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Tosçelik Profil Ve Sac Endüstrisi A.S. and Erbosan Erciyas Boru Sanayi Ve Ticaret A.S., v. United States
Consol. Court No. 17-00255, Slip Op. 19-9
(CIT January 18, 2019)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. SUMMARY

The Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the *Remand Order* of the U.S. Court of International Trade (CIT, or the Court), issued on January 18, 2019.[1] This remand concerns the final results of the administrative review of the countervailing duty (CVD) order on circular welded carbon steel pipes and tubes from the Republic of Turkey (Turkey), covering the period January 1, 2015, through December 31, 2015 (POR).[2]

In its *Remand Order*, the Court remanded Commerce's denial of a no shipment certification filed by Erbosan Erciyas Boru Sanayi ve Ticaret A.S. (Erbosan) and ordered Commerce to address whether Erbosan's knowledge of U.S. entries of its subject merchandise is relevant in the context of a CVD proceeding. In accordance with the *Remand Order*, Commerce: 1) reopened and placed information on the record and requested interested parties to comment;[3]

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[1] *See Tosçelik Profil Ve Sac Endüstrisi A.S. and Erbosan Erciyas Boru Sanayi Ve Ticaret A.S., v. United States*, Consol. Court No. 17-00255, Slip Op. 19-9 (CIT January 18, 2019) (*Remand Order*).
[2] *See Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2015*, 82 FR 47479 (October 12, 2017) (*Final Results*), and accompanying Issues and Decision Memorandum (Final Decision Memorandum).
[3] *See* Memorandum to File, "Redetermination Pursuant to Court Remand; Countervailing Duty Order on Circular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey; Placement of Information on the Record and Request for Comments," dated March 19, 2019 (No Shipment Query Instructions).

2) and explains why, in the context of CVD proceedings, knowledge of U.S. entries on the part of the respondent (in the instant proceeding, Erbosan) is not a necessary condition for determining whether the respondent had reviewable entries during the POR. As a result, we continue to find that Erbosan had reviewable entries during the POR and made no changes to the *Final Results*.

II. BACKGROUND

On May 2, 2016, Commerce initiated an administrative review of the CVD order on circular welded carbon steel pipes and tubes from Turkey.[4] The initiation notice named 16 companies, including Erbosan. Commerce required any producer and exporter named in the notice to notify Commerce within 30 days whether it had no exports, sales, or entries of subject merchandise during the POR.[5] Erbosan submitted a letter on May 9, 2015, certifying that it did not export, sell, or enter any subject merchandise during the POR.[6] Erbosan also represented that it did not know, or have reason to know, that its customers outside the United States would subsequently export or sell the subject merchandise produced by Erbosan to the United States during the POR.[7]

On May 13, 2016, Commerce placed on the record, and released to interested parties, the proprietary results of a query performed on the Customs and Border Protection (CBP) database for the 2015 calendar year.[8] On June 21, 2016, to corroborate Erbosan's no shipment certification, Commerce sent a message to CBP inquiring whether CBP had suspended

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 FR 26203 (May 2, 2016).
[5] *Id.* at 26203.
[6] *See* Letter from Erbosan, "No Shipment Certification of Erbosan Erciyas Boru Sanayi ve Ticaret A.S. ("Erbosan") in the 2015 Administrative Review of the Countervailing Duty Order Involving Certain Welded Carbon Steel Standard Pipe from Turkey," May 9, 2016 (No Shipment Letter).
[7] *Id.*
[8] *See* Memorandum, "Results of Customs and Border Protection Query Results," May 13, 2016 (CBP Query Results Memorandum).

liquidation of entries of subject merchandise produced and/or exported by Erbosan and requested entry documentation for such entries.[9] On October 4, 2016, we received information from CBP that contradicted Erbosan's claim of no sales, shipments, or entries of subject merchandise to the United States during the POR.[10] Therefore, in the *Preliminary Results*, we found that there were reviewable entries of subject merchandise produced by Erbosan that entered the United States during the POR. Accordingly, Commerce did not rescind the administrative review with respect to Erbosan and ultimately assigned to Erbosan the "non-selected rate" (*i.e.*, the rate assigned to respondents not selected for individual examination), which equaled the rate calculated for the sole mandatory respondent whose rate exceeded the 0.50 percent *de minimis* threshold.[11]

On April 24, 2017, Erbosan requested an opportunity to clarify the discrepancy between the data obtained from CBP and Erbosan's no shipment certification.[12] On May 1, 2017, Commerce provided interested parties with an opportunity to submit factual information to rebut, clarify, or correct information in the entry documents provided by CBP.[13] On May 8, 2017, Erbosan submitted information to clarify its no shipment certification.[14] In its submission, Erbosan stated the following:

