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Administrative Review
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DATE: November 29, 2012

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

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Citric Acid and Certain Citrate Salts from the People's Republic of China

I. Summary

On June 5, 2012, the Department of Commerce (the Department) published the Preliminary Results for this countervailing duty (CVD) administrative review. *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review*, 77 FR 33167 (June 5, 2012) (*Preliminary Results*). The respondent companies in this review are RZBC Co., Ltd., RZBC Juxian Co., Ltd., RZBC Imp. & Exp. Co., Ltd., and RZBC Group Shareholding Co., Ltd. (collectively, the RZBC Companies or RZBC).

The Department originally extended the deadline for these final results by 60 days until December 2, 2012.[1] As explained in the memorandum from the Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 29, through October 30, 2012. Thus, all deadlines in this segment of the proceeding have been extended by two days. The revised deadline for the final results of this review is now December 4, 2012.[2]

[1] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through Melissa G. Skinner, Office Director, Antidumping and Countervailing Duty Operations 3, from Kristen Johnson, International Trade Compliance Analyst, Antidumping and Countervailing Duty Operations 3, regarding "Extension of Deadline for Final Results of Countervailing Duty Administrative Review," (September 12, 2012).

[2] *See* Memorandum to the Record from Paul Piquado, AS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Hurricane" (October 31, 2012), attached to Memorandum to File from Kristen Johnson, International Trade Compliance Analyst, Antidumping and Countervailing Duty Operations 8, regarding "Tolling of Deadlines" (November 1, 2012); *see also* Memorandum to File through Eric B. Greynolds, Program Manager, Antidumping and Countervailing Duty Operations 8, from Kristen Johnson, International Trade Compliance Analyst, Antidumping and Countervailing Duty Operations 8, regarding "Corrected Final Results Signature Date," (November 27, 2012).

The "Analysis of Programs" and "Subsidies Valuation Information – Benchmarks and Discount Rates" sections below describe the subsidy programs and the methodologies used to calculate benefits for the programs under examination. Additionally, we have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the "Analysis of Comments" section below,[3] which contains the Department's positions on the issues raised in the briefs. Based on the comments received, we have not made any modifications to the *Preliminary Results*. We recommend that you approve the positions described in this memorandum.

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

Comment 1: Authority to Apply CVD to the PRC
Comment 2: Double-Counting
Comment 3: Countervailability of Shandong Province Policy Loans
Comment 4: Specificity Findings for Sulfuric Acid and Steam Coal
Comment 5: Use of Tier One Benchmark for Sulfuric Acid and Steam Coal
Comment 6: Whether Certain Input Suppliers Are Government Authorities
Comment 7: Rejection of RZBC's Submission
Comment 8: Export Prices for Sulfuric Acid from India and Thailand

II. Period of Review

The period for which we are measuring subsidies, *i.e.*, the period of review (POR), is January 1, 2010, through December 31, 2010.

III. Scope of the Order

The scope of the order includes all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend. The scope of the order also includes all forms of crude calcium citrate, including dicalcium citrate monohydrate, and tricalcium citrate tetrahydrate, which are intermediate products in the production of citric acid, sodium citrate, and potassium citrate. The scope of the order does not include calcium citrate that satisfies the standards set forth in the United States Pharmacopeia and has been mixed with a functional excipient, such as dextrose or starch, where the excipient constitutes at least 2 percent, by weight, of the product. The scope of the order includes the hydrous and anhydrous forms of citric acid, the dihydrate and anhydrous forms of sodium citrate, otherwise known as citric acid sodium salt, and the monohydrate and monopotassium forms of potassium citrate. Sodium citrate also includes both trisodium citrate and monosodium citrate, which are also known as citric acid trisodium salt and citric acid monosodium salt, respectively. Citric acid and sodium citrate are classifiable under 2918.14.0000 and 2918.15.1000 of the Harmonized Tariff Schedule of the United States

[3] The RZBC Companies and the Government of the People's Republic of China (GOC) submitted case briefs. Petitioners filed a rebuttal brief. Petitioners are Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Ingredients Americas LLC.

(HTSUS), respectively. Potassium citrate and crude calcium citrate are classifiable under 2918.15.5000 and 3824.90.9290 of the HTSUS, respectively. Blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.90.9290 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.[4,5]

IV. Attribution of Subsidies

The Department's regulations at 19 CFR 351.525(b)(6)(i) state that the Department will normally attribute a subsidy to the products produced by the corporation that received the subsidy. However, 19 CFR 351.525(b)(6)(ii)-(iv) directs the Department to attribute subsidies received by certain other companies to the combined sales of those companies if (1) cross-ownership exists between the companies, and (2) the cross-owned companies produce the subject merchandise, are a holding or parent company of the subject company, or produce an input that is primarily dedicated to the production of the downstream product. In the case of a transfer of a subsidy between cross-owned companies, 19 CFR 351.525(b)(6)(v) directs the Department to attribute the subsidy to the sales of the company that receives the transferred subsidy.

According to 19 CFR 351.525(b)(6)(vi), 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. This regulation states that this standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations.

The Court of International Trade (CIT) has upheld the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits. *See Fabrique de Fer de Charleroi v. United States*, 166 F. Supp. 2d 593, 600-604 (CIT 2001).

RZBC Companies

As noted above, the RZBC Companies consist of the RZBC Group Shareholding Co. Ltd. (RZBC Group),[6] RZBC Co., Ltd. (RZBC Co.) , RZBC (Juxian) Co., Ltd. (RZBC Juxian), and RZBC Imp. & Exp. Co., Ltd. (RZBC IE). All companies are domestically-owned People's

[4] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, from Christopher Siepmann, International Trade Compliance Analyst, Antidumping and Countervailing Duty Operations 1, regarding "Citric Acid and Certain Citrate Salts: Scope Ruling for Calcium Citrate USP," (February 14, 2011). This public document and all other public documents and public versions generated in the course of this review by the Department and interested parties are on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at http://iaaccess.trade.gov and in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of this notice can be accessed directly on the internet at http://www.trade.gov/ia/.

[5] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, from Christopher Siepmann, International Trade Compliance Analyst, Antidumping and Countervailing Duty Operations 1, regarding ''Citric Acid and Certain Citrate Salts: Final Determination on Scope Inquiry for Blended Citrate Acid from the People's Republic of China and Other Countries," (May 2, 2011).

[6] During the POR, there was a name change from "RZBC Group Co., Ltd." to "RZBC Group Shareholding Company." *See* RZBC Companies Initial Questionnaire Response (IQR) (September 27, 2011) at "RZBC Group" page III-7.

Republic of China (PRC) companies. RZBC Co., RZBC Juxian, and RZBC IE are wholly owned by RZBC Group and, hence, are cross-owned within the meaning of 19 CFR 351.525(b)(6)(vi). RZBC Co. and RZBC Juxian are producers of the subject merchandise; RZBC IE is the exporter of the subject merchandise; and RZBC Group is a headquarters company and does not produce any merchandise. Consequently, the subsidies received by these companies are being attributed according to the rules established in 19 CFR 351.525(b)(6)(ii),(c) and (b)(6)(iii), respectively.

In their IQR, the RZBC Companies also reported their ownership history and affiliations prior to the POR, but since the cut-off date of December 11, 2001. RZBC Co. reported that the company "Sisha" was a prior owner.[7] In the first administrative review of the order, the Department determined that Sisha Co., Ltd. (Sisha) was cross-owned with RZBC Co. and instructed the company to file a response on behalf of Sisha.[8] *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 76 FR 77206 (December 12, 2011) (*Citric Acid First Review*), and accompanying Issues and Decision Memorandum (Citric Acid First Review Decision Memorandum) at "Attribution of Subsidies - RZBC." The Department found that Sisha received a countervailable, allocable subsidy in 2003. *See* Citric Acid First Review Decision Memorandum at "Enterprise Development Fund from Zibo City Financial Bureau."

Consistent with the *Citric Acid First Review*, we continue to find that Sisha was cross-owned with RZBC Co. (*see* 19 CFR 351.525(b)(6)(vi)) and have attributed the allocable benefit for Sisha's grant to the RZBC Companies for the POR. For more information, *see* "Enterprise Development Fund from Zibo City Financial Bureau," below.

Also, RZBC IE reported that it exports subject merchandise produced by other, unaffiliated companies, but that this merchandise was not exported to the United States during the POR.[9] Although any subsidies to the unaffiliated producers would normally be cumulated with those of the trading company that sold their merchandise pursuant to 19 CFR 351.525(c), the Department has, in some instances, limited the number of producers it examines where the merchandise was not exported to the United States during the POR, or accounted for a very small share of the respondent's exports to the United States.[10] In this review, we have not issued CVD questionnaires to the unaffiliated producers of citric acid whose merchandise was exported by RZBC IE, because such merchandise was not exported to the United States during the POR. Also, we have removed the sales of these products from RZBC IE's 2010 sales to derive the denominator for purposes of calculating countervailable subsidy rates for the RZBC Companies. This approach is consistent with the Department's treatment of RZBC IE's exports of subject merchandise produced by unaffiliated companies in *Citric Acid First Review*. *See* Citric Acid First Review Decision Memorandum at "Attribution of Subsidies - RZBC."

[7] *Id*. at "RZBC Co. Ltd." page III-5.

[8] In the first administrative review, the Department also found that the company "HTI" was a prior owner of RZBC Co. and, thus, was cross-owned with the RZBC Companies. *See* Citric Acid First Review Decision Memorandum at "Attribution of Subsidies - RZBC." All subsidies received by HTI that the Department found to be countervailable were expensed. *See* Citric Acid First Review Decision Memorandum at "Shandong Province Financial Special Fund for Supporting High and New Technology Industry Development Project."

[9] *See* RZBC Companies' IQR at "RZBC IE" page III-6.

[10] *See, e.g., Certain Pasta from Italy: Final Results of the Fourth Countervailing Duty Administrative Review*, 66 FR 64214 (December 12, 2001), and accompanying Issues and Decision Memorandum at "Attribution."

Sales Denominators

We determine that multiple sales denominators are appropriate for use in the attribution of subsidies to the RZBC Companies. To attribute a subsidy received by RZBC Co., RZBC Juxian, or RZBC IE, we used as the denominator the total consolidated sales of all three companies, exclusive of sales among affiliated companies, for 2010. To attribute a subsidy received by RZBC Group, we used as the denominator the total consolidated sales of RZBC Group, RZBC Co., RZBC Juxian, and RZBC IE, exclusive of sales among affiliated companies, for 2010. Lastly, to attribute an export subsidy received by a company, we used as the denominator the 2010 export sales of RBZC IE, exclusive of sales of merchandise produced by unaffiliated companies.

V. Allocation Period

The average useful life (AUL) period in this proceeding, as described in 19 CFR 351.524(d)(2), is 9.5 years according to the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System for assets used to manufacture the subject merchandise. Consistent with the Department's practice, we have rounded the 9.5 years up to 10 years for purposes of setting the AUL. *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Preliminary Results and Rescission, in Part, of Countervailing Duty Administrative Review*, 72 FR 43607, 43608 (August 6, 2007), unchanged in *Polyethylene Terephthalate Film, Sheet and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 7708 (February 11, 2008).

VI. Use of Facts Otherwise Available and Adverse Inferences

Sections 776(a)(1) and (2) of the Tariff Act of 1930, as amended (the Act), provide that the Department shall, subject to section 782(d) of the Act, 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's practice when selecting an adverse rate from among the possible sources of information is to ensure that the result is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." *See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, vol. 1 at 870 (1994).

GOC – Sulfuric Acid

In our initial questionnaire, we requested ownership information from the GOC about the companies that produced the sulfuric acid purchased by the RZBC Companies.[11] We notified the GOC that the Department generally treats producers that are majority owned by the government or a government entity as controlled by the government and, hence, as "authorities" within the meaning of section 771(5)(B) of the Act. However, for those majority government-owned companies that the GOC argues are not "authorities" and for each producer that is not majority owned by the government, we instructed the GOC to answer all questions in Appendix 5 (Information Regarding Input Producers) and Appendix 6 (Information on Government and Chinese Communist Party (CCP) Officials and Representatives).

