C-489-817
Remand 1/1/12 – 12/31/12: Investigation
Maverick Tube Corporation Consol. Ct. No. 14-00229
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FINAL RESULTS OF REMAND REDETERMINATION
Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. and Borusan Istikbal Ticaret v. United States; Maverick Tube Corporation v. United States
Consol. Ct. No. 14-00229, 61 F. Supp. 3d 1306 and Slip Op. 15-59

A. SUMMARY

The Department of Commerce (Commerce) has prepared this final remand redetermination in accordance with the orders of United States Court of International Trade (CIT, or the Court) in *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. and Borusan Istikbal Ticaret v. United States*, 61 F. Supp. 3d 1306 (April 22, 2015) (*Borusan*); and *Maverick Tube Corporation v. United States*, Consol. Court No. 14-00229, Slip Op. 15-59 (June 15, 2015) (*Maverick*).[1] The litigation involves challenges to Commerce's final affirmative countervailing duty (CVD) determination on certain oil country tubular goods (OCTG) from the Republic of Turkey (Turkey) for the period January 1, 2012, through December 31, 2012.[2]

In *Borusan*, the CIT remanded for further consideration, *inter alia*, Commerce's finding of distortion in the Turkish hot-rolled steel (HRS) market and application of facts available with adverse inferences under section 776(b) of the Tariff Act of 1930, as amended (the Act), with

[1] On June 22, 2015, the CIT granted a motion to consolidate Court No. 14-00214 into Consolidated Court No. 14-00229.
[2] *See Certain Oil Country Tubular Goods From the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 79 FR 41964 (July 18, 2014) (*Final Determination*), and accompanying Issues and Decision Memorandum. Commerce issued a countervailing duty order in this proceeding on September 10, 2014. *See Certain Oil Country Tubular Goods From India and the Republic of Turkey: Countervailing Duty Orders and Amended Affirmative Final Countervailing Duty Determination for India*, 79 FR 53688 (September 10, 2014) (*Order*).

respect to purchases of HRS by respondent Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Istikbal Ticaret (collectively, Borusan).[3]

In *Maverick*, the CIT remanded Commerce's benchmark valuation for a land parcel that the Government of Turkey (GOT) granted to respondent Toscelik Profil ve Sac Endustrisi A.S. (Toscelik) in 2008 for less than adequate remuneration (LTAR).[4] The CIT also adopted and adhered to the reasoning in *Borusan* with respect to Toscelik's claims relating to the HRS for LTAR program.[5]

Commerce released its Draft Remand Redetermination on July 21, 2015, and invited comments from interested parties.[6] Petitioners Maverick Tube Corporation (Maverick Tube) and United States Steel Corporation (U.S. Steel) separately filed comments on July 28, 2015.[7] Borusan also submitted comments on July 28, 2015.[8] No other interested party submitted comments.

For the reasons described herein, we respectfully disagree with the Court's orders to the extent they preclude the possibility that Turkish HRS producers Eregli Demir ve Celik Fabrikalari T.A.S. (Erdemir) and its subsidiary Iskenderun Demir ve Celik A.S. (Isdemir) accounted for the majority of the HRS market in Turkey.[9] In fact, because the GOT did not provide Commerce with the necessary information on the HRS market in Turkey, as discussed

[3] *See Borusan*, 61 F. Supp. 3d at 1327 - 1332 and 1343 - 1349.
[4] *See Maverick* at 12.
[5] *Id.* at 10.
[6] *See* Draft Results of Remand Redetermination: Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. and Borusan Istikbal Ticaret v. United States; Maverick Tube Corporation v. United States. Consol. Ct. No. 14-00229, Slip Op. 15-36 and Slip Op. 15-59 (July 21, 2015) (Draft Remand Redetermination).
[7] *See* letter from Maverick Tube to Commerce, "Oil Country Tubular Goods from Turkey: Comments on Draft Remand Results," (July 28, 2015) (Maverick Comments); *see also* letter from U.S. Steel to Commerce, "Remand Proceeding Concerning the Investigation of Oil Country Tubular Goods from Turkey - Consol. Court No. 14-00229," (July 28, 2015) (U.S. Steel Comments).
[8] *See* letter from Borusan to Commerce, "Maverick Tube Corporation v. United States, Consol. Ct. No. 14-229, Oil Country Tubular Goods from Turkey, Case No. C-489-817: Comments on Draft Results of Redetermination," (July 28, 2015) (Borusan Comments).
[9] *See Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003) (*Viraj*).

further below, Commerce's finding that those companies accounted for, *at a minimum*, a "substantial portion" of the market was only a conservative assessment. However, in accordance with the Court's orders in *Borusan* and *Maverick,* we have reconsidered our finding regarding the distortion of the Turkish HRS market based on a consideration of other factors on the record. Also in accordance with *Borusan,* we have clarified the application of adverse facts available (AFA) to Borusan.

Although the CIT remanded several other issues related to Commerce's benefit measurements under 19 CFR 351.511(a)(2)(iv) from Borusan's and Toscelik's HRS purchases, the Court recognized that these issues may become moot based on Commerce's findings relating to the Turkish HRS market's level of distortion.[10] As discussed below, to comply with the CIT's orders, we have reversed our finding from the *Final Determination* with respect to the distortion issue. Therefore, the other issues remanded in *Borusan* and *Maverick* with respect to the HRS for LTAR program are no longer applicable.[11]

Finally, we have corrected the benchmark valuation for the land parcel that the GOT granted to Toscelik, in accordance with the CIT's instructions in *Maverick.*

B. BACKGROUND OF THE OCTG INVESTIGATION

Issue 1: Provision of HRS for LTAR: "Authorities" Determination, Market Distortion, and Benchmark

In the underlying investigation, the petitioners explained in the Petitions that HRS is a significant input into the production of OCTG, and claimed that the Turkish government distorts HRS pricing through several means, including its National Restructuring Plan, which by its terms allows the Turkish government to provide subsidies to its HRS industry "to increase the competitiveness" of that sector and to "allow Turkish steel producers using government

[10] *See Borusan*, 61 F. Supp. 3d at 1337.
[11] *Id*. at 1332-1342. *See also Maverick* at 10-11.

subsidies" to increase "production quality, developing product range to high value added products, reducing production costs and improving viability and competitiveness of the sector{.}"[12] The Petitions alleged that the result of the Turkish government's involvement in the HRS market was a reduction in HRS prices across the board within Turkey.[13]

The Petitions also alleged that two of Turkey's largest HRS producers, Erdemir and Isdemir, are owned by Ordu Yardimlasma Kurum (OYAK), Turkey's military pension fund, and collectively account for at least 54 percent of Turkish HRS capacity.[14] The Petitions alleged that because the Turkish government "effectively owns" Erdemir and Isdemir, and because the government has been "completely restructuring" the HRS industry in Turkey, it was "likely that Turkish OCTG producers have purchased hot-rolled steel for less than adequate remuneration from these companies."[15]

Commerce therefore initiated an investigation into whether Erdemir and Isdemir provided respondents with HRS for LTAR. Both Borusan and Toscelik reported purchasing HRS from Erdemir and Isdemir during the period of investigation (POI). In the *Final Determination*, Commerce determined that the GOT exercised meaningful control over Erdemir and Isdemir.[16] Therefore, Commerce determined that Erdemir and Isdemir were public bodies, and hence "authorities," under section 771(5)(B) of the Act.[17] Consequently, Commerce determined that the HRS supplied by Erdemir and Isdemir to Borusan and Toscelik constituted a financial contribution in the form of a governmental provision of a good under section 771(5)(D)(iii) of

[12] *See* Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Oil Country Tubular Goods from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam (July 2, 2013) (Petitions), at Vol. X, p. 4-5.
[13] *Id.* at 6.
[14] *Id.* at 9.
[15] *Id.* at 3, 8-9.
[16] *See Final Determination* and accompanying Issues and Decision Memorandum at 22.
[17] *Id.*

the Act.[18] Commerce also found that the provision of HRS was specific pursuant to section 771(5A)(D)(iii)(I) of the Act because the number of industries or enterprises using the program was limited.[19]

Regarding benefits from the provision of HRS for LTAR by Erdemir and Isdemir, Commerce applied its hierarchy under 19 CFR 351.511(a)(2) to determine benchmark prices for measuring the adequacy of remuneration. The hierarchy under 19 CFR 351.511(a)(2) is as follows: (1) market prices from actual transactions within the country under investigation (*e.g.*, actual sales, actual imports or competitively run government auctions) (tier one); (2) world market prices that would be available to purchasers in the country under investigation (tier two); or (3) an assessment of whether the government price is consistent with market principles (tier three).

Based on this hierarchy, Commerce first determined whether there were market prices from actual sales transactions involving Turkish buyers and sellers that could be used to determine whether Erdemir and Isdemir sold HRS to Borusan and Toscelik for LTAR. Notwithstanding the regulatory preference for the use of prices stemming from actual transactions in the country, where Commerce finds that the government owns or controls the majority or, in certain circumstances, a substantial portion of the market for the good or service, Commerce will consider such prices to be significantly distorted and not an appropriate basis of comparison for determining whether there is a benefit.[20]

[18] *Id.*
[19] *Id.*
[20] *See, e.g.*, *Drawn Stainless Steel Sinks From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 13017 (February 26, 2013) (*Sinks from the PRC*), and accompanying Issues and Decision Memorandum at 19-20 (citing *Countervailing Duties; Final Rule*, 63 FR 65348, 65377 (November 25, 1998) (*CVD Preamble*)).