> ERBOSAN did not have an opportunity to review the entry documents provided by the Customs and Border Protection (CBP) since ERBOSAN is not under the

[9] *See* Memorandum, "CBP Message Number 616301," dated June 15, 2016, which was placed on the record of the review; *see also* Memorandum, "Request for U.S. Entry Documents - Certain Welded Carbon Steel Pipe and Tube from Turkey (C-489-502)," dated July 28, 2016.
[10] *See* Memorandum to the File, "Placement of Customs and Border Protection (CBP) Query Results and Entry Documentation on Record of Review," dated December 22, 2016 (Entry Documents Memorandum).
[11] *See Circular Welded Carbon Steel Pipes and Tubes from Turkey: Preliminary Results of Countervailing Duty Administrative Review; Calendar Year 2015*, 82 FR 16994 (April 7, 2017) (*Preliminary Results*) and accompanying Decision Memorandum (Preliminary Decision Memorandum) at 7.
[12] *See* Letter from Erbosan, "Request of Opportunity to Clarify No Shipment Certification of Erbosan Erciyas Boru Sanayi ve Ticaret A.S. ("Erbosan") in the 2015 Administrative Review of the Countervailing Duty Order Involving Certain Welded Carbon Steel Standard Pipe from Turkey," dated April 24, 2017.
[13] *See* Memorandum to the File, "Submission of Factual Information," dated May 1, 2017.
[14] *See* Letter from Erbosan, "Clarification on No Shipment Certification of ERBOSAN in the 2015 Administrative Review of the Countervailing Duty Order Involving Certain Welded Carbon Steel Standard Pipe from Turkey," dated May 8, 2017 (Erbosan Clarification Submission).

> APO listing. Thus, it cannot comment specifically on the CBP data. However, ERBOSAN checked its records and confirms that it did not sell any subject merchandise to the United States during the POR, and that it did not export any subject merchandise to the U.S. for commercial purposes during the POR. ERBOSAN did make a very small air freight shipment to a laboratory in the United States for testing, but this shipment was not a sale, and was not in any case on commercial terms. Rather, Erbosan sent the small quantity samples for laboratory testing in order to get "FM Approvals" certification.[15]

In its case brief filed with Commerce, Erbosan argued that it had only one shipment of a small sample of subject merchandise to a laboratory in the United States for testing, not for commercial sale and, thus, the shipment cannot serve as the basis of a CVD review.[16] Erbosan additionally stated that "{i}t made no other shipment itself, and it does not know or have reason to know that any of its domestic or third country customers of subject merchandise subsequently exported or resold Erbosan's merchandise to the United States during the POR. Its understanding is that no such transshipments were made."[17] Erbosan further argued that, upon examining the same sample shipment in the companion antidumping (AD) review, Commerce determined that Erbosan had no reviewable entries during the POR of the AD review.[18] For these reasons, Erbosan requested that Commerce rescind the CVD review with respect to Erbosan.

In the *Final Results*, Commerce continued to find that Erbosan had reviewable entries of subject merchandise during the POR of the CVD review.[19] Specifically, Commerce determined

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[15] *Id.* at 2-3.
[16] *See* Letter from Erbosan, "Comments (case brief) of ERBOSAN on the preliminary determination on the 2015 Administrative Review of the Countervailing Duty Order Involving Certain Welded Carbon Steel Standard Pipe from Turkey," May 8, 2017 (Erbosan Case Brief) at 3.
[17] *Id.* at 4.
[18] *Id*. at 6, citing *Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 81 FR 92785 (December 20, 2016).
[19] *See Final Results* and accompanying Decision Memorandum (Final Decision Memorandum) at 19., citing Memorandum, "Discussion Pertaining to BPI," dated October 4, 2017 (BPI Erbosan Entry Memorandum) at 2.

that record evidence contradicted Erbosan's assertions that it had no shipments of subject merchandise and, in fact, demonstrated that subject merchandise produced by Erbosan entered the United States during the POR, and that [

].[20] Therefore, in the *Final Results*, Commerce continued to find that subject merchandise produced by Erbosan entered the United States during the POR and continued to assign Erbosan the non-selected rate of 6.64 percent *ad valorem*, which equaled the subsidy rate calculated for the sole mandatory respondent whose rate exceeded the 0.50 percent *de minimis* threshold.[21]

III. REMAND OPINION AND ORDER

Erbosan filed suit at the CIT to challenge Commerce's denial of its no shipment certification, maintaining that, other than a test shipment, it did not know or have reason to know that any of its domestic or third-country customers of subject merchandise subsequently exported or resold Erbosan's merchandise to the United States during the POR.[22] The Court found that the record confirmed subject merchandise produced by Erbosan entered the United States during the POR.[23] The Court also found that "{t}he POR entries of Erbosan's subject merchandise appear to involve exportation to the United States by a third-country purchaser of Erbosan's merchandise."[24] However, the Court remanded Commerce's denial of Erbosan's no shipment certification because "Commerce did not address Erbosan's contention that it did not know or