For one sulfuric acid producer, Producer X,[12] the GOC attempted to provide information to Appendices 5 and 6. Specifically, the GOC provided a response to some of the questions contained in Appendix 5, but failed to identify owners, members of the board of directors, or managers who were also government or CCP officials or representatives during the POR,[13] and did not respond to any questions contained in Appendix 6.[14] To Appendix 6, the GOC stated that the Department's CCP questions are not relevant to the investigation of the less than adequate remuneration (LTAR) program and that, as a matter of PRC law, the government cannot interfere in the management and operation of the sulfuric acid suppliers.[15] The GOC stated that, in prior cases, it explained that the CCP, the People's Congress, and the Chinese People's Political Consultative Conference are not government bodies.[16] The GOC also stated that "because these organizations are not governmental bodies, the GOC cannot require them to provide the information requested by the Department."[17] Furthermore, the GOC stated that "there is no central informational database to search for the requested information, and the industry and commerce administrations do not require companies to provide such information."[18] As such, the GOC claimed that it was unable to respond to the Department's questions.[19]

On March 16, 2012, we issued a deficiency questionnaire in which we asked the GOC to provide a response to those questions in Appendix 5 and Appendix 6, which it did not answer in the initial questionnaire response.[20] In its March 23, 2012, response, the GOC did not provide an answer to the questions, stating "The GOC has previously provided a response that it believes appropriately addresses these inquires."[21]

Regarding the GOC's objection to the Department's questions about the role of CCP officials in the management and operations of the sulfuric acid producer, we have explained our understanding of the CCP's involvement in the PRC's economic and political structure in

[11] *See* Department's Initial Questionnaire (July 26, 2011) (Initial Questionnaire) at II-8.
[12] The name of the producer is business proprietary information. We, therefore, refer to the company as "Producer X."
[13] *See* GOC IQR (September 27, 2011) at II-12.
[14] *Id.* at II-14 through II-18.
[15] *Id*.
[16] *Id.* at II-14.
[17] *Id*. at II-16.
[18] *Id*.
[19] *Id*.
[20] *See* Department's Deficiency Questionnaire Issued to the GOC (March 16, 2012) at 3.
[21] *See* GOC Deficiency Questionnaire Response (March 23, 2012) at 5.

another proceeding.[22] Public information suggests that the CCP exerts significant control over activities in the PRC.[23] This conclusion is supported by, among other documents, a publicly available background report from the U.S. Department of State.[24] With regard to the GOC's claim that Chinese law prohibits GOC officials from taking positions in private companies, we have previously found that this particular law does not pertain to CCP officials.[25]

Because the GOC did not respond to our requests for information on this issue, we have no further basis for evaluating the GOC's claim that the role of the CCP is irrelevant. Thus, the Department finds, as it has in other PRC CVD proceedings, that the information requested regarding the role of CCP officials in the management and operations of the sulfuric acid producer, and in the management and operations of the producer's owners, is necessary to our determination of whether the producer is an authority within the meaning of section 771(5)(B) of the Act. In addition, the GOC did not promptly notify the Department, in accordance with section 782(c) of the Act, that it was unable to submit the information in the requested form and manner, nor did it suggest any alternative forms for submitting this information. Further, the GOC did not provide any information regarding the attempts it undertook to obtain this information, despite the fact that we provided the GOC with a second opportunity to provide the information. Therefore, we have no basis to accept the GOC's claim that it is unable to provide this information. This is particularly appropriate given that the GOC has claimed that such information regarding the CCP is irrelevant, when the Department has made it clear on the record of this administrative review, other segments of this proceeding, as well as other PRC CVD proceedings that such information is relevant to our analysis of whether input producers are "authorities" under the statute.

Therefore, we find that the GOC has withheld necessary information that was requested of it and, thus, that the Department must rely on "facts otherwise available" in conducting our analysis of a sulfuric acid producer.[26] Moreover, we find that the GOC has failed to cooperate by not acting to the best of its ability to comply with our request for information. By stating that the requested information is not relevant, the GOC has placed itself in the position of the Department, and only the Department can determine what is relevant to this administrative review.[27] Furthermore, by stating that it is unable to obtain the information because the CCP is

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[22] *See* Memorandum to the File from Patricia M. Tran, International Trade Compliance Analyst, AD/CVD Operations, Office 3, regarding "Additional Documents for the Preliminary Results" (May 30, 2012) (Additional Documents Memorandum) at Attachments II and III (which include the post-preliminary analysis memorandum from certain seamless carbon and alloy steel standard, line, and pressure pipe and a State Department report, both recognizing the significant role the CCP has in the GOC).

[23] *Id*. at Attachment IV.

[24] *Id*.; *see also Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 75 FR 57444 (September 21, 2010), and accompanying Issues and Decision Memorandum (Seamless Pipe Decision Memorandum) at Comment 7.

[25] *See* Seamless Pipe Decision Memorandum at 16.

[26] *See* section 776(a)(2)(A) of the Act.

[27] *See Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (CIT 1986) (*Ansaldo*)(stating that "{i}t is Commerce, not the respondent, that determines what information is to be provided"). The Court in *Ansaldo* criticized the respondent for refusing to submit information which the respondent alone had determined was not needed, for failing to submit data which the respondent decided could not be a basis for the Department's decision, and for claiming that submitting such information would be "an unreasonable and unnecessary burden on the company." *Id*. *See also Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1298-99 (CIT 2010) (stating that "{r}egardless of whether Essar deemed the license information relevant, it nonetheless should have produced it {in} the event that Commerce reached a different conclusion" and that "Commerce, and not Essar, is charged with

not the government, the GOC is substantially non-responsive. The GOC would have the Department reach its determination on the role of the CCP with regard to the government and the input producer based solely on the conclusory statements of the GOC without any of the information that the Department considers necessary for its analysis. As this constitutes a failure to cooperate to the best of its ability, we find that an adverse inference is warranted in the application of facts available.[28] As adverse facts available (AFA), we find that Producer X for which the GOC did not provide complete information is an "authority" within the meaning of section 771(5)(B) of the Act.

GOC – Steam Coal

In the final results of the first administrative review, the Department was not able to determine whether steam coal is being provided by the GOC to a specific industry or enterprise or group of industries or enterprises, because of insufficient record evidence. *See* Citric Acid First Review Decision Memorandum at Comment 6. We stated that we would revisit the *de facto* specificity of the provision of steam coal for LTAR program in a future review. *Id*.

On February 1, 2012, we issued a supplemental questionnaire in which we requested the GOC to provide the following information concerning the steam coal industry in the PRC for 2008, 2009, and 2010:

> the number of producers of steam coal;
>
> the percentage of total volume and value of domestic production of steam coal that is accounted for by companies in which the GOC maintains an ownership or management interest either directly or through other government entities;
>
> the names and addresses of the top ten steam coal producing firms – in terms of sales and quantity produced – in which the GOC maintains an ownership or management interest;
>
> a discussion of what laws or policies govern the pricing of steam coal, the levels of production of steam coal, or the development of steam coal capacity; and a list of industries in China that use steam coal and the volume of steam coal used/consumed by each industry and submit official documentation to support the response.

On February 15, 2012, the GOC provided an inadequate response to the Department's questions regarding steam coal, stating that "the GOC only collects information on general coal producers and does not disaggregate the data it collects about the coal industry by different

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conducting administrative reviews and weighing all evidence in its calculation of a countervailing duty margin"); *NSK, Ltd. v. United States*, 919 F. Supp. 442, 447 (CIT 1996) ("NSK's assertion that the information it submitted to Commerce provided a sufficient representation of NSK's cost of manufacturing misses the point that 'it is Commerce, not the respondent, that determines what information is to be provided for an administrative review'"); *Nachi-Fujikoshi Corp. v. United States*, 890 F. Supp. 1106, 1111 (CIT 1995) ("Respondents have the burden of creating an adequate record to assist Commerce's determinations").

[28] *See* section 776(b) of the Act.

segments within that industry."[29] The GOC added that "most of the Chinese coal producers also produced steam coal and, thus, the GOC believes that providing information on general coal producers and the general coal industry will provide a reasonable indication of nature of the steam coal industry."[30]

Specifically, to the Department's request for the number of producers of steam coal for 2008, 2009, and 2010, the GOC provided information on coal producers.[31] Similarly, to the Department's request for the percentage of total volume and value of domestic production of steam coal that is accounted for by companies in which the GOC maintains an ownership or management interest, the GOC limited its response to only "coal producers that are wholly state-owned or state-controlled" and submitted those "companies' share of gross industry revenue."[32] In response to the Department's request for the names and addresses of the top ten steam coal producing firms, in terms of sales and quantity produced, in which the GOC maintains an ownership or management interest, the GOC provided a list of ten coal companies for each year, but failed to submit the requested "sales and quantity produced" for the listed companies.[33] Additionally, to the Department's request for a list of industries in the PRC that use steam coal and the volume of steam coal used/consumed by each industry, the GOC provided a list of industries that purchase steam coal directly with no associated volume data and no explanation about how the list was compiled.[34]

On March 8, 2012, we issued a second supplemental questionnaire in which we again asked the GOC to provide a response to the provision of steam coal questions.[35] In its March 29, 2012, response, the GOC explained that after receiving the February 1, 2012, questionnaire, the government contacted the National Bureau of Statistics of China (NBSC) to obtain information on the steam coal industry, but the NBSC stated that it did not have such information.[36] The GOC stated that it also consulted with the China National Coal Association, which responded that:

> "At present, relevant Chinese agencies and institutions have not collected information on the total number of steam coal producers. At present, almost all coal producers produce both steam coal and coking coal. Until now, there is not a single coal producer that produces solely coking coal. Therefore {the total number of Chinese coal producers} should be the total number of Chinese steam coal producers."[37]

As such, the GOC stated that it submitted information on the steam coal industry/production in its February 15, 2012, response and had no additional information to provide to the Department.[38] Concerning the Department's second request for a list of industries in the PRC that use steam coal and the volume of steam coal used/consumed by each industry,

[29] *See* GOC First Supplemental Questionnaire Response – Part A (February 15, 2012) (GOC Part A First SQR) at 1.
[30] *Id*.
[31] *Id*.
[32] *Id*. at 1-2
[33] *Id*. at 2-4.
[34] *Id*. at 5 and Exhibit 2.
[35] *See* Department's Supplemental Questionnaire Issued to the GOC (March 8, 2012).
[36] *See* GOC Second SQR (March 29, 2012) (GOC Second SQR) at 1.
[37] *Id*.
[38] *Id*.

the GOC, in its March 29, 2012, response stated that "this information has already been provided by the GOC, to the best of its ability" in its February 15, 2012, response.[39] However, in response to the Department's request for this data, the GOC simply submitted a list of industries that it claims purchase steam coal directly and failed to submit the requested volume data.[40] The GOC also failed to provide documentation supporting its response that those listed industries actually purchase steam coal.[41]

With respect to the GOC's failure to provide the information requested about steam coal, we find that necessary information is not available on the record and that the GOC has withheld information that was requested of it and, thus, the Department must rely on facts otherwise available.[42] Concerning the PRC steam coal industry/production, we find that the GOC acted to the best of its ability in responding to the Department's information request. The GOC provided a detailed explanation of the efforts it took to obtain information regarding steam coal. Because the GOC's explanation is sufficient to determine that it acted to the best of its ability, we are relying on the "facts available" on the record and are not applying an adverse inference for the finding on whether PRC prices from actual transactions involving Chinese buyers and sellers are significantly distorted by the involvement of the GOC.

As noted above, the GOC submitted information for the coal industry and stated that the information on general coal producers and the general coal industry can provide a reasonable indication of the steam coal industry. We, therefore, are relying on that general coal information to determine whether the PRC steam coal market is distorted by the involvement of the GOC. The GOC reported that Chinese wholly state-owned or state controlled coal producers accounted for 60.59, 61.94, and 59.13 percent of gross industry revenue in 2008, 2009, and 2010, respectively.[43] The fact that Chinese state-owned enterprises were responsible for such a large percentage of domestic production volume, as reflected in their share of gross industry revenue, leads us to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market. *See Preamble to Countervailing Duty Regulations*, 63 FR 65348, 65377 (November 25, 1998) (*Preamble*); *see also* "Provision of Steam Coal for LTAR," below.

We find, however, that the GOC failed to cooperate by not acting to the best of its ability in responding to the Department's information request about the PRC industries that use steam coal and the volume of steam coal used/consumed by each of those industries. Despite two opportunities to submit volume data for the industries reported to purchase steam coal, the GOC chose to not provide such data to the Department. The GOC did not notify the Department, in accordance with section 782(c) of the Act, that it was unable to submit the information in the requested form and manner, nor did it suggest any alternative forms of data. As a result, the record is void of any evidence that would allow the Department to conduct an analysis to determine whether there is predominant or disproportionate use of steam coal by an industry(ies) reported by the GOC. Consequently, we find that an adverse inference is warranted in the application of facts available with regard to the specificity of the provision of steam coal for

[39] *Id*. at 4.
[40] *See* GOC Part A First SQR at 5 and Exhibit 2.
[41] *Id*.
[42] *See* sections 776(a)(1) and (a)(2)(A) of the Act.
[43] *See* GOC Part A First SQR at 2.

LTAR.[44] As AFA, we find that the provision of steam coal for LTAR is *de facto* specific, under section 771(5A)(D)(iii) of the Act. *See* "Provision of Steam Coal for LTAR," below.

