




C-489-502
Administrative Review
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DATE: October 5, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

RE: Decision Memorandum for Final Results of Countervailing Duty
Administrative Review: Circular Welded Carbon Steel Pipes and
Tubes from Turkey

I. Summary

On April 8, 2015, the Department of Commerce (Department) published the *Preliminary Results* in the countervailing duty (CVD) review referenced above.¹ On April 8, 2015, Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (BMB), Borusan Istikbal Ticaret T.A.S. (Istikbal), and the Borusan Group (collectively, the Borusan Companies) requested that the Department conduct a hearing in this review. On May 8, 2015, the Department received case briefs from the Borusan Companies, the Government of Turkey (GOT), and Toscelik Profil ve Sac Endustrisi A.S. (Toscelik Profil), Toscelik Metal Ticaret AS., and Tosyali Dis Ticaret AS. (Tosyali) (collectively, the Toscelik Companies).² No interested party submitted a rebuttal brief. On June 2, 2015, the Borusan Companies withdrew their request for a hearing. On June 16, 2015, the Department extended the deadline for the final results of this administrative review until October 5, 2015.³

After analyzing the comments, we made certain modifications to the *Preliminary Results*. The “Analysis of Programs” section below describes the methodology followed in this review with respect to the Borusan Companies, the sole producer/exporter of subject merchandise subject to individual examination in this review. Also below is the “Analysis of Comments” section, which contains the Department’s responses to the issues raised in the case briefs.

¹ See *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Preliminary Results of Countervailing Duty Administrative Review and Preliminary Intent To Rescind in Part; Calendar Year 2013*, 80 FR 18809 (April 8, 2015) (*Preliminary Results*) and accompanying Issues and Decision Memorandum (Preliminary Decision Memorandum).

² See the May 8, 2015, case briefs submitted by the Borusan Companies, the GOT and the Toscelik Companies.

³ See Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, “Circular Welded Carbon Steel Pipes and Tubes from Turkey: Extension of Deadline for Final Results of Countervailing Duty Administrative Review,” (June 16, 2015).



We received comments on the following issues with regard to the following respondents:

Arguments of the Borusan Companies

Comment 1: Whether the Department Erred by Finding that Prices of Hot-Rolled Steel (HRS) in Turkey Are Significantly Distorted

Comment 2: Calculating the Share of HRS Accounted for by Erdemir and Isdemir

Comment 3: Data Sources Used in the Calculation of the Two-Tier Benchmark Price

Comment 4: Calculating the Tier-Two Benchmark Price Concerning Import Duties and VAT

Comment 5: Calculating the Tier-Two Benchmark Price Concerning Freight

Comment 6: Whether the Method the Department Used to Weight Average the Tier-Two Benchmark is Flawed

Comment 7: Whether Erdemir and Isdemir are Public Bodies

Comment 8: The Department's Specificity Determination

Arguments of the Toscelik Companies

Comment 9: Whether the Department Erred in Not Selecting the Toscelik Companies as a Mandatory Respondent

II. Rescission of the 2013 Administrative Review, in Part

Erbosan Erciyas Boru Sanayi ve Ticaret A.S. (Erbosan AS) and Erbosan Erciyas Pipe Industry and Trade Co. Kayseri Free Zone Branch (Erbosan FZB), (collectively, the Erbosan Companies) and the Yucel Group and all affiliates including Yucel Boru ye Profil Endustrisi A.S, Yucelboru Ihracat Ithalat ye Pazarlama A.S, and Cayirova Born Sanayi ye Ticaret A.S.) (collectively, the Yucel Companies) each claimed no shipments during the POR, and Customs and Border Protection (CBP) did not provide any information contradicting the claims made by these companies. Based on our analysis of record evidence, we determine that the Erbosan Companies and the Yucel Companies did not ship subject merchandise to the United States during the POR. Therefore, in accordance with 19 CFR 351.213(d)(3), and consistent with our practice, we are rescinding the review for the Erbosan Companies and the Yucel Companies.⁴

⁴ See, e.g., *Aluminum Extrusions from the People's Republic of China: Notice of Partial Rescission of Countervailing Duty Administrative Review*, 79 FR 2635 (January 15, 2014).

III. Subsidies Valuation Information

A. Allocation Period

Under 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the average useful life (AUL) of the renewable physical assets used to produce the subject merchandise. Pursuant to 19 CFR 351.524(d)(2), there is a rebuttable presumption that the AUL is the AUL listed in the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (IRS Tables), as updated by the Department of Treasury. For the subject merchandise, the IRS Tables prescribe an AUL of 15 years. No interested party claimed and established that the IRS Tables do not reasonably reflect the AUL for the industry under investigation. Further, for non-recurring subsidies, we applied the "0.5 percent expense test" described in 19 CFR 351.524(b)(2). Under this test, we compare the amount of subsidies approved under a given program in a particular year to sales (total sales or total export sales, as appropriate) for the same year. If the amount of subsidies is less than 0.5 percent of the relevant sales, then the benefits are allocated to the year of receipt rather than allocated over the AUL period.

B. Attribution of Subsidies

19 CFR 351.525(b)(6)(i) states that the Department will normally attribute a subsidy to the products produced by the corporation that received the subsidy. However, 19 CFR 351.525(b)(6)(ii)-(v) provides additional rules for the attribution of subsidies received by respondents with cross-owned affiliates. Subsidies to the following types of cross-owned affiliates are covered in these additional attribution rules: (ii) producers of the subject merchandise; (iii) holding companies or parent companies; (iv) producers of an input that is primarily dedicated to the production of the downstream product; or (v) an affiliate producing non-subject merchandise that otherwise transfers a subsidy to a respondent.

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This section of the Department's regulations states that this standard will normally be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. The *Preamble* to the Department's regulations further clarifies the Department's cross-ownership standard. According to the *Preamble*, relationships captured by the cross-ownership definition include those where:

{T}he interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same way it can use its own assets (or subsidy benefits) . . . Cross-ownership does not require one corporation to own 100 percent of the other corporation. Normally, cross-ownership will exist where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) or a "golden share" may

also result in cross-ownership.⁵

Thus, the Department's regulations make clear that the agency must look at the facts presented in each case in determining whether cross-ownership exists. The U.S. Court of International Trade has upheld the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits.⁶

Borusan and its affiliated foreign trading company, Istikbal, are both part of the Borusan Companies and are cross-owned under 19 CFR 351.525(b)(vi) by virtue of common ownership.⁷ Borusan produces subject merchandise for both the home and export markets. During the period of review (POR), all subject merchandise exported to the United States was exported from Turkey by Borusan. Additionally, Borusan and Istikbal exported subject merchandise to non-U.S. locations during the POR.⁸ Consistent with 19 CFR 351.525(c), in these final results, as in past reviews, we continue to attribute any subsidies received by Istikbal to the sales of Borusan and Istikbal, net of intra-company sales. In accordance with 19 CFR 351.525(b)(6)(i), we attributed subsidies received by Borusan to the consolidated sales of Borusan and Istikbal. In these final results, we find that the Borusan Group did not receive any subsidies and, thus the issue of the attribution of subsidies received by the Borusan Group to the remaining members of the Borusan Companies is moot.

C. Benchmark Interest Rates

Short-Term Benchmark

To determine whether government-provided loans under review conferred a benefit, the Department uses, where possible, company-specific interest rates for comparable commercial loans obtained by the company.⁹ The Borusan Companies reported receiving loans from the subsidy programs under examination that were denominated in U.S. Dollars. Therefore, in its August 15, 2014, QR at Exhibit 24, the Borusan Companies submitted information regarding company-specific short-term interest rates on its comparable commercial loans. Thus, we calculated benchmark interest rates for short-term U.S. dollar denominated loans based on the data reported by the Borusan Companies consistent with 19 CFR 351.505(a)(2)(ii). To calculate the short-term benchmark rates for the Borusan Companies, we derived an annual average of the

⁵ See *Countervailing Duties; Final Rule*, 63 FR 65347, 65401 (November 25, 1998) (*Preamble*).

⁶ See *Fabrique de Fer de Charleroi, SA v. United States*, 166 F. Supp. 2d 593, 600-604 (CIT 2001).

⁷ See Borusan Companies' August 15, 2014, QR at 3. Our approach in this regard is consistent with our practice. See, e.g., *Circular Welded Carbon Steel Pipe and Tube Products From Turkey: Preliminary Results of Countervailing Duty Administrative Review; Calendar Year 2012 and Intent To Rescind Countervailing Duty Administrative Review*, in *Part (Turkey Pipe 2012 Prelim Results)* and accompanying Preliminary Issues and Decision Memorandum at 5, unchanged in *Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2012 and Rescission of Countervailing Duty Administrative Review*, in *Part*, 79 FR 51140 (August 27, 2014) (*Turkey Pipe 2012 Final Results*), and accompanying Issues and Decision Memorandum at 2.

⁸ See Borusan Companies' August 15, 2014, Questionnaire Response (QR) at 2.

⁹ See 19 CFR 351.505(a)(2)(ii).

interest rates on comparable commercial loans that the Borusan Companies obtained during the years in which the government loans were issued, weighted by the principal amount of each loan.

IV. Analysis of Programs

A. Programs Determined To Be Countervailable

1. Deduction from Taxable Income for Export Revenue

Addendum 4108 of Article 40 of Turkey's Income Tax Law Number 193, effective June 2, 1995, allows taxpayers engaged in export activities to claim a lump sum deduction from gross income resulting from exports, construction, maintenance, assembly, and transportation activities abroad in an amount not to exceed 0.5 percent of the taxpayer's foreign-exchange earnings from such activities.¹⁰ This deduction is to cover the expenditures without documentation incurred from exports, construction, maintenance, assembly, and transportation activities abroad.¹¹ The deduction for export earnings may be taken as a lump sum on a company's annual income tax return.¹² Under this program, marketing, selling, and distribution expenses are deductible expenditures for tax purposes.

Consistent with prior determinations, we find that this tax deduction is a countervailable subsidy.¹³ The income tax deduction provides a financial contribution within the meaning of section 771(5)(D)(ii) of the Act, in the form of revenue forgone by the GOT. The deduction provides a benefit in the amount of the tax savings to the company pursuant to section 771(5)(E) of the Act. It is also specific under section 771(5A)(B) of the Act because its receipt is contingent upon export earnings. In this review, no new information or evidence of changed circumstances has been submitted to warrant reconsideration of the Department's prior finding of countervailability for this program.

During the POR, Borusan and Istikbal reported receiving the deduction for export earnings with respect to their 2012 tax returns filed during the POR.¹⁴ In addition to its fiscal year 2012 income tax return filed in 2013, Borusan also filed an amended 2011 tax return in 2013 in which it claimed the remaining amount of its lump sum deduction under this program. This additional amount was not claimed on the 2011 tax return by Borsuan because of the company's dispute with tax authorities regarding whether this lump sum amount was permissible.¹⁵ The Borusan Companies reported that Borusan challenged the tax authorities and won the appeal. Therefore, Borsuan claimed this amount on the amended 2011 tax return filed in 2013 and, thus, we find that Borsuan received this benefit during the POR, consistent with 19 CFR 351.509(b).¹⁶

The Department normally treats a tax deduction as a recurring benefit in accordance with 19

¹⁰ See GOT's initial QR dated August 13, 2014, at II-4.

¹¹ *Id.*

¹² *Id.*

¹³ See, e.g., *Turkey Pipe 2012 Preliminary Result* and accompanying Issues and Decision Memorandum at 7 unchanged in *Turkey Pipe 2012 Final Results*.

¹⁴ See Borusan Companies' August 15, 2014, QR at 14.

¹⁵ *Id.*, at 16.

¹⁶ *Id.*

CFR 351.524(c)(1).¹⁷ The amount of the benefit is equal to the amount of tax that would have been paid absent the program. For Borsuan and Istikbal, we divided their combined tax savings by the total consolidated exports of Borusan and Istikbal, net of intra-company sales. We included in our calculation the benefit from the 2011 amended tax return which was filed during the POR.

On this basis, we determine the net countervailable subsidy for this program to be 0.20 percent *ad valorem* for the Borusan Companies.

2. Short-Term Pre-Shipment Rediscount Program

The “Short Term Pre-Shipment Rediscount Program” (SPRP) is administered by the Export Credit Bank of Turkey (Export Bank).¹⁸ The SPRP is designed to provide financial support to Turkish exporters, manufacturer-exporters and manufacturers supplying exporters.¹⁹ This program is contingent upon an export commitment. The SPRP requires a minimum loan amount of USD 50,000 per company.²⁰ Loan payments must be made within the credit period or at maturity to the Export Bank. Companies can repay these loans either in the foreign currency in which the loan was obtained or in Turkish Lira (TL) equivalent of the principal by using the exchange rate determined by the Export Bank.²¹ During the POR, Borusan and Istikbal paid interest on U.S. dollar pre-shipment rediscount loans under this program.²²

We find that these loans confer a countervailable subsidy within the meaning of section 771(5) of the Act. The loans constitute a financial contribution in the form of a direct transfer of funds from the GOT under section 771(5)(D)(i) of the Act. A benefit exists under section 771(5)(E)(ii) of the Act in the amount of the difference between the payments that Borusan and Istikbal made on the loans during the POR and the payments the company would have made on comparable commercial loans. The program is specific in accordance with section 771(5A)(B) of the Act because receipt of the loans is contingent upon export performance. These findings are consistent with the Department’s prior findings regarding this program.²³

Pursuant to 19 CFR 351.505(a)(1), we calculated the benefit as the difference between the payments that Borusan and Istikbal made on its short-term pre-shipment rediscount loans during the POR and the payments the companies would have made on comparable commercial loans.

After computing the benefit amount, we subtracted from the benefit amount the fees which Borusan and Istikbal paid to commercial banks for the required letters of guarantee, as provided under section 771(6)(A) of the Act. Our approach in this regard is consistent with the

¹⁷ See e.g., *Turkey Pipe 2012 Final Results*, and accompanying Issues and Decision Memorandum at 6.

¹⁸ See GOT’s QR dated August 13, 2014, at II-49 and Exhibit 27.

¹⁹ *Id.*, at II-49.

²⁰ *Id.*, at II-51.

²¹ *Id.*, at II-52-53.

²² *Id.*, at Exhibit 11; see also the Borusan Companies’ August 15, 2014, QR at Exhibit 21.

²³ See *Turkey Pipe 2012 Preliminary Results* and accompanying Issues and Decision Memorandum at 9, unchanged in *Turkey Pipe 2012 Final Results*.

Department's practice.²⁴ We then divided that amount by the amount of total consolidated export sales of Borusan and Istikbal, net of intra-company sales. On this basis, we determine that the net countervailable subsidy for this program is 0.22 percent *ad valorem* for the Borusan Companies.

3. Investment Encouragement Program (IEP): Customs Duty Exemptions

The GOT provides certificates through the IEP that qualified recipients use to import items at reduced duty rates. The Council of Ministers' Decision NO. 2009/15199, provides certain producers with Investment Encourage Certificates to receive customs duty and value added tax (VAT) exemptions on equipment imported for use.²⁵ Under Article 3.2 of Decree No. 2009/15199, the customs duty and VAT exemption program is limited to firms that make an investment in excess of 50 million Turkish Lira.²⁶ Additionally, the decree limits such exemptions for iron and steel investment to certain regions.²⁷ The Ministry of Economy administers this program.²⁸

Consistent with previous determinations, we find that duty reductions received under exemption certificates granted after January 1, 2009, constitute a financial contribution in the form of revenue forgone within the meaning of section 771(5)(D)(ii) of the Act, and confer a benefit within the meaning of section 771(5)(E) of the Act in the amount of tax savings. Further, we find that this program is limited to firms making investments in excess of 50 million Turkish Lira.²⁹ Thus, the program is specific under section 771(5A)(D)(i) of the Act.

Borusan reported using this program during the POR.³⁰ Specifically Borusan reported holding an IEP certificate during the POR that allowed it to import equipment at a reduced duty rate.³¹ Borusan reported that the receipt of duty exemptions on this certificate was contingent upon the firm using the equipment to produce subject and non-subject merchandise.³² Borusan reported that it has two plants at Gemlik, one that produces subject and non-subject merchandise (*e.g.*, oil country tubular goods) (hereinafter referred to as the Gemlik ERW plant), and one that started production in the second half of 2012 and exclusively produces non-subject merchandise (hereinafter referred to as the Gemlik HSAW plant). Borusan reported that the investment encouragement certificate held by Borusan during the POR was specifically related to capacity increase and modernization of the Gemlik ERW plant, which produces subject and non-subject merchandise.³³

²⁴ See *Turkey Pipe 2012 Preliminary Results* and accompanying Issues and Decision Memorandum at 9, unchanged in *Turkey Pipe 2012 Final Results*.

²⁵ See GOT's QR dated August 13, 2014, at II-72-73.

²⁶ *Id.*, at Exhibit 36.

²⁷ *Id.*

²⁸ *Id.*, at II-72.

²⁹ See *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2011*, 78 FR 64916 (October 30, 2013) (*Turkey Pipe 2011 Final Results*) *Turkey Pipe 2011 Final Results*, and accompanying Issues and Decision Memorandum (*Turkey Pipe 2011 Final Decision Memorandum*) at 16.

³⁰ See Borusan Companies' August 15, 2104, QR at 30; see also GOT's August 13, 2014, QR at II-74.

³¹ *Id.*, at 31 and Borusan Companies' December 14, 2014, QR at Exhibit 43.

³² See Borusan Companies' December 14, 2014, QR at Exhibit 43.

³³ *Id.*, at 10.

Based on review of the record, we find that the certificate was received after January 1, 2009. As a result, we find that Borusan received benefits from this program pursuant to the post-2008 modified IEP regime. Thus, based on the analysis described above, we determine that the Borusan Companies received countervailable benefits under this program.

Based on review of the IEP certificate, we determine that the benefit Borusan received on this certificate was not tied to the production of any particular products. Thus, we attributed benefits under this program to the total sales of the Borusan Companies. To calculate the benefit, we measured the difference in the amounts of customs duties and VAT paid by Borusan during the POR under the program and the amounts otherwise payable during the POR absent the program. We then divided the benefit amount by the total consolidated sales of Borusan and Istikbal, net of intra-company sales during the POR. On this basis, we determine that the net countervailable subsidy for this program is 0.03 percent *ad valorem* for the Borusan Companies.

4. Provision of HRS for Less Than Adequate Remuneration (LTAR)

As noted above, on November 6, 2014, we initiated an investigation into whether the GOT provided HRS for LTAR to Turkish steel pipe producers during the POR. Thus, we investigated whether Eregli Demir ve Celik Fabrikalari T.A.S. (Erdemir) and its subsidiary, Iskenderun Iron & Steel Works Co (Isdemir) provided the Borusan Companies with HRS for LTAR during the POR.³⁴ The Borusan Companies reported purchasing HRS from Erdemir (produced and sold by Erdemir, and produced by Isdemir and sold by Erdemir) during the POR.³⁵

The GOT provided information on Erdemir, Isdemir, and Ordu Yardımlaşma Kurumu (OYAK), the Turkish military pension fund that is a shareholder of Erdemir and Isdemir. During the POR, OYAK, the Turkish military pension fund, owned 49.29 percent of Erdemir's shares through a wholly-owned holding company, Ataer Holding A.S.³⁶ During the POR, Erdemir owned 95.07 percent of Isdemir.³⁷

The law establishing OYAK (the Military Personnel Assistance and Pension Fund Law), which was enacted on January 3, 1961, states that the GOT created OYAK "as an institution related to the Ministry of National Defense."³⁸ Information in the GOT's New Subsidy Allegations (NSA) questionnaire responses indicates the GOT's significant involvement in OYAK. For example, pursuant to the pension fund law, OYAK's Representative Assembly shall be composed of not less than 50 and not more than 100 members of the Turkish Armed Forces "designated by their

³⁴ See New Subsidy Allegation Memorandum to Melissa G. Skinner, Director, AD/CVD Operations, Office III, from Eric B. Greynolds, Program Manager, AD/CVD Operations, Office III, regarding Administrative Review of the Countervailing Duty Order on Welded Carbon Steel Pipes and Tubes from Turkey; 2013, dated November 6, 2014 (NSA Memorandum).

³⁵ See Borusan Companies' New Subsidy Allegation Questionnaire (NSA QR) dated December 10, 2014, at 2 and Borusan Companies' Supplemental New Subsidy Allegation Questionnaire (Supplemental NSA QR) dated January 23, 2015, at Exhibit NSA-8.

³⁶ See the GOT's New Subsidy Allegation Questionnaire (NSA QR) dated December 10, 2014, at 3 and Exhibit 4.

³⁷ *Id.*, at Exhibit 4 at 4.

³⁸ See GOT's NSA QR at Article 1 of Exhibit 4G-11.

respective commanders or superiors.”³⁹ The Representatives Assembly, in turn, elects 20 of the 40 members of OYAK’s General Assembly.⁴⁰ Of the General Assembly’s other 20 members, 17 are by statute government officials (*e.g.*, Ministers of Finance and Defense). Members of the General Assembly elect the eight-person Board of Directors.⁴¹ Also, OYAK’s property has, by law, the “same rights and privileges of state property,” OYAK is exempt from corporate and other taxes, and members of the armed forces must by law contribute part of their salaries to OYAK.⁴²

Record evidence indicates that the GOT’s significant involvement in OYAK extends to Erdemir and Isdemir. For example, Erdemir’s 2013 Annual Report states, “Through . . . flat steel sales to exporting industries,” Erdemir “made a major contribution to the 4.6% increase in Turkey’s manufacturing exports in 2013” . . . and “continues to create value added for Turkish industry through its initiatives to increase the use of domestic sources of raw materials.”⁴³ These policies are in line with the GOT’s stated policy and its 2012- 2014 Medium Term Programme to improve Turkey’s balance of payments.⁴⁴ Also, the GOT explained that the Turkish Privatization Administration (TPA) holds veto power over any decisions related to the closedown, sale, merger, or liquidation of both Erdemir and Isdemir.⁴⁵ Further, Erdemir’s 2013 Annual Report indicates that OYAK and the TPA both have members on Erdemir’s Board of Directors.⁴⁶

We determine that the record evidence cited above indicates that the GOT exercises meaningful control over Erdemir and Isdemir through its control of OYAK. Therefore, consistent with the final CVD determination in *OCTG from Turkey*, we determine that Erdemir and Isdemir are public bodies, and hence “authorities,” pursuant to section 771(5)(B) of the Act.⁴⁷ Consequently, we find that the HRS Erdemir and Isdemir supplied to the Borusan Companies is a financial contribution in the form of a governmental provision of a good under section 771(5)(D)(iii) of the Act.

Regarding the specificity of HRS for LTAR, the GOT provided a list of the industries that purchased HRS in Turkey during the POR.⁴⁸ Specifically the GOT identified the following industries as purchasers of HRS during the POR: Construction, Automotive, Machinery Industry, Domestic Appliances, Agricultural, Shipbuilding, Steel Pipe and Profile, and Rerolling

³⁹ *Id.*, at Article 3 of Exhibit G-11.

⁴⁰ *Id.*, at Article 4 of Exhibit 4G-11.

⁴¹ *Id.*, at Articles 5 and 8 of Exhibit 4G-11 (Law No. 205).

⁴² *Id.*, at Articles 18, 35, and 37 of Exhibit 4G-11.

⁴³ See GOT’s NSA QR at Exhibit 4-C (Erdemir 2013 Annual Report at 35 and 18, respectively).

⁴⁴ See Petitioners’ December 22, 2014, submission at Exhibit 5, which contains the 2012-2014 Medium Term Programme.

⁴⁵ *Id.*, at Exhibit 4 a (Erdemir’s Articles 21, 22, 27 of Association).

⁴⁶ *Id.*, at Exhibit 4 c (Erdemir 2013 Annual Report, pages 65-66).

⁴⁷ See *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Determination in the Countervailing Duty Determination and Final Affirmation Critical Circumstances Determination*, 79 FR 41964 (July 18, 2014) (*OCTG from Turkey*), and accompanying Issues and Decision Memorandum (*OCTG from Turkey Decision Memorandum*) at Comment 1; see also *See Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. & Borusan Istikbal Ticaret v. United States*, Slip Op. 15-36 (CIT) (April 22, 2015) (*Borusan*) at 28, in which the Court upheld the Department’s finding that Erdemir and Isdemir are “authorities.”

⁴⁸ See GOT’s NSA QR at 12.

Producers.⁴⁹ Consistent with the Department's determination in *OCTG from Turkey*, we determine that the financial contribution provided by the GOT under this program is specific within the meaning of section 771(5A)(D)(iii)(I) of the Act because the number of industries or enterprises using HRS is limited in number.⁵⁰

Finally, regarding benefit, the Department identifies appropriate market-determined benchmarks for measuring the adequacy of remuneration for government-provided goods or services, in accordance with 19 CFR 351.511(a)(2). This section of the Department's regulations specifies potential benchmarks in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation (*e.g.*, actual sales, actual imports or competitively run government auctions) (tier one); (2) world market prices that would be available to purchasers in the country under investigation (tier two); or (3) an assessment of whether the government price is consistent with market principles (tier three). As provided at 19 CFR 351.511(a)(2), the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation.⁵¹ This is because such prices generally reflect most closely the prevailing market conditions of the purchaser under investigation.

Based on this hierarchy, we must first determine whether there are market prices from actual sales transactions involving Turkish buyers and sellers that can be used to determine whether Erdemir and Isdemir sold HRS to the respondents for LTAR. Notwithstanding the regulatory preference for the use of prices stemming from actual transactions in the country, where the Department finds that the government owns or controls the majority or a substantial portion of the market for the good or service, the Department will consider such prices to be significantly distorted and not an appropriate basis of comparison for determining whether there is a benefit.⁵²

We obtained production and consumption data for HRS during the POR and the previous two years from the GOT.⁵³ The GOT's information indicates that Erdemir's and Isdemir's collective share of the domestic supply of HRS during 2011, 2012, and 2013 accounted for 49.7 percent, 47.2 percent, and 46.5 percent, respectively, of the total domestic supply of HRS (inclusive of imports and internally-consumed production) in Turkey.⁵⁴ Based on this information, we found in the *Preliminary Results* that Erdemir's and Isdemir's production accounted for a substantial portion of the domestic supply during the POI and previous years.⁵⁵ As a result, we preliminarily found that tier one prices for HRS could not serve as appropriate benchmarks, and we instead based our benchmark on tier two, or world market prices.⁵⁶

After considering the arguments raised by interested parties in this case, we have reconsidered

⁴⁹ *Id.*

⁵⁰ See *OCTG from Turkey* and OCTG from Turkey Decision Memorandum at 20-26.

⁵¹ See, *e.g.*, *Notice of Affirmative Countervailing Duty Determination and Final Negative Critical Determination: Certain Softwood Lumber Products from Canada*, 67 FR 15545 (April 2, 2002) (*Softwood Lumber from Canada*) and accompanying Issues and Decision Memorandum at "Market Based Benchmark."

⁵² See *Preamble*, 63 FR at 65277.

⁵³ See GOT's NSA QR at page 10.

⁵⁴ *Id.*

⁵⁵ See Preliminary Decision Memorandum at 12-13.

⁵⁶ *Id.*

the benchmark we are using to measure the adequacy of remuneration for HRS. *See* Comment 1, below, for further discussion. Therefore, for purposes of the final results we determine that the record evidence does not support a finding that the Turkish HRS market is so distorted that it cannot serve as an appropriate benchmark. Thus, we determine that the Borusan Companies' domestic and import prices for HRS can serve as a tier one benchmark. Therefore, pursuant to 19 CFR 351.511(a)(2)(i), we used the Borusan Companies' actual domestic and import prices for HRS to calculate the benefit from the Borusan Companies' purchases of HRS from Erdemir and Isdemir during the POI.

Under 19 CFR 351.511(a)(2)(iv), when measuring the adequacy of remuneration under tier one or tier two, the Department will adjust the benchmark price to reflect the price that a firm actually paid or would pay if it imported the product, including delivery charges and import duties. Because we are using actual domestic and import prices paid by the Borusan Companies, the benchmark already includes the delivery charges, import duties (where applicable), and VAT paid.

We then compared the monthly benchmark prices to the Borusan Companies' actual purchase prices for HRS from Erdemir and Isdemir, including taxes and delivery charges, as appropriate. In instances in which the Borusan Companies paid to Erdemir and Isdemir a lower unit price than the benchmark unit price, we multiplied the difference by the quantity of HRS purchased to calculate the benefit.⁵⁷ Under this methodology, we find that the Borusan Companies received a benefit to the extent that the prices it paid for HRS produced by Erdemir and Isdemir were for LTAR.⁵⁸

To calculate the net subsidy rate attributable to the Borusan Companies, we divided the benefit by the total consolidated sales of Borusan and Istikbal, net of intra-company sales during the POR. On this basis, we find that the Borusan Companies received a countervailable subsidy of 0.46 percent *ad valorem*.⁵⁹

B. Programs Determined Not To Confer Countervailable Benefits

1. Inward Processing Certificate Exemption

The Ministry of Economy is the authority responsible for administering the Inward Processing Certificate program (IPC).⁶⁰ Under the IPC program, companies are exempt from paying customs duties and VAT on raw materials and intermediate unfinished goods that are imported and used in the production of exported goods.⁶¹ Companies may choose whether to be exempt from the applicable duties and taxes upon importation (*i.e.*, the Suspension System) or have the duties and taxes reimbursed after exportation of the finished goods (*i.e.*, the Drawback System).

⁵⁷ *See* Memorandum to the File, "Final Results Calculations for the Borusan Companies," October 5, 2015 (Borusan Companies' Final Calculations Memorandum)

⁵⁸ *See* Sections 771(5)(D)(iv) and 771(5)(E)(iv) of the Act.

⁵⁹ *See* Borusan Companies' Final Calculations Memorandum.

⁶⁰ *See* the GOT's August 13, 2014, QR at II-38.

⁶¹ During the POR, the IPC was implemented under Resolution No. 2005/8391. A copy of this resolution was submitted by the GOT in the GOT's QR dated August 13, 2014, at Exhibit 19.

Under both systems, companies provide a letter of guarantee that is returned to them upon fulfillment of the export commitment.⁶²

To participate in this program, a company must hold an IPC, which lists the amount of raw materials/intermediate unfinished goods to be imported and the amount of product to be exported.⁶³ To obtain an IPC, an exporter must submit an application, which provides information about the goods to be produced and the raw materials to be imported.⁶⁴ There are two types of IPCs: (1) D-1 certificate for imported raw materials or intermediate unfinished goods used in the production of exported goods, and (2) D-3 certificate for imported raw materials or intermediate unfinished goods used in the production of goods sold in the domestic market.⁶⁵ During the POR, Borusan used D-1 certificates for the importation of raw materials used in the production of exported pipe and tube. The Borusan Companies did not use a D-3 certificate during the POR.⁶⁶

Concerning D-1 certificates, pursuant to 19 CFR 351.519(a)(1)(ii), a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product, making normal allowances for waste, or if the exemption covers charges other than import charges that are imposed on the input. With regard to the VAT exemption granted under this program, pursuant to 19 CFR 351.517(a), in the case of the exemption upon export of indirect taxes, a benefit exists to the extent that the Department determines that the amount exempted exceeds the amount levied with respect to the production and distribution of like products when sold for domestic consumption.

In prior reviews, the Department found that, in accordance with 19 CFR 351.519(a)(4)(i), the GOT has a system in place to confirm which inputs, and in what amounts, are consumed in the production of the exported product, and that the system is reasonable for the purposes intended.⁶⁷ The Department also found that the exemption granted on certain methods of payments used in purchasing imported raw materials under this program does not constitute a subsidy pursuant to 19 CFR 351.517(a), because the tax exempted upon export does not exceed the amount of tax levied on like products when sold for domestic consumption.⁶⁸ No new information is on the record of this review to warrant a reconsideration of the Department's earlier findings.

During the POR, under D-1 certificates, Borusan received duty and VAT exemptions on certain imported inputs used in the production of steel pipes and tubes exported to the United States. Consistent with the Department's findings in *Turkey Pipe 2012 Final Results* and based on our review of the information supplied by the respondents regarding this program, we preliminarily find no evidence on the record of this review indicating that the amounts of VAT and duty

⁶² See the GOT's QR dated August 13, 2014, at II-39-40.

⁶³ *Id.*, at II-41.

⁶⁴ *Id.*

⁶⁵ *Id.* at II-41-42.

⁶⁶ See the Borusan Companies' August 15, 2014, QR at 28-29 and at Exhibit 27; see also the GOT's August 13, 2014, QR at II-42.

⁶⁷ See, e.g., *Final Results of Countervailing Duty Administrative Review: Certain Welded Carbon Steel Standard Pipe from Turkey*, 71 FR 43111 (July 31, 2006), and accompanying Issues and Decision Memorandum at 12 – 19; see also GOT Initial QNR Response at II-37 – 43 and Exhibits 20 – 22.

⁶⁸ *Id.*; see also *Turkey Pipe 2012 Final Results* and accompanying Issues and Decision Memorandum at Comment 8.

exemptions on inputs Borusan imported under the program were excessive or that the company used the imported inputs for any other product besides those exported, respectively.

Therefore, consistent with past cases,⁶⁹ we determine that the tax and duty exemptions, which Borusan received on imported inputs under D-1 certificates of the IPC program, did not confer countervailable benefits as the exemptions were applied only to the imported inputs consumed in the production of the exported product, making normal allowance for waste. We further find that the VAT exemption did not confer countervailable benefits to Borusan because the exemption does not exceed the amount levied with respect to the production and distribution of like products when sold for domestic consumption. Further, because Borusan did not import any goods under a D-3 certificate during the POR, we preliminarily determine that this aspect of the IPC program was not used by the Borusan Companies.

C. Programs Determined Not to Be Used

We examined and determine that the Borusan Companies did not apply for or receive benefits under these programs during the POR:

- Post-Shipment Export Loans
- Pre-Export Credits
- Pre-Shipment Export Credits
- Export Credit Bank of Turkey Buyer Credits
- Foreign Trade Companies Short Term Export Credits
- Law 5084: Withholding of Income Tax on Wages and Salaries
- Law 5084: Incentives for Employers' Share in Insurance Premiums
- Law 5084: Allocation of Free Land and Purchase of Land for LTAR
- Law 5084: Energy Support
- Subsidized Turkish Lira Credit Facilities
- Subsidized Credit for Proportion of Fixed Expenditures
- Subsidized Credit in Foreign Currency
- Regional Subsidies
- VAT Support System (Incentive Premium on Domestically Obtained Goods)
- Investment Encouragement Program (IEP): Reductions in Corporate Taxes
- IEP: Interest Support
- IEP: Social Security Premium Support
- IEP: Land Allocation
- National Restructuring Program
- Regional Incentive Scheme (RIS): Reduced Corporate Tax Rates
- RIS: Social Security Premium Contribution for Employees
- RIS: Allocation of State Land
- RIS: Interest Support
- Organized Industrial Zones (OIZ): Waste Water Charges

⁶⁹ See, e.g., *id.*, and accompanying Issues and Decision Memorandum at 4.