[20] *See* Final Decision Memorandum at 19; citing BPI Erbosan Entry Memorandum at 2.
[21] *See Final Results*, 82 FR at 47480; *see also* Final Decision Memorandum at 19. In light of the information obtained from CBP, Commerce determined that it was unnecessary to "consider whether it would be appropriate to rescind a countervailing duty review in which a company's only reviewable entries were samples shipped to the United States for testing." *See* BPI Erbosan Entry Memorandum at 2.
[22] *See Remand Order* at 9, citing to Erbosan's Administrative Case Brief at 4.
[23] *Id.*
[24] *Id.*

have reason to know of any transshipments of its subject merchandise to the United States during the POR."[25] On this point, the Court explained that Commerce "simply concluded that 'record evidence contradicts Erbosan's assertions of no shipments, and demonstrates that subject merchandise produced by Erbosan entered the United States during the POR.'"[26] The Court held that Commerce did not satisfy the statutory requirement to provide "an explanation of the basis for its determination that addresses relevant arguments made by interested parties."[27] The Court explained that "it might infer from Commerce's decision that Erbosan's knowledge (actual or constructive) about any transshipments is simply irrelevant in the CVD context" and noted that the Government argued as much in its brief before the Court.[28] However, the Court declined to make such an inference and stated that "Commerce should address this issue in the first instance."[29] Accordingly, the Court remanded the *Final Results* for "Commerce to address whether Erbosan's knowledge of U.S. entries of its subject merchandise is relevant in the CVD context."[30]

On February 19 and March 19, 2019, respectively, Commerce: 1) issued the Draft Remand Results;[31] and 2) placed customs instructions on the record of this proceeding and provided parties an opportunity to comment and to file rebuttal, clarifying, or correcting factual information. On February 25 and March 21, 2019, Erbosan filed comments.[32]

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[25] *Id*. at 9-10.
[26] *Id*. at 10, citing to Final Decision Memorandum at 19.
[27] *Id*., citing to section 777(i)(3)(A) of the Tariff Act of 1930, as amended (the Act).
[28] *Id*.
[29] *Id.*
[30] *Id*.
[31] *See* Draft Results of Redetermination Pursuant to Court Remand: Tosçelik Profil Ve Sac Endüstrisi A.S. and Erbosan Erciyas Boru Sanayi Ve Ticaret A.S., v. United States Consol. Court No. 17-00255, Slip Op. 19-9 (CIT January 18, 2019), dated February 19, 2019 (Draft Remand Results). *See* No Shipment Query Instructions.
[32] *See* Letter from Erbosan, "Comments on Draft Remand Determination," dated February 25, 2019 (Erbosan Comments). *See also* Letter from Erbosan, "Comments on Documents Placed on the Record *Toscelik Profil Ve Sac Endustrisi A.S. and Erbosan Erciyas Boru Sanayi Ve Ticaret A.S., v. United States* (Court No.: 17-00255) Slip Op. 19-9," dated March 21, 2019 (Erbosan Comments II).

IV. ANALYSIS

Section 731(1) of the Tariff Act of 1930, as amended, which concerns the imposition of AD duties, describes foreign merchandise that is *sold* in the United States at less than fair value.[33] The statute's emphasis on merchandise *sold* necessarily requires an examination of sales and the prices set by the party that sold the goods (*i.e.*, the price discriminator). To determine whether merchandise is being sold in the United States at less than fair value, Commerce must compare the export price (or constructed export price) of the subject merchandise in the United States with the normal value of the foreign like product in the home market.[34] Under section 772(a) of the Act, the basis for export price is the price at which the first party in the chain of distribution who sells the subject merchandise with knowledge that the merchandise is destined for sale in the United States, either directly to a U.S. purchaser or to an intermediary such as a trading company.[35] In AD cases, the party that sells the subject merchandise with such knowledge is the price discriminator that is the subject of Commerce's investigation or review. Commerce must identify the seller of the merchandise to conduct the dumping analysis and compare the sales price of the subject merchandise in the United States with the sales price of the foreign like product in the home market.

