

April 18, 2011

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

FROM: Gary Taverman  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

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

**I. Summary**

We have analyzed the case and rebuttal briefs submitted by interested parties in response to the preliminary results of this review, the post-preliminary analysis, and the verification reports. See Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil: Preliminary Results of Countervailing Duty Administrative Review, 75 FR 64700 (October 20, 2010) (Preliminary Results); see Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Countervailing Duty Administrative Review of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Post-Preliminary Analysis Regarding the Provision of FINEM Loans dated March 3, 2011 (Post-Preliminary Decision); see Memorandum to File, Countervailing Duty Administrative Review of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Verification of the Questionnaire Responses Submitted by Usinas Siderurgicas de Minas Gerais (USIMINAS) and Companhia Siderurgica Paulista (COSIPA) dated March 7, 2011 (Usiminas Verification Report); see also Memorandum to File, Countervailing Duty Administrative Review of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Verification of the Questionnaire Responses Submitted by the Government of Brazil dated March 7, 2011 (GOB Verification Report). Based on our analysis, we have made certain changes to the subsidy calculations. A full discussion of our determinations with respect to the programs under review, as well as the changes to the subsidy calculations are set forth in the “Subsidies Valuation Information,” the “Analysis of Programs,” and “Analysis of Comments” sections below

Comments were submitted by Nucor Corporation (Nucor) (a domestic interested party), and United States Steel Corporation (USS or petitioner), as well as the company respondent, Usinas

Siderurgicas de Minas Gerais and its subsidiary Companhia Siderurgica Paulista (USIMINAS/COSIPA). Below is a complete list of issues raised by interested parties in their case and rebuttal briefs:

- Comment 1: Whether it is Appropriate to Apply Adverse Facts Available to Find the FINEM Loans Countervailable
- Comment 2: Selection of an Appropriate Benchmark for BNDES Loans
- Comment 3: Calculation of FOB Sales Value

We recommend that you approve the positions described in this memorandum.

## **II. Subsidies Valuation Information**

### **Period of Review (POR)**

January 1, 2008, through December 31, 2008.

### **Allocation Period**

Under 19 CFR 351.524(d)(2)(i), the Department will presume the allocation period for non-recurring subsidies to be the average useful life (AUL) prescribed by the Internal Revenue Service (IRS) for renewable physical assets of the industry under consideration (as listed in the IRS's 1977 Class Life Asset Depreciation Range System, and as updated by the Department of the Treasury). This presumption will apply unless a party claims and establishes that these tables do not reasonably reflect the AUL of the renewable physical assets of the company or industry under investigation. Specifically, the party must establish that the difference between the AUL from the tables and the company-specific AUL or country-wide AUL for the industry under investigation is significant, pursuant to 19 CFR 351.524(d)(2)(i) and (ii). For assets used to manufacture steel products such as HRS, the IRS tables prescribe an AUL of 15 years.

USIMINAS/COSIPA did not rebut the presumption that the IRS tables should be used. Therefore, we are using the 15-year AUL as reported in the IRS tables to allocate any non-recurring subsidies under review which were provided directly to the producers and exporters of the subject merchandise. For these final results, we have found that USIMINAS/COSIPA did not receive any non-recurring subsidies that required allocation over time.

### **Cross Ownership**

The Department's regulations state that cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. See 19 CFR 351.525(b)(6)(vi). The regulation specifies that this standard will normally be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. Id. The preamble to the Department's regulations further clarifies

the Department's cross-ownership standard. See Countervailing Duties; Final Rule, 63 FR 65347, 65401 (November 25, 1998) (CVD Preamble). According to the CVD Preamble, relationships captured by the cross-ownership definition include those where the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (including subsidy benefits) of the other corporation in essentially the same way it can use its own assets (including subsidy benefits). Id. The cross-ownership standard does not require one corporation to own 100 percent of the other corporation. In certain circumstances, a large minority voting interest (for example, 40 percent) or a "golden share" may also result in cross-ownership. Id. 63 FR at 65401.

As such, the Department's regulations make it clear that we must examine the facts presented in each case in order to determine whether cross-ownership exists. If we find that cross-ownership exists and if one or more of the relationships identified in 19 CFR 351.525(b)(6) exists, we treat all cross-owned companies, to which at least one of those relationships applies, as one company, and calculate a single rate for any countervailable subsidies that we identify and measure, in accordance with 19 CFR 351.525(b)(6).

Further, in accordance with 19 CFR 351.525(b)(6)(iv), if the Department determines that the suppliers of inputs primarily dedicated to the production of the downstream product are cross-owned with the producers/exporters under investigation, then the Department will treat subsidies provided to the input producers as subsidies attributable to the production of the downstream product.

In the Preliminary Results the Department found USIMINAS and COSIPA were cross-owned during the POR in accordance with 19 CFR 351.525(b)(6)(vi). Further, since both companies produce and export subject merchandise, the Department treated them as a single entity (USIMINAS/COSIPA). In addition, the Department found that cross-ownership exists, as defined by 19 CFR 351.525(b)(6), among and across USIMINAS/COSIPA and the following companies involved in the inventory/processing/distribution of hot-rolled flat-rolled carbon-quality steel products (HRS): Fasal, S.A., Dufer, S.A., and Rio Negro Comercio e Industrial; and the iron-ore supply company, Mineração J. Mendes Ltda. (J. Mendes).<sup>1</sup>

At verification, we did not find any evidence of cross-ownership with other companies involved in the production of or supply of inputs to subject merchandise, other than those identified in our Preliminary Results. In addition, our review at verification of the shareholders and shareholdings of USIMINAS/COSIPA, as presented in the annual report, financial statements and other company records, did not indicate that there were any other related companies involved in steel making, which was consistent with the information provided in the

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<sup>1</sup> J. Mendes was merged with USIMINAS in 2008. Therefore, USIMINAS/COSIPA's financial statements necessarily incorporate J. Mendes financial results. See Memorandum to Barbara E. Tillman, Director, AD/CVD Operations, Office 6, from Justin M. Neuman, International Trade Compliance Analyst; Countervailing Duty Administrative Review: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel from Brazil, Cross-Ownership, dated October 7, 2010.

questionnaire responses. See USIMINAS Verification Report at 2 – 4. No party commented on this issue in the case briefs. Therefore, for these final results our analysis of cross-ownership remains unchanged from the Preliminary Results.

### **Benchmark Rate Information**

For loan programs requiring the application of a benchmark interest rate, 19 CFR 351.505(a)(1) states a preference for using an interest rate that the company would have paid on a comparable commercial loan<sup>2</sup> on the market. Also, 19 CFR 351.505(a)(3)(i) stipulates that when selecting a comparable commercial loan that the recipient “could actually obtain on the market” the Department will normally rely on actual short-term and long-term loans obtained by the firm. However, when there are no comparable commercial loans, the Department “may use a national average interest rate for comparable commercial loans,” pursuant to 19 CFR 351.505(a)(3)(ii).

Pursuant to 19 CFR 351.505(a)(2)(iii) and (a)(2)(iv), if a program under review is a government-provided loan program, the preference would be to use a company-specific annual average of interest rates of comparable commercial loans during the year in which the government-provided loan was approved. For this review, the Department required benchmark rates to determine benefits received from FINAME loans and FINEM loans provided by Banco Nacional de Desenvolvimento Economico e Social (BNDES), the Brazilian National Development Bank.

In the Preliminary Results, we examined loans under the BNDES FINAME loan program. During the POR, USIMINAS/COSIPA had outstanding loans under this program that were provided in Brazilian reais and in the BNDES monetary unit, URTJLP. This monetary unit was created by BNDES to address inflation. The interest rate on these loans is the TJLP rate which is a variable rate set by the Banco Central do Brasil, Brazil’s central bank, every quarter. Loans are received and repaid in reais, but the amount of reais received and repaid is based on a conversion rate set by BNDES. For the Preliminary Results, USIMINAS/COSIPA did not report having any comparable commercial loans meeting the above criteria outstanding during the POR. Therefore, to calculate the benefit to USIMINAS/COSIPA from FINAME loans, for the Preliminary Results, in accordance with 19 CFR 351.505(a)(3)(ii), the Department used national average interest rates, as reported by the central bank. Specifically, for the FINAME fixed-rate loans in Brazilian reais, we used an annual average of the monthly rates identified as interest rates for working capital for corporate entities for fixed operations. For these final results we continue to use this rate as the benchmark.

For URTJLP loans in the Preliminary Results, because there were inconsistencies regarding the loan structure and interest rate information provided by USIMINAS/COSIPA, and because the loan information indicated that these loans had multiple components including indexation, the Department selected the “Corporate Entities Consolidated” rate, which represented a composite of the fixed, indexed, and floating interest rates available to corporate entities, as the appropriate

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<sup>2</sup> A comparable commercial loan is normally a loan in the same currency, with a similar maturity and interest rate structure (i.e., fixed vs. variable interest rate). See CVD Preamble, 63 FR at 65348, 65362.

benchmark. See Preliminary Results Calculation Memorandum.<sup>3</sup> After the Preliminary Results, in supplemental questionnaires dated November 9, 2010, the Department asked both the GOB and USIMINAS/COSIPA to provide any other information that may provide a more appropriate benchmark to compare to the BNDES loans. USIMINAS/COSIPA provided the ‘Floating Operations – Goods Purchase’ interest rate published by the Banco Central do Brasil. Also following the Preliminary Results, the Department issued the Post-Preliminary Decision, and found that BNDES FINEM loans are countervailable. Under the FINEM program, USIMINAS/COSIPA had loans outstanding during the POR denominated in U.S. dollars, the BNDES monetary unit, UMBNDES, and the BNDES monetary unit, URTJLP. For loans denominated in U.S. dollars, the Department relied on information available from USIMINAS’ 2008 Financial Statements that shows that USIMINAS/COSIPA had a comparable commercial debt instrument. As shown in the financial statement at note 15, USIMINAS/COSIPA issued dollar-denominated Eurobonds in January 2008. The Department found that this bond issue satisfied the criteria in 19 CFR 351.505 (a)(2)(iii) and (iv). The bonds were issued at a “coupon” rate (i.e., a discount rate) of 7.25 percent. Information from a January 11, 2008 bond report from Reuters shows that the yield rate on the bond issue is 7.375 percent. The Department used the yield rate as a benchmark because it represents USIMINAS/COSIPA’s actual cost of borrowing. The Department also used the bond yield rate as a benchmark for FINEM loans denominated in UMBNDES. The Department identified this dollar-based interest rate as an appropriate benchmark for these loans because even though UMBNDES is based on a basket of foreign currencies, the basket is overwhelmingly dominated by the U.S. dollar. See Post-Preliminary Calculation Memorandum.<sup>4</sup> For these final results, we continue to use the Eurobond yield rate as the benchmark for both the U.S. dollar loans and the UMBNDES loans.

