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Investigation  
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September 16, 2021

**MEMORANDUM TO:** James Maeder  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**FROM:** Shawn Thompson  
Director, Office V  
Antidumping and Countervailing Duty Operations

**SUBJECT:** Issues and Decision Memorandum for the Final Determination in  
the Countervailing Duty Investigation of Certain Aluminum Foil  
from the Republic of Turkey

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## I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of certain aluminum foil (aluminum foil) from the Republic of Turkey (Turkey), as provided in section 705 of the Tariff Act of 1930, as amended (the Act). The mandatory respondent subject to this investigation is Assan Aluminyum Sanayi ve Ticaret A.S. (Assan) and its cross-owned affiliates, Kibar Dis Ticaret A.S. (Kibar Dis), Kibar Holding A.S. (Kibar Holding), and Ispak Esnek Ambalaj Sanayi A.S. (Ispak). The period of investigation (POI) is January 1, 2019, through December 31, 2019.

After analyzing the comments submitted by interested parties, we have made certain changes to the *Preliminary Determination*.<sup>1</sup> We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of issues in this investigation for which we received comments from interested parties:

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<sup>1</sup> See *Certain Aluminum Foil from the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 86 FR 12911 (March 5, 2021) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).



- Comment 1: Whether to Revise the Sales Denominators
- Comment 2: Whether to Use Total Sales as the Denominator for the Exemptions on Exchange Tax for Foreign Exchange Transactions
- Comment 3: How to Compute the Benefit Calculation for the Rediscount Loan Program and the Export-Oriented Working Capital Credit Program
- Comment 4: Whether to Apply Adverse Facts Available (AFA) to “Other” Subsidy Programs
- Comment 5: Whether Certain Ministerial Errors Exist
- Comment 6: Whether the Value-Added-Tax (VAT) Exemption on the Acquisition of Operating Rights Provided a Measurable Benefit to Assan

## II. BACKGROUND

On March 5, 2021, Commerce published the *Preliminary Determination* in this investigation.<sup>2</sup> On March 15, 2021, we issued a verification questionnaire in lieu of on-site verification to Assan and its cross-owned affiliates.<sup>3</sup> On March 23, 2021, Assan timely responded to the verification questionnaire in lieu of on-site verification, and also submitted minor corrections related to this exercise.<sup>4</sup> Commerce accepted the minor corrections onto the record of this investigation.<sup>5</sup>

Assan, the Government of Turkey (GOT), and the petitioners<sup>6</sup> submitted case and rebuttal briefs between April 15, 2021, and April 28, 2021.<sup>7</sup> We received no scope comments from interested parties in response to the Preliminary Scope Decision Memorandum,<sup>8</sup> other than the petitioners’ comment that Commerce should adopt the preliminary scope decision for the final determination.<sup>9</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> See Commerce’s Letter, “Countervailing Duty Investigation of Certain Aluminum Foil from the Republic of Turkey – Request for Documentation,” dated March 15, 2021.

<sup>4</sup> See Assan *et al.*’s Letter, “Aluminum Foil from the Republic of Turkey: Assan, Ispak, and Kibar’s Response to the Request for Documentation in Lieu of Verification,” dated March 23, 2021 (Assan QILOV Response).

<sup>5</sup> See Commerce’s Letter, “Countervailing Duty Investigation of Certain Aluminum Foil from the Republic of Turkey: Minor Corrections,” dated March 29, 2021.

<sup>6</sup> The petitioners are the Aluminum Association Trade Enforcement Working Group and its individual members, Granges Americas Inc., JW Aluminum Company, and Novelis Corporation.

<sup>7</sup> See Assan *et al.*’s Letter, “Aluminum Foil from the Republic of Turkey: Assan’s, Ispak’s, and Kibar’s Case Brief,” dated April 15, 2021 (Assan Case Brief); GOT’s Letter, “Case Brief of the Government of Turkey in Countervailing Duty Investigation on Certain Aluminum Foil from the Republic of Turkey,” dated April 15, 2021 (GOT Case Brief); Petitioners’ Letter, “Petitioners’ Case Brief,” dated April 15, 2021 (Petitioners Case Brief); Assan *et al.*’s Letter, “Aluminum Foil from the Republic of Turkey: Assan’s, Ispak’s, and Kibar’s Rebuttal Case Brief,” dated April 27, 2021 (Assan Rebuttal Brief); and Petitioners’ Letter, “Petitioners’ Rebuttal Brief,” dated April 27, 2021 (Petitioners Rebuttal Brief).

<sup>8</sup> See Memorandum, “Preliminary Scope Determination and Comment Period,” dated September 3, 2021 (containing the Memorandum, “Antidumping and Countervailing Duty Investigations of Certain Aluminum Foil from the Republic of Armenia, Brazil, the Sultanate of Oman, the Russian Federation, and the Republic of Turkey: Preliminary Scope Decision Memorandum,” dated April 27, 2021 (Preliminary Scope Decision Memorandum)).

<sup>9</sup> See Petitioners’ Letter, “Certain Aluminum Foil from the Republic of Armenia, Brazil, the Sultanate of Oman, the Russian Federation, and the Republic of Turkey – Petitioners’ Final Scope Comments,” dated September 8, 2021.

### III. SUBSIDIES VALUATION INFORMATION

#### A. Allocation Period

We made no changes to, and interested parties raised no issues in their case briefs regarding, the allocation period or the allocation methodology used in the *Preliminary Determination*. For a description of the allocation period and the methodology used for this final determination, see the *Preliminary Determination*.<sup>10</sup>

#### B. Attribution of Subsidies

Interested parties submitted comments regarding the attribution of subsidies in the *Preliminary Determination*, specifically for the Exemptions on Exchange Tax for Foreign Exchange Transactions program and the Minimum Living Allowance grant. We have made changes to the attribution of subsidies in response to the comments submitted by interested parties. See Comments 1, 2 and 5.

#### C. Denominators

Interested parties submitted comments regarding the selection of the appropriate denominators used to compute the subsidy rates for Assan and its cross-owned affiliates. We have made changes to the denominators in response to the comments submitted by interested parties. See Comments 1 and 2. We also made adjustments related to the corrections Assan submitted in its response to Commerce's questionnaire in lieu of on-site verification.<sup>11</sup>

#### D. Benchmarks and Interest Rates

Interested parties submitted comments regarding the benchmark used to examine the Export-Credit ExIm Bank of Turkey (ExIm Bank of Turkey) Loans. We made adjustments to the benchmarks used to examine the ExIm Bank of Turkey Loans. See Comment 3.

### IV. USE OF FACTS OTHERWISE AVAILABLE AND APPLICATION OF ADVERSE INFERENCES

Section 776(a)(1) and (2) of the Act provides that Commerce shall, subject to section 782(d) of the Act, use "facts otherwise available" if necessary information is not on the record or if an interested party or any other person (A) withholds information that has been requested; (B) fails to provide information within the deadlines established or in the form and manner requested by Commerce, subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified, as provided by section 782(i) of the Act.

Under section 782(c)(1) of the Act, if an interested party, "promptly after receiving a request from {Commerce} for information, notifies {Commerce} that such party is unable to submit the

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<sup>10</sup> See *Preliminary Determination* PDM at 4-5.

<sup>11</sup> See Assan QILOV Responses at Exhibits VE-01 and VE-02.

information requested in the requested form and manner,” then Commerce shall consider the ability of the interested party and may modify the requirements to avoid imposing an unreasonable burden on that party.

In accordance with section 782(d) of the Act, if we determine that a response to a request for information does not comply with the request, Commerce shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. If that party submits further information that continues to be unsatisfactory or such information is not submitted within the applicable time limits, Commerce may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that Commerce shall not decline to consider information that is submitted by an interested party and is necessary to the determination, but does not *meet all* of the applicable requirements established by the administering authority, if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act further provides that Commerce may use an adverse inference in selecting from among the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. When selecting an AFA rate from among the possible sources of information, Commerce’s practice is to ensure that the rate is sufficiently adverse so “as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide {Commerce} with complete and accurate information in a timely manner.”<sup>12</sup> Commerce’s practice also ensures “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”<sup>13</sup> At the same time, section 776(b)(1)(B) of the Act states that Commerce is not required to determine, or make any adjustments to, a countervailable subsidy rate based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.

In *Nippon Steel*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that, while the statute does not provide an express definition of the “failure to act to the best of its ability” standard, the ordinary meaning of “best” is “one’s maximum effort.”<sup>14</sup> Thus, according to the Federal Circuit, the statutory mandate that a respondent act to the “best of its ability” requires the respondent to do the maximum it is able to do. The Federal Circuit indicated that

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<sup>12</sup> See, e.g., *Drill Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011); see also *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8932 (February 23, 1998).

<sup>13</sup> See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. I (1994) (SAA) at 870.

<sup>14</sup> See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*).

inadequate responses to an agency's inquiries would suffice to find that a respondent did not act to the best of its ability. While the Federal Circuit noted that the "best of its ability" standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.<sup>15</sup> The "best of its ability" standard recognizes that mistakes sometimes occur; however, it requires a respondent to, among other things, "have familiarity with all of the records it maintains," and "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of" its ability to do so.<sup>16</sup> Moreover, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.<sup>17</sup>

Section 776(c) of the Act provides that, when Commerce relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.<sup>18</sup> Secondary information is "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."<sup>19</sup> It is Commerce's practice to consider information to be corroborated if it has probative value.<sup>20</sup> In analyzing whether information has probative value, it is Commerce's practice to examine the reliability and relevance of the information to be used.<sup>21</sup> However, the SAA emphasizes that Commerce need not prove that the selected facts available are the best alternative information.<sup>22</sup>

In a countervailing duty investigation, Commerce requires information from both the foreign producers and exporters of the merchandise under investigation and the government of the country where those producers and exporters are located. When the government fails to provide requested and necessary information concerning alleged subsidy programs, Commerce uses facts otherwise available and may, if appropriate, apply an adverse inference in selecting from among the facts otherwise available to find that a financial contribution exists under the alleged program and that the program is specific. However, where possible, Commerce will rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit conferred, to the extent that those records are useable and verifiable.