At times it may be unclear from the chain of distribution whether the price discriminator is the producer or a reseller of the merchandise. To carry out the purpose of the AD statute and identify the price discriminator, Commerce has established what is known as the "knowledge

[33] *See* section 731(1) of the Act: " . . . the administering authority determines that a class or kind of foreign merchandise is being or is likely to be, sold in the United States at less than its fair value . . ."
[34] *See* sections 773(a) and 771(35)(A) of the Act; *see also* 19 CFR 351.401(a).
[35] *See* Statement of Administrative Action Accompanying the Trade Agreements Act of 1979, H.R. Rep. No. 4537, 388, 411, reprinted in 1979 U.S.C.C.A.N. 665, 682 (providing that the Act's definition of export price "makes clear that if the producer knew or had reason to know the goods were for sale to an unrelated U.S. buyer, and the terms of sale were fixed or determined from events beyond the control of the parties as of the date of importation, the producer's sales price will be used as 'purchase price' to be compared with that producer's foreign market value.").

test," under which Commerce's practice is to consider documentary or physical evidence that the producer knew (actual knowledge) or should have known (constructive knowledge) at the time of sale that the ultimate destination of the products it sold was the United States.[36] This test applies only in AD proceedings when resellers are in the chain of commerce between the producer and the sale to a customer for importation into the United States.[37] Commerce provided the following explanation in the *Antidumping Duty Assessment Policy* regarding why identifying the price discriminator is key in the context of an AD proceeding:

> Within this context, the rate we determine for a producer is based on that particular producer's pricing practices. These are not necessarily the same pricing practices as those of the reseller. Resellers virtually always determine their own pricing and marketing policies with no input from the producer. Indeed, the producer may have no knowledge of the product after it leaves the producer's possession. Therefore, to use that producer's pricing practices to determine the reseller's final duty rate is inappropriate and does not address the pricing practices of the price discriminator for the sales to the United States. To permit the reseller to claim the producer's rate when the reseller is the price discriminator for the U.S. sale allows the reseller to sell subject merchandise in the United States without the appropriate discipline of an antidumping duty order.[38]

Thus, in AD cases, a respondent's sales of subject merchandise to a reseller are reviewable if the respondent knew, or should have known, that its merchandise was destined for sale in the United States.[39] Conversely, a respondent's sales of subject merchandise to a reseller are not reviewable if the respondent had no knowledge that the merchandise was destined for sale in the United States (*i.e.*, where a respondent believes the ultimate consumer for its sales is a customer in the home market or a third country).[40]

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[36] *See Certain Crystalline Silicon Photovoltaic Products from Taiwan: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 30401 (June 28, 2018), and accompanying Issues and Decision Memorandum at comment 1.
[37] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954, 23954 (May 6, 2003) (*Antidumping Duty Assessment Policy*).
[38] *Id.* at 23960-61.
[39] *Id.* at 23954.
[40] *Id.*

The statute's emphasis on merchandise sold in the United States is notably absent in the CVD context. Specifically, section 701(a) of the Act, which deals with the imposition of CVDs, describes foreign merchandise that benefits from countervailable subsidies with respect to the manufacture, production, or export of merchandise imported, or sold (or likely to be sold) for importation, into the United States.[41] As explained above, the knowledge test is employed in AD proceedings to ascertain the identity of the price discriminator that sold the subject merchandise at less than fair value in the United States and to determine the appropriate assessment rate. However, as stated in the *Antidumping Duty Assessment Policy*, the issue of whether a respondent possessed knowledge that its merchandise was destined for the United States "does not arise in the subsidy enforcement context."[42] A respondent's knowledge is not a necessary condition in the CVD context because CVDs are not imposed on merchandise sold at less than fair value in the United States. Rather, duties under a CVD order are imposed on imports of merchandise that benefit from countervailable subsidies. When Commerce conducts a CVD review, it is conducting a review of the producer's merchandise, not the producer's U.S. sales. Thus, the knowledge test is inapplicable in the context of CVD proceedings because Commerce does not examine a producer's selling practices in such proceedings.

By statute, a subsidy is countervailable if the following elements are satisfied: (1) a government or public authority has provided a financial contribution, (2) to a specific enterprise or industry, and (3) a benefit is thereby conferred upon the recipient of the financial contribution.[43] The statutory analysis is focused on whether a company's merchandise enjoys

[41] *See* section 701(a) of the Act: " . . . the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported or sold (or likely to be sold) for importation into the United States."
[42] *See Antidumping Duty Assessment Policy*, 68 FR at 23961.
[43] *See* section 771(5)(A)-(B) of the Act.

the benefit of government subsidies; it does not concern subsequent sales of the merchandise or the effect that a countervailable subsidy might have on the sales price of merchandise sold in the United States.[44] The statute's focus on subsidies related to the manufacture, production, and exportation of goods is reflected in the *Preamble* to the CVD regulations, which defines subsidy benefits as those that enhance revenue or reduce production inputs:

