



C-489-823
Administrative Review
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MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Final Results of 2015
Countervailing Duty Administrative Review: Welded Line Pipe
from Turkey

I. Summary

There is one respondent in the 2015 administrative review of the countervailing duty (CVD) order on welded line pipe (WLP) from the Republic of Turkey (Turkey): Borusan Holding A.S., Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (BMB), and Borusan Istikbal Ticaret T.A.S. (Istikbal) (collectively, Borusan). For these final results, we analyzed the case and rebuttal briefs submitted by interested parties in this administrative review. As a result of our analysis, we made no changes to the *Preliminary Results* and continue to determine that the Borusan received a 0.78 percent *ad valorem* net countervailable subsidy rate during the period of review (POR).¹ We address the issues raised in the “Analysis of Comments” section below.

II. Background

On January 10, 2018, the Department of Commerce (Commerce) published the *Preliminary Results* for this review. We invited parties to comment on the *Preliminary Results*. On

¹ See *Welded Line Pipe from the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review; 2015*, 83 FR 1237 (January 10, 2018) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).



February 12, 2018, Borusan and the Government of Turkey filed case briefs.² No party requested a hearing and no party filed rebuttal briefs.

On January 23, 2018, Commerce exercised its discretion to toll all deadlines affected by the closure of the Federal Government from January 20 through January 22, 2018. The revised deadline for the final results of this administrative review was extended until May 14, 2018.³ On May 2, 2018, Commerce extended the deadline for the final results of this administrative review until July 12, 2018.⁴

The “Subsidy Valuation Information” and “Analysis of Programs” sections, below, describe the subsidy programs and the methodologies used to calculate the subsidy rates for these final results. Additionally, the “Analysis of Comments” section, below, contains our analysis of the comments submitted by interested parties in their case and rebuttal briefs and Commerce’s responses to these issues. Based on the comments received, we made no modifications to the *Preliminary Results*.

Below is the complete list of the issues raised in this administrative review for which we received comments:

Comment 1: Treatment of the Investment Encouragement Program (IEP): Customs and Value Added Tax Exemption Program

Comment 2: Whether to Include Borusan’s Exchange Variation Income in the Total Value of Sales and Total Value of Export Sales

III. Scope of the Order

The merchandise covered by the order is circular welded carbon and alloy steel (other than stainless steel) pipe of a kind used for oil or gas pipelines (welded line pipe), not more than 24 inches in nominal outside diameter, regardless of wall thickness, length, surface finish, end finish, or stenciling. Welded line pipe is normally produced to the American Petroleum Institute (API) specification 5L, but can be produced to comparable foreign specifications, to proprietary grades, or can be non-graded material. All pipe meeting the physical description set forth above, including multiple-stenciled pipe with an API or comparable foreign specification line pipe stencil is covered by the scope of this investigation.

² See Letter from Borusan, “Welded Line Pipe from Turkey, Case No. C-489-823: Case Brief,” dated February 12, 2018 (Borusan’s Case Brief); and Letter from the GOT, “Case Brief of the Government of Turkey in First Administrative Review of the Countervailing Duty on Imports of Welded Line Pipe-from the Republic of Turkey,” dated February 12, 2018 (GOT’s Case Brief).

³ See Memorandum for The Record from Christian Marsh, Deputy Assistant Secretary for Enforcement and Compliance, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, “Deadlines Affected by the Shutdown of the Federal Government,” dated January 23, 2018. All deadlines in this segment of the proceeding have been extended by three days.

⁴ See Memorandum, “Welded Line Pipe from Turkey: Extension of Deadline for the Final Results of 2015 Countervailing Duty Administrative Review,” dated May 2, 2018.

The welded line pipe that is subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7305.11.1030, 7305.11.5000, 7305.12.1030, 7305.12.5000, 7305.19.1030, 7305.19.5000, 7306.19.1010, 7306.19.1050, 7306.19.5110, and 7306.19.5150. The subject merchandise may also enter in HTSUS 7305.11.1060 and 7305.12.1060. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

IV. Subsidies Valuation

A. Allocation Period

Commerce made no changes to the allocation period or the allocation methodology used in the *Preliminary Results*.⁵

B. Attribution of Subsidies

Commerce made no changes to the attribution methodologies used in the *Preliminary Results*.⁶

C. Benchmarks Interest Rates

Commerce made no changes to the benchmarks and discount rates used in the *Preliminary Results*.⁷

V. Programs Determined to be Countervailable

Commerce made no changes to the methodology used to calculate the subsidy rates for the following programs in its *Preliminary Results*. The final program rates for Borusan are as follows:

1. Deduction from Taxable Income for Export Revenue

0.12 percent *ad valorem*

2. Short-Term Pre-Shipment Rediscount Program

0.08 percent *ad valorem*

3. Provision of Hot-Rolled Steel (HRS) for Less Than Adequate Remuneration (LTAR)

0.04 percent *ad valorem*

⁵ See *Preliminary Results* IDM at 3.

⁶ *Id.* at 3-5.

⁷ *Id.* at 5-6.

4. *Inward Processing Certificate Exemption*

0.38 percent *ad valorem*

5. *Investment Encouragement Program (IEP): Customs Duty and Value Added Tax Exemptions*

0.16 percent *ad valorem*

VI. Programs Determined Not to be Used During the POR

1. *Provision of Land for Less Than Adequate Remuneration*
2. *Provision of Lignite for Less Than Adequate Remuneration*
3. *Incentives for Research & Development Activities*
4. *Pre-Export Credits*
5. *Post-Shipment Rediscount Credit Program*
6. *Export Insurance Provided by Turk Eximbank*
7. *Large-Scale Investment Incentives: Customs Duty Exemptions*
8. *Large-Scale Investment Incentives: VAT Exemptions*
9. *Large-Scale Investment Incentives: Tax Reductions*
10. *Large-Scale Investment Incentives: Income Withholding*
11. *Large-Scale Investment Incentives: Social Security and Interest Support*
12. *Large-Scale Investment Incentives: Land Allocation*
13. *Strategic Investment Incentives: Customs Duty Exemptions*
14. *Strategic Investment Incentives: VAT Exemptions*
15. *Strategic Investment Incentives: Tax Reductions*
16. *Strategic Investment Incentives: Income Tax Withholding*
17. *Strategic Investment Incentives: Social Security and Interest Support*
18. *Strategic Investment Incentives: Land Allocation*
19. *Law 5084: Withholding of Income Tax on Wages and Salaries*
20. *Exemption from Property Tax*
21. *Law 5084: Incentives for Employers' Share in Insurance Premiums*
22. *Law 5084: Energy Support*
23. *Export Loan Rediscount Program*
24. *Export-Oriented Working Capital Program*
25. *Law 6486: Social Security Premium Incentive*

VII. Analysis of Comments

Comment 1: Treatment of the Investment Encouragement Program (IEP): Customs and Value Added Tax (VAT) Exemption Program

The Government of Turkey's Case Brief

- In the *Preliminary Results*, Commerce countervailed the benefits received under the IEP program (i.e., VAT and import duties forgone) as a contingent liability which was

outstanding for a portion of the POR and was subsequently written-off when the Government of Turkey issued the “completion visa” to Borusan for the project in 2015.

- The exemptions provided under the IEP certificate should not be treated as a loan. Further, Commerce should follow its past practice with regards to the IEP exemptions. Specifically, in the reviews of *CWP from Turkey 2015* and *OCTG from Turkey 2015*, Commerce found the VAT exemption not used for the same IEP certificate and for the same company during the same period of review.⁸
- There is no export commitment or requirement under the IEP certificate, and Commerce misstated that there was an export commitment associated with the IEP certificate in its *Preliminary Results*.⁹

Borusan’s Case Brief

- The customs and VAT exemptions received by Borusan under the IEP certificate are not a contingent liability loan, and the Government of Turkey’s IEP program is very different from India’s Export Promotion Capital Goods Scheme (EPCGS) and, as such, should not be the basis of Commerce’s change of practice here.¹⁰
- Under the Indian EPCGS program, producers can import capital equipment and pay reduced rates of duty if they commit to earn an amount of convertible foreign exchange via export sales, equal to a certain percentage of the value of the capital goods, within a period of eight years.¹¹ If the producer fails to meet its obligation after eight years, the company is subject to payment of all or part of the duty reduction, depending on the extent of the shortfall. Thus, under the EPCGS certificate, the unpredictability of meeting the export requirement gives rise to a contingent liability. In fact, under the EPCGS, Commerce has characterized the benefits received as “deferred duties.”¹²
- Turkey’s IEP program is not similar to the Indian EPCGS program.¹³ Under the IEP certificate, Borusan imports equipment for an investment project and, once the material is imported and consumed, there is no further obligation that Borusan must complete. Further,

⁸ See GOT’s Case Brief at 4 (citing *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2015*, 82 FR 47479 (October 12, 2017) (*CWP from Turkey 2015*) and *Oil Country Tubular Goods from the Republic of Turkey: Final Results of Countervailing Duty Administrative Review*, 83 FR 6511 (February 14, 2018) (*OCTG from Turkey 2015*)).

⁹ See GOT’s Case Brief at 5 (citing PDM at 17 and *Welded Line Pipe from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 80 FR 61371 (October 13, 2015) (*WLP from Turkey Final Determination*) and accompanying Issues and Decision Memorandum (IDM) at Comment 7).

¹⁰ See Borusan’s Case Brief at 2 (citing *Polyethylene Terephthalate Film, Sheet and Strip from India: Final Results of Countervailing Duty Administrative Review; 2012*, 80 FR 11163 (March 2, 2015) (*PET Film from India*) IDM; *Steel Threaded Rod From India: Final Affirmative Countervailing Duty Determination and Partial Final Affirmative Determination of Critical Circumstances*, 79 FR 40712 (July 14, 2014) (*Steel Threaded Rod from India*) IDM; *Certain Frozen Warmwater Shrimp from India: Preliminary Countervailing Duty Determination*, 78 FR 33344 (June 4, 2013) (*Shrimp from India Prelim*) PDM, unchanged in *Certain Frozen Warmwater Shrimp from India: Final Affirmative Countervailing Duty Determination*, 78 FR 50385 (August 19, 2013)).

¹¹ *Id.* at 2 (citing *PET Film from India* IDM at 7 and Comment 5).

¹² *Id.* at 3 (citing *PET Film from India* IDM at 9 and Comment 5).

¹³ *Id.* at 3-4 (citing *MTZ Polyfilms, Ltd. v. United States*, 659 F. Supp. 2d 1303, 1312-1313 (CIT 2009) (*MTZ Polyfilms*)).

there has never been an instance where Borusan has had to pay back duties, and thus the analysis is purely hypothetical.

- The benefit under the IEP program was received at the time Borusan entered the equipment for the project and was exempted from paying the normally applicable duties and taxes. By importing only equipment approved under the IEP certificate and using it for the approved project, Borusan knew it had met the terms of the IEP certificate, and hence there is no uncertainty that could give rise to a contingent liability. Further, Borusan does not book the VAT and duties exempted as a pending or contingent liability in its accounting system.
- The final closure of the certificate by the Government of Turkey and the certification of compliance with its terms changes nothing; it is a bureaucratic formality to ensure that the privileges arising from the certificate are not abused. As such, Commerce should reverse its determination to treat the benefit received under the IEP certificate as a contingent-liability interest-free loan and should, consistent with past practice, expense the benefits in the years in which Borusan made the imports.¹⁴
- Commerce acted unreasonably when it changed its consistent practice with respect to this program, a practice established over multiple investigations and reviews of products from Turkey. Not only is the determination in this case inconsistent with prior established practice with respect to this program in Turkey generally,¹⁵ but it is also inconsistent with its previous treatment of the same IEP certificate for the same respondent in the same POR (2015) in *CWP from Turkey 2015* and *OCTG from Turkey 2015*, where Commerce found that Borusan received no benefit under the IEP program from the same certificate it reported in the instant review.¹⁶
- The CIT has held “an action... becomes an ‘agency practice’ when a uniform and established procedure exists that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the {particular action} or procedure.”¹⁷ Here, Borusan would reasonably expect Commerce to follow its practice with respect to the IEP program, developed over many years, particularly when it had just followed that practice in two reviews involving the same IEP certificate for the same year.

¹⁴ *Id.* at 5 (citing *CWP from Turkey 2015* and *OCTG from Turkey 2015*).

¹⁵ *Id.* at 6 (citing *Pasta from Turkey; Preliminary Results of Countervailing Duty Administrative Review; 2014*, 81 FR 52825 (August 10, 2016), accompanying decision memorandum at 6-8), unchanged in *Pasta from Turkey; Final Results of Countervailing Duty Administrative Review; 2014*, 81 FR 90775 (December 14, 2016) (*Pasta from Turkey 2014*); *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 81 FR 47349 (July 21, 2016), IDM at 17-18, unchanged in *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 81 FR 62874 (September 13, 2016) (*HWR from Turkey Investigation*); *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 79 FR 41964 (July 18, 2014) (*OCTG from Turkey Investigation*), IDM at 16; *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2013 and Rescission of Countervailing Duty Administrative Review, in Part*, 80 FR 61361 (October 13, 2015) (*CWP from Turkey 2013*), IDM at 7-8).

¹⁶ *Id.* at 5-6 (citing *CWP from Turkey 2015* at 8 and *OCTG from Turkey 2015* at 16-17).

¹⁷ *Id.* at 8 (citing *Huvis Corp. v. United States*, 525 F. Supp. 2d 1370, 1378 (CIT 2007) (*Huvis*) (citing *Ranchers-Cattlemen Action Legal Found. v. United States*, 74 F. Supp. 2d 1353, 1374 (1999) (*Ranchers-Cattlemen*)).

- Further, if an agency decides to change course and alter that consistent practice “it must adequately explain the reason for a reversal of policy.”¹⁸ In the instant case, Commerce did not provide an adequate explanation for why it determined to abandon its prior treatment of the program, nor did Commerce point to any changes in the program itself or the Government of Turkey’s administration of the program or explain that it had uncovered something new about the program at Borusan’s verification that it had not discovered in the other verifications with respect to this program. Thus, in the final results, Commerce should follow its established practice and find that Borusan received no benefits under the IEP: customs and VAT exemption program during the POR.

Commerce’s Position: We disagree with the Government of Turkey and Borusan, and we continue to countervail the IEP customs duty and VAT exemption program as we did in the *Preliminary Results*, finding that the VAT and duty exemptions under this program are contingent liabilities within the meaning of 19 CFR 351.505(d).

Commerce’s preliminary finding was firmly grounded in facts duly verified and well-articulated in both the verification report and the *Preliminary Results*, and which have not changed in the intervening time. The arguments from Borusan and the Government of Turkey neither negate this review’s verified facts, nor detract from the preliminary conclusion, that these exemptions are not the standard incentives we have seen in the other cases, but rather, contingent liabilities for which the company remains obligated until “some future action” is taken or “some goal” achieved to satisfy requirements for a final waiver from the government.¹⁹ Under this IEP program, before the company obtains the final waiver in the form of a “completion visa,” it must pass an on-site audit by the government confirming, *inter alia*, that it has installed all the imported machinery and equipment, and that these machinery and equipment meet the eligibility requirements for duty-free and VAT-free importation under the program.²⁰ Our verification reports clearly show that, failing this, the company must repay all the exempted duty and VAT, *plus interest* (i.e., like a loan).²¹ That a company may have a perfect past record of passing such an audit does not, in any way, remove this contingency from the company’s future projects, or from the other companies that participate in the program, or from the program generally. Thus, although the particular mechanics may differ from EPCGS in India, the contingency in this program does, in fact, function in essentially the same way as EPCGS in India, which we have consistently treated as a contingent liability program under 19 CFR 351.505(d).²²

¹⁸ *Id.* at 8 (citing *Nippon Steel Corp. v. U.S. Int’l Trade Comm’n*, 494 F.3d 1371, 1378 n.5 (Fed. Cir. 2007) (*Nippon Steel*); *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (*Motor Vehicle Mfrs. Ass’n*) (“an agency changing its course must supply a reasoned analysis”); and *SKF USA, Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (*SKF USA*)).

¹⁹ See 19 CFR 351.505(d).

²⁰ See Memorandum, “Verification of the Questionnaire Responses of Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Istikbal Ticaret,” dated October 23, 2017 (Borusan Verification Report); and Memorandum, “Verification of the Questionnaire Responses of the Government of Turkey,” dated October 23, 2017 (GOT Verification Report).

²¹ See Borusan Verification Report at 3 and 12, and GOT Verification Report at 2 and 12.

²² See, e.g., *Countervailing Duty Investigation of Welded Stainless Pressure Pipe from India: Final Affirmative Determination*, 81 FR 66925 (September 29, 2016), IDM at Comment 3.

Abandoning the preliminary finding so as to conform with the “no benefit” or “not used” findings in the 2015 reviews of *CWP from Turkey 2015* and *OCTG from Turkey 2015* would be a misplaced attempt at cross-case consistency. The well-developed, verified, record information in this review supporting the preliminary finding of contingent liability differs and distinguishes the case record here from the case records of those other reviews, which lack the information. The findings in those reviews consist solely of the VAT and duty exemptions being included among a long list of other “not used” or “no benefit” programs, reflecting the lack of similar information in the case records of those reviews with regard to those exemptions.²³ Simply put, we have new and different facts in this review and, thus, we have changed our analysis and our conclusions accordingly. We discuss this issue at further length below. Therefore, we have not abandoned the preliminary finding and we continue to countervail these exemptions as contingent liabilities under 19 CFR 351.505(d).

As we explained in *Preliminary Results* for this program,

It is Commerce’s practice to treat any balance on an unpaid liability that may be waived in the future as a contingent-liability interest-free loan pursuant to 19 CFR 351.505(d)(1).²⁴ Since the unpaid duties are a liability contingent on subsequent events, we are changing our treatment of this program to match how Commerce handles the similar {EPCGS program} in India CVD cases.²⁵ As such, we regard the amount of unpaid duty liabilities as an interest-free contingent-liability loan, and we find the amount the respondent would have paid during the POR had it borrowed the full amount of the duty reduction or exemption at the time of importation to constitute the first benefit under the investment incentive certificate. Further, we find that a second benefit arises based on the amount of duty and VAT waived by the {Government of Turkey} on imports and domestic purchases of capital equipment covered by the IEP certificate when the {Government of Turkey} certifies that the investment requirements have been met and issues a completion visa. For those certificates for which the {Government of Turkey} has acknowledged that the company has completed its investment requirements, we treat the import duty and VAT savings as grants received in the year in which the {Government of Turkey} waived the contingent liability on the duty and VAT exemptions pursuant to 19 CFR 351.505(d)(2). Further, because the import duty and VAT exemptions under this program are approved for the purchase of capital equipment, in accordance with 19 CFR 351.524(c)(2)(iii), we are treating the total waived import duty and VAT exemptions as providing non-recurring benefits at the time of receipt of the completion visa from the {Government of Turkey}.²⁶

²³ See *CWP from Turkey 2015* IDM at 8; and *OCTG from Turkey 2015* IDM at 5.

²⁴ See, e.g., *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*; 2012, 80 FR 11163 (March 2, 2015), IDM at 7-10; and *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 76 FR 3613 (January 20, 2011), IDM at items A and B.

²⁵ See, e.g., *Steel Threaded Rod from India: Final Affirmative Countervailing Duty Determination and Partial Final Affirmative Determination of Critical Circumstances*, 79 FR 40712 (July 14, 2014), IDM at “Export Promotion of Capital Goods Scheme (‘EPCGS’)” (pages 14-16).

²⁶ See *Countervailing Duties*, 63 FR 65348, 65393 (November 25, 1998) (*CVD Preamble*). The preamble of Commerce’s regulations states that, if a government provides an import duty exemption tied to major equipment

BMB reported that it imported capital goods with waived duties and VAT under the IEP program.²⁷ Information provided by BMB indicates that their certificate was not tied to the production of pipe and that the plant where it was installing the equipment produces both subject and non-subject pipe,²⁸ so we are attributing the BMB benefits received to its total sales, consistent with 19 CFR 351.525(b)(3). BMB and the {Government of Turkey} reported that BMB met the capital investment requirement for its IEP license in the POR and the {Government of Turkey} completed its audit and certified that the requirements of the program had been met during the POR.²⁹ Therefore, BMB received a deferral from paying import duties and VAT for a portion of the POR and the final waiver of the obligation to pay the duties was demonstrated and certified by the {Government of Turkey} also during the POR. Consistent with Commerce's practice, we are calculating a subsidy rate based on (a) the interest otherwise payable on the amounts outstanding during the POR and (b) the full amount of the duties and VAT actually foregone during the POR, based upon Borusan's successful completion of the project, as certified by the {Government of Turkey}.³⁰

Further, as we stated in our verification report from the Government of Turkey's verification:

In order to close the certificate, {Government of Turkey} officials stated that the company submits a "completion visa" application within six months of the end of the certificate's validity. At this stage, according to {Government of Turkey} officials, the company opens up its factory to the {Government of Turkey} for a mandatory site visit (*i.e.*, to physically examine the equipment/machinery purchased). {Government of Turkey} officials explained that if the company is under the minimum investment amount criteria or if a piece of the equipment is missing, the {Government of Turkey} will not grant the completion visa; and the company is liable for the exempted fees it did not pay, plus interest. Otherwise, {Government of Turkey} officials stated that they will issue a letter to the company notifying that it completed its requirements.³¹

purchases, "it may be reasonable to conclude that, because these duty exemptions are tied to capital assets, the benefits from such duty exemptions should be considered non-recurring...." *See also, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 75 FR 6634 (February 10, 2010), IDM at Comment 9; *see also Certain Frozen Warmwater Shrimp from India: Preliminary Countervailing Duty Determination*, 78 FR 33344 (June 4, 2013) (*Shrimp India Preliminary Determination*), PDM at "Duty Incentives under the Export Promotion Capital Goods ('EPCG') Program," unchanged in *Certain Frozen Warmwater Shrimp from India: Final Affirmative Countervailing Duty Determination*, 78 FR 50385 (August 19, 2013) (*Shrimp from India*).

²⁷ *See* Borusan May 1, 2017 IQR at 37-38, Exhibits H-1, H-2, and 18. *See also* Borusan Verification Report at 12.

²⁸ *Id.*

²⁹ *See* Borusan May 1, 2017 IQR at 37 and Exhibit H-2 ("BMB applied to close this certificate on April 9, 2015 and the Ministry of Economy responded on August 12, 2015"). *See also* GOT Verification Report at 12-13 and GOT Verification Exhibit 6; and Borusan Verification Report at 12-13 and Borusan Verification Exhibit 11.

³⁰ *See* 19 CFR 351.505(d)(1); *see also, e.g., Shrimp India Preliminary Determination* PDM at EPCGS Program, unchanged in *Shrimp from India*.

³¹ *See* GOT Verification Report, at 12.

Commerce's regulations and *CVD Preamble* require that, when a program is contingently liable, we must countervail it in a manner so as to take into account the fact that the monies foregone may one day either be forgiven, and thus become a grant, or they may be clawed back by the government and repaid, or not granted.³² In such a case, if Commerce were to have originally considered the monies as a grant, we would be left with no remedy to restore the subsidies attributed and duties paid. Thus, we must countervail contingent liability programs as such, when there is clearly a contingent liability.

We disagree with the Government of Turkey's and Borusan's assertions that there is not, in fact, a contingent liability as a result of this program. When Borusan imported or purchased the materials pursuant to the IEP certificate, it did not have to pay duties or VAT that it otherwise would have owed. However, the waiving of the duties was not final. As we observed at verification, the waiving of the duties was contingent upon the granting of a "completion visa," by the Government of Turkey. The process for obtaining the completion visa is significantly involved. Borusan must first purchase or import machinery under its IEP certificate. Within six months of the end of the term of the IEP certificate, Borusan must have fully installed the machinery and must then submit an application for completion to the Government of Turkey.³³ Upon receipt of the application, the Government of Turkey will schedule and conduct an onsite audit of Borusan's factory to ensure that the machinery for which it received a waiver of duties and/or VAT was fully installed and matches to the application.³⁴ At the conclusion of the audit, the Government of Turkey will issue a report and the completion visa to Borusan, which implies no further obligations on the part of Borusan. Company officials stated that, "if Borusan failed to fulfill the terms of the IEP certificate, then Borusan would owe the government all taxes and duties forgone, plus interest," and that "there is an outstanding liability associated with the fact that the duties, fees, and interest may still be owed."³⁵ Additionally, at the Government of Turkey, we observed that the obligation on the part of the company applying for the completion visa is real, and not merely a bureaucratic formality, as Borusan tries to imply.³⁶ The completion visa requires that all obligations are met and an onsite audit has been completed, by Government of Turkey officials.

We also disagree with Borusan that it is relevant how the company records the liability under the IEP certificate, if at all. As explained above, we have established that there is a contingent liability under the IEP program, and company officials acknowledged the existence of such a potential liability at verification.³⁷ Whether or not Borusan records such a liability in its books and records is not dispositive. Commerce frequently encounters countervailable subsidy programs where the company does not track the benefits received in the same manner as Commerce. Even as part of the IEP certificate examined for Borusan, we note that Borusan did not book the duties and taxes saved under this program in its system. In order to confirm use/non-use of the program, at verification, we examined Borusan's imports and purchases of

³² See 19 CFR 351.505(d); and *CVD Preamble*, 63 FR at 65369-65370.

³³ See GOT Verification Report, at 12.

³⁴ *Id.*

³⁵ See Borusan Verification Report, at 12. Borusan officials also noted that Borusan does not track such a liability in its books and records, despite its existence.

³⁶ See GOT Verification Report, at 12 and GOT verification exhibit 6, containing the final audit report.

³⁷ See Borusan Verification Report, at 12.

fixed assets (*i.e.*, not an accounting record of VAT and duties foregone), and we examined documentation filed with the Government of Turkey to confirm the benefit amounts.³⁸ Thus, while the purchase amounts will reconcile back to Borusan's books and records, Borusan does not record the VAT and duties saved as a benefit, or a liability, in its normal course of business.

We disagree with the Government of Turkey and Borusan that Commerce should follow its past practice with regards to this program. In the instant review, we conducted onsite verification of this program at Borusan's offices in Istanbul, and the Government of Turkey Ministry of Economy, in Ankara. As stated previously, we noted very clearly in our verification reports the contingent obligations involved with this program. The *CWP from Turkey 2015* and *OCTG from Turkey 2015* cases cited by the Government of Turkey and Borusan contain no discussion of how this program works or how Borusan may have benefited from this program, and we note that, unlike the present case, the cited cases did not involve the same onsite verification of the questionnaire responses. Additionally, Borusan cited to numerous other Turkey CVD cases involving the IEP program.³⁹ None of other the cases cited by Borusan discuss the issuance of a completion visa; nor do any of the cited cases contemplate the possibility of the duties or VAT being clawed back by the Government of Turkey (*i.e.*, as contingent liabilities). Thus, the record in the instant case is significantly different than in the previous cases where we did not treat this program as a contingent liability for Borusan. Further, we believe our reasoned analysis, above, is consistent with the requirements in the court cases cited by Borusan and provides sufficient explanation for our departure from past practice in how we treat this program.⁴⁰

Additionally, while we agree with the Government of Turkey that there is no export requirement for the IEP VAT and duties exemption program,⁴¹ we disagree with Borusan's contention that the IEP certificate program is not at all like the India EPCGS program and should not be treated in a similar manner.⁴² While it is true that there is no export obligation under the Turkish IEP program, as is the case with the Indian EPCGS program, the relevant provision under 19 CFR 351.505(d) does not limit contingency to an export requirement, but more broadly to a company "taking some future action or achieving some goal." The Turkish IEP program allows for duty exemptions on imports of capital goods, contingent upon "'official documentation' from the {Government} before it will convert a portion of an interest-free loan to a grant."⁴³ As earlier noted, the official documentation here is in the form of a "completion visa" that depends on a successful showing by the company at an on-site verification by the government that the terms of the program have been met, failing which the company would forfeit the waiver of the VAT and duties and must repay them with interest.

³⁸ *Id.* at 12-13.

³⁹ See Borusan's Case Brief at 6, citing *Pasta from Turkey 2014*, *HWR from Turkey Investigation*, *OCTG from Turkey Investigation*, and *CWP from Turkey 2013*.

⁴⁰ See Borusan's Case Brief at 8, citing *Huvis*, *Ranchers-Cattlemen*, *Nippon Steel*, *Motor Vehicle Mfrs. Ass'n*, and *SKF USA*.

⁴¹ In our *Preliminary Results* we inadvertently misstated that such a requirement exists, though we did not account for any such export requirement in our calculations (*i.e.*, we used total sales as the denominator for this program).

⁴² *Id.* at 3-4, citing *MTZ Polyfilms*.

⁴³ See *MTZ Polyfilms*, 659 F. Supp. 2d at 1303, 1312. See also GOT Verification Report at 12.

Comment 2: Whether to Include Borusan's Exchange Variation Income in the Total Value of Sales and Total Value of Export Sales

Borusan's Case Brief

- In the *Preliminary Results*, Commerce did not include Borusan's reported exchange variation income in its calculation of Borusan's total sales and total export sales, used as the denominators to calculate the countervailable subsidy rate for the various subsidy programs.
- Borusan's total sales match to its financial statements and the exchange variation income is included in Borusan's value of sales because it represents the value of the sales made during the period.
- It has been Commerce's consistent practice to include the exchange variation income in the denominator in prior reviews and investigations involving Borusan and other companies in Turkey, and this practice has been affirmed by the CIT in *Mannesmann-Sumnerbank*.⁴⁴
- Since Borusan records sales values in its accounts in Turkish Lira (TL), revenue received in foreign currency must be converted to TL when entered into its sales accounts, and the exchange variation income represents the difference between the value in TL of an invoice denominated in a foreign currency that is entered into Borusan's system at the prevailing exchange rate on the invoice date and the actual amount in TL received by Borusan when it receives payment in a foreign currency at a later date. These gains and losses are recorded in Borusan's export sales accounts in its normal books and records. Thus, the net gain or loss in TL due to currency fluctuations is part of the real TL revenue received by Borusan from its foreign currency sales (*i.e.*, this is not revenue related to expenses) and should properly be included in the calculation of Borusan's total sales and export sales values. Therefore, Commerce should add the exchange variation income amount back to the sales denominators for the subsidy calculation.

Commerce's Position: We disagree with Borusan and have made no changes to Borusan's sales denominator in the calculations used in the *Preliminary Results*; specifically, we disagree with Borusan that exchange gains/losses should be a part of the sales denominator.

In accordance with 19 CFR 351.525(a), Commerce calculated an *ad valorem* rate by "dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period." The sales value is determined on "an f.o.b. (port) basis (if the product is exported) or on an f.o.b. (factory) basis (if the product is sold for domestic consumption)."⁴⁵ As laid out in the *CVD Preamble*, the sales denominator should align as closely as possible to the f.o.b. (port) basis to ensure that Customs and Border Protection (CBP) collects the correct amount of duties.⁴⁶ Any gains or losses that the exporter might experience as a result of a fluctuation in the exchange rates between the invoice and payments will not be applied by CBP.

⁴⁴ See Borusan's Case Brief at 9 (citing *Mannesmann-Sumnerbank Boru Endustrisi T.A.S. v. United States*, 86 F. Supp. 2d 1266 (CIT 1999) (*Mannesmann-Sumnerbank*)).

⁴⁵ See 19 CFR 351.525(a). Note that "f.o.b." means "free on board" and is also sometimes abbreviated as "FOB."

⁴⁶ See *CVD Preamble*, 63 FR at 65399.

