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November 21, 2014

MEMORANDUM TO: Paul Piquado
Assistant Secretary
For Enforcement and Compliance

FROM: Christian Marsh *CM*
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; 2012-2013

SUMMARY

The Department of Commerce (the Department) has analyzed the comments submitted by the petitioner, Wheatland Tube Company (Wheatland), and Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (Borusan) in the administrative review of the antidumping duty order on welded carbon steel standard pipe and tube products (welded pipe and tube) from Turkey (Turkey) covering the period of review (POR) May 1, 2012, to April 30, 2013. Based upon our analysis of the comments received, we made no changes to the margin calculation for the final results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments from parties:

- Issue 1: Physical Characteristic for Grade
- Issue 2: Whether the Department Should Collapse ASTM A53 grade A and ASTM A53 grade B into a Single Grade Category
- Issue 3: Duty Drawback and Treatment of the Resource Utilization Support Fund Tax
- Issue 4: Duty Drawback and Yield Loss Factor
- Issue 5: Differential Pricing

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

BACKGROUND

The Department published the *Preliminary Results* in the *Federal Register* on June 25, 2014.¹ In accordance with 19 CFR 351.309(c), we invited parties to comment on our *Preliminary Results*.² On July 31, 2014, we received case briefs from Wheatland and Borusan. On August 5, 2014, we received rebuttal briefs from Wheatland and Borusan.

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 ORDER³

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.

DISCUSSION OF THE ISSUES

Issue 1: Physical Characteristic for Grade

Wheatland contends that, in the *Preliminary Results*, the Department erred in using classifications for the physical characteristic of grade (reported as GRADEH and GRADEU in the home market and U.S. market sales data, respectively) that is different from that used in prior reviews. In past reviews, Wheatland asserts that the Department used grade classification, as represented in its coding methodology, for Borusan that separated grade into three different grade categories, but instituted an unexplained, illogical, and unjustified change in that methodology in the *Preliminary Results*.⁴

¹ See *Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 35999 (June 25, 2014) (*Preliminary Results*), and the accompanying Preliminary Decision Memorandum.

² See *Preliminary Results*, 79 FR at 36000.

³ See *Antidumping Duty Order; Welded Carbon Steel Standard Pipe and Tube Products From Turkey*, 51 FR 17784 (May 15, 1986). Note that the HTSUS did not exist at the time the order went into effect, so the references to the HTSUS numbers did not appear in the scope contained in that order.

⁴ See Wheatland's July 30, 2014, case brief (Wheatland's case brief) at 2-3.

Wheatland states that the Department only revises model match criteria (*i.e.*, the physical characteristics of the merchandise under consideration) from those used in previous reviews in limited circumstances where record evidence provides “compelling reasons” to justify such a change.⁵ Wheatland further contends that the Department’s practice is to “refrain from revising the model match criteria absent evidence establishing that the model match is not reflective of the merchandise in questions... or there is some other compelling reason requiring a change.”⁶ Wheatland contends that the Department does not provide a compelling reason for changing Borusan’s grade classifications, so such a change is inappropriate.⁷

Wheatland asserts that the Department should adhere to a defined logic that ranks from the highest quality grade to the lowest quality grade or vice versa. Wheatland argues that nothing on the record explains why, under the newly-devised methodology used in the *Preliminary Results*, certain grades were assigned lower numbers or higher numbers in rank. Wheatland also maintains that Borusan was not able to explain the newly proposed grade ranking methodology when asked to do so, with Borusan simply responding that it followed the revised directions provided by the Department.⁸ Wheatland suggests the Department simply adopted a methodology proposed by Borusan’s counsel in a recent pipe investigation, without further scrutiny or analysis.⁹ Wheatland argues that the Department should have adequately explained why it departed from its normal practice, given parties advance notice of its changes, and allowed for appropriate rebuttal opportunities.¹⁰

Wheatland contends that the record contains no supporting information demonstrating that the new grade reporting methodology accurately reflects the differences in physical, chemical, and mechanical properties, nor does it yield more accurate matching and margins. Wheatland argues that the Department has divided pipe specification into categories using nominal physical, chemical, and mechanical properties identified in steel pipe specifications, but the criteria used

⁵ *Id.* at 3, citing *Fagersta Stainless AB v. United States*, 577 F. Supp. 2d 1270, 1276 (CIT 2008) (“*Fagersta*”).

⁶ *Id.*, citing *Stainless Steel Sheet and Strip in Coils From Germany; Notice of Final Results of Antidumping Duty Administrative Review*, 70 FR 73729 (December 13, 2005) and accompanying Issues and Decision Memorandum at comment 1.

⁷ *Id.* at 3-4, citing *Consolidated Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (“When the Department has developed an established practice with respect to an issue, it is arbitrary and capricious – and therefore unlawful – for the Department to take an “unjustified departure from a contrary past practice without reasonable explanation.”).

⁸ *Id.* at 4-5.

⁹ *Id.* at 5 and 6-7, citing Wheatland’s January 14, 2014, letter to the Secretary of Commerce entitled “Circular Welded Carbon Steel Pipes And Tubes From Turkey: Comments Responding To Borusan's January 7 Letter” (“Wheatland January 14, 2014 Letter”), in turn citing *Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 77 FR 32539 (June 1, 2012), unchanged at *Notice of Final Determination of Sales at Less Than Fair Value: Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates*, 77 FR 64475 (October 22, 2012) (“*Circular Pipe from the UAE*”).

¹⁰ *Id.* at 6.

only refer to specified minimums (*e.g.*, minimum specified yield strength) or maximums (*e.g.*, maximum carbon content). Wheatland maintains that relying on nominal requirements identified in pipe specifications creates artificial distinctions that are not consistent with the actual characteristics of the products. Wheatland further asserts that chemical and mechanical properties can be achieved by selecting the appropriate coil from inventory, and the cost of the various types of hot-rolled coil could be identical depending upon the steel supplier and the grade variation. Wheatland states that the more meaningful aspect of a pipe specification is the differing, costly testing requirements of each, which the Department's revised methodology ignores.¹¹

Lastly, Wheatland asserts that the Department should revert to Borusan's original reporting methodology by using the sequence number (SEQH/U) reporting fields to link product characteristic and product control number (CONNUM) data from Borusan's original sales databases to the final versions of the sales files. Wheatland states the Department should rely on Borusan's original cost dataset, which also reflects the CONNUM data based on the original reporting methodology, given the final version of the cost dataset otherwise is otherwise very little changed from the original cost dataset.¹²

Borusan states that Wheatland is incorrect in its claim that Borusan opposes the Department's modifications. Borusan states it only raised objections because additional questions asked by the Department suggested that the Department was considering further revisions to the general methodology, and that Borusan does not object to the methodology used in the *Preliminary Results*.¹³

Borusan contends that neither Borusan nor the other respondent in this review, Toscelik Profil ve Sac Endustrisi A.S. (Toscelik), initially followed the grade model match criteria in their reporting of grade and was not based on the established grade model match criteria as listed in the questionnaire. Borusan states that in revising the grade model match criteria, the Department did not deviate from any established grade model match to replace the *ad hoc* reporting that had been done in this review and in past review by both respondents. Furthermore, Borusan asserts that the Department stated it was making these revisions because they accurately distinguish between products with different physical, chemical and mechanical properties. Borusan also contends that seeking to provide a more detailed and specific breakout of the grade of the pipe for comparison purposes is a compelling reason for modifying the model match methodology.¹⁴

Borusan claims that the grade codes closely adhere to the order of the grade codes in the most recent investigations of standard pipe, including those involving the United Arab Emirates

¹¹ *Id.* at 7-8.

¹² *Id.* at 8-9.

¹³ See Borusan's August 5, 2014, rebuttal brief (Borusan rebuttal brief) at 2.

¹⁴ *Id.* at 6-8.

(UAE), Oman, Vietnam, and India.¹⁵ Specifically, Borusan contends that the ordering of reporting codes under grades used in the *Preliminary Results* is almost identical to those used in those investigations, with the exception that the grade/specification codes used in this review include certain additional grades classified under certain European (EN) specifications not encountered in those investigations.¹⁶

Borusan states that after requesting and receiving revised responses from the respondents using the new grade codes in this review, the Department received comments from Wheatland that addressed the new hierarchy. As a result of these comments, Borusan asserts that the Department issued supplemental questionnaires to the respondents and revised the order of the grade criteria used in the *Preliminary Results* by moving the three different grades of EN 10217 up in the hierarchy from the 6400 codes to the 4000 codes. Borusan claims that the new criteria are not only consistent with other more recent investigations, but are based on comments from Wheatland.¹⁷

Borusan notes that Wheatland was a petitioner in *Circular Pipe from the UAE*.¹⁸ Borusan asserts that Wheatland essentially admits in its case brief that it is objecting to the methodology used in the *Preliminary Results*, though it did not do so in the four recent investigations, because in this review it perceives the impact on Borusan's margin is not to its liking.¹⁹

Borusan rebuts Wheatland's argument that the Department did not give parties adequate notice that it was contemplating revision to the grade coding hierarchy. Borusan states that the Department requested that respondents modify the reporting of grade in the first supplemental questionnaire in November 2013, which gave parties seven months before the *Preliminary Results*. Borusan notes Wheatland filed comments on the modified grade criteria and requested that the Department make revisions in order to collapse ASTM A53 grades A and B.²⁰

Lastly, Borusan argues that the Department's four-digit ranking methodology is logical and consistent with recent investigations. Borusan asserts that Wheatland cites no requirement that the Department's model match criteria must be tailored to the actual characteristics of the pipe sold by each respondent and cannot be based on the specified criteria from the ASTM or other standards books. Borusan notes that such industry standards have meaning in the trade, and are a key basis on which merchandise is sold. Also, Borusan states that Wheatland fails to explain what level of differences in the chemical, physical, or mechanical properties would be sufficient

¹⁵ *Id.* at 7, citing Borusan's March 21, 2014 letter at Attachments 1-4, which in turn reference model match information from those investigations, e.g., *Circular Pipe from the UAE*.

¹⁶ *Id.* at 8-9.

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 10.

¹⁹ *Id.*, citing Wheatland's case brief at 10.

²⁰ *Id.* at 10-11.

to require that grade codes be combined or separated, nor does it explain what about the grade criteria used by the Department leads to inaccurate comparisons or margins.²¹

Department's Position: The Department disagrees with Wheatland and will continue to use the same classification codes for the grade physical characteristic that it used in the *Preliminary Results*. To “establish the dumping margin{ } . . . {the Department} must first identify the ‘foreign like product’ which will form the basis for comparison to merchandise exported to the United States.”²² The “process by which {the Department} identifies the ‘foreign like product’ in determining dumping margins . . . is called ‘model-matching.’”²³ The Department attempts to match United States sales with sales of identical merchandise in the comparison market.²⁴ Where there is no identical merchandise, the Department attempts to match sales in the United States with sales of a similar product in the comparison market.²⁵ Congress has not defined the methodology by which the Department may identify the foreign like product, so the Department is left to fill the statutory gap.²⁶ The Department enjoys wide discretion in constructing a method for identifying the foreign like product.²⁷

As an initial matter, we agree with Wheatland that model match revision (*i.e.*, revision to the reporting requirements for the physical characteristics of the merchandise under consideration) should be contemplated only for compelling reasons, as confirmed, for example, by the Court of International Trade (“CIT”) in *Fagersta*.²⁸ However, such reasons exist in this proceeding. The Preamble to the Department’s regulations states “that continuity and consistency from one segment of a proceeding to another is desirable.”²⁹ The Department has also noted “the model match criteria should be consistent across reviews so that parties may have a predictable means of determining possible product matches in current as well as future administrative reviews.”³⁰ Such predictability, however, has not been achieved in the reviews of this order, as different respondents utilized what Borusan correctly notes are “*ad hoc*” approaches to reporting the GRADE fields during this and past reviews.³¹ With respect to the reporting of the GRADE physical characteristic, there has been neither continuity nor consistency for this order. Rather,

²¹ *Id.* at 11-13.

²² *Fagersta Stainless AB v. United States*, 577 F. Supp. 2d 1270, 1275 (CIT 2008) (*Fagersta*).

²³ *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1289 (Fed. Cir. 2008).

²⁴ Section 771(16)(A) of the Act.

²⁵ Section 771(16)(B)-(C) of the Act.

²⁶ *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001).

²⁷ *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1379 (Fed. Cir. 2008).

²⁸ *See* Wheatland’s Case Brief at 3, citing *Fagersta*, 577 F. Supp. 2d at 1276.

²⁹ *See Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27370 (May 19, 1997).

³⁰ *See Top of the Stove Stainless Steel Cooking Ware from Korea: Final Results and Rescission, in Part, of Antidumping Duty Administrative Reviews*, 66 FR 45664 (August 29, 2001), and accompanying Issues and Decision Memorandum at Comment 1; *see also Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, from Japan: Final Results of Antidumping Duty Administrative Review*, 56 FR 41508 (August 21, 1991), and accompanying Issues and Decision Memorandum at Comment 1 (“ . . . absent good reason, the model match methodology should be consistent for all . . . reviews.”).

³¹ *See* Borusan’s rebuttal brief at 3.

there has been a pattern of inconsistent reporting of the GRADE physical characteristic in various administrative reviews of this order, and that pattern continued at the outset of the current review. Modification of the Department's instructions for reporting the GRADE physical characteristic was necessary to ensure consistency, as discussed below.

The description of the GRADE physical characteristic and its reporting requirements in the Department's initial questionnaire, which followed the description in prior reviews of this and some other circular welded steel pipe orders, was ambiguous, given the imprecise use of terminology in that description. Consequently, like various respondents in prior administrative reviews, the respondents in this review initially reported the field using differing methodologies. By subsequently clarifying how the GRADE physical characteristic should be reported, the Department has enabled consistent reporting of this information that also accurately reflects the varying physical characteristics of pipe products subject to this order. Because this clarification was made only a few months after the outset of this review, parties had opportunity to comment on the Department's clarifications, and Wheatland did submit a series of objections.³² As described above, Wheatland has repeated and elaborated on those objections in its case brief.³³ However, Wheatland's concerns are unfounded.

The Department's initial questionnaire in this administrative review asked the respondents to report the GRADE physical characteristic as follows:

Specify the grade of pipe, *e.g.*, "ordinary" standard pipe such as ASTM A-53, which is intended for low pressure conveyance of liquids and gases, structural pipe, for use in load-bearing applications or as fence tubing; or conduit, used primarily for housing electrical wiring. The products within these categories generally share physical characteristics.³⁴

³² See the January 2, 2014 letter from Wheatland to the Secretary of Commerce entitled "Circular Welded Carbon Steel Pipes And Tubes From Turkey: Comments On Borusan's Supplemental Section A-D Response" ("Wheatland January 2, 2014 letter"); Wheatland January 14, 2014 Letter; and the May 13, 2014 letter from Wheatland to the Secretary of Commerce entitled "Circular Welded Carbon Steel Pipes And Tubes From Turkey: Pre-Preliminary Results Comments," at 1-6 ("Wheatland May 13, 2014 letter"). The objections raised by Wheatland in each of these letters, and in its case brief, relate to the reporting of the GRADE physical characteristic with respect to Borusan. However, Toscelik's initial GRADE reporting methodology varied from that of Borusan, and the Department provided the same clarifications regarding reporting of the GRADE physical characteristic to Toscelik as it did to Borusan. Wheatland does not explain why it appears to tacitly endorse methodological differences in reporting of the GRADE physical characteristic between the two respondents in this review.

³³ See Wheatland's case brief at 2-9.

³⁴ See the July 2, 2013 questionnaire from Robert James to Borusan Mannesmann Boru ("Borusan questionnaire"), at B-8 and C-7, and the July 3, 2013 questionnaire from Robert James to Toscelik Profil ve Sac Endustrisi A.S. ("Toscelik questionnaire") at B-8 and C-7. In each questionnaire, the Department also asked the respondents to "{d}escribe each grade of pipe that you identified." *Id.*

By citing the examples of “grades” that it did, the Department conflated the term “grade” with what amounts to groupings of products (such as “ordinary” standard pipe, structural pipe, or conduit). Such groupings of products are not “grades,” but rather are categories of types of pipes distinguished broadly by end uses. Under such broad groupings of products, various steel pipe “specifications” may be classified, such as the ASTM A-53 specification within an “ordinary” standard pipe category, or the ASTM A500 specification within a “structural pipe” category.³⁵ Within steel pipe specifications, in turn, particular grades may be designated (such as “grade B” under the specification ASTM A-53, also referred to as “ASTM A-53 grade B”).³⁶ In other words, products identified as made to a single specification must meet all the requirements of that specification, and specifications containing further segregations by grade (such as ASTM A53 grade A and ASTM A53 grade B) provide more precise, individual requirements for individual grades as well.

Therefore, the Department’s initial questionnaire instructions assigned the term “grade” to mean a much broader category of merchandise (*i.e.*, categories consisting of various specifications, which in turn may contain multiple grades) than that understood by the term “grade” in the steel industry. Furthermore, with respect to specifications identified by the steel industry and recognized by steel markets (*e.g.*, ASTM A53), actual grades of pipe exist under, and in conformance to, the requirements of the specifications under which they are identified, and products covered under a grade designation such as “grade A” or “grade B” under one specification need not bear any resemblance to products covered under a grade designation of “grade A” or “grade B,” respectively, under some other specification. Accordingly, it is arbitrary to group products under simple headings such as “grade A” and “grade B”.³⁷

Wheatland claims Borusan has used a grade coding methodology for over two decades that separated products into three grade categories.³⁸ However, Wheatland does not provide evidence to support this claim, and Borusan was not involved in administrative reviews for that extended period of time.³⁹ Regarding other companies containing the word “Borusan” in their name, to which Wheatland seemingly refers, those companies did not follow the reporting methodology employed by Borusan in more recent reviews. In one early administrative review, the Borusan

³⁵ See, *e.g.*, *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Investigation Nos. 701-TA-253 and 731-TA-132, 252, 271, 273, 532-534 and 536 (Third Review), Publication 4333, June 2012, U.S. International Trade Commission (“*Sunset Review 2012*”), at I-24 and I-25; see also the April 15, 2014 letter from Wheatland to the Secretary of Commerce entitled “Circular Welded Carbon Steel Pipes And Tubes From Turkey: Rebuttal Factual Information” (containing excerpts from product brochures of non-respondent Korean producers Husteel (Attachment 1) and Hyundai HYSCO (Attachment 2)).

³⁶ See *Sunset Review 2012* at I-25 & n.34.

³⁷ We note not only that Borusan no longer argues for its original “grade” reporting methodology, but also that no other interested parties in this segment, including two other domestic interested parties (U.S. Steel Corporation and Allied Tube and Conduit) have objected to the Department’s clarification of the GRADE physical characteristic.

³⁸ See Wheatland’s case brief at 2.

³⁹ As explained in the *Preliminary Results*, the Department treats Borusan, Borusan Istikbal Ticaret T.A.S., and Borusan Lojistik Dagitim Depolama Tasimacilik ve Tic A.S. as the same legal entity. See 79 FR at 35999 & n.3.

Group segregated products for CONNUM purposes by specification.⁴⁰ Several years later, the Borusan Group also segregated products by specification.⁴¹ However, more recently, Borusan segregated its pipes into two “grade” groupings (“grade A” versus “grade B”), which as noted above would not have represented actual steel pipe grades or conformed to the part of the Department’s instructions directing respondents to define “grade” based on broad pipe category groupings such as “ordinary” standard pipe; rather, it was based on grades of input coils use to make pipes.⁴² In the current review, Borusan also initially segregated pipe products by such “grade” categories, but as stated in the Department’s *Preliminary Results*, Borusan used three such groupings (“grade A” versus “grade B” versus grade “C”) which do not represent pipe “grades.”⁴³

In its Section A questionnaire response, Borusan’s descriptions of “Grade A” and “Grade B” pipes distinguished the finished pipe products sold to the United States based on the alleged “levels” of “quality of hot-rolled coil” used to produce the pipes being grouped in the respective “grade” categories. Borusan stated “grade B” pipe was made from allegedly “higher quality” coil (grade ST-44) than “grade A” pipe (grade ST-37).⁴⁴ Borusan reiterated this emphasis on level of “quality” of steel coil input in its Section B questionnaire response, noting that pipes produced from “high quality ST52 coil” were being identified as “Grade C.”⁴⁵ Nowhere in Borusan’s responses is there an explanation of why the coil input grade should be the basis for grouping finished pipe products into “grade” categories, or what makes one grade of coil “higher quality” than another.⁴⁶ Furthermore, while it appears that Borusan in some way considered

⁴⁰ See *Certain Welded Carbon Steel Pipe and Tube Products From Turkey; Final Results of Antidumping Duty Administrative Review*, 55 FR 42230 (October 18, 1990), at Comment 9. Those final results only refer to the respondent as “Borusan.” The preliminary results of that review indicate the review company was named “the Borusan Group.” See *Certain Standard Welded Carbon Steel Pipes and Tubes From Turkey; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 55 FR 11633, 11633 (March 29, 1990).

⁴¹ See *Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 61 FR 69067 (December 31, 1996), at Sales Comment 9. The companies constituting the “Borusan Group” were identified in the preliminary results of that review as Borusan Birlesik Boru Fabrikalar A.S., Kartal Boru Sanayi ve Ticaret A.S., and Borusan Ihracat Ithalat ve Dagitim A.S. See *Notice of Preliminary Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 61 FR 35188, 35188 & n.2 (July 5, 1996).

⁴² See, e.g., *Certain Welded Carbon Steel Pipe and Tube From Turkey: Notice of Final Antidumping Duty Administrative Review*, 75 FR 64250 (October 19, 2010) and accompanying Issues and Decision Memorandum at comment 2 (“Specifically, Borusan argues that in the preliminary results, the Department calculated indices by computing a single, weighted average unit value of consumption at slitting for two grades of coil substrate - ST 37 and ST44. Borusan states that grade ST 37 is used to make Grade A pipes and Grade ST 44 is used to make Grade B pipes, and both types of coils are also used to make non-subject merchandise.”).

⁴³ See, e.g., Preliminary Decision Memorandum at 7.

⁴⁴ See Borusan’s August 6, 2013 Section A questionnaire response at 36.

⁴⁵ See Borusan’s August 28, 2013, Section B questionnaire response at 11.

⁴⁶ The Department has identified another company for which coil inputs were used as the basis for identifying the pipe “grade.” In the review in question, the Department described that company’s reporting as follows: “Regarding the cost data, we found no distinction between the steel costs of grade A and grade B, and that Erbosan’s cost accounting records indicate the cost of steel is inclusive of *both grades for all products*. Therefore, we disagree that the Department should apply an additional difmer adjustment for the differences in grades.” (emphasis added). See

input coils as the basis for categorizing the “grade” of the various types of pipe products it sold in the home market, it did not state explicitly the basis for that categorization, thereby leaving uncertainty regarding the consistency of Borusan’s initial reporting of the different GRADE physical characteristics (*i.e.*, GRADEU (for U.S. sale products) versus GRADEH (for home market sale products)).⁴⁷

Examination of the various official standard organization (*e.g.*, ASTM) pipe specifications Borusan has submitted in its questionnaire responses and those identified in its product brochure indicates only a few specifications contain references to a “grade A” or a “grade B,” and none refer to a “grade C.”⁴⁸ Furthermore, as explained above, Borusan’s groupings of products under those “grade” headings is arbitrary, because even if multiple specifications contained references to grades designated as “grade A” or “grade B” or “grade C,” for any one of those classification terms (*e.g.*, grade A), the chemical, physical, and mechanical properties of the products in question could vary across specifications, given there is no standardized meaning for terms such as “grade A” that apply across specifications.

Even though a comprehensive review of the history of reporting of the GRADE product characteristic is not possible given the information available on the record of this review or in published determinations, it is evident that there has been repeated variation in reporting of the GRADE product characteristic in the history of this order. As noted above, there has been variation among Borusan companies. Furthermore, the reporting of the GRADE product characteristic for other respondents in various reviews reveals methodologies different from those “grade” methodologies utilized by Borusan in recent reviews. One respondent in a review, Cayirova, segregated pipe products by standard organization (*i.e.*, ASTM versus TSE).⁴⁹ In this

Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey, 61 FR 69067 (December 31, 1996), at Erbosan Comment 1. In other words, two “grades” of input coils were used to categorize the entire range of pipe products reported by Erbosan, with no reference to either actual pipe specifications or grades, or to categories of pipe products such as “ordinary” standard pipe, structural pipe, or conduit.

⁴⁷ Borusan’s description of the finished pipe products sold in the home market actually referred to various steel specifications, rather than grades, though Borusan stated they are “made of the same raw materials” as those produced for, and sold to, the U.S. market. See Borusan’s August 6, 2013 Section A questionnaire response at 36.

⁴⁸ For steel specifications submitted, see Borusan’s August 6, 2013 Section A questionnaire response at Exhibits A-16 and A-17, Borusan’s March 4, 2014 Section A-C supplemental questionnaire response at Exhibit A-30, Toscelik’s August 12, 2014 Section A response at Exhibits 16 and 17, and Toscelik’s October 31, 2013 Section A-C supplemental questionnaire response at Exhibits 4, 5, 6, 7, and 8. For product brochures, see Borusan’s August 6, 2013 Section A questionnaire response at Exhibit A-18, and Toscelik’s August 13 2013 Section A response at Exhibit 2. Ironically, Wheatland argues that two products actually identified by the steel industry as “grade A” and “grade B” (*i.e.*, ASTM A53 grade A and ASTM A53 grade B, respectively), should be considered identical, under the same “grade” grouping. See *e.g.* Wheatland’s case brief at 9-12. This argument is addressed in a separate comment, below.

⁴⁹ See *Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 70 FR 73447 (December 12, 2005), and accompanying Issues and Decision Memorandum at Comment 2 (“Moreover, after sorting Cayirova’s sales in the home-market database by control number “CONNUMH,” we found numerous transactions of TSE pipes with volumes that were at the same level or lower

current review, Toscelik did not initially segregate its products at all but, rather grouped them under a heading called “hydrostatically tested.”⁵⁰

In other words, various respondents have not followed the recent Borusan approach of identifying pipe “grades” by the grades of the coil inputs used to produce the pipes. While type of input coil no doubt has an impact upon the properties of the final pipe products made from the coils, the Department can best identify the “grade” of the pipe product by considering the actual grades of the pipes themselves, rather than the grades of their inputs. It would be another matter if pipe products could not be differentiated in such a way, but as discussed above, the pipe products are sold to specifications which in turn identify in detail the various chemical, physical, and mechanical properties and other requirements (*e.g.*, testing, marking, *etc.*) of those products, beyond those simply reflected in the properties of the input coils themselves. Some of those specifications further segregate products by particular grades and, when specifications do not further segregate products by grades, the specification itself serves in essence as the (single) grade for such a specification. Consequently, pipe products can be identified by specification/grade combinations (*e.g.*, ASTM A53 grade A) or, where no grades are identified, just by specification (*e.g.*, BS 1387).⁵¹

During this current review, the Department provided clarification of the GRADE fields that is consistent with the Department’s description of the GRADE physical characteristic in other proceedings involving nearly identical scopes, as discussed further below. The Department provided specific guidance regarding what reporting codes to report for particular specification/grade combinations.⁵² For additional specification/grade combinations identified

than Cayirova's typical ASTM sale. Thus, on an individual sale basis, the quantity of Cayirova's ASTM pipe sales in the home-market fall within the typical range of its corresponding sales of TSE pipe.”). Whether these products were further segregated within standard organization (*e.g.*, ASTM) by actual standard organization specifications (*e.g.*, ASTM A53) is unclear but it is evident the products (“CONNUMs”) were not defined based on broad pipe categories or on input coil grades. Cayirova was a designation covering several companies that belong to the Yucel Group, which includes Cayirova Boru Sanayi ve Ticaret A.S. and its affiliate, Yucel Boru Ithalat-Ihracat ve Pazarlama A.S. *Id.* at 73447.

⁵⁰ See, *e.g.*, Preliminary Decision Memorandum at 7.

⁵¹ For ease of reference, references to “specification/grade combinations” include those situations in which no separate grades are distinguished within a specification (which amounts to the specification by itself covering in essence a single “grade”).

⁵² See the September 13, 2013 supplemental questionnaire from Robert James to Toscelik at 4 and 6, and the November 12, 2013 supplemental questionnaire from Robert James to Borusan Mannesman Boru at 5 and 8. The specific guidance provided was as follows:

2940 = BS 1387 and AS 1074 and EN10255

3000 = ASTM A53 grade A or ASTM A135 grade A or ASTM A795 grade A

3020 = ASTM A53 grade B or ASTM A135 grade B or ASTM A795 grade B

5000 = ASTM A500 grade A

5020 = ASTM A500 grade B

5400 = EN 10219 grade 235

5440 = EN 10219 grade 275

5460 = EN 10219 grade 355

by the respondents, in some instances the Department made adjustments to the reporting codes for its *Preliminary Results*.⁵³

Citing the Department's Preliminary Decision Memorandum, Wheatland claims that for over two decades Borusan has used a grade coding methodology "that separated products into three different grade categories."⁵⁴ However, as noted above, various Borusan companies have segregated products by specification, and in at least one recent review Borusan used only two "grade" categories. More importantly, review of past preliminary and final *Federal Register* notices revealed no instances in which companies other than Borusan used a three "grade" category grouping. As noted in the Department's preliminary analysis memoranda (and not addressed by Wheatland in its case brief), those designations do not correspond to actual pipe grades.⁵⁵ Those arbitrary groupings also did not correspond to what was referenced in the Department's initial questionnaire guidance regarding reporting of the GRADE physical characteristic, which as noted above identified as "grades" the different broad categories of products, such as "ordinary" standard pipe, structural pipe, and conduit.⁵⁶

Marketing and technical information on the record of this review support the Department's contention that the description of the GRADE physical characteristic in its initial questionnaire required clarification and revision, given the imprecise use of the term "grade" in that description. The product brochures of the respondent companies identify subgroupings within broad categories of products such as "standard pipe" or "structural pipe." For example, within the ordinary "standard pipe" grouping are pipes typically used for normal water transmission, within which are identified particular steel pipe specifications (*e.g.*, ASTM A53), which in turn identify particular grades within those specifications (*e.g.*, ASTM A53 grade B).⁵⁷ Consistent with this, the aforementioned copies of the steel specifications of national standards organizations, submitted by the respondents on the record, identify grades within the specifications. Therefore, with respect to level of detail, the record of this review demonstrates an actual grade is far removed from a broad category such as "standard pipe" or "structural pipe" or "conduit." Consequently, modification of the Department's initial instructions was justified, given the conflation of the term "grade" with broad categories of products such as ordinary "standard pipe."

⁵³ See the June 18, 2014 memorandum from Victoria Cho to the File entitled "Analysis Memorandum for Borusan Mannesmann Boru Sanayi ve Ticaret A.S." ("Borusan Preliminary Analysis Memorandum") at 3, and the June 18, 2014 memorandum from Fred Baker to the File entitled Analysis for the Preliminary Results of the Antidumping Duty Administrative Review of Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Toscelik Profil ve Sac Endustrisi" ("Toscelik Preliminary Analysis Memorandum") at 6.

⁵⁴ See Wheatland's case brief at 2.

⁵⁵ See Preliminary Decision Memorandum at 7.

⁵⁶ See the Borusan questionnaire at B-8 and C-7, and the Toscelik questionnaire at B-8 and C-7.

⁵⁷ See, *e.g.*, Borusan's August 6, 2013 Section A questionnaire response at Exhibit A-18, page 7, and Toscelik's August 13 2013 Section A questionnaire response at Exhibit 2, page 7.

In its criticisms of the Department's clarification of reporting the GRADE physical characteristic, Wheatland fails to mention the methods of reporting of the GRADE physical characteristic by parties other than Borusan, including that of the other respondent in this administrative review, Toscelik. As noted above, Toscelik had initially reported for the GRADE physical characteristic just one reporting code, representing "hydrostatically tested." The Department explained in its *Preliminary Results* that such reporting was not in accordance with the Department's initial questionnaire (which had referred to categories of products such as "ordinary" standard pipe, structural pipe, and conduit), and does not reflect any "grade."⁵⁸ During this review, the Department provided the same GRADE physical characteristic reporting clarification to Toscelik that it did to Borusan.⁵⁹ However, in its case brief, Wheatland failed to acknowledge this initial inconsistency in reporting of GRADE between Toscelik and Borusan, and made no reference in its case brief to the modified instructions regarding the GRADE physical characteristic as they affect Toscelik. Wheatland does not explain why Borusan's initial methodology for reporting GRADE should be used for Borusan, but Toscelik's should be left unchanged or revert to Toscelik's original reporting methodology. As noted above, one goal the Department strives for is consistency of reporting of the product's physical characteristics.

Regarding Wheatland's claim that the revised instructions for reporting GRADE are not logical, the reporting codes identified by the Department do reflect basic differences across product groupings. Reporting codes assigned to specification/grade combinations classifiable as ordinary "standard pipes," (such as BS 1387 (reporting code 2940) ASTM A53 (reporting codes 3000 (grade A) and 3020 (grade B))), are clustered together numerically, distinct from reporting codes for "structural pipes" (such as ASTM A500 (reporting codes 5000 (grade A) and 5020 (grade B))), which results in priority of matching standard pipes to standard pipes, and structural pipes to structural pipes. Within certain specifications, distinct grades may vary from each other significantly with respect to one or more properties, and should in such situations be distinguished from each other, as they are under the Department's modification. For example, while the different grades of structural steel specification EN 10219 share various requirements under that specification, the mechanical requirements vary significantly from one grade to another; for example, EN 10219 grade 235 (reporting code 5400) has a minimum yield strength of only 235 megapascals (MPa) and a minimum tensile strength of only 360 MPa, but EN 10219 grade 355 (reporting code 5460) has a yield strength of at least 355 MPa and tensile strength of at least 510 MPa.⁶⁰ Distinguishing these two specification/grade combinations (*i.e.*, EN 10219 grade 235 and EN 10219 grade 355) is appropriate, but they still would match to each other before matching to the ASTM A500 structural steel specification grades, given the relative differences in the reporting codes assigned by the Department. Consequently, the importance of both the general requirements of the specifications, and the additional requirements of the grades

⁵⁸ See Preliminary Decision Memorandum at 7.

⁵⁹ See Preliminary Decision Memorandum at 7-8.

⁶⁰ See Borusan's March 4, 2014 Section A-C supplemental questionnaire response at Exhibit A-30. While the EN 10219 grade 355 product has higher strength requirements than the EN 10219 grade 235 product, the products vary in other ways (*e.g.*, the grade 235 product has higher minimum elongation requirement than the grade 355 product). *Id.*

within specifications, are accounted for by the Department's GRADE physical characteristic reporting clarification. Both the specifications and, within them, grade subgroupings, reflect a variety of physical characteristics which, as stated in Section 771(16)(A) of the Act, should be the basis for the physical characteristics used for model matching criteria.

Wheatland states that "the Department is aware" that the grade code designations should be ranked "from the highest quality grade to the lowest quality grade, or vice versa."⁶¹ However, it is not evident from Wheatland's claim what products are of "higher" quality and what products are of "lower" quality, or why differentiation of grades need be based on relative levels of "quality." Also, while Wheatland states "{t}he more meaningful aspect of the pipe specifications relate to the differing, costly testing requirements,"⁶² the Department's clarification uses the GRADE physical characteristic to distinguish products based on differences in the required properties of the pipe specification/grade combinations, which include not only physical properties but also, to an extent, differences in testing requirements across specifications. Section 771(16)(A) of the Act requires the Department to base its model-match criteria on "physical characteristics,"⁶³ and numerous precedents confirm that such differences should be considered regardless of possible differences or similarities in costs.⁶⁴

Wheatland also asserts Borusan has historically treated various "grades" as identical, but does not explain why such treatment is reasonable for even the full range of examples it cites.⁶⁵

⁶¹ See Preliminary Decision Memorandum at 4.

⁶² See Wheatland case brief at 8.

⁶³ See *NSK v. United States*, 217 F. Supp. 2d 1291, 1299-1300 (CIT 2002) ("Section 771(16) establishes a descending hierarchy of preferential modes that Commerce must select for matching purposes.").

⁶⁴ See, e.g., *Certain Hot-Rolled Lead and Bismuth Carbon Steel Flat Products From the United Kingdom; Final Results of Antidumping Duty Administrative Review*, 63 FR 18879 (April 16, 1998), at Comment 2 ("The creation of a product concordance inherently relies upon the matching of significant physical characteristics, not on cost groupings in a company's cost accounting system."); *Notice of Final Determination of Sales at Less Than Fair Value; Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Turkey*, 65 FR 15123 (March 21, 2000), and accompanying Issues and Decision Memorandum at Model Match Comment 1 ("...the Department focuses its selection of model match characteristics on unique measurable physical characteristics that the product can possess...." and "...differences in price or cost, standing alone, are not sufficient to warrant inclusion in the Department's model-match of characteristics which a respondent claims to be the cause of such differences...."); *Stainless Steel Wire Rod From Sweden: Final Results of Antidumping Duty Administrative Review*, 73 FR 12950 (March 11, 2008), and accompanying Issues and Decision Memorandum at Comment 1 ("cost variations are not the determining factor in assigning product characteristics for model-matching purposes."); and *Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 77 FR 32531, 32534 (June 1, 2012), unchanged at *Notice of Final Determination of Sales at Less Than Fair Value: Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman*, 77 FR 64480 (October 22, 2012) ("*Circular Pipe from Oman*") ("The goal of the product characteristic hierarchy is to identify the best possible matches with respect to the characteristics of the merchandise. While variations in cost may suggest the existence of variation in product characteristics, such variations do not constitute differences in products in and of themselves. Furthermore, the magnitude of variations in cost may differ from company to company, and even for a given company over time, and therefore do not, in and of themselves, provide a reliable basis for identifying the relative importance of different product characteristics.").

⁶⁵ See Wheatland's case brief at 4.

Wheatland had the opportunity to suggest alternative grade code designations, or to explain why an assortment of different specifications and specification/grade combinations should be considered to be “identical” or the same level of “quality,” but did not do so, with the exception of its argument that ASTM A53 grade A and ASTM A53 grade B should not be distinguished from each other for product classification purposes (which is addressed in another comment, below).

Wheatland’s claim that counsel to Borusan was the source for the GRADE reporting requirements provided by the Department subsequent to the initial questionnaire is unfounded. As noted above, the Department provided these requirements to Borusan and Toscelik for certain specifications and specification/grade combinations. Also, Wheatland’s complaint that Borusan could not explain the basis for its reporting changes, other than to “merely state{ } that it was following the Department’s instructions,” is unwarranted. Wheatland itself requested that the Department ask Borusan to “explain the basis for the numerical ranking” used for the reporting of the GRADE physical characteristic.⁶⁶ Borusan’s list of rankings not only included those the Department had assigned, but also contained an additional reporting code as well, and Borusan did not provide an adequate reason for the additional reporting code it had assigned.⁶⁷ The Department then asked Borusan the question Wheatland had suggested.⁶⁸ Borusan’s response that it had followed the Department’s directive with respect to the reporting codes identified by the Department was appropriate, though Borusan continued to provide no explanation for the

⁶⁶ See Wheatland’s January 2, 2014 letter, at 2.

⁶⁷ In response to the Department’s clarification regarding the reporting of the GRADEH and GRADEU fields (which appeared in the Department’s November 12, 2013 Section A-D supplemental questionnaire), Borusan stated it added a new reporting code for grade EN 10217. Borusan stated it created the new code for specification EN 10217 rather than add it to a listed code, such as that for EN 10219, because creation of a new code was “in line with the Department’s decision to assign separate codes for each unique specification.” Finally, Borusan stated “there is no difference in results if EN 10217 is a separate code or combined with EN 10219.” See Borusan’s December 6, 2013 supplemental questionnaire response at 9 (narrative and footnote 4) (Borusan’s December 6 Supp.). With regard to those statements by Borusan, we note first that EN 10217 is not a grade but, rather, a specification, and that in its *Preliminary Results* the Department assigned different reporting codes to the different specification/grade combinations reflected within that specification. See the Borusan Preliminary Analysis Memorandum at 3. Second, we emphasize that the Department is not always assigning a separate reporting code for every specification, or even for every specification/grade combination. See, e.g., the aforementioned reporting requirements provided to Borusan and Toscelik, which include some specification/grade combinations under the same reporting code. The Department need not account for every conceivable difference between products when determining which products are identical to others. See, e.g., *See Final Results of Antidumping Duty Administrative Review: Certain Cold Rolled Carbon Steel Flat Products from Germany*, 60 FR 65264, 65271, (December 19, 1995); *Light Walled Rectangular Pipe and Tube From Mexico: Notice of Final Determination of Sales at Less Than Fair Value*, 69 FR 53677 (September 2, 2004), and accompanying Issues and Decision Memorandum at Comment 13; and *Notice of Final Results of the Tenth Administrative Review and New Shipper Review of the Antidumping Duty Order on Certain Corrosion Resistant Carbon Steel Flat Products from the Republic of Korea*, 70 FR 12443 (March 14, 2005), and accompanying Issues and Decision Memorandum at General Issues Comment 1. Finally, the Department affirms that its assignment of reporting codes for product characteristic and CONNUM purposes is unrelated to the impact of such assignments on calculated “results.”

⁶⁸ See the February 7, 2014 supplemental questionnaire from Robert James to Borusan, at 3.

numerical reporting code it selected for the additional specification it was reporting.⁶⁹ Subsequently, the Department in its *Preliminary Results* did not use the reporting code which Borusan had added for the additional specification, but made modifications for the specification/grade combinations in question, as it had done previously for other specification/grade combinations earlier in the review.⁷⁰

No interested parties have specifically challenged the modification of the reporting codes assigned to the specification EN 10217 grades. In fact, no interested parties other than Wheatland have continued to object to the modification of the reporting requirements for the GRADE physical characteristic provided by the Department to respondents early in this review, including not only the two respondents, but also two other domestic interested parties (*i.e.*, U.S. Steel Corporation and Allied Tube and Conduit). In the intervening months since the Department directed both respondents to modify their reporting of the GRADE physical characteristic (on September 13, 2013 for Toscelik and on November 12, 2013 for Borusan), other interested parties could have made an entry of appearance to challenge the Department's modification, but none did so. As noted by the Department in its *Preliminary Results*, the Department has adopted this approach in reviews of other orders involving the same or almost the same scopes, most recently the order on circular welded pipes from Korea.⁷¹ The Department has also recently used specification/grade combinations in defining the products in recent reviews of the antidumping duty order on certain circular welded carbon steel pipes and tubes from Taiwan.⁷² And as acknowledged by Wheatland, the Department also recently used specification/grade combinations in defining the products in recent less-than-fair-value investigations covering such products.⁷³

⁶⁹ See Borusan's March 4, 2014 supplemental questionnaire response at 1-3.

⁷⁰ See the Borusan Preliminary Analysis Memorandum at 3.

⁷¹ In its March 14, 2014 letter from Wheatland to the Secretary of Commerce entitled "Circular Welded Carbon Steel Pipes And Tubes From Turkey: Rebuttal Factual Information" ("Wheatland March 14, 2014 letter"), Wheatland provides excerpts from the questionnaire responses of two respondents in a recent review of the Korean order, prior to the Department's adoption of the revised GRADE field methodology. Those excerpts identify inconsistencies within that review as well, with Hyundai HYSCO (Attachment 1) having reported certain "grades" (Ordinary; Pressure Service; General Structural; Machine Structural; Unfinished Conduit; and Pile) and Husteel (Attachment 2) having reported others (1 = Pressure Pipe; 2 = Ordinary Standard Pipe; 3 = General Structural (Fence Tubing)). These vary not only from those listed in the Department's questionnaire (which contained virtually the same language as that in the original questionnaire issued in this Turkey review), but also from each other, and from all variations identified in the Department's analysis above of various reviews under the Turkish order.

⁷² See, *e.g.*, *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 34335 (June 7, 2013), and accompanying Decision Memorandum ("In accordance with section 771(16) of the Act, we compared the EP and NV of products produced by Shin Yang (or its predecessor company, Yieh Phui) and sold in the U.S. and home markets which were either identical or most similar in terms of the physical characteristics to the product sold in the United States. In descending order of importance for matching purposes, these physical characteristics are specification/grade, diameter, wall thickness, coating, and end finish."), unchanged at *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 71563 (November 29, 2013).

⁷³ See, *e.g.*, *Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 77 FR 32531, 32533 (June 1, 2012),

Consequently, for the final results, the Department is making no changes from the reporting methodology for the GRADE physical characteristic which it utilized for its *Preliminary Results*.

Issue 2: Whether the Department Should Collapse ASTM A53 grade A and ASTM A53 grade B into a Single Grade Category

Wheatland asserts that the Department's attempts during the *Preliminary Results* to revise the grade model match methodology hierarchy to be consistent across the various circular welded pipe cases has not only been unjustified, but also unsuccessful, as evidenced by its decision to not collapse ASTM A53 grade A products with ASTM A53 grade B products.

Wheatland argues that the Department in other circular pipe cases has taken the practice to collapse ASTM A53 Grade A and ASTM A53 Grade B, whenever it resulted in a difference in the calculated margin. In this particular case, Wheatland asserts that there have been no changes in facts, and for the Department to abandon its practice of considering ASTM A53 grade A and ASTM A53 grade B as falling in the same GRADE category would be unlawful, given it has not explained the basis for the change.⁷⁴

Wheatland acknowledges that in *Circular Pipe from the UAE*, the Department did use different grade codes for ASTM A53 Grade A and ASTM Grade B. However, Wheatland states the petitioners in that case apparently did not have issues with this deviation because it did not affect the calculated weighted-average dumping margin. Wheatland suggests the Department's adoption of that methodology in *Circular Pipe from the UAE* was not based on any analysis.⁷⁵ In contrast, according to Wheatland, the Department's decision to collapse ASTM A53 grade A and ASTM A53 grade B in various reviews of the antidumping duty order on circular welded non-alloy steel pipe from Korea has been based on exhaustive analysis.⁷⁶

Wheatland further argues that Borusan's claim that Wheatland provided no authority for its argument the model match criteria (*i.e.*, the reporting requirements for the physical characteristics used to define the merchandise under consideration) used in one country should not differ for other countries is incorrect. Wheatland claims that it provided authority demonstrating that the Department adopted the collapsing of ASTM A53 grades finding in *Circular Pipe from Korea* when examining the same issues in a recent review of the order on

unchanged at *Circular Pipe from Oman*; see also *Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 77 FR 32539, 32546 (June 1, 2012), unchanged at *Circular Pipe from the UAE*.

⁷⁴ See Wheatland's case brief at 9-10.

⁷⁵ *Id.* at 10-11.

⁷⁶ *Id.* at 11, citing *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of the Antidumping Duty Administrative Review*, 76 FR 36089 (June 21, 2011) and accompanying Issues and Decision Memorandum at comment 4 (*Circular Pipe from Korea 2011*).

circular welded carbon steel pipes and tubes from Thailand.⁷⁷ Wheatland further contends that Borusan's claim that collapsing the two grades will be timely and burdensome to the Department is incorrect, and that such a modification can be done easily with the SAS programming language that Wheatland has provided.⁷⁸

Borusan claims that the Department should continue to reject Wheatland's request to collapse ASTM A53 grades A and B. Borusan agrees that the Department, in *Circular Pipe from Thailand 2012* and in recent reviews of the Korea order, collapsed ASTM A53 Grades A and B based on the factual evidence presented, but it does not establish precedence that must be followed in this review.⁷⁹ Borusan further comments that Wheatland failed to mention that in the current administrative review of circular pipe from Korea, the Department also revised its grade model match to be consistent with the revised criteria used in more recent investigations, no longer collapsing ASTM A53 grades A and B.⁸⁰ Borusan notes that given inconsistencies between Korea and Thailand reviews versus more recent (*e.g.*, UAE) investigations, Wheatland's argument that "it would be unlawful for the Department to abandon" the practice of collapsing the ASTM A53 grades is misplaced. Borusan states a practice used in two prior reviews does not constitute an "agency practice."⁸¹

Borusan asserts that Wheatland acknowledges petitioners (including Wheatland itself) in the recent investigations on circular pipe (*e.g.*, *Circular Pipe from the UAE*, *Circular Pipe from Oman*, *etc.*) did not comment on the segregation of ASTM A53 grade A and ASTM A53 grade B products "apparently because it did not affect the margin."⁸² Borusan notes the model match criteria should not depend upon margin results, something Wheatland itself acknowledges when it states "grade code designations should adhere to a defined logic...."⁸³

Regarding Wheatland's claim that the Department's decision in the recent investigations (*e.g.*, *Circular Pipe from the UAE*) was not based on exhaustive analysis of substantive comments, in contrast to its decision in the reviews of the order on circular pipe from Korea, Borusan reiterates Wheatland did not submit any comments in the investigations. Borusan also notes that the

⁷⁷ See Wheatland's case brief at 11 citing *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review*, 77 FR 20782 (April 6, 2012), unchanged in *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review*, 77 FR 61738 (October 11, 2012) (*Circular Pipe from Thailand 2012*).

⁷⁸ *Id.* at 11-12.

⁷⁹ See Borusan's rebuttal brief at 15, citing *Shandong Huarong Machinery Co., Ltd. v. United States*, 30 CIT 1269, 1293 n.23, 435 F. Supp. 2d 1261, 1282 & n.23 (CIT 2006).

⁸⁰ See Borusan's rebuttal brief at 15.

⁸¹ *Id.* at 16-17, citing *Fischer A.A. Comercio, Industria and Agricultura v. United States*, (CIT 2014) at 5-6.

⁸² *Id.* at 15, citing Wheatland's case brief at 10.

⁸³ *Id.*, citing Wheatland's case brief at 4.

Department's first decision to collapse the ASTM A53 grades under the Korea order was made in 2010, prior to the model match comment period in the recent investigations.⁸⁴

Moreover, Borusan states that the conflicting grade model match hierarchies used in circular pipe from Korea and Thailand reviews and the UAE investigations, there are no consistent agency practice on collapsing ASTM Grades A and B.

Department's Position: The Department disagrees with Wheatland and will continue to assign distinct reporting codes for both ASTM A53 grade A and ASTM A53 grade B for the GRADE physical characteristic.

Wheatland is correct that the Department found that ASTM A53 grade A and ASTM A53 grade B should be treated as identical in recent reviews of the order on circular welded non-alloy steel pipe from Korea. However, in those reviews, the reporting methodologies of the Korean respondents were in response to the broad reporting category aspect of the Department's instructions (that is, reporting not based upon individual specification/grade combinations or even individual specifications, but rather based on broad categories of products). Under such circumstances, it was reasonable for the Department to consider ASTM A53 grade A and ASTM A53 grade B to fall in the same "grade" grouping, because the reporting requirements were not at a detailed specification or specification/grade combination level of detail, and the Department had not required a specification/grade reporting basis for the GRADE physical characteristic. For example, in the 2011/2012 administrative review, the Department provided essentially the same reporting requirements regarding the GRADE physical characteristic as it did initially in this review of the Turkey order.⁸⁵ In response, Hyundai HYSCO (HYSCO), one of the respondents in the Korean review, reported the GRADE physical characteristic based on the following group categories:

HYSCO has reported the pipe grade in the field GRADEAH as follows:

- 1 = Ordinary
- 2 = Pressure Service
- 3 = General Structural
- 4 = Machine Structural
- 5 = Unfinished Conduit
- 6 = Pile

HYSCO also indicated it was providing "a table at Exhibit B-7 identifying both the grade of pipe, *i.e.* ordinary, pressure service, etc., and the corresponding specifications...."⁸⁶ So while

⁸⁴ *Id.* at 16, citing *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review*, 75 FR 34980 (June 21, 2010) ("*Circular Pipe from Korea 2010*") and Wheatland January 14, 2014 Letter at Exhibit 1.

⁸⁵ See Wheatland March 14, 2014 letter at Attachments 1 and 2.

⁸⁶ *Id.* at Attachment 1.

HYSCO reported somewhat less broad product categories than those identified in the Department's questionnaire (*i.e.*, "ordinary" standard pipe, structural pipe, conduit, *etc.*), it did report broad product groupings as "grades."

In that same review, another respondent, Husteel Co. Ltd. (Husteel), also reported the GRADE physical characteristic based on broad group categories:

Husteel has reported the grade of pipe maintained in its sales system as follows:

- 1 = Pressure Pipe
- 2 = Ordinary Standard Pipe
- 3 = General Structural (Fence Tubing)⁸⁷

Both Korean respondents reported categories of products as "grades" in the GRADEH and GRADEU fields, and with respect to the categorization of ASTM A53 grade A and ASTM A53 grade B, the issue was whether the Department should allocate each of those two specification/grade combinations into different broad product category "grades" (*e.g.*, ordinary standard pipe versus pressure pipe) or categorize them in one single broad category (ordinary standard pipe). The Department determined it was reasonable to consider the ASTM A53 specification to fall under the single ordinary standard pipe "grade" grouping, despite certain differences between the requirements of each grade under the specification, because the differences were not substantial enough to warrant assigning them to different broad product category "grade" groupings. The Department further noted that "ASTM A-53 is the only specification for which the respondents have categorized the grades within the specification separately for model match purposes."⁸⁸ In other words, the respondents had not proposed segregating any other specification/grade combinations when it came to classifying them in broad product category groupings referred to as "grades," and the Department concluded that ASTM A53 grade A and ASTM A53 grade B did not qualify as exceptions.

In short, the Department "continue{d} to determine that ordinary and pressure pipe are distinct grades for purposes of this review, but that {ASTM A53} Grade A and {ASTM A53} Grade B are properly treated as ordinary {standard} pipe."⁸⁹ If "ordinary" standard pipe and "pressure pipe" are considered "grades," then it is reasonable to find that ASTM A53 grade A and ASTM A53 grade B should both be categorized in the "ordinary" standard pipe "grade," given the ASTM A53 specification is recognized as a standard pipe specification.⁹⁰ However, if broad product categories such as ordinary standard pipe are not identified as "grades" (and neither

⁸⁷ *Id.* at Attachment 2.

⁸⁸ See *Circular Pipe from Korea 2011*, and accompanying Issues and Decision Memorandum at Comment 4.

⁸⁹ *Id.*

⁹⁰ *Id.* ("The ITC report states that standard pipe is made primarily to ASTM A-53, A-135, etc., as well as to other industry standards, such as BS-1387. While respondents asserted that Grade B is an example of pressure pipe and Grade A is an example of ordinary pipe, there is no distinction in the ITC report between the two products. All ASTM A-53 is listed under standard pipe.").

respondent in this review initially reported the GRADEH and GRADEU fields in such manner), but rather if specification/grade combinations are identified as grades, the rationale articulated in *Circular Pipe from Korea 2011* (and, similarly, *Circular Pipe from Korea 2010*) does not apply. Once specification/grade combinations replace broad product categories as “grades” for reporting the GRADE physical characteristic, it is reasonable to segregate ASTM A53 grade A from ASTM A53 grade B, because other specification/grade combinations would also properly be considered to differ from each other according to the different properties required by each individual pipe specification/grade combination.

The reporting of the respondents in the reviews cited by Wheatland (*e.g.*, *Circular Pipe from Korea 2011*), like the initial reporting of Toscelik and Borusan in this review, could not be fully consistent with the Department’s instructions, as groupings of categories of products are not grades; rather, the Department’s initial instructions regarding the GRADE physical characteristic equated the two terms. The Department is ensuring greater consistency with the changes in this review. Also, with regard to the importance of consistency in the reporting requirements, as noted above the method of identification of “grades” by each of the Korean respondents varied in those reviews cited by Wheatland, not only at level of detail (*e.g.*, HYSCO segregating multiple “structural” pipe groupings, versus only one for Husteel), but also with respect to reporting codes (*e.g.*, the respondents ordered the reporting codes for different categories in different ways).⁹¹ In order to better reflect differences in products by actual grades, the Department indicated in a recent review of the Korean order it would require the respondents in the subsequent review to report the GRADE physical characteristic based on specification/grade combinations.⁹² As a result, in some instances different grades in the same specification are being segregated from each other (*e.g.*, ASTM A53 grade A versus ASTM A53 grade B). This change, like the

⁹¹ See Wheatland March 14, 2014 letter at Attachments 1 and 2.

⁹² See *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 78336 (December 26, 2013), and accompanying Decision Memorandum, under “Product Comparisons” section (unchanged in *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 37284 (July 1, 2014)):

In many other circular welded pipe proceedings, the Department instructs parties to report the actual industrial specification and grade combinations for the “grade” physical characteristic rather than product categories. In the Department’s experience, products in different specification and grade combinations are often not identical, but they have differences (*e.g.*, in chemical and physical properties, production methods, testing requirements, *etc.*). We note that reporting the actual industrial specification and grade combination will allow us to take into consideration the differences between different specifications and grade combinations that is not possible if two specifications and grade combinations are in the same product category but are not absolutely identical.

Therefore, the Department is giving notice in these preliminary results that we intend to change the reporting of this physical characteristic for the next review, which is scheduled to be initiated in December 2013. Specifically, we intend to instruct parties to report the actual industry specification and grade combinations of pipe rather than product categories under the “grade” physical characteristic. In that review, we will solicit comments on the weightings of each specification and grade combination for use in determining the most appropriate comparison model for U.S. sales.

comparable one made in this current review of the Turkish order, also enhances the likelihood of consistency and predictability, as it avoids the misleading application of the term “grade” (understood in the steel industry as a subgrouping within a pipe specification) to broad product categories that each cover various steel specifications, and prevents interpretations of the term “grade” in other *ad hoc* ways.

Furthermore, as noted by Wheatland, the Department segregated ASTM A53 grade A and ASTM A53 grade B from each other in recent circular welded pipe investigations. Wheatland claims this segregation resulted “simply from respondents’ unexamined system.”⁹³ Rather, the Department considered the proposals for the reporting requirements for each physical characteristic and the model matching hierarchy in those investigations and, following its analysis, the Department adopted the reporting requirements and model matching hierarchy, including the reporting requirements for the GRADE physical characteristic based on specification/grade combinations which Wheatland now opposes.⁹⁴ Wheatland, as one of the petitioners in those recent pipe investigations, certainly had an opportunity to contest the methodology adopted by the Department soon after the outset of those investigations.⁹⁵ However, it did not do so.⁹⁶ Regarding Wheatland’s claim about the apparent lack of impact on the margin in the UAE investigation of the methodology in question, Wheatland does not provide evidence supporting this claim, nor does it explain why this should be relevant in the context of determining the model match methodology.

With regard to the Thailand order, in its case brief Wheatland referred to its January 2, 2014 submission for a reference to the collapsing of the ASTM A53 grades in a review of that order.⁹⁷ The original document cited by Wheatland appears to be an “analysis memo” that is not on the record of the current review. However, the Department did locate a reference to consolidated treatment of the ASTM A53 grades in a new shipper review of that order. In that new shipper review, the Department treated the two grades as identical, stating it had “combined ASTM A53 Grade A and Grade B sales in the home market, consistent with the product matching criteria.”⁹⁸ In the current review, in contrast, the original “product matching criteria” were replaced with a clarification that focused upon specification/grade combinations, and combining ASTM A53 grade A and ASTM A53 grade B would be inconsistent with that latter methodology, as discussed in more detail below.

⁹³ See Wheatland case brief at 10-11, citing its January 14, 2014 letter at Exhibit 1.

⁹⁴ See e.g. *Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 77 FR 32539, 32546-47 (Jun 1, 2012), unchanged in *Circular Welded Pipe from the UAE*.

⁹⁵ *Id.* at 32540.

⁹⁶ *Id.* at 32546 (“The Department identified five criteria for matching U.S. sales of subject merchandise to normal value (specification/grade, diameter, wall thickness, coating, and end finish) and, as noted above, gave parties to this and the concurrent AD investigations an opportunity to comment within a certain deadline. The only timely comments submitted were from UTP and its U.S. affiliate, Prime Metal.”).

⁹⁷ See Wheatland case brief at 10 (narrative and footnote 29), citing Wheatland January 2, 2014 letter at 3 (note 7).

⁹⁸ See *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty New Shipper Review*, 75 FR 4529, 4530 (January 28, 2010).

Justification for consolidating ASTM A53 grade A from ASTM A53 grade B for product classification purposes exists in the Department rulings in Korean reviews that found the two grades to be identical under the broad product category grouping methodology. As noted, if “ordinary standard pipe” is considered a “grade,” then products classified under an “ordinary standard pipe” specification such as ASTM A53 may reasonably be considered to fall under the same “grade.” However, once the assignment of grades is made based on actual pipe grades and the properties of those grades as defined by specifications (*i.e.*, based on specification/grade combinations), the variations between ASTM A53 grade A and ASTM A53 grade B that seemed minor in the context of broad product category groupings become significant. For example, in the 2008/2009 review of the Korea order, in discussing differences in minimum yield and tensile strength requirements of both grades, the Department noted “[i]t is not unusual for an industry standard to include more than one grade and the differences between the tensile and yield strengths of {ASTM A53} Grade A and {ASTM A53} Grade B are no different than the differences between grades within other standards.”⁹⁹ Under a specification/grade combination methodology, which focuses on variations between actual grades rather than differences between broad product category groupings, such variations in strength requirements feature prominently, such that many grades in fact are named based on minimum yield strength requirements. For example, the grades in the EN 10219 specification possess names that coincide with the minimum specified yield strength that must be present in the product (*e.g.*, EN 10219 grade 235 must have a minimum yield strength of at least 235 MPa, EN 10219 grade 355 must have a minimum yield strength of at least 355 MPa, *etc.*).¹⁰⁰

In the 2008/2009 review of the Korea order, the Department listed a variety of similarities in ASTM A53 grade A and ASTM A53 grade B that exist because both are covered under the same general requirements of the ASTM A53 specification. The Department also discussed a variety of claimed differences between ASTM A53 grade A and ASTM A53 grade B, and concluded that the actual differences (most notably, differences in the strength requirements and in chemistry), were “minor and commercially insignificant.” However, they were “minor and insignificant” in the context of whether to classify them both as “ordinary standard pipe” or, alternatively, to classify ASTM A53 grade B in a separate “pressure pipe” category.¹⁰¹ The Department acknowledged that the required tensile and yield strengths of ASTM A53 grade B exceed those of ASTM A53 grade A by 25 and 17 percent, respectively, making Grade B pipe able to withstand more pressure. Although the Department cited evidence that in some

⁹⁹ See *Circular Welded Pipe from Korea 2011*, and accompanying Issues and Decisions Memorandum at Comment 4.

¹⁰⁰ See Borusan’s March 4, 2014 Section A-C supplemental questionnaire response at Exhibit A-30. Furthermore, these grades exhibit additional differences as well – *e.g.*, the grade 235 product has higher minimum elongation requirement than the grade 355 product, *etc. Id.*

¹⁰¹ See *Circular Welded Pipe from Korea 2011*, and accompanying Issues and Decisions Memorandum at Comment 4 (“{The differences do} not make them so different as to justify different treatment. Therefore, we are continuing to classify {ASTM A53} Grade B as ordinary pipe, while leaving the other products reported as pressure pipe as classified as such for the final results.”).

circumstances use of both grades is interchangeable, the Department's primary reason for dismissing variations between the ASTM A53 grades as minor was that such differences in mechanical and chemical requirements commonly exist between grades in specifications.¹⁰² If one is grouping specifications into broad product category groupings, such a difference between grades may not be relevant; but if one is comparing actual steel pipe grades to each other, such differences are significant. In addition, the weld seam of ASTM A53 grade B product, unlike the weld seam of ASTM A53 grade A product, can contain no untempered martensite, which involves additional processing (*e.g.*, heat treatment to a minimum of 1000 degrees Fahrenheit).¹⁰³

To summarize, the Department has in some proceedings segregated the ASTM A53 grade A and ASTM A53 grade B products from each other, and in others it has not. But in those where specification/grade combinations were used for the reporting of the GRADE physical characteristic, including recent pipe investigations and in the current review of the Korea order, it has segregated them. Such a segregation of grades within specifications for reporting GRADE physical characteristic is appropriate under a specification/grade combination methodology, given an attempt to classify pipes by actual pipe grades should reflect the fact that actual pipe grades exist to differentiate one product from another. While certain grades within a specification (or even across specifications) need not always vary enough from each other to warrant segregation for model match purposes, ASTM A53 grade A and ASTM A53 grade B differ enough from each other to warrant such segregation under the specification/grade methodology now being utilized for the reporting of the GRADE physical characteristic.

Issue 3: Duty Drawback and Treatment of the Resource Utilization Support Fund Tax

Wheatland asserts that the Department should not make an upward adjustment to U.S. price for Borusan's modified extra duty adjustment (OTHER2U) field because such an adjustment would be inconsistent with what the statute requires for a duty drawback adjustment. Wheatland argues that the amounts reported in the field OTHER2U are not import duties, but rather tax payments. Wheatland states that this tax program (referred to as the "Resource Utilization Support Fund" or "KKDF") was "...established to fund the investments and to lower the costs incurred in special loans in accordance with development plans and yearly programs." Thus, Wheatland argues that Borusan's requested adjustment relates to a tax and not an import duty.¹⁰⁴

Wheatland acknowledges that the Department classified this as a duty drawback adjustment in the prior review, but noted that the Department relied upon a very old case involving a "defense tax" to justify allowing the adjustment.¹⁰⁵ Wheatland argues that precedent was superseded by a

¹⁰² *Id.*

¹⁰³ See *e.g.* Borusan's August 6, 2013 Section A questionnaire response at Exhibit A-16 (ASTM A53 specification, at paragraph 4.3).

¹⁰⁴ See Wheatland's case brief at 12-13.

¹⁰⁵ *Id.* at 13, citing *Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 79665 (December 31, 2013) ("*Circular Pipe from*

later case in which the Department determined duty drawback adjustments should be limited to “ordinary” duties, which it characterizes as import duties associated with a normal customs tariff schedule.¹⁰⁶ Wheatland states that the Department failed to address this conflicting precedent in the final results of the previous review or in the *Preliminary Results*.¹⁰⁷

Wheatland further argues that the Department has described import duties eligible for duty drawback treatment as those which are (1) assessed in conjunction with other duties and administered in the same manner, and (2) not levied on duty-free merchandise.¹⁰⁸ Wheatland asserts that the description of the KKDF tax demonstrates that it does not meet these requirements.¹⁰⁹

Moreover, Wheatland contends the Department’s position is not consistent with the fact that the duty drawback provision of the statute is limited to those import duties that “have been rebated or which have not been collected by reason of exportation.”¹¹⁰ Wheatland states that there are reasons other than re-exportation of the final product that results in the KKDF not being collected.¹¹¹ Wheatland asserts that the Department should therefore disallow the KKDF tax as a duty drawback adjustment or explain how its position is consistent with the statute.

In addition, Wheatland contends that regardless of what was decided in the prior review about the KKDF tax, the record of this review does not support granting a duty drawback adjustment related to the KKDF tax. Wheatland argues that in the prior review the Department appears to have confused the situation with respect to Borusan’s normal custom duties and related duty drawback program versus the KKDF tax program and the refund of those taxes. Specifically, Wheatland states that the Department concluded that a KKDF tax “must be paid to enter goods into Turkey.”¹¹² Wheatland argues that even applying this rationale from the prior review, the

Turkey 2011-2012”) and accompanying Issues and Decision Memorandum at comment 4, in turn citing *Color Picture Tubes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 56 FR 19084 (April 25, 1991)(*Color Picture Tubes from Korea*) and accompanying Issues and Decision Memorandum at comment 6.

¹⁰⁶ *Id.* at 13, citing *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review*, 69 FR 61649 (October 20, 2004) (“*Circular Pipe from Thailand 2004*”), and accompanying Issues and Decision Memorandum at Comment 4 (“...antidumping duties imposed by the country of exportation are special duties that should be distinguished from ordinary customs duties imposed by such countries,” and, therefore, “...we will not make an adjustment for exempted or rebated foreign antidumping duties by adding such duties to U.S. export or constructed export price for purposes of duty drawback under section 772(c)(1)(B) of the Act.”).

¹⁰⁷ *Id.* at 14.

¹⁰⁸ *Id.* at 14, citing *Huffy Corp. v. United States*, 632 F.Supp. 50, 57 (CIT 1996) (“*Huffy Corp.*”).

¹⁰⁹ *Id.* at 14, citing Borusan’s August 28, 2013 Section C questionnaire response (“Borusan Section C response”) at Exhibit C-12 (page 143). Wheatland’s argument references information the parties have been classifying as proprietary information.

¹¹⁰ *Id.* at 15, citing section 772(c)(1)(B) of the Act.

¹¹¹ *Id.*, citing Borusan Section C response at Exhibit C-14 (page 11).

¹¹² *Id.* at 16, citing *Circular Pipe from Turkey 2011-2012*, and accompanying Issues and Decision Memorandum at Comment 4.

record evidence in this review does not support this conclusion, because for various reasons some hot-rolled steel coil imports were exempted from the KKDF tax.¹¹³ Finally, Wheatland notes that the Department concluded in another proceeding that the KKDF tax is “levied on financial transactions... not on goods or services used in making the product.”¹¹⁴

Borusan contends that the Department’s decision to grant Borusan a duty drawback adjustment for the exempted KKDF tax is consistent with law and the Department’s practice. Borusan asserts that in the previous review the fact that the KKDF tax was not identified as an import duty tax is not determinative, and even if the Department did not characterize the KKDF tax as an import duty, 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.¹¹⁵ Here, as in *Color Picture Tubes from Korea*, Borusan claims that the KKDF tax is a 6% tax on imports purchased with deferred payments that is exempted if the goods are exported under the Turkish duty drawback system.¹¹⁶ Borusan asserts that it would have paid the KKDF tax but for the fact that the coil was imported under an inward processing certificate as part of Turkey’s duty drawback program.¹¹⁷ Borusan states that the record shows that the KKDF tax is assessed in conjunction with other duties and administered in the same manner as import duties.¹¹⁸ Borusan also cites cases in which duty drawback adjustments were granted for taxes or fees that are not “import duties.”¹¹⁹

Borusan also rebuts Wheatland’s argument that *Color Picture Tubes from Korea* has been superseded by the *Circular Pipe from Thailand 2004* case. Borusan claims that in *Circular Pipe from Thailand 2004*, the Department denied a respondent’s request for duty drawback adjustment for antidumping duties owed on imported hot coil that were not paid if re-exported, and that the Department’s interpretation in that case was under another statutory provision, namely, section 772(c)(2)(A) of the Act, dealing with reductions to CEP or EP for United States import duties that are incident to bringing subject merchandise to the United States. Borusan states that the Department found that since it treats antidumping duties as special duties for purposes of that section of the Act, it would consistently treat antidumping duties as special

¹¹³ *Id.* at 16-17, citing Borusan Section C response at 37 and Exhibit C-14 (page 11).

¹¹⁴ *Id.* at 17, citing *Final Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Turkey*, 67 FR 55815 (August 30, 2002) and accompanying Issues and Decision Memorandum at comment 6 and comment 8 (*Wire Rod from Turkey*).

¹¹⁵ See Borusan’s rebuttal brief at 18, citing *2011-2012 Circular Pipe from Turkey* and accompanying Issues and Decision Memorandum at 17-18, in turn citing *Color Picture Tubes from Korea* and accompanying Issues and Decision Memorandum at comment 6.

¹¹⁶ See Borusan’s rebuttal brief at 18, citing Borusan Section C response at 32-37, Exhibit C-12 (marked as page 143 from the 2011/2012 review sales verification Exhibit 15), and Exhibit C-14 (page 11 “Fund Rate”).

¹¹⁷ *Id.* at 18-19, citing Borusan Section C response at 33 and Exhibit C-14 (page 11).

¹¹⁸ *Id.* at 19-20, citing Borusan Section C response at 33, 37, and Exhibit C-14 (page 11).

¹¹⁹ *Id.* at 19, citing *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 70 FR 28271 (May 17, 2005), and accompanying Issues and Decision Memorandum at Comment 3 (granting duty drawback adjustment for “Merchant Navy” taxes), and *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Mexico*, 64 FR 30790, 30813 (June 8, 1999) (granting duty drawback adjustment for customs processing fees).

duties and thus not “import duties” for purposes of increasing CEP or EP under section 772(c)(1)(B) of the Act. Borusan concludes *Color Picture Tubes from Korea* dealt with a more analogous situation to this review than *Circular Pipe from Thailand 2004* because the former involved exemption from a defense tax, rather than antidumping duties which are treated as “special duties” by the Department. Borusan adds that to the extent *Huffy Corp* is relevant, it was superseded by *Color Picture Tubes from Korea*.¹²⁰

Borusan rejects Wheatland’s citation to the Federal Circuit’s ruling in *Wheatland Tube* finding that the Department is not required to reduce CEP or EP by section 201 duties paid upon importation because those duties, like antidumping duties, are “special duties.”¹²¹ Borusan states that case related to “special duties” and the question of whether or not to decrease CEP or EP, and has nothing to do with increases to CEP under the duty drawback provision in section 772(c)(1)(B) of the Act.

Regarding Wheatland’s contention that the Department’s position is not consistent with the fact that the duty drawback provision of the statute is limited to those import duties that have been rebated or which have not been collected by reason of exportation, and that there are reasons other than re-exportation of the final product that results in the KKDF not being collected, Borusan states Wheatland is mistaken. Borusan states its Section C questionnaire response indicates the KKDF is a tax/duty on imports purchased with deferred payments,” that “{a}ll hot rolled coils imported under an Inward Processing Certificate pursuant to Turkey’s Duty Drawback program are exempt from this tax,” and that “{t}he duty/tax is collected at the time of entry of the goods into the customs jurisdiction of Turkey.”¹²² Borusan states that for all imports of hot rolled steel coil that were imported under an Inward Processing Certificate and that had deferred payment terms Borusan was exempt from payment of the KKDF tax, and that, fully consistent with the statute, Borusan is only claiming the duty drawback for KKDF tax exemptions that were received under the Turkish duty drawback system, and is not claiming the exemption for purchases that were not.¹²³

Moreover, Borusan states that the facts of this case support granting Borusan a duty drawback adjustment for the KKDF duty/tax. Borusan claims that Wheatland takes one statement in the prior review and argues that the record in this review does not support the conclusion of this entire proceeding. Borusan agrees with the Department statement in the prior review that the KKDF tax “must be paid to enter goods into Turkey,” but adds that the tax is exempted if the company imports under an Inward Processing Certificate. Borusan emphasizes it only claimed a duty drawback adjustment for the KKDF tax from which it was exempted by virtue of importing under the Inward Processing Certificate as part of Turkey’s duty drawback program.¹²⁴ Borusan

¹²⁰ *Id.* at 19-20.

¹²¹ *Id.* at 20, citing *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1360-66 (Fed. Cir. 2007) (“*Wheatland Tube*”).

¹²² *Id.* at 21, citing Borusan’s Section C response at 37.

¹²³ *Id.* at 21.

¹²⁴ *Id.* at 22.

asserts that the Department should continue to follow its consistent practice in the standard pipe reviews, which the Department also followed in the recently completed *OCTG from Turkey*¹²⁵ investigation.

The Department's Position: The Department disagrees with Wheatland and continues to find that Borusan has met the requirements of the Department's duty drawback adjustment for the adjustment reported in its OTHER2U field for KKDF taxes.

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."¹²⁶ "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')."¹²⁷ 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.¹²⁸

The burden to establish entitlement to a duty drawback adjustment lies with the respondent.¹²⁹ Here, Borusan participates in Turkey's duty drawback program with respect to imported hot-rolled coil used to produce standard pipe exported to the United States. Borusan is exempted from paying an amount of duties on imported raw materials associated with a particular shipment of subject merchandise to the United States upon exportation. The amount reported in the OTHER2U field represents the amount of KKDF duty/tax on imports that is exempted for the goods that are exported.¹³⁰

We find that Borusan has met the requirements of the Department's duty drawback adjustment for the KKDF taxes. First, Borusan proved that the relevant import duties and rebates were

¹²⁵ See *Certain Oil Country Tubular Goods From the Republic of Turkey: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances, in Part*, 79 FR 41971 (July 18, 2014) ("*OCTG from Turkey*"), and accompanying Issues and Decision Memorandum at Comment 1.

¹²⁶ See Section 772(c)(1)(B) of the Act

¹²⁷ *Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011) (*Saha Thai*).

¹²⁸ See *id.* at 1340; accord *Allied Tube & Conduit Corp. v. United States*, 374 F. Supp. 2d 1257, 1261 (CIT 2005).

¹²⁹ See *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1040 (Fed. Cir. 1996).

¹³⁰ See Borusan's section C response at 32-37 and Borusan's December 6 Supp. at 24-26.

directly linked to, and dependent upon, one another.¹³¹ 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.¹³² In particular, Borusan provided evidence on 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 the Department found no discrepancies.¹³³ Thus, the Department finds that Borusan has provided sufficient evidence on the record that KKDF taxes were actually refunded for duty drawback purposes, or that Borusan was properly exempted from paying the taxes, such that it warrants a duty drawback adjustment.¹³⁴

We disagree with Wheatland that the record does not support a duty drawback adjustment for the KKDF taxes. Regarding Wheatland's argument that the KKDF taxes are not an import duty but a tax, the Department has determined that the name of a tax does not matter in this context if it functions as a duty on imports. This is supported not only by long-standing precedent, but also by recent decisions.¹³⁵ Even though the Department concluded in *Wire Rod from Turkey* that the KKDF taxes are a tax levied on financial transactions, not on goods and services, this again does not prevent the KKDF taxes from functioning as a duty on imports, as it did in this review.

Regarding Wheatland's citing of *Circular Pipe from Thailand 2004*, we agree with Borusan that case is not analogous because it deals with another statutory provision involving the interpretation of U.S. import duties.¹³⁶

Regarding the need for the exemption to be linked to the exportation of the subject merchandise, Borusan has demonstrated that exemptions from the KKDF taxes were contingent upon the re-exportation of the subject merchandise.¹³⁷ Regarding the second prong of the analysis, Borusan submitted sample documentation pertaining to the company's applications to the Turkish government for duty drawback during the POR, with no indication that there were insufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise,¹³⁸ with some adjustment required (see Issue 4).

¹³¹ *Id.* and exhibits C-12 and C-14.

¹³² *Id.*

¹³³ See Borusan's section C response at 33-35 and exhibits C-12 and C-14.

¹³⁴ Regarding Wheatland's reference to the Department's statement in *Circular Pipe from Turkey 2011-2012* that the KKDF must be paid to enter goods into Turkey, it should be understood that any tax is potentially subject to exemptions. As noted above, the statute, as interpreted in *Saha Thai*, allows for duty drawback adjustments even if the duty (or in this instance, the tax functioning as a duty) is exempted.

¹³⁵ See, e.g., *Color Picture Tubes from Korea* and accompanying Issues and Decision Memorandum at comment 6; see also *OCTG from Turkey* and accompanying Issues and Decision Memorandum at comment 1.

¹³⁶ See *Circular Pipe from Thailand 2004*, and accompanying Issues and Decision Memorandum at Comment 4.

¹³⁷ See Borusan's section C response at 32-37 and exhibits C-12 and C-14.

¹³⁸ See Borusan's August 28, 2013, Section C questionnaire response at 35-36 and Exhibit C-14.

Wheatland is incorrect in arguing that the claimed adjustment is not consistent with the fact that the duty drawback provision of the statute is limited to those import duties that “have been rebated or which have not been collected by reason of exportation.” The record indicates imports of coil were exempt from payment of the KKDF tax as a result of deferred payment terms,¹³⁹ and as noted above, the aforementioned sample documentation supports the conclusion the only duty drawback adjustments being granted relate to export pipe quantities associated with imports exempted from the tax.

Issue 4: Duty Drawback and Yield Loss Factor

Borusan asserts that it reported its duty drawback adjustment (DTYDRW1U) field reflecting the amount of duties on imported raw materials associated with a particular shipment of subject merchandise to the United States that is exempted upon export. Borusan states it also reported, in the extra duty adjustment (OTHER1U) field, the amount of KKDF duty/tax on imports that were exempted for the goods that were exported.¹⁴⁰ However, Borusan claims that the Department incorrectly reduced Borusan’s duty drawback adjustments in the *Preliminary Results* by using the modified duty drawback adjustment (DTYDRW2U) and OTHER2U fields, which reflect the yield loss between the imported raw materials (steel coils) and the exported pipes, rather than the DTYDRAW1U and OTHER1U fields, which do not.¹⁴¹

Borusan states that according to the statute, a respondent’s export price shall be increased by the amount of any duties imposed by the country of exportation which has been rebated, or which have not been collected, by reason of exportation of the subject merchandise to the United States.¹⁴² Borusan asserts that it took full advantage of the duty exemption program under Turkish law where the quantity of a coil can be greater than the quantity of the finished products that it exports. Borusan states that the difference is the yield loss that is incurred in producing the finished product, and that Borusan receives the full drawback on the entire quantity of the coil imported (including what ultimately becomes the yield loss in the process of transforming the coils into the finished pipes).¹⁴³ Borusan states that it is required under Turkish law to pay normal duty on residual scrap, but that the duty on such residual scrap (and second quality pipe) is zero.¹⁴⁴

Borusan claims that it has consistently calculated its adjustment for duty drawback by applying yield loss factors in every administrative review completed under this antidumping duty order since the order was issued in the mid-1980s, and that the Department has accepted and used this

¹³⁹ *Id.* at 37.

¹⁴⁰ See Borusan’s July 30, 2014 case brief (Borusan’s case brief) at 11, citing Borusan’s section C response at 33.

¹⁴¹ *Id.*

¹⁴² *Id.* at 12, citing Section 772(c)(1)(B) of the Act.

¹⁴³ *Id.*

¹⁴⁴ *Id.*, citing Borusan’s Section C response at 34.

adjustment for duty drawback as reported, with the exception of the 2011-2012 administrative review, which is under appeal.¹⁴⁵ Borusan further maintains that the Department, in the recently completed *OCTG from Turkey*, granted Borusan the full duty drawback adjustment as reported and made no reductions for yield loss.¹⁴⁶

Borusan concludes that it correctly reported its duty drawback adjustment to include yield loss, which is necessary to ensure that it correctly associates the quantity imported with the quantity exported. For these final results, Borusan argues that the Department should revise the duty drawback adjustment for Borusan to include the duties exempted on the quantity of product exported to the United States and the additional quantity representing the yield loss.¹⁴⁷

Wheatland argues that section 772(c)(1)(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, by reason of the exportation of the subject merchandise to the United States.¹⁴⁸ Wheatland 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 Borusan does not qualify for an adjustment for unexported scrap and second quality pipe under a plain reading of the statute, as the Department determined in *Circular Pipe from Turkey 2011-2012*.¹⁴⁹

Regarding *OCTG from Turkey*, Wheatland states that although several duty drawback related issues were raised in the OCTG case, it is not apparent that the Department directly confronted the yield loss issue. Wheatland argues that the Department's established practice is to exclude the quantity of the yield loss from the calculation of the duty drawback adjustment.¹⁵⁰ Wheatland maintains that Borusan's argument that the materials which constitute the yield loss carry a normal duty rate of zero is irrelevant.¹⁵¹

¹⁴⁵ *Id.* at 13 citing *Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 61 FR 69067 (December 31, 1996); *Antidumping Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 69 FR 48843 (August 11, 2004); and *Certain Welded Carbon Steel Pipe and Tube From Turkey: Notice of Final Results of Antidumping Duty Administrative Review*, 76 FR 76939 (December 9, 2011).

¹⁴⁶ *Id.* at 12-13 citing *OCTG from Turkey* and accompanying Issues and Decision Memorandum at comment 1.

¹⁴⁷ *Id.* at 13-14.

¹⁴⁸ See Wheatland's August 5, 2014 rebuttal brief ("Wheatland rebuttal brief") at 5, citing section 772(c)(1)(B) of the Act.

¹⁴⁹ *Id.* at 5, citing *Circular Pipe from Turkey 2011-2012* at Comment 4.

¹⁵⁰ *Id.* at 6, citing *Circular Pipe from Thailand 2012* and accompanying Issues and Decision Memorandum at comment 2; *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 73 FR 61019 (October 15, 2008) and accompanying Issues and Decision Memorandum at comment 4; *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Turkey*, 65 FR 15123 (March 21, 2000), and accompanying Issues and Decision Memorandum at Section 4, Comment 2.

¹⁵¹ *Id.*

Department's Position: The Department disagrees with Borusan and continues to find that the DTYDRW2U and OTHER2U fields, which account for yield loss, reflect the appropriate amounts with which to calculate Borusan's duty drawback adjustment.

Borusan reported that the Turkish government exempted it from paying import duties on hot-rolled coils that it imported to produce subject merchandise, which it subsequently exported to the United States.¹⁵² However, in producing subject merchandise, Borusan did not export as subject merchandise the entire quantity of hot-rolled coils that it imported. The "yield loss" reflects the difference between the quantity of hot-rolled coils that Borusan imported into Turkey to produce subject merchandise and the resulting quantity of subject merchandise that Borusan exported to the United States.¹⁵³ Borusan recovered this amount as scrap and second-quality pipe and sold those products in Turkey.¹⁵⁴

Borusan's scrap and second-quality pipe fails to qualify for a duty drawback because those products were not exported and, in the case of scrap, was not subject merchandise. The statute only permits the Department to grant such an adjustment for duty drawback for import duties not collected "by reason of the exportation of the subject merchandise to the United States."¹⁵⁵ An adjustment for duty drawback cannot be granted for non-subject merchandise (*e.g.*, scrap), and Borusan provided no evidence that it exported the second-quality pipe to the United States. This position is consistent with a past decision by the Department, where we have not granted duty drawback adjustments for the portion of inputs that resulted in non-subject merchandise (*e.g.*, scrap).¹⁵⁶ Therefore, for the final results we continue to use the DTYDRW2U and OTHER2U fields for duty drawback adjustments.

Borusan's remaining claims are unpersuasive. Regarding Borusan's claim that the Department, with the single exception of the prior review, has consistently allowed duty drawback adjustments that include values associated with yield loss quantities since the institution of the order, Borusan provides no evidence of this issue having been addressed in any prior administrative review, or that the duty drawback adjustments made in prior reviews were constituted as claimed by Borusan. Regarding Borusan's argument that it pays no duties on imports of scrap, even if one were to assume that a duty drawback adjustment may reflect non-subject or non-exported merchandise, Borusan acknowledges that 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." Borusan also claims that there is no customs import duty on scrap or second-quality pipe imported into Turkey, but apparently identified no supporting documentation for this claim.¹⁵⁷ Therefore, even if a duty drawback adjustment could be granted that reflects

¹⁵² See Borusan's section C response at 32-33.

¹⁵³ See Borusan's December 6 Supp. at 26.

¹⁵⁴ See *id.* at 25-26 and also see Borusan's section C response at 33.

¹⁵⁵ See section 772(c)(1)(B) of the Act; *Saha Thai* at 1338.

¹⁵⁶ See *Circular Pipe from Turkey 2011-2012* and accompanying Issues and Decision Memorandum at Comment 4.

¹⁵⁷ See Borusan's section C response at C-34 at exhibit C-13.

non-subject or non-exported merchandise where no import duties would be due on such merchandise, the Department would not incorporate quantities related to scrap and second-quality pipe in making Borusan's duty drawback adjustment in these final results, consistent with the last administrative review.¹⁵⁸

In the recently completed investigation of *OCTG from Turkey*, the Department granted Borusan the duty drawback adjustment as reported and made no reductions for yield loss.¹⁵⁹ The Department agrees with Wheatland that in *OCTG from Turkey* several duty drawback issues were raised, but it is not apparent that the Department directly confronted the yield loss issue as here. Also, it is the Department's established practice to exclude yield loss from the drawback adjustment when evident.¹⁶⁰

Issue 5: Differential Pricing

Borusan argues the Department should abandon the differential pricing analysis for the final results because it is unreasonable and unlawful. Borusan indicates that the statute specifically states that the average-to-transaction methodology is an "exception" to the normal calculation methodologies and is to be applied only when "(i) there is a pattern of export prices...for comparable merchandise that differ significantly among purchasers, regions, or period of time and (ii) the administering authority explains why such differences cannot be taken into account using one of the standard comparison methodologies."¹⁶¹ Borusan contends that the test should be derived from section 777A(d)(1)(B) of the Act as described by the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, "provid[ing] 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 methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where *targeted dumping* may be occurring."¹⁶²

Borusan states that the *Cohen's d test* used in the Department's differential pricing analysis does not identify causal links or statistical significance, does not distinguish between high and low priced sales or discount tiny price differences, and cannot differentiate between targeted or "masked" dumping and the myriad other potential causes of variations in price that can affect the

¹⁵⁸ See *Circular Pipe from Turkey 2011-2012* at comment 4.

¹⁵⁹ *Id.* at 12-13 citing *OCTG from Turkey* and accompanying Issues and Decision Memorandum at comment 1.

¹⁶⁰ See Wheatland's rebuttal brief at 6 citing to *Circular Pipe from Turkey 2011-2012* at Comment 4, citing *Circular Pipe from Thailand 2012* and accompanying Issues and Decision Memorandum at comment 2; *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 73 FR 61019 (October 15, 2008) and accompanying Issues and Decision Memorandum at comment 4; *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Turkey*, 65 FR 15123 (March 21, 2000), and accompanying Issues and Decision Memorandum at Section 4, Comment 2.

¹⁶¹ See Borusan case brief at 3, citing section 777A(d) of the Act.

¹⁶² See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, Vol. 1 (1994) at 843 ("SAA") (emphasis added).

Department's analysis, such as market factors, differences in producers' costs, or differences in material costs. 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, and is particularly prone to such aberrational results when the sample size of sales is small.¹⁶³

Borusan further 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. Borusan states 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. Borusan claims that the *Cohen's d test* treats prices of the test group that are high (in relation to the mean, as measured based on the standard deviation) the same as those that are low. For example, a sale that had a *Cohen's d test* result of 0.8 or greater would pass the *Cohen's d test*, regardless of whether the sale was priced higher or lower than the comparison group. Borusan states this is an absurd result, as sales that are higher priced than their comparison group cannot be said to be dumped or "targeted."¹⁶⁴

Borusan asserts if the Department continues to apply the differential pricing test, Borusan argues that the Department has never explained its reasoning for the 33 percent to 66 percent cutoffs for its consideration of the average-to-transaction comparison methodology, and states that this appears to be an arbitrary, and, therefore, unlawful cut-off point for the Department's analysis.¹⁶⁵ Accordingly, Borusan argues that the Department should only apply the alternative A-T method to the "targeted sales" as provided for under the withdrawn targeted dumping regulations.

Wheatland asserts that the Department has the statutory authority to conduct a differential pricing analysis and to apply the average-to-transaction methodology in an administrative review. Wheatland contends that Borusan's argument has been repeatedly considered and rejected by the Department, and for the same reasons discussed in those earlier decisions, Borusan's statutory argument is without merit.¹⁶⁶ Moreover, Wheatland states that Borusan's various criticisms of the *Cohen's d test* have all been addressed and rejected in recent cases, which have found the Department's usage and implementation of this statistical tool in its

¹⁶³ See Borusan case brief at 3-5.

¹⁶⁴ *Id.* at 5-6.

¹⁶⁵ *Id.* at 6.

¹⁶⁶ See Wheatland's rebuttal brief at 2, citing, e.g., *Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 26712 (May 9, 2014), and accompanying Issues and Decision Memorandum ("*Multilayered Wood Flooring from the PRC*") at Comment 1.A, and *Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates : Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 24401 (April 30, 2014), and accompanying Issues and Decision Memorandum ("*PET Film from the UAE*") at Comment 2.

differential pricing analysis to be reasonable and appropriate.¹⁶⁷ Borusan notes the Department has found that “[t]he statute does not require that the difference be ‘statistically significant,’ only that it be significant.”¹⁶⁸

Wheatland also notes the Department has rejected Borusan’s argument that the methodology should not treat higher-priced sales as part of any pattern of significant price differences. Wheatland states the Department has noted higher priced sales are equally capable as lower priced sales to create a pattern of prices that differ significantly, that higher priced sales, by offsetting lower priced sales, can mask dumping, and that the statute does not distinguish between low priced and high priced sales when discussing patterns of price differences.¹⁶⁹

With respect to the patterns of prices that differ significantly, Wheatland notes that the statute only requires the Department to only find that there exists a pattern of prices that differ significantly among purchasers, regions, or periods of time.¹⁷⁰ No examination of causes of the patterns is required, nor is there a requirement to demonstrate it was the intention of exporters to discriminate between purchasers, regions, or periods of time when setting U.S. prices.¹⁷¹ Wheatland argues that any pattern of significant differences, regardless of its cause, and regardless of the exporter’s motivation, has the potential to mask dumping and the purpose of applying the average-to-transaction method is to unmask such dumping.¹⁷²

Department’s Position: We disagree with Borusan and continue to find that the differential pricing test reasonably fills a statutory gap as to which comparison method the Department may use in a given administrative review.

The SAA expressly recognizes that the statute “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 methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping *may* be occurring.”¹⁷³ Thus, the SAA states that in order to use the A-T method, that the two statutory requirements must be fulfilled. The SAA’s reference to where targeted dumping may be occurring reflects the concern regarding the use of the A-A method in investigations and the

¹⁶⁷ *Id.* at 2, citing *PET Film from the UAE* at Comment 3, and *Certain Steel Nails From the People’s Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review*, 79 FR 19316 (April 8, 2014) and accompanying Issues and Decision Memorandum (“*PRC Nails*”) at Comment 7.

¹⁶⁸ *Id.* at 2-3, citing *PRC Nails* at Comment 7.

¹⁶⁹ *Id.* at 3, citing *Multilayered Wood Flooring from the PRC* at Comment 1.C.

¹⁷⁰ *Id.*, citing section 777A(d)(1)(B)(i) of the Act.

¹⁷¹ *Id.* at 3-4, citing *Multilayered Wood Flooring from the PRC* at Comment 1.C.

¹⁷² *Id.* at 4, citing *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930, 74391 (December 10, 2008) (*2008 Withdrawal*) and *Union Steel v. United States*, 713 F.3d 1101 & nn. 3, 5, & 8 (Fed. Cir. 2013).

¹⁷³ See SAA at 843 (emphasis added).

possible concealment of targeted dumping.¹⁷⁴ Thus, the SAA recognizes that targeted dumping may be occurring where there is a pattern of prices that differ significantly among purchasers, regions, or time periods; however, it does not limit the consideration of the A-T method to only situations where “targeted dumping” exists. In our view, the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-A method or the A-T method is the appropriate tool to measure whether, and if so to what extent, a given respondent is dumping the merchandise at issue.¹⁷⁵ While targeting may be occurring with respect to such sales, it is neither a requirement nor a precondition for us to otherwise determine that the A-T method is warranted based upon a finding of a pattern of prices that differ significantly and explaining whether the A-A method or T-T method cannot account for such differences, as provided in the statute.

We use the A-A method unless we determine that another method is appropriate in a particular situation.¹⁷⁶ In the context of administrative reviews, the statute is silent on when and how the Department may determine whether the A-A method is appropriate or whether an alternative comparison method should be applied.¹⁷⁷ The Department has filled this statutory gap by looking to section 777A(d)(1)(B) of the Act to determine whether the A-A method or an alternative comparison method is an appropriate tool with which to measure the extent of a respondent’s dumping in a given situation. Section 777A(d)(1)(B)(i) of the Act requires that there exists “a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time.” The statute leaves to our discretion how to determine the existence of such a pattern under section 777A(d)(1)(B)(i) of the Act and does not provide a specific direction on how to make such determination. The statute simply requires that we find the existence of a pattern of prices that “differ significantly,” and we reasonably demonstrated that such a pattern exists in this administrative review.

The Cohen’s *d* coefficient is a statistical measure which gauges the extent (or “effect size”) of the difference between the means of two groups. “Effect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone.”¹⁷⁸ In *Xanthan Gum*, we stated as follows:

Effect size is the measurement that is derived from the Cohen’s *d* test. Although Deosen argues that effect size is a statistic that is “widely used in meta-analysis,” we note that the article also states that “[e]ffect size quantifies the size of the difference between two groups, and may therefore be said to be a *true measure of the significance of the difference*.” The article points out the precise purpose for

¹⁷⁴ See Borusan Case Brief at 4, quoting the SAA at 842.

¹⁷⁵ See 19 CFR 351.414(c)(1) (2012).

¹⁷⁶ *Id.*

¹⁷⁷ See section 777A(d)(2) of the Act.

¹⁷⁸ See *Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) (*Xanthan Gum*) and the accompanying I&D Memo at Comment 3, quoting from Coe, Robert, “It’s The Effects Size, Stupid: What effect size is and why it is important,” presented at the Annual Conference of British Educational Research Association (September 12-14, 2002).

which the Department relies on Cohen's *d* test to satisfy the statutory language, to measure whether a difference is significant.¹⁷⁹

Accordingly, we disagree with Borusan's claim that the Cohen's *d* test is not an appropriate and reasonable approach to examine whether there exists a pattern of prices that differ significantly.

The statute only requires a finding of a pattern of prices that differ "significantly." The statute does not require that the difference be "statistically significant." Borusan does not demonstrate that our reliance on the Cohen's *d* test, which is a generally recognized statistical measure of effect size, is unreasonable and that some higher threshold, not enumerated in the statutory language, must be satisfied. Further, as discussed above, the Cohen's *d* test is a generally recognized measure of the significance of the differences of two means, and we set a threshold of "large" to provide the strongest indication that there is a significant difference between the means of the test and comparison groups.

If Congress intended to require a particular result be obtained, with a level of "statistical significance" of price differences as a condition for finding that there exists a pattern of prices that differ significantly, then Congress presumably would have used language beyond the stated requirement and more precise than "differ significantly." This is what Congress did, for example, with respect to enacting the sampling provision for respondent selection in section 777A(c)(2)(A) of the Act. But it did not do so with respect to the determination of the existence of a pattern in section 777A(d)(1)(B)(i) of the Act. As the executive agency tasked with implementing the antidumping law, resolving statutory ambiguities, and filling gaps in the statute, we do not agree with Borusan's opinion that the term "significantly" in the statute can mean only "statistically significant." The law includes no such directive. Our analysis, 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."

The Cohen's *d* test does not need to take into account any "causal links" for the identified pattern of prices that differ significantly. The statute does not require that we account for some kind of causality for any observed pattern of prices that differ significantly, such as differences in market factors, production costs, or material inputs. Congress did not speak to the intent of the producers or exporters in setting export prices that exhibit a pattern of significant price differences. Nor is an intent-based analysis consistent with the purpose of the statutory provision, as noted above, which is to determine whether averaging is a meaningful tool to measure whether, and if so, to what extent, dumping is occurring. Consistent with the statute and the SAA, we determined whether a pattern of significant price differences exists. Neither the statute nor the SAA requires us to conduct an additional analysis to account for potential reasons for the observed pattern of prices that differ significantly. To interpret the statute as containing

¹⁷⁹ *Id.* Footnote omitted and emphasis originally included.

an intent-based requirement “would create a tremendous burden on {the Department} that is not required or suggested by the statute.”¹⁸⁰

We agree with Borusan’s description of effect size, but we disagree with Borusan’s contention that the Cohen’s *d* test does not measure the significance of the differences between the mean prices between the test and comparison groups. The examination of the price differences between test and comparison groups is relative to the “pooled standard deviation.” The pooled standard deviation reflects the dispersion, or variance, of prices within each of the two groups. When the variance of prices is small within these two groups, then a smaller difference between the weighted-average sale prices of the two groups represents a more significant difference because there is less of an overlap in the prices between the test and comparison groups. When the variance within the two groups is larger (*i.e.*, the dispersion of prices within one or both of the groups is greater), then the difference between the weighted-average sale prices of the two groups must be larger in order for the difference to be significant. When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, this value is expressed in standardized units based on the dispersion of the prices within each group. This is the concept of an effect size, as represented in the Cohen’s *d* coefficient.

We disagree with Borusan’s interpretation of the statute and the SAA that the purpose of the differential pricing analysis should be to identify “targeted dumping.” Rather, as discussed above, the purpose of the application of the differential pricing analysis in this review is to determine whether the A-A method is the appropriate tool to evaluate the extent of dumping by Borusan. We disagree further with Borusan’s interpretation that a pattern of prices that differ significantly necessarily involves only lower priced sales as these can be the only sales which are “targeted” or that higher priced sales are incapable of masking dumping. The statute does not require that we consider only lower-priced sales when considering whether the A-A method is appropriate. Further, the SAA states when recognizing the concerns of concealed “targeted dumping”

In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.¹⁸¹

Thus, the SAA recognizes that “targeted dumping” involves both higher- and lower-priced sales. In our view, it is reasonable for us to consider sales information on the record and to draw reasonable inferences as to what the data show. Contrary to Borusan’s claim, it is reasonable for us to consider both lower-priced and higher-priced sales as potentially passing the Cohen’s *d* test because higher-priced sales are equally capable as lower-priced sales to create a pattern of prices that differ significantly which may mask dumping. Further, the statute states that we may apply the A-T method if “there is a *pattern of export prices . . .* for comparable merchandise that *differ*

¹⁸⁰ See *Viraj Grp. v. United States*, 476 F.3d 1349, 1357-58 (Fed. Cir. 2007).

¹⁸¹ See SAA at 842.

significantly among purchasers, regions, or periods of time,” and we explain “why *such differences* cannot be taken into account” using the A-A method.¹⁸² The statute directs us to consider whether a pattern of significantly different prices exist. The statutory language references prices that “differ” and does not specify whether the prices differ by being lower or higher than the prices for comparable merchandise to other purchasers, regions or time periods. The statute does not provide that we consider only higher-priced sales or only lower-priced sales when conducting the analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. Higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis.¹⁸³

We also emphasize that whether any of the U.S. sale prices, lower or higher than those to other purchasers, regions or time periods in the U.S. market, are actually above or below their comparable normal value is not a part of determining whether there exists a pattern of prices that differ significantly. Section 777A(d)(1)(B)(i) of the Act specifies a “pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions or periods of time.” Such a pattern is strictly between the sale prices in the U.S. market, and has no relationship with the comparable normal values for these U.S. sales. Accordingly, consideration of whether these U.S. sales are dumped is not part of fulfilling this requirement. Indeed, the lower-priced U.S. sales could be below their normal value, the high-priced U.S. sales could also be below their normal value, or none of the U.S. sales could be below their normal value. Such a determination is not part of this statutory requirement. Therefore, the Cohen’s *d* test, in its application to determine whether there exists a pattern of prices that differ significantly, is not required to identify “targeted dumping” or “dumped” sales as asserted by Borusan.¹⁸⁴

The Department disagrees with Borusan’s claim that the thresholds provided for in its differential pricing analysis regarding the results of the ratio test and the identification of an appropriate alternative comparison method, if any, are unlawful. Neither the statute nor the SAA provide any guidance in determining how to apply the A-T method once the requirements of section 777A(d)(1)(B)(i) and (ii) have been satisfied. Accordingly, the Department has reasonably created a framework to determine how the A-T method may be considered as an alternative to the standard A-A method based on the extent of the pattern of prices that differ significantly as identified with the Cohen’s *d* test. As stated in the *Preliminary Results*, the purpose of the Cohen’s *d* test is “to evaluate the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise.”¹⁸⁵ When 66 percent or more of the value of a respondent’s U.S. sales are found to establish a pattern of prices that differ significantly, then the Department finds that

¹⁸² See section 777A(d)(1)(B) of the Act (emphasis added).

¹⁸³ See *Hardwood and Decorative Plywood From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013) and the accompanying I&D Memo at Comment 5.

¹⁸⁴ See Borusan Case Brief at 5-6.

¹⁸⁵ See *Preliminary Results* and the accompanying Preliminary Decision Memorandum at 5.

the extent of these price differences throughout the pricing behavior of the respondent does not permit the segregation of this pricing behavior which constitute the identified pattern or prices that differ significantly from that which does not. Accordingly, the Department determines that considering the application of the A-T method to all U.S. sales to be reasonable. Further, when 33 percent or less of the value of a respondent's U.S. sales constitute the identified pattern of prices that differ significantly, then the Department considers this extent of the pattern to not be significant in considering whether the A-A method is appropriate, and has not considered the application of the A-T method as an alternative comparison method. When between 33 percent and 66 percent of the value of a respondent's U.S. sales constitute a pattern of prices that differ significantly, the Department considers the extent of this pattern to be meaningful to consider whether the A-A method is appropriate, but also finds that segregating this pricing behavior from the pricing behavior which does not contribute to the pattern to be reasonable, and has then only considered the application of the A-T method as an alternative comparison method to this limited portion of a respondent's U.S. sales. Lastly, as stated in the *Preliminary Results*, the Department invited interested parties to submit arguments and support with respect to the differential pricing analysis used in this administrative review with respect to modifying the default definitions used in the Department's approach. Borusan has provided no such comments to alter the 33 percent and 66 percent thresholds, or any of the other thresholds or definitions, used by the Department in the *Preliminary Results*.

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

Borusan states that the Department's development of the differential pricing analysis and its application in this review is contrary to law because the Department's rescission of the prior targeted dumping regulations¹⁸⁶ did not comply with the Notice and Comment Requirements of the Administrative Procedures Act (APA).¹⁸⁷ Moreover, Borusan rejects the Department's claim that the withdrawal of the regulation without notice and comment required under the APA was with "good cause" because the notice and comment requirement under the APA was "impractical and contrary to the public interest" under the circumstances.¹⁸⁸ Borusan argues this did not qualify as a "good cause" exception because the Department made no attempt to substantiate its claims of the impact such a notice and comment period would have had. Borusan states the Federal Circuit has made clear that all exceptions under the APA, including the good cause exception, are "narrowly construed and only reluctantly countenanced."¹⁸⁹ Borusan states that claims that notice and comment are "impracticable" have only rarely been accepted by the Federal Circuit, and have primarily involved national emergencies impacting the entire economy

¹⁸⁶ See *2008 Withdrawal*, in which the Department withdrew 19 CFR 351.301(d)(5) (2007) and 19 CFR 351.414(f)-(g) (2007).

¹⁸⁷ See Borusan's case brief at 7, citing Pub. L. 79-404, 60 Stat. 237 (1946).

¹⁸⁸ *Id.* at 8, citing *2008 Withdrawal*, 73 FR 74930.

¹⁸⁹ *Id.* at 8-9 citing *Tunik v. MSPB*, 407 F.3d 1326, 1344 (Fed. Cir. 2005).

due to the petroleum price controls of 1974 and 1979.¹⁹⁰ Borusan cites another case in which the Federal Circuit upheld reliance on the “good cause” exception, but that case required an immediate promulgation of regulations in order to bring existing regulations into compliance with a change in the statute, a fact pattern that did not exist when the Department withdrew its regulations governing targeted dumping.¹⁹¹

Borusan states that claimed exceptions involving the “public interest” refer to the threat of anticipatory evasion by the regulated parties once those parties know they soon face new restrictions.¹⁹² Borusan asserts no such threat was present in the context of the withdrawn targeted dumping regulations.

Borusan argues that the Department must limit any resultant average-to-transaction price comparisons and zeroing of negative comparison results to the sales that are found to have been targeted, consistent with a recent decision by the Court of International Trade.¹⁹³ Borusan concludes that for these final results, the Department should not apply its unlawful differential pricing analysis and should instead apply its 2007 targeted dumping regulations, including 19 CFR 351.414(f)(2) (2007), which directed the Department to apply the average-to-transaction method to only those sales that it may determine have been targeted.¹⁹⁴

Wheatland maintains that the withdrawn targeted dumping regulations have no possible relevance to this case. Wheatland asserts even though *Gold East* held those targeted dumping regulations were improperly withdrawn in 2008, the Department continues to take the position that such withdrawal was proper, and even if it had not been, that the withdrawal became effective when the Department published the *Final Modification for Reviews* on February 14, 2012, and promulgated 19 CFR 351.414 (2012),¹⁹⁵ which was prior to the initiation of this review.¹⁹⁶

¹⁹⁰ *Id.* at 9, citing *Reeves v. Simon*, 507 F.2d 455, 459 (Temp. Emer. Ct. App. 1974) and *Shimek v. Department of Energy*, 685 F.2d 1372, 1375 (Temp. Emer. Ct. App. 1981).

¹⁹¹ *Id.* at 9 (footnote 1), citing *Nat’l Customs Brokers and Forwarders Ass’n of Am., Inc. v. United States*, 59 F.3d at 1219, 1223 (Fed. Cir. 1995).

¹⁹² *Id.* at 9, citing U.S. Justice Department, Attorney General’s Manual on the Administrative Procedures Act (1947) at 30 and *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974).

¹⁹³ *Id.* at 10, citing *Gold East Paper (Jiangsu) Co., Ltd. v. United States*, 918 F.Supp.2d 1317 (CIT 2013) (“*Gold East*”).

¹⁹⁴ *Id.* at 6 and 10-11.

¹⁹⁵ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

¹⁹⁶ See Wheatland’s rebuttal brief at 4, citing *Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 79 FR 22371, 22373 (April 22, 2014).

Furthermore, Wheatland argues that even if the old regulations remained in effect, they would only apply to investigations.¹⁹⁷ Wheatland notes the Department has repeatedly found, even after *Gold East*, that the withdrawn regulations do not apply to administrative reviews.¹⁹⁸

Department's Position: We disagree with Borusan and find that its arguments fail as a matter of law in several respects.

The targeted dumping regulations withdrawn in the 2008 *Withdrawal* are no longer in effect and, when they were in effect, they applied only to investigations, not administrative reviews. Likewise, *Gold East* involves a less-than-fair-value investigation, not an administrative review, and the *Gold East* decision is not final.¹⁹⁹ Furthermore, the currently effective 19 CFR 351.414 (2012) specifically fills the statutory gap regarding the selection of an appropriate comparison method in the context of administrative reviews.²⁰⁰ This process was done with 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.

In any event, the targeted dumping regulation was properly withdrawn pursuant to the APA. 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 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 regulations, 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.²⁰¹ 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. Various parties submitted comments in response to the

¹⁹⁷ *Id.* at 4, citing 19 C.F.R. 351.414(f)(1)(2007).

¹⁹⁸ *Id.* at 4-5, citing *Multilayered Wood Flooring from the PRC* at Comment 1.B.

¹⁹⁹ Borusan also cites to the Court of International Trade's recent decision in *Timken Co. v. United States*, 968 F. Supp. 2d 1279 (CIT 2014), but that case is inapposite. As an initial matter, the passage cited by Borusan involves dicta and, thus, does not bind the Department. See, e.g., *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006) (explaining that a court is not bound to follow "dicta in a prior case in which the point now at issue was not fully debated"). Moreover, the withdrawal of the regulations at issue was not in dispute in that case.

²⁰⁰ See *Final Modification for Reviews*, 77 FR 8101.

²⁰¹ See *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 FR 60651 (October 25, 2007) (*Targeted Dumping*).

Department's request.²⁰² Borusan provided no comments in response to the Department's request.²⁰³

After considering those comments, the Department published a proposed new methodology in May 2008 and again requested public comment.²⁰⁴ Among other things, the Department specifically sought comments "on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping."²⁰⁵ Several of the submissions²⁰⁶ received from parties explained that the Department's proposed methodology was inconsistent with the statute and should not be adopted.²⁰⁷ 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.²⁰⁸ Once again, Borusan did not comment on the Department's proposed methodology.²⁰⁹

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."²¹⁰ For this reason, the Department determined that the regulation had to be withdrawn.²¹¹ Although this withdrawal was effective immediately, the Department again invited parties to submit comments, and gave them a full 30 days to do so.²¹² The comment period ended on January 9, 2009, with several parties submitting

²⁰² See Public Comments Received December 10, 2007, *available at* <http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html> (listing the entities that commented).

²⁰³ *Id.*

²⁰⁴ See *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 FR 26371, 26372 (May 9, 2008).

²⁰⁵ *Id.*

²⁰⁶ The public comments received by 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>.

²⁰⁷ See, e.g., letter from Kelley, Drye and Warren on behalf of Various Domestic Producers entitled "Comments on Targeted Dumping Methodology" (Kelley Drye Comments) (June 23, 2008), at 2, *available at* <http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html>.

²⁰⁸ See, e.g., letter from Committee to Support U.S. Trade Laws entitled "Comments on Targeted Dumping Methodology" (June 23, 2008), at 25, *available at* <http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html>; see also Kelley Drye Comments at 29.

²⁰⁹ 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).

²¹⁰ See *2008 Withdrawal*, 73 FR 74930.

²¹¹ *Id.*

²¹² *Id.*

comments.²¹³ As before, Borusan failed to participate and did not submit comments in response to the Department's request.²¹⁴

The course of the Department's decision-making process demonstrates that it sought to actively engage the public. This type of public participation is fully consistent with the APA's notice-and-comment requirement.²¹⁵ Moreover, various courts have rejected the idea that an agency must give the parties an opportunity to comment before every step of regulatory development.²¹⁶ 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, as a whole, acted in a way that is consistent with the statute's purpose.²¹⁷ Here, similar to the agency in *Fed. Express Corp.*, the Department provided the parties more than one opportunity to submit comments before issuing the final rule. As in *Fed. Express Corp.*, the Department also considered the comments submitted and based its final decision, at least in part, upon those comments. Just as the court in *Fed. Express Corp.* 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.²¹⁸ 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 two rounds of comments that the Department solicited before the withdrawal of the regulation were insufficient to satisfy the APA's requirements, the Department was not required 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

²¹³ See Public Comments Received January 23, 2009, Department of Commerce, (January 23, 2009), [available at http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html](http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html) (Jan. 23, 2009) (listing the entities that commented).

²¹⁴ *Id.*

²¹⁵ 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).

²¹⁶ See *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (*Fed. Express Corp.*) (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).

²¹⁷ *Id.*

²¹⁸ See, e.g., *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

interest.”²¹⁹ The Federal Circuit 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. 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.²²⁰ The U.S. Customs Service explained that “good cause” existed 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.”²²¹ 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.”²²² For this reason, the court affirmed the regulation against the plaintiff’s challenge.²²³

National Customs Brokers similarly counters Borusan’s assertion that “good cause” only exists in situations of “national emergency.” Borusan principally cites Temporary Emergency Court of Appeals cases dealing with rulemaking during the 1974 Arab oil embargo and its aftermath. These cases deal with the invocation of a different prong of the good cause exception, namely, the prong that allows an agency to forego notice and comment when “that notice and public procedure {is} . . . impracticable.”²²⁴ The “public interest” exception that the Department invoked is subject to a different legal standard, one that can be satisfied by different factors.²²⁵ The Department complied with this standard.

In short, the regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy to consider whether the A-A method is the appropriate tool with which to measure each respondent’s amount of dumping. Such effect would have been contrary to congressional intent. Notwithstanding that we satisfied the APA’s requirements as discussed above, the Department’s revocation of such a regulation without additional notice and comment was based upon a recognized invocation of the “public interest” exception because good cause existed to waive the notice and comment period.

²¹⁹ See 5 USC 553(b)(B).

²²⁰ See *National Customs Brokers*, 59 F.3d at 1220-21.

²²¹ *Id.*, at 1223.

²²² *Id.*, at 1224 (emphasis added).

²²³ *Id.*

²²⁴ See 5 USC 553(b)(B).

²²⁵ See, e.g., *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996).


Therefore, we have no basis to use the withdrawn targeted dumping regulations for the final results of this review.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If 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

21 NOVEMBER 2014
Date