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July 7, 2008

MEMORANDUM TO: David M. Spooner
Assistant Secretary
Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
Import Administration

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

SUBJECT: Issues and Decision Memorandum: Final Results of
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 (HRC) steel flat products from India for the period January 1, 2006, through December 31, 2006. After analyzing the comments, we have made certain modifications to the Preliminary Results. See Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review, 73 FR 1578 (January 9, 2008) (Preliminary Results). The “Subsidies Valuation Information” and “Analysis of Programs” sections below describe the methodology followed in this review with respect to Essar Steel Ltd. (Essar), Ispat Industries Limited (Ispat), Tata Steel Limited (Tata), and JSW Steel Limited (JSW), the producers/exporters of subject merchandise covered by this review. Also below is the “Analysis of Comments” section, which contains the Department of Commerce’s (Department’s) response to the issues raised in the briefs.

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

Company-Specific Issues

Essar

Comment 1: Whether the Department Erred in Its Calculation of Essar’s Benefit under the Government of Gujarat Value Added Tax Remission Program

Comment 2: Whether the Department Erred in Converting Dry Metric Tons to Wet Metric

Tons in the Calculation of the Benchmark Used to Measure the Adequacy of Essar's Purchases of Iron Ore from the GOI

- Comment 3: Whether the Department Should Use Actual Transaction Prices, Where Available, in Calculating the Benchmark Used to Measure Essar's Benefit under the Iron Ore Provided for Less Than Adequate Remuneration Program
- Comment 4: Whether the Department Should Adjust the Prices Reported by Essar for Its Purchases of Iron Ore Lumps and Fines to Exclude Sales Tax Which Is Not Included in the Benchmark Price
- Comment 5: Whether the Department Should Deduct Certain Freight Costs from the Benchmark Used to Measure the Adequacy of Essar's Purchases of Iron Ore from the GOI
- Comment 6: Whether the Failure of the GOI and the Indian State Governments to Respond to the Department's Questions Warrants Application of Adverse Facts Available with Respect to Newly Subsidy Programs Essar Claims It Did Not Use
- Comment 7: Whether Essar Adequately Demonstrated Its Non-Use of the Special Economic Zone Act of 2005
- Comment 8: Whether Essar Adequately Demonstrated Its Non-Use of the Gujurat Special Economic Zone Act
- Comment 9: Whether Essar Adequately Demonstrated Its Non-Use of the Captive Port Facilities Program
- Comment 10: Whether Essar Adequately Demonstrated Its Non-Use of the Andhra Pradesh Industrial Policy Program
- Comment 11: Whether Essar Adequately Demonstrated Its Non-Use of the Chhattisgarh Industrial Policy Program
- Comment 12: Whether the Department Erred in Calculating the Benefit on Essar's Pre-Shipment Export Financing

Ispat

- Comment 13: Whether the Department Should Calculate the Benefit Attributable to Ispat's Purchase of Iron Ore for Less Than Adequate Remuneration from the GOI on an Ex Mines Basis Rather Than an FOB Port Basis
- Comment 14: Whether the Department Erred in Calculating the Benchmark Used to Measure the Adequacy of Remuneration of Ispat's Purchases of High-Grade Iron Ore from the GOI

- Comment 15: Whether the Department Should Adjust the Prices Reported by Ispat for Its Purchases of Iron Ore Lumps and Fines to Exclude Sales Tax Which Is Not Included in the Benchmark Price
- Comment 16: Whether Ispat's Purchases of Iron Ore from a Private Supplier Are a Valid Benchmark
- Comment 17: Whether to Include Fees in the Calculation of Ispat's Long-Term Benchmark Loan Rates
- Comment 18: Whether the Department Made Clerical Errors in Calculating Ispat's Long-Term Loan Benchmark
- Comment 19: Whether the Department Erred in Calculating the Benchmark Used for Ispat under the EPCGS Program
- Comment 20: Whether the Department Incorrectly Included VAT Refunds in the Benefit Calculation of the State of Maharashtra's Sales Tax Program
- Comment 21: Whether the Department Erred by Including Countervailing Duties and Special Additional Duties in the Benefit Calculation of the EPCGS
- Comment 22: Whether the Advance License Program Is Countervailable
- Comment 23: Whether the Failure of the GOI and the Indian State Governments to Respond to the Department's Questions Warrants Application of Adverse Facts Available with Respect to New Subsidy Programs Ispat Claims It Did Not Use

Tata

- Comment 24: Tata's Ownership of Captive Mines of Iron Ore and Coal and Whether the Provision of Such Minerals under the Captive Mining Rights Program Constitutes a Financial Contribution under the Act
- Comment 25: Whether the Provision of Iron Ore and Coal under the Captive Mining Rights Programs Is Specific under the Act
- Comment 26: The Benchmark Used to Measure Whether the Captive Mining Rights Programs Imposed by the GOI Provide a Benefit in the Form of a Provision of a Good for Less Than Adequate Remuneration
- Comment 27: Whether the Department Should Calculate Separate Benchmarks to Measure the Adequacy of Remuneration of Tata's Purchases of Iron Ore Lumps and Fines under the Captive Mining Rights Program

Comment 28: Whether the Department Should Include Ocean Freight in the Coal and Iron Ore Benchmark Calculation Used to Measure the Adequacy of Remuneration of Tata's Purchases of Coal and Iron Ore under the Captive Mining Rights Program

Comment 29: Whether the Department Should Make Adjustments for the Benchmark Prices of Tata Steel's Iron Ore and Coal Costs on an Equivalent Basis

Comment 30: Whether the TPS Conferred Benefits upon Tata During the POR

Comment 31: Whether the SDF Constitutes a Financial Contribution

Comment 32: Calculation of the Benefit to Tata under the EPCGS

Comment 33: Whether the Department Should Revise the Manner in Which It Conducted the "0.5" Percent Test When Calculating the Benefit Attributable to Tata under the EPCGS

Comment 34: Attribution of Subsidies Received under the EPCGS

Comment 35: The Use of Long-Term Prime Lending Rates as Benchmarks

Comment 36: Whether the Department Should Countervail Tata's Sales of DFRC Licenses As an Untied Subsidy

JSW

Comment 37: Whether the Department Unlawfully Used AFA Rate for JSW

Comment 38: Whether Assistance under the 1993 KIP Is Countervailable

Comment 39: Whether JSW Purchased High Grade Iron Ore for Less Than Adequate Remuneration

Comment 40: Whether Loan Guarantees from the GOI Are Countervailable

Comment 41: Whether JSW Has Captive Mining Rights

Comment 42: Whether the EPCGS Is Countervailable

Comment 43: Whether DEPS Is Countervailable

Adverse Facts Available (AFA)

I. The Government of India (GOI)

As discussed in the Preliminary Results, the Department initiated investigations of new subsidies allegedly provided to Essar, Ispat, JSW, and Tata by the GOI and Indian state governments. On September 20, 2007, the Department issued a questionnaire to the GOI pertaining to new subsidies allegedly received by Ispat. On September 27, 2007, the Department issued new subsidies questionnaires to the GOI pertaining to new subsidies allegedly received by JSW and Tata, respectively. On October 5, 2007, the Department issued a questionnaire to the GOI pertaining to new subsidies allegedly received by Essar. See 73 FR at 1580.

In spite of the fact that the Department extended the GOI's deadline to respond to the new subsidies questionnaires on multiple occasions, the GOI, with the exception of the questionnaire pertaining to Tata, failed to submit responses to the new subsidies questionnaires pertaining to Essar, Ispat, and JSW. Because the GOI failed to provide the requested information by the established deadlines, the Department determined in the Preliminary Results that it did not have the necessary information on the record to determine whether the new subsidies allegedly received by Essar, Ispat, and JSW constitute financial contributions and are specific within the meaning of sections 771(D) and 771(5A) of the Tariff Act of 1930, as amended (the Act), respectively. 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. See 73 FR at 1581. In the Preliminary Results, the Department further determined that the GOI did not act to the best of its ability and, therefore, the Department employed adverse inferences in selecting from among the facts otherwise available. Thus, pursuant to section 776(b) of the Act, the Department preliminarily determined that all newly alleged subsidy programs used by Essar, Ispat, and JSW constitute financial contributions and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. Id. Therefore, in the Preliminary Results, the Department determined that any newly alleged subsidy program used by Essar, Ispat, or JSW are countervailable to the extent that the programs conferred a benefit during the period of review (POR) within the meaning of section 771(5)(E) of the Act.

We received comments regarding the Department's application of adverse facts available (AFA) with respect to the GOI. However, no comments have been submitted that warrant reconsideration of the Department's preliminary finding.

II. JSW

As explained in the Preliminary Results, because JSW failed to provide the information requested in the Department's November 8, 2007, supplemental questionnaire by the established deadline, the Department did not have the necessary information on the record to determine the extent to which JSW benefitted from certain programs within the meaning of section 771(5)(E) of the Act. See 73 FR at 1581. Therefore, the Department based its determination on facts otherwise available in accordance with section 776(a)(2)(B) of the Act. Furthermore, the Department preliminarily determined that by failing to respond to the Department's supplemental questionnaire by the established deadline, JSW failed to cooperate to the best of its ability and, thus, pursuant to section 776(b) of the Act, the Department used adverse inferences in applying the facts otherwise available. See 73 FR at 1581 – 82.

We received comments regarding the Department's application of AFA with respect to JSW (see Comment 37, 38, 39, and 41). No argument has been presented to move the Department from the preliminary finding to apply AFA. However, for these final results, the Department has modified its selection of AFA rates assigned to certain new subsidy programs for which JSW failed to provide the required information.

Selection of the Adverse Facts Available Rate

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. At the Preliminary Results, for those programs for which the Department determined an AFA rate was applicable, we selected the rate of 16.63 percent ad valorem that was calculated for the Export Promotion Capital Goods Scheme (EPCGS) in the underlying investigation. This EPCGS rate is the highest program rate calculated within any segment of this proceeding. See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 FR 49635 (September 28, 2001) (Final Determination of HRC Investigation), and accompanying Issues and Decision Memorandum (HRC Investigation Decision Memorandum) at "Export Promotion of Capital Goods Scheme."

However, since the Preliminary Determination, the Department has reconsidered its methodology for selecting AFA rates. For purposes of these final results, the Department has selected, as AFA, the highest calculated rate for the same or similar type of program in any segment of this proceeding.¹ This approach of selecting AFA rates from segments of this proceeding is particular to this segment only. In any future administrative reviews of this order, the Department will consider if it is appropriate to select an AFA rate for the same or similar type of program from another India CVD proceeding.

Where there is no identical or comparable program AFA match within a segment of this proceeding, it is the Department's practice to apply the highest calculated subsidy rate for any program otherwise listed in any India CVD proceeding, unless it is clear that the industry in which the respondent operates cannot use the product for which these rates were calculated. See, e.g., Final Affirmative Countervailing Duty Determination: Prestressed Concrete Steel Wire Strand from India, 68 FR 68356 (December 8, 2003) (Wire Strand from India), and accompanying Issues and Decision Memorandum at "Use of Facts Available;" Final Affirmative Countervailing Duty Determination: Carbazole Violet Pigment 23 from India, 69 FR 67321 (November 17, 2004) (CVP-23 from India), and accompanying Issues and Decision Memorandum at "Use of Adverse Facts Available;" Certain In-Shell Roasted Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review, 71 FR 66165 (November 13, 2006) (Pistachios from Iran), and accompanying Issues and Decision Memorandum at "Analysis of Programs" and Comment 1; Coated Free Sheet Paper from the Republic of China: Final Determination of Countervailing Duty Investigation, 72 FR 60645 (October 25, 2007) (CFS China Final), and accompanying Issues and Decision Memorandum at "Use of Adverse Facts Available;" Circular Welded Carbon Quality Steel Pipe from the People's

¹The Department's first preference is to use the highest calculated rate for the same program (i.e., identical program); if there is no identical program, then the Department's preference is to use the highest calculated rate for a similar program (e.g., tax program to tax program, loan program to loan program, etc.).

Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 FR 31966 (June 5, 2008) (CWP China Final), and accompanying Issues and Decision Memorandum at “Use of Adverse Facts Available;” Light-Walled Rectangular Pipe and Tube from the People’s Republic of China: Final Affirmative Countervailing Duty Investigation Determination, 73 FR 35642 (June 24, 2008) (Light-Walled China Final), and accompanying Issues and Decision Memorandum at “Use of Adverse Facts Available;” and Laminated Woven Sacks from the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 FR 35639 (June 24, 2008) (Sacks China Final), and accompanying Issues and Decision Memorandum at “Application of Facts Available and Use of Adverse Inferences.”

The Department’s practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse “as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.” See Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8932 (February 23, 1998). The Department’s practice also ensures “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See Statement of Administrative Action (SAA) at 870. In choosing the appropriate balance between providing a respondent with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent’s prior commercial activity, selecting the highest prior margin “reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less.” See Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185, 1190 (Fed. Cir. 1990).

Because JSW failed to act to the best of its ability in this review, for each new subsidies program examined, we made the adverse inference that JSW benefitted from that program. We are applying, where available, the highest subsidy rate calculated for the same or a similar program in any segment of this proceeding. Absent a subsidy rate calculated for the same or similar program, we are applying the highest calculated subsidy rate for any program otherwise listed in an India CVD proceeding.

We are able to match the following programs to similar programs for which subsidy rates were calculated in either the instant review or underlying investigation: GOI’s Captive Mining of Iron Ore and certain sub-programs of the State Government of Karnataka’s (SGOK) “New Industrial Policy and Package of Incentives and Concessions of 1993” (1993 KIP), specifically the assistance sub-programs for land, water, iron ore, coal, limestone/dolomite, term loans, and interest-free unsecured loans. For more information on the matching of these programs, see “SGOK’s New Industrial Policy and Package of Incentives and Concession of 1993,” program analysis below and Memorandum to the File concerning Final Results Calculation for JSW, dated July 7, 2008.²

For the remaining new subsidy programs,³ we are unable to match those programs to

² A public version of this memorandum is available on the public record in the Department’s Central Records Unit (CRU) located in room 1117 of the main Department building.

³ The remaining programs, for which we do not have an identical or comparable program match, are: (1) the following sub-programs of the 1993 KIP: power, roads, port facilities, and training facilities; (2) SGOK’s “Other Subsidies” programs, which are: MML’s Receipt of VMPL Shares, MML’s Receipt of Premium Payments, and

either identical or similar programs. Therefore, consistent with our practice, we have selected and applied as the AFA rate for those programs, the highest calculated subsidy rate for any program otherwise listed in an India CVD proceeding. As such, for these final results, we have applied the net subsidy rate of 18.60 percent ad valorem, which is the rate calculated for “Export Oriented Unit Program: Duty-Free Import of Capital Goods and Raw Material” in the final affirmative CVD determination of bottle-grade polyethylene terephthalate (PET) resin from India. See Final Affirmative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate Resin from India, 70 FR 13460 (March 21, 2005) (PET Resin), and accompanying Issues and Decision Memorandum at “Export Oriented Unit Program: Duty-Free Import of Capital Goods and Raw Material”

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.” See SAA at 870. Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. Id. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information. Id. at 869.

With regard to the reliability aspect of corroboration, we note that the rates, being used as AFA, were calculated in prior final CVD determinations involving Indian producers/exporters. No information has been presented that calls into question the reliability of these calculated rates that we are applying as AFA. Unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as AFA, the Department will not use it. See, e.g., Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812 (February 22, 1996). In the absence of record evidence concerning these new subsidy programs due to JSW’s and the GOI’s decision not to respond to the Department’s questionnaires, the Department has reviewed the information concerning the new subsidy programs in this and other Indian CVD cases. For those programs for which the Department has found a program-type match within any segment of this proceeding, we find that programs of the same type are relevant to the programs of this case. For the programs for which there is no program-type match, the Department has selected the highest calculated subsidy for any India program to use as AFA. The rate is therefore relevant to JSW in that it is an actual calculated CVD rate for an India subsidy program and there is no clear evidence that the industry in which the respondent operates cannot use the

MML’s Failure to Enforce Pricing Arrangements; (3) SGOK’s New Industrial Policy and Package of Incentives and Concessions of 1996; (4) SGOK’s New Industrial Policy and Package of Incentives and Concessions of 2001; and (5) SGOK’s New Industrial Policy and Package of Incentives and Concessions of 2006.

product for which this rate was calculated. No evidence had been presented or obtained which contradicts the reliability or relevance of the secondary information which was information from a prior Indian CVD investigation. Due to the lack of participation by JSW and the GOI and the resulting lack of record information concerning these programs, the Department has corroborated the rates it selected to the extent practicable.

Additionally, we explained in the Preliminary Results that JSW reported using a program that was previously found to be countervailable (i.e., Sale of High-Grade Iron Ore for Less Than Adequate Remuneration), about which it failed to provide complete questionnaire responses. The Department preliminarily determined that, by failing to provide a complete response concerning the program, JSW failed to act to the best of its ability. Therefore, under section 776(b) of the Act, we applied adverse inferences using, to the extent possible, the limited information provided by JSW along with other information on the record of this segment of the proceeding when calculating the benefit. We received comments regarding the Department's application of AFA with respect to this program (see Comment 39). However, no argument has been presented to move the Department from the preliminary finding to apply AFA when calculating the benefit JSW received under this program. See also "Sale of High-Grade Iron Ore for Less Than Adequate Remuneration," program analysis below.

Subsidies Valuation Information

I. Benchmarks for Loans and Discount Rates

A. Short-Term Loan Benchmark

For this review, we required both U.S. dollar-denominated and rupee-denominated short-term loan benchmark rates to determine benefits received under the Pre-Shipment Export Financing and Post-Shipment Export Financing programs. Absent a company-specific, commercial interest rate denominated in rupees to calculate the benefit, in the Preliminary Results we sourced a rupee-denominated short-term interest rate for India as reported in International Financial Statistics, a publication produced by the International Monetary Fund. Where we did not have comparable, company-specific short-term loans denominated in U.S. dollars, we used the dollar-denominated short-term interest rate for the United States as reported in International Financial Statistics. See 73 FR at 1584.

Interested parties commented on our selection of short-term benchmarks. See Comment 12. Based on these comments, we have revised certain short-term benchmark calculations.

B. Long-Term Benchmarks and Discount Rates

In the Preliminary Results, for programs requiring a 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. Some respondents, however, did not have comparable commercial long-term, rupee-denominated loans for all the required years. Therefore, for those years for which we did not have company-specific information, we relied on comparable long-term, rupee-denominated benchmark interest rates from the immediately preceding year as directed by 19 CFR 351.505(a)(2)(iii). When there were no comparable long-term, rupee-

denominated loans from commercial banks during either the year under consideration or the preceding year, pursuant to 19 CFR 351.505(a)(3)(ii), we used a national average interest rate as the benchmark. 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. See 73 FR at 1584.

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. 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 International Financial Statistics. Id.

In the Preliminary Results, we explained that 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). Where such benchmark instruments were unavailable, we used interest rates from loans issued during the POR as our benchmark, as such rates better reflect a variable interest rate that would be in effect during the review period.

Interested parties commented on our selection of long-term benchmarks and discount rates. See Comments 17, 18, 19, and 35. Based on these comments, we have revised certain long-term benchmark calculations.

II. 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) (First Review of HRC from India), and accompanying Issues and Decision Memorandum (First Review of HRC from India Decision Memorandum) at the "Benchmark for Long-Term Loans issued in 2001 and 2002" section.

In the Preliminary Results, we continued to find that Essar was uncreditworthy during 2001 and 2002 and continued to apply the uncreditworthy benchmark methodology for those programs requiring a long-term benchmark for 2001 and 2002. 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). See 73 FR at 1584.

Interested parties did not comment on Essar's creditworthiness. Our approach remains unchanged from the Preliminary Results.

III. Allocation Period

In the Preliminary Results, we used a 15-year average useful life (AUL) to allocate any non-recurring subsidies. See 73 FR at 1584. Further, for non-recurring subsidies, we applied the "0.5 percent test" described in 19 CFR 351.524(b)(2). Under this test, we compared the amount of subsidies approved 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.

Interested parties did not comment on this issue. Our approach remains unchanged from the Preliminary Results.

Analysis of Programs

I. Programs Determined To Be Countervailable

A. GOI Programs

1. Pre- and Post-Shipment Export Financing

In the Preliminary Results, the Department determined that the pre- and post-shipment loan programs were countervailable. See 73 FR at 1584. Specifically, the Department determined that the GOI's issuance of financing at preferential rates 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. The Department also found this program, which is contingent upon exports, to be specific within the meaning of section 771(5A)(B) of the Act. See 73 FR at 1584.

In the Preliminary Results, to calculate the benefit conferred by the pre-shipment and post-shipment loan programs, 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). 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 the participating company's total export sales during the POR. See 73 FR at 1585. Because post-shipment loans are granted for particular shipments, we treated the benefits from the loans as tied to particular markets, in accordance with 19 CFR 351.525(b)(2). Id. Therefore, to calculate each company's subsidy rate for post-shipment financing, we divided the benefit received on sales of subject merchandise to the United States by the company during the POR by the company's exports of subject merchandise to the United States during the POR. Id.

No arguments have been presented in this review to warrant a reconsideration of the Department's finding. However, Essar commented on our benefit calculation with respect to their pre-shipment export financing. Based on these comments, we have revised our benefit calculations for this program. See Comment 12.

We determine the net countervailable subsidy rate under the pre-shipment export financing program to be 0.49 percent ad valorem for Essar and 0.03 percent ad valorem for Ispat. Tata and JSW did not use the pre-shipment program during the POR. We determine that no benefit was provided to Tata post-shipment export financing program during the POR. Essar, Ispat, and JSW did not use the post-shipment program during the POR.

2. Export Promotion Capital Goods Scheme (EPCGS)

In the Preliminary Results, the Department determined that the import duty reductions provided under the EPCGS constitute a countervailable export subsidy. See 73 FR at 1585. Specifically, the Department found that under the EPCGS program, the GOI provides a financial contribution under section 771(5)(D)(ii) of Act, in the form of revenue foregone that otherwise would be due. The Department also found that the tax savings confer a benefit, as defined by

section 771(5)(E) of the Act. The Department further found the program to be specific under section 771(5A)(B) of the Act because it is contingent upon export performance.

In the Preliminary Results, the Department found 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 also Preliminary Results, 73 FR at 1585.

Accordingly, for those unpaid duties for which JSW, Essar, Tata, and Ispat have yet to fulfill their export obligations, we preliminarily determined the benefit to be the interest that they would have paid during the POR had they 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 depends (i.e., the date of expiration of the time period for the companies to fulfill their 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 companies imported the items under the program. Id. 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 73 FR at 1586.

In the Preliminary Results, we determined that 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 those licenses for which respondents demonstrated that they had fulfilled the export obligations, we treated the import duty savings as grants received in the year in which the GOI waived the contingent liability on the import duty exemptions. In accordance with 19 CFR 351.524(b)(2), for each of the grant amounts, 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). In the Preliminary Results, we deducted application fees from the benefit in accordance with section 771(6)(A) of the Act. Id.

In the Preliminary Results, to calculate the net subsidy rate, we divided the total benefits received by the respondents' respective total export sales. We included deemed exports in the denominator of the net subsidy rate calculation. Id.

We received comments from interested parties regarding the benefit calculation used by the Department in the Preliminary Results. Based on these comments, we have revised certain aspects of our benefit calculations. See Comments 19, 21, 32, 33, 34, and 42.

We determine the net countervailable subsidy rate under the EPCGS to be 0.53 percent ad valorem for Essar, 10.70 percent ad valorem for Ispat, 1.71 percent ad valorem for JSW, and 4.28 percent ad valorem for Tata.

3. Duty Entitlement Passbook Scheme (DEPS)

In the Preliminary Results, the Department determined that import duty exemptions provided under the DEPS were countervailable. Specifically, we determined that under DEPS, a financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided because (1)

the GOI provides credits for the future payment of import duties, and (2) the GOI does not have in place and does not apply a system that is reasonable and effective for determining what imports are consumed in the production of the exported product and in what amounts. *Id.* Therefore, under section 771(5)(E) of the Act, we determined that the entire amount of import duty exemption earned during the POR constitutes a benefit.⁴ We also found DEPS to be specific under section 771(5A)(B) of the Act because the program can only be used by exporters.

For those DEPS credits that JSW and Tata earned during the POR, we followed our past practice and calculated the benefit under the DEPS program by multiplying the FOB value of each export shipment to the United States during the POR by the relevant percentage of DEPS credit allowed under the program. *Id.* We then subtracted as an allowable offset the actual amount of application fees paid for each license in accordance with section 771(6) of the Act.

Because DEPS credits are earned on a shipment-by-shipment basis, in calculating the benefit from the DEPS program, in the Preliminary Results we calculated the net subsidy rate by dividing the benefit earned on shipments of subject merchandise to the United States during the POR by the total sales of subject merchandise to the United States during the POR. *Id.*

We received a comment from an interested party regarding the countervailability of DEPS (*see* Comment 43). However, no arguments have been presented in this review to warrant a reconsideration of the Department's finding.

On this basis, we calculate the net countervailable subsidy from the DEPS program to be 2.56 percent ad valorem for JSW, and 1.29 percent ad valorem for Tata. We find that Essar and Ispat did use this program during the POR.

4. 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 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 GOI limits actual recipients of the subsidy to industries that use iron ore, including the steel industry. Essar, Ispat, and JSW reported that they purchased high-grade iron ore lumps and fines (*i.e.*, iron ore with Fe content of 64 percent or above) from the NMDC during the POR. *See* 73 FR at 1586-87.

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 less than adequate remuneration. 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

⁴ Specifically, we found that benefits under the DEPS program are conferred as of the date of exportation of the shipment for which the pertinent DEPS credits are earned. *See e.g.*, Notice of Preliminary Affirmative Countervailing Duty Determination and Preliminary Negative Critical Circumstances Determination: Certain Lined Paper Products From India, 71 FR 7916, 7920 (February 15, 2006) (Preliminary Determination of Lined Paper from India) (unchanged in 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) (Lined Paper from India) and accompanying Issues and Decision memorandum (Lined Paper from India Decision Memorandum).

actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions.

Under 19 CFR 351.511(a)(2)(ii), where actual market-determined prices are not available with which to make the comparison under paragraph (a)(2)(i), 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 are publications on the record that include prices from the world market for comparable goods which can be used as a benchmark to determine whether the GOI sold high-grade iron ore to the respondents for less than adequate remuneration.

As explained in the Preliminary Results, there is no information on the record of actual transaction prices between private parties in India, imports, or sales from government auctions with which to measure the adequacy of remuneration with respect to Essar's and Ispat's purchases of iron ore lumps and fines from the GOI under 19 CFR 351.511 (a)(2)(i). See Preliminary Results at 1587. No new iron ore lumps and fines prices have been submitted on the record since the Preliminary Results. Therefore, in accordance with 19 CFR 351.511(a)(2)(ii), we used as the benchmarks world-market prices that were reasonably available to parties in India to measure the benefit of the lumps and fines provided to Essar and Ispat from NMDC. Specifically, we used for benchmark purposes 2006 lump and fines prices of iron ore from Hamersly, Australia, as listed in the Tex Report, as these prices constitute world market prices that would be available to the respondents in India. In the Preliminary Results, we included prices from the NMDC listed in the Tex Report in our benchmark calculations. However, as explained in Comment 2, when using prices in the Tex Report as our benchmark, we have limited our calculations to those prices for lump and fines from Hamersley, Australia.

Regarding Ispat, as explained below in Comment 15, for purposes of measuring the adequacy of remuneration of the GOI's sales of lump and fine iron ore, we compared the actual domestic prices paid (including delivery charges from the mine to the port) with benchmark prices that were adjusted to include ocean freight to the port. We would have also adjusted the "government side" and benchmark side of the equation to include inland freight from the port to the factory, but such data are not available on the record. Furthermore, because there was insufficient information on the record, we did not include, for these final results, central sales taxes paid on Ispat domestic purchases of iron ore lumps and iron ore fines, and we did not adjust the benchmark prices to include import duties and any other taxes and fees payable on imports.

Regarding Essar, for purposes of measuring the adequacy of remuneration of the GOI's sales of lump and fine iron ore, we compared the actual domestic prices paid (including delivery charges from the mine to the port and the port to the factory) with benchmark prices that were adjusted to include ocean freight to the port and inland freight from the port to the factory. Furthermore, because there was insufficient information on the record, we did not include, for these final results, central sales taxes paid on Essar's domestic purchases of iron ore lumps and iron ore fines, and we did not adjust the benchmark prices to include import duties and any other taxes and fees payable on imports.

Concerning the ocean freight adjustment to the benchmark used to measure the adequacy of remuneration of the GOI's sales of iron ore lumps and fines to Essar and Ispat, we used the publicly available per metric ton cost that Tata incurred to transport coal from Australia to India.

The use of this information was necessary because the prices in the Tex Report are FOB foreign port and, thus, we lacked information concerning ocean freight delivery charges.

Subsequent to the Preliminary Results, Essar provided information regarding purchases it made during the POR of DR-CLO iron ore from a non-affiliated foreign supplier. There is no information on the record that suggests that 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, in accordance with 19 CFR 351.511(a)(2)(i), we are using Essar's actual import prices charged by the non-affiliated foreign supplier for DR-CLO lumps to compare with Essar's purchases of DR-CLO lumps from NMDC.

For purposes of measuring the adequacy of remuneration of the GOI's sales of DR-CLO iron ore to Essar, we compared the actual domestic prices paid (including delivery charges from the mine to the port and the port to the factory) with benchmark prices that were inclusive of ocean freight. We further adjusted the benchmark prices to include inland freight from the port to the factory. Because there was insufficient information on the record, we did not include, for these final results, central sales taxes paid domestic purchases of DR-CLO, and we did not adjust the benchmark prices to include import duties and any other taxes and fees payable on imports..

Ispat reported that it made purchases of DR-CLO from a private supplier in India during the POR of the same type of iron ore that Ispat purchased from NMDC. As explained below in Comment 16, we determine that, pursuant to 19 CFR 351.511(a)(2)(i), Ispat's purchases of DR-CLO iron ore from the private supplier are suitable for comparison with Ispat's purchases of DR-CLO from NMDC. Therefore, in accordance with section 19 CFR 351.511(a)(2)(i), we are using Essar's actual import prices from the non-affiliated foreign supplier for DR-CLO lumps to compare with Essar's purchases of DR-CLO lumps from NMDC.

For purposes of measuring the adequacy of remuneration of the GOI's sales of DR CLO iron ore to Ispat, we compared the actual domestic prices paid (including domestic sales tax and delivery charges from the mine to the port) with benchmark prices that included sales tax and were adjusted to delivery charges from the mine to the port. We also did not have on the record the data necessary to include inland freight from the port to the factory and, therefore, data on inland was not included in the "government side" or the benchmark side of the equation.