> {W}e will normally consider a benefit to be conferred where a firm pays less for its inputs (e.g., money, a good, or a service) than it otherwise would pay in the absence of the government program or received more revenues than it otherwise would earn.
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> We have adopted this because it captures an underlying theme behind the definition of benefit contained in section 771(5)(E) of the Act and, in our estimation, reflects the fundamental principles that we have articulated over the years with respect to programs and practices that we have determined confer either direct or indirect countervailable subsidies. . . . {I}n the overwhelming majority of cases, the recipient of a government financial contribution, income or price support, or indirect subsidy, enjoys a reduction in input costs or revenue enhancement that it would not otherwise have enjoyed absent that government action.
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> {A} determination of whether a firm's costs have been reduced or revenues have been enhanced bears no relation to the effect of those cost reductions or revenue enhancements on the firm's subsequent performance, such as its prices or output. In analyzing whether a benefit exists, we are concerned with what goes into a company, such as enhanced revenues and reduced-cost inputs in the broad sense that we have used the term, not with what the company does with the subsidy.[45]

On the basis of the explanation above, we find that whether Erbosan had knowledge that its subject merchandise entered the United States during the POR is not a necessary condition for purposes of determining whether there were reviewable entries of Erbosan's subject merchandise during the POR of the CVD review at issue. Rather, consistent with our findings in the *Final Results*, we continue to find that record evidence demonstrates that: (1) subject merchandise

[44] *See* section 771(5)(C) of the Act ("The administering authority is not required to consider the effect of the subsidy in determining whether a subsidy exists under this paragraph."); *see also* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, at 926, reprinted in 1994 U.S.C.C.A.N. 4040, 4240.

[45] *See Countervailing Duties; Final Rule*, 63 FR 65348, 65359-61 (November 25, 1998) (*Preamble*).

produced by Erbosan entered the United States during the POR of the CVD review; (2) such shipments constitute reviewable entries; (3) it was inappropriate for Commerce to rescind the review with respect to Erbosan; and (4) it was appropriate to assign Erbosan the "non-selected rate" of 6.64 percent *ad valorem*, which equals the rate calculated for the sole mandatory respondent whose net subsidy rate exceeded the 0.50 percent *de minimis* threshold.[46]

V. INTERESTED PARTY COMMENTS

On February 19, 2019, Commerce released the Draft Remand Results and invited interested parties to comment. Erbosan filed timely comments on February 25, 2019. In response to factual information placed on the record by Commerce, Erbosan filed additional comments on March 21, 2019. We have considered the comments received and, based on the analysis above, continue to find that Erbosan had reviewable entries during the POR. We address Erbosan's comments below.

Erbosan's Comments

- Commerce's position is contrary to the plain language and intent of the statute, and its claim that the statute's emphasis on merchandise sold in the United States is notably absent in the CVD context reveals a fundamental misunderstanding of why AD and CVD proceedings are conducted. While AD and CVD duties address different types of trade distortions in the marketplace, they both are applied to the same level of trade: sales of subject merchandise to the United States. Pursuant to 19 CFR 351.213, in both AD and CVD reviews, the proper entity to be reviewed is the party that made the sale, shipment, or entry – that is, the one with knowledge that the subject merchandise is being sold or

[46] *See* Final Decision Memorandum at 19; BPI Erbosan Entry Memorandum; Entry Documents Memorandum. The Court found that the record confirmed subject merchandise produced by Erbosan entered the United States during the POR. *See Remand Order* at 9. The Court also found that "{t}he POR entries of Erbosan's subject merchandise appear to involve exportation to the United States by a third country purchaser of Erbosan's merchandise." *Id.*

shipped to the United States. In AD proceedings, the knowledge test is applied to address the pricing practices of the price discriminator for sales to the United States. If the producer does not have knowledge of those discriminatory pricing practices, it would be, as Commerce notes in the *Antidumping Duty Assessment Policy*, inappropriate to use the producer's pricing practices to determine a reseller's final duty rate.[47]

- In the Draft Remand Results, Commerce argues that it is not required to analyze the "effect that a countervailable subsidy might have on the sale price of merchandise sold in the United States."[48] But the issue is not price discrimination in the CVD context but rather whether subsidies distort trade with the United States. For a subsidy received by a producer to have a distortive effect in the United States when sold by a third party (reseller), the benefit of the subsidies must have been passed from the producer to the reseller. Commerce concedes in the Draft Remand Results, that the "statutory analysis is focused on whether a company's merchandise enjoys the benefit of government subsidies."
- If Erbosan resells the merchandise to a foreign third party in an arm's-length transaction (instead of to the United States), Commerce cannot assume without record evidence that all subsidies covered by the all-others CVD rate have been passed through to a reseller and that the all-others rate should be applied to these sales to the United States.[49] Calculating or evaluating subsidies on sales for which a producer such as Erbosan has no knowledge was sold to the United States circumvents the pass-through analysis required when the producer is not the exporter in CVD proceedings.