In the *Final Determination*, Commerce determined, based on record information, that domestic production of HRS in Turkey accounted for a majority of the total supply (inclusive of imports) in Turkey during the POI and previous two years.[21] Furthermore, although the GOT stated that it was unable to provide Erdemir and Isdemir's combined share of HRS production in Turkey, the GOT stated in a questionnaire response that the Erdemir Group (which includes Erdemir and Isdemir) accounted for the "majority" of HRS production in Turkey.[22] Therefore, Commerce found that "authorities" pursuant to section 771(5)(B) of the Act (*i.e.*, Erdemir and Isdemir) accounted for the majority of HRS production in Turkey.[23] Given these two facts (*i.e.*, domestic production of HRS in Turkey accounted for a majority of the total supply and Erdemir and Isdemir accounted for the majority of HRS production in Turkey), Commerce determined that the level of government involvement in the market was such that prices would be significantly distorted.[24] Commerce found that a reasonable conclusion to draw from the facts on the record was that, *at a minimum*, Erdemir and Isdemir accounted for "a substantial portion of the market."[25] Accordingly, Commerce determined that actual transaction prices in Turkey were not appropriate to use as a benchmark for the HRS purchased by respondents during the POI because they were significantly distorted as a result of the government's involvement in the market.[26] Therefore, Commerce used an external (tier 2) benchmark under 19 CFR 351.511(a)(2) to measure the adequacy of remuneration under this program.[27]

[21] *See Final Determination* and accompanying Issues and Decision Memorandum at 23.
[22] *Id.* at 24.
[23] *Id.*
[24] *Id.*
[25] *Id. See also CVD Preamble*, 63 FR at 65377.
[26] *Id.*
[27] *Id.* at 25.

Issue 2: Provision of HRS for LTAR: Application of AFA to Borusan

In the Original Questionnaire in this investigation, Commerce requested that Borusan "report all of your purchases of hot-rolled steel during the {period of investigation}" and explained that Borusan "should report this purchase information regardless of whether your company used the input to produce the subject merchandise during the {period of investigation}."[28] In response, Borusan explained that it had "production facilities at three locations: (1) Gemlik, (2) Halkali, and (3) Izmit."[29] Borusan stated that only the Gemlik mill produced the subject merchandise, so it elected to report HRS purchases for only that mill, "as these are the only purchases that could have benefitted from subsidies attributable to the production or sale of the OCTG subject merchandise."[30] Borusan claimed that collecting HRS purchase data for the other mills "would impose great burdens on {Borusan} for no purposes."[31]

In a supplemental questionnaire, we reiterated our request that Borusan report all of its purchases of HRS, including its purchases for the two mills (Halkali and Izmit) that Borusan claimed did not produce subject merchandise.[32] We referred to the instructions in the Original Questionnaire to report all HRS purchases, regardless of whether Borusan used the HRS to produce subject merchandise.[33] We also stated the following: "If you are unable to provide this information, please explain in detail why you cannot provide this information and the efforts you made to provide it to {Commerce}."[34] Yet again, Borusan refused to provide such information.

[28] *See* Letter from Commerce to the GOT, "Countervailing Duty Investigation: Certain Oil Country Tubular Goods from the Republic of Turkey," (August 27, 2013) (Original Questionnaire), at Section III, page 6.
[29] *See* Letter from Borusan to Commerce, "Oil Country Tubular Goods from Turkey: Initial Questionnaire Response" (October 31, 2013) (BQR), at 10-11 and Exhibit 9A.
[30] *Id.* at 11.
[31] *Id.* at 11, n. 2.
[32] *See* Letter from Commerce to Borusan, "Supplemental Questionnaire for Borusan Group Companies in the Countervailing Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey," (November 21, 2013) at 4-5.
[33] *Id.*
[34] *Id.*

Borusan stated that it wanted to "fully cooperate," but believed Commerce's request resulted in an "unreasonable burden."[35] Borusan then stated that "if {Commerce} insists on full reporting of all hot-coil purchases form every facility then," upon a third request for the information by Commerce, it stood "ready to provide that information with the understanding that it will require several weeks to do so."[36]

Because Borusan failed to report its HRS purchases for two of its mills despite requests for that information in two different questionnaires, Commerce determined that necessary information regarding Borusan's HRS purchases for these facilities was not on the record. Thus, Commerce applied "facts available" in the *Final Determination* to calculate Borusan's countervailable subsidy rate under this program.[37] Moreover, Commerce found that Borusan failed to cooperate by not acting to the best of its ability because Borusan withheld requested information on its purchases of HRS, despite having two opportunities, and never requested an extension to provide this information in accordance with 19 CFR 351.302(c). Consequently, Commerce applied an adverse inference in the application of facts available.[38] Under this adverse inference, Commerce inferred that Borusan's other mills each purchased the same quantity of HRS during the POI as their annual production capacity.[39]

[35] *See* Letter from Borusan to Commerce, "Oil Country Tubular Goods from Turkey, Case No. C-489-817, Supplemental Questionnaire Response," (December 5, 2013) (BSR) at 9-10.
[36] *Id*. at 9-10.
[37] *See Final Determination* and accompanying Issues and Decision Memorandum at 22. *See also* sections 776(a)(1), (a)(2)(A) and (a)(2)(B) of the Act (stating that Commerce may make a determination based on facts available if "(1) necessary information is not available on the record" or "(2) an interested party" "(A) withholds information that has been requested" by Commerce or "(B) fails to provide such information by the deadline for the submission of the information").
[38] *See Final Determination* and accompanying Issues and Decision Memorandum at 22. *See also* section 776(b) of the Act (permitting Commerce to "use an inference that is adverse to the interests of the party in selecting from among the facts otherwise available").
[39] *See Final Determination* and accompanying Issues and Decision Memorandum at 22.

Issue 3: Provision of Land for LTAR

In the *Final Determination*, Commerce determined that the allocation of free land to Toscelik by the GOT in 2008 was specific under section 771(5A)(D)(iv) of the Act and conferred a benefit under section 771(5)(E)(iv) of the Act.[40] To calculate the benefit from the GOT's provision of land to Toscelik, Commerce relied on land benchmark data used in two previous administrative reviews of a CVD order on circular welded carbon steel pipe and tubes from Turkey.[41] Specifically, Commerce used a simple average of publicly available industrial land prices in Turkey to calculate a comparable commercial benchmark price.

C. THE COURT'S HOLDINGS IN *BORUSAN* AND *MAVERICK*

Upon appeal, Borusan and Toscelik challenged Commerce's determination that Erdemir and Isdemir were public bodies, and hence "authorities," pursuant to section 771(5)(B) of the Act. The CIT affirmed Commerce's "authorities" determination,[42] but did "encourage" Commerce to respond to whether the CIT's interpretation of "meaningful control" as discussed in *Borusan* was "an accurate statement of Commerce's interpretation."[43]

Borusan and Toscelik also challenged Commerce's determination that substantial evidence supported the finding that the Turkish government's involvement distorted the HRS market in Turkey. Based on record information on Turkish HRS production and imports, Commerce found in the *Final Determination* that "at a minimum, Erdemir and Isdemir account

[40] *Id.* at 19.
[41] *Id. See also* Memorandum to the File from Joseph Shuler, regarding "Certain Oil Country Tubular Goods from the Republic of Turkey: Preliminary Determination, Calculation Memorandum for Toscelik," (December 16, 2013). The calculation memorandum includes the benchmarks that Commerce used in *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review*, 77 FR 46713 (August 16, 2012) (*CWP Turkey 2010 AR*), and accompanying Issues and Decision Memorandum; and *Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2011*, 78 FR 64916 (October 30, 2013) (*CWP Turkey 2011 AR*), and accompanying Issues and Decision Memorandum.
[42] *See Borusan*, 61 F. Supp. 3d at 1324.
[43] *Id.*

for 'a substantial portion of the market.'"[44] Thus, Commerce found that the level of government involvement in the market was such that HRS prices in Turkey would be significantly distorted, and that HRS prices stemming from transactions within Turkey – either from domestic purchases or from imports into the country (*i.e.*, tier one prices) – could not be considered to be independent of the government price.[45] Because Commerce found that tier one prices for HRS could not serve as appropriate benchmarks, Commerce evaluated information on the record and determined that, pursuant to 19 CFR 351.511(a)(2)(ii), tier two (world market prices) were available to producers of subject merchandise in Turkey.[46]

In *Borusan*, the CIT found that Commerce did not adequately explain its interpretation of the record connecting the GOT's substantial portion of the HRS market in Turkey to Commerce's finding of significant distortion of the HRS market.[47] The Court held that Commerce's analysis "simply leap(ed) from 'substantial portion of the HRS market in Turkey' attributed to the Turkish government, to finding 'significant' distortion of that market as a result of a policy to improve Turkey's balance of payments."[48] The CIT concluded that Commerce must provide further explanation or analysis of the record to explain those circumstances where "substantial portion of the market" results in minimal distortion and where it results in substantial or significant distortion.[49]

In *Maverick*, the CIT remanded this issue to Commerce based on its analysis in *Borusan*, and also requested that Commerce "specifically" "address more fully and directly the incongruity of Toscelik's evidence that it argues shows the prices it paid to Erdemir were higher than the

[44] *See Final Determination* and accompanying Issues and Decision Memorandum at 24.
[45] *Id.*
[46] *Id.* at 25.
[47] *See Borusan*, 61 F. Supp. 3d at 1330.
[48] *Id.*
[49] *Id.* at 1330-1332.

prices it paid for imported coils and higher than its own cost of production, as summarized in Table 1 of Toscelik's confidential brief on its Rule 56.2 motion (referencing Toscelik's Questionnaire Response at Exhibit 22," and "explain how Erdemir's less-than majority share of the HRS market gives it the power to dictate below-market import prices to major steel mills in Europe, Russia, and Ukraine."[50]

Regarding the application of AFA to Borusan's purchases of HRS, the CIT quoted Commerce's explanation as to why all of Borusan's HRS purchases were relevant to the investigation and, in its comments on the passage, suggested that verification of the mills' production might have settled the question of how Commerce should have attributed the benefit from those HRS purchases.[51] The CIT concluded that Commerce appeared to have abused its discretion by attributing to all the HRS purchases for the Halkali and Izmit mills the lowest HRS purchase price for the Gemlik plant, and then attributing that impact to all downstream products, including subject merchandise.[52] On remand, the CIT granted Commerce the latitude to clarify and persuade the Court that the HRS purchase information pertaining to the Halkali and Izmit plants was "necessary."[53]

Regarding the benchmark Commerce used to calculate the benefit from the allocation of free land to Toscelik by the GOT, the CIT concluded that because Commerce "merely adopted the results of the *CWP Turkey 2010 AR* and *CWP Turkey 2011 AR*, the *status quo*" of the result of the *CWP Turkey 2011 AR* on remand, subsequently sustained by the CIT, "applies directly to the present case."[54]

[50] *See Maverick* at 10.
[51] *See Borusan*, 61 F. Supp. 3d at 1347.
[52] *Id.* at 1348-1349.
[53] *Id.* at 1349.
[54] *See Maverick* at 12.

D. ANALYSIS ON REMAND

1. *Provision of HRS for LTAR: "Authorities" Determination and "Meaningful Control"*

As noted above, the CIT affirmed Commerce's "authorities" determination,[55] but "encouraged" Commerce to respond to whether the CIT's interpretation of "meaningful control" as discussed in *Borusan* was "an accurate statement of Commerce's interpretation."[56] In *Borusan*, the CIT stated the following:

> The OP Memo formulates 'meaningful control' for CVD purposes as 'control related to the possession or exercise of governmental authority and governmental functions.' OP Memo at 3. Necessarily, Commerce implies, that inquiry must proceed case by case and not be limited to consideration of corporeal voting rights and other corporate formalities. It would involve examination of any relevant and not necessarily quantifiable factors, such as informal or official ties, incentives, off-book obligations, and so forth.[57]

We confirm that the CIT's interpretation is an accurate statement of Commerce's meaningful control standard, as discussed in the OP Memo.

2. *Provision of HRS for LTAR: Market Distortion and Benchmark*

In the Issues and Decision Memorandum for the *Final Determination*, we explained that a reasonable conclusion to draw from the facts on the record was that Erdemir and Isdemir, the producers we found to be "authorities" pursuant to section 771(5)(B) of the Act, accounted for, *at a minimum*, a substantial portion of the Turkish HRS market during the POI.[58] We based this on the following record information: 1) the GOT's statement that Erdemir and Isdemir

[55] *See Borusan*, 61 F. Supp. 3d at 1324.
[56] *Id.*
[57] *Id.* at 1320, citing Letter from Maverick Tube to Commerce, "Oil Country Tubular Goods from Turkey: Comments on the Government of Turkey's Supplemental Questionnaire Response" (Feb 6, 2014), at Exhibit 8 (Memorandum to Paul Piquado, Assistant Secretary for Import Administration, dated May 18, 2012, from Office of Policy, Import Administration, Re: "Section 129 Determination of the {CVD} Investigation{s} of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the {PRC} in Accordance with the WTO Appellate Body's Findings" resulting from United States -- Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, DS379/AB/R (March 21, 2011) ("OP Memo")).
[58] *See Final Determination* and accompanying Issues and Decision Memorandum at 24.

accounted for the majority of HRS production in Turkey; and 2) record information indicating that domestic production accounted for a majority of the total supply (inclusive of imports) of HRS in Turkey during the POI.[59] Based on these facts, Commerce found that the level of government involvement in the Turkish HRS market was such that prices would be significantly distorted.[60]

The *CVD Preamble* states the following:

> While we recognize that government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal *unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market*. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy.[61]

As noted above, the CIT concluded that Commerce must provide further explanation or analysis of the record to explain those certain circumstances where "substantial portion of the market" results in minimal distortion and where it results in substantial or significant distortion. While we agree that the language of the *CVD Preamble* does suggest a possible limitation on Commerce's analysis to "certain circumstances" when a "substantial portion of the market" is at issue, the *CVD Preamble* does not suggest the same constraint when the government "constitutes a majority" of the market. Both the GOT's statement in its questionnaire response that Erdemir and Isdemir accounted for the "majority" of HRS production in Turkey, as well as record information indicating that domestic production accounted for a majority of the total supply (inclusive of imports) of HRS in Turkey during the POI, suggest the possibility that the government provider in this case might, in fact, have constituted a majority of the market.

However, the record evidence on this point is incomplete because the GOT did not

[59] *Id.* at 23-24.
[60] *Id.* at 24.
[61] *See CVD Preamble*, 63 FR at 65377 (emphasis added).

respond fully and comprehensively to Commerce's requests for information. In two separate instances, when Commerce requested that the GOT provide production data for HRS in Turkey, the GOT responded that such data was not available.[62] Moreover, no other information on the record allowed Commerce to draw a specific conclusion about the government's share of the HRS market in Turkey. Therefore, when Commerce concluded in the *Final Determination* that Erdemir and Isdemir accounted for, *at a minimum*, a substantial portion of the Turkish HRS market, this determination was not an affirmative acknowledgement that Erdemir and Isdemir accounted for less than a majority of the Turkish HRS market during the POI. Instead, it was Commerce's cautious conclusion based on the limited data on the record.[63] In fact, during the investigation, no interested party presented any single data source as an alternative to demonstrate that Erdemir and Isdemir accounted for less than a majority of the Turkish HRS market.

We are therefore conducting our market distortion analysis on remand under protest, because we believe that information available on the record supports our initial conclusion in the *Final Determination* that Erdemir and Isdemir accounted for, *at a minimum*, a substantial portion of the Turkish HRS market, and possibly a majority of the HRS market. Moreover, we find that this situation is different from one in which record information shows definitively that government providers account for less than the majority of the market for a good. Commerce

[62] *See* Letter from the GOT to Commerce, "Initial Questionnaire Response," (November 22, 2013) (GQR), at 4; *see also* Letter from the GOT to Commerce, "Response of the Government of Turkey to Supplemental Questionnaire," (January 27, 2014) (GSQR), at 4. We note additionally that the GOT originally claimed that the share of HRS production in Turkey by companies in which the GOT maintained an ownership or management interest (either directly or through other government entities) was zero. *See* GQR at 5. The GOT's failure to take into account our investigation into whether Erdemir and Isdemir were government authorities in response to this question further demonstrates the data constraints that Commerce faced in this investigation because of the manner in which the GOT provided information.

[63] The program on which we initiated an investigation was the provision of HRS for LTAR by Erdemir and Isdemir. *See* "Countervailing Duty Initiation Checklist: Certain Oil Country Tubular Goods from the Republic of Turkey," (July 22, 2013) (Initiation Checklist) at 9. Therefore, we did not request information on other HRS producers in Turkey because they were outside of the scope of our investigation of this subsidy program.

made its conclusion that Erdemir and Isdemir accounted for, *at a minimum*, a substantial portion of the Turkish HRS market based on limited information that the GOT and other interested parties provided. To the extent that substantial evidence does not prove definitively that Erdemir and Isdemir accounted for a majority of the Turkish HRS market, it is because the GOT did not provide all pertinent domestic production information on the record and because no other record information allowed Commerce to draw specific conclusions about the government's share of the Turkish HRS market. This places Commerce in an unfortunate situation in which the GOT is rewarded for not providing relevant information.[64] Therefore, we can only come to the conclusion based on the limited record that Erdemir and Isdemir accounted for, "at a minimum," "a substantial portion" of the Turkish market, which under the Court's direction requires us to conduct an additional analysis of the "certain circumstances" that would lead Commerce to find, or not find, the existence of distortion.

To comply with the CIT's decision, we first reexamined the record for any evidence that Erdemir and Isdemir accounted for a majority of the HRS market in Turkey during the POI. In the *Final Determination*, we relied on import statistics that the GOT reported for hot-rolled coil during 2010 – 2012, business proprietary information that the petitioners submitted in a supplement to the Petitions, and the GOT's statement that Erdemir and Isdemir accounted for a majority of HRS production in Turkey.[65] The GOT's statement that Erdemir and Isdemir accounted for a majority of HRS production in Turkey, however, was not sufficient for us to

[64] The CIT has ordered Commerce on remand to draw a more specific conclusion about the percentage of the Turkish HRS market attributable to specific producers, but Commerce is limited in its analysis by the information on the administrative record. Commerce must rely on information that the parties provide during a CVD investigation, and in this case, there is a strong possibility that it may work to the GOT's benefit not to provide all information relevant for such an analysis if that information adversely affects the outcome of the proceeding for it. Put another way, in this case, if the GOT or another interested party had provided information showing definitively that Erdemir and Isdemir accounted for a majority of the HRS market in Turkey, then the "certain circumstances" language of the *CVD Preamble* would be inapplicable, and an analysis of those "certain circumstances" would not be required to conduct this additional analysis on remand. *See CVD Preamble*, 63 FR at 65377.

[65] *See Final Determination* and accompanying Issues and Decision Memorandum at 23-24.

calculate Erdemir and Isdemir's specific percentage of the HRS market in Turkey.

Additional sources of information combined with the sources that we considered for the *Final Determination* do not establish that Erdemir and Isdemir accounted for a majority of the HRS market in Turkey. First, Erdemir's 2012 Annual Report shows Erdemir and Isdemir's production of HRS during the POI.[66] Second, Toscelik, which produces HRS in Turkey, provided its production of HRS in its original questionnaire response.[67] Third, the petitioners provided the HRS production capacity of other HRS producers in Turkey.[68] Considering these three sources with the GOT's import statistics and the information that petitioners provided in their petition supplement, we find no evidence that Erdemir and Isdemir accounted for a majority of the HRS market in Turkey during the POI. *See* the Calculation Memo, where we show a calculation of Erdemir and Isdemir's combined market share based on these five sources.[69] Our combination of five data sources to calculate Erdemir and Isdemir's market share, however, is not ideal, because the five different sources are likely not to have been reported on the same basis. Nonetheless, because the GOT did not provide Commerce with complete information in its questionnaire responses, these are the only sources of relevant data available to us on the record with respect to this issue.

With no evidence that Erdemir and Isdemir accounted for a majority of the HRS market in Turkey, we next examined whether record information contains evidence that the GOT's presence resulted in significant distortion of the Turkish HRS market. In past cases, Commerce has examined factors such as government export restraints (*e.g.*, export quotas, export licensing

[66] *See* GQR at Exhibit 4 (Erdemir's 2012 Annual Report, Page 26).
[67] *See* Letter from Toscelik to Commerce, "OCTG from Turkey Questionnaire Response" (November 13, 2013), at 14 and Exhibit 22.
[68] *See* Petitions, Volume X at Exhibit X-14.
[69] *See* Memorandum from Shane Subler to the File dated July 20, 2015, "Calculations for Draft Remand Redetermination," (Calculation Memo). There were no changes to Commerce's Calculation Memo between the Draft and Final Remand Redeterminations.

requirements, and export taxes) and low import levels as additional evidence that the market for a good was subject to government distortion,[70] including cases where record evidence did not show definitively that government-controlled producers accounted for a majority of the market.[71]

In this case, although the government-controlled providers constituted *at least* a substantial portion of the market, the other factors that Commerce has considered as additional evidence of market distortion in other proceedings are not evident on the record of this case. First, the record shows no evidence of GOT export restraints on HRS.[72] Second, the share of imports in the domestic market is notably higher than in past cases where Commerce pointed to low import levels as an additional basis to reject tier one prices.[73] Thus, the record of this investigation lacks additional facts present in other cases in which the agency found government distortion even where record evidence did not show definitively that government-controlled producers accounted for a majority of the market for the good.

We emphasize, however, that while export restraints and low import levels are certainly relevant additional factors to consider, they do not constitute an exhaustive set of factors that might indicate significant distortion of a market because of the government's involvement. Had the GOT or another party provided clear evidence during the investigation that the government accounted for less than a majority of the HRS market, Commerce could have undertaken a more

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[70] *See, e.g., Certain Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 37012 (July 27, 2009) (*Kitchen Racks from the PRC*), and accompanying Issues and Decision Memorandum at 15 ("Analysis of Programs - Provision of Wire Rod for Less Than Adequate Remuneration"), in which Commerce found that wire rod imports accounted for only 1.53 percent of the volume of wire rod available in the Chinese market during the POI. *See also Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 59212 (September 27, 2010) (*Coated Paper from the PRC*), and accompanying Issues and Decision Memorandum at 22, in which Commerce found that imports of papermaking chemicals as a share of domestic consumption were insignificant.

[71] *Id.*

[72] *See* GQR at 6-7, where the GOT states that no export tariffs, export quotas, or export licensing requirements were in effect for HRS during the POI.

[73] *See* Memorandum from Shane Subler to the File, "Final Determination Calculation Memorandum for Borusan" (July 10, 2014), at Exhibit 2 for the percentage of imports as a share of the total market. The exact percentage is business proprietary information.

thorough examination of other factors to better assess whether the HRS market in Turkey was significantly distorted through the GOT's involvement. In the end, Commerce is constrained by the limited facts on the record regarding the program under investigation (*i.e.*, the provision of HRS for LTAR by Erdemir and Isdemir, not by all HRS producers in Turkey).[74]

Therefore, in compliance with the Court's analysis in *Borusan* and *Maverick*, we are reversing our determination that actual transaction prices in Turkey are not appropriate to use as a benchmark for the HRS purchased by respondents during the POI.[75] Accordingly, we find that HRS prices stemming from transactions within Turkey – including domestic purchases and imports into the country (*i.e.*, tier one prices) – may be considered appropriate, pursuant to the statutory and regulatory requirements, to use as benchmarks for the purposes of this remand redetermination. On this basis, we have recalculated the benefit to Borusan and Toscelik from their purchases of HRS produced by Erdemir and Isdemir. We find that Borusan received a countervailable subsidy of 2.08 percent *ad valorem* under this program. We find that Toscelik received a countervailable subsidy of 0.06 percent *ad valorem*. *See* the Calculation Memo for the calculations.

Finally, in *Maverick*, the CIT requested that Commerce "specifically" "address more fully and directly the incongruity of Toscelik's evidence that it argues shows the prices it paid to Erdemir were higher than the prices it paid for imported coils and higher than its own cost of production, as summarized in Table 1 of Toscelik's confidential brief on its Rule 56.2 motion (referencing Toscelik's Questionnaire Response at Exhibit 22)," and "explain how Erdemir's

[74] A complete examination of distortion in the Turkish HRS market, absent the provision of information from the GOT, would require Commerce to request the information in the Input Producer Appendix of Commerce's standard questionnaire from Turkish HRS producers other than Erdemir and Isdemir. *See* Original Questionnaire at Section II, "Input Producer Appendix." Under the limits of the program that we investigated (*i.e.*, the provision of HRS for LTAR by Erdemir and Isdemir), we did not request this information from other Turkish HRS producers.
[75] *See Final Determination* and accompanying Issues and Decision Memorandum at 24.

less-than-majority share of the HRS market gives it the power to dictate below-market import prices to major steel mills in Europe, Russia, and Ukraine."[76] As a preliminary point, we wish to reemphasize that it is possible Erdemir and Isdemir accounted for a majority share of the HRS market in Turkey, and the primary reason we cannot be certain of this fact is the lack of information on the administrative record. Nonetheless, for the reasons explained above, consistent with the Court's orders, we have determined to use domestic and import prices (*i.e.*, tier one) as a benchmark to measure the adequacy of remuneration in this remand redetermination. Therefore, these specific concerns, which relate to Commerce's use of tier two benchmarks, are moot.[77]

3. *Provision of HRS for LTAR: Application of AFA to Borusan*

The CIT also found that Commerce appeared to have abused its discretion in applying AFA to Borusan's purchases of HRS for the Halkali and Izmit mills (*i.e.*, the mills that Borusan claimed did not produce subject merchandise).[78] The CIT stated that Borusan's interpretation of the regulation governing how HRS for LTAR would "tie" to subject merchandise did not appear to have been unreasonable, and that Borusan's characterization of the purchase information as "legally irrelevant" was reasonable.[79]

At page 10 of the Issues and Decision Memorandum for the *Final Determination*, we stated that Borusan's contention that the HRS purchase information for the Halkali and Izmit mills was not necessary "was not consistent with our instructions in the Questionnaire or past Department determinations." We cited *OCTG from the PRC* as an example of a case in which

[76] *See Maverick* at 10.
[77] *See Borusan*, 61 F. Supp. 3d at 1337 (recognizing that some of the CIT's issues might become moot based on Commerce's findings on the Turkish HRS market's level of distortion on remand).
[78] *Id.* at 1343 – 1349.
[79] *Id.* Commerce believes there may be some misunderstanding with regard to the earlier explanation of its subsidy attribution and tying methodology. For the benefit of the Court, we have a more detailed explanation of our attribution methodology under item 2 of the "Discussion of Comments" section.

Commerce did not limit its analysis of an input LTAR program (steel billet in *OCTG from the PRC*) to steel billet used in the production of subject merchandise.[80] As the CIT has granted us latitude to explain why the purchase information for the Halkali and Izmit mills was necessary, we explain in greater detail below why this information was necessary and why Borusan's failure to provide the purchase information warranted an adverse inference in the application of facts available.

As stated above, we noted in the *Final Determination* that Borusan's claim that the purchase information was not necessary was inconsistent with past Commerce determinations. In addition to *OCTG from the PRC*, Commerce has explained in detail in other proceedings why it does not "tie" an input subsidy to specific products absent record evidence that a government intended to benefit a specific product at the time of bestowal of the subsidy. For example, in *Kitchen Racks from the PRC*, a party argued that Commerce should have tied the benefit from a wire rod for LTAR subsidy to specific products.[81] Citing the *CVD Preamble*'s guidance on tying, which states, "{o}ur tying rules are an attempt at a simple, rational set of guidelines for reasonably attributing the benefit from a subsidy based on the stated purpose of the subsidy or the purpose we evince from record evidence at the time of bestowal,"[82] Commerce rejected that party's argument. Commerce explained that its focus was on the evidence (or lack of evidence) of the product which the government intended to benefit through the subsidy:

> The times of bestowal for the wire rod subsidy are the points in time when Wire King purchased {state-owned enterprise}-produced wire rod during the POI. On page 23 of their case brief, Petitioners identified 'wire-rod-containing products' as the 'specific product' that benefits from the wire rod subsidy at the time of bestowal. Petitioners'

[80] *See Final Determination* and accompanying Issues and Decision Memorandum at 10, citing *Oil Country Tubular Goods From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009) (*OCTG from the PRC*), and accompanying Issues and Decision Memorandum at Comment 13.B.
[81] *See Kitchen Racks from the PRC* and accompanying Issues and Decision Memorandum at Comment 10.
[82] *See CVD Preamble*, 63 FR at 65403.

> classification, however, simply groups together different products that use a common material input. The classification does not identify a product that the GOC intended to benefit at the time of bestowal of the wire rod subsidy.[83]

In *Pressure Pipe from the PRC*, a respondent argued that for the provision of stainless steel coils for LTAR, Commerce should exclude from the analysis any such inputs not actually used to produce subject merchandise. Commerce rejected the argument, stating:

> In their submissions, the Winner Companies argue that the Department should not subject the stainless steel coils that WSP purchased from GOC authorities to our LTAR subsidy analysis because the inputs were not subsequently used to make CWASPP. For purposes of this preliminary determination, we disagree with the Winner Companies' arguments. We note that the Winner Companies are not arguing that the inputs WSP purchased from GOC authorities are incompatible with the production process used to produce CWASPP but that WSP did not use those inputs to produce CWASPP. … 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. … Therefore, in accordance with our regulations, we do not consider the manner in which WSP used its inputs as a factor that is germane to the Department's subsidy analysis and, thus, we have for purposes of this preliminary determination subjected WSP's purchases of stainless steel coils from GOC authorities to our LTAR subsidy analysis.[84]

In *Steel Wire Strand from the PRC*, where Commerce investigated the provision of wire rod for LTAR, Commerce encountered a situation nearly identical to the issue that Borusan raised in this investigation.[85] A respondent argued that the inputs used in its mills that produced non-subject merchandise were outside the scope of the subsidy analysis. Commerce rejected the argument and countervailed the government-supplied wire rod used in all the respondent's mills, including those that only produced non-subject merchandise:

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[83] *See Kitchen Racks from the PRC* and accompanying Issues and Decision Memorandum at Comment 10.

[84] *See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 73 FR 39657, 39663 (July 10, 2008) (*Pressure Pipe from the PRC*), at "Provision of Stainless Steel Coil for LTAR." (Unchanged in *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 4936 (January 28, 2009), and accompanying Issues and Decision Memorandum.) "CWASPP" in this section refers to circular welded austenitic stainless pressure pipe; *i.e.*, the subject merchandise.

[85] *See Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 28557 (May 21, 2010) (*Steel Wire Strand from the PRC*), and accompanying Issues and Decision Memorandum.

> In its questionnaire responses, Xinhua reported the purchases of wire rod made by its PC strand producing factory. At verification, the Department discovered that Xinhua failed to report the wire rod purchased for their aluminum and steel wire rod factories. *The Xinhua Companies explained that they did not report these other purchases of wire rod because the other two factories did not use the wire rod they purchased during the POI to produce PC strand*. However, *the Department's questionnaire clearly requested that respondents report the total volume and value of wire rod purchased during the POI*. Furthermore, the Department's regulations and established practice do not track the manner in which subsidies are used and, thus, *all wire rod acquired by Xinhua during the POI is relevant to our benefit analysis*.[86]

Moreover, in the same case, Commerce found similar situations with regard to the other respondents and applied the same attribution standard by countervailing the government-supplied wire rod used in all of the respondents' production, including non-subject merchandise:

> Similarly, in the case of the Fasten Companies, the notes to 2008 financial statements indicate that Fasten Steel produced steel wire, stranded steel wires, and wire ropes while Hongyu Metal's product line included high-grade steel wire helical casing hardware. Thus, given the variety of the respective product lines of the Xinhua and Fasten Companies, we do not find that the GOC intended to benefit specific products produced by respondents at the time of bestowal of the wire rod subsidy.[87]

Thus, under 19 CFR 351.525(b)(5) of Commerce's regulations and Commerce's established practice, the provision of an input for LTAR is deemed to benefit a company's overall production absent a requirement explicitly made at the time of bestowal—*i.e.*, when the terms for the provision are set—that the input may only be used for a certain subset of a company's production. Commerce has provided essentially the same supporting explanation in other

[86] *See Steel Wire Strand from the PRC* and accompanying Issues and Decision Memorandum at 11. (Citations omitted; emphasis added.)
[87] *Id*. at Comment 17 ("Whether the Wire Rod Sold for LTAR Should be Attributed Only to Sales of Wire Rod").

proceedings in finding that an input subsidy was not "tied" to specific products unless evidence at the point of bestowal shows an intentional restriction of the subsidy to those products.[88]

Consistent with this precedent and the *CVD Preamble's* guidance, Commerce twice reasonably requested that Borusan report all of its HRS purchases, including those for the Halkali and Izmit mills, and provided Borusan adequate time to do so. During the investigation, Borusan cited no record information showing that the GOT intended to benefit a specific product at the time of bestowal of the subsidy, *i.e.*, at the time the terms were set for the provision of HRS by Erdemir and Isdemir. Further, Borusan had the opportunity in its case brief to argue that Commerce should have tied the HRS for LTAR subsidy to specific products based on record information showing that the GOT intended to benefit a specific product, but Borusan made no such argument.[89] Moreover, no such information is on the record. As we stated at page 53 of the Issues and Decision Memorandum for the *Final Determination*, "{a}bsent a determination that a subsidy is 'tied' to a specific product under 19 CFR 351.525(b)(5), Commerce does not limit the attribution of a benefit from a subsidy program to a specific product."

Under Commerce's well-established practice, a "tying" determination requires a specific affirmative finding by Commerce based on record information. Thus, in refusing to provide the purchase information, Borusan was substituting its own definition of "tying" under Commerce's practice. That is, Borusan presumed the existence of tying without providing Commerce with the information to make such a determination on the record of this investigation. As we have

[88] *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), and accompanying Issues and Decision Memorandum at Comment 6 (*Drill Pipe from the PRC*). We note additionally that not tying input subsidies to specific products absent evidence of tying has been Commerce's consistent practice in other cases in which interested parties did not raise this practice as an issue in their comments. *See, e.g.*, *Coated Paper from the PRC* and accompanying Issues and Decision Memorandum at 23-24; *see also Sinks from the PRC and accompanying Issues and Decision Memorandum* at 3-4 ("Attribution of Subsidies") and 21. Further below, under item 2 of the "Discussion of Comments" section, Commerce presents additional explanation for this practice.

[89] *See* Letter from Borusan to Commerce, "Oil Country Tubular Goods from Turkey, Case No. C-489-817: Case Brief," (May 23, 2014).

shown above, Commerce's consistent practice has been not to make this tying determination with respect to input LTAR subsidies without affirmative record evidence showing that the input was expressly intended at bestowal for use in a specified subset of a company's production. Neither the GOT nor Borusan submitted such evidence for the record.

Therefore, consistent with the *CVD Preamble* and Commerce's practice, and as further elaborated below under item 2 of the "Discussion of Comments" section, this information was essential to Commerce's analysis of the HRS for LTAR program.

Given that the purchase information was necessary, we now turn to the reasons Borusan's failure to provide the information justified the application of an adverse inference. This Court stated, "on this record it does not appear that Borusan's was the type of 'willful' non-compliance that would merit imposition of an adverse inference."[90] Borusan's decision not to provide the purchase information, however, depended on its assertion that its arguments regarding tying under 19 CFR 351.525(b)(5) were correct, which is not consistent with Commerce's practice or the *CVD Preamble*. At page 51 of the Issues and Decision Memorandum for the *Final Determination*, we explained, "Were the Department to accept Borusan's and the GOT's argument, however, respondents would be free to disregard our deadlines based on their assertions about the countervailability of programs or the Department's treatment of the programs."

Furthermore, as the Federal Circuit made clear in *Nippon Steel Corporation v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon*), a showing of "willfulness" is not required under the AFA provisions in the Act. As the Federal Circuit explained, section 776(b) of the Act "does not by its terms set a 'willfulness' or 'reasonable respondent' standard, nor does it require findings of motivation or intent. Simply put, there is no *mens rea* component to the section

[90] *See Borusan*, 61 F. Supp. 3d at 1349.

(776(b)) inquiry."[91] The Federal Circuit explained in *Nippon* that in concluding that an importer has not cooperated to the best of its ability and to draw an adverse inference under section 776(b), Commerce need only make two showings. First, Commerce "must make 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."[92] Second, "Commerce must then make a subjective showing 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."[93]

The Federal Circuit held that "while intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element. 'Inadequate inquiries' may suffice. The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent."[94]

Borusan's refusal to provide information based on its unilateral rejection of Commerce's practice and its interpretation of how Commerce should alternatively evaluate a subsidy program constitutes "willful non-compliance." Even if the Court disagrees with that assessment of Borusan's intentions, however, Commerce's application of AFA to Borusan is still supported by substantial evidence on the record because Borusan, by its own admission, failed to put forth its

[91] *See Nippon*, 337 F.3d at 1382.
[92] *Id.*
[93] *Id.*
[94] *Id.*

maximum efforts to investigate and obtain the requested information from its records, as requested.

As we noted at page 11 of the Issues and Decision Memorandum for the *Final Determination*, the time between our original request for the HRS purchase information in the Original Questionnaire and Borusan's statement that it would need several weeks to compile the information if we "insist(ed) on full reporting of all hot-coil purchases from every facility"[95] was 100 days. In other words, 100 days after we originally requested necessary purchase information, and despite having two opportunities, Borusan only provided a statement that it would provide the information in the future if we continued to request it. One hundred days after receiving a request for the purchase data, Borusan had not provided any purchase data for the Halkali or Izmit mills, despite having been given two opportunities to do so by Commerce.

In *Borusan*, the CIT cited *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1304, 1306-7 (Fed. Cir. 2014), which stated, "{t}he 'best of its ability' standard . . . does not require perfection on the respondent's part." We agree that holding respondents to a standard of perfection is unreasonable, which is the reason we issued multiple supplemental questionnaires in this investigation to allow respondents to clarify and correct record information. This instance is not, however, a failure of a respondent to achieve perfection or a matter of allowing a respondent to correct a minor deficiency. Borusan failed to provide *any* of the information we requested for the Halkali and Izmit mills based on its own assertions about what Commerce "needed" to analyze for purposes of the HRS for LTAR program.

Thus, Borusan's failure to provide any of the requested purchase data for its two additional mills belies its assertions that it acted to the best of its ability by explaining the difficulties it faced in providing the information. Section 782(c) of the Act states the following:

[95] *See* BSR at 11.

> If an interested party, *promptly* after receiving a request from the administering authority or the Commission for information, notifies the administering authority or the Commission (as the case may be) that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority or the Commission (as the case may be) shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

Section 782(c) of the Act (emphasis added). In its original questionnaire response, which was submitted over two months after our original request for the purchase information, Borusan only stated, "{g}athering this data for the other facilities that do not produce the OCTG subject merchandise would impose great burdens on BMB for no purpose."[96] In addition to taking over two months to provide this response, Borusan did not state that it was unable to submit the information and did not suggest alternative forms through which it could submit the information.

In its supplemental questionnaire response, which Borusan submitted 100 days after our original request for the information, Borusan explained in greater detail the difficulties it experienced in compiling the purchase information.[97] Again, however, Borusan did not provide any purchase information for the two mills, did not state that it was unable to provide the information, and only suggested that the data it provided for the Gemlik mill was its proposed alternative to Commerce's request. This "proposal" was wholly unresponsive to our request that Borusan provide the purchase data for the other mills.

Thus, Borusan's actions in this investigation did not comply with the requirements of section 782(c) of the Act. Moreover, as we explained in detail at pages 11-12 of the Issues and Decision Memorandum for the *Final Determination*, Borusan never properly requested an extension in accordance with our instructions in the questionnaires, and as required under 19

[96] *See* BQR at 11. The date of the Original Questionnaire was August 27, 2013. Borusan submitted the BQR on October 31, 2013, after receiving a deadline extension from Commerce.
[97] *See* BSR at 8-11.

CFR 351.302(c).[98] Thus, we continue to find that we must rely on "facts available" to calculate Borusan's CVD rate, and we find that Borusan failed to cooperate by not acting to the best of its ability because Borusan withheld requested information on its purchases of HRS, despite having two opportunities, and never requested an extension to provide this information in accordance with 19 CFR 351.302(c).

Consequently, we continue to find that an adverse inference is warranted in the application of facts available, in accordance with section 776(b) of the Act. In recalculating Borusan's CVD rate for the HRS for LTAR program under a tier one benchmark, as described above, we have made no changes to the AFA methodology that we described at pages 12-13 of the Issues and Decision Memorandum for the *Final Determination*.

4. *Provision of Land for LTAR*

The CIT concluded that because Commerce adopted the results of the *CWP Turkey 2010 AR* and *CWP Turkey 2011 AR*, the *status quo* of the result of the *CWP Turkey 2011 AR* on remand applies directly to the present case.[99] Thus, to comply with the CIT's order in *Maverick*, the valuation of the same parcel of land in the remand redetermination from the *CWP Turkey 2011 AR*, as sustained by the CIT, must be the same.[100] Accordingly, we have used the same calculation for the benefit as Commerce used in the *CWP Turkey 2011* AR. On this basis, we find that Toscelik received a countervailable subsidy of 0.07 percent *ad valorem.*[101]

[98] The other respondent, Toscelik, also requested that Commerce relieve it of providing information that we requested. Toscelik, however, unlike Borusan, made a formal request for an extension to provide this information, in accordance with Commerce's regulations. *See* letter from Toscelik to Commerce dated December 6, 2013, "Tosçelik conditional extension request."
[99] *See Maverick* at 12.
[100] *See Toscelik Profil ve Sac Endustrisi A.S. v. United States*, Slip Op. 14-126 (Oct. 29, 2014), remand results sustained, Slip Op. 15-28 (April 1, 2015).
[101] *See* Calculation Memo.

E. DISCUSSION OF COMMENTS

1. Finding of Distortion in the Turkish HRS Market and Use of Tier 1 Benchmark

Maverick Tube's/U.S. Steel's Comments

- In light of the GOT's failure to cooperate, Commerce should find as an adverse inference that the Turkish hot-rolled steel market is significantly distorted and that the use of a tier-two benchmark is necessary.
- Commerce should re-open the record to obtain more information from the GOT.
- Alternatively, Commerce should find distortion based on other record evidence, such as the GOT's National Restructuring Plan (NRT) for the steel industry and evidence related to Commerce's public bodies analysis of Erdemir and Isdemir.

Borusan's Comments

- Record evidence shows Erdemir and Isdemir accounted for less than a majority of the Turkish HRS market during the POI; thus, Commerce has no basis to protest the use of a tier 1 benchmark.
- Commerce erroneously concluded that it would not have to identify factors indicating distortion if Erdemir and Isdemir accounted for a majority of the HRS market.
- The *CVD Preamble* poses a restraint to the election of a two-tier benchmark and does not create a *per se* market distortion rule when government authorities account for the majority of the production of an input, as interpreted by Commerce.

Commerce's Position:

As a preliminary matter, we disagree with Maverick Tube and U.S. Steel that the application of facts available with an adverse inference with respect to the GOT is appropriate. Sections 776(a)(1), (a)(2)(A), and (a)(2)(B) of the Act state that Commerce shall make a

determination based on facts available if "(1) necessary information is not available on the record," or "(2) an interested party" "(A) withholds information that has been requested" by Commerce; or "(B) fails to provide such information by the deadline for the submission of the information." Section 776(b) of the Act permits Commerce to "use an inference that is adverse to the interests of the party in selecting from among the facts otherwise available."

The conditions in sections 776(a) and 776(b) of the Act are not applicable to this issue in the remand redetermination. Regarding the GOT's NRT, the GOT stated on the record that it prepared the NRT within the context of the Turkey - European Coal and Steel Community (ECSC) Free Trade Agreement to meet specific requirements stemming from the exclusive relationship between Turkey and the European Union.[102] The GOT stated that it was not possible to share the documents because of their confidentiality.[103] Moreover, as we stated at page 9 of the Initiation Checklist, documentation on the record concerning the NRT showed no evidence of an active restructuring program that the GOT had in place during the POI. Given this record information, we find no basis to apply an adverse inference to the GOT under section 776(b) of the Act.

With respect to the GOT's submission of production information for the Turkish HRS industry, we have determined that the application of facts available, with or without an adverse inference, would be outside the scope of the Court's remand orders. The GOT stated twice on the record that this information was not available, and although it seems highly unlikely that the GOT would be unable to gather information on domestic steel production in Turkey, there is no

[102] *See* GSQR at 3.
[103] *Id.* at 4. We note that although the GOT claimed that the documents are confidential, it provided no documentation to support this claim. *Id.* at 3-4; *see also* letter to the GOT dated February 13, 2014, "Response of the Government of Turkey to Second Supplemental Questionnaire," at 2.

evidence on the record which would contradict the GOT's claim.[104] Furthermore, the CIT's orders directed Commerce to provide further explanation or analysis of the record to explain those circumstances where a "substantial portion of the market" results in minimal distortion and where it results in substantial or significant distortion.[105] The CIT did not direct Commerce to reassess the GOT's failure to provide HRS production data, and on that basis presume as adverse facts available that the HRS market is distorted. Therefore, we do not believe it would be appropriate to apply facts available with an adverse inference to the GOT pursuant to sections 776(a) and 776(b) of the Act in the context of this remand.

We note that at page 2 of the Maverick Comments, Maverick Tube states that it believes Commerce is applying two different standards on remand:

> It is unclear how the Department, in one section of the Results, can lodge a stringent defense of its discretion to apply adverse facts available in investigating one respondent, while in another section it concedes that it has no choice but to reward both respondents and the Turkish Government for the latter's refusals to provide necessary information.[106]

We acknowledge, as we describe in the "Analysis on Remand" section above, that both the GOT and Borusan did not respond fully to our requests for information. As we also explain above in this section, however, although Borusan referenced the difficulties that it encountered in providing the HRS purchase information, it never stated that it could not provide the information. Instead, Borusan: 1) did not provide any purchase information for two of its mills; 2) did not state that it was unable to provide the information; 3) only suggested that the data it provided for the Gemlik mill was its proposed alternative to Commerce's request; and 4) never properly submitted an extension request in accordance with Commerce's regulations for providing the HRS purchase information.

[104] *See* GQR at 4; *see also* GSQR at 4.
[105] *See Borusan*, 61 F. Supp. 3d at 1327-1330.
[106] *See* Maverick Comments at 2.

The GOT, on the other hand, explained the reason it was unable to provide the NRT (*i.e.*, because of confidentiality requirements) and actually acknowledged that Erdemir and Isdemir accounted for a "majority" of HRS production in Turkey. This statement, in fact, provided information necessary for our conclusions in the *Final Determination*.[107] It is only the GOT's failure to provide complete HRS production data in Turkey which has, on remand, proved to be a liability for Commerce, and for the reasons we have explained, we do not believe the application of facts available, adverse or otherwise, is appropriate for purposes of this remand.

Accordingly, for the reasons provided, the application of adverse facts available to Borusan pursuant to sections 776(a) and 776(b) of the Act is appropriate, but not with respect to the GOT.

As we explain in the "Analysis on Remand - Market Distortion and Benchmark" section above, we find no other record evidence to support a finding of distortion in the Turkish HRS market. Further, although U.S. Steel cites additional evidence that it claims supports a finding of distortion, this information relates solely to our public bodies determination with respect to Erdemir and Isdemir.[108] Thus, this information does not allow us to draw conclusions about the broader Turkish HRS market.

Finally, although Maverick Tube suggests that Commerce should re-open the record to request additional information from the GOT, no interested party has identified specific documentation on the record for which additional information is necessary, other than the documentation that we address above (*i.e.*, the NRT and documentation specific to Erdemir and

[107] *See Final Determination* and accompanying Issues and Decision Memorandum at 24.
[108] *See* U.S. Steel Comments at 15, citing *Final Determination* and accompanying Issues and Decision Memorandum at 21 (in which Commerce cited language in Erdemir's 2012 Annual Report on its policies to encourage its customers to engage in export-oriented production, and the relationship between these policies and the GOT's stated policy to improve its balance of payments).

Isdemir).[109] With respect to the Turkish HRS industry data, because the GOT has twice stated on the record that it does not have the necessary requested HRS production data, we disagree that re-opening the record to request this information once again would be advisable, especially in light of the deadlines in which Commerce was directed to issue this remand redetermination. Therefore, we find no basis to request additional information from the GOT for this final remand redetermination.

With respect to Borusan's arguments concerning Erdemir and Isdemir's combined market share, as we explain in the "Analysis on Remand - Market Distortion and Benchmark" section above, there are obvious problems with combining five different data sources to estimate Erdemir and Isdemir's market share. We also disagree with Borusan's contention that even if record evidence shows a government supplier accounts for a majority of the market, Commerce must still demonstrate through additional record evidence that the market is significantly distorted (*i.e.*, a *per se* market distortion rule). In making its argument, Borusan claims, "The *CVD Preamble* is not a primary legal authority and cannot be relied upon to support a determination that is flatly inconsistent with the statute and regulations."[110] The CIT, however, relied on the *CVD Preamble* in rendering its decision.[111] The CIT stated the following:

> The latter part of that sentence of the {*CVD*} *Preamble* is reasonably clear, in providing that where the governmental provider 'constitutes a majority . . . of the market', *i.e.*, the market's share, Commerce will find that the price of the good or service is, *per se*, significantly distorted, *i.e.*, that the price is not a competitive-market price. Also, that part is clear in indicating that where the government provides a 'substantial portion' of the market, significant distortion will be found 'in certain circumstances,'[112] (footnote omitted).

Moreover, because we find no record evidence that Erdemir and Isdemir accounted for a

[109] *See* Maverick Comments at 3.
[110] *See* Borusan Comments at 8.
[111] *See Borusan*, 61 F. Supp. 3d at 1328.
[112] *Id*.

majority of the HRS market in Turkey during the POI, Borusan's arguments with respect to this issue are moot.

2. Application of AFA to Borusan's HRS Purchases

Maverick Tube's Comments

- Supports the continued application of AFA to Borusan.

U.S. Steel's Comments

- Commerce rightly found that the HRS purchase information was necessary and that Borusan's failure to provide such information warranted the application of AFA.
- The idea that Commerce alone determines what information is relevant and necessary has been repeatedly upheld by the Courts.

Borusan's Comments

- Commerce failed to address the Court's instructions by continuing to apply AFA.
- Commerce continues to ignore the Court's direction regarding its tying analysis and merely repeats arguments that Commerce already briefed to the Court.

Commerce's Position:

In the underlying investigation, Borusan unilaterally rejected Commerce's tying practice and twice refused to provide the agency with the necessary requested information. We agree with Maverick Tube and U.S. Steel that the application of adverse facts available, consistent with sections 776(a) and 776(b), was therefore warranted. In the Borusan Comments, Borusan attempts to shift the focus from its failure to provide the requested purchase information to its legal arguments concerning Commerce's attribution practice for input subsidies. The threshold issue, though, is Borusan's failure to provide the requested information.

Borusan argues that "{i}nstead of addressing the basic question asked by the Court of

why information regarding inputs to non-subject products was 'necessary' to determine the benefit to the production of the subject merchandise (OCTG)," Commerce's Draft Remand Redetermination only repeated arguments that Commerce already made to the Court.[113] Borusan cites the following from the CIT's decision in *Borusan*:

> Commerce never addressed this 'tying' issue in the *Final Determination*, stating only that 'we cannot fully determine the benefit that Borusan received from each purchase of HRS from Erdemir and Isdemir', but that statement does not appear to be true with respect to the benefit that is legally attributable to the subject merchandise.[114]

Contrary to Borusan's assertion that the Court has already "agreed with {Borusan's} conclusion," the Court granted Commerce the "latitude to clarify and persuade" the Court that the HRS purchase information was necessary.[115] Moreover, contrary to Borusan's claims, the Court did not hold that Commerce's conclusion that it could not "fully determine the benefit that Borusan received from each purchase of HRS from Erdemir and Isdemir" was *not* true, but that, based on Commerce's statements in the *Final Determination*, it "did not *appear* to be true with respect to the benefit that is legally attributable to the subject merchandise."[116] (emphasis added). To the extent that the *Final Determination* did not fully explain Commerce's practice of not tying input subsidies to specific products and why this practice is consistent with the *CVD Preamble*, in the "Analysis on Remand – Application of AFA to Borusan" section above, we have cited to four cases in which Commerce has rejected similar arguments to Borusan's assertion in this case.[117] In the Borusan Comments, Borusan did not address any of this case precedent.

Pursuant to the Court's invitation for further clarification of Commerce's attribution

[113] *See* Borusan Comments at 2.
[114] *Id.*, citing *Borusan*, 61 F. Supp. 3d at 1349.
[115] *See Borusan* at 1349.
[116] *Id*.
[117] *See* above at "Analysis on Remand - Provision of HRS for LTAR: Application of AFA to Borusan" (citing to *Kitchen Racks from the PRC, Pressure Pipe from the PRC, Steel Wire Strand from the PRC,* and *Drill Pipe from the PRC*).

methodology, we provide additional explanation below as to Commerce's practice in that regard.

As an initial matter, we believe there may be some misunderstanding regarding Commerce's description of its subsidy attribution and tying methodology in the *Final Determination*; therefore, a further explanation about that methodology is warranted. The Court's decision in *Borusan* appears to suggest that by verifying Borusan's production at all of its three plants, Commerce would have ascertained which HRS purchases were related to non-subject merchandise production and, thus, determined which HRS purchases were irrelevant and "unnecessary" to Commerce's attribution of benefit from the HRS for LTAR subsidy. Specifically, the Court observed that if "the truth of Borusan's claims regarding subject merchandise and non-subject merchandise production survived verification, Commerce's 'attribution' would wind up . . . exactly at the point that Borusan had been making all along . . . that the HRS purchase information for the non-subject-merchandise-producing Halkali and Izmit mills is not relevant to the attributable HRS for LTAR in the countervailing duty investigation of {OCTG} from Turkey, and therefore such information is, strictly and legally speaking, not 'necessary' information."[118] The Court therefore held that it agreed with Borusan's argument that "there is little doubt that HRS purchased by the non-subject mills and shipped to those non-subject mills is tied to the non-subject product at the time of bestowal."[119]

However, verification of Borusan's three mills would not have changed Commerce's attribution methodology, nor obviated the necessity of this information for Commerce's calculations. Sections 19 CFR 351.525(b)(2) through (b)(7) provide requirements for different applications of Commerce's attribution methodology. Subsection 525(b)(3) states a broad rule that Commerce "will attribute a domestic subsidy to all products sold by a firm, including

[118] *See Borusan* at 1347.
[119] *Id.* at 1348.

products that are exported." This provision governs attribution for what Commerce has usually referred to as "untied" subsidies, *i.e.*, subsidies attributable the company's overall production. This is consistent with Commerce's explanation in the *CVD Preamble* that "{w}e have generally stated that we will not trace the use of subsidies through a firm's books and records. . . . Once the firm receives the funds, it does not matter whether the firm used the government funds, or some of its own funds that were freed up as a result of the subsidy, for the stated purpose or the purpose that we evince."[120]

The rest of the attribution provisions specify the treatment for scenarios where a subsidy is "tied" in some way to a subset of the company's production or sales and, thus, attributable only to that particular subset. In this case, the provision at issue is subsection 525(b)(5): "If a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product."

The regulations, however, provide no specific definition of what "tied" means. As noted in the *CVD Preamble*, this lack of a definition was intentional. Commerce intended to further develop the meaning of the term in the course of its subsequent CVD practice, while drawing guidance from past experience:

> Although the rules described in paragraphs (b)(2)-(b)(7) of §351.525 deal with tying, §351.525 does not contain a definition of "tied." In the past, the Department has described this concept in a variety of ways. For example, in Appendix 2 to *Certain Steel Products from Belgium*, 47 FR 39304, 39317 (September 7, 1982), we stated that "a grant is tied" when the intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy." In the preamble to the 1989 Proposed Regulations at 23374, we stated that a "tied" subsidy benefit is "*e.g.*, a benefit bestowed specifically to promote the production of a particular product." . . . Given the wide variety of factual scenarios that we have encountered in the past, and are likely to encounter in the future, we are not promulgating an all-encompassing definition of "tied." . . . {A}t this time we intend to apply the term "tied" on a case-by-case basis, using the guidelines in this section.[121]

[120] *See CVD Preamble*, 63 FR at 65403.
[121] *Id.* 63 FR at 65402.

Since the regulations were implemented, through a number of cases in which it has encountered the issue, Commerce developed a standard for determining when a subsidy is "tied" to a particular product pursuant to subsection 525(b)(5), absent which Commerce's practice is to treat the subsidy instead as a generally attributable subsidy pursuant to subsection 525(b)(3), attributing the subsidy to the company's overall production.[122] This standard rests on what is known to the subsidy provider at the point of bestowal, *i.e.*, when the terms of the provision are set – prior to, and irrespective of, the actual use to which the subsidy recipient subsequently applies the subsidy. Pursuant to this standard, for a subsidy to be treated as "tied" to a particular product, record evidence must reflect that at the point of bestowal there was an express condition limiting the use of the subsidy for that particular product.[123]

In practice, Commerce has looked for this evidence in such documentation as an executed contract or agreement with express language specifying, *e.g.*, the purposes to which the subsidy is intended to be used.[124] This evidence will necessarily come from a point in time prior to, or at the latest concurrent with, the delivery of the subsidy. The "tie" to a product is made at that point; in making this determination, Commerce does not examine the subsequent application of the subsidy. Absent substantive evidence of "tying," Commerce's practice has been to treat the subsidy as "untied" and attribute the subsidy to the company's overall production pursuant to

[122] *See, e.g.*, *Pressure Pipe from the PRC*, 73 FR at 39663 (2008); *Kitchen Racks from the PRC* and accompanying Issues and Decision Memorandum at Comment 10 (2009); *Steel Wire Strand from the PRC* and accompanying Issues and Decision Memorandum at 11 and Comment 17 (2010); and *Drill Pipe from the PRC* and accompanying Issues and Decision Memorandum at Comment 6 (2011).

[123] *See CVD Preamble*, 63 FR at 65402 (stating that Commerce analyzes "the purpose of the subsidy based on information available at the time of bestowal")

[124] *See, e.g.*, *Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 75975 (December 26, 2012), and accompanying Issues and Decision Memorandum at 17. ("Based on the Samsung verification report … and an examination of the *application and approval documents provided by Samsung*, we find that one project for which Samsung received benefits during the POI … relates broadly to numerous types of products, including subject merchandise … {and therefore} the grants provided for that project are *not tied to any particular merchandise, subject or non-subject*.) (Emphasis added.)

subsection 525(b)(3).[125]

Thus, in arguing that the HRS purchased for and shipped to its non-OCTG mills is "tied to the non-subject product at the time of bestowal," Borusan misrepresented Commerce's definition and substituted its own definition of what constitutes "tying" under Commerce's practice. The investigation record lacked any evidence that the sale was accompanied by an express condition limiting use of the HRS or an express intention by the government-controlled provider to benefit specific downstream products through its provision of HRS, a commodity used in the production of OCTG and a wide range of other downstream products.[126] Absent such evidence, the shipment of the good to those plants is simply a logistical detail that did not constitute positive evidence indicative of the subsidy provider's intent to limit the use of the subsidy in some way. Thus, the shipment particulars did not *per se* "tie" the subsidy to the company's production at that particular plant, regardless of what that plant produces, *i.e.*, Commerce would neither "tie" the subsidy to the subject merchandise if the plant produced only subject merchandise nor to non-subject merchandise if that is what the plant produced.

Accordingly, the verification of Borusan's Halkali and Izmit mills would not have resulted in a different outcome under Commerce's attribution practice with regard to Borusan's HRS purchases. Instead, Commerce's determination rested on whether there was documentary evidence at the point of bestowal clearly showing an express condition by the government limiting Borusan's use of the subsidy exclusively for the production of specific products. Neither Borusan nor any other party placed such evidence on the investigation record.

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[125] *Id*.

[126] *See, e.g.*, *Final Determination* and accompanying Issues and Decision Memorandum at 22 (citing the GOT's identification of "Construction, Automotive, Machinery & Industrial, Electrical Equipment, Appliances, Agricultural, Oil & Gas, and Containers & Packaging" as the industries that purchased HRS in Turkey during the POI (citation omitted). Given that HRS is a commodity used in a wide range of downstream products, documentation showing that the government expressly limited the use of the HRS to the production of specific downstream products would be critical to any finding that the subsidy is "tied" to specific merchandise.

Accordingly, as facts available in accordance with section 776(a) of the Act, Commerce attributed the subsidy to Borusan's overall production, pursuant to subsection 19 CFR 351.525(b)(3).

Commerce's tying inquiry is meant to balance the fact that money is fungible with the congressional intent to attribute subsidies to the products directly benefiting from the subsidy.[127] Accordingly, Commerce's inquiry properly focuses on whether a government's intent is to subsidize certain activities, whether through explicit criteria for receiving the subsidy, or through the receipt of documentation that informs it of the subsidized activities.[128]

Commerce intended for its practice to promote the effective enforcement of the CVD law:

> {W}e are extremely sensitive to potential circumvention of the countervailing duty law. We intend to examine all tying claims closely to ensure that the attribution rules are not manipulated to reduce countervailing duties. . . . If subsidies allegedly tied to a particular product are in fact provided to the overall operations of a company, {Commerce} will attribute the subsidy to sales of all products by that company.[129]

"{I}t is well settled that an agency's interpretation of its own regulations is entitled to broad deference from the courts." *Cathedral Candle Co. v. United States Int'l Trade Comm'n*, 400 F.3d 1352, 1363 (Fed. Cir. 2005) (*Cathedral Candle*) (citing, among other cases, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (*Thomas Jefferson Univ.*)). "Deference to an agency's interpretation of its own regulations is broader than deference to the agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in the former it is addressing its own." *Cathedral Candle*, 400 F.3d at 1363-64. "Thus, as the Supreme Court has explained, the agency's construction of its own regulations is

[127] *See CVD Preamble*, 63 FR at 65403.
[128] *Id.* 63 FR at 65402 (explaining that "a grant is 'tied' when the intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy").
[129] *Id.* 63 FR at 65400.

'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 1364 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *accord Torrington Co. v. United States*, 156 F.3d 1361, 1363-64 (Fed. Cir. 1998) (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512). Commerce's interpretation of 19 CFR §351.525(b)(5) in the *CVD Preamble* was intended to promote effective law enforcement and it is entitled to "controlling weight." *Cathedral Candle*, 400 F.3d at 1364.

Thus, far from "inventing" this request for all input purchases specifically for this investigation, as alleged by Borusan,[130] Commerce followed its consistent and longstanding practice. By refusing to provide information based on its own assertions on how Commerce should analyze a subsidy program, Borusan "failed to cooperate by not acting to the best of its ability because Borusan withheld requested information on its purchases of HRS, despite having two opportunities, and never requested an extension to provide this information in accordance with 19 CFR 351.302(c)."[131]

Moreover, Commerce's attribution regulations at 19 CFR 351.525(b)(5) and (b)(6) do not provide exceptions for the attribution of subsidies between a corporation's separate facilities. In fact, in *Refrigerators from Korea*, Commerce faced a similar argument that it should have tied the benefit from a subsidy program to specific facilities.[132] Commerce rejected that argument and stated the following:

> {T}his claim is not supported by the tax return provided on the record by Samsung, which does not evince that the tax credits provided under the RSTA were tied to any specific facility. In addition, the tax credit reduces Samsung's overall tax liability which benefits all of its domestic production and sales. While Samsung may maintain underlying documentation, these documents do not form the basis for bestowal and are

[130] *See* Borusan Comments at 2.
[131] *See Final Determination* and accompanying Issues and Decision Memorandum at 12.
[132] *See Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012) (*Refrigerators from Korea*), and accompanying Issues and Decision Memorandum at Comment 7.

> not included in the annual tax returns that the company files with the Korean tax authority. As such, there is no basis to find that the benefits are tied to any specific facility or operating division at the point of bestowal.[133]

Consistent with the fact pattern in *Refrigerators from Korea*, the record reflects no evidence that the government expressly limited the subsidy at issue for exclusive use by one of Borusan's mills.

This Court has repeatedly held that "{i}t is Commerce, not the respondent, that determines what information is to be provided," in a given investigation or administrative review. *Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (CIT 1986) (noting this is the case despite the respondent's claim that Commerce's request "cannot legally serve as a basis for the Department's administrative review" and imposed "an unreasonable and unnecessary burden on the company"). *See also Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1298-99 (CIT 2010) (stating that "{r}egardless of whether Essar deemed the license information relevant, it nonetheless should have produced it {in} the event that Commerce reached a different conclusion," and that "Commerce, and not Essar, is charged with conducting administrative reviews and weighing all evidence in its calculation of a countervailing duty margin"); and *NSK, Ltd. v. United States*, 919 F. Supp. 442, 447 (CIT 1996) ("NSK's assertion that the information it submitted to Commerce provided a sufficient representation of NSK's cost of manufacturing misses the point that 'it is Commerce, not the respondent, that determines what information is to be provided.'"). In the Court's holding in *Borusan*, the Court questioned whether the HRS purchase information was "strictly and legally speaking, not 'necessary' information."[134] For the reasons we have provided on remand, however, that information was both factually and legally necessary to Commerce's analysis, and to the extent that Borusan

[133] *Id.*
[134] *See Borusan*, 61 F. Supp. 3d at 1347.

disagreed with Commerce in that regard, it was Commerce, and not Borusan, who was charged with conducting the investigation and requesting the data it believed necessary. As Commerce has explained in previous administrative proceedings, when respondents are free to disregard Commerce's information requests and the deadlines for those requests based on respondents' own interpretations of these requests, Commerce cannot conduct a proper CVD investigation.[135]

Thus, for the reasons provided, the HRS purchase information requested of Borusan was necessary and fully consistent with Commerce's regulations, the *CVD Preamble*, and long-standing practice, and Borusan's failure to provide that information after it was requested twice by Commerce warranted the application of adverse facts available, in accordance with sections 776(a) and (b) of the Act.

As a final point on this issue, it is worth highlighting that Borusan makes a statement in its comments on remand about verification that have no basis in law or the facts on the administrative record. Specifically, Borusan states, "The irony of {Commerce's} argument is that the Department refused to verify the HRS for LTAR program at the {GOT} in violation of U.S. law and now faults Borusan for not affirmatively providing evidence of government intent."[136] First, as this Court recognized in *Borusan,* the Federal Circuit has held that "Congress has implicitly delegated to Commerce the latitude to derive verification procedures *ad hoc*."[137] There was nothing "unlawful" about Commerce's determination not to verify the HRS for LTAR

[135] *See, e.g., Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 75 FR 57444 (September 21, 2010), and accompanying Issues and Decision Memorandum at Comment 22 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 FR 24329, 24361 (May 6, 1999) (stating that "{w}hen requesting information pursuant to a questionnaire, the Department will specify the deadlines by which the information is to be provided by the parties...Any information submitted after the deadline specified in the questionnaire is untimely, regardless of whether the general deadline in section 351.301(b)(I) has passed.").
[136] *See* Borusan Comments at 3.
[137] *See Borusan*, 61 F. Supp. 3d at 1349 (citing *Micron Tech. Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997)).

program, as Commerce accepted the GOT's information on the record and determined no verification was warranted. As we explained in the Issues and Decision Memorandum for the *Final Determination*, "The purpose of verification is to verify the accuracy of information already on the record, not to continue the information-gathering stage of the Department's investigation."[138] Thus, Commerce verifiers would not have obtained new information relating to this program at verification.

Second, and more relevant for purposes of this issue, Borusan provided no information on the record that the GOT intended to benefit a specific product at the time of bestowal of the HRS for LTAR subsidy and made no argument on this issue in its case brief.[139] Borusan instead refused to provide the HRS purchase information requested based on nothing but assertions. Thus, if there is any "theme" tying those two agency determinations together, it is that Commerce consistently made its determinations based on the information placed on the record before it, whether it be accepting the GOT's information as valid and electing not to verify it, or determining that Borusan failed to act to the best of its ability when the company decided not to provide the purchase information which Commerce twice requested and needed for its analysis.

3. Toscelik's Land for LTAR Benchmark

U.S. Steel's Comments

- The valuation calculation as formulated in the *CWP Turkey 2011 AR* is not binding in this case and has no application. For the Final Remand, Commerce should continue to calculate the benefit received by Toscelik through the grant of the Osmaniye Parcel using the same method it used in the final determination.

[138] *See Final Determination* and accompanying Issues and Decision Memorandum at Comment 9.
[139] *See* Draft Remand Redetermination at 20-21.

Commerce's Position:

We disagree with U.S. Steel's argument that the Court's decision does not require Commerce to alter the calculation of the benefit that Toscelik received. The CIT concluded that because Commerce adopted the results of the *CWP Turkey 2010 AR* and *CWP Turkey 2011 AR*, the *status quo* of the result of the *CWP Turkey 2011 AR* on remand applies directly to the present case.[140] The CIT specifically remanded the issue *for correction* (emphasis added).[141] Therefore, we have made no changes to the analysis from the Draft Remand Redetermination, as explained in the "Analysis on Remand – Provision of Land for LTAR" section above.

[140] *See Maverick* at 12.
[141] *Id.*

F. FINAL RESULTS OF REDETERMINATION

Consistent with the Court's orders, under protest, for the reasons explained above, we have altered the *Final Determination* and used actual transaction prices in Turkey as a benchmark to calculate the benefit from the provision of HRS to Borusan and Toscelik during the POI. We have also revised the benchmark valuation to calculate the benefit for a land parcel that the GOT granted to Toscelik, pursuant to *Maverick*. This has resulted in a revised CVD rate of 2.39 percent for Borusan and 0.95 percent for Toscelik. Additionally, we have provided further explanation with respect to the application of AFA to Borusan's purchases of HRS for its Halkali and Izmit mills.

Consistent with the CIT's statement that other issues relating to the HRS for LTAR calculation may become moot based on Commerce's findings on the Turkish HRS market, we have made no other changes to the *Final Determination*.

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

31 August 2015
(Date)