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. Ispat reported its transactions on a monthly basis. Therefore, we conducted our calculations for Ispat on a monthly basis.

We also adjusted our calculations for iron (FE) content. We first used the data provided and information contained in invoices and contracts provided on the record to derive the actual percentage Fe content 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 percentage 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. After adjusting this benchmark price by including delivery charges (as described above), we compared the delivered benchmark prices with the delivered domestic prices to obtain the benefit amounts (transaction-specific or monthly) for each type of iron ore. Then, for each company, we summed the benefit amounts and divided the total benefit received during the POR by the company's total sales.

On this basis, we calculate the net countervailable subsidy from the program to be 13.21 percent ad valorem for Essar, and 3.33 percent ad valorem for Ispat. Tata did not use this program during the POR.

We received comments from interested parties regarding this program. See Comments 2, 3, 4, 5, 13, 14, 15, 16, and 41. Based on these comments, we have made certain changes to our benefit calculations.

As noted, JSW reported that it purchased high-grade iron ore fines and lumps from NMDC during the POR. JSW, however, submitted incomplete information to the Department's questions concerning those purchases. In particular, JSW submitted only the quantity of iron ore purchased from NMDC and no associated pricing data. See JSW's November 19, 2007, Supplemental Questionnaire Response at Table A. JSW submitted comments on this program (see Comment 39); however, the arguments do not warrant a change in the Department's determination to apply facts available with an adverse inference when calculating the benefit JSW received from this program.

Therefore, as AFA, for these final results, we continue to find that JSW received the iron ore from NMDC at no charge during the POR. To calculate the benefit, we multiplied the quantity of iron ore JSW received from NMDC in 2006 by the benchmark price for iron ore fines and lumps, obtained from the Tex Report. We then divided the benefit by JSW's total sales for 2006. On this basis, we calculate a program rate of 8.83 percent ad valorem for JSW.

5. Advance License Program (ALP)

In the Preliminary Results, the Department determined that import duty exemptions under the program were countervailable because under the 2002 - 2007 Export/Import Policy Guidelines, the GOI does not have in place, and does not apply, a system that is reasonable and effective for determining which imports are consumed in the production of the exported product and in what amounts, in accordance with 19 CFR 351.519(a)(4). See 73 FR at 1587. Specifically, the Department determined that the ALP confers a countervailable subsidy because: (1) a financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided under the program, as the GOI exempts the respondents from the payment of import duties; (2) the GOI does not have in place and does not apply a system that is reasonable and effective for the purposes intended in accordance with 19 CFR 351.519(a)(4) to confirm which inputs and in what amounts are consumed in the production of the exported products; thus, the entire amount of the import duty deferral or exemption earned by the respondent constitutes a benefit under section 771(5)(E) of the Act; and (3) this program is contingent upon exportation and, therefore, is specific under section 771(5A)(B) of the Act. See 73 FR at 1588.

As explained in the Preliminary Results, under 19 CFR 351.519(c), the exemption of import duties on inputs consumed in production of an exported product normally provides a recurring benefit. To calculate the subsidy, we first determined the total value of duties exempted during the POR for each company. From this amount, we subtracted the required application fees paid for each license during the POR as an allowable offset in accordance with section 771(6) of the Act. See 73 FR at 1589.

To calculate the net subsidy rate, we divided the benefit under the ALP by export the recipient's export sales. We preliminarily determined to include deemed export sales in the sales denominator for the ALP program only when the respondent applied for and was granted licenses during the POR based on both physical exports and deemed exports. Id.

We received comments from interested parties regarding this program. See Comment 22. However, no new arguments have been presented in this review to warrant a reconsideration of the Department's finding.

On this basis, we calculate the net countervailable subsidy from the ALP to be 0.13 percent ad valorem for Essar and 0.50 percent ad valorem for Ispat. Tata and JSW did not use this program during the POR.

6. Loan Guarantees from the GOI

In the Preliminary Results, we determined that loan guarantees from the GOI and/or the State Bank of India (SBI) were countervailable. See 73 FR at 1589. Specifically, we determined that in accordance with section 771(5)(D)(i) of the Act, the government loan guarantees confer countervailable subsidies because they result in a financial contribution by the government in the form of a potential direct transfer of funds or liabilities. Id. We further determined that in accordance with section 771(5)(E)(iii) of the Act, the loan guarantees provide a benefit to the recipient in the amount of the difference between the amount the recipient pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no government guarantee. We also determined that the loan guarantees are limited to certain companies selected by the GOI on an ad hoc basis and, thus, the program is specific under section 771(5A)(D)(iii)(II) of the Act. Id.

In the Preliminary Results, in order to determine whether the government loan guarantees, for which JSW received a benefit under section 771(5)(E)(iii) of the Act, we compared the total amount JSW paid for the guaranteed loans with the benchmark interest rates that would have been charged on a comparable commercial loan.⁵ Id. Consistent with the approach discussed in the "Subsidies Valuation Information" section, supra, where available, as our benchmark, we used the interest rate on comparable, foreign currency loans that JSW received from commercial lenders. Where company-specific benchmarks were unavailable, consistent with our practice, we used the lending rate for the appropriate foreign currency, as reported by the IMF.

JSW submitted comments on this program (see Comment 40); however, no argument was presented to move the Department from its finding that loan guarantees provided by the GOI and/or SBI are countervailable.

To calculate the net subsidy rate, we divided the benefit by JSW's total sales. On this basis, we calculated net subsidy rate of 0.01 percent ad valorem for JSW. Tata, Ispat, and Essar did not use this program during the POR.

7. Steel Development Fund (SDF) Loans

In the Preliminary Results, the Department found that loans from the SDF were countervailable. See 73 FR at 1590. Specifically, in the Preliminary Results we determined that loans under the SDF constitute a financial contribution within the meaning of section 771(5)(D)(i) of the Act. We also determined that loans under the SDF are specific within the meaning of section 771(5A)(D)(i) of the Act because eligibility for loans from the SDF is limited to steel companies. We further found that loans under the SDF program confer a benefit under

⁵ There is no information on the record regarding what, if any, guarantee fees may have applied, so no adjustment has been made in this regard.

section 771(5)(E)(ii) of the Act to the extent that the interest paid under the program during the POR was less than what would have been charged on a comparable commercial loan. Id.

To calculate the benefit, we compared the actual interest rates charged to the benchmark interest rates that would have been charged on a comparable commercial loan. As discussed in the “Subsidies Valuation Information,” supra, where available we used as our benchmark the weighted-average interest rates on comparable, commercial loans. For those years in which no company-specific long-term benchmark was available, we used the average interest rate for India’s PLR, as published by the RBI.

To calculate the net subsidy rate, we divided the total amount of interest savings obtained under this program during the POR by the total sales for the POR.

Interested parties commented on our approach with regard to our benefit and net subsidy rate calculations under the program. See Comment 31. However, no new arguments have been presented in this review to warrant a reconsideration of the Department’s finding.

On this basis, we determine the net countervailable subsidy to be 0.41 percent ad valorem for Tata. Ispat, JSW, and Essar did not use this program during the POR.

8. Captive Mining of Iron Ore

In the Preliminary Results, the Department found that the GOI’s provision of captive mining rights for minerals, including iron ore, to a limited number of eligible applicants was countervailable. See 73 FR at 1591. Specifically, the Department determined that the provision of iron ore under the program constitutes a financial contribution in the form of a provision of a good, within the meaning of section 771(D)(iii) of the Act. We also determined that the GOI conferred a benefit upon those firms with captive mining rights within the meaning of section 771(5)(E)(iv) of the Act because it enables the firms to purchase iron ore from the GOI for less than adequate remuneration. We further determined that the GOI’s provision of captive mining rights is specific in accordance with section 771(5A)(D)(iii)(I) of the Act because the provision of the rights is limited to certain enterprises, such as steel producers. Id.

We received comments from interested parties regarding the countervailability of the program and the benchmark used to measure adequacy of remuneration. No new arguments have been presented in this review to warrant a reconsideration of the Department’s finding that the program is countervailable. However, based on comments from interested parties, we have made revisions to the benchmarks used in the benefit calculation. See Comments 24, 25, 26, 27, 28, and 29.

With regard to the captive iron ore benchmark, we lacked actual commercial transactions that could be used as first tier benchmark under 19 CFR 351.511(a)(2)(i). As explained elsewhere in this decision memorandum, we are using as second tier benchmark prices for iron ore from Hamersly, Australia, as reported by the Tex Report. See 19 CFR 351.511(a)(2)(ii). Furthermore, as explained elsewhere in this decision memorandum, we have calculated separate benchmarks for iron ore lumps and fines.

In the case of iron ore fines, we converted our benchmark unit price (expressed as percentage of FE content) from U.S. dollar per dry long ton to U.S. dollar per metric ton. We then converted this unit price from U.S. dollars to rupees. Next, we multiplied the domestic percentage Fe content by the benchmark price per percentage Fe content. This resulted in the benchmark price per wet metric ton for iron ore fines to be of the same Fe content as the domestic iron ore fines purchased under the program. To this per unit benchmark price, we

added the following per unit costs ocean freight, haulage charges, tripling charges, siding charges, shipment charges, shore incentive, manual unloading and loading of shipments, inland freight. In this manner, we arrived at the total per unit benchmark price.

Next, we calculated a weighted average unit cost (rupees per metric ton) for the iron ore fines Tata mined under the captive mining rights of iron ore program as reported by Tata. This unit price includes extractions costs and the delivery charges incurred to transport the coal to Tata's factory. To this unit cost, we added a profit adjustment to arrive at a total per unit captive iron ore fines cost. See Exhibit 70 of Tata's February 8, 2008 supplemental questionnaire response.

To calculate the benefit, we compared the per unit benchmark price to the per unit captive iron ore fines price. We multiplied the difference by the quantity of iron ore fines Tata mined under the captive mining of iron ore program.

Regarding iron ore lumps, to calculate the benchmark we followed the same methodology that we used for iron ore fines. However, we lacked record evidence concerning the FE content of iron ore lumps that Tata mined under the captive mining rights program. Therefore, in order to bring the benchmark price to a level of FE content that is comparable to the FE content of the domestic iron ore lumps purchased under the program, we multiplied the iron ore lumps benchmark price per percentage Fe content by the FE content of iron ore fines that Tata mined under the program. To this per unit benchmark price, we added the following per unit costs ocean freight, haulage charges, tripling charges, siding charges, shipment charges, shore incentive, manual unloading and loading of shipments, inland freight. In this manner, we arrived at the total per unit benchmark price.

Next, we calculated a weighted average unit cost (rupees per metric ton) for the iron ore lumps Tata mined under the captive mining rights of iron ore program as reported by Tata. This unit price includes extractions costs and the delivery charges incurred to transport the coal to Tata's factory. To this unit cost, we added a profit adjustment to arrive at a total per unit captive iron ore fines cost. See Exhibit 70 of Tata's February 8, 2008 supplemental questionnaire response.

To calculate the benefit, we compared the per unit benchmark price to the per unit captive iron lumps cost. We multiplied the difference by the quantity of iron ore lumps that Tata mined under the captive mining rights program during the POR.

To calculate the net subsidy rate, we divided the total benefit attributable to Tata's purchases of iron ore lumps and fines under the program by Tata's total sales during the POR. On this basis, we calculated a net subsidy rate of 18.08 percent ad valorem for Tata. Ispat and Essar did not use the program during the POR.

Concerning JSW, in its November 1, 2007, supplemental questionnaire response, JSW stated that the GOI did not provide captive mining rights to the company. We subsequently issued on November 8, 2007, a supplemental questionnaire seeking additional information on this program. JSW did not submit a response to that supplemental questionnaire. Because JSW did not provide any further information or supporting documentation to substantiate the company's non-use of captive mining rights, we preliminarily applied facts available with an adverse inference to address these omissions and assigned to JSW the rate of 16.63 percent ad valorem, the highest program rate calculated in any segment of this proceeding.

JSW submitted comments on this program and the application of the 16.63 percent rate (see Comment 41). Based on arguments presented and the Department's practice to apply as AFA the highest subsidy rate calculated for the same program, where available, we have, for

these final results, changed the AFA rate assigned to JSW for “Captive Mining of Iron Ore.” In the instant review, the Department has calculated a company-specific rate of 18.08 percent ad valorem for Tata for the same program. Tata’s rate is the highest subsidy rate calculated for this program in this segment of this proceeding. Therefore, for these final results, we have applied Tata’s rate of 18.08 percent ad valorem to JSW for “Captive Mining of Iron Ore.”

9. Captive Mining Rights of Coal

In the Preliminary Results, the Department determined that the GOI’s provision of captive mining rights of coal was countervailable. See 73 FR at 1592. Specifically, the Department determined that the provision of coal under the program constitutes a financial contribution in the form of a provision of a good, within the meaning of section 771(D)(iii) of the Act. We also determined that the GOI conferred a benefit upon those firms with captive mining rights of coal within the meaning of section 771(5)(E)(iv) of the Act because it enables firms to purchase coal from the GOI for less than adequate remuneration. We further determined that the GOI’s provision of the mining rights is specific under section 771(5A)(D)(i) of the Act because preference is given in the allocation of coal mining rights or “blocks” to steel producers whose annual production capacity exceeds one million tons.

We received comments from interested parties regarding the countervailability of the program and the benchmark used to measure adequacy of remuneration. No new arguments have been presented in this review to warrant a reconsideration of the Department’s finding that the program is countervailable. However, based on comments from interested parties, we have made revisions to the benchmark used in our benefit calculations. See Comments 24, 25, 26, 27, 28, and 29.

To calculate the captive coal benchmark, we used actual transactions between Tata and its Australian supplier of coal during the POR as described under 19 CFR 351.511(a)(2)(i). Specifically, we calculated net prices (rupees per metric ton) for the coal Tata paid to mine under the program, the inland freight from the Australia to the port, ocean freight from the Australian port to India, Indian inland freight from the port to the factory, as well as other handling charges associated with the shipments. We then summed these net prices to arrive at the total unit cost. Next, we subtracted from this sum a unit value that accounts for the quality differences that we find exist between the coal that Tata mined under the captive mining rights program and the coal used in our benchmark calculation. See Comment 29 for further discussion. In this manner, we arrived at an adjusted benchmark unit price for coal.

Next, we calculated a weighted average unit cost (rupees per metric ton) for the coal Tata mined under the captive mining rights of coal program as reported by Tata. This unit price includes extractions costs and the delivery charges incurred to transport the coal to Tata’s factory. To this unit cost, we added a profit adjustment to arrive at a total per unit captive coal cost. See Exhibit 64D of Tata’s February 8, 2008 supplemental questionnaire response.

To calculate the benefit, we compared the per unit benchmark price to the per unit captive coal cost. We multiplied the difference by the quantity of coal that Tata mined under the captive mining rights program during the POR.

To calculate the net subsidy rate, we divided the benefit by total sales during the POR. On this basis, we calculated a net subsidy rate of 3.09 percent ad valorem for Tata. Essar, Ispat, and JSW did not use this program during the POR.

10. Duty Free Replenishment Certificate (DFRC) Scheme

In the Preliminary Results, we explained that no companies reported using DFRC licenses to import items duty-free during the POR but that Tata sold DFRC licenses during the POR. See 73 FR at 1597. However, we preliminarily determined that the licenses Tata sold were tied to non-subject merchandise and, thus, did not confer a countervailable benefit in the instant review. Id.

We received comments from interested parties regarding the Department's approach in the Preliminary Results. See Comment 36. Based on the comments received, we have modified our approach from the Preliminary Results. Specifically, we find that Tata's sales of DFRC licenses during the POR (as opposed to the use of DFRC licenses for the importation of a given item) constitute an untied export subsidy. Therefore, we find that that Tata's sales of the licenses constitute a financial contribution and a benefit under sections 771(5)(D)(ii) and 771(5)(E) of the Act, respectively. Because receipt of DFRC licenses is limited to exporters, we find that the program is specific under section 771(5A)(B) of the Act.

To calculate the benefit, we summed the revenue that Tata earned on its sales of DFRC licenses during the POR.

To calculate the net subsidy rate, we divided the benefit by Tata's total export sales.

On this basis, we calculated a net subsidy rate of 0.07 percent ad valorem for Tata. Essar, Ispat, and JSW did not use this program during the POR.

B. State Government of Gujarat Programs

State Government of Gujarat (SGOG) Tax Incentives

As explained in the Preliminary Results, the Pioneer and Prestigious Schemes are two programs that are available under the SGOG's tax incentive program. We found that the sales tax exemptions provided under the Prestigious Scheme constitute a financial contribution, in the form of revenue forgone, and confer a benefit in accordance with sections 771(5)(D)(ii) and 771(5)(E) of the Act, respectively. See 73 FR at 1593. We further found that the Prestigious Scheme is limited to only those companies that make an investment in a specified disadvantaged area and therefore is specific under section 771(5A)(D)(iv) of the Act. Id.

To calculate the benefit, we summed the amount of sales tax exemptions received, as indicated by the annual state tax return filed during the POR. To calculate the net subsidy rate, we divided the benefit by total sales during the POR. With regard to the Pioneer Scheme, we preliminarily determined that the program was not used during the POR. Id. Interested parties did not comment on our findings regarding the Prestigious and Pioneer Schemes.

On this basis, we calculated a net subsidy rate of 1.08 percent ad valorem for Essar under the Prestigious Scheme. Ispat, JSW, and Tata did not use the Prestigious Scheme during the POR.

In Preliminary Results, we stated that in the course of explaining its use of the Pioneer and Prestigious Schemes, Essar stated that it also used a Value Added Tax (VAT) system that the SGOG established on April 1, 2006. See 73 FR at 1593. We further stated that because the source of the tax remissions received under the VAT system is participating firms' unused tax credits under the Prestigious Scheme, the indirect tax remissions constitute a financial contribution, in the form of revenue forgone, and are regionally specific under sections

771(5)(D)(ii) and 771(5A)(D)(iv) of the Act, respectively. We also found that the VAT system confers a benefit under section 771(5)(E) of the Act because it enables participating firms to pay less indirect taxes than they would have to pay absent the VAT system. See 73 FR at 1593.

In the Preliminary Results, we treated the balance of tax credits under the Prestigious Scheme that were used to obtain VAT remissions during the POR as the benefit. Id.

To calculate the net subsidy rate, we divided the benefit by total sales during the POR.

Interested parties commented on our findings with regard to the VAT remissions received during the POR. See Comment 1. Based on these comments, we have revised our benefit calculations.

On this basis, we calculated a net subsidy rate of 2.06 percent ad valorem for Essar. Ispat, JSW, and Tata did not use the Prestigious Scheme during the POR.

C. State Government of Karnataka (SGOK) Programs

1. SGOK's New Industrial Policy and Package of Incentives and Concessions of 1993 (1993 KIP)

a. Total AFA for Certain Sub-Programs

As explained in the “Adverse Facts Available” section, we determine that JSW failed to cooperate to the best of its ability in this review and, in accordance with section 776(b) of the Act, we have applied AFA with regard to assistance provided to JSW under the following sub-programs of the 1993 KIP: land, power, water, roads, iron ore, coal, limestone/dolomite, port facilities, training facilities, term loans, and interest-free unsecured loan.⁶ As such, we have assigned, where available, the highest subsidy rate calculated for the same or a similar program in any segment of this proceeding. Absent a subsidy rate calculated for the same or similar program, we have applied the highest calculated subsidy rate for any program otherwise listed in an India CVD proceeding, unless it is clear that the industry in which the respondent operates cannot use the product for which these rates were calculated.

We are able to match the following sub-programs of the 1993 KIP to similar programs for which subsidy rates were calculated in either the instant review or underlying investigation: land, water, iron ore, coal, limestone/dolomite, term loans, and interest-free unsecured loan. Specifically, for the land, water, iron ore, and limestone/dolomite less than adequate remuneration (LTAR) sub-programs, we have made a program match to the GOI's Captive Mining of Iron Ore program. For these final results, the Department has calculated, for Tata, a program rate of 18.08 percent ad valorem for the GOI's Captive Mining of Iron Ore program. Tata's rate is the highest calculated rate for a LTAR program in this review. For the coal sub-program, we have made a program match to the EPCGS and have applied the rate of 16.63 percent ad valorem, which was calculated in the underlying investigation and is the highest rate calculated for a comparable program. For the two financing sub-programs (i.e., term loans and interest-free unsecured loan), we have made a program match to Pre-Shipment Export Financing and have applied the rate of 1.32 percent ad valorem, which was calculated in the underlying

⁶We did not apply AFA to the following two sub-programs of the 1993 KIP: Tax Incentives and VAT Refunds. For these two programs, JSW provided to the Department information which we used to calculate the benefit conferred under each of the programs.

investigation and is the highest rate calculated for a comparable program. For more information on the matching of these programs, see the July 7, 2008, Memorandum to the File concerning Final Results Calculation for JSW.⁷

For the remaining new subsidy sub-programs,⁸ we are unable to match those programs to either identical or similar programs. Therefore, consistent with our practice, we have selected and applied as the AFA rate for those programs, the highest calculated subsidy rate for any program otherwise listed in an India CVD proceeding. As such, for these final results, we have applied the net subsidy rate of 18.60 percent ad valorem, which is the rate calculated for “Export Oriented Unit Program: Duty-Free Import of Capital Goods and Raw Material” in PET Resin.

Also, as explained in the Preliminary Results, the Department finds that JSW and Vijayanagar Minerals Private Limited (VMPL) are cross-owned companies under section 776(b) of the Act and 19 CFR 351.525(b)(6)(iv). See 73 FR at 1594. The Department sent a questionnaire to VMPL regarding assistance provided to it by the SGOK under the 1993 KIP (and other industrial policies); however, VMPL failed to respond. Therefore, we found that VMPL failed to act to best of its ability in this review and, in accordance with section 776(b) of the Act, applied AFA. Specifically, we assumed that each of the following sub-programs of the 1993 KIP conferred countervailable benefits upon VMPL: land, power, water, roads, iron ore, coal, limestone/dolomite, port facilities, training facilities, term loans, and interest-free unsecured loan (see discussion below for the VAT Refund and Tax Incentive sub-programs). Because we determine that VMPL and JSW are cross-owned, we attribute subsidies found to be received by VMPL under these sub-programs to JSW. See Preliminary Results, 73 FR at 1594 – 1595. Ispat, Essar, and Tata did not use these 1993 KIP sub-programs during the POR.

We received comments regarding the Department’s finding that assistance provided under the 1993 KIP is countervailable and the application of facts available with adverse inferences with respect to JSW and VMPL (see Comment 37 and 38). However, no arguments have been presented to warrant a reconsideration of the Department’s finding that the 1993 KIP is countervailable or move the Department from applying AFA to JSW and VMPL.

b. VAT Refunds

As explained in the Preliminary Results, JSW reported that it received VAT refunds from the SGOK during the POR for domestic sales. JSW reported that the VAT refunds are only for companies that set up productive units in “backward” areas of Karnataka and are only permitted for products sold within Karnataka. See 73 FR at 1594. As explained above, because the SGOK did not respond to the Department’s new subsidy questionnaire, we find as AFA that the VAT refunds constitute a financial contribution and are specific under sections 771(5)(D) and 771(5A) of the Act, respectively. We further find that the VAT refunds confer a benefit under section 771(5)(E) of the Act and 19 CFR 351.510(a)(1).

Interested parties did not comment on this issue.

To calculate the benefit, we summed the total amount of VAT refunds JSW received under the program during the POR. To calculate the net subsidy rate, we divided the benefit by JSW’s total sales. On this basis, we calculated a net subsidy rate of 0.83 percent ad valorem for

⁷ A public version of this memorandum is available in the CRU.

⁸ The following sub-programs of the 1993 KIP: power, roads, port facilities, and training facilities.

JSW. As AFA, we assigned an additional net subsidy rate of 0.83 percent ad valorem to JSW to reflect the VAT refund benefits attributed to VMPL. Ispat, Essar, and Tata did not use this sub-program during the POR.

c. Tax Incentives

As explained in the Preliminary Results, JSW reported that it received tax incentives and that the incentives were limited to capital investments in the fixed assets of projects undertaken by the company. See 73 FR at 1594. Because the SGOK did not respond to the Department's new subsidy questionnaire, we find as AFA that the tax incentives constitute a financial contribution and are specific under sections 771(5)(D)(ii) and 771(5A) of the Act, respectively. We further find that the tax incentives confer a benefit under section 771(5)(E) of the Act.

Interested parties did not comment on this issue.

To calculate the benefit, as in the Preliminary Results, we resorted to the use of AFA. See 73 FR at 1594. Specifically, we assumed that the tax incentive JSW received was equal to 100 percent of the company's capital investments in fixed assets. Thus, we divided JSW's total fixed asset investment amount by the number of years that JSW can receive tax incentives. To determine the net subsidy rate, we divided the benefit by total sales during the POR. On this basis, we calculated a net subsidy rate of 3.99 percent ad valorem for JSW. As AFA, we assigned an additional net subsidy rate of 3.99 percent ad valorem to JSW to reflect the tax incentive benefits attributed to VMPL. Ispat, Essar, and Tata did not use this sub-program during the POR.

2. Other SGOK Subsidies

As explained in the Preliminary Results, petitioner alleged that JSW received subsidies from the SGOK by virtue of JSW's majority ownership in VPML, which is also partially owned by Mysore Minerals Limited (MML), a state-owned company located in Karnataka. See 73 FR at 1595. JSW failed to respond to the Department's questions concerning the subsidy allegations involving VMPL and MML. Therefore, we found that JSW failed to act to the best of its ability and applied AFA to address JSW's failure to cooperate. Id. Because we are unable to match these new subsidy programs to identical or comparable programs found countervailable in a segment of this proceeding, we have assigned to each of the following "Other SGOK Subsidies" the AFA rate of 18.60 percent ad valorem, which is the highest calculated subsidy rate for any program otherwise listed in an India CVD proceeding (see PET Resin and accompanying Issues and Decision Memorandum at "Export Oriented Unit Program: Duty-Free Import of Capital Goods and Raw Material"): a) MML's receipt of VMPL's shares; b) MML's receipt of premium payments from VMPL; and 3) MML's failure to enforce certain pricing arrangements vis-à-vis VMPL. We did not receive any comments regarding these SGOK subsidies.

3. SGOK's New Industrial Policy and Package of Incentives and Concessions of 1996 (1996 KIP)

In the Preliminary Results, we discussed that VMPL did not respond to the Department's new subsidies questionnaire regarding the 1996 KIP and, therefore, we found that VMPL/JSW

failed to act to the best of their ability. See 73 FR at 1595. Thus, pursuant to section 776(b) of the Act, we applied AFA to address the firms' failure to cooperate. We did not receive any comments regarding the 1996 KIP.

Therefore, as AFA, we have assigned to JSW a net subsidy rate of 18.60 percent ad valorem for this program because we are unable to match this subsidy program to an identical or comparable program found countervailable in a segment of this proceeding. Ispat, Essar, and Tata did not use this program during the POR.

4. SGOK's New Industrial Policy and Package of Incentives and Concessions of 2001 (2001 KIP)

In the Preliminary Results, we noted that VMPL did not respond to the Department's new subsidies questionnaire regarding the 2001 KIP and, therefore, we found that VMPL/JSW failed to act to the best of their ability. See 73 FR at 1595. Thus, pursuant to section 776(b) of the Act, we applied AFA to address the firms' failure to cooperate. We did not receive any comments regarding the 2001 KIP.

Therefore, as AFA, we have assigned to JSW a net subsidy rate of 18.60 percent ad valorem for this program because we are unable to match this subsidy program to an identical or comparable program found countervailable in a segment of this proceeding. Ispat, Essar, and Tata did not use this program during the POR.

5. SGOK's New Industrial Policy and Package of Incentives and Concessions of 2006 (2006 KIP)

In the Preliminary Results, we noted that VMPL did not respond to the Department's new subsidies questionnaire regarding the 2006 KIP and, therefore, we found that VMPL/JSW failed to act to the best of their ability. See 73 FR at 1595. Thus, pursuant to section 776(b) of the Act, we applied AFA to address the firms' failure to cooperate. We did not receive any comments regarding the 2006 KIP.

Therefore, as AFA, we have assigned to JSW a net subsidy rate of 18.60 percent ad valorem for this program because we are unable to match this subsidy program to an identical or comparable program found countervailable in a segment of this proceeding. Ispat, Essar, and Tata did not use this program during the POR.

D. State Government of Maharashtra Programs (SGOM)

1. Sales Tax Program

In the Preliminary Results, the Department found that sales tax exemptions, deferrals, and sales tax loans, in the form of interest-free loans, were provided under the SGOM's sales tax program. See 73 FR at 1595. The Department found that the benefits provided under the program are specific under section 771(5A)(D)(iv) of the Act because they are limited to only those companies that make an investment in a specified developing area. We further found that the program constitutes a financial contribution under section 771(D)(ii) of the Act by forgoing the collection of sales taxes and, in the case of sales tax deferrals, in the form of uncollected interest on the deferred sales taxes. We also found that the sales tax program confers a benefit

under section 771(5)(E) of the Act: (1) in the amount of sales tax that it does not pay; (2) in the case of sales tax deferrals, in the amount of interest otherwise due; and (3) in the case of sales tax loans, in the form of interest-free loans. Id.

Interested parties submitted comments regarding VAT refunds reported by Ispat. As explained in Comment 20, we determine that the refunds Ispat claimed for VAT paid during the POR are not excessive and do not constitute a benefit. Accordingly, we have removed the VAT refunds from the calculations. We will continue to examine this program in any future administrative review of Ispat.

Regarding Ispat's deferrals of indirect taxes, a benefit exists to the extent that the appropriate interest charges are not collected. See 19 CFR 351.510(2)(a)(2). Ispat provided a monthly breakdown of its sales tax deferrals. Using these data, we calculated the monthly benefit by multiplying the monthly amount of deferred tax by the days outstanding in the POR by the benchmark interest rate. We used the long term 2006 benchmark interest rate because Ispat is not required to repay these deferral sales tax amounts for 10 to 15 years.

Regarding interest free sales tax loans, Schedule 4 of Ispat's Annual Report contains an entry for the amount of interest-free sales tax loans outstanding as of March 31, 2006. Because Ispat did not provide more specific data, we calculated the benefit by treating this amount as the amount of interest-free tax loan outstanding at the beginning of 2006 and multiplying it by the benchmark interest rate. As explained in the "Subsidies Valuation Section" above, because Ispat did not have comparable, commercial loans for 2006, we used the average interest rate in 2006 for India's PLR, as reported by the RBI. We used a long-term benchmark interest rate because Ispat reported that is not required to repay the unsecured sales tax loans for 10 to 15 years.