Moreover, in the case of Borusan, its “exchange variation income” is booked in a separate account.⁴⁷ While incidental to making export sales, the exchange rate gains or losses represent the inflation or change in value between TL and the sales currency over time, not the TL amount of the sale at the time it was booked. It is not the purchase or sale transaction that creates the foreign exchange gain or loss; it is the decision by the company to delay cash payment and finance the transaction. For example, a company could demand payment immediately, or, alternatively, could extend credit (*i.e.*, set up accounts receivable from customers). In the latter case, the seller could purchase currency contracts to hedge its exposure to large balances of foreign denominated accounts receivable. In other words, the company can enter into a second financing decision to protect itself from the risks of the initial financing decision. Therefore, a company’s decision to extend credit to its customers and expose itself to foreign currency fluctuations is a cash management decision. Accordingly, we consider a company’s foreign exchange gain or loss to be a part of the company’s net financing expense, and not a part of its sales denominator. Therefore, the value of the sale, when Borusan booked the sale, most closely reflects the f.o.b. (port) value that CBP uses to determine duties.

We disagree with Borusan’s assertion that it is Commerce’s consistent practice to treat foreign exchange gains and losses as sales income. In companion antidumping duty cases, Commerce has consistently adopted the position that foreign exchange gains and losses resulting from the cash management decisions of a company are financing decisions that occur apart from the company’s manufacturing and sales activities and are classified as a financial expense.⁴⁸

It is Commerce’s general practice not to include exchange rate gains or losses in the sales denominator. In the vast majority of cases, no party has taken issue with the policy of excluding exchange rate gains or losses from the sales denominator of our subsidy calculations. Therefore, this aspect of our calculations is not directly addressed in the public notices describing our investigative or review results. To verify that exchange rate gains and losses are not normally included in the sales values used to compute subsidy margins, one would have to review respondents’ sales responses, verification documents, and financial statements; data that cannot be easily accessed or discussed since it is proprietary, segment-specific information.

Lacking this data, Commerce’s standard CVD questionnaire demonstrates that the normal practice does not include exchange rate gains and losses in the sales denominator of the subsidy calculations. In the questionnaire issued in this case, Commerce requested the “f.o.b. (port)

⁴⁷ See Borusan’s Case Brief at 10 (citing Borusan’s June 30, 2017, Supplemental Questionnaire Response at Exhibit 23, page 6).

⁴⁸ See *e.g.* *Welded Line Pipe From the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 80 FR 61362 (October 13, 2015), IDM at 32-37 (stating Commerce has a long-standing practice of including all foreign exchange gains and losses in the financial expense ratio); *Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products From Canada*, 70 FR 73437 (December 12, 2005), IDM at 42-42 (stating “it is not the purchase transaction that creates the foreign exchange gain or loss; it is the decision by the company to delay cash payment and finance the purchase.”); and *Certain Steel Concrete Reinforcing Bars From Turkey: Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part*, 73 FR 66218 (November 7, 2008), IDM at 19-29.

value” of export sales.⁴⁹ The questionnaire also instructs respondents to describe any adjustments that were made to report these sales on an FOB basis if the sales in the company's records were recorded on some other basis than the FOB terms we specified.⁵⁰ Commerce does not solicit any data regarding a company's exchange rate gains and losses in the standard questionnaire.

We do not disagree that, in the *Mannesmann-Sumnerbank* litigation cited by Borusan, Commerce made the adjustment at the direction of the Court. However, Commerce explained in its first remand redetermination that we believed the addition of foreign currency gains/losses to sales revenue to be an inappropriate adjustment to the sales denominators.⁵¹ Further, since *Mannesmann-Sumnerbank* was decided, it has been Commerce's consistent policy, since 2003, that all foreign exchange gains and losses be treated as a financial expense.⁵² In fact, in at least one other countervailing duty case involving Turkey, Commerce explicitly did not include exchange rate income or loss in the sales denominator.⁵³

⁴⁹ See “First Administrative Review of the Countervailing Duty Order on *Welded Line Pipe from the Republic of Turkey*: Initial Questionnaire,” dated March 9, 2017, at III-7.

⁵⁰ *Id.* at III-6.

⁵¹ See *Mannesmann-Sumnerbank*, 659 F. Supp. 2d at 1274.

⁵² *Id.* at 34 (citing e.g. *Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Results of the Antidumping Duty Administrative Review; 2012-2013*, 80 FR 19964 (April 14, 2015), IDM at Comment 3; *Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Notice of Revocation of Order in Part*, 75 FR 41813, (July 19, 2010), IDM at Comment 7; and, *Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review*, 69 FR 13813 (March 24, 2004), IDM at Comment 14).

⁵³ See *Oil Country Tubular Goods from the Republic of Turkey: Final Results of Countervailing Duty Administrative Review*, 83 FR 6511 (February 14, 2018), IDM at 5-6 (stating Commerce declines to address Borusan's argument that Commerce should include exchange rate income or loss in the sales denominator because it would have no impact on the outcome of the administrative review).

VIII. Conclusion

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of this administrative review and the final subsidy rate in the *Federal Register*.



Agree



Disagree

7/12/2018

X



Signed by: GARY TAVERMAN

Gary Taverman

Deputy Assistant Secretary

for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance