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MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey

Summary

We have analyzed the case and rebuttal briefs of the petitioners[1] and the respondents[2] for the final results of the antidumping duty administrative review covering certain welded carbon steel pipe and tube ("pipe and tube") from Turkey. We recommend that you approve the positions we have developed in the Department's Position sections of this memorandum.

Background

On July 7, 2005, the Department of Commerce ("the Department") published the preliminary results of this antidumping duty administrative review of pipe and tube from Turkey.[3] The period of review ("POR") is May 1, 2003 through April 30, 2004. On July 21, 2005, we received case briefs from Çayirova, Borusan, and the petitioners. On July 28, 2005, we received rebuttal briefs from the same parties. A public hearing was held on August 4, 2005.

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[1] The petitioners are Allied Tube and Conduit Corporation and Wheatland Tube Company.

[2] The respondents in this administrative review are Yücel Group ("Yücel"), which includes Çayirova Boru Sanayi ve Ticaret A.S., and Yücel Boru Ithalat-Ihracat ve Pazarlama A.S. (collectively referred to as "Çayirova"), and the Borusan Group ("Borusan").

[3] Notice of Preliminary Results of Antidumping Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey, 70 FR 33084, (June 7, 2005) ("Preliminary Results").

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Discussion of Issues

Comment 1: Date of Sale

Çayirova states that for sales in the United States, the date of its sale the e-mail order confirmation date. Çayirova also states that its e-mail order confirmation is the acceptance of an offer made by its U.S. customers, and constitutes a firm contract. Çayirova further states that they provided e-mail confirmations for the ten largest line-item sales as requested by the Department during the sales verification, as well as the five pre-selected U.S. sales and two on-site selected U.S. sales. Thus, the documentation for a total of 17 U.S. sales was reviewed by the Department. Çayirova argues that the Department's conclusion in its Preliminary Results to use invoice date rather than e-mail confirmation date due to one missing e-mail confirmation is unreasonable because a "completely errorless investigation is simply not a reasonable expectation."[4] Çayirova urges the Department to recalculate the margins based on contract date as date of sale.

The petitioners argue that the Department correctly selected invoice date as the date of sale for both the home-market and the U.S. market for three reasons. First, they state that 19 CFR § 351.401(i) (2002) favors using invoice date as the date of sale. Second, the petitioners argue that the e-mail correspondence submitted during verification exhibit ongoing negotiations which do not finalize the terms of the sale. The petitioners point to phrases in the messages referring to "revised order," and "revision as per your last order."[5] The petitioners also refer to the Department's position that "price and quantity are often subject to continued negotiation between the buyer and the seller until the sale is invoiced."[6] Third, the petitioners point out that Çayirova

[4] Brief for Cayirova at 14 (July 21, 2005)(citing Fujian Machinery & Equipment Import & Export Corp. v. United States, 178 F. Supp. 2d 1305, 1334, (2001)).

[5] Brief for Petitioner at 4 (July 21, 2005).

[6] Brief for Petitioner at 5 (July 28, 2005) citing Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27348-49 (May 19, 1997).

selected the invoice date as the date of sale in the home market, and that for an accurate comparison, the same should be applied in the U.S. market.

Department's Position:

We agree with Çayirova that it has properly identified the e-mail confirmation date as date of sale for its U.S. sales. The Department's regulations state that "the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." 19 CFR § 351.401(i). The Department "may exercise its discretion to rely on a date other than invoice date for the date of sale only if 'material terms' are not subject to change between the proposed date and the invoice date, or the agency provides a rational explanation as to why the alternative date 'better reflects' the date when 'material terms' are established."[7] The Department considers a sale as made when the material terms of sale (i.e., price and quantity) are firmly established.[8]

The e-mail confirmations provided by Çayirova reflect the date upon which material terms of sale were established. The e-mail messages contain price and quantity, and the date the order was confirmed. In addition, the petitioners' argument that the e-mail correspondence constitutes ongoing negotiations and do not finalize the material terms of sale is without merit. The negotiations occurred prior to the confirmation of a particular order. Also, the Department verified 17 e-mail confirmations.[9] Further, the Department verified that the material terms of sale (price and quantity) had not changed between the time Çayirova received the e-mail confirmation and the bill of lading for shipment to the United States. More specifically, the terms outlined in the e-mail confirmation were found to be consistent with the actual terms of shipment for the shipments sampled at verification.[10]

The Department disagrees with the petitioners' argument that invoice date should be selected for date of sale in the U.S. market in order to obtain accurate comparisons to sales in the home market. The test is whether a different date, other than invoice date, better reflects the date on

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[7] Seah Steel Corp. v. United States, 25 Ct. Int'l Trade 133, 135 (2001).

[8] Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia, 70 FR 13456, at Comment 2 (March 21, 2005).

[9] In the Preliminary Results, the Department determined that it verified 16 of 17 requested e-mail confirmations. The Department recognizes that it overlooked the fact that one e-mail confirmation applies to 2 confirmed orders. See Brief for Çayirova at 6 (July 21, 2005).

[10] Verification of Sales Data Submitted by Çayirova Boru San. ve Tic. A.S. and Yücel Boru Ithalat-Ihracat ve Pazarlama A.S. ("Verification Report"), exhibits 31 and 23, May 25, 2005, available in the Central Records Unit ("CRU") of the Department.

which the material terms of sale are established. 19 CFR 351.401(i). The Department determines that the confirmation date establishes the material terms of sale and best represents the date of sale for Çayirova's sales to the United States.[11] The appropriate changes have been made to the SAS program.

Comment 2: ASTM Pipe in the Home Market

Çayirova argues that sales in the home-market of pipes made to the specification of the American Society of Testing Materials ("ASTM"), consisting of overruns, should be excluded from the normal value calculation as outside the ordinary course of trade. Çayirova states that such sales are relatively small in volume compared to the volume of sales of pipes made to Turkish specifications ("TSE"), are sold to a limited number of customers, and do not appear on its price list. Further, Çayirova argues that ASTM pipes do not conform to TSE pipe standards and are not produced for the home-market or for inventory. Also, Cayirova argues that only one-third of home-market sales of ASTM pipes are sold as packed pipes (bundled), whereas overall, 90 percent of home-market sales are packed pipes. Çayirova states that the sales of ASTM pipes to the home-market are unique because home-market buyers purchase ASTM pipes and further manufacture the pipes to make couplings, whereas TSE pipes are used for conveyance of liquids of gasses. Finally, Çayirova argues that the Department's cite to Korean Steel does not relate to the issue in this case.[12]

The petitioners argue that Çayirova's sales of ASTM pipes are within the ordinary course of trade and that the Department should consider all of Çayirova's ASTM pipe sales made in the home-market when calculating the duty rate regardless of whether the sales involved overrun merchandise, or if the ASTM pipes are sold bundled or individually. Citing Romanian Pipe,[13] the petitioners assert that the Department found that ASTM pipe sold in the home-market was within the ordinary course of trade. The petitioners specifically refer to the factors that the Department considered in Romanian Pipe in reaching its determination that ASTM pipes were sold within the ordinary course of trade in Romania's home market: 1) ASTM sales represented a very small percentage of total home-market sales; 2) a limited customer base; 3) production overruns that were "anything but ordinary;" 4) ASTM pipes were identified by invoice as

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[11] Verification Report, (May 25, 2005).

[12] Notice of Final Results of the Tenth Administrative Review and New Shipper Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 70 FR 12443, accompanying Issues and Decision Memorandum at General Issues comment 1 (Mar. 14, 2005) ("Korean Steel").

[13] Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not to Revoke, 70 FR 7237 (Feb. 11, 2005) ("Romanian Pipe").