Ispat claims that the provision in the Maharashtra Package Scheme of Incentives which allows for exemptions of sales taxes on purchases was terminated on March 31, 2005, and that a substitute program has not been instituted. On this basis, Ispat requests that the Department take a program-wide change into consideration when establishing the cash deposit rate applicable to the Maharashtra Package Scheme of Incentives. We note that 19 CFR 351.526(d) provides that the Department will not adjust the cash deposit rate if the program-wide change consists of a terminated program and: (1) the Department determines that residual benefits may continue to be bestowed under the terminated program, or (2) the Department determines that a substitute program for the terminated program has been introduced and the Department is not able to measure the amount of countervailable subsidies provided under the substitute program. In this administrative review, the GOM has not provided the required information regarding residual benefits and successor programs, as discussed under 19 CFR 351.526(d).

To calculate net subsidy rate received during the POR under this program, we summed the various benefit amounts received under each provision of the program and divided the total benefit by total sales during the POR. Id.

On this basis, we calculated a net subsidy rate of 0.59 percent ad valorem for Ispat. JSW, Tata, and Essar did not use this program during the POR.

2. Electricity Duty Exemption Under the Package Scheme of Incentives for 1993

In the Preliminary Results, the Department determined that electricity duty exemptions received under the Package Scheme of Incentives of 1993 are countervailable. Specifically, we determined that the exemptions are regionally specific under section 771(5A)(D)(iv) of the Act because they are limited to companies that make investments in a specified development area.

See 73 FR at 1596. We further determined that the exemptions constitute a financial contribution, in the form of revenue forgone, and a benefit equal to the amount of unpaid duties within the meaning of sections 771(5)(D)(ii) and 771(5)(E) of the Act, respectively. Id.

To calculate the benefit received under the program, we summed the monthly value of electricity charges that were eligible for the duty exemptions and multiplied these totals by the “industrial” electricity duty rate of six percent.

To calculate the net subsidy rate, we divided the benefit by total sales during the POR.

We did not receive any comments from interested parties on our approach with regard to this program in the Preliminary Results.

On this basis, we calculated a net subsidy rate of 0.12 percent ad valorem for Ispat. Essar, Tata, and JSW did not use this program during the POR.

II. Programs Determined Not To Be Used

A. GOI Programs

1. Status Certificate Program

In the Preliminary Results, the Department explained that it required additional time to determine whether the Status Certificate program confers countervailable benefits. See 73 FR at 1597. We further explained that the Department would issue an interim analysis prior to the issuance of the final results. On May 15, 2008, the Department issued its decision memorandum regarding the Status Certificate program. See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, through Melissa G. Skinner, Director, Office 3, Operations, “Decision Memorandum Regarding the Status Certificate Program” (Status Certificate Memorandum), a public document on file in the CRU. In the Status Certificate Memorandum, we preliminarily determined that the Status Certificate Program was not used during the POR by any of the respondents subject to the instant review. We further stated that the Department will continue to examine the Status Certificate Program in future administrative reviews.

We did not receive any comments from interested parties regarding the Department’s decision in the Status Certificate Memorandum. Therefore, for purposes of these final results, we continue to find that the Status Certificate Program was not used during the POR.

2. Target Plus Scheme (TPS)

In the Preliminary Results, the Department found that import duty exemptions under the TPS were countervailable. See 73 FR at 1590. Specifically, the Department determined that a financial contribution, in the form of revenue forgone, as defined under section 771(5)(D)(ii) of the Act, is provided under the TPS program because the GOI provides credits for the future payment of import duties. We also found that the TPS program provides a benefit because the GOI does not have in place and does not apply a system that is reasonable and effective for the purposes intended to confirm which inputs, and in what amounts, are consumed in the production of the exported products. Therefore, in accordance with 19 CFR 351.519(a)(4) and section 771(5)(E) of the Act, we determined that the entire amount of import duty exemption earned during the POR constitutes a benefit. Further, because the TPS program can only be used by

exporters, we determined that the program is specific under section 771(5A)(B) of the Act. Id.

In the Preliminary Results, we calculated the benefit under the TPS on an “as-earned” basis because the amount of the exemption is known at the time the TPS license is earned. See 73 FR at 1591. However, we found that unlike the DEPS, TPS credits are not tied to particular sales. Rather, under the TPS, we determined credits are provided as a percentage of the value of incremental growth in the exported merchandise. As such, we found that participating firms do not know the value of TPS credits they have earned until they receive the TPS license.

Therefore, in the Preliminary Results, we found that the date on which participating firms receive their TPS licenses constitutes the time period in which benefits are earned. Accordingly, in the Preliminary Results, we did not include TPS credits earned prior to the POR in our benefit calculations. Further, in the Preliminary Results, we subtracted from the benefit the amount of any application fees paid for each license in accordance with section 771(6) of the Act.

In the Preliminary Results, to calculate the net subsidy rate, we divided the amount of TPS credits earned during the POR by total export sales for the POR.

Interested parties commented on our approach with regard to the TPS. Based on the comments received, we have revised our approach from the Preliminary Results. As explained in Comment 30, we find that Tata did not use this program during the POR. Ispat, Essar, and JSW also did not use the program during the POR.

3. Export Processing Zones and Export Oriented Units
4. Export Processing Zones
5. Income Tax Exemption Scheme (Sections 10A, 10B, and 80HHC)
6. Market Development Assistance
7. Market Access Initiative
8. Exemption of Export Credit from Interest Taxes
9. Long-Term Loans from the GOI
10. Special Economic Zone Act of 2005

We received comments from interested parties regarding the Department’s decision in the Preliminary Results to find that the programs listed below were not used during the POR.

However, no comments have been submitted that warrant reconsideration of the Department’s preliminary finding. See Comments 6 and 7.

- a. Duty free import/domestic procurement of goods and service for development, operation, and maintenance of SEZ units.
- b. Exemption from excise duties on goods (i.e., machinery and capital goods) “brought from the Domestic Tariff Area” (defined as the “whole of India” excluding SEZs) for use by an enterprise in the SEZ.

- c. Drawback on goods brought or services provided from the Domestic Tariff Area into an SEZ, or services provided in an SEZ by service providers located outside India.
- d. 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.
- e. Exemption from the Central Sales Tax.
- f. Exemption from the National Service Tax.

B. State Government of Andhra Pradesh Programs- Grants Under the Industrial Investment Promotion Policy of 2005-2010

We received comments from interested parties regarding the Department's decision in the Preliminary Results to find that the programs listed below were not used during the POR. However, no comments have been submitted that warrant reconsideration of the Department's preliminary finding. See Comment 10.

- 1. 25 percent reimbursement of cost of land in industrial estates and industrial development areas.
- 2. 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).
- 3. 50 percent subsidy for expenses incurred for quality certification up to Rs. 100 lakhs.
- 4. 25 percent subsidy on "cleaner production measures" up to Rs. 5 lakhs.
- 5. 50 percent subsidy on expenses incurred in patent registration, up to Rs. 5 lakhs.
- 6. 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.
- 7. 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.

8. Exemption from the GAAP Non-agricultural Land Assessment (NALA).
9. Provision of “infrastructure” for industries located more than 10 kilometers from existing industrial estates or industrial development areas.
10. Guaranteed “stable prices of municipal water for 3 years for industrial use” and reservation of 10 percent of water for industrial use for existing and future projects.

C. State Government of Chhattisgarh Programs- Industrial Policy 2004-2009

We received comments from interested parties regarding the Department’s decision in the Preliminary Results to find that the programs listed below were not used during the POR. However, no comments have been submitted that warrant reconsideration of the Department’s preliminary finding. See Comment 11.

1. A direct subsidy of 35 percent to total capital cost for the project, up to a maximum amount equivalent to the amount of commercial tax/central sales tax paid in a seven year period.
2. A direct subsidy of 40 percent toward total interest paid for a period of five years (up to Rs. lakh per year) on loans and working capital for upgrades in technology.
3. Reimbursement of 50 percent of expenses (up to Rs. 75,000) incurred for quality certification.
4. Reimbursement of 50 percent of expenses (up to Rs. 5 lakh) for obtaining patents.
5. Total exemption from electricity duties for a period of 15 years from the date of commencement of commercial production.
6. 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.
7. Exemption from payment of “entry tax” for seven years (excluding minerals obtained from mining in the state).
8. 50 percent reduction of the service charges for acquisition of private land by Chhattisgarh Industrial Development Corporation for use by the company.
9. Allotment of land in industrial areas at a discount up to 100 percent.

D. State Government of Gujarat Programs

We received comments from interested parties regarding the Department's decision in the Preliminary Results to find the programs listed below were not used during the POR. However, no comments have been submitted that warrant reconsideration of the Department's preliminary finding. See Comments 8 and 9.

1. Gujarat Special Economic Zone (SEZ) Act
 - a. Stamp duty and registration fees for land transfers, loan agreements, credit deeds, and mortgages.
 - b. Sales tax, purchase tax, and other taxes payable on sales and transactions.
 - c. Sales and other state taxes on purchases of inputs (both goods and services) for the SEZ or a Unit within the SEZ.
2. Captive Port Facilities
 - a. Discount on Gujarat wharfage charges.
 - b. 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.

E. State Government of Jharkhand Programs

1. Grants and Tax Exemptions under the State Industrial Policy of 2001
2. Subsidies for Mega Projects under the JSIP of 2001

F. State Government of Maharashtra Programs

We received comments from interested parties regarding the Department's decision in the Preliminary Results to find that the programs listed below were not used during the POR. However, no comments have been submitted that warrant reconsideration of the Department's preliminary finding. See Comment 23.

1. Refunds of Octroi Under the PSI of 1993, Maharashtra Industrial Policy of 2001, and Maharashtra Industrial Policy of 2006.
2. Infrastructure Assistance for Mega Projects.
3. Land for Less than Adequate Remuneration.

4. Loan Guarantees Based on Octroi Refunds by the SGM.
5. Investment Subsidy.

III. Total Ad Valorem Rate

The total net subsidy rates for the respondents subject to this review are as follows:

Company Name	Total Net Subsidy Rate
Essar	17.50 percent
Ispat	15.27 percent
JSW	484.41 percent
Tata	27.22 percent

IV. Analysis of Comments

Comments Regarding Essar

Comment 1: Whether the Department Erred in Its Calculation of Essar’s Benefit under the Government of Gujarat (GOG) Value Added Tax (VAT) Remission Program

Petitioners argue that in the Preliminary Results the Department correctly countervailed Essar’s use of the program. However, they argue that the Department erred in its calculation of Essar’s benefit under the program. Specifically, they argue that the Department used an incorrect conversion rate when converting the benefit from a value expressed in the Indian numbering system. Petitioners argue the Department’s error in the benefit calculation understates the ad valorem rate attributable to Essar.

Essar did not comment on this issue.

Department’s Position: In our calculation of Essar’s benefit under the GOG VAT Remission Program, the Department inadvertently used an incorrect conversion rate in converting the benefit from a value expressed in the Indian numbering system. We have corrected our calculation in these final results.

Comment 2: Whether the Department Erred in Converting Dry Metric Tons to Wet Metric Tons in the Calculation of the Benchmark Used to Measure the Adequacy of Essar’s Purchases of Iron Ore from the GOI

Petitioners argue that in the Preliminary Results the Department converted the benchmark prices from dry metric tons (DMT) to wet metric tons (WMT) using a conversion factor of 0.955 WMT/DMT. However, petitioners contend that when converting certain benchmark prices, specifically the Donimalai iron ore lump, Hamersley iron ore lump, and Donimalai iron ore fines prices, from \$/DMT to \$/WMT, the Department inadvertently multiplied the 0.955 WMT/DMT conversion rate by the price in \$/iron (FE) content instead of the price in \$/DMT. Petitioners argue that, should the Department continue to use these prices as the benchmark for Essar, it

should correct the conversion error. Specifically, for the final results, petitioners argue the Department should correct the error by multiplying the Donimalai iron ore lump, Hamersley iron ore lump, and Donimalai iron ore fines benchmark prices expressed in \$/DMT by the 0.955 WMT/DMT conversion factor to arrive at benchmark prices properly expressed in \$/WMT.

Essar did not comment on this issue.

Department's Position: In our calculation of the benchmark used to measure the adequacy of Essar's purchases of iron ore from the GOI, we inadvertently made an error in converting from DMT to WMT. We have corrected the error in the calculations for the final results.

We note that we have revised the iron ore benchmark calculation that was used in the Preliminary Results for fines by excluding the Bailadila and Donimalai prices that were reported in the Tex Report. Because these prices pertain to iron ore from NMDC, the very government provider of the good at issue, we used only the Hamersley prices listed in the Tex Report for benchmark purposes to measure the adequacy of remuneration of Essar's purchases of iron ore fines from NMDC.⁹ Moreover, we revised our benchmark calculation for Essar's DR-CLO iron ore by replacing prices reported in the Tex Report with the actual transaction price from a non-affiliated supplier for DR-CLO purchases during the POR as explained in Comment 3. For further information see the public version of Essar's calculations which are on file in the CRU.

Comment 3: Whether the Department Should Use Actual Transaction Prices, Where Available, in Calculating the Benchmark Used to Measure Essar's Benefit under the Iron Ore Provided for Less Than Adequate Remuneration Program

Petitioners note that according to Essar, it does not have blast furnaces, but instead produces steel using Midrex technology. As a result, Essar is required to use only direct reduction calibrated lump iron ore (DR-CLO) with an FE content of 67 percent to produce hot-briquetted iron and direct reduction iron (HBI/DRI) used in its steelmaking process. Petitioners explain that in the Preliminary Results, the Department used the price of lump iron ore from the Bailadila, Donimalai, and Hamersley mines as a benchmark to measure the adequacy of remuneration of Essar's purchases of DR-CLO from the GOI via the NMDC. However, since the Preliminary Results, petitioners indicate that Essar has provided information on its actual purchases of DR-CLO.

Petitioners explain that under 19 CFR 351.511(a)(2)(i), the Department will normally first 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. Petitioners note that the benchmark prices used in the Preliminary Results to measure Essar's benefit under the iron ore provided for less than adequate remuneration program were average export prices. In contrast, petitioners argue that additional information provided by Essar indicates that there are data regarding Essar's actual purchase of DR-CLO. Petitioners argue that, in accordance with 19 CFR 351.511(a)(2)(i), which establishes a preference for actual transaction prices, the Department should use prices Essar paid on its purchases of DR-CLO when determining the adequacy of remuneration under the program.

⁹ In the Preliminary Results, the benchmark prices we derived from the Tex Report consisted of prices charged by the NMDC and prices from Hamersley, Australia. As a result of finding in these final results, we are limiting the benchmark prices derived from the Tex Report to prices from Hamersley.

Petitioners acknowledge that the company-specific DR-CLO price they advocate for use in measuring the adequacy of remuneration appears on an invoice issued to Essar that is dated after the POR. However, petitioners argue that details concerning Essar's agreement with its supplier of DR-CLO make it clear that it is appropriate for the Department to use the price as a benchmark in its benefit calculations.¹⁰

Essar agrees with petitioners' arguments that the Department should include the actual transaction prices Essar paid for an unaffiliated international purchase of DR-CLO in the benchmark to measure the adequacy of remuneration of Essar's purchases of DR-CLO from the NMDC. However, Essar, reiterating points made in its February 14, 2008, submission, argues that certain factors affect the comparability of the actual transaction price and the price paid to the NMDC for iron ore. Specifically, Essar explains that the iron ore prices reported in the Tex Report include freight from the mines to the load port and FOB costs at the load port. Therefore, Essar argues that in order to make an accurate comparison, the Department must deduct the freight-to-port costs and FOB costs at the load port from the benchmark price (*i.e.*, the prices in the Tex Report) in order to make an accurate comparison with Essar's purchases of iron ore lumps and fines from NMDC.

Essar further argues that, to the extent that the Department continues to use the prices in the Tex Report as the benchmark in determining the adequacy of Essar's purchases of lump iron ore from the NMDC, the Department should deduct from the benchmark freight costs from the mine to the load port and FOB costs at the load port. Essar argues such an adjustment is required in order to conduct an "apples-to-apples" comparison.

Department's Position: We agree that in accordance with 19 CFR 351.511(a)(2)(i), the first tier of the benchmark hierarchy for determining the adequacy of remuneration calls for comparing the government price with a market-determined price resulting from actual transactions in the country in question. There is no information on the record that suggests that 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, we determine that Essar's purchases of DR-CLO iron ore from a non-affiliated foreign company are the preferable benchmark for comparison with Essar's purchases of DR-CLO from NMDC under this section.

Regarding Essar's comments concerning the treatment of freight costs with regard to the benchmark, see Comments 4 and 5.

Comment 4: Whether the Department Should Adjust the Prices Reported by Essar for Its Purchases of Iron Ore Lumps and Fines to Exclude Sales Tax Which Is Not Included in the Benchmark Price

Petitioners explain that in calculating the prices Essar reported for purchases of iron ore lumps and fines from NMDC, Essar included an amount for "local tax" (*i.e.*, the four percent central sales tax (CST) levied on interstate purchases within India). Petitioners argue that the Department has found that CST is not charged on Indian exports. See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review,

¹⁰ Petitioners' argument on this point references business proprietary data. Therefore, further description cannot be provided on the public record.

73 FR 7708 (February 11, 2008) (PET Film from India 2008), and the accompanying Issues and Decision Memorandum (PET Film from India 2008 Decision Memorandum) at Comment 11; see also Certain Welded Carbon Steel Standard Pipe and Tube from India: Final Determination of Sales at Less Than Fair Value, 51 FR 9089 (March 17, 1986) (Pipe and Tube from India) at Comment 3, noting that CST is not collected on exports from India. As such, petitioners argue that no CST was included in the Tex Report export prices for Bailadila and Donimalai lumps and fines used as benchmarks by the Department in the Preliminary Results. Petitioner further argues that no CST is charged on exports of iron ore from Australia and, therefore, the Hamersley lump prices did not include CST. They also argue that the company-specific DR-CLO price Essar paid did not include CST due to the location of the supplier.

Thus, to ensure an accurate, “apples-to-apples” comparison, petitioners contend that the Department should remove the amount of CST included in the prices of the iron ore lumps and fines Essar purchased from the GOI when measuring the adequacy of remuneration under the iron ore provided for less than adequate remuneration program. In support of their contention, petitioners cite to Final Negative Countervailing Duty Determination: Live Cattle From Canada, 64 FR 57040 (October 22, 1999) (Cattle from Canada), at Comment 22, in which they claim the Department adjusted the benchmark to account for differences in taxes.

Essar argues that petitioners’ request to deduct the CST that Essar is required to pay on its purchases of iron ore lumps and fines from NMDC prior to comparing it with the benchmark price creates a distortion where none previously existed. Essar argues that the CST is a cost incurred by Essar in purchasing iron lumps and fines from the NMDC. According to Essar, in order to have a fair comparison, the CST must be included in the government price.

Essar contests the relevance of petitioners’ citation to Cattle from Canada. Essar argues that the entire context of the Department’s approach in Cattle from Canada is apparent in the preliminary determination of that proceeding:

Specifically, we adjusted the private price downward by deducting costs for the construction and maintenance of fences and water improvements, and the cost of paying property taxes.

See Preliminary Negative Countervailing Duty Determination; Live Cattle From Canada, 64 FR 25277, 25282 (May 11, 1999) (Preliminary Determination of Cattle from Canada).

Therefore, according to Essar, in Cattle from Canada the adjustment for taxes was not to deduct the costs from the government land lease but to deduct them from the private price to make that price comparable to the government lease. Essar agrees that if it had paid taxes on its purchases to a private party that were not paid on government purchases, the price to the private party would have to be reduced to make it comparable to the government price. Essar contends that this is not the case in the instant review.

Department’s Position: 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. The domestic prices for Essar's purchases from NMDC are delivered prices, and we have adjusted the benchmark price to include delivery charges. However, because the import duties for imports of iron ore are not on the record of this administrative review, we are not able to adjust the benchmark price to include import duties and any other taxes payable on imports of iron ore. Consequently, for comparability reasons and in light of the incomplete record information, for this administrative review only, we have excluded the domestic taxes Essar paid on its purchases of iron ore from NMDC. In any future administrative reviews, we will collect information regarding import duties and any other taxables payable on imports of iron ore. For further information see Essar's calculations which are on file in the CRU.

Comment 5: Whether the Department Should Deduct Certain Freight Costs from the Benchmark Used to Measure the Adequacy of Essar's Purchases of Iron Ore from the GOI

Essar asserts that with respect to the provision of iron ore at less than adequate remuneration, no benefit was conferred on Essar in its purchase of iron ore lumps and fines. Essar maintains that in its February 2008 questionnaire response, it explained that iron ore lumps and fines prices for Essar are reported on an ex mines basis. Essar further asserts that prices reported in the Tex Report are the FOB prices at the load port in India. According to Essar, in order to derive an accurate comparison for purchases of iron ore fines between the price Essar paid to NMDC and the prices in the Tex Report, the prices reported in the Tex Report must be adjusted by deducting freight cost from mines to the load port in India, as well as deducting the FOB cost at the load port. Essar argues that the benchmark price of Rs. 2022.06/per WMT considered by the Department should be reduced by the freight cost and FOB cost at load port as reported in the February 2008 questionnaire response. Essar argues that the resulting ex-mines price should then be compared with prices Essar paid to the NMDC for iron ore fines.

Essar further asserts that it supplied information regarding international purchases of comparable iron ore DR-CLO lumps from MBR Overseas Ltd. (MBR) which shows that the FOB price to the unaffiliated party, when compared with the price paid to NMDC, provided no benefit to Essar in its purchase of iron ore DR-CLO lumps from NMDC.

In rebuttal, petitioners argue that the GOI's provision of high grade iron ore lumps and fines confer a benefit on Essar. Petitioners assert that the Department's preliminary calculations, with respect to the value of iron ore lumps and fine purchases by Essar from NMDC, used the actual monthly transaction prices paid and showed that Essar's purchases from NMDC were below the benchmark price. Thus, we find that a benefit was received by Essar for the program.

Petitioners assert that in Essar's case brief, it has argued that when the Department uses a comparison of comparable prices, such as the MBR price with the NMDC price for iron ore lumps and the Tex Report price with the NMDC price for iron ore fines, no benefit is found on

its purchases of iron ore lumps or fines. However, petitioners argue that the NMDC “price” for both lumps and fines presented by Essar in its case brief are derived from constructed average values presented in its February 2008 questionnaire response and not the actual transaction prices reported by Essar in its March 28, 2007, questionnaire response. According to petitioners, to construct the NMDC lump price in question, Essar took the single “base” contract price and added average value for “bonus FE%”, royalty, local tax, rail freight, and port expenses. Petitioners argue that Essar then converts this total to U.S. dollars using an average exchange rate. Petitioners argue that by using average values instead of actual prices, Essar distorts the comparison of its constructed NMDC lump price with the benchmark price used in the Preliminary Results. Petitioners assert that in its comparison of Essar’s iron ore lump purchases to the benchmark, the Department should reject Essar’s constructed price presented in its case brief and use the same prices that it used in the Preliminary Results, which are the actual transaction-specific prices paid to NMDC, as reported by Essar in its March 28, 2007, questionnaire response.

In addition, petitioners argue that there is no basis for Essar’s claimed adjustments to the benchmark prices used by the Department for high grade iron ore fines. Petitioners explain that Essar argues that two adjustments should be made to the Tex Report benchmarks used in the Preliminary Results to determine the benefit from Essar’s purchases of high grade iron ore fines from NMDC. Petitioners maintain that Essar is mistaken in its claim that when the adjusted benchmark is compared with purchases of high-grade iron ore fines from NMDC it will show that Essar received no benefit.

According to petitioners, Essar contends that to derive an ex-mine price for the benchmark the Department should deduct freight from the FOB prices for high grade iron ore fines reported in the Tex Report. Petitioners assert that in making this deduction Essar proposes that the Department use average freight values instead of the actual monthly transaction charges for freight reported in its March 28, 2007, questionnaire response. Petitioners argue that Essar has failed to establish why average freight values should be used when the Department has the actual monthly transactions on the record. Petitioners assert that the Department should use the actual freight charges to perform any type of adjustments to the benchmark prices for high grade iron ore fines.

Moreover, petitioners contend that Essar also argues that the Department should deduct the “fob cost at the load port” from the benchmark prices used to calculate the benefit received by Essar for its purchases of high grade iron ore fines from NMDC. Petitioners argue that Essar asserts that this adjustment is necessary because the price Essar paid to NMDC was an “ex mine” price that did not include port expenses. Petitioners contend that Essar cannot support its assertion that the price paid to NMDC was “ex mine”. According to petitioners, Essar’s February 2008 questionnaire response clearly states that any port expenses incurred were included in the transaction-specific prices that it reported for its purchases of high grade iron ore fines from NMDC. Petitioners argue that because Essar has not excluded port charges from the actual transaction prices it paid NMDC, it would be incorrect to make such an adjustment to the benchmark prices. Furthermore, petitioners maintain that the Department made no adjustments to the benchmark prices for port expenses in the third administrative review of this case.

Department’s Position: Pursuant to 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 a firm actually paid or would pay, and that any such

adjustment will include all delivery charges. Therefore, we have adjusted our benchmarks for Essar's DR-CLO and fines to include delivery charges as explained in Comments 2 and 4. We have made the appropriate adjustments to ensure that the delivered price includes not only ocean freight but also any inland freight charges up to the factory gate which represents the actual price paid. When comparing Essar's iron ore purchases from NMDC to the benchmark price in these final results, we have used the actual transaction prices Essar reported in its March 28, 2007, questionnaire response and included adjustments for delivery charges (including all charges that would be incurred to transport the iron ore to Essar's factory gate). For Essar's iron ore fines purchases, where the data is incomplete with respect to the quantity of the purchase or there is a negative amount, we are excluding these purchases from our calculations.

Comment 6: Whether the Failure of the GOI and the Indian State Governments to Respond to the Department's Questions Warrants Application of Adverse Facts Available with Respect to New Subsidy Programs Essar Claims It Did Not Use

Petitioners explain that in the Preliminary Results the Department accepted Essar's claims that it did not use the following new subsidy programs: 1) Special Economic Zone Act of 2005; 2) Gujarat Special Economic Zone Act; 3) Captive Port Facilities; 4) Andhra Pradesh Industrial Policy; and 5) Chhattisgarh Industrial Policy. See 73 FR at 1598. However, petitioners explain that in recognizing that the GOI and the Indian State Governments had failed to respond to its request for information regarding the new subsidy programs, the Department invited comment for the final results on whether it would be more appropriate to use facts available in determining to what extent Essar and Ispat may have benefited from these newly alleged programs. See 73 FR at 1581.

Petitioners argue that in CVD cases, it is the Department's practice to require the respondent government to provide information about each subsidy program including, inter alia, information as to: 1) whether such program provides a financial contribution; 2) if so, whether the financial contribution confers a benefit; 3) whether any such benefit is limited to a specific enterprise or industry or group of enterprises or industries; and 4) whether each respondent subject to review received benefits under the subsidy program during the POR. Petitioners argue that in situations where there is evidence that the respondent company used a particular subsidy program but the respondent government failed to provide information pertaining to such program, the Department has consistently applied facts available in determining whether the program is countervailable. See 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 (March 7, 2006) (CTL Plate from Korea) (unchanged in final results).

However, petitioners explain that the Department recently determined not to apply AFA in instances involving a non-responsive foreign government where the respondent companies claimed not to have used a subsidy program. See Countervailing Duty New Shipper Review: Certain In-shell Roasted Pistachios from the Islamic Republic of Iran, 73 FR 9993 (February 25, 2008) (Roasted Pistachios from Iran), and accompanying Issues and Decision Memorandum (Roasted Pistachios from Iran Decision Memorandum) at Comment 2. Petitioners argue that the Department should depart from the standard applied in Roasted Pistachios from Iran.

Petitioners argue that the preamble to the CVD regulations, in the context of new shipper reviews, establishes that the burden is squarely on the respondent company to persuade its government to respond to the Department's information requests.

Just as in the case of an administrative review, the Department will require information from the foreign government concerning any countervailable subsidies conferred during the period of review. In addition, as stated in the Antidumping (AD) Proposed Regulations, the purpose of this . . . requirement is to minimize situations in which the Department will be forced to rely upon the facts available.

See Antidumping Duties; Countervailing Duties; Final Rule, Preamble, 62 FR 27296, 27319 (May 19, 1997) (Preamble). Petitioners further note that the Department has also stated that its requirement for information from the foreign government “. . . is intended 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.” See Antidumping Duties; Countervailing Duties; Proposed Rule, 61 FR 7308, 7318 (February 27, 1996) (Proposed Rule). Petitioners argue that Essar requested the administrative review and, in accordance with the standard set forth in the Preamble and the Proposed Rule, the burden is squarely on Essar to ensure that the GOI and the Indian State Governments provide the required information.

In addition, petitioners argue the refusal of the GOI and the Indian State Governments to respond to the new subsidy questionnaire denied the Department of essential information it needed to determine whether Essar, in fact, received subsidies under the alleged programs.

Further, petitioners argue that the Department explicitly put both the Indian Governments and Essar on notice as to the importance of the governments' responses and of the possible application of AFA if the governments continued to ignore the Department's repeated requests for information. Petitioners explain that the Department asked on several occasions for the Indian Governments to provide information regarding the identity of respondent companies that used the alleged programs. Petitioners state that in response to the Indian Governments' fourth extension request, the Department explained that the fact that certain of the Indian respondents had provided a response to the company-specific portion of the new subsidies questionnaire did not alter the importance of the information sought from the Indian Governments. See Department Response to GOI Fourth Extension Request, November 14, 2007. Petitioners note that the Department also stated that, “failure by the GOI to respond to the new subsidy questionnaire to the best of its ability may result in the Department applying adverse inferences within the meaning of section 776(b) of the Act.” Id.

In sum, petitioners argue that the GOI and Indian State Governments have failed to respond to the Department's requests for information and Essar has failed to satisfy its obligation to ensure the cooperation of those entities despite the fact that Essar itself requested the review. Therefore, petitioners assert that the Department should invoke AFA with respect to Essar and find that Essar received countervailable subsidies under the newly alleged subsidy programs.

Petitioners further argue that there are critical policy reasons warranting the application of AFA in the instant review. Petitioners explain that the Department lacks subpoena power or other compulsory means to require participation in a CVD proceeding. As such, the potential use of AFA is the only incentive for parties to respond to the Department's request for information. Absent the application of AFA in the instant review, petitioners argue that the GOI and Indian State Governments would have little or no incentive to participate in future proceedings and would effectively eliminate the respondent company's obligation to encourage its government to respond.

Nucor reiterates the arguments of petitioners and urges the Department to overturn its

finding in Roasted Pistachios from Iran. Nucor argues that the Act directs the use of facts available and permits the application of adverse inferences so that the Department can encourage respondents to provide the Department with timely, accurate, and complete information. Nucor argues that should a respondent to an administrative review fail to provide such information without facing the application of adverse inferences, the Department will be unable to calculate accurate net subsidy rates and would likely face even greater recalcitrance in future reviews.

Nucor argues that in the instant review, the GOI and Indian State Governments have refused to respond to the Department's questions. Nucor asserts that for the GOI and Indian State Governments to be permitted to act in such a manner would set a dangerous precedent that would result in the Department being left in the dark regarding important information regarding the Indian governments' subsidies to steel producers. Nucor further argues that once it has been established that there is no consequence for a failure to respond, the Department will find it ever more difficult to obtain necessary and timely information. Nucor also contends that by finding that no countervailable subsidies were received by companies for which the GOI refused to provide information, the Department essentially failed to ensure that the adverse inference is effectively adverse to the interests of the GOI and the Indian State Governments, such that it would promote greater cooperation in the future.

Thus, in light of the refusal to cooperate to the best of their ability on the part of the GOI and the Indian State Governments, Nucor argues that the Department should resort to the use of AFA when calculating the net subsidy rate for the new subsidy programs alleged with respect to the respondent companies.

Essar explains that, as a result of the refusal of the GOI and the Indian State Governments to respond to the Department's new subsidy questionnaire, in the Preliminary Results the Department assumed, as facts available, that the new subsidies programs constituted a financial contribution and were specific. See 73 FR at 1581. Essar argues that the Department's decision in the Preliminary Results was correct and consistent with its long-standing practice. Essar argues that in Roasted Pistachios from Iran the Department articulated its practice where a foreign government fails to cooperate to the best of its ability:

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. 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 e.g., 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)

See Roasted Pistachios Decision Memorandum at Comment 2.

In addition, Essar notes that basing the decision of whether Essar received certain subsidies on facts or inferences other than its own information would be contrary to the statute. Essar notes that the Act prohibits the Department from declining to consider information submitted by interested parties that is timely, verifiable, complete, usable, and provided to the best of the parties' ability. See 19 USC 1677m(e). Essar contends that petitioners' suggestion of calculating an AFA net subsidy rate for Essar based on the Indian Governments' inability to respond directly contradicts the statute which requires the Department to incorporate the information Essar properly submitted onto the record of the instant review.

Essar further argues that petitioners have tried to create a burden where one is not indicated in the statute. According to Essar, petitioners contend that Essar has the burden to compel the GOI and the Indian State Governments to respond to requests for information from the Department. Essar asserts that such a requirement is equivalent to suggesting that U.S. steel producers have the ability to compel the Department to take action that it is not statutorily required to take. Essar maintains that neither the statute nor the Preamble place such a burden on respondents.

Regarding petitioners' citation to the Preamble, Essar notes that the language refers to new shipper reviews and points out that, in the context of a new shipper review, the only burden on the respondent company is that it informs the government of the exporting country that the government will be required to respond to the Department's questions. See 19 CFR 351.214(b)(2)(v).

Essar also disputes petitioners' argument that the fact that Essar requested the review makes Essar responsible for obtaining the cooperation of the GOI and Indian State Governments. First, Essar points out petitioners also requested an administrative review, though the Department rejected their request because it was untimely. Further, Essar argues that petitioners' argument seems to suggest that petitioners would somehow be responsible for compelling the foreign government to respond if they were only party to request a review. Essar argues that this is an absurd standard not foreseen by the statute or the Department's regulations. Essar asserts that the law cannot place a burden on respondents that cannot be met. Essar argues that respondents can request that foreign governments participate, but they are in no position to compel compliance. Lastly, Essar argues that if such a burden existed, presumably the Department would have notified respondent as such and asked the respondent to contact the government.

Department's Position: We disagree with petitioners' argument that the failure of the GOI and the Indian State Governments to respond to the Department's new subsidy questionnaires necessarily warrants the application of an AFA net subsidy rate to Essar. Notwithstanding the Department's request for comments on this topic in the Preliminary Results, as explained in Roasted Pistachios from Iran:

. . . 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 Comment 2 of the Roasted Pistachios from Iran Decision Memorandum.

We note that the Department's approach in this regard in Roasted Pistachios from Iran 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 also disagree with petitioners' argument that, when faced with non-responding foreign governments, the Department's decisions not to apply AFA net subsidy rates to respondent companies that used the programs at issue (as is the case in CTL Plate from Korea) are distinct from instances in which respondent firms claim non-use of programs. As explained above, the Department's past practice in such cases as Roasted Pistachios from Iran and the 2006 Review of Roasted Pistachios from Iran undermine petitioners' argument on this point. Further, petitioners' argument on this point constitutes a distinction without a difference because in both of the scenarios, use and non-use of a given subsidy program, the Department relies on information provided by respondent firms to determine the extent to which the firms benefited from the alleged subsidy program.

As to petitioners' other comments regarding the burden that respondents' bear in securing their government's 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 approach in this final determination diminishes those burdens or weakens those incentives within the particular facts and circumstances of this case. First, we note that the Department applied AFA against the GOI and the Indian State Governments as a result of their refusal to respond to the Department's new subsidy questionnaires. Specifically, due to the governments' failure to act to the best of their ability, the Department determined that, with respect to the new subsidy programs at issue, the programs constitute a financial contribution and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. Thus, contrary to petitioners' claims, foreign governments face negative consequences for failing to respond to the Department's requests for information. And, to the extent that respondent firms used the programs at issue, the firms will also suffer the consequences of their government's failure to respond to the Department's questionnaires, to the extent that the Department determines that the firms used the program in a manner that confers a benefit. The AFA net subsidy rate the Department has assigned to JSW demonstrates the risk that respondent firms face when foreign governments fail to respond to the Department's requests for information.

Comment 7: Whether Essar Adequately Demonstrated Its Non-Use of the Special Economic Zone (SEZ) Act of 2005

Petitioners state that the SEZ Act of 2005 provides benefits to companies which establish operations in an SEZ. They state that to obtain benefits, an enterprise must first be "notified," signifying that the enterprise seeking to establish the SEZ has met all terms and conditions set by the GOI. Upon "notification" the enterprise becomes eligible to receive subsidies under the program.

Petitioners note that in its response Essar stated that "the SEZ has only recently become operational and therefore during the POR Essar has obtained no benefit." Petitioners argue that Essar's claim of non-use is contradicted by evidence in Essar's annual report. Petitioners claim that Essar's 2006-2007 annual report states that Essar's SEZ in Hazira, Gujarat, was "notified" on September 28, 2006, which was three months before the end of the POR. Petitioners further argue that Essar's 2006-2007 annual report indicates that it had established a facility in the SEZ that began producing HRC inputs on October 27, 2006. Petitioners argue that, according to Essar's 2006-2007 annual report, the operations of the facility have apparently resulted in substantial exemptions from customs duties over the period October 27, 2006, through March 21, 2007.

In light of the evidence in Essar's annual report, petitioners reiterate their contention that the need for the GOI's responses to the Department's new subsidy questionnaire concerning the SEZ program becomes all the more critical. Petitioners argue that the Department cannot determine the details concerning the exemptions from customs duties Essar received without questionnaire responses from the GOI.

Thus, given Essar's inadequate response and the GOI's failure to cooperate to the best of its ability, petitioners argue that the Department should apply AFA and determine that Essar received a benefit under the SEZ Act of 2005 program. Specifically, they argue that as AFA, the Department should conclude that Essar received the full amount of the exemptions from customs duties resulting from Essar's SEZ operations as disclosed in the company's annual report (i.e.,

Rs. 161.35 crores)¹¹. Petitioners argue that the Department should calculate the net subsidy rate under this program by dividing the benefit by Essar's total sales.

Essar argues that petitioners have selectively quoted from the record and ignored other sections of Essar's questionnaire responses. Essar notes that in its November 1, 2007, submission it clearly stated that it was in the processing of building facilities at the SEZ during the POR, no subject merchandise was produced at the SEZ, and no merchandise whatsoever was exported from the SEZ during the POR. Essar explains that in a follow-up questionnaire response, Essar supplied the Department with the information for all of the EPCGS licenses that were used in the SEZ. Essar argues that all of the licenses related to equipment used in the production of subject and non-subject merchandise. Essar further argues that these licenses are already reflected in the context of the Department's preliminary analysis of the EPCGS program. Thus, Essar argues that it has already provided the Department with all of the information needed to calculate a benefit provided by customs duties forgone under the SEZ. Essar argues that petitioners ignore the information Essar provided regarding the EPCGS licenses when they argue that the Department should, as AFA, make the benefit equal to the amount of customs duties resulting from Essar's SEZ operations as disclosed on the company's annual report. Essar adds that even by petitioners' calculation, much of the purported benefit would have occurred after the POR.

In addition, Essar argues that petitioners have selectively quoted from Essar's financial statement by contending that the SEZ was "notified" on September 27, 2006 and, therefore, benefits could have been received. Essar argues that a full examination of the text in its annual report calls into question petitioners' claim that Essar received benefits during the POR.

Department's Position: Essar has supplied the Department with the information for all of the EPCGS licenses that it used in the SEZ during the POR, and the Department has continued to calculate subsidy benefits with regard to those licenses in the context of the EPCGS in the final results. In addition, we find that Essar has supplied necessary information with respect to its non-use during the POR of other alleged subsidies offered under the SEZ Act of 2005. For example, in Essar's November 1, 2007, questionnaire response, it explains that:

Essar Steel Ltd. and affiliates of Essar are in the process of building facilities in this Special Economic Zone . . . Further no merchandise (subject as well as non-subject merchandise) has been exported from this SEZ during the POR. Therefore, Essar Steel could not have obtained any benefit from the SEZ related to exports to the United States.

Furthermore, information in Essar's financial statement indicates that it was not eligible to participate in the program until after the POR. For example, Essar's 2006-2007 financial statement at Note 22 (which was included in Exhibit 1 of petitioners' October 5, 2007, submission) states:

Essar SEZ Hazira Ltd. applied for setting up a Special Economic Zone (SEZ) on 3rd December 2005 and the zone was notified for setting up in Hazira on 28th September 2006. Subsequently, Essar Steel Limited ("the company") submitted a request for Letter of Approval (LOA) for setting up a SEZ unit ("the Unit") to manufacture Hot Briquette

¹¹ A crore is equal to 10,000,000 rupees.

Iron (HBI) and Direct Reduced Iron (DRI) to the development commissioner – Kandla on 3rd October 2006. The said HBI/DRI unit commenced operations on 27th October 2006. The HBI/DRI unit was approved on 11th January 2007 subject to fulfillment of certain conditions. Such conditions were fulfilled on 21st March 2007.

Petitioners have contested the information. However, we find that record evidence supports our finding of non-use with respect to this program. We will continue to examine the program in any future administrative reviews.

Comment 8: Whether Essar Adequately Demonstrated Its Non-Use of the Gujarat Special Economic Zone (SEZ) Act

Petitioners explain that in its questionnaire response Essar claimed that it did not receive any benefits under the Gujarat SEZ program. According to petitioners, Essar stated that: “As with the SEZ Act discussed above, the Gujarat Economic Zone Act only became operational during the POR.” See page 5 of Essar’s November 1, 2007, response. Petitioners argue that Essar’s response can be interpreted in one of two ways. Essar did not receive benefits under the program because either: 1) the Gujarat SEZ Act itself was not in effect during the POR; or 2) Essar’s SEZ did not become operational during the POR.

Petitioners argue that both claims are contradicted by record evidence. They contend that record evidence clearly demonstrates that the Gujarat SEZ was in operation during the POR and that the Gujarat SEZ entered into force nearly two years prior to the POR. Petitioners further argue that the regulations for the Gujarat SEZ Act were issued on March 2, 2005, prior to the POR. Therefore, petitioners argue that there is no basis for any claim by Essar that it did not receive benefits under the program because the Gujarat SEZ was not in effect during the POR.

Petitioners further argue that there is no support for a claim that Essar did not receive benefits under the program because its Hazira SEZ was not in operation during the POR. Petitioners argue that Essar’s 2006 – 2007 annual report clearly indicates that Essar’s Hazira SEZ was recognized by the GOI in September 2006 and began operations in October 2006, two months before the end of the POR.

Petitioners assert that because the GOI and SGOG failed to respond to the Department’s request for information regarding this program and the information provided by Essar is refuted by its 2006 – 2007 annual report, the Department should apply AFA and find that Essar received countervailable subsidies under this program. Petitioners argue that as AFA, the Department should assign a net subsidy rate that is equal to the rate that petitioners advocate as AFA under the Special Economic Zone (SEZ) Act of 2005 program.

Essar charges that petitioners are selectively reviewing the record to make their case. Essar argues that in its November 1, 2007, questionnaire response, it explained that with regard to the Gujarat SEZ Act, it only became operational during the POR. Essar argues that an Act can become operational but not enter into force until a later date, which it claims was the case with respect to the Gujarat SEZ Act during the POR.

Department’s Position: Essar has supplied information with respect to its non-use of the Gujarat SEZ Act during the POR. For example, in Essar’s November 1, 2007, response it states that:

. . . the Gujarat Economic Zone Act only became operational during the POR. Therefore,

Essar could not receive any of the benefits . . . on its exports of subject merchandise to the United States during the POR.

Furthermore, as noted in the comment above, statements in Essar's 2006 – 2007 financial statement indicate that Essar's facility located inside the Gujarat SEZ was not approved under the program until after the POR. Petitioners have contested the information. However, we find that record evidence supports our finding of non-use with respect to this program. We will continue to examine the program in future administrative reviews.

Comment 9: Whether Essar Adequately Demonstrated Its Non-Use of the Captive Port Facilities Program

Petitioners argue that record evidence indicates that Essar, in fact, received benefits from the SGOG's Gujarat Maritime Board (GMB) under the Captive Port Facilities program during the POR. According to petitioners, Essar states in its questionnaire response that it did not receive any benefits under the program because:

. . . since 2000, there has been a dispute between the GMB and Essar, and Essar has paid the entire wharfage amount to GMB. Therefore, Essar not only paid all the expenses of building the Port but is also paying the wharfage fee.

See page 6 of Essar's November 1, 2007, questionnaire response.

Petitioners argue that the documentation Essar submitted to support its claim of non-use, namely a copy of a memorandum of understanding (MOU) between the GMB and Essar, fail to substantiate its claim.¹²

Petitioners further argue that Essar has failed to substantiate its claim that it has paid the full amount of wharfage fees to the SGOG for its captive jetty. They assert that the documents Essar provided to the Department as proof of payment of the wharfage fees are not related to or supportive of Essar's payment of wharfage fees to the SGOG. Petitioners argue that the information supplied by Essar, in fact, contradicts its claim of non-use.¹³

Petitioners argue that because the GOI and SGOG failed to respond to the Department's new subsidy questionnaire and the information provided by Essar fails to support its claim of non-use, the Department should find that Essar received countervailable subsidies under the program.¹⁴

Essar argues that it explained in its questionnaire response that it had not only paid for the wharf but had also paid for the wharfage fee as well.

Department's Position: Essar has supplied information with respect to its non-use of the

¹² The Details of the MOU are business proprietary and cannot be disclosed on the public record.

¹³ The Details of the source documents submitted by Essar are business proprietary and cannot be disclosed on the public record

¹⁴ Petitioners did not propose an AFA net subsidy rate for this program.

Captive Port Facilities program during the POR. With respect to the 2005 MOU that Essar signed with the GOG, Essar states in its November 1, 2007, submission “that the terms of the agreement were not implemented.” Thus, it maintains in the same response that “. . . during the POR there was no rebate on wharfage charges on exports of steel . . . Essar has paid for the port and the wharfage fees.” Petitioners have contested the information. However, we find that record evidence supports our finding of non-use with respect to this program. We will continue to examine the program in future administrative reviews.

Comment 10: Whether Essar Adequately Demonstrated Its Non-Use of the Andhra Pradesh Industrial Policy (APIP) Program

Petitioners argue that the APIP provides benefits including exemptions from taxes and fees, reimbursements for power, and the provision of water and infrastructure. According to petitioners, Essar contends it did not receive benefits under this program because it had no facilities located in eligible areas of Andhra Pradesh. Petitioners argue that record evidence, in fact, indicates that Essar has extensive facilities in Andhra Pradesh, including a 267 kilometer (KM) iron ore slurry pipeline which crosses the state and which was constructed on land acquired at no cost. See page 51, Exhibit 1 of petitioners’ December 10, 2007, submission.

Petitioners contend that Essar has failed to provide any information concerning its pipeline in Andhra Pradesh and any other facilities it has in the state, which are eligible for benefits under the APIP program. They further argue that the GOI and the State Government of Andhra Pradesh (SGAP) failed to respond to the Department’s questionnaire concerning the program. Thus, petitioners argue that as AFA the Department should find that Essar received countervailable subsidies under the APIP program.¹⁵

Reiterating points made in its questionnaire response regarding the APIP program, Essar explains that its pellet plant is situated 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, according to Essar, since the facility is within municipal corporation limits of Visakhapatnam, the plant is not eligible for benefits under the APIP.

Further, Essar acknowledges that it has an iron ore pipeline that crosses Andhra Pradesh and that it indicated as much in its December 10, 2007, questionnaire response. However, neither petitioners nor the Department has asked any questions concerning this pipeline. Irrespective of this fact, Essar reiterates its statement that it did not apply for nor receive any benefits under the APIP program.

Department’s Position: Essar has supplied information with respect to its non-use of the APIP program 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 APIP benefits, Essar’s November 29, 2007, 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 Visakhapatman municipal corporation in Andhra Pradesh. In the same submission, Essar provides an abstract regarding the APIP

¹⁵ Petitioners did not propose an AFA net subsidy rate for this program.

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 Visakapatnam . . .and commence commercial production on or after 1/4/2005 but before 31/3/2010.

Petitioners have contested the information. However, we find that record evidence supports our finding of non-use with respect to this program. We will continue to examine the program in any future administrative reviews.

Comment 11: Whether Essar Adequately Demonstrated Its Non-Use of the Chhattisgarh Industrial Policy (CIP) Program

Petitioners claim that the CIP program provides subsidies to certain industries operating in specified areas of Chhattisgarh. Petitioners explain that Essar claims it did not receive benefits under this program because “the land that is in Chhattisgarh that Essar has proposed using for its new facility is barren land (i.e., construction has not started and the land acquisition process has not even begun). See page 3 and 4 of Essar’s November 29, 2007, submission. However, according to petitioners, Essar’s own website discloses that the company began operation of an 8 million MT per year iron ore beneficiation plant in Chhattisgarh in early 2006. Petitioners maintain that the plant is located in Bailadilla in the Bastar region of Chhattisgarh, making it eligible for the highest level of benefits under the program.

Petitioners charge that Essar has failed to provide any information regarding the CIP. They argue that Essar’s failure to cooperate to the best of its ability coupled with the refusal of the GOI and the Government of Chhattisgarh (SGOC) to respond to the Department’s new subsidy questionnaire warrants the application of AFA. Specifically, petitioners argue that the Department should find that Essar received countervailable subsidies under the CIP program.¹⁶

Essar argues that it responded to all of the Department’s questions concerning the CIP, thus contradicting petitioners’ claims that Essar failed to act to the best of its ability. Essar further argues that it provided evidence in its November 29, 2007, submission that the land in Chhattisgarh was barren land that had yet to be acquired.

Department’s Position: Essar has supplied information with respect to its non-use of the CIP program during the POR. For example, in Essar’s November 29, 2007, questionnaire response, it provided an October 27, 2007, press release from India News that states:

Tribals in Chhattisgarh’s mineral-rich Bastar region have planned a rally next month against the proposed project of . . . Essar Steel. . .Tribals will not hand over their land at any cost to . . . Essar Steel for its 3.2 mtpa project. . . Essar had . . . signed a deal to invest Rs. 70 billion for a two-phased 3.2 mtpa steel plant at Dhurli and Bhansi villages in Datwada. The district has large fine quality iron ore stocks at Bailadila hills.

¹⁶ Petitioners did not propose an AFA net subsidy rate for this program.

Thus, we find that Essar has provided sufficient information indicating that it has yet to acquire land in Chhattisgarh and could not have benefitted from the CIP program during the POR. Petitioners have contested the information. However, we find that record evidence supports our finding of non-use with respect to this program. We will continue to examine the program in any future administrative reviews.

Comment 12: Whether the Department Erred in Calculating the Benefit on Essar’s Pre-Shipment Export Financing

Essar argues that the Department made a ministerial error in its calculation of pre-shipment export financing loans or “packing credit” loans in the Preliminary Results. Essar asserts that all of its accounts are maintained in rupees and that the information in its accounts was reported in Indian rupees. Essar argues that in its February 14, 2008, supplemental questionnaire response, it provided financial information for its January and February 2006 “packing credit” account with the State Bank of India which demonstrated that the amounts are converted into Indian rupees when posted in Essar’s financial accounts. In addition, Essar asserts that its March 18, 2008, supplemental questionnaire response shows that all “packing credit” interest and principal payments made during the POR were in rupees. When calculating the benefit of pre-shipment export financing loans in the final results, Essar therefore argues that the Department should not convert the final benefit into rupees as this figure is already in rupees.

Petitioners did not comment on this issue.

Department’s Position: After reviewing the information Essar provided in its February 14, 2008, questionnaire response, we agree that the pre-shipment “packing credit” loans were, in fact, denominated in rupees. Therefore, we have adjusted our calculations accordingly. Specifically, in these final results we have changed the benchmark short-term interest rate to a rupee short-term interest rate and have eliminated any currency conversion of the final benefit which is in rupees. For further information, see Essar’s Final Results Calculation Memorandum, the public version of which is on file in the CRU.

Comments Regarding Ispat

Comment 13: Whether the Department Should Calculate the Benefit Attributable to Ispat’s Purchase of Iron Ore for Less Than Adequate Remuneration from the GOI on an Ex Mines Basis Rather Than an FOB Port Basis

Petitioners explain that in the Preliminary Results, the Department measured whether Ispat purchased iron ore (i.e. DR-CLO) for less than adequate remuneration by comparing the prices Ispat paid to the state-owned NMDC to the prices the company paid to Essel Mining & Industries Ltd. (Essel), a domestic supplier of iron ore. See 73 FR at 1587. Petitioners state that for both purchases from NMDC and Essel, Ispat reported the purchase value for the ore (i.e., the ex-mines cost), the freight cost from the mines to the port, and the total cost (i.e., the sum of the purchase value and the freight cost, or the FOB port cost).

Petitioners contend that although the Department's methodology in the Preliminary Results is generally appropriate, conducting the benefit calculation on an FOB port basis is not. Petitioners note that the DR-CLO from the NMDC and Essel was shipped from two different locations in two different Indian states and went to three different ports in three different Indian states. Petitioners argue that if the NMDC and Essel materials were shipped from the same point to the same port, it would be appropriate to calculate the benefit on an FOB port basis. However, since this is not the case, the NMDC price and benchmark price must be calculated on an ex-mines basis to eliminate the distortions inherent in the freight costs.

Ispat argues that its purchases from Essel were spot purchases of very small quantities and purchased only to fill an emergency need. Ispat argues that the purchases from Essel should not be used as a benchmark.

If the Department nevertheless determines to use the prices from Essel as a benchmark, Ispat argues that they should be compared on an FOB port basis as reported by Ispat, as opposed to an ex-mines basis as advocated by petitioners. Ispat explains that its purchases from NMDC are on a delivered (port) basis and its purchases from Essel are on a delivered (port) basis. Ispat argues that while the ports may differ, the expenses are incurred in purchasing the ore. Ispat further argues that the freight cost on the Essel purchases is an actual expense that has to be incurred and therefore also should be considered while determining the benchmark. Ispat asserts that petitioners are trying to eliminate a real difference between the Essel purchases and NMDC purchases by couching their argument in terms of distortion.

Department's Position: Pursuant to 19 CFR 351.511(a)(2)(i), the first tier of the benchmark hierarchy for determining the adequacy of remuneration calls for comparing the government price with a market-determined price resulting from actual transactions in the country in question. We determine that Ispat's purchases of DR-CLO iron ore from Essel are a suitable first tier benchmark for comparison with Ispat's purchases of DR-CLO from NMDC. See Comment 16. As directed by 19 CFR 351.511(a)(2)(iv), in measuring the adequacy of remuneration under section 351(a)(2)(i), the comparison price is to be adjusted to reflect the price that a firm actually paid or would pay, and this adjustment will include, inter alia, delivery charges. Therefore, we have adjusted our benchmarks for Ispat to include all delivery charges (e.g., including inland freight), as explained in Comments 4 and 5, in order to arrive at a benchmark price that reflects what Ispat would pay to bring the iron ore to its factory. We then compared this benchmark price to the prices Ispat paid for DR-CLO, as delivered, to its factory gate. Therefore, we are conducting our benefit calculation in a manner that is in accordance with our regulations and constitutes an "apples-to-apples" comparison.

Comment 14: Whether the Department Erred in Calculating the Benchmark Used to Measure the Adequacy of Remuneration of Ispat's Purchases of High-Grade Iron Ore from the GOI

Petitioners explain that in the Preliminary Results, to derive a benchmark price for Ispat's purchases of high-grade iron ore lump, the Department attempted to convert prices for Bailadila, Donimalai, and Hamersly lump iron ore from a price per dry long ton (DLT) to a price per DMT and from a price per DMT to a price per WMT. However, petitioners contend that in calculating the Donimalai and Hamersly prices per WMT, the Department inadvertently multiplied the price per DLT by the conversion rate from DMT to WMT, rather than multiplying the price per DMT by the conversion rate from DMT to WMT. Petitioners urge the Department to correct this ministerial error in the final results.

Ispat did not comment on this issue.

Department's Position: We agree with Petitioners and have corrected the calculations accordingly. We note that we have revised the iron ore benchmark calculation that was used in the Preliminary Results by excluding the Bailadila and Donimalai prices that were reported in the Tex Report. Because these prices pertain to iron ore from NMDC, the very government provider of the good at issue, they are not suitable as benchmarks. For these final results, we used only the Hamersley prices listed in the Tex Report for benchmark purposes to measure the adequacy of remuneration of Ispat's purchases of iron ore lumps and fines from NMDC.

Comment 15: Whether the Department Should Adjust the Prices Reported by Ispat for Its Purchases of Iron Ore Lumps and Fines to Exclude Sales Tax Which Is Not Included in the Benchmark Price

Petitioners state that to calculate the benefit attributable to Ispat's purchases of high-grade iron ore lumps and fines from the NMDC, the Department used benchmark prices from the Tex Report. Petitioners state that the Tex Report contains export prices for Bailadila and Donimalai lumps and fines and the price for the Hamersly lumps and fines. They argue that since exports are not subject to Indian CST, the export prices in the Tex Report do not include Indian CST. Similarly, petitioners argue that the prices for Hamersly lumps and fines, which are FOB Australia, do not include Indian CST.

Petitioners argue that in order to conduct an "apples-to-apples" comparison, the Department must remove the CST from the prices Ispat reported paying to the NMDC and then compare those values to the benchmark prices to measure the adequacy of remuneration of Ispat's purchases of high-grade iron ore from the NMDC.

Ispat reiterates the arguments by Essar in opposing the deduction of CST from the price it paid to NMDC when determining whether Ispat's purchases were made for less than adequate remuneration. Ispat argues that petitioners' argument on this point creates a distortion where none previously existed. Citing to Cattle from Canada, Ispat argues that the Department's practice on this matter undermines petitioners' arguments.

Department's Position: In measuring whether Ispat's purchases of iron ore were for less than adequate remuneration, under 19 CFR 351.511(a)(2)(iv) and as fully explained in the Department's response under Comments 4 and 5, the Department will adjust the comparison

price to include all delivery charges and import duties. We have applied this analysis to Ispat's ore consistent with our adjustments for Essar, discussed in Comments 4 and 5. The domestic prices for Ispat's purchases from NMDC are delivered prices, and we have adjusted the benchmark price to include delivery charges. However, as explained in Comment 4, because the import duties for imports of iron ore lumps and fines are not on the record of this administrative review, we are not able to adjust the benchmark price to include import duties payable and any other taxes payable on imports of lumps and fines of iron ore. Consequently, for comparability reasons and in light of the incomplete record information, for this administrative review only, we have excluded the domestic taxes Ispat paid on its purchases of iron ore lumps and fines from NMDC. In any future administrative reviews, we will collect information regarding import duties payable and any other taxes payable on imports of iron ore. We would have also adjusted the "government side" and benchmark side of the equation to include inland freight from the port to the factory, but such data are not available on the record.

However, regarding Ispat's purchases of DR-CLO iron ore, as discussed in Comment 16, Ispat reported purchases of DR-CLO from a domestic supplier. We are using these domestic purchases as our benchmark when measuring the adequacy of remuneration of Ispat's purchases of DR CLO from NMDC. CST was payable on the purchases of DR-CLO from the NMDC, and so we have included in that price. Likewise, CST was also payable on the purchases from the domestic supplier and so we have reflected it in the benchmark price.

Comment 16: Whether Ispat's Purchases of Iron Ore from a Private Supplier Are a Valid Benchmark

Ispat argues that its purchase of small quantities of iron ore from a domestic private supplier is not comparable to its iron ore purchases from NMDC and should not be used for benchmark purposes. Ispat contends that the purchase from the private supplier was made on an emergency, "spot" basis, whereas purchases from NMDC are made on a long-term basis. Ispat also argues that the quantity of the purchase from the private supplier was not in commercial quantities for a large integrated steel plant. Ispat argues that the Department should use the lump prices from the Tex Report as a benchmark because these prices reflect the world market prices for commercial quantities.

Petitioners counter that it is the Department's preference is to use the actual prices paid by a respondent in its home market, rather than a world market price, as the benchmark prices. They argue that the evidence on the record allows the Department to compare the NMDC price to a private purchase price which is a market-determined price resulting from actual transactions in India.

Petitioners further argue that, while it is true that the Department considers the quantities sold in choosing its benchmark, the Department should consider in its analysis the quantity of DR-CLO Ispat purchased from the private supplier as percentage of the all DR-CLO it purchased. They argue that this figure is higher than the figure provided by Ispat because Ispat provided the quantity of its purchases from the private supplier as a percentage of all of its ores and fines purchases.

Finally, Petitioners argue that, given the dissimilarity in the two products, the Department should not use the high-grade ore prices in the Tex Report as the benchmark prices for Ispat's purchases of DR-CLO from NMDC during the POR. They maintain that the Department should use the prices paid for DR-CLO by Ispat to a private supplier as the benchmark prices.

Department's Position: Under 19 CFR 351.511(a)(2)(i), the first tier of the benchmark hierarchy for determining the adequacy of remuneration calls for comparing the government price with a market-determined price resulting from actual transactions in the country in question. Further, 19 CFR 351.511(a)(2)(i) stipulates that consideration will be given to product similarity, quantities sold and other factors affecting comparability.

Information provided by Ispat indicates that Ispat made purchases of DR-CLO from a private supplier in India during the POR of the same type of iron ore that Ispat purchased from NMDC. We do not agree with Ispat's contention that its purchases from Essel are unsuitable for comparison purposes. Although the total amount of DR-CLO Ispat purchased from Essel during the POR represents a small percentage of Ispat's total iron ore purchases during the POR, the information is not conclusive that the quantities of the shipments from Essel are not commercial in nature. For example, evidence on the record indicates that the quantities of individual shipments provided to Ispat by NMDC are comparable to the quantities shipped to Ispat by Essel and, thus, we find that the private purchases constitute market-determined prices under 19 CFR 351.511(a)(1).

Ispat's purchases from Essel are actual transactions of the same type of iron ore that Ispat purchases from NMDC. Because the record does not support that these purchases are not comparable to its purchases of DR-CLO from NMDC, we determine that, pursuant to section 351.511(a)(2)(i), Ispat's purchases of DR-CLO iron ore from Essel are suitable for comparison with Ispat's purchases of DR-CLO from NMDC.

Comment 17: Whether to Include Fees in the Calculation of Ispat's Long-Term Benchmark Loan Rates

Ispat argues that, in calculating the company-specific long-term benchmark interest rates for Ispat, the Department inadvertently calculated the interest rate for each loan as the nominal interest rate plus the entire percentage of commissions and fees that were paid on the loan. Ispat contends that, instead, the Department should have calculated the annual interest rate for each loan by allocating the upfront commissions and fees over the duration of the loan. Ispat provided revamped long-term benchmark interest rate calculations in which the up-front commission and fees for each loan were allocated over the life of the loan.

Petitioners did not comment on this issue.

Department's Position: We agree with Ispat and have adjusted the calculation of Ispat's company-specific long-term interest benchmark interest rate accordingly.

Comment 18: Whether the Department Made Clerical Errors in Calculating Ispat's Long-Term Loan Benchmark

Ispat argues that the Department inadvertently made clerical errors in the proprietary calculation table entitled "Benchmark Rates" (i.e., the "Loan Benchmarks" tab in the proprietary electronic file that was created as part of the preliminary calculations). Ispat contends that, for the 1993, 1994, 1995, and 2005 company-specific long-term loan benchmark interest rates listed in the "Benchmark Rates" calculation table, the Department incorrectly linked the respective cells to cells for other years and to loan control number 51 in the calculation table titled "Long

Term Rupee Denominated Bench Mark Loans” (i.e., the “LT Loans” tab in the proprietary electronic file). See pages 16 - 22 of the Department’s December 31, 2007, preliminary calculations for Ispat. Ispat also argues that, in the calculation table titled “Long Term Rupee Denominated Bench Mark Loans,” the Department incorrectly omitted Loan Control number 123 from its calculation of the average long-term interest rate for 2005. Ispat provided a revised calculation of the long-term company-specific benchmark interest rate for 2005.

Petitioners did not comment on this issue.

Department’s Position: We agree with Ispat and have adjusted the calculation of Ispat’s company-specific long-term interest benchmark interest rate accordingly. We note that we also revised the calculation by excluding certain line items reported by Ispat that pertained to instruments that are not comparable to Ispat’s long-term fixed rates loans.

Comment 19: Whether the Department Erred in Calculating the Benchmark Used for Ispat Under the EPCGS Program

Ispat argues that, for four of Ispat’s imports under the EPCGS program, the Department incorrectly applied a long-term benchmark interest rate that did not apply to the year of import. Ispat provided proposed corrections.

Petitioners did not comment on this issue.

Department’s Position: We agree with Ispat and, for each of these imports, have corrected the errors by applying the benchmark interest rate for the year of import.

Comment 20: Whether the Department Incorrectly Included VAT Refunds in the Benefit Calculation of the State of Maharashtra’s Sales Tax Program

Ispat argues that the Department incorrectly treated its VAT refunds as part of the Sales Tax program of the State of Maharashtra. Ispat argues that the VAT system is independent of the State’s Package Scheme of Incentives. Ispat argues that the VAT system is a federal tax that applies to almost all of the states of India and explains that every buyer has to pay VAT on purchases and is entitled to a credit of the VAT paid upon further manufacturing the materials and selling goods.

Ispat further argues that, if a unit is not exempted under the Package Scheme of Incentives, the credit of VAT can be utilized towards payments of VAT on goods sold. If the unit is exempted under the Package Scheme of Incentives (i.e., not required to recover and then deposit VAT on sales), then the credit of the VAT paid on purchases will be refunded by the Government. Ispat argues that, therefore, units under the State’s Package Scheme of Incentives and units which are not under any of the State’s package Scheme of Incentives are at Par with regard to the VAT and that there is no benefit from Ispat’s VAT refunds.

Ispat explains that, starting April 2005, Ispat has paid VAT on its purchases and has received VAT credit. Ispat also states that it did not collect VAT on its sales, did not deposit VAT on its sales, and therefore the VAT credit on its purchases was refunded. Ispat argues that receiving refunds of its VAT is the same as non-exempted units receiving VAT credit. Therefore, Ispat argues that there is no benefit from the VAT refunds received by Ispat.

Petitioners did not comment on this issue.

Department's Position: Ispat provided a breakdown of its VAT refunds from April 2005 through 2006. Ispat also provided copies of the applicable tax rules and examples of tax returns and accounting records pertaining to VAT refunds Ispat received for three months during the POR. See Exhibit 13 of Ispat's November 13, 2007, supplemental questionnaire response. This information indicates that the monthly amounts reported by Ispat are the VAT amounts Ispat paid each month. The tax returns and accounting record indicate that Ispat claimed its VAT refunds consistent with the VAT rules. Therefore, we determine that the refunds Ispat claimed for VAT paid during the POR are not excessive or otherwise confer a benefit under CFR 351.510(a) and do not constitute a benefit. Accordingly, we have removed the VAT refunds from the calculations. We will continue to examine this program in any future administrative reviews of Ispat.

Comment 21: Whether the Department Erred by Including Countervailing Duties and Special Additional Duties (SADs) in the Benefit Calculation of the EPCGS

Ispat argues that the exemption of India's Countervailing Duty (CVD) and Special Additional Duty (SAD) under the EPCGS program do not confer a benefit because, under India's Central Value Added Tax (CENVAT) system, these duties are refundable or "CENVATABLE" to all importers. Ispat contends that, under India's CENVAT system, importers that do not import under the EPCGS program receive full credit CVDs and SADs paid under India's CENVAT system. Ispat therefore argues that no exemption for CVDs or SADs is provided under the EPCGS program.

Ispat also argues that the inclusion of CVDs and SADs in the Ispat calculations is inconsistent with past practices, stating that no mention of including SADs or CVDs in the benefit calculation has been made in recent India CVD cases.

Petitioners did not comment on this issue.

Department's Position: We agree with Ispat. The information provided by Ispat on the record indicates that the additional duty (CVD) (as of September 10, 2004), the Education Cess (as of July 9, 2004), and the SAD (as of March 1, 2004) are creditable under India's VAT system (*i.e.*, they are refunded regardless of whether a firm uses the EPCGS). Therefore, based on these effective dates, we adjusted each company's EPCGS calculations by removing the impact of the additional duty (CVD), the Education Cess, and the SAD for each instance in which the data was provided.

Comment 22: Whether the ALP is Countervailable

Ispat argues that the Department incorrectly countervailed the ALP with respect to Ispat. Ispat contends that the facts on the record prove the GOI has a system in place for determining the extent to which imported inputs are consumed in the re-exported product through the GOI's use of standard input/output norms ("SIONs"). Ispat also argues that it provided explanations of how the SION applicable to Ispat's manufacturing process are determined and how SIONs are reviewed and revised. Ispat argues that the evidence on the record demonstrates that the GOI has a procedure to determine the level of consumption of imported goods in exports.

Ispat further argues that, if the Department continues to determine the ALP to be countervailable, it should find that no benefit was received by Ispat during the POR. Ispat argues that advance licenses are tied to specific exports and, because none of its licenses were related to U.S. sales, they are not countervailable. Finally, Ispat argues that, because these licenses were granted prior to the POR and the Department assigns benefits to the period in which they are earned, any benefit that could have been received would have been prior to the POR. In the alternative, Ispat argues that, if the Department finds a benefit, the amounts for the CVDs and SADs should not be included in the benefit.

Petitioners argue that the ALP is countervailable. They argue that the GOI has not shown that it has in place a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts. They contend that the GOI and the respondent companies have failed to provide any information that demonstrates that the systemic deficiencies in the use of SIONs have been addressed. They argue that the information submitted by Ispat merely shows that the GOI collects certain export and consumption data from companies using the program.

With regard to Ispat's argument that there was no benefit under the ALP to Ispat during the POR, Petitioners argue that it is the Department's standard practice to treat the date an import duty exemption is received as the date a benefit is conferred. They therefore argue that Ispat's use of its advance licenses to receive import duty exemptions during the POR constitutes countervailable benefits.

Department's Position: We disagree with Ispat and continue to find the ALP countervailable. As explained in the Preliminary Results and in Lined Paper from India, with regard to the ALP, systematic issues continue to exist that demonstrate that the GOI lacks a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts that is reasonable and effective for the purposes intended, as required under 19 CFR 351.519. Although the information placed on the record by the GOI and Ispat indicates that the GOI considered Ispat's company-specific production information in the creation of the SION for hot-rolled steel, statements on the record indicate that updates and revisions to SIONs are conducted on an ad hoc basis, based on requests by companies. For this reason, along with all the reasons discussed in the preliminary results, we conclude that India does not have an effective system in place during the POR for regularly monitoring and updating the accuracy of SIONs.¹⁷

With regard to Ispat's argument that, in any case, Ispat advance licenses did not provide a benefit to Ispat during the POR, we again disagree and continue to find that the benefits were received under the program by Ispat during the POR. Advance Licenses are quantity-based licenses. Unlike the value-based licenses (where a specified amount of duty reduction is accrued at the time the license is received), the amount of duty reduction is not known until the date the license is used. Therefore, the timing of the benefit for an advance license is the date the license is used, which in this administrative review was during the POR. This approach is consistent with the Department's practice. See CTL Plate from India, 64 FR at 73134 (where the Department found that "because the licenses specify ranges of quantities to be imported rather than an actual amount of duty exemption that can be claimed, the actual value of the advance

¹⁷ In the Preliminary Results we stated that systemic issues continue to exist with respect to the ALP. See 73 FR at 1588 – 1589. The systemic issues are explained in detail in the Preliminary Results. *Id.*

licenses is not known at the time the license is issued.” Thus, for the ALP the Department equates the timing of the receipt of the benefit with the time period in which respondents use their advance licenses to obtain import duty exemptions. See e.g., Lined Paper from India Decision Memorandum at “Advance License Program” section (. . . we find the benefit under the ALP is equal to the duty exemptions received by Aero during the POI).

Comment 23: Whether the Failure of the GOI and the Indian State Governments to Respond to the Department’s Questions Warrants Application of Adverse Facts Available (AFA) with Respect to New Subsidy Programs Ispat Claims It Did Not Use

Petitioners explain that in the Preliminary Results the Department accepted Ispat’s claims that it did not use the following new subsidy programs: 1) Refunds of octroi under the SGOM’s Package Scheme of Incentives of 1993 and Maharashtra Industrial Policies of 2001 and 2006; 2) Infrastructure subsidies to mega projects; 3) Provision of land for less than adequate remuneration; 4) Loan guarantees based on Octroi refunds; and 5) an investment subsidy. See 73 FR 1578, 1598.

Petitioners reiterate their arguments regarding the Department’s approach concerning respondent companies’ non-use claims. They urge the Department to find that the GOI and Indian State Governments have failed to respond to the Department’s requests for information and that Ispat has failed to satisfy its obligation to ensure the cooperation of those entities despite the fact that Ispat itself requested the review. Therefore, petitioners assert that the Department should invoke AFA with respect to Ispat and find that Ispat received countervailable subsidies under the newly alleged subsidy programs.

Ispat reiterates the arguments Essar makes above. Specifically, Ispat argues that in the Preliminary Results the Department followed its long-standing practice with respect to non-responding foreign governments. They argue that petitioners’ argument contradicts the statute and the Department’s regulations. Ispat further argues that it provided evidence that it did not use the five new subsidy programs at issue and that there is no evidence on the record of this case that could refute the evidence provided by Ispat.

Department’s Position: We agree with Ispat that AFA is not warranted for the same reason as those discussed in Comment 6 above.

Tata

Comment 24: Tata’s Ownership of Captive Mines of Iron Ore and Coal and Whether the Provision of Such Minerals under the Captive Mining Rights Program Constitutes a Financial Contribution under the Act

Tata argues that the GOI is not providing it with coal for less than adequate remuneration. Tata cites that in 1972 the GOI nationalized all of the Indian coal mines and coke oven plants in the country, with the exception of coking mines owned and managed by TISCO, which became Tata. However, according to Tata the nationalization law exempted coking coal mines owned or managed by a company engaged in the production of iron and steel. Thus, the two steel producers, Tata and Steel Authority of India Limited, were allowed to continue to operate their

mines.

Tata explains that in 1972 it was operating two coking coal mines and was not required to obtain a license to take over the mines but was required to pay a royalty pursuant to an agreement called for by the Mines and Minerals Development and Regulation Act (MMDR). Tata contends that the fact that the mines were not nationalized and that it maintained continuous control of the mines both before and after the nationalization indicates that the GOI does not provide Tata with a conferrable benefit or a financial contribution as defined by the statute.

Tata further argues that according to U.S. accounting principles Tata is the owner of the mines in question. Tata explains that the original 1946 agreement between the Raja of Ramgur and Tata Steel's predecessor in interest, Bokaro & Ramgur Ltd., for a 999 year term constituted a capital, sales-type lease under Financial Accounting Standard 13 ("FAS-13"). Tata contends that FAS-13, which was developed by the Financial Accounting Standards Board, sets forth criteria for classifying a lease as a "capital lease" – a lease that by its terms is equivalent to ownership of the leased property. On this basis, Tata argues that the Department should find that Tata is the owner of the mines, thereby eliminating the provision of a financial contribution on the part of the GOI.

Tata argues that FAS-13 provides that in the pertinent part of its inception (as defined in paragraph 5(b)), the lease shall be classified as a capital lease if it meets one or more of the following four criteria: 1) the lease transfers ownership of the property to the lessee by the end of the lease term (as defined in paragraph 5(f)); 2) the lease contains a bargain purchase option (as defined in paragraph 5(d)); 3) the lease term (as defined in paragraph 5(f)) is equal to 75 percent or more of the estimated economic life of the property (as defined in paragraph 5(f)); or 4) the present value at the beginning of the lease term of the minimum lease payments (as defined in paragraph 5(j)), excluding that portion of the payments representing executor costs such as insurance, maintenance, and taxes to be paid by the lessor, including any profit thereon, equals or exceeds 90 percent of the excess of the fair value of the leased property. Thus, according to Tata, its lease agreement with the GOI for 999 years should be considered a capital lease under FAS-13.

Tata argues that one of the governing principles of contract interpretation in the mining context comes from India's Third Circuit, where the court found that "while the (agreement at issue) is called a 'lease,' the real character of an instrument must be determined from the intention of the parties as gathered from a fair interpretation of the instrument as a whole." See Jefferson Gas Coal Co., v. Comm'ner of Internal Revenue, 52 F.2nd 120, 122 (3rd Cir. 1931).

Tata argues that the circumstances surrounding the agreement at issue in the instant investigation show that the parties intended it to constitute a sale despite calling it a lease. First, the term of the lease was agreed to be 999 years, a length of time that would outlast the life of the coal to be mined. Second, because the original seller was a government entity, the royalty payments that are subsequently received are, according to Tata, more accurately described as a tax on the coal mined rather than any economic interest retained in the property. Third, the 1946 agreement was preceded by a number of short-term (five- or ten-year) leases from the Rajas of Ramgur to Bokaro & Ramgur Ltd. In 1946, the sharp departure from that pattern to a 999 year agreement supports the contention that the 1946 Raja of Ramgur meant to sell the land and mining rights in question rather than continue to lease them.

Tata notes that at verification the Department inspected and took a copy of the entry in Tata's accounting records showing that it entered the purchase of land from Bokaro & Ramgarth Ltd. as an asset on its books. The fact that the GOI continues to tax Tata in the same manner that

it taxes every other mining company in India does not alter the fact that Tata was and is the owner of the property. Tata concludes that the Department's calculation of the alleged coal subsidy is flawed.

Petitioners contend that in an effort to avoid the fact that it receives a subsidy based on the GOI's provision of captive mining rights for coal, Tata claims that it owns the coal mining rights at issue. Petitioners claim that the two agreements put forth by Tata provide no support for Tata's claim that it owns the mining rights at the West Bokaro and Jamadoba coal mines, either constructively or otherwise. They contend that both of these agreements regarding the mines are leases, not transfers of ownership from the sovereign at the time to Tata's predecessor companies. While Tata claims that under U.S. accounting principles such long-term leases constitute constructive ownership, petitioners maintain that it is clear from the record that the GOI still owns the mineral rights at issue regardless of their alleged status under U.S. law.

Petitioners state that in the GOI's response to a supplemental questionnaire from the Department, it stated that "State Governments {not the company engaged in mining} are the owners of the minerals and grant mineral concessions" under the MMDR. See GOI February 8, 2008, response. Petitioners note that the GOI further confirmed that it controls what Tata can do with the coal it mines under the captive mining regime. According to the GOI's response to the Department's questionnaire regarding new subsidies afforded to Tata, "any coal obtained by the companies engaged in the manufacture of iron and steel, in excess of their requirements for production of iron and steel, shall not be sold, delivered, transferred or otherwise disposed of except with the previous approval of the {GOI}." See GOI's November 8, 2007, response at 19. Petitioners contend that if Tata owned the coal mined at West Bokaro and Jamadoba, it would be free to dispose of the coal without the previous approval of the GOI.

Petitioners note that other evidence provided by respondents supports the GOI's assessment of its ownership of the coal mining rights. According to JSW, another company with captive mining rights, the GOI is the "sole owner of all mineral resources" in India. See JSW's Case Brief at 17. Petitioners argue that Tata itself acknowledges that mineral ownership is one of the exclusive privileges of sovereignty. According to Tata, "{1}evying royalty on the coal mined in a country is a sovereign function of the country concerned." See Tata's February 8, 2008, response at 3. For these reasons, petitioners argue that Tata does not own the mining rights at the West Bokaro and Jamadoba coal mines and its arguments to the contrary must be rejected.

Department's Position: We agree with petitioners. We find that what is germane to our analysis is not who owns the land but rather the identity of the owner of the minerals rights. In its February 8, 2008 submission, the GOI stated that "State Governments are the owners of minerals and grant mineral concessions" under the MMDR. See the GOI Response to the Department's Supplemental Questionnaire, February 8, 2008, at 1. The GOI further confirmed its control over the mineral rights in question stating, "any coal obtained by the companies engaged in the manufacture of iron and steel, in excess of their requirements for production of iron and steel, shall not be sold, delivered, transferred or otherwise disposed of except with the previous approval of the (GOI). See the GOI's response to the Department's Supplemental Questionnaire Regarding Tata Steel New Subsidies Allegation, November 8, 2007, at 19. Additionally at verification, the GOI confirmed that it sets royalty rates for both iron ore and coal. See Verification of the Questionnaire Response of the Government of India (GOI Verification Report) at 4-5.

Thus, because record evidence indicates that the GOI maintains ownership of the mineral rights to iron ore and coal mines, and thereby has control over whom it grants mining concessions for iron ore and coal, we find that Tata obtains the iron ore and coal it extracts from the ground from the GOI. Therefore, we have determined that Tata's captive mining of iron ore and coal constitute a financial contribution, in the form of a provision of a good, as described under section 771(5)(D)(iii) of the Act.

Comment 25: Whether the Provision of Iron Ore and Coal Under the Captive Mining Rights Programs Is Specific Under the Act

Tata argues that in order to be countervailable under section 771(5) of the Act, a subsidy must be specific. A domestic subsidy is specific as a matter of law where the government "expressly limits access to the subsidy to an enterprise or industry." A subsidy is not specific as a matter of law as long as (i) once objective criteria or conditions are met, eligibility for the subsidy is automatic; (ii) the criteria or conditions for eligibility are strictly followed; and (iii) the criteria or conditions are clearly set out in the relevant statute. Here, objective criteria or conditions" is defined as criteria or conditions that are neutral and that do not favor one enterprise or industry over another. A subsidy is specific as a matter of fact if the actual recipients of the subsidy are limited in number, one enterprise or industry is a predominant user of the subsidy or receives a disproportionately large amount of the subsidy, or the manner in which the government has exercised discretion indicates that one enterprise or industry is favored over others.

According to Tata, the GOI has not afforded it a subsidy either as a factual matter or law. Tata cites the rules of the MMDR regarding the granting of mining leases. Tata claims the regulations indicate that the GOI grants such leases based on objective criteria and conditions that conform to the definition under section 771(5A)(D)(ii) of the Act and that the GOI's criteria are without distinction to any qualified applicant. Thus, Tata asserts that the mining leases are not specific under U.S. law.

Tata points out that the Department's verification of the GOI demonstrates that it grants mining rights to any qualified producer not simply to four producers as stated in petitioners' allegations and in the Department's Preliminary Results. Tata notes that the Department's verification of Tata demonstrated that, while the GOI did grant iron ore mining rights to the four producers referenced in the Preliminary Results, it has also granted mining leases to a variety of industries. See GOI Verification Report at 5. Tata notes the Department's verification reports showed that 142 companies have been granted mining access, not just four steel producers. See GOI Verification Report at Exhibit VE-7.

Tata further argues that the terms of its mining leases are the same as all others that were granted by the GOI and that there is no evidence on the record of any favoritism towards Tata. Thus, because the subsidy is not specific as a matter of law or fact, Tata argues that it cannot qualify as a countervailable subsidy.

Tata points out that because petitioners mischaracterized what the GOI's iron ore policy was, they misled the Department into reaching an erroneous conclusion in the Preliminary Results. Tata notes that at the Department's verification of the GOI it found that the four steel companies are not granted special terms for the mining of minerals by the government. On the contrary, mining rights are granted to a wide variety of companies and enterprises that seek to mine for a wide variety of minerals. See GOI Verification Report at Exhibit VE-7.

Tata also contends that petitioners misled the Department by selectively quoting portions of the National Mineral Policy, Report of the High Level Committee (the Hoda Report), an independent commission study on India's national mineral policy. Tata claims that petitioners relied too much on the comments of independent miners, who were not vertically integrated as was Tata, and who were complaining about spikes in the market price. According to Tata, the Hoda Report disagreed with the independent miners' assertion and concluded that the existing granting of open access should be maintained and no preference should be given either to captive or stand-alone mines.

Tata claims that it receives no more advantage from holding mining rights than any other downstream producer which has control of its upstream inputs. Tata argues that by cutting out the intermediary, it merely pays the extraction cost of ore instead of retail price for extraction services. Tata contends that the supposedly "highly favorable terms" for access that petitioners complain that Tata enjoys are the exact same terms applicable to every other mining company in India. Tata concludes that the Hoda Report recommends that "[s]tand alone mining and captive mining should continue to co-exist in [India]" and that "[e]xisting captive mines should be renewed if they complied with the conditions of lease."

Tata contends that petitioners' complaint is not based on a government subsidy offered for less than adequate remuneration, instead the crux of their allegation is that the GOI subsidizes Tata because the GOI allows Tata to do what any manufacturer would do - control the source material it uses to make its end products.

Tata further argues that because of petitioners' misleading allegations, the Department initiated a review of the GOI's "granting mining concessions to select Indian steel producers." Tata argues that the Department missed the point by stating that captive mining rights are almost limited by definition to large-scale steel producers in India and throughout the world. Tata claims that there are no special benefits that are granted to the mining operations of the large integrated steel producers and that the GOI charges the same royalty rate for minerals extracted by any of a wide range of operations, each of which was granted mining rights in accordance with objective criteria. Thus, Tata argues there is no subsidy afforded to the Indian steel industry.

Tata contends that Department precedent in connection with the mining industry supports a finding of no subsidy. See Certain Steel Products From France; Final Affirmative Countervailing Duty Determinations, 47 FR 39332, 39338 (September 7, 1982) (Certain Steel Products from France). According to Tata, in Certain Steel Products from France the Department found that no subsidy was conferred where the only benefit provided to the iron ore industry in France was the assumption by the French government of part of the employers' share of pensions due to miners under a special pension plan for all employees of extractive industries.

According to Tata, the Department has also found that where there is no evidence that the government targeted the benefit toward the industry under investigation, a government subsidy afforded to mining and metallurgy companies is not "limited to a specific enterprise or industry or group of enterprises or industries." See Certain Heavy Iron Construction Castings from Brazil; Final Affirmative Countervailing Duty Determination, 51 FR 9491, 9494 (March 19, 1986) (Certain Heavy Iron Construction Castings from Brazil). Tata argues that because there is no evidence that the GOI targeted the benefit toward the industry under investigation; therefore, a government subsidy afforded to mining and metallurgy companies is not "limited to a specific enterprise or industry or group of enterprises or industries."

Tata contends that the royalty rate charged under the program is reasonable. It claims

that the GOI charges the entire Indian extractive industry the same rate. Tata argues that the effective Indian ad valorem rate is no different from other countries. Tata contends that petitioners do not present any evidence that the GOI's royalty rates are not reasonable.

Tata argues that the Department's analysis of the alleged iron ore subsidy is flawed. Tata contends that the Department conflated the provision of access to ore with the provision of ore. Tata points out that not only is there no captive mining program in India, but there is also no provision for iron ore. Tata asserts that, on the contrary, companies such as Tata that are vertically integrated expend their own money to establish mines and extract resources. Tata notes that only after the extraction is completed does it pay the state governments royalty fees that comprise a small share of total costs of production.

Petitioners argue that in the Preliminary Results, the Department determined that the provision of captive mining rights for iron ore by the GOI was de facto specific pursuant to section 771(5A)(D)(iii)(I) of the Act because it is limited to certain enterprises. In support of this determination, the Department cited two documents produced by the GOI – the report of the "Expert Group" on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore issued by the GOI Ministry of Steel (the Expert Group Report), and the Hoda Report.

Petitioners claim that according to the Expert Group Report, the mining of iron ore in India is undertaken by only two types of entities – mining companies of various sizes that sell the iron ore to downstream users and four steel companies, one of which is Tata. The only entities that have established "captive" mines are the four steel companies: SAIL, JSW, JSPL and Tata. Likewise, the Hoda Report, in its discussion of captive mining of iron ore in India, makes it clear that captive mining is limited to the steel industry and, within the steel industry, to only a few producers.

Petitioners note that Tata, in its case brief, acknowledges that "{o}nly four steel producers have obtained captive mining leases" from the GOI. Petitioners further contend that, for the reasons set forth below, Tata's argument that the GOI's provision of captive mining rights is not de facto specific is without merit and should be rejected in its entirety.

Petitioners argue that the program at issue is subject to its own governing regulations, which allow for only steel, power and cement companies to mine coal for captive use. See Petitioner's New Subsidies Allegation at Exhibits 18 and 19. Petitioners argue that Tata has not challenged this fact. Thus, petitioners contend that, contrary to Tata's claims, there is no captive mining program applicable to all minerals. Since there is no program applicable to the entire extractive mining sector, petitioners contend the cases cited by Tata in support of its specificity argument are inapposite.

Petitioners emphasize that only four steel producers benefit from the GOI's provision of captive mining rights for iron ore. While Tata claims that its establishment of captive mines is a function of the company's business foresight, petitioners argue that the fact remains that only four companies in a single industry have been granted captive mining rights for iron ore by the GOI. Therefore, the GOI's program for captive iron ore is clearly de facto specific under any definition.

Petitioners note that even when viewed as the provision of iron ore mining rights, rather than captive iron ore mining rights, the GOI's program is still de facto specific. Only two industries benefit from the GOI's provision of mining rights for iron ore – iron ore mining companies and the four steel companies. Petitioners argue that the program is specific as a matter of fact under section 771(5A)(D)(iii)(I) of the Act and that Tata's arguments to the

contrary should be rejected.

Department's Position: We agree with petitioners. As in the Preliminary Results, the Department finds that the provision of mining rights to Tata by the GOI is de facto specific pursuant to section 771(5A)(D)(iii)(I) of the Act because it is limited to certain enterprises. As petitioners note, the captive mining programs for iron ore and coal are subject to their own separate governing regulations. Thus, we are conducting our specificity analysis as it pertains to the GOI's provision of captive mining rights of iron ore and coal and not, as Tata argues, in terms of the GOI's provision of minerals in general. This approach is consistent with the Department's practice. See e.g., Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod from Italy, 63 FR 40474, 40485 – 40486 (July 29, 1998) (where the Department treated two articles provided under Law 25/81 as separate programs and conducted a separate specificity analysis because the articles established different eligibility requirements, different application procedures, different levels of available aid, and different types of aid (grants and loans) than other assistance provided under 25/81). Viewed in this light, we find that the GOI limited its provision of captive mining rights for coal to steel, power, and cement companies. Regarding iron ore, record evidence indicates that the GOI limited its provision of captive mining rights for iron ore to only four steel producers. Based on this evidence, we continue to find that the programs are de facto specific as described under section 771(5A)(D)(iii)(I) of the Act.

Comment 26: The Benchmark Used to Measure Whether the Captive Mining Rights Programs Imposed by the GOI Provide a Benefit in the Form of a Provision of a Good for Less Than Adequate Remuneration

Tata argues that if the Department conducts a benefit analysis of the GOI's captive mining rights programs, a fair analysis would involve a comparison of royalty program rates. Tata explains that under 19 CFR 351.511, the Department follows a three-tiered procedure, in descending order of preference, when selecting a benchmark with which to measure the adequacy of remuneration of the government price; (i) comparing government prices to market prices in the country in question; (ii) comparing government prices to world-market prices available to a consumer in the country in question is likely to have available; and (iii) determining whether government prices are set according to market principles.

Tata notes that a Tier 1 price is not available in India. Under the MMDR and the Mineral Concession Rules Act of 1960, as amended, the GOI owns all the minerals either in or on the ground. Mining companies may apply for and receive a mining lease, which allows the company to extract ore from government-owned lands in exchange for a nominal leasing fee and a royalty per ton of ore extracted. Since the GOI owns the rights to all minerals in India, other than Tata's coal, there is no private market for mining rights. Thus, Tata argues a Tier 1 assessment cannot be performed.

According to Tata, the Department cannot perform an analysis under Tier II because the price of international mining rights is not available in India. See Certain Hot-Rolled Carbon Steel Flat Products from South Africa; Notice of Preliminary Results of Affirmative Countervailing Duty Determinations, 66 FR 20261, 20270 (April 20, 2001) (Certain Hot-Rolled Carbon Steel Flat Products from South Africa) (in which the Department found that there is no world market price for rail lines in South Africa because all such lines are owned by the South

African government).

According to Tata, the Department may resort to Tier III when measuring the adequacy of remuneration when Tier I and Tier II benchmarks are not available. Tata states that under Tier III, the Department seeks to determine whether the price charged by the government for the good or service in question was set “according to market principles.” Tata claims that there is no definition of the term “according to market principles” but that the Preamble to the regulation does provide some guidance, noting that:

[w]here the government is the sole provider of a good or services, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles, through an analysis of such factors as the government’s price-setting philosophy, costs (rates of return sufficient to ensure future operations), or possible price discrimination. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case. In our experience, these types of analyses may be necessary for such goods or services as electricity, land leases, or water, and the circumstances of each case may vary widely.

See Preamble, 63 FR at 65378.

Tata argues that the Department should therefore evaluate the price of the GOI’s mining rights under Tier III to determine whether the GOI set the price in accordance with market principles. Tata explains that the various American states have differing royalty schemes, as well as Canadian Provinces and Australian states. Of the countries that charge a royalty on iron ore, most use an ad valorem rate. The percentage is then applied either to the gross market value of the given ore, the net revenue of a mine, the net profit of a mine, or the royalty can be lessened or waived until a given mine recoups its startup costs or meets other criteria.

Tata contends that through the flat-fee royalties are the exception rather than the rule, the GOI is not the only government which uses a flat-fee structure, specifically New South Wales in Australia charges a four percent ad valorem rate for most minerals, but a flat rate of \$0.35 per ton of iron ore. Tata contends that such an analysis will demonstrate that the royalty rates charged by the GOI are set according to market principles.

Tata claims that the methodology used in the Preliminary Results is neither logical nor just. Tata notes that the Department adopted a methodology that finds a subsidy to exist to the extent the market price of the end-product mineral exceeds the extraction royalty fee plus the cost of extraction. Tata argues that in order to avoid the imposition of a countervailing duty on its exports, the GOI would have had to impose royalty rates above anywhere else in the world.

Thus, Tata concludes with respect to the Department’s preliminary analysis that it incorrectly found that (a) the lower the cost of extraction, the higher the subsidy, (b) the more efficient the producer, the higher the subsidy, (c) integrated steel producers such as Tata are penalized because of the efficiencies of vertical integration and for having taken the market risk of falling ore prices, and (d) to avoid countervailing duties on exports of steel by its integrated producers, India would have to charge mining royalties many times higher than those charged in the United States or other places in the world.

Petitioners state that 19 CFR 351.511(a)(2) establishes that the adequacy of remuneration is to be determined based on a comparison between the government price and, in descending

order of preference: 1) a market-determined price resulting from actual transactions in the country, 2) a world market price, or 3) market principles. Petitioners argue that even assuming that Tata is correct in claiming that a Tier III benchmark (in the form of foreign captive mining right fees) can be employed in the instant review, Tier III is the least preferable of the three options available to the Department under its regulations. In contrast, petitioners argue that the benchmark used by the Department in the Preliminary Results is the world market price for iron ore as reported in the Tex Report. See 73 FR at 1591. Pursuant to the requirements of the Department's regulations, this benchmark used by the Department is clearly superior to the benchmark proposed by Tata and should continue to be used by the Department as required by the hierarchy specified under 19 CFR 351.511.

Petitioners contest Tata's argument that the Department cannot use a Tier II world market benchmark price for the captive mining rights program because Indian mining rights are not an international good and hence not available to purchasers in India or elsewhere. Petitioners argue that Tata's objections ignore the fact that the Department did not use a world market price for mining rights. Rather, the Department used a world market price for iron ore, which was widely available, and made an adjustment for the fact that Tata incurs the costs of mining. See Preliminary Results, 73 FR at 1591-92.

Petitioners claim that Tata's argument is also inconsistent with the Department's practice. According to petitioners, in prior cases regarding the countervailability of programs involving the extraction of government-owned resources, the Department has never compared the royalty rates assessed by the government on the respondent to other governments' royalty rates as a way to determine adequate remuneration pursuant to the statute. See Certain Hot-Rolled Carbon Steel Flat Products from South Africa and see also Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from Indonesia, 71 FR 47174 (August 16, 2006) (Lined Paper from Indonesia), and accompanying Issues and Decision Memorandum (Lined Paper from Indonesia Decision Memorandum) at Comment 4.

Department's Position: We agree with petitioners. 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 less than adequate remuneration. 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.

As stated in the Preliminary Results, Tata's sole source of iron ore during the POR was from the captive mining rights program. Thus, Tata was not able to provide a market-determined benchmark price resulting from actual transactions in the country in question, as described under 19 CFR 351.511(a)(2)(i).

Under 19 CFR 351.511(a)(2)(ii), if there is no useable market-determined price with which to make the comparison under sub-paragraph (a)(2)(i), 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 a price would be available to purchasers in the country in question. There are publications on the record that include prices from the world market for comparable goods which can be used as a benchmark to determine whether the GOI

sold high-grade iron ore to the respondents for less than adequate remuneration. Specifically, during the course of this review, the GOI placed on the record copies of the Tex Report, which include prices for high-grade iron ore that were set for 2006. Consistent with our approach in the Final Results of Second HRC Review, we continue to find that the prices reported in the Tex Report constitute world market prices for iron ore that would be available to the respondents in India in accordance with 19 CFR 351.511(a)(2)(ii). In this regard, we note that we adjusted our benefit calculations with respect to the “government-side” of our equation in that we have added, to the mining rights fees that Tata paid for its iron ore acquired under the captive mining program, the costs Tata incurred to extract/mine the goods, an amount for profit that accounts for those extraction costs, as well as any freight expenses incurred to transport the iron ore to its factory. Thus these adjustments made to the “government-side” of the equation do not change the fact that the prices for iron ore, as reported by the Tex Report, constitute second tier world market prices as described under 19 CFR 351.511(a)(2)(ii).

The same can be said with regard to the benchmark we have used to measure the adequacy of Tata’s purchases of coal under the captive mining rights of coal program. As explained in the Preliminary Results, Tata imported coal from an Australian supplier during the POR. See 73 FR at 1592. For purposes of our benefit calculation, we made adjustments to make the “government-side” comparable to the benchmark price. Namely, we added to the mining fees Tata paid to the GOI under the program an amount for profit that accounts for the extraction costs, costs Tata incurred to extract/mine the coal, and costs Tata incurred to transport the coal to its factory. However, these adjustments do nothing to change the fact that the prices Tata paid to import the coal from Australia constitute first tier prices as described under 19 CFR 351.511(a)(2)(i).

Having obtained a first tier benchmark in the case of coal and a second tier benchmark in the case of iron ore that are in accordance with 19 CFR 351.511(a)(2)(i) and (ii), respectively, there is no need examine, as advocated by Tata, whether the GOI provided coal and iron ore in accordance with market principles as described under 19 CFR 351.511(a)(2)(iii).

Comment 27: Whether the Department Should Calculate Separate Benchmarks to Measure the Adequacy of Remuneration of Tata’s Purchases of Iron Ore Lumps and Fines under the Captive Mining Rights Program

Petitioners explain that in the Preliminary Results the Department measured the adequacy of Tata’s purchases of iron ore under the captive mining rights program based on a benchmark for iron ore fines. See 73 FR at 1592. Petitioners contend that Tata mined both iron ore lumps and iron ore fines during the POR under the captive mining program. Petitioners argue that in measuring the adequacy of Tata’s purchases of iron ore lumps under the program, the Department should use a benchmark based on the price of iron ore lumps.

Petitioners contend that in measuring the adequacy of remuneration of the GOI’s provision of iron ore lumps in prior segments of this proceeding and in the Preliminary Results of the instant review for other respondents, the Department has calculated distinct benchmarks for lumps and fines. Petitioners note that in the Preliminary Results, the Department calculated separate iron ore lumps and fines benchmarks when measuring the adequacy of remuneration of purchases of iron ore that Essar and Ispat made from the GOI during the POR. Petitioners argue that the Department’s calculation of a separate benchmark for iron ore lumps and fines is consistent with the fact that there is a significant difference between the price of lumps and fines.

Petitioners note that the prices at the Bailadila mine, which is one of the mines that the Department uses to determine its benchmark, are 28 percent higher for lumps than for fines. Thus, petitioners argue that the use of a fine-based benchmark for Tata's mining of lumps results in a significant understatement of the benefit to Tata under the captive mining rights program.

To calculate a separate iron ore lumps benchmark for use in measuring the adequacy of remuneration of Tata's purchases of iron ore lumps under the captive mining program, petitioners advocate multiplying the lump prices from the Tex Report by the FE content of fines at the Noamundi and Joda mines to derive a lump benchmark price for each mine. Petitioners explain that in the instant review, the FE content of lumps at Tata's mines is not on the record. Therefore, petitioners argue that the Department should assume that the FE content of the lumps from Tata's two iron ore mines, Noamundi and Joda, is equal to the FE content of other mines examined at verification. Petitioners argue that such an assumption is conservative because lumps generally have a higher FE content than fines. Lastly, petitioners argue that the Department should subtract from the resulting benchmarks the mine-specific costs for Tata's two mines to arrive at the benefit to Tata of mining lumps under the GOI's captive mining rights program.

Tata argues that if the Department finds captive mining rights countervailable and decides to identify separate benchmark prices specific to lumps and fines, the Department should adjust both such calculations to reflect the differences in physical properties and movement and profit components. Tata explains that it submitted data regarding these differences in Exhibit 68 of its February 8, 2008, submission and these data were verified by the Department.

Department's Position: In the Preliminary Results, we did not calculate a separate benefit for Tata's purchases of lump and fine iron ore under the captive mining rights of iron ore program. However, in order to be consistent with the benefit calculations performed for Essar and Ispat under the Provision of Iron Ore for Less Than Adequate Remuneration program, we have calculated separate benefits for Tata's purchases of iron lumps and fines.

Subsequent to the Preliminary Results, Tata provided revised data concerning the iron ore it purchased under the captive mining rights program. These data delineated the quantity and value of lump and fine iron ore Tata acquired under the captive mining rights program. See Exhibit 70 of Tata's February 8, 2008, response. Using these data, we have calculated the prices Tata paid to the GOI for lump and fine iron ore and have compared these prices to separate lump and fine iron ore benchmarks. For further information, see Tata's final calculations.

In conducting our calculations, we have adjusted our fines benchmark from the Tex Report for the FE content Tata acquired from its Noamundi and Joda mines. The record lacks information concerning the FE content of the lumps Tata mined under the program. Therefore, we have adjusted our lumps benchmark under the assumption that FE content of the lumps Tata mined under the program is equal to the FE content of the fines it mined under the program from its Noamundi and Joda mines.

Regarding the issue of whether to adjust Tata's iron ore benefit calculations to account for technical/quality differences and profit, see Comment 29. Regarding the issue of whether to adjust Tata's iron ore benefit calculations for movement costs, see Comment 28.

Comment 28: Whether the Department Should Include Ocean Freight in the Coal and Iron Ore Benchmark Calculation Used to Measure the Adequacy of Remuneration of Tata’s Purchases of Coal and Iron Ore under the Captive Mining Rights Program

Petitioners explain that to measure the adequacy of remuneration of Tata’s purchases of coal under the captive mining rights program, the Department calculated a benchmark price consisting of the price Tata paid for coal from an Australian supplier. Petitioners argue that the Department should also add the ocean freight value of Tata’s imports of Australian coal to calculate the benchmark price. Petitioners argue that according to 19 CFR 351.511(a)(2)(i), the Department:

. . . will normally seek 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.

Petitioners add under 19 CFR 351.511(a)(2)(iv), the Department is instructed to use delivered prices that include freight when the benchmark price consists of an imported good: the Department “will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.”

Petitioners argue that, as instructed by the regulations, the Department should therefore add delivery charges (*i.e.*, ocean freight) to the benchmark price used to measure the adequacy of remuneration of Tata’s purchases of coal under the captive mining rights program.

Tata asserts that pursuant to 19 CFR 351.511, a Tier I benchmark refers to a “market-determined” price for the good or service resulting from actual transactions in the country in question. Tata argues that if any good or service is being provided by the GOI, it is only the right to mine coal, not the coal itself. Thus, Tata maintains that the use of a Tier I benchmark pursuant to 19 CFR 351.511 is inappropriate because there is no way for Tata to import mining rights and no market price for such rights is available in India. Tata therefore argues a Tier I benchmark pursuant to 19 CFR 351.511 cannot be used.

Tata argues that even if the Department found applicable the use of a Tier I benchmark, it still would not mandate the inclusion of ocean freight in the benchmark. Tata notes that 19 CFR 351.511(a)(2)(iv) provides that the Department “normally” will use a market-determined price available in the producer’s country to measure adequacy of remuneration. According to Tata, the term “normally” grants the Department discretion to alter its methodology to suit the facts of individual proceedings, including such factors as product similarity, quantities sold, whether the product was imported or auctioned, and other factors affecting comparability. Thus, Tata argues that in order to ensure an accurate comparison, the Department should refrain from adding the costs of ocean freight in the benchmark.

Tata also argues that a Tier II benchmark under 19 CFR 351.511 (*e.g.*, a world market price) is not appropriate because there is no world market price for mining rights in other countries available to purchasers in India.

Tata maintains that since neither a Tier I nor a Tier II benchmark is appropriate in the instant review, any benchmark that is used must fall under Tier III, as described under 19 CFR 351.511 (*e.g.*, a price consistent with market principals). Tata argues that with a Tier III

benchmark, the question the Department must answer is not what Australian coal would cost in India, but rather what a steel company in an unregulated market economy such as Australia would pay at the mine for a comparable product. Tata argues that under such an analysis, the inclusion of freight would distort the comparison.

Department's Position: We agree with petitioners. As explained in Comments 4, 5, 13, and 15, under 19 CFR 351.511(a)(2)(iv), in measuring adequate remuneration under paragraph (a)(2)(i) or (a)(2)(ii):

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

Thus, we have included the cost of ocean freight and Indian inland freight when deriving the benchmark prices that are compared to the prices Tata paid to the GOI under the captive mining rights of coal and iron ore programs.

During the POR, Tata reported company-specific imports of coal. Thus, as explained in the Preliminary Results and for purposes of the final results, we have used these prices as the benchmark when measuring the adequacy of Tata's purchases of coal under the captive mining rights of coal program. See 73 FR at 1592. In deriving this benchmark, we have included, where available, all costs incurred to transport the coal to Tata's factory in India including Australian domestic inland freight, ocean freight, and Indian inland freight.

As explained in the Preliminary Results, Tata's sole source of iron ore was through the captive mining rights of iron ore program. See 73 FR at 1591 – 1592. As a result, Tata was not able to provide actual transaction data as described under 19 CFR 351.511(a)(2)(i). As explained above in Comment 2, we are using the FOB port prices for iron ore from Hamersley, Australia, as reported in the Tex Report, as our benchmark. In accordance with 19 CFR 351.511(a)(2)(iv), we have accounted for delivery charges incurred on imports of iron ore from Australia by using the ocean freight and Indian inland freight Tata incurred on its shipments of coal from Australia. For further information see Tata's final calculations.

As explained in Comment 26, we find that we have a tier one benchmark for coal and tier two benchmarks for iron ore for purposes of measuring the adequacy of remuneration under the captive mining programs. Therefore, there is no need to consider the appropriateness of using a tier three benchmark.

Comment 29: Whether the Department Should Make Adjustments for the Benchmark Prices of Tata Steel's Iron Ore and Coal Costs on an Equivalent Basis

Tata argues that in the Preliminary Results the Department failed to adjust its benchmark prices for iron ore and coal so as to compare equivalent products on equivalent terms of sale. Furthermore, Tata argues that, while it disagrees with the Department's conclusion that the GOI subsidized its iron and coal production, the Department should refine its benchmarks, which Tata asserts did not compare equivalent products.

Tata contends that at verification the Department confirmed that the benchmark product was physically different from the iron ore mined by Tata with differences in value and use. Specifically Tata cites the fact that the benchmark value was FOB port, while Tata Steel's value

was FOB mine. Thus, the Department should subtract movement and handling charges to reach an equivalent comparison. Tata notes that it provided applicable freight rates with the only exception of a hauling fee because it does not regularly ship goods on that route.

Additionally, the company also provided profit data from the publicly owned NMDC and from Sesa Goa Ltd. for iron ore and from one of Tata's coal suppliers. Tata argues that the Department must not subtract not only movement expenses but also a profit expense from the benchmark to make an accurate comparison.

Tata contends that the benchmark for coal used in the Preliminary Results, coal that Tata imported from Australia, is of a higher quality than the coal Tata purchased from the GOI because the Australian coal contains a lower ash product. Tata argues that it imported this type of coal specifically because it was of better quality and that during verification the Department examined data on consumption rates and the cost impact of its utilization for imported coal. Tata contends that the imported coal used in its production process is of higher quality and that the Department must account for this quality difference in its benefit calculations.

Petitioners advocate that the Department should not adjust the benchmark prices for iron ore and coal as proposed by Tata. Rather, the Department should continue to calculate the benchmark prices using the methodology in the Preliminary Results.

Petitioner argues that while the Department may make adjustments to a benchmark price to account for market-determined differences in price between the benchmark and the government-provided good, the Department has rejected attempts to reduce the benefit based on the impact of the subsidy on the respondent's cost of production. 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) (Softwood Lumber First Review), and accompanying Issues and Decision Memorandum (Softwood Lumber First Review Decision Memorandum) at Comment I(B). An example given by the Department in the General Issues Appendix in Certain Steel Products from Austria ("GIA") stated that, if a government were to provide a specific producer with a smokestack scrubber in order to reduce air pollution, the Department would countervail the amount that the company would have had to pay for the scrubber on the market, notwithstanding that the scrubber may actually reduce the company's output or raise its cost of production. See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37260 (Certain Steel Products from Austria).

Petitioners assert that Tata is asking the Department to take into account the effects of the products captive mined on Tata's cost of production via its value-in-use methodology. In addition to being specifically and unequivocally rejected in the GIA, petitioners contend that the statute, the Department's regulations, and the Department's practice prohibit an effects test.

Petitioners state that section 771(5)(C) of the Act precludes the Department from considering the effect of the subsidy in question. Rather, in determining whether a subsidy is provided to a respondent via the provision of a good for less than adequate remuneration, petitioners argue that the Department looks at the "prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review." See Certain Steel Products from Austria, 58 FR 37217, 37260. Thus, according to petitioners, the statute instructs the Department to look at market conditions, not the impact on the respondent's cost of production, when determining whether and to what extent a good is provided for less than adequate remuneration.

Petitioners argue that the statute requires the Department to countervail an allocated share

of the subsidies received by producers, regardless of their effect. See HRC Investigation Decision Memorandum at Comment 1. Petitioners further argue that consistent with the statute, the Department's regulations state that the Department will not consider "the effect of the government action on the firm's performance, including its prices or output." See 19 CFR 351.504(c). Petitioners note that in practice, the Department has determined that "{b}ecause neither the statute nor the Department's regulations permit an analysis of the use nor effect of subsidies, the Department does not attempt such an analysis." See Industrial Phosphoric Acid from Israel: Final Results of Countervailing Duty Administrative Review, 64 FR 2879, 2885 (January 19, 1999) (IPA from Israel).

Petitioners argue that the statute, the regulations, and Department's practice call for the Department not to examine and make adjustments for the effect of a subsidy on the respondent's cost of production. Petitioners argue that the law and the Department's practice in this respect are based on sound policy concerns. Petitioners note that such analyses would be unduly burdensome for the Department and would be subject to abuse by respondents. Petitioners assert that Tata's request for calculation adjustments based on the purported quality differences between iron ore/coal purchased from the government and the benchmark prices for iron ore/coal necessitate taking the effect of a subsidy into consideration. Petitioners further claim that Tata's requested quality adjustments incorporate numerous indices that make it susceptible to manipulation. According to petitioners, Tata has presented no market-based evidence that the Department improperly valued the amount that Tata would have had to pay for the iron ore and coal that it mined if it had purchased the goods on the market. Petitioners argue that Tata's value-in-use methodology is based on changes in its cost of production and, therefore, cannot be used by the Department in its adequacy of remuneration analysis.

Petitioners note that in its case brief, Tata offers the conclusory statement that profit "must be stripped" out of the iron ore and coal benchmark prices in calculating the benefits that Tata received under the captive mining programs. See Tata's Case Brief at 4-5. However, petitioners note that Tata does not proffer a citation or any argument for the proposition that profit should be deducted from the benchmark prices. Furthermore, petitioners claim that Tata did not establish a reason for why profit should be deducted from the benchmarks in previous submissions to the Department. Petitioners argue that Tata, in its case brief for the first time claimed that the Department should deduct profit from the benchmark prices for iron ore and coal. There, according to petitioners, Tata made a similarly conclusory argument that "average profit . . . should be deducted from the stated {benchmark} price. If such an adjustment is not made, it would lead to a situation where Tata's mining costs would be compared with {the benchmark's} cost {plus} profit." See Tata's February 8, 2008, response.

Petitioners claim that Tata failed to provide a justification and argue that none exists for deducting profit from the benchmarks. In fact, petitioners advocate that profit should not be deducted from the benchmarks because the prevailing market conditions for iron ore and coal include an amount for profit. Here, petitioners argue that the Department's determination in a prior CVD investigation is on point. See Notice of Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From the Republic of Korea, 67 FR 62102 (October 3, 2002) (Cold-Rolled Steel from Korea), and accompanying Issues and Decision memorandum (Cold-Rolled Steel from Korea Decision Memorandum). According to petitioners, in Cold-Rolled Steel from Korea, developed land was provided to a respondent by the government with the profit component removed from the price. See Cold-Rolled Steel from Korea Decision Memorandum at the "Provision of Land at Asan Bay." Petitioners claim the

Korean respondent only paid the costs to the government for the developed land. See Cold-Rolled Steel from Korea Decision Memorandum at Comment 9. Petitioners claim that as the benchmark price, the Department used the costs of the developed land plus a market-determined amount for profit on the grounds that "the prevailing market conditions {for the sale of land} include a profit factor." Id. According to petitioners, to determine the benefit in Cold-Rolled Steel from Korea, the Department compared what the respondent paid, which was the government's costs absent profit, to the benchmark, which was equal to costs plus profits. Id. In sum, petitioners argue that in Cold-Rolled Steel from Korea, the Department did not deduct profit from the benchmark before determining the benefit conferred because profit was part of the market-determined price and the remuneration received by the government did not include profit.

Petitioners conclude as was the case in Cold-Rolled Steel from Korea, Tata is receiving goods from the GOI without having to pay profit in its remuneration to the GOI. Since the prevailing market conditions for the sale of iron ore and coal include a profit factor, and the remuneration paid by Tata does not include profit, profit should continue to be included in the benchmark prices. Therefore, petitioners argue that Tata's proposed adjustment to the benchmark should not be made.

Department's Position: We agree with Tata in part. In the Preliminary Results the Department used Tata's actual transactions of coal from an Australian supplier as the benchmark and compared it to the captive mined coal that Tata produced at its domestic mines. See 73 FR at 1592. Subsequent to the Preliminary Results, Tata provided the Department further information in its supplemental questionnaire response and at verification that the coal it imported from Australia had a lower ash content, thus making it more valuable because it burns longer and hotter, as compared to domestic Indian coal which has a higher ash content. See Tata's February 8, 2008, submission at 1-5 and Exhibits 64(c) and 65. Company officials demonstrated and provided documentation during verification that, in the normal course of business, the production staff formulate how much imported Australian coal it will blend with domestic Indian coal to produce different hot-rolled carbon steel flat products for an optimum production quality and to maximize profit. See Verification of the Questionnaire Responses Submitted by Tata Steel Limited (Tata Verification Report) at 7-8 and VE-13. Thus, because the respondent has clearly demonstrated that the imported coal is of more value than the domestically produced coal, we are making an adjustment to the benchmark to account for the physical differences between domestic and imported coal. For further information, see Tata's final calculations.

However, regarding iron ore, we are not making an adjustment to the benefit calculations to adjust for what Tata claims are technical differences in the iron ore it acquired from the NMDC and the iron ore that comprise the benchmark. In its February 8, 2008, response, Tata provided information that purportedly demonstrated the technical differences between the iron ore it acquired under the captive mining rights program and the publicly available information on iron ore sold by NMDC, as listed in the Tex Report. See Exhibit 68h of Tata's February 8, 2008, questionnaire response. As explained in Comment 2 in these final results, when using prices from the Tex Report, we are no longer including prices from NMDC in our benchmark calculation because these prices pertain to the very government provider of the good at issue. As a result, in such instances we are limiting our benchmark calculations to prices from Hamersly, Australia, as listed in the Tex Report. Given this approach, we find that the technical differences that Tata claims exist between the iron ore it acquired from the GOI under the captive mining

rights program and the iron ore sold by NMDC, as listed in the Tex Report, are, to the extent they exist at all, no longer applicable. Furthermore, unlike the production requirements for coal, we find that Tata has not submitted information on the record that, in the ordinary course of business, it accounts for technical differences in iron ore used for the production of subject merchandise. For this reason, we have not made the technical adjustments that Tata has requested.

Regarding profit, we have determined to include a profit rate when deriving the total per unit cost that Tata incurs to produce a “finished” unit of iron ore that it acquired under the captive mining program. Specifically, we are adding this profit component to Tata’s total per unit cost in order to account for the profit component (namely, profit earned during the mining/extraction phase) that exists in the benchmark but does not exist in the data Tata submitted to the Department.¹⁸ In this manner, we are able to make an “apples-to-apples” comparison. This approach is consistent with prior Department practice. See Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber from Canada, 70 FR 73448 (December 12, 2005) (Second Review of Lumber from Canada) and accompanying issues and decision memorandum (Second Review of Lumber from Canada Decision Memorandum) at Comment 52 (where the Department included a profit component in its stumpage benefit calculations to account for the fact that the price data submitted by certain vertically integrated lumber producers did not include a profit component with regard to their logging activities under the Government of Canada’s stumpage program). For the profit rate for iron ore, we have used publicly available information (financial reports) from two Indian mining companies. See Exhibit 69 of Tata’s February 8, 2008, submission. For additional information, see Tata’s final calculations.

Similarly, we have included a per unit profit rate when deriving the total per unit cost that Tata’s incurs to produce a “finished” unit of coal it acquired under the captive mining rights of coal program for the same reasons that are discussed above. Tata submitted publicly available information regarding its supplier of Australian coal (e.g., its financial statements). Using this information we derived a profit rate that we incorporated into our benefit calculations. For additional information, see Tata’s final calculations.

Comment 30: Whether the TPS Conferred Benefits upon Tata during the POR

Tata claims that it did not receive any benefit under the TPS because it precluded both Tata International and Tata from using credits earned by Tata International. Tata contends that throughout the entire review, and as reflected in the Department’s verification reports, neither entity received any benefit under the TPS. Tata claims that it did not qualify under the program for 2006-2007 because it did not have any increase in exports over the prior year. Tata further argues that for earlier years, when there was qualifying export growth, the exports were handled by Tata International. Tata states that Tata International was not permitted to transfer earned credits to Tata Steel.

¹⁸ Tata is a vertically integrated producer and, thus, mining/extraction activities under the captive mining program are performed “in-house.” As a result, Tata did not include a profit component along with the mining/extraction costs it reported to the Department.

Tata explains that under the TPS, incremental exports made from the previous year are eligible for duty credit. Tata further explains that during 2003-04 and 2004-05, Tata exported goods through Tata International and, accordingly, Tata International applied for TPS licenses based on its incremental exports during 2004-05 over 2003-04. Tata explains that it obtained TPS licenses in June 2006 and that the licenses were in the name of Tata International with the name of Tata as supporting manufacturer.

Tata cites Paragraph 3.2.5 of the Handbook of Procedures (Vol. I) 2004-2009 issued on September 1, 2004, as follows:

The licensing authority shall at the time of issuance of the duty credit entitlement certificate endorse the name of the associate manufacturer/supporting manufacturer/job worker on the certificate as declared by the applicant. Goods imported against such entitlement certificate shall be sued by the applicant or his supporting manufacturer/job worker.

However, according to Tata, under the India Customs regulations, V.E. 5, pages 14-16, licenses on goods imported by Tata International could not be transferred or sold to Tata. Thus, Tata contends that the licenses earned by Tata International were unusable and worthless, which according to Tata is a gap in the structure of the program itself. The GOI came to recognize this gap and amended its policy in the subsequent year.

Tata explains that in order to enable supporting manufacturers, whose names appear in the shipping bills, to import directly, the GOI eventually allowed the names of such supporting manufacturers on the certificate as co-licensees. However, Tata claims that the GOI's revision was introduced only with respect to licenses issued in the second year of operation of the program covering incremental exports made during 2005-06 over 2004-05. But, Tata claims that in that year Tata International and Tata did not qualify since they did not have the necessary export growth.

Tata further notes that the GOI rebuffed its petition to waive the restrictions on the transfer of TPS. Tata also states that it petitioned the Director General for Foreign Trade (DGFT) to accord co-licensee status to Tata for the licenses issued during the first year covering the incremental exports made during 2004-05 over 2003-04, however Tata's request was rejected by the DGFT.

Petitioners state that the duty credits earned under this program can be used to pay customs duties on imports of any inputs or items that are freely importable under India's Foreign Trade Policy. See Preliminary Results, 73 FR at 1590. Petitioners note that Tata reported that its trading company, Tata International, had been issued credits under the TPS during the POR. See Tata's April 16, 2007, response at Ex. 25. Petitioners further note that the Department found credits provided under the TPS to be confer countervailable benefits. See Preliminary Results, 73 FR at 1590.

Petitioners argue that the fact that Tata International did not actually use the TPS credits that it received is irrelevant as to the countervailability of the program. Petitioners contend that Tata's argument to the contrary would require the Department to determine the use or effect of the TPS credits received by Tata International in violation of the CVD statute, the Department's regulations, and the Department's longstanding and consistent practice. See 19 CFR 351.525(c). Petitioners argue that section 771(5)(C) of the Act specifically provides for the Department not to consider the effect of the subsidy in determining whether a subsidy exists. They further argue

that the Department has recognized that "nothing in the statute conditions countervailability on the use or effect of a subsidy. Rather, according to petitioners, the statute requires the Department to countervail an allocated share of the subsidies received by producers, regardless of their effect." See Cold-Rolled Steel from Korea Decision Memorandum at Comment 1. Moreover, petitioners maintain that the Department has stated that it is required "to countervail the value of subsidies at the time they are provided to a company (i.e., the cost savings to the company from receiving the subsidies), without regard to their actual use by that company or their effect on its subsequent performance." Id. Petitioners further note that the Preamble states "the law is concerned with the benefit originally received, not with what the recipient does with it." See 63 FR at 65348.