[47] *See* Erbosan Comments at 2-3, citing *Antidumping Duty Assessment Policy*, 68 FR at 23960.
[48] *Id.* at 3, citing Draft Remand Results at 9.
[49] *Id*., citing *Delverde, SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000).

- Commerce's draft decision to adopt a *per se* rule that the all-others rate is applicable to Erbosan for sales in which it had no knowledge or involvement ignores the intervening arm's-length sale to the third-party shipper of subject merchandise and whether the subsidy has passed through to that third-party shipper. With this, Commerce erroneously presumes that Erbosan received a financial contribution and a benefit with regard to those sales of subject merchandise sold to a foreign third-party shipper (which is not subject to the review), which in turn sold them to the U.S. market. Under the statute, Commerce is required to determine that a person received both a financial contribution and a benefit with regard to the U.S. sales being reviewed.[50] By not applying a knowledge test, Commerce erroneously decides that a countervailable financial contribution and benefit passed through the third-party seller and that the all-others rate is appropriate for those U.S. sales.
- When Commerce confirms a no-shipment certification with CBP in CVD administrative reviews, it addresses whether there is evidence that those respondents had shipped merchandise to the United States during the POR: "The Department confirmed with U.S. Customs and Border Protection (CBP) that these companies did not ship merchandise to the United States during this review period."[51]
- When CBP provides information to Commerce indicating that entries of subject merchandise produced and/or exported by the companies in question entered the United

[50] *Id*. at 4-5, citing *Allegheny Ludlum Corp. v. United States*, 182 F. Supp. 2d 1357, 1367 (2002).
[51] *Id.* at 5, citing to *Aluminum Extrusions from the People's Republic of China: Final Results, and Partial Rescission of Countervailing Duty Administrative Review*; *2013*, 80 FR 77325, 77326 (Dec. 14, 2015) (*Aluminum Extrusions from China*) and accompanying decision memorandum (Aluminum Extrusions Decision Memorandum); *Multilayered Wood Flooring from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2015*, 83 FR 27750, 27751 (June 14, 2018) (Wood Flooring from China) and accompanying decision memorandum (Wood Flooring from China Memorandum).

States during the relevant period, this is only the beginning of the inquiry. Commerce must then take the next step of asking the company in question whether it knew of these shipments to the United States.[52]

Commerce's Position: Erbosan contends that, in both AD and CVD reviews, the proper entity to be reviewed is the one with knowledge that the subject merchandise is being sold or shipped to the United States. Erbosan cites to 19 CFR 351.213, but has not identified any specific language in that regulation to support its contention with respect to CVD administrative reviews. With respect to CVD reviews, the regulation provides that "an administrative review under this section normally will cover entries or exports of the subject merchandise during the most recently completed calendar year."[53] We disagree that the language in this regulation supports the proposition that Commerce may only review entries or exports of a respondent's subject merchandise if the respondent has knowledge that its subject merchandise has been sold or shipped to the United States. As discussed above, in the *Final Results*, there is record evidence on the record of the underlying review that subject merchandise produced by Erbosan entered the United States during the POR. Erbosan, as the producer of the entries of subject merchandise, is the party that is subject to an administrative review. Neither the statute nor Commerce's regulations make special provisions for producers that lack knowledge of the ultimate destination of its merchandise in a CVD proceeding.

Erbosan, citing to the *Antidumping Duty Assessment Policy*, asserts that the knowledge test is applied in AD proceedings to address the pricing practices of the price discriminator for sales to the United States. Erbosan attempts to extend the application of the knowledge test and the *Antidumping Duty Assessment Policy* to CVD proceedings, stating that if a producer does not

[52] *See* Erbosan Comment II at 2.
[53] *See* 19 CFR 351.213(e)(2)(i).

have knowledge of discriminatory pricing practices, it would be inappropriate to use the producer's pricing practices to determine a reseller's final duty rate. However, the *Antidumping Duty Assessment Policy* explicitly states that Commerce's clarification on the automatic-liquidation regulation, 19 CFR 351.212(c), where an intermediary (*e.g.*, a reseller, a trading company, an exporter) has been involved in the chain of commerce, "does not apply to imports of merchandise subject to a countervailing duty order because this issue does not arise in the subsidy enforcement context."[54] As explained in the analysis section above, the knowledge test is employed in AD proceedings to ascertain the identity of the price discriminator that sold the subject merchandise at less than fair value in the United States and to determine the appropriate assessment rate. A respondent's knowledge is not a necessary condition in the CVD context because CVDs are not imposed on merchandise sold at less than fair value in the United States. Rather, duties under a CVD order are imposed on imports of merchandise that benefit from countervailable subsidies. The knowledge test is inapplicable in the context of CVD proceedings because Commerce does not examine a producer's selling practices and, thus, has no need to determine the identity of the price discriminator in such proceedings.[55]

Erbosan further argues that, pursuant to the U.S. Court of Appeals for the Federal Circuit's (Federal Circuit) decision in *Delverde, SrL v. United States*,[56] Commerce cannot assume without record evidence that all subsidies covered by the all-others CVD rate have been passed through to a reseller and that the all-others rate should be applied to the reseller's sales to the United States. Erbosan misinterprets the issue in that case, which was whether Commerce's attribution of allocable subsidies in change-in-ownership situations was in accordance with the

[54] *See Antidumping Duty Assessment Policy*, 68 FR at 23961.
[55] *See* Draft Remand Results at 9.
[56] *See Delverde*, 202 F.3d at 1360.

statute. The Federal Circuit held that, prior to attributing non-recurring subsidies to a company in a change-in-ownership situation, Commerce was required to examine the facts and determine whether the company was an indirect recipient of the subsidies by having purchased assets from the company that directly received the subsidies.[57] Attribution issues stemming from changes in ownership are distinct from whether a particular producer had reviewable entries during the POR.

Along the same lines, Erbosan argues that the issue in the CVD context is whether subsidies distort trade with the United States and that for a subsidy received by a producer to have a distortive effect in the United States when sold by a third party (reseller), the benefit of the subsidies must have been passed from the producer to the reseller. Erbosan again misinterprets how Commerce treats merchandise exported to the United States by non-producing entities in CVD proceedings. Contrary to Erbosan's argument, a pass-through analysis would be inapplicable to entries of subject merchandise produced by Erbosan and exported by a trading company. Commerce's regulation at 19 CFR 351.525(c) provides that "benefits from subsidies provided to a trading company which exports subject merchandise *shall be cumulated* with benefits from subsidies provided to the firm which is producing subject merchandise that is sold through the trading company, regardless of whether the trading company and the producing firm are affiliated" (emphasis added). As clearly stated, subject merchandise exported by the trading company is deemed to benefit from the subsidies provided to both the trading company and the producer of the merchandise.[58]

[57] *Id.* at 1366.
[58] *See Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2014-2015*, 83 FR 11694 (Mar. 16, 2018), and accompanying Issues and Decision Memorandum at comment 3; *see also POSCO v. United States*, Slip Op. 18-169 (CIT Dec. 6, 2018), at pp. 34-36; *TMK IPSCO v. United States*, 222 F. Supp. 3d 1306, 1322-23 (CIT 2017).

Additionally, Erbosan argues that while AD and CVD duties address different types of trade distortions in the marketplace, they both are applied to the same level of trade: sales of subject merchandise to the United States. Erbosan makes this point to contend that Commerce should apply a uniform standard (specifically the AD standard) when determining whether Erbosan had reviewable entries during the POR of the CVD review at issue. We disagree. As with its argument concerning *Delverde, SrL v. United States*, Erbosan confuses the issue of how Commerce determines whether firms made entries of subject merchandise during the PORs of AD and CVD reviews with how Commerce attributes dumping duty margins and countervailing duties to those sales. As explained above, because Commerce does not examine a firm's selling practices in CVD proceedings, Commerce does not employ the knowledge test in CVD proceedings to determine whether firms made reviewable entries of subject merchandise or to determine which firm's assessment rate should be applied to entries of subject merchandise. Commerce expressly stated in the *Antidumping Duty Assessment Policy* that the "knowledge test" does not apply in the CVD context.[59] Further, the inapplicability of a "knowledge test" in CVD proceedings is reflected in the language of Commerce's trading company regulation, which states that Commerce "shall cumulate" subsidies received by trading companies with the subsidies received by the firm that produced the merchandise that was sold through the trading company.[60] Cumulation of subsidies is required without regard to affiliation and the producer's knowledge regarding the ultimate destination of the merchandise.