Finally, under section 776(d) of the Act, Commerce may use any countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country, or, if there is no same or similar program, use a countervailing duty rate for a subsidy program from a proceeding that Commerce considers reasonable to use, including the highest of such rates. Additionally, when selecting an AFA rate, Commerce is not required for purposes of section 776(c) of the Act, or any other purpose, to estimate what the countervailable subsidy rate

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<sup>15</sup> *Id.*, 337 F.3d at 1382.

<sup>16</sup> *Id.*

<sup>17</sup> *See, e.g., Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27340 (May 19, 1997); *see also Nippon Steel*, 337 F.3d at 1382-83.

<sup>18</sup> *See also* 19 CFR 351.308(d).

<sup>19</sup> *See* SAA at 870.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 869.

<sup>22</sup> *Id.* at 869-70.

would have been if the interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an “alleged commercial reality” of the interested party.<sup>23</sup>

For purposes of this final determination, we are applying AFA in the circumstances outlined below.

#### *Application of AFA: Financial Contribution and Specificity for Certain “Other” Reported Subsidies*

In the *Preliminary Determination*, Commerce relied on AFA to preliminarily find that a financial contribution that was specific existed with respect to four programs because the GOT failed to cooperate by not acting to the best of its ability to comply with our requests for information.<sup>24</sup> Specifically, in applying AFA, we preliminarily found that the assistance for import transactions, Insurance Premium Support for Employer’s Share under Law No. 6111 (insurance premium support), freight expenses, and minimum living allowance programs each provides a financial contribution within the meaning of section 771(5)(D) of the Act and that each of the programs is specific within the meaning of section 771(5A) of the Act.<sup>25</sup> Interested parties commented on this issue. After considering the comments from the various parties, Commerce has determined to continue to apply AFA for this final determination for the financial contribution and specificity findings, and will continue to rely on Assan’s reported usage to determine the benefit. See Comment 4.

## **V. ANALYSIS OF THE PROGRAMS**

Commerce made no changes to its *Preliminary Determination* with regard to the methodology used to calculate the subsidy rates for the programs listed below, with the exceptions noted in the program-specific comments. For the descriptions, analyses, and calculation methodologies of these programs, see the *Preliminary Determination*. The final program rates are identified below.

### **A. Programs Determined to be Countervailable**

#### **1. Exemption from Property Tax**

We made no changes to our methodology for calculating a subsidy rate under this program. After incorporating the changes in the denominator, discussed above, the final subsidy rate for this program is 0.01 percent *ad valorem* for Assan and its cross-owned affiliates.<sup>26</sup>

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<sup>23</sup> See section 776(d)(3) of the Act.

<sup>24</sup> See *Preliminary Determination* PDM at 8-11.

<sup>25</sup> *Id.* at 11.

<sup>26</sup> See Memorandum, “Preliminary Determination Calculations for Aluminyum Sanayi Ve Ticaret A.S. and Kibar Dis Ticaret A.S.,” dated February 26, 2021 (Prelim Analysis Memorandum).

## 2. Exemptions on Exchange Tax for Foreign Exchange Transactions

We made changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 0.08 percent *ad valorem* for Assan and its cross-owned affiliates.<sup>27</sup> See Comment 2.

## 3. Regional Investment Incentive Scheme (RIIS)

We made no changes to our methodology for calculating a subsidy rate under this program. After incorporating the changes in the denominator, discussed above, the final subsidy rate for this program is 0.50 percent *ad valorem* for Assan and its cross-owned affiliates.<sup>28</sup>

## 4. Loan Programs from Export Credit Bank of Turkey: Rediscount Program

We made changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 0.25 percent *ad valorem* for Assan and its cross-owned affiliates.<sup>29</sup> See Comment 3.

## 5. Foreign Fair Support

We made changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 0.01 percent *ad valorem* for Assan and its cross-owned affiliates.<sup>30</sup> See Comment 5.

## 6. Turquality Program

We made no changes to our methodology for calculating a subsidy rate under this program. After incorporating the changes in the denominator, discussed above, the final subsidy rate for this program is 0.07 percent *ad valorem* for Assan and its cross-owned affiliates.<sup>31</sup>

## 7. Research and Development (R&D) Incentives Under Turkey's R&D Law

We made no changes to our methodology for calculating a subsidy rate under this program. After incorporating the changes in the denominator, discussed above, the final subsidy rate for this program is 0.04 percent *ad valorem* for Assan and its cross-owned affiliates.<sup>32</sup>

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<sup>27</sup> See Memorandum, "Final Determination Calculations for Aluminyum Sanayi Ve Ticaret A.S. and Kibar Dis Ticaret A.S.," dated September 16, 2021 (Final Analysis Memorandum).

<sup>28</sup> See Final Analysis Memorandum.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See Prelim Analysis Memorandum.

## 8. Special Consumption Tax Reimbursement

We made no changes to our methodology for calculating a subsidy rate under this program. After incorporating the changes in the denominator, discussed above, the final subsidy rate for this program is 0.03 percent *ad valorem* for Assan and its cross-owned affiliates.<sup>33</sup>

## 9. Other Subsidy Programs

We made changes to our methodology for calculating a subsidy rate for the minimum living allowance grant, but made no changes to the methodology for calculating subsidy rates under three additional “other subsidy” programs.<sup>34</sup> After incorporating the changes in the denominator, discussed above, the final subsidy rates for the government assistance related to Assan’s import transactions is 1.46 percent *ad valorem*, 0.02 percent *ad valorem* for the assistance related to Kibar Dis’ freight expenses, 0.01 percent *ad valorem* for assistance under the Insurance Premium Support for Employer’s Share under Law No. 6111, and 0.12 percent *ad valorem* for assistance under the minimum living allowance for Assan and its cross-owned affiliates.<sup>35</sup> See Comment 5.

### B. Programs Determined to Not Confer a Measurable Benefit During the POI

The following programs: (1) were fully expensed prior to the POI; or (2) are less than 0.005 percent *ad valorem* when attributed to the respondent’s applicable sales, as discussed in the “Attribution of Subsidies” section in the *Preliminary Determination*.<sup>36</sup> Consistent with Commerce’s practice,<sup>37</sup> we have not included programs which provided no measurable benefit in our final subsidy rate calculations. Moreover, we determine that it is unnecessary for Commerce to make a determination as to the countervailability of these programs.

### Tax Programs

#### 1. Deductions from Taxable Income for Export Revenue

### Investment Incentive Scheme

2. Investment Incentive Scheme – Customs Duty Exemptions
3. RISS
  - a. Custom Duty Exemptions
  - b. Social Security Premium Employer Share Support

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<sup>33</sup> *Id.*

<sup>34</sup> See Final Analysis Memorandum.

<sup>35</sup> *Id.*

<sup>36</sup> See Prelim Analysis Memorandum.

<sup>37</sup> See, e.g., *Certain Steel Wheels from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 77 FR 17017 (March 23, 2012), and accompanying Issues and Decision Memorandum (IDM) at “Income Tax Reductions for Firms Located in the Shanghai Pudong New District”; and *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 FR 49935 (July 29, 2016), and accompanying IDM at “Tax Deduction for Research and Development (R&D) Expenses.”



#### Loan Programs from Export Credit Bank of Turkey

4. Specific Export Credit Program<sup>38</sup>
5. Export-Oriented Working Capital Credit Program<sup>39</sup>

#### R&D Incentives

6. Contributions for Social Security Premiums for R&D and Support Personnel
7. Scientific and Technological Research Council of Turkey (TUBITAK) Grants

#### Grants

8. Foreign Market Research and Market Entry Grants

#### Other Subsidies

9. Pre-Shipment Export Credits Program
10. Tax and Fee Exemption Under Transfer of Operating Rights of Power Plant
11. Banking and Insurance Transactions (BITT) Under Transfer of Operating Rights of Power Plant
12. Islamic Development Bank Loans Funded Through the ExIm Bank of Turkey
13. Purchase of Machinery and Equipment Without VAT Under Value Added Tax Law 3065
14. Fee Exemption of Certificate Obtained from Vocational Qualifications Authority
15. Intern Salary Support
16. Support on Environmental Expenses
17. Support on Subscription Fee Paid for e-commerce Website Membership
18. Training Support
19. Trademark Registry Expense Support
20. Minimum Wage Support
21. Social Security Premium Support Under Law 4857
22. Social Security Premium Support Under Law 4447
23. Social Security Premium Support Under Decree 687
24. Retroactive Social Security Premium Support Under Above Listed Support Programs

#### C. Programs Determined to Not be Countervailable

1. RIIS – VAT Exemption
2. Inward Processing Certificates
3. Provisional Article 15 of Unemployment Insurance Law No. 4447
4. Payments from the Turkish Employers' Association of Metal Industries
5. Insurance Premium Support for Employer's Share Law No. 7103
6. Social Security Premium Support Act No. 5510

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<sup>38</sup> We made changes to our methodology for calculating a subsidy rate under this program. *See* Comment 5.

<sup>39</sup> We made changes to our methodology for calculating a subsidy rate under this program. *See* Comment 3.

