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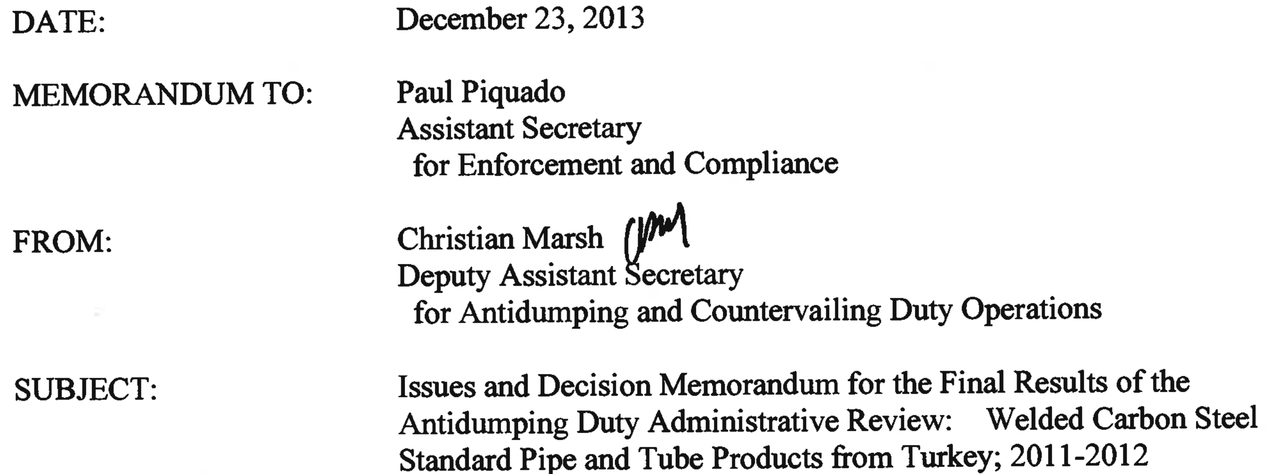

DATE: December 23, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2011-2012

Summary

For the final results in the 2011-2012 administrative review of the antidumping duty order on welded carbon steel standard pipe and tube products from Turkey (the Order), we have analyzed all case and rebuttal briefs filed in this segment. The case and rebuttal briefs were filed by the following interested parties: U.S. Steel Corporation (U.S. Steel); Wheatland Tube Company (Wheatland); Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (Borusan);[1] and ERBOSAN Erciyas Boru Sanayi ve Ticaret A.S. (Erbosan). As a result of this analysis, we have made certain changes to the margin calculations for Borusan. We recommend that you approve the positions provided in the "Discussion of Comments" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

Borusan

Comment 1: **Significance of Cost Changes**
Comment 2: **Date of Sale for U.S. Sales**
Comment 3: **Home Market Direct Selling Expenses and Factoring Costs**

[1] The Borusan Mannesmann Boru Sanayi ve Ticaret A.S. case and rebuttal briefs make no reference to any other Borusan entities and was filed only on behalf of that entity. However, other Borusan entities are affected by the final results, and for ease of reference we use the term "Borusan" in this memorandum.

Comment 4: **Duty Drawback for U.S. Sales**
Comment 5: **Whether to Remove the Non-VAT Sales from the Home Market Sales Data Prior to Making Sales Comparisons**
Comment 6: **Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Less-Than-Fair-Value Investigations**
Comment 7: **Consideration of an Alternative Comparison Method in Administrative Reviews**
Comment 8: **The Average-to-Transaction Method and the Denial of Offsets for Non-Dumped Comparisons**
Comment 9: **Differential Pricing Issues**

Erbosan

Comment 10: **Differential Pricing Issues**

Background

On June 7, 2013, the Department of Commerce (the Department) published the preliminary results of the administrative review of the Order for the period of review (POR) May 1, 2011, to April 30, 2012.[2] At that time, we invited interested parties to comment on our *Preliminary Results*.[3] On July 22, 2013, we received case briefs from Wheatland, U.S. Steel, and Borusan. On August 1, 2013, we received rebuttal briefs from Borusan and Erbosan. On August 2, 2013, we received rebuttal briefs from Wheatland and U.S. Steel.

The Department has conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The products covered by this order are welded carbon steel standard pipe and tube products with an outside diameter of 0.375 inch or more but not over 16 inches of any wall thickness, and are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, and 7306.30.5090. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive. These products, commonly referred to in the industry as standard pipe or tube, are produced to various ASTM specifications, most notably A-120, A-53 or A-135.

[2] *See Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 34340 (June 7, 2013) (*Preliminary Results*).
[3] *See id.* at 34341.

Discussion of Comments

Borusan

Comment 1: Significance of Cost Changes

Borusan's Case Brief Comments

Borusan argues that the Department should base the calculation of Borusan's cost of production (COP) and constructed value (CV) for the final results on the quarterly per-unit costs submitted by Borusan, rather than the weighted-average POR per-unit costs relied on by the Department in the *Preliminary Results*. According to Borusan, significant changes occurred in Borusan's COP over the period that home market and U.S. market sales were reported. Borusan asserts that while the POR is from May 1, 2011 to April 30, 2012, the date of sale for the first U.S. sale took place in January 2011.[4] As such, Borusan reported home market sales 90 days prior to the date of the first U.S. sale (*i.e.*, November 1, 2010) to the end of the POR, April 30, 2012.[5] Borusan asserts that the record evidence shows that the fluctuation in quarterly costs over the period of November 1, 2010 to April 30, 2012 exceeded 25 percent.[6]

Borusan alleges that the Department, in the *Preliminary Results*, based its significance of cost changes analysis on six quarters and then compared the resulting cost changes in that 18-month period to a threshold of 37.5 percent (*i.e.*, 25 percent for 12 months plus 12.5 (25/2) for the additional six months).[7] As a result, the Department then found that only one of the five highest volume home market and five highest volume U.S. products experienced cost changes that exceeded 37.5 percent. Borusan contends that the Department should be sensitive not only to significant cost changes over the entire extended POR, but also to significant cost changes within the POR. Borusan argues that instead of applying a single 18-month rate of 37.5 percent to the entire POR, the Department should consider whether significant changes in cost took place within the POR by applying an annualized 25 percent rate to the actual period between the highest and lowest quarterly costs being compared.

Borusan provided an analysis of the highest and lowest quarterly costs for each of the five highest volume control numbers (CONNUMs) sold in the home market and in the U.S. market that were examined by the Department in the *Preliminary Results*.[8] Borusan's analysis shows the percentage change between the highest and lowest cost quarters for these products and compares that percentage change to the 25 percent annualized rate which Borusan adjusted for the period of time between the highest and lowest cost quarter for each CONNUM examined. For example, for one of the home market CONNUMs, the lowest quarterly cost was in the first

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[4] *See* Borusan's case brief at 10.

[5] In Borusan's section B submission, the company stated that 90 days before the date of the first sale equated to October 2010. *See* Borusan's October 9, 2012 section B submission at 6. This is correct, as October 2010 amounts to 90 days before the first sale. However, the company erroneously defined 90 days prior to the first sale as November 2010 in its case brief. *See* Borusan's case brief at 10.

[6] *See* Borusan's case brief at 10-12. In the section D submission, Borusan reported only those pre-POR costs incurred beginning in November 2010, rather than October 2010.

[7] *See id.*

[8] *See id.* and Exhibit 1.

quarter of the window period (*i.e.*, November 1, 2010 through January 31, 2011) and the highest quarterly cost was in the second quarter of the POR (*i.e.*, August 1, 2011 through October 31, 2011). The difference between the highest and lowest quarterly cost is 35.58 percent. Borusan alleges that this percentage of change should be compared to a benchmark of 25 percent because the high and low quarterly costs were taken from the same 12-month period.

Borusan's analysis also shows that for another product, the lowest quarterly cost occurred in the first quarter of the window period (*i.e.*, November 1, 2010 through January 31, 2011), while the highest quarterly cost occurred in the third quarter of the POR (November 1, 2011 through January 31, 2012). Borusan asserts that the changes in costs for this CONNUM should be compared to an annualized 25 percent benchmark adjusted for the period of time between the first quarters of the window period and the third quarter of the POR (*i.e.*, 31.25 percent). Borusan argues that comparing the changes in costs for each CONNUM to an annualized 25 percent benchmark adjusted for the period of time between the quarters being compared yields the conclusion that there were significant cost changes for all five of the highest volume home market CONNUMs and for three of the five highest volume U.S. CONNUMs. Borusan asserts that, as such, the Department should conclude in the final results that significant cost changes took place and, accordingly, should base COP and CV on Borusan's quarterly costs.

Wheatland's Rebuttal Brief Comments

Wheatland argues that the Department should reject Borusan's claim that using an 18-month period, as opposed to a 12-month period, should have no impact on the 25 percent threshold of the shorter cost-averaging period analysis. According to Wheatland, the Department should reject this claim because Borusan has provided no reasoned basis for altering the test. Wheatland contends that Borusan's claim is inconsistent with International Accounting Standard (IAS) 29 and that Borusan has provided no precedent or compelling factual basis that would support a change in the Department's established practice. As such, Wheatland asserts the Department should reject Borusan's request to employ the alternative cost methodology for purposes of the final results.

U.S. Steel's Rebuttal Brief Comments

U.S. Steel disputes Borusan's claim that the Department should have relied on Borusan's quarterly costs in the *Preliminary Results*. According to U.S. Steel, Borusan's contention that the Department should use any 12-month period within the extended POR that reflects a significant change in costs is contrary to the Department's established practice and should be rejected. U.S. Steel contends that such a methodology would require the Department to calculate Borusan's costs based on time periods outside of the 12-month POR. U.S. Steel asserts that such a calculation has no support in the statute and, in fact, is contrary to the Department's normal practice as upheld by the CIT. Moreover, even if Borusan's costs of manufacture for the six quarters of the extended POR were used to determine whether the company experienced a significant change in costs, the Department's analysis shows that such a change did not occur. As such, U.S. Steel concludes that the Department should continue to calculate the company's costs of production by relying on the average costs for the 12-month POR.

Department's Position:

We agree in part and disagree in part with Borusan. Our findings in the *Preliminary Results* of this case conflated the issue of whether costs changed significantly during the POR with the issue of whether the costs incurred during the POR reasonably reflect those incurred during the window period.[9] The comments submitted by Borusan, Wheatland, and U.S. Steel likewise conflate these distinct issues. For these final results, we have treated these two issues separately. Accordingly, we determine that the use of shorter cost-averaging periods is not warranted because Borusan's POR costs did not change significantly during the POR.[10] We also find that, as a result of the changes between Borusan's production costs during the pre-POR cost period, Borusan's POR annual weighted-average costs do not reasonably reflect the costs incurred during the pre-POR period.[11] As such, we find that the more reasonable and accurate approach in this case is to rely on the pre-POR costs for purposes of comparing costs to Borusan's pre-POR sales.

The statute does not dictate a specific method of calculating COP, nor does it provide a definition for the term "period" in calculating COP and CV.[12] The Department's normal practice is to use weighted-average costs for the POR.[13] However, we recognize that distortions may result if we use our normal POR weighted-average cost method during a period of significant cost changes. In determining whether to deviate from our normal methodology of calculating a POR weighted-average cost, we evaluate the case-specific record evidence using two primary factors: (1) the change in the cost of manufacturing (COM) recognized by the respondent during the POR must be significant; and (2) the record evidence must show that the changes in sales prices during the shorter cost-averaging periods are reasonably correlated with changes in the cost during the same shorter cost-averaging periods (*i.e.*, linkage).[14] The Department's threshold for establishing whether a significant change in POR costs has occurred

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[9] *See* Memo to Neal M. Halper, Cost of Production and Constructed Value for the Preliminary Results – Borusan Mannesmann Boru Sanayi ye Ticaret A.S., dated June 3, 2013 and herein incorporated by reference (Prelim Cost Memo).

[10] *See* Prelim Cost Memo at Attachment 1 for the Department's shorter cost-averaging period analysis.

[11] *See* Memo to Neal M. Halper, Cost of Production and Constructed Value for the Final Results – Borusan Mannesmann Boru Sanayi ye Ticaret A.S., dated October 4, 2013 (Final Cost Memo), incorporated herein by reference, at Attachment 1 for the Department's analysis of Borusan's pre-POR weighted-average costs and the POR weighted-average costs.

[12] *See* Section 773(b) of the Act.

[13] *See, e.g., Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852 (December 13, 2000), and accompanying Issues and Decision Memorandum at Comment 18; *Notice of Final Results of Antidumping Duty Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (January 24, 2006), and accompanying Issues and Decision Memorandum at Comment 5 (explaining the Department's practice of computing a single weighted-average cost for the entire period).