Erbosan argues that Commerce has improperly adopted a *per se* rule that the non-selected rate is applicable to Erbosan and erroneously presumes that Erbosan received a financial contribution and a benefit with regard to those sales of subject merchandise sold to a foreign

[59] *See Antidumping Duty Assessment Policy*, 68 FR at 23961.
[60] *See* 19 CFR 351.525(c).

third-party shipper who then sold the merchandise in the United States. To the extent that Erbosan is suggesting that Commerce must conduct a company-specific subsidy analysis to determine whether the non-selected rate applies to Erbosan, we disagree. Commerce was under no obligation to conduct an individual examination of Erbosan prior to assigning it the non-selected rate. When Commerce limits its examination of respondents in an administrative review pursuant to section 777A(e)(2) of the Act, Commerce conducts an individual examination of the selected mandatory respondents.[61] The statute does not address the establishment of a rate to be applied to respondents not selected for individual examination when Commerce limits the review; however, the statutory framework contemplates the possibility that Commerce will employ the same methods for calculating subsidy rates for respondents not selected for individual examination in administrative reviews as it does in the investigation. Thus, Commerce's well-established practice in administrative reviews for determining the subsidy rate for respondents not selected for individual examination is based on the statutory guidance for calculating the all-others rate in an investigation, pursuant to section 705(c)(5) of the Act (*i.e.*, average the weighted-average net subsidy rates for the selected mandatory respondents, excluding rates that are zero, *de minimis*, or based entirely on facts available).[62] In this case, Commerce selected the two companies that accounted for the largest volume of U.S. imports of subject merchandise during the POR: Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (Borusan) and Toscelik Profil ve Sac Endustrisi A.S. (Toscelik). In the *Final Results*, Commerce calculated a net subsidy rate of 6.64 percent for Borsuan and 0.49 percent (*de minimis*) for Toscelik. Accordingly, Commerce assigned a net subsidy rate of 6.64 percent to Erbosan and to the other respondents covered by the review and not selected for individual examination.

[61] *See* section 777A(e)(2)(A)(i) and (ii).
[62] *See* Preliminary Decision Memorandum at 7.

Erbosan cites *Aluminum Extrusions from China* and *Wood Flooring from China* to assert that when Commerce confirms a firm's no-shipment certification with CBP in CVD administrative reviews, it addresses whether there is evidence that those respondents had shipped merchandise to the United States during the POR. Erbosan mischaracterizes the inquiry that Commerce undertakes to confirm a respondent's no-shipment certification. Contrary to Erbosan's argument, in the review at issue Commerce did not seek confirmation in the "no shipment" inquiry to CBP as to whether Erbosan was the company directly responsible for shipping subject merchandise to the United States. Rather, Commerce sought confirmation in the "no shipment" inquiry to CBP as to whether subject merchandise "***produced and/or exported*** by Erbosan Erciyas Boru Sanayi ve Ticaret A.S. (AKA Erciyas Boru Sanayii Ve Ticaret A.S.)" was imported into the United States during the POR.[63] Commerce's approach in the review at issue is the same approach it undertook in *Aluminum Extrusions from China*, in which Commerce explained that it issued its "no-shipments" message.[64] Specifically, in that case, Commerce inquired with CBP as to whether aluminum extrusions from China had been "produced and/or exported" by the firms at issue.[65] We also note that Commerce rescinded the administrative review with respect to the no-shipment companies in *Aluminum Extrusions from China* because all requests to review those companies were timely withdrawn.[66] Similarly, in *Wood Flooring from China*, Commerce's "no shipment" message to CBP inquired whether wood flooring from China had been "produced and/or exported" by the firms at issue.[67] Thus, Commerce's approach in *Aluminum Extrusions from China* and *Wood Flooring from China* does

[63] *See* Customs Instructions, Message Number 6167301 dated June 15, 2016 (emphasis added).
[64] *See Aluminum Extrusions from China*, 80 FR at 77326.
[65] *See* No Shipment Query Instructions at Attachment (Customs Instructions Message Numbers 4280301 and 5239314).
[66] *See Aluminum Extrusions from China*, 80 FR at 77326.
[67] *See Wood Flooring from China*, 83 FR at 27751, and accompanying Issues and Decision Memorandum at page 4 n.8. *See also* No Shipment Query Instructions at Attachment (Customs Instructions Message Number 7171306).

not stand for the proposition that in CVD reviews Commerce determines non-shipment based on whether a company was directly responsible for shipping subject merchandise to the United States.

Finally, Erbosan suggests, in response to the factual information placed on the record by Commerce during this remand proceeding, that Commerce is obligated to issue questionnaires to the company in question, if CBP data contradicts the company's "no-shipment" certification, to determine whether the producer had knowledge of the sales in question. As discussed above, we have explained how, in the context of CVD proceedings, knowledge of U.S. entries on the part of the respondent is not a necessary condition for determining whether the respondent had reviewable entries during the POR.

VI. FINAL RESULTS OF REDETERMINATION

Consistent with the *Remand Order*, we have explained whether a respondent's knowledge of U.S. entries of its subject merchandise is relevant in the CVD context. For the reasons stated above, we continue to find that Erbosan had reviewable entries during the POR and have made no changes to the *Final Results*.

3/25/2019

X 

Signed by: GARY TAVERMAN
Gary Taverman
Deputy Assistant Secretary
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performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance