziya Sozen, member of the BIM board. In addition, the human resources manager and information technologies managers of Birlik are affiliated with Birlik because they are managers of that company, while they are also affiliated with Marsan because they are on Marsan's payroll.

- Under subparagraph (E), all Ulker group companies are *per se* affiliated with BIM and other Ulker group companies and Topbas is *per se* affiliated with BIM, Marsan and some

Ulker group companies because they own more than a 5 percent share in those companies or serve on the board of those companies.

- Under subparagraphs (F) and (G) Marsan is controlled, in fact, by the Ulker group through Mr. Tevfik Arikan.

Petitioners' Comment

Petitioners contend that Marsan's arguments regarding affiliation do not accord with the statutory "affiliation" provisions of section 771(33)(A) through (G) of the Act. Moreover, petitioners contend that Marsan does not establish a direct or indirect affiliation under any subsection of section 771(33) of the Act. Instead, petitioners assert that Marsan's arguments rest on the assumption that complex inter-relationships among several parties must somehow result in affiliation. Thus, petitioners assert that, once it is clear that Marsan and Birlik are not affiliated, the Department properly did not invoke section 771(33) of the Act under any of its subsections A through G because those statutory definitions of corporate groupings did not apply.

Petitioners assert that the dozens of instances of separate cross-ownership and common shareholdings and offices within the Topbas family holdings, within the Ulker family's holdings, and within the Ozokur family's holdings are immaterial because the only germane facts must relate to mutual ownership of, in or by Marsan and Birlik. Petitioners contend that Marsan's argument that Mr. Arikan, the vice-chairman of Marsan's board, is also a general manager within the Ulker group and the director of Pasifik is moot, as he is not a manager or director of Birlik. Furthermore, petitioners argue that no matter how extraordinary Mr. Arikan's role might theoretically be at Marsan, he plays no role whatsoever at Birlik, making his role irrelevant for purposes of affiliation. Likewise, petitioners argue that Marsan's assertion that Mr. Yalcin Oner, director of a Topbas-related company who is also an officer and director of various Ulker group companies, is also moot, as the statute would require that Marsan be the Topbas-related company he directed and that Birlik be the Ulker group company he directed in order to indicate affiliation between Marsan and Birlik.

Department's Position

We continue to find that Marsan and Birlik are not affiliated under section 771(33) of the Act. Pursuant to section 771(33) of the Act, an affiliated person may be: (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants; (B) Any officer or director of an organization and such organization; (C) Partners; (D) Employer and employee; (E) Any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the voting stock or shares of any organization and such organization; (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person; and (G) Any person who controls any other person and such other person.

To determine affiliation between companies, the Department must find at least one of the criteria above is applicable to the respondent. Section 771(33) of the Act explains that a person shall be considered to control another person if the person is legally or operationally in a position to

exercise restraint or direction over the other person. Section 351.102(b)(3) of the Department's regulations provides that, in finding affiliation based on control, the Department will, among other factors, consider (i) corporate or family groupings; (ii) franchise or joint venture agreements; (iii) debt financing; and (iv) close supplier relationships. In determining whether control exists, the Department does not require evidence of the actual exercise of control by one party over another party. Rather, we focus upon one party's ability to control the other.[3]

Marsan's arguments in support of affiliation cover a vast range of information regarding the corporate structure and operations of Topbas family entities and Ulker family entities. However, Marsan does not establish a direct or indirect affiliation between itself and Birlik/Bellini[4] under any of the subsections of 771(33) of the Act. Accordingly, we find Marsan's arguments that the corporate structure and operations of Marsan and the Ulker group give rise to overall affiliation, cross-ownership and control are fundamentally without merit. In accordance with subsections 771(33)(A) through (E) of the Act, we find the following:

- As an initial matter, subparagraph A establishes affiliation between family members, not between corporations. Further, the Topbas family and the Ulker family are not members of the same family.[5] Furthermore, no Topbas family member has ownership or involvement in Birlik, and no Ulker family member has ownership or involvement in Marsan.[6]

- As an initial matter, subparagraph B establishes affiliation between an officer or director of a corporation and such corporation, not affiliation between corporations. Further, no Topbas family member is an officer or director of Birlik, and no Ulker family member is an officer or director in Marsan.[7] Mr. Yalcin Oner is a director of BIM, in which Mr. M. Latif Topbas is a shareholder, but Mr. Yalcin Oner is not affiliated with Marsan or Birlik because he is not an officer or director of either company.[8] Mr. Zeki Ziya Sozen is president of Ulker's food, frozen goods division, serves on the board of BIM, is an officer or director of six Ulker companies, but he is not an officer or director of Marsan or Birlik.[9] Although Mr. Orhan Ozokur is a nominal shareholder in Birlik and chairman of

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[3] See Antidumping Duties; Countervailing Duties; Final rule, Part II, 62 FR 27296, 27297-98 (May 19, 1997) (Preamble).

[4] Effective June 1, 2010, Marsan leased all of its assets in the Hendek facility to Bellini, which thereby replaced Birlik as lessee. See November 12, 2010, questionnaire response at 5.

[5] See November 12, 2010, questionnaire response at Exhibit 7, PDF-334.

[6] See id. at Exhibit 11(C), PDF-446, and Exhibit 12, PDF- 469.

[7] See id. at Exhibit 11, PDF-413. See also January 24, 2011, questionnaire response at 49-50 and Exhibit 27, PDF-427- 428.

[8] See January 24, 2011, questionnaire response at Exhibit 3, PDF-86. See also November 12, 2010, questionnaire response at Exhibit 7 at PDF-334.

[9] See November 12, 2010, questionnaire response at Exhibit 4, PDF-313, and January 24, 2011, questionnaire response at Exhibit 3, PDF-86.

board of Ulker Biskuvi, he is not an officer or director in Marsan or Birlik.[10] Mr. Arikan is vice-chairman of Marsan's board of directors, but he is not an officer or director for Birlik.[11]

- Subparagraph C establishes affiliation between partners and Marsan and Birlik are not partners.[12]

- As an initial matter, subparagraph D establishes affiliation between employers and employees, not between corporations. Further, Mr. Karabulut who previously held a position in the Ulker group and who currently works for Marsan is presently not affiliated with both Birlik and Marsan.[13] With respect to Marsan's external auditor who is also auditor of Pasifik and an employee of Yildiz, we find that he is an independent auditor who performs a service for Marsan.[14] We find unpersuasive Marsan's contention that because the chief of human resources and the chief of information technology for the Hendek plant are both Marsan employees working on Birlik's operations and that Birlik pays a fee to Marsan to cover their salaries and expenses is evidence of the interdependence of the two companies. We find that this relationship is a function of the evolving nature of the operations at this facility through the negotiated lease agreement.

- Under subsection (E), there is no record evidence indicating that Marsan and Birlik directly or indirectly own or otherwise control fi**v**e percent or more of each other's equity.

Thus, we have identified no basis for affiliation between Marsan and Birlik under sections 771(A) through (E) of the Act. We address Marsan's arguments concerning "control-in-fact" under subparagraphs (F) and (G) of section 771(33) in subsection 1.C below.

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[10] See November 12, 2010, questionnaire response at Exhibit 3, PDF-186; Exhibit 12, PDF-469; Exhibit 13, PDF-551; and Exhibit 14, PDF-603 and PDF-606 **.**

[11] See January 24, 2011, questionnaire response at 60. See also Comment 1.B infra.

[12] See id. at Exhibit 7.

[13] See Marsan's case brief at 16.

[14] See id. at 16. See also November 12, 2010, questionnaire response at Exhibit 11, PDF-422, and Exhibit 14, PDF-604.

1.B Whether an "intertwining" relationship exists and creates affiliation

Marsan argues that the Preliminary Results overlook the extensive cross-linked and intertwined shareholdings, directors, officers, and employees, among the Tophas, Arikan, Sozen and Oner family and corporate groupings via common interests in the food production, food distribution, and retailing sectors, and through Mr. Tevfik Arikan's simultaneous positions as general manager in Ulker, vice chairman of Marsan's board of directors, and as director of Pasifik Tuketim Urunleri Satis (Pasifik), an Ulker company. Marsan asserts that several of the board members of Marsan are also officers of Ulker group companies, thus giving rise to an affiliation under section 771(33)(B) of the Act separate and apart from the "control" issue of section 771(33)(G) of the Act. Thus, Marsan argues that the Preliminary Results did not conduct the "sophisticated analysis" envisioned by the SAA which encourages a broad interpretation of "affiliated" and not the narrow, formalistic reading given by the Department.[15]

Marsan further argues that the Topbas, Ulker and Ozokur families, together with Messrs. Tevfik Arikan, Zeki Ziya Sozen and Yalcin Oner, share interlocked ownerships, directorships and officerships in Topbas and Ulker companies, which creates a complex, intertwined and mutually dependent set of companies, subsidiaries, holding companies, and other corporate vehicles by means of which they operate in concert in the production, distribution and sale of various products, including pasta. Marsan also argues that, because M. Latif Topbas, the owner of Marsan, is affiliated with no fewer than ten Ulker companies, these companies are affiliated with each other by virtue of common owners or directors. In addition, Marsan asserts as further evidence of affiliation is the fact that Marsan's general manager and board member came over to Marsan from his previous position as a high-level auditor in Ulker, and Marsan's external auditor is also an auditor of Pasifik and an employee of Yildiz Holding.

Petitioners' Comment

Petitioners argue that Marsan, having failed to prove affiliation under any provision of section 771(33) of the Act, asserts an "economic community of interest" by combining all corporate relationships of those companies with some commercial or ownership link, direct or indirect, to either Marsan or Birlik. Petitioners also contend that the statute contemplates the possibility of affiliation between specific entities, not the general nature of interactions and relations among far-flung groups or entities. Thus, the ownership of certain Topbas-related entities in certain Ulker group companies sheds no light on the nature of the relationship between Marsan and Birlik, insofar as those relationships never impact both Marsan and Birlik. Therefore, petitioners argue that respondent confuses multiple relationships with some theoretical potential for indirect influence with a concrete affiliation between two discrete parties of a type whereby one party is in a position to restrain or direct the other.

Petitioners argue that Marsan incorrectly insinuates that Mr. M. Latif Topbas creates a nexus of affiliation between Marsan and Birlik simply because there are extraneous relationships among Mr. Topbas, BIM, Marsan, and some Ulker companies other than Birlik. Petitioners contend that

[15] Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA), H.R. Doc. No. 103–316, vol. 1 at 838 (1994).

Marsan does not name what successive ownerships or other affiliations tie Mr. Topbas, through Ulker companies, to Birlik. Rather, Marsan simply attempts to leave the impression that Mr. Topbas ties to Marsan and BIM parallels his ties to the Ulker group. Petitioners argue that inherently separate affiliations of other parties to Birlik, or its related companies, under subsections (A) and (B) do not indicate affiliation between Marsan and Birlik. Petitioners also argue that the same fallacy underlies Marsan's claim that subsections (C) and (D) indicate affiliation between Marsan and Birlik; affiliations between BIM and Ak Gida (another Ulker group company) or Marsan and BIM share no nexus of affiliation, or even of any other corporate relation between Marsan and Birlik. Petitioners contend that Marsan invokes subsection (E) to point out affiliations within the Topbas group to which Marsan belongs, then separately to point out affiliations within the Ulker group to which Birlik belongs. However, petitioners argue that repeating the types of potential affiliations between or among all possible companies other than between Marsan and Birlik are extraneous absent a statutory definition of affiliation via "community of shared economic interests."

Responding to Marsan's argument regarding "combined economic community of interest," petitioners argue that Marsan creates a new standard not found in the statute that would have the Department find companies acting in their shared mutual economic interest to be affiliated, even when there is no direct affiliation and no control or restraint being exercised by one party over another. Petitioners assert that the Department has found similar situations to be insufficient to indicate affiliation under section 771(33) of the Act. According to petitioners, the closest economic corporate structure sharing attributes with respondent's new concept would be the traditional Japanese Keiretsu formation. Petitioners argue that the Department has examined and rejected the finding of affiliation and control for entities in such a "community" of companies based on the pattern of inter-relationships indicating shared interests.

Petitioners argue that Marsan falsely reads 19 CFR 351.102(b)(3) to mean that the existence of corporate family or family groupings is, *per se*, evidence of affiliation for any and all entities related, directly or indirectly, to members of such corporate or family groupings. Petitioners contend that once it is clear that Marsan and Birlik are not affiliated to each other by shared directors, mutual equity interest, a common parent with controlling shares, etc., the Department properly did not invoke section 771(33) of the Act under any of its subsections A thorough G because those statutory definitions of corporate groupings did not apply.

