

71 FR 28665, May 17, 2006

C-533-821
AR: 2004
Public Document
Office 3: TT/PT

May 10, 2006

MEMORANDUM TO: David M. Spooner
Assistant Secretary
Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
Import Administration

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

Summary

We have analyzed the comments and rebuttal comments of interested parties in the administrative review of the countervailing duty (CVD) order on certain hot-rolled carbon (HRC) steel flat products from India for the period January 1, 2004, through December 31, 2004. After analyzing the comments, we have made certain modifications to the Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 1512 (January 10, 2006) (Preliminary Results). The “Subsidies Valuation Information” and “Analysis of Programs” sections below describe the methodology followed in this review with respect to Essar Steel Ltd. (Essar), the producer/exporter of subject merchandise covered by this review. Also below is the “Analysis of Comments” section, which contains the Department of Commerce’s (Department’s) response to the issues raised in the briefs.

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

- Comment 1: Correct Calculation of State Government of Gujarat Tax Incentives Program
- Comment 2: Benchmark Price for High-Grade Iron Ore
- Comment 3: Benefit Calculation for the Sale of High-Grade Iron Ore for Less than Adequate Remuneration
- Comment 4: Denominator Used in Calculating the Export Promotion of Capital Goods Scheme (EPCGS) Subsidy Rate
- Comment 5: Inclusion of a Line Item in an EPCGS License Calculation

I. SUBSIDIES VALUATION INFORMATION

A. Benchmark for Short-Term Loans

In the Preliminary Results, in accordance with 19 CFR 351.505(a)(3)(ii), the Department used a national average interest rate from the International Monetary Fund publication of International Financial Statistics for any program requiring the application of a short-term benchmark interest rate. See Preliminary Results, 71 FR at 1513. Consistent with the Preliminary Results, we continue to use the same benchmark for the final results.

B. Benchmark for Long-Term Loans issued up to 2000

In the Preliminary Results the Department used, where available, company-specific weighted-average interest rates on commercial rupee denominated long-term loans. Id. For the years which Essar did not have rupee-denominated long-term loans from commercial banks, the Department relied on rupee-denominated long-term benchmark interest rates from the year immediately preceding, as directed by 19 CFR 351.505(a)(2)(iii). Consistent with the Preliminary Results, we continue to use the same benchmark for the final results.

C. Benchmark for Long-Term Loans issued in 2001 and 2002

As noted in the Preliminary Results the Department found Essar to be uncreditworthy during 2001 and 2002. For the final results, we continue to use an uncreditworthy benchmark for any programs requiring a long-term benchmark for 2001 and 2002, as directed by 19 CFR 351.505(a)(3)(iii).

D. Benchmark for Long-Term Loans issued in 2003 and 2004

Consistent with the Preliminary Results, we continue to use Essar's company-specific rupee-denominated long-term benchmark interest rate for 2003 and 2004 for the final results. Id.

II. ANALYSIS OF PROGRAMS

A. Programs Determined to Confer Subsidies

1. Export Promotion of Capital Goods Scheme

In the Preliminary Results and prior proceedings¹ we determined that the import duty reductions provided under the EPCGS constituted a countervailable export subsidy. In both the HRC 1st AR Decision Memo and the PET Film Decision Memo, at section II.A.4. "EPCGS", the Department found that under the EPCGS program, the Government of India (GOI) provides a

¹ Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 69 FR 26549 (May 13, 2004) (HRC 1st AR Final) and Accompanying Issues and Decision Memorandum (HRC 1st AR Decision Memo), Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip from India, 67 FR 34950 (May 16, 2002) (PET Film), and PET Film Issues and Decision Memorandum (PET Film Decision Memo).

financial contribution pursuant to section 771(5)(D)(ii) of the Tariff Act of 1930, as amended (the Act), in the form of revenue forgone that would otherwise have been due, thereby conferring a benefit to Essar, as defined by section 771(5)(E) of the Act. Moreover, this program is specific under section 771(5A)(B) of the Act, as it is contingent upon export performance. No comments have been submitted warranting reconsideration of this determination; we therefore continue to find that this program is countervailable.

However, our calculation of the program specific subsidy rate has changed since the Preliminary Results. The Department has corrected an error in a line item on one of Essar's EPCGS licenses. See Comment 5. In addition, although petitioner argued that the Department should use exports of subject merchandise as the denominator in calculating the ad valorem rate for this program, we have continued to use Essar's total exports as the denominator. See Comment 4, for more details. Therefore, we determine the net countervailable subsidy from this program to be 0.74 percent ad valorem.

2. State Government of Gujarat (SGOG) Tax Incentives

In the Preliminary Results, the Department found that this program provided a countervailable subsidy. See Preliminary Results, 71 FR at 1515. We found that pursuant to section 771(5A)(D)(iv) of the Act, this program is specific as it is limited to only those companies that make an investment in a specified disadvantaged area. Furthermore, we found that the SGOG provided a financial contribution in accordance with section 771(5)(D)(ii) of the Act, as revenue foregone, as it did not collect taxes that it would have otherwise collected absent this program. Essar received a benefit, as defined under section 771(5)(E) of the Act, in the amount of taxes that it did not pay. No comments have been submitted warranting reconsideration of this determination; we therefore continue to find this program to be countervailable. Id.

In the Preliminary Results, we calculated the benefit by multiplying the amount of purchases for which Essar reported it claimed tax exemptions in 2004 by the tax rate. Id. Upon further review, we find this method to be incorrect. See Comment 1. For the final results, we took the amount of tax exemptions that Essar claimed under the Pioneer and Prestigious programs as the benefit and divided it by Essar's total sales to calculate the ad valorem rate. On this basis we determine the net countervailable subsidy from this program to be 3.09 percent ad valorem.

3. Bombay Relief Undertaking (BRU) Act

In the HRC 1st AR Decision Memo, we found that the SGOG provided a countervailable benefit to Essar in the form of suspension of interest and principal payments. In the Preliminary Results, we found that during the period of review (POR) Essar applied for and was granted a one-year extension under the BRU. See Preliminary Results, 71 FR at 1516. As we did not receive comments on this issue, we continue to find that the SGOG's protection of Essar from litigation under the BRU continues to constitute a financial contribution under section 771(5)(B)(iii) of the Act. This, therefore, confers a benefit to Essar in an amount equal to the amount of interest and principal that it would have had to pay absent the legal protection

afforded under the BRU. As noted in the Preliminary Results, the BRU expired on September 10, 2004; we therefore are calculating a net subsidy rate for this program up to that date. Id. On this basis, we find that Essar received a countervailable subsidy of 0.63 percent ad valorem.

4. Sale of High-Grade Iron Ore for Less than Adequate Remuneration

The Department preliminarily found that Essar's purchases of high-grade iron ore from the National Mineral Development Corporation (NMDC), a government-owned entity, were made at less than adequate remuneration. See Preliminary Results, 71 FR at 1516. Pursuant to section 771(5)(D)(iii) of the Act, the Department preliminarily determined that the government provided a financial contribution where NMDC provided a provision of a good (*i.e.*, sales of high-grade iron ore) for less than adequate remuneration. Moreover, we also preliminarily found that this program is specific under section 771(5A)((D)(iii)(I) of the Act.

In fulfilling our requirements under section 771(5) of the Act, the Department must also determine whether a benefit is conferred. In the Preliminary Results, we found that the Department was unable to measure the adequacy of remuneration using actual market-determined prices in India, as directed by 19 CFR 351.511(a)(2)(i). Preliminary Results, 71 FR at 1517. Therefore, pursuant to 19 CFR 351.511(a)(2)(ii), the Department sought to measure the adequacy of remuneration by comparing the government price to a world market price. We received comments on our selection of the world market price. See Comments 2 and 3.

For the final results, we have modified our benchmark and our calculation. In the Preliminary Results we used an average price of lumps and fines from different mines to compare to NMDC's sales of high-grade iron ore to Essar. However, based on information submitted, Essar only purchased high-grade iron ore lumps during the POR. See Comment 2. Therefore, to conduct a more accurate comparison, we are using only prices of high-grade iron ore lumps as our benchmark. In addition, 19 CFR 351.511(a)(2)(iv) directs the Department to adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. Therefore, we used the f.o.b. port prices contained in the Tex Report. However, Essar's purchases of high-grade iron ore lumps were made on an ex-mine basis. Therefore, to ensure the most accurate comparison, we are including railway freight rates to adjust Essar's ex-mine price of high-grade iron ore in order to calculate a delivered f.o.b. port price. See Comment 3. We then compared the benchmark price to Essar's monthly f.o.b. port price and calculated an ad valorem rate of 0.10 percent.

B. Programs Determined Not to be Used

1. Duty Free Replenishment Certificate (DFRC)
2. Pre-Shipment Export Financing
3. Duty Entitlement Passbook (DEPS)
4. Target Plus Scheme
5. Advance Licenses
6. Tax Incentives from the State of Government of Maharashtra (SGOM)

C. Program Determined Not to Be Countervailable

1. Corporate Debt Restructuring

III. TOTAL AD VALOREM RATE

The total net subsidy rate for Essar is 4.56 percent ad valorem for the period January 1, 2004, through December 31, 2004.

IV. ANALYSIS OF COMMENTS

Comment 1: Correct Calculation of State Government of Gujarat Tax Incentives Program

Petitioner states that the Department erroneously calculated the benefit received by Essar and should correct this for the final results. In the instant case, petitioner notes that the Department calculated the benefit by multiplying the tax exemptions received by Essar by a tax rate of four percent. Therefore, petitioner argues that the Department erroneously calculated the benefit as if it was the value of the company's purchases upon which the taxes were exempted, rather than the amount of taxes Essar did not have to pay. Petitioner states that in PET Resin, the Department treated the amount of the sales tax exemptions received by the company as the amount of the benefit from that program. See Notice of Final Affirmative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate Resin from India, 70 FR 13460 (March 21, 2005) (PET Resin). Thus, petitioner argues that, consistent with the decision in PET Resin, the Department should treat the total amount of the sales tax exemptions received by Essar as the benefit to the company.

Essar did not comment on this issue.

Department Position

The Department agrees with petitioner that it erroneously calculated the benefit received by Essar. In the Preliminary Results, we found that Essar received a benefit under section 771(5)(E) of the Act in the amount of sales tax that Essar did not pay under this program. The Department has found that the benefit under SGOG's tax incentive program is the amount of sales tax exemptions. See PET Resin and accompanying Issues and Decision Memorandum at Section III.A.2.a. Therefore, we will correct this calculation for the final results and treat the total amount of the sales tax exemptions received by Essar as the benefit under this program.

Comment 2: Benchmark Price for High-Grade Iron Ore

Petitioner asserts that the benchmark that the Department used to compare Essar's purchases from NMDC did not properly measure the benefit. Petitioner argues that the

Department should not have included in the benchmark prices of high-grade iron ore fines as Essar's purchases of iron ore were for lumps only. Furthermore, petitioner contends that the price difference between lumps and fines is significant and results in the Department making an apples-to-oranges comparison. By using a benchmark that is a composite of lumps and fines, petitioner concludes that the Department is not accurately capturing the benefit from this subsidy. Petitioner asserts that for the final results the Department should modify its benchmark in order to make an accurate comparison and calculation of this program.

Essar disputes petitioner's argument that the Department should remove iron ore fines from the benchmark. Essar contends that record evidence supports the conclusion that it purchases both fines and lumps from the NMDC, and therefore, it is appropriate to include both lumps and fines in the benchmark price. Essar asserts that its long-term supply agreement with NMDC is for both fines and lumps, and that the contract between Essar and the NMDC includes purchases of iron ore fines. Essar, therefore, argues that the Department should continue to include iron ore lumps and fines in its benchmark price calculation.

Department Position

Although Essar's supply agreement with NMDC lists both lumps and fines, in response to the Department's requests for all of its purchases of high-grade iron ore during the POR, Essar provided only invoices for purchases of iron ore lumps during the POR. See Essar's August 25, 2005, Questionnaire Response at Exhibit 2, and the Department's January 3, 2006, Verification Report of Essar (Essar's Verification Report) at Exhibit E-16. See also the Department's July 19, 2005, New Subsidy Allegation Questionnaire for Essar at page 7, and the Department's September 20, 2005, Third Supplemental Questionnaire for Essar at page 5. Because the evidence on the record shows that Essar only purchased high-grade iron ore lumps during the POR, we agree with petitioner that for the world market comparison price to be as accurate as possible, it should only include prices of high-grade iron ore lumps. We are, therefore, modifying the world market benchmark price to include only prices of high-grade iron ore lumps and not fines.

Comment 3: Benefit Calculation for the Sale of High-Grade Iron Ore for Less than Adequate Remuneration

Essar claims that in calculating a benefit for the GOI's provision of high-grade iron ore for less than adequate remuneration, the Department used a non-comparative benchmark. Essar asserts that the Department used as its benchmark an f.o.b. Indian port value to compare to Essar's ex-mine prices. It contends that the potential benefit was overstated by the cost incurred in transporting the iron ore from the mine to the port.

Essar further notes that the Department did not ask for this information, and therefore, has not fulfilled its requirement for making a facts available determination under section 776(a) of the Act. Essar argues that the use of facts otherwise available is only appropriate where a request is made and, if the response to that request is deficient, an opportunity to remedy the deficiency is provided. Essar asserts that the Department never requested the benchmark information needed to determine whether a benefit exists and never provided Essar the

opportunity to remedy any deficiencies in the record. Essar cites Ta Chen where the Department resorted to facts available and the Court of International Trade (CIT) overturned the Department's decision because the Department had never specifically requested certain information. See Ta Chen Stainless Steel Pipe Ltd. v. United States, (CIT Oct. 28, 1999) (Ta Chen). Therefore, Essar argues that the Department must find that the GOI provision of iron ore is not countervailable. Alternatively, Essar states that it is willing to supply the Department with the necessary information to perform a comparison analysis.

Petitioner refutes Essar's argument that the Department incorrectly calculated the benefit for this program. Petitioner argues that Essar's position that the Department was not justified in using a benchmark based on facts available is incorrect. Specifically, petitioner contends that the Department in at least two separate questionnaires, its initial questionnaire and a supplemental questionnaire, requested benchmark information from Essar. Essar did not provide the requested information until asked again at verification. Moreover, petitioner argues that it was at the GOI's verification that the Department was informed that the Tex Report, the source ultimately used by the Department to determine the world market benchmark, functioned as a guideline for international iron ore prices. Thus, petitioner asserts that the Department made multiple requests for benchmark pricing information and that Essar failed to provide such information.

In addition, petitioner cites section 776(a) of the Act, as well as the Department's regulations, stating that the Department shall use facts available in reaching a determination if:

- (1) necessary information is not available on the record; or
- (2)
 - (a) a respondent withholds information that has been requested;
 - (b) a respondent fails to provide such information by the deadlines for submission of the information or in the form and manner requested;
 - (c) a respondent significantly impedes the proceeding; or
 - (d) a respondent provides such information but the information cannot be verified.

See section 776(a) of the Act and 19 CFR 351.308.

The application of facts available is required where any one of these criteria is met. Petitioner concludes that such is true in this case, and that Essar did in fact fail to provide the requested information. Therefore, petitioner asserts that the Department was justified in using facts available to determine an appropriate benchmark price.

Department Position

We agree with Essar that its ex mine prices should be adjusted to include railway freight, in order to make them comparable to the world market benchmark price. Pursuant to 19 CFR 351.511(a)(2)(iv), in measuring the adequacy of remuneration, the Department will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. The regulation further specifies that the price adjustment will include delivery charges.

In keeping with our regulations, in the Preliminary Results we based our benchmark on delivered prices, specifically prices on an f.o.b. port basis. However, in our preliminary

calculations, we compared these f.o.b. port prices with high-grade iron ore prices Essar paid to the GOI, which were on an ex-mine basis. Thus, in light of this discrepancy, we are adjusting Essar's ex-mine price to include railway freight.

To this end, we note that there is data on the record of this administrative review concerning the railway freight rates from mine to port that Essar paid on shipments of high-grade iron ore purchased from the GOI. See Essar's August 25, 2005, submission at Exhibit 2. Therefore, we have used the railway freight information provided by Essar to adjust the ex-mine price of high-grade iron ore lumps paid to the GOI. In this manner, we are able to compare both prices on a delivered, f.o.b. basis. For further information, see section C of the Final Results Calculation Memorandum, dated May 10, 2006.

We disagree with Essar's contention that the Department should either find this program to be not countervailable or request new information from Essar at this late date. As noted above, Essar provided the Department with rail freight information on its purchases of iron ore on August 25, 2005. Therefore, there is no need to request new information from Essar. Second, we disagree with Essar that this case is comparable to that in Ta Chen. Unlike the situation in Ta Chen, we specifically requested proposed benchmark information two times prior to verification, and neither time did either Essar or the GOI provide the Department with the requested information. However, we also disagree with petitioner that the application of facts available is warranted. Because, as noted above, the necessary information to determine Essar's freight rates is on the record, was provided within the relevant deadlines, and was verifiable, the Department does not find it appropriate to apply facts available pursuant to section 776(a) of the Act.

Comment 4: Denominator Used in Calculating EPCGS Subsidy Rate

In the Preliminary Results, the Department countervailed licenses received by Essar under the EPCGS. See Preliminary Results 71 FR at 1524. The Department calculated the subsidy rate by dividing Essar's total benefit under the program by its total export sales during the POR. Petitioner argues that the Department should recalculate the subsidy rate using Essar's export sales of the subject merchandise for the POR, rather than its total export sales, as the denominator. Petitioner further argues that the Department's regulations provide that a benefit must be attributed only to exports of that product. Petitioner states that in the first administrative review, the Department attributed the benefit from Essar's EPCGS licenses to total exports sales as well, but petitioner distinguishes that case from this review by stating that in the first administrative review Essar did not provide the appropriate information, and therefore, the Department had nothing to use but the total export sales. They state further that in this review, because Essar provided the requisite information at verification on the composition of its export sales during the POR, the Department has the necessary information to use sales of the subject merchandise only as the denominator.

Essar argues that the Department used the appropriate denominator in calculating the margin under the EPCGS. Essar states that its EPCGS benefits are tied to the importation of machinery that is used in the production of both subject and non-subject merchandise. Essar

argues that as the Department determined in PET Resin and PET Film, where EPCGS licenses are not tied to the production of particular products and the same production equipment is used to produce both subject and non-subject merchandise, the benefit should, as it was in the Preliminary Results, be divided by total exports rather than just sales of subject merchandise. Essar asserts that the Department should not change the denominator for the final results.

Department Position

The Department agrees with Essar that we used the appropriate denominator in calculating the subsidy rate under the EPCGS in the Preliminary Results. Pursuant to 19 CFR 351.525(b)(5), if a subsidy is tied to the production of a particular product as well as an input product, then the subsidy will be attributed to both products. The Department has also found that where EPCGS licenses are not tied to the production of particular products and the licenses benefit a company's total exports, then it is appropriate to include total exports in the denominator of the calculation. See PET Resin and accompanying Issues and Decision Memorandum at Comment 7. Therefore, the Department will continue to use Essar's total export sales during the POR, rather than its total export sales of subject merchandise, as the denominator. See Essar's Verification Report at pages 6-8 and Exhibit E-6.

Comment 5: Errors in the EPCGS Calculation for a Particular License

Essar argues that the Department inadvertently included a line in the calculation of a particular EPCGS license that was not for the import of a good and that the line should be deleted from the calculation. Essar states further that the date field for this line item is blank and that the days outstanding for the loan is listed as being over 105 years. Essar argues further that the Department has recognized the need and articulated a test for correcting errors found after the preliminary determination. See Certain Fresh Cut Flowers from Colombia: Final Results of Antidumping Administrative Review, 61 FR 42,833 42,834 (August 19, 1996)(Colombian Flowers). Essar states that the clerical error in this case meets the conditions articulated in Colombian Flowers. At the public hearing, Essar also argued that in Timken, a more recent case, the U.S. Court of Appeals for the Federal Circuit refused to adopt the Colombian Flowers criteria and noted that no regulation prohibits the Department from correcting a respondent's errors. Timken U.S. Corp. v. United States, Slip. Op. 05-1158 (Fed. Cir. Jan. 10, 2006) (Timken). Therefore, Essar believes the Department should correct this line item for this EPCGS license calculation.

Petitioner argues that Essar, not the Department, included the information reported on the line item. Therefore, petitioner asserts that the line item should not be deleted and that the Department properly calculated the benefit to the line item on the EPCGS license. Petitioner argues further that although the Department does not need to correct that particular error, the Department did inadvertently exclude the last line item in its calculation, as that line item is also for the import of a good. In addition, petitioner identified other formatting errors in the EPCGS calculation for this particular license.

Department Position

The Department disagrees with Essar's assertion that we inadvertently included a line item in the calculation of an EPCGS license. Upon review of the record, we determine that Essar and not the Department included this line item and that it represents a subtotal of the preceding line items reported for the license, and therefore, it is appropriate for us to include the subtotal amount and others like it in the total sum calculated for this license. However, we do agree with Essar that the days outstanding for the loan were incorrectly listed as 105 years. Therefore, although we find that it is appropriate to retain the line item for the final results, we have made the appropriate correction to the days outstanding for the license.

In addition, the Department agrees with petitioner that we inadvertently excluded the last line item in the calculation, as that is also a subtotal of the preceding line items reported for the license. We have also corrected the formatting errors identified for this license.

Recommendation

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

Agree

Disagree

David M. Spooner
Assistant Secretary
for Import Administration

Date