- OIZ: Exemptions from Customs Duties, VAT, and Payments for Public Housing Fund, for Investments for which an Income Certificate is Received
- OIZ: Credits for Research and Development Investments, Environmental Investments, Certain Technology Investments, Certain “Regional Development” Investments, and Investments Moved from Developed regions to “Regions of Special Purpose”
- OIZ: Exemption from Building and Construction Charges
- OIZ: Exemption from Amalgamation and Allotment Transaction Charges
- OIZ: Exemption for Property Taxes
- Corporate Income Tax Exemption under the Free Zones Law
- Stamp Duties and Fees Exemptions under the Free Zones Law
- Customs Duty Exemptions Under the Free Zones Law
- Value Added Tax Exemptions Under the Free Zones Law
- Provision of Building and Land Use Rights for Less than Adequate Remuneration under the Free Zones Law

V. Non-Selected Rate

The Tariff Act of 1930, as amended (the Act), and the Department’s regulations do not address the establishment of a rate to be applied to respondents not selected for individual examination when the Department limits its examination in an administrative review pursuant to section 777A(e)(2) of the Act. Generally, when determining the rate for such respondents in an administrative review, the Department looks to section 705(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation. Section 705(c)(5)(A)(i) of the Act instructs the Department to use the average of the individually calculated rates as the all-others rate, excluding rates which are zero, *de minimis* or based entirely on facts available. Accordingly, the Department’s usual practice in administrative reviews for determining the rate for respondents not selected for individual examination has been to average the weighted-average net subsidy rates for the selected companies, excluding rates that are zero, *de minimis*, or based entirely on facts available.⁷⁰ However, section 705(c)(5)(A)(ii) of the Act provides that, where all the individually calculated rates are zero, *de minimis*, or based entirely on facts available, we may use “any reasonable method” for assigning the all-others rate, including averaging the estimated weighted-average net subsidy rates determined for the exporters and producers individually investigated.

- As indicated above, we determine that the Borusan Companies, the only mandatory respondent in this review, received a 0.91 percent net subsidy rate during the POR. Therefore, in keeping with our practice of basing the non-selected rate on the above-*de minimis* net subsidy rate(s) calculated for the mandatory respondent(s), we used the net subsidy rate calculated for the Borusan Companies as the subsidy rate applicable to the following companies not selected for individual review: the Toscelik Companies, Guven Steel Pipe (also known as Guven Celik Boru San. Ve Tic. Ltd.) (Guyen), and Umran Celik Born Sanayii A.S. (also known as Umran Steel Pipe Inc.) (Umran).⁷¹ Accordingly, the net

⁷⁰ See, e.g., *Certain Pasta from Italy: Final Results of the 13th (2008) Countervailing Duty Administrative Review*, 75 FR 37387 (June 29, 2010) (2008 Review of Pasta from Italy).

⁷¹ *Id.*, 75 FR at 37387.

subsidy rate assigned to the Toscelik Companies, Guven, and Umran is 0.91 percent *ad valorem*.

VI. Analysis of Comments

Comment 1: Whether the Department Erred by Finding that Prices of HRS in Turkey Are Significantly Distorted

Case Brief Arguments of the Toscelik Companies

- Consistent with the Court's holding in *Borusan*, the Department should use a tier-one benchmark unless it provides evidence that domestic and import market prices for HRS in Turkey are distorted by the market share of Erdemir.⁷²
- In the instant review, the Department should use a tier-one benchmark because the HRS pricing data on the record show no evidence that the pricing policies of Erdemir distort the HRS prices charged by private producers in the Turkish market. Thus, in the absence of any evidence of market distortion, the Department should use import and domestic prices of HRS in Turkey as the tier-one benchmark.

Case Brief Arguments of the GOT

- The Department failed to provide an adequate explanation and analysis pertaining to the Turkish HRS market to justify its preliminary finding that the actual market prices of HRS in Turkey are distorted by Erdemir's and Esdemir's presence on the Turkish market.
- The Department's reliance on *Softwood Lumber from Canada* is not an appropriate reference to support its preliminary finding of distortion of HRS prices in the Turkish market considering the very different nature of the two proceedings.⁷³ In the *Softwood Lumber from Canada*, the Canadian government's involvement in the stumpage market accounted for approximately 83 to 99 percent of the standing timber harvested, while in the instant administrative review the alleged GOT involvement in the HRS market was only 40 percent during the POR."⁷⁴
- Second, in *Softwood Lumber from Canada*, the Department stated that it would have used import prices for purposes of its benchmark if such prices had been available on the record.⁷⁵ Thus, in *Softwood Lumber from Canada*, the Department implied that the use of import prices is permitted even when the Department finds that the domestic market under examination is distorted.
- The Department failed to explain the circumstances which resulted in a significant distortion of the Turkish HRS market, as required by its regulations.⁷⁶
- Further, the Department's preliminary finding runs counter to the World Trade Organization's (WTO) recent findings concerning distortion. Specifically, the Appellate

⁷² See *Borusan* at 37-40, in which the Court found that the Department lacked sufficient evidence to conclude that the prices for domestically-sourced HRS was dominated by domestic sales of HRS by stated-owned entities, *e.g.*, Erdemir and Ismir, thereby rendering any private HRS prices inside Turkey ineligible for use as tier-one benchmarks.

⁷³ See *Softwood Lumber from Canada* and accompanying Issues and Decision Memorandum.

⁷⁴ *Id.* at Comment 1 (Section: There are no Market Based Internal Canadian Benchmarks).

⁷⁵ *Id.*

⁷⁶ See *Preamble*, 63 FR at 65377.

Body's Report in U.S.-Antidumping and Countervailing Duties in China (DS 379) states, "If the government is a significant supplier, this fact alone cannot justify a finding that prices are distorted" and "...evidence pertaining to factors other than government market share will be needed..."⁷⁷

Case Brief Arguments of the Borusan Companies

- The Department's rejection of a tier-one benchmark is not supported by substantial evidence and is otherwise not in accordance with law.
- The Department implemented a *per se* market distortion finding in the *Preliminary Results* that is not in accordance with law.
- The Department erred in relying on the *Preamble* and *Softwood Lumber from Canada*. The *Preamble* is not a primary legal authority and cannot be relied upon to support the Department's decision to use tier-two benchmark.
- The Department disregarded the statutory requirement to use a benchmark that reflects the prevailing market conditions in the country under investigation.⁷⁸ The law requires that the Department apply market-determined tier-one prices unless they are not available.⁷⁹ The actual market prices on the record (*e.g.*, import prices and domestic prices for HRS from private sellers) are appropriate to use as a tier-one benchmark because there is no evidence of any market distortion.
- Further, contrary to the Department's preliminary findings, the *Preamble* does not support the application of a *per se* rule that the substantial presence of a government supplier in the market should lead the Department to find that other prices in the market are not useable market-determined prices.⁸⁰
- Rather, the *Preamble* states that the Department's preference will be to use actual transactions within the country for purposes of the LTAR benchmark. The *Preamble* further states that the Department "normally" does "not intend to adjust such price to account for government distortion of the market" and that it will "normally" consider that a government's involvement in the market will cause a "minimal" distortive impact on prices unless "it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market."⁸¹
- In the *Preliminary Results* the Department failed to address the requirement from its regulations that it is "reasonable" to conclude that actual transaction prices were distorted.
- In *Borusan* the Court held that the Department's policy of finding actual transaction prices to be distorted based solely on Erdemir's share of HRS production in the Turkish market amounted to a *per se* rule and remanded the Department to "explain those circumstances where 'substantial portion of the market' results in minimal distortion and where it results in substantial distortion."⁸²

⁷⁷ See Appellate Body Report in United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, DS379 at paragraphs .441 and 443.

⁷⁸ See section 771(5)(E) of the Act and 19 C.F.R. 351.511(a)(2)(i) and (ii).

⁷⁹ See 19 CFR 351.511(a)(2)(ii).

⁸⁰ See *Preamble* 63 FR at 65377.

⁸¹ *Id.*

⁸² See *Borusan*, Slip Op. 15-36 at 38.

- In the instant review the Department should adhere to the Court’s holding in *Borusan* and find that there is insufficient evidence to conclude that the domestic market for HRS in Turkey is distorted.
- The Department’s reliance on *Softwood Lumber from Canada* in its preliminary analysis is misplaced. In *Softwood Lumber from Canada*, the Department’s market distortion analysis was not a *per se* rule based on market share but rather an examination based on the structure of the Canadian timber market and the government’s role in the market, which included evidence that provincial governments set prices with a goal towards government policy, established minimum production requirements, administered prices for standing timber.⁸³
- Further, the Department’s analysis in *Softwood Lumber from Canada* was not based on a mere finding that government suppliers constituted a substantial portion of the market but rather on a situation “{w}here the market for a particular good or service is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price.”⁸⁴
- The phrase “so dominated by” is not the same as “substantial portion” and, thus, the latter is not sufficient to support a finding of significant market distortion. Evidence shows that the HRS market in Turkey is “far from being dominated” by Erdemir and Isdemir and, therefore, there is insufficient evidence to support the Department’s finding of significant market distortion.⁸⁵
- The *per se* distortion analysis applied in the *Preliminary Results* is unprecedented even in the context of prior CVD proceedings involving the People’s Republic of China (PRC). For example in *Guangdong Wireking* and *Archer Daniels Midland*, the Department found in the underlying proceedings that the Chinese market was significantly distorted based on several factors: the Chinese government’s significant ownership and control of the market, low import penetration, and export tariffs and export licensing requirements.⁸⁶ Thus, in those proceedings, the Department did not rely solely on the share of production accounted for by the purported state-owned entities, but rather based its decision on additional factors that found to be impacting domestic prices.
- The distortion finding in the *Preliminary Results*, in which the Department relied solely on the share of HRS allegedly accounted for by Erdemir and Isdemir, is therefore a departure from its long-standing practice.
- The Department failed to consider evidence on the record that should serve as a tier-one benchmark. The Department verified the Borusan Companies’ HRS purchases from private domestic and import suppliers including purchases from Isdemir during the POR and all of them showed similar price quotations and similar products specifications for HRS.⁸⁷ These purchases accounted for over 40 percent of the Borusan Companies’ total HRS purchases

⁸³ See *Softwood Lumber from Canada* and accompanying Issues and Decision Memorandum at “Market Based Benchmark” section.

⁸⁴ *Id.*

⁸⁵ See *Borusan*, Slip Op. 15-36, at 40, footnote 24.

⁸⁶ See *Guandong Wireking Housewares and Hardware Co., v United States*, 900 F. Supp. 2d 1362, 1380-81 (CIT 2013) (*Guandong Wireking*); see also *Archer Daniels Midland Co. v. United States*, 917 F. Supp 2d 1331, 1343-44 (CIT) 2013) (*Archer Daniels Midland*).

⁸⁷ See the Memorandum to Eric B. Greynolds, Program Manager, AD/CVD Operations, Office III, “Verification of the Questionnaire Responses submitted by Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (BMB), and Borusan Istikbal Ticaret T.A.S. (Istikbal) (collectively, Borusan), (Borusan Companies’ Verification Report) at 11, and Verification Exhibit 13 at 4.

during the POR.⁸⁸ Further the Borusan Companies' purchases included HRS sold by such global suppliers as ArcelorMittal SA and U.S. steel. There is no evidence on the record indicating that these prices, including the prices charged by the world's leading steelmaker, are distorted, depressed, or otherwise unsuitable for use as a tier-one benchmark.

- The tier-one HRS prices submitted by the Borusan Companies track and frequently exceed the HRS prices for Southern Europe, Turkey, Russia, the Black Sea, and the United States and, therefore, undercut the Department's preliminary finding that tier-one price for HRS in Turkey are distorted.
- Contrary to its practice in other cases, such as *Coated Paper from China* or *Off the Road Tires from China*, the Department failed to explain how its market distortion finding can be reconciled with the presence of significant imports of HRS into the Turkish market.⁸⁹
- The record evidence showing that Turkish market is one of the most open in the world undermines the Department's findings that the Turkish HRS market is significantly distorted. For example, the Department failed to consider zero import duties on HRS imports from European Union to free trade agreement (FTA) countries and a duty drawback system that exempts Turkish companies from import duties and value added tax (VAT) from non-EU⁹⁰ and non-FTA countries imports accounting for approximately one third of the total domestic supply of HRS.⁹¹
- Further, the Department's rejection of imports as a tier-one benchmark is also inconsistent with *Carbon Steel Flat Products from Korea* where the Department used Dongbu Steel Co., Ltd.'s (Dongbu) import purchases as the tier-one benchmark for measuring whether Dongbu purchased HRS from government supplier, Pohang Iron & Steel Co., Ltd. (Posco) for LTAR.⁹²
- Further, according to the Borusan Companies, in *Husteel* the Court of International Trade (CIT) refused to permit the Department to simply reject prices made into a market by a foreign supplier based on alleged distortion by the government in that market.⁹³

Department's Position: Following the remand redetermination issued in *OCTG from Turkey*, we have reconsidered our distortion finding for the final results. In *Borusan*, the Court pointed

⁸⁸ See the Borusan Companies' Supplemental NSA QR at NSA-8.

⁸⁹ See *Certain Coated Paper Suitable for high Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 59212 (September 27, 2010) (*Paper from the PRC*) and accompanying Issues and Decision Memorandum at 22; see also *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 FR 40480 (July 15, 2008) and accompanying Issues and Decision Memorandum at 11.

⁹⁰ See GOT's NSA QR at Exhibit 2.

⁹¹ See the Memorandum to Eric B. Greynolds, "Verification of Information Submitted by the Government of Turkey (GOT)," March 31, 2015 (GOT Verification Report) at Exhibit 1.

⁹² See *Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From the Republic of Korea*, 67 FR 9685 (March 4, 2002) (*Carbon Steel Flat Products from Korea*); see also *Final Results and Partial Rescission of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 68 FR 13267 (March 19, 2003) (*Stainless Steel from Korea*) and accompanying Issues and Decision Memorandum at 40-42. See also *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 73 FR 31966 (June 5, 2008), and accompanying Issues and Decision Memorandum (May 29, 2008) at 65-67.

⁹³ See *Husteel Co. v. United States* 558 F. Supp 2d 1357, 1365 (CIT 2008) (*Husteel*).

to language from the *Preamble* and directed the Department to provide further analysis of the “certain circumstances” that would lead it to find, or not find, the existence of market distortion where the government supplier accounts for a “substantial portion,” but not a majority, of the input market in question.⁹⁴ In compliance with the Court’s direction, in *OCTG from Turkey Remand Redetermination*, the Department re-assessed the underlying record and determined that “the other factors that Commerce has considered as additional evidence of market distortion in other proceedings {were} not evident on the record” of the investigation.⁹⁵ Accordingly, the Department concluded that “HRS prices stemming from transactions within Turkey – including domestic purchases and imports into the country (*i.e.*, tier one prices) – may be considered appropriate, pursuant to the statutory and regulatory requirements, to use as benchmarks” in measuring the benefit under the provision of HRS for LTAR program.⁹⁶

Similar to *OCTG from Turkey Remand Redetermination*, the record of this review does not contain evidence of the GOT’s direct or indirect involvement resulting in distortion of the Turkish HRS market during the POR sufficient to warrant using an out-of-country benchmark.⁹⁷ For example, the record does not contain evidence of GOT export restraints on HRS⁹⁸ and the share of imports into the domestic market is higher than in certain past cases where the Department pointed to low import levels as relevant information in rejecting tier one prices.⁹⁹ The record information regarding any policies that the GOT may have with respect to the steel industry does not indicate that the GOT’s pursuit of those policies results in a significant distortion of the Turkish HRS market. There is no indication otherwise that government involvement significantly distorts this market. Thus, the record of this investigation is absent additional facts present in other cases in which the agency found government distortion even where record evidence did not show that government-controlled producers accounted for a majority of the market for the good.¹⁰⁰

Therefore, in light of the Department’s reconsideration of that evidence pursuant to *Borusan*, we find it appropriate to conclude, consistent with *OCTG from Turkey Remand Redetermination*, that the Borusan Companies’ domestic and import prices for HRS can serve as a tier one

⁹⁴ See *Borusan*, 61 F. Supp. 3d at 1330-1332. Specifically, the Court cited to the statement in the *Preamble* that “[w]hile we recognize that government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market.” (Emphasis added.)

⁹⁵ See Final Results of Remand Redetermination, *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. and Borusan Istikbal Ticaret v. United States; Maverick Tube Corporation v. United States*, Consol. Ct. No. 14-00229, 61 F. Supp. 3d 1306 and Slip Op. 15-59 (*OCTG from Turkey Remand Redetermination*).

⁹⁶ *Id.*

⁹⁷ See *OCTG from Turkey Remand Redetermination*.

⁹⁸ See GOT’s December 10, 2014 NSA QR at 8.

⁹⁹ *Id.*, at 9-10.

¹⁰⁰ See, e.g., *Certain Kitchen Shelving and Racks from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 37012 (July 27, 2009) (*Kitchen Racks from the PRC*), and accompanying Issues and Decision Memorandum at Comment 8, where the Department found that the domestic market for wire rod was distorted by government producers accounting for approximately 46 percent of production because of the presence of export tariffs and export licensing requirements, as well as the low share of imports in the domestic market; see also *Coated Paper from the PRC* and accompany Issues and Decision Memorandum at Comment 14, where the Department found that the domestic market for caustic soda was distorted by government producers accounting for approximately 37 percent of production because imports as a share of domestic consumption were insignificant.

benchmark in this review. Consequently, pursuant to 19 CFR 351.511(a)(2)(i), we used the Borusan Companies' actual domestic and import prices for HRS to calculate the benefit from the Borusan Companies' purchases of HRS from Erdemir and Isdemir during the POR. *See* "Programs Determined to be Countervailable – HRS for LTAR," above, for the details of the final determination tier one benchmark calculation.

Comment 2: Calculating the Share of HRS Accounted for by Erdemir and Isdemir

Case Brief Arguments of the Borusan Companies

- The Department's calculation of the share of HRS accounted for by Erdemir/Isdemir during the POR is flawed because it included the firms' internally-consumed production. HRS that is internally consumed by a producer is never "in the market" and, thus, does not impact prices that are available in the market. By removing internal consumption from its calculation, the Department would have calculated that Erdemir/Isdemir accounted for only 44.74, 43.47, and 40.8 percent of the HRS market during the period 2011-2013. These ratios, which are significantly lower than the flawed ratios cited in the *Preliminary Results*, indicate that the production accounted for by Erdemir/Isdemir is not large enough to distort the prices of HRS charged by other HRS producers and sellers in Turkey.

Department's Position: As indicated above in the "Provision of HRS for LTAR" section and Comment 1 above, in these final results, we have determined to use a tier-one benchmark under 19 CFR 351.511(2)(i). As a result, this issue is moot.

Comment 3: Data Sources Used in the Calculation of the Tier-Two Benchmark Price

Case Brief Arguments of the Borusan Companies

- In the event the Department continues to use a tier -two benchmark in the final results, it should make the following adjustments to the calculation of the two tier benchmark to ensure prices used are "commercially reasonable:"
- The Department should use the non-GTIS price series data for calculating the two-tier benchmark (*e.g.*, pricing data from SBB, Steel Orbis, AMM, and Metal Bulletin). Evidence indicates that the non-GTIS price series data available on the record are actual market information that are relied upon by the steel industry in general, as well as by Erdemir and Isdemir. In contrast, the GTIS data are not appropriate to use because they constitute nothing more than a "data dump" that is based on raw customs data of various countries and do not represent real market prices.
- It is not reasonable to conclude that the GTIS data, which include HRS prices for countries that are extremely far from Turkey and from which the Borusan Companies did not purchase HRS during the POR, are available to purchasers in the country in question as required under 19 CFR 351.511(a)(2)(ii).
- In *Borusan*, the CIT stated that the world market prices "must be grounded in the reality of prevailing market conditions for the good or services or the goods being prices in the country which is subject to the investigation or review."¹⁰¹ Thus, geographical proximity and transportation costs are factors to be taken into consideration in deciding from what countries

¹⁰¹ *See Borusan*, Slip Op. 15-36 at 46.

to purchase. The CIT's opinion in *Borusan* is consistent with the Department's determination in *Softwood Lumber from Canada* where the Department stated that prices from countries in close proximity are preferable to prices from countries farther away.¹⁰² Also, record evidence contradicts the Department's preliminary findings that all countries in the GTIS data would be "commercially available to purchasers in Turkey."¹⁰³

- In contrast, the data from the non-GTIS data sources reflect actual transactions between parties in the market. Further, Erdemir and Isdemir rely on the non-GTIS data sources for purposes of setting their HRS prices.¹⁰⁴
- The Department should include in the tier-two price benchmark calculation the SBB Black Sea, AMM, and Metal Bulletin World Market Prices data available on the record. Contrary to the Department's claim there is information on the record concerning which countries are included in these price series; therefore there is no basis to exclude this price series in the calculation of the Department's tier-two benchmark.¹⁰⁵ The Department should also include the AMM "Steel, Steel Benchmark, hot-rolled coil/World Export Market" price series and the Metal Bulletin "Steel Benchmark Hot Rolled coil World Export Market USD per metric ton" submitted by the Borusan Companies,¹⁰⁶ as it has been the Department's practice to utilize these prices in its benchmark calculations.¹⁰⁷ Furthermore, it has been the Department's practice to use SBB and AMMM/Metal bulleting SteelBenchmarker data.¹⁰⁸

Department's Position: As indicated above in the "Provision of HRS for LTAR" section and Comment 1 above, in these final results, we have determined to use a tier-one benchmark under 19 CFR 351.511(2)(i). As a result, this issue is moot.

Comment 4: Calculating the Tier-Two Benchmark Price Concerning Import Duties and VAT

Case Brief Arguments of the GOT

- The Department erred in including ocean and inland freight charges, VAT, and import duties in its tier-two benchmark price calculations. The Department disregarded information on the record that Turkey's Inward Processing Regime (IPR) program allows Turkish exporters to import raw materials used in the productions of exported goods without paying any customs duty and VAT and that during the POR all Turkish companies imported more than 90 percent of HRS without paying import duties either from the EU and FTA countries or from non-EU and non-FTA countries under the IPR during the POR. Thus, based on this information, the Department should have excluded VAT and customs tariffs when calculating the tier-two HRS benchmark.
- The Department disregarded information on the record and calculated a simple average of import duties on HRS ranging between zero and 15 percent based on the subheading of the

¹⁰² See *Softwood Lumber from Canada* at 36.

¹⁰³ See *Preliminary Results* and Preliminary Decision Memorandum at 16.

¹⁰⁴ See GOT's NSA QR, Exhibit 4 at 11 and Exhibit 4-K at 15; see also Borusan Companies' NSA QR at 7.

¹⁰⁵ See *Preliminary Results* and Preliminary Decision Memorandum at 14-15.

¹⁰⁶ See the Borusan Companies' NSA QR at Exhibit NSA-5; see also the Borusan Companies' February 26, 2015 Rebuttal Benchmark Data Submission at Exhibit 49.

¹⁰⁷ See *53-Foot Domestic Dry Containers from China* and accompanying Issues and Decision Memorandum at 22; see also *Wire Rod from China Preliminary* and accompanying Issues and Decision Memorandum at 29-30.

¹⁰⁸ *Id.*

Harmonized Tariff System Classification for HRS.¹⁰⁹ This resulted in the Department attributing import duties for imports of HRS for countries in which no import duties were in place during the POR (*e.g.*, no import duties were in place with regard to HRS imported from the EU member countries and FTA partners of Turkey).