Petitioners point out that in practice, the Department has determined that "{b}ecause neither the statute nor the Department's regulations permit an analysis of the use nor effect of subsidies, the Department does not attempt such an analysis." See IPA from Israel, 64 FR at 2885. Petitioners further argue that the Department has rejected claims for it to adjust the amount of a respondent's benefit or to find that a respondent received no benefit at all based on its use or non-use of a subsidy that has been provided to the company. Id.; See also Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 66 FR 50410 (October, 3, 2001) (Certain Hot-Rolled Carbon Steel Flat Products from Thailand), and accompanying Issues and Decision memorandum (Certain Hot-Rolled Carbon Steel Flat Products from Thailand Decision Memorandum) at Comment 14.

Therefore, petitioners contend that what Tata International did with the TPS credits that it received is irrelevant and should not be considered by the Department in determining whether the company received a countervailable benefit under the TPS. To do otherwise, argue petitioners, would require the Department to trace the use of a company's subsidies to determine whether the company used the subsidies as intended. Petitioners argue that this would violate the statute, the Department's regulations, and its well-established and consistent practice of not considering the use and effect of subsidies. They further argue that it would be burdensome for the Department and would be subject to abuse by respondents. Accordingly, petitioners contend that Tata's claims regarding the use and effect of the TPS credits that Tata International received should not be considered by the Department.

Petitioners also argue that the fact that Tata International obtained the TPS credits and did not transfer the credits to Tata has no impact on the countervailability of the program. Petitioners explain that 19 CFR 351.525(c) states that "{b}enefits from subsidies provided to a trading company which exports subject merchandise shall be cumulated with benefits from subsidies provided to the firm which is producing subject merchandise that is sold through the trading company." See 19 CFR 351.525(c).

Petitioners note that Tata International is a trading company, which exports the subject merchandise produced by Tata. See Tata Verification Report at 3 (Public Version). Therefore, petitioners assert that benefits received by Tata International are combined with benefits provided to Tata and the fact that Tata International could not transfer the TPS credits is irrelevant. Accordingly, petitioners advocate that the Department should continue to countervail this program in the final results.

Department's Position: We agree with respondent. Under 19 CFR 351.503(c), the Department "is not required to consider the effect of the government action on the firm's performance, including its prices or output or how the firm's behavior otherwise is altered." Although the

Department will not normally take into account whether and how a subsidy was used, we find that the facts surrounding this issue are unique to this review.

In the instant review, Tata International exported on behalf of Tata (the entity that produces steel) with the belief that its export credits earned under the TPS program could be used for Tata. Although the export credits were awarded to Tata International, record evidence indicates that Tata was unable to avail itself to the program's benefits because, by law, only Tata International could use the credits for the production of the exported good. Furthermore, record evidence indicates that Tata International, because it was not the actual producer, was not permitted under the program to use the credits earned under the program to import items duty free. This prohibition applied to Tata International regardless of whether it sought to import items directly or on behalf of Tata. Furthermore, record evidence indicates that Tata International was not permitted to import items duty free under the program and transfer them to Tata. Tata provided the Department with documentation of its court case against the GOI in which it requested to be allowed to use Tata International's export credits for its products. The document Tata submitted indicates that its request to the court was denied. Thus, unlike the DEPS program, we find that Tata and Tata International never earned any TPS credits that they could have possibly used for the importation of goods to make steel. We note that our finding in this circumstance (*i.e.*, that respondent was prevented under the program to avail itself of subsidy benefits) is markedly different than the issue of whether or how a firm may have used a subsidy benefit under a given program and, therefore, is distinct from the issue described under 19 CFR 351.503(c). On this basis, we find that Tata could not use the program during the POR. We will continue to examine this program, and any useable credits that Tata may have subsequently earned, however, in any future administrative review of Tata.

Comment 31: Whether the SDF Constitutes a Financial Contribution

Tata contends that the money it contributed into the SDF was controlled through a Joint Planning Committee (JPC) consisting of representatives from four steel companies, namely Tata, SAIL, IISCO and RINL. Tata explains that in 1978, the JPC decided to set up the SDF with contributions from member steel plants. According to Tata, a portion of the price per ton of steel sold was to be given as a contribution towards the SDF by the members. Tata states that member plants were accordingly authorized to add an element towards the SDF in their prices and that the portion of the price to be given to the SDF as a contribution was known as the SDF levy. Tata contends this contribution made by member steel plants was a contribution, not a tax or levy.

Tata notes that since the Department last reviewed this program, all of the other members of the SDF have opted out of the program and only Tata's funds are locked in the SDF. Tata claims that there are no new SDF levies. Tata explains that, as noted in its verification report, it had contributed Rs. 6.120 billion into the SDF while the loans availed by Tata from the SDF amounted to only Rs. 4.792 billion. Thus, according to Tata, it is accessing funds that the company itself has contributed. Moreover, Tata claims that it has never been entitled to any interest on the contributions made but has always been liable for interest on the loans taken from the SDF.

Tata further argues that the Indian Courts have ruled that the SDF funds are controlled by Tata itself. According to Tata, the GOI's Ministry of Finance took the view that there was nothing comprising an SDF levy and that the SDF funds were only a part of the price charged by the steel plants to their customers. Tata claims that the Ministry of Finance took the position that

the steel companies should pay central excise duty on the full price including the SDF levy portion. Tata claims the Supreme Court of India affirmed the finding of the Indian lower court:

. . . in any event, a plain reading of the notification makes it clear that what has been added is an 'element of price'. Neither JPC nor the SPC could have made any compulsory exaction from the purchaser . . . Thus what was being added was to the price. Another aspect to be kept in mind is ultimate beneficiaries of these amounts are the steel plants themselves." See Tata Iron & Steel Co. Ltd. V. Collector of Central Excise, Jamshedpur, 146 E.L.T. 3 Supreme Court of India, (Oct. 24, 2002) (Tata Iron & Steel Co.).

Tata contends that the Courts' findings constitute new evidence that the Department has not previously considered. Tata argues that the new evidence demonstrates that SDF loans do confer any countervailable benefits upon Tata.

Tata concludes that all funds remaining in the SDF are Tata's money. The fund was not created out of public funds and the total loans granted are less than the contributions made. Further, Tata claims that it has lost money on the program as it did not earn any interest on its contributions to the fund but has had to pay interest on the loans taken from the fund.

Petitioners note that in the initial investigation, the Department rejected an argument made by the respondents that levies on purchases of steel that were subsequently used to fund the SDF program "represented the integrated steel producers' own money and, thus, cannot constitute a government financial contribution." See HRC Investigation Decision Memorandum at Comment 1. Rather, petitioners maintain that in Final Determination of HRC Investigation the Department found that "steel consumers were compelled by the GOI to pay a levy, the proceeds of which were channeled back to a select group of steel producers." Id. Thus, petitioners argue that the Department previously determined that the SDF levies were not the "steel producers' own funds" but rather something that was "analogous to tax revenues collected from consumers" that could be countervailed by the Department. Id.

Petitioners further argue that in Tata Iron & Steel Co., the Supreme Court of India was faced with the question of whether the levies used to fund the SDF program were taxes for purposes of India's domestic tax law – the Central Excises and Salt Act of 1944. Petitioners explain that in answering the aforementioned question in the negative, the Supreme Court of India held that "{t}he purpose of creating {the SDF was} for the benefit of {the} member steel plants. Such a levy {used to fund the SDF}, even though it may be compulsory{,} can never be {called a} 'tax'."

Petitioners argue that the Supreme Court of India in Tata Iron & Steel Co. never addressed the issue of the ownership of the SDF corpus. Therefore, petitioners argue that Tata's argument that Tata Iron & Steel Co. does not support Tata's contention that it owns the SDF corpus used to make SDF loans.

Petitioners also argue that the Department's decision in the Final Determination of HRC Investigation that the SDF loans were countervailable was not based on whether SDF levies were technically "taxes." Rather, petitioners argue that the Department based its decision on its finding that the compulsory SDF levies were "analogous to tax revenues collected from consumers" See HRC Investigation Decision Memorandum at Comment 1. Petitioners argue that the Supreme Court of India's decision in Tata Iron & Steel Co. does nothing to change the Department's analysis from the initial investigation that the SDF levies were similar to tax

revenues and, therefore, should be countervailed because the respondents do not own the corpus. Petitioners further argue that the Supreme Court of India reaffirmed the fact that the levies were indeed compulsory, which actually supports the Department's tax analogy. Accordingly, petitioners argue the Department should continue to find that the SDF loans received by Tata are countervailable.

Department's Position: We agree with petitioners. In the Final Determination of HRC Investigation the Department determined in that proceeding that the SDF Management Committee is a government body. See HRC Investigation Decision Memorandum at Comment 1. We further determined that, based on information available to the Department at that time, the SDF was financed solely by producer levies and other non-GOI sources. Id.

Accordingly, based on our previous findings we determined in the Preliminary Results that the GOI directed the contribution of funds for the SDF within the meaning of section 771(5)(B) of the Act and that the loans received under the SDF were specific subsidies under section 771(5A)(D)(i) of the Act that constituted a government financial contribution and conferred a benefit under sections 771(5)(D)(i) and 771(5)(E)(ii) of the Act, respectively.

We do not agree with respondent's contention that the SDF levies represented the integrated steel producers' own money and, thus, cannot constitute a government financial contribution. As explained in Final Determination of HRC Investigation, under the SDF program steel consumers were compelled by the GOI to pay a levy, the proceeds of which were channeled back to a select group of steel producers. Thus, rather than constituting the steel producers' own funds, the SDF levies, as noted by petitioners, are analogous to tax revenues collected from consumers as mandated by the GOI. See HRC Investigation Decision Memorandum at Comment 1. Tata has not provided any new information or arguments that warrant a reconsideration of this finding. Tata's arguments regarding the Indian Supreme Court's ruling in Tata Iron & Steel Co., in fact, belie its contention that the SDF levies do not constitute a financial contribution under the Act. As noted by petitioners, in Tata Iron & Steel the Indian Supreme Court reaffirmed the fact that the levies paid by steel consumers were indeed compulsory and were designed to benefit Indian steel producers.

On this basis, we continue to find that the loans provided to Tata under the program are countervailable.

Comment 32: Calculation of the Benefit to Tata under the EPCGS

Tata explains that under the EPCG Program, it paid its customs duty at the rate applicable for imports under the program. It further argues that the rate at which Tata would have had to pay duty absent the EPCG Program is the "Project Rate" specified under Chapter 98 of the Indian Import Tariff. According to Tata, the Project Rate covers all items of machinery, as well as components or raw materials for manufacture of machinery and their components, required for (a) the initial set up of a unit or (b) substantial expansion of an existing unit of a specified industrial plant.

Tata argues that it imported machinery for effecting substantial expansion of its existing facilities and that absent the EPCG program it would have paid the Project Rate specified under the Chapter Heading 9801 and not the individual item rates specified for the machinery concerned in the respective Indian Import Tariff chapters. Therefore, Tata argues that benefits under EPCGS should be based on the differences between the 'Project Rate' and the actual duty

paid under EPCG Program.

Petitioners argue that Tata has provided no evidence that its imports under the EPCG program were required to substantially expand an existing unit of a specified industrial plant so as to qualify for the "Project Rate." Petitioners claim that at one point in its case brief, Tata cites to the GOI's Verification Report as support for its argument. However, according to petitioners, the GOI Verification Report merely states that "most capital goods" have a universal duty rate. See GOI Verification Report at 1 (Public Version). Moreover, according to petitioners many of Tata's EPCG licenses were clearly not for expansion. For example, petitioners claim that some of Tata's EPCG licenses were for the importation of spare parts. See Tata's April 16, 2008 response. Given this evidence, petitioners argue that Tata has failed to show that it qualifies for the Project Rate and, accordingly, the Department should not use the Project Rate in its benefit calculations.

Department's Position: We agree with petitioners. There is no information on the record indicating that Tata's imports of capital goods under the EPCGS were qualified to be imported at a "Project Rate." As a result, we have not adjusted our calculations in the manner suggested by Tata.

Comment 33: Whether the Department Should Revise the Manner in Which It Conducted the "0.5" Percent Test When Calculating the Benefit Attributable to Tata Under the EPCGS

Tata notes that in the Preliminary Results the Department conducted its 0.5 percent test for every EPCG license for which the export obligation has been fulfilled and the GOI had issued formal waiver certificates. Tata claims that under the Department's regulations:

The Secretary will normally allocate (expense) non-recurring benefits provided under a particular subsidy program to the year in which the benefits are received if the total amount approved under the subsidy program is less than 0.5 percent of relevant sales of the firm in question during the year in which the subsidy was approved." See 19 CFR 351.524(b)(2).

Tata argues that in applying the requirement of examining whether the total amount approved under the subsidy program is less than 0.5 percent of the relevant sales, the Department mistakenly examined whether the amount granted under each of the various licenses is less than 0.5 percent of the relevant sales. By doing so, it allocated to the POR all the benefits ultimately available to Tata under the EPCG instead of spreading those benefits, as is its normal practice, over the AUL of the assets.

Petitioners argue that in the Preliminary Results of the last administrative review of this order, the Department made it clear that it applies the 0.5 percent test on a per-license basis. Specifically, the Department stated that:

{f}or one license waived in 2002, we divided the benefit by Essar's export sales for 2002 and found that the benefit was less than 0.5 percent . . . For other waived licenses, we found that the benefit exceeded the 0.5 percent test and we are allocating the benefit pursuant to the methodology described under 19 CFR 351.524(d)(1).

See Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 1512, 1514 (January 10, 2006) (Preliminary Results of 2004 HRC from India) (affirmed in Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 28665 (May 17, 2008), and accompanying Issues and Decision Memorandum. Petitioners maintain that the Department made it clear in the last administrative review that it applies the 0.5 percent test on a per-license basis.

Thus, petitioners contend that the Department did not err in the Preliminary Results in conducting the 0.5 percent test on a per-license basis. Moreover, petitioner contends that Tata has failed to articulate a reason as to why the Department should deviate from its determination in the previous review.

Department's Position: We agree with petitioners. Our approach in the Preliminary Results regarding the application of the 0.5 percent test with regard to the EPCGS is consistent with the Department's practice. See e.g., Preliminary Results of 2004 HRC from India, 71 FR at 1514. Furthermore, because we are analyzing whether the GOI waived Tata's contingent liability under the program on a license-by-license basis, we find it appropriate to conduct the 0.5 percent test on a license-by-license basis.

Comment 34: Attribution of Subsidies Received under the EPCGS

Tata explains that in the Preliminary Results, the Department divided the total benefits that Tata received under the program by Tata's total export sales for the POR. See 73 FR at 1585-1586. Tata argues that EPCG licenses obtained and used by its cold-rolling mill ("CRM") and ferro alloys and minerals divisions ("FAM") divisions should be excluded from the Department's net subsidy calculation in this administrative review because the two divisions are not involved in the manufacture of the subject merchandise. Specifically, Tata claims that CRM manufactures a downstream product and is not used to manufacture subject merchandise. Similarly, it argues that the FAM Division is involved in ferro-alloys and other materials and was not involved in the mining of coal or iron ore and is also not involved in the manufacture of the subject merchandise. Therefore, according to Tata, licenses obtained and used by these divisions should not be included in the Department's net subsidy calculation.

Petitioners contend that Tata has failed to demonstrate that the licenses in question were tied solely to the production of non-subject merchandise so as to be attributable to non-subject merchandise under the applicable regulation – 19 CFR 351.525(b)(5). Petitioners argue that in analyzing the attribution of EPCG licenses, the Department has previously found that the respondent has the burden to show that the licenses in question are tied solely to the production of non-subject merchandise in order for the licenses not to be included in the net subsidy calculation for the subject merchandise. See PET Film from India 2008 Decision Memorandum at Comment 8. Thus, according to petitioners, PET Film from India 2008 stands for the proposition that only capital goods imported under the EPCG program that are used exclusively in the production of non-subject merchandise are omitted from the net subsidy calculation. Here, according to petitioner, Tata failed to fulfill the burden established in PET Film from India 2008 and, therefore, the Department should continue to countervail these licenses in the final results.

Petitioners note that Tata does not claim that the EPCG licenses at issue relate solely to

the production of non-subject merchandise. Rather, petitioners argue that Tata states that the licenses were obtained and used by certain divisions within the company that make non-subject merchandise. Moreover, petitioners argue that an examination of the name and description of the capital goods imported under the licenses in question shows that the products could be used in the production of subject merchandise. Consequently, according to petitioners, Tata has failed to show that these licenses are tied solely to the production of non-subject merchandise and, thus, they argue that the Department should continue to include them in the net subsidy calculation in the final results.

Petitioners argue that if the Department excludes the licenses cited by Tata from the benefit calculation, then the Department should limit the denominator of the net subsidy rate calculation to Tata's total exports of subject merchandise.

Department's Position: We agree with petitioners. In PET Film from India 2008, the Department found that, absent information indicating that an imported item could only be used in the production of non-subject merchandise, the Department would find the duty exemptions provided on the item under the EPCGS to be attributable to all of the respondent firm's export sales. See PET Film from India 2008 Decision Memorandum at Comment 8. Tata has presented no factual evidence on the record of this review to indicate that certain EPCGS licenses were not used or could not be used for the production of subject merchandise. Therefore, we have not revised our calculations for this program in the manner requested by Tata.

Comment 35: The Use of Long-Term Prime Lending Rates as Benchmarks

Tata notes that in the Preliminary Results the Department used the PLRs of long-term loans as reported by the RBI as the benchmark interest rate. According to Tata, the Department should have used long-term loans taken out by Tata, which are on the record of this review. Tata argues that 19 CFR 351.505(a)(1) requires the Department to use as the benchmark commercial loans that the firm could actually obtain on the market.

Petitioners argue that under 19 CFR 351.505(a)(2)(iii), for long-term loans, the Department "will use a loan the terms of which were established during, or immediately before, the year in which the terms of the government provided loan were established." See 19 CFR 351.505(a) (2) (iii). According to petitioners, though the loans that Tata refers to in its case brief were outstanding during the POR, the terms of the loans were not established in the year in which the terms of the government loans for 2005 and 2006 being analyzed were established. Petitioners contend that benchmark loans are to be used pursuant to the Department's regulations. Thus, petitioners argue that the Department should continue to use the PLR long-term rates reported by the RBI for benchmark purposes.

Department's Position: We agree with petitioners. The loans that respondents reference do not meet the Department's criteria enumerated under 19 CFR 351.505(a) (2) (iii). The Department will continue to use the PLR long-term benchmark loan rate as it did in the Preliminary Results. This is consistent with the regulations. When there are no comparable commercial loans that the respondent firm actually obtained, the terms of which were set during either the year under consideration or the preceding year, pursuant to 19 CFR 351.505(a)(3)(ii), we use a national average interest rate as the benchmark. Specifically, in the instant review we used India's long-term PLR, as published by the RBI, as our long-term benchmark interest rate. The use of the

PLR is consistent with the Department's practice in prior Indian proceedings. See, e.g., First Review of HRC from India Decision Memorandum at "Benchmarks for Loans and Discount Rate" section.

Comment 36: Whether the Department Should Countervail Tata's Sales of DFRC Licenses As an Untied Subsidy

Petitioners explain that in the Preliminary Results, the Department found that Tata sold DFRC licenses during the POR but that the Department did not countervail benefits obtained by Tata from its sales of the licenses on the ground that the licenses were attributable to exports of non-subject merchandise. See 73 FR at 1596-1597. Petitioners assert that the Department's approach in the Preliminary Results directly contradicts the approach adopted in Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review: Final Results of Countervailing Duty Administrative Review, 72 FR 6530 (February 12, 2007) (PET Film from India 2007) and accompanying Issues and Decision Memorandum (PET Film from India 2007 Decision Memorandum) at Comment 5. Petitioners explain that in PET Film from India 2007, the respondent argued that the Department should not countervail the proceeds from the sale of DFRC licenses because, in accordance with 19 CFR 351.525(b)(5)(i), the licenses were based on the production of non-subject merchandise. Petitioners claim that in rejecting the respondent's argument, the Department explained that 19 CFR 351.525(b)(5)(i) is wholly inapposite to the attribution of benefits stemming from sales of DFRC licenses. Id. According to petitioners, in PET Film from India 2007, the Department held that the benefit (the proceeds from the sale of the licenses) cannot be tied to the export of any particular product but instead benefits all exports made by the company. Id.

Petitioners argue that facts of the instant review do not support a deviation from the Department's finding in PET Film from India 2007. Yet, in deriving the net subsidy rate, petitioners nonetheless argue that the Department should limit the benefit to the revenue on sales of DFRC licenses that were earned on sales to the United States. Citing to business proprietary information, petitioners describe how the Department should identify the proceeds from sales of DFRC licenses earned against U.S. sales.

They further argue that the Department should limit the denominator of the net subsidy rate to Tata's total export sales to the United States. Petitioners argue that this approach to calculating the net subsidy rate is consistent with the methodology employed in Lined Paper from India and accompanying decision memorandum (Lined Paper from India Decision Memorandum) at Comment 7. According to petitioners, in Lined Paper from India, the Department identified the numerator as the proceeds each respondents realized from sales of DFRC licenses (net of fees) that were earned against U.S. sales. Petitioners further argue that in Lined Paper from India, the Department found that the corresponding denominator was the respondent's total export sales to the United States. Petitioners maintain that the Department's approach in Lined Paper from India stands for the proposition that the Department seeks to calculate net subsidy rates on a basis that is as specific as possible, which in the instant review requires using U.S. sales as the denominator rather than the more general category of all export sales. Id.

Tata argues that the Department correctly concluded that Tata received no countervailable benefit as a result of its sales of DFRC licenses because the licenses were tied to non-subject merchandise. See Preliminary Results 73 FR at 1597. Tata contends that the

Department's confirmed its preliminary finding at verification where, according to Tata, the Department did not find any DFRC licenses earned by Tata during the POR. Tata notes that it sold previously earned DFRC licenses during the POR; however it asserts these licenses were tied to non-subject merchandise.

Tata takes issue with petitioners' reliance on PET Film from India 2007. According to Tata, petitioners take the case to mean that any cash benefit to a company (either in cash or directly convertible to cash), no matter if tied to a non-subject product, results in a countervailable benefit allocable to all products of the company in question. Tata asserts that such a broad reading of PET Film from India 2007 would result in a countervailable benefit allocable to all products of the company in question and thus render the attribution regulations under 19 CFR 351.525 nugatory. Tata further argues that such an interpretation would lead to the absurd result that even where a benefit is tied directly to the subject merchandise, it would have to be attributed to all of a respondent's exports. Tata argues such an interpretation could not have been the Department's intent in PET Film from India 2007.

Tata argues that even if its sales of DFRC licenses during the POR were found countervailable, petitioners' methodology for deriving the benefit is mathematically erroneous and cannot be used. Tata explains that petitioners estimate the benefit under the program by summing all of the figures listed in U.S. dollars in the "Premium" field in Exhibit 54 of Tata's November 27, 2008 questionnaire response. According to Tata, petitioners' approach assumes incorrectly that every sale denominated in U.S. dollars necessarily was a sale to the United States. But, argues Tata, as the Department has verified, Tata routinely makes sales denominated in U.S. dollars to many different countries. Tata argues that since a U.S. dollar sale price does not mean that the products were actually sold to the United States, the figure petitioners used as their numerator does not accurately reflect the value of the sale of DFRC licenses based on exports to the United States.

In addition, Tata argues that there is no indication on the record as to which, if any, of the licenses sold during the POR were actually earned on a sale to the United States. Thus, Tata maintains the only correct calculation would be to equate the numerator as the total value of DFRC licenses sold in the POR, instead of using the arbitrary and demonstrably wrong figure based solely on the currency of the sale. Tata further argues that the numerator (*i.e.*, one equal to the total value of DFRC licenses sold in the POR) should then be divided by Tata's total export sales during the POR to arrive at the net subsidy rate.

Department's Position: We agree with petitioners in part. The DFRC license rights that Tata sold were approved for the duty-free importation of goods used to produce non-subject merchandise. However, Tata did not use these licenses to import such items during the POR. Rather, Tata sold the licenses during the POR. Thus, as explained in PET Film from India 2007, the benefit at issue is not the exemption on items used to produce non-subject merchandise. Rather, we find that the benefit in this instance is the revenue that Tata earned on its sale of the DFRC licenses. Because Tata was eligible to receive the DFRC licenses based on its status as an exporter, we find that DFRC licenses are export specific under section 771(5A)(B) of the Act and, therefore, are attributable to Tata's total export sales. See PET Film from India 2007 Decision Memorandum at Comment 5. Given this finding, we are not, as petitioners request, attributing Tata's sales of DFRC licenses solely to Tata's export sales to the United States.

On this basis, we have calculated a countervailable benefit based on Tata's sales of DFRC licenses during the POR. We have divided this benefit by Tata's total export sales during

the POR. See Tata's final calculations.

Comments Regarding JSW

Comment 37: Whether the Department Unlawfully Used AFA Rate for JSW

JSW argues that the AFA rate of 505.20 percent preliminarily calculated by the Department is unlawful and beyond punitive. JSW maintains that it did the best it could to cooperate with the Department during the review, but the demands for information that the Department placed on it were far greater than the company's ability to comply given its limited resources. JSW states that the Department requires far more of a respondent than other national investigating authorities and far more than JSW, which initially was an unrepresented respondent, was in a position to furnish, especially given that the company was also simultaneously participating in U.S. antidumping and sunset reviews. JSW argues, therefore, that a facts available final determination may be appropriate, but a punitive adverse facts available final determination is not.

JSW discusses that the purpose of AFA is to "provide respondents with incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." See F.Li de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (Cecco v. United States). JSW asserts that in spite of the Court's ruling in Cecco v. United States, which stated that Congress did not give Commerce the power to "select unreasonably high rates with no relationship to the respondent's actual ... margin," the Department, at the Preliminary Results, did just that by selecting the highest industry-wide rate calculated in a prior administrative review (i.e., 16.63 percent ad valorem calculated for the EPCGS). JSW adds that according to the Court in Cecco v. United States, Congress required corroboration in order to ensure that rates were "reasonable and have some basis in reality." Id. at 1033.

To illustrate the unreasonableness of the AFA rate, JSW discusses how the Department preliminarily attributed to it alleged subsidies given to its affiliated company, VMPL, a producer of iron ore that supplies 22 percent of JSW's iron ore needs. Specifically, the Department found that subsidies allegedly paid to VMPL conferred a benefit on JSW equal to 287.53 percent (which is over half of the total 505.20 percent subsidy ascribed to JSW) by applying the 16.63 percent rate to each sub-part of a domestic subsidy program and other alleged programs. Using information from its 2006-2007 financial statement, JSW contends that, if the Department were to assume that JSW paid nothing for the iron ore supplied by VMPL, that assumption yields a margin of just 1.58 percent ad valorem.¹⁹

JSW argues that if a facts available margin is to be taken from another proceeding, the statute requires that it be selected and applied in a way that fits the facts of the proceeding in which it is used. JSW further argues and discusses that the Court has held that the purpose of "corroboration" is to arrive at a margin that is reasonably related to the actual rate that would likely have been found if the producer in question had cooperated, albeit with a premium for deterrence purposes. See, e.g., Shandong Huarong Gen. Group Corp. v. United States, where the Court remanded a 139.31 percent dumping margin as aberrational and not probative of what the companies' actual rate would likely have been had they cooperation with the investigation (No. 01-00858, CIT, 2004).

¹⁹ See JSW's case brief at 3-4.

JSW asserts that the Department, however, did not act consistently with the law governing AFA determinations when, in the Preliminary Results, it blindly applied a CVD rate found in a prior review to the programs alleged against JSW and VMPL. JSW argues there is no rational basis to conclude that subsidies allegedly associated with the provision of iron ore, electricity, water, land, or other inputs used by JSW in the production of hot-rolled carbon steel flat products sold on the domestic and export markets each confer a benefit equal to 16.63 percent of the value of the hot-rolled sheet simply because the Department has elsewhere found that a different type of subsidy paid on the export of hot-rolled sheet was equal to 16.63 percent of the value of the exports at issue.

JSW posits that the Department is permitted to use as an AFA rate a high rate assigned in an earlier proceeding, but only if it can justify the use of that rate by reference to substantial evidence and demonstrate its reasonableness in application to the actual facts. JSW discusses that in Shandong Huarong Mach. Co. v. United States, where the CIT remanded the 139.31 percent rate, the Court stated “by merely selecting a rate from a previous review, Commerce has not provided the court with sufficient factual findings justifying” the rate. See Shandong Huarong Mach. Co. v. United States, 435 F. Supp. 2d 1261, 1274-75 (CIT, 2006). JSW argues that in the instant review the Department has again failed to provide sufficient factual findings to justify the use of the 16.63 percent rate.

JSW asserts that if, for the final results, the Department determines to use an AFA rate and sources that rate from another proceeding, it should use a rate that reasonably approximates the actual subsidies in the instant review. JSW discusses that in Wire Strand from India, the Department, in choosing the AFA rate, focused on the specific programs at issue and determined the AFA rates by reference to the highest rate found for the particular program in the “most recently completed” Indian investigation preferably involving steel exports when possible and did not blindly select the highest company-specific rate for any industry-wide program in any review in the proceeding. See Final Affirmative Countervailing Duty Determination: Prestressed Concrete Steel Wire Strand from India, 68 FR 68356 (December 8, 2003) (Wire Strand from India) and accompanying Issues and Decision Memorandum. JSW further adds that in Wire Strand from India, for programs that had not been found to be used in other Indian investigations, the Department applied the 2.0 percent de minimis rate for developing countries.

Petitioners describe JSW’s claims that the company “did the best it could” to cooperate with the Department’s requests for information and that the Department’s AFA rate is “punitive” and does not “bear a reasonable relationship to reality” as baseless. Contrary to JSW’s assertions, petitioners declare that JSW is not a small company with limited resources, but a large, sophisticated firm, which had total revenue of over \$1.4 billion for fiscal year 2005–2006.²⁰ Petitioners also state that the Department’s treatment of JSW was anything but unfair.

Petitioners underscore that JSW, and only JSW, requested both the instant CVD administrative review and the companion AD review. Petitioners add that during the time leading up to the Preliminary Results, when JSW was acting pro se, the Department was in regular communication with JSW officials and made efforts to assist the company. For example, petitioners note that Commerce officials spoke with JSW officials on November 14, 2007, to discuss the company’s response to the supplemental questionnaire on the new subsidy allegations. Petitioners explain that in the phone conversation the JSW official stated that providing the requested information was “a challenge” since “individuals with knowledge of the

²⁰ See Petitioners’ Rebuttal Brief (May 1, 2008) at 2.

programs no longer work for the company and the information requested dates back 12 to 15 years.” See Memorandum to the File regarding Telephone Call to JSW Steel Limited (November 14, 2007). Petitioners discuss that the Department officials, subsequent to that telephone conversation, reminded JSW in writing that if it was “unable to provide some of the information requested . . . to explain in detail the steps/procedures you took to attempt to locate that information.” See Memorandum to the File regarding Emails Sent to JSW Steel Limited (November 21, 2007). Petitioners further note that the Department also reminded JSW of the due date of the response and the need to file a letter requesting an extension if one was necessary. Id. Notwithstanding the Department’s assistance, petitioners explain that JSW did not provide any response to the Department’s supplemental new subsidies questionnaire.

Petitioners assert that given JSW’s failure to cooperate by not acting to the best of its ability to comply with a request for information, the Department is correct in using an adverse inference in selecting among the facts otherwise available. Petitioners note that the Federal Circuit has held that the “statutory mandate that a respondent act to ‘the best of its ability’ requires the respondent to do the maximum it is able to do.” See Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Petitioners add that affirmative evidence of bad faith on the part of the respondent is not required before the Department may apply adverse facts. See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27340 (May 19, 1997) (Final Rule). Petitioners argue that when applying this standard to the instant review, it is clear that JSW failed to act to the best of its ability by simply choosing to not respond to the questionnaire. Petitioners add that at no time did JSW advise the Department as to the steps that it took, if any, to obtain and produce the required information or request an extension of time to submit a response.

Petitioners further rebut JSW’s claim that the Department issued a steady stream of supplemental questionnaires. Petitioners argue that the Department properly and lawfully issued supplemental questionnaires to provide JSW with the opportunity to correct deficient responses and to request the information necessary to ensure the most accurate results in the proceeding. See 19 U.S.C. § 1677m(d) (2000). Petitioners add that JSW was not besieged with multiple questionnaires, receiving just one supplemental questionnaire for the new subsidies allegations. Petitioners argue that if JSW felt it needed assistance with the Department’s request for information and the review was too demanding, then JSW should have asked the Department for assistance or hired counsel prior to issuance of the Preliminary Results. Petitioners assert that the Department did not, as JSW argues, place demands on the company that were far greater than JSW’s ability to comply, given the Department’s efforts to assist the company and JSW’s extensive resources.

Petitioners argue that because JSW failed to do the minimum in this review, the Department is correct to apply adverse facts available and, contrary to JSW’s arguments, the AFA rate calculated is neither improper nor punitive. Petitioners comment that the Federal Circuit has recognized that the “discretion granted by the statute appears to be particularly great, allowing {the Department} to select among an enumeration of secondary sources as a basis for its adverse factual inferences.” See F.Li de Cecco di Flilippo v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (citing 19 U.S.C. § 1677e(b) (2000)) (emphasis added). Petitioners observe that there is scant information about the new subsidies on the record of the review because of JSW’s reporting failures. In addition, petitioners note that the new subsidies allegations did not contain estimated duty rates and the Department had no experience with these subsidies from prior investigations or reviews. Therefore, petitioners assert the Department was

correct to select the highest calculated subsidy rate for an industry-wide program (i.e., EPCGS) from a prior segment of the proceeding.

Petitioners further argue that the Department's rate selection was not improper because it fails to distinguish between the type of program at issue (i.e., whether the program is an export or production/input subsidy). Petitioners posit that JSW's argument ignores the fact that JSW itself, and its affiliated supplier VMPL, the GOI, and the SGOK each failed to provide the requested information on the new subsidies. As a result, the record is void of information on the eligibility criteria for the programs under review and, therefore, petitioner stresses that the Department does not know whether exports were, or were not, a condition for the subsidies. Petitioners, thus, assert that, where the Department has no basis upon which to determine the types of programs involved, the Department has no choice but to use the highest program rate from a previous segment of the proceeding.

Petitioners add that the Department did distinguish between programs where it was able to do so and used available information to determine program rates, such as with respect to JSW's and VMPL's tax incentives and VAT refunds under the SGOK's New Industrial Policy and Package of Incentives and Concessions of 1993 (1993 KIP).

Department's Position: Section 776(a) of the Act states that the Department will apply facts available in reaching a determination if:

- (1) necessary information is not available on the record, or
- (2) an interested party or any other person
 - (A) withholds information that has been requested by the administering authority or the Commission under this title,
 - (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
 - (C) significantly impedes a proceeding under this title, or
 - (D) provides such information but the information cannot be verified as provided in section 782(i).

Section 776(b) of the Act provides that the Department may use an adverse inference (i.e., AFA) in selecting from the facts otherwise available if it finds that an interested party has failed to cooperate to the best of its ability.

In the instant administrative review, although JSW requested to be reviewed by the Department,²¹ the company, after participating in the proceeding for eleven months, stopped cooperating with the Department by not responding to the November 8, 2007, supplemental questionnaire on the new subsidy allegations. JSW, therefore, failed to provide information requested by the Department in order to accurately and fully analyze the receipt of benefits under the new alleged programs.

Knowing that JSW was a *pro se* respondent, the Department frequently communicated with the company about the information needed by the Department to conduct the review and the deadlines for the submission of that data and always provided JSW with extensions to respond to

²¹ See JSW's December 29, 2006 letter requesting a review for the period January 1, 2006 through December 31, 2006.

questionnaires when requested by the company.²² However, JSW chose to neither submit a response explaining difficulties it encountered when seeking the requested information nor request an extension to respond to the new subsidies supplemental questionnaire. JSW simply stopped communicating with the Department.

Because JSW failed to provide the information requested in the Department's supplemental questionnaire by the established deadline, the Department does not have the necessary information on the record to determine the extent to which JSW benefitted from certain programs within the meaning of section 771(5)(E) of the Act. Therefore, the Department must base its determination on facts otherwise available in accordance with section 776(a)(2)(B) of the Act. Furthermore, we determine that by failing to respond to the Department's supplemental questionnaire by the established deadline, JSW has failed to cooperate to the best of its ability and, thus, pursuant to section 776(b) of the Act, the use of adverse inferences in applying the facts otherwise available is warranted. We separately find that because the GOI failed to submit a response to the new subsidies questionnaire pertaining to JSW, that consistent with section 776(a)(2)(B) of the Act, the GOI did not act to the best of its ability and, therefore, use of adverse inference in selecting from among the facts otherwise available is warranted. Accordingly, pursuant to section 776(b) of the Act, we find that all newly alleged subsidy programs used by JSW constitute financial contributions and are specific pursuant to sections 771(5)(D) and 771(5A) of the Act, respectively.²³ See "Adverse Facts Available" section above for more discussion of these findings.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. At the Preliminary Determination, for those programs for which the Department determined an AFA rate was applicable, we selected the rate of 16.63 percent ad valorem that was calculated for the Export Promotion Capital Goods Scheme (EPCGS) in the underlying investigation. This EPCGS rate is the highest program rate

²² See Department's March 27, 2007, letter to JSW in which the company was instructed to correct deficiencies in its initial questionnaire response and an extension to respond to the questionnaire was granted; Department's October 2, 2007, letter granting to JSW an extension to respond to the September 18, 2007, supplemental questionnaire; Department's October 18, 2007, letter granting to JSW an extension to respond to the September 27, 2007, new subsidies allegations questionnaire; Department's November 8, 2007, letter granting to JSW an extension to respond to the November 1, 2007, supplemental questionnaire; November 13, 2007, Memorandum to the File regarding Release of Supplemental Questionnaire to JSW (where the Department memorialized that the November 8, 2007, new subsidies questionnaire was faxed, emailed, and sent via Federal Express to JSW); November 14, 2007, Memorandum to the File regarding Telephone Call to JSW (where Department officials spoke with a JSW official about the information requested in the supplemental questionnaires); November 21, 2007, Memorandum to the File concerning Emails Sent to JSW (where, in emails, we reminded JSW that if additional time was needed to respond to the November 8, 2007, new subsidies supplemental questionnaire then the company would have to submit an extension request letter and we provided guidance to JSW on responding to that supplemental questionnaire); and January 9, 2008, Memorandum to the File concerning Release of Notice of Preliminary Results and Preliminary Calculations to JSW (where we instructed JSW on the procedure for filing comments with the Department). All of these documents are public documents available in the CRU.

²³ Because the programs at issue are new and because the GOI failed to provide any information on how the alleged programs operate, in applying adverse inferences, we are unable to reference any sub-paragraphs under section 771(5)(D) and 771(5A) of the Act.

calculated within any segment of this proceeding. See HRC Investigation Decision Memorandum at “Export Promotion of Capital Goods Scheme.”

However, since the Preliminary Determination, the Department has reconsidered its methodology for selecting AFA rates. For purposes of these final results, the Department has selected, as AFA, the highest calculated rate for the same or similar type of program in any segment of this proceeding.²⁴ This approach of selecting AFA rates from segments of this proceeding is particular to this segment only. In any future administrative reviews of this order, the Department will consider if it is appropriate to select an AFA rate for the same or similar type of program from another Indian CVD proceeding.

Where there is no identical or comparable program AFA match within a segment of this proceeding, it is the Department’s practice to apply the highest calculated subsidy rate for any program otherwise listed in any India CVD proceeding, unless it is clear that the industry in which the respondent operates cannot use the product for which these rates were calculated. See, e.g., Wire Strand from India, and accompanying Issues and Decision Memorandum at “Use of Facts Available;” CVP-23 from India, and accompanying Issues and Decision Memorandum at “Use of Adverse Facts Available;” Pistachios from Iran, and accompanying Issues and Decision Memorandum at “Analysis of Programs” and Comment 1; CFS China Final, and accompanying Issues and Decision Memorandum at “Use of Adverse Facts Available;” CWP China Final, and accompanying Issues and Decision Memorandum at “Use of Adverse Facts Available;” Light-Walled from China Final, and accompanying Issues and Decision Memorandum at “Use of Adverse Facts Available;” and Sacks China Final, and accompanying Issues and Decision Memorandum at “Application of Facts Available and Use of Adverse Inferences.”

The Department’s practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse “as to effectuate the purpose of the facts available role to induce respondents to provide the Department with complete and accurate information in a timely manner.” See Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8932 (February 23, 1998). The Department’s practice also ensures “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See Statement of Administrative Action (SAA) at 870. In choosing the appropriate balance between providing a respondent with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent’s prior commercial activity, selecting the highest prior margin “reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less.” See Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185, 1190 (Fed. Cir. 1990).

Because JSW failed to act to the best of its ability in this review, for each new subsidies program examined, we made the adverse inference that JSW benefitted from that program. We, therefore, have applied, where available, the highest subsidy rate calculated for the same or a similar program in any segment of this proceeding. Absent a subsidy rate calculated for the same or similar program, we are applying the highest calculated subsidy rate for any program otherwise listed in an India CVD proceeding.

²⁴ The Department’s first preference is to use the highest calculated rate for the same program (i.e., identical program); if there is no identical program, then the Department’s preference is to use the highest calculated rate for a similar program (e.g., tax program to tax program, loan program to loan program, etc.).

For a discussion of the AFA rates applied in this review for JSW, see “SGOK’s New Industrial Policy and Package of Incentives and Concessions of 1993,” sections above and Memorandum to the File concerning Final Results Calculation for JSW, dated July 7, 2008.²⁵

Regarding Wire Strand from India, in which a 2.0 percent rate was assigned as the AFA rate to programs that had not been found to be used in other Indian investigations, we note that it was the only instance in which the Department took such an approach. As indicated above, the Department has modified its approach since the issuance Wire Strand from India. Therefore, the approach taken in Wire Strand from India does not reflect the Department’s current practice concerning the selection and application of adverse facts available rates.

Contrary to JSW’s statements, we do not know whether the new subsidy programs for which we are assigning AFA rates, in this review, are domestic or export subsidies. No information has been placed on the record by either the GOI or JSW concerning the eligibility criteria for the assistance provided under the 1993 KIP, the SGOK’s New Industrial Policy and Package of Incentives and Concessions of 1996, 2001, and 2006, and the SGOK “Other Subsidies.” The information that JSW submitted to the Department about these programs is limited, ambiguous, and required the Department to issue a supplemental questionnaire seeking additional and clarifying information to which JSW did not respond. As noted above, the GOI did not respond to the Department’s new subsidies allegations concerning JSW. As such, there is no evidence to demonstrate whether eligibility for assistance under the new subsidy programs is or is not contingent upon export performance.

In addition, JSW comments that VMPL supplied just 22 percent²⁶ of JSW’s iron ore needs for the period April 1, 2006, through March 31, 2007, and, therefore, it is punitive for the Department to find that subsidies allegedly received by VMPL conferred a benefit on JSW equal to 287.53 percent. As an initial matter, VMPL, majority-owned by JSW, and a supplier of iron ore to JSW’s production of subject merchandise had a responsibility to participate in the review. As stated in the February 2, 2007, initial questionnaire at section three under “Affiliated Companies,” the Department told JSW “you must provide a complete questionnaire response for those affiliates where cross-ownership exists and the affiliate supplies an input product to you that is primarily dedicated to the production of the subject merchandise.” VMPL, however, did not respond to the Department’s questionnaire on the new subsidies allegations and, therefore, did not cooperate to the best of its ability. As such the use of adverse facts available with regard to the new subsidy programs for VMPL is warranted.

Moreover, we are finding VMPL to be cross owned with JSW, pursuant to 19 CFR 351.525(b)(6). Subsidy benefits received by either entity, regardless of the type of subsidy, can be attributable to both entities. The percentage of its iron ore that JSW sources from VMPL is therefore not necessarily relevant. Further, even if it were relevant, there is no verified information on the record of this review regarding VMPL’s supply of iron ore to JSW during the POR (i.e., calendar year 2006). Also, the information on the supply of iron ore from VMPL is contained in JSW’s financial statement which covers a time period different than this review period. As such, there is no way to know the quantity of iron ore that VMPL supplied to JSW during the POR. Furthermore, it is incorrect to assume that the extent of any and all subsidies received by VMPL was the provision of free iron ore supplied to JSW. As discussed above, the

²⁵ A public version of this memorandum is available on the public record in the CRU.

²⁶ See JSW’s case brief at 3.

1993 KIP is an industrial policy with many assistance sub-programs. It is quite possible that under the 1993 KIP or other SGOK industrial policy, VMPL received subsidized land, facilities, infrastructure, financing, etc. Without a complete questionnaire response from VMPL, it is not possible for the Department to know the countervailable subsidies provided to VMPL and how best to measure those subsidies and, therefore, absent a response, the use of adverse facts available is warranted.

Comment 38: Whether Assistance Under the 1993 KIP Is Countervailable

JSW argues that the Department misunderstands the SGOK order, dated October 11, 1994, which relates to the construction of the company's integrated steel plant and, therefore, erred in finding the sub-schemes under the 1993 KIP to be countervailable. JSW states that the Department relies on minutes of a meeting held between the promoters of JSW and the SGOK, where the requirements as desired by the promoters were listed. On several of the requirements, the SGOK stated that it would attempt to provide facilities or would request the GOI to do so. For example, JSW stated that the company sought captive iron ore mines, however, no such mine was granted.

JSW claims that the Department ignores other material facts in the SGOK order. For example, JSW states that the provision of land was on a "lease cum-sale basis" for an initial period of 10 years, after which the sales deed was to be executed in favor of JSW. JSW claims it was to bear all the costs incurred in transfer of the property, annual maintenance, fencing/security, etc. Regarding the provision of water to the plant, JSW states that the SGOK order shows that the company had to bear all the costs for receiving water, such as laying the water supply pipelines and service. Thus, JSW argues, the Department cannot conclude that the SGOK provided any financial contribution to JSW.

Petitioners disagree with JSW's attempts to have the Department rely on information that it placed on the record in its initial new subsidies questionnaire response (e.g., the SGOK order). Petitioners first note that, throughout its arguments, JSW refers to "facts," which indicate that the SGOK did not provide countervailable subsidies to it and its affiliated supplier, VMPL, but fails to provide any citation to evidence on the record. Petitioners next argue that such information submitted in the initial new subsidies questionnaire response was not sufficient for the Department to conduct its analysis of the assistance provided under the 1993 KIP. Petitioners discuss that JSW's initial response caused the Department to issue the supplemental new subsidies questionnaire requesting additional information concerning the nature and extent of the sub-programs outlined in the SGOK order. For example, petitioners note that with regard to the provision of land under the SGOK order, the Department asked two pages of questions designed to determine whether JSW received land at less than adequate remuneration. Petitioners further note that the Department asked questions about the provision of electricity and water, captive mining rights as well as other types of assistance outlined in the SGOK order. However, petitioners explain that JSW failed to respond to the questions thereby denying the Department the information necessary to conduct the review. Petitioners, therefore, argue that the Department's adverse facts available determination is appropriate and warranted.

Department's Position: JSW's November 1, 2007, response to the September 27, 2007 new subsidies questionnaire was incomplete and not sufficient for the Department to conduct its analysis of the assistance provided to JSW under the 1993 KIP. In its response, JSW provided a

copy of “Government Order No. CI 29 SOI 94” dated October 11, 1994 (i.e., the SGOK order), which outlines infrastructural assistance and facilities, incentives, and concessions to JSW by the state government of Karnataka for construction of an integrated steel plant. See JSW’s November 1, 2007, new subsidies allegations questionnaire response at Annexure A.

JSW did not provide any explanation of the various types of assistance discussed in the SGOK order and the extent to which the company received assistance from the government. The Department, therefore, issued a supplemental questionnaire on November 8, 2007, seeking additional and clarifying information on the specific assistance received by JSW. For example, in that supplemental questionnaire, we asked JSW to explain the arrangements by which the company was allotted land from the state government for the steel plant and to report whether the company purchased the land at the expiration of the 10-year lease. We also asked JSW to explain any assistance it received from the SGOK for water, power, infrastructure, raw material inputs, and training facilities related to the operation of the steel plant. See the Department’s November 8, 2007, supplemental questionnaire on new subsidies. JSW, however, failed to submit a response to that supplemental questionnaire.

Moreover, the GOI/SGOK failed to provide information requested by the Department on the 1993 KIP (see “Adverse Facts Available” section above). Specifically, the GOI/SGOK failed to submit a response to the September 27, 2007, new subsidies questionnaire pertaining to JSW. As such, pursuant to section 776(b) of the Act, the Department determines that all newly alleged subsidy programs used by JSW constitute financial contributions and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. Further, because the GOI/SGOK failed to cooperate to the best of their ability in this review, we find that an adverse facts available determination is appropriate and warranted with respect to the countervailability of the 1993 KIP. The Department’s decision to rely on adverse inferences when lacking a response from a foreign government is in accordance with its practice. See, e.g., CTL Plate from Korea, 71 FR 11397, 11399, 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 the sections 771(5)(D)(i) and 771(5A)(D)(iii) of the Act, respectively.

Concerning benefit, the Department finds that any newly alleged subsidy program used by JSW is countervailable to the extent that the programs conferred a benefit during the POR within the meaning of section 771(5)(E) of the Act. Because JSW failed to provide information requested by the Department on the 1993 KIP, we have applied an AFA rate to each of the sub-programs of the 1993 KIP, except where JSW submitted sufficient data on use of a sub-program and we were able to calculate the benefit that was conferred on the company during the POR (i.e., Tax Incentives and VAT Refunds sub-programs).

Comment 39: Whether JSW Purchased High Grade Iron Ore for Less Than Adequate Remuneration

JSW argues that the GOI, through the NMDC, does not provide high-grade iron ore to steel producers for less than adequate remuneration. JSW asserts that the NMDC provides minerals to it and other consumers at market-determined prices and, therefore, there is no financial contribution or benefit.

Despite a lack of financial contribution and benefit, JSW argues that the Department nevertheless drew adverse inferences to conclude that JSW was given iron ore for free because

the company did not submit complete responses to the questions regarding purchases of iron ore from NMDC. JSW states that its accounts and audited financial statements, which were verified in the companion AD case, disprove the Department's conclusion. JSW argues, however, that if the Department continues to deem this a subsidy, it is wrong to assume that JSW received the iron ore for free. JSW posits that, at worst, the Department should assign to JSW the highest company-specific rate (which was 6.11 percent ad valorem preliminarily calculated for Essar) and not the AFA rate of 9.01 percent ad valorem that was assigned in the Preliminary Results.

Petitioners state that in a prior review the Department found that the GOI, through the NMDC, provides high-grade iron ore for less than adequate remuneration. See Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 28665 (May 17, 2006) (Second Review of HRC from India) and accompanying Issues and Decision Memorandum (Second Review of HRC from India Decision Memorandum) at "Sale of High-Grade Iron Ore for Less Than Adequate Remuneration". Petitioners observe that JSW has provided no new information to warrant a reconsideration of the Department's finding.

Concerning the AFA rate, petitioners remark that JSW had the burden of providing information on the prices it paid for iron ore from the NMDC, but failed to do so. Petitioners note that despite JSW's claims that its "accounts and audited financial statements" show it purchased iron ore at some cost, the company failed to provide a citation to record evidence in this review to support its assertion, or to identify the purchase price of the iron ore from the record evidence. Petitioners add that JSW cannot ask the Department to rely on facts verified in the companion AD review, but not on the record of this CVD review. Petitioners further add that the Department cannot assign the same rate to JSW as it did Essar, when JSW failed to cooperate to the best of its ability and Essar's rate is based on the price that the company actually paid. Therefore, petitioners assert that because JSW failed to provide the information requested about its purchases of high-grade iron ore during this instant review, the use of adverse facts available is warranted.

Department's Position: As an initial matter, in a prior segment of this proceeding the Department found the Sale of High-Grade Iron Ore for Less Than Adequate Remuneration program to be countervailable. See Second Review of HRC from India Decision Memorandum at "Sale of High-Grade Iron Ore for Less Than Adequate Remuneration." Neither the GOI nor JSW have presented new information to warrant a reconsideration of the Department's finding. It is the Department's long-standing policy to not reconsider the countervailability of a previously examined program absent new information to warrant reconsideration of the finding. See, e.g., Pure and Alloy Magnesium from Canada: Final Results of the Fifth (1996) Countervailing Duty Reviews, 63 FR 45045-46 (August 24, 1998) (Pure and Alloy Magnesium from Canada) and Softwood Lumber First Review.

With regard to iron ore purchase data, the AD review is a different and distinct proceeding that maintains a separate record from the instant CVD review. The Department is limited to making its determinations based upon the record of the segment of the proceeding. Information submitted in another proceeding, such as the AD proceeding, is not part of the record of the instant proceeding and therefore cannot be used by the Department in reaching its determination, unless parties specifically submit such information to the Department in the context of this proceeding. In the instant review, the Department requested that JSW provide information on its purchases of iron ore on three separate occasions (i.e., February 2, 2007, initial

questionnaire, September 18, 2007, supplemental questionnaire, and November 1, 2007, supplemental questionnaire). In its November 19, 2007, supplemental questionnaire response at Table A, JSW reported the quantity of high-grade iron ore fines and lumps that it purchased from NMDC during the POR. JSW did not provide any pricing information. Therefore, as AFA, we find that JSW received the iron ore from NMDC for free during the POR. For information on the calculation of the benefit, see “Sale of High-Grade Iron Ore for Less Than Adequate Remuneration” program analysis above.

Comment 40: Whether Loan Guarantees from the GOI Are Countervailable

JSW argues that the Department erred in construing that GOI shareholdings in nationalized banks (e.g., SBI) are tantamount to government control. As such, JSW asserts that the Department mischaracterized loan guarantees provided to it by government banks on commercial terms as a subsidy.

Petitioners claim that the Department previously determined that loans guaranteed by the GOI or SBI are countervailable subsidies. See HRC Investigation Decision Memorandum at “Loan Guarantees from the GOI.” Petitioners add that JSW presented no information in this review that would warrant the Department to reconsider its finding.

Department’s Position: The Department has previously determined that the GOI or SBI provide countervailable subsidies in the form of loan guarantees to certain companies. See, e.g., HRC from India and Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From India, 64 FR 73131, 73137 (December 29, 1999) (CTL Plate from India). Neither the GOI nor JSW provided new information regarding this program to cause the Department to revisit its finding that loan guarantees from the government are countervailable. As noted above, it is the Department’s long-standing policy to not reconsider the countervailability of a previously examined program absent new information to warrant reconsideration of the finding. See, e.g., Pure and Alloy Magnesium from Canada and Softwood Lumber First Review. Based on record evidence, we continue to find, for these final results, that loan guarantees provided by the GOI are countervailable.

Comment 41: Whether JSW Has Captive Mining Rights

JSW argues that it did not have captive mining rights for iron ore granted by the GOI and, therefore, the Department erred in imposing a countervailing duty for this program. JSW adds that the Department in the companion AD case verified that JSW did not have any captive mining rights. However, if, for the final, the Department maintains that JSW did not act to the best of its ability in answering questions about this program, then the company argues that the Department should assign to it the highest company-specific rate calculated in this review for the program and not the AFA rate of 16.63 percent ad valorem.

In its rebuttal, petitioners state that JSW’s unsupported denial of captive mining rights is not adequate for the Department to establish non-use. Despite supplemental questionnaires seeking additional information about captive mining rights, petitioners contend that JSW failed to provide the requested information and, therefore, petitioners stress the Department appropriately determined to apply adverse facts available for this program. Petitioners add that the Department cannot rely on information verified in the companion antidumping duty case,

which is not on the record of the instant CVD review. Petitioners further add that because JSW failed to cooperate to the best of its ability, the Department cannot apply the highest calculated rate in the Preliminary Results (which was 9.42 percent ad valorem) because that rate is not an adverse facts available rate, but a facts available rate.

Department's Position: As an initial matter, the Department is limited to making its determinations based upon the record of the segment of the proceeding. Information submitted in another proceeding, such as the AD proceeding, is not part of the record of the instant proceeding and therefore cannot be used by the Department in reaching its determination, unless parties specifically submit such information to the Department in the context of this proceeding.

On November 8, 2007, the Department issued a supplemental CVD questionnaire to JSW that requested information on captive mining rights for iron ore. JSW did not respond to that supplemental questionnaire. As such, there is no evidence on the record to support JSW's claims of non-use of captive mining rights for iron ore, a program which the Department finds to be countervailable (see program analysis section above). For these final results, we continue to find that JSW failed to cooperate to the best of its ability in this review and, therefore, the application of an AFA rate for this program is warranted.

As discussed above in "Adverse Facts Available," it is the Department's approach in this administrative review is to apply as the AFA rate the highest subsidy rate calculated for the same or a similar program, where available. In this review, we determine that Tata received countervailable subsidies from the GOI's captive mining rights for iron ore program and calculated a net subsidy rate of 18.08 percent ad valorem for Tata. Tata's rate reflects the highest subsidy rate calculated or this program in any segment of this proceeding. As such, we have assigned to JSW the AFA rate of 18.08 percent ad valorem for the program "Captive Mining of Iron Ore" for these final results.

Comment 42: Whether the EPCGS Is Countervailable

JSW argues that the EPCGS does not confer benefits to exporters, but permits manufacturers to upgrade their equipment through a reduction of customs duties on imports of capital goods subject to the fulfillment of an export obligation. JSW disagrees with the Department's determination that there are two types of benefits under the EPCGS. Specifically, JSW argues that the Department erred in treating the unpaid duty for exporters, who have not met their export obligation as a "contingent liability" or "interest free loan." JSW asserts that while the liability for repayment of the customs duty is contingent upon fulfillment of the export obligation, the failure to complete the export obligation would render the exporter liable to pay the customs duty and the interest amount. Therefore, JSW asserts it cannot be correctly termed an interest free loan.

Petitioners state that the Department has repeatedly determined that the EPCGS is a countervailable subsidy²⁷ and, absent new information, a change in this determination is not warranted. Petitioners observe that JSW has offered no new information about the EPCGS during this review and, therefore, the Department should continue to find the program to be countervailable. Petitioners add that JSW's argument regarding the treatment of the unpaid duty is contrary to the Department's long-standing practice of considering such unpaid duty

²⁷ See, e.g., PET Film from India Decision Memorandum at "Export Promotion Capital Goods Scheme."

concessions to be contingent liabilities and treating them as interest-free loans.²⁸ Petitioners further add that JSW has not provided any information to would lead the Department to change its practice.

Department's Position: The Department has a long history of finding the import duty reductions provided under the EPCGS to be countervailable export subsidies. See, e.g., Final Determination of Lined Paper Investigation Decision Memorandum at "Export Promotion Capital Goods Scheme;" PET Film from India Decision Memorandum at "Export Promotion Capital Goods Scheme;" Final Affirmative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin From India, 70 FR 13460 (March 21, 2005) (PET Resin from India) and accompanying Issues and Decision Memorandum (PET Resin from India Decision Memorandum) at "Export Promotion Capital Goods Scheme," and CTL Plate from India, 64 FR at 73135-36.

No new information has been presented in this review to warrant reconsideration of the Department's finding. As noted above, it is the Department's long-standing policy to not reconsider the countervailability of a previously examined program absent new information to warrant reconsideration of the finding. See, e.g., Pure and Alloy Magnesium from Canada and Softwood Lumber First Review. Therefore, for these final results, we continue to find the EPCGS to be countervailable and unpaid duty concessions to be contingent liabilities, which we are treating as interest-free loans.

Comment 43: Whether DEPS Is Countervailable

JSW argues that the Department erred in finding the input duty exemption earned under the DEPS as a benefit. JSW states that the DEPS enables exporting companies to earn import duty exemptions in the form of passbook credits that can be applied to imported inputs. The DEPS, according to JSW, is based on the concept of neutralization of the incidence of customs duty on the import content on the exported product and, as such, does not confer any subsidy to the exporter. JSW adds that the DEPS scheme is based on actual export shipments and these credits are awarded on the basis of India's Standard Input-Output Norms and that the GOI has in place a system, which is reasonable and effective to confirm which inputs are consumed in the production of the exported products and in what amounts.

Petitioners state that the Department has repeatedly determined that DEPS is a countervailable subsidy²⁹ and, absent new information, a change in this determination is not warranted. Petitioners further add that the Department has also determined that the GOI does not have in place and does not apply a system that is reasonable and effective for the purposes intended to confirm which inputs, and in what amounts, are consumed in the production of the exported products.

Department's Position: The Department has a long history of finding DEPS to be

²⁸See Id., and also CTL Plate from India, 64 FR at 73135-36.

²⁹See, e.g., PET Memo at "Duty Entitlement Passbook Scheme."

countervailable because the GOI provides credits for the future payment of import duties to exporters and there is no system in place that is reasonable and effective for determining what imports are consumed in the production of the exported product and in what amounts. See, e.g., Final Determination of Lined Paper Investigation Decision Memorandum at “Duty Entitlement Passbook Scheme;” PET from India Decision Memorandum at “Duty Entitlement Passbook Scheme;” PET Resin from India Decision Memorandum at “Duty Entitlement Passbook Scheme;” and CTL Plate from India, 64 FR at 73133-34.

No new information has been presented in this review to warrant reconsideration of the Department’s finding. As noted, it is the Department’s long-standing policy to not reconsider the countervailability of a previously examined program absent new information to warrant reconsideration of the finding. See, e.g., Pure and Alloy Magnesium from Canada and Softwood Lumber First Review. Therefore, absent new evidence regarding this program, we continue to find, for these final results, that DEPS is countervailable.

V. 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.

Agree

Disagree

David M. Spooner
Assistant Secretary
for Import Administration

Date