#### D. Programs Found to be Not Used

We determine that Assan and its cross-owned affiliates did not apply for or receive benefits during the average useful life (AUL) period through the POI under the following programs:

##### Tax Programs

1. Free Zones Law No. 3218: Corporate Income Tax Exemption
2. Free Zones Law No. 3218: Exemption from Income Tax for Workers' Wages
3. Tax and Fee Incentives for Renewable Energy

##### Investment Incentive Scheme Programs

4. Investment Incentive Scheme
  - a. Income Tax Withholding Support
5. RIIS
  - b. Investment Land Allocation
  - c. Interest Rate Support
  - d. Income Tax Stoppage Support (Region 6 only)
  - e. Social Security Premium Support (Region 6 only)
6. Large Scale Investment Incentive Scheme
7. Strategic Investment Incentive Scheme
8. Project-Based Investment Incentive Program

##### Export Financing Programs

9. Investment Credit for Export Program
10. Export Buyer's Credits

##### Provision of Goods & Services for Less Than Adequate Remuneration (LTAR)

11. Provision of Land for LTAR Under Law No. 5084
12. Provision of Land for LTAR Under Law No. 4916
13. Provision of Natural Gas for LTAR

##### Grant Programs

14. Renewable Energy Support Mechanism

##### R&D Incentives

15. Stamp Duty Exemptions for Documentation on R&D and Innovation Facilities
16. Subsidies for Capital Regarding Technology and Innovation
17. Customs Duty Exemptions for Imported Goods Used for R&D

## VI. DISCUSSION OF THE ISSUES

### Comment 1: Whether to Revise the Sales Denominators

In the *Preliminary Determination*, we determined the sales denominators used in our calculation of Assan's subsidy rates by summing the values recorded in the domestic and export sales accounts of Assan and its cross-owned affiliates;<sup>40</sup> we did not include in this calculation any other sales accounts reported for Assan, Ispak or Kibar Dis.<sup>41</sup> Further, to calculate the free-on-board (FOB) total and export sales for Ispak, we intended to use the "Total FOB Values Excluding Sales To Affiliates But Including Resales Of Affiliated Companies"; however, we inadvertently relied on the sales reported under "Total FOB Values Excluding Sales To Affiliates" instead.<sup>42</sup>

#### *Assan's Comments*<sup>43</sup>

- Assan provided the sales values for itself and its cross-owned affiliates using three accounts in its accounting systems – domestic sales, export sales, and "other" sales. For each account, Assan indicated whether the subaccounts within the account were for "domestic sales," "export to the USA sales," or "export to other countries" sales.
- Commerce incorrectly excluded the "other" sales account from Assan's sales denominators, which inflated the subsidy rates. Consistent with Commerce's practice in previous cases, Commerce should include the "other" sales in the sales denominators in the final determination.<sup>44</sup>
- Commerce also erred in its calculation of Ispak's domestic sales value by relying on the information in Ispak's revised sales table labeled "Total FOB Values Excluding Sales To Affiliates," rather than "Total FOB Values Excluding Sales To Affiliates But Including Resales Of Affiliated Companies." This impermissibly understated Ispak's total domestic sales value.<sup>45</sup>
- Finally, Commerce improperly categorized sales from Ispak to Kibar Dis as domestic sales, rather than export sales. While Ispak records sales to Kibar Dis under its domestic sales accounts, its sales to Kibar Dis are necessarily indirect export sales and should be included as such in Commerce's calculations.

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<sup>40</sup> As part of this calculation, we categorized sales from Ispak to Kibar Dis as domestic sales because they were recorded under the domestic sales account in Ispak's revised sales table. *See Assan et al.'s Letter, "Assan, Ispak, and Kibar's Response to the Supplemental Questionnaire,"* dated February 8, 2021 (Assan February 8, 2021 SQR) at Exhibit S3-5.

<sup>41</sup> *See Prelim Analysis Memorandum at Attachment II; see also Assan Case Brief at 2-4.*

<sup>42</sup> *Id.* at 6 and Attachment II.

<sup>43</sup> *See Assan Case Brief at 2-6.*

<sup>44</sup> *Id.* at 4 (citing *Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Final Affirmative Determination*, 83 FR 9274 (March 5, 2018) (*Aluminum Foil from China*), and accompanying IDM at Comment 9; and *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) (*HWR from Turkey Investigation*), and accompanying IDM at 10).

<sup>45</sup> *Id.* at 4.

*Petitioners' Comments*<sup>46</sup>

- Commerce should individually evaluate each reported subaccount in the three sales accounts and determine whether the underlying sales are directly associated with Assan's production. Commerce's standard practice is to rely on the company's sales of goods and to evaluate the sales recorded in a company's accounts on a case-by-case basis to determine whether their inclusion is appropriate.<sup>47</sup>
- Absent substantial evidence showing that the income included in the sales accounts is production-related, Commerce should exclude those reported values from the sales denominators.

**Commerce's Position:** We made several changes to the denominators for this final determination for the reasons noted below.

Assan and each of its cross-owned affiliates reported their sales values recorded in three sales accounts – domestic sales, export sales, and “other” sales – and they also identified whether the subaccounts within each account are related to “domestic sales,” “exports to the USA,” or “export to other countries.”<sup>48</sup> We included only the sales recorded in the domestic and export sales accounts in the sales denominators of our subsidy rate calculations in the *Preliminary Determination*. However, Assan argues that all of the subaccounts included in its “other” sales accounts should also be included for purposes of the final determination, consistent with Commerce's practice.<sup>49</sup> In addition, the petitioners' requested that Commerce examine all of Assan and its cross-owned affiliates' sales accounts and only include sales that are directly associated with production.<sup>50</sup>

Commerce is required by 19 CFR 351.525(b)(2) and (3) to attribute export and domestic subsidies “only to products exported by a firm,” and “to all products sold by a firm, including products that are exported,” respectively.<sup>51</sup> In accordance with our regulations, Commerce does not include income that is not related to “*products* exported,” or “*all products* sold.”<sup>52</sup> Commerce's practice is to include any sales or income accounts in the sales denominator unless it is determined that those accounts are not related to production activities.<sup>53</sup>

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<sup>46</sup> See Petitioners Rebuttal Brief at 10-12.

<sup>47</sup> *Id.* at 11 (citing *Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria*, 58 FR 37217, 37238 (July 9, 1993); *Large Residential Washers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 75975 (December 26, 2012), and accompanying IDM at Comment 13; and *Aluminum Foil from China* IDM at Comment 9).

<sup>48</sup> See Assan February 8, 2021 SQR at Exhibit S3-5.

<sup>49</sup> See Assan Case Brief at 4 (citing *Aluminum Foil from China* IDM at Comment 9; and *HWR from Turkey Investigation* at 10).

<sup>50</sup> See Petitioners Rebuttal Brief at 10-12.

<sup>51</sup> See, e.g., *Truck and Bus Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 8606 (January 27, 2017), and accompanying IDM at Comment 20 (citing *Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Affirmative Determination and Final Determination of Critical Circumstances, in Part*, 82 FR 3282 (January 11, 2017), and accompanying IDM at Comment 7)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

Assan points to *Aluminum Foil from China* and *HWR from Turkey Investigation* to support its argument that Commerce should include all “other” revenue accounts in the sales denominators.<sup>54</sup> However, we disagree that *Aluminum Foil from China* fully supports Assan’s argument. In that investigation, Commerce included certain non-operational income in the sales denominator only because Commerce was able to verify it was, in fact, related to the production of merchandise under investigation.<sup>55</sup> Likewise, in *HWR from Turkey Investigation*, Commerce included revenue from the sales of services in the sales denominator only because Commerce determined that it was received from production-related service activities.<sup>56</sup>

Therefore, consistent with Commerce’s practice, we re-examined all of the sales accounts reported by Assan and its cross-owned affiliates and included in the sales denominators all sales recorded in the respective domestic sales, export sales, and “other” sales accounts, except where the evidence supports finding that the subaccount in one of these three sales accounts is not related to production activities. For example, for this final determination, Commerce is now excluding two subaccounts in Assan’s export sales account that are not related to production activities.<sup>57</sup> In the event that Commerce issues a CVD order in this proceeding and conducts a future administrative review, Commerce intends to review all accounts to determine which should be included in the sales denominator for that subsequent period.

Regarding Ispak’s domestic sales denominator, we agree that our calculation in the *Preliminary Determination* contained an error. We calculated Ispak’s FOB total and export sales using “Total FOB Values Excluding Sales To Affiliates,” rather than “Total FOB Values Excluding Sales To Affiliates But Including Resales Of Affiliated Companies,” despite stating we were doing otherwise in the *Preliminary Determination*.<sup>58</sup> We are correcting this error in the final determination by using “Total FOB Values Excluding Sales To Affiliates But Including Resales Of Affiliated Companies” instead of “Total FOB Values Excluding Sales to Affiliates” to determine Ispak’s total domestic sales.<sup>59</sup> This will align the methodology used to calculate Ispak’s sales denominator with the methodology used to calculate the sales denominators for Assan and Kibar Dis, and is what we had intended to do in the *Preliminary Determination*.<sup>60</sup>

Finally, we disagree with Assan that we improperly categorized sales from Ispak to Kibar Dis as domestic, rather than export, sales. Ispak reported its domestic sales accounts, and there is no record evidence that Ispak made these sales to Kibar Dis or that Kibar Dis later exported these sales. Nor does Assan point to any record evidence to support its claim that these domestic sales should be treated as export sales or that these sales are “indirect export sales.” Because the

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<sup>54</sup> See Assan Case Brief at 4 (citing *Aluminum Foil from China* IDM at Comment 9; and *HWR from Turkey* IDM at Comment 4).

<sup>55</sup> See *Aluminum Foil from China* IDM at Comment 9 (finding that “record evidence demonstrates that the non-operational income at issue was related to the production of merchandise under investigation”).

<sup>56</sup> See *HWR from Turkey* IDM at Comment 4 (finding it “appropriate to include {the respondent’s} revenue from production-related service activities...in the company’s total sales denominator”).

<sup>57</sup> See Final Analysis Memorandum for a break-down of the proprietary subaccounts we are including in, or excluding from, the sales denominators.

<sup>58</sup> See Prelim Analysis Memorandum at 6 and Attachment II.