"prime" materials rather than overruns; and 5) ASTM pipes were often used as a substitute for Romanian standard pipe in the home market.[14]

Çayirova argues that the Department's decision in Romanian Pipe is inapplicable in this case. They state that in that case, ASTM overruns were sold in the home-market as substitutes for Romanian standard pipes. In the instant case, the respondent argues that ASTM pipes are not substitutes for TSE pipes and are not being used as such; therefore, they should be considered outside the ordinary course of trade. Furthermore, Çayirova argues that the customers for ASTM pipes in the home-market are "not ordinary customers for Çayirova's standard products" because these customers are in "the fittings industry rather than in the industry of supplying or using pipes for conveyance of liquids or gases."[15]

Çayirova further argues that the Department has stated that overruns should be excluded as outside the ordinary course of trade in previous cases.[16]

The petitioners argue that the facts of Korean Steel are applicable to the present case. The petitioners argue that in Korean Steel, the Department determined that certain home-market prices should not be excluded as being outside the ordinary course of trade because the merchandise was "prime" grade material.[17]

Department's Position

We do not agree with Çayirova's contention that its home market-sales of ASTM pipe are outside the ordinary course of trade. Section 771(15) of the Tariff Act, as amended ("the Act"), defines the term "ordinary course of trade" as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." The Statement of Administrative Action ("SAA") clarifies this definition stating "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." SAA accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1, at 834. The Department will normally consider the totality of the circumstances, including the following four factors, in evaluating whether sales in a given market are not ordinary when compared to other sales generally made in the same market: 1) whether there are different standards and product uses, 2) comparative volume of sales and number of

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[14] Brief for Petitioner at 20-21 (July 21, 2005) (citing Romanian Pipe).

[15] Brief for Çayirova at 22 (July 28, 2005).

[16] Brief for Çayirova at 25 (July 21, 2005).

[17] Korean Steel, at General Issues comment 1 (Mar. 14, 2005).

buyers in the home market, 3) price and profit differentials in the home market, and 4) whether sales in the home-market consisted of production overruns or seconds.[18]

Regarding whether there are different standards and product uses, although Çayirova can differentiate ASTM sales from those of TSE sales on the basis of their respective specification labels, Çayirova has not demonstrated that use of ASTM pipe is unique. During verification, Çayirova stated that "pipes made to U.S. standards sold on the domestic market are used by further manufacturers who use the excess wall thickness of the pipe to make couplings."[19] However, the submitted home-market sales database shows that of the customers that purchased ASTM pipe in the home market, only one did not also purchase TSE.[20] This indicates that ASTM pipe is sold for common purposes.

Çayirova states that ASTM sales represent a very small percentage of total home-market sales and that the number of customers for the ASTM sales is limited. In addition, Cayirova states that only one-third of home-market sales of ASTM pipes are sold as packed pipes, and for the home-market overall, 90 percent of sales are packed pipe. Although the small number of sales in absolute terms is an important factor to consider in our overall evaluation of whether sales fall inside or outside the ordinary course of trade, a small number of sales by itself is not dispositive of a finding that sales are outside the ordinary course of trade.[21]

Moreover, after sorting Çayirova's sales in the home-market database by control number "CONNUMH," we found numerous transactions of TSE pipes with volumes that were at the same level or lower than Çayirova's typical ASTM sale. Thus, on an individual sale basis, the quantity of Çayirova's ASTM pipe sales in the home-market fall within the typical range of its corresponding sales of TSE pipe.[22]

We also found that relative prices and profitability do not distinguish Çayirova's ASTM sales from its TSE sales. We compared the per-unit prices of the ASTM sales reported in the home-market database to those of equivalent TSE sales and did not find any significant differentials.

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[18] Romanian Pipe, at comment 14.

[19] Verification Report, (May 25, 2005).

[20] Because the Department's analysis contains business proprietary information, further discussion can be found in the Administrative Review of the Antidumping Duty Order on Certain Welded Carbon Steel Pipe and Tube from Turkey POR 5/1/2003 - 4/31/2004: ASTM Pipe Sales in the Home Market, at 3 (December 5, 2005), ("Home-Market Sales Memo") on file in the CRU.

[21] Romanian Pipe, at comment 14.

[22] Home-Market Sales Memo at 3.

Thus, there is no data on the record to indicate that there is any difference between either the production costs or the profitability ratios of the ASTM products and of other pipe sold in the home market.[23]

Although Çayirova classified ASTM pipes sold in the home-market as overrun production, there is no evidence suggesting that Çayirova treated sales of this excess material from inventory any differently than TSE pipe. We find nothing on the record to suggest that any ASTM sales from production overruns were anything other than ordinary sales out of inventory.[24]

Further, Çayirova's assertion that the Department determined in Korean Steel that overruns should be excluded as outside the ordinary course of trade is erroneous. In Korean Steel, at comment 14, the Department corrected a ministerial error because in the Preliminary Results the Department inadvertently failed to exclude overrun sales it had determined were outside the ordinary course of trade. Therefore, home-market sales of production overruns does not create a *per se* rule as Çayirova suggests, but rather is but one factor that the Department considers when determining if certain home-market sales are outside the ordinary course of trade.[25]

Therefore, considering the totality of the circumstances that ASTM usage is not demonstrably unique, sales volumes of ASTM pipe fall within the normal range of sales in the home market, relative price and profitability do not set sales of ASTM pipe apart, and ASTM pipe are overruns sold out of inventory, we continue to consider ASTM sales in the home-market as within the ordinary course of trade.

Comment 3: Weighting Factors in the Model Match Program

Çayirova argues that the weighting factors in the Department's model match program are causing black painted pipes in the U.S. to be incorrectly matched with a preference to galvanized pipes sold in the home market. Instead, they argue that black painted pipes in the U.S. market should be matched to black unpainted pipes in the home market.

The petitioners state that the Department properly matched U.S. sales of black painted pipe to home-market sales of galvanized pipe. They state that it is appropriate to match painted pipe to galvanized pipe, both of which have a coating to prevent rusting, before matching them to pipe that does not have a coating. They further argue that cost should not be a factor in deciding the matching criteria.

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[23] Home-Market Sales Memo at 4.

[24] Home-Market Sales Memo at 4.

[25] See Romanian Pipe, at comment 14 ("The Department will normally consider the totality of the circumstances" when determining whether home-market sales are outside the ordinary course of trade); see also 19 CFR 351.102(b).

Department's Position

The Department agrees with Çayirova and finds that it is appropriate to match black painted pipes in the U.S. market to black unpainted pipes in the home market. In the Preliminary Results, the Department added language in the SAS programming to change Çayirova's painted variable data from characters to numbers to allow the SAS program to run properly. This adjustment inadvertently caused the SAS program to preferentially match black painted pipes in the U.S. to galvanized pipes sold in the home market, for pipes that have similar diameters and wall thicknesses. The Department did not intend to change either the model match preferences or deviate from established practice. Thus, the programming language that caused this error amounts to a ministerial error, rather than a methodological decision made by the Department. Additionally, cost has not been considered as a factor in the model match criteria. The appropriate changes have been made to the SAS program so that black painted pipe in the U.S. market would match to black unpainted pipe in the home market. See Analysis Memorandum for Çayirova Boru San, at page 2 (December 5, 2005) ("Calc Memo").

Comment 4: CVD Adjustment

The respondent, Çayirova, claimed an upward adjustment to U.S. price because of the countervailing duty ("CVD") order in Certain Welded Carbon Steel Pipes and Tubes and Welded Carbon Steel Line Pipe from Turkey; Final Results of Countervailing Duty Administrative Reviews, 64 FR 44496 (September 11, 2000). It requests that we add the CVD adjustment to the calculations.

The petitioners did not comment on this issue.

Department's Position

The Department agrees with Cayirova. Section 772(c)(1)(C) of the Act states that "[t]he price used to establish export price and constructed export price shall be... increased by... the amount of any countervailing duty imposed on the subject merchandise under section 772(c)(1)(A) of the Act, to offset an export subsidy."

Çayirova reported the CVD on shipments to the United States.[26] At verification, the Department verified the CVD rate.[27] Consistent with Department practice, we increased U.S. price by an amount attributed to export subsidies established in the CVD investigation.[28]

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[26] Çayirova Response to Supplemental Questionnaire at 35 (February 24, 2005).

[27] Verification Report at page 14 (May 25, 2005).

[28] Certain Welded Carbon Steel Pipes and Tubes and Welded Carbon Steel Line Pipe from Turkey; Final Results of Countervailing Duty Administrative Reviews, 64 FR 44496

Comment 5: Certain United States and Home-Market Sales

The respondent, Borusan, argues that the Department incorrectly dropped 198 U.S. sales from the analysis because their date of sale was prior to the POR. They claim the Department should include those sales in the calculations because they are export price ("EP") sales and they entered into the United States during the POR, despite the fact that the date of sale for the 198 U.S. sales occurred prior to the POR. Borusan further argues that certain home-market sales made within 90 days prior to the first reported U.S. "date of sale" should be restored. Borusan states that these home-market sales are needed in order to properly calculate dumping margins on the 198 U.S. sales that were incorrectly dropped from the U.S. sales database.

The petitioners did not comment on this issue.

Department's Position

The Department agrees with Borusan that the 198 U.S. sales that had a date of sale outside the POR and an entry date within the POR should be included in Borusan's margin calculation program. The Department's regulations permit review of either entries or sales when calculating duties.[29] Further, the "Department's usual practice in export price situations is to review and assess duties on entries within the POR, regardless of whether the sales occurred prior to the review period."[30] In the instant review, the 198 sales dropped from the margin calculation program used for the preliminary results of this segment of the proceeding will be included in the calculation of the dumping margin for Borusan for the final results of this review. Furthermore, in accordance with the Department's practice, we will include home-market sales made within the 90-day period prior to the commencement to the POR. The appropriate changes have been made to the SAS program.

Comment 6: Cash Deposit Rate

The respondent, Borusan, requests that the Department ensure that the cash deposit rate is applied to all members of the Borusan Group, including Borusan Birleşik Boru Fabrikalari A.Ş., Mannesmann Boru Endüstrisi T.A.Ş., Borusan Mannesmann Boru Sanayii ve Ticaret A.Ş., and Istikbal Ticaret T.A.S.

(September 11, 2000).

[29] 19 CFR § 351.213(e)(1)(i).

[30] Helmerich & Payne v. United States, 24 F.Supp 2d. 304, 311, 312 (1998) (citing High-Tenacity Rayon Filament Yarn From Germany; Final Results of Antidumping Duty Administrative Review, 61 FR 51421 (October 2, 1996) and finding Department's practice to be reasonable).

The petitioners did not comment on this issue.

Department's Position:

The Department agrees with Borusan and in our instructions to U.S. Customs and Border Protection ("CBP") we will notify CBP that the Borusan Group includes Borusan Birleşik Boru Fabrikalari A.Ş., Mannesmann Boru Endüstrisi T.A.Ş., Borusan Mannesmann Boru Sanayii ve Ticare A.Ş., and Istikbal Ticaret T.A.S.

Comment 7: Duty Drawback

The petitioners argue that pursuant to section 772(c)(1)(B) of the Act, the Department should not grant Çayirova a duty drawback adjustment unless Çayirova can show that import duties are reflected in the cost or price of subject merchandise sold in the home market. The petitioners assert that the objective of the drawback statute is to offset an imbalance that occurs when the import duty is rebated or exempted on export merchandise but is not rebated or exempted on merchandise sold in the home market. The petitioners also assert that the Department has established the prerequisite for payment of import duties on imports used for sales in the domestic market.[31] The petitioners argue that in the present case, prices in the home-market and the United States were stated on an equivalent basis before the duty drawback adjustment, because no import duties were included in either the cost or price of subject merchandise sold in either the U.S. or the home market. The petitioners argue that the Department had noted that "with regard to the drawback and tax adjustment, 'the overall legislative history of these provisions makes clear that Congress was attempting to create adjustments that would establish comparability between home-market and export transactions.'"[32] The petitioners maintain that the duty drawback adjustment must be denied to maintain a fair comparison of export price and normal value based on equivalent commercial terms.

Çayirova argues that the Department should maintain the practice of granting the duty drawback adjustment in light of section 772(c)(1)(B) of the Act, judicial precedent, and the Department's practice regarding duty drawback. Further, Çayirova argues that the Department may not alter its methodology where a respondent has relied on an old methodology used in previous reviews. Çayirova states that the precedents cited by the petitioners do not condition a duty drawback adjustment on Çayirova proving that import duties are reflected in the cost or price of subject merchandise sold in the home market. Çayirova alternatively argues that import duties on coils were paid. Çayirova states that import duties were paid on coils during the POR. Çayirova also

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[31] Brief for Petitioner at 13 (July 21, 2005) citing Hornes Electricos de Venezuela, S.A. v. United States, 285 F. Supp. 2d 1353, 1360 (2003) ("HEVENSA").

[32] Brief for Petitioner at 6 (July 21, 2005) citing Final Determination of Sales at Less than Fair Value; Color Television Receivers from Korea, 49 FR 7620 (March 1, 1984) ("Color Television Receivers").

states that the import duties on imported coil were included in the cost of production. Çayirova also claims that its cost system does pass the cost on to its domestic consumers.

Finally, Çayirova states that the Department verified that Çayirova is obligated to pay import duties on coils if the exportation commitment is not satisfied.[33] Çayirova also states that it has demonstrated exports to countries other than the United States to satisfy its export commitment to the Turkish government.

Borusan argues that the issue of duty drawback has been addressed and resolved by the Department in the last administrative review of this proceeding, in Light-Walled Rectangular Pipe and Tube from Turkey, 69 FR 53675 (September 2, 2004), and by the Court of International Trade in Allied Tube & Conduit Corp and Wheatland Tube Company v. United States ("Allied Tube"), 374 F. Supp. 2d 1257 (2005) (holding that section 772(c)(1)(B) of the Act provides for duty drawback adjustment without reference to any finding that the home-market price is reflective of duties).

Borusan further argues that the petitioners misstate the law on this issue. Specifically, Borusan states that the petitioners' cite of Color Television Receivers is incorrect. Borusan argues that Color Television Receivers does not condition duty drawback adjustments on whether import duties are reflected in cost or price of subject merchandise. Borusan argues that Color Television Receivers did not respond directly to duty drawback but rather to the indirect tax adjustment of section 772(d)(1)(C) of the Act where the Department applied the tax adjustment according to the letter of the law.

In addition, Borusan argues that any changes to duty drawback would be a departure from the Department's established practice. Borusan argues that there is no qualification in section 772(c)(1)(B) of the Act that conditions the grant of a duty drawback adjustment on proof that a company paid import duties. Borusan further argues that if the Department were to adopt the preconditions to the duty drawback adjustment proposed by the petitioners, then the Department would be departing from 20 years of consistent application of duty drawback adjustments.

The petitioners further argue that the government of Turkey can set its tariff rate of hot-rolled steel and zinc sufficiently high, thereby insulating Çayirova from U.S. antidumping duties because the tariffs in Turkey trigger a duty drawback. As such, the petitioners argue that Çayirova would receive the benefit of a duty drawback adjustment to its calculated margin despite not having actually paid any import duties on inputs used to produce the subject merchandise.[34] Further, the petitioners argue that imports of hot rolled steel coil into Turkey are

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[33] Rebuttal Brief for Çayirova at 11-12 (July 28, 2005) citing Verification Report at 9 ("[I]n the event the importer does not satisfy its export commitment, then it is required to pay the duties on the imports, plus a penalty.").

[34] Brief for Petitioner at 8 (July 21, 2005).

duty-free from numerous countries, and that the single domestic producer might not increase its price for the inputs commensurate with the tariff.[35] Finally, the petitioners state that the Department should not presume that an import tariff increases the price of an input commensurate with the tariff as a justification for adjusting for duty drawback in the absence of actual payment of import duties on inputs.[36]

Both Çayirova and Borusan claim that petitioner's argument is without basis. They submit that evidence on the record shows that Turkish import duties have fallen from 22.5 percent to 5 percent during the POR and if the Turkish government's intention was to shield Turkish companies from U.S. antidumping duties, the import duties would not have fallen. Borusan further states that the tariff rate on hot-rolled coil has deeper effects on the domestic economy in Turkey than Turkish producers' defense from antidumping duties in the United States.

In addition, to the extent the petitioners argue that imports of hot-rolled steel coil into Turkey are duty-free from numerous countries, Çayirova and Borusan request that this argument be struck from the proceeding because it is new information. Çayirova states that the petitioners do not cite the record in the instant review nor does such an assertion have a place in the present proceeding. Borusan argues that the Department did not request this information during the investigation phase of this review, and has no grounds to deny the adjustment on this basis at this time. Borusan argues that the petitioners did not raise this issue in their comments on the respondents' responses during the fact-finding portion of this review and cannot raise this issue now. Çayirova also argues that the petitioners' argument that the Department "should not presume an import tariff increases the price on an input commensurate with the tariff as a justification for adjusting for duty drawback received," should also be stricken from the proceeding.[37]

The petitioners also argue that if the Department increases export price by the amount of drawback received by respondents on U.S. exports, the Department should add the same amount to respondent's costs of production, as done in Light Walled Rectangular Pipe and Tube from Turkey.

Both Çayirova and Borusan assert that waived duties are not a cost of production, and therefore are not recorded in their accounting books. Furthermore, they state that the cost of production is compared to the home-market selling price under the antidumping practice, and the home-market

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[35] Brief for Petitioner at 16 (July 21, 2005).

[36] Brief for Petitioner at 15 (July 21, 2005).

[37] With respect to the respondents' allegations of the petitioners' addition of new factual information to the record, we consider it argument, not factual. Thus, the Department will not strike these arguments on this topic from the record of this proceeding.

price is not adjusted for exempted duties. Çayirova states that where duties are actually paid, they are recorded in its accounting system as part of its cost.

The petitioners also argue that the Department should adopt the same practices regarding duty drawback as the European Union ("EU") and other World Trade Organization ("WTO") members. The petitioners assert that the EU does not allow an adjustment for duty drawback in calculating antidumping duties unless the foreign producer proves that the import duty was paid on inputs used to produce the merchandise sold in the producer's home market.

Çayirova states that its duty drawback would not be disallowed by EU practice, as it did in fact pay Turkish import duties, and, therefore, would satisfy EU requirements for duty drawback. Çayirova further states that the EU does not operate under the U.S. statute.

Borusan argues that the petitioners have not established that EU practice towards duty drawback in this instance is different from that of the United States. It states that the EU provision does not say that a manufacturer must import material inputs on a duty-paid basis in order to qualify for a drawback adjustment.

Department's Position

We disagree with the petitioners' arguments relating to the application of duty drawback. Section 772(c)(1)(B) of the Act states that "The price used to establish export price and constructed export price shall be increased by the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." To determine if a duty drawback adjustment is warranted, the Department has employed a two-prong test which determines whether: (1) the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, if the exemption is linked to the exportation of the subject merchandise; and (2) the respondent has demonstrated that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise.[38]

The petitioners' assertion that the Department established in HEVENSA the prerequisite for payment of import duties on inputs used for sales in the domestic market is without merit. In Allied Tube, the petitioners, Allied Tube and Conduit Corp., and Wheatland Tube Company, argued that the respondent, Borusan, was required to demonstrate the payment of duties upon raw material used to produce merchandise sold in the home-market in order to receive duty

[38] Allied Tube, 374 F. Supp. 2d at 1261.

drawback.[39] The court held that its decision in HEVENSA does not impose a requirement that respondents prove the payment of import duties upon inputs used in the home market.[40]

The court also held that "the statute provides for a duty drawback adjustment without reference to any finding that the home-market price is reflective of duties."[41] The court further stated that "the clear language of section 772(c)(1)(B) does not require an inquiry into whether the price for products sold in the home-market includes duties paid for imported inputs."[42] Therefore, consistent with the court's decision in Allied Tube, we find that Çayirova's duty drawback adjustment is not conditional on Çayirova proving that import duties are included in the cost or price of subject merchandise sold in the home market.

Finally, the petitioners' argument that the Department should not grant Çayirova a duty drawback adjustment because prices in the home-market and the United States were reported on an equal basis prior to the duty drawback is irrelevant to the requirement of the two-prong duty drawback test. We find that the respondents have met the requirements of the Department's two-prong test for a duty drawback adjustment. First, the respondents proved that the relevant import duties and rebates were directly linked to, and dependent upon, one another. Second, the respondents demonstrated that there were sufficient imports of raw materials to account for the duty drawback received on the exports of the manufactured product. Further, Çayirova demonstrated that if it had not met its export requirement under the Turkish Duty system, it would have been required to pay the duties on the imports, plus a penalty.[43] During the verification, the Department reviewed the Turkish import system including the Inward Processing Certificates, which showed imports of raw materials and a commitment to export a certain amount of finished goods; duty rates as published by the Turkish government; the connection between commercial invoices to customs declaration forms; and tied Cayirova's duty drawback calculations to the values in the U.S. sales database and found no discrepancies.[44] Thus, for purposes of this review, we have accepted the respondents duty drawback adjustment for the final results.

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[39] Allied Tube, 374 F. Supp. 2d at 1262.

[40] Allied Tube, 374 F. Supp. 2d at 1262 (citing HEVENSA, 283 F. Supp.2d at 1358-60).

[41] Allied Tube, 374 F. Supp. 2d at 1262, (citing Avesta Sheffield Inc, v. United States, 838 F. Supp. 608 (1993)).

[42] Allied Tube, 374 F. Supp. 2d at 1262, (citing Timex V.I. v. United States, 157 F. 3d 879 (Fed. Cir. 1998) ("Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter.”))

[43] Voluntary Submission of Çayirova Concerning Duty Drawback at 4 (Nov. 30, 2004).

[44] Verification Report (May 25, 2005) at pg. 9.

Comment 8: Test for Below-Cost Sales

The petitioners argue that the Department should test for below-cost sales in the home-market for Çayirova.

Çayirova states that the Department recognized that it erroneously requested that Çayirova should respond to section D of the questionnaire. Çayirova argues that had the petitioners wanted the Department to test for below-cost sales, the petitioners could have filed its below-cost sales allegation in a timely manner, in this case, by January 16, 2005. However, Çayirova argues, due to fact that the petitioners have made their allegation in an untimely manner (i.e., July 21, 2005) the issue is no longer subject to further consideration.

Department's Position

The Department agrees with Çayirova. The regulations require that a below-cost allegation on a company-specific basis must be made within 20 days after a respondent files the response to the relevant section of the questionnaire.[45] Clearly, the date of submission of the petitioners' below-cost sales allegation (i.e., July 21, 2005) is past the 20-day deadline. Thus, we are not considering the petitioners' comments on below-cost sales for purposes of this review.

Recommendation

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

AGREE _____ DISAGREE _____

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____
Date

[45] See §351.301(d)(2)(ii).