- Rather than rely on an average, the Department should base any tier-two benchmark based on the actual import duties (or lack of import duties) that are in place for each country.¹¹⁰

Case Brief Arguments of the Borusan Companies

- The Department should exclude import duties, VAT, and inland freight from the tier-two benchmark calculations. The Department's inclusion of these charges in its benchmark calculation is unlawful and inconsistent with record evidence.
- In the *Preliminary Results* the Department failed to explain why it included import duties from certain countries in the tier-two benchmark when no import duties are charged for these countries.
- The Department's decision to include import duties from EU and FTA countries is inconsistent with the Department's decision in *OCTG from Turkey*.¹¹¹ According to the Borusan Companies, VAT is not a cost component and Turkish companies do not record it in their inventory records when raw materials are purchased.¹¹²
- Further, the Department should allocate the benefit over a sales denominator that does not include VAT because a company does not consider VAT collected on its sales as revenue when it records the value of its sales in the financial records.¹¹³ To continue to include VAT in the benchmark used to calculate the benefit under the HRS for LTAR program will therefore result in a mismatch and, thus, an over calculation of the subsidy benefit because the sales denominator of the Borusan Companies does not include VAT.
- The Department disregarded verified information showing that Borusan did not pay import duties on imports of HRS from the EU and FTA countries on the grounds that the Department is applying a new weighted average methodology.¹¹⁴
- The Department's new weighted average methodology is unlawful and appears to be the reason why the Department did not deduct import duties from EU and FTA countries that are subject to zero import duties on HRS into Turkey as it was in the case in *Welded Line Pipe from Turkey*.¹¹⁵
- The use of a methodology that simple averages the available price series data would allow the Department to exclude the import duties from EU and FTA countries, VAT, and the inland freight from its tier-two benchmark. The Department has a long practice of applying a simple average methodology as it has done in cases such as *53-Foot Domestic Dry Containers from China* or *Wind Towers from China*.¹¹⁶

¹⁰⁹ See the GOT's NSA QR at Exhibit 3.

¹¹⁰ *Id.*, at Exhibits 3 and 2, respectively.

¹¹¹ See *OCTG from Turkey* and accompanying Issues and Decision Memorandum at 46.

¹¹² See the Borusan Companies' Case Brief at 54.

¹¹³ *Id.*, at 55.

¹¹⁴ See GOT's NSA QR at 3 and Exhibit 2; Borusan Companies' NSA QR at 5-6; Borusan Companies' August 15, 2014 QR at Exhibits 19 and 20; Borusan Companies' Verification Exhibits 18-20.

¹¹⁵ See *Welded Line Pipe from the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Determination* 80 FR 14943 (March 20, 2015) and accompanying issues and Decision Memorandum at 16-17 (*Welded Line Pipe from Turkey*).

¹¹⁶ See *53-Foot Domestic Dry Containers From the People's Republic of China: Final Affirmative Countervailing*

Department's Position: As indicated above in the “Provision of HRS for LTAR” section and Comment 1 above, in these final results, we have determined to use a tier-one benchmark under 19 CFR 351.511(2)(i). As a result, comments from interested parties concerning the derivation of freight charges in a tier-two benchmark are moot.

However, as explained above, consistent with 19 CFR 351.511(a)(2)(iv), we have calculated the tier-one benchmark price to reflect the price that the Borusan Companies actually paid. Therefore, we have included in the tier-one benchmark any transportation expenses, import duties (where applicable), and VAT paid by the Borusan Companies on purchases of imported HRS and domestic purchases of HRS from Turkish producers/suppliers (other than Erdemir and Isdemir). Our approach in this regard is consistent with our practice.¹¹⁷ We also disagree with the GOT's claims that inclusion of VAT in the benchmark is not appropriate due to the Borusan Companies' participation in the IPR program. Again, consistent with our practice, we find that the exclusion of VAT would not be consistent with the methodology described under 19 CFR 351.511(a)(2)(iv).¹¹⁸ Lastly, we disagree with the Borusan Companies that the inclusion of VAT in the HRS benchmarks creates a mismatch in the net subsidy rate calculation between the benefit in the numerator and the companies' sales in the denominator. In accordance with 19 CFR 351.511(a)(2)(iv), which directs us to use “delivered prices,” our comparison of the tier-one HRS benchmark and the Borusan Companies' purchases of HRS from Erdemir and Isdemir incorporates VAT on both sides. Next, consistent with 19 CFR 351.525(b)(6)(i), we then divided any resulting benefit from this calculation to the Borusan Companies' free on board (FOB) sales. In this manner, and consistent with our practice, we avoided a mismatch in the numerator and denominator of the net subsidy rate calculation.¹¹⁹

Comment 5: Calculating the Tier-Two Benchmark Price Concerning Freight

Case Brief Arguments of the Borusan Companies

- The Department should remove inland freight charges from the calculation of the two-tier benchmark to insure consistency with the Court's holding in *Borusan*.¹²⁰ The removal of inland freight from the calculation of the two-tier benchmark is warranted because Borusan does not pay domestic inland freight charges on imported HRS that is delivered to the Gemlik port for the Gemlik ERW and Gemlik Spiral plants.
- The Department should exclude inland freight for all imports that went to Gemlik ERW or Gemlik Spiral plants from its two tier benchmark calculation because Borusan does not pay

Duty Determination, 80 FR 21209 (April 17, 2015) (*53-Foot Domestic Dry Containers from China*), and accompanying IDM at 22; see also *Utility Scale Wind Towers From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012) (*Wind Towers from China*), and accompanying Issues and Decision Memorandum at 11;

¹¹⁷ See OCTG from Turkey Decision Memorandum at Comment 3: “As long as VAT and import duties are reflective of what an importer – and not necessarily the respondent specifically – would have paid, then the VAT and duties are appropriate to include in our benchmark.”

¹¹⁸ *Id.* at Comment 3 where the Department concluded that: “. . . exclusion of VAT . . . from the benchmark because of the Inward Processing Regime would not be consistent with the directions in 19 CFR 351.511(a)(2)(iv) to adjust the comparison price to reflect the price that a firm would pay if it imported the product, including delivery charges and import duties.”

¹¹⁹ *Id.* at Comment 3.

¹²⁰ See *Borusan*, Slip Op. 15-36 at 54.

inland freight charges on imported HRS that is delivered to the Gemlik port for the Gemlik ERW and Gemlik spiral plants.¹²¹

- In the event the Department decides to use a tier-two benchmark in the final results, it should not adjust the benchmark prices for containerized freight, since there is no evidence that any company in Turkey imports coil in containers.

Department's Position: As indicated above in the "Provision of HRS for LTAR" section and Comment 1 above, in these final results, we have determined to use a tier-one benchmark under 19 CFR 351.511(2)(i). As a result, comments from interested parties concerning the derivation of freight charges in a tier-two benchmark are moot.

Comment 6: Whether the Method the Department Used to Weight Average the Tier-Two Benchmark is Flawed

Case Brief Arguments of the Borusan Companies

- If the Department continues to use the GTIS price data to derive a tier-two benchmark, it must abandon the weighted average method used in the *Preliminary Results* and instead calculate a tier-two benchmark based on a simple average of the GTIS and non-GTIS price series data.
- Evidence indicates that during the POR Turkey imported over 91 percent of its HRS from Europe and Commonwealth of Independent States countries, but these two regions constitute only 40 percent of GTIS data used to derive the HRS in the *Preliminary Results*. Thus, the Department's methodology gives "undue weight" to countries that did not export or exported only a small quantity to Turkey, and are not in close proximity to Turkey, which is unlawful.
- The use of a simple weighted methodology would be consistent with the CIT's opinion in *Borusan* where the Court stated that the Department must "revise the tier-two benchmark to ensure that its comparability bears (s) a reasonably realistic resemblance to the importing market's reality."¹²²
- Accordingly, the Department should follow the methodology in *53-Foot Domestic Dry Containers from China* and *Wind Towers from China*, where the Department calculated monthly benchmarks based on simple averages of the various price series on the record and treated GTIS data as one of the several price series it used. This methodology allows for all appropriate adjustments.
- The tier-two benchmark price utilized by the Department in the *Preliminary Results* does not reflect commercial reality as evidenced by the fact that in some months the tier-two price was up to 46 percent higher than the HRS import prices that the Borusan Companies actually paid during the POR.
- The Department must explain how it can use such an inflated benchmark price for a commodity product that is openly traded in the world market and that is far higher than the HRS prices listed in price indices, such as SBB, Steel Orbis, Metal Bulletin, and AMM that are widely used by the steel industry.

¹²¹ See the Borusan Companies NSA QR at 4.

¹²² See *Borusan*, Slip Op. 15-36 at 58.

Department's Position: As indicated above in the "Provision of HRS for LTAR" section and Comment 1 above, in these final results, we have determined to use a tier-one benchmark under 19 CFR 351.511(2)(i). As a result, comments from interested parties concerning the derivation of freight charges in a tier-two benchmark are moot.

Comment 7: Whether Erdemir and Isdemir are Public Bodies

Case Brief Arguments of the GOT

- The GOT disagrees with the Department's preliminary finding that the GOT exercises meaningful control over Erdemir and Isdemir through the control of OYAK and argues that the record evidence shows that the GOT does not exercise any control over Erdemir and Isdemir.
- The Department's finding that OYAK is a public body is inconsistent with the WTO. There is no record evidence that OYAK possesses government authority and performs governmental functions as articulated in recent panel and Appellate Body report.¹²³ Thus, the Department should revise its *Preliminary Results* to be consistent with Article 1.1(a)(1) of the Subsidies and Countervailing Measures Agreement of the WTO.
- The Department failed to provide any evidence showing that OYAK is controlled by the GOT. The record shows OYAK's financial and administrative autonomy.¹²⁴ The Department violated the WTO law by finding that Erdemir and Isdemir are public bodies and improperly focused its analysis on the issue of the majority share of OYAK rather than the fact that Erdemir and Isdemir are both profit oriented companies.

Case Brief Arguments of the Borusan Companies

- The Department's treatment of Erdemir as a public entity is inconsistent with the statute and the Department's practice.
- In the *Preliminary Results*, the Department concluded that Erdemir and Isdemir were public bodies based on its finding that "GOT exercises meaningful control over" the companies through the GOT's "control of OYAK."¹²⁵ The Department resorted to an impermissible "daisy chain" approach to control because the GOT has no ownership interest in OYAK or Erdemir. This approach conflicts with the Department's five-factor test that is normally applied to entities with less than government ownership.
- The Department approach in the *Preliminary Results* is at odds with its own definition of meaningful control as applied in *OCTG from Turkey*.¹²⁶ As discussed in *Borusan*, the Department defined meaningful control in *OCTG from Turkey* as "control related to the possession or exercise of government authority and government functions."¹²⁷ This approach is consistent with the CVD statute and its focus on acts that demonstrate possession or exercise of government authority or functions.

¹²³ See Appellate Body Report in United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (DS 379); See also U.S. - Countervailing Duty Measures on Certain Hot Rolled Carbon Steel Flat Products from India (DS 436) and U.S. - Countervailing Duty Measures on Certain Products from China (DS 437).

¹²⁴ See the GOT's NSA QR at Exhibit 4-G, Article 1 of the Law No. 205.

¹²⁵ See Preliminary Decision Memorandum at 12.

¹²⁶ See *OCTG from Turkey*, and accompanying Issues and Decision Memorandum.

¹²⁷ See *Borusan*, Slip Op. 15-36 at 27-28.

- However, the Department did not apply this standard in the *Preliminary Results*. The Department did not discuss any evidence that indicates that Erdemir possesses or exercises government authority and government functions. Thus, the Department's analysis was unlawful because it found Erdemir, an entity with no government ownership and no control related to possession or exercise of government authority and government functions, to be a public entity.
- In the *Preliminary Results* the Department improperly relied on nebulous connections between Erdemir and OYAK and statements from OYAK's annual report to support its conclusion that the GOT exerts meaningful control over OYAK and, thus, by extension meaningful control over Erdemir as well.
- However, there is no evidence that OYAK is owned by the GOT. OYAK, a pension fund, does not have shareholders. It is a corporate body with financial and administrative autonomy that manages and invests the funds from these pensions. Its owners are the military pension fund holders who have made contributions.
- In the *Preliminary Results*, the Department quotes Law No. 205, which states that OYAK was created "as an institution related to the Ministry of National Defense."¹²⁸ However, when read in its entirety, the law indicates that the purpose of the law is to help supplement the retirement benefits of members of the Turkish Armed Forces.¹²⁹
- Thus, while OYAK may be related to the Ministry of National Defense, OYAK is not acting in its capacity as a government agency; rather it is acting as a representative of the military pension fund holders.¹³⁰
- Further, the presence of members of the Turkish Armed forces on the Representative Assembly is not evidence of the GOT's control of OYAK. Rather, the presence of these members is merely a function of the fact that members of the Turkish Armed Forces are the members and beneficiaries of the fund.
- Further, the Department was wrong to conclude that OYAK is operated by officials appointed by the GOT. These 20 members are acting merely as contributors and beneficiaries of the pension fund. The Department also incorrectly focuses on the fact that the GOT appoints the eight-person board of OYAK. However, the Department failed to consider that four of OYAK's board members are not GOT or military members but are instead university graduates with finance and investment experience.¹³¹ Further, there is nothing in Law No. 205 (the law cited by the Department in the *Preliminary Results*) that OYAK's board decisions are or can be subject to GOT approval or consent.¹³²
- Citing to *Huaiyin*, the Borusan Companies claim that the Department failed to discuss any evidence that would support its finding that the GOT exercises control over OYAK.¹³³
- That OYAK is exempt from corporate and other taxes and that Turkish military members must contribute a portion of the salaries to OYAK does not constitute indicia of control by the GOT. OYAK is, in fact, treated in a similar way to any other private pension fund

¹²⁸ See Preliminary Decision Memorandum at 11.

¹²⁹ See GOT's NSA QR at Exhibit 4-G.

¹³⁰ See the Borusan Companies' Case Brief at 12 citing to the GOT's NSA QR at Exhibit 4-G, "OYAK's 2013 Annual Report at 5."

¹³¹ See GOT's NSA QR at Exhibit 4-G.

¹³² *Id.*

¹³³ See *Huaiyin Foreign Trade Corp v. United States* 322 F.3d 1369,1374 (Fed Cir. 2003) (*Huaiyin*).

operating in Turkey. Further, OYAK pays a variety of taxes in conjunction with its subsidiaries.¹³⁴

- In reaching its preliminary findings, the Department failed to consider that: (1) OYAK has no obligation to carry out any obligations or services for the GOT; (2) OYAK is not subject to any obligations or targets regarding the prices or production quantities of any raw materials; (3) OYAK is not an administrative institution or an administrative guardian of the Ministry of Defense; (4) OYAK does not receive any share of the GOT's budget; and (5) OYAK does not and has not used public resources or acquired any support or contributions from the GOT.
- The evidence relied upon by the Department to preliminary find that OYAK, and by extension Erdemir and Isdemir, are entities subject to meaningful GOT control is weak. For example, nearly a majority of Erdemir's shares are held by private investors.
- In the *Preliminary Results* the Department cherry picked snippets from the record to support its theory of meaningful GOT control. The statements the Department cites in the *Preliminary Results* as the basis for finding Erdemir to be a public body are irrelevant or are contradicted by other record evidence. For example, the Department cites as evidence of control statements in Erdemir's annual report that it played a role in increasing Turkey's exports and that it sought to increase its use of domestically-procured raw materials. However, this statement is unremarkable and is evidence of nothing more than the operations of a profit maximizing business. Further, the Department ignored other parts of Erdemir's annual report indicating that Erdemir is simply seeking to diversify its raw material supplier base in order to reduce over dependence on a single supply source and to ensure a level of raw materials that are close proximity to its manufacturing facilities.
- In support of its preliminary findings, the Department cites to the fact that the Turkish Privatization Authority (TPA) holds veto power over any decision related to the closedown, sale, merger, or liquidation of Erdemir and Isdemir. However, the TPA has no say in how the two firms price their goods and the TPA has only a single seat on the board of directors of Erdemir. These facts concerning the TPA do not indicate that the GOT has meaningful control over Erdemir.
- Concerning Erdemir's nine board members, during the POR, the TPA held one seat, OYAK held two seats, and the remaining six seats were held by private investors. Thus, it cannot be said that OYAK held a majority of Erdemir's board seats during the POR.
- Additionally, the Department failed to reconcile its preliminary findings that Erdemir is subject to meaningful control such that it would sell HRS for LTAR with the fact that Erdemir was profitable during the POR, that nearly a majority of its shares are privately traded, and that its largest single shareholder in Erdemir is the leading steelmaker ArcelorMittal.
- Application of the Department's five factor test demonstrates that Erdemir is not a government authority. Specifically, the results of the test show that Erdemir should not be treated as a public entity because: 1) OYAK has no government ownership, therefore, OYAK's ownerships in Erdemir does not constitute government ownership of Erdemir; 2) while OYAK has a presence on Erdemir's board of directors, these officials are not government officials; 3) there is no evidence that the GOT is in control of Erdemir's activities or directs the company to carry out its policies related to selling HRS in the Turkish

¹³⁴ See GOT's NSA QR at Exhibit 4-G.

market for LTAR; 4) there is no evidence that Erdemir is carrying out GOT's policies; rather the company is acting in a commercial manner to maximize its profits ; and 5) Erdemir was not created by the Statute.¹³⁵

Department's Position: We continue to find that Erdemir and Isdemir are "authorities" within the meaning of section 771(5)(B) of the Act. As an initial matter, we note that the Court in *Borusan* affirmed the Department's determination from *OCTG from Turkey* that Erdemir and Isdemir are "authorities" as defined in the Act.¹³⁶ The analysis supporting our finding that Erdemir and Isdemir are "authorities" in this review is largely the same as that performed in *OCTG from Turkey*. Specifically, both in the *Preliminary Results* and explained again in detail above at the "Programs Determined to be Countervailable – Provision of HRS for LTAR" section, we determined that Erdemir and Isdemir are public bodies, and hence "authorities" pursuant to section 771(5)(B) of the Act, based on our analysis of record evidence very similar to that on the record of *OCTG from Turkey*. As described in detail above, and as we did in *OCTG from Turkey*, we cited the following record evidence in the *Preliminary Results* indicating that the GOT exercised meaningful control over OYAK:

- OYAK's creation by GOT statute;
- The composition of OYAK's leadership;
- OYAK's property status; and
- The requirement that members of the military must contribute to OYAK.¹³⁷

As we did in *OCTG from Turkey*, we also provided evidence of how the GOT's meaningful control of OYAK extends to Erdemir (and its subsidiary Isdemir), as follows:

- OYAK's predominant and near majority ownership of Erdemir;
- Erdemir's policies described in its Annual Report;
- The GOT's power over Erdemir's decisions on closure or capacity adjustments; and
- OYAK / GOT presence on Erdemir's Board of Directors.¹³⁸

Thus, we disagree with the Borusan Companies and the GOT that we have failed to provide evidence showing that OYAK and Erdemir are controlled by the government.

Regarding Borusan Companies' claims that OYAK serves its pensioners and not the GOT and, thus, cannot be considered a government authority for purposes of the HRS for LTAR program, we note that in *Borusan* the Court rejected the Borusan Companies' similar claims concerning the GOT's purported lack of "meaningful control" over OYAK.¹³⁹ Further, on this point, the Borusan Companies provide no additional facts to distinguish their arguments made in the instant from those considered by the Court in *Borusan*.

¹³⁵ See *Certain Hot-Rolled Carbon Steel Flat Products from South Africa*, 66 FR 50412 (October 3, 2011) and accompanying Issues and Decision Memorandum at 1.

¹³⁶ See *Borusan*, Slip Op. 15-36 at 13-28.

¹³⁷ See Preliminary Decision Memorandum at 11-12.

¹³⁸ *Id.*

¹³⁹ See *Borusan*, Slip Op. 15-36 at 27-28.

We also disagree with the notion that OYAK's ownership of Erdemir did not exceed 50 percent during the POR and, thus, belies the Department's finding that OYAK was in a position to exert control over Erdemir, and by extension, Isdemir. While OYAK did not hold a 50 percent ownership stake in Erdemir during the POR, OYAK's 49.29 percent ownership stake in Erdemir made it the predominant shareholder and, thus, able to exert control over Erdemir.¹⁴⁰ We note that our finding in this regard is consistent with the manner in which the Department evaluates the ability of one firm to control the assets of another company in essentially the same way as it can control its own assets. While 19 351.525(b)(6)(iv) indicates that such control will normally be met where there is majority voting ownership interest, the Preamble makes clear that the Department can find that such control exists in the event that a large minority voting interest exists.¹⁴¹

The Borusan Companies argue that the fact that the TPA holds veto power over any decision related to the closedown, sale, merger, or liquidation of Erdemir and Isdemir is irrelevant because the TPA has no say in how the two firms price their goods and the TPA has only a single seat on the board of directors of Erdemir. We disagree. The Court rejected this same line of argument in *Borusan*.¹⁴² Specifically, the Court held that on this point the Borusan Companies did not render the Department's "interpretation of the record 'as a whole' unreasonable." It further held that:

Borusan's interpretation of the standard applied to Erdemir, expressed in all of its claims, assumes that Commerce was required to find that Erdemir and Isdemir were 'acting as' the government or carrying out government functions, but that is not the standard Commerce applied in this instance, and none of Borusan's arguments to this point demonstrate that Commerce's standard is unreasonable or unlawful.¹⁴³

Furthermore, we disagree with the argument that, because OYAK, Erdemir, and Isdemir each operate on a commercial basis to maximize profitability, they cannot be "authorities." The Department explained previously why a firm's commercial behavior is not dispositive in determining whether that firm is a government "authority," stating that:

It has been argued that government-owned firms may act in a commercial manner. We do not dispute this. Indeed, the Department's own regulations recognize this in the case of government-owned banks by stating that loans from government-owned banks may serve as benchmarks in determining whether loans given under government programs confer a benefit. However, this line of argument conflates the issues of the "financial contribution" being provided by an authority and "benefit." If firms with majority government ownership provide loans or goods or services at commercial prices, *i.e.*, act in a commercial manner, then the borrower or purchaser of the good or service receives no benefit. Nonetheless, the loans or goods or service is still being provided by an authority

¹⁴⁰ See the GOT's NSA QR at 3 and Exhibit 4.

¹⁴¹ See *Preamble*, 63 FR at 65401.

¹⁴² See *Borusan*, Slip Op. 15-36 at 24-25.

¹⁴³ *Id.*, at 25.

and, thus, constitutes a financial contribution within the meaning of the Act.¹⁴⁴

Thus, as the Department explained in *Kitchen Racks from the PRC*, the evidence that entities operate in a commercial manner is not dispositive as to whether such entities are public bodies, and hence government “authorities,” within the meaning of section 771(5)(B) of the Act. Rather, we find that the arguments of the Borusan Companies and the GOT erroneously conflate the issues of “financial contribution” with “benefit.”

Additionally, we disagree that the Department is compelled in the instant review to utilize the five-factor test when determining whether OYAK is a government authority. It is true that the Department has relied on the five-factor test in prior cases.¹⁴⁵ However, there are other cases, particularly cases where a government producer provides an input, where the Department has not conducted such an analysis.¹⁴⁶ Section 771(5)(B)(iii) of the Act defines “authority” as a “government of a country or any public entity within the territory of a country.” Therefore a financial contribution by either a government or a public entity that is specific and confers a benefit is considered a subsidy. We note that our decision on this issue is consistent with the Department’s practice in recent CVD proceedings involving the PRC.

Therefore, based on the record evidence as a whole, as described under the “Analysis of Programs –Provision of HRS for LTAR” section, above, we continue to find Erdemir and Isdemir to be public bodies, and hence “authorities,” pursuant to section 771(5)(B) of the Act. Consequently, we find that the HRS Erdemir and Isdemir supplied to the Borusan Companies is a financial contribution in the form of a governmental provision of a good under section 771(5)(D)(iii) of the Act.

Comment 8: The Department’s Specificity Determination

Case Brief by the Borusan Companies

- The Department’s preliminary finding that the HRS for LTAR program is specific is flawed. The eight broad industry groups that the GOT reported (*e.g.*, construction, automotive, machinery industry, domestic appliances, agriculture, shipbuilding, steel pipe and profile, and rerolling producers) are not limited in number, because they “. . . constitute the entire

¹⁴⁴ See *Certain Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 37012 (July 27, 2009) (*Kitchen Racks from the PRC*), and accompanying Issues and Decision Memorandum at Comment 4.

¹⁴⁵ See, *e.g.*, *Coated Free Sheet Paper from the Republic of Korea: Notice of Final Affirmative Countervailing Duty Determination*, 72 FR 60639 (October 25, 2007) (*CFS from Korea*) and accompanying Issues and Decision Memorandum (CFS from Korea Decision Memorandum) at Comment 11; see also *Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 30946, 30954 (July 13, 1992) (*Magnesium from Canada*).

¹⁴⁶ See, *e.g.*, *Certain Hot-Rolled Carbon Steel Flat Products From India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008) (*HRC from India*) and accompanying Issues and Decision Memorandum at “Sale of High-Grade Iron Ore for Less Than Adequate Remuneration” section, where the Department countervailed the provision of iron-ore from a mostly government-owned mine without any reference to the five factor test; see also *Circular Welded Carbon Quality Steel Line Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 70961 (November 24, 2008) (*Line Pipe from the PRC*) and accompanying Issues and Decision Memorandum at Comment 3.

universe of industries that would ever purchase HRS . . .”¹⁴⁷ Thus, these benefits are available to all industries in Turkey that use HRS.

Department’s Position: We continue to find that uses of HRS are limited and, consequently, that the provision of HRS is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act. Although the eight industries that the GOT identified may comprise many companies, section 771(5A)(D)(iii)(I) of the Act clearly directs the Department to conduct its analysis on an industry or enterprise basis. Consistent with our past practice, the industries that the GOT identified (Construction, Automotive, Machinery and Industrial, Electrical Equipment, Appliances, Agricultural, Oil & Gas, and Containers and Packaging) are limited in number.¹⁴⁸ For example, in *Belgium Steel*, we concluded that eight industries (steel, food processing, paper, chemicals and fertilizer, mining, electromechanical, firearms, and cement and ceramics) were “too few” users, and as a result, found the subsidy to be *de facto* specific.¹⁴⁹ Further, in *Stainless Steel Sinks from the PRC*, we found specificity within the meaning of section 771(5A)(D)(iii)(I) of the Act, based on information showing that potential users of stainless steel products fell into 20 or 32 different industry classifications under ISIC and Chinese national economy industry classifications, respectively.¹⁵⁰ It is uncontroverted that the users of HRS in Turkey are, as a matter of fact, limited in number. Additionally, whether or not the eight industry groupings identified by the GOT as purchasers of HRS constitutes the only possible users of HRS is not relevant to our analysis. Thus, the provision of HRS for LTAR by the GOT (by way of Erdemir) is *de facto* specific.

Comment 9: Whether the Department Erred in Not Selecting the Toscelik Companies as a Mandatory Respondent

Case Brief Arguments of the Toscelik Companies

- The Department’s decision not to select the Toscelik Companies as mandatory respondent denied them an opportunity to be heard, as required by the due process clause of the Constitution.¹⁵¹
- In the past the Court has denied respondents’ due process claims in instances in which the Department afforded them an opportunity to participate and present evidence.¹⁵² However, concerning the instant review, by virtue of its decision not to select the Toscelik Companies as a mandatory respondent, the Department precluded the Toscelik Companies from presenting evidence to the Department.

¹⁴⁷ See the Borusan Companies’ Case Brief at 58.

¹⁴⁸ See GOT’s NSA QR at 12.

¹⁴⁹ See *Final Affirmative Countervailing Duty Determination: Certain Steel from Belgium*, 58 FR at 32273, 37276 (July 9, 1993) (*Belgium Steel*).

¹⁵⁰ See *Drawn Stainless Steel Sinks from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 13017 (February 26, 2013) (*Stainless Steel Sinks from the PRC*) and accompanying Issues and Decision Memorandum at 45.

¹⁵¹ See *PSC VSMPO-AVISMA Corp. v. United States*, 688 F.3d 751 (Fed. Cir.2012), quoting *LaChance v. Erickson*, 522 U.S. 262, 266, 118 S. Ct. 753, 756, 139 L. Ed. 2d. 695, 700 (1998); See also, *SKF USA Inc. v. United States*, 630 F.3d 1365, 1372 (Fed. Cir. 2011) (*SKF*).

¹⁵² *Id.*; see also *Magnesium Corp. of America. v. United States*, 166 F.3d 1364, 1370 (Fed. Cir.1999) (*Magnesium Corp.*).

- The Department’s decision not to select the Toscelik Companies as a mandatory respondent resulted in the Department assigning the Toscelik Companies the net subsidy rate calculated for the Borusan Companies. Any CVD rate assigned to the Borusan Companies would be grossly overstated and, thus unfair, if applied to the Toscelik Companies. Specifically, the structure of the Toscelik Companies is different from the Borusan Companies and that difference impacts the outcome of this CVD review.
- In addition, the Toscelik Companies, unlike the Borusan Companies, purchase a very small quantity of HRS from Erdemir.¹⁵³ This is notable because the bulk of the net subsidy rate attributable to the Borusan Companies derives from the companies’ purchases of HRS from Erdemir and Ismir, which the Department preliminarily determined were government authorities whose sales of HRS constituted a government financial contribution. The difference in HRS sourcing patterns between the Toscelik and Borusan Companies demonstrates that the net subsidy rate calculated for the Borusan Companies, particularly with regard to the HRS for LTAR program, does not reflect the experience of the Toscelik Companies.¹⁵⁴
- In the final results, the Department should apply the *de minimis* net subsidy rate calculated for the Toscelik Companies in the final results of the most recently completed CVD review in which the Toscelik Companies were selected as a mandatory respondent.¹⁵⁵

Department’s Position: Section 777A(e)(1) of the Act directs the Department to calculate individual countervailing duty rates for each known exporter and producer of the subject merchandise. However, section 777A(e)(2) of the Act gives the Department discretion, when faced with a large number of exporters/producers, to limit its examinations to a reasonable number of such companies if it is not practicable to examine all companies. As explained in the Respondent Selection Memorandum, the Department, pursuant to section 777A(e)(2) of the Act, found that after consideration of its available resources it would not be practicable to examine all six company groupings of producers/exporters of subject merchandise for which a review was initiated. Thus, referencing the inherent complexities of a CVD analysis (which requires an analysis of each respondent’s financial information, CVD programs, sales data, cross-ownership, etc.) and in consideration of the other ongoing proceedings being conducted by Office III staff at the time (which included six investigations, 25 administrative reviews, four changed circumstances reviews, ten sunset reviews, three remands, and 31 scope inquiries)¹⁵⁶ the Department limited the number of companies it would individually examine.¹⁵⁷ Specifically, pursuant to section 777A(e)(2)(A)(ii) of the Act, the Department limited its examination of

¹⁵³ See the Toscelik Companies’ May 8, 2015, Case Brief at 1 (The Toscelik Companies’ Case Brief).

¹⁵⁴ See Toscelik Companies’ November 20, 2014 letter Re: *Welded Carbon Steel Pipe and Tube from Turkey*; Toscelik information regarding coil purchase at page 2.

¹⁵⁵ See *Circular Carbon Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review: Calendar Year 2011*, 78 FR 64916 (October 30, 2013), as modified by *Toscelik Profil ve Sac End v. United States*, Slip Op. 15-28 (April 1, 2015) and the Department’s Final Results of Redetermination Pursuant to Court Remand (February 13, 2015).

¹⁵⁶ See, e.g., *Pre-Stressed Concrete Steel Wire Strand from the People’s Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order*, 75 FR 38977 (July 7, 2010), in which the Department had to examine the financial information of and solicit questionnaire responses for a total a six cross-owned entities with regard to a single mandatory respondent under individual examination in the investigation.

¹⁵⁷ See the Memorandum to Melissa G. Skinner, “Countervailing Duty Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Turkey: Respondent Selection,” (June 18, 2015) at 3.

individual respondents to the producer(s) accounting for the largest volume of the subject merchandise entries during the POR that the Department could reasonably examine.¹⁵⁸ The Department found that the Borusan Companies accounted for the “overwhelming volume of U.S. imports of subject merchandise during the POR,”¹⁵⁹ and, thus, pursuant to the discretion afforded to the Department by the statute, its resource constraints at the time, and the fact that the Borusan Companies “accounted for nearly all of the subject merchandise imports during the POR,” Department selected the Borusan Companies as the sole, mandatory respondent.¹⁶⁰

We disagree with the Toscelik Companies’ argument that to assign it a non-selected rate based on the rate calculated rate for the Borusan Companies would be grossly overstated and, thus unfair, if applied to the Toscelik Companies. In support of their argument, the Toscelik Companies claim that the structure of their companies are different from the Borusan Companies and that this difference impacts the outcome of this CVD review. The Toscelik Companies’ argument amounts to a consideration that is not contemplated by the statute. As noted above, under section 777A(e)(2)(A) of the Act, the Department permits the limitation of its examination of individuals to either the largest producers by volume or by limiting its examination based on a random selection. Inherent in these two methods is the notion that the largest producers and/or randomly selected producers chosen for individual examination are sufficiently representative of the remaining universe of producers such that the subsidy rates calculated for the individually selected respondents may serve as the basis for the all others rate in investigations and as the basis of the non-selected rate in administrative reviews. Furthermore, nowhere in the statute does it instruct the Department to contemplate the comparability of the “structure” of the largest producer or the producer selected by means of a random sample relative to those firms not selected for individual examination.

We also disagree with the Toscelik Companies that the Department should take the Toscelik Companies’ HRS sourcing patterns into consideration when determining whether it is appropriate to base their non-selected rate on the rate calculated for the Borusan Companies. Again, there is no provision in section 777A(e)(2)(A) of the Act that provides for such a consideration when limiting the number of firms subject to individual examination. Further, under the approach proposed by the Toscelik Companies, the Department, despite having determined that it had the resources to individually examine no more than one company, would nonetheless be required to examine the unsolicited HRS data submitted by Toscelik Companies and conduct what amounts to a *de facto* individual subsidy analysis. As noted above, the Department faced considerable resource constraints at the time that it made its respondent selection decision. The approach proposed by the Toscelik Companies, aside from having no support under the relevant provisions of the Act, would impose a level of administrative burden that the Department could not accommodate and that the Department has within its statutory discretion to avoid.

Further, the Toscelik Companies fail to address the Department’s explanations pursuant to the statute that (1) the number of exporters or producers is “large” or (2) the respondent selected accounts for the largest volume of subject merchandise that can be reasonably examined.

¹⁵⁸ *Id.*, at 3-4.

¹⁵⁹ *Id.*, at Attachment I.

¹⁶⁰ *Id.*, at 5.

The Toscelik Companies also argue that the Department's respondent selection determination violated its due process rights. Specifically, the Toscelik Companies cite two Federal Circuit cases for the proposition that it lacked the opportunity to participate fully and, therefore, was denied a meaningful opportunity to be heard. Neither case supports Toscelik's argument. In *SKF*, the Federal Circuit *rejected* SKF's due process claim because its counsel could review the relevant data under APO procedures.¹⁶¹ In the present case, the Toscelik Companies also enjoyed access to the administrative record. The Federal Circuit similarly identified no violation of due process rights in *Magnesium Corp. of Am. v. United States*, because the plaintiff "had actual knowledge of Commerce's communication" and "had a full opportunity to comment on the data presented therein."¹⁶² Again, the Toscelik Companies had access to the administrative record and the opportunity to comment on the record. Moreover, the Toscelik Companies did participate in this proceeding, even if the Department exercised its discretion under the statute not to select the Toscelik Companies for individual examination.


VII. Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of the review in the *Federal Register*.



Agree

Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance



Date

¹⁶¹ See *SKF*, 630 F.3d 1365, 1372 (Fed. Cir. 2011).

¹⁶² See *Magnesium Corp.*, 166 F.3d 1364, 1370 (Fed. Cir. 1999).