<sup>59</sup> See Final Analysis Memorandum at Attachment II.

<sup>60</sup> See Prelim Analysis Memorandum at 6 and Attachment II.

record shows, Ispak clearly recorded these sales as domestic sales, we have continued to treat all sales in Ispak’s domestic sales account as domestic sales in our final determination.<sup>61</sup>

## **Comment 2: Whether to Use Total Sales as the Denominator for the Exemptions on Exchange Tax for Foreign Exchange Transactions**

In the *Preliminary Determination*, we found this program was specific in accordance with sections 771(5A)(D)(i) and 771(5A)(B) of the Act, because the program is limited to firms that conduct certain types of foreign exchange transactions that were exempted by law in Decree Nos. 1106 and 1149.<sup>62</sup>

### *Assan’s Comments*<sup>63</sup>

- Commerce improperly considered the Exemptions on Exchange Tax for Foreign Exchange Transactions to be an export subsidy. As a result, Commerce improperly attributed the benefit to export sales only, rather than to total sales.
- Commerce found in *Aluminum Sheet from Turkey Preliminary Determination* that this program was specific because it was limited to firms “that conduct certain types of foreign exchange transactions that were exempted by law in Decree Nos. 1106 and 1149”<sup>64</sup> pursuant to section 771(5A)(D)(i) and (iv) of the Act only.
- Commerce provides no explanation for considering the Exemptions on Exchange Tax for Foreign Exchange Transactions as an export subsidy, nor could it do so, given that the program is not contingent on export performance. The Exemptions on Exchange Tax for Foreign Exchange Transactions is available in a variety of situations, including those involving: transactions between banks (inter-bank trades) and exchange offices; foreign currency sales made to the Turkish Ministry of Treasury and Finance; foreign currency sales made to corporate borrowers having foreign currency loan payables; and companies having an industrial registry certificate obtained from Ministry of Science, Industry and Technology.<sup>65</sup> Although exporters that are members of exporters associations are also eligible, that is only one of the many qualifying conditions under the program.<sup>66</sup>
- Commerce should find the program to be specific on the basis of *de jure* specificity only and allocate the benefit to total sales, rather than export sales, in the final determination.

### *GOT’s Comments*<sup>67</sup>

- Commerce’s determination of Exemptions on Exchange Tax for Foreign Exchange Transactions Program as an export subsidy is unsupported by substantial evidence. Therefore, Commerce should use total sales, rather than export sales, as the denominator.

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<sup>61</sup> See Final Analysis Memorandum at Attachment II.

<sup>62</sup> See *Preliminary Determination* PDM at 12-13.

<sup>63</sup> See Assan Case Brief at 6-7.

<sup>64</sup> *Id.* at 6 (citing *Common Alloy Aluminum Sheet from the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Determination of Critical Circumstances in Part, and Alignment of Final Determination with Final Antidumping Duty Determination*, 85 FR 49629 (August 14, 2020) (*Aluminum Sheet from Turkey Preliminary Determination*), and accompanying PDM at 23).

<sup>65</sup> *Id.* at 7 (citing Assan *et al.*’s Letter, “Assan, Ispak, and Kibar’s Response to the Initial Questionnaire,” dated January 5, 2021 (Assan January 5, 2021 IQR) at 31-32).

<sup>66</sup> *Id.*

<sup>67</sup> See GOT Case Brief at 4-6.

- The Exemptions on Exchange Tax for Foreign Exchange Transactions program is not available only to exporters but applies under various conditions. Any enterprise having an industrial registry certificate is subject to the zero percent rate. The program is not, either in law or in fact, contingent upon export performance.<sup>68</sup>
- Commerce’s finding of this program to be an export subsidy conflicts with its recent findings. In *Aluminum Sheet from Turkey Preliminary Determination*, Commerce found this program to be specific under section 771(5A)(D)(i) and (iv) of the Act only, and not section 771(5A)(B) of the Act.<sup>69</sup>

*No other party commented on this issue.*

**Commerce’s Position:** For the final determination, we are finding that this program is specific pursuant to section 771(5A)(D)(i) of the Act only. In the *Preliminary Determination*, Commerce found this program was specific in accordance with sections 771(5A)(D)(i) and 771(5A)(B) of the Act.<sup>70</sup> After re-evaluating the evidence on the record, and consistent with *Aluminum Sheet from Turkey*,<sup>2</sup> we find this program is specific pursuant to section 771(5A)(D)(i) of the Act because the program is limited to firms that conduct certain types of foreign exchange transactions that were exempted by law in Decree Nos. 1106 and 1149.<sup>71</sup> We agree with Assan and the GOT that nothing on the record indicates this program is contingent upon export performance.

Because we now find that this program is specific pursuant to section 771(5A)(D)(i) of the Act only, the appropriate denominator for this program is total sales, not export sales.<sup>72</sup> Thus, for this final determination, we have changed the denominator for the Exemptions on Exchange Tax for Foreign Exchange Transactions from total exports sales to total sales. To calculate the benefit, which Assan, Ispak, and Kibar Dis each reported receiving, we separately summed the amount of the POI tax exemptions as reported by Assan, Ispak, and Kibar Dis, respectively. We then divided each company’s benefit by the respective total sales value to derive individual subsidy rates for Assan, Ispak, and Kibar Dis. We then summed each company’s individual subsidy rate to calculate the total program subsidy rate. On this basis, we determine a countervailable subsidy rate of 0.08 percent *ad valorem* for Assan and its cross-owned affiliates.

**Comment 3: How to Compute the Benefit Calculation for the Rediscount Loan Program and the Export-Oriented Working Capital Credit Program**

In the *Preliminary Determination*, we found that the Rediscount Loan program and the Export-Oriented Working Capital Credit program provided measurable benefits to Assan and its cross-

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See *Preliminary Determination PDM* at 12-13.

<sup>71</sup> *Id.*; see also *Aluminum Sheet from Turkey Preliminary Determination* at 23, unchanged in *Common Alloy Aluminum Sheet from the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, in Part*, 86 FR 13315 (March 8, 2021) (*Aluminum Sheet from Turkey Final Determination*), and accompanying IDM. We note that we are making no determination regarding whether this program specific under section 771(5A)(D)(iv) of the Act because we have found it to be specific under section 771(5A)(D)(i) of the Act.

<sup>72</sup> *Id.*; and 19 CFR 351.502(a) and (b).

owned affiliates during the POI. In calculating the benefit amounts for both programs, we relied on Assan's comparable loans during the same period for the benchmark interest rates.<sup>73</sup>

*Assan's Comments*<sup>74</sup>

- Commerce failed to deduct the reported commissions from the calculated benefit for the Rediscount Loan program and the Export-Oriented Working Capital Credit program in contravention of Commerce's established practice.
- In *LDWP from Turkey Final Determination*, Commerce explained that guarantee fees were appropriately deducted in accordance with section 771 of the Act.<sup>75</sup> Likewise, in *HWR from Turkey Preliminary Results* and *Rebar from Turkey Preliminary Determination*, Commerce subtracted fees the respondents paid to commercial banks from the benefit amount for the Rediscount Loan programs.<sup>76</sup>
- Most recently in *Aluminum Sheet from Turkey Final Determination*, Commerce addressed this exact issue for Assan for both loan programs and revised its final calculations to deduct the commissions that Assan paid with respect to these loans.<sup>77</sup>
- The loan guarantee is a requirement for both of the loan programs and is provided by commercial banks.<sup>78</sup> Therefore, as in *Aluminum Sheet from Turkey Final Determination*, commissions reported by Assan were guarantee fees and should be deducted from Commerce's benefit calculation.<sup>79</sup>
- Regarding the Export-Oriented Working Capital Credit program, Commerce's preliminary calculations ignored the principal payments that the respondent had previously made.<sup>80</sup> Commerce's long-standing practice is to use the "principal balance to which each interest payment applies" in the loan benefit calculation as required under 19 CFR 351.505(a)(1). Commerce corrected this same error in the *Aluminum Sheet from Turkey Final Determination*, and it should make the same correction here.<sup>81</sup>

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<sup>73</sup> See *Preliminary Determination PDM* at 7, 15, and 17.

<sup>74</sup> See Assan Case Brief at 8-12.

<sup>75</sup> *Id.* at 8 (citing *Large Diameter Welded Pipe from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 84 FR 6367 (February 27, 2019) (*LDWP from Turkey Final Determination*), and accompanying IDM at 16-17).

<sup>76</sup> *Id.* at 8-9 (citing *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review; 2017*, 84 FR 43583 (August 21, 2019) (*HWR from Turkey Preliminary Results*), and accompanying PDM at 9, unchanged in *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Results of Countervailing Duty Administrative Review; 2017*, 84 FR 70495 (December 23, 2019) (*HWR from Turkey Final Results*), and accompanying IDM; and *Steel Concrete Reinforcing Bar from the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination*, 82 FR 12195 (March 1, 2017) (*Rebar from Turkey Preliminary Determination*), and accompanying PDM at 16-17, unchanged in *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 82 FR 23188 (May 22, 2017), and accompanying IDM).

<sup>77</sup> *Id.* at 9 (citing *Aluminum Sheet from Turkey Final Determination* IDM at 44).

<sup>78</sup> *Id.* (citing Assan January 5, 2021 IQR at 73; and GOT's Letter, "Resubmission of Response of the Government of Turkey to Initial Questionnaire in Countervailing Duty Investigation on Certain Aluminum Foil from the Republic of Turkey," dated January 8, 2021 (GOT January 8, 2021 IQR)).

<sup>79</sup> *Id.* at 9-10 (citing *LDWP from Turkey Final Determination* IDM at 17).

<sup>80</sup> *Id.* at 10-11.

<sup>81</sup> *Id.* at 11 (citing *Aluminum Sheet from Turkey Final Determination* IDM at 13).



