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May 6, 2004

MEMORANDUM TO: Jeffrey A. May
Acting Assistant Secretary
for Import Administration

FROM: Holly A. Kuga
Acting Deputy Assistant Secretary
for AD/CVD Enforcement II

SUBJECT: Issues and Decision Memorandum: Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India

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Summary

We have analyzed the comments and rebuttals of interested parties in the final results of the above-mentioned countervailing duty (CVD) administrative review covering the period April 20, 2001 through December 31, 2002[1] (the POR). As a result of our analysis, we have made certain modifications to our Preliminary Results. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 69 FR 907 (January 7, 2004) (Preliminary Results). Below are the "Subsidies Valuation Information" and "Analysis of Programs" sections of this memorandum that describe the decisions made in this administrative review with respect to Essar Steel, Ltd. (Essar), the producer/exporter of subject merchandise covered by this segment of the proceeding. Also below is the "Analysis of Comments" section in which we discuss the issues raised by interested parties. We recommend that you approve the positions we have developed below in this memorandum.

Below is a complete list of the issues in this review for which we received comments and rebuttal comments from parties:

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[1] For the purposes of these final results, we have analyzed data for the period January 1, 2001 through December 31, 2001 to determine the subsidy rate for exports of subject merchandise made during the period in 2001 when liquidation of entries was suspended. In addition, we have analyzed data for the period January 1, 2002 through December 31, 2002 to determine the subsidy rate for exports during that period. Further, we are using the 2002 subsidy rate to establish the cash deposit rate for exports of subject merchandise subsequent to the issuance of the final results of this administrative review.

## I. SUBSIDIES VALUATION INFORMATION

### A. Creditworthiness

As explained in the Preliminary Results, we initiated a creditworthy investigation of Essar for fiscal years 2001 and 2002, in accordance with section 351.505(a)(4)(i) of the Department's regulations. See 69 FR 908. In the Preliminary Results, we found that Essar was uncreditworthy during the fiscal years 2001 and 2002 based on the company's financial ratios for the period, the fact that Essar was not able to secure commercial financing during fiscal years 2001 and 2002 without the aid of Government of India (GOI) guarantees, and that in 2001 Essar defaulted on a long-term loan to a group of noteholders. Id. at 909. See also the December 31, 2003, Memorandum to the File from the Team, RE: Creditworthiness Allegation (Creditworthiness Memorandum), on file in the Department's Central Records Unit (CRU), Room B099 of the main Commerce Building.

Neither party raised issues regarding the Department's preliminary finding of Essar being uncreditworthy; therefore, we continue to find that Essar was uncreditworthy during fiscal years 2001 and 2002.

### B. Benchmarks for Loans and Discount Rate

#### (1) Benchmark for Short-Term Loans

In the Preliminary Results, for those programs requiring the application of a short-term benchmark interest rate, we used, in accordance with section 351.505(a)(3)(i) of the Department's regulations, company-specific, short-term interest rates on commercial loans as reported by Essar. See 69 FR at 909. We note that in the Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from India, 66 FR 49635 (September 28, 2001) (HRC Investigation), and Issues and Decision Memorandum (HRC Decision Memo) at II.C., we found that cash credit loans provide the most comparable type of short-term benchmark when calculating the benefit under the GOI's short-term loan programs. With respect to the rupee-denominated, short-term benchmark, we used the weighted-average of Essar's cash credit loans in rupees (Rs).

#### (2) Benchmark For Loans issued up to 2000

In the Preliminary Results, for those programs requiring a rupee-denominated discount rate or the application of a rupee-denominated, long-term benchmark interest rate, we used, where available, company-specific, weight-averaged interest rates on commercial long-term, rupee-denominated loans. See 69 FR 909. We note, however, that **Essar did not** have rupee-denominated, long-term loans from commercial banks for all required years. Therefore, for those years for which we did not have company-specific information, we relied on a rupee-denominated, long-term benchmark interest rate from the immediately preceding year as directed by section 351.505(a)(2)(iii) of the Department's regulations.

(3) Benchmark for Loans issued in 2001 and 2002

As indicated above, for the final results we continue to find that Essar was uncreditworthy for years 2001 and 2002. See "Creditworthiness" section, above. Where Essar received benefits that were treated as fixed, long-term loans, we used as our long-term benchmark interest rate India's Prime Lending Rate (PLR), as published by the Reserve Bank of India (RBI), and we converted the PLR into a benchmark interest rate for uncreditworthy companies using the formula set forth in section 351.505(a)(3)(iii) of the Department's Regulations.

## II. ANALYSIS OF PROGRAMS

### A. Programs Conferring Subsidies

#### 1. Pre-Shipment Export Financing

In the Preliminary Results, and HRC Investigation we found that this program conferred a countervailable subsidy. No comments have been submitted warranting reconsideration of this determination; we therefore continue to find that this program is countervailable. In the Preliminary Results we calculated a benefit rate for Essar of less than 0.005 percent ad valorem. See 69 FR 910. Essar used this program in 2002; we continue to find that Essar did not use this program in 2001. To calculate the benefit conferred by these pre-shipment loans taken out by Essar in 2002, we compared the actual interest paid on the loan with the amount of interest that would have been paid at the benchmark interest rate. Where the benchmark interest exceeds the actual interest paid, the difference constitutes the benefit. In the Preliminary Results, we divided the benefit by Essar's total exports. This methodology was not consistent with the finding in the HRC Investigation and information contained on the record of this proceeding. See HRC Decision Memo at Comment 10. For these final results we are changing our calculation and have divided the total amount of benefit by Essar's 2002 exports of subject merchandise to the United States. As determined in the HRC Investigation, the pre-shipment export financing loan was tied to a shipment to the United States of subject merchandise, therefore, we find that it is appropriate to use total exports of subject merchandise to the United States as the denominator. See Comment 1, below. On this basis, we calculated a net countervailable subsidy under the pre-shipment export financing program in 2002 to be 0.28 percent ad valorem for Essar.

2. Export Promotion Of Capital Goods Scheme (EPCGS)

In the Preliminary Results, we found that this program conferred countervailable benefits to Essar. In PET Film, we determined that import duty reductions provided under the EPCGS constituted a countervailable export subsidy. See Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip from India, 67 FR 34905 (May 16, 2002) (PET Film) and PET Film Decision Memorandum, at section II.A.4. "EPCGS." Specifically, the Department found that under the EPCGS program, the GOI provides a financial contribution under section 771(5)(D)(ii) of the Tariff Act of 1930, as amended (the Act) in the form of revenue foregone that otherwise would be due, that a benefit is thereby conferred, as defined by section 771(5)(E) of the Act, and that this program is specific under section 771(5A)(B) of the Act because it is contingent upon export performance. No comments have been submitted warranting a reconsideration of this determination. Therefore, we continue to find that import duty reductions provided under the EPCGS are countervailable export subsidies.

The EPCGS provides for a reduction or exemption of customs duties and an exemption from excise taxes on imports of capital goods. Under this program, producers may import capital equipment at reduced rates of duty by undertaking to earn convertible foreign exchange equal to five times the cost, insurance and freight (CIF) value of capital goods, to be fulfilled over a period of eight years (12 years in the case where the CIF value is Rs. 100 Crore[2] or more). If a company fails to meet the export obligation, the company is subject to payment of all or part of the duty reduction, depending on the extent of the export shortfall, plus penalty interest. During verification, we found that in April 2003, after the POR, there was a change to the EPCGS with respect to export obligation commitments: the export earning commitment, which was five times the CIF value of the imported capital goods, was changed to eight times the CIF value of the imported capital good.

We have determined the benefit under this program in accordance with the methodology applied in HRC Investigation and PET Film. See HRC Decision Memorandum, at Analysis of Programs I.E. "Export Promotion of Capital Goods Scheme (EPCGS)" and PET Film Decision Memorandum, at section II.A.4. "EPCGS." The benefit is the amount of unpaid duties that would have to be paid to the GOI if the export requirements are not met. The repayment of this liability is contingent on subsequent events, and in such instances it is the Department's practice to treat any balance on an unpaid liability as an interest-free loan. See section 351.505(d)(1) of the Department's regulations. In the Preliminary Results, we determined that the company has an outstanding contingent liability during the POR, because Essar had not yet met its export obligation. No comments have been submitted warranting reconsideration of this determination; therefore, consistent with the methodology employed in the Preliminary Results, we are treating the amount of the import duty reduction or exemption as a contingent liability interest-free loan for those EPCGS licenses for which Essar applied but, as of the end of the POR had not received a waiver of its obligation to repay the duties from the GOI.

Accordingly, for those unpaid duties for which Essar has yet to fulfill its export obligations, we

[2]A crore is equal to 10,000,000 rupees.

determine the benefit to be the interest that Essar would have paid during the POR had they borrowed the full amount of the duty reduction at the time of importation. Pursuant to section 351.505(d)(1) of the Department's regulations, we used a long-term interest rate as our benchmark to calculate the benefit of a contingent liability interest-free loan because the event upon which repayment of the duties depends (i.e., the date of expiration of the time period for Essar to fulfill its export commitments) occurs at a point in time more than one year after the date the capital goods were imported. Specifically, we used the calculated long-term benchmark interest rate for Essar, as described in the "Subsidies Valuation" section above. The rate used corresponded to the year in which Essar imported the item under the program.

Essar reported that it paid application fees in order to obtain its EPCGS license. In the Preliminary Results, we found that the application fees paid by Essar qualified as an "application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy." See section 771(6)(A) of the Act. As a result, we have offset the benefit by an amount equal to the fees paid.

To calculate the subsidy rate, we summed the benefits conferred on Essar in the form of contingent liability loans. We note, that for licenses related to imports of capital goods during 2001 and 2002, we prorated the contingent liability by the actual number of days. See Comment 4. We then divided Essar's total benefit under this program by its respective total export sales during years 2001 and 2002. On this basis, we determine the net countervailable subsidy rate from this program to be 1.69 percent ad valorem for 2001 and 1.16 percent ad valorem for 2002.

In the Preliminary Results, we found that Essar transferred EPCGS licenses tied to iron-ore pellets to its former subsidiary, Hy-Grade. We also found that these licenses were a liability of Hy-Grade and were not attributable to Essar. See 69 FR 911. Parties did not raise any issues or arguments with regard to the preliminary finding; we therefore continue to find that Hy-Grade's EPCGS licenses do not provide a benefit to Essar.

3. Bombay Relief Undertaking Act (BRU)

In the Preliminary Results, we found that under the BRU, the State Government of Gujarat (GOG) provided a countervailable benefit to Essar in the form of suspension of interest and principal payments. We received comment on this issue. However, we continue to find that the BRU provides a countervailable benefit within the meaning of the Act.

In the Preliminary Results, the Department stated that to determine that a program is countervailable, the Department must conclude that the program constitutes a financial contribution by the government, confers a benefit, and is specific pursuant to the criteria specified under the Act. In the Preliminary Results, we found that the GOG's protection of Essar from litigation under the BRU constituted a financial contribution under section 771(5)(B)(iii) of the Act. Specifically, we found that by granting Essar protection under the BRU and by prohibiting Essar's creditors from pursuing any pending litigation against the company, the GOG directed the creditors to not collect principal and interest payments on loans that otherwise would be due. We also found that the limitations imposed on the creditors by the GOG conferred a benefit upon Essar, under section 771(5)(E)(ii) of the Act, in an amount equal to the principal and interest it would have had to pay absent the legal protection afforded

under the BRU. We also found that the GOG exercises discretion in the manner in which it grants approval under the program to a limited number of users. Therefore, we found that this program is specific as provided for under section 771(5A)(D)(iii)(I) of the Act. While we received comments from the parties on this issue, we continue to find for these final results that the program is countervailable. See Comments 5 and 6, below.

To calculate the benefit to Essar, we summed the amount of the principal and interest payments that Essar would have otherwise been required to make had it not been under the protection of the BRU. We used the company-specific interest rates to calculate what Essar would have paid. We then treated these payments as interest-free short-term loans using the short-term interest benchmark, as discussed in the "Benchmarks for Loans and Discount Rate" section above. See also Comment 6, below. We divided this amount by Essar's total sales for 2002 (as the protection under the BRU did not take effect until March 19, 2002, we are not calculating a net subsidy rate for this program for 2001). On this basis, we find that Essar received a countervailable subsidy of 1.43 percent ad valorem for 2002.

4. Duty Entitlement Passbook Scheme

In the Preliminary Results, we found that Essar received benefits under the DEPS program. See 67 FR 912. As explained in the Preliminary Results, we found that Essar earned DEPS credits on its shipment of subject merchandise to the United States in 2002.

In PET Film, the Department determined that DEPS conferred countervailable subsidies on the respondents: 1) a financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided under the program, as the GOI provides the respondents with credits for the future payment of import duties; 2) since the GOI does not have in place and does not apply a system to confirm which inputs, and in what amounts, are consumed in the production of the exported products that is reasonable and effective for the purposes intended, under section 351.519(a)(4) of the Department's regulations and section 771(5)(E) of the Act, the entire amount of import duty exemption earned by the respondents during the POI constitutes a benefit; and 3) this program can only be used by exporters and, therefore, is specific under section 771(5A)(B) of the Act. See the "DEPS" section of the PET Film Decision Memorandum. No new information or evidence of changed circumstances have been presented in this review to warrant reconsideration of these findings.

In October 2003, Essar claims that it switched the license it earned under the DEPS program to a license under the Duty Free Remission Certificate Scheme (DFRCS). Essar claims that the DFRCS program is similar to the Advance License program, a program under which duty exemptions are not countervailable provided that the input imported under the program is physically incorporated into the exported product. Essar also claims that, as it did not use the DEPS credits during the POR to receive duty exemption on imported inputs, the Department should not find that it received any benefits under the DEPS program during the POR. Essar further claims that it switched the credits (after the POR) in order to avoid any countervailable duties associated with the DEPS program.

We note that in CTL Plate, we stated that, "benefits from the DEPS program are conferred as of the date of exportation of the shipment for which the pertinent DEPS credits are earned rather than the date the DEPS credits are used. At that time, the amount of the benefit is known by the exporter."

See Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from India, 64 FR 73131 at 73134 (December 29, 1999) (CTL Plate) and at Comment 4 "Timing and Calculation of DEPS Benefits.," We received comments on this issues. However, we continue to find that the DEPS program provided a benefit as of the date of exportation. See Comment 2 below.

To derive the DEPS program benefit, we first calculated the value of the credits that Essar earned for its export shipments of subject merchandise to the United States during the POR by multiplying the f.o.b. value of each export shipment by 14 percent, the percentage of DEPS credit allowed under the program. We then subtracted as an allowable offset, in accordance with section 771(6)(A) of the Act, any application fees paid. Finally, we divided the total value of the credits net of application fees paid by Essar's total exports of subject merchandise to the United States during 2002. On this basis, we determine the net countervailable subsidy from this program to be 14.01 percent ad valorem for 2002.

II. Programs Determined To Be Not Used

A. Corporate Debt Restructuring (CDR)
B. Duty Free Remission Certificate Scheme
C. Sick Industrial Companies Act and Board for Industrial and Financial Reconstruction
D. Advance Licenses
E. Exemption of Export Credit from Interest Taxes
F. Income Tax Deductions Under Section 80 HHC
G. Post-Shipment Export Financing

III. Total Ad Valorem Rate

The net subsidy rate for producers/exporters of subject merchandise are as follows:

| **Producer/Exporter** | **2001 Net Subsidy Rate** | **2002 Net Subsidy Rate** |
|---|---|---|
| Essar Steel Limited (Essar) | 1.69 percent ad valorem | 16.88 percent ad valorem |

IV. Analysis of Comments

**Comment 1: Denominator for the Pre-Shipment Export Financing Program**

Petitioners argue that the Department used an incorrect denominator for calculating the ad

valorem rate for the pre-shipment export financing program by using Essar's total export sales as the denominator. Petitioners argue that the Department should revise its calculations for the final results by using the value of Essar's exports of subject merchandise to the United States, as the denominator for calculating the subsidy rate. Petitioners claim that Essar is able to tie its pre-shipment export financing to its exports of the subject merchandise to the United States, and doing so would be consistent with the calculation methodology employed in the HRC Investigation.

Petitioners also argue that the Department should not prorate the liability by the actual number of days remaining. They argue that the Department should instead calculate the benefit to Essar from the unpaid duties on those imports as a contingent liability for the full year in which the imports occurred.

Respondent did not comment on this issue.

Department's Position:

We agree with petitioners that we incorrectly calculated the ad valorem rate for Essar's pre-shipment export financing program. As noted in the HRC Investigation, the Department found that the respondent companies were able to tie their pre-shipment export financing to specific shipments, by the letters of credit that accompanied the shipments; therefore, the Department determined that it was more appropriate to use the respondent companies' exports of subject merchandise to the United States, as the denominator. See HRC Investigation Decision Memo at Comment 10. We find that the methodology used in the HRC Investigation is an appropriate methodology to apply with respect to the facts of this review. As we are able to tie Essar's use of the pre-shipment export financing program to its respective shipment of subject merchandise to the United States, for the final results, we are using Essar's exports sales of subject merchandise to the United States as the denominator in the subsidy calculation.

However, we disagree with petitioners' position that we should not prorate the pre-shipment export financing program by the actual number of days the loan was outstanding. In performing a benefit calculation on loans, it is the Department's normal practice to calculate the benefit beginning on the date of the receipt of the loan. For example, if company X receives a countervailable loan on June 01, the Department will not calculate a benefit to include the period from January to May 31. This method would overstate the benefit. We also disagree with petitioners' statement that the Department did not use this methodology in calculating the benefit under this program in the HRC Investigation. In HRC Investigation, the Department did, in fact, prorate the benefit for loans under this program. Therefore, we conclude that it is appropriate and consistent with our long-standing practice to calculate a benefit based on the actual number of days that the loan was outstanding.

**Comment 2: Financial Contribution and Benefit under the DEPS program**

Respondent argues that the Department incorrectly found in its Preliminary Results that a financial contribution was provided to Essar under the DEPS program. Essar asserts that it does not question the countervailability of the DEPS program, as such. Essar, however, questions its application to the facts of this review, since the evidence in this case does not support a finding that a financial

contribution was provided. Essar claims that the Department's finding of a financial contribution was based on the assertion that the GOI provides companies with credits for future payment of import duties, and this assertion is not reconcilable with the verification report which states that, ". . . the company did not use DEPS license on sales of subject merchandise to the United States during the POR." See Essar's Verification Report at 6.[3]

The company further claims that it mistakenly processed its U.S. shipment under the DEPS program. When the company discovered the error, Essar requested the GOI to grant the duty drawback under the Duty Free Remission Certificate (DFRC) scheme. According to the company, the GOI granted this request on May 21, 2003. Essar further supports its claim by citing to the GOI verification report which states that the GOI allows the switching from a DEPS to a DFRC as long as no claims have been made against the license. See GOI Verification Report at 15.[4] The company also points to numerous places in its questionnaire responses where it stated that it did not use the DEPS licensing program.

Respondent claims that there are other instances where a respondent company received DEPS on some but not all shipments to the United States. In these instances, the Department calculated the benefit based on those shipments for which the respondent actually applied for DEPS. In other cases, respondent asserts that the Department considered circumstances where the respondent firm earned DEPS credits without actually using them. Respondent relies on the Department's determination in PET Film, which found that the respondent company did not benefit from DEPS because it applied for duty drawbacks for certain U.S. sales of subject merchandise under the advance license program. Respondent claims that as the advance license program had been found not countervailable, the Department excluded the U.S. sales claimed under the advance license scheme from the subsidy rate calculated for the DEPS. Respondent also claims that in the HRC Investigation, Essar's benefit calculation under the DEPS program was significantly lower than other respondents, thus, drawing the conclusion that not all of Essar's shipments to the United States used DEPS or earned DEPS credit.

Essar also cites Castings from India where the Department found that three respondents sold their DEPS licenses. See Certain Iron-Metal Castings From India: Preliminary Results and Partial Recission of Countervailing Duty Administrative Review, 64 FR 61592 (November 12, 1999) (Castings from India). Essar cites this case to demonstrate that the Department treated the revenue received from these sales as a benefit but excluded the U.S. shipments where DEPS credit was available but not used. Respondent distinguishes this case from CTL Plate, which the Department relied on for the Preliminary Results, where the Department found that the responding company earned and used credits but did not transfer a license. See CTL Plate 64 FR 73131.

Respondent also relies on the Essar's Verification Report in support of its arguments that no

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[3] December 8, 2003 Memorandum from Tipten Troidl, Cindy Robinson, Maura Jeffords to Melissa G. Skinner RE: Verification of the Questionnaire Responses Submitted by Essar Steel, Limited (Essar) (Essar's Verification Report).

[4] December 8, 2003 Memorandum from Tipten Troidl, Cindy Robinson, Maura Jeffords to Melissa G. Skinner RE: Verification of the Questionnaire Responses Submitted by the Government of India (GOI) (GOI's Verification Report).

benefit was conferred onto Essar by the DEPS program. Respondent points to the detailed description of the DFRC scheme compared to the four sentences written on the DEPS as evidence that no benefit was conferred to Essar. See Essar's Verification Report at pages 7-8.

Respondent argues that the Subsidies and Countervailing Measures (SCM) Agreement provides that a countervailing duty cannot be in excess of the amount needed to offset any subsidy found to exist. Based on this provision and on the fact that the SCM Agreement limits the instances in which a government contribution and benefit result in a subsidy, Essar argues that it received nothing of value because its comparative market advantage was not improved.

Essar further argues that under both the SCM Agreement and U.S. law, a respondent could have only received a subsidy if a person has in fact received something. Essar claims that it received nothing because it transferred the U.S. shipment to the DFRC scheme and received GOI approval to do so.

In the alternative, respondent argues that if the Department finds that Essar did receive a benefit under the DEPS program, at the time of export, the subsidy was extinguished when Essar switched the shipment from the DEPS to DFRC. In short, Essar's withdrawal of the shipment under the DEPS program had the effect of paying back any subsidy. Respondent points to the argument summarized above, that the Department's calculation failed to reflect the fact that Essar processed its U.S. shipment under the DEPS and later switched to the DFRC scheme, precluding any benefit receipt under the DEPS.

Citing the Preamble to the countervailing duty regulations, respondent claims that the Department has a longstanding practice of recognizing that countervailable subsidies may be extinguished upon some subsequent event, such as the return of a countervailable grant, repayment of a countervailable loan or the privatization of a government-owned company. Respondent cites several cases to support the extinguishment of subsidies: Pure and Alloy Magnesium from Canada, where the Department found no countervailable subsidy remained when respondent company repaid a government grant; Pure Magnesium from Israel, where the Department found that respondent company repaid only one grant and excluded the repayment amount from the benefit calculation; and Computer Aided Software from Singapore, where the Department found that the program did not provide the responding company with a countervailable benefit from a government workers program because respondent's reimbursement of employee's salary and benefits to the government eliminated the prior subsidy. See Final Affirmative Countervailing Duty Determination: Pure Magnesium and Alloy Magnesium from Canada, 57 FR 30946 (July 13, 1992) (Pure and Alloy Magnesium from Canada); Final Countervailing Duty Determination: Pure Magnesium from Israel, 66 FR 49351 (September 27, 2001) and accompanying Decision Memorandum; and Final Negative Countervailing Duty Determination: Certain Computer Aided Software Engineering Products from Singapore, 55 FR 12248 (April 2, 1990) (Computer Aided Software from Singapore). Furthermore, respondent also uses the Department's analysis in privatization cases to support its claim that the Department has a well-established practice of allowing subsequent events to extinguish a subsidy and to assert that Essar's withdrawal from the DEPS program constitutes a subsequent event, thus extinguishing the receipt of the subsidy.

Respondent further argues that the payback analysis it proposed does not amount to an "effects test." The Department's repayment methodology does not require that the Department examine the

effects of a subsidy to determine the existence of a subsidy. Measurement of the benefit of prior subsidies, according to the respondent, requires the Department to address the impact of certain subsequent events. Essar also emphasizes that the Department's analysis should be on a case-by-case basis which in this case requires the Department to analyze Essar's withdrawal from the DEPS program.

Petitioners argue that respondent's contention that Essar did not receive a financial contribution from the GOI nor did it benefit from the DEPS program, is without merit. Petitioners claim that Essar earned credits under DEPS for the future payment of import duties, and these credits fulfill the criteria set forth under section 771(5)(D)(ii) of the Act, which defines a financial contribution as foregoing or not collecting revenue that is otherwise due. Petitioners further assert that the Department properly found that Essar's DEPS credits constituted a financial contribution from the GOI.

Petitioners assert that the Department correctly found that on the date of exportation Essar received a benefit by receiving DEPS credits. Petitioners note that under section 351.519(b)(2) of the Department's regulations, where a program like DEPS permits exemption of import duties upon export, the Department normally will consider the benefit as having been received as of the date of exportation. Petitioners counter respondent's argument that the Department should not be calculating a benefit on the basis of when the benefit was earned. Rather, petitioners argue that since the exact amount of exemption is known at the time of exportation, the date of exportation should determine when a benefit is conferred and not the date when the DEPS credits are used. Petitioners note that parties in CTL Plate raised similar concerns, and that the Department in that case rejected those arguments and calculated the benefit starting at the time of exportation.

Next, petitioners refute respondent's claim that the facts in this case are "unique" because the shipment was transferred to another program. First, petitioners argue that Essar has had experience in using the GOI's export promotion programs, including the DEPS and the DFRCS, and that there was no mistake in using the DEPS. Second, petitioners contend that Essar simply did not transfer the shipment to a different program, as there is no evidence on the record that the GOI approved the switch from the DEPS to the DFRCS program.

Petitioners also rebut respondent's argument that Essar did not receive a benefit under the DEPS program. Petitioners claim that Essar misinterprets the Department's verification report. Specifically, petitioners argue that the Department's statement that Essar, "did not use a DEPS license on sales of subject merchandise to the United States during the POR" only acknowledged that Essar did not use the DEPS credits that it earned during the POR. Petitioners also disagree with respondent's citation to PET Film. Petitioners claim that the Department in PET Film excluded certain U.S. sales from the DEPS calculation because the shipments were claimed under another program, the advance license scheme. Therefore, the Department did not make any determination that the respondent earned DEPS credits without actually using them, and it did not decline to countervail these credits on that basis.

Furthermore, petitioners assert that record evidence demonstrates that the Department's finding of a benefit to the recipient in this case is fully consistent with the SCM Agreement and U.S. law. Specifically, petitioners stress that the World Trade Organization (WTO) Appellate Body found that Article 14 of the SCM Agreement and section 771(5)(E) of the Act require the Department to focus a subsidy analysis on the benefit to the recipient and not to the cost of the government. See Canada -

Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R (August 2, 1999), at para. 156. Petitioners claim that the Department's finding that Essar received a benefit is in accordance with this standard.

Petitioners also counter respondent's claim that the record reflects that Essar did not receive benefits from the DEPS credits because it withdrew from the DEPS program, it never claimed DEPS credits, and it cannot apply them towards future imports. Petitioners further disagree with respondent's contention that the DEPS credits were extinguished. Petitioners argue that Essar's contention would require the Department to determine the use or effect of the program, in violation of the statute and the Department's longstanding practice. Petitioners note that section 771(5)(C) of the Act provides for the Department not to consider the effect of the subsidy in determining whether a subsidy exists. Section 351.503(c) of the Department's regulations also provides that in determining whether a benefit is conferred by a subsidy, the Department does not consider the effect of the government action on the recipient firm's performance or how the firm's behavior is otherwise altered. To support their point, petitioners cite to Industrial Phosphoric Acid from Israel, where the Department stated that, "because neither the statute nor the Department's regulations permit an analysis of the use and effect of subsidies, the Department does not attempt such an analysis." See Industrial Phosphoric Acid from Israel: Final Results of Countervailing Duty Administrative Review, 64 FR 2879 at 2885 (January 19, 1999) (Industrial Phosphoric Acid from Israel). In addition, petitioners cite to Hot-Rolled Steel from Thailand, where the Department found that, "what a company chooses to do with a subsidy it receives is not relevant to our determination of the amount of the benefit. . . Accordingly, no adjustment was made in calculating the benefit from the provision of electricity." See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 66 FR 50410 (October 3, 2001) (Hot-Rolled Steel from Thailand) and Decision Memorandum in Hot-Rolled Steel from Thailand at Comment 14.

Department's Position:

We disagree with respondent's argument that no financial contribution or benefit existed under the DEPS program during the POR. We find that Essar's claim that the processing of the shipment under DEPS was a mistake is irrelevant. Essar acknowledges that it processed its U.S. sale under the DEPS despite its initial questionnaire response stating that no DEPS was used. It is the Department's practice to find a financial contribution in cases of duty drawback schemes, such as the DEPS, when a government program foregoes revenue under section 771(5)(D)(ii) of the Act. See Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Determination with Final Antidumping Determinations: Certain Hot-Rolled Carbon Steel Flat Products from India, 66 FR 20240, 20245 (April 20, 2001); PET Film Decision Memorandum at II.A.2. Essar's argument that it did not receive a benefit is incorrectly premised on determining the time of receipt to be when it used the credits. Essar claims that the Department should not have found a benefit was conferred on an "as earned" basis at the time of exportation. However, Essar misinterprets the Department's practice. In PET Film Preliminary Determination, the Department found that the respondent company received a benefit under the DEPS licensing scheme when the company exported subject merchandise, *not when the duties were refunded*. See Notice of Preliminary Affirmative

Countervailing Duty Determination and Alignment of Final Countervailing Determination with Final Antidumping Duty Determination: Polyethylene Terephthalate Film, Sheet and Strip from India, 66 FR 53389 at 53392-3 (October 2001) (emphasis added) (PET Film Preliminary Determination) and later finalized in PET Film. An important aspect of the DEPS program is that these licenses can be sold or traded for value, and, given this feature, the Department calculates the benefit as earned upon exportation, since the exporter knows the amount it will receive back at the time of exportation.

We disagree with respondent's claim that the Department's verification report confirms that Essar did not receive a financial contribution or benefit from a DEPS license during the POR on the basis of the statement in the report that "the company did not use a DEPS license on sales of subject merchandise to the United States during the POR." See Essar's Verification Report at 6. The verification statement was not intended to mean that Essar had not received a financial contribution or benefit from the DEPS. The quoted passage simply means that Essar had not claimed any imports against the shipment. The company acknowledges it processed the U.S. sale under the DEPS, and exhibits collected at verification show that the respondent did claim DEPS on its sale of subject merchandise to the United States. See Essar Verification Exhibit 6. Therefore, contrary to respondent's argument, the Department's determination regarding the DEPS will not result in assessing countervailing duties in excess of the amount needed to offset a subsidy. The Department has previously determined that the DEPS is countervailable when earned, that is when exportation occurs. As such, we find that Essar received a tangible benefit at the time of exportation.

We also disagree with the argument that the benefit from the DEPS licensing program was extinguished because the company switched the license to the DFRC. During verification, we gathered information about the DEPS program and the transferral of the DEPS license to a DFRC. We also reviewed a letter from the Director General of Finance and Trade (DGFT) informing Essar that it could switch its U.S. shipment from the DEPS to the DFRC, to avoid action against the company in a countervailing duty investigation. See Exhibit 6 of Essar's Verification Report. However, the GOI's Ministry of Commerce's Handbook of Procedures states that Indian Customs must also approve the transferral of a license and there is no information on the record of Indian Customs granting this approval. See GOI Verification Exhibit 5. Evidence on the record, however, does not demonstrate that Essar received approval from both the DGFT and Indian Customs; and, therefore, we find that evidence on the record does not support Essar's claim that DEPS license was switched to a DFRC license. Consequently, this case is distinguishable from Pure and Alloy Magnesium from Canada, Pure Magnesium from Israel, and Computer Aided Software from Singapore, as we found that the subsidy was not extinguished.

**Comment 3: Benefit Calculation for the DEPS**

Petitioners claim that the Department inadvertently used an incorrect amount for a deduction it made when calculating the benefit conferred under the DEPS program and should correct this error for the final results.

Respondent challenges petitioners' contention that an error was made in the benefit calculation by claiming that no benefit was received by Essar, so no revision is required.

Department's Position:

We disagree with the petitioners' comment about the amount used for the deduction in calculating the benefit conferred by the DEPS program. We collected information at verification that supports the amount used by the Department. See Verification Exhibit 7, and Exhibit 5 at 6, 12 and 14. The proprietary information contained in these documents demonstrates that the Department used the correct amount.

**Comment 4: Revision of Benefits under the Export Promotion Capital Goods Scheme (EPCGS)**

Petitioners claim that the Department incorrectly calculated the benefit under the EPCGS program on goods imported in 2001 and 2002, and applied a different methodology from that used in the HRC Investigation. They claim that the Department should have followed the methodology used in the investigation and calculate the benefit from the unpaid duties for the full year in which the imports occurred, rather than prorating the interest on the unpaid duties over the actual number of days remaining in the year at the time the imports were made.

Essar maintains that the Department should not revise the calculation for the EPCGS benefit. Essar argues that the Department is correct in treating the benefit from an EPCGS license as a short-term loan while export contingencies are still outstanding. Essar compares the calculation of the EPCGS benefit to the calculation of pre-shipment export financing where the Department calculated the benefit based on the actual number of days that the loan was outstanding. Essar alleges that the same approach should be used in the case of the EPCGS, i.e., by prorating the contingent liability over the actual number of days remaining in the year at the time the imports were made.

Essar claims that not prorating the liability would overstate the benefit. Essar argues that the benefit from the EPCG program is received when the duty on capital goods is payable. Essar further argues that petitioners are incorrect in arguing that the Department should impute a benefit when one was not received. For these final results, Essar urges the Department to continue prorating the amount to avoid overstating the margin and to be consistent with U.S. countervailing duty law and WTO rules.

Department's Position:

We disagree with petitioners' allegation that we incorrectly calculated the benefit on the EPCGS licenses. While petitioners are correct in asserting that the methodology used in the Preliminary Results is different from that employed in the HRC Investigation, we do not agree that it is appropriate to follow the methodology applied in the HRC Investigation. In the HRC Investigation for those licenses which were taken out during the POR, we calculated a benefit on the entire year. After further review, the Department finds that this approach overstates the benefit. In the Preliminary Results we found that the EPCGS licenses were contingent liabilities and therefore, we treated them as interest-free loans. It is the Department's longstanding practice to find a benefit on a countervailable loan as of the date of receipt of the loan. This approach more accurately reflects the program and does not overstate the benefit. Therefore, we continue to prorate the contingent liability by the actual days that the license

was outstanding.

**Comment 5: Benefit under the Bombay Relief Undertaking Act (BRU)**

Essar disagrees with the Department's statement in the Preliminary Results that the protection under the BRU conferred a benefit. Essar states that in its September 15, 2003 submission, it reported that "the BRU does not provide any financial relief whatsoever." In addition, Essar cites to the verification report, which states that while Essar was under the BRU protection, the company negotiated a settlement with its foreign rate note (FRN) holders and repaid the obligations. They claim this is evidence that the BRU did not provide a benefit to Essar.

Petitioners disagree with respondent's position that the BRU did not provide any financial relief. Petitioners point to the GOI Verification Report which states that the BRU allows for suspension of interest and principal payments. See GOI Verification Report at 10. Petitioners allege that the BRU expressly provides that where a company is declared a relief undertaking, "any . . . obligation or liability accrued or incurred before the undertaking was declared a relief undertaking and any remedy for the enforcement thereof shall be suspended . . ." See Essar's October 2, 2003 Supplemental Response at Exhibit 10 page 5. In addition to the stay of any legal enforcement measure, petitioners allege that Essar also received a moratorium on, or suspension of, any interest and principal payment on its outstanding loans for a one-year period.

With regard to respondent's claim that while under the BRU protection, Essar negotiated a settlement with FRN holders in May 2003 and repaid its obligations to them in July 2003 as evidence that no financial relief was provided, petitioners argue that it is irrelevant. Petitioners contend that the repayment occurred after the POR and has no bearing on the suspension of interest and principal payments that occurred during the POR.

Department's Position:

We disagree with respondent's assertion that the BRU did not provide a benefit to Essar. Section 4(1)(a)(iv) of the BRU states, "any right, privilege, obligation, or liability accrued or incurred before the undertaking was declared a relief undertaking and any remedy for the enforcement, thereof shall be suspended and all proceedings relative there to pending before any court, Tribunal, officer or authority shall be stayed." See Essar's October 2, 2003 at Exhibit 10. Pursuant to this provision, for the period that it was designated as a relief undertaking company under the BRU, Essar's principal and interest payments were suspended. As such, Essar benefitted by being under the protection of the BRU by the amount of principal and interest that it did not pay. Essar's allegation that it did not receive a benefit is, therefore, contrary to the facts and evidence in this case, that, had it not been under the protection of the BRU, it would have been required to make principal and interest payments. We therefore continue to find that Essar received a benefit under the BRU.

Furthermore, we disagree with respondent's argument that repayment of FRN holders demonstrates that it repaid its obligation and therefore a benefit was not conferred. As noted by respondent, repayment to the FRN holders occurred in July 2003, outside of the POR and outside of the period when Essar was under the protection of the BRU. Therefore, this argument does not

demonstrate that Essar did not receive a benefit under the BRU during the POR.

**Comment 6: Recalculation of the Benefit to Essar under the BRU**

Petitioners claim that the Department, in the preliminary results calculation, used an incorrect benchmark rate for calculating Essar's countervailable subsidy benefit under the BRU. Petitioners request that for the final results, in accordance with clear practice, the Department use Essar's long-term benchmark interest rate for 2002 to calculate the interest otherwise due. Petitioners base their argument on the results reached by the Department in HRC Investigation and the Department's Decision Memorandum at Comment 5 in Final Affirmative Countervailing Duty Determination: Structural Steel Beams From the Republic of Korea, 65 Fed. Reg. 41051 (July 3, 2000) (H-Beams). Petitioners state that, in those cases, the Department calculated the benefit received from similar suspensions by first calculating the interest payment due using the respondent's long-term interest rate for the period of suspension. The Department then multiplied the amount of the payments otherwise due by the respondent's short-term benchmark interest rate to arrive at a benefit attributable to the suspension of interest payments. Citing to the HRC Decision Memo at Comment 4, petitioners further assert that the Department calculated the benefit for suspension of interest payments received by the Steel Authority of India, Ltd. (SAIL) in the HRC Investigation by using this methodology.

Petitioners assert that if the Department does not change the benchmark rate to a long-term rate, it should use company-specific data. Petitioners argue that certain loans in question had interest rates above the rate the Department used as the benchmark rate.

Petitioners also argue that the interest rates for many, but not all the loans in question, were reduced pursuant to the Corporate Debt Restructuring (CDR). As the Department found that the CDR did not take effect until after the POR, the reduction in interest rates pursuant to the CDR should not be in effect during the POR.

Respondent challenges petitioners' argument, stating that the BRU does not provide any financial relief and therefore did not provide a benefit to Essar. Essar argues that the BRU only gives relief from legal proceedings. In the alternative, Essar states that if the Department continues to find that the BRU is a countervailable program, the benchmark used in the preliminary calculations should be applied for the final results.

Department's Position:

We disagree with petitioners' claim that we should calculate the amount of interest that Essar would have paid absent the suspension by using the long-term benchmark rate, rather than Essar's actual interest rate that was in effect during the POR. The methodology employed in the HRC Investigation was based on the facts of that case. The facts in this case do not support using that calculation methodology in this proceeding.

The Department determined in HRC Investigation that the Steel Development Fund (SDF) loans conferred countervailable subsidies on subject merchandise because of the GOI's control over the fund. See HRC Investigation Decision Memorandum at I.F. "Loans from the Steel Development Fund (SDF)" and Comment 1. Accordingly, for calculation purposes the Department treated these loans as

if they were government loans when it determined the benefit attributable to the interest payment suspension under the SDF loan program. The Department adopted a similar approach in H-Beams, in terms of how it viewed directed credit. See H-Beams Decision Memorandum at I.A.2. "The GOK's Credit Policies from 1992 through 1998". In H-Beams, the Department determined that the Government of Korea controlled and directed the lending practices of domestic and government-owned banks. In both of these cases the Department first found that the respondent companies received countervailable loans with interest rates that were less then the benchmark rate from either government directed programs or from governmental sources.

In the instant proceeding, there was neither an allegation nor is there information on the record to suggest that the loans for which interest and principal payments were suspended were either government loans or that the GOI directed these loans to be made to the steel sector or to Essar directly. Therefore, it is not necessary, nor appropriate to calculate what Essar should have paid by using a long-term benchmark rate as there is no finding that the loans, *per se*, are countervailable. Therefore, we find that in our Preliminary Results, we properly calculated the benefit conferred to Essar under the BRU, by first determining the amount of interest that Essar would have paid during the POR using the actual interest rates charged on the suspended loans and then multiplying that amount by Essar's short-term benchmark interest rate.

**Comment 7: Changes to Draft Customs Instructions**

Respondent notes that the Department in its draft liquidation instructions applied section 351.212(c) of the Department's regulations, which covers automatic assessment of antidumping and countervailing duties if no review is requested. Since Essar in fact did request a review and the Department has conducted a review, the draft instructions included certain language that is inappropriate. Specifically, paragraphs 3 and 4 of the draft liquidation instructions are not appropriate for liquidation instructions covering this review. In addition, certain dates referenced in paragraph 3 are incorrect and should be corrected for the final instructions.

Petitioners also note that paragraphs 3 and 4 of the liquidation instructions are incorrect. They suggest that the two paragraphs be combined into a single paragraph that simply instructs the CBP to assess countervailing duties by the rates determined by the final results and any reference to cash deposits of estimated countervailing duties is not necessary. Furthermore, petitioners claim that paragraph 5 of the draft liquidation instructions is unclear on how to calculate over or underpayment of interest.

Essar claims that the draft cash deposit instructions is missing an effective date. Essar also contends that the language incorrectly reads "on or after date" and should read "on or after the date of publication of this notice."

Department's Position:

We agree with both parties that the draft liquidation instructions incorrectly applied section 351.212(c) of the Department's regulations. In addition, we agree that the language used in paragraphs 3 and 4 of the draft liquidation instruction is incorrect and will be corrected for the final liquidation

instructions. Regarding the draft cash deposit instruction, we will use as the effective date, the date of publication of the notice of final results of this review.

V. Recommendation:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review in the Federal Register.

_____ _____

Agree Disagree

_____

Jeffrey A. May
Acting Assistant Secretary
for Import Administration

_____

Date