[14] *See Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of Antidumping Duty Administrative Review*, 75 FR 6627 (February 10, 2010), and accompanying Issues and Decision Memorandum at Comment 6; *Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review*, 73 FR 75398 (December 11, 2008) (*SSPC from Belgium*), and accompanying Issues and Decision Memorandum at Comment 4.

is 25 percent.[15] This methodology has been upheld by the Court of International Trade in numerous cases.[16]

Under the Department's normal practice, we calculate costs for all comparison market sales using only costs which were incurred during the POR. The Department's practice stems in part from sections 773(b)(1)(B), 773(b)(2)(B), and 773(b)(2)(D) of the Act, where an extended period of time for cost recovery is defined as being normally one year and the cost recovery test references the "weighted average per unit cost of production for the period of investigation or review." In most cases, we make the reasonable assumption that POR costs are representative of the costs for all reported sales, including those sales made during the window periods (*i.e.*, three months prior to the first, and two months after the last month of the POR).[17] The Department has only departed from this practice in cases where all or a significant portion of the home market sales occurred prior to the POR. In those cases, the Department shifted the cost reporting period to match more closely with the time period surrounding the reported sales.[18] In *Shrimp from Thailand*, the Department noted that departure from its normal practice may be appropriate if the record evidence shows that the POR costs are not reasonably reflective of the pre-POR period.[19]

In the instant review, Borusan reported that the first U.S. sale included in this review took place in January 2011, four months prior to the commencement of the POR (*i.e.*, May 1, 2011).[20] Borusan alleges that the Department's significance of cost changes analysis should therefore include the two quarters preceding the POR (*i.e.*, the period of November 2010 through April 2011) because the U.S. sale occurred during that period.[21] Borusan concluded that the Department's significance of cost change analysis shows that the changes in Borusan's cost over the extended 18 month period exceed the Department's 25 percent threshold.[22] As such, Borusan reported quarterly costs for the window period and the POR.[23]

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[15] *See Certain Welded Stainless Steel Pipes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 FR 31242 (June 30, 2009), and accompanying Issues and Decision Memorandum at Comment 1b.
[16] *See Habas Sinai ve Tibbi Gazlar Isthihsal Endustrisi A.S. v. United States*, Slip Op. 09-133 (CIT November 23, 2009); *SeAH Steel Corporation v. United States*, Slip Op. 10-60 (CIT May 19, 2010); *Pastificio Lucio Garofalo S.P.A. v. United States*, 783 F.Supp.2d 1230 (CIT 2011),*aff'd*, 469 Fed. Appx. 901 (Fed. Cir. March 14, 2012).
[17] *See e.g., Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 FR 54847 (September 9, 2010) (*Shrimp from Thailand*), and accompanying Issues and Decision Memorandum at Comment 13.
[18] *See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part*, 73 FR 66218 (November 7, 2008), and accompanying Issues and Decision Memorandum at Comment 2 (where approximately fifty percent of its reported home market sales occurred prior to the POR); *see also, Final Results of Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from Romania*, 72 FR 18204 (April 11, 2007), and accompanying Issues and Decision Memorandum at Comment 2 (where the Department used costs from the prior review period because all of the U.S. transactions examined had dates of sale prior to the POR).
[19] *See Shrimp from Thailand*, 75 FR 54847 and accompanying Issues and Decision Memorandum at Comment 13.
[20] *See* Borusan's October 9, 2012 submission at 25.
[21] *See id.* at 26.
[22] *See id.*
[23] In addition to the reported quarterly costs, Borusan also submitted a cost data file reporting POR weighted-average costs. *See id.*

In the *Preliminary Results*, the Department examined the changes in Borusan's costs during the POR (May 2011 through April 2012) and determined that use of shorter cost averaging periods for the POR was not warranted.[24] The Department also examined Borusan's analysis of the cost changes within the extended period (November 2010 through April 2012) and found that Borusan's analysis failed to consider the equivalent changes relative to the 18 month extended period.[25]

Upon further review of the facts in this case, we find that the methodology used in the *Preliminary Results,* including six quarters of cost data in our analysis of whether significant changes in cost occurred, was not appropriate. This approach, which was also relied on by Borusan in its own analysis, conflates the issue of whether costs changed significantly during the POR with the issue of whether the costs incurred during the POR reasonably reflect those incurred during the pre-POR cost period.[26] We find that the correct approach is to treat the two issues separately.

The first issue is whether it is appropriate to rely on POR, weighted-average costs for comparison to sales throughout the POR, in accordance with our normal practice, or whether the changes in Borusan's costs during the POR are significant such that the use of shorter cost averaging periods is warranted. The Department has made a concerted effort to develop a predictable methodology for determining when the use of shorter cost averaging periods is more appropriate due to the occurrence of significant cost changes within the POR.[27] This methodology is to calculate the percentage of change between the quarter within the POR with the highest weighted-average cost and the quarter within the POR with the lowest weighted-average cost and compare that percentage of change to the threshold of 25 percent. The threshold established by the Department considers the change in costs over the entire POR, regardless of the number of quarters between the quarter with the highest average cost and the quarter with the lowest average cost.[28] Based on the Department's analysis, the changes in Borusan's costs during the POR failed to meet the Department's established threshold. The nature of the change in Borusan's costs is proprietary and, consequently, discussed more fully in the Final Cost Memo.[29] Therefore, consistent with our practice, we have relied on Borusan's POR annual weighted-average costs for comparison to Borusan's POR sales.

In regard to Borusan's contention that, instead of applying a single 18-month rate of 37.5 percent to the entire POR, the Department should consider whether significant changes in cost took place within the POR by applying an annualized 25 percent rate to the actual period between the

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[24] *See* Prelim Cost Memo at Attachment 1.

[25] The Department stated that Borusan's change in cost analysis should have been based on a threshold of 37.5 percent change in costs for an 18-month period rather than the 25 percent threshold for a 12-month period. *See* Prelim Cost Memo at 3.

[26] *See* Borusan's October 9, 2012 submission at exhibit D-19.

[27] *See Seamless Refined Copper Pipe and Tube From Mexico: Notice of Final Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination*, 75 FR 60723 (October 1, 2010), and accompanying Issues and Decision Memorandum at Comment 2.

[28] *See, e.g., Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part*, 73 FR 66218 (November 7, 2008), and accompanying Issues and Decision Memorandum at Comment 5.

[29] *See* Final Cost Memo at Attachment 1.

highest and lowest quarterly costs being compared, we find the argument to be off point. As explained above, the Department's analysis of Borusan's change in costs over 18 months is not appropriate in this case because it conflates the issue of significant changes in costs within the POR with whether the costs incurred during the POR reasonable reflect those incurred during the pre-POR period. Because we find that Borusan's argument does not apply to the facts in this case, we find it inappropriate to address that argument here.

The second issue in this case is whether the costs incurred during the POR, which are normally used for comparison to pre-POR sales, reasonably reflect the costs incurred during the pre-POR period.[30] In this review, Borusan reported its actual CONNUM-specific production costs incurred during the six-month pre-POR cost period that closely approximates the time span which includes the time span for Borusan's pre-POR U.S. sales and the home-market sales window reporting period.[31] As such, we were able to compare Borusan's POR weighted-average costs to Borusan's weighted-average costs incurred during that pre-POR period.[32] We performed this analysis for the same CONNUMs that we examined in our shorter cost-averaging period analysis. We calculated the weighted-average costs for the pre-POR period for these CONNUMs using the production quantities and values reported as incurred during that pre-POR period.[33] Based on this analysis, we find that the magnitude of the difference between Borusan's POR weighted-average costs for these CONNUMs and the pre-POR weighted-average costs for these same CONNUMs demonstrates that the POR weighted-average costs do not reasonably reflect the production costs incurred during the pre-POR period.[34] As such, we have relied on the weighted-average pre-POR costs when performing the margin calculations for the U.S. sales during the pre-POR period.[35]

For a detailed discussion of the significance of Borusan's costs changes and our analysis of these changes, see the Final Cost Memo.

Comment 2: Date of Sale for U.S. Sales

U.S. Steel Case Brief Comments

U.S. Steel asserts that, during the *Preliminary Results*, the Department used the date of the sales contract reported by Borusan as the date of sale for its U.S. sales. U.S. Steel argues that record evidence, however, clearly demonstrates that the Department should use the invoice date as the date of sale for Borusan's U.S. sales in the final results, consistent with the Department's regulations and well-established practice. U.S. Steel claims that, under the Department's regulations, the invoice date is the presumptive date of sale and that a party proposing to use a

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[30] *See e.g., Shrimp from Thailand*, 75 FR 54847 and accompanying Issues and Decision Memorandum at Comment 13.
[31] *See* Borusan's October 9, 2012 submission at 26. The pre-POR cost period data reported by Borusan covers the period November 2010 through April 2011, while the home-market sales window reporting period is October 2010 through April 2011.
[32] *See* Final Cost Memo at Attachment 1.
[33] *Id.*
[34] *Id.* Borusan's POR and window period costs, the change between these costs, and the direction of the change in costs are proprietary information.
[35] *See* Final Cost Memo at 2.

different date as the date of sale must show that the proposed date better reflects the date on which the material terms of sale are established. U.S. Steel states that a party must establish that the material terms of sale (price, quantity, delivery terms, and payment terms) undergo no meaningful change (or are not subject to meaningful change) between the proposed date of sale and the invoice date.

As an initial matter, U.S. Steel contends that it is not clear whether Borusan claims that the sales contract date should be used as the date of sale. According to the Department's verification report, Borusan stated that the invoice date should be used as the date of sale for its U.S. sales, despite originally claiming that the contract date better reflects the date on which the material terms of sale were established.

U.S. Steel argues further that the material terms of Borusan's sales changed from Borusan's contract date to its invoice date. U.S. Steel argues that there was a change in the material term of quantity in a U.S. sales contracts that the Department examined at verification.[36] In particular, U.S. Steel avers that the changes to the quantity of various line items in the U.S. sales contracts did not stay within the permitted tolerance. U.S. Steel also argues that that the delivery terms of some of Borusan's U.S. sales contracts also were subject to change due to Borusan's delays in receiving its raw material.

Borusan's Rebuttal Brief Comments

Borusan states that U.S. Steel correctly notes that the invoice date is the presumptive date of sale and that, in order to propose a different date of sale, a party must show that there are no meaningful changes in the material terms of sale between the proposed date of sale and the invoice date. Borusan claims that there were no meaningful changes in the material terms of sale between the final sales contract date and the invoice date; consequently, the Department's preliminary determination to base Borusan's date of sale for U.S. sales on the final sales contract date was correct.

Borusan states that by using the invoice date as the date of sale for its U.S. sales, the Department's consistent practice on this issue over the last three administrative reviews would be undermined. First, Borusan acknowledges that "according to the Department's verification report, Borusan stated that the invoice date should be used as the date of sale for its U.S. sales."[37] However, Borusan states that it has consistently claimed throughout this proceeding, including at verification, that the date of sale for U.S. sales should be based on the definitive contract date, not the invoice date. Borusan asserts that they were no changes to the date of sale in the minor corrections submitted at the outset of verification, and there were no errors in the reported date of sale, which was based on contract date, noted in the report.

Borusan claims that the Sales Verification Report does not state that the invoice date should be the date of sale for U.S. sales, but rather it makes this claim only with respect to home market

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[36] *See* the Department's May 14, 2013, sales verification report entitled, "Verification of the Sales Response of Borusan Mannesmann Boru Sanayi ve Ticaret A.S.: Antidumping Review of Certain Welded Carbon Steel Pipe and Tube from Turkey," (Sales Verification Report) at 4.

[37] *See* Sales Verification Report at Exhibit 10a.

sales. To the extent that the passage at issue in the Sales Verification Report can be interpreted to refer to the date of sale for U.S. sales, Borusan asserts that there appears to be an inadvertent error in the report. Borusan states that it is apparent that the date of sale was based on the definitive contract date because the Sales Verification Report goes on to observe that the differences in quantity between the definitive contract date and the invoice date were within the tolerances stated in the contracts. Borusan asserts that this observation would have been irrelevant had Borusan not been claiming that the definitive contract date was the date of sale.

Borusan rebuts U.S. Steel's argument that there was a meaningful change in the terms of the contract because the quantity shipped varied from the quantity stated in the contract for certain invoice line items by more than the allowed tolerance. Borusan contends that the tolerance stated in the contract applies to the total sales quantity of the contract as a whole and that it does not apply to each line item separately.[38] Borusan asserts that several other contracts on the record support its claim that the tolerance applies to the contract as a whole and that, besides, it could never agree to a quantity tolerance of this kind on a line-by-line basis.

Regarding U.S. Steel's claim that the delivery terms of U.S. sales contracts changed, Borusan argues that the shipment time specified in the contract is an entire month. Other than the bare statement referred to by U.S. Steel in Borusan's October 9, 2013, section A response (section A response), Borusan claims that there is no evidence on the record showing that there actually were any instances where there was a delay in shipment beyond the month specified in the contract. Borusan further asserts that all of the contracts that were produced in its section A response and at verification, the shipment date was within the month referred to as "Shipment Time" in the contract. Borusan states had U.S. Steel raised this issue earlier, it could have been explored in more detail in a supplemental questionnaire or at verification, but it was not. Moreover, Borusan asserts that the Department normally considers changes in the delivery date to constitute a "nonessential" change in the terms of sale.

Finally, Borusan claims that while the expected shipment time is stated in the contract, there is no evidence that shipments cannot be delayed to accommodate delays in the arrival of raw material at Borusan before the pipe is produced. Assuming that there were in fact delays in the date of shipment, the course of dealing between Borusan and its customer in the United States shows that the shipment date is considered flexible by both sides, depending on the availability of the raw material, whereas the other material terms of sale (price, quantity, size breakdown, destination, shipment term, payment term) are strictly adhered to.

The Department's Position:

We disagree with U.S. Steel and will continue to use the final sales contract date as the date of sale. The regulation governing date of sale determinations, 19 CFR 351.401(i), states the following:

> In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the

[38] *See* the Sales Verification Report at Exhibit 10a.

> Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

The regulation indicates that while the date of invoice is the preferred date of sale, the Department will consider a different date if it is satisfied that the material terms of sale are established on a date other than the invoice date. Importantly, "unless the party seeking to establish a date of sale other than the invoice date produces sufficient evidence to overcome this presumption, Commerce will use invoice date as the date of sale."[39] In determining the date of sale, the Department considers which date best reflects the date on which the respondent establishes the material terms of sale (*e.g.*, price and quantity).[40]

With respect to the date of sale for Borusan's U.S. sales, the record shows that Borusan reported contract date as the date of sale in its section A questionnaire response because the material terms of price and quantity are not subject to change after that date.[41] In this submission, Borusan submitted sample U.S. sales contracts to corroborate its statement that the material terms of sale are set at that date.[42] During verification, we analyzed specific U.S. sales traces,[43] which supported Borusan's reported contract date as the date of sale for its U.S. sales. In particular, we noted that the difference in quantity between the production order and invoice was within the quantity tolerance.[44] At that time, Borusan again provided sample contracts for U.S. sales covered by this review that,[45] when coupled with the subsequent documents issued and placed on the record for the sales in question,[46] support Borusan's contention that price and quantity are not subject to change after the date of final contract. Thus, Borusan has provided substantial evidence that shows the final contract date, rather than the invoice date, is the date upon which all of the material terms are set for its U.S. sales.

We disagree with U.S. Steel's argument that Borusan reported the invoice date as the appropriate date of sale for its U.S. sales during verification. The Sales Verification Report inadvertently states that Borusan indicated that the invoice date was the appropriate date of sale for its U.S. sales. This is in error. To the contrary, the record, including verification statements and exhibits,[47] shows that Borusan has consistently reported the final contract date as its date of sale for its U.S. sales.

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[39] *See Sahaviriya Steel Industries Public Company Limited v. United States*, 714 F. Supp. 2d 1263, 1279-80 (CIT 2010) (*SSI*); *see also Allied Tube & Conduit Corp. v. United States*, 127 F. Supp. 2d 207, 220 (CIT 2000) ("Plaintiff, therefore, must demonstrate that it presented Commerce with evidence of sufficient weight and authority as to justify its factual conclusions as the only reasonable outcome. If, however, the record indicates that Commerce's decision to use the invoice date as the date of sale was reasonable and was supported by substantial evidence, Plaintiffs arguments must fail."); *accord Yieh Phui Enterprise Co. v. United States*, 791 F. Supp. 2d 1319, 1324 (CIT 2011).
[40] *See SSI*, 714 F. Supp. 2d at 1279-80.
[41] *See* Borusan's Section A Response at 25.
[42] *Id.* at exhibit 7.
[43] *See* Sales Verification Report at 4-5 and exhibits 5 and 10.
[44] *Id.* at 5.
[45] *Id.* at 4-5.
[46] *Id.* at exhibits 10a and 10b.
[47] *Id.* at 4-5 and exhibits 5 and 10.

U.S. Steel similarly is in error when it claims that the material term of quantity changed after the final contract date. The quantity tolerance stated in each contract does not apply to individual line items, as U.S. Steel suggests, but rather pertains to the quantity of the contract as a whole.[48] On the first page of each contract, the contract states: "Quantity Tolerance."[49] We interpret the quantity tolerance to apply to the contract as a whole because the contract contains no indicia that the quantity tolerance applies to individual line items, such as an express statement that the quantity tolerance applies on a line item basis or a separate quantity tolerance accompanying each line item. Thus, the record does not support U.S. Steel's claim that the material term of quantity changed after the final contract date.

Finally, we disagree with U.S. Steel's contention that the delivery terms of Borusan's U.S. sales changed after the final contract date, such that it would render them changes to the material terms of these sales. The shipment time specified in the sample contracts and at verification is a month.[50] The record evidence shows that the aforementioned contracts were actually delivered within the shipment time specified in the final sales contract.[51] Furthermore, while the expected shipment time is stated in the contract, there are no terms in the contracts themselves that indicate that the parties considered the delivery terms material or that shipments could not be delayed to accommodate delays in the arrival of raw material at Borusan before the pipe is produced.

Comment 3: Home Market Direct Selling Expenses and Factoring Costs

Wheatland's Case Brief Comments

Wheatland asserts that the Department should add Borusan's specific amounts of factoring costs to the Department's calculation for home market direct selling expenses as reflected in Borusan's reporting field FACTORH. Wheatland claims that certain home market sales are a result of receiving an advance payment from a factoring institution. Wheatland asserts that, in the prior reviews, the Department appropriately included Borusan's reported home market factoring cost as a price adjustment.

U.S. Steel's Case Brief Comments

During the *Preliminary Results*, U.S. Steel claims that the Department should have used Borusan's corrected home market credit expenses reported in the CREDIT2H field. Instead, Borusan contends that the Department inadvertently relied on the home market credit expenses reported in the CREDITIH field, which is based Borusan's weighted-average short term interest rate that impermissibly incorporates Borusan's factoring expenses. In the final results, U.S. Steel argues that the Department should correct this error by using CREDIT2H for Borusan's home market credit expenses and applying the factoring expenses reported by Borusan in the FACTORH field as direct selling expenses on a transaction-specific basis.

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[48] *See e.g.* Borusan's section A response at exhibit 7; *see also* Sales Verification Report at exhibit 10.
[49] *Id.*
[50] *Id.*
[51] *Id.*

U.S. Steel contends that Borusan errs when it states that the average interest rate embodied in its factoring expenses should be included in the weighted-average short-term interest rate used to calculate home market credit expenses. Indeed, according to U.S. Steel, the case cited by Borusan does not stand for the proposition that an interest rate based on factoring expenses should be incorporated in the weighted-average short term interest rate used to calculate home market credit expenses. In fact, in recent cases, U.S. Steel contends that the Department has excluded interest rates based on factoring when determining the interest rate used to calculate home market credit expenses.

U.S. Steel urges that Department to calculate Borusan's imputed home market credit expenses with CREDIT2H for these final results. U.S. Steel further contends that the Department should adjust Borusan's home market prices for factoring expenses by deducting the amounts reported in the field FACTORH as direct selling expenses on a transaction-specific basis as it did in *Carboxymethylcellulose from the Netherlands*.[52]

Borusan's Rebuttal Brief Comments[53]

Borusan rebuts that it initially calculated the interest rate used to compute its credit cost (CREDITH) based on all sources of short-term funding, including its factoring of accounts receivables. Borusan states that this interest rate was applied to the adjusted gross price for the sale for the period from the date of shipment to the payment date to compute the imputed credit cost. Borusan asserts that for the purpose of the payment, payment date was taken as the date on which the invoice was factored with a factoring institution. Borusan claims that the direct cost associated with the factoring period (*i.e.*, the period from the date the invoice was factored until the payment date on the invoice) was included in a separate field on Borusan's home market sales listing as FACTORH. Thus, Borusan states that it did not include its factoring expenses or the factoring period directly in CREDITH; rather, it included its factored loans only in its calculation of the weighted-average interest rate on short-term loans that was used to compute imputed credit costs.

Finally, Borusan disagrees with U.S. Steel that two cases – *Bottom-Mount Refrigerator Freezers from Mexico*[54] and *Purified Carboxymethylcellulose from the Netherlands* – support the proposition that interest expenses associated with factoring loans as a whole should not be included in the respondent's calculation of its weighted-average interest rate on short-term sources of funding. Instead, Borusan contends these cases stand only for the proposition that the factoring expense for a particular sale should be broken out and reported in a field similar to Borusan's FACTORH.

The Department's Position:

[52] *See Purified Carboxymethylcellulose from the Netherlands: Final Results of Antidumping Duty Administrative Review*, 72 FR 70821 (December 13, 2007) (*Carboxymethylcellulose from the Netherlands*).
[53] On this issue, Borusan does not rebut Wheatland's arguments in its rebuttal brief.
[54] *See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From Mexico*, 77 FR 17422 (March 26, 2012) (*Bottom-Mount Refrigerator Freezers from Mexico*).

We agree in part and disagree in part with U.S. Steel, Wheatland, and Borusan. In the *Preliminary Results*, the Department adjusted Borusan's U.S. price for imputed credit expenses by using its reported CREDIT1H field. The CREDIT1H calculation was based on Borusan's short-term cost of credit in the home market which included short-term loans as well as its reported factoring of accounts receivables. In so doing, the Department inadvertently omitted the factoring expenses reported by Borusan in the FACTORH field as direct selling expenses on a transaction-specific basis. For these final results, we agree with U.S. Steel and Wheatland that Borusan's reported FACTORH field should be included as a direct selling expense adjustment to U.S. price to correctly reflect Borusan's factoring costs. By including these factoring expenses, the Department will follow its practice in, among other cases, the previous administrative review of this proceeding,[55] and in *Purified Carboxymethylcellulose from Finland*.[56]

However, the Department disagrees with U.S. Steel that the Department should use Borusan's CREDIT2H to make an adjustment to U.S. price for Borusan's imputed credit expense. The Department calculates the weighted-average interest rate used to compute credit expenses based on the weighted-average interest rate paid by the company for short-term loans in the currency of the sale. The purpose of this calculation is to calculate the opportunity cost to the company of not having the funds for the period over which the company must finance the receivable. An accurate measure of a company's opportunity cost should include all of its sources of short-term funds, including factoring. "Since factoring is a recognized method of financing receivables, the discount from face value can be used to establish credit expense…."[57] The Department has previously recognized that factoring is a method of financing a receivable.[58] Therefore, the interest rate charged for factoring can be used as reported in Borusan's CREDITH.

For the final results, the Department will continue to use CREDIT1H reported by Borusan as an adjustment to U.S. price, and also include the reported FACTORH field in the calculation of Borusan's direct selling expenses.[59]

Comment 4: Duty Drawback for U.S. Sales

A. The Resource Utilization Support Fund

Borusan's Case Brief Comments

Borusan asserts that in the *Preliminary Results* the Department did not grant Borusan's full duty

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[55] *See Circular Welded Carbon Steel Pipes and Tubes From Turkey; Final Results of Antidumping Duty Administrative Review; 2010 to 2011*, 77 FR 72818 (December 6, 2012).
[56] *See Purified Carboxymethylcellulose from Finland; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 47788, 47790 (August 9, 2010) (*Purified Carboxymethylcellulose from Finland).*
[57] *See Industrial Phosphoric Acid From Belgium; Final Results of Antidumping Duty Administrative Review*, 61 FR 20227 (May 6, 1996), and accompanying Issues and Decision Memorandum at Comment 3.
[58] *See, e.g., Purified Carboxymethylcellulose*, 75 FR at 47790; *see also Stainless Steel Sheet and Strip in Coils From Italy: Final Results of Antidumping Administrative Review*, 68 FR 6719 (February 10, 2003), and accompanying Issues and Decision Memorandum at comment 4.
[59] *See* Borusan's February 22, 2013, sections A-C supplemental questionnaire response at 21 (Feb. 22 Supplemental Response)

drawback adjustments. Borusan contends that it claimed a duty drawback adjustment, which was composed of two parts: (1) a normal customs duties of 9% ad valorem on imported coils that were exempted contingent upon exportation of the finished pipe and tube products to the United States (and other destinations); and (2) other taxes payable upon importation of the same coils that are also exempted by reason of exportation of the finished pipe products.[60] Borusan states that, at the Department's request, it broke out the normal customs duties and the other taxes and reported them as DTYDRW1U and OTHTAX1U. However, in the *Preliminary Results*, the Department granted the adjustment for DTYDRW1U only. According to Borusan, the Department should have granted both adjustments because OTHTAX1U concerned an import duty that was due to enter Turkey, that was paid at the time of entry and that was computed as a percentage of the imported goods customs value. This tax is referred to as "KKDF" or the Resource Utilization Support Fund. Borusan notes that the tax also is exempted when the coils are imported pursuant to Turkey's duty drawback program. Finally, Borusan notes that it does not matter that this tax is not found in Turkey's normal customs tariff schedule; the Department has provided a duty drawback adjustment when, as in this case, the tax is imposed upon importation and rebated upon exportation.

U.S. Steel's Rebuttal Brief Comments

U.S. Steel claims that Borusan concedes that the amounts reported in the field OTHTAX1U – taxes referred to as KKDF – are not import duties.[61] U.S. Steel asserts that in a countervailing duty proceeding, the Department has found that the KKDF is not assessed on imported goods, but rather financial transactions. Moreover, U.S. Steel contends that the KKDR tax is collected from the importer by the servicing financial institution at the time the credit transaction takes place, which may or may not be at the time of import. U.S. Steel alleges further that the tax is not uniformly assessed on all purchases, but only on purchases of imports completed through credit-based transactions. Unlike duties subject to duty drawback, U.S. Steel argues further that the tax under the KKDF is neither assessed in conjunction with other import duties nor administered in the same manner as such duties. Finally, even if the Department characterizes the KKDF tax as an import duty, U.S. Steel alleges that Borusan has not demonstrated that exemptions from the tax were contingent upon the re-export of the subject merchandise, as required by section 772(c)(1)(B) of the Act.

Wheatland's Rebuttal Brief Comments

Wheatland asserts that the Department appropriately excluded the field OTHAX1U reported by Borusan because such an adjustment would be inconsistent with the duty drawback statute and that the amounts reported in the field OTHTAX1U are not import duties, but rather related to a "tax" referred to as that "KKDF" or the "Resource Utilization Support Fund."

Wheatland states that this tax program was established in 1988 "to direct the investments and to lower the costs incurred in special loans in accordance with development plans and yearly

[60] *See* Borusan's Feb. 22 Supplemental Response at 28-30.
[61] *See* Borusan's Case Brief at 6.

programs."[62] Thus, the record demonstrates that Borusan's requested adjustment relates to a tax and not an import duty.

Finally, Wheatland argues that, although the Department may have granted this duty drawback adjustment in past reviews, the Department has not actually considered it as an issue raised in a case brief in those reviews. Moreover, Wheatland contends that the case cited by Borusan is inapposite because the Department properly has since limited its adjustment to the import duties of a customs tariff schedule.

B. Yield Loss Factors Relating To Scrap and Second-Quality Pipe

U.S. Steel's Case Brief Comments

U.S. Steel states that in the *Preliminary Results*, the Department erroneously incorporated yield loss factors relating to scrap and second-quality pipe, for Borusan's duty drawback adjustment. U.S. Steel argues that section 772(c)(l)(B) of the Act directs the Department to increase the export price by the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected. U.S. Steel asserts that the import duty rate applied to Borusan's scrap and secondary pipe are subject to import duties for which Borusan does not receive a rebate or exemption and that the scrap and second-quality pipe are sold in the home market, not re-exported. Thus, U.S. Steel states that Borusan's claimed adjustment for scrap and second-quality pipe does not qualify for duty drawback treatment under the statute.

Borusan's Rebuttal Brief Comments

Borusan objects to U.S. Steel's argument that the Department erred in the *Preliminary Results*. Borusan asserts that the Department instructed Borusan in a supplemental questionnaire to submit a recalculated duty drawback adjustment without a yield loss adjustment. Borusan claims that it was reported in the duty drawback field DTYDRW2U.[63] Nevertheless, Borusan claims that the calculation that it reported and that the Department used in the *Preliminary Results* – DTYDRW1U – contains the appropriate adjustment amounts. This is true, according to Borusan, because it does not pay regular import duty, either on the date of entry or on any other date, on that portion of the coil that represents the yield loss on the finished, prime product, and that the reason why it does not pay this duty is because it exports the finished exported, prime product. Borusan asserts that if it was true that there was any duty imposed on imported scrap and second quality pipe, one might be able argue that the duty drawback adjustment taken by Borusan should be reduced by that amount; however, there is no duty on these products with the result that Borusan has correctly reported the net economic benefit of its drawback adjustment in the DTYDRWIU field.

The Department's Position:

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[62] *See* Wheatland's rebuttal brief at 14.

[63] *See id.*

We find that Borusan has met the requirements of the Department's duty drawback adjustment for the adjustment reported in its "OTHTAXU" field for KKDF taxes. However, the Department agrees with U.S. Steel that the yield loss adjustment for scrap and second quality merchandise should not be included in the duty drawback adjustment granted to Borusan.

In accordance with the statute, the Department increases export price or constructed export price for import duties rebated or not collected by the country of exportation "by reason of the exportation of the subject merchandise to the United States."[64] "In other words, if a foreign country would normally impose an import duty on an input used to manufacture the subject merchandise, but offers a rebate or exemption from the duty if the input is exported to the United States, then {the Department} will increase {export price or constructed export price} to account for the rebated or unpaid import duty (the 'duty drawback')."[65]

In determining whether to grant a duty drawback adjustment, Commerce applies a two-prong test under which the party requesting the adjustment must demonstrate that

> (1) the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, {that} the exemption is linked to the exportation of the subject merchandise; and {that} (2) ... there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise.[66]

The burden to establish entitlement to a duty drawback adjustment lies with the respondent.[67]

We discuss each of the adjustments at issue in turn.

A. The Resource Utilization Support Fund

With respect to the KKDF taxes, we find that Borusan has met the requirements of the Department's duty drawback adjustment. First, Borusan proved that the relevant import duties and rebates were directly linked to, and dependent upon, one another.[68] Second, Borusan demonstrated that there were sufficient imports of raw materials to account for the duty drawback received on the exports of the manufactured product.[69] In particular, during verification, the Department reviewed the Turkish import system, including the Inward Processing Certificates, which showed imports of raw materials and a commitment to export a certain amount of finished goods; duty rates as published by the Turkish government; and the connection between commercial invoices to customs declaration forms which tied Borusan's duty drawback calculations to the values in the U.S. sales database and found no discrepancies.[70] Thus, the Department finds that Borusan has provided sufficient evidence on the record that

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[64] *See* Section 772(c)(1)(B) of the Act

[65] *Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011).

[66] *See id.* at 1340; *accord Allied Tube & Conduit Corp. v. United States*, 374 F. Supp. 2d 1257, 1261 (Ct. Int'l Trade 2005).

[67] *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1040 (Fed. Cir. 1996).

[68] *See* the Sales Verification Report at 11-12.

[69] *Id.*

[70] *Id.*

KKDF taxes were actually refunded for duty drawback purposes such that it warrants a duty drawback adjustment.[71]

We disagree with U.S. Steel and Wheatland that the record does not support a duty drawback adjustment for the KKDF taxes paid by Borusan. The record belies U.S. Steel and Wheatland's claims that (1) the KKDF tax was actually collected from the importer by a servicing financial institution at the time the subject credit transaction takes place, which may or may not be at the time of import; and (2) the KKDF tax was not assessed on imported goods, but rather financial institutions. To the contrary, the record shows that Borusan pays the Turkish government at the time when the raw materials are imported, which we verified, and that Borusan is rebated that amount upon exportation, which we also verified. Therefore, these claims are not supported by the record.[72]

In addition, even if the Department did not characterize the KKDF tax as an import duty,[73] the Department has in a previous review determined that the name of the tax did not matter as long as its function was on import duties paid. Here, Borusan has clearly demonstrated that exemptions from the KKDF tax were contingent upon the re-export of the subject merchandise.[74]

We further reject U.S. Steel's argument that the KKDF tax is not uniformly assessed on all purchases, but only on purchases of imported merchandise completed through credit-based transactions, and that unlike duties subject to duty drawback, the KKDF is neither assessed in conjunction with other import duties nor administered in the same manner as such duties. In Turkey, all hot-rolled coils imported under an Inward Processing Certificate pursuant to Turkey's duty drawback program are exempt from this tax and there is a tax on imports purchased with deferred payments. During verification, we confirmed the tax rate paid by Borusan was 3% of the customs import value until October 13, 2011, and then it was adjusted to 6%. If Borusan did not participate in the Duty Drawback Program, it must pay these taxes at the time of entry. The import duty is usually computed as a percentage of the customs import value, or on some other basis (such as a per ton basis). In this case, the KKDF tax functions as an import duty in the sense that it must be paid to enter goods into Turkey, it is paid at the time of entry of the goods, and it is computed as a percentage of the imported goods customs value.[75]

B. Yield Loss Factors Relating To Scrap and Second-Quality Pipe

We agree with U.S. Steel that the Department erroneously incorporated yield loss factors relating to scrap and second-quality pipe in making Borusan's duty drawback adjustment. In the *Preliminary Results*, the Department used Borusan's reported DTYDRW1U field that accounted

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[71] *Id.* at 11 & Ex. 15; *see also* Borusan's October 9, 2012, section C response at C-35-39 and exhibits C-7-8; Borusan's March 11, 2013, supplemental response at 1-2 and exhibit S2-2.

[72] *See* Sales Verification Report at 11 and exhibit 15 at pages 143-144; *see also Color Picture Tubes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 56 FR 19084 (April 25, 1991), and accompanying Issues and Decision Memorandum at comment 6.

[73] *See Color Picture Tubes From the Republic of Korea*, 56 FR 19084 and accompanying Issues and Decision Memorandum at comment 6.

[74] *See* Sales Verification Report at 11 and exhibit 15 at pages 143-144.

[75] *Id.*

for the yield loss factors for scrap and second-quality pipes.[76] Although it did not export the scrap and second-quality pipe, Borusan claimed that it did not pay regular import duties on that portion of the coil that represents the yield loss on the finished, prime product because it exports the finished, prime product. This was in error because, under Turkish law, the scrap and second-quality pipe that are not re-exported are, in fact, "subject to import duty ... at the rate in effect for imports of the specific by-products ... as if the by-products or scrap had been imported into Turkey."[77] Therefore, the Department will not incorporate yield loss factors related to scrap and second-quality pipe in making Borusan's duty drawback adjustment in these final results. Consequently, the Department will make an adjustment for duty drawback for Borusan by using the values reported for the DTYDRW2U and corresponding OTHTAX2U fields.

Comment 5: Whether to Remove the Non-VAT Sales from the Home Market Sales Data Prior to Making Sales Comparisons

Borusan's Case Brief Comments

Borusan claims that the Department should have removed non-VAT home market sales from its home market sales data prior to making price-to-price comparisons with sales to the United States. Borusan states that (1) the Department's practice is to classify such sales (home market sales which the producer knew at the time of sale were intended for export) as export sales and exclude them from the home market sales data and (2) the Department has removed non-VAT sales from its home market sales data in the last three administrative reviews in this proceeding.

U.S. Steel Rebuttal Brief Comments

U.S. Steel states that in the last administrative review the Department did not exclude these sales from the home market sales data prior to conducting the dumping margin analysis. To the contrary, in recent practice, U.S. Steel contends that the Department has included sales in the home market sales data for comparison to U.S. sales where such sales are destined for export but undergo further manufacturing before export.[78] Consistent with its recent practice, U.S. Steel claims that the Department should continue to conduct its dumping margin analysis on all home market sales reported by Borusan, given that Borusan has conceded that non-VAT sales include sales to home market customers who further process the product and export the final product.

The Department's Position:

We agree with Borusan. In the *Preliminary Results*, the Department inadvertently included Borusan's non-VAT home market sales in the comparison market program. We disagree with U.S. Steel because the record for this administrative review does not show that further manufacturing took place for the merchandise in question. When a shipment is intended for

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[76] *See* Borusan's October 9, 2012, section C response at C-35-39 and exhibits C-7-8; Borusan's March 11, 2013, supplemental response at 1-2 and exhibit S2-2; *see also* Sales Verification Report at 11 and exhibit 15.

[77] *See* Borusan's October 9, 2012, section C response at C-37 at exhibit C-10.; *see also* Borusan's February 22, 2013, Supplemental Response for Sections A-C at 29.

[78] *See Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea; Final Results of Antidumping Duty Administrative Review; 2010 to 2011*, 78 FR 16247 (March 14, 2013), and accompanying Issues and Decision Memorandum at 39-40.

export from the comparison market, we exclude it from the Department's comparison market calculations if that shipment does not undergo further manufacturing in the comparison market.[79] U.S. Steel argues that the Department did not exclude these sales in the previous administrative review; however, the Department excluded these sales in the 2007-2008, 2008-2009, and 2009-2010 administrative reviews of this Order.[80] In the 2010-2011 administrative review no parties commented on this question. For the final results, the Department will remove Borusan's non-VAT home market sales in the comparison market program.

Comment 6: Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Less-Than-Fair-Value Investigations

Borusan's Case Brief Comments

Borusan states that the Department's development of the new differential pricing policy and its application in this review is contrary to law because the Department's rescission of the prior targeted dumping regulation did not comply with the Notice and Comment Requirements of the Administrative Procedures Act (APA). Moreover, Borusan argues that the Department's statement that the withdrawal of the regulation was proper because it established an "impractical deadline" did not qualify as "good cause" exception to the notice and comment requirements of the APA. Given that the Department had no authority to rescind the targeted dumping regulation, Borusan contends that the Department must follow the regulation when analyzing whether Borusan has engaged in targeted dumping or differential pricing. Moreover, Borusan argues that the Department must limit any resultant average-to-transaction price comparisons and zeroing of negative margins to the sales that are found to have been targeted.

U.S. Steel's Rebuttal Brief Comments

U.S. Steel contends that the Department did not violate the APA when it withdrew its previous regulation. When the Department initially withdrew its targeted dumping regulation, U.S. Steel asserts that the Department addressed its compliance with the APA in the withdrawal notice. U.S. Steel states that the Department explained that because the regulation had been "promulgated without the benefit of any departmental experience on the issue of targeted dumping, the Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."[81] Therefore, the Department concluded that the targeted dumping regulation "would act to deny relief to domestic industries suffering material injury from unfairly traded imports" and that this would be "contrary to the

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[79] *See Stainless Steel Sheet and Strip in Coils From Taiwan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review*, 75 FR 49467, 49470 (August 13, 2010), unchanged in *Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results of Antidumping Duty Administrative Review*, 75 FR 76700 (December 9, 2010).

[80] *See Certain Welded Carbon Steel Pipe and Tube from Turkey: Notice of Final Results of Antidumping Duty Administrative Review*, 74 FR 22883 (May 15, 2009); *Certain Welded Carbon Steel Pipe and Tube From Turkey: Notice of Final Antidumping Duty Administrative Review*, 75 FR 64250 (October 19, 2010); *see also Certain Welded Carbon Steel Pipe and Tube From Turkey: Notice of Final Results of Antidumping Duty Administrative Review*, 76 FR 76939 (December 9, 2011).

[81] *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930, 74931 (December 10, 2008) (*2008 Withdrawal*).

Department's intention in promulgating the provisions, and inconsistent with the Department's statutory mandate to provide relief to domestic industries materially injured by unfairly traded imports."[82]

Wheatland's Rebuttal Brief Comments

Wheatland further asserts that the Department correctly complied with the APA. Wheatland contends that the withdrawal of the targeted dumping regulation fully complied with the APA. Although the Court of International Trade ruled to the contrary in *Gold East Paper (Jiangsu) Co. v. United States*,[83] Wheatland argues that the case remains ongoing and may be appealed. Wheatland further asserts that it does not constitute binding precedent for this proceeding or other agency cases. Even assuming *arguendo* that the withdrawal had been ineffective and the old targeted dumping regulations remained in place, Wheatland claims that it would make no difference here. The former regulation at 19 C.F.R. 351.414(f) applied, by its plain language, only to targeted dumping in an antidumping investigation. Wheatland states that the former regulation placed no restrictions on Department's discretion to identify patterns of significant price difference and apply alternative margin calculation methodologies in administrative reviews. Wheatland contends that even if the "limiting rule" set forth at the former 19 C.F.R. § 351.414(f)(2) remained in force for current investigations, therefore, it would not be binding in this review.

The Department's Position:

The Department disagrees with Borusan's claim that 19 CFR 351.414 (1999)[84] remains in effect, thereby limiting the application of the A-to-T comparison method in this administrative review. The *2008 Withdrawal* involved a regulation which only applied in less-than-fair-value investigations and not in administrative reviews. Likewise, the *Gold East Paper* judicial proceeding involves a less-than-fair-value investigation and not a review. Furthermore, the Department's promulgation of a revised regulation, 19 CFR 351.414, specifically dealt with filling the gap in the statutory language regarding the selection of an appropriate comparison method in the context of administrative reviews. It is undisputed that this process was done with proper notice and opportunity to comment, and no party could reasonably have been left with the impression that the Department would be bound by the withdrawn targeted dumping regulations in administrative reviews.

Even if the *2008 Withdrawal* were relevant to administrative reviews, the Department would still disagree with Borusan that the *2008 Withdrawal* was improper. While the CIT held that the issuance of the Department's interim final rule withdrawing the targeted dumping regulation was defective,[85] the Court's ruling is not final and conclusive as that matter is still in litigation. Moreover, the targeted dumping regulation was properly withdrawn pursuant to the APA.

[82] *See* the U.S. Steel's rebuttal brief at 28, citing to *Xanthan Gum from the PRC* at 23 "{t}he regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy to unmask dumping.... contrary to congressional intent)."

[83] *See Gold East Paper (Jiangsu) Co. v. United States*, 918 F.Supp.2d 1317 (CIT 2013) (*Gold East Paper*).

[84] The Department notes that the *2008 Withdrawal* only applied to 19 CFR 351.301(d)(5), 351.414(f), 351.414(g).

[85] *See Gold East Paper*, 918 F. Supp. 2d at 1327-28.

During the withdrawal process, the Department engaged the public to participate in its rulemaking process. In fact, the Department's withdrawal of its regulations in December 2008 came after two rounds of soliciting public comments on the appropriate targeted dumping analysis. The Department solicited the first round of comments in October 2007, more than one year before it withdrew the regulation by posting a notice in the *Federal Register* seeking public comments on what guidelines, thresholds, and tests it should use in conducting an analysis under section 777A(d)(1)(B) of the Act.[86] As the notice explained, because the Department had received very few targeted dumping allegations under the regulations then in effect, it solicited comments from the public to determine how best to implement the remedy provided under the statute to address masked dumping. The notice posed specific questions, and allowed the public 30 days to submit comments.[87] Various parties submitted comments in response to the Department's request.[88] Borusan provide no comments in response to the Department's request.[89]

After considering those comments, the Department published a proposed new methodology in May 2008 and again requested public comment.[90] Among other things, the Department specifically sought comments "on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping."[91] Several of the submissions[92] received from parties explained that the Department's proposed methodology was inconsistent with the statute and should not be adopted.[93] Moreover, several entities explicitly stated that the Department should not establish minimum thresholds for accepting allegations of targeted dumping because the statute contains no such requirements.[94] Once again, Borusan did not comment on the Department's proposed methodology.[95]

These comments suggested that the regulation was impeding the development of an effective remedy for masked dumping. Indeed, after considering the parties' comments the Department explained that because "the provisions were promulgated without the benefit of any experience on the issue of targeted dumping, the Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."[96]

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[86] *See Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 FR 60651 (October 25, 2007).
[87] *Id.*
[88] *See* Public Comments Received December 10, 2007, Department of Commerce, http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html (Dec. 10, 2007) (listing the entities that commented).
[89] *Id.*
[90] *See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 FR 26371, 26372 (May 9, 2008).
[91] *Id.*
[92] The public comments received June 23, 2008 and submitted on behalf of several domestic parties can be accessed at: http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html.
[93] *See, e.g.,* Letter from Kelley, Drye and Warren to the Department: "Comments on Targeted Dumping Methodology, Comments," ("Letter from Kelley Drye") dated June 23, 2008, at 2.
[94] *See, e.g.*, letter from Committee to Support U.S. Trade Laws, to the Department: "Comments on Targeted Dumping Methodology" at 25; see also, Letter from Kelley Drye at 29.
[95] *See* Public Comments received June 23, 2008, *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html (June 23, 2008) (listing the entities that commented).
[96] *See 2008 Withdrawal.*

For this reason, the Department determined that the regulation had to be withdrawn.[97] Although this withdrawal was effective immediately, the Department again invited parties to submit comments, and gave them a full 30 days to do so.[98] The comment period ended on January 9, 2009, with several parties submitting comments.[99] As before, Borsuan failed to participate and did not submit comments in response to the Department's request.[100]

The course of the Department's decision-making demonstrates that it actively sought to engage the public. This type of public participation is fully consistent with the APA's notice-and-comment requirement.[101] Moreover, various courts have rejected the idea that an agency must give the parties an opportunity to comment before every step of regulatory development.[102] Rather, where the public is given the opportunity to comment meaningfully consistent with the statute, the APA's requirements are satisfied. The touchstone of any APA analysis is whether the agency has, as a whole, acted in a way that is consistent with the statute's purpose.[103] Here, similar to the agency in *Mineta*, the Department provided the parties more than one opportunity to submit comments before issuing the final rule. As in *Mineta*, the Department also considered the comments submitted and based its final decision, at least in part, upon those comments. Just as the court in *Mineta* found all of those facts to indicate that the agency's actions were consistent with the APA, so too the Department's actions here demonstrate that it fulfilled the notice and comment requirements of the APA.

The APA does not require that a final rule that the agency promulgates must be identical to the rule that it proposed and upon which it solicited comments.[104] Here, the Department actively engaged the public in its rulemaking process; it solicited comments and considered the submissions it received. In fact, that the numerous comments prompted the Department to withdraw the regulation demonstrates that the Department provided the public with an adequate opportunity to participate. In doing so, the Department fully complied with the APA.

Further, even if the two rounds of comments that the Department solicited before the withdrawal of the regulation were insufficient to satisfy the APA's requirements, the Department properly declined to solicit further comments pursuant to the APA's "good cause" exception. This exception provides that an agency is not required to engage in notice and comment if it determines that doing so would be "impracticable, unnecessary, or contrary to the public

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[97] *Id.*
[98] *Id.*
[99] *See* Public Comments received January 23, 2009, *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html (Jan. 23, 2009) (listing the entities that commented).
[100] *Id.*
[101] *See, e.g.*, *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000) (holding that the EPA's decision to not implement a rule upon which it had sought comments did not violate the APA's notice and comment requirements because the parties should have understood that the agency was in the process of deciding what rule would be proper).
[102] *See Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (*Mineta*) (holding that the Department of Transportation's promulgation of four rules, each with immediate effect, only after the issuance of which the public was given the opportunity to comment, afforded proper notice and comment).
[103] *Id.*
[104] *See, e.g.*, *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

interest."[105] The Federal Circuit has recognized that this exception can relieve an agency from issuing notice and soliciting comment where doing so would delay the relief that Congress intended to provide.[106] In *National Customs Brokers*, the Federal Circuit rejected a plaintiff's argument that the U.S. Customs Service failed to follow properly the APA in promulgating certain interim regulations when it had published these regulations without giving the parties a prior opportunity to comment. Moreover, although the U.S. Customs Service solicited comments on the published regulations, it stated that it "would not consider substantive comments until after it implemented the regulations and reviewed the comments in light of experience" administering those regulations.[107] The U.S. Customs Service explained that "good cause" existed to comply with the APA's usual notice and comment requirements because the new requirements did not impose new obligations on parties, and emphasized its belief that the regulations should "become effective as soon as possible" so that the public could benefit from "the relief that Congress intended."[108] The Court recognized that this explanation was a proper invocation of the "good cause" exception and explained that soliciting and considering comments was *both* unnecessary (because Congress had passed a statute that superseded the regulation) "*and* contrary to the public interest because the public would benefit from the amended regulations."[109] For this reason, the Court affirmed the regulation against the plaintiff's challenge.[110]

The regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy to unmask dumping. Such effect would have been contrary to congressional intent. The Department's revocation of such a regulation without additional notice and comment was based upon a recognized invocation of the "public interest" exception. Accordingly, the Department has determined not to base its analysis in the instant proceeding upon the withdrawn regulation.

Comment 7: Consideration of an Alternative Comparison Method in Administrative Reviews

Borusan's Case Brief Comments

Borusan claims that according to section 777A of the Act, the statutory provision regarding an alternative comparison method (*i.e.*, the "exception" of section 777A(d)(1)(B) of the Act), is specific to antidumping investigations, and not to administrative reviews. Borusan states that sections 777A(a) and 777A(c) of this statutory provision clearly apply both to investigations and administrative reviews. While section 777A(b) is not as explicit, it also applies in both types of proceedings because it is an explanation of the authority to select averages and statistically valid samples provided in section 777A(a).

Borusan asserts that subsection (d) contains separate paragraphs for the procedures applicable

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[105] *See* 5 USC 553(b)(B).
[106] *See, e.g.*, *National Customs Brokers and Forwarders Ass'n of Am., Inc. v. United States*, 59 F.3d 1219, 1223 (Fed. Cir. 1995).
[107] *Id.*, at 1220–21.
[108] *Id.*, at 1223.
[109] *Id.*, at 1224 (emphasis).
[110] *Id.*

separately to investigations and administrative reviews. Borusan contends that section 777A(d)(1) explicitly relate only to investigations and the express authority allowing the consideration of an alternative comparison method in specific circumstances is included in section 777A(d)(l)(B). Borusan claims that there is no language in section 777A(d)(l)(B) permitting the Department the discretion to apply this exception in administrative reviews and that section 777A(d)(2), which does specifically relate to administrative reviews, includes no reference to an alternative comparison method.

According to Borusan, these different references to investigations and reviews in various portions of section 777A of the Act are important because "where Congress includes particular language in one section of a statute, but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Moreover, Borusan avers that any such omission allows for "a negative inference" to be "drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." Thus, Borusan argues that Congress did not intend for the Department to consider an alternative comparison method in administrative reviews, otherwise it would have created this provision in the parts of the statute that relate to administrative reviews. Instead, in the antidumping statute, Congress specifically included consideration of an alternative comparison method as an exception to the normal procedure for determining less than fair value in investigations, and omitted this exception in the section of the statute relating to administrative reviews. Borusan also observes that the heading of subparagraph (d)(l)(B) is "Exception."

Moreover, Borusan alleges that "absence of a statutory prohibition cannot be the source of agency authority" and the "fact that Commerce is empowered to take action in certain limited situations does not mean that Commerce enjoys such power in other instances." Therefore, Borusan argues that the fact that the statute explicitly provides an exception allowing the consideration of an alternative comparison method in investigations, but is silent on this matter with regard to administrative reviews, is not an adequate source of authority for the Department to consider an alternative comparison method in administrative reviews.

Finally, should the Department wish to consider an alternative comparison method in this review, Borusan contends that the Department must seek an amendment to the statute by Congress.

U.S. Steel's Rebuttal Brief Comments

U.S. Steel asserts that the Department may properly consider an alternative comparison method in administrative reviews. U.S. Steel contends that the SAA states that the use of the average-to-transaction method is the "preferred methodology" in administrative reviews precisely because it combats the problem of masked dumping. As a result, U.S. Steel states that there is no provision in the statute relating to consideration of an alternative comparison method in administrative reviews because, unlike the provisions pertaining to investigations, the use of the average-to-transaction method in administrative reviews is already expressly authorized in the statute. In addition, U.S. Steel contends that sections of the average-to-transaction method is plainly proper to determine whether the average-to-average method can account for price differences because, as both the statute and the SAA recognize, the average-to-average method

can mask dumping, and the use of the average-to-transaction method is essential to combat that problem.[111]

U.S. Steel further asserts that although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1)[112] in an administrative review is, in fact, analogous to the issue in antidumping investigations. U.S. Steel claims that the Department made the same finding in the *Preliminary Results* of this case, and it should adhere to this finding for the final results.

Wheatland's Rebuttal Brief Comments

Wheatland also contends that Borusan's argument on the provision of the statute providing for use of the exceptional average-to-transaction methodology (where there exist patterns of price differences) appears only in the section applicable for investigations are incorrect. Wheatland states that the statute is silent with respect to the use of the alternative average-to-transaction methodology in reviews. Furthermore, Wheatland asserts that the Department has repeatedly held that it does, in fact, have the statutory authority to apply the alternative average-to-transaction methodology in reviews as well as investigations.

The Department's Position:

The Department disagrees with Borusan's claim that it does not have the statutory authority to employ an alternative comparison method in administrative reviews. Section 771(35)(A) of Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The definition of "dumping margin" calls for a comparison of normal value and export price or constructed export price. Before making the comparison called for, it is necessary to determine how to make the comparison.

Borusan posits that the Department has no statutory authority to consider the application of an alternative comparison method in administrative reviews. Borusan states that Congress made no provision for the Department to apply an alternative comparison method in an administrative review under section 777A(d) of the Act. Indeed, section 777A(d)(1) of the Act applies to "Investigations" and section 777A(d)(2) of the Act applies to "Reviews". Section 777A(d)(1) discusses, for investigations, the standard comparison methods (*i.e.*, the average-to-average or A-to-A method and the transaction-to-transaction or T-to-T method), and then provides for an alternative comparison method (*i.e.*, the average-to-transaction or A-to-T method) that may be applied as an exception to the standard methods when certain criteria have been meet. Section 777A(d)(2) discusses, for administrative reviews, the maximum length of time over which the

[111] *See* U.S. Steel's rebuttal brief at 26, citing to "19 U.S.C. 1677f-1(d)(1) (authorizing the Department to use the average-to-transaction method where there is evidence of targeted dumping); SAA at 842, U.S.C.C.A.N. 4177 ('the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal targeted dumping')."
[112] *See* U.S. Steel's rebuttal brief at 31 citing to *Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011*, 77 FR 73415 (December 10, 2012) and accompanying Issues and Decision Memorandum at 10-12.

Department may calculate weighted-average normal values when using the average-to-transaction method. Section 777A(d)(2) has no provision specifying the comparison method to be employed in administrative reviews. Borusan's asserts that in order to consider an alternative comparison method, that "it must seek amendment to the statute in order to do so."[113] To follow Borsuan's logic would yield an absurd result that we do not believe Congress could have intended, namely that because the statute makes no provision specifying any comparison method(s) which may be used in administrative reviews, the Department has no means to consider any comparison method under the existing statute.

To fill the gap in the statute (the absence of a specified comparison method for administrative reviews), the Department has promulgated regulations to specify how comparisons between normal value and export price or constructed export price would be made in administrative reviews.[114] The Department followed proper rule making procedures, including consultations with the appropriate congressional personnel. The Department's regulations at 19 CFR 351.414(b) describe the methods by which normal value may be compared to export price or constructed export price in antidumping investigations and administrative reviews (*i.e.*, A-to-A, T-to-T, and A-to-T). These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons a comparison is made for each group of comparable export transactions for which the export prices, or constructed export prices, have been averaged together (i.e., for an averaging group[115]). The Department's regulation at 19 CFR 351.414(c)(1) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping investigations and administrative reviews, the A-to-A method will be used "unless the Secretary determines another method is appropriate in a particular case."[116]

The Act, the SAA, and the Department's regulations do not address the circumstances that could lead the Department to select a particular comparison method in an administrative review. Indeed, whereas the statute addresses this issue specifically in regards to investigations, the statute conspicuously leaves a gap to fill on this same question in regards to administrative reviews.[117] In light of the statute's silence on this issue, the Department indicated that it would use the A-to-A method as the default method in administrative reviews, but would consider whether to use an alternative comparison method on a case-by-case basis.[118] At that time, the Department also indicated that it would look to practices employed by the Department in antidumping investigations for guidance on this issue.[119]

In antidumping investigations, the Department examines whether to use the A-to-T method consistent with section 777A(d)(1)(B) of the Act:

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[113] *See* Borusan Case Brief at 43.
[114] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) ("*Final Modification for Reviews*").
[115] *See* 19 CFR 351.414(d)(2).
[116] *See* 19 CFR 351.414(c)(1).
[117] *See* section 777A(d)(1)(B) of the Act; SAA, at 842-43; 19 CFR 351.414.
[118] *See Final Modification for Reviews*, 77 FR at 8107.
[119] *Id.* at 77 FR at 8102.

> 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).[120]

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review to analogous to the issue in antidumping investigations. Accordingly, the Department finds the analysis that has been used in antidumping investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

The SAA does not demonstrate that the Department may consider the application of an alternative comparison method in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) does not require or prohibit the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that "section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction comparison methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods."[121] Like the statute, the SAA does not limit the Department to undertake such an examination in investigations only.[122]

The silence of the statute with regard to application of an alternative comparison method in administrative reviews does not preclude the Department from applying such a practice in this situation. Indeed, the Federal Circuit has stated that the "court must, as we do, defer to Commerce's reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency's generally conferred authority and other statutory circumstances."[123] Further, the court has stated that this "silence

[120] *See* section 777A(d)(1)(B) of the Act.
[121] *See* SAA at 843.
[122] *Id.*
[123] *See United States Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010).

has been interpreted as 'an invitation' for an agency administering unfair trade law to 'perform its duties in the way it believes most suitable' and courts will uphold these decisions '{s}o long as the {agency}'s analysis does not violate any statute and is not otherwise arbitrary and capricious."[124] Commerce has filled a gap in the statute with a logical, reasonable and deliberative comparison method for administrative reviews.

Comment 8: The Average-to-Transaction Method and the Denial of Offsets for Non-Dumped Comparisons

Borusan's Case Brief Comments

Borusan states that the Department should zero only the sales with prices that are below the standard deviation (those that create only positive Cohen's *d* values in the Department's program). The reason for zeroing only the positively targeted sales is simple: such sales are the only ones that are priced below the control group, and therefore are targeted. As set forth above, the legal concept of targeting in dumping presupposes sales with prices that are lower than some benchmark.

U.S. Steel's Rebuttal Brief Comments

U.S. Steel refutes Borusan's argument to zero only low-priced differential sales. U.S. Steel states "as the Department has previously explained, it may apply the zeroing methodology to all sales when employing an alternative comparison methodology (*i.e.*, the average-to-transaction methodology) to address masked dumping concerns."[125]

Wheatland's Rebuttal Brief Comments

Wheatland argues that Borusan's suggestion of using the Cohen's *d* test which employs zeroing and the suggestion that the Department should only zero the low-priced differential sales should be rejected. Wheatland reiterates that the goal of using the alternative average-to-transaction method is to unmask dumping. Wheatland argues if zeroing is not applied to the complete set of both low and high priced sales, dumping margins will be masked. Wheatland contends in order to further the statutory purpose to unmask dumping; the Department must employ zeroing for sales on both ends of the pricing spectrum.

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[124] *See Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1376-77 (CIT 2010), *citing U.S. Steel Group v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996).
[125] *See* U.S. Steel's Rebuttal Brief at 18 citing to *Xanthan Gum from the PRC*.

The Department's Position:

The Department disagrees with Borusan. The purpose of considering an alternative comparison method is to unmask dumping. Masked dumping is the result of two concurrent situations: dumped sales and non-dumped sales. One, without the other, does not result in masked dumping. The existence of both dumped and non-dumped sales to have the potential for masked dumping, and one must consider both low-priced and high-priced sales with determining whether a pattern of prices that differ significantly exists and whether masking is occurring.

When the Department looks for a pattern of prices that differ significantly, a pattern can involve prices that are lower than the comparison price or higher than a comparison price. Lower, higher, or both are each possibilities for establishing a pattern consistent with section 777A(d)(1)(B) of the Act. Further, when considering a pattern, this is a pattern of export prices (or constructed export prices) and is limited to an analysis of prices in the U.S. market. There is no reference to the normal values for these U.S. sales or a comparison between the prices of the U.S. sales and their normal values. Accordingly, "dumping" is not part of the analysis in establishing whether a pattern of prices that differ significantly exists.

Moreover, the recent decision by the Court of Appeals for the Federal Circuit (CAFC) in *Union Steel*[126] resolved the outstanding question of whether the Department's statutory interpretation is reasonable. The CAFC affirmed the Department's explanation that it may interpret the statute to permit the denial of offsets for non-dumped sales with respect to the A-to-T comparison method in administrative reviews, while permitting the Department to grant offsets for non-dumped transactions when applying the A-to-A comparison method in investigations. The CAFC also affirmed the Department's explanation that it may interpret the same statutory provision differently because there are inherent differences between the comparison methods used in investigations and reviews.[127] Indeed, the Court noted that although the Department recently modified its practice "to allow for offsets when making average-to-average comparisons in administrative reviews . . . {t}his modification does not foreclose the possibility of using zeroing methodology when {the Department} employs a different comparison method to address masked dumping concerns."[128]

Likewise, in *United States Steel Corp.*,[129] the CAFC sustained the Department's decision to no longer apply zeroing when employing the A-to-A comparison method in investigations while recognizing the Department's intent to continue to apply zeroing in other circumstances. Specifically, the Court recognized that the Department may use zeroing when applying the A-to-T comparison method where patterns of significant price differences are found.[130]

As the CAFC affirmed, the Department may reasonably interpret section 771(35) of the Act in

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[126] *Union Steel v. United States*, 713 F.3d 1101 (CAFC 2013) (*Union Steel*).
[127] *Id.*, at 1109.
[128] *Id.* at 1106 (internal citations omitted).
[129] *See United States Steel Corp. v. United States*, 621 F.3d at 1355 n.2, 1362-63 (Fed. Cir. 2010).
[130] *Id.* at 1363 ("{T}he exception contained in 1677f-1(d)(1)(B) indicates that Congress gave {the Department} a tool for combating targeted or masked dumping by allowing {the Department} to compare weighted average normal value to individual transaction values when there is a pattern of prices that differs significantly among purchasers, regions, or periods of time.")

the context of the A-to-A comparison method to permit negative comparison results to offset or reduce the sum of the positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. In contrast, when applying the A-to-T comparison method under 777A(d)(1)(B) of the Act, the Department determines dumping on the basis of individual U.S. sales prices. Under the A-to-T comparison method, the Department compares the export price (EP) or constructed export price (CEP) for a particular U.S. transaction with the weighted-average normal value (NV) for the comparable merchandise of the foreign like product. This comparison method yields results specific to each individual export transaction. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its weighted-average NV. The Department then aggregates the results of these comparisons (*i.e.*, the amount of dumping found for each individual U.S. sale) to calculate the numerator of the weighted-average dumping margin (*i.e.*, the total amount of dumping for the respondent). To the extent the weighted-average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific comparison results.[131] Thus, when the Department focuses on transaction-specific comparison results, the Department reasonably interprets the word "exceeds" in section 771(35)(A) of the Act as including only positive comparison results in the aggregate dumping margin. Consequently, when using the A-to-T comparison method, the Department reasonably does not permit negative comparison results to offset or reduce the sum of the positive comparison results when determining the aggregate dumping margin within the meaning of section 771(35)(B) of the Act.

Comment 9: Differential Pricing Issues

Borusan has raised several claims that contest whether the Department's differential pricing is in accordance with law. Borusan claims that "differential pricing" is simply a new way of determining whether U.S. sales of comparable merchandise were "targeted" to particular purchasers, regions, or time periods. Under either phrasing, Borusan asserts that the Department should find neither targeting dumping nor differential pricing for Borusan for these final results. Borusan contends that both tests are derived from section 777A(d)(1)(B) of the Act and text in the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA). Under either phrasing, Borusan claims that the statue requires more than a simple finding of lower prices; rather there must be a pattern. According to Borusan, the Department's differential pricing analysis (and use of the Cohen's *d* test) fails to establish the requisite pattern. Wheatland and U.S. Steel contest these arguments, stating that the Department's differential pricing analysis and use of the Cohen's *d* test is consistent with law.

For the reasons set forth below, the Department has not changed its application of the differential pricing analysis and selection of the appropriate comparison methodology from the *Preliminary Results*. We address each of Borusan's arguments in turn.

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[131] As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of all non-dumped sales is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, all non-dumped transactions result in a lower weighted-average dumping margin.

Borusan's Case Brief Comments

A. The Department's Differential Pricing Analysis Does Not Identify Targeted Dumping

Borusan claims that the Department's new term "differential pricing" is simply a new name for "targeting" and "targeted dumping." The SAA specifically linked the pattern of significant price differences described in section 777A(d)(1)(B)(i) of the Act with targeted dumping where "an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."[132] Therefore, Borusan asserts, if test prices are lower than the base prices, then targeting may be occurring, and prices that are at or above the base prices are not targeted. Further, the Department must show that these lower priced sales constitute a "pattern."

B. Whether the Department's Differential Pricing Analysis Fails to Account for Specific Market Conditions

According to Borusan, to date, the Department has used the same basic test with no adjustments made for the specific application at hand, such as for whether it is an investigation or review, the type of product, types of customers, or specific market conditions. Specifically in this review, the Department has failed to account for cost changes over the POR for hot-rolled coil, the principal input for the production of subject merchandise. Borusan states that in past administrative reviews, the Department has recognized the correlation between hot-rolled coil costs and pipe prices. Accordingly, the Department cannot simply look at pipe prices and find targeting when such an explanation exists unless the Department adjusts the pipe prices to take into account the changing costs of the hot-rolled coil input.

C. The Cohen's *d* Test Is Inappropriate Because It Does Not Measure Statistical Significance or Establish the Confidence Level of the Result

Borusan states that the Department has not invited general public comment on its new "differential pricing" policy but, rather, has been implementing it on a case-by-case basis to new preliminary determinations since March 2013. Borusan avers that Cohen's *d* is not normally used in economics, finance, or business analyses; rather, it is found in medical or social science contexts. Borusan contends that certain first-order tests establish statistical significance, whereas secondary tests like the Cohen's *d* test provide insight into the meaning of those first-order results. According to Borusan, using Cohen's *d* in this manner results in applying the test in a different manner from which it was designed. Consequently, as set forth below, Borusan contends that the Department's use of Cohen's *d* suffers from the following fatal flaws: (1) ascertaining whether the magnitude of the observed differences is meaningful in the market under investigation; (2) establishing the confidence level of the results of the test; or (3) recognizing the direction of the results. Because of these problems, Borusan contends that Cohen's *d*, as the early record of its application demonstrates, regularly finds "targeting" when none in fact exists. Furthermore, Borusan argues that Cohen's *d* in and of itself is incapable of

[132] *See* Borusan Case Brief at 16, citing to the SAA at 842.

discerning "patterns" that are required by statute.

Borusan states that there are relatively few observations of each unique product, and thus very few comparable data point combinations needed for measuring differential pricing using Cohen's *d*. Moreover, Borusan contends that the Department's use of Cohen's *d* in such circumstances contravenes the requirements laid out by Cohen himself, who stated that a certain sample size was needed for the results to be regarded as reliable.

D. The Cohen's *d* Test Is Inappropriate Because It Systematically Results in Affirmative Findings

According to Borusan, the Department's application of the Cohen's *d* test has systematically resulted in affirmative findings which in no way establishes the Department's practice as an "exception" as provided for under section 777A(1)(d)(B) of the Act. Further, in more than one third of the cases where the Department has applied its new differential pricing analysis, the pattern has been found to be pervasive (i.e., 66% or more of the value of the U.S. sales pass the Cohen's d test). Therefore, the differential pricing analysis is inconsistent with the statute.

E. The Cohen's *d* Test Is Not An Appropriate Tool to Identify Targeting

According to Borusan, the Cohen's *d* test does not identify causal links or statistical significance; instead, it values the magnitude of an effect, but only in relation to standard of measure of the level of variability within data. In particular, Borusan contends that the Cohen's *d* test measures the "effect size" of a difference between the means of two groups relative to the population's standard deviation. Because the Cohen's *d* test is limited to determining effect size within the context of the standard deviation of a data set, Borusan contends that it cannot differentiate between targeting and the myriad of other potential causes of such variations. Specifically, Borusan alleges that the test produces a strong positive result under circumstances where the variations in price are insignificant to the market, but happen to exceed the standard deviation. Borusan argues that this critical flaw means that using the Cohen's *d* test to determine the presence of targeting will result in an inherently inaccurate estimation of the frequency of targeting. Because the Cohen's *d* test cannot differentiate between market driven price fluctuations and actual targeting, Borusan argues that the Cohen's *d* test is an inappropriate tool for identifying targeting.

F. The Cohen's *d* Test Does Not Consider the Relative Magnitude of Pricing Differences

Borusan contends that the Cohen's *d* test does not consider the relative magnitude of pricing differences. Since "magnitude" or "size" matters, Borusan contends a test that is indifferent to "size" is not an appropriate means for finding "targeting." Borusan states that if the standard deviation of the population happens to be small (meaning very little variation in prices), then very small price differences will generate Cohen's *d* coefficient which are deemed to be "large." Once again, Borusan states that a "one-size-fits-all" test for targeting not workable.

Cohen's *d* is a useful statistical tool when there is no meaningful scale for the dependent variable. Borusan quotes at page 28 of its case brief, "...as Professor Lane explains: when the scale of a dependent variable is not inherently meaningful, it is common to consider the difference between means in standardized units. That is, effect size is measured in terms of the number of standard deviations the means differ by." Further, Borusan argues that the small, medium and large thresholds identified by the Department are arbitrary. Quoting Lane:[133] "{i}t should be noted, however, that these guidelines are somewhat arbitrary and have not been universally accepted."

Borusan states that this standardization is useful to provide some context to a difference in a variable for which the scale itself is not meaningful. But in the case of dumping, the variable is price. The scale used to measure price differences - dollars per unit- is meaningful. That is, a dollar change in price has implications for whether or not a sale has been made through the practice of "targeting." However, Borusan contends a dollar change in price does not have the same meaning in all markets and at all times. Borusan further argues how big a price differential has to be in order to generate a sale is a function of the cost per unit of the product, as well as the price elasticity. If demand is inelastic, then even a large difference in price will not result in increased sales. Borusan claims that any defensible test for finding targeting, therefore, must incorporate the sensitivity of the market to changes in price.

G. The Cohen's *d* Test Does Not Distinguish Between Low and High Priced Sales

Borusan comments that the Cohen's *d* test is poorly suited for the Department's task for identifying targeting because it does not distinguish between positive and negative results: in this case, it does not distinguish between circumstances in which the mean prices of the test group are above or below the mean prices of the base group. According to Borusan, such a distinction is essential to any test purporting to identify targeting, which by definition consists solely of pricing that is aberrationally low. For example, where region-specific targeting is found, both regions in which there are sales of the CONNUM in question "pass" the Cohen's *d* test because there are tiny price differences within both. Borusan claims that this leads to the result that one region "passes" because its positive price differences are "high" relative to the standard deviation, while the other region "passes" because its negative price differences are also considered "high."

H. The Department Must Explain Why the Average-to-Average Method Cannot Account for the Identified Pattern of Prices That Differ Significantly

Borusan asserts that the Department has not explained why the use of the average-to-average method cannot account for the identified pattern of prices that differ significantly. Borusan argues if the Cohen's *d* test does correctly identify targeted sales in this proceeding, the Department should not use it to reinstitute zeroing in cases where it would drive up the weighted-average dumping margins. Borusan states that Section 777A(l)(B)(ii) dictates that, prior to applying the average-to-transaction method, the Department must explain why the use of the average-to-average method cannot account for the pricing differences found.

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[133] *See* Borusan's Case Brief at 27, *quoting* David Lane et al, e-Statistics Education: A Multimedia Course of Study, 622-623 (Rice Univ.; Univ. of Houston, Downtown Campus).

Because the Department has not provided an adequate explanation of why the average-to-average method cannot account for the observed pattern of price differences, Borusan contends that the Department has failed to meet the statutory prerequisite for applying the average-to-transaction method. Accordingly, the Department should continue to calculate its weighted-average dumping margin using the average-to-average method, and not zero, in the final results.

U.S. Steel's Rebuttal Brief Comments

As a general matter, U.S. Steel contends that the Department is not required to consider the underlying causes of a company's differential pricing. According to Borusan, the Department's differential pricing analysis must account for changes in the cost of the hot-rolled steel coil used to produce the subject merchandise,[134] but U.S. steel argues that Borusan is wrong. U.S Steel states that the antidumping statute requires that the Department discern patterns of pricing; it "does not require the Department to discern why such patterns arise."[135] There has been no change to the statute since the last administrative review in this case. U.S. Steel claims that there is still no statutory requirement for the Department to identify and account for the potential causes of the pattern of differential pricing evident in Borusan's U.S. sales.

U.S. Steel asserts that Borusan's objections to the Cohen's *d* test are baseless. U.S. Steel contends that the Cohen's *d* test is "a generally recognized statistical measure of the extent of the difference between the mean of a test group and mean of a comparison group."[136] U.S. Steel states that this is precisely what the statute directs the Department to analyze when it determines whether a pattern of differential pricing exists. As the Department has explained, it decided to use the Cohen's *d* test based on its "experience over the last several years, and... {its} research, further analysis and consideration of the numerous comments and suggestions."[137] U.S. Steel states that the statute does not specify how the identification of a pattern of significant price differences should be undertaken or require the Department to adopt a specific type of test, and that the Department's use of the Cohen's *d* test is well within its discretion.

U.S. Steel contends that Borusan mistakenly claims that the Cohen's *d* test is inappropriate because it systematically results in affirmative findings. U.S. Steel claims that the frequency with which individual respondents engage in differential pricing has no bearing on the propriety of the methodology the Department uses to identify a pattern of significant price differences. U.S. Steel states that in at least twelve cases since it began using the differential pricing analysis, the Department has found that the amount of differential pricing exceeded the medium or large thresholds of the Cohen's *d* test, yet did not require the application of the average-to-transaction methodology to any sales. U.S. Steel claims that in two recent cases, the Department found that zero percent of the respondents' U.S. sales passed the Cohen's *d* test.[138]

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[134] *See* Borusan' case brief at 18-19.

[135] *See Circular Welded Carbon Steel Pipes and Tubes From Turkey; Final Results of Antidumping Duty Administrative Review; 2010 to 2011*, 77 FR 72818 (December 6, 2012) and accompanying Issues and Decision Memorandum at comment 13.

[136] *See Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33350, 33351 (June 4, 2013) (*Xanthan Gum from the PRC*).

[137] *See Xanthan Gum from the PRC* at comment 3.

[138] *See* U.S. Steel's Rebuttal Brief at 13.

U.S. Steel contends that the Cohen's *d* test is not deficient like Borusan contends because it does not rely on large sample sizes that generate a high "confidence level." U.S. Steel refutes Borusan's contention that the Cohen's *d* test may generate "false positives" in the differential pricing context. U.S. Steel comments that the fact that the Department has Borusan's entire dataset available obviates any purported need for a certain "confidence level" or large sample size. The purpose of the analysis is to measure the difference between the means of groups of sales. U.S. Steel claims that this is exactly what the Cohen's *d* test accomplishes.

U.S. asserts that Borusan itself provided the data used by the Department, and the results of the differential pricing analysis can be easily verified against that data for errors. Here, there is no question that the Department accurately applied the Cohen's *d* test to Borusan's data. This is clear from the fact that Borusan did not and cannot identify a single comparison in the Department's differential pricing analysis that resulted in a so-called false positive result. Furthermore, U.S. Steel contends that the purported error rates offered by Borusan are irrelevant to the Cohen's *d* test, given that the Department's methodology is not used for price forecasting or any similar analysis that might contemplate the use of an error rate. Unless Borusan reported U.S. sales data that contain errors, U.S. Steel argues that the accuracy of the Department's application of the Cohen's *d* test cannot be seriously contested.

U.S. Steel claims that consideration of the results from use of an alternative comparison method is plainly proper to determine whether the average-to-average method can account for price differences because as both the statute and the SAA recognize, the average-to-average method can mask dumping and the use of an alternative comparison method is essential to address that problem.[139]

U.S. Steel asserts that the courts have repeatedly found that the use of the average-to-transaction methodology (in conjunction with zeroing) can "unmask" dumping that would otherwise be concealed by the offsetting effect of the average-to-average methodology.[140] Accordingly, it is entirely appropriate, indeed necessary, for the Department to determine whether the average-to-average methodology can account for a pattern of differential pricing by reference to the weighted-average dumping margins calculated using the average-to-average method and an alternative comparison method.

U.S. Steel also refutes Borusan's claim that the Department's use of the average-to-transaction method with zeroing is improper because, in its view, that methodology was "banned by the WTO" and, therefore, should not be used for any purpose, including to determine whether the average-to-average methodology can account for a pattern of price differences. U.S. Steel contends that there has been no WTO decision addressing the use of the Department's

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[139] *See* U.S. Steel's rebuttal brief at 26, citing to "19 U.S.C. 1677f-1(d)(1) (authorizing the Department to use the average-to-transaction method where there is evidence of targeted dumping); SAA at 842, U.S.C.C.A.N. 4177 ('the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal targeted dumping')."

[140] *See* Borusan's rebuttal brief at 17, citing to *Union Steel, et al v. United States*, Ct. No. 2012-1248 (Fed. Cir. April 16, 2013) at 16 n.8.

differential pricing analysis or the use of alternative comparison methods like that used by the Department as part of that analysis.

Wheatland's Rebuttal Brief Comments

As a general matter, Wheatland states that the statute requires only a finding that there exists a "pattern of export prices" that differ significantly among purchasers, regions, or periods of time for the Department to apply the average-to-transaction methodology to Borusan.[141] Wheatland comments that the statue requires no examination of the cause for such a pattern. It requires no finding regarding the exporter's motivation for such a pattern. Wheatland asserts that any significant pricing pattern, regardless of its cause, and regardless of the exporter's motivation, has the potential to mask dumping.

Moreover, according to Wheatland, the purpose of applying the alternative average-to-transaction method is to unmask such dumping. Wheatland claims that Borusan cites no support, and none exists, for the proposition that the Department is powerless to unmask dumping where the exporter identifies "specific market conditions" that supposedly explain the observed pricing patterns. Wheatland states that the statute, however, does not define the terms "pattern" or "differ significantly," and the Department has considerable discretion under the second prong of *Chevron*[142] to adopt any reasonable interpretation.

Wheatland argues that the Cohen's *d* test is, as the Department observed, "a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group." Wheatland contends that Borusan cannot demonstrate that the Department's use of the Cohen's *d* test in this context is unreasonable. Wheatland argues that the Department, in *Xanthan Gum from the PRC*, has already addressed and rejected the same variety of statistical objections to the Cohen's *d* test that Borusan is now reasserting. Wheatland claims the Department concluded correctly in *Xanthan Gum from the PRC*, "the use of Cohen's *d* test as a component in this {differential pricing} analysis is in no way contrary to the law."

Wheatland asserts that Borusan's claim of the average-to-transaction methodology with zeroing "was discredited and finally banned by the WTO"[143] is incorrect. Wheatland states that the WTO has never ruled that zeroing is impermissible in cases involving patterns of significant price differences.[144] Moreover, Wheatland asserts that the WTO dispute resolution decisions have no legal effect on U.S. law (unless and until implemented through the statutory procedures). Wheatland further argues that under U.S. law, zeroing remains permissible under the average-to-transaction methodology and that the use of the average-to-transaction method (with zeroing) as a benchmark is, in fact, the best way to measure the degree to which pricing patterns "mask" dumping.

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[141] *See* section 77A(d)(1)(B)(i) of the Act.
[142] *See Chevron USA. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 CIT (1984)(*Chevron*).

Wheatland asserts that the Department stated when promulgating the now-withdrawn 19 C.F.R. 351.414(f)(2) that in cases where the pattern of significant price differences is "pervasive," the average-to-transaction method should not be limited and should apply to all sales. As the Department explained in *Xanthan Gum from the PRC*, when it "finds that 66 percent or more of the value of the sales pass the Cohen's *d* test, the Department considers that the pattern of prices that differ significantly is so pervasive in the reported prices that application of the average-to-transaction method to all sales is appropriate to address all masked dumping that may result from such differences." Here, Wheatland argues that Borusan's U.S. sales easily pass that mark because 74.99 percent of Borusan's sales pass the Cohen's *d* test.

The Department's Position:

The Department disagrees with Borusan that the differential pricing analysis is unsupported by the record or contrary to the statute. As explained in the *Preliminary Results*, the Department continues to develop its approach pursuant to its authority to address potential masked dumping. In carrying out this statutory objective, the Department determines whether "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions, or periods of time, and.... why such differences cannot be taken into account using {the A-to-A or T-to-T comparison method}"[145] With the statutory language in mind, the Department has relied on the differential pricing analysis to determine whether these criteria are satisfied such that application of an alternative methodology is appropriate.[146] There is nothing, however, in the statute that mandates *how* the Department measure whether there is a pattern of export prices that differs significantly. To the contrary, carrying out the purpose of the statute here is within Commerce's discretion afforded by the silence in the statute. As explained in the *Preliminary Results* and below, the Department's differential pricing analysis is reasonable, and the use of Cohen's *d* test as a component in this analysis is in no way contrary to the law.

A. Whether the Department's Differential Pricing Analysis Does Not Identify Targeted Dumping

The Department disagrees with Borusan's argument. Contrary to Borusan's assertion, the statute does not require that the Department consider only lower priced sales in the differential pricing analysis. The Department has the discretion to consider sales information on the record in its analysis and to draw reasonable inferences as to what the data show. Contrary to Borusan's assertions, it is reasonable for the Department to consider both lower priced and higher priced sales in the Cohen's *d* analysis because higher priced sales are equally capable as lower priced sales to create a pattern of prices that differ significantly. Further, higher priced sales will offset lower priced sales, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, that can mask dumping. The statute states that the Department may apply the average-to-transaction comparison method if "there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time," and the Department "explains why such

[145] *See* section 777A(d)(1)(B) of the Act (emphasis added).
[146] *See* 19 CFR 351.414(c)(1).

differences cannot be taken into account" using the average-to-average comparison method.[147] The statute directs the Department to consider whether a pattern of prices differ significantly. The statutory language references prices that "differ" and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that the Department considers only higher priced sales or only lower priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department has explained that higher priced sales and lower priced sales do not operate independently; all sales are relevant to the analysis. Higher or lower priced sales could be dumped or could be masking other dumped sales—this is immaterial in the Cohen's *d* test and the question of whether there is a pattern of export prices that differ significantly because this analysis includes no comparisons with normal values. By considering all sales, higher priced sales and lower priced sales, the Department is able to analyze an exporter's pricing practice and to identify whether there is a pattern of prices that differ significantly. Moreover, finding such a pattern of prices that differs significantly among purchasers, regions, or periods of time signals that the exporter is discriminating between purchasers, regions, or periods of time within the U.S. market, rather than following a more uniform pricing behavior. Where the evidence indicates that the exporter is engaged in a discriminating pricing behavior, there is cause to continue with the analysis to determine whether masked dumping is occurring. Accordingly, both higher and lower priced sales are relevant to the Department's analysis of the exporter's pricing behavior.

Furthermore, the statute makes no provision that a pattern of prices that differ significantly involves sales that are dumped. The SAA discusses targeted dumping in reference to section 777A(d)(1)(B)(i) of the Act, which the Department considers to be one type of pattern which might exist. Similarly, another possible pattern could be that there are a few high, "differentially-priced," "targeted" sales which provide offsets to "normally" priced sales which each provide a small amount of dumping with the total amount of dumping being masked by offsets from the few, high-priced sales. Whether masking is actually occurring is then evaluated by considering section 777A(d)(1)(B)(ii) of the Act under which the Department assesses whether the standard method can account for the observed pricing pattern if one exists.

B. Whether the Department's Differential Pricing Analysis Fails to Account for Specific Market Conditions

The Department disagrees with Borusan that it must account for some kind of causality for any observed price differences, such as changes in raw material costs, prices of natural gas, or declines in market demand.[148] No such requirement exists in the statute. Congress did not speak to the intent of the producers or exporters in setting export prices that exhibit a pattern of significant price differences. Consistent with the statute and the SAA, the Department has determined whether a pattern of significant price differences exists. Neither the statute nor the

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[147] *See* section 777A(d)(1)(B) of the Act.

[148] The Department notes that the other examples given by Borusan as a cause of price differences, level of trade or circumstances of sale, are accounted for in the differential pricing analysis. Level of trade is a part of the definition of "comparable merchandise." Circumstances of sale are accounted for as the Department uses the adjusted U.S. price, net of all circumstance of sale adjustments, in the Cohen's *d* test.

SAA requires the Department to conduct an additional analysis as argued by Borusan to account for potential reasons that the observed price differences exist.

C. Whether the Cohen's *d* Test Is Inappropriate Because It Does Not Measure Statistical Significance or Establish the Confidence Level of the Result

To the extent that Borusan insists that the Department's analysis demonstrate statistical significance and identify the confidence level of its results, the Department disagrees. If Congress had intended to require a particular result be obtained with a certain statistical significance or at a given confidence level for the price differences that mask dumping as a condition for applying an alternative comparison method, Congress presumably would have used language more precise than "differ significantly." The Department, tasked with implementing the antidumping law, resolving statutory ambiguities, and filling gaps in the statute, reasonably does not agree with Borusan that the term "significantly" in the statute can mean only statistically significant. The law includes no such directive. The analysis employed by the Department, including the use of the Cohen's *d* test, reasonably fills the statutory gap as to how to determine whether a pattern of prices "differ significantly." Further, the use of statistical significance, confidence levels, or other statistical measures is to determine for a sample of a larger population an estimate of what the actual values (*e.g.*, the mean or variance) of the larger population may be with a "statistical significance" attached to that estimate. However, the Department's use of the Cohen's *d* test is based on the entire population of U.S. sales by the respondent and, therefore, there are no estimates involved in the results and accordingly "statistical significance" is not a relevant consideration.

D. Whether the Cohen's *d* Test Is Inappropriate Because It Systematically Results in Affirmative Findings

The Department disagrees with Borusan's contention that the Cohen's *d* test systematically results in affirmative findings. Borusan confuses the individual results for each comparison of the Cohen's d test with the application of an alternative comparison method. The Cohen's *d* test, for each combination of comparison merchandise and either purchaser, region or period of time, determines whether the weighted-average sales price to a particular test group is different from the weighted-average sale price to the comparison group. The fact that any one comparison for a respondent meets the large threshold for determining that those sales in the test group have significantly different prices is not unexpected. However, this is only the first step of the Department's differential pricing analysis. As described in the *Preliminary Results*, the Department next aggregates the results for each of the comparisons of the Cohen's *d* coefficient to confirm whether a pattern of prices that differ significantly exists for the respondent. If a pattern is found to exist, then based on the results of the of the Cohen's d and ratio test, the Department will determine an appropriate alternative comparison method and determine whether the average-to-average method can account for the observed pattern. Additionally, the parameters used for each of these steps for a given respondent are open for comments from interested parties which the Department will consider in its analysis. Further, the Department will continue to evaluate its practice with respect to identifying and addressing masked dumping and implement changes as warranted.

E. Whether the Cohen's *d* Test Is Not An Appropriate Tool to Identify Targeting

The Department agrees with Borusan, in part, that the Cohen's d test is based on a measurement of "effect size" which evaluates the difference in the mean prices of the two groups in relation to the pooled variance of the prices for the two groups. However, the Department disagrees with Borusan's claim that the Cohen's *d* test is inappropriate when determining whether section 777A(d)(1)(B)(i) is satisfied in that it provides no explanation for the differences in the mean prices. As discussed above, the statute imposes no requirement on the Department to identify the reason for the price discrimination practiced by a respondent if one exists, or to establish a statistical significance or confidence level for a finding that a pattern exists. Changes in market demand, available supply from other producers, variations in production costs, or the significance of the changes in the prices are not a part of analyzing the reported prices for a respondent's U.S. market sales and determining whether a pattern of prices that differ significantly exists.

F. Whether the Cohen's *d* Test Does Not Consider the Relative Magnitude of Pricing Differences

The Department disagrees with Borusan's claim that the Cohen's *d* test does not consider the relative magnitude of the pricing differences. Indeed, this contradicts what Borusan said for the previous comment where Borusan stated that the Cohen's *d* coefficient measures the magnitude of the price differences "in relation to a standard measure of the level of variability within the data."[149] Borusan appears to be implying that this should be done with respect to the magnitude of the prices themselves, or even with the price elasticity of the market for the subject merchandise.

The Department disagrees with Borusan and believes that the appropriate measure should be the variability of the price data within the two groups. The idea behind the Cohen's *d* coefficient is that it indicates the degree by which distribution of prices within the test and comparison groups overlap. With a larger Cohen's *d* coefficient, the less that they overlap and the more different the price distributions within the two groups are. This is independent of the absolute price levels for the merchandise under consideration.

G. Whether the Cohen's *d* Test Does Not Distinguish Between Low and High Priced Sales

For the reasons stated above, the Department considers that both lower-priced and higher-priced sales may contribute a pattern of prices that differ significantly. Therefore, the Department disagrees with Borusan's argument.

H. Whether the Department Must Explain Why the Average-to-Average Method Cannot Account for the Identified Pattern of Price That Differ Significantly

The Department disagrees with Borusan. As explained in the *Preliminary Results*, if the

[149] *See* Borusan's Case Brief at 24.

difference in the weighted-average dumping margins calculated using the average-to-average method and an appropriate alternative comparison method is meaningful, then this demonstrates that the average-to-average method cannot account for such differences and, therefore, an alternative method would be appropriate. The Department has determined that a difference in the weighted-average dumping margins is considered meaningful if: 1) there is a 25 percent relative change in the weighted-average dumping margin between the A-to-A method and the appropriate alternative method when both margins are above *de minimis*; or 2) the resulting weighted-average dumping margin moves across the *de minimis* threshold. Here, such a meaningful difference existed for Borusan because when comparing Borusan's weight-averaged dumping margin calculated pursuant to the average-to-average method and an alternative comparison method based on applying the average-to-transaction method to all U.S. sales, moves Borusan's weight-averaged dumping margin across the *de minimis* threshold. This threshold is reasonable because comparing the weighted-average dumping margins calculated using the two comparison methods allows the Department to quantify the extent to which the average-to-average method cannot take into account different pricing behaviors exhibited by the exporter in the U.S. market.

The Department adequately stated the reasons why the average-to-average method cannot account for the Department's finding of differential pricing. Section 777 A(l)(B)(ii), dictates that prior to applying the average-to-transaction method, the Department must explain why the use of the default average-to-average method cannot account for the pricing differences found.

For Borusan, the value of U.S. sales passing the Cohen's *d* test is pervasive (*i.e.*, above 66 percent) such that we should consider an alternative comparison method applying the average-to-transaction method to all U.S. sales. When comparing the weighted-average dumping margins calculated using the standard average-to-average method for all U.S. sales and the appropriate alternative comparison method, there is a meaningful difference in the results.

Therefore, for these final results, the average-to-average method cannot take into account the observed differences, and an average-to-transaction method for all U.S. sales should be used.

<u>Erbosan</u>

Comment 10: Differential Pricing Issues

Wheatland's Case Brief Comments[150]

Wheatland argues the Department should revise the first step of the Cohen's *d* test for Erbosan to compare prices between similar products, rather than only between identical products. Wheatland argues that this change in the analysis is necessary because the Department's standard Cohen's *d* test makes comparisons of prices only between identical merchandise and Erbosan reported no two U.S. sales of the same CONNUM. As a consequence, Wheatland claims that the Department in effect did not perform a Cohen's *d* test on Erbosan's U.S. sales. To correct

[150] In its case brief, Wheatland designated several portions of its arguments on this issue as business proprietary. However, in its rebuttal brief, Erbosan did not designate this same information as business proprietary. Consequently, the Department has treated the information at issue as public.

this error, Wheatland argues that the fact pattern of this case requires that the Department amend its differential pricing analysis to make comparisons of prices between similar products. Wheatland contends that the Department can compare prices between similar products by making a difference-in-merchandise (DIFMER) adjustment. Wheatland avers that the Department has never faced this particular fact pattern, but that it has acknowledged in a past case – *Nails from the UAE* – that it might make a DIFMER adjustment under certain circumstances for purposes of determining whether there is a pattern of export prices. In support of these arguments, Wheatland submitted sample calculations using a DIFMER adjustment in its case brief.

Erbosan Rebuttal Brief Comments

Erbosan argues that in *Nails form the UAE* and in all subsequent investigations and administrative reviews in which the Department has performed an analysis to identify whether a pattern of prices that differ significantly exists, the Department has limited U.S. price comparisons to only identical products based on product control numbers (CONNUMs). Erbosan argues that Wheatland's suggested DIFMER-based approach in the context of a differential pricing analysis is inconsistent with the Department's use of DIFMER adjustments in calculating dumping margins and when performing the arm's-length test. Specifically, in the latter two calculations, the Department uses DIFMERs to identify the most similar product, whereas the methodology Wheatland advances would have the Department group all of Erbosan's U.S. CONNUMs into a single CONNUM basket. This approach is flawed, Erbosan states, because each of Erbosan's U.S. CONNUMs is different from one another and would have a more appropriate most-similar product match.

The Department's Position:

We disagree with Wheatland and decline to modify our differential pricing analysis. The statute does not define what the Department should regard as "comparable merchandise" for purposes of determining whether there is a pattern of export prices that differ significantly among customers, regions, or time periods.[151] In interpreting this ambiguous statutory provision, in both past targeted dumping analyses and current differential pricing analyses, the Department always has relied upon comparing U.S. prices of identical merchandise.[152] The Department has followed this practice to ensure that (1) an apples-to-apples comparison is made between export sales and (2) the most accurate comparison between U.S. sales – *i.e.*, comparisons of sales of identical merchandise – is made. Accordingly, we find this interpretation is a reasonable interpretation of the controlling statute.

Wheatland is correct that the Department acknowledged in *Nails from the UAE* that there may be circumstances under which making a DIFMER adjustment may be appropriate when determining

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[151] *See* section 777A(d)(1)(B) of the Act.

[152] *See, e.g., Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Antidumping Duty Administrative Review and New Shipper Review; 2011-2012*, 78 FR 55676 (Sept. 11, 2013), and accompanying Preliminary Decision Memorandum at 20 ("For purposes of analyzing sales transactions by purchaser, region and time period, comparable merchandise is considered using the product control number . . . ." (footnote omitted)).

whether there is a pattern of export prices that differ significantly among customers, regions, or time periods.[153] Nevertheless, we do not find those circumstances present here. In this case, every CONNUM was sold only once during the POR. Thus, no differences in pricing patterns occurred with respect to purchasers, regions, or time periods. We find no reason to search for them by making DIFMER adjustments when our consistent practice has been to base our analysis on sales of identical CONNUMs. In any case, if the Department were to compare the prices of a given CONNUM as the test group with the prices of the most similar CONNUM as the comparison group, the Cohen's d coefficient could not be calculated because as stated in the description of the differential pricing analysis:

> ...when the test and comparison groups of data each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise.[154]

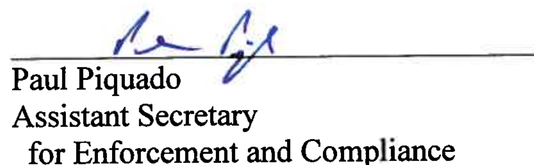
Thus, the Department could not apply the test with the available data

In addition, the Department finds Wheatland's suggestion of somehow applying DIFMER adjustments to all CONNUMs to derive some type of hybrid product would not conform to the Department's practice in identifying most similar merchandise, such as in making comparisons of export prices with normal values.[155] Therefore, in these final results, we have not applied a DIFMER adjustment to Erbosan's sales in performing the differential pricing analysis.

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 results of the review and the final weighted-average dumping margins in the *Federal Register*.

Agree ✓ Disagree _____



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

23 December 2013
Date

[153] *See Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales At Not Less Than Fair Value*, 73 FR 33985 (June 16, 2008), and accompanying Issues and Decision Memorandum at Comment 4.
[154] *See* Memorandum From Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, To Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration: Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2011-2012 Administrative Review, dated May 31, 2013, at 5.
[155] *Id.* at 6.