*Petitioner's Comments*<sup>82</sup>

- Commerce preliminarily determined that the ExIm Bank of Turkey provided countervailable loans to Assan under the Rediscount Loan program, the Export-Oriented Working Capital Credit program, and the Specific Export Credit program. Commerce relied on the interest rates from comparable commercial loans by each company to calculate the countervailable benefit. When a company did not receive any comparable commercial loans concurrent with the government loan, Commerce used lending data from the International Monetary Fund's International Financial Statistics.<sup>83</sup>
- If Commerce decides to deduct the commissions paid from the benefit of these ExIm Bank of Turkey loans, Commerce should also adjust the associated benchmark interest rates. Information on the record of this investigation indicates that Assan's short-term benchmark rates should be adjusted to reflect the actual total cost of the comparable commercial loans.
- Section 776(a) of the Act authorizes Commerce to use facts otherwise available when the necessary information is not on the record. Based on the totality of the circumstances, Commerce should apply neutral facts available to Assan's long-term loan benchmarks that are used to determine the benefit Assan receives from its Export-Oriented Working Capital Credit loans. While Assan is correct that Commerce's preliminary calculations did not account for commissions, the benchmark interest rates provided by Assan were incomplete. Should Commerce decide to exclude commissions in its calculation of the benefit Assan received from its ExIm Bank of Turkey loans, Commerce must ensure the benchmark interest rates also reflect all additional expenses on the commercial loans.

**Commerce's Position:** For the final determination, we have revised the benefit calculation for Assan's use of the ExIm Bank of Turkey loans. We reviewed the record and determine that, in the *Preliminary Determination*, we failed to deduct commissions that Assan and its cross-owned affiliates paid with respect to the loans under these programs.<sup>84</sup> Commerce's practice is to deduct fees, including commissions, from the reported loans used to calculate benefit.<sup>85</sup> Consistent with *Aluminum Sheet from Turkey Final Determination*, we are revising our final calculations to deduct commissions paid by Assan and its cross-owned affiliates from the benefit calculation with respect to the loans under these programs.<sup>86</sup>

We also determine that, in the *Preliminary Determination*, we failed to take into account the principal payments previously made by Assan under its Export-Oriented Working Capital Credit program loans. Commerce's practice is to account for all principal payments made by the respondent when calculating any benefit from a loan program.<sup>87</sup> Consistent with *Aluminum Sheet from Turkey Final Determination*, we are revising our final calculations to account for all principal payments made by Assan to calculate the benefit for loans under the Export-Oriented Working Capital Credit program.<sup>88</sup>

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<sup>82</sup> See Petitioners Rebuttal Brief at 7-10.

<sup>83</sup> *Id.* at 7 (citing *Preliminary Determination* PDM at 15-17; and 19 CFR 351.505(a)(2) and (a)(3)(ii)).

<sup>84</sup> See Prelim Analysis Memorandum at Attachment II.

<sup>85</sup> 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), and accompanying IDM at Comment 17.

<sup>86</sup> See *Aluminum Sheet from Turkey Final Determination* IDM at 44; and Final Analysis Memorandum.

<sup>87</sup> See, e.g., *Aluminum Foil from China* IDM at Comment 10.

<sup>88</sup> See *Aluminum Sheet from Turkey Final Determination* IDM at 44; and Final Analysis Memorandum.

Finally, regarding Assan’s reported interest rate benchmarks, we agree with the petitioners that an adjustment is warranted. In particular, we instructed Assan to report “any fees, commissions, compensating balances, taxes or penalties paid in addition to interest, which affect the cost of the loan (indicated whether paid or provided).”<sup>89</sup> While Assan did not separately report any such fees, commissions, or taxes, Assan provided documentation in the Assan QILOV Response showing that it incurred these amounts on several loans.<sup>90</sup> As a consequence, and as discussed further in the Final Analysis Memorandum, we have adjusted certain reported short-term interest rate benchmarks to account for charges associated with those short-term loans.<sup>91</sup> However, because there is no evidence on the record indicating that the remaining short-term benchmark loans had associated unreported fees, we do not find the application of facts available warranted. Should this investigation result in an order, we intend to further review all fees associated with reported loans made to Assan in subsequent segments of this proceeding.

#### **Comment 4: Whether to Apply AFA to “Other” Subsidy Programs**

In the *Preliminary Determination*, we determined, based on AFA, that the following self-reported grants provided a financial contribution and were specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively: import transactions, insurance premium support, freight expenses, and minimum living allowance. We determined the benefit from each of these grants based on the information provided by Assan and its cross-owned affiliates.

#### *Assan’s Comments*<sup>92</sup>

- Commerce previously found that the insurance premium support program was not countervailable because it was not specific.<sup>93</sup> Similarly, the minimum living allowance is available to all companies and, thus, not specific pursuant to the Act.<sup>94</sup> Accordingly, because neither program is specific, neither can be countervailed in this investigation.
- Through self-reporting the insurance premium support and minimum living allowance benefit amounts, Assan complied with Commerce’s requests to provide information for all grants received during the AUL period.<sup>95</sup> However, because both programs are non-specific and not countervailable, Assan only informed the GOT of the programs from

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<sup>89</sup> See Commerce’s Letter, “Countervailing Duty Investigation of Certain Aluminum Foil from the Republic of Turkey: Initial Questionnaire,” dated November 5, 2020 (Initial Questionnaire).

<sup>90</sup> See Assan QILOV Response at VE-17 and Exhibit VE-4.

<sup>91</sup> See Final Analysis Memorandum.

<sup>92</sup> See Assan Case Brief at 12-14.

<sup>93</sup> *Id.* at 12-13 (citing *Large Diameter Welded Pipe from the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination*, 83 FR 30697 (June 29, 2018) (*LDWP from Turkey Preliminary Determination*), and accompanying PDM at 23, unchanged in *LDWP from Turkey Final Determination* IDM); and *Steel Concrete Reinforcing Bar from the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review and Intent to Rescind the Review in Part; 2017*, 85 FR 3030 (January 17, 2020) (*Rebar from Turkey Preliminary Results*), and accompanying PDM, unchanged in *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2017*, 85 FR 42353 (July 14, 2020) (*Rebar from Turkey Final Results*), and accompanying IDM.

<sup>94</sup> *Id.* at 13 (citing Assan January 5, 2021 IQR at Exhibit-73).

<sup>95</sup> *Id.* at 13-14 (citing Assan February 8, 2021 SQR at Exhibit S4-1).

which it received countervailable benefits, *i.e.*, import transactions and freight expenses, and the GOT provided information for these programs.<sup>96</sup>

- Record evidence does not support Commerce’s finding that the GOT withheld requested information, impeded the proceeding, or failed to cooperate to the best of its ability.<sup>97</sup>

#### *GOT’s Comments*<sup>98</sup>

- Commerce requested the GOT coordinate with Assan to respond to the appropriate questions for any program reported in the “Grants Received During the AUL” exhibit for which Assan received a measurable benefit during the POI.<sup>99</sup>
- Assan subsequently informed the GOT that only the import transactions and freight expenses grants were measurable among the programs reported in the referenced exhibit.
- The GOT did not respond to the appropriate appendices for the insurance premium support and minimum living allowance programs because Commerce did not request that it do so.
- Commerce erred in its application of AFA for these two programs since the request for information pertained to measurable benefit information, and Assan informed the GOT that the benefits from the insurance premium support and minimum living allowance programs were not measurable.

#### *Petitioners’ Rebuttal Comments*<sup>100</sup>

- Pursuant to section 776(b) of the Act, Commerce concluded that the GOT’s failure to provide twice-requested information associated with four “other” grants received by Assan warranted the application of AFA.
- Assan’s challenge to Commerce’s application of AFA for only the insurance premium support and minimum living allowance programs tacitly concedes that the use of AFA was justified with respect to the GOT’s assistance for Assan’s two other self-reported grants, *i.e.*, import transactions and freight transaction.<sup>101</sup>
- Respondents’ purported explanations for failing to report information on the insurance premium support and minimum living allowance grants do not call into question the factual basis for Commerce’s AFA finding, and, therefore, are irrelevant to this final determination. Further, neither the GOT nor Assan contends that the necessary, and twice-requested, information is on the record of this investigation.
- Although Commerce’s initial questionnaire directed the GOT to provide information regarding other assistance extended with respect to the production/exportation of subject merchandise,<sup>102</sup> the GOT failed to identify such programs.<sup>103</sup> An additional questionnaire

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<sup>96</sup> *Id.* at 14 (citing GOT’s Letter, “Response of the Government of Turkey to the Second Supplemental Questionnaire in Countervailing Duty Investigation on Certain Aluminum Foil from the Republic of Turkey,” dated February 16, 2021 (GOT February 16, 2021 SQR) at 1).

<sup>97</sup> *Id.* at 14.

<sup>98</sup> *See* GOT Case Brief at 3-4.

<sup>99</sup> *Id.* (citing Commerce’s Letter, “Countervailing Duty Investigation of Certain Aluminum Foil from Turkey – Supplemental Questionnaire,” dated February 8, 2021 (Commerce February 8, 2021 Supplemental)).

<sup>100</sup> *See* Petitioners Rebuttal Brief at 3-7.

<sup>101</sup> *Id.* at 4 (citing GOT Case Brief at 3-4, and Assan Case Brief at 12-14).

<sup>102</sup> *Id.* at 4 (citing Initial Questionnaire at Section II at 22).

<sup>103</sup> *Id.* at 5 (citing GOT January 8, 2021 IQR at 273-313).

directly asked for the relevant information “for any program.”<sup>104</sup> In response, the GOT submitted three sentences, and it claimed to not know under which programs Assan received benefits.

- Assan’s acknowledgement that it failed in reporting insurance premium support and minimum living allowance benefits to the GOT does not alleviate the GOT’s obligation to comply with Commerce’s request for relevant information. The instruction “for any program” makes clear that the inquiry was not contingent on a program’s potential countervailability. The GOT was legally required to provide a full and complete answer to Commerce’s questions, regardless of Assan’s opinion regarding the countervailability of these programs.
- It is the purview of Commerce, not the responding party, to determine what information is required in an investigation.<sup>105</sup> The “reason” cited by the GOT for failing to respond does not excuse non-compliance with Commerce’s request.<sup>106</sup> The application of AFA does not require Commerce to determine a party’s intention when failing to provide requested information.<sup>107</sup>
- Assan does not contest the fact that the GOT failed to provide complete and accurate information regarding certain subsidy programs that benefitted Assan.
- Respondents’ attempt to justify why the requested and necessary information is not on the record is immaterial; conduct marked by “inattentiveness and carelessness” is similarly censured under the Act’s AFA provisions.<sup>108</sup>
- For the final determination, Commerce should reject the respondents’ baseless claims and affirm its AFA finding that the GOT provided a specific financial contribution to Assan, consistent with the investigative record and the law.

**Commerce’s Position:** For this final determination, we are continuing to apply AFA to the GOT for its failure to provide necessary, requested information on the record of this investigation. We continue to find that it was the responsibility of the GOT to provide complete and accurate information to Commerce so that we could determine whether these programs conferred a countervailable subsidy. By not providing the necessary information, the GOT withheld information that was requested of it, significantly impeded this proceeding, and did not cooperate to the best of its ability. As result, we find that the insurance premium support and minimum living allowance grants each provides a financial contribution and is specific, pursuant to sections 771(5)(D) and 771(5A) of the Act, respectively, based on AFA.

In the initial questionnaire, we requested the following information from the GOT:

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<sup>104</sup> *Id.* at 5 (citing Commerce February 8, 2021 Supplemental).

<sup>105</sup> *Id.* at 6 (citing *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (Fed. Cir. 1992) (*PPG Indus Inc.*) (finding that, as a general rule, Commerce has the discretion and “authority to determine the extent of investigation and information it needs”); and *Ningbo Dafa Chemical Fiber Co., Ltd. v. United States*, 577 F. Supp. 2d 1304, 1309 (CIT 2008) (*Ningbo Dafa Chem. Fiber Co.*), affirmed in *Ningbo Dafa Chemical Fiber Co., Ltd. v. United States*, 580 F.3d 1247 (Fed. Cir. 2009)).

<sup>106</sup> *Id.* at 6 (citing *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed Cir. 2011) (stating that “the burden of creating an adequate record lies with interested parties and not with Commerce”)).

<sup>107</sup> *Id.* at 6 (citing *Tianjin Machinery Imp. & Exp. Corp v. United States*, 353 F. Supp. 2d 1294, 1305 (CIT 2004) (*Tianjin Machinery*), *aff’d per curiam*, 2005 U.S. App. LEXIS 23,082 (Fed. Cir. 2005)).

<sup>108</sup> *Id.* at 6-7 (citing *Tianjin Machinery*, 353 F. Supp 2d at 1305).

Does the GOT or any state or local government (or entities owned directly, in whole or in part, by the GOT or a state or local government) provide, directly or indirectly, any other form of assistance to producers or exporters of aluminum foil? Please coordinate with the respondent companies to determine if they are reporting usage of any subsidy programs. For each such program, please describe such assistance in detail, including the amounts, date of approval/receipt, purpose and terms, and answer all questions in the Standard Questions Appendix and other appropriate appendices attached to this questionnaire.<sup>109</sup>

Although in its response the GOT provided information with respect to three “other” subsidy programs, it made no mention of several additional programs Assan initially self-reported (*i.e.*, the Provisional Article 15 of Unemployment Insurance Law No. 4447, Specific Export Credits, and Pre-Shipment Export Credits programs).<sup>110</sup> Based on its incomplete response to our request, Commerce found that the GOT did not comprehensively address all programs Assan self-reported using, namely grants received during the AUL period. Pursuant to section 782(d) of the Act, we provided the GOT with an opportunity to remedy this deficiency. Specifically, we instructed the GOT to:

Please coordinate with {Assan} to respond to the appropriate appendices for any program reported in Exhibit 73 of Assan’s January 8, 2021, for which Assan received a *measurable benefit* in the period of investigation.<sup>111</sup>

As the petitioners note, the GOT’s response to this request for information consisted merely of three sentences:

The GOT was informed by Assan that among the programs that were reported in Exhibit 73 of Assan’s January 8, 2021 submission, only “Payments Received Generally Related to Assan’s Import Transactions” and “Payments Received Generally Related to Freight Expenses” contained measurable benefit in the period of investigation. However, the GOT is not aware of such programs. Therefore, the GOT is not able to respond the appropriate appendices for them.<sup>112</sup>

As we explained in the *Preliminary Determination*,<sup>113</sup> because the GOT did not provide necessary information and did not act to the best of its ability to provide the requested information, we determined, as AFA, that these programs provide a financial contribution and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively.

According to section 776(a) of the Act, Commerce shall use the facts otherwise available in reaching a determination if: (1) necessary information is not available on the record, or (2) an interested party or any other person – (A) withholds information that has been requested by

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<sup>109</sup> See Initial Questionnaire, Section II at 22.

<sup>110</sup> See GOT December 28, 2020 IQR at 273-313, and Exhibits 20 and Exhibits 49 through Exhibit 53.

<sup>111</sup> See Commerce February 8, 2021 Supplemental (emphasis added). The referenced Exhibit 73 contains the programs Assan and its cross-owned affiliates reported using during the AUL period.

<sup>112</sup> See GOT February 16, 2021 SQR.

<sup>113</sup> See *Preliminary Determination* PDM at 10-11 and 21.

Commerce, (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act.

Further, section 776(b) of the Act provides that, if Commerce finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, it may use an inference that is adverse to the interest of that party in selecting from the facts otherwise available. The “best of its ability” standard of section 776(b) of the Act means to put forth maximum effort to provide full and complete answers to all inquiries.<sup>114</sup> In *Nippon Steel*, the Federal Circuit clarified that, for Commerce to determine that a respondent did not act to the best of its ability, Commerce must demonstrate:

(1) an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations and

(2) that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent’s lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.<sup>115</sup>

In this case, the GOT withheld information requested of it and significantly impeded the proceeding, within the meaning of section 776(a) of the Act. Further, although the GOT claimed to be unaware of the programs at issue, these programs were administered by the GOT itself. Additionally, the GOT’s response does not indicate that it made any effort to obtain a complete list of measurable programs, as instructed, and to seek clarification from Assan regarding its self-reported programs and which programs provided measurable benefits such that the GOT was required to provide a response. Thus, it is clear that the GOT also failed to “put forth its maximum efforts to investigate and obtain the requested information from its records,” as required by the Federal Circuit in *Nippon Steel*. In that case, the Federal Circuit held that, while intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the Act does not contain an intent element,<sup>116</sup> and although “the standard does not require perfection and recognizes that mistakes sometimes occur,” conduct marked by “inattentiveness and carelessness” is not condoned under the “best of its ability” standard.<sup>117</sup> The GOT’s conduct, irrespective of its intention when failing to provide requested information,<sup>118</sup> exemplifies the failure to act to the best of its ability. Therefore, for this final determination, we continue to find that the application of AFA is warranted in establishing the final subsidy rates for the insurance premium support and minimum living allowance programs, pursuant to section 776(b) of the Act.

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<sup>114</sup> See *Nippon Steel*, 337 F.3d at 1382-83.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 6 (citing *Tianjin Machinery*, 353 F. Supp 2d at 1305).

While Assan claims that it provided to the GOT only the names of programs that Assan considered to be countervailable,<sup>119</sup> this fact does not mitigate the GOT's failure here. As noted above, we requested that the GOT provide information for all *measurable* programs.<sup>120</sup> Assan does not contest that the insurance premium support and minimum living allowance grants are measurable, and, as such, the GOT was required to provide information related to these programs in accordance with Commerce's directions.<sup>121</sup> The information requested concerns each program's implementation and operation, which allows Commerce to clearly determine whether an authority provided a financial contribution within the meaning of section 771(5)(D) of the Act, which conferred a benefit to the respondent, and whether the subsidy is specific as defined under section 771(5A) of the Act. Commerce requested information for these "other" programs because the responses, including the relevant appendices, are necessary in determining whether a financial contribution exists and whether the alleged subsidy is specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively.

With respect to Assan's claim that the insurance premium support and minimum living allowance grants are not specific, we disagree. As the petitioners correctly state, it is the purview of Commerce, not the responding party, to determine what information is required in an investigation.<sup>122</sup> This includes the discretionary authority to determine the extent of the investigation and information we need in order to determine whether a respondent received any countervailable benefit.<sup>123</sup> As the Federal Circuit held in *Maverick Tube*, it is the responsibility of Commerce, and not the responsibility of a respondent, to analyze and determine if a benefit exists, and if it does, to determine the amount of benefit received.<sup>124</sup> Because the GOT failed to provide information regarding the financial contribution and specificity of these programs, there is no record evidence that these programs are available to diverse industries and are, therefore, not specific, as Assan claims. In the absence of record evidence concerning specificity, nothing on the record supports Assan's claims that these programs are not specific. Furthermore, Commerce normally relies on governments to provide financial contribution and specificity information as they are the record keepers of this information.

The questions asked to the GOT make it clear that Commerce's request for information was not limited to only programs Assan considered "countervailable."<sup>125</sup> We specifically requested information for all grants that were *measurable*, *i.e.*, that had a rate of greater than 0.005 percent *ad valorem*. The GOT was on notice that its initial response was deficient because Commerce issued a supplemental questionnaire identifying the GOT's deficient response and providing the GOT an opportunity to remedy its deficient reporting in accordance with section 782(d) of the Act. The GOT's failure to provide the requested information in the multiple questionnaires issued by Commerce indicates that the GOT did not exercise the required diligence in preparing

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<sup>119</sup> See Assan Case Brief at 14 (stating that Assan did not inform the GOT of the insurance premium support and minimum living allowance grants because they "were non-specific and hence not countervailable").

<sup>120</sup> See Commerce February 8, 2021 Supplemental.

<sup>121</sup> *Id.*

<sup>122</sup> See *PPG Indus Inc.*, 978 F.2d 1232, 1238 (finding that, as a general rule, Commerce has the discretion and "authority to determine the extent of investigation and information it needs"), and *Ningbo Dafa Chem. Fiber Co.* 577 F.2d at 1309.

<sup>123</sup> See *PPG Indus Inc.*, 978 F.2d 1238.

<sup>124</sup> See *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360-61 (Fed. Cir. 2017) (*Maverick Tube*).

<sup>125</sup> See Assan Case Brief at 14.

its questionnaire responses.<sup>126</sup> Moreover, the burden of building the record rests on the party in possession of the necessary information.<sup>127</sup> In other words, it is not Commerce's responsibility to find and fix discrepancies in the communication between Assan and the GOT. Assan's self-reported receipt of the insurance premium support and wage allowance grants during the AUL period provides ample indication that Assan received benefits.<sup>128</sup> Accordingly, the GOT was fully aware of the need to answer Commerce's questions regarding these programs.

The GOT did not provide the requested information and did not cite difficulties in obtaining or accessing the requested information which hindered its reporting. We are not convinced by the GOT's argument attributing its non-responsiveness to Commerce's not requesting the appropriate appendices for the insurance premium support and minimum living allowance programs.<sup>129</sup> The GOT never indicated that Commerce's request for information was unclear or that it did not understand the information being requested of it. The GOT simply failed to comply with Commerce's multiple requests to coordinate appropriately with the respondent. It is the respondent's responsibility to build the record, and conversely, Commerce should not be required to reconstruct the record when a respondent fails to do so.<sup>130</sup>

We disagree with Assan's claim that our decisions in *LDWP from Turkey* and *Rebar from Turkey* for the programs "Social Security Premium Support Program"<sup>131</sup> and "Social Security Premium Support for Hiring New Employees Who Were Previously Unemployed,"<sup>132</sup> respectively, should compel us to not countervail the insurance premium support grant in the instant investigation. Each proceeding contains its own independent record,<sup>133</sup> and this principle is even more true when applied across entirely separate countervailing duty investigations. The CIT explained in *Hyundai Steel*, "the question before the court is whether {Commerce}'s determination in this case is supported by substantial evidence on this record. What {Commerce} may have concluded in a parallel investigation of a different product with a separate record is of little moment."<sup>134</sup> Each record is separate and distinct in that the findings and conclusions in a different proceeding concerning a different product line cannot be relied upon without substantial evidence on the record of this investigation. Each of Commerce's determinations stands on its own based on the particular evidentiary record developed in each proceeding.

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<sup>126</sup> See GOT's Letter, "Response of the Government of Turkey to Initial Questionnaire in Countervailing Duty Investigation on Certain Aluminum Foil from the Republic of Turkey," dated December 28, 2020 at 3; see also GOT's Letter, "Response of the Government of Turkey to the Supplemental Questionnaire in Countervailing Duty Investigation on Certain Aluminum Foil from the Republic of Turkey," dated February 5, 2021 (GOT February 5, 2021 SQR) at 3; and GOT February 16, 2021 SQR at 3.

<sup>127</sup> See *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F. 3d 1330, 1336 (Fed. Cir. 2002) (quoting *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)).

<sup>128</sup> See Assan February 8, 2021 SQR at Exhibit S4-1.

<sup>129</sup> See GOT Case Brief at 4.

<sup>130</sup> See *Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT 1568, 1590-91 (CIT 2003).

<sup>131</sup> See *LDWP from Turkey Preliminary Determination* PDM at 23; and *LDWP from Turkey Final Determination* IDM at 6.

<sup>132</sup> See *Rebar from Turkey Preliminary Results* PDM at 18; and *Rebar from Turkey Final Results* IDM at 6.

<sup>133</sup> See *Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (CIT 2005).

<sup>134</sup> See *Hyundai Steel Co. v. United States*, 319 F. Supp. 3d 1327, 1342 n.13 (CIT 2018) (citing *Yama Ribbons & Bows Co. v. United States*, 865 F. Supp. 2d 1294, 1298 (CIT 2012)).



Moreover, we cannot conclude that the insurance premium support is the same as previous programs investigated by Commerce due to the absence of the necessary record information. Because Commerce was unable to build the investigation record, we cannot determine whether the referenced programs are the exact same program as the one under investigation. With respect to the minimum living allowance, Assan cites no prior instances in which Commerce reached a countervailability determination and instead, relies on its own determination that the program is not countervailable.<sup>135</sup> Additionally, because the GOT did not respond to our questionnaires regarding these programs, the record does not support Assan's assertions that all companies use this program.<sup>136</sup>

Therefore, for this final determination, Commerce determines that these programs provide a financial contribution and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. Commerce continues to find that the application of AFA to the GOT is warranted in establishing the countervailability of the programs, supported by evidence on the record, and in accordance with Commerce's practice under sections 776(a) and (b) of the Act. We continue to apply AFA for this final determination for the financial contribution and specificity findings continue to rely on Assan's reported usage to determine the benefit.

#### **Comment 5: Whether Certain Ministerial Errors Exist**

##### *Assan's Comments*<sup>137</sup>

- Commerce made ministerial errors in the preliminary calculations performed for three programs (*i.e.*, Specific Export Credit, Minimum Living Allowance, and Foreign Fair Support).
- Commerce used the incorrect principal amount when calculating the benefit for the Specific Export Credit program.
- Contrary to its statement in the *Preliminary Determination*, Commerce failed to determine the subsidy rate for the minimum living allowance grant received by Kibar Holding by attributing the benefit to Kibar Holding's consolidated sales.
- In the *Preliminary Determination*, Commerce countervailed certain foreign fair support grants twice.<sup>138</sup>
- Commerce should correct these inadvertent ministerial errors in the final determination.

*No other party commented on this issue.*

**Commerce's Position:** We agree with Assan and have corrected the calculations for these programs.<sup>139</sup>

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<sup>135</sup> See Assan January 5, 2021 IQR at Exhibit 73; *see also* Assan *et al.*'s letter, "Aluminum Foil from the Republic of Turkey: Assan, Ispak, and Kibar's Response to the Supplemental Questionnaire Question No. 39," dated February 11, 2021 SQR at 1, "As detailed in Exhibit 73 of the Initial Response, the benefit details were not included because {the} programs had been found to be either not countervailable or not specific in previous proceedings. See "Notes" column of Exhibit-73 for the relevant proceeding in which Commerce made said findings."

<sup>136</sup> See Assan Case Brief at 14; *see also* Assan January 5, 2021 IQR at Exhibit 73.

<sup>137</sup> See Assan Case Brief at 15-16.

<sup>138</sup> *Id.* at 16 (citing Assan January 5, 2021 IQR at IQR-97).

<sup>139</sup> See Final Analysis Memorandum for a discussion of our revised calculations for this final determination.

Regarding the loans Ispak received under the Specific Export Credit program, we have corrected the principal amount used to calculate the benefit under this program.<sup>140</sup>

Regarding Kibar Holding's use of the minimum living allowance, we have corrected the attribution of its benefit from this grant by attributing the calculated benefits to the consolidated sales of Assan, Ispak and Kibar Dis.<sup>141</sup>

Assan correctly notes that the foreign fair support received under the Turquality program is separate from the Foreign Fair Support Program itself, and that we inadvertently double counted Assan's use of this grant.<sup>142</sup> Accordingly, we are revising the calculation of the benefit from the Foreign Fair Support program to exclude any foreign fair support that was countervailed under the Turquality program.<sup>143</sup>

### **Comment 6: Whether the VAT Exemption on the Acquisition of Operating Rights Provided a Measurable Benefit to Assan**

#### *Petitioners' Comments*<sup>144</sup>

- The GOT exempted Assan from the payment of VAT, stamp tax, and BITT regarding its acquisition of operating rights for a hydroelectric plant from the Turkish Privatization Authority in 2016 under Article 27 of Law No. 4046 and Provisional Article 12 of Law No. 3065.<sup>145</sup>
- Although Commerce did not separately address the distinct exemptions under this program, Commerce computed a benefit under this acquisition for Assan's stamp tax and BITT exemptions.<sup>146</sup> Contrary to Commerce's assessment, Assan's exemption from VAT under this program also conferred a measurable benefit during the POI and should be addressed in the final determination.<sup>147</sup>
- In the Aluminum Sheet from Turkey Post-Preliminary Determination, Commerce improperly conflated VAT exemptions provided under the investment incentive certificate programs with the VAT exemption provided on privatization transactions when it found that the VAT exemptions, including the exemption provided to Assan for its acquisition of operating rights at the hydroelectric plant, did not confer a benefit.<sup>148</sup>
- According to the statements and documentation provided by Assan and the GOT, under Article 30(a) of VAT Law No. 3065, companies are prohibited from deducting VAT on tax-exempt transactions; however, this sub-paragraph "shall not apply" to privatization

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See Assan Case Brief at 16 (citing Assan January 5, 2021 IQR at IQR-97).

<sup>143</sup> See Final Analysis Memorandum.

<sup>144</sup> See Petitioners Case Brief at 2-8.

<sup>145</sup> *Id.* at 2-3 (citing Assan January 5, 2021 IQR at IQR-150 IQR-154, and GOT February 5, 2021 SQR at 20).