With respect to the URTJLP FINEM loans, the Department used the “Corporate Entities Consolidated” rate as the benchmark in its post-preliminary calculations, because these loans have the same structure as the FINAME loans in URTJLP. In the Post-Preliminary Decision, the Department invited parties to comment on its selection of the “Corporate Entities Consolidated” rate as an appropriate benchmark for URTJLP loans vis-à-vis the “Floating Operations – Goods Purchase” rate.<sup>5</sup> For these final results the Department has considered all of the information on the record concerning these loans as well as the parties comments and finds the “Floating Operations – Goods Purchase” rate to be a more appropriate benchmark, that better meets the criteria set forth in 19 CFR 351.505(a)(2). Therefore, for these final results we are using the “Floating Operations – Goods Purchase” rate as the benchmark for FINAME and FINEM loans

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<sup>3</sup> Memorandum to the File from Milton I. Koch, Preliminary Results of the 2008 Countervailing Duty Administrative Review of the Order on Hot-Rolled Flat-Rolled Carbon-Quality Steel Products (HRS) from Brazil, Calculations for the Preliminary Results: Usinas Siderurgicas de Minas Gerais S.A. and Companhia Siderurgica Paulista (USIMINAS/COSIPA) dated October 7, 2010 (Preliminary Results Calculation Memorandum).

<sup>4</sup> See Memorandum to the File from Milton Koch, Analyst, Administrative Review of the Countervailing Duty Order on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Calculations for the Post-Preliminary Decision on the FINEM Loan Program dated March 3, 2011 (Post-Preliminary Calculation Memorandum).

<sup>5</sup> The Department noted in the Post-Preliminary Calculation Memorandum that record information suggests TJLP loans are long-term and at variable rates.

denominated in URTJLP. See the Department’s Position on Comment 2 below for a full discussion of the selection of benchmarks.

### **Application of Facts Available and the Use of Adverse Inferences**

Sections 776(a)(1) and (2) of the Tariff Act of 1930, as amended (the Act) provide that the Department shall apply “facts otherwise available” if necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

The Department repeatedly requested information from the GOB that is essential to the Department’s evaluation of whether the GOB’s provision of FINEM loans, through BNDES, is a countervailable subsidy program. This information is necessary to determine the distribution of FINEM loans among industries in Brazil, whether the distribution of these loans disproportionately favored the Brazilian steel industry, and whether the Brazilian steel industry was a predominant user of the program.

In the initial questionnaire we issued to the GOB on December 10, 2009, the Department explained that, because of its findings in the CRS Final Determination<sup>6</sup> that the GOB provided de facto countervailable subsidies under loan programs administered by BNDES, there was reason to believe that the programs administered by BNDES continued to provide a benefit to the subject merchandise during the POR. See Original Questionnaire at 14. As such, that questionnaire instructed the GOB to respond to questions regarding the loan programs found countervailable in the CRS Final Determination: FINAME, BNDES EXIM, and BNDESPAR. In its February 4, 2010 response, the GOB stated that USIMINAS/COSIPA did not use the BNDES EXIM or BNDESPAR programs, but that it did have outstanding FINAME loans during the POR, as well as other BNDES loans. See GOB Original Questionnaire Response at 29. These other BNDES loans were included in the loans reported by USIMINAS/COSIPA in its February 1, 2010 response to the original questionnaire, and identified by USIMINAS/COSIPA only as “BNDES loans.” See USIMINAS/COSIPA Original Questionnaire Response at Exhibit 8. Specifically, loans were identified as either “FINAME loans” or “BNDES loans.”

In our first supplemental questionnaire to the GOB, issued June 25, 2010, we asked the GOB to clarify under which programs these other BNDES loans were provided. In its July 26, 2010

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<sup>6</sup> Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From Brazil, 67 FR 62128 (October 3, 2002) (CRS Final Determination or CRS Investigation) and the accompanying Issues and Decision Memorandum (CRS IDM).

response, the GOB indicated that the BNDES loans received by USIMINAS/COSIPA during the POR were FINEM loans for the financing of investment projects. GOB First Supplemental Questionnaire Response at 2. These loans had been granted to USIMINAS/COSIPA after calendar year 2000, the period of investigation (POI) examined in the CRS Final Determination.

On September 14, 2010, we issued a second supplemental questionnaire requesting information from the GOB regarding loans provided under the FINEM program. As discussed in further detail below, the GOB's September 24, 2010 response to the second supplemental questionnaire did not provide the Department with the information necessary to conduct a proper de facto specificity analysis of the FINEM program.

Considering the GOB's repeated decision not to provide the requested information, explanation, and documentation, we conclude that the GOB failed to provide requested information within the deadlines established. Despite asking the GOB for this information in two supplemental questionnaires, the only response we received is the GOB's decision that the information we requested is "not relevant." See FINEM Loan Program under Analysis of Program section below. Further, the Department considers the GOB's decision to have significantly impeded the proceeding by hindering the Department's analysis of the FINEM program. Therefore, in accordance with sections 776(a)(1) and 776(a)(2)(A)-(C) of the Act, for these final results we find it is appropriate to apply facts otherwise available. In addition, because the GOB failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information; on this basis, we conclude that the use of adverse inferences is warranted in accordance with section 776(b) of the Act. Therefore, as adverse facts available (AFA), we determine that the FINEM loan program constitutes a financial contribution and is specific pursuant to sections 771(5)(D) and 771(5)(A) of the Act.

### **III. Analysis of Programs**

#### **A. Programs Determined to be Countervailable**

##### **1. BNDES FINAME Loan Program**

In the cold-rolled steel investigation,<sup>7</sup> we determined that the FINAME loan program was countervailable as an import substitution program in accordance with section 771(5A)(C) of the Act. In a prior administrative review of the instant order, the Department decided that it was appropriate to examine programs discovered in that investigation that reasonably appeared to provide countervailable subsidies to USIMINAS/COSIPA, such as FINAME loans. See Additional Programs Memorandum. Although the prior administrative review was subsequently

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<sup>7</sup> See CRS Final Determination and CRS IDM. See also "Memorandum to the File, from The Team; Additional Subsidy Programs to be Included in the Questionnaire for the Countervailing Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from Brazil" (December 19, 2005) placed on the record of this review on January 20, 2011. See "Memorandum to The File from Justin M. Neuman: Additional Programs Memorandum and Calculation Memorandum" (January 20, 2011) (Additional Programs Memorandum).

rescinded (see Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Flat Products from Brazil: Notice of Rescission of Countervailing Duty Administrative Review, 71 FR 8278 (February 16, 2006)), the decision to examine FINAME loans to producers of HRS stands.

The FINAME program was established by BNDES in the 1990s to finance purchases of Brazilian-produced equipment. Essentially, financing was only provided by BNDES for the purchase of Brazilian-made equipment and financing for imported equipment could only be provided if that equipment could not be obtained in Brazil. Financing was not provided for foreign-made equipment if the same equipment was produced in Brazil. FINAME loans are primarily made on an indirect basis through agent banks.

The terms of FINAME loans vary depending on whether the financing is for imported or domestically-produced equipment. For domestically-produced equipment, FINAME finances up to 90 percent of the purchase for a small business and up to 80 percent of the purchase for a large company. If the equipment is imported, or less than 60 percent Brazilian content, the financing must be made from a basket of foreign currencies. For imported equipment, a maximum financing term of five years is applied, and financing is available for 85 percent of the value of the equipment for small businesses and for 80 percent of the value for large businesses. During the POR, USIMINAS/COSIPA had outstanding FINAME loans granted for the purchase of Brazilian-made equipment.

Therefore, we are examining the specificity of the FINAME financing that USIMINAS/COSIPA received. In the absence of new information or evidence of changed circumstances that would warrant a reconsideration of the countervailability of this program, we continue to find this program to be de jure specific as an import substitution program because these loans are only available to finance the purchase of domestically-produced equipment. See section 771(5A)(C) of the Act. We further find that there is a financial contribution, through the provision of loans, under section 771(5)(D)(i) of the Act.

To the extent that the interest rates on these loans are lower than the benchmark rate, a benefit exists in accordance with 19 CFR 351.505(a). We calculated the benefit in accordance with 19 CFR 351.505(a)(5)(i) and 19 CFR 351.505(a)(5)(ii), by comparing the actual interest paid on the outstanding FINAME loans during the POR, to the amount of interest that would have been paid on these loans using the benchmark rates noted in the “Benchmark Rate Information” section above, and discussed more fully in the Department’s position on Comment 2, below. Some of the FINAME loans received by USIMINAS/COSIPA have unique interest rates and structures including monetary correction (indexation) of the loan principal. Because the structure of these loans is complex, and much of the information is business proprietary, the calculation methodology for these loans is discussed in more detail in the Memorandum to the File from The Team, Calculations for the Final Results: Usinas Siderurgicas de Minas Gerais S.A. and Companhia Siderurgica Paulista (USIMINAS/COSIPA), dated concurrently with this notice (Final Results Calculation Memorandum). For these final results we continue to find that USIMINAS/COSIPA received benefits under the FINAME financing program during the POR. We summed the benefits received by all the cross-owned companies from all such loans, and

divided this total by the total sales of USIMINAS/COSIPA during the POR. Further, based on our analysis of the comments received, we have modified the denominator used to calculate the subsidy rate. For a full discussion of these changes see Comment 3 below. We thus determine the countervailable subsidy from FINAME loans to be 0.03 percent ad valorem.