Department's Position

We disagree with Marsan's contention that the Department overlooked all of the corporate affiliations and, instead, narrowly focused on the statutory criteria, including control-in-fact, in reaching its preliminary finding of no affiliation between Marsan and Birlik. Marsan's argument of affiliation hinges on its theory of "combined economic community of interest," and Marsan posits that the Department should conduct a "sophisticated analysis," which better reflects the realities of the marketplace. A review of the corporate structure does not show that there is a corporate group that includes Marsan either vertically or horizontally. Instead, Marsan combines all corporate relationships of those companies with some link, direct or indirect, to the Topbas family and Ulker family, and created an "economic community of interest." Although these companies may share a common interest in the food and beverage industry in Turkey, none of

the Ulker group companies are affiliated with Marsan under the definition set forth by the Act. Moreover, because the theory set forth by Marsan is not a criterion used to determine affiliation under any of the subsections 771(33)(A) through (G) of Act or the SAA, the Department did not conduct, nor was it obligated to conduct, a "combined economic community of interest" analysis as advocated by Marsan.

The Department also disagrees with Marsan's argument that, if board members of one company are officers of another company, this constitutes affiliation pursuant to section 771(33)(B) of the Act. This provision provides for affiliation between "an officer and director of an organization *and such organization*." (emphasis added). In addition, the fact that Marsan's general manager and board member used to work at Ulker, or the fact that Marsan's external auditor may have audited Ulker group companies does not create affiliation between Marsan and Birlik under any sections of 771 (33) of the Act.

1.C Whether "control-in-fact" exists

Marsan argues that it is affiliated with Birlik/Bellini based on control-in-fact. According to Marsan, the Department's Affiliation Memo purports to address the issue of control-in-fact; however, Marsan asserts that the Department does so by a selective reading of both the law and the facts.[16] Marsan also asserts that although the Affiliation Memo acknowledges that 19 CFR 351.102(b)(3) requires the Department to "consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships," the Department narrowly focused on control and close supplier relationships. Marsan contends that the Department failed to consider (1) whether there was control-in-fact by reason of corporate groupings, or the corporate groupings' potential to impact decisions on production, pricing or cost; (2) the full spectrum of the relationship between Birlik and Marsan in light of the corporate groupings, including the lessor/lessee relationship and the shared employees between the two companies; and (3) the significance of Mr. Arikan's various positions. Marsan further contends that the Marsan and Birlik relationship was much more than a relationship between producer and customer. Marsan contends that it was not only Birlik's customer but also the owner of the facility, under a non-arm's-length lease, while Birlik was not only the supplier but also the lessee.

Marsan also argues that the Department's equating the production contract with an exclusive sales contract in its Preliminary Results is fallacious because (1) the mere presence of Mr. Arikan on Marsan's board of directors *ipso facto* creates an affiliation between Ulker and Marsan and (2) that Ulker's ability to control Marsan via the presence of Mr. Arikan on Marsan's board dispels any notion that Marsan's dealings with Birlik are at arm's length. Therefore, Marsan argues that Mr. Tevfik Arikan is in a pivotal position regarding pricing decisions, as well as any other decisions affecting Marsan's marketing and sales activities vis-à-vis Ulker/Pasifik's market strategy.

[16] See Memorandum to Melissa G. Skinner, Office Director, AD/CVD Operations 3, from the Team, entitled "Marsan Gida Sanayi ve Ticaret A.S. (Marsan's) Affiliation," dated April 4, 2011 (Affiliation Memo).

Next, Marsan contends that the progressive transfer of its assets to Ulker is irrefutable evidence of affiliation and control between Marsan and Ulker, and more specifically, between Marsan and Birlik. Thus, respondent asserts that the "hollowing out" of Marsan in favor of Ulker's Birlik and Bellini would only be made at the direction and under the concerted control of the owners of the respective companies. Marsan argues that, while it was left with no production capability, no ability to purchase semolina or wheat, and no control over production schedules, Birlik not only gained control of production, raw materials purchasing and scheduling, but it also substantially reduced the plant's reliance on Marsan as a customer, while becoming reliant on Ulker companies for over half of its sales. According to Marsan, the "hollowing out" of Marsan is further evidence that the dealings between Marsan and Birlik are not at arm's length. Marsan argues that all of this occurred under a lease which was negotiated on a non-arm's length basis, i.e., at cost rather than at cost-plus-profit. Thus, Marsan argues that the lease is another example of non-arm's length dealing, reflecting the fact that Marsan-Birlik relations were subject to control of the coordinated Topbas/Ulker interests via the presence on Marsan's board of directors of Mr. M. Latif Topbas and Ulker's representative, Mr. Tevfik Arikan.

Marsan argues that the Preliminary Results are silent on whether the "corporate groupings have the potential to impact decisions" on production, pricing or cost. Marsan claims that in the Preamble to the current regulations, the Department makes it clear that "potential to influence" does not require the showing of actual influence but only the ability to influence.[17] Marsan also claims that, in the Preamble, the Department acknowledges that a control relationship relating to commercial activity other than that directly under investigation could well satisfy the "potential to impact" test or the "ability to exercise control" test. Thus, Marsan argues that the extensive relationships between Topbas and Ulker interests and persons, in and of themselves, establish a pattern sufficient to prove Topbas and Ulker's potential to control the working relationship between Birlik, Bellini and Marsan.

It is Marsan's contention that the Preliminary Results give an unjustifiably narrow reading of control-in-fact. Marsan argues that the Department's "reliance upon the other" phrase is the sole basis of its analysis and that the Department has ignored the SAA's instruction to consider the "exercise of restraint or direction … through corporate… groupings," which is present in the instant case.[18] Marsan states that the SAA teaches that control exists if "one person is legally or operationally in a position to exercise restraint or control over another person," even if that person does not, in fact, exercise such restraint.[19] Moreover, Marsan argues that the reliance of the Preliminary Results on the last phrase of the SAA's explanation overlooks the more general expectation that the revised statute would encourage the Department to "address adequately modern business arrangements." Thus, Marsan argues that, in the present case, the Topbas/Ulker economic community of interest exercises control over all aspects of the joint group's activities. Marsan asserts that this was manifestly not the evolution of an arm's length relationship; it was entirely managed by the Topbas/Ulker community of interests at its highest level and

[17] See Preamble, 62 FR at 27297-98.

[18] SAA at 838.

[19] Id.

operationally through their subordinates throughout the organizations and specifically through the presence on Marsan's board of directors of Ulker's representative, Mr. Tevfik Arikan.

Further, Marsan argues that the hypotheticals posed in the Preliminary Results reflect an underlying theory that Marsan had the burden to prove that Birlik exercised actual control over Marsan's supply or pricing. However, Marsan argues that the law does not require such a showing. Marsan argues that, in the present case, Ulker is legally and operationally in a position to control Marsan through Birlik, by reason of the unity of interest between Topbas and Ulker and by reason of such individual instances of direct affiliation and the fact that Mr. Arikan is a high-level officer of Ulker, a board member of Pasifik, and vice-chairman of Marsan's board.

Marsan contends that the discussion of pricing in the Preliminary Results relates principally to the Department's assertion that, even if the production contract is deemed an exclusive sales contract, such a contract is not evidence of control-in-fact. Marsan asserts that, when Birlik's price to Merkez/Pasifik (Ulker group companies) is compared with the price to Marsan, the difference is within 1.5 percent of its net price to its affiliated customers, which shows that Marsan is paying an affiliated-party price for its pasta from Birlik.

Marsan asserts that other instances of the non-arm's length nature of its dealings with Birlik arise from other operational linkages between the companies. Specifically, Marsan argues that the human resources and information technology departments of the Hendek facility are under the management of Marsan employees and that Birlik pays a fee to Marsan to cover these persons' salaries and expenses, both of which indicate that, in terms of personnel, the two companies are interdependent. Marsan argues that another instance of the non-arm's length nature of the relationship is the lease agreement between Marsan and Birlik which requires Birlik to set aside space in its warehouse to store Marsan's inventory requirements at no charge.

Petitioners' Comment

Petitioners assert that Marsan's argument that it is affiliated with Birlik by mutual control-in-fact is based on the faulty premise that the Ulker group of companies and the Topbas-related companies combine to form one interested party in a position to control both Birlik and Marsan. Petitioners contend that Marsan's corporate structure is not the pattern of corporate relationships that permits a finding of affiliation by equity ownership through third parties. Petitioners point out that, under section 771(33)(F) of the Act, affiliated persons include two or more persons directly or indirectly controlled by, or under common control with, any person. However, petitioners assert that Marsan and Birlik are not under common equity ownership, neither directly by the same parent company, nor indirectly through a shared parent company's subsidiaries. Therefore, equity ownership provides no basis for potential control. Furthermore, there are no equity ownership mechanisms, direct or indirect, by which any company is able to exercise operational and strategic control over both Marsan and Birlik.

Petitioners argue that Marsan and Birlik never produced subject merchandise simultaneously, so neither entity could exercise restraint or control over the other's pricing or production decisions, as required by the Departments regulations for a finding of "control." Petitioners also argue that Marsan's claim that the "hollowing out" by which its pasta-making assets were transferred to

Birlik is proof that Marsan and Birlik are affiliated is specious. Petitioners argue that the Topbas-related companies came to an agreement with the Ulker group to transfer assets because it was to the mutual competitive advantage of the two separate groups, not because either group controlled the other, or one controlled both Marsan and Birlik. In addition, petitioners argue that none of Mr. Arikan's positions in the Ulker group provide him with a position to exercise any direct influence over Birlik. Petitioners contend that, to be of import, Mr. Arikan must have direct and commensurate positions in both companies, but he is not an owner or officer of any capacity in Birlik. Moreover, petitioners argue that Marsan has provided no evidence that Mr. Arikan has control-in-fact over the entire board of Marsan and by extension over its operations, even to the marginalization of its major shareholders.

Petitioners also argue that Marsan's argument that Marsan and Birlik/Bellini are companies that produce, or formerly produced, pasta is immaterial. First, Marsan and Birlik would need to be affiliated. Second, that affiliation would require means of control for which one company's pricing and production of subject merchandise would be controlled by the other. In addition, petitioners argue that Marsan's argument that the production of water, mineral oil, margarine, and edible oils be considered indicia of affiliation is misplaced because those products are not subject merchandise and the statute does not provide for affiliation by means of similarity of production of non-subject merchandise.

Petitioners assert that mutually agreeing on a value that covers costs is not an indication that a transaction was not at arm's length, but, instead, all transactions among the parties must be examined as possible concessions on one aspect of a relationship that may be compensated by additional premiums on other transactions. Petitioners also assert that the mutually agreed upon and mutually supported evolution of Marsan's operations and Birlik's operations do not indicate affiliation. According to petitioners, when parties act on mutually agreed commercial reasons, they are reacting freely to market forces. Thus, petitioners contend that none of the mechanisms for affiliation under section 771(33)(A) through (G) exist that would permit manipulation or violation of Marsan interests by Birlik or vice-versa.

Regarding Marsan's argument that other dealings demonstrate that Marsan and Birlik did not conduct arm's length transactions, petitioners contend that those transactions actually demonstrate that commercial interests of both parties were taken into consideration. Petitioners argue that the terms of the lease of the Hendek facility and the eventual transfer of Hendek assets is not evidence of affiliation between Marsan and Birlik. Petitioners further argue that the terms of the lease do not force any conditions by Birlik, or any other Ulker company, on Marsan. Petitioners also argue that none of the elements of the transition of the Hendek assets and human resources is contrary to terms that would be found between two companies that had no corporate relationships.

Petitioners argue that Marsan's claims that other dealings, such as "at-cost" rent and the set-aside of warehouse space, demonstrate that Marsan and Birlik did not conduct arms-length transactions actually show commercial interests of both parties were taken into consideration. Petitioners also argue that the fact that Marsan kept its expert human resources and information technology officers at Hendek during the transition period, or for Marsan's plant manager at Hendek to remain as a Birlik employee after the transition, does not indicate that the transition

was not at arm's length, but rather reflects good business sense to leave some key resources in place to facilitate an even transition of responsibility.

Petitioners argue that no mechanisms that might support a finding of control-in-fact exist because Marsan has presented no evidence (1) of intertwined operations, such as shared board members between itself and Birlik; (2) of family groups owning controlling shares of the two companies; (3) of Marsan and Birlik being significantly indebted one to another, or to a shared lender, so as to indicate potential affiliation via debt financing; (4) of contractual obligations such as franchise or joint-venture operations between itself and Birlik. Therefore, there are no mechanisms that would suggest the potential for affiliation by these or any other potential means of control.

Petitioners assert that the Department properly found in its Preliminary Results that the business relationship among the parties did not constitute affiliation via a close supplier relationship. Petitioners also assert that the Department correctly recognized that the contractual *de jure* terms of the relationship between Marsan and Birlik did not provide any means to place either company in a position to impact the other's decisions regarding the production, pricing or cost of the subject merchandise or foreign like product in a manner that would indicate control-in-fact. Petitioners argue that first, the contractual relationship between Marsan and Birlik is voluntary; there is no indication that the Ulker group used mechanisms of control to force Marsan and Birlik to collaborate. Second, the terms do not permit either company to dictate production, pricing or cost decisions to the other party. Petitioners contend that Marsan's claim that a 1.5 percent difference between Birlik's price to Ulker companies and Marsan is negligible is incorrect, and, in any event, the statute requires the potential to control pricing, not that prices are consistent across companies.