GOC –Other Subsidies

The financial statements submitted by the RZBC Companies indicated that they received potentially countervailable subsidies in the form of grants. Consequently, we sought further information from the companies about these grants, and also asked the GOC to provide information about the programs under which the grants were provided.[45]

The Department normally relies on information from the government to assess program specificity; however, the GOC did not submit such information in all instances. Where the RZBC Companies submitted information which showed the specificity of a program, we relied upon that information to make our finding. Where neither the RZBC Companies nor the GOC provided information that would allow us to determine the specificity of a program, we relied upon AFA to make our finding. For those particular programs, we find that the GOC withheld necessary information that was requested of it and, thus, the Department must rely on facts available for these results. *See* section 776(a)(2)(A) of the Act. Moreover, we find that the GOC has failed to cooperate by not acting to the best of its ability to comply with our request for information. Consequently, an adverse inference is warranted in the application of facts available. *See* section 776(b) of the Act.

Due to the GOC's failure to provide the requested information about the programs under which the RZBC Companies received grants, we are assuming adversely that these grants are being provided to a specific enterprise or industry, or group of enterprises or industries. *See* section 771(5A) of the Act.

VII. Subsidies Valuation Information - Benchmarks and Discount Rates

The Department is examining loans received by the RZBC Companies from Chinese policy banks and state-owned commercial banks (SOCBs), as well as non-recurring, allocable subsidies (*see* 19 CFR 351.524(b)(1)). The derivation of the benchmark and discount rates used to value these subsidies is discussed below.

Short-Term RMB Denominated Loans

Section 771(5)(E)(ii) of the Act explains that the benefit for loans is the "difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." Normally, the Department uses comparable commercial loans reported by the company as a benchmark.[46] If the firm did not have any comparable commercial loans during the period, the Department's regulations provide that we "may use a national average interest rate for comparable commercial loans."[47]

[44] *See* section 776(b) of the Act.
[45] *See* Department's Supplemental Questionnaires Issued to the GOC on February 1 and March 16, 2012, and Supplemental Questionnaires Issued to the RZBC Companies on February 1 and March 21, 2012.
[46] *See* 19 CFR 351.505(a)(3)(i).
[47] *See* 19 CFR 351.505(a)(3)(ii).

As noted above, section 771(5)(E)(ii) of the Act indicates that the benchmark should be a market-based rate. For the reasons explained in *Coated Paper from the PRC*,[48] loans provided by Chinese banks reflect significant government intervention in the banking sector and do not reflect rates that would be found in a functioning market. Because of this, any loans received by respondents from private Chinese or foreign-owned banks would be unsuitable for use as benchmarks under 19 CFR 351.505(a)(2)(i). Similarly, we cannot use a national interest rate for commercial loans as envisaged by 19 CFR 351.505(a)(3)(ii). Therefore, because of the special difficulties inherent in using a Chinese benchmark for loans, the Department is selecting an external market-based benchmark interest rate. The use of an external benchmark is consistent with the Department's practice. For example, in *Softwood Lumber from Canada*, the Department used U.S. timber prices to measure the benefit for government-provided timber in Canada.[49]

In past proceedings involving imports from the PRC, we calculated the external benchmark using the methodology first developed in *Coated Paper from the PRC*[50] and more recently updated in *Thermal Paper from the PRC*.[51] Under that methodology, we first determine which countries are similar to the PRC in terms of gross national income, based on the World Bank's classification of countries as: low income; lower-middle income; upper-middle income; and high income. As explained in *Coated Paper from the PRC*, this pool of countries captures the broad inverse relationship between income and interest rates. For 2001 through 2009, the PRC fell in the lower-middle income category.[52] Beginning in 2010, however, the PRC is in the upper-middle income category.[53] Accordingly, as explained further below, we are using the interest rates of upper-middle income countries to construct the 2010 benchmark.

After identifying the appropriate interest rates, the next step in constructing the benchmark has been to incorporate an important factor in interest rate formation, the strength of governance as reflected in the quality of the countries' institutions. The strength of governance has been built into the analysis by using a regression analysis that relates the interest rates to governance indicators. In each of the years from 2001-2009, the results of the regression analysis reflected the intended, common sense result: stronger institutions meant relatively lower real interest rates, while weaker institutions meant relatively higher real interest rates. For 2010, however, the regression does not yield that outcome for the PRC's income group.

This contrary result for a single year in ten does not lead us to reject the strength of governance as a determinant of interest rates. As confirmed by the Federal Reserve, "there is a significant negative correlation between institutional quality and the real interest rate, such that higher quality institutions are associated with lower real interest rates."[54] However, for 2010, incorporating the governance indicators in our analysis does not make for a better benchmark.

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[48] *See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (October 25, 2007) (*Coated Paper from the PRC*), and the accompanying Issues and Decision Memorandum (Coated Paper Decision Memorandum) at Comment 10.

[49] *See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 FR 15545 (April 2, 2002) (*Softwood Lumber from Canada*), and accompanying Issues and Decision Memorandum (Softwood Lumber Decision Memorandum) at "Analysis of Programs, Provincial Stumpage Programs Determined to Confer Subsidies, Benefit."

[50] *See* Coated Paper Decision Memorandum at Comment 10.

[51] *See Lightweight Thermal Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 57323 (October 2, 2008) (*Thermal Paper from the PRC*), and accompanying Issues and Decision Memorandum at 8-10.

[52] *See* World Bank Country Classification, http://econ.worldbank.org/.

[53] *Id*.

[54] *See* Additional Documents Memorandum at Attachment I for Federal Reserve Consultation Memorandum.

Therefore, while we have continued to rely on the regression-based analysis used since *Coated Paper from the PRC* to compute the benchmarks for loans taken out prior to the POR, for the 2010 benchmark we are using an average of the interest rates of the upper-middle income countries. Based on our experience for the 2001-2009 period, in which the average interest rate of the lower-middle income group did not differ significantly from the benchmark rate resulting from the regression for that group, use of the average interest rate for 2010 does not introduce a distortion into our calculations.

Many of the countries in the World Bank's upper-middle and lower-middle income categories reported lending and inflation rates to the International Monetary Fund, and they are included in that agency's international financial statistics (IFS). With the exceptions noted below, we have used the interest and inflation rates reported in the IFS for the countries identified as "upper middle income" by the World Bank for 2010, and "lower middle income" for 2001-2009. First, we did not include those economies that the Department considered to be non-market economies for antidumping purposes for any part of the years in question, for example: Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Turkmenistan. Second, the pool necessarily excludes any country that did not report both lending and inflation rates to IFS for those years. Third, we removed any country that reported a rate that was not a lending rate or that based its lending rate on foreign-currency denominated instruments. For example, Jordan reported a deposit rate, not a lending rate, and the rates reported by Ecuador and Timor L'Este are dollar-denominated rates; therefore, the rates for these three countries have been excluded. Finally, for each year the Department calculated an inflation-adjusted short-term benchmark rate, we have also excluded any countries with aberrational or negative real interest rates for the year in question.

The resulting inflation-adjusted benchmark lending rates are in the Department's Interest Rate Benchmark Memorandum.[55] Because these rates are net of inflation, we adjusted the benchmark to include an inflation component.

Long-Term RMB-Denominated Loans

The lending rates reported in the IFS represent short- and medium-term lending, and there are no sufficient publicly available long-term interest rate data upon which to base a robust benchmark for long-term loans. To address this problem, the Department has developed an adjustment to the short- and medium-term rates to convert them to long-term rates using Bloomberg U.S. corporate BB-rated bond rates.[56]

In the *Citric Acid Investigation*, this methodology was revised by switching from a long-term mark-up based on the ratio of the rates of BB-rated bonds to applying a spread which is calculated as the difference between the two-year BB bond rate and the n-year BB bond rate, where "n" equals or approximates the number of years of the term of the loan in question.[57]

[55] *See* Memorandum to the File from Patricia M. Tran, International Trade Compliance Analyst, AD/CVD Operations, Office 3, regarding "Preliminary Results Interest Rate Benchmark Memorandum" (May 30, 2012) (Interest Rate Benchmark Memorandum).

[56] *See, e.g., Light-Walled Rectangular Pipe and Tube from People's Republic of China: Final Affirmative Countervailing Duty Investigation Determination*, 73 FR 35642 (June 24, 2008) (*Rectangular Pipe from the PRC*), and accompanying Issues and Decision Memorandum (Rectangular Pipe Decision Memorandum) at 8.

[57] *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 16836 (April 13, 2009) (*Citric Acid Investigation*), and accompanying Issues and Decision Memorandum (Citric Acid Investigation Decision Memorandum) at Comment 14.

Finally, because these long-term rates are net of inflation as noted above, we adjusted the benchmark to include an inflation component.

Foreign Currency-Denominated Loans

To calculate benchmark interest rates for foreign currency-denominated loans, the Department is following the methodology developed over a number of successive PRC investigations. For US dollar short-term loans, the Department used as a benchmark the one-year dollar London Interbank Offering Rate (LIBOR), plus the average spread between LIBOR and the one-year corporate bond rate for companies with a BB rating. Likewise, for any loans denominated in other foreign currencies, we used as a benchmark the one-year LIBOR for the given currency plus the average spread between the LIBOR rate and the one-year corporate bond rate for companies with a BB rating.

For any long-term foreign currency-denominated loans, the Department added the applicable short-term LIBOR rate to a spread which is calculated as the difference between the one-year BB bond rate and the n-year BB bond rate, where "n" equals or approximates the number of years of the term of the loan in question.

Discount Rate Benchmarks

Consistent with 19 CFR 351.524(d)(3)(i)(A), we have used as the discount rate the long-term interest rate calculated according to the methodology described above for the year in which the government agreed to provide the subsidy.

The resulting interest rate benchmarks used in the final results calculations are provided in the Interest Rate Benchmark Memorandum.

ANALYSIS OF PROGRAMS

I. Programs Determined To Be Countervailable

A. Shandong Province Policy Loans Program

In the underlying investigation and *Citric Acid First Review*, the Department found that the *Shandong Province Development Plan of Chemical Industry during "Tenth Five-Year Plan" Period* identifies objectives and goals for the development of the citric acid industry and calls for lending to support these objectives and goals. *See* Citric Acid Investigation Decision Memorandum at "Policy Lending," and Citric Acid First Review Decision Memorandum at "Shandong Province Policy Loans Program." Moreover, loan documents reviewed by the Department stated that because the food-use citric acid industry "has characteristics of capital and technology concentration and belongs to high and new technology … the State always takes positive policy to encourage its development." *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review*, 76 FR 33219, 33228 (June 8, 2011) (*Citric Acid First Review Prelim*), unchanged in the *Citric Acid First Review*.

On the record of the instant review, the GOC reported that there were no changes to this program during the POR.[58] Therefore, consistent with the *Citric Acid Investigation* and *Citric Acid First Review*, we find that Shandong Province policy loans from SOCBs constitute financial contributions from "authorities" within the meaning of sections 771(5)(B) and 771(5)(D)(i) of the Act. Further, pursuant to section 771(5)(E)(ii) of the Act, such financing provides a benefit equal to the difference between what the recipients paid on the loans and the amount they would have paid on comparable commercial loans. We also find that the loans are *de jure* specific within the meaning of section 771(5A)(D)(i) of the Act because of the Government of Shandong's policy to develop the citric acid industry.

RZBC Co., RZBC Juxian, and RZBC IE reported that they had loans and bank acceptance notes outstanding during the POR, which were provided by SOCBs. To calculate the benefit under this program, we compared the amount of interest each company paid on the outstanding loans to the amount of interest they would have paid on comparable commercial loans. *See* 19 CFR 351.505(a). In conducting this comparison, we used the interest rates described in the "Subsidies Valuation Information - Benchmarks and Discount Rates" section above. We have attributed benefits under this program to the total consolidated sales of RZBC Co., RZBC Juxian, and RZBC IE (exclusive of inter-company sales), as discussed in the "Attribution of Subsidies" section above. On this basis, we find that the RZBC Companies received a countervailable subsidy of 0.40 percent *ad valorem*.

B. Export Seller's Credit for High- and New-Technology Products

RZBC IE also reported having outstanding loans from the Export-Import Bank of the PRC (EXIM) during the POR, which were provided under this program. In the underlying investigation and *Citric Acid First Review*, the Department found that loans under this program conferred a countervailable subsidy. *See* Citric Acid Investigation Decision Memorandum at "Policy Lending," and Citric Acid First Review Decision Memorandum at "Export Seller's Credit for High- and New-Technology Products."

On the record of the instant review, the GOC reported that that there were no changes to the program during the POR.[59] Therefore, consistent with the *Citric Acid Investigation* and *Citric Acid First Review*, we find that the loans provided by the GOC under this program constitute financial contributions under sections 771(5)(B)(i) and 771(5)(D)(i) of the Act. The loans also provide a benefit under section 771(5)(E)(ii) of the Act in the amount of the difference between the amounts the recipient paid and would have paid on comparable commercial loans. Finally, the receipt of loans under this program is tied to actual or anticipated exportation or export earnings and, therefore, this program is specific pursuant to sections 771(5A)(A)-(B) of the Act.

To calculate the benefit under this program, we compared the amount of interest RZBC IE paid on the outstanding loans to the amount of interest the company would have paid on comparable commercial loans. *See* 19 CFR 351.505(a). In conducting this comparison, we used the interest rates described in the "Subsidies Valuation Information - Benchmarks and Discount Rates" section above. We divided the total benefit amount by the RZBC Companies' export sales, as discussed in the "Attribution of Subsidies" section above. On this basis, we find that the RZBC Companies received a countervailable subsidy of 0.74 percent *ad valorem*.

[58] *See* GOC IQR at II-2.
[59] *Id*. at II-3.

C. Reduced Income Tax Rate for High or New Technology Enterprises

In the *Citric Acid First Review*, the Department found this program to be countervailable. *See* Citric Acid First Review Decision Memorandum at "Reduced Income Tax Rate for High or New Technology Enterprises." As discussed in the preliminary results of the first review, Article 28.2 of the Enterprise Income Tax Law authorizes a reduced income tax rate of 15 percent for high- and new-technology enterprises (HNTEs). *See Citric Acid First Review Prelim*, 76 FR at 33229-30. The criteria and procedures for identifying eligible HNTEs are provided in the *Measures on Recognition of High and New Technology Enterprises* (GUOKEFAHUO {2008} No. 172) (*Measures on Recognition of HNTEs*) and the *Guidance on Administration of Recognizing High and New Technology Enterprises* (GUOKEFA HUO {2008} No. 362). *Id*. Article 8 of the *Measures on Recognition of HNTEs* provides that the science and technology administrative departments of each province, autonomous region, and municipality directly under the central government or cities under separate state planning shall collaborate with the finance and taxation departments at the same level to recognize HNTEs in their respective jurisdictions. *Id*.

The annex of the *Measures on Recognition of HNTEs* lists eight high- and new-technology areas selected for the State's "primary support": 1) Electronics and Information Technology; 2) Biology and New Medicine Technology; 3) Aerospace Industry; 4) New Materials Technology; 5) High-tech Service Industry; 6) New Energy and Energy-Saving Technology; 7) Resources and Environmental Technology; and 8) High-tech Transformation of Traditional Industries. *Id*.

On the record of the instant review, the GOC reported that there were no changes to this program during the POR.[60] RZBC Co. and RZBC Juxian reported that they received tax savings under this program on their 2009 income tax returns filed during the POR.

Consistent with the *Citric Acid First Review*, we find that the reduced income tax rate paid by RZBC Co. and RZBC Juxian is a financial contribution in the form of revenue foregone by the GOC, and provides a benefit to the recipient in the amount of the tax savings. *See* section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We also find, consistent with the *Citric Acid First Review*, that the reduction afforded by this program is limited as a matter of law to certain new and high technology companies selected by the government pursuant to legal guidelines specified in *Measures on Recognition of HNTEs* and, hence, is specific under section 771(5A)(D)(i) of the Act. Both the number of targeted industries (eight) and the narrowness of the identified project areas under those industries support a finding that the legislation expressly limits access to the program to a specific group of enterprises or industries.

To calculate the benefit, we compared the income tax rate that RZBC Co. and RZBC Juxian would have paid in the absence of the program (25 percent) to the income tax rate that the companies actually paid (15 percent). We treated the income tax savings realized by RZBC Co. and RZBC Juxian as a recurring benefit, consistent with 19 CFR 351.524(c)(1) and divided the tax savings received during the POR by the consolidated sales (excluding inter-company sales) for RZBC Co., RZBC Juxian, and RZBC IE for the POR, pursuant to 19 CFR 351.525(b)(6)(iii) and 19 CFR 351.525(c). On this basis, we find that the RZBC Companies received a countervailable subsidy of 0.91 percent *ad valorem*.

[60] *Id*. at II-6, 7.

D. Income Tax Credits on Purchases of Domestically Produced Equipment

In the underlying investigation and *Citric Acid First Review*, the Department found that this program provided countervailable subsidies. *See* Citric Acid Investigation Decision Memorandum at "Income Tax Credits on Purchases of Domestically Produced Equipment," and Citric Acid First Review Decision Memorandum at "Income Tax Credits on Purchases of Domestically Produced Equipment."

As discussed in the first review, according to the *Provisional Measures on Enterprise Income Tax Credit for Investment in Domestically Produced Equipment for Technology Renovation {Projects}* (CAI SHU ZI {1999} No. 290), a domestically invested company may claim tax credits on the purchase of domestic equipment if the project is compatible with the industrial policies of the GOC. *See Citric Acid First Review Prelim*, 76 FR at 33230. Specifically, a tax credit up to 40 percent of the purchase price of the domestic equipment may apply to the incremental increase in tax liability from the previous year. *Id*.

On the record of the instant review, the GOC reported that that there were no changes to this program during the POR.[61] RZBC Co. and RZBC Juxian reported that they received tax savings under this program on their 2009 income tax returns filed during the POR.

Consistent with the prior segments of this proceeding and prior CVD determinations,[62] we find that income tax credits for the purchase of domestically produced equipment are countervailable subsidies. The tax credits are a financial contribution in the form of revenue foregone by the government and provide a benefit to the recipients in the amount of the tax savings. *See* section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We further find that these tax credits are contingent upon use of domestic over imported goods and, hence, are specific under section 771(5A)(C) of the Act.

We treated the income tax savings enjoyed by RZBC Co. and RZBC Juxian as a recurring benefit, consistent with 19 CFR 351.524(c)(1), and divided the companies' tax savings by the consolidated sales (excluding inter-company sales) for RZBC Co., RZBC Juxian, and RZBC IE for the POR, pursuant to 19 CFR 351.525(b)(6)(iii) and 19 CFR 351.525(c). On this basis, we find that the RZBC Companies received a countervailable subsidy of 1.36 percent *ad valorem*.

E. Provision of Sulfuric Acid for LTAR

The Department is examining the provision of sulfuric acid to the RZBC Companies. In the first administrative review, the Department found that this program provides countervailable subsidies. *See* Citric Acid First Review Decision Memorandum at "Provision of Sulfuric Acid for LTAR."

In the July 26, 2011, initial questionnaire issued to the GOC in this review, we informed the GOC that the Department would not reevaluate the countervailability of this program. However, if there were any changes to the operation of the program during the POR, then the GOC was instructed to explain the changes and answer all relevant questions in Appendix 1.[63]

[61] *Id*. at II-4.
[62] *See, e.g., Certain Oil Country Tubular Goods from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009), and accompanying Issues and Decision Memorandum at 18.
[63] *See* Initial Questionnaire at "Provision of Sulfuric Acid for LTAR."

The GOC did not report any changes to the operation of the program during the POR and did not answer the questions in Appendix 1.[64] As such, the Department continues to find that this program is specific, within the meaning of section 771(5A)(D)(iii)(I) of the Act.

Further, we find that sulfuric acid producers that are majority owned by the government are "authorities" within the meaning of section 771(5)(B) of the Act. Also, as discussed under "Use of Facts Otherwise Available and Adverse Inferences," above, we are relying on AFA to determine that Producer X, from whom the RZBC Companies purchased sulfuric acid, is an "authority" within the meaning of section 771(5)(B) of the Act. Therefore, we find that the RZBC Companies received a financial contribution in the form of the provision of a good. *See* section 771(5)(D)(iii) of the Act.

In the *Citric Acid First Review*, the Department found that actual transaction prices for sulfuric acid in the PRC are significantly distorted by the government's involvement in the market. As such, we determined that domestic prices in the PRC cannot serve as viable, tier one benchmark prices. For the same reasons, we determined that import prices into the PRC cannot serve as a benchmark. *See* Citric Acid First Review Decision Memorandum at "Provision of Sulfuric Acid for LTAR." No new evidence has presented in this review that would call into question that finding. Accordingly, to determine whether the provision of sulfuric acid conferred a benefit within the meaning of section 771(5)(E)(iv) of the Act, consistent with the *Citric Acid First Review*, we applied a tier two benchmark, *i.e.*, world market prices available to purchasers in the PRC (*see* 19 CFR 351.511(a)(2)(ii)).

Petitioners placed on the record export values for sulfuric acid from Canada, the European Union (EU), Thailand, India, and the United States for the year 2010, taken from trade statistics compiled by Canadian Customs, Eurostat, Thai Customs, U.S. International Trade Commission, and Global Trade Atlas.[65]

The average of the export prices provided by Petitioners represents an average of commercially available world market prices for sulfuric acid that would be available to purchasers in the PRC. Also, 19 CFR 351.511(a)(2)(ii) states that where there is more than one commercially available world market price, the Department will average the prices to the extent practicable. Therefore, we have averaged the prices to calculate a single benchmark by month.

Under 19 CFR 351.511(a)(2)(iv), when measuring the adequacy of remuneration under tier two, the Department will adjust the benchmark price to reflect the price that a firm actually paid or would pay if it imported the product, including delivery charges and import duties. Regarding delivery charges, we averaged the international freight rates from Canada, the EU, Thailand, India, and the United States to Shanghai, submitted by Petitioners.[66] We also added inland freight in the PRC based on the RZBC Companies' sulfuric acid purchase information,[67] import duties as reported by the GOC, and the value added tax (VAT) applicable to imports of sulfuric acid into the PRC.[68] Both RZBC Co. and RZBC Juxian reported the prices that they paid for sulfuric acid inclusive of inland freight and VAT.

To derive the benchmark, we did not include marine insurance. In prior PRC CVD cases, the Department has found that, while the PRC customs authorities impute an insurance cost on

[64] *See* GOC IQR at II-9 and II-10.
[65] *See* Petitioners' Submission of Factual Information (November 17, 2011) (Petitioners' Factual Information) at 3-4 and Exhibit 4. Where we could, we extracted from the pricing data export prices to the PRC.
[66] *See* Petitioners' Factual Information at 4-5 and Exhibit 5.
[67] *See* RZBC Companies SQR (February 6, 2012) at Exhibit 10 (for RZBC Co.) and Exhibit 2 (for RZBC Juxian).
[68] For import duties and VAT, *see* GOC Third SQR (March 23, 2012) at 3.

certain imports for purposes of levying duties and compiling statistical data, there is no evidence to suggest that PRC customs authorities require importers to pay insurance charges.[69]

Comparing the adjusted benchmark prices to the prices paid by RZBC Co. and RZBC Juxian for sulfuric acid, we find that the GOC provided sulfuric acid for LTAR, and that a benefit exists in the amount of the difference between the benchmark and what the respondents paid. *See* 19 CFR 351.511(a). To calculate the benefit, we took the difference between the delivered world market price and the price that the companies paid for sulfuric acid, including delivery charges, and divided the sum of the price differentials by the total consolidated sales of RZBC Co., RZBC Juxian, and RZBC IE (exclusive of inter-company sales), as discussed in the "Attribution of Subsidies" section above. On this basis, we find that the RZBC Companies received a countervailable subsidy of 1.29 percent *ad valorem* in 2010.

F. Provision of Steam Coal for LTAR

The Department is examining whether the RZBC Companies purchased steam coal for LTAR during the POR. The GOC reported that the RZBC Companies purchased steam coal from state-owned enterprises during the POR.[70] Consistent with our practice, we find that state-owned enterprises are "authorities" within the meaning of section 771(5)(B) of the Act.[71] Therefore, we determine that the RZBC Companies received a financial contribution in the form of the provision of a good, pursuant to section 771(5)(D)(iii) of the Act.

Regarding specificity, in the final results of the first administrative review, the Department was not able to determine whether steam coal is provided to a specific industry or enterprise or group of industries or enterprises because of insufficient evidence. *See* Citric Acid First Review Decision Memorandum at Comment 6. The Department stated that it would revisit the *de facto* specificity of this program in a future review. *Id*. As discussed under "Use of Facts Otherwise Available and Adverse Inferences," above, we are relying on AFA to determine that the provision of steam coal for LTAR is *de facto* specific, under section 771(5A)(D)(iii) of the Act, because the GOC failed to provide information, which was requested of it on two occasions, regarding the industries that used/consumed steam coal and the associated volume data for the years 2008, 2009, and 2010.

To determine whether the government's provision of steam coal conferred a benefit within the meaning of section 771(5)(E)(iv) of the Act, we relied on 19 CFR 351.511(a)(2) to identify an appropriate, market-determined benchmark for measuring the adequacy of remuneration. Potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation (*e.g.*, actual sales, actual imports, or competitively run government auctions) (tier one); (2) world market prices that would be available to purchasers in the country under investigation (tier two); or (3) an assessment of whether the government price is consistent with market principles (tier three). As we explained in *Softwood Lumber from Canada*, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation because

[69] *See, e.g., Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 28557 (May 21, 2010), and accompanying Issues and Decision Memorandum at Comment 13.
[70] *See* GOC IQR at II-9.
[71] *See, e.g., Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011), and accompanying Issues and Decision Memorandum at Comment 18.

such prices generally would be expected to reflect most closely the prevailing market conditions of the purchaser under investigation.[72] Beginning with tier one, we must determine whether the prices from actual sales transactions involving Chinese buyers and sellers are significantly distorted. As explained in the *Preamble*: "Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative tier two in the hierarchy." *See Preamble*, 63 FR at 65377. The *Preamble* further recognizes that distortion can occur when the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market. *Id*.

In the instant review, we are relying on the facts available regarding the general coal industry as a proxy to determine whether the PRC steam coal market is distorted by the involvement of the GOC. As discussed in "Use of Facts Otherwise Available and Adverse Inferences," the GOC reported that Chinese wholly state-owned or state controlled coal producers accounted for 60.59, 61.94, and 59.13 percent of gross industry revenue in 2008, 2009, and 2010, respectively.[73] The fact that Chinese state-owned enterprises were responsible for such a large percentage of domestic production volume, as reflected in their share of gross industry revenue, makes it reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market. For this reason, we determine that domestic prices charged by privately-owned coal producers based in the PRC and import prices into the PRC may not serve as viable, tier one benchmark prices.

Turning to tier two benchmarks, *i.e.*, world market prices available to purchasers in the PRC, we received steam coal benchmark pricing data from Petitioners.[74] Petitioners submitted monthly steam coal prices for January 2010, through December 2010, reported by the International Monetary Fund (IMF) for Australia (Newcastle) and from the Platts International Coal Report (Platts Report) for Colombia, Poland, Russia, Australia (Gladstone), Japan and Korea.[75] The Department's regulations at 19 CFR 351.511(a)(2)(ii) state that where there is more than one commercially available world market price, the Department will average the prices to the extent practicable. Therefore, where more than one benchmark price was submitted for a given month, we averaged those prices to calculate the single benchmark price for that month.

Under 19 CFR 351.511(a)(2)(iv), when measuring the adequacy of remuneration under tier two, the Department will adjust the benchmark price to reflect the price that a firm actually paid or would pay if it imported the product, including delivery charges and import duties. Accordingly, in deriving the benchmark prices, we included international freight and inland freight. The international ocean freight rates used are an average of the freight rates submitted on the record by Petitioners. Petitioners placed on the record ocean freight pricing data from Platts and the Baltic Panamax Index, for the POR, pertaining to shipments of steam coal from various world ports (in Australia, Colombia, Poland, and Russia) to Qingdao, PRC.[76] We averaged the international freight rates to derive the amount included in the benchmark.

For inland freight, we relied on information submitted by Petitioners, who provided inland freight charges based on the transportation cost of steam coal calculated from the Qingdao

[72] *See* Softwood Lumber Decision Memorandum at "Market-Based Benchmark."
[73] *See* GOC Part A First SQR at 2.
[74] *See* Petitioners' Factual Information at 2 and Exhibit 1.
[75] *Id*.
[76] *Id*. at 2-3 and Exhibit 2.

Port to the respondent's location.[77] To derive the monthly inland freight charges, Petitioners used data published by Haver Analytics and the 2010 average freight costs of another energy producer in the PRC.[78] Petitioners first divided the average freight cost per metric ton by the average cost of rail transportation per metric ton kilometer to determine the average distance shipped. Petitioners next divided the monthly average freight charge by the average distance shipped to determine the monthly average freight charge per metric ton kilometer. Petitioners then multiplied that rate by the kilometer distance between Qingdao and RZBC and added 17 percent VAT to arrive at the inland freight charges, which we include in the monthly benchmark prices.[79]

Additionally, to derive the benchmark, we included import duties and the VAT applicable to imports of steam coal into the PRC as reported by the GOC.[80] As with sulfuric acid, we did not include marine insurance.

Comparing the adjusted benchmark prices to the prices paid by RZBC Co. and RZBC Juxian for steam coal during the POR, we find that the GOC provided steam coal for LTAR, and that a benefit exists in the amount of the difference between the benchmark price and the price that the companies paid. *See* 19 CFR 351.511(a). To calculate the benefit, we took the difference between the delivered world market price and the price that the companies paid for steam coal, including delivery charges, and divided the sum of the price differentials by the total consolidated sales of RZBC Co., RZBC Juxian, and RZBC IE (excluding inter-company sales), as discussed in the "Attribution of Subsidies" section above. On this basis, we determine that the RZBC Companies received a countervailable subsidy of 0.19 percent *ad valorem* in 2010.

G. Science and Technology Export Innovation Support

According to the RZBC Group, it received a subsidy from Rizhao City, Donggang District, the purpose of which is to encourage export development.[81]

Because the financial assistance was pursuant to the "Rizhao City Financial Support for Encouraging Export Development{s} Policy," we determine that the program is specific within the meaning of section 771(5A)(B) of the Act. We determine that the grants received by RZBC Group constitute a financial contribution and a benefit under sections 771(5)(D)(i) and 771(5)(E) of the Act, respectively.

The grant that RZBC Group received during the POR was less than 0.5 percent of the exports sales for the POR. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POR. On this basis, we determine that the RZBC Companies received a countervailable export subsidy of 0.01 percent *ad valorem* in 2010.

H. Donggang Finance Bureau IPO Preparation Subsidy

RZBC Group reported that it received a grant from Rizhao City, Donggang District during the POR because it was preparing to make an initial public offering.[82]

[77] *Id*. at 3 and Exhibit 3.
[78] *Id*.
[79] *Id*.
[80] *See* GOC Third SQR at 3.
[81] *See* RZBC Companies Second SQR at Exhibit 6.
[82] *See* RZBC Companies IQR at "RZBC Group" page III-23.

We determine that the grant received by RZBC Group constitutes a financial contribution and a benefit under sections 771(5)(D)(i) and 771(5)(E) of the Act, respectively. Regarding specificity, because the grant is limited to firms undertaking an initial public offering, we determine that the grant is specific under section 771(5A)(D)(i) of the Act.

The grant that RZBC Group received during the POR was less than 0.5 percent of the total consolidated sales of RZBC Group, RZBC Co., RZBC Juxian, and RZBC IE (excluding inter-company sales) for the POR. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amounts to the POR. On this basis, we determine that the RZBC Companies received a countervailable subsidy of 0.02 percent *ad valorem*.

I. Shandong Province Science and Technology Development Fund

The GOC reported that this program was established in 2004, pursuant to the *Provisional Measures on Shandong Province Applied Technology Research and Development Fund (the Provisional Measures)*, to facilitate the development of science and technology in Shandong Province.[83] The program is jointly administered by the Shandong Province Department of Finance and Shandong Province Science and Technology Department.[84]

The GOC provided a copy of *the Provisional Measures* which, at Article 2, states that the fund is to promote technological development and strengthen technological application.[85] As stated in Article 8, the fund will cover the project fees and plan management fees, *i.e.*, labor, equipment, energy, and travel costs.[86]

RZBC Co. reported that it received a subsidy under this program during the POR. The GOC stated that RZBC Co. received assistance for its "continuous-analog-moving-bed lactic acid production technology" project.[87]

We find that the grants received by RZBC Co. under Shandong Province's Applied Technology Research and Development Fund constitute a financial contribution, in the form of a direct transfer of funds from the government, which bestows a benefit equal to the amount of the grant, within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act. We also find that, because the receipt of assistance under the program is limited in law to certain enterprises, *i.e.*, companies with science and technological development projects, the program is *de jure* specific within the meaning of section 771(5A)(D)(i) of the Act.

To calculate the benefit, we divided the grant amount approved by the total consolidated sales of RZBC Co., RZBC Juxian, and RZBC IE (excluding inter-company sales) for the year in which the grant was approved and found that the amount was less than 0.5 percent. Therefore, in accordance with 19 CFR 351.524(b)(2), we expensed the total amount of the grant to the year of receipt, which is the POR. On this basis, we determine that the RZBC Companies received a countervailable subsidy of 0.01 percent *ad valorem*.

[83] *See* GOC First SQR - Part II (February 29, 2012) at 9.
[84] *Id*.
[85] *Id*. at Exhibit 2.
[86] *Id*.
[87] *Id*. at 12.

J. First Industrial Enterprises Development Budget in District Level

RZBC Co. reported that it received a grant from the Donggang District Economic and Trade Bureau and Donggang District Financial Bureau during the POR because it promoted the development of the industrial enterprises in the district.[88] RZBC Co. stated that the company applied and underwent the approval process in order to receive the funds.

We determine that the grant received by RZBC Co. constitutes a financial contribution and a benefit, under sections 771(5)(D)(i) and 771(5)(E) of the Act, respectively. As discussed under "Use of Facts Otherwise Available and Adverse Inferences," the Department is relying on AFA to determine that the grant program is specific because the GOC failed to provide information, which was requested of it on two occasions, regarding the details of the government assistance.

To calculate the benefit, we divided the grant amount approved by the total consolidated sales of RZBC Co., RZBC Juxian, and RZBC IE (excluding inter-company sales) for the year in which the grant was approved and found that the amount was less than 0.5 percent. Therefore, in accordance with 19 CFR 351.524(b)(2), we expensed the total amount of the grant to the year of receipt, which is the POR. On this basis, we determine that the RZBC Companies received a countervailable subsidy of 0.02 percent *ad valorem*.

K. First and Second Industrial Enterprises Development Budget in City Level

RZBC Co. received grants from Rizhao City to encourage technical improvement and innovation. Each grant is linked to a specific area of achievement and the approval documents name the companies that received the grants.

We determine that the grants received by RZBC Co. constitute a financial contribution and a benefit under sections 771(5)(D)(i) and 771(5)(E) of the Act, respectively. As discussed under "Use of Facts Otherwise Available and Adverse Inferences," the Department is relying on AFA to determine that the grant program is specific because the GOC failed to provide information, which was requested of it on two occasions, regarding the details of the government assistance. To calculate the benefit, we divided the grant amount approved by the total consolidated sales of RZBC Co., RZBC Juxian, and RZBC IE (excluding inter-company sales) for the year in which the grant was approved and found that the amount was less than 0.5 percent. Therefore, in accordance with 19 CFR 351.524(b)(2), we expensed the total amount of the grant to the year of receipt, which is the POR. On this basis, we determine that the RZBC Companies received a countervailable subsidy of 0.04 percent *ad valorem*.

L. Award for Contribution to City and People

RZBC Co. reported that it received a grant from Rizhao City during the POR because of the company's outstanding contribution to the commercial development of the district.[89] The company did not apply for this grant.

We determine that the grant received by RZBC Co. constitutes a financial contribution and a benefit under sections 771(5)(D)(i) and 771(5)(E) of the Act, respectively. As discussed under "Use of Facts Otherwise Available and Adverse Inferences," the Department is relying on

[88] *See* RZBC Companies IQR at III-24 and Exhibit 14 of RZBC Companies Second SQR.
[89] *See* RZBC Companies IQR at III-28.

AFA to determine that the grant program is specific because the GOC failed to provide information, which was requested of it on two occasions, regarding the details of the government assistance.

The grant that RZBC Co. received during the POR was less than 0.5 percent of the total consolidated sales of RZBC Co., RZBC Juxian, and RZBC IE (excluding inter-company sales) for the POR. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POR. On this basis, we determine that the RZBC Companies received a countervailable subsidy of 0.01 percent *ad valorem*.

M. Award for Enterprise Technology Improvement Project

RZBC Co. reported that it received a grant from Rizhao City during the POR because it operated a technology improvement project.[90] RZBC Co. stated that the company did not apply for this grant program.

We determine that the grant received by RZBC Co. constitutes a financial contribution and a benefit under sections 771(5)(D)(i) and 771(5)(E) of the Act, respectively. Regarding specificity, because the grant is limited to firms operating technology improvement projects within the city, we determine the grants to be specific under section 771(5A)(D)(i) of the Act.

The grant that RZBC Co. received during the POR was less than 0.5 percent of the total consolidated sales of RZBC Co., RZBC Juxian, and RZBC IE (excluding inter-company sales) for the POR. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POR. On this basis, we determine that the RZBC Companies received a countervailable subsidy of 0.01 percent *ad valorem*.

N. Special Fund for Pollution Control of Three Rivers, Three Lakes, and the Songhua River[91]

The Department found this program to be countervailable in the *Citric Acid First Review*. *See* Citric Acid First Review Decision Memorandum at "Other Subsidies Received by RZBC" and "Special Fund for Pollution Control of Three Rivers, Three Lakes, and the Songhua River." On the record of the instant review, the GOC stated that it does not challenge the Department's countervailable finding for this program.[92] RZBC Juxian reported that it received a benefit under this program during the POR for a sewage treatment project.[93]

This program was established pursuant to the State Council's *Comprehensive Work Plan on Energy Conservation and Emission Reduction* (Guo Fa 2007 No. 7115) and the State Council's mandate to "strengthen pollution control of Three Rivers, Three Lakes, and the Songhua River." *Id*. The program is administered by the Shandong Finance Department and the Shandong Environmental Protection Bureau. *Id*. The purpose of the program is to enhance pollution control efforts by financing projects affecting the Huaihe River, Haihe River, Liaohe River, Taihu Lake, Chaohu Lake, Dianchi Lake, and the Songhua River. *Id*.

[90] *Id*. at III-30.
[91] RZBC Juxian referred to this program as "Resource Conservation and Environmental Protection." *See* RZBC Companies IQR at "RZBC Juxian" page III-20.
[92] *See* GOC SQR (February 29, 2012) at 2.
[93] *See* RZBC Companies IQR at "RZBC Juxian" page III-19 through III- 21, and Second SQR at "RZBC Juxian" Exhibit 20.

Because the fund is limited to enterprises located in these designated areas, the Department determined in the first administrative review that the program is specific within the meaning of section 771(5A)(D)(iv) of the Act. *Id*. The Department also found that these grants are direct transfers of funds within the meaning of section 771(5)(D)(i) of the Act and that they provide a benefit in the amount of the grant under 19 CFR 351.504(a). *Id*. at "Other Subsidies Received by RZBC."

To calculate the benefit, we divided the grant amount approved by the total consolidated sales of RZBC Co., RZBC Juxian, and RZBC IE (excluding inter-company sales) for the year in which the grant was approved and found that the amount was less than 0.5 percent. Therefore, in accordance with 19 CFR 351.524(b)(2), we expensed the total amount of the grant to the year of receipt, which is the POR. On this basis, we determine that the RZBC Companies received a countervailable subsidy of 0.16 percent *ad valorem*.

O. Shandong Self-Innovation Subsidy

The GOC reported that this program was established in 2007, pursuant to the *Measures on Shandong Province Self-Innovation Results Commercialization Special Fund* (*the Measures*), to promote the commercialization of self-innovation results, to facilitate the development of high technology industries with intellectual property rights, to guide economic growth, and to improve the competitiveness of Shandong Province.[94] The program is jointly administered by the Shandong Province Department of Finance and Shandong Province Science and Technology Department.[95]

The GOC provided a copy of *the Measures* which, at Article 8, states that the fund is to strictly adhere to the strategic plan of Shandong Province's medium- and long-term technology development plan and focus on the development of 15 high-tech industry groups.[96] As stated in Article 10, depending on the characteristics of the project and enterprise, assistance under the fund consists of direct funding of projects, equity investment, discount loans, financial rewards, and reimbursable aid.[97]

RZBC Juxian reported that it received a subsidy under this program during the POR.[98] The GOC stated that RZBC Juxian received assistance for its "citric acid bio-manufacturing key technology development and application" project.[99]

We find that the grant received by RZBC Juxian under Shandong Province's Self-Innovation Results Commercialization Special Fund constitutes a financial contribution, in the form of a direct transfer of funds from the government, which bestows a benefit equal to the amount of the grant within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act. We also find that, because the receipt of assistance under the program is limited in law to certain enterprises, *i.e.*, 15 high-tech industry groups, the program is *de jure* specific within the meaning of section 771(5A)(D)(i) of the Act.

To calculate the benefit, we divided the grant amount approved by the total consolidated sales of RZBC Co., RZBC Juxian, and RZBC IE (excluding inter-company sales) for the year in

[94] *See* GOC First SQR - Part II at 2.
[95] *Id*. at 3
[96] *Id*. at Exhibit 1.
[97] *Id*.
[98] *See* RZBC Companies IQR at "RZBC Juxian" page III-24 and III-25.
[99] *See* GOC First SQR – Part II at 6.

which the grant was approved and found that the amount was less than 0.5 percent. Therefore, in accordance with 19 CFR 351.524(b)(2), we expensed the grant to the POR, the year of receipt. On this basis, we determine that the RZBC Companies received a countervailable subsidy of 0.03 percent *ad valorem*.

P. Enterprise Development Supporting Fund from Zibo City Financial Bureau

In the *Citric Acid First Review*, the Department found that Sisha, RZBC Co.'s prior cross-owned parent company, received a countervailable subsidy under this program in 2003. *See* Citric Acid First Review Decision Memorandum at "Enterprise Development Fund from Zibo City Financial Bureau."

Because RZBC's statement regarding the eligibility criteria for this program indicated enterprises that receive these grants are, as a matter of fact, limited in number, the Department determined in the first administrative review that the program is specific within the meaning of section 771(5A)(D)(iii)(I) of the Act. The Department also found that these grants are direct transfers of funds within the meaning of section 771(5)(D)(i) of the Act and that they provide a benefit in the amount of the grant. *See* 19 CFR 351.504(a).

The Department determined to use Sisha's consolidated sales, reported by Sisha, as the denominator for the 2003 allocation test pursuant to 19 CFR 351.524(b)(2). *Id*. We found that the 2003 grant was greater than 0.5 percent of the reported consolidated sales for 2003. *Id*. Thus, because the 2003 grant was a non-recurring benefit consistent with 19 CFR 351.524(c)(2)(iii), we allocated the benefit over the 10-year AUL.

Because RZBC Co. and Sisha ceased to be cross-owned after March 2008, we applied a Sisha/RZBC Co. sales ratio to compute the benefit attributable to the RZBC Companies during the POR; this approach is consistent with the Department's decision in *Citric Acid First Review*. *Id*. We then divided that benefit amount by RZBC Co.'s, RZBC IE's, and RZBC Juxian's total combined sales (excluding inter-company sales) for 2010, to obtain the *ad valorem* subsidy rate. On this basis, we find that the RZBC Companies received a countervailable subsidy of 0.07 percent *ad valorem*.

II. Program Determined Not To Provide Countervailable Benefits During the POR

A. Award of Financial Construction

RZBC Juxian reported that it received a benefit under this program during the POR.[100] We determine that the benefit from this program results in a net subsidy rate that is less than 0.005 percent *ad valorem*. Consistent with our past practice, we have not included this program in our net CVD rate calculations. *See, e.g.*, Coated Paper Decision Memorandum at "Analysis of Programs, Programs Determined Not To Have Been Used or Not To Have Provided Benefits During the POI for GE;" *see also Certain Steel Wheels from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 77 FR 17017 (March 23, 2012), and accompanying Issues and Decision Memorandum at "Income Tax Reductions for Firms Located in the Shanghai Pudong New District."

[100] *See* RZBC Companies IQR at "RZBC Juxian" pages III-22 and III- 23.

III. Programs Determined Not To Be Used

We find that the RZBC Companies did not use the following programs during the POR:

Reduced Income Tax Rates to Foreign Invested Enterprises (FIEs) Based on Location
Reduced Income Tax Rate for Tech or Knowledge Intensive FIEs
Two Free, Three Half Tax Program for FIEs
Local Income Tax Exemption & Reduction Program for Productive FIEs
VAT Rebate on Purchases by FIEs of Domestically Produced Equipment
Famous Brands - Yixing City
Anqui City Energy & Water Savings Grant
Land for LTAR in Anqui Economic Development Zone
Land-Use Rights Extension in Yixing City
National Government Policy Lending
Fund for Optimizing Import and Export Structure of Mechanical Electronics and High and New Technology Products
International Market Development Fund Grants for Small and Medium Enterprises
Fund for Energy-saving Technological Innovation
Jiangsu Province Energy Conservation and Emissions Reduction Program
Rizhao City: Subsidies to Encourage Enterprise Expansion
Rizhao City: Subsidy for Antidumping Investigations
Rizhao City: Special Fund for Enterprise Development
Rizhao City: Technological Innovation Grants
Rizhao City: Technology Research and Development Fund
Shandong Province: Special Fund for the Establishment of Key Enterprise Technology Centers
Shandong Province: Subsidy for Antidumping Investigations
Shandong Province: Award Fund for Industrialization of Key Energy-saving Technology
Shandong Province: Environmental Protection Industry R&D Funds
Shandong Province: Waste Water Treatment Subsidies
Yixing City: Leading Enterprise Program
Yixing City: Tai Lake Water Improvement Program
Loans Provided to the Northeast Revitalization Program
State Key Technology Renovation Project Fund
National Level Grants to Loss-making State-Owned Enterprises (SOEs)
Income Tax Exemption Program for Export-Oriented FIEs
Tax Benefits to FIEs for Certain Reinvestment of Profits
Preferential Income Tax Rate for Research and Development for FIEs
Preferential Tax Programs for Encouraged Industries
Preferential Tax Policies for Township Enterprises
Provincial Level Grants to Loss-making SOEs
Reduced Income Tax Rates for Encouraged Industries in Anhui Province
Provision of Land for LTAR in Anhui Province
Funds for Outward Expansion of Industries in Guangdong Province
Income Tax Exemption for FIEs Located in Jiangsu Province
Administration Fee Exemption in the Yixing Economic Development Zone (YEDZ)
Tax Grants, Rebates, and Credits in the YEDZ

Provision of Construction Services in the YEDZ for LTAR
Grants to FIEs for Projects in the YEDZ
Provision of Electricity in the YEDZ for LTAR
Provision of Water in the YEDZ for LTAR
Provision of Land in the YEDZ for LTAR
Provision of Land to SOEs for LTAR
Torch Program – Grant
Discounted Loans for Export-Oriented Industries
Provision of Land in the Zhuqiao Key Open Park for LTAR
Special Funds for Energy Saving and Recycling Program
Water Resource Reimbursement Program
Shandong Province: Energy Saving Award
VAT and Import Duty Exemptions on Imported Equipment
Ecology Compensation Subsidy Funds[101]

ANALYSIS OF COMMENTS

Comment 1: Authority to Apply CVD to the PRC

The GOC asserts that the Federal Circuit held that the Department has no authority to pursue CVD investigations against the PRC, where the Department also holds that the PRC is a non-market economy (NME). *See GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011) (*GPX*). The GOC also asserts that Public Law 112-99, which contains a retroactive provision that applies to all CVD petitions against NMEs filed after November 20, 2006, is unconstitutional. *See Application of Countervailing Duty Provisions to Nonmarket Economy Countries*, 112 Pub. L. No. 99, 126 Stat. 265 (March 13, 2012) (Public Law 112-99). The GOC specifically argues that Public Law 112-99:

(1) Violates equal protection of the law as guaranteed by the Fifth Amendment's due process clause. Section 1(b) of Public Law 112-99 creates a special rule that creates a particular class of parties to whom both antidumping duties (ADs) and CVDs may be retroactively imposed without the protections under section 2 to account for potential double counting.

(2) Section l(b) is unconstitutional because the extent of retroactivity violates the Fifth Amendment's guarantee of due process. The adverse impact on Chinese producers, the GOC, and U.S. importers of the retroactivity does not serve a legitimate legislative purpose furthered by rational means.

(3) Section l(b) is unconstitutional because it violates the constitutional prohibition against the passage of an *ex post facto* law that sanctions conduct only after that conduct has already occurred.

Arguing these constitutional deficiencies, the GOC asserts that there is no legitimate statutory basis for the conduct of this review. The GOC asserts that the Department should

[101] This program discovered during the course of the review was expensed prior to the POR.

terminate this review, revoke the CVD order, and return all deposits of CVDs held by U.S. Customs authorities.

In rebuttal, Petitioners state that there is a presumption that a statute enacted by Congress and signed by the President is constitutional and that the party complaining of a constitutional violation bears the burden of showing that the statute is unconstitutional.[102] Petitioners assert that the GOC's statements on the unconstitutionality of Public Law 112-99 are insufficient and merely recite issues raised in pleadings in other cases without providing any argumentation specific to the review at issue.

Petitioners further discuss that Congress has an "unquestioned right to make economic legislation retroactive."[103] Petitioners note that courts have upheld Congress' authority to enact retroactive legislation needed to cure defects in a statutory scheme.[104] They add that the "retroactive aspects of legislation ... must meet the test of due process" meaning that the statute must serve a legitimate legislative purpose furthered by rational means.[105]

Petitioners note that the Department recently found that Public Law 112-99 did not violate the due process clause of the Constitution because its retroactive application furthers a legitimate legislative purpose. *See High Pressure Steel Cylinders from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 26738 (May 7, 2012), and accompanying Issues and Decision Memorandum at Comment 1. Similarly, Petitioners assert that Public Law 112-99 does not violate the Equal Protection Clause because it furthers a legitimate legislative purpose that is achieved by rational means.

Lastly, to the GOC's allegation that Public Law 112-99 is a prohibited *ex post facto* law, Petitioners state that the Supreme Court interprets the *ex post facto* clauses of the Constitution to apply only to legislation that imposes criminal punishment and, thus, by definition the *ex post facto* clauses do not apply to this legislation.[106] They add that the courts have long held that the unfair trade laws are remedial, not punitive in nature.[107]

Department's Position:

Public Law 112-99 clarifies that the Department has the authority to apply the CVD law to imports from NME countries, such as the PRC. The GOC's reliance upon the Federal Circuit's decision in *GPX* to contend that the Department lacks such authority is misplaced because that decision never became final and was in fact vacated by a subsequent decision of the Federal Circuit. *See GPX Int'l Tire Corp. v United States*, 678 F.3d 1308 (Fed. Cir. 2012)(*GPX vacate*).

We disagree with the GOC that Public Law 112-99 violates equal protection of the law as guaranteed by the Fifth Amendment's due process clause. Section 1 of Public Law 112-99

[102] *See Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 15 (1976).
[103] *See Baker v. GTE North Inc*., 110 F.3d 28, 30 (7th Cir. 1997) (Easterbrook, J.); *see also INS v. St. Cyr*, 533 U.S. 289, 316 (2001) ("Congress has the power to enact laws with retrospective effect").
[104] *See, e.g., United States v. Carlton*, 512 U.S. 26, 31 (1994), and *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 378 (1940).
[105] *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984), and *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).
[106] *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798).
[107] *See, e.g., KYD Inc. v. United States*, 607 F.3d 760 (Fed. Cir. 2010), citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) ("{T}he antidumping laws are remedial not punitive").

imposes no new obligation on parties, but merely reaffirms the Department's authority to apply the CVD law to NME countries. Thus, section 1 does not single out one group of companies and deny them the "protections" of section 2. Rather, section 1 simply confirms that existing law, to which all companies already were subject, applies. Further, the distinction between section 1 and section 2 of the legislation serves a rational purpose. As evidenced by the legislative history, section 2 of Public Law 112-99 was adopted, in part, to bring the United States into compliance with its WTO obligations.[108] Given the statutory scheme for prospective implementation of adverse WTO decisions,[109] it was entirely reasonable for Congress to decline to upset the finality of already-completed administrative determinations or to impose new obligations in administrative proceedings already in progress by requiring the Department to make adjustments not necessary to bring the United States into compliance with its WTO obligations.

Further, we disagree with the GOC that the "retroactivity" of the legislation violates the Fifth Amendment's due process clause. Section 1 of Public Law 112-99 is not retroactive. Rather, it clarifies existing law by ensuring that the Department will continue to apply the CVD law to NME countries. Congress enacted the legislation to prevent the Federal Circuit's decision in *GPX* – a decision that would have changed existing law – from becoming final and taking effect.[110] In any event, even if section 1 of Public Law 112-99 were considered retroactive, it does not violate the due process clause. This is because the legislation has a rational basis, which is to correct a mistake and confirm the law in light of the *GPX* decision.[111]

Lastly, we disagree with the GOC that Public Law 112-99 is a prohibited *ex post facto* law. The *ex post facto* clause of the Constitution bars retroactive application of penal legislation, but, as just described, section 1 of Public Law 112-99 is not retroactive. Even if that section were considered retroactive, it is not penal, because it merely clarifies that the government can collect duties proportional to the harm caused by unfair foreign subsidization.

Comment 2: <u>Double-Counting</u>

The GOC argues, assuming Public Law 112-99 is constitutional, that the Department must account for double-counting/double remedies. The GOC contends that, although the new law amends the CVD statute to apply a double-counting remedial provision prospectively with respect to newly initiated reviews, the new provision does not apply to this case since this review was initiated prior to the new amendment's enactment. The GOC adds that the statute, even as amended, contains an inherent prohibition against double-counting. If an adjustment cannot be reasonably measured, then, the GOC asserts, the Department must terminate the case.

The GOC states that the prohibition against the application of double-counting is implicit in the statute and that the proscription against double remedies is a settled matter, citing to *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1358 (Fed. Cir. 2007) (affirming the Department's "obligation to avoid collecting double remedial remedies" in its refusal to consider section 201 safeguard duties to be "United States import duties" that therefore should not be deducted from U.S. price in AD margin calculations); *see also* 19 CFR 351.401(b)(2) ("The

[108] *See, e.g.*, 158 Cong. Rec. at H1167–68, H1171 (daily ed. March 6, 2012) (statements of Representatives Camp, Brady, and Jackson Lee).
[109] *See* 19 U.S.C. 3533, 3538.
[110] *See, e.g.*, 158 Cong. Rec. at H1167–68 (daily ed. March 6, 2012) (statements of Representatives Camp, Levin, Rohrabacher, and Boustany).
[111] *See, e.g., Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (upholding retroactive legislation that corrected unexpected results of judicial opinion).

Secretary will not double-count adjustments."); *U.S. Steel Group v. United States*, 15 F. Supp. 2d 892, 900 (CIT 1998), reversed on other grounds, *US. Steel Group v. United States*, 225 F.3d 1284, 1285 (Fed. Cir. 2000) (where the court stated "the deduction of a countervailing duty, whether export or non-export, from the U.S. price used to calculate the antidumping margin would result in a double remedy for the domestic industry."); and *Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73437 (December 12, 2005), and accompanying Issues and Decision Memorandum at Comment 5 (reaffirming the position that deducting CVDs from export price would "create a greater dumping margin in the form of a second remedy for the domestic industry").

Further, the GOC states that this requirement for an adjustment is also consistent with the United States' WTO obligations. The GOC discusses that the WTO's Appellate Body concluded that the Department's simultaneous imposition of CVDs and ADs calculated using the NME methodology presented a likely double remedy not permitted under the Agreement on Subsidies and Countervailing Measures (SCM). In *United States - Definitive Antidumping and Countervailing Duties on Certain Products from China*,[112] the Appellate Body found that "investigating authorities may not … simply ignore that anti-dumping duties have been imposed to offset the same subsidization." The GOC notes that the Appellate Body went on to find that not only did imposition of the double remedy itself constitute a violation, but so too did the Department's failure to address this issue in the context of the investigation.

The GOC asserts that since the Department may now apply CVDs to an NME, both the CIT and the WTO agree that the Department must take into account whether that application will result in double-remedies or double-counting.

In rebuttal, Petitioners state that the Federal Circuit recently held Public Law 112-99's inclusion of a prospective obligation of the Department to consider whether a double-counting adjustment should be made means that "the statute prior to the enactment of the new legislation did not impose a restriction on Commerce's imposition of countervailing duties on goods imported by NME countries to account for double counting." *See GPX International Tire Corp. v. United States*, No. 2011-1107, -1108, -1109 (May 9, 2012) (Order on Petition for Rehearing), at 6. Moreover, Petitioners add that the court overruled the CIT's holding in *GPX International Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1240-43 (CIT 2009), which had found that the imposition of both CVDs and ADs on imports from NME countries constituted double-counting. The court stated, "The new legislation makes clear that {the CIT's} theory was not correct." *Id.* at 6, note 3. Petitioners, thus, assert that this holding renders the GOC's argument on this issue moot.

Department's Position:

The GOC is wrong that the statute, pre-Public Law 112-99, requires an adjustment for "double counting." The Federal Circuit's decision in *GPX vacate* is directly contrary to the GOC's position. The Federal Circuit explained that Public Law 112-99 effectuated a change in the statute, which made clear that prior to the effective date of section 2 of Public Law 112-99, the statute did not require an adjustment for double counting. It stated that the "clear implication of this new provision is that the pre-existing statute did not contain a prohibition against double counting." *GPX vacate*, 678 F.3d at 1312. The Federal Circuit concluded "that the statute prior to the enactment of the new legislation did not impose a restriction on Commerce's imposition of

[112] WT/DS379/AB/R (March 11, 2011) (*WTO AB Decision*) (DS379) at para. 571.

countervailing duties on goods imported by NME countries to account for double counting." *Id*. Accordingly, the GOC's arguments are without merit.

Regarding the arguments concerning the *WTO AB Decision*, that decision involved an "as applied" challenge to the eight AD and CVD determinations at issue in that case, and the Department's recent implementation applied only to those eight AD and CVD determinations. *See Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube From the People's Republic of China*, 77 FR 52683 (August 30, 2012)(*Section 129 Implementation*). Neither the decision nor the implementation applies to this administrative review.[113]

Comment 3: Countervailability of Shandong Province Policy Loans

The GOC discusses that the Department preliminarily found the "Shandong Province Policy Loans" program to be countervailable for two reasons: (1) because "Shandong Province Development Plan of Chemical Industry during Tenth Five-Year Plan Period identifies objectives and goals for the development of the citric acid industry and calls for lending to support these objectives and goals;" and (2) because loan documents, reviewed by the Department in the first administrative review, stated that "because the food-use citric acid industry 'has characteristics of capital and technology concentration and belongs to high and new technology … the State always takes positive policy to encourage its development.'"[114]

The GOC argues that the evidence presented for Shandong Province policy lending and RZBC's alleged benefit from this program contains flaws. First, the GOC states that the only policy that the Department identifies as the *de jure* basis for this program is the Shandong Tenth Five-Year Chemical Plan, which covers the period from 2001 through 2005, and not the POR. The GOC states that the Department did not show how a plan with a finite period can influence loans issued years after its ending date. The GOC opines that without a connection between the facts presented and the conclusion reached, the Department has no legal basis for continuing to countervail this program.[115]

Second, the GOC states the preliminary finding based on loan documents reviewed in the first administrative review is an inaccurate characterization of the facts. In the first administrative review, the GOC states the Department reviewed loan documents from the investigation for Shandong TTCA Biochemical Co., Ltd. (TTCA), a company that was not involved in the first review. The GOC notes that the Department did not review loan documents from RZBC in the first administrative review. Thus, a more accurate characterization, according to the GOC, is that the Department based its preliminary results that RZBC received Shandong Policy loans in 2010, on that fact that documents regarding loans to TTCA contained policy references.

The GOC further adds that the Department has argued before the court that "each administrative review is a separate segment of proceedings with its own unique facts. Indeed, if

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[113] *See Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005) (*Corus I*); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (*Corus II*); and *NSK Ltd. v. United States*, 510 F.3d 1375, 1380 (Fed. Cir. 2007) (*NSK Fed. Cir*.).

[114] *See Preliminary Results*, 77 FR at 33174.

[115] *See Yangzhou Bestpak Gifts and Crafts Co. v. United States*, 783 F. Supp. 2d 1343, 1348-1349 (CIT 2011) (explaining that the Department must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'").

the facts remained the same from period to period, there would be no need for administrative reviews."[116] The GOC opines that though in CVD reviews the Department does not reassess a program's countervailability unless there has been a change in the program, in instances such as this, where the existence of a program is dependent on a fact that is specific in time and scope to a particular respondent, the Department is obligated in subsequent reviews to evaluate whether that specific fact can be generally applied to other respondents in subsequent years. As such, the GOC asserts that with the Tenth Five-Year Chemical Plan concluded and the absence of any policy statements in RZBC's loan documents, the Department has no basis to apply this program to the RZBC Companies

In rebuttal, Petitioners state that the Department should continue to countervail loans and bank acceptance notes consistent with the Department's approach in all prior segments of this proceeding. They note that, in the investigation, the Department explained that the GOC did not explain the true nature of the Shandong Tenth Five-Year Chemical Plan.[117] In addition, the GOC never provided requested loan documentation.[118] Petitioners note that the Department uncovered loan documentation at verification, which proclaimed that "because the food-use citric acid industry 'has characteristics of capital and technology concentration and belongs to high and new technology ... the State always takes positive policy to encourage its development.'"[119] The Department, therefore, concluded that "this loan program is specific in law because the Government of Shandong has a policy in place to encourage and support the development of the citric acid industry."[120] Petitioners note that this policy applies to the citric acid industry as a whole and that the Department has rejected the premise that "even where the Department finds that loans have been made to specific industry under a particular policy it must additionally find that the policy caused the loan to be provided."[121]

Petitioners note that it is the Department's policy that absent "significant and fundamental changes," the Department does "not intend to investigate anew in each proceeding the 'link' between government plans and directives and the lending actions of SOCBs in the PRC."[122] They add that no evidence of "significant or fundamental changes" is on the record of this review.