## 2. BNDES FINEM Loan Program

In the CRS Final Determination,<sup>8</sup> we found the FINEM program not to confer a subsidy based on information provided by the GOB that showed that FINEM loans were not specific because there was no indication of de jure specificity under section 771(5A)(D)(i) of the Act; further, the financing was provided to a wide variety of industries ranging from paper to electricity to farming products, and the breakdown of FINEM financing by industry indicated that the steel industry was neither a predominant user nor a disproportionate recipient of FINEM financing. Therefore the Department found that the program was not de facto specific under section 771(5A)(D)(iii) of the Act.<sup>9</sup> This decision was reached based on a detailed analysis of information provided by the GOB showing the distribution of all FINEM loans granted, across regions, industry sectors, and enterprises.<sup>10</sup>

Our decision in the CRS Final Determination that FINEM loans were de facto not specific was based on our analysis of the distribution of all FINEM loans granted contemporaneously with USIMINAS/COSIPA's FINEM loans outstanding during 2000, the POI examined for the CRS Final Determination. Because the FINEM loans outstanding during the current POR are new loans granted to USIMINAS/COSIPA since 2000, the facts underlying the Department's previous decision that the program is not specific are no longer applicable. Therefore, as stated in the Preliminary Results, the Department determined that it was appropriate to examine whether this program is de facto specific for purposes of this review.

As part of our initial questionnaire in the instant review of HRS, we included standard questions necessary for conducting a proper specificity analysis regarding the loan programs administered by BNDES. Included as part of this analysis, we asked the GOB to:

Please provide a list by industry and by region of the companies which have received benefits under this program in the year the provision of benefits was approved and each of the preceding three years. Provide the total amounts of benefits received by each type of industry in each region in the year the provision of benefits was approved and each of the preceding three years.<sup>11</sup>

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<sup>8</sup> See also Additional Programs Memorandum.

<sup>9</sup> See CRS IDM at 25.

<sup>10</sup> See CRS Calculation Memorandum included in Additional Programs Memorandum.

<sup>11</sup> See Original Questionnaire at 19.

In its February 4, 2010 response to the initial questionnaire the GOB stated that it “does not consider it relevant to provide the amount of benefits received by industry and by region regarding the programmes of BNDES.”<sup>12</sup>

When the Department issued the first supplemental questionnaire to the GOB on June 25, 2010, we sought clarification of the BNDES programs under which the loans reported by USIMINAS/COSIPA as “BNDES” loans had been provided.<sup>13</sup> In its July 26, 2010 response, the GOB identified these BNDES loans as FINEM loans for the financing of investment projects.<sup>14</sup> After the GOB had identified the BNDES loans at issue as FINEM loans in its July 26, 2010 response, we separately issued second supplemental questionnaires to the GOB and USIMINAS/COSIPA. In the second supplemental questionnaire issued to USIMINAS/COSIPA on September 14, 2010, we asked for confirmation of the GOB’s identification of BNDES loans as FINEM loans.<sup>15</sup> In its September 27, 2010 response, USIMINAS/COSIPA confirmed that the BNDES loans were indeed FINEM loans.<sup>16</sup>

In the second supplemental questionnaire issued to the GOB on September 14, 2010, we provided the GOB with another opportunity to clarify the reported BNDES loans, which the GOB had identified as FINEM loans in its first supplemental response as explained above. Therefore, in this second supplemental questionnaire, we were now able to specifically ask the GOB to provide information regarding the particulars of the FINEM program, specifically the distribution of loans by industry for each year in which USIMINAS/COSIPA’s loans were provided and the prior three years.<sup>17</sup> We informed the GOB that because the Department found FINEM loans de facto not specific in the CRS Final Determination, we would have to continue our examination of whether the GOB’s provision of FINEM loans was specific for the purposes of this review, *i.e.*, whether the facts regarding the distribution of FINEM loans indicated continued non-specificity of the program, or whether they had changed since 2000, such that they now indicated de facto specificity in accordance with section 771(5A)(D) of the Act.<sup>18</sup> We specifically warned the GOB that failure to provide this information might result in the use of facts otherwise available in accordance with section 776 of the Act, and 19 CFR 351.308.<sup>19</sup>

In its September 24, 2010 response to the supplemental questionnaire, the GOB stated that “(a)ll the relevant information concerning FINEM has already been provided in the detailed answers to

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<sup>12</sup> See GOB Original Questionnaire Response at 31.

<sup>13</sup> See GOB First Supplemental Questionnaire at 1.

<sup>14</sup> See GOB First Supplemental Questionnaire Response at 2.

<sup>15</sup> See USIMINAS/COSIPA Second Supplemental Questionnaire at 1.

<sup>16</sup> See USIMINAS/COSIPA Second Supplemental Questionnaire Response at 3.

<sup>17</sup> See GOB Second Supplemental Questionnaire at 2. We included as part of this inquiry the standard questions appendix for programs under review, which was also included as part of the Original Questionnaire at 18-20. Question G.6 of the standard questions appendix corresponds to the specificity analysis outlined in sections 771(5A)(D)(iii) and 771(5A)(D)(iv) of the Act. This question was repeated in the GOB Second Supplemental Questionnaire as question F.6, and forms the basis of the Department’s de facto specificity analysis.

<sup>18</sup> See GOB Second Supplemental Questionnaire at 1.

<sup>19</sup> See *id.*

the first questionnaire, through references to BNDES' {sic} loans."<sup>20</sup> As stated above, the GOB's February 4, 2010 response to our standard specificity question in the original questionnaire was that the GOB "does not consider it relevant to provide the amount of benefits received by industry and by region regarding the programmes of BNDES."<sup>21</sup>

Accordingly, in the Preliminary Results we stated that we would request additional information from the GOB in order to complete our analysis of whether this program provides a countervailable subsidy to USIMINAS/COSIPA.<sup>22</sup> After the Preliminary Results, on November 9, 2010 we issued another supplemental questionnaire to the GOB. For the second time, we specifically asked the GOB to:

Please provide a list by industry and by region of the companies that have received loans under this program in each year in which USIMINAS/COSIPA's FINEM loans, outstanding during the POR, were approved and each of the preceding three years. Provide the total value of loans received by each type of industry in each region in the year the provision of loans was approved and each of the preceding three years.<sup>23</sup>

Again, the Department informed the GOB in this supplemental questionnaire that because the FINEM loans outstanding during the POR were new loans granted to USIMINAS/COSIPA after the POI examined in the CRS Final Determination, it was necessary to determine whether the de facto non-specificity determination made in the CRS Final Determination would still be applicable.<sup>24</sup> We further stated that:

The Department must now analyze the specificity of this program based on facts that may have changed since the CRS investigation, and the information we are requesting is relevant and necessary to the Department's specificity analysis regarding the receipt of FINEM loans by USIMINAS/COSIPA. Failure to provide this information in the requested form and manner may result in the use of the facts otherwise available under section 776 of the Tariff Act of 1930, as amended, and section 351.308 of the Department's regulations.<sup>25</sup>

In its November 23, 2010 response to the Department's request, the GOB stated that "(t)he Government of Brazil considers all relevant information regarding FINEM has already been provided in the detailed answers provided to the first questionnaire, by reference to BNDES' {sic} loans."<sup>26</sup>

In a countervailing duty administrative review, the Department requires information from both the government of the country whose merchandise is covered by the order and the foreign

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<sup>20</sup> See GOB Second Supplemental Questionnaire Response at 2.

<sup>21</sup> See GOB Original Questionnaire Response at 31.

<sup>22</sup> See Preliminary Results, 75 FR at 64707.

<sup>23</sup> See GOB Third Supplemental Questionnaire at 1.

<sup>24</sup> See id.

<sup>25</sup> See id.

<sup>26</sup> See GOB Third Supplemental Questionnaire Response at 1.

producers and exporters for which a review was requested. When the government decides not to provide requested information concerning alleged subsidy programs, the Department, typically finds, as AFA, that a financial contribution exists under the alleged program and that the program is specific.<sup>27</sup> However, where possible, the Department will normally rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit to the extent that those records are useable and verifiable.

On March 3, 2011 the Department issued a post-preliminary analysis regarding the FINEM program. See Post-Preliminary Decision. In this analysis, the Department found that because the GOB declined to provide information essential to the analysis of the FINEM program, it was relying on facts otherwise available, and in selecting from among the facts available, it was drawing an adverse inference. See "Application of Facts Available and the Use of Adverse Inferences" section above. For these final results we continue to find that FINEM loans provided by the GOB are specific pursuant to section 771(5A) of the Act, and that the provision of such loans constitutes a financial contribution in accordance with section 771(5)(D) of the Act.

Notwithstanding the GOB's decision not to act to the best of its ability, we find that the information provided by USIMINAS/COSIPA with respect to its FINEM loans is reliable, so we are using that information to calculate the benefit to USIMINAS/COSIPA under the FINEM program. In measuring the benefit from FINEM loans, we are comparing the interest paid by USIMINAS/COSIPA to the interest USIMINAS/COSIPA should have paid at the benchmark interest rate selected in accordance with 19 CFR 351.505(a).<sup>28</sup> See "Benchmark Rate Information" above and Comment 2, below, for a more detailed discussion. Some of the FINEM loans received by USIMINAS/COSIPA have unique interest rates and structures including monetary correction (indexation) of the loan principal. Because the structure of these loans is complex, and much of the information is business proprietary, the calculation methodology for these loans is discussed in more detail in the Final Results Calculation Memorandum. For these final results we find that USIMINAS/COSIPA received benefits under the FINEM loan program during the POR. Further, based on our analysis of the comments received, we have modified the denominator used to calculate the subsidy rate. For a full discussion of these changes see Comment 3 below. We thus determine the countervailable subsidy from FINEM loans to be 0.43 percent ad valorem.

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<sup>27</sup> See, e.g., Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea, 71 FR 11397, 11399 (March 7, 2006) (unchanged in the Notice of Final Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea, 71 FR 38861 (July 10, 2006) (Korea Cut-to-Length Plate), in which the Department relied on adverse inferences in determining that the Government of Korea directed credit to the steel industry in a manner that constituted a financial contribution and was specific to the steel industry within the meaning of sections 771(5)(D)(i) and 771(5A)(D)(iii) of the Act, respectively).

<sup>28</sup> See Final Results Calculation Memorandum.

**B. Program Determined To Be Not Countervailable**

Presumed Tax Credit for the Program of Social Integration and the Social Contributions of Billings on Inputs Used in Exports (PIS/COFINS)

In 1970, through Supplementary Law No. 7, the GOB established PIS. Under the law, companies make PIS contributions to a fund which is “a means of creating wealth for ... employees.” In 1991, through Supplementary Law No. 70, the GOB established COFINS as a contribution for the financing of social insurance “intended solely to defray the cost of health care and social security and assistance work.” At the time of the CRS Investigation, the Department found that PIS and COFINS taxes were assessed on all products purchased domestically but did not apply to the sale of products that are exported.<sup>29</sup> Each company was responsible for making monthly payments of PIS and COFINS based on the total value of its domestic sales of goods and services.

In 1996, through Law No. 9363, the GOB established the PIS/COFINS tax credit program to provide a rebate of PIS/COFINS contributions assessed on the purchase of raw materials, intermediate products, and packing materials used in the production of exports. The PIS and COFINS “presumed” tax credit was established to prevent the cascading effect of these taxes which accrue at each point in the chain of production. Companies calculated PIS/COFINS credits on a monthly basis, and used the credit by making deductions from the Industrial Products Tax (IPI) due.

The “presumed” tax credit rate for PIS and COFINS was 5.37 percent and applied to exporters in all industries. The Department found in the CRS Investigation that the GOB did not determine the value, quantity or type of inputs consumed in the production, by any particular producer, of subject merchandise, nor did the GOB take into account any yield factors. The Department further found that this tax credit rate was arbitrarily chosen for administrative convenience. To calculate its credit, a company divided its export revenues, accumulated through the prior month, by its total sales revenues for the same period. This export revenue ratio was then multiplied by the company’s total value of purchases as reflected in the supplier’s sale invoices for raw materials, semi-finished products, and packaging materials used in the production process. This amount was then multiplied by the tax credit rate of 5.37 percent to yield the year-to-date accumulated tax credit. In order to calculate the credit for the current month, the credit used through the prior month was deducted from this accumulated tax credit.

Consistent with the definition provided in 19 CFR 351.102(b), we treated PIS/COFINS taxes as indirect taxes.<sup>30</sup> Further, because PIS/COFINS was charged on inputs used to make cold-rolled steel, it was charged on goods at one stage of production that were used in a succeeding stage of

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<sup>29</sup> See CRS IDM at 15.

<sup>30</sup> See CRS IDM at Comment 2.

production, thus falling within the definitions provided in 19 CFR 351.102(b) of “cumulative indirect tax” and “prior-stage indirect tax.”<sup>31</sup>

In the CRS Investigation, based on our determination that PIS and COFINS were prior-stage cumulative indirect taxes, we examined whether the GOB had a system or procedure in place, within the meaning of 19 CFR 351.518(a)(4)(i), to confirm which inputs and in what amounts were used in the production of subject merchandise. We determined that this system was established as a simplified and streamlined methodology to implement and administer the tax rebate for all companies in Brazil. The only limitation imposed on companies making rebate claims was that the claims be limited to those inputs defined under the PIS/COFINS rebate law, which was broader than the “consumed in production” standard provided for in 19 CFR 351.518(a)(1). Companies reported their purchases of inputs based on the assumption that all goods purchased were consumed equally in exported and domestically sold goods. Further confirmation was not conducted by the government. As such, we determined that this system did not permit the GOB to confirm which inputs are being consumed in the production of exported goods and in what amounts.

In addition, in the CRS Investigation, we determined that the system did not account for the fact that domestic and export sales may include imported inputs. Further, in determining the actual amounts of inputs consumed in final products, the GOB did not make due allowance for waste, thereby raising the concern that the claim amounts were overstated. Because we found that the GOB had not met the requirements for non-countervailability under 19 CFR 351.518(a)(4)(i), we determined that the entire amount of the credit granted on PIS/COFINS payments conferred a benefit to the respondent companies. In the CRS Final Determination, we determined that, according to section 771(5)(D)(ii) of the Act, the granting of tax credits constituted a financial contribution, and because the PIS/COFINS rebates were calculated based on a company’s export revenue, *i.e.*, were available only to exporters, we found that this program was *de jure* specific as an export subsidy pursuant to section 771(5A)(B) of the Act.

In the current review of HRS, in response to the initial questionnaire, the GOB reported widespread changes to the administration of PIS/COFINS since the CRS Investigation. In order to eliminate the distortions caused by the cumulative regime of PIS/COFINS and to promote tax neutrality, the GOB introduced Law No. 10.637 of December 30, 2002, and Law No. 10.833 of December 29, 2003, for PIS and COFINS, respectively. These laws revised the PIS/COFINS programs such that they now operate as a value-added tax (VAT) system. For the reasons discussed above, as in the CRS Investigation we preliminarily determine that the PIS/COFINS taxes meet the definitions of an “indirect tax” and a “prior-stage indirect tax” within the meaning of 19 CFR 351.102(b).

According to the revisions in the legislation, PIS and COFINS taxes are now collected at 1.65 percent and 7.6 percent, respectively, when companies sell goods in the domestic market. Companies also pay PIS and COFINS at the rates of 1.65 percent and 7.6 percent, respectively,

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<sup>31</sup> See CRS IDM at 16.

when domestically purchasing goods for resale, goods and services used as inputs in the production or manufacture of goods for sale, storage of merchandise related to sales, freight expenses related to sales, etc. Goods that are exported do not generate any tax liability under the non-cumulative PIS/COFINS regime.

To calculate the difference between the taxes paid by a company on its purchases and the taxes collected by a company on its sales under the non-cumulative PIS/COFINS system, the total value of the company's exports is subtracted from the company's overall revenue before applying the combined PIS/COFINS tax rate of 9.25 percent to determine the amount of PIS/COFINS taxes due to the government. Eligible purchases of inputs, goods for resale, etc., that were subject to PIS/COFINS taxation are summed and multiplied by the same 9.25 percent rate to determine the total amount of PIS/COFINS taxes already paid by the company on its purchases. When a company has paid more in PIS/COFINS taxes on its purchases than it collects on its sales, the company is due the difference. When a company collects more in PIS/COFINS on its sales than it pays on its purchases, the company remits the difference to the government. Brazilian companies prepare monthly documents that reconcile the amount of PIS/COFINS taxes they paid on their purchases and the amount of PIS/COFINS taxes they collected on the company's total sales in each month. These documents are filed with the Brazilian federal income tax authority.

In the CRS Investigation, we found that PIS/COFINS operated as a cumulative, indirect tax, as defined within 19 CFR 102(b), for which excessive remission was received by respondents within the meaning of 19 CFR 351.518(a)(2). However, because information provided by the GOB indicates widespread changes in the administration of PIS/COFINS since the Department last examined this program in the CRS Investigation, we have reexamined this program. For the purposes of this review, we determine that the PIS/COFINS program has been transformed via Laws No. 10.637 and 10.833 and now operates like a standard VAT system. Based on the information on the record, the PIS/COFINS program no longer operates as a cumulative indirect tax. Therefore, an analysis of the program under 19 CFR 351.518 is no longer appropriate. Because of the program's transformation into a standard VAT program, we have reexamined whether any remittance or rebate received under this program is excessive within the meaning of 19 CFR 351.517.<sup>32</sup> Under 19 CFR 351.517, which addresses the exemption or remission upon export of indirect taxes, a benefit exists to the extent that the amount remitted or exempted exceeds the amount levied with respect to the production and distribution of like products when sold for domestic consumption. The record demonstrates and the results of verification confirm that the changes to the program have eliminated the tax credits granted upon export.<sup>33</sup> The credit is now based on the actual amount of PIS/COFINS taxes already paid by a company on its purchases, and there are no additional credits granted upon export. Thus, there is no benefit as defined under the provisions of 19 CFR 351.517(a), which define a benefit as the amount by which the credit upon export exceeds the taxes levied on the production and distribution of like products sold for domestic consumption.

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<sup>32</sup> See CVD Preamble, 63 FR at 65383.

<sup>33</sup> See GOB Verification Report at 3-6, and Usiminas Verification Report at 13.

Therefore, for these final results, we continue to find that there is no benefit within the meaning of 19 CFR 351.517(a). Furthermore, we continue to find that the laws transforming these PIS/COFINS tax credits into a VAT-like system did not provide any “grandfathering” provisions and therefore we find that there are no benefits available under the old PIS/COFINS structure. As such, we determine that the PIS/COFINS program is not countervailable within the meaning of section 771(5) of the Act.

### **C. Programs Determined To Be Not Used**

Based on the questionnaire responses, we determined that USIMINAS/COSIPA did not apply for or receive benefits during the POR under the programs listed below:

#### 1. Equity Infusions

As noted in the Preliminary Results, the countervailable benefits from the equity infusions granted by the GOB to USIMINAS from 1983 through 1988, and to COSIPA from 1983 through 1989, and in 1991, were fully allocated prior to the POR. USIMINAS/COSIPA has not received any other equity infusions that provide countervailable benefits in the POR.

#### 2. GOB Debt-to-Equity Conversions

Similarly, the subsidies in the form of debt-to-equity conversions to COSIPA in 1992 and 1993 were fully allocated prior to the POR. USIMINAS/COSIPA has not received any other debt-to-equity conversions that provide countervailable benefits in the POR.

#### 3. National Bank for Economic and Social Development Loans (BNDES) Loan Programs

- a. BNDES EXIM
- b. BNDES Participacoes S.A. (BNDESPAR)

#### 4. Provincial Government Program: PRO-INDUSTRIA

#### 5. Programa de Financiamento as Exportacoes (PROEX)

#### 6. Program to Induce Industrial Modernization of the State of Minas Gerais (PROIM)

#### **IV. Analysis of Comments**

##### **Comment 1: Whether it is Appropriate to Apply Adverse Facts Available to Find the FINEM Loans Countervailable**

USIMINAS/COSIPA argues that the Department's decision in the Post-Preliminary Decision to apply adverse inferences under the "facts available" provision of the statute to determine that the FINEM program was de facto specific and therefore countervailable, is not supported by evidence on the record. USIMINAS/COSIPA points to page 23 of its questionnaire response of June 14, 2010, wherein it stated that BNDES loans are not limited to any particular industries or regions in Brazil, recipients are not required to export goods or increase exports, domestic inputs are not preferred over imports, and private companies and all levels of Brazilian government are eligible. Additionally, USIMINAS/COSIPA notes that its initial questionnaire response provided an internet link to the BNDES website to support its statement that BNDES loans are not limited, and thus the Department is free to obtain documents in the public domain.

In USIMINAS/COSIPA's view, the Department's decision that the FINEM program is countervailable is not based on any positive evidence of selectivity because there is nothing on the record to indicate that it, or even the steel industry, has benefitted disproportionately from this program. According to USIMINAS/COSIPA, the decision to countervail the FINEM program is based entirely on the Department's conclusion that the GOB refused to provide information that the Department deems to be in the GOB's possession. USIMINAS/COSIPA understands that the purpose of AFA under both U.S. law and the WTO Agreement on Subsidies and Countervailing Measures is to encourage the provision of information by penalizing uncooperative respondents. However, USIMINAS/COSIPA argues that, in this case, the application of AFA does not punish or remedy any failure of the GOB, but rather it punishes USIMINAS/COSIPA which has been fully cooperative. Therefore, it is fundamentally unfair to punish USIMINAS/COSIPA for the alleged failure of the GOB; such punishment does nothing to effectuate the purpose of the AFA rule. In conclusion, USIMINAS/COSIPA states that the Department must base its determination on substantial evidence on the record and not on actions of a secondary party to the review. As such, the Department must reverse its Post-Preliminary Decision and find that BNDES FINEM, as well FINAME programs are generally available without restriction to a particular company or group of companies.

USS disagrees with the respondent's contention that the Department improperly relied on AFA to determine that the BNDES FINEM loan program was countervailable. According to USS, the failure of the GOB to act to the best of its ability to respond to multiple requests for information clearly warranted the application of AFA. As detailed in the Post-Preliminary Decision, despite several requests, the GOB failed to provide requested information and responded that the information was not "relevant." USS argues that the Department's Post-Preliminary Decision establishes that the GOB withheld information requested by the Department concerning the recipients and distribution of FINEM loans. Moreover, USS adds, the GOB failed to provide the information in question by the deadlines established by the Department and in the form and manner requested, despite clear instructions in the Department's original countervailing duty

questionnaire and three supplemental questionnaires, and despite multiple extensions of time granted by the Department. Consequently, USS states, the GOB has significantly impeded the Department's efforts to determine the recipients and distribution of FINEM loans, factors that go directly to the specificity analysis required by section 771(5A) of the Act. USS notes that the requested information would enable the Department to determine pursuant to section 771(5A)(D)(iii) of the Act whether: (i) the enterprises or industries receiving the FINEM loans were limited in number; (ii) whether certain enterprises or industries were predominant users of the FINEM loans; (iii) whether a limited number of enterprises or industries received a disproportionately large amount of FINEM loans; or (iv) whether certain enterprises or industries were favored over others in the decision to grant the FINEM loans.<sup>34</sup> Therefore, in USS' opinion, repeated failures by the GOB to provide the requested information more than adequately meet the criteria for the application of facts available under section 776(a)(2) of the Act.

USS cites to section 776(b) of the Act which provides that, in selecting facts available, the Department may use an adverse inference if an interested party fails to cooperate by not acting to the best of its ability to comply with the Department's requests for information. Further, USS adds that the use of AFA "ensure{s} that a party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully" and prevents interested parties from controlling the outcome of a proceeding by selectively providing information.<sup>35</sup> To demonstrate that it has acted to the best of its ability, USS explains, an interested party must do the maximum it is able to do,<sup>36</sup> which includes providing complete, accurate and timely responses to the Department's requests for information.<sup>37</sup> Therefore, USS states, the Department may conclude that an interested party has failed to act to the best of its ability where it was reasonable to expect the interested party to maintain relevant information and where the failure to produce the requested information was due to either the failure to keep and maintain all required information or the failure to put forth maximum efforts to investigate and obtain the requested information.<sup>38</sup> An adverse inference may be drawn when it is reasonable to expect that more forthcoming responses should have been provided.<sup>39</sup>

In the instant case, USS argues, the GOB has clearly failed to act to the best of its ability by not providing the information in response to repeated requests, and stating instead that it deemed the

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<sup>34</sup> Post-Preliminary Decision at 6-7. See also section 771(5A)(D)(iii) of the Act.

<sup>35</sup> USS cites to the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 at 868-870, 1994 U.S.C.C.A.N. 4040, 4197-99; Asociacion Colombiana de Exportadores de Flores v. United States, 40 F. Supp. 2d 466, 475 (Ct. Int'l Trade 1999) (a "major purpose" of Section 776(b) of the Act is "to permit Commerce, and not respondents" to control the Department's proceedings); Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185, 1191 (Fed. Cir. 1993) (the provisions of Section 776(b) of the Act are designed to prevent the Department, which lacks subpoena power, from being "left merely to the largesse of the parties at their discretion to supply {the Department} with information.").

<sup>36</sup> USS notes Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003) ("Nippon Steel").

<sup>37</sup> Id. See also, e.g., Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 71 FR 69546 (December 1, 2006) and accompanying Issues and Decision Memorandum at "Application of Total Adverse Facts Available."

<sup>38</sup> USS cites Nippon Steel, 337 F.3d at 1382-83.

<sup>39</sup> Id. at 1383.

information not "relevant" to the Department's inquiry. Moreover, USS adds, the GOB had previously provided this information in the CRS Investigation, demonstrating that it maintained and had the ability to provide the requested records to the Department.<sup>40</sup> In other words, USS states, the GOB clearly failed to do the maximum it was able to do to respond to the Department's requests and therefore, the Department's decision to apply AFA with regard to the specificity of the FINEM loans provided by the GOB is fully supported by the record of this proceeding and is in clear compliance with the requirements of sections 776(a) and 776(b) of the Act.

According to USS, the respondent ignores the statutory standard for the application of AFA, which clearly gives the Department the ability to apply AFA based on the GOB's failure to act to the best of its ability. The record in this case, USS argues, shows that the GOB possessed and had the ability to provide evidence directly relevant to the Department's inquiries but failed to do so based only on its claim that such information was not "relevant."<sup>41</sup> USS adds that the AFA provisions of section 776(b) of the Act are designed to guard against such attempts to control the course of the Department's proceedings by selectively providing information that is in an interested party's possession.

USS argues that USIMINAS/COSIPA is not being "punished" by the Department's decision to apply AFA. To the contrary, USS notes that the Department relied on USIMINAS/COSIPA's own information in calculating the benefit and ad valorem subsidy rate. In performing these calculations, the Department made no inferences, much less adverse ones. USS further argues that, contrary to the respondent's claims, the GOB is not a "secondary party." According to the statute, the government of the country in which the subject merchandise is produced is considered to be an "interested party" to the Department's countervailing duty proceedings. USS contends that Korea Cut-to-Length Plate shows that, in countervailing duty proceedings, the Department reasonably places the responsibility for providing information relevant to determining whether a subsidy is specific under section 771(5A) of the Act on the foreign government. Thus, USS argues, the Department's decision is fully in accordance with sections 776(a) and 776(b) of the Act, which assign responsibility for providing information to the party in possession of that information.<sup>42</sup> Indeed, USS points out, as the interested party that creates and administers the subsidy programs at issue, the foreign government is the only party with possession of the complete range of information pertinent to the Department's specificity analysis. As such, USS argues that the Department reasonably drew an inference that is adverse to the party in possession of the information, fully in accordance with the AFA provisions of the Act and not in any way punitive.

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<sup>40</sup> USS cites to CRS IDM at 38.

<sup>41</sup> Id.

<sup>42</sup> Id. See also United States Steel Corporation v. United States, 2009 Ct. Int'l Trade LEXIS 156 (Ct. Int'l Trade Dec. 30, 2009) at 28-29 (the party in possession of relevant information "bears the burden of creating an adequate record in a countervailing duty proceeding").

Nucor also maintains that the Department should continue to find that the BNDES FINAME and FINEM loan programs are specific and countervailable. Further, Nucor maintains, the application of AFA by the Department for the FINEM program is justified because the GOB failed to provide the requested information despite being given several opportunities. With regard to the FINAME program, Nucor states the respondent's arguments are unclear as to whether it wants the FINAME and FINEM programs to be considered as one program, or whether it is arguing, without any support, that the FINAME program is not countervailable. Nucor, however, agrees that the Department properly determined the FINAME program to be de jure specific.

#### Department Position:

As detailed above in the section 'Programs Determined To Be Countervailable,' for purposes of these final results the Department continues to find the FINEM program countervailable. See also 'Application of Facts Available and the Use of Adverse Inferences' section above.

Contrary to USIMINAS/COSIPA's argument that it is being unfairly punished for the failure to cooperate by a secondary party, the GOB is not a secondary party to this proceeding. In a countervailing duty proceeding, according to section 771(9) of the Act, the government of the country in which the subject merchandise is produced is considered to be an "interested party" that is subject to the Department's countervailing duty proceeding. In this case, the GOB is the only party that has the information on the FINEM program. Indeed, as the party that creates and administers the FINEM program, the GOB is the interested party with possession of the complete range of information pertinent to the Department's analysis. Therefore, the Department reasonably placed the responsibility on the GOB for providing the information necessary to determine whether the FINEM loan program is specific under section 771(5A) of the Act. However, the GOB did not provide the information, deciding on its own that the information was "not relevant." See GOB's questionnaire response dated November 23, 2010. See also Post-Preliminary Decision. The information requested of the GOB was essential to the Department's evaluation of the FINEM program. When a government decides not to provide requested information concerning subsidy programs, the Department, as AFA, typically finds that the program is specific and a financial contribution exists under the alleged program. See, e.g., Certain Magnesia Carbon Bricks From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 75 FR 45472 (August 2, 2010) and accompanying Issues and Decision Memorandum at Comment 6 (finding the Government of China, the only party which possessed the requested information that would enable the Department to conduct its full analysis of this allegation and the GOC affirmatively and repeatedly refused to provide that information to the Department. In a countervailing duty investigation, the Department requires information from both the government of the country whose merchandise is under investigation and the foreign producers and exporters of merchandise under investigation. When the government fails to provide requested information concerning alleged subsidy programs, the Department, as AFA, typically finds that a financial contribution exists under the alleged program and that the program is specific). See also Korea Cut-to-Length Plate (the Department relied on adverse inferences in determining that the Government of Korea directed credit to the

steel industry in a manner that constituted a financial contribution and was specific to the steel industry within the meaning of sections 771(5)(D) and 771(5A)(D)(iii) of the Act, respectively). Here the GOB has not provided the Department with any of the requested information regarding the operation of FINEM loans, and has specifically stated that it does not believe it needs to provide such information. Thus, the Department has acted fully in accordance with sections 776(a) and (b) and 771(5A) of the Act and, consistent with our practice, we find that the application of AFA is justified and warranted for the FINEM program.

In addition, USIMINAS/COSIPA appears to be arguing that the Department should find the FINAME program not countervailable. We continue to find the FINAME program countervailable for the reasons articulated in the Preliminary Results. We found the FINAME program countervailable in the CRS investigation. See CRS Final Determination. The loan program was specific as an import substitution program in accordance with 771(5A)(C) of Act and 19 CFR 351.510. Therefore, there is no basis to reconsider the countervailability of this program, and we continue to find the FINAME program countervailable.

With respect to USIMINAS/COSIPA's argument that it provided an internet link to the BNDES website and the Department is free to obtain documents in the public domain to support the respondent's statements, the Department cannot consider information that has not been placed on the record of the proceeding prior to the relevant deadlines for the filing of factual information. A party to the proceeding must provide evidence to support its own statements, and such information must be timely filed in accordance with 19 CFR 351.104. No document will be considered as having been received by the Secretary unless it is submitted to the Department and is stamped with the date and, where necessary, the time, of receipt. See 19 CFR 351.104. Indeed, we addressed this issue in our first supplemental questionnaire to the GOB dated July 25, 2010 in which we first stated,

In your response, you referred us to the BNDES website. Please note that we cannot consider references to websites as information on the record, as such information is subject to change, and may not apply to the POR. Any such information you wish the Department to consider must be provided in hard copy format in accordance with the Department's filing requirements.

Later, in the same questionnaire, we stated,

Although you provided Internet links to these laws, we must have them placed on the record of this review. Please provide copies of these laws, with translations, as well as any relevant implementing legislation, confirming Respondent's statements.

A copy of this questionnaire was provided to USIMINAS/COSIPA and, therefore, USIMINAS/COSIPA was aware of the requirement that information must be placed on the record in order to be considered part of the record. In this case, USIMINAS/COSIPA merely identified an internet link. Thus, the information on the BNDES website cannot be considered part of this case record.

## **Comment 2: Selection of an Appropriate Benchmark for BNDES Loans**

USIMINAS/COSIPA argues that, if the Department continues to find BNDES loan programs countervailable, it should use an appropriate benchmark to calculate the benefit. Addressing its comment solely to the selection of an appropriate benchmark for the BNDES FINEM and FINAME loans with the interest rate of “TJLP,” USIMINAS/COSIPA argues that the appropriate benchmark is USIMINAS’ 2008 Eurobond financing that the Department used for certain FINEM loans. USIMINAS/COSIPA cites to 19 CFR 351.505(a)(1) which requires that the benefit of a government loan be measured against comparable commercial loans that a firm could actually obtain on the market, and 19 CFR 351.505(a)(2), which states that in determining comparability, the Department will place primary emphasis on similarities in the structure of the loans. USIMINAS/COSIPA notes its 2008 Eurobond financing meets the regulatory criteria, and the Department itself accepted the Eurobond rates as reflective of actual loans obtained by USIMINAS/COSIPA in the market. On the other hand, USIMINAS/COSIPA explains, the “Corporate Entities Consolidated” rate, that the Department used as a benchmark for the TJLP loans in the Preliminary Results and the Post Preliminary Decision, does not reflect its actual loan experience and there is no evidence on the record of the companies or types of loans that were included in the compilation of this rate. Because long-term loans are not generally available on the commercial market in Brazil, USIMINAS/COSIPA views the information on which the Department relied as suspect and contends these rates are less suitable as a benchmark than USIMINAS/COSIPA’s own Eurobond rate.

USIMINAS/COSIPA notes that the Department may not view the 2008 Eurobond rate as an appropriate benchmark for TJLP loans because the TJLP loans are in reais, while the Eurobonds are in a mixture of currencies. According to USIMINAS/COSIPA, this distinction is without a meaningful difference because, as noted in the Department’s verification report, all of USIMINAS/COSIPA’s loans are ultimately received and repaid in reais due to the fact that the company is not permitted to hold foreign currency on its books. Moreover, the TJLP loans are indexed to the rate of inflation in Brazil; hence, the only difference between TJLP-based BNDES loans and the other BNDES loans is that the former are indexed to Brazilian inflation rates and the latter are indexed to currency exchange rates. While those rates may be different, according to USIMINAS/COSIPA, they do not amount to a structural difference in the nature of the financing. USIMINAS/COSIPA points to the Post-Preliminary Calculation Memorandum that states USIMINAS’ other BNDES loans “utilize a similar structure” to the TJLP loans. Finally, USIMINAS/COSIPA emphasizes that 19 CFR 351.505(a)(2) places “primary” importance on selecting a benchmark loan with a similar structure. Because the Department has appropriately identified the Eurobonds as having a structure similar to the other BNDES loans, USIMINAS/COSIPA contends that the Eurobonds also have a structure similar to the TJLP loans.

USIMINAS/COSIPA further argues that, if the Department continues to select a rate published by the Brazilian Central Bank, it should use a rate that is more representative of the company’s actual experience. According to USIMINAS/COSIPA, the “Corporate Entities Consolidated” rate is inappropriate because it is a composite of fixed, variable and indexed credit and it is a

weighted average of these three components that appears to be weighted toward fixed financing transactions rather than toward either variable or indexed credit financing. As stated by USIMINAS/COSIPA, this rate is not comparable to either its BNDES or commercial loans. USIMINAS/COSIPA states that, as indicated in Usiminas Verification Report at 11, its FINEM loans with an interest rate of TJLP are variable rate loans. More importantly, USIMINAS/COSIPA states that all commercial loans it could actually obtain in the market are variable or indexed rate loans. Further, USIMINAS/COSIPA notes the Department verified that the majority of USIMINAS/COSIPA's loans are with private overseas banks in foreign currencies. USIMINAS/COSIPA adds that the Usiminas Verification Report at 7-8 shows all of these private long-term loan rates have interest rates that are either variable or indexed, or both. Since USIMINAS/COSIPA does not have any long term loans at a fixed rate, and since 19 CFR 351.505(a)(2) requires the highest priority be given to similarities in loan structure, USIMINAS/COSIPA argues the Department must choose a benchmark that uses only variable and/or indexed rates. Finally, because the "corporate consolidated" rate contains a fixed component which is over-weighted, USIMINAS/COSIPA argues that this rate is not comparable in structure to the company's BNDES or private loans.

USIMINAS/COSIPA suggests two alternative benchmarks. As its preferred alternative to using its Eurobond rate, USIMINAS/COSIPA argues that the "Floating Operations – Goods Purchase" rate, shown in Table XLVI of the Banco Central do Brasil publication, reflects floating interest rates, does not appear to contain a fixed rate component, and most closely resembles the kinds of rates that USIMINAS/COSIPA obtains on both its BNDES and its private loans. Further, according to USIMINAS/COSIPA, the "Floating Operations – Goods Purchase" rate in Table XLVI is a better choice than the "Corporate Consolidated" rate because it does not contain a fixed component. As its next alternative, USIMINAS/COSIPA urges the Department to, at least, eliminate the fixed component of the Corporate Rate because none of its FINAME and FINEM TJLP loans are fixed-rate loans. An average of the "indexed" and "floating" components of the "Corporate Entities" section of Table XLII would better reflect USIMINAS/COSIPA's actual commercial loans, which could be construed as either indexed or variable-rate loans.

USS contends that the respondent's arguments for use of the Eurobond rates as a benchmark are without merit. USS notes that the Department found that USIMINAS/COSIPA did not receive loans with a TJLP interest rate except through the GOB's FINEM and FINAME loan programs, and therefore, pursuant to 19 CFR 351.505(a)(1) and (a)(3)(ii), the Department identified national average interest rates for comparable commercial loans in accordance with the criteria set forth in 19 CFR 351.505(a)(2). Pointing out that that the national average private lending rate benchmark used by the Department is a consolidated rate comprised of fixed, indexed, and floating interest rate loans provided by commercial lenders to corporations in Brazil, USS also notes that the report published by the Banco Central do Brasil specifically states that these rates are for loans "with interest rates freely negotiated among borrowers and financial institutions, excluding operations involving transfers from the National Bank of Economic and Social Development (BNDES) and any other operation backed by mandatory or government funds." This statement, according to USS, directly contradicts the respondent's claim that "there is a serious question as to what experience" the rates reflect. According to USS,

USIMINAS/COSIPA did not provide any support for its claim that "long term loans are not generally available on the commercial market in Brazil." To the contrary, USS concludes that the Banco Central do Brasil report (Post-Preliminary Calculation Memorandum at Attachment IV, Table XLVII) shows that commercial lenders in Brazil do provide long term commercial loans to companies in Brazil. Thus, USS argues, the "Corporate Entities Consolidated" rate, which reflects freely negotiated rates between corporate borrowers and commercial lenders, represents rates for commercial loans that USIMINAS/COSIPA could actually obtain on the market, in accordance with 19 CFR 351.505(a)(1) and (3).

Moreover, USS adds, the loan benchmarks used by the Department were comparable to the FINEM and FINAME loans with TJLP interest rates according to the criteria set forth in 19 CFR 351.505(a)(2). USS notes the Department found that the FINEM and FINAME TJLP loans had multiple components; USIMINAS/COSIPA itself stated that the interest rate for the TJLP loans "reflects all relevant components,"<sup>43</sup> and that the FINEM and FINAME TJLP loans had a "fixed" component in the sense that there is a fixed percentage that represents a risk premium.<sup>44</sup> According to USS, USIMINAS/COSIPA also reported that the TJLP loans had an "indexed" component linked to "an indexation of the currency value for projected inflation."<sup>45</sup> Finally, USS adds, that, as shown in the respondent's questionnaire responses, the loans also had aspects of a floating or "variable" interest rate because any increases to the indexed portion of the interest rate above 6 percent is capitalized into the loan principal, and thus increase the borrowing costs for the loan on a floating, or variable, basis.<sup>46</sup>

The benchmark interest rates used by the Department, USS adds, also meet the two other criteria specified in 19 CFR 351.505(a)(2): loan term and currency. USS argues that the respondent misreads the regulations when arguing that "primary emphasis" should be placed on the first of the three factors enumerated in 19 CFR 351.505(a)(2), *i.e.*, the loan structure, when the preamble to 19 CFR 351.505(a)(2) makes clear that the "primary emphasis" refers to each of the factors, *i.e.*, loan structure, term, and currency. Therefore, contrary to the respondent's contention, USS argues that the term and currency of a loan must be considered as part of the Department's benchmark analysis.

According to USS, the respondent emphasized in its questionnaire responses that the rate for FINEM and FINAME TJLP loans "reflects what the company's cost of borrowing would be if long-term loans were available in Brazil in local currency."<sup>47</sup> Therefore, USS contends, the Department's selected benchmark represents the rates for loans with a term longer than one year (*i.e.*, long-term loans) that are likewise provided in Brazilian currency.<sup>48</sup> Thus, USS notes, the

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<sup>43</sup> USS cites to USIMINAS' December 2, 2010 Supplemental Response at 12.

<sup>44</sup> *Id.* (stating that the risk premium element of the TJLP loans is fixed based on a risk premium category set by the lender).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 12 and Exhibit TS-1, pp. 4-5.

<sup>47</sup> USS cites USIMINAS December 2, 2010 Supplemental Response at 12.

<sup>48</sup> Post-Preliminary Calculation Memorandum at 3; USIMINAS December 2, 2010 Supplemental Response at 12.

term and currency of the benchmark rates used by the Department are fully comparable to the FINEM and FINAME TJLP loans.

The Eurobond rate, USS contends, meets none of the comparability criteria. USS argues that the respondent's audited 2008 financial statements show that the two Eurobond loans have fixed interest rates and, therefore, are not similar in structure to the FINEM and FINAME TJLP loans and should not be used as a benchmark pursuant to 19 CFR 351.505(a)(2). Further, USS points out that the Eurobonds will be repaid in a foreign currency. Regardless of the respondent's contention that the currency in which the loans are denominated is "a distinction without a difference," USS contends that currency is highly relevant. From the perspective of the lender, the currency in which loan payments will be made is directly relevant to loan risk and, therefore, interest rates. As such, loans repaid in stable currencies have a different risk calculation than loans repaid in currencies that devalue or fluctuate. USS further explains that in the context of risk calculation, the perspective of the borrower is irrelevant; while the borrower may, in repaying the loan, use its local currency at the foreign currency equivalent, from the lender's perspective all payments reflect the current value of the foreign currency in which the loan was made. According to USS, under such an arrangement, the borrower bears the currency risk, and that enables the lender to extend credit at rates that will be different (and usually lower) than loans denominated in the local currency. USS notes that 19 CFR 351.505(a)(2) properly recognizes this, as does the respondent's own audited 2008 financial statement, which segregates the company's outstanding loans into "local currency" loans and "foreign currency" loans.<sup>49</sup> Therefore, USS argues, the currency denomination cannot and should not be ignored, and the Eurobonds, unlike the FINEM and FINAME TJLP loans, require repayment in the current value of a foreign currency, not in Brazilian reais.

Furthermore, USS argues there is no basis to reject the benchmarks used by the Department in favor of the respondent's proposed alternatives. According to USS, neither the "Floating Operations – Goods Purchase" or a simple average of "indexed" and "floating" interest rates for corporate entities is comparable to the TJLP loans at issue, while the benchmarks used by the Department are: 1) comparable to the FINEM and FINAME TJLP loans with respect to each of the factors set forth in 19 CFR 351.505(a)(2); 2) like the TJLP loans, represent a composite of fixed, indexed, and floating interest rates; and 3) are long-term loans in the same currency.

In addition, contrary to the respondent's claims, USS points out that the explanatory notes to Table XLVI state the rates for "Floating Operations – Goods Purchase" represent the rates for loans in which "the granting of credit is based on purchase of a certain good that usually plays the role of collateral to the operation."<sup>50</sup> Therefore, USS argues, the loan differs from the FINEM TJLP loans, which are granted for a variety of purposes, are not necessarily secured by

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<sup>49</sup> USS cites to USIMINAS' July 26, 2010 Supplemental Response at Exhibit 3, pp. 55-56. USIMINAS' financial statements thus signal to its investors and potential investors that it has two categories of loan obligations, which are subject to very different degrees of risk.

<sup>50</sup> USS cites to the Post-Preliminary Calculation Memorandum at Attachment IV (Brazilian Central Bank Notes Text "NI2-I.TXT"), p. 5, n. I.2.13.6.

any particular collateral, and hence are more risky than loans secured by collateral.<sup>51</sup> According to USS, the respondent has not provided any evidence to support its claim that the structure and terms of the "Floating Operations – Goods Purchase" loans are comparable to the FINEM TJLP loans and, therefore, the Department should reject this rate as a benchmark.

Regarding USIMINAS/COSIPA's other proposed alternative, for the Department to calculate a simple average of the "indexed" and "floating" corporate rates (found at Table XLII of the Brazilian Central Bank publication), USS argues that the Department has correctly determined the FINEM TJLP loans contain multiple components, including components that may be characterized as fixed interest rates. Therefore, USS states, such loans are not comparable to loans comprised exclusively of indexed and floating interest rates. Moreover, USS adds, there is no evidence to suggest that a simple average of the rates reported for "indexed" and "floating" loans would accurately reflect the rates of loans that could actually be obtained on the market, as required by 19 CFR 351.505(a)(1).

USS concludes that the respondent has failed to provide any basis for the Department to use any of its proposed benchmarks and requests that the Department continue to use the corporate consolidated loan rates for commercial loans in Brazil as the benchmark for the FINAME and FINEM TJLP loans.

Nucor maintains that the Department's benchmark selection was appropriate, given the multiple components of the TJLP loans and some inconsistencies in the information reported by USIMINAS/COSIPA and the GOB. Because the respondent's commercial loans do not use the same currency, have different structures, or have a different maturity than its TJLP loans, Nucor implies that the Eurobond rate may not be an appropriate benchmark.

#### Department Position:

In selecting a benchmark, pursuant to 19 CFR 351.505(a)(2)(iii) and (a)(2)(iv), if a program under review is a government-provided loan program, the preference is to use a company-specific annual average of interest rates of comparable commercial loans during the year in which the government-provided loan was approved. Further, 19 CFR 351.505(a)(2) defines "comparable" loans and states that the Department will "normally place primary emphasis on similarities in the structure of the loans (e.g., fixed interest rate versus variable interest rate), the maturity of the loans (e.g., short-term versus long-term), and the currency in which the loans are denominated." However, if there are no comparable commercial loans received by the company, the regulations instruct the Department to use a national average interest rate for comparable commercial loans. See 19 CFR 351.505(a)(3)(ii).

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<sup>51</sup> USS cites Post-Preliminary Decision at 3; Post-Preliminary Calculation Memorandum at 1; CRS IDM at 25 (noting that FINEM loans may be granted for a variety of purposes, including "construction projects, engineering projects, projects for the acquisition of equipment, studies of special projects, and working capital projects").

The Eurobond loans that USIMINAS/COSIPA recommends using for the FINAME and FINEM TJLP loans are a fixed-rate, foreign currency debt instrument. As shown on USIMINAS/COSIPA's financial statements, they are long-term because they mature in 2018, and they were issued and will be repaid in U.S. dollars. The FINAME and FINEM TJLP loans, even though they are based on a monetary unit created by BNDES, this unit is tied to conditions within Brazil to account for domestic inflation, are received and repaid in reais and have a variable interest rate. Although the regulations include "a debt instrument issued by the company in a commercial market" in the definition of "commercial loans" (19 CFR 351.505(a)(2)(i)), we must evaluate whether this instrument is "comparable," as defined by the regulations. With respect to structure, we do not find that the loans are comparable: the Eurobonds have a fixed rate structure while the FINAME and FINEM TJLP loans have a structure that is more comparable to a variable rate loan. With respect to maturity, both the Eurobonds and the FINAME and FINEM TJLP loans are long-term loans. With respect to currency, we do not find that the loans are comparable: the Eurobonds are U.S. dollar-based, while the FINAME and FINEM TJLP loans are reais-based. As such, the Department does not find that the Eurobond loans satisfy the regulatory criteria for identifying a comparable commercial loan; since simply meeting the maturity criterion alone, if there are other more appropriate benchmarks available, is not sufficient to permit the selection of the Eurobond loans as an appropriate benchmark for the FINAME and FINEM TJLP loans.

Furthermore, USIMINAS/COSIPA misreads the Department's regulations in arguing that they place primary emphasis on similarity in structure. The Department is clearly directed by the regulations to place primary emphasis on structure, maturity and currency, and indeed, it is not the structure, but rather the maturity, of the Eurobonds that is comparable to the TJLP loans. Finally, we find USIMINAS/COSIPA's argument with regard to currency comparability unavailing. Although USIMINAS/COSIPA actually receives and repays its foreign currency loans in the reais equivalent, this equivalent is calculated on the basis of foreign currency principal plus interest payments. For this reason, the Eurobonds rate, even in reais equivalents, is not an appropriate benchmark.

With respect to USIMINAS/COSIPA's proposed alternatives to the Eurobond rate as a benchmark, in the Post-Preliminary Calculation Memorandum the Department indicated that it had considered two possible interest rates as the benchmark, *i.e.*, the "Corporate Entities Consolidated" rate and the "Floating Operations – Goods Purchase" rate, and used the "Corporate Entities Consolidated" rate in its post-preliminary calculations. The Department also noted in the Post-Preliminary Calculation Memorandum that record information suggested that TJLP loans were long-term and at variable rates.

We have further considered our benchmark selection in light of all of the information on the record and the parties' arguments. In accordance with 19 CFR 351.505(a)(2) which defines "comparable" by placing primary emphasis on similarities in the structure of the loans (*e.g.*, fixed interest rate versus variable interest rate), the maturity of the loans (*e.g.*, short-term versus long-term), and the currency in which the loans are denominated, we find the "Floating Operations – Goods Purchase" rate to be a more appropriate benchmark for the FINAME and

FINEM TJLP loans. Weighing all of the regulatory requirements against the information we have on the record regarding possible national average interest rates, and recognizing the difficulty of finding an acceptable match, we find that this rate more closely satisfies the regulatory criteria, on the whole, because it is a variable rate for longer term loans given in reais, and as such, better reflects the structure, maturity and currency of the FINAME and FINEM TJLP loans.

With regard to the “Corporate Entities Consolidated” rate which the Department used in the Preliminary Results and the Post-Preliminary Decision, further analysis of the record indicates that this rate apparently includes a broad range of loan types under the fixed, indexed and floating components, the majority of which do not match the structure, maturity, and or currency of FINAME and FINEM TJLP loans.

With regard to USS’ concerns that the “Floating Operations – Goods Purchase” rate has a different type of collateral requirement than the FINEM TJLP loans, we note that even though there is a different collateral requirement, there is still collateral on the FINEM TJLP loans and, as such, we do not find that this difference is sufficient to overcome the elements of comparability we find between the TJLP rate of the FINEM loans and the “Floating Operations – Goods Purchase” rate. Therefore, for these final results, we are using the “Floating Operations – Goods Purchase” rate as the benchmark rate for both FINAME and FINEM TJLP loans.

### **Comment 3: Calculation of FOB Sales Value**

USS and Nucor argue that the Department did not use the correct sales denominator to calculate the ad valorem subsidy rate for USIMINAS/COSIPA in the post-preliminary analysis for the FINEM loan program. According to the statute and regulations, USS and Nucor state, the Department should calculate the respondent’s sales on an FOB basis, exclusive of foreign taxes and certain other items. USS notes that the Court of International Trade has determined, pursuant to section 402 of the Act, that foreign taxes that are rebated or exempted on exports are not properly part of the FOB value for customs purposes.<sup>52</sup> Therefore, USS contends that the Department should deduct the amount shown on USIMINAS/COSIPA’s 2008 financial statements as “deductions from gross revenues, mainly sales taxes.”

Nucor further notes that the gross sales value in the respondent’s financial statements do not appear to tie to Verification Exhibit 11 and were extracted from different sources, making an apples-to-apples comparison difficult. Nucor also suggests the Department could calculate a ratio of taxes to gross sales and apply this ratio to the consolidated sales after deductions for services are made. Nucor urges the Department to make deductions to exclude all taxes and other items that do not form part of the FOB value.

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<sup>52</sup> Both USS and Nucor cite Caterpillar Inc. v United States, 941 F. Supp. 1241, 1257 (CIT 1996); U.S. Customs and Border Protection Ruling HQ 548128 (July 15, 2002).

USIMINAS/COSIPA disagrees with USS and Nucor's claims that VAT should be deducted to determine FOB value. USIMINAS/COSIPA emphasizes that FOB value requires the inclusion of those VAT that are included in the price of merchandise paid by the customer on home-market sales.

According to USIMINAS/COSIPA, both USS and Nucor do not provide a precedent in which the Department deducted VAT on home-market sales from the calculation of FOB sales value to determine the rate of subsidy. USIMINAS/COSIPA states that the only case USS and Nucor mention as authority for their claim is Caterpillar v. United States. U.S. Steel Case Brief at 2, Nucor Case Brief at 3. However, according to USIMINAS/COSIPA, that case entirely addressed the calculation of U.S. customs value under 19 U.S.C. § 1401a, that is, the value of merchandise exported to the United States and valued for normal customs duty purposes. In that case, the court determined that the "transaction value" of the merchandise, as defined by the statute, does not include any VAT that are rebated or exported on the exports. Caterpillar v. United States, 941 F. Supp at 1256. Thus, that case did not even consider the definition of FOB value and, to the extent it may be construed as defining FOB value, it considered a situation where VAT were clearly not part of the price paid by the customer; they had been rebated or not charged on exports, and by definition could not have been part of the price of the transaction.

USIMINAS/COSIPA argues that the VAT shown as "deductions from gross revenue" in this case do not include any VAT on exported products. USIMINAS/COSIPA points out that the Department is aware that all exports are exempt from such taxes. Further, USIMINAS/COSIPA adds, all of the VAT shown as deductions from gross sales value are taxes included in the price of the product sold in the home market. These taxes are incurred exclusively on the domestic sales of the merchandise, according to USIMINAS/COSIPA, and thus have nothing to do with the "customs value" of the merchandise as sold for export.<sup>53</sup>

USIMINAS/COSIPA argues that the Department must determine, pursuant to its regulations, the "FOB factory" value of the merchandise, and not the customs value of the merchandise. According to USIMINAS/COSIPA, for domestic sales, that value must include VAT. USIMINAS/COSIPA notes that the Department specifically verified that the amount paid by the customer on home-market sales includes VAT; this is particularly clear for PIS and COFINS taxes, the largest component of the "deductions from sales." USIMINAS/COSIPA adds that these taxes are imposed as a percentage of the gross sales value (gross revenue) to the customer, that is, the customer pays the full FOB price of the merchandise, and the taxes are imposed as a percentage of that price. Moreover, USIMINAS/COSIPA states, the seller pays these VAT after the sale has occurred. As part of its payment of these post-sale taxes, USIMINAS/COSIPA states, it credits the amount of taxes that it paid on inputs (which were also paid on the gross sales price of the input) toward the liability that it has on the gross sales value. According to USIMINAS/COSIPA, in all cases, the "FOB" factory price of the merchandise includes the taxes

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<sup>53</sup> USIMINAS/COSIPA notes that the Department has repeatedly recognized that determinations by U.S. Customs and Border Protection of what constitutes dutiable value are not relevant to the calculation of countervailing duty or antidumping duty rates.

subsequently incident on those sales and therefore, to deduct the VAT from sales value results in a sales value that is clearly less than the FOB value of the product.

On export sales, USIMINAS/COSIPA concedes that the Department may wish to deduct any VAT that are otherwise included in the export price in determining FOB value. However, USIMINAS/COSIPA adds, the Department is equally aware that none of the VAT are incident on such sales. Hence, according to USIMINAS/COSIPA, none of the VAT shown as “deductions from gross revenue” relate to export sales and, therefore, the Department has no basis in law or practice for deducting VAT incurred by USIMINAS/COSIPA from the calculation of sale value.

Further, USIMINAS/COSIPA contends that the record shows that virtually all of the deductions from gross sales shown on its financial statements are VAT that are part of the FOB value of the merchandise. According to USIMINAS/COSIPA, Verification Exhibits 5 and 6 show total freight costs for USIMINAS and COSIPA, as well as amounts for returned or cancelled sales. USIMINAS/COSIPA contends that more than 90 percent of the deductions from gross sales are VAT and, thus, there is no basis for deducting the full amount of deductions shown on the financial statements.

#### Department Position:

The Department normally uses the FOB sales value in its calculation of the ad valorem subsidy rate. See 19 CFR 351.525(a). However, in its post-preliminary calculations, the Department inadvertently included freight and certain other expenses in its sales denominator. For these final results, we have excluded these expenses to derive the sales value on an FOB basis, to be used as the sales denominator in accordance in 19 CFR 351.525(a). Further details of the calculation of the sales denominator are provided in the Final Results Calculation Memorandum.

With respect to VAT, the Department finds that these taxes should also not be included in the calculation of the FOB sales value because these taxes are not part of the company’s sales revenue. It is evident from USIMINAS/COSIPA’s own financial records that taxes that are incident on sales are not recognized as USIMINAS/COSIPA’s income. Thus, the Department does not consider VAT, whether on domestic or export sales, to be part of the FOB sales value. Normally, VAT do not enter a company’s income statement, but are kept in separate accounts that do not affect the income statement or sales revenue. However, as is clear from USIMINAS/COSIPA’s financial statements, the VAT are initially included as part of the revenue, and then deducted to determine the actual revenue accruing to the company from its sales of goods. Therefore, we have excluded these taxes in calculating the FOB sales value to use as the denominator in the subsidy calculations. See, e.g., Notice of Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium From Germany, the Netherlands, and the United Kingdom, 66 FR 65903 (December 21, 2001), and accompanying Issues and Decision Memorandum at Comment 14 (Sales Denominator of the Urenco Group, where the Department agreed that the sales denominator appropriately excluded value added taxes).

However, in making this adjustment to remove the VAT from the sales denominator, we have not used the methodology proposed by Nucor and USS because we think this may overstate the deduction attributable to the cross-owned companies. While we have actual information for USIMINAS and COSIPA regarding the VAT paid, we do not have that detail for the two other cross-owned companies. Therefore, because we do not have this information for all of the cross-owned companies, we have determined that it is appropriate to use, instead, only the information that is on the record from USIMINAS' and COSIPA's individual financial statements regarding taxes and other deductions. In addition, we have deducted the value for the sales of services by the cross-owned group. For a complete description of the methodology used, see Final Results Calculation Memorandum.

### **Recommendation**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are approved, we will issue and publish in the Federal Register the final results in accordance with these recommendations.

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Agree

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Disagree

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Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

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Date