Department's Position

Having determined that there was no affiliation between Marsan and Birlik pursuant to subsections 771(33)(A) through (E) above, we next examine whether there was affiliation under subsections 771(33)(F) and (G). In determining whether control exists, the Department does not require evidence of the actual exercise of control by one party over another party. Rather, we focus our analysis upon one party's ability to control the other.[20] Although Marsan argues that both Marsan and Birlik/Bellini are controlled-in-fact by reason of corporate groupings and the significant influence of Mr. Arikan, we continue to find that affiliation based on control and a close supplier relationship between Marsan and Birlik do not meet the standards for affiliation within the meaning of subsection 771(33)(F) of the Act. The evidence on the record does not show direct cross-ownership between Marsan and Birlik or the same shareholders in Marsan and Birlik's parent companies. The only ownership the parties have in common is that the majority owner of Marsan's parent company and Birlik's parent company each own non-controlling shares in BIM, a third party.[21] Thus, nothing about this ownership creates affiliation pursuant to section 771 (33) of the Act.

[20] See Preamble, 62 FR at 27297-98.

[21] See November 12, 2010, questionnaire response at 9.

Section 771(33)(G) of the Act defines an affiliated party as "any person who controls any other person and such other person." Section 771(33) of the Act states further that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." We find that there are no directives, minutes from meetings or other documentation on the record that supports Marsan's contention that Mr. Tevfik Arikan, given his various positions, directly or indirectly controlled Marsan or Birlik. Marsan points out that Messrs. Topbas and Ulker intended to convert Marsan from a producing company to a trading to company.[22] Marsan also points out that there was an important commercial reason for transferring the pasta-production capability from Marsan to Birlik.[23] We find that Marsan's statements do not demonstrate unilateral control by Mr. Tevfik Arikan, who is not a shareholder in either Marsan or Birlik, or control by the Ulker group. Instead, the statements appear in line with business decisions between Marsan and Birlik. Therefore, we do not find anything in the record that indicates that either Marsan or Birlik are in a position to be controlled, either legally or operationally, by each other or a third party.[24]

The SAA defines a close supplier relationship as one where "the supplier or buyer becomes reliant upon another."[25] To establish a close supplier relationship, the party must demonstrate that the "relationship is so significant that it could not be replaced."[26] The Department's regulations at section 351.102(b)(3) state that such a relationship must have the potential to impact decisions concerning the production, pricing or cost of the subject merchandise or foreign like product. Marsan and Birlik/Bellini are large independent companies that are involved in various aspects of the food industry in Turkey. The fact that Marsan purchases all of its pasta from Birlik or that members of the Topbas family have stock ownership in some of the Ulker group companies that are engaged in complementary food and beverage industries does not create a cross-ownership that "controls" or has the ability to control Marsan within the meaning of section 771(33). Although Birlik acts as Marsan's sole supplier under the terms of the contract production agreement, Birlik produces pasta for other companies in the Ulker group. Moreover, prior segments of this proceeding which have covered additional pasta producers demonstrate that there are multiple pasta producers in Turkey.[27] Furthermore, Marsan has not identified any law, regulation, or directive, whether formal or informal, mandating that it must purchase pasta from Birlik, or a restriction on their purchases from non-Birlik sources. Thus, the

[22] See Marsan's case brief at 21.

[23] See id. at 24.

[24] See Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review, 74 FR 47198 (September 15, 2009), and accompanying Issues and Decision Memorandum (Stainless Steel Bar From India) at Comment 1.

[25] SAA at 838. See also Ammonium Nitrate, 65 FR at 1142-43.

[26] See Ammonium Nitrate, 65 FR at 1142-43.

[27] See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta from Turkey, 64 FR 69493 (December 13, 1999).

Birlik supplier relationship with Marsan does not rise to the level of one in which one party is in a position to exercise control over the other.[28] Because there is no evidence on the record that indicates that Birlik or any other company in the Ulker group had the ability to control Marsan or that a close supplier relationship exists, we continue to determine that there is no affiliation between Marsan and Birlik under subsections 771(33)(F) and(G) of the Act.[29] Moreover, as stated in the Preliminary Results, record evidence indicates that nothing in the contract production agreement between Marsan and Birlik indicates that either party could control the pricing of the other party. Marsan stated that "the price of the product to be produced will be jointly determined in terms of the market conditions by Marsan and Birlik."[30] Thus, Marsan, Birlik, or a third party did not have the ability to unilaterally control pricing of the product.

The Department disagrees with Marsan's contention that the non-arm's length progressive transfer of its assets to Ulker is irrefutable evidence of affiliation and control by Ulker. First, arm's length negotiations, or lack thereof, are not a factor for determining affiliation under the Act. The Department first determines whether parties are affiliated and then considers whether their transactions are arm's length. Thus, because the Department has determined that there is no affiliation between Marsan and Birlik, it is unnecessary to consider whether Marsan's assets transfers were arm's length transactions. Second, regarding Marsan's assertion that Birlik's affiliated-party price to Merkez/Pasifik is comparable to Birlik's price to Marsan, the Department would only conduct an arm's length analysis of those sales if we determined that Marsan and Birlik are affiliated, which we do not. In accordance with section 351.403(d) of the Department's regulations, the Department, after determining that companies are affiliated, analyzes whether the sales were made at a price comparable to the price at which the exporter or producer sold the foreign like product to an unaffiliated customer (i.e., made at arm's length). Thus, because the Department has determined that there is no affiliation between Marsan and Birlik, we do not analyze whether the sales transactions were at arm's length.

Nevertheless, we observe that the Marsan and Birlik have negotiated a Lease and Occupation Agreement, and a Contract Production Agreement regarding the operation of the Hendek facility.[31] Nothing about these agreements shows evidence of affiliation or control. Indeed, if one of the two parties were in fact in a position to exercise control, they would be able to modify these agreements to exclusively advance its own interests. In addition, the Marsan-Birlik price confirmation list[32] and Marsan's statement that the price of the product to be produced will jointly be determined in terms of the market conditions by Marsan and Birlik is further evidence of price negotiation between the entities and not control by either entity. Moreover, as the producer of pasta, Birlik pays for the following: (1) lease of the plant, (2) cost of the equipment,

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[28] See Korean Carbon Steel, 62 FR at 18417.

[29] See id. at 18417- 18.

[30] See January 24, 2011, supplemental section AC questionnaire response at 3.

[31] See November 12, 2010, questionnaire response at Exhibit 2, PDF-160 and PDF-164.

[32] See March 1, 2011, questionnaire response at 2 and Exhibit 2, PDF-24.

(3) raw material costs, (4) labor costs, (5) energy and other overhead costs.[33] Birlik pays Marsan the lease fee and charges it for the finished pasta, at a price that recovers all of its costs and makes a profit.[34] Thus, we find that the terms of the Lease and Occupation Agreement, Contract Production Agreement, and the price confirmation list reflect that the commercial interests of both parties were taken into consideration.

1.D Cases cited by the Department in support of non-affiliation finding

Regarding the cases cited by the Department in the Preliminary Results, Marsan contends that they are not applicable to the instant case. Marsan argues that the Department's cite to Ammonium Nitrate[35] is misplaced because, in that case, the respondent did not argue that there was an affiliation by reason of section 771(33) (A) through (D) or (F) of the Act. Marsan argues that unlike Ammonium Nitrate, where the respondent claimed affiliation under section 771(33)(E) of the Act and control under section 771 (33)(G) of the Act, the present case invokes every subsection of the affiliation statute.

Marsan also argues that the Department's reliance on Steel Wire Rod[36] is also misplaced. Marsan asserts that, in Steel Wire Rod, the issue was whether two manufacturers should be collapsed because of the significant potential for manipulation of price and production. Marsan claims that, in the Steel Wire Rod case, the analysis governing collapsing of affiliated manufacturers was 19 CFR 351.401(f), whereas in the instant case, the applicable regulation is 19 CFR 351.102(b)(3), defining "affiliates." Marsan asserts that 19 CFR 351.401(f) has much more specific requirements and that 19 CFR 351.102(b)(3) is intended to be read more broadly.

Marsan argues that the Department's reliance on Honey[37] is similarly misplaced. Marsan claims that, in Honey, having decided that the companies were not affiliated by reason of reliance upon each other under a "close supplier relationship," the Department went on to analyze the record to determine whether there were any other bases for affiliation. However, Marsan contends that the Department failed to conduct such further analysis in the instant case. Marsan also argues that

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[33] See November 12, 2010, questionnaire response at Exhibit 2, PDF-161. See also January 24, 2011, section D questionnaire response at 15.

[34] See November 12, 2010, questionnaire response at Exhibit 12, PDF-474.

[35] See Notice of Preliminary Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation, 65 FR 1139 (January 7, 2000), unchanged in Notice of Final Determination of Sales at Less Than Fair Value; Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation, 65 FR 42669 (July 11, 2000) (Ammonium Nitrate).

[36] See Stainless Steel Wire Rod from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review, 71 FR 59739 (October 11, 2006), unchanged in Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 72 FR 6528 (February 12, 2007) (Steel Wire Rod).

[37] See Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review, 70 FR 38873 (July 6, 2005) (Honey).

the Department should have applied the "Mitsubishi rule"[38] that it infers from reading Honey as the basis for analyzing a close supplier relationship.

Marsan further argues that the Department's reliance on Hontex[39] is similarly unavailing. Marsan states that in Hontex, the Court simply quoted the Department's own language that exclusive sales contracts "are typically made at arm's length and do not normally indicate control of one party over the other." Marsan contends that, in the present case, the Department's assertions that the production agreement between Marsan and Birlik can be considered an exclusive sales contract is incorrect. Marsan further contends that Marsan did not have an explicit exclusive-dealing contract with Birlik. Instead, Marsan had a lease-production agreement, and its terms were not arm's length in nature, because Marsan leased the facility to Birlik at cost rather than at cost-plus-reasonable profit, and Birlik agreed to set aside warehouse space adequate to Marsan's requirements free of charge.

Petitioners' Comment

Responding to Marsan's argument that the Department's reliance upon Ammonium Nitrate is misplaced, petitioners contend that Marsan cannot and has not shown any evidence of affiliation between, or control of, Marsan and Birlik. Instead, Marsan has proposed a theory of "manifestly intertwined" corporate groupings and shared general interests that putatively constitute "an array of affiliation-creating relationships" greater than a close supplier relationship, rather than any actual application of any of the subsections of section 771(33).

Petitioners assert that Marsan's description of Steel Wire Rod ignores that, in order to conduct the collapsing analysis, the Department must first determine if and how two entities are affiliated, which has a bearing on this case. Petitioners argue that Marsan and Birlik were neither legally nor operationally affiliated in a manner to indicate collapsing into a single respondent.

Petitioners contend that unlike Honey, in the instant case, there is no director, president, or other officer running both Marsan and Birlik. Petitioners assert that Marsan improperly substitutes Mr. Arikan's positions in Ulker companies other than Birlik, none of which control Birlik, for a position by Mr. Tevfik Arikan in Birlik. Petitioners also contend that there is no parallel between this case and Honey. Petitioners point out that, in Mitsubishi, affiliation did not invalidate the arm's length nature of certain transactions, and the court sustained as permissible under the law the Department's non-arm's length treatment of other affiliated transactions, namely of purchases where a supplier depended upon a given purchaser for 50 percent or more of its sales during each year of a five-year period. However, petitioners argue that there is no five-year history of Marsan being dependent on Birlik, nor did the terms under which the transformation occurred prevent Marsan from trading pasta from companies other than Birlik.

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[38] See Mitsubishi Heavy Industries, Ltd. v. United States, 54 F. Supp. 2d 1183, 1190-91 (CIT 1999) (Mitsubishi) (where the Department determined that "any supplier that depended upon {buyer} for 50 percent or more of its sales during each year during a five-year period {would} be potentially subject to the restraint or direction of {the buyer})."

[39] See Hontex Enterprises v. United States, 342 F. Supp 2d 1225, 1243 (CIT 2004) (Hontex).

Petitioners argue that if the lease contract between Marsan and Birlik is a commercial contract with terms that do not indicate that either entity controlled the other, then the fundamental arrangement between Marsan and Birlik would be no less at arm's length than the transactions examined in either Hontex or its Korean Carbon Steel[40] precedent. Petitioners also rebut Marsan's argument that the rent at cost provision invalidates such a parallel.

Department's Position

We disagree with Marsan's assertion that the cases cited by the Department in the Preliminary Results are inapplicable case precedents. In Ammonium Nitrate, the Department did not find the existence of an affiliation, as defined by the statute, between parties Nevinka and Transammonia. First, Transammonia's ownership of Nevinka was below the five percent requirement under section 771(33)(E).[41] The Department also found no evidence of a basis for affiliation with respect to the statutory definitions under section 771(33), subsections (A) through (D), or (F).[42] Furthermore, with respect to section 771(33)(G), we did not find that Nevinka's relationship with Transammonia constituted a ''close supplier relationship'' which would indicate control by either party over the other.[43] Thus, similar to the circumstances in the instant review, the Department found no affiliation under section 771(33), subsections (A) through (G).[44]

The information on the record of this case indicates that Marsan and Birlik entered into a lease and contract production agreement, and that although Birlik acts as Marsan's sole supplier under the terms of the contract production agreement, Birlik produces pasta for other companies in the Ulker group as well.[45] In addition, there is no record evidence that Birlik determined the types of pasta it produces for Marsan or that Marsan was mandated to purchase pasta from Birlik or restricted in its purchases of pasta from other suppliers. On the other hand, in Stainless Steel Wire Rod, the Department found a close supplier relationship between two companies based on the fact that the purchaser, whose operations were almost exclusively dependent upon finishing unfinished stainless steel wire rod, was unable to obtain suitable black coil from sources other than the supplier in question.[46]

Regarding Marsan's argument that, in Honey, unlike the instant case, the Department conducted further analysis to determine whether there were any other bases for affiliation, we analyzed all information on the record regarding the possible affiliations between Marsan and Birlik, pursuant

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[40] See Certain Cold-Rolled and Corrosion- Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18404 (April 15, 1997) (Korean Carbon Steel).

[41] See Ammonium Nitrate, 65 FR at 42672.

[42] See id.

[43] See id.

[44] See Ammonium Nitrate, 65 FR at 1142-43, unchanged in the final results.

[45] See November 12, 2010, questionnaire response at 6.

[46] See Stainless Steel Wire Rod, 71 FR at 59739-59740.

to section 771(33) of the Act and found no basis for affiliation. In addition, in Honey, the Department also found that the terms of the exclusive sales contract were adhered to by both parties during the period of review under consideration. In the instant case, we find that the lease and production agreements and price confirmation list between Marsan and Birlik constitute an exclusive sales contract. As a result of these three agreements, Birlik is the sole supplier of all the pasta sold to Marsan; and Birlik is clearly in charge of the production of all of the pasta produced at the Hendek facility. Regarding the fact that Marsan leased the facility to Birlik at cost, this relates to the fact that Marsan entered into these arrangements to have pasta produced, rather than earn a profit leasing the factory. Regarding the set aside warehouse space, this is not unusual or a sign of control given the fact that Marsan used to operate the factory itself and had been transferring operations to Birlik in a piece meal fashion over several years.[47] Thus, contrary to Marsan's contention, Honey is applicable to the instant case, where the Department recognized an exclusive sales contract to be "common" in that it is typically made at arm's length and does not normally indicate control of one party by another.

The Department's cite to Hontex is applicable to the instant case. In Hontex, the Court of International Trade held that, even where there are exclusive sales contracts, the Department has properly found that such contracts alone were insufficient to support an affiliation finding.[48] Likewise, in the instant case, an exclusive sales contract or lease-production and purchase agreement between Birlik and Marsan alone are insufficient to support a finding of affiliation.

1.E Cases cited by Marsan to support a finding of affiliation

On the other hand, Marsan cites to case precedents that it argues support a finding of affiliation in the instant case. Marsan asserts that, in Carbon Steel Pipes and Tubes,[49] as in the instant case, the respondent had a vast web of interlocking corporate entities ultimately in the hands of a small number of families. Thus, Marsan argues that it is the corporate and family groupings that give rise to the affiliation in this case. Marsan asserts that, operationally, these groupings are manifest through Mr. Arikan's position as Ulker's representative on Marsan's board of directors. Moreover, Marsan claims that, in Carbon Steel Pipes and Tubes, the Department emphasized that it was not necessary to show actual control, but instead the ability to control as the key factor under section 771(33)(F) of the Act. Therefore, Marsan argues that, in the instant case, the Topbas/Ulker economic entity, through Mr. Arikan, has the ability to control not only Marsan but also Birlik and Bellini.

Marsan claims that, in Cold-Rolled Carbon Steel,[50] the Department held that the relationship between the respondent and the bank, whose interest rate was the basis for the home market

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[47] See Honey, and accompanying Issues and Decision Memorandum at Comment 11.

[48] See Hontex, 342 F. Supp. at 1243.

[49] See Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808 (October 16, 1997) (Carbon Steel Pipes and Tubes).

[50] See Notice of Preliminary Determination of Sales at Not Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From France, 67 FR 31204 (May 9, 2002) (Cold-Rolled Carbon Steel).

credit expense calculation, was too attenuated to constitute an affiliation, even though the bank appointed a member of the steel mill's board of directors. Marsan argues that the lack of affiliation in Cold-Rolled Carbon Steel is in contrast to its own situation, where Mr. Tevfik Arikan, vice chairman of Marsan's board of directors is affiliated with Marsan, and with the Ulker group.

Marsan cites to Ta Chen,[51] and argues that, in that case, the Department found affiliation with a comparable slim body of evidence, thus making it difficult to understand how the Department could maintain its position that Marsan and Birlik are not affiliated in the current case.

Marsan argues that the family-based affiliation sustained in New World Pasta[52] compels an affiliation finding in this case because of the presence of common shareholders, directors and officers throughout the Topbas/Ulker companies, including Marsan, Birlik and Bellini.

Marsan claims that, in China Steel,[53] the court emphasized that the Department need not focus on whether a particular individual is chairman of the board, but, rather on whether the evidence shows that the person is in a position to exercise restraint or direction over the companies in question. Marsan argues that, in the present case, the Department should make the same type of thorough analysis of the record as it did in China Steel. Marsan further argues that the short shrift given to the factual record is an insufficient basis to impose the functional equivalent of adverse facts available on a thoroughly cooperative respondent who provided abundant and compelling evidence on affiliation.

Petitioners' Comment

Petitioners contend that Marsan glosses over all of the details in Carbon Steel Pipes and Tubes. On the contrary, petitioners claim that the Department found separate affiliations for separate families in that case. Petitioners further argue that the vertical integration of ownership in Carbon Steel Pipes and Tubes does not exist in the instant case.

Petitioners assert that in Cold-Rolled Carbon Steel the appointment of one board member out of a total of 18 members did not indicate control. Petitioners argue that Marsan has similarly tried to make one board membership or one management position indicative of affiliation, even when the singular positions were held in companies other than Marsan or Birlik.

Petitioners argue that Marsan incorrectly claims that Ta Chen supports finding affiliation between Marsan and Birlik. Petitioners also argue that Ta Chen is completely inapposite to the instant case, as it deals with the direct inter-relationships between two parties, not distant, diluted and extended relationships between different parts of two corporate groups that only tangentially

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[51] See Ta Chen Stainless Steel Pipe Inc., v. United States, 298 F. 3d 1330, 1335 (Fed. Cir. 2002) (Ta Chen).

[52] See New World Pasta Co. v. United States, 316 F. Supp. 2d 1338, 1341-42 (CIT 2004) (New World Pasta).

[53] See China Steel Corp. v. United States, 306 F. Supp. 2d 1291, 1299 (CIT 2004) (China Steel).

involve Marsan in some aspects and separately involve Birlik in other respects. Thus, petitioners contend that Ta Chen is not an applicable precedent.

Petitioners rebut that Marsan misreads the findings in New World Pasta. Petitioners claim that, in that case, two companies were found to be affiliated under section 711(33)(A) because the sister and sister-in-law of one of the company's majority shareholders were major shareholders in the other company. Petitioners argue that, for New World Pasta to be germane here, the sister and sister-in-law of a majority Marsan shareholder would need to be major shareholders in Birlik, or conversely, the sister and sister-in-law of a majority Birlik shareholder would need to be major shareholders in Marsan. Neither situation, nor any similar parallel, is in place in this review.

Petitioners assert that Marsan's reliance on China Steel is misplaced. Specifically, petitioners state that in China Steel the court sustained the Department's determination that a board member, whether or not holding chairmanship, was in a critical position to exercise restraint or direction over the companies on whose board he served. However, petitioners contend that the finding in China Steel might be germane as a potential indicator of affiliation in the instant case if Marsan and Birlik shared a common member of both companies' boards of directors.

Department's Position

Contrary to Marsan's assertion, the fact pattern in this case is different from that in Carbon Steel Pipes and Tubes. In Carbon Steel Pipes and Tubes, the Department found Saha Thai and certain home market customers, service providers, and producers of the subject merchandise to be affiliated under section 771(33)(F) by virtue of common control by several families involved in the ownership and management of Saha Thai.[54] In addition, the Department found the Karuchit/Kunanantakul family to be in a position of legal and operational control of the Siam Steel Group companies by virtue of the Karuchit/Kunanantakul family members' positions as directors and the family's ownership interests in these companies.[55] The record evidence therefore demonstrated that the Karuchit/Kunanantakul family controlled the Siam Steel Group companies, which established an affiliation among all Siam Steel Group companies under section 771(33)(F) of the Act.[56] In the instant case, as noted above, there is no common ownership or family relationship between Birlik and Marsan, and the record evidence does not demonstrate that either Marsan or Birlik or a third party is in a position of legal and operational control of Marsan.

Contrary to Marsan's assertion regarding the dissimilarities between the Department's finding in Certain Cold-Rolled Carbon Steel and the instant case, we find that in both cases the

[54] See Carbon Steel Pipes and Tubes, 62 FR 53808, 53815.

[55] See id. at 53810.

[56] See id.

appointment of one board member does not constitute control.[57] Therefore, we do not find that Mr. Tevfik's position on Marsan's board does not constitute control of Marsan or Birlik.

The Department also finds unpersuasive Marsan's contention that Ta Chen supports a finding of affiliation between Marsan and Birlik. Ta Chen dealt with the affiliation of two entities.[58] However, in the instant case, Marsan does not provide information showing affiliation between Marsan and Birlik. Instead, Marsan has put forth a web of relationships among the Ulker group companies and an economic unity of interest argument to show an involved corporate group to demonstrate affiliation. However, none of the relationships among the Ulker group companies illustrates a direct relationship to Marsan. Likewise, we do not find Marsan's cite to New World Pasta to be applicable to the instant case. In New World Pasta, the court sustained a family-based affiliation.[59] However, as noted above, we do not find that there is a familial affiliation between Marsan and Birlik.

Finally, we find that Marsan's cite to China Steel does not support a finding of affiliation between Marsan and Birlik in the current review. As noted above, there is no record evidence that Mr. Tevkin Arikan, as Marsan's vice chairman of Marsan's board of directors, exercised restraint or direction over Marsan. Moreover, China Steel concerned an instance of one individual serving on multiple boards of directors, which is not the case with respect to Mr. Tevkin Arikan and Birlik.[60]

Comment 2: Whether the review covered Marsan and its affiliates

Marsan argues that the Preliminary Results errs in stating that "we received a request from petitioners to review Marsan," because the Department received a request from petitioners to review Marsan and all its affiliates.

Petitioners contend that it used standard language in requesting the review and that it did not concede in advance that Marsan and Birlik were affiliated.

Department's Position

Marsan's comment presupposes that Marsan has affiliates. However, the Department has not identified any affiliates of Marsan in this administrative review. Moreover, petitioners' request for review did not specify Birlik or Bellini by name.[61] In the absence of such specific language, we do not find that petitioners' request for a review of Marsan and its affiliates constitutes any

[57] See Notice of Final Determination of Sales at Less Than Fair Value; Certain Cold-Rolled Carbon Steel Flat Products From France, 67 FR 62114 (October 3, 2002), and accompanying Issues and Decision Memorandum at Comment 7.

[58] See Ta Chen, 298 F. 3d at 1330.

[59] See New World Pasta, 316 F. Supp. 2d at 1344.

[60] See China Steel, 306 F. Supp. 2d at 1299.

[61] See petitioners' July 30, 2010, request for administrative review.

sort of admission by petitioners of affiliation between Marsan and Birlik or between Marsan and any other entity. Nor does the wording of the review request constitute substantial evidence on which the Department could find Marsan and other companies affiliated.

Comment 3: Whether the application of the reseller policy was unlawful

Marsan argues that the Department applied the reseller policy based on its erroneous finding that Birlik and Marsan were not affiliated. Marsan also argues that the reseller policy does not apply when the producer is affiliated with the reseller/exporter, since in such cases the price from the producer to the affiliated exporter is not an arm's-length price. Marsan further argues that in the instant case, Marsan is affiliated with Birlik. Therefore, the relevant price, for antidumping purposes, is Marsan's price to its customer, which is the first sale to an unaffiliated customer.

Petitioners did not comment on this issue.

Department's Position

As discussed above in Comment 1, no comments were received that warrant a change in the Department's preliminary finding that Marsan and Birlik are not affiliated. As stated in the Preliminary Results, the Department's review of information on the record shows that Marsan did not produce the subject merchandise and it was not the first party in the transaction chain to have knowledge that the merchandise was destined for the United States.[62] The record also shows that the shipments of the merchandise at issue were produced by Birlik and that Birlik had knowledge of the destination of the exports, a fact not disputed by Marsan.[63] Therefore, it remains appropriate to apply the reseller policy.

Recommendation:

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the Federal Register.

AGREE _____ DISAGREE _____

_____

Paul Piquado
Assistant Secretary
for Import Administration

[62] See Preliminary Results, 76 FR at 23977.

[63] See id.

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(Date)