Department's Position:

The Shandong Province Policy Loans program was found to be countervailable in the investigation, and the GOC has provided no information in this review to demonstrate that there has been any change in the program. In the initial questionnaire for the "Shandong Province Policy Loans Program," we notified the GOC that:

> The Department found this program to be countervailable in the investigation. We do not intend to reevaluate the countervailability of this program. However, if there were any changes to this program during the POR, or if the GOC replaced it with a successor program, please answer all questions in the Standard Questions

[116] *See Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (2005) (*Shandong Huarong*).
[117] *See* Citric Acid Investigation Decision Memorandum at Comment 5.
[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id*.

> appendix. If there were no changes to this program during the POR, please so state; you do not need to provide a response to this appendix if there were no changes.[123]

In response, the GOC reported that there were no changes to this program during the POR, and did not provide a response to the appendix.[124] A previous countervailability determination creates a situation in which the burden is on the challenging party to present new evidence that would cause the Department to revisit its prior finding.[125] The GOC, however, failed to present new evidence.

In its brief, the GOC essentially reargues the evidence relied upon by the Department in the investigation. However, absent evidence that there were any changes to the program, during the POR, those arguments are moot. To the GOC's claim that loan documents pertaining to a company not covered in its review are irrelevant, we disagree because those documents related to the citric acid industry as a whole. The GOC's arguments that RZBC's loan documents must contain "policy language" in order to be countervailed under this program also fail. First, despite the opportunity to do so, the GOC did not submit any new evidence on the record, such as loan documentation for the Department's examination. Second, it is sufficient that the Shandong Tenth Five-Year Chemical Plan "identifies objectives and goals for the development of the citric acid industry" and pursues "lending to support these objectives and goals."[126]

Where the Department has previously determined that a program is countervailable or not countervailable, the burden is on the challenging party to present new evidence that would cause the Department to revisit its prior finding.[127] The GOC has not met that burden here. As such, the GOC's reliance on *Shandong Huarong* is misplaced.

Comment 4: <u>Specificity Findings for Sulfuric Acid and Steam Coal</u>

The GOC argues that despite record evidence that many industries purchase sulfuric acid and steam coal, the Department preliminarily found the number of industries to be "limited" and, therefore, the programs (*i.e.*, provision of sulfuric acid for LTAR and provision of steam coal for LTAR) specific within the meaning of section 771(5A)(D)(iii) of the Act.[128] The GOC asserts that those decisions should be reversed in the final results.

The GOC states that the Department has found inputs for LTAR programs in the PRC to be *de facto* specific because the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number. In determining whether a particular industry or enterprise fits within the term "limited," the GOC notes that the *Preamble* explains that it is not necessarily dependent on the number of enterprises involved but instead is "focused on the makeup of the users" (*see Preamble*, 63 FR at 65357). For example, "if numerous enterprises that received benefits had comprised a limited number of industries, then {a} program would

[123] *See* Initial Questionnaire at II-2.
[124] *See* GOC IQR at II-2.
[125] *See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 74 FR 7395 (February 17, 2009), and accompanying Issues and Decision Memorandum at "Programs Previously Determined to Confer Subsidies."
[126] *See* Citric Acid Investigation Decision Memorandum at Comment 5.
[127] *See Certain Pasta from Italy: Final Results of the Seventh Countervailing Duty Administrative Review*, 69 FR 70657 (December 7, 2004), and accompanying Issues and Decision Memorandum at 27.
[128] *See Preliminary Results*, 77 FR at 33171, 33175.

{be} specific." *Id*. In contrast, if the "users represented numerous and diverse industries" the program is not specific. *Id*. The GOC states that the court took this premise further in *PPG Industries, Inc. v. United States*, 978 F.2d 1232, 1241 (Fed. Cir. 1992), as specifically discussed in the *Preamble*, explaining:

> Because eligibility requirements always serve to limit participation in any given program and may do so indiscriminately, something more must be shown to prove that the program benefits only a specific industry or group of industries. Similarly, although the actual number of eligible firms must be considered, it is not controlling. Instead, the actual make-up of the eligible firms must be evaluated. This analysis determines whether those firms comprise a specific industry or group of industries.

The GOC opines that despite these clear guidelines, the manner in which the Department applies this standard in PRC CVD cases represents a departure from its previous practice. The GOC contends that in prior non-PRC cases where the Department has addressed LTAR programs, its specificity findings related to inputs that were limited to a handful of industries. For example, in *CFS from Indonesia*, the Department found the provision of stumpage was limited as "five of these industries out of a total of 23 industries at the same level of industrial classification (large and medium manufacturing activities), were 'making use of timber' during the POI."[129] Additionally, the GOC states that the Department's treatment of the term "limited" in *Bethlehem Steel Corp. v. United States*, 25 CIT 307, 322 (2001) (*Bethlehem Steel*) is instructive. In that case, the Department found that a multitude of industries could not fall within the definition of the term "limited," and the court agreed. The GOC claims that sulfuric acid and steam coal are widely sold throughout the PRC to a diverse spectrum of industries for a wide variety of uses.

Sulfuric Acid

Reiterating arguments made in the first administrative review, the GOC argues that even if it was proper to group industry categories into smaller groupings, the small number of industry groups is less important than the diversity of those industries.[130] The GOC opines that the groupings demonstrate that the "program" is available to the mining industry, various raw material and down-stream manufacturing industries, and utilities. The GOC asserts that, since the only limitation on this program is that an industry uses sulfuric acid, and given that the Department did not request information on the volume of each industry's purchases, the Department has no basis to find this program to be limited. The GOC adds that, based on the diversity of users, there are few industry groups that do not use sulfuric acid and, thus, there is no support for a finding that these groups are limited for specificity purposes

To the extent that volume data from each user industry are necessary for a specificity determination, then the GOC asserts that the Department must defer a specificity finding until the next review and request volume information. The GOC states that the Department cannot

[129] *See Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (October 25, 2007) (*CFS from Indonesia*), and accompanying Issues and Decision Memorandum at Comment 10.
[130] *See* Citric Acid First Review Decision Memorandum at Comment 7.

make an adverse specificity finding without providing the GOC with an opportunity to submit this information, citing to *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 23 CIT 804, 820 (1999) (noting that "it is Commerce, not the respondent, which bears the burden of asking questions{,} and Commerce must ask "clear" questions "to let the respondent know what information it really wants").

Steam Coal

The GOC claims that the Department found this program was not specific in the first review and that this instant review contains identical facts and requires an identical finding.[131] The GOC contends that despite the presence of the same information, the Department preliminarily applied AFA to the GOC for the failure to provide volume data on the amount of steam coal each of the industries purchased. The GOC alleges several errors in the preliminary results.

First, the GOC reported that it does not maintain data specific to steam coal; thus, any predominant use analysis is impossible.[132] The GOC adds that, while data regarding the producers of other types of coal could be used as a proxy for statistics on the make-up of the steam coal industry, purchases of other types of coal (even if available) could not be used as a proxy for the make-up of steam coal purchasers. The GOC explains that different types of coal, such as coking coal, are largely used in the steel and related industries whereas steam coal is widely distributed throughout the economy.[133]

Second, the GOC notes that it could not provide volume data (*i.e.*, that it does not maintain steam coal purchase statistics) stating that it had responded to this request to the "best of its ability."[134] The GOC claims that having disclosed its inability to obtain this information, it was the Department's responsibility to seek alternative information for its analysis, but that the Department has not sought any clarifying information from the GOC and has not sought to determine whether other information could be used to undertake the analysis. The GOC further claims that the Department has investigated hundreds of PRC industries and has knowledge of the wide variety of industrial users of steam coal. The GOC asserts that the Department must recognize that PRC chemical production uses steam coal on a much smaller scale as compared to other industries, such as those involved in steel making, and find this program is not specific to the citric acid industry.[135]

Third, the GOC states that this program was originally initiated in the first administrative review because Yixing Union, a mandatory respondent, was affiliated with a power generator.[136] The GOC states that Petitioners supported their allegation by citing industrial policies with regard to power generation, and not to citric acid production or to activities in any other related chemical industry.[137] The GOC states that the RZBC Companies have no relation to any power generators. As such, the GOC argues that the Department lacks any factual or legal basis to apply this program to the RZBC Companies and has no standing to extend this program beyond

[131] *See* Citric Acid First Review Decision Memorandum at Comment 6.
[132] *See* GOC Second SQR at 1 - 4.
[133] *See* GOC Part A First SQR at Exhibit 2.
[134] *See* GOC Second SQR at 4.
[135] Citing to *Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010) (explaining that Commerce's application of AFA must have "some grounding in commercial reality").
[136] *See* Citric Acid First Review Decision Memorandum at Comment 6.
[137] *Id*.

the original allegation simply because the RZBC Companies purchased steam coal, citing to Steel Wire Decision Memorandum at 21 (finding that though a policy lending program existed, SBZ did not use the program because its loan documents did not reference the policy).

In their rebuttal brief, Petitioners make the following arguments:

Sulfuric Acid

Petitioners note that the Department informed the GOC that the countervailability of the provision of sulfuric acid for LTAR would not be reevaluated absent an explanation by the GOC of "any changes to the operation of the program during the POR" accompanied by answers to "all relevant questions in Appendix 1."[138] The GOC reported no changes to this program and did not answer any questions in Appendix 1.[139] Thus, the Department, consistent with the first review, continued to find the provision of sulfuric acid for LTAR specific within the meaning of section 771(5A)(D)(iii)(I) of the Act.

Petitioners discuss that, in the first review, the Department found "a concentration of users in the major industrial area that clearly includes citric acid production" and that "the three major groups originally identified by the GOC are a limited number" consistent with the statute.[140] The three major industrial categories are Mining, Manufacturing, and Electric Power and Gas and Water Production and Supply.[141] As such, Petitioners assert the three major industries constitute the "handful of industries" that the GOC concedes are appropriate to find specificity under section 771(5A)(D)(iii)(I) of the Act. Petitioners note that the three major categories on the record included more specific subcategories, the overwhelming majority of which fall under Manufacturing.[142] The Department found that several subcategories "appear to be closely related to the citric acid industry in terms of processes and outputs."[143] The Department, therefore, properly considered the "makeup of the users" in finding the provision of sulfuric acid for LTAR specific under section 771(5A)(D)(iii)(I) of the Act.

To the GOC's arguments on volume information, Petitioners reply that the Department based its specificity determination for sulfuric acid for LTAR on section 771(5A)(D)(iii)(I) of the Act, which examines whether the recipients of the subsidy are "limited in number." They explain that while volume data may be relevant to the Department's specificity analysis under sections 771(5A)(D)(iii)(II) and (III) of the Act, it is not necessary for a *de facto* specificity finding under section 771(5A)(D)(iii)(I) of the Act. Petitioners add that the CIT made this clear in *Bethlehem Steel*, 25 CIT at 321, where the court stated that "Commerce must on a case-by-case basis sequentially analyze each of the four factors listed in 19 U.S.C. § 1677(5A)(D)(iii) and determine whether any of the factors is present," explaining that "the presence of a single factor mandates a finding of *de facto* specificity." Petitioners, thus, assert that the Department was not required to request volume information before making a specificity finding, where the record supports a specificity finding under section 771 (5A)(D)(iii)(I) of the Act in the first review.

[138] *See Preliminary Results*, 77 FR at 33175.
[139] *Id*.
[140] *See* Citric Acid First Review Final Decision Memorandum at Comment 7.
[141] *Id*.
[142] *Id*.
[143] *Id.*

Steam Coal

Petitioners assert that the GOC's argument regarding specificity of the provision of steam coal for LTAR is based on a faulty premise that the record of the second review contains identical facts as in the first review. They discuss that the Department relied on AFA to "determine that the provision of steam coal for LTAR is specific because the GOC failed to provide information, which was requested of it on two occasions, regarding" steam coal use/consumption and "associated volume data for the years 2008, 2009, and 2010."[144] Petitioners add that, contrary to the GOC's statements, the Department's request for volume data was necessary and only the Department can determine what is relevant to an administrative review.[145]

Petitioners also assert that, contrary to the GOC's statement, the original allegation was not limited to the relationship between Yixing Union and an affiliated power generator. They add that the GOC further argues, wrongly, that RZBC "has no relation to any power generators" and that only "RZBC's unaffiliated power company's purchases of steam coal {could have} benefitted from the subsidy, not RZBC's purchases."[146] Petitioners argue that RZBC admits that it falls within the subsidy allegation when it explains that RZBC Co. "generate{s} steam by itself," that "{s}team is used in the production process" of citric acid, and that "RZBC Co. consumes the coal and produces the steam."[147] For these reasons, Petitioners argue that the Department appropriately applied AFA with regard to the specificity of the provision of steam coal for LTAR and should continue to find that the provision of steam coal for LTAR is *de facto* specific.

Department's Position:

We