<sup>146</sup> See *Preliminary Determination* PDM at 22 (Tax and Fee Exemption Under Transfer of Operating Rights of Power Plant and BITT Under Transfer of Operating Rights of Power Plant are listed as programs which do not providing a measurable benefit in the POI).

<sup>147</sup> See Petitioners Case Brief at 3-4 (citing Prelim Analysis Memorandum at Attachment II).

<sup>148</sup> *Id.* at 4 (citing Memorandum, "Placing Information on the Record," dated March 1, 2021 (placing Memorandum, "Post-Preliminary Analysis of Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the Republic of Turkey," dated December 28, 2020 (Aluminum Sheet from Turkey Post-Preliminary Determination) on the record of this investigation)).

transactions; therefore, companies participating in a privatization transaction are allowed to deduct VAT that was not paid. The GOT has not claimed that Assan's VAT exemption did not provide a benefit to the company because the VAT paid on asset sales was eligible for a VAT input credit. Assan itself conceded that the VAT incurred on privatization transactions "was allowed to be offset in Assan's monthly value-added tax filings pursuant to Articles 29, 30 and Provisional Article 12 of VAT Law No. 3065." Assan did not pay VAT on this transaction. If Assan was allowed to offset for VAT payments that the company never incurred, it received a financial contribution from the GOT within the meaning of section 771(5)(D)(ii) of the Act.

- Commerce should perform a different analysis for VAT exemptions under the investment incentives certificate programs, as new information on the record of this investigation differentiates the circumstances here from those in *Aluminum Sheet from Turkey Final Determination*.<sup>149</sup> Provisional Article 12 of VAT Law No. 3065 and Assan's own admission prove that Assan was allowed a VAT deduction for VAT that was not paid by the company. Therefore, Commerce should find that the GOT's exemption of VAT on Assan's acquisition of operating rights at the hydroelectric plant provided a financial contribution under section 771(5)(D)(ii) of the Act; confers a benefit in accordance with 19 CFR 351.510(a); and is specific in accordance with section 771(5A)(D)(i) of the Act.

#### *Assan's Comments*<sup>150</sup>

- Consistent with other cases from Turkey, Commerce found this program to not confer a countervailable benefit because companies fully recover input VAT, regardless of whether they qualify for VAT exemptions.<sup>151</sup> There is no exemption under VAT Law No. 3065 for operating rights for fixed assets such as hydroelectric powerplants nor any mention of transactions such as the transaction under investigation. Because there is no VAT exception related to the transfer of operating rights of a hydroelectric power plant, it follows that Assan did not retain an output VAT surplus as a result of being exempt from paying input VAT and was not otherwise subsidized as a result of the VAT exemption.
- Despite the plain language of Turkish VAT laws and Commerce's consistent interpretation thereof, the petitioners continue to misconstrue the record.
- While Assan stated that it did not pay VAT to the GOT for transfer of economic assets of the power plant, nowhere in its responses did Assan state it used the exempted VAT to deduct from its input VAT and there is no record evidence to that effect.
- While the petitioners allege that Commerce improperly conflated VAT exemptions provided under the investment incentive certificate programs with the VAT exemption provided on privatization transactions, there is no new information which differentiates the facts in this investigation from those in *Aluminum Sheet from Turkey Final Determination*.

**Commerce's Position:** We agree with Assan that nothing on the record indicates Assan deducted unpaid VAT under VAT Law No. 3065, and we continue to find that Assan received no benefit under this program in the POI.

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<sup>149</sup> *Id.* at 7-8 (citing *Aluminum Sheet from Turkey Final Determination* IDM at Comment 2).

<sup>150</sup> See Assan Rebuttal Brief at 2-6.

<sup>151</sup> *Id.* at 2-3 (citing *Aluminum Sheet from Turkey Final Determination* IDM at Comment 2).

In our *Preliminary Determination*, we preliminarily determined that the Tax and Fee Exemption Under Transfer of Operating Rights of Power Plant program did not confer a measurable benefit during the POI.<sup>152</sup> This was consistent with our final determination in *Aluminum Sheet from Turkey*, where we found the exact same program did not provide a countervailable benefit to the exact same respondent company during the identical POI. In that case we explained that:

Commerce determined that Turkey maintains a “normal” VAT system, which did not confer a benefit on Assan or Teknik, under our practice in accordance with 19 CFR 351.510(a), because neither respondent retained an output VAT surplus as a result of being exempt from paying input VAT on their purchases, and they were not otherwise subsidized as a result of exemptions. Turkey’s VAT Law No. 3065, under Article 29, states that taxpayers in Turkey may deduct VAT for the deliveries of goods and services from the VAT calculated over the taxable transactions they have performed. In other words, non-exempt input VAT (*i.e.*, VAT paid to suppliers) may be offset against output VAT (*i.e.*, VAT collected from domestic customers). Article 30 of VAT Law No. 3065 provides a list of exceptions when VAT may not be deducted from VAT “calculated over the taxable transaction of a taxpayer.” In other words, Article 30 lists instances where an input VAT credit is not available to be offset against output VAT, and this article does not list the payment for operating rights for fixed assets such as hydroelectric power plants. The exceptions at Article 30 include purchases of documents of passenger cars owned by enterprises, goods that have been lost other than by earthquake, flood, or fire, where the GOT’s Ministry of Finance declared force majeure, and for depreciated assets that have been lost or delivered under the exemption after the expiry of their service life, but make no mention to transactions such as the transaction under investigation. Our examination of the record leads us to conclude that the exceptions noted at Article 30 makes no reference to operating rights regarding fixed assets such as a hydroelectric plant.<sup>153</sup>

The petitioners argue that Commerce erred in the *Preliminary Determination* and in *Aluminum Sheet from Turkey Final Determination*. The petitioners state Commerce improperly conflated VAT exemptions provided on privatization transactions with the traditional Turkish VAT system, which Commerce has found not countervailable in past cases, when we found that the VAT exemptions, including the exemption provided to Assan’s acquisition of operation rights at the hydroelectric plant was not countervailable. They contend that Turkish VAT law would allow Assan to offset VAT payments that the company never actually paid due to its acquisition of these operating rights (*i.e.*, a privatization transaction) and that this constitutes a financial contribution.

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<sup>152</sup> See *Preliminary Determination* PDM at 22.

<sup>153</sup> See *Aluminum Sheet from Turkey Final Determination* IDM at 28-29; see also GOT January 8, 2021 IQR at Exhibit 13.

The record of this investigation demonstrates, and no party disputes, that Assan’s acquisition of operating rights for a hydroelectric plant was exempted from VAT.<sup>154</sup> The petitioners only point to the potential that Assan used exempted VAT to offset its VAT payments. The petitioners do not point to any record evidence that Assan actually used exempted VAT to offset its VAT payments. Nothing on the record of this investigation indicates that Assan actually used its exempted VAT to offset its required VAT payments. Commerce explicitly asked Assan whether it used its VAT exemptions to offset its monthly VAT tax filings.<sup>155</sup> In its supplemental response, Assan reports that “in the event of *absence of an exemption*, delivery of the economic assets of the power plant would be considered under Article 29.1.a of the Law, and VAT paid for delivery of economic assets of power plant would be subject to deduction.”<sup>156</sup> As Assan reports in the same response, “Assan did not pay VAT to the GOT for transfer of {infrastructure} rights of the powerplant.”<sup>157</sup> Therefore, the record of this investigation does not indicate that Assan used its exempted VAT to offset its VAT payments. Further, we agree with Assan that there is no new information regarding this program which differentiates this investigation from *Aluminum Sheet from Turkey Final Determination*. Therefore, we continue to find that Assan received no countervailable benefit under this program during the POI.

Because there is no evidence on the record that Assan used exempted VAT to offset its VAT payments, Commerce makes no determination regarding whether such offset would constitute a financial contribution from the GOT within the meaning of section 771(5)(D)(ii) of the Act and continues to find this program not used for the final determination.

The petitioners further argue that Commerce did not separately address the distinct exemptions under this program, and that Commerce computed benefits under this acquisition for Assan’s reported stamp tax and BITT exemptions.<sup>158</sup> There is no evidence that Assan used its exempted VAT to offset its VAT payments during the POI. However, record evidence indicates that Assan was exempt from stamp tax and BITT under the same transaction (*i.e.*, the acquisition of operating rights of the hydroelectric power plant).<sup>159</sup> Unlike the Turkish VAT system, which Commerce has found to be a “normal” VAT system that does not confer a countervailable benefit, we have made no such finding for exemptions of stamp tax and BITT. Therefore, we properly calculated a benefit for these programs. The fact that these two programs stem from the same transfer of operating rights as the VAT exemption is not material. These are separate programs and Commerce properly analyzed each program’s countervailability on a program-specific basis.

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<sup>154</sup> See Assan *et al.*’s Letter, “Assan’s Second Supplemental Affiliation Questionnaire Response,” dated December 16, 2020 at Exhibit S2-4; see also Assan January 5, 2021 IQR at 150-155.

<sup>155</sup> See Commerce’s Letter, “Section III Supplemental Questionnaire,” dated January 28, 2021 at 6.

<sup>156</sup> See Assan February 8, 2021 SQR at S3-30 (emphasis added).

<sup>157</sup> *Id.* at S3-29.

<sup>158</sup> See *Preliminary Determination* PDM at 22 (These programs were publicly identified as Tax and Fee Exemption Under Transfer of Operating Rights of Power Plant and BITT Under Transfer of Operating Rights of Power Plant programs which do not provide a measurable benefit in the POI).

<sup>159</sup> See Assan January 5, 2021 IQR at IQR-151.

**VII. RECOMMENDATION**

We recommend approving all of the above positions. If these positions are accepted, we will publish the final determination in the *Federal Register* and will notify the U.S. International Trade Commission of our determination.

\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

9/16/2021

X

*James Maeder*  
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Signed by: JAMES MAEDER

James Maeder  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations