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April 29, 2009

**MEMORANDUM TO:** Ronald K. Lorentzen  
Acting Assistant Secretary  
for Import Administration

**FROM:** John M. Andersen  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**RE:** Certain Hot-Rolled Carbon Steel Flat Products from India

**SUBJECT:** Issues and Decision Memorandum: Final Results and Partial  
Rescission of Countervailing Duty Administrative Review

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 steel flat products (HRS) from India for the period of review (POR) January 1, 2007, through December 31, 2007. After analyzing the comments the Government of India (GOI), Essar Steel Ltd. (Essar), and petitioners, we have made certain modifications to the Preliminary Results.<sup>1</sup> See Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review, 73 FR 79791 (December 30, 2008) (Preliminary Results). The “Subsidies Valuation Information” and “Analysis of Programs” sections below describe the methodology followed in this review with respect to 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 (the Department) 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:

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<sup>1</sup> Petitioners are the United States Steel Corporation and the Nucor Corporation.

- Comment 1:** Whether the Failure of the GOI and the Indian State Governments (ISGs) to Respond to the Department's Questions Warrants Application of Adverse Inferences with Respect to Subsidy Programs Essar Claims It Did Not Use
- Comment 2:** Whether Essar Received Benefits Under the Industrial Policy of the State Government of Chhattisgarh (SGOC)
- Comment 3:** Whether Essar Received Benefits Under the Industrial Policy of the State Government of Andhra Pradesh (SGOAP)
- Comment 4:** Whether Essar Received Benefits Under the Captive Port Facilities Program of the State Government of Gujarat (SGOG)
- Comment 5:** Whether Essar Received Benefits Under the GOI's Special Economic Zone Act of 2005 (SEZ Act)
- Comment 6:** Whether the Department Inadvertently Failed to Include Certain Export Promotion Capital Goods Scheme (EPCGS) Licenses in the Benefit Calculation for the Preliminary Results
- Comment 7:** Whether the Department Should Adjust the EPCGS License Application Fees Reported by Essar
- Comment 8:** Whether It Was Appropriate to Apply Adverse Inferences With Regard to Certain of Essar's EPCGS Licenses
- Comment 9:** Whether the Department Erred In Calculating Benefits Conferred Under the Pre-Shipment Export Financing Program
- Comment 10:** Whether the National Mineral Development Corporation (NMDC) is a Government Authority Capable of Providing a Financial Contribution
- Comment 11:** Whether There is a Viable In-Country Benchmark Price For Use in the Benefit Calculation of the Provision of High-Grade Iron Ore DR-CLO Lumps (lumps) and Iron Ore Fines (Fines) for Less Than Adequate Remuneration (LTAR) Calculation, and If So, How It Should Be Calculated

- Comment 12:** Whether the Department Used Comparable Benchmark Prices in the Benefit Calculations of the Provision of Lumps and Fines for LTAR Program
- Comment 13:** Whether the Department's Inclusion of Freight Costs in the Fines and Lumps Benchmarks Produced a Distorted Result
- Comment 14:** Whether the Department Should Make Certain Adjustments to the Benchmark Used in the Benefit Calculation of the Provision of lumps and fines and for LTAR Program

I. Partial Rescission of Review

We preliminarily rescinded the administrative review regarding Ispat Industries Limited (Ispat), JSW Steel Limited (JSW), and Tata Steel Limited (Tata) due to the fact that they had no shipments during the POR. We received no comments on the partial rescission of administrative review for Ispat, JSW, and Tata and, therefore, we have rescinded the administrative review with regard to these firms.

II. Adverse Facts Available (AFA)

A. The GOI

On February 28, 2008, the Department issued the initial questionnaire to Essar, the GOI, and ISGs. After requesting and receiving several extension requests, the GOI filed a response to the Department's initial questionnaire on May 5 and May 9, 2008.<sup>2</sup> However, the GOI failed to provide a response to certain programs addressed in the Department's initial questionnaire, namely the 2005 SEZ Act and programs administered by the ISGs.

At the request of the GOI, the Department extended the GOI's deadline to respond to questions regarding the 2005 SEZ Act as well as questions concerning various programs administered by ISGs. Specifically, on May 6, 2008, the Department granted the GOI an extension until May 9, 2008, to respond to the outstanding questions. On May 9, 2008, the GOI requested a three-week extension to respond to the questions concerning the 2005 SEZ Act and the ISG programs. On May 15, 2008, the Department granted the GOI an extension until May 23, 2008, to respond to the questions concerning the 2005 SEZ Act and the ISG programs.<sup>3</sup> On May 23, 2008, the GOI submitted a letter in which it indicated that it was unable to specify a date on which it would be able to submit the requested information. No further response has been filed by the GOI with respect to the 2005 SEZ Act and the ISG programs in this proceeding.

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<sup>2</sup> The Department provided the GOI a total of 71 days to respond to the initial questionnaire, which was comprised of the standard 37-day deadline plus 31 days in extensions.

<sup>3</sup> The Department included questions concerning the 2005 SEZ Act and the state government programs in its initial questionnaire. Thus, the Department provided the GOI with a total of 85 days to respond to questions concerning the 2005 SEZ Act and the ISG programs.

Sections 776(a)(1) and (2) of the Tariff Act of 1930, as amended (the Act), provide that the Department shall apply “facts otherwise available” if, inter alia, necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (D) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act provides that the Department “shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority” if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interested party acts to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the information if it can do so without undue difficulties.

Because the GOI failed to provide the requested information by the established deadlines, the Department found it did not have the necessary information on the record to determine whether the subsidies received by Essar under the SEZ Act and the state administered programs (e.g., the SGOC’s Industrial Policy and the SGOG’s captive port facilities program) constitute financial contributions and are specific within sections 771(D) and 771(5A) of the Act, respectively. See Preliminary Results, 73 FR at 79792. As noted, the Department extended the GOI’s deadline to respond to the SEZ Act and the programs administered by the state governments in the initial questionnaire on several occasions. However, the GOI failed to submit responses to these programs. Therefore, consistent with section 776(a)(2)(B) of the Act, in the Preliminary Results, we resorted to facts available. See 73 FR at 79793.

Because the GOI did not provide the requested information on all of its subsidy programs, pursuant to section 776(b) of the Act, we found in the Preliminary Results that the GOI did not act to the best of its ability and, therefore, we employed adverse inferences in selecting from among the facts otherwise available. Id. Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Section 776(b) of the Act also authorizes the Department to use as AFA information derived from the petition, the final determination, a previous administrative review, or other information placed on the record. In a countervailing duty case, the Department requires information from both the government of the country whose merchandise is under the order and the foreign producers and exporters. When the government fails to provide requested information concerning alleged subsidy programs, the Department, as AFA, typically finds that a financial contribution exists under the alleged program and that the program is specific. See, e.g., Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea, 71 FR 11397, 11399 (March 7, 2006) (Preliminary Results of CTL Plate from Korea) (unchanged in the Notice of Final Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality

Steel Plate from the Republic of Korea, 71 FR 38861 (July 10, 2006) (CTL Plate from Korea), in which the Department relied on adverse inferences in determining that the Government of Korea directed credit to the steel industry in a manner that constituted a financial contribution and was specific to the steel industry within the meaning of sections 771(5)(D)(i) and 771(5A)(D)(iii) of the Act, respectively). However, where possible, the Department will normally rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit. Consistent with its past practice, because the GOI failed to provide information concerning certain alleged subsidies, in the Preliminary Results the Department, as AFA, determined that those programs confer a financial contribution and are specific pursuant to sections 771(5)(D) and 771(5A) of the Act, respectively.<sup>4</sup> See 73 FR at 79793.

Our finding in this regard includes the SGOG's captive port facilities program. As explained below in the "SGOG's Captive Port Facilities Program" section, the GOI and the SGOG failed to respond to our questions regarding the program. Thus, because the GOI and SGOG failed to respond to our requests for information, we determine pursuant to sections 776(a)(2)(A) and (B) and 776(b) of the Act that the wharfage payments Essar made to the GMB during the POR at the captive jetty rate constitute a financial contribution and are specific under sections 771(5)(D)(ii) and 771(5A) of the Act, respectively. Furthermore, as explained in the "SGOG's Captive Port Facilities Program" section, we are treating the wharfage fees paid under the captive port facilities program as an indirect tax program. Pursuant to 19 CFR 351.510, a benefit exists under an indirect tax program to the extent that the taxes or charges paid by a firm as a result of the program are less than what would have been paid by a firm in the absence of the program. In the case of the instant review, we find it is the responsibility of the GOI and the SGOG to provide the necessary information regarding the revenue that would otherwise be due (e.g., the amount of wharfage fees that would have been paid in the absence of the program). However, as indicated, the GOI and the SGOG failed to respond to the Department's questions concerning the captive port facilities program. Therefore, because the GOI and the SGOG failed to cooperate to the best of their abilities and because we require a benchmark in order to determine whether Essar received a benefit under the program, we are applying AFA under section 776(b) of the Act to portions of Essar's benefit calculation. Specifically, we are relying on partial AFA to derive the benchmark used in determining whether Essar received a benefit with regard to wharfage fee paid under the captive port facilities program.

We received comments regarding our decision to rely on adverse inferences as a result of the failure of the GOI and ISGs to respond to the Department's questionnaires. See **Comments 1 and 4**. However, our decision to apply AFA in the manner described above remains unchanged from the Preliminary Results.

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<sup>4</sup> The GOI failed to provide any information on how the alleged programs operate. Therefore, in applying adverse inferences, we are unable to reference any sub-paragraphs under sections 771(5)(D) and 771(5A) of the Act.

B. Essar

1. SGOC's Industrial Policy

In our initial questionnaire, we asked Essar to provide us with information on the SGOC's Industrial Policy, which included 9 alleged subprograms. For the subprograms, we asked Essar to respond to all of the items in the Standard Questions, Grant, Allocation, Tax, and Provision of Goods/Services appendices in accordance with the type of benefits being examined. In its May 12, 2008, questionnaire response, Essar did not respond to the appendices, as requested, but instead stated that it did not have any manufacturing facilities in the State of Chhattisgarh. See Essar's May 12, 2008, questionnaire response at 68. Therefore, in the Department's September 29, 2008, supplemental questionnaire we asked the following:

On page III-68 of your May QR, you stated that you “do { } not have any manufacturing facilities in the State of Chhattisgarh.” An Essar press release on the record of this review appears to indicate that you have an iron ore beneficiation plant located in Bailadilla in the Dantewara area of Chhattisgarh. Please state whether you received subsidies under the Chhattisgarh Industrial Policy with respect to an iron ore beneficiation plant in Bailadilla **and any other Essar facility in Chhattisgarh.**” (Emphasis added)

See the Department's September 29, 2008, supplemental questionnaire at page 11. Essar responded in its October 20, 2009, questionnaire response:

No. Essar does not have an iron ore beneficiation plant in Bailadilla in the Dantewara area of Chhattisgarh. These facilities are still in the planning stage. Please see attached to Exhibit 15 of this response a press release submitted in the last review that show that as of October of 2007 the construction on these facilities had not begun.

See Essar's October 20, 2009, questionnaire response at 18-19. Based on this information, we preliminarily determined that Essar did not use this program. See Preliminary Results, 73 FR at 79801.

As discussed in **Comment 2** of the “Analysis of Comments” section, documents that Essar itself placed on the record of the review demonstrate that Essar, in fact, operated an iron ore beneficiation plant during the POR that was located in Kirandul, which is in the Bailadilla area of Chhattisgarh.<sup>5</sup> In light of this information, we are revising our determination from the Preliminary Results.

Sections 776(a)(1) and (2) of the Act provide that the Department shall apply “facts otherwise available” if, inter alia, necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

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<sup>5</sup> See, e.g., Essar's 2006 – 2007 Annual Report at 31, which is contained in Essar's May 12, 2008, questionnaire response at Exhibit 4; see also Exhibit 2 of Essar's October 20, 2008, questionnaire response.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act provides that the Department “shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority” if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the information if it can do so without undue difficulties.

As explained above, Essar failed to provide information requested by the Department. Therefore, we are basing our determination on whether the SGOC’s Industrial Policy conferred a countervailable benefit on Essar on the facts otherwise available in accordance with sections 776(a)(2)(A) and (B) of the Act. We note that the Department’s obligations under section 782(d) of the Act were fulfilled when it inquired about the SGOC’s Industrial Policy program in the initial questionnaire and September 29, 2008, supplemental questionnaire issued to Essar. Furthermore, we find that record evidence submitted by Essar indicating that it operated an iron ore beneficiation plant during the POR contradicts Essar’s statements to the contrary in the narrative of its questionnaire response. As a result, we find that the conditions described under section 782(e) of the Act do not apply.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Section 776(b) of the Act also authorizes the Department to use as AFA information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

With regard to the SGOC’s alleged provision of subsidies under its Industrial Policy, we find that Essar did not act to the best of its ability because Essar failed to provide to the Department requested information that was in its possession. Therefore, in accordance with section 776(b) of the Act, as AFA we find that Essar used the SGOC’s Industrial Policy during the POR in a manner that conferred a benefit under section 771(5)(E) of the Act.

For a discussion of the calculation of the AFA rate applied to Essar under the SGOC’s Industrial Policy program, see “SGOC Industrial Policy 2004 – 2009” in the “Analysis of Programs” section.

## 2. EPCGS

With respect to the EPCGS, the Department sent supplemental questionnaires to Essar on September 29, 2008, and November 7, 2008, requesting additional and clarifying information with respect to several licenses under this program. While Essar provided responses to these questionnaires, the Department explained in the Preliminary Results that Essar failed to provide all of the information requested with respect to several licenses under the EPCGS program. See 73 FR at 79793. Because Essar failed after several requests to provide the requested information for the EPCGS licenses in question by the established deadlines, the Department found that it did not have the necessary information to determine the net subsidy for these licenses. Therefore, in

the Preliminary Results the Department based its determination on the facts otherwise available in accordance with section 776(a)(2)(B) of the Act with respect to the licenses for which we have incomplete information. Id.

Because Essar did not provide the requested information on all of its EPCGS licenses, pursuant to section 776(b) of the Act, we determined that Essar did not act to the best of its ability and, therefore, we employed adverse inferences in selecting from among the facts otherwise available. See Preliminary Results, 73 FR at 79793. Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Section 776(b) of the Act also authorizes the Department to use as AFA information derived from the petition, the final determination, a previous administrative review, or other information placed on the record. Normally, where possible, the Department will rely on the foreign producer's or exporter's records to determine the existence and amount of the benefit. Because Essar failed to provide information concerning certain EPCGS licenses, the Department, as AFA in the Preliminary Results, used Essar's highest calculated benefit (on a contingent liability basis) pertaining to EPCGS licenses in this review. See 73 FR at 79793.

We received comments from interested parties regarding the Department's decision in the Preliminary Results to apply AFA with regard to certain EPCGS licenses received by Essar. See Comment 8. However, we find that no new arguments have been raised that warrant reconsideration of the Department's decision to apply AFA. For a discussion of the benefit and net subsidy rate calculation, see the "Export Promotion Capital Goods Scheme (EPCGS)" section and **Comments 6 through 8**.

### III. Subsidies Valuation Information

#### A. Benchmarks for Loans and Discount Rates

Pursuant to 19 CFR 351.524(d)(3)(i), the Department will use, when available, the company-specific cost of long-term fixed-rate loans (excluding loans deemed to be countervailable subsidies) as a discount rate for allocating non-recurring benefits over time. Similarly, pursuant to 19 CFR 351.505(a), the Department will use the actual cost of comparable borrowing by a company as a loan benchmark, when available. According to 19 CFR 351.505(a)(2), a comparable commercial loan is defined as one that, when compared to the loan being examined, has similarities in the structure of the loan (e.g., fixed interest rate vs. variable interest rate), the maturity of the loan (e.g., short-term vs. long-term), and the currency in which the loan is denominated.

For programs requiring the application of a benchmark interest rate, 19 CFR 351.505(a)(2)(ii) states a preference for using an interest rate that the company could have obtained on a comparable loan in the commercial market. Also, 19 CFR 351.505(a)(3)(i) stipulates that when selecting a comparable commercial loan that the recipient "could actually obtain on the market," the Department will normally rely on actual short-term and long-term loans obtained by the firm. However, when there are no comparable commercial loans, the Department may use a national average interest rate, pursuant to 19 CFR 351.505(a)(3)(ii). In addition, 19 CFR 351.505(a)(2)(ii) states that the Department will not consider a loan provided by a government-owned bank for purposes of calculating benchmark rates.



In the Preliminary Results for programs requiring an Indian Rupee (rupee) denominated discount rate or the application of a rupee-denominated long-term fixed-rate benchmark, we used, where available, company-specific, weighted-average interest rates on comparable commercial long-term, rupee-denominated loans. See 73 FR at 79774. We have continued the same approach in these final results. In the Preliminary Results, when there were no comparable long-term, rupee-denominated loans from commercial banks during the year under consideration, pursuant to 19 CFR 351.505(a)(3)(ii), we used a national average interest rate as the benchmark. Id. Specifically, we used India's prime lending rate (PLR), as published by the Reserve Bank of India (RBI), as our long-term, benchmark interest rate. Id. We have continued the same approach in these final results. However, as explained in the Preliminary Results, we lacked information regarding India's PLR for the POR. See 73 FR at 79774. Therefore, in the Preliminary Results, we used rupee-denominated long-term rates as reported by the International Monetary Fund's (IMF) publication International Financial Statistics.<sup>6</sup> In response to the Department's January 21, 2009, supplemental questionnaire, the GOI provided information regarding the PLR for the POR. See the GOI's January 28, 2009, questionnaire response at 4. Therefore, for purposes of the final results and in accordance with 19 CFR 351.505(a)(3)(ii), we used the PLR as our long-term, rupee-denominated benchmark interest rate for the POR.

In the Preliminary Results, for those programs requiring a foreign currency-denominated discount rate or application of a foreign currency-denominated long-term fixed-rate benchmark, we used, where available, company-specific, weighted-average interest rates of comparable commercial long-term loans, denominated in the same currency. See 73 FR at 79774. Where no such benchmark instruments were available, consistent with 19 CFR 351.505(a)(3)(ii), we used currency-specific lending rates from private creditors as reported by the IMF's publication International Financial Statistics. See 73 FR at 79774. We have continued the same approach in these final results.

For variable-rate rupee-denominated or foreign currency-denominated loans outstanding during the POR, our preference is to use the interest rates of variable-rate lending instruments issued during the year in which the government loans were issued, pursuant to 19 CFR 351.505(a)(5)(i). As explained in the Preliminary Results, where such benchmark instruments were unavailable, we used interest rates from loans issued during the POR as our benchmark, as, for purposes of this proceeding, such rates better reflect a variable interest rate that would be in effect during the review period. See 73 FR at 79774. We have continued the same approach in these final results.

Pursuant to 19 CFR 351.505(a)(2)(iv), if a program under review is a government-provided, short-term loan, the preference is to use an annual average of the interest rates on comparable commercial loans during the year in which the government-provided loan was taken

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<sup>6</sup> The use of the IMF's publication for benchmark rate information is consistent with the Department's practice in prior Indian cases. See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 FR 49635 (September 28, 2001) (HRS Investigation) and accompanying Issues and Decision Memorandum (HRS Investigation Decision Memorandum) at "Benchmarks for Loans and Discount Rate" section; see also Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from India, 71 FR 45034 (August 8, 2006) (Final Determination of Lined Paper Investigation), and accompanying Issues and Decision Memorandum (Final Determination of Lined Paper Investigation Decision Memorandum) at "Benchmarks for Loans and Discount Rate."

out, weighted by the principal amount of each loan. For this review, we required both US dollar-denominated and rupee-denominated short-term loan benchmark rates to determine benefits received under the Pre-Shipment Export Financing program. In the Preliminary Results, absent a company-specific, commercial interest rate denominated in rupees to calculate the benefit, we sourced a rupee-denominated short-term interest rate for India as reported in the IMF's International Financial Statistics. See 73 FR at 79774. Where we did not have comparable, company-specific short-term loans denominated in US dollars, we used the dollar-denominated short-term interest rate for the United States as reported in International Financial Statistics. See e.g., Final Determination of Lined Paper Investigation Decision Memorandum at "Benchmarks for Loans and Discount Rate" section.

#### B. Use of Uncreditworthy Benchmarks for Essar

In the administrative review covering the period April 20, 2001, through December 31, 2002, we found Essar to be uncreditworthy during 2001 and 2002. See Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 69 FR 26549 (May 13, 2004) (Final Results of First HRS Review) and accompanying Issues and Decision Memorandum (Final Results of First HRS Review Decision Memorandum) at "Creditworthiness." As no new evidence had been provided to the Department with respect to Essar's uncreditworthiness during 2001 and 2002, in the Preliminary Results we continued to apply the uncreditworthy benchmark methodology for those programs requiring a long-term benchmark for 2001 and 2002. See 73 FR at 79774. For our long-term interest rates, we used India's PLRs and converted those rates into benchmark interest rates for Essar using the formula set forth in 19 CFR 351.505(a)(3)(iii). Id. We have continued the same approach in the final results.

#### C. Allocation Period

Under 19 CFR 351.524(d)(2)(i), we presume the allocation period for non-recurring subsidies to be the average useful life (AUL) of renewable physical assets for the industry concerned, as listed in the Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (IRS tables), as updated by the U.S. Department of the Treasury. This presumption will apply unless a party claims and establishes that the IRS tables do not reasonably reflect the AUL of the renewable physical assets for the company or industry under review, and the party can establish that the difference between the company-specific or country-wide AUL for the industry under review is significant, pursuant to 19 CFR 351.524(d)(2)(ii). For assets used to manufacture products such as hot-rolled carbon steel flat products, the IRS tables prescribe an AUL of 15 years. In their questionnaire responses, the GOI and Essar did not rebut the regulatory presumption of a 15-year AUL. Therefore, in the Preliminary Results we used a 15-year AUL to allocate any non-recurring subsidies. See 73 FR at 79774. We have continued this approach in the final results.

Further, for non-recurring subsidies, we have applied the "0.5 percent test" described in 19 CFR 351.524(b)(2). Under this test, we compare the amount of subsidies approved under a given program in a particular year to sales (total sales or total export sales, as appropriate) for the same year. If the amount of subsidies is less than 0.5 percent of the relevant sales, then the benefits are allocated to the year of receipt rather than allocated over the AUL period.

#### IV. Analysis of Programs

##### A. Programs Administered by the Government of India

###### 1. Pre- and Post-Shipment Export Financing

The RBI provides short-term pre-shipment export financing, or “packing credits,” to exporters through commercial banks. Upon presentation of a confirmed export order or letter of credit to a bank, companies may receive pre-shipment credit lines upon which they may draw as needed. Credit line limits are established by commercial banks based upon a company’s creditworthiness and past export performance, and may be denominated either in Indian rupees or in foreign currency. Commercial banks extending export credit to Indian companies must, by law, charge interest on this credit at rates capped by the RBI. For post-shipment export financing, exporters are eligible to receive post-shipment short-term credit in the form of discounted trade bills or advances by commercial banks at preferential interest rates to finance the period between the date of shipment of exported merchandise and payment from export customers (transit period).

In the Preliminary Results, we found that the pre- and post-shipment loans programs constituted a financial contribution pursuant to section 771(5)(D)(i) of the Act and that the interest savings under this program conferred a benefit pursuant to section 771(5)(E)(ii) of the Act. See 73 FR at 79795. We also found this program, which is contingent upon exports, to be specific within the meaning of section 771(5A)(B) of the Act. Id. No new information or evidence of changed circumstances has been presented in this review to warrant a reconsideration of the Department’s finding.

Essar reported rupee-denominated, pre-shipment loans outstanding during the POR. Essar also reported U.S. dollar-denominated, pre-shipment export loans outstanding during the POR. Essar reported that it did not use post-shipment loans during the POR.

To calculate the benefit conferred by the pre-shipment loan program, we compared the actual interest paid on the loans with the amount of interest that would have been paid at the benchmark interest rates. We used a rupee- or U.S. dollar-denominated benchmark, as appropriate (see “Subsidies Valuation Information” section, supra). We converted U.S. dollar denominated benefits into rupees using exchange rate data supplied by the GOI. Where the benchmark interest exceeds the actual interest paid, the difference constitutes the benefit.

For pre-shipment loans, we calculated the net subsidy rate by dividing the benefit by Essar’s total exports, consistent with the Department’s practice. See e.g., Final Determination of Lined Paper Investigation Decision Memorandum at “Pre- and Post-Shipment Export Financing.” We received comments from interested parties regarding inadvertent errors in our benefit calculations. Based on interested parties’ comments, we have corrected certain errors in our benefit calculations. See Comment 9. For the final results, we determine the countervailable subsidy rate under the pre-shipment export financing program to be **0.50** percent ad valorem for Essar.

###### 2. Export Promotion Capital Goods Scheme (EPCGS)

The EPCGS provides for a reduction or exemption of customs duties and an exemption for excise taxes on imports of capital goods. Under this program, producers may import capital

equipment at a reduced customs duty, subject to an export obligation equal to eight times the duty saved to be fulfilled over a period of eight years (12 years where the customs, insurance, and freight (CIF) value is Rs. 100 crore<sup>7</sup>) from the date the license was issued. For failure to meet the export obligation, a company is subject to payment of all or part of the duty reduction, depending on the extent of the export shortfall, plus penalty interest.

In the Preliminary Results, the Department found that under the EPCGS program, the GOI provides a financial contribution under section 771(5)(D) of the Act. The Department also found this program to be specific under section 771(5A)(B) of the Act because it is contingent upon export performance and that it conferred a benefit under section 771(5)(E) of the Act. See 73 FR at 79795. No new information or evidence of changed circumstances has been provided with respect to this program. Therefore, we continue to find that import duty reductions provided under the EPCGS are countervailable export subsidies.

Because the importation of capital equipment is tied to firms' capital structure, we are, in accordance with 19 CFR 351.524(c)(2)(iii), treating the receipt of duty exemptions under the program as non-recurring subsidies. Furthermore, under the Department's approach, there are two types of benefits under the EPCGS program. The first 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 19 CFR 351.505(d)(1). See, e.g., PolyethyleneTerephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review, 72 FR 6530 (February 12, 2007) (Final Results of 3<sup>rd</sup> PET Film Review), and accompanying Issues and Decision Memorandum (Final Results of 3<sup>rd</sup> PET Film Review Decision Memorandum) at "Export Promotion Capital Goods Scheme."

For those EPCGS licenses for which Essar has not yet met the export obligations specified in the licenses by the end of the POR, we find that the company had an outstanding contingent liability that should be treated as an interest-free loan in the amount of the import duty reduction or exemption for those EPCGS licenses for which Essar applied but, as of the end of the POR, has 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 find the benefit to be the interest that it would have paid during the POR had it borrowed the full amount of the duty reduction at the time of import. Pursuant to 19 CFR 351.505(d)(1), 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 (i.e., the date of expiration of the time period for the company 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 long-term benchmark interest rates as described in the "Subsidies Valuation" section, supra. The rate used corresponds to the year in which the company imported the items under the program. Furthermore, consistent with our policy, absent any acknowledgment from the GOI, in the form of an official letter demonstrating that the liability has been eliminated, we treat benefits from these licenses as contingent liabilities. See, e.g., Final Results of 3<sup>rd</sup> PET Film Review Decision Memorandum "Export Promotion Capital Goods Scheme;" see also Final Determination of Lined Paper Investigation Decision Memorandum at "Export Promotion Capital Goods Scheme."

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<sup>7</sup> A crore is equal to 10,000,000 rupees.

The second benefit is the waiver of duty on imports of capital equipment covered by those EPCGS licenses for which export requirements have been met. For certain licenses, Essar reported that it had completed its export obligation under the EPCGS program, thereby eliminating the outstanding contingent liabilities on the corresponding duty exemptions. However, as explained above, in keeping with our practice, we have only accepted those claims that are accompanied by official letters from the GOI.

For those licenses for which Essar demonstrated that it had fulfilled the export obligations, we followed our methodology set forth in prior CVD proceedings involving India and treated the import duty savings as grants received in the year in which the GOI waived the contingent liability on the import duty exemptions. See Final Determination of Lined Paper Investigation Decision Memorandum at “Export Promotion Capital Goods Scheme (EPCGS)” section. In accordance with 19 CFR 351.524(b)(2), for each license, we performed the “0.5 percent test” to determine whether the benefit should be fully expensed in the year of receipt or allocated over the AUL used in this proceeding pursuant to the grant allocation methodology set forth in 19 CFR 351.524(d)(1). Our approach concerning the two types of benefits provided under the EPCGS remains unchanged from the Preliminary Results. See 73 FR at 79795 – 79796.

Essar reported that it paid application fees in order to obtain its EPCGS licenses. We preliminarily find that the application fees paid qualify 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 to account for application fees.

To calculate the company-specific subsidy rates for this program, we summed the benefits from the waived licenses, which we determine confers a benefit in the form of a grant, and from those licenses that have yet to be waived, which we determine confers a benefit in the form of contingent liability loans. With respect to licenses related to imports of capital goods during the POR, we prorated the contingent liability by the actual number of days the contingent liability was in effect during the POR. See Final Determination of Lined Paper Investigation Decision Memorandum at “Export Promotion Capital Goods Scheme.” To calculate the net subsidy rate, we divided the total benefits received by Essar by its total export sales for the POR.

We received comments from interested parties regarding the calculation of the application fees Essar reported paying under the program during the POR. See **Comment 7**. Based on these comments, we have changed our calculation regarding the offset of the benefit to account for application fees. Specifically, in these final results, we are allocating the application fees based on the importation value of each capital good under the license and offsetting the benefit for each capital good imported. Interested parties also submitted comments concerning whether the Department correctly applied AFA with respect to certain EPCGS licenses and whether the Department, in fact, included benefits from all relevant EPCGS licenses in its calculations. See **Comments 6 and 8**. Based on these comments, for these final results we included several licenses that we had preliminarily inadvertently omitted. In addition, with respect to several licenses in which the Department applied AFA in the Preliminary Results, we continue to apply AFA in these final results by using Essar’s data regarding the specific license when possible. See 73 FR at 79793. In applying AFA to these licenses, we have used the same AFA analysis as in the Preliminary Results. Id. In instances where there was no data for a specific license in question, we continue to use the highest benefit (on a contingent liability basis) calculated for Essar for an EPCGS license in this review.

On this basis, we determine the net countervailable subsidy from this program to be **1.22** percent ad valorem for Essar.

### 3. Sale of High-Grade Iron Ore for LTAR

The Department has previously determined that the GOI provides high-grade iron ore to steel producers for LTAR through the government-owned NMDC. See Notice of Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 28665 (May 17, 2006) (Final Results of Second HRS Review), and accompanying Issues and Decision Memorandum (Final Results of Second HRS Review Decision Memorandum) at “Sale of High-Grade Iron Ore for Less Than Adequate Remuneration.” The NMDC is governed by the Ministry of Steel and the GOI holds the vast majority of its shares. In past reviews, we have found the NMDC to be a government authority that provides a financial contribution within the meaning section 771(5)(D)(iii) of the Act. See e.g., Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review, 73 FR 40295 (July 14, 2008) (Final Results of Fourth HRS Review), and accompanying Issues and Decision Memorandum (Final Results of Fourth HRS Review Decision Memorandum) at “Sale of High-Grade Iron Ore for Less Than Adequate Remuneration.”

Therefore, in the Preliminary Results we found that the GOI, through the government-owned NMDC, continues to provide a direct financial contribution as defined under section 771(5)(D)(iii) of the Act and that the GOI’s provision of high-grade iron ore is specific under section 771 (5A)(D)(iii)(I) of the Act because the actual recipient of the subsidy is limited to industries that use iron ore, including the steel industry, and is thus limited in number. See 73 FR at 79796. Essar reported that it purchased high-grade iron ore (i.e., iron ore with iron (Fe) content of 64 percent or above) fines and high-grade direct reduced calibrated lump iron ore (DR-CLO lumps or lumps) from the NMDC during the POR.

We received comments from interested parties regarding whether the NMDC can be considered a government authority capable of providing a financial contribution under section 771(5)(D) of the Act. See Comment 10. However, we find that comments from interested parties are unpersuasive and therefore, we have not changed our finding that the NMDC is a government authority that provided a financial contribution to Essar.

Section 771(5)(E)(iv) of the Act provides that a benefit is conferred by a government when the government provides the good or service for LTAR. Pursuant to 19 CFR 351.511(a)(2)(i), the Department will normally seek to measure the adequacy of remuneration by comparing the government price for the goods or service to a market-determined price resulting from actual transactions in the country in question. The regulations provide that such market-determined prices could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions.

Essar provided information concerning its purchases of lumps from a non-affiliated Brazilian supplier during the POR. There is no information on the record that suggests such private supplier prices, including import prices into India, do not reflect actual market-determined prices in India for comparable ore, or that such private supplier prices have been distorted by GOI control of or other involvement in the market. Therefore, pursuant to 19 CFR 351.511(a)(2)(i), we used Essar’s actual import prices charged by the non-affiliated Brazilian

supplier for lumps to compare with Essar's purchases of lumps from the NMDC. Our approach in this regard is consistent with the approach employed in the previous review. See Final Results of Fourth HRS Review Decision Memorandum at "Sale of High-Grade Iron Ore for Less Than Adequate Remuneration."

With respect to Essar's purchases of fines from the GOI, we find the record of this review contains no information on actual transaction prices between private parties in India, imports, or sales from government auctions that can be used to measure any benefit to Essar as a result of this program. Thus, for these transactions, the Department is unable to measure the adequacy of remuneration using actual market-determined prices in India, as directed by 19 CFR 351.511(a)(2)(i).

Under 19 CFR 351.511(a)(2)(ii), where actual market-determined prices are not available with which to make the comparison, the Department will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such prices would be available to purchasers in the country in question. This second tier directs the Department to examine prices which it would be reasonable to conclude that purchasers could obtain in India. There is a publication on the record that includes prices from the world market for comparable goods which can be used as a benchmark to determine whether the GOI sold fines to the respondent for LTAR. Specifically, the Tex Report, a daily Japanese publication that reports on world-wide price negotiations for high-grade iron ore, includes 2007 prices for fines. Therefore, consistent with our approach in the Final Results of Fourth HRS Review, we continue to find that the prices reported in the Tex Report constitute world market prices that would be available to the respondent in accordance with 19 CFR 351.511(a)(2)(ii). See Final Results of Fourth HRS Review Decision Memorandum at "Sale of High-Grade Iron Ore for Less Than Adequate Remuneration." Specifically, we used for benchmark purposes the 2007 prices for fines from Hamersley, Australia, as listed in the Tex Report, as our world market price.

We received comments from interested parties regarding the applicability of the benchmarks we used for purposes of measuring whether the NMDC sold fines and lumps to Essar for LTAR. See **Comments 11 and 12**. However, we find that interested parties' comments do not warrant altering our approach from the Preliminary Results. See 73 FR at 79796 – 79797.

With regard to fines, we compared the actual prices Essar paid to the NMDC, including central sales tax (CST), with benchmark prices for fines from Hamersley, Australia, as listed in the Tex Report. We adjusted the benchmark price to include ocean freight, import duties, other import fees payable.

With regard to lumps, we compared the actual prices Essar paid to the NMDC, including CST and inland freight with the prices Essar paid to its Brazilian supplier. We adjusted the benchmark price to include ocean freight, inland freight, import duties, other import fees payable.

Concerning the ocean freight adjustment to the benchmark used to measure the adequacy of remuneration of the GOI's sales of fines to Essar, we used the publicly available per metric ton cost that Tata Steel incurred to transport coal from Australia to India.<sup>8</sup> The use of this

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<sup>8</sup> See Memorandum to the File from Gayle Longest, Case Analyst, "Calculations for the Final Results of Countervailing Duty Administrative Review for the POR January 1, 2006 through December 31, 2006" (Tata Cost Data Memorandum) (October 23, 2008), in which the calculations were moved to the record of the ongoing review. These calculations contain the information concerning the freight adjustment discussed above.

information was necessary because the fines prices in the Tex Report are free on board (FOB) foreign port and, thus, lacked information concerning ocean freight delivery charges.

Essar reported its purchases of domestic iron ore on a transaction-by-transaction basis. Therefore, we conducted our calculations for Essar on a transaction-specific basis. We also adjusted our calculations for Fe content. We first used the data provided and the information contained in invoices and contracts on the record to ascertain the actual percentage Fe of the domestic iron ore that was purchased. We then multiplied the derived domestic percentage Fe content by the benchmark price per percentage Fe content. Where the data were not available, to derive the actual Fe content of the domestic iron ore purchase, we multiplied the reported base Fe content of the domestic purchase by the benchmark price per percentage Fe content. This resulted in the benchmark price per wet metric ton for iron ore of the same Fe content as the domestic iron ore purchase.

We next compared the delivered benchmark prices with the domestic prices to obtain the benefit amounts on a transaction-by-transaction basis for each type of iron ore. We then summed the benefit amounts.

We received comments from interested parties regarding the manner in which we adjusted the government price (e.g., the price paid by Essar to the NMDC) and the benchmark prices to account for freight, import duties, and other charges. See Comments 13 and 14. Based on these comments, we have made certain revisions to our benchmark. See Comment 14.

To calculate the net subsidy rate, we divided the total benefit by Essar's total sales during the POR. On this basis, we calculated a net countervailable subsidy rate of **16.14 percent ad valorem** for Essar.

#### 4. SEZ Act

Petitioners contend that the SEZ Act provides for the establishment, development and management of SEZs for the promotion of exports.<sup>9</sup> As explained in the Preliminary Results and in the "Adverse Facts Available" section, supra, the GOI failed to respond to the Department's questionnaire with respect to the SEZ. Accordingly, pursuant to sections 776(a) and (b) of the Act, as AFA we found in the Preliminary Results that the programs under the SEZ Act, as described below, constitute financial contributions section 771(5)(D) of the Act. See 73 FR at 79793. We also found as AFA that the programs under the SEZ Act were contingent on exports and, therefore, specific within the meaning of section 771(5A)(B) of the Act. We further found that Essar's use of the program conferred benefits within the meaning of section 771(5)(E) of the Act. Id.

We received comments from interested parties regarding our application of AFA in determining whether subsidies were provided under the 2005 SEZ Act. See Comment 5. However, we find that interested parties' comments do not warrant altering our approach from the Preliminary Results. See 73 FR at 79797.

- a. Duty free import/domestic procurement of goods and services for development, operation, and maintenance of SEZ units program

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<sup>9</sup> See The Gazette of India Extraordinary Part II-Section 1, published by authority New Delhi, Thursday, June 23, 2005, Ministry of Law and Justice (Legislative Department), The Special Economic Zones Act, 2005 No. 28 of 2005, which petitioners placed on the record of the current review in their November 24, 2008 submission.



Essar's Steel-Mod V SEZ unit (ESTL-MOD V unit) became eligible for duty free import for both overseas and domestic procurement of goods and services as of January 31, 2007. Essar reported that under this program it imported duty-free goods during the POR for use in its ESTL-MOD V unit.

In the Preliminary Results, we determined, based on AFA, that the programs under the SEZ Act constitute financial contributions that are specific within the meaning of sections 771(5)(D) and 771(5A)(B) of the Act. See 73 FR at 79797. We also determined that Essar's receipt of duty exemptions under the 2005 SEZ Act conferred a benefit under section 771(5)(E) of the Act. Id. Because the GOI did not respond to questions concerning the SEZ Act, we found that the exception described under 19 CFR 351.519(a)(4) applies, namely that the entire amount of the duty exemptions confer a benefit. We have reached the same conclusion based on the same analysis in these final results based on the same analysis. Accordingly, we determine that the benefit is equal to the entire amount of the duty exemptions Essar received under the program. Therefore, to calculate the benefit, we summed all of the duty exemptions Essar received under the SEZ Act during the POR.

To calculate the net subsidy rate, we divided the benefits Essar received under the program during the POR by its total export sales for the POR. On this basis, we calculated a net countervailable subsidy from this program of **1.66 percent** ad valorem for Essar.

- b. Exemption from excise duties on goods machinery and capital goods brought from the Domestic Tariff Area for use by an enterprise in the SEZ

Essar indicated in its questionnaire response that, as of January 31, 2007, the ESTL-MOD V unit became eligible for exemption from excise duties on goods machinery and capital goods brought from the Domestic Tariff Area for use by an enterprise in the SEZ. Information Essar provided indicates that during the POR, it accrued excise duty exemptions under the program on capital goods brought from a Domestic Tariff Area for use in its ESTL-MOD V unit.

In the Preliminary Results, we determined, based on AFA, that the programs under the SEZ Act constitute a financial contribution that are specific within the meaning of sections 771(5)(D) and 771(5A)(B) of the Act. See 73 FR at 79798. We also determined that Essar's receipt of excise duty exemptions on capital goods under the SEZ Act conferred a benefit under section 771(5)(E) of the Act. Id. We have reached the same conclusion in these final results based on the same analysis.

In accordance with 19 CFR 351.517(a), we determine the benefit is equal to the entire amount of the excise duty exemptions Essar received on its imports of raw materials under the program.

In accordance with 19 CFR 351.524(c)(2)(iii), we determine that the provision of excise duty exemptions on capital goods provides non-recurring benefits in the amount of the exemptions because the excise duty exemptions are tied to the capital assets of the firm. We summed all of the duty exemptions on capital goods received under the program, which is equal to all of the duty exemptions on capital goods received during the POR, and divided the total by Essar's total export sales for the POR. Because the resulting rate was less than 0.5 percent, we expensed in full the duty exemptions on capital goods received under the program in the POR.

To calculate the net subsidy rate, we divided the total benefits Essar received under the program during the POR by Essar's total export sales during the POR. On this basis, we calculated a net countervailable subsidy from this program of **2.57** percent ad valorem for Essar.

c. Exemption from the CST

In its questionnaire response, Essar explained that the ESTL–MOD V unit became eligible for exemption from the 2 percent CST on inter–state purchases as of January 31, 2007. Essar reported that under this program, it received CST exemptions on inter–state purchases made by the ESTL–MOD V unit during the POR.

In the Preliminary Results, we determined, based on AFA, that the 2005 SEZ Act constitutes a financial contribution that is specific within the meaning of sections 771(5)(D) and 771(5A)(B) of the Act. See 73 FR at 79798. We also determined that Essar's receipt of CST exemptions on inter–state purchases confer a benefit under section 771(5)(E) of the Act. Id.

Subsequent to the Preliminary Results, the Department sent supplemental questionnaires to the GOI and Essar regarding whether this program was a separate program from the SGOG's Sales and Other State Taxes on Purchases of Inputs (Both Goods and Services) for the SEZ or a Unit within the SEZ. See the Department's January 21, 2009, supplemental questionnaire. The GOI explained in its January 28, 2009, questionnaire response that, if goods are purchased from a state other than Gujarat, they are exempted from the CST pursuant to the GOI SEZ Act. However, if the goods are procured from Gujarat, they are exempted from the Gujarat State Sales Tax pursuant to the SGOG SEZ Act. Therefore, we determine that they are separate but complementary programs. In accordance with 19 CFR 351.510(c), we are allocating the CST exemptions Essar received on its inter–state purchases made during the POR to the POR. The information on the record does not, however, delineate the purchases of goods from Gujarat from the purchases from other states. Therefore, we are allocating the total benefits received by Essar on purchases of goods in India equally between the GOI SEZ and the SGOG SEZ Act.

To calculate the net subsidy rate, we divided the total benefits received by Essar by its total export sales for the POR. On this basis, we calculated a net countervailable subsidy from this program of less than 0.005 percent ad valorem for Essar, which pursuant to the Department's practice is not measurable. Therefore, we did not include the net subsidy rate from this program in the total net subsidy rate for Essar. See Corrosion–Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 74 FR 2512 (January 15, 2009) (CORE from Korea 2006 Review) and accompanying Issues and Decision Memorandum (CORE from Korea 2006 Decision Memorandum) at "GOK's Direction of Credit."

d. Exemption from the National Service Tax

According to Essar, SEZ units are exempt from paying the national service tax of 12.36 percent. Therefore, according to Essar, a service provider to an SEZ unit is not required to pay the 12.36 percent service tax on invoices issued to SEZ units. Essar reported that it received a service tax exemption for the ESTL–MOD–V unit during the POR.

In the Preliminary Results, we determined, based on AFA, that the 2005 SEZ Act constitutes a financial contribution that is specific within the meaning of sections 771(5)(D) and 771(5A)(B) of the Act. See 73 FR at 79798. We also determined that Essar's receipt of national

service tax exemptions on inter-state purchases confer a benefit under section 771(5)(E) of the Act. Id. We have reached the same conclusion based on the same analysis in these final results.

In accordance with 19 CFR 351.510(a), we find that the benefit is equal to amount of service tax that Essar would have paid during the POR absent the exemptions provided under the program. Pursuant to 19 CFR 351.510(b), we are treating the benefit as having been received as of the time Essar provided the services subject to the tax. In accordance with 19 CFR 351.510(c), we are allocating the service tax exemptions Essar received on its provision of services during the POR to the POR.

To calculate the net subsidy rate, we divided the total benefits received by Essar by its total export sales for the POR. On this basis, we calculated a net countervailable subsidy from this program of **0.07** percent ad valorem for Essar.

## B. Programs Administered by the State Government of Gujarat

### 1. SGOG Special Economic Zone Act (SEZ Act)

#### a. Stamp duty and registration fees for land transfers, loan agreements, credit deeds, and mortgages

During the POR the ESTL–MOD V unit leased an area of land from the SEZ Developer, Essar SEZ Hazira Limited, for a period of 20 years. Essar reported that under the SGOG SEZ act, the registration charge was not collected. Essar further reported that under the SGOG SEZ act, the stamp duty on the lease rental was also not collected.

In the Preliminary Results, we determined, based on AFA, that the SGOG’s SEZ Act constitutes a financial contribution that is specific within the meaning of sections 771(5)(D) and 771(5A)(B) of the Act. See 73 FR at 79798. We also determined that the exemptions on registration charges and stamp duties confer a benefit under section 771(5)(E) of the Act. Id. We have reached the same conclusion based on the same analysis in these final results.

In accordance with 19 CFR 351.510(a), we find that the benefit is equal to amount of registration and stamp duty charges that Essar would have paid during the POR absent the registration and stamp duty exemptions provided under the program. Under 19 CFR 351.510(b), it states that the Department will normally consider the benefit on an indirect tax as having been received at the time the recipient firm otherwise would be required to pay the indirect tax or import charge. Therefore, pursuant to 19 CFR 351.510(b), we are treating the benefit as having been received as of the time of the ESTL–MOD V unit’s lease payments because we find that is the time when the registration charges and stamp duty charges normally would be incurred. Therefore, in accordance with 19 CFR 351.510(c), we are allocating the registration charge and stamp duty exemptions Essar received on the lease it signed during the POR to the POR.

To calculate the net subsidy rate, we divided the total benefits received by Essar by its total export sales for the POR. On this basis, we calculated a net countervailable subsidy from this program of less than 0.005 percent ad valorem for Essar, which is not measurable. Therefore, we did not include the net subsidy rate from this program in the total net subsidy rate for Essar.

#### b. Sales tax, purchase tax, and other taxes payable on sales and transactions

According to Essar, inputs purchased by SEZ units from within the State of Gujarat are exempted from payment of sales tax. In the Preliminary Results, we determined, based on AFA, that the SGOG's SEZ Act constitutes a financial contribution that is specific within the meaning of sections 771(5)(D) and 771(5A)(B) of the Act. See 73 FR at 79799. We also determined that the sales tax exemptions received by Essar confer a benefit under section 771(5)(E) of the Act. Id. We have reached the same conclusion based on the same analysis in these final results.

In accordance with 19 CFR 351.510(a), we find that the benefit is equal to the amount of sales tax that Essar would have paid during the POR absent the exemption provided under the program. Pursuant to 19 CFR 351.510(b), we are treating the benefit as having been received as of the time of the ESTL-MOD V unit's input purchases because we find that is the time when sales taxes normally would be incurred. Therefore, in accordance with 19 CFR 351.510(c), we are allocating the sales tax exemptions Essar received on the input purchase during the POR to the POR.

To calculate the net subsidy rate, we divided the total benefits received by Essar by its total export sales for the POR. On this basis, we calculated a net countervailable subsidy from this program of less than 0.005 percent ad valorem for Essar, which is not measurable. Therefore, we did not include the net subsidy rate from this program in the total net subsidy rate for Essar.

c. Sales and other state taxes on purchases of inputs (both goods and services) for the SEZ or a Unit within the SEZ

According to Essar, a CST of two percent is charged on goods and services procured by SEZ units from states other than Gujarat. However, according to Essar, this amount is exempted when goods and services are supplied to SEZ units. Essar reported that under this program, it received sales tax exemptions on purchases from states other than Gujarat made by the ESTL-MOD V unit during the POR.

In the Preliminary Results we determined, based on AFA, that the SGOG's SEZ Act constitutes a financial contribution that is specific within the meaning of sections 771(5)(D) and 771(5A)(B) of the Act. See 73 FR at 79799. Furthermore, we preliminarily determine that Essar's receipt of sales tax exemptions on inter-state purchases confer a benefit under section 771(5)(E) of the Act. Id. We have reached the same conclusion based on the same analysis in these final results.

As explained above, based on information provided by the GOI in its January 28, 2009, questionnaire response, we determine that the GOI's Exemption from the CST program and the SGOG's Sales and Other State Taxes on Purchases of Inputs (Both Goods and Services) for the SEZ or a Unit Within the SEZ program are separate but complementary programs. See section "Special Economic Zone Act of 2005 (SEZ Act)" at subprogram "Exemption of Central Sales Tax (CST)". In accordance with 19 CFR 351.510(c), we are allocating the sales and other state taxes exemptions Essar received on its in-state purchases made during the POR to the POR. As explained above, the information on the record does not separate the purchases of goods from Gujarat from the purchases from other states. Therefore, we are allocating the total benefits received by Essar on purchases of goods in India equally between the GOI SEZ and the SGOG SEZ Act.

To calculate the net subsidy rate, we divided the total benefits received by Essar by its total export sales for the POR. On this basis, we calculated a net countervailable subsidy from

this program of less than 0.005 percent ad valorem for Essar, which is not measurable. Therefore, we did not include the net subsidy rate from this program in the total net subsidy rate for Essar.

## 2. Wharfage Fees Paid Under the SGOG's Captive Port Facilities Program

Petitioners allege that the SGOG provided exemptions and rebates on the wharfage fees that Essar paid in connection with its captive jetty under the captive port facilities program. As discussed in **Comment 4** below, we find that information on the record indicates that during the POR Essar, in fact, paid wharfage fees to the Gujarat Maritime Board (GMB) in connection with its captive jetty which is part of its captive port facility. See Essar's October 20, 2008, submission at Exhibit 12. Therefore, we determine that Essar did not receive any exemptions on its captive jetty payments during the POR. Further, we find there is no information on the record indicating that the SGOG provided any rebates on wharfage fees to Essar during the POR.

Information on the record also indicates that the wharfage fees Essar paid to the GMB during the POR were equal to Rs. 60 per metric ton of HRS exported from Essar's captive jetty. See Essar's October 20, 2008, submission at Exhibit 12. Information on the record further indicates that the wharfage fees Essar paid during the POR are less than the wharfage fees paid by firms operating in GMB jetties. Id. Petitioners allege that, with regard to the wharfage fees Essar paid during the POR, Essar's status as an operator of a captive port enabled it to pay less wharfage fees than the "normal" rate, which petitioners contend is the GMB wharfage rate.

As explained above in the "Adverse Facts Available" section of these final results, we have determined that the SGOG's captive port facilities program provides a financial contribution that is specific under sections 771(5)(D) and 771(5A) of the Act, respectively. Therefore, we must determine whether the wharfage fees Essar paid to the GMB in connection with its captive jetty under the captive facilities program conferred a benefit.

To measure whether Essar received a benefit with regard to the wharfage fees it paid during the POR, we are treating this program as an indirect tax. Under 19 CFR 351.510(a), a benefit exists on an indirect tax to the extent that the taxes or fees paid by a firm as a result of the program are less than what would have been paid in the absence of the program. The GOI and the SGOC did not provide any information on whether the wharfage fees Essar paid during the POR constituted a preferential rate under the program nor did they provide information on the wharfage fees Essar would have paid in the absence of the captive port facility program. Information on the record indicates that the wharfage fee rates Essar paid during the POR were Rs. 10 per metric ton less than the wharfage fees paid by firms operating in GMB jetties. See Essar's October 20, 2008 submission at Exhibit 12. Therefore, pursuant to 776(a)(2)(A) and (B) and 776(b) of the Act, as AFA we assume that the GMB wharfage fee is the rate that Essar would have paid absent the program. Therefore, we find that wharfage payments Essar made during the POR conferred a benefit within the meaning of section 771(5)(E) of the Act.

Information on the record indicates the captive jetty wharfage rate Essar paid on its exports of subject merchandise during the POR as well as the GMB wharfage rate applied to subject merchandise. Id. Therefore, to derive the benefit, we multiplied the Rs. 10 per metric ton price difference between the GMB wharfage rate and the captive jetty rate by the volume of subject merchandise Essar exported during the POR.

To calculate the net subsidy rate, we divided the benefit by Essar's total exports of subject merchandise during the POR. On this basis, we calculated a net countervailable subsidy

for this program of **0.04** percent ad valorem for Essar. We will continue to seek information from the GOI and SGOG regarding this program in future proceedings. We received comments from interested parties regarding this program. See Comment 4.

C. Programs Administered by the SGOC

SGOC Industrial Policy 2004-2009

The SGOC's Industrial Policy provides incentives to accelerate the process of industrialization in the state.<sup>10</sup> As explained in the Preliminary Results and above in the "Adverse Facts Available" section, the GOI failed to respond to the Department's questionnaire with respect to the SGOC's Industrial Policy. See 73 FR at 79792. Accordingly, pursuant to sections 776(a) and (b) of the Act, we find that the subprograms under the SGOC's Industrial Policy, as listed below, constitute financial contributions and are specific under sections 771(5)(D) and 771(5A) of the Act, respectively.

Further, as discussed above in the "Adverse Facts Available" section and **Comment 2**, we determine, pursuant to section 776(b) of the Act, that Essar used the following subprograms provided under the SGOC's Industrial Policy during the POR in a manner that conferred a benefit within the meaning of section 771(5)(E) of the Act.

In assigning net subsidy rates for each of the alleged subprograms provided under the SGOC's Industrial Policy, we were guided by the Department's approach in the prior review as well as recent CVD investigations involving the People's Republic of China (PRC). See e.g., Final Results of Fourth HRS Review Decision Memorandum at "Selection of the Adverse Facts Available Rate" section; see also Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 4935, January 28, 2009 (CWASPP from the PRC) and accompanying issues and decision memorandum (CWASPP from the PRC Decision Memorandum) at "Application of Facts Available and Use of Adverse Inferences" section. Namely, in these final results, as AFA, we have first sought to apply, where available, the highest, above de minimis, subsidy rate calculated for the identical program from any segment of this proceeding. Absent such a rate, we have applied, where available, the highest, above de minimis subsidy rate calculated for a similar program from any segment of this proceeding. Under our AFA approach, absent a subsidy rate calculated for the same or similar program, the Department applies the highest, above de minimis, calculated subsidy rate for any program from any CVD proceeding involving the country in which subject merchandise is produced, so long as the producer of the subject merchandise or the industry to which it belongs could have used the program for which the rates were calculated. In the instant review, it was not necessary to utilize the third hierarchy of our AFA methodology because above de minimis subsidy rates for identical and/or similar programs were available within the proceeding.

Pursuant to the AFA methodology described above, for subprograms involving grants, we first attempted to find an above de minimis subsidy rate calculated for an identical program from any segment of this proceeding. However, we find that there are no such rates available from any segment of this proceeding. Therefore, for subprograms involving grants, as AFA, we

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<sup>10</sup> See Government of Chhattisgarh Industrial Policy (2004-2009), Commerce & Industries Department, Exhibit 24 of petitioners May 19, 2008, submission.

have assigned the highest above de minimis subsidy rate calculated for a similar program from any segment of this proceeding. See HRS Investigation Decision Memorandum at “The GOI’s Forgiveness of SDF Loans Issued to SAIL” section, in which the Department calculated a net subsidy rate of 6.06 percent ad valorem for a grant program.

Pursuant to the AFA methodology described above, for subprograms involving the provision of a good for LTAR, we first attempted to find an above de minimis subsidy rate calculated for an identical program from any segment of this proceeding. However, we find that there are no such rates available from any segment of this proceeding. Therefore, for subprograms involving the provision of a good for LTAR, as AFA, we have assigned the highest above de minimis subsidy rate calculated for a similar program from any segment of this proceeding. See the Final Results of Fourth HRS Review Decision Memorandum at “Captive Mining of Iron Ore” section, in which the Department calculated a net subsidy rate of 18.08 percent ad valorem for an LTAR program.

Pursuant to the AFA methodology described above, for subprograms involving indirect tax benefits, we attempted to find an above de minimis subsidy rate calculated for an identical program from any segment of this proceeding. However, we find that there are no such rates available from any segment of this proceeding. Therefore, for subprograms involving indirect taxes, as AFA, we have assigned the highest above de minimis subsidy rate calculated for a similar program from any segment of this proceeding. See Final Results of Second HRS Review Decision Memorandum at “State Government of Gujarat (SGOG) Tax Incentives” section, in which the Department calculated net subsidy rate of 3.09 percent ad valorem for an indirect tax program.

- a. A direct subsidy of 35 percent of total capital costs for the project, up to a maximum amount equivalent to the amount of commercial tax/central sales tax paid in a seven year period

Pursuant to section 776(b) of the Act, as AFA we find this program provides a countervailable subsidy in the form of a grant. Therefore, in accordance with the methodology described above, as AFA we are assigning a net subsidy rate of **6.06** percent ad valorem under this program. This AFA net subsidy rate corresponds to the highest above de minimis subsidy rate calculated for a similar grant program in any segment of this proceeding. See HRS Investigation Decision Memorandum at “The GOI’s Forgiveness of SDF Loans Issued to SAIL.”

- b. A direct subsidy of 40 percent toward total interest paid for a period of 5 years (up to Rs. lakh<sup>11</sup> per year) on loans and working capital for upgrades in technology

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<sup>11</sup> A lakh is equal to 100,000 rupees.

Pursuant to section 776(b) of the Act, as AFA we find this program provides a countervailable subsidy in the form of a grant. Therefore, in accordance with the methodology described above, as AFA we are assigning a net subsidy rate of **6.06** percent ad valorem under this program. This AFA net subsidy rate corresponds to the highest above de minimis subsidy rate calculated for a similar grant program in any segment of this proceeding. See HRS Investigation Decision Memorandum at “The GOI’s Forgiveness of SDF Loans Issued to SAIL.”

- c. Reimbursement of 50 percent of expenses (up to Rs. 75,000) incurred for quality certification

Pursuant to section 776(b) of the Act, as AFA we find this program provides a countervailable subsidy in the form of a grant. Therefore, in accordance with the methodology described above, as AFA we are assigning a net subsidy rate of **6.06** percent ad valorem under this program. This AFA net subsidy rate corresponds to the highest above de minimis subsidy rate calculated for a similar grant program in any segment of this proceeding. See HRS Investigation Decision Memorandum at “The GOI’s Forgiveness of SDF Loans Issued to SAIL.”

- d. Reimbursement of 50 percent of expenses (up to 5 lakh) for obtaining patents

Pursuant to section 776(b) of the Act, as AFA we find this program provides a countervailable subsidy in the form of a grant. Therefore, in accordance with the methodology described above, as AFA we are assigning a net subsidy rate of **6.06** percent ad valorem under this program. This AFA net subsidy rate corresponds to the highest above de minimis subsidy rate calculated for a similar grant program in any segment of this proceeding. See HRS Investigation Decision Memorandum at “The GOI’s Forgiveness of SDF Loans Issued to SAIL.”

- e. Total exemption from electricity duties for a period of 15 years from the date of commencement of commercial production

Pursuant to section 776(b) of the Act, as AFA we find this program provides a countervailable subsidy in the form of an indirect tax. Therefore, in accordance with the methodology described above, as AFA we are assigning a net subsidy rate of **3.09** percent ad valorem under this



program. This AFA net subsidy rate corresponds to the highest-calculated above de minimis subsidy rate found for a similar indirect tax program in any segment of this proceeding. See Final Results of Second HRS Review Decision Memorandum at “State Government of Gujarat (SGOG) Tax Incentives” section.

- f. Exemption from stamp duty on deeds executed for purchase or lease of land and buildings and deeds relating to loans and advances to be taken by the company for a period of three years from the date of registration

Pursuant to section 776(b) of the Act, as AFA we find this program provides a countervailable subsidy in the form of an indirect tax. Therefore, in accordance with the methodology described above, as AFA we are assigning a net subsidy rate of **3.09** percent ad valorem under this program. This AFA net subsidy rate corresponds to the highest-calculated above de minimis subsidy rate found for a similar indirect tax program in any segment of this proceeding. See Final Results of Second HRS Review Decision Memorandum at “State Government of Gujarat (SGOG) Tax Incentives” section.

- g. Exemption from payment of “entry tax” for 7 years (excluding minerals obtained from mining in the state)

Pursuant to section 776(b) of the Act, as AFA we find this program provides a countervailable subsidy in the form of an indirect tax. Therefore, in accordance with the methodology described above, as AFA we are assigning a net subsidy rate of **3.09** percent ad valorem under this program. This AFA net subsidy rate corresponds to the highest-calculated above de minimis subsidy rate found for a similar indirect tax program in any segment of this proceeding. See Final Results of Second HRS Review Decision Memorandum at “State Government of Gujarat (SGOG) Tax Incentives” section.

- h. 50 percent reduction of the service charges for acquisition of private land by Chhattisgarh Industrial Development Corporation for use by the company

Pursuant to section 776(b) of the Act, as AFA we find this program provides a countervailable subsidy in the form of an indirect tax. Therefore, in accordance with the methodology described above, as AFA

we are assigning a net subsidy rate of **3.09** percent ad valorem under this program. This AFA net subsidy rate corresponds to the highest-calculated above de minimis subsidy rate found for a similar indirect tax program in any segment of this proceeding. See Final Results of Second HRS Review Decision Memorandum at “State Government of Gujarat (SGOG) Tax Incentives” section.

- i. Allotment of land in industrial areas at a discount up to 100 percent

Pursuant to section 776(b) of the Act, as AFA we find this program provides a countervailable subsidy in the form of provision of a good for LTAR. Therefore, in accordance with the methodology described above, as AFA we are assigning a net subsidy rate of **18.08** percent ad valorem under this program. This AFA net subsidy rate corresponds to the highest above de minimis subsidy rate calculated for the provision of a good for LTAR in any segment of this proceeding. See the Final Results of Fourth HRS Review Decision Memorandum at “Captive Mining of Iron Ore” section.

D. Programs Found Not To Confer a Countervailable Benefit During the POR

In the Preliminary Results, we found that the programs listed below did not confer benefits during the POR. See 73 FR at 79799. We did not receive comments from interested parties regarding our preliminary findings. Therefore, our final findings regarding these programs remain unchanged from the Preliminary Results. Id.

1. Own Your Own Wagon Scheme
2. Duty Free Replenishment Certificate (DFRC) Scheme

E. Programs Determined Not To Be Used

In the Preliminary Results, we found that the programs listed below were not used during the POR. See 73 FR at 79801. We received comments from interested parties regarding our preliminary findings. See **Comments 3 and 4**. However, we find that interested parties’ comments do not warrant altering our findings from the Preliminary Results.

1. GOI Programs
  - a. Advance License Program (ALP)
  - b. Duty Entitlement Passbook Scheme (DEPS)
  - c. Export Processing Zones (EPZ) and Export Oriented Unit (EOU)

- d. Target Plus Scheme (TPS)
  - e. Income Tax Exemption Scheme (Sections 10A, 10B, and 80 HHC)
  - f. Market Development Assistance (MDA)
  - g. Status Certificate Program
  - h. Market Access Initiative
  - i. Loan Guarantees from the GOI
  - j. Steel Development Fund (SDF) Loans
  - k. Exemption of Export Credit from Interest Taxes
  - l. Captive Mining of Iron Ore
  - m. Captive Mining of Coal
  - n. Duty Free Import Authorization Scheme (DFIA)
  - o. Wagon Investment Scheme (WIS)
  - p. Drawback on goods brought or services provided from the Domestic Tariff area into a SEZ, or services provided in a SEZ by service providers located outside India
  - q. 100 percent exemption from income taxes on export income from the first 5 years of operation, 50 percent for the next 5 years, and a further 50 percent exemption on export income reinvested in India for an additional 5 years
2. State Government of Andhra Pradesh Programs – Grants Under the Industrial Investment Promotion Policy of 2005-2010
- a. 25 percent reimbursement of cost of land in industrial estates and industrial development areas
  - b. Reimbursement of power at the rate of Rs. 0.75 “per unit” for the period beginning April 1, 2005, through March 31, 2006 and for the four years thereafter to be determined by the Government of Andhra Pradesh (GOAP)

- c. 50 percent subsidy for expenses incurred for quality certification up to RS. 100 lakhs
  - d. 25 percent subsidy on “cleaner production measures” up to Rs. 5 lakhs
  - e. 50 percent subsidy on expenses incurred in patent registration, up to Rs. 5 lakhs
  - f. 100 percent reimbursement of stamp duty and transfer duty paid for the purchase of land and buildings and the obtaining of financial deeds and mortgages
  - g. A grant of 25 percent of the tax paid to GAAP, which is applied as a credit against the tax owed the following year, for a period of five years from the date of commencement of production
  - h. Exemption from the GAAP Non-agricultural Land Assessment (NALA)
  - i. Provision of “infrastructure” for industries located more than 10 kilometers from existing industrial estates or industrial development areas
  - j. Guaranteed “stable prices of municipal water for 3 years for industrial use” and reservation of 10% of water for industrial use for existing and future projects
3. State Government of Gujarat Programs
- a. State Government of Gujarat (SGOG) Provided Tax Incentives
    - (1). Sales Tax Exemptions of Purchases of Goods During the POR
    - (2). Sales Tax Deferrals on Purchases of Good from Prior Years (As Well as Deferrals Granted During the POR) which Were Outstanding During the POR)
    - (3). Accounting Treatment of Purchases
    - (4). Value Added Tax (VAT) Program Established on April 1, 2006
  - b. Captive Port Facilities
 

Credit for the cost of the capital (including interest) to construct the port facilities, which is then applied as an offset to the wharfage charges due Gujarat on cargo shipped through the captive jetty
4. State Government of Jharkhand Programs

- a. Grants and Tax Exemptions under the State Industrial Policy of 2001
  - b. Subsidies for Mega Projects under the JSIP of 2001
5. State Government of Maharashtra Programs
- a. Refunds of Octroi Under the PSI of 1993, Maharashtra Industrial Policy of 2001, and Maharashtra Industrial Policy of 2006
  - b. Infrastructure Assistance for Mega Projects
  - c. Land for Less than Adequate Remuneration
  - d. Loan Guarantees Based on Octroi Refunds by the SGM.
  - e. Investment Subsidy

V. Analysis of Comments

**Comment 1:** Whether the Failure of the GOI and the ISGs to Respond to the Department's Questions Warrants Application of Adverse Inferences with Respect to Subsidy Programs Essar Claims It Did Not Use

Petitioners argue that it is the Department's practice to obtain information regarding alleged subsidy programs from the respondent firm and foreign government. Petitioners explain this practice ensures the accuracy of the Department's investigations in two ways. First, petitioners claim the practice enables the Department to obtain first-hand knowledge from the foreign government on which companies applied for and used the programs at issue. Second, petitioners argue that responses from foreign governments serve to clarify, supplement, and correct information supplied by the respondent company.

Petitioners argue that the Department's regulations concerning new shipper reviews make clear the importance of foreign governments' responses in investigating alleged subsidy programs. Petitioners refer to 19 CFR 351.214(b)(v), which they claim requires that firms requesting new shipper reviews certify that they have informed governments of the exporting country that they will be required to provide full responses to the Department's questionnaires. Petitioners maintain that the Department would not require such a certification if it did not consider the responses of foreign governments to be essential to its analysis. Petitioners further point out that the Department has stated that 19 CFR 351.214(b)(v) was specifically included "to put parties on notice that, in a review of a countervailing duty order, the party will have to have the cooperation of the government" and thereby "minimize situations in which {the Department} will be forced to rely on the facts available." See Antidumping Duties; Countervailing Duties; Final Rule, Preamble, 62 FR 27296, 27319 (May 19, 1997) (Preamble).

Petitioners argue that the Department asked each respondent party (i.e., Essar, the GOI, and the ISGs) to provide information concerning Essar's use of the subsidy programs subject to the review, in particular Essar's alleged use of the industrial policies of the SGOAP and SGOC and the SGOG's captive port facilities program. Petitioners contend the Department's request

for information from the GOI and ISGs concerning Essar's alleged use of these programs reflect a determination by the Department that such information is necessary. Petitioners assert that to assume otherwise would be to assume that the questions the Department posed to the GOI and ISGs were entirely superfluous.

Petitioners assert that having determined that a response from a foreign government concerning a respondent's alleged use of a subsidy program is necessary in order to complete an accurate investigation, the Department cannot permit the foreign government to blatantly ignore the Department's requests. If it were to do so, petitioners argue, the Department would effectively cede control of the investigative process to the respondent parties.

Petitioners further argue that the consequences of a decision not to apply AFA to the respondent firm in the face of complete intransigence by a foreign government are aptly illustrated by the history of the instant proceeding. Petitioners note that in the prior review, the Department refrained from applying AFA under section 776(b) of the Act with regard to Essar despite the fact that the GOI and ISGs refused to respond to the Department's questions concerning the industrial policies of the SGOAP and SGOC and the SGOG's captive port facilities program. In the instant review, the GOI and the ISGs have again failed to respond to the Department's questions concerning these programs. Petitioners contend that without the possibility of the application of AFA with regard to Essar, the consequences are simply not adverse enough to induce the GOI and ISGs to respond to the Department's questions concerning these programs. In order to avoid an endless perpetuation of this problem, petitioners argue that Department should apply AFA as described under section 776(b) of the Act with regard to Essar's alleged use of the industrial policies of the SGOAP and SGOC and the SGOG's captive port facilities program.

Lastly, petitioners note that the instant review is distinct from two prior cases in which the Department declined to apply AFA with regard to a respondent firm notwithstanding a foreign government's failure to respond to the best of its ability concerning subsidy programs allegedly used by the firm. Petitioners explain that in Pistachios from Iran 2003 Review and Pistachios from Iran NSR the Department verified respondents' non-use of the alleged subsidy programs through financial records provided by the respondents. See Certain In-shell Roasted Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review, 71 FR 27682 (May 12, 2006) covering calendar year 2003 (Pistachios from Iran 2003 Review), and accompanying issues and decision memorandum (Pistachios from Iran 2003 Review Decision Memorandum) at Comments 3 through 7; see also Certain In-shell Roasted Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty New Shipper Review, 73 FR 9993 (February 25, 2008) (Pistachios from Iran NSR), and accompanying issues and decision memorandum (Pistachios from Iran NSR Decision Memorandum) at Comment 2. Petitioners argue that in the instant review, rather than verify Essar's non-use of the alleged subsidy programs, record evidence provided by Essar actually confirm its eligibility for and use of the alleged programs.

Essar argues that the Department's decision in the Preliminary Results to assume that the industrial policies of the SGOAP and SGOC and the SGOG's captive port facilities program constitute financial contributions and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively, was consistent with its practice. See 73 FR at 79792 – 797993. Specifically, Essar asserts that the Department's approach concerning the application of AFA under section 776(b) of the Act follows the precedent set forth in Pistachios from Iran NSR:

Contrary to petitioners' claims, it is not the Department's practice to assign an adverse facts available rate to a respondent in CVD proceedings based solely on the fact that the foreign government failed to participate to the best of its ability. Rather, in instances in which the foreign government fails to adequately respond to the Department's questionnaires, it is the Department's practice to apply adverse inferences and assume that the alleged subsidy programs constitute a financial contribution and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively.

See Pistachios from Iran NSR Decision Memorandum at Comment 2.

Essar takes issue with petitioners' claims that the facts concerning Pistachios from Iran NSR and Pistachios from Iran 2003 Review are distinct from the instant review on the basis that the Department "verified" the respondent companies' non-use of subsidy programs at issue in the pistachios proceedings through financial records provided by respondent. Essar notes that the Department did not request verification in the instant case and contends that the financial data Essar supplied to the Department supports each of its claims of non-use of the alleged subsidy programs.

Essar argues that basing the decision of whether Essar received a certain subsidy on facts or inferences other than on Essar's own information would be contrary to the statute. Essar asserts that the statute is very clear about when a decision should be based on facts otherwise available. Essar argues that section 782(e)(1) – (4) of the Act stipulates that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination" if such information is timely, verifiable, sufficiently complete such that it may serve as a reliable basis for reaching the applicable determination, the submitting party has acted to the best of its ability, and the information can be used without undue difficulties. Essar contends that the information it has provided fulfills the criteria enumerated under section 782(e) of the Act and, therefore, refusing to rely on the information submitted by Essar when determining whether Essar used certain alleged subsidy programs would be contrary to the statute.

Essar also disagrees with the notion that the statute places the burden on the respondent firm to compel compliance by the foreign government. Essar argues that, contrary to petitioners' claims, the statute does not place such a burden on respondent firms. Essar adds that the Preamble does not indicate that such a burden resides with respondent firms either. Essar argues that the section of the Preamble referenced by petitioners relates to new shipper reviews and, moreover, only requires the respondent firm to "inform" the foreign government that it will be required to respond to the Department's questionnaire.

In sum, Essar asserts that petitioners' arguments concerning the application of AFA are the same as those argued before the Department in the previous review of this proceeding. Essar urges the Department to once again reject petitioners' arguments concerning application of AFA and continue its practice from the Preliminary Results in which the Department found that the alleged subsidy programs at issue constituted financial contributions and were specific pursuant to section 776(b) of the Act but relied upon information supplied by Essar to determine that Essar did not use the alleged subsidy programs at issue.

The GOI did not comment on this issue.

**Department's Position:** As in the prior review, we disagree with petitioners' argument that the failure of the GOI and the ISGs to respond to the Department's new subsidy questionnaires

necessarily warrants the application of an AFA net subsidy rate to Essar. As explained in Pistachios from Iran NSR:

. . . it is not the Department's practice to assign an adverse facts available rate to a respondent in CVD proceedings based solely on the fact that the foreign government failed to participate to the best of its ability. Rather, in instances in which the foreign government fails to adequately respond to the Department's questionnaires, it is the Department's practice to apply adverse inferences and assume that the alleged subsidy programs constitute a financial contribution and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. In such instances, the Department calculates the benefit by relying, to the extent possible, on information supplied by the respondent firm. Thus, if the respondent firm's books and records confirm that it used the alleged program, the Department will assume that the program is countervailable to the extent that the program conferred a benefit during the review period. However, if information on the record indicates that the respondent did not use the program, the Department will find the program was not used, regardless of whether the foreign government participated to the best of its ability.

See Pistachios from Iran NSR Decision Memorandum at Comment 2.

We note that the Department's approach in Pistachios from Iran NSR in this regard reflects a long-standing practice. For example, in Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 72 FR 51615, 51617-51618 (September 10, 2007) (Preliminary Results of SSSS from Korea) (unchanged in Stainless Steel sheet and Strip in Coils from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 73 FR 2456 (January 15, 2008)), the Department found that the Government of Korea (GOK) failed to act to the best of its ability and, thus, pursuant to sections 776(a)(2)(A) and 776(b) of the Act determined that the GOK directed domestic and government-owned banks to lend to the Korean steel producers in a manner that constituted a countervailable subsidy, to the extent that loans conferred a benefit upon the respondent firms. The Department reached the same conclusion in the Final Results of Countervailing Duty Administrative Review: Certain In-shell Roasted Pistachios from the Islamic Republic of Iran, 71 FR 27682 (May 12, 2006) (2006 Review of Roasted Pistachios from Iran), and accompanying Issues and Decision memorandum (2006 Review of Roasted Pistachios from Iran Decision Memorandum) at Comment 2:

. . . in CVD administrative reviews, if a respondent has claimed that it can establish non-use of a program as a factual matter, without an accompanying or complete government response, the Department has determined that it will analyze the responses provided by the company to determine if the information on the record is sufficient to establish non-use.

We disagree with petitioners' assertion that the Department's past practice in Pistachios from Iran 2003 Review and Pistachios from Iran NSR is invalid concerning the instant review because the Department did not conduct verification of Essar's questionnaire responses. The Department is not obligated to automatically apply AFA net subsidy rates in instances in which it did not verify information that respondents placed on the record. Further, contrary to petitioners'



claim, the Department did not conduct verification in Pistachios from Iran 2003 Review or Pistachios from Iran NSR. See Pistachios from Iran Decision Memorandum at Comments 3 through 7; see also Pistachios from Iran NSR Decision Memorandum at Comment 2. Rather, the Department based its decision in those proceedings using information submitted on the record by respondents that was not subjected to verification. We have utilized the same approach in the instant review.

As to petitioners' other comments regarding the burden that respondents bear in securing their governments' cooperation in a proceeding and not wanting to weaken the incentives to cooperate, while we recognize those as legitimate concerns generally, we do not believe our practice diminishes those burdens or weakens those incentives within a given proceeding. First, as discussed above, we apply AFA against foreign governments when they refuse to respond to the Department's requests for information. And, to the extent that the Department determines that respondent firms used the programs at issue, the firms will also suffer the consequences of their governments' failure to respond to the Department's questionnaires, to the extent that the Department determines that the firms used the programs in a manner that confers a countervailable benefit.

**Comment 2:** Whether Essar Received Benefits Under the Industrial Policy of the SGOC

Petitioners argue that the SGOC provided countervailable benefits under the SGOC's Industrial Policy. They maintain that record evidence demonstrates that Essar has a manufacturing facility in the state. Petitioners claim that in preliminarily determining that Essar did not receive benefits under the SGOC's Industrial Policy, the Department does not appear to have acknowledged the existence of Essar's iron ore beneficiation plant in Chhattisgarh.

According to petitioners, a March 2006 press release issued by Essar indicates that the company has an iron ore plant located in Bailadilla, the Dantewada area of Chhattisgarh. Petitioners claim that the press release states that Essar commissioned an iron ore slurry line to connect its eight million ton per year capacity iron ore beneficiation plant in Bailadilla, Chhattisgarh, to Essar's pellet plant in Visakhapatnam. Petitioners assert the press releases states that the beneficiation plant began operating in early 2006.

Petitioners argue that Essar's questionnaire responses on this topic fail to demonstrate a lack of facilities eligible to receive subsidies under the SGOC's industrial policy. Petitioners challenge Essar's claim that it is not eligible to participate in the SGOC's industrial policy because the iron beneficiation plant in Bailadilla is still in the planning stages and no longer operational. They note that Essar supports its assertions regarding the beneficiation plant by citing to an October 2007 news article describing local protests against Essar's proposed construction of a 3.2 million ton per year steel plant in Chhattisgarh. Petitioners argue that the March 2006 press release and October 2007 news articles describe fundamentally different facilities (e.g., an iron ore beneficiation plant versus a steel plant). Petitioners argue that the Department accepted Essar's explanation in the Preliminary Results but has failed to provide any explanation for its apparent finding that the two facilities are, in fact, one in the same.

In addition, petitioners argue that business proprietary information on the record further demonstrates that Essar operated an iron ore beneficiation plant in an area of Chhattisgarh thereby making the facility and thus Essar eligible to receive benefits under the SGOC's industrial policy. First, petitioners point to a fines contract between Essar and the GOI's NMDC. Petitioners argue that the business proprietary information contained in the contract flatly

contradict Essar's claims of ineligibility and non-use. Second, petitioners reference business proprietary information that Essar submitted in the context of the EPCGS program, which they assert demonstrates that Essar benefited from the SGOC's industrial policy during the POR. Third, petitioners cite to a business proprietary document which they claim unequivocally demonstrates that Essar's iron ore beneficiation plant was in operation and supplying Essar's HRS operations during the POR. Fourth, petitioners note that information Essar supplied in the context of the provision of iron ore for LTAR program demonstrate that its iron ore beneficiation plant in Chhattisgarh was in operation during the POR. According to petitioners, Essar stated in its questionnaire response that fines purchased from the NMDC are transported from NMDC's facilities by conveyor to the beneficiation plant. Petitioners argue that, by this statement, Essar acknowledged that its iron ore beneficiation plant was no longer in the planning stages but was facilitating its HRS operations during the POR.

Petitioners argue that record evidence clearly contradicts Essar's claims that its iron ore beneficiation plant was "only in the planning" stages during the POR and, thus, was ineligible to receive benefits during the POR. Petitioners conclude that because record evidence indicates Essar operated a facility that was eligible to receive benefits under the SGOC's Industrial Policy, the Department should find, pursuant to section 776(b) of the Act, that Essar received benefits under the SGOC's Industrial Policy during the POR.

Essar argues that, contrary to petitioners' claims, it has acted to the best of its ability in the instant review by responding fully to all of the Department's questions concerning the SGOC's industrial policy. Essar further argues that petitioners ignore information Essar submitted regarding its alleged use of the SGOC's industrial policy, information that the Department utilized in the Preliminary Results and the prior review for purposes of determining that Essar did not receive benefits under the industrial policy. Essar argues that the Department should once again rely on the information Essar has submitted to determine that the company did not receive benefits under the SGOC's industrial policy.

Essar acknowledges that it has a beneficiation facility in Kirandul, Chhattisgarh, and notes that this fact has been made clear in submissions the company has made to the Department during the prior and current review. With regard to the Kirandul facility, Essar claims it is nothing more than a facility for mixing fines with water to produce slurry which is then piped to its pellet plant in the city of Vizag. Essar argues that the facility in Kirandul is not a production facility. It argues that, as discussed in the fines contract it signed with the NMDC, the facility in Kirandul merely serves as the first stage in the transportation of the fines from the mine to the pellet plant in Vizag. On this basis, Essar, reiterating statements made in its questionnaire responses, states that it does not have eligible production facilities in Chhattisgarh and did not and could not have received any alleged benefits under the SGOC's industrial policy.

The GOI did not comment on this issue.

**Department's Position:** As petitioners correctly note in their case brief, documents that Essar itself placed on the record of the review demonstrate that Essar, in fact, operated a beneficiation plant during the POR that was located Kirandul, which is in the Bailadilla area of Chhattisgarh.<sup>12</sup> In light of this information, we are revising our determination from the Preliminary Results. See 73 FR at 79801. Specifically, we find that due to the SGOC's failure to respond to the initial

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<sup>12</sup> See, e.g., Essar's 2006 – 2007 Annual Report at 31, which is contained in Essar's May 12, 2008 questionnaire response at Exhibit 4; see also Exhibit 2 of Essar's October 20, 2008, questionnaire response.

questionnaire and because Essar provided no information concerning the SGOC's industrial policy and its Kirandul facility in its questionnaire responses, the use of AFA as described under sections 776(a)(2)(A) and (B) and 776(b) is appropriate for the final results when analyzing Essar's use of the SGOC's industrial policy program.

As explained above in the "Adverse Facts Available" section, in the section of the September 29, 2008, supplemental questionnaire issued to Essar regarding the SGOC's industrial policy, the Department specifically directed Essar to state whether it received subsidies under the Chhattisgarh Industrial Policy with respect to an iron ore beneficiation plant in Bailadilla as well as any other facility Essar operated in the state. In its October 20, 2009, questionnaire response, Essar failed to mention or discuss the iron ore beneficiation facility in Kirandul. Therefore, because it did not provide any information with respect to the iron ore beneficiation plant in Kirandul, we find that Essar failed to provide information requested in the Department's September 29, 2008, supplemental questionnaire regarding the SGOC's Industrial Policy.

Essar has based its claims of non-use on the assertion that Essar has no existing or eligible facilities in Chhattisgarh and therefore could not have received any of the benefits allegedly provided by the SGOC under its industrial policy program. However, we find that information on the record indicating that Essar owned and operated an iron ore beneficiation facility in Kirandul, Chhattisgarh, during the POR undermines Essar's claims regarding the non-existence of such facilities. In its rebuttal briefs, Essar argues for the first time that the Kirandul facility is ineligible for the SGOC's industrial policy because the facility merely mixes fines with water to produce slurry which is then piped to Essar's pellet plant in the city of Vizag. However, as noted above, the SGOC failed to respond to the Department's questions concerning its industrial policy program. We further note that Essar did not respond to any of the questions in the Standard Questions, Grant, Allocation, Tax, and Provision of Goods/Services appendices the Department's initial and September 29, 2008, supplemental questionnaire regarding the administration, eligibility requirements, or any other aspect of the SGOC's industrial policy. Therefore, the SGOC and Essar have failed to provide the requested information needed to evaluate whether Essar's beneficiation plant in Kirandul was eligible to receive benefits under the program.

Furthermore, we disagree with Essar's argument that it made clear the existence of the iron ore beneficiation plant in Kirandul in its questionnaire responses. Though Essar's iron ore beneficiation plant in Kirandul is mentioned in its annual report and in contracts signed between Essar and the NMDC, Essar failed to acknowledge or discuss the facility when the Department directly asked whether Essar operated iron ore beneficiation plants in Chhattisgarh. See the Department's September 29, 2008, supplemental questionnaire.

Therefore, as discussed above in the "Adverse Facts Available" section, we find, pursuant to sections 776(a)(2)(A) and (B) and 776(b) of the Act that the SGOC's industrial policy program constitutes a financial contribution and is specific within the meaning of sections 771(5)(D) and 771(5A) of the Act. Further, as discussed in the "Adverse Facts Available" section, we find that, pursuant to sections 776(a)(2)(A) and (B) and 776(b) of the Act, Essar used the SGOC's industrial policy program and benefited from subsidies allegedly provided under the program as described under section 771(5)(E) of the Act. Accordingly, we have applied AFA when calculating the net subsidy rate attributable to Essar under this program. See the "Adverse Facts Available" and "SGOC's Industrial Policy 2004 – 2009" sections of these final results for a discussion of Essar's net subsidy rate under this program.

**Comment 3:** Whether Essar Received Benefits Under the Industrial Policy of the SGOAP

Petitioners argue that under its industrial policy, the SGOAP provides tax and fee exemptions, reimbursements for energy use, and water and infrastructure benefits to eligible firms in the state. Petitioners assert that the Department's Preliminary Results do not support the finding that Essar did not receive benefits under the SGOAP's industrial policy. Petitioners argue that record evidence makes clear that Essar maintains facilities through Andhra Pradesh but that Essar failed to provide sufficient information indicating that those facilities were ineligible for benefits under the industrial policy. Petitioners contend the record indicates that Essar has an iron ore slurry pipeline, land holdings on which the pipeline runs, and two pumping stations and support facilities in the State. According to petitioners, Essar stated that it did not receive benefits under the SGOAP's industrial policy because its facilities were not located in areas eligible to receive benefits under the program. Petitioners note that record evidence clearly indicates that Essar's pipeline passes through areas of Andhra Pradesh that would make Essar eligible to receive benefits under the program. Petitioners further note that Essar operates a pellet plant in Andhra Pradesh. Petitioners contest Essar's claims that the pellet plant is not eligible to receive funds under the SGOAP's industrial policy. Petitioners argue that the information Essar submitted to substantiate its claims concerning the eligibility of its pellet plant, translations of a tax document, fail to support Essar's contentions.

Petitioners argue that record evidence that clearly contradicts Essar's claims of non-use of the SGOAP's industrial program and, thus, the Department should determine that Essar has failed to cooperate by not acting to the best of its ability. Accordingly, petitioners urge the Department to find, pursuant to section 776(b) of the Act, that Essar received benefits under the SGOAP's Industrial Policy during the POR.

Reiterating statements from its questionnaire responses, Essar states that its pellet plant facility is located on leased land taken from the Visakhapatnam Port Trust under a long-term lease agreement and that the leased land is situated within the Municipal Corporation limits of Visakhapatnam. Therefore, argues Essar, because the facility is in the Municipal Corporation limits of Visakhapatnam, the plant is not eligible for any alleged benefits under the SGOAP's industrial policy. Essar notes that in the prior review the Department found that Essar provided sufficient information indicating that it could not have benefited from the SGOAP's industrial policy during the POR. See Final Results of Fourth HRS Review Decision Memorandum at Comment 11. Essar argues that the facts of the instant review should lead the Department to reach the same conclusion.

The GOI did not comment on this issue.

**Department's Position:** Essar has supplied information with respect to its non-use of the SGOAP programs during the POR. In support of Essar's claim that its facilities were located in an area of Andhra Pradesh that makes it ineligible for SGOAP benefits, Essar's October 20, 2008, questionnaire response includes the property tax form for Hy-grade Pellets Ltd., which indicates that the iron-ore pellet facility is located in the Greater Visakhapatnam municipal corporation in Andhra Pradesh. In the same submission, Essar provides an abstract regarding the SGOAP program from the Industries and Commerce Department of Andhra Pradesh that states at item four:

To promote Andhra Pradesh as attractive and competitive destination for industrial investments, the State Government have offered various incentives/benefits to all eligible new industrial units set up in the State except in the Municipal Corporation limits of Visakhapatnam . . . and commence commercial production on or after 1/4/2005 but before 31/3/2010.

Repeating arguments made in the prior review, petitioners contest the information supplied by Essar. However, we find that petitioners have not submitted any arguments or information that warrants altering our findings in the Preliminary Results for these final review results. See Preliminary Results, 73 FR at 79801; see also Final Results of Fourth HRS Review Decision Memorandum at Comment 10. Therefore, we continue to determine that record evidence supports our finding that Essar did not receive any benefits with regard to its pellet plant or pipeline activities. We will continue to examine the program in any future administrative reviews.

**Comment 4:** Whether Essar Received Benefits Under the Captive Port Facilities Program of the SGOG

Petitioners argue that information on the record belies Essar's claims that did not use or benefit from the SGOG's captive port facilities program during the POR. Petitioners point out that after refusing to respond directly to the Department's questions concerning the captive port facilities program, Essar provided information indicating that it used and benefitted from the program during the POR. Petitioners note that Essar indicated that it paid wharfage fees of Rs. 60 per metric ton for HRS exported from the captive jetty during the POR. Petitioners argue that the rate Essar paid was Rs. 10 per metric ton less than what they contend is the normal wharfage fee charged by the SGOG's Gujarat Maritime Bureau (GMB). Petitioners argue that this information demonstrates that Essar used and benefitted from the SGOG's captive port facilities program during the POR.

Petitioners argue that Essar's denial that it used the program is flatly contradicted by record evidence, clearly constitutes the withholding of information requested by the Department, and has resulted in the Department's investigation of the captive port facilities program being significantly impeded. Petitioners assert that the Department should find that Essar used the program during the POR. Because Essar failed to act to the best of its ability when responding to the Department's questions concerning this program, petitioners argue that the Department should apply AFA, as described under section 776(b) of the Act, when calculating the benefit attributable to Essar under the program.

Essar asserts that petitioners have ignored evidence provided in its questionnaire response, which indicates that discounted wharfage fees expired prior to the POR, Essar paid for the wharf itself, and paid non-discounted wharfage fees during the POR. See Essar's October 17, 2008, questionnaire response at pages 15 – 17 and Exhibit 10 – 13.

The GOI did not comment on this issue.

**Department's Position:** As explained above in the "Wharfage Fees Paid Under the SGOG's Captive Port Facilities Program" section, information on the record indicates that during the POR Essar, in fact, paid wharfage fees to the GMB at the captive jetty rate in an amount equal to Rs.

60 per metric ton of HSR exported from its captive jetty.<sup>13</sup> See Essar's October 20, 2008 submission at Exhibit 12. Therefore, we determine that Essar did not receive any exemptions on its captive jetty payments during the POR. Further, we find there is no information on the record indicating that the SGOG provided any rebates on wharfage fees to Essar the during the POR. Id.

However, as explained above in the "Adverse Facts Available" and "Wharfage Fees Paid Under the SGOG's Captive Port Facilities Program" sections of these final results, as AFA, we find that the program constitutes a financial contribution and is specific under sections 771(5)(D) and 771(5A), respectively.

To measure whether Essar received a benefit with regard to the wharfage fees it paid during the POR, we are treating this program as an indirect tax because we find the fees match a description of an indirect tax as provided under 19 CFR 351.102. Under 19 CFR 351.510(a), a benefit exists on an indirect tax to the extent that the taxes or fees paid by a firm as a result of the program are less than what would have been paid in the absence of the program. Because the GOI and SGOC did not respond to the Department's questionnaires, we do not know whether the wharfage fee Essar paid during the POR constituted a preferential rate under the program and we do not know the wharfage fee that Essar would have paid in the absence of the captive port facility program. Information on the record indicates that the wharfage fee rates Essar paid during the POR were Rs. 10 per metric ton less than the wharfage fees paid by firms operating in GMB jetties. See Essar's October 20, 2008, submission at Exhibit 12. Therefore, pursuant to 776(a)(2)(A) and (B) and 776(b) of the Act, as AFA we assuming that the GMB wharfage fee is rate the rate that Essar would have paid absent the program.

**Comment 5:** Whether Essar Received Benefits Under the GOI's SEZ Act of 2005

Essar argues that the product that Essar exported to the United States could not have been subsidized because it was produced prior to the point where any subsidization could have been received. Further, contends Essar, the Department's regulations specify that if subsidies can be tied to a particular product the subsidy will be attributed only to that product. See 19 CFR 351.525(b)(5). Therefore, Essar argues that if the Department finds that any subsidy was provided to the company, the Department must determine that it was provided to products produced after January 31, 2007, the date on which Essar's bond was granted. According to Essar, no subsidy can be attributed prior to January 31, 2007. On this basis, Essar argues that the Department should find that the company did not receive any countervailable subsidy under the SEZ Act.

The GOI asserts that in the Preliminary Results, the Department determined the SEZ Act constitutes a subsidy based on AFA. According to the GOI, the Department based this decision on the GOI's inability to provide information on the SEZ Act within the deadlines specified by the Department. The GOI argues that it did not answer the questions on the SEZ Act because the companies involved in this review did not receive any benefit under the program during the POR. The GOI further maintains that Article 12.7 of the SCM Agreement specifies the decision as to whether benefits were provided may be made on the basis of AFA when a party is unable to provide "necessary" information. According to the GOI, Essar provided complete responses to

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<sup>13</sup> Essar's captive jetty is part of its captive port facility.

the SEZ program that should provide the Department with enough information to determine that the program was not used.

The GOI further argues that whether or not the Department determines the SEZ Act to be a countervailable subsidy based on AFA, the SCM Agreement does not allow duties to be imposed in this case. According to the GOI, the Department noted in its Preliminary Results that Essar did not obtain the SEZ license until January 31, 2007. The GOI contends that Essar provided evidence on the record of this case that the goods exported to the United States were produced, sold, and were exported to the United States prior to that date. According to the GOI the SCM Agreement states:

No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product. (Emphasis added).<sup>14</sup>

The GOI contends that the product that Essar exported to the United States could not have been subsidized, because it was produced prior to the point at which any subsidization could have been received. Furthermore, the GOI argues that the Department's regulations specify that if subsidies can be tied to a particular product the subsidy will be attributed only to that product.<sup>15</sup> The GOI asserts that if any subsidy was provided in this case, it was provided to products produced after January 31, 2007. The GOI further argues that no subsidy can be attributed before January 31, 2007. The GOI argues that products exported to the United States physically could not have been subsidized because they were produced prior to the point where any subsidy could have been received. Therefore, the GOI contends that in the final results, the Department should find that Essar did not receive any subsidy under the SEZ Act.

Petitioners contend that the Department justifiably applied AFA when it preliminarily determined that benefits under the SEZ Act constitute a financial contribution and are specific under sections 771(5)(D) and 771(5A) of the Act, respectively. Petitioners assert that by refusing to respond to the Department's questions, the GOI denied the Department information that was critical to its subsidy analysis. Thus, argue petitioners, in light of the GOI's failure to cooperate the Department appropriately followed its AFA practice in the Preliminary Results. See 73 FR at 79798; see also Pistachios from Iran 2003 Review Decision Memorandum at Comment 2.

Petitioners disagree with Essar's argument that any benefits received under the program were tied to specific export products produced after January 31, 2007, thereby making Essar's use of the program impossible because it made no exports in 2007. Petitioners contend that Essar's arguments fail to recognize that benefits provided under the SEZ act are tied to exports generally rather than to specific products. Thus, argue petitioners, in the Preliminary Results the Department correctly attributed subsidies under the program to Essar's total exports. See 73 FR at 79798.

**Department's Position:** As explained in the Preliminary Results, the GOI failed to provide information regarding the SEZ Act, although it was given several opportunities to respond to the

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<sup>14</sup> SCM Agreement at article 19.4.

<sup>15</sup> 19 C.F.R. Section 351.525(b)(5).

Department's questions concerning this program. See 73 FR at 79792. Because the GOI did not provide the information requested concerning the SEZ Act, pursuant to section 776(b) of the Act, we found that the GOI did not act to the best of its ability and we have employed adverse inferences in selecting from among the facts otherwise available. As we explained in the Preliminary Results, in countervailing duty cases, we require information from both the government of the country whose merchandise is under the order and the foreign producers and exporters. See 73 FR at 79792. As discussed above in the "Adverse Facts Available (AFA)" section above, when the government fails to provide requested information concerning alleged subsidy programs, as AFA, we find that a financial contribution exists under the alleged program and that the program is specific as described under sections 771(5)(D) and 771(5A) of the Act, respectively. See e.g., Preliminary Results of CTL Plate from Korea, 71 FR at 11399 (unchanged in CTL Plate from Korea). However, where possible, the Department will normally rely on the foreign producer's or exporter's records to determine the existence and amount of the benefit. Id.

In the Preliminary Results and in these final results, we find that Essar's use of the programs under the 2005 SEZ Act was contingent on exports and, therefore, specific within the meaning of section 771(5A)(B) of the Act. See 73 FR at 79797. Because the GOI failed to provide information requested by the Department, we find that the record does not support Essar's claim that the SEZ Act program is tied to specific export shipments. On this basis, as AFA we find that the SEZ Act is related to total exports, and therefore find that Essar benefited from the program during the POR.

**Comment 6:** Whether the Department Inadvertently Failed to Include Certain EPCGS Licenses in the Benefit Calculation for the Preliminary Results

Petitioners argue that the Department inadvertently failed to include certain of Essar's EPCGS licenses on which it has yet to meet its export obligations. Referencing business proprietary data, petitioners list the EPCGS license numbers that they claim the Department errantly failed to include in the calculations of the Preliminary Results. Petitioners add that the Department should treat each of the EPCGS licenses at issue as contingent liabilities for purposes of calculating the benefit. Though Essar claimed to have fulfilled its export obligations with regard to the licenses at issue, petitioners contend that Essar failed to provide documentation substantiating its claim. Petitioners argue that it is the Department's practice to treat benefits on EPCGS licenses as contingent liabilities in the absence of an official letter from the GOI demonstrating the elimination of the liability. See Preliminary Results, 73 FR at 79796.

Essar and the GOI did not comment on this issue.

**Department's Position:** We have reviewed the record and found that some of Essar's EPCGS licenses on which it has yet to meet its export obligations, including those listed in petitioners brief, were inadvertently omitted from our preliminary calculations. We have treated these licenses as contingent liabilities and included them in the calculations of these final results.

**Comment 7:** Whether the Department Should Adjust the EPCGS License Application Fees Reported by Essar



In accordance with section 771(6)(A) of the Act, in the Preliminary Results, the Department adjusted the benefit Essar received under the EPCGS to account for application fees paid by Essar. See 73 FR at 79796. According to petitioners, information from the GOI indicates that a company is required to pay a one-time application fee of “Rs. 5 per thousand of duty saved . . . subject to a maximum of Rs. 250,000.” Petitioners maintain that despite the information from the GOI, Essar reported EPCGS license application fees that greatly exceeded the maximum amount stipulated by the GOI. Petitioners argue that based on the information submitted by the GOI, the Department should reject the excessively high application fee data reported by Essar and recalculate the application fee data with the correct license fee amount, as indicated by the GOI.

Essar and the GOI did not comment on this issue.

**Department’s Position:** The GOI reported that Rs. 250,000 is the maximum application fee for an EPCGS license. In the spreadsheets Essar provided, Essar included the application fees it paid for the EPCGS licenses that it obtained in various years. In some instances, the amount reported by Essar for a given license exceeds Rs. 250,000. There is no information on the record to determine why the application fees reported by Essar exceed the maximum application fee amount reported by the GOI. Therefore, for purposes of this administrative review, we are calculating the benefit under this program using application fee amounts Essar reported and certified are accurate. We will continue to examine the issue in future administrative reviews.

However, we have revised our treatment of the application fees in the EPCGS calculations. In the calculations for the Preliminary Results, for licenses in which we calculated the benefit using the contingent liability approach, we subtracted the reported total amount of application fees paid from the total benefit. This was incorrect because the application fees have no relation to the interest-free nature of the contingent liability. Therefore, in the calculations for the final results, we allocated the total application fee Essar paid for each license by the values of the various imports of capital goods Essar made under the license. Then, to determine the amount of contingent liability for each import, we subtracted the duty paid under the program and the portion of the application fees attributable to that import from the amount of duty that would be payable absent the program. We then multiplied the amount of contingent liability for each import by the benchmark interest rate to derive the benefit for each import. We then summed the benefits for each import to determine the total benefit for each license.

**Comment 8:** Whether It Was Appropriate to Apply Adverse Inferences With Regard to Certain of Essar’s EPCGS Licenses<sup>16</sup>

Essar explains that in the Preliminary Results, the Department Applied AFA to Essar with regard to certain EPCGS licenses for which the Department claims that Essar failed to provide all of the information requested. See 73 FR at 79793. Essar argues that it is not clear which EPCGS licenses the Department was referring to in the Preliminary Results. Essar states that it has reviewed its records and cannot find any instances in which data pertaining to EPCGS licenses were not provided. Essar explains that section 782(d) of the Act instructs the Department to promptly inform interested parties submitting information of the nature of any deficiencies and shall, to the extent practicable, provide interested parties with an opportunity to

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<sup>16</sup> The EPCGS licenses addressed in this comment are distinct from those discussed in **Comment 6**.

remedy or explain the deficiencies at issue. Essar argues that the Court has previously interpreted section 782(d) of the Act as placing an obligation on the Department to seek the information it requires. See SKF USA Inc. v. United States, 391 F. Supp. 11327 (CIT 2005). (SKF). On this basis, Essar argues that the Department cannot resort to the use of AFA with regard to certain licenses under the EPCGS program without giving Essar the opportunity to address any deficiency in the information provided for the EPCGS licenses.

Petitioners argue that the Department correctly applied AFA with regard to the EPCGS licenses at issue. Petitioners note that the Department asked Essar in its September 29, 2008 supplemental questionnaire to provide specific pieces of information regarding the program as well as letters from the GOI indicating Essar's fulfillment of its export obligations. Petitioners contend that in its October 20, 2008 response Essar provided answers for some but not all of the relevant duty exemptions provided under the EPCGS. Therefore, explain petitioners, the Department issued another questionnaire in which it explained that the requested information for the EPCGS "was not provided," enumerated the licenses for which information was not provided, and directed Essar, yet again, to provide the information the Department previously requested. Petitioners contend Essar failed to provide the requested information. Petitioners provide the EPCGS license numbers for which they claim Essar failed to provide the requested information. This information is business proprietary. Given the Department's repeated efforts to obtain the information and Essar's refusal to provide the information, petitioners argue that the Department justifiably applied AFA in the Preliminary Results and should continue to do in the final results.

The GOI did not comment on this issue.

**Department's Position:** As noted by petitioners, with respect to the EPCGS licenses in question, we provided Essar multiple opportunities to submit the data that we requested. In Essar's supplemental questionnaire responses, they indicated that the EPCGS licenses in question were used to procure goods from suppliers within India and provided documents for one of these licenses to explain how licenses can be used under the EPCGS duty exemption program to procure domestic goods. However, the fact remains that Essar obtained these licenses based on export obligations. The documentation that Essar submitted does not demonstrate that Essar did not benefit from duty reductions on these licenses provided under the EPCGS. Therefore, because Essar failed to provide the information that was requested by the Department, we are applying AFA to the EPCGS licenses at issue.

With respect to the licenses in question, as AFA we are treating them as contingent liabilities because we find that Essar has failed to submit the requested documentation from the GOI indicating that Essar fulfilled its export obligation with regard to the licenses. Where possible, we have used information supplied by Essar to calculate the AFA rate for the licenses in question. For example, in one instance, Essar provided limited information with regard to one of its EPCGS licenses. Therefore, as AFA we have used the information from that license to derive maximum amount of benefit that could have been conferred upon Essar during the POR under the contingent liability method. For the other licenses at issue, Essar failed to provide any of the information requested by the Department. Therefore, as AFA, we have assigned to those licenses the highest benefit amount calculated in this review for an EPCGS license using the contingently liability method.

**Comment 9:** Whether the Department Erred In Calculating Benefits Conferred Under the Pre-Shipment Export Financing Program

Essar argues that in calculating the benefit under the pre-shipment export financing program the Department committed a number of inadvertent errors with regard to foreign currency and rupee denominated loans. Essar contends that for foreign currency loans, the calculation of the benefit was incorrect because the benefit should be based on the benchmark interest amount minus the interest paid by the company. Using the State Bank of Patiala as an example, Essar argues that in its preliminary calculations the Department deducted from the values in the interest benefit column the values in the corresponding exchange rate column rather than the values in the interest paid column. Essar explains that the same error was made for each bank in each row of the preliminary calculations. Essar provides what it argues are the corrected calculations in its case brief. These calculations are business proprietary.

The GOI and petitioners did not comment on this issue.

**Department's Position:** In the Preliminary Results, we inadvertently calculated the benefit on Essar's foreign currency facility pre-shipment loans outstanding during the POR as the difference between the benchmark interest payment and the Rupees/U.S. Dollar interest rate. In the calculations for the final results, we have corrected the inadvertent error by calculating the benefit as the difference between the benchmark interest payment and the amount of interest paid under the program.

**Comment 10:** Whether the NMDC is a Government Authority Capable of Providing a Financial Contribution

Essar argues that in preliminarily determining that the NMDC constitutes a government authority capable of providing a financial contribution under section 771(5)(D) of the Act, the Department failed to address information placed on the record by the GOI. Essar notes that in its initial questionnaire the GOI explained that it is not involved in the daily operation of the NMDC and that the NMDC's operations are managed by an independent board consisting of 13 members, where two members are from the GOI and seven are independent directors nominated by the GOI. Essar asserts that there is no evidence on the record to suggest that the NMDC is either a government authority or a public entity. Essar further maintains that there is no evidence that the GOI has entrusted or directed the NMDC to provide Essar with high-grade iron ore for LTAR. Essar argues that the Department failed to address these issues in the Preliminary Results.

Essar further asserts that, with regard to this issue, in the Preliminary Results the Department relied entirely on its finding from HRS from India 2006 that the NMDC is a government authority. See Preliminary Results, 73 FR at 79796. Essar claims that the information placed on the record by the GOI in the instant review clearly indicates that the composition of the NMDC's board does not make it possible for the GOI to exercise the type of direction and control that are consistent with a finding that the NMDC is a government authority.

The GOI argues that the Department did not address the evidence provided by the GOI in the Preliminary Results. The GOI asserts that in its initial questionnaire response it explained that the GOI is not involved in the daily operations of the NMDC. Moreover, according to the GOI, it explained to the Department that the NMDC's operations are managed by an independent

Board of Directors. The GOI contends that in order for the Department to find a financial contribution, it must find that the NMDC has been directed or entrusted by the GOI to provide ore and fines at LTAR. The GOI argues that there is no evidence on the record that supports the determination that the NMDC is a government authority that provides a financial contribution.

Petitioners argue that a subsidy exists when a government authority provides a financial contribution, makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution. See section 771(5)(B)(iii) of the Act. Petitioners add that the Act defines a government authority as “the government of a country or any public entity within the territory of the country.” Id. Petitioners assert that the NMDC falls within this definition. In response to the Department’s questions, the GOI admitted that the NMDC is a “public sector company” of which over 98 percent of the equity is held by the GOI. See the GOI’s May 5, 2008, questionnaire response at 40 and 41. Petitioners also point out that the GOI indicated that it appoints two members of the NMDC’s board and approves the appointments of the seven other members. Id. Thus, argue petitioners, with the GOI owning nearly all of the NMDC’s equity and controlling a significant portion of the NMDC’s management, the Department should continue to find that the NMDC is a government authority that provided a financial contribution to Essar.

Petitioners further argue that the Department has repeatedly determined that the NMDC is a government authority. See, e.g., Final Results of Fourth HRS Review Decision Memorandum at “Sale of High-Grade Iron Ore for Less Than Adequate Remuneration.” They argue that Essar and GOI have presented no evidence that would warrant reconsideration of the Department’s findings that the NMDC is a government authority. Further, petitioners note that Essar and the GOI have provided nothing that suggests that the GOI lacks the power to control the NMDC through the nine directors of the NMDC that are either GOI officials or directly selected by the GOI.

**Department’s Position:** As petitioners correctly note, in the HRS from India 2006, the Department found that the NMDC constitutes a government authority capable of providing a financial contribution within the meaning of section 771(5)(D)(iii) of the Act. See Final Results of Fourth HRS Review Decision Memorandum at “Sale of High-Grade Iron Ore for Less Than Adequate Remuneration:”

In the Preliminary Results, we determined that the GOI provides high-grade iron ore to steel producers for less than adequate remuneration through the government-owned National Mineral Development Corporation (NMDC). Specifically, we found that the GOI directly, through the government-owned NMDC, continues to provide a financial contribution as defined under section 771(5)(D)(iii) of the Act

The Department’s determination in Final Results of Fourth HRS Review was a continuation of its finding in the administrative review covering calendar year 2004, the segment of the proceeding in which petitioners first alleged the GOI’s provision of iron ore for LTAR. See Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 1512, 1516 (January 10, 2006) (Preliminary Results of HRS from India 2004):

Section 771(5)(D)(iii) of the Act states that the provision of a good or service (other than general infrastructure) by a government (or any public entity) constitutes a financial

contribution. During verification, the Department found that the NMDC is a mining company governed by the GOI's Ministry of Steel and that the GOI holds 98 percent of its shares. See GOI Verification Report, at page 5. Accordingly, we preliminarily determine that the NMDC is a part of the GOI. Therefore, we preliminarily find that the GOI directly, through the government-owned NMDC, provided a financial contribution as defined under section 771(5)(D)(iii) of the Act to Essar.<sup>17</sup>

It is the Department's practice that majority ownership of an input supplier qualifies it as a government authority within the meaning of section 771(5)(D)(i) of the Act. Analyzing additional factors is not necessary absent information that calls into question whether government ownership does not mean government control. See, e.g., Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 FR 40480 (July 15, 2008), and accompanying Issues and Decision Memorandum at "Government Provision of Rubber for Less Than Adequate Remuneration."

The information on the record of the instant review only further bolsters the Department's prior determinations that the NMDC is a GOI authority capable of providing a financial contribution within the meaning of section 771(5)(D)(iii) of the Act. For example, with regard to the NMDC's 13 board members, information from the GOI indicates that it directly appoints two members and approves the appointments of an additional seven members. See the GOI's May 5, 2008, questionnaire response at 46. In addition, neither the GOI nor Essar have provided information or argument indicating that the GOI has relinquished its near total ownership stake in the NMDC. On this basis, we continue to find that the NMDC is a government authority that provided a financial contribution to Essar within the meaning of section 71(5)(D)(iii) of the Act through its sale of iron ore fines and lumps for LTAR.

**Comment 11:** Whether There is a Viable In-Country Benchmark Price For Use in the Benefit Calculation of the Provision of Lumps and Fines for LTAR Calculation, and If So, How It Should Be Calculated

Essar argues that in the Preliminary Results the Department ignored in-country market-based prices for lumps and fines that it could have used for purposes of its benchmarks in the LTAR benefit calculation. According to Essar, the GOI indicated that the NMDC sold lumps and fines to both Indian steel producers and foreign buyers during the POR. Essar explains that the export sales prices to the unaffiliated, foreign buyers, which are included in the Tex Report on an FOB port (Vizag) basis, may serve as the basis for determining whether the NMDC sold lumps and fines to Essar for LTAR. In other words, Essar argues that the prices between the NMDC and its foreign buyers may serve as in-country benchmarks as described under 19 CFR 351.511(a)(2)(ii).

Essar adds that it would defy logic to assume that the NMDC would have any interest to provide a subsidy to the foreign buyers. Thus, contends Essar, the NMDC's export prices to the

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<sup>17</sup> The Department's findings in Preliminary Results of HRS from India 2004 were unchanged in the final results. See Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 28665 (May 17, 2006) (HRS from India 2004), and accompanying issues and decision memorandum (HRS from India 2004 Decision Memorandum) at "Sale of High-Grade Iron Ore for Less than Adequate Remuneration."

foreign buyers should constitute viable and appropriate benchmarks for the Department to use in its final results calculations. Specifically, Essar argues that the Department's benchmark should be comprised of prices the NMDC charged to Japanese buyers. Essar notes that the lumps and fines sold to the Japanese buyers came from the same mine and are identical to the lumps and fines the NMDC sold to Essar. Essar provides the lumps and fines prices that the NMDC sold to its Japanese buyers on a Rs. per wet metric ton (WMT) basis in its case brief.

Essar further argues that the Department should conduct its comparison of the lumps and fines prices Essar acquired from the NMDC and the prices the NMDC charged to foreign buyers on an ex-mines basis. Essar asserts comparing these prices on an ex-mines basis is necessary because Essar acquires lumps and fines from the NMDC on an ex-mine basis while the NMDC sell lumps and fines on a FOB port (Vizag) basis. Thus, contends Essar, in order to conduct an apples-to-apples comparison free from distortions caused by differences in transport costs, the Department should perform the Essar's proposed benefit calculation using ex-mine prices.

Essar maintains that, properly adjusted, a comparison of the prices the NMDC charged to Essar and its foreign buyers demonstrates that the NMDC charged the same prices to both parties and, thus, did not sell lumps and fines to Essar for LTAR.

According to the GOI no benefit was provided from Essar's purchases of fines and lumps from the NMDC because the prices charged by the NMDC were set based on market prices negotiated between the NMDC and foreign buyers. The GOI asserts that the NMDC fixes prices for a fiscal April to March year and has long term agreements with major consumers of iron ore. According to the GOI, the export prices the NMDC charged to Japanese and Korean buyers are fixed in line with international benchmark prices, which increase or decrease by a fixed percentage and are applied to the previous fiscal year's price to derive the price for the following year. The GOI maintains that domestic prices are fixed considering the percentage increase or decrease in international benchmark prices and the Rupee/US Dollar exchange rate. According to the GOI, this fixed price is kept firm for an entire fiscal year, unless there is an unprecedented variation in the market scenario of more than 25 percent. The GOI maintains that the NMDC revised domestic prices mid-term during the 2007-2008 fiscal year effective October 1, 2007. According to the GOI, the NMDC's prices are product specific and kept the same for all customers with long-term agreements.

The GOI argues that prices for long-term domestic customers, such as Essar, are fixed based on the market price for a comparable product in India. According to the GOI, the WTO SCM Agreement specifies that when determining whether a good has been provided at LTAR, the "adequacy of remuneration shall be determined in relation to the prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)."<sup>18</sup> The GOI notes that there is similar language in the Department's regulations at CFR section 351.511(a)(2). The GOI contends that in the Preliminary Results, the Department has ignored its WTO obligation and its own regulations.

The GOI further maintains that the NMDC's prices to domestic producers are based on the prevailing market conditions for iron ore in India. The GOI asserts that the NMDC domestic prices are based on prices negotiated annually with foreign buyers. According to the GOI, these prices can be made comparable by adjusting them to the same basis in terms of weight and

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<sup>18</sup> WTO Agreement on Subsidies and Countervailing Measure (SCM) Agreement at Article 14(d).

transportation. Furthermore, the GOI asserts that Indian producers purchase iron ore in rupees and on an ex mine basis while the foreign buyers purchase in dollars on an FOB port basis.

With respect to Essar's lumps purchases from the NMDC, the GOI argues that the Department compared Essar's ex mine price charged by the NMDC to an FOB port price in Brazil plus freight from Brazil to Essar's facility in India and found that Essar paid a lower price at the mine than it paid for ore that it had to ship from Brazil. The GOI argues that the Department has ignored not only its WTO and regulatory obligations, but also economic reality in making its comparison. According to the GOI, using the Department's logic, in order for the NMDC to sell lumps to Indian producers at an unsubsidized price, the NMDC would have to charge a price equal to the world market price plus the cost of freight from Brazil to India. The GOI contends that this would be at a price higher than the lumps price the NMDC charged to its Japanese buyers and put Indian producers at a significant disadvantage vis a vis foreign producers because India has a comparative advantage in iron ore.

With respect to fines purchases from the NMDC, the GOI maintains the Department used the prices reported in the Tex Report as the comparable benchmark. The GOI contends that instead of using market-based fines prices that the NMDC charged to its foreign buyers, the Department used as its benchmark the 2007 fines price from Hamersley, Australia, as listed in the Tex Report, a price the Department found was a world market price available to India steel producers. According to the GOI, the SCM Agreement and the Department's regulations specify that the price should be determined based on the prevailing market conditions for the good or service in question in the country of provision or purchase. The GOI asserts that the Department does not explain why it chose a fines price in Australia as its benchmark over a market-based price between two unaffiliated parties (the NMDC and its foreign buyers) for the same material that was procured from the same mine. The GOI contends that the Department further distorts the comparison by adding freight from Australia to India.

The GOI maintains that there is further evidence that the price between the NMDC and Essar is an arm's length market price. According to the GOI, the Department asked whether the Indian steel companies had asked for a reduction in the price of lumps and fines. The GOI maintains that it answered as follows:

Indian Steel Producers, who are sourcing iron ore from the NMDC, have petitioned the NMDC for not increasing the prices on midterm basis from October 1, 2007. However, the NMDC increased the prices of its iron ore with effect from October 1, 2007 in accordance with the provisions of long term agreements with various steel producers including Hot Rolled Coil Producers. The Indian Steel Industry is not involved in pricing decision of NMDC. Prices are fixed as per the terms of Long term contracts with the customers.

See GOI's May 5, 2008, questionnaire response at 41. The GOI argues that the explanation above demonstrates that the NMDC is insisting that the companies abide by the terms of their contract, as would be expected in an arm's length transaction.

Petitioners contest Essar's proposal to use prices the NMDC charged to foreign buyers as the fines and lumps benchmarks when measuring the adequacy of remuneration of the NMDC's sales of fines and lumps to Essar. Petitioners assert that 19 CFR 351.511(a)(2)(i) requires that benchmarks used in the benefit calculation of LTAR programs utilize "actual transactions between private parties" or "actual imports." Petitioners argue that because the NMDC is a

public entity, the prices it charges to foreign buyers cannot represent prices between “private parties.” Petitioners further argue that the NMDC’s status as a government authority means that the NMDC will incorporate other considerations into its prices that lie outside the purely commercial realm. In addition, petitioners argue that even if the NMDC were a private party, there is no evidence of any transactions between Indian sellers and foreign buyers. Petitioners contend that the NMDC’s prices to foreign buyers, as listed in the Tex Report, are merely price quotes and that there is no evidence to show that they were embodied in actual transactions as described under 19 CFR 351.511(a)(2)(i).

Petitioners further argue that the record does not support the finding that the NMDC’s prices to foreign buyers constitute prices from “competitively run government auctions” as described under 19 CFR 351.511(a)(2)(i). They contend that 19 CFR 351.511(a)(2)(i) requires that prices from government run auctions may serve as a tier one benchmark only where the government sells a significant portion of the goods or services through competitive bid procedures that are open to everyone, protect confidentiality, and are based solely on price. Petitioners contend that Essar has provided no evidence that the NMDC’s prices to certain foreign buyers resulted in a process that meet the criteria enumerated under 19 CFR 351.511(a)(2)(i). Petitioners further argue that for these reasons, the Department should also reject the GOI’s arguments that the Department’s decision not to use the NMDC’s prices to foreign buyers violates Article 14(d) of the SCM.

Petitioners also argue that the fines prices that the NMDC charged to foreign suppliers was on the record of Final Results of Fourth HRS Review and that the Department nonetheless determined that no suitable tier one fines price was available. See Final Results of Fourth HRS Review Decision Memorandum at “Sale of High-Grade Iron Ore for Less Than Adequate Remuneration” and Comment 2. Thus, contend petitioners, the Department has previously rejected the use of prices charged to foreign buyers by the NMDC as a possible benchmark. Petitioners argue that Essar has presented no information to warrant reconsideration of the Department’s approach from Final Results of Fourth HRS Review and the Preliminary Results.

**Department’s Position:** When examining the adequacy of remuneration of the purchase of goods from a government authority, the Department is guided by 19 CFR 351.511. Under 19 CFR 351.511(a) there is a three-tier hierarchy for determining the price to be used for comparison and the types of adjustments that are to be made in making this comparison. The first tier is under 19 CFR 351.511(a)(2)(i). It states that “the Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question.” If there is no information with which to conduct the analysis under this first tier, 19 CFR 351.511(a)(2)(ii), the second tier, states the “the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such a price would be available to purchasers in the country in question.” Finally, if the analysis cannot be conducted under the second tier, 19 CFR 351.511(a)(2)(iii), the third tier, states that “if there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.” 19 CFR 351.511(a)(2)(iv) states that, “in measuring the adequacy of remuneration under paragraph (a)(2)(i) (the first tier) or (a)(2)(ii) (the second tier), the Secretary will adjust the



comparison price to reflect the price that a firm actually paid or would pay if it imported the product” and that “this adjustment will include delivery charges and import duties.”

During the POR of this administrative review, Essar purchased lumps and fines from the NMDC. As explained above, we have determined that the NMDC is a government authority whose sale of lumps and fines constitutes a financial contribution under section 771(5)(D)(iii) of the Act. We have further determined that the NMDC’s sales of lumps and fines are specific under section 771 (5A)(D)(iii)(I) of the Act because the actual recipient of the subsidy is limited to industries that use iron ore, including the steel industry, and is thus limited in number.

In order to determine whether a benefit was conferred by the purchases, as described under section 771(5)(E)(iv) of the Act, we must determine whether the purchases were made for less than adequate remuneration. The first step of this analysis requires determining whether there is a market-determined price for the good or service resulting from actual transactions in the country in question. If such a comparison price exists, then the analysis is conducted under tier one of the hierarchy. If such a comparison price does not exist, then we will conduct the analysis under tier two, or alternatively, tier three of the hierarchy.

With respect to Essar’s purchases of lumps from the NMDC, we were able to conduct the analysis under section 351.511(a)(2)(i) of the hierarchy. Section 351.551(a)(2)(i) states that the comparison price “could include prices stemming from actual transactions between private parties, actual imports, or in certain circumstances, actual sales from competitively run auctions.” During the POR, Essar purchased lumps POR from a private Brazilian supplier. The lumps prices from the Brazilian supplier price meet the criteria of the first tier because they stem from actual transactions between Essar and another private party, that is, an actual import. Because these are actual prices paid, we used the imported lumps prices Essar paid to its Brazilian supplier as the tier one benchmark price for comparison with the prices of Essar’s purchases of lumps from the NMDC.

With respect to Essar’s purchase of iron ore fines from the NMDC, we were unable to conduct the analysis under tier one of the hierarchy because there is no evidence on the record of “actual transaction between private parties, actual imports, or actual sales from competitively run auctions.” Thus, we sought to conduct the analysis under tier two of the hierarchy. 19 CFR 351.511(a)(2)(ii) stipulates that the comparison price is to be a “world market price where it is reasonable to conclude that such a price would be available to purchases in the country in question.” Because the regulation requires that the prices be “available to purchasers in the country,” we sought world market prices that would be available to a purchaser in India. The Tex Report contains several prices for iron ores fines. As explained above, publicly available data indicate the per metric ton cost that Tata Steel incurred to transport coal from Australia, to India.<sup>19</sup> Therefore, we determined that it is reasonable to conclude that the prices listed for iron ore fines from Hamersley Australia would be available to purchasers in the country in question, that is, to purchasers in India such as Essar. For these reasons, we have used the price reported in the Tex Report for iron ore from Hamersley as tier two benchmark prices for comparison with the prices of Essar’s purchases of iron ore fines from NMDC. As required under 19 CFR 351.511(a)(2)(iv), we used information on the record to adjust the Hamersley prices in the Tex Report to include delivery charges and import duties.

We do not agree with Essar’s claim that the lumps and fines prices the NMDC charged to foreign buyers, as listed in the Tex Report, are necessarily suitable tier two comparison prices or

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<sup>19</sup> See Tata Cost Data Memorandum.

preferable to the benchmarks we have used. As explained above, the price quotes in the Tex Report for lumps and fines in India pertain to iron ore sold by the NMDC. Because these price quotes pertain to the very government provider of the goods at issue, we would not normally use these prices for comparison purposes under tier one or tier two where other more appropriate benchmark data are available.

Lastly, because we have determined not to use the lumps and fines prices charged by the NMDC to foreign buyers, the comments of Essar and the GOI regarding transnational subsidization are moot.

**Comment 12:** Whether the Department Used Comparable Benchmark Prices For Use in the Benefit Calculations of the Provision of Lumps and Fines for LTAR Program

In the Preliminary Results, the Department measured whether the NMDC sold fines to Essar for LTAR by comparing the fines prices Essar paid to the NMDC to fines prices from Hamersley, Australia, as listed in the Tex Report. See 73 FR at 79797. The Department also measured the adequacy of remuneration of the NMDC's sales of lumps to Essar by comparing those prices to the lumps prices Essar paid to a Brazilian supplier.

Essar argues that the Department should have instead used the tier one benchmark price discussed above in **Comment 11** as its lump and fines benchmarks (e.g., the lumps and fines prices the NMDC charged to foreign buyers). Essar further contends that the fines prices from Hamersley, Australia, listed in the Tex Report are not suitable world market benchmarks for purposes of measuring the adequacy of remuneration of the fines prices sold by the NMDC because a comparison of the two prices suffers from numerous distortions. First, Essar argues that the fines contract between Essar and the NMDC contains a number of conditions beyond simple price and quantity for fines, which Essar claims impact the determination of the adequacy of remuneration test. Essar points out that section 771(5)(E)(iv) of the Act requires the Department determine adequacy of remuneration in relation to market conditions for the good being provided in the country of provision, including "other conditions of purchase or sale."

Essar explains that the contract between it and the NMDC contains several conditions which render the resulting prices incomparable to the prices from the Hamersley mine that are listed in the Tex Report. Referencing business proprietary information, Essar explains that the NMDC contract specifies a fine with a particular chemical composition whereas the Hamersley fines prices from the Tex Report simply reference prices for "fines." More importantly, argues Essar, the Hamersley fines are incompatible with Essar's hot briquetted iron (HBI)/direct reduced iron (DRI) production process because fines from the Hamersley mine are strictly blast furnace (BF)-grade lump. See page 5 of Essar's February 14, 2008 questionnaire response. In light of these facts, Essar charges that the Department cannot conclude, as it did in the Preliminary Results, that the fines prices "... reported in the Tex Report constitute world market prices that would be available to respondent ..." because Essar cannot incorporate the fines sold at the Hamersley mine into its production process. See Preliminary Results, 73 FR at 79797.

In addition to differences in physical specifications, Essar argues that the contract between Essar and the NMDC requires substantial capital investments as part of the purchase of fines, which include among other requirements, the installation of a fine ore conveyor system, slimes pipelines with pumping systems, a sump, pipeline, and pumping system for reclaimed water, and the laying of a slurry pipeline from its facilities in Kirandul to its facilities in Vizag.

In light of these conditions, Essar asserts that the company is not simply purchasing delivered fines from the NMDC. Rather, Essar argues it is buying fines at the mine source and that it is then responsible for transporting the material to its production facility in Vizag. Given this set of circumstances, Essar maintains that the Hamersley fines prices in the Tex Report are simply not comparable to those charged by the NMDC.

Reiterating their arguments from **Comment 11**, petitioners contend that the prices the NMDC charged to foreign buyers cannot serve as a viable benchmark under 19 CFR 351.511(a)(2)(i). Concerning Essar's arguments that Hamersley fines prices from the Tex Report are not comparable to fines it purchased from the NMDC, petitioners disagree. They argue that Essar erroneously interprets the Department's regulations to require that the domestic market goods be identical to the world market goods. Petitioners note that the Department will use world market prices under 19 CFR 351.511(a)(2)(ii) if such prices are "available to purchasers in the country in question." They argue that Essar neither contends nor does the record reveal that fines from Hamersley, Australia, cannot actually be purchased by consumers in India. In addition, petitioners argue that the fact that Essar itself purchased lumps from Brazil, a country farther away from India than Australia, demonstrates that physical distance is not an impediment to Indian companies wishing to purchase iron ore from overseas suppliers.

Petitioners further argue that Essar provides no evidence to show that Hamersley fines are not comparable to those Essar purchased from the NMDC. Petitioners note that the Hamersley fines prices are quoted per the percentage of Fe content and, thus, the price may be readily converted to a price for fines with an Fe content that is identical to that sold by the NMDC. Petitioners note that this is precisely what the Department did in the Preliminary Results. On this basis, petitioners argue that the Department appropriately used the Hamersley fines prices from the Tex Report as the benchmark when measuring whether the NMDC sold fines to Essar for LTAR.

Regarding Essar's purchases of lumps from the Brazilian supplier that the Department used as a benchmark in the Preliminary Results, Essar argues that chemical and physical composition of the lumps specified in the NMDC contract are substantially different from the lumps sold by the Brazilian supplier. Essar further argues that Essar's contract with the NMDC is long-term and requires minimum purchase clauses, requirements that are not present in its contract with the Brazilian supplier. On this basis, Essar argues that the lumps purchased from the Brazilian supplier are not comparable to the lumps it purchased from the NMDC.

Petitioners assert that 19 CFR 351.511(a)(2)(i) instructs the Department to compare, where possible, the government price in question "to a market determined price for the good or service resulting from actual transactions in the country." Petitioners argue that, in the case of the lumps Essar purchased from the Brazilian supplier, the Department appropriately followed 19 CFR 351.511(a)(2)(i). Reiterating its arguments from above, petitioners argue that the Department's regulations do not require that prices for goods or services used as benchmarks under 19 CFR 351.511(a)(2)(i) be identical to the government provided good or service.

Further, regarding the lumps benchmark utilized in the Preliminary Results, petitioners note that Essar itself placed pricing data regarding lumps it purchased from its Brazilian supplier on the record of the prior review and advocated using the prices for purposes of a lumps benchmark. See Final Results of Fourth HRS Review Decision Memorandum at "Sale of High-Grade Iron Ore for Less Than Adequate Remuneration" and Comment 2. Thus, petitioners call into question Essar's claims in the instant review that the lumps it purchased from the same Brazilian supplier are not comparable to the lumps Essar purchased from the NMDC.

**Department's Position:** As explained above in Comment 11, we disagree with Essar's argument that the fines and lumps the NMDC purportedly charged to its Japanese buyers are a preferable tier one benchmark under 19 CFR 351.511(a)(2)(i).

We also find that Essar has not sufficiently demonstrated that the chemical composition of the fines from the Hamersley mine and the lumps Essar purchased from its Brazilian supplier are so substantially different that they are incomparable with the lumps and fines Essar purchased from the NMDC's mine. There is no requirement that the benchmark used in the Department's LTAR analysis be identical to the good sold by the foreign government. See section 771(5)(E)(iv) and 19 CFR 351.511. In fact, the imposition of such a requirement would likely disqualify most, if not all, potential benchmarks under consideration in a LTAR analysis. However, as explained in the Preliminary Results, we have adjusted the government and benchmark prices used in our LTAR analysis to ensure comparability to the extent feasible and appropriate. See 73 FR at 79797. Specifically, we adjusted the benefit calculations to account for differences in Fe content in order to ensure that the benchmark fines and lumps prices are of the same Fe content as the fines and lumps Essar purchased from the NMDC. Id. Further, concerning the lumps Essar purchased from its Brazilian supplier, as petitioners correctly note, Essar itself placed pricing data regarding lumps it purchased from the Brazilian supplier on the record of the prior review and advocated using the prices for purposes of a lumps benchmark. See Final Results of Fourth HRS Review Decision Memorandum at "Sale of High-Grade Iron Ore for Less Than Adequate Remuneration" and Comment 2. Therefore, we find unpersuasive Essar's claims in the instant review that the lumps sold by the Brazilian supplier are incomparable to those Essar purchased from the NMDC.

We also take issue with Essar's claim that the fines obtained from the Hamersley mine are incompatible with Essar's production process. Other than an assertion in the narrative of its questionnaire response, Essar does not document its claim regarding the types of fines that are able to be used in its BBI/DRI production process. Further, we find there is no information in the Tex Report to substantiate Essar's claim that the fines from Hamersley are strictly BF-grade lump.

Further, we do not agree that the Department must abandon the use of the Hamersley fines prices in the Tex Report and the lumps prices charged by Essar's Brazilian supplier as benchmarks because of purported additional contractual obligations in the fines and lumps contracts Essar signed with the NMDC and the Brazilian supplier. The Department, in conducting its LTAR analysis, attempts to make an appropriate comparison of the government price and the benchmark price. To the extent that there are differences between the two prices that are substantiated with record evidence, the Department, where possible, will make the necessary adjustments to ensure an appropriate comparison. And, to the extent that substantiated record evidence demonstrates that the price of the good sold by the government is not comparable to the price of the proposed benchmark, the Department will not conduct its LTAR analysis using that benchmark. However, the mere existence of contractual obligations with regard to either the government price or the benchmark price does not automatically disqualify a comparison of the two prices for purposes of the Department's LTAR analysis. See Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products From Canada, 69 FR 75917 (December 20, 2004), and accompanying Issues and Decision Memorandum at "Adjustments,"

in which the Department adjusted the price firms paid to the Canadian Government to account for certain costs imposed on firms that purchased standing timber located on government land.

Further, Essar did not quantify the impact that the contractual obligations had on the effective price it paid for fines and lumps purchased from the NMDC. The Department inquired about movement expenses associated with transporting fines from the NMDC mine to Essar's beneficiation plant in Vizag. In reply, Essar simply stated that the fines it acquired from the NMDC were transported by conveyor from the mine to the beneficiation plant and did not utilize rail transport. See Essar's November 21, 2008, questionnaire response at 6 – 7. Therefore, even when asked to explain movement costs associated with transporting fines, which Essar claims are dictated by the contract it signed with the NMDC, Essar failed to do so. Thus, the information on the record of this review does not support adjusting the benefit calculations for the effect any contractual obligations had on the price Essar paid to the NMDC.

**Comment 13:** Whether the Department's Inclusion of Freight Costs in the Fines and Lumps Benchmarks Produced a Distorted Result

Essar argues that the Department's decision in the Preliminary Results to add freight costs into the benchmarks used to measure the adequacy of the NMDC's sales of fines and lumps to Essar is inconsistent with its practice and produced distortive results. See 73 FR 79797. Essar notes that in CFS from Indonesia the Department refused to make a freight adjustment for cut timber because what was being sold was standing timber:

By its nature stumpage, and the underlying standing timber on which stumpage fees are charged, are not "delivered." For our analysis, we are deriving a market-based stumpage price; we are not comparing log prices to log prices. The Malaysian export statistics are a starting point from which to derive a market-based stumpage price. As such, we find that ocean freight should not be deducted from or added to the Malaysian price . . . Therefore, the Department is not adjusting its stumpage benchmark for movement expenses in the final determination.

See Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia, 72 FR 60642 (October 25, 2007) (CFS from Indonesia), and accompanying Issues and Decision Memorandum (CFS from Indonesia Decision Memorandum) at Comment 14. Essar argues that, similar to CFS from Indonesia, it is purchasing fines and lumps at the mine source and, thus, freight should not be added to the lumps and fines benchmarks or otherwise incorporated into the LTAR benefit calculation.

Essar further argues that the addition of freight costs, particularly international freight costs, into the fines and lumps benchmarks produces distortive results. Essar notes that it acquired the fines and lumps from the NMDC on an ex-mine basis and that no freight was added to the purchase price. Essar recognizes that 19 CFR 351.511(a)(2)(iv) specifies that a delivered price should be used in comparing world market prices with a government-price in order to determine the adequacy of remuneration. However, Essar argues that in the instant review the application of this regulation would produce absurd and unintended results. Essar explains that in order for the NMDC not to be selling lumps and fines domestically at LTAR, it would have sell such goods to Indian producers at the world market price plus the cost of freight from, in the case of the instant review, Brazil and Australia. Essar contends the Department's approach in

the Preliminary Results creates a net subsidy rate where none exists. Thus, Essar contends that the Department's interpretation of 19 CFR 351.511(a)(2)(iv) is distortive. Essar argues the use of a delivered benchmark price under 19 CFR 351.511(a)(2)(iv) is meaningful where (1) a government subsidized price for an imported good is compared to other imports or (2) where a government subsidized price for a locally sourced good is compared with a market price for a local purchase. However, contends Essar, there is a built-in distortion where the Department attempts to compare an allegedly subsidized price for a locally sourced good with a market price quoted from a foreign country (e.g., FOB Australia) on which ocean freight is added.

Essar explains that Viraj holds that mere compliance with regulations cannot trump what appears to be an absurd result. See Viraj Group Ltd. v. United States, 162 F. Supp. 2d 656, 662 (CIT 2000) (Viraj). Essar argues that the Department's inclusion of freight costs in the fines and lumps benchmarks produces exactly the absurd result addressed in Viraj and, thus, the Department must not include such costs in the benchmark used in the final determination.

Petitioners argue that under 19 CFR 351.511(a)(2)(ii) the Department will use a world market price that is "available to purchasers in the country in question." They contend that prices available to purchasers are necessarily inclusive of related costs, including shipping. Petitioners assert that the notion that purchasers of any product may pay only the portions of the final cost that they choose is absurd. In addition, petitioners argue that 19 CFR 351.511(a)(2)(iv) requires the Department to adjust the benchmark such that it reflects what a firm paid or would pay if it imported the product and that such an adjustment "will include delivery charges and import duties."

Petitioners further contend that absent the participation of the NMDC, Indian steel producers would be required to obtain iron ore either from private suppliers in India, or overseas. In either case, argue petitioners, delivery costs would affect the cost for iron ore (e.g., domestic suppliers would set their iron ore prices on a delivered basis to match the delivered costs from abroad). On this basis, petitioners maintain that the Department correctly added delivery charges and other charges to the fines and lumps benchmarks. Petitioners further note that the Department's approach in the Preliminary Results was consistent with its practice. See Final Results of Fourth HRS Review Decision Memorandum at Comments 4, 14, and 15.

The GOI did not comment on this issue.

**Department's Position:** We disagree with Essar that the Department's inclusion of freight in the benchmark fines and lumps prices used in the Preliminary Results was in error. See 73 FR 79797. We addressed this issue in the prior review. See Final Results of Fourth HRS Review Decision Memorandum at Comment 4:

Under 19 CFR 351.511(a)(2)(iv), in measuring whether Essar's purchases of iron ore were for less than adequate remuneration, the Department will adjust the comparison price to reflect the price that the firm actually paid or would pay if it imported the product, including delivery charges and import duties. In addition, pursuant 19 CFR 351.511(a)(2)(i), consideration will be given to product similarity, quantities sold and other factors affecting comparability. In keeping with these regulations, delivery charges and import duties would include all shipping, handling and related charges (e.g., foreign inland freight, local inland freight, and ocean freight) that would be incurred in delivering the product to the respondent's factory gate, as well as all duties and taxes (e.g., VAT, normal customs duties, antidumping and countervailing duties) applicable to that product.

Similarly, to ensure an appropriate level of comparability, the domestic purchases from the government supplier should also be inclusive of all delivery charges incurred in delivering the product to the respondent's factory gate and all domestic taxes or other fees paid on that product. Therefore, we have applied this comparison analysis to Essar.

Furthermore, under 19 CFR 351.511(a)(2)(ii) the Department will use a world market price that is "available to purchasers in the country in question." As petitioners correctly note, world market prices, such as the fines prices from Hamersley, Australia, and the lumps prices from Essar's Brazilian supplier, are necessarily inclusive of related costs, including shipping. It is for this reason that 19 CFR 351.511(a)(2)(iv) specifies that the benchmark will reflect a delivered price that is inclusive of import charges. Therefore, we find unpersuasive the argument that purchasers of any product may pay only the portions of the final cost that they choose.

**Comment 14:** Whether the Department Should Make Certain Adjustments to the Benchmarks Used in the Benefit Calculation of the Provision Lumps and Fines for LTAR Program

In the Preliminary Results, the Department found that the NMDC sold lumps and fines to Essar for LTAR. See 73 FR at 79796. The Department used as its benchmark Essar's purchases of lumps from an un-affiliated Brazilian supplier for purposes of determining whether the NMDC sold lumps to Essar for LTAR. Id. In the Preliminary Results, the Department, pursuant to 19 CFR 351.511(a)(2)(iv), adjusted the benchmark price to account for international freight, import duties, and other charges incurred on importing lumps into India. See 73 FR at 79797.

Petitioners argue that the Department should revise its lumps benchmark. Specifically, petitioners argue that the Department should revise the amount of basic customs duty and landing fees that were added to the lumps benchmark in the Preliminary Results to comport with the customs duty and landing fee expenses that Essar reported in its questionnaire response in connection with its importation of lumps acquired from the Brazilian supplier. In their case brief, petitioners provide what they argue are the correct values for basic customs duties and landing fees that should be added to the lumps benchmark. They also provide the values on a Rs. per WMT basis. These values are business proprietary.

Regarding fines, in the Preliminary Results the Department used as its benchmark 2007 fines prices from Hamersley, Australia, as listed in the Tex Report. See 73 FR at 79797. Petitioners note that, in accordance with 19 CFR 351.511(a)(2)(iv), the Department correctly adjusted the benchmark to include delivery charges and other costs incurred on importing fines into India. However, petitioners argue that in the Preliminary Results the Department failed to add landing fee expenses to the fines benchmark. See Memorandum to the File, "Calculations for the Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India (C-533-821)" (December 19, 2008) (Preliminary Results Calculation Memorandum) at 50, of which the public version is on file in room 1117 of the Central Records Unit (CRU) of the main Commerce building. Petitioners assert that landing fees are part of the duty-inclusive price that a firm would pay to import fines into India and thus, pursuant to 19 CFR 351.511(a)(2)(iv), such fees should be added to the fines benchmark. Petitioners also point out that the Department correctly added landing fees to the benchmark for lumps in the Preliminary Results and therefore, for the sake of consistency, should also add landing fees to the fines benchmark. Id.

Petitioners further explain that the fines prices from the Tex Report are world market prices and therefore lack any transaction -specific information regarding the amount of landing fees that Essar would incur to import fines into India. However, petitioners maintain that the import documentation submitted by Essar in connection with its purchases of lumps from the Brazilian supplier indicates that landing fees are calculated as a percentage of the CIF value of the imports. Thus, argue petitioners, in order to estimate the amount of landing fees that would be incurred on imports of fines, the Department must first determine the CIF value of imported fines. Petitioners explain that in the Preliminary Results, the Department used a fines benchmark that included a free on board (FOB) price (Rs. per WMT) and ocean freight. See Preliminary Results Calculation Memorandum at 50. Petitioners contend that these two figures can be summed to provide a conservative estimate of the CIF value (Rs. per WMT) for the fines benchmark. Next, petitioners explain that the Department should multiply the estimated CIF value of the fines benchmark by the landing fees rate charged on Essar's imports of lumps that were acquired from the Brazilian supplier. After calculating the estimated landing fee charged on imports of fines, petitioners argue that the Department should then recalculate the import duties and other charges as a percentage of the revised fines benchmark (inclusive of landing fees). Petitioners maintain that in performing this calculation, the Department should use a basic customs duty rate of two percent, as indicated in the GOI's questionnaire responses. In addition, petitioners argue that Indian law provides that a special additional customs duty rate of four percent and an education cess rate of two percent are assessed on imports of fines. They argue that the Department should add these additional charges to the fines benchmark taking into account the revisions they describe above.

In their case brief, petitioners provide what they argue are the correct values for landing fees, basic customs duties, and other charges that the Department should add to the fines benchmark. They also provide the values on a Rs. per WMT basis. These values are business proprietary.

Essar argues that if the Department continues to use the flawed fines and lumps benchmarks from the Preliminary Results, the Department should at least correct certain errors. Regarding the benefit calculation for fines, Essar explains that in the Preliminary Results, the Department compared the ex-mines price charged by the NMDC with the FOB load port price in Hamersley, Australia, a mine that is approximately 5,000 miles from India. See 73 FR at 79797. In addition to erroneously including international freight in the benchmark price, Essar argues that the Department incorrectly added to the Hamersley fines benchmark price the cost of transport from the Hamersley mine to the FOB Australian load port and Indian inland freight from the port of Vizag to Essar's facility in Hazira. Essar notes that the fines it purchases from the NMDC are never shipped to its facility in Hazira. Referencing information on the record, Essar explains that it takes possession of iron ore fines purchased from the NMDC's mine, transports the fines to Vizag and processes the fines at its pellet plant in Vizag. Given this fact pattern concerning the fines Essar purchases from the NMDC, Essar argues it was inappropriate for the Department assume that imported fines would be shipped from Vizag to Essar's steel plant in Hazira and, thus, require the addition to its fines benchmark of an inland freight charge from Vizag to Hariza. Essar therefore argues that if the Department continues to use an Australian and Brazilian benchmark in the final results, the Department should base the comparison on ex mines prices.

The GOI did not comment on this issue.



**Department's Position:** We agree with petitioners that in the Preliminary Results we inadvertently used incorrect amounts for basic customs duty and landing fees when calculating the lumps benchmark. See Preliminary Results Calculation Memorandum at 50. We have corrected these amounts so that the amounts used in the final calculations reflect the amounts reported by Essar in its questionnaire response. See Essar's December 2, 2008, supplemental questionnaire at Exhibit 2.

We further agree with petitioners that we inadvertently failed to account for landing fees in the fines benchmark. See Preliminary Results Calculation Memorandum at 50. As petitioners note, information submitted by Essar concerning its imports of lumps from its Brazilian supplier indicates that landing fees are a certain percentage of the CIF value. See Essar's December 2, 2008, supplemental questionnaire at Exhibit 2. Thus, in the final results, we have revised the fine benchmark to include landing fees. To calculate the amount of landing fees that would be charged on imports of fines, we first calculated the CIF value of the fines by summing the ocean freight cost and the Hamersley fines price listed in the Tex Report. We then multiplied the calculated CIF value of the fines by the landing fees rate charged on Essar's imports of lumps to calculate the amount of landing fees to be added to the fines benchmark.

In the Preliminary Results, the fines benchmark also included amounts for basic customs duties and additional customs duties. See Preliminary Results Calculation Memorandum at 50. Information on the record indicates that the amount of basic customs duties is the product of the basic customs duty rate and the assessable value. See Essar's December 2, 2008, supplemental questionnaire at Exhibit 2. As discussed above, in the final results, we have revised the assessable value used in the fines benchmark calculation to include landing fees. Therefore, in the final results we recalculated the amount of basic customs duties added to the fines benchmark to account for the revised assessable value.

As indicated in the Preliminary Results, the amount of education cess and G&H E cess on imports of fines is calculated by multiplying the respective cess rates by the sum of the assessed value and basic customs duty amounts. See Preliminary Results Calculation Memorandum at 50; see also Essar's December 2, 2008, supplemental questionnaire at Exhibit 2. As discussed above, in calculating the amounts added to the fines benchmark, we have revised the assessable value to include landing fees and we have, in turn, recalculated the amount of basic customs duty that would be collected on the assessable value. Accordingly, we have also revised the amount of education cess and G&H E cess included in the fines benchmark. As indicated in the Preliminary Results, the fines benchmark included the amount of additional cess charged on imports of fines. See Preliminary Results Calculation Memorandum at 50; see also Essar's December 2, 2008, supplemental questionnaire at Exhibit 2. The additional cess is a fixed amount charged per metric ton of imported material. For this reason, we have left the calculation of the additional cess unchanged from the Preliminary Results.

We have also revised the manner in which we calculated additional customs duties added to the fines benchmark. In the Preliminary Results, we multiplied the value of the fines benchmark by the additional customs duty rate. See Preliminary Results Calculation Memorandum at 50. In the final results, we have calculated the amount of additional customs duties added to the fines benchmark by multiplying the additional duty rate by the sum of the revised assessable value, inclusive of landing fees and basic duty. This revision is consistent with the transaction specific information Essar submitted regarding the lumps it imported from its Brazilian supplier. See Essar's December 2, 2008, supplemental questionnaire at Exhibit 2.

As discussed in **Comment 13** above, we disagree with Essar that the Department's inclusion of international freight in the benchmark fines and lumps prices used in the Preliminary Results was in error. For the same reason, we also disagree with Essar that the Department's should conduct its LTAR analysis on an ex-mines basis. However, we agree with Essar that information on the record indicates that the fines Essar purchased from the NMDC were never shipped, as fines, to Hazira. Specifically, we find that Essar has provided information on record indicating that the fines Essar purchased from the NMDC were converted from fines to iron ore pellets in Vizag. See page 8, Exhibit 2 of Essar's October 17, 2008, supplemental questionnaire response. As a result, we agree with Essar that it was incorrect for the Department assume that imported fines would be shipped from Vizag to Essar's steel plant in Hazira and, thus, add an inland freight charge from Vizag to Hariza to the fines benchmark. In the final results calculations we have removed the inland freight component from fines benchmark and the price Essar paid to the NMDC.

VI. Total Net Subsidy Rate

Based on the positions discussed above, the total net subsidy rate for Essar is **76.88** percent ad valorem.

VII. Recommendation

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

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Agree

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Disagree

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Ronald K. Lorentzen  
Acting Assistant Secretary  
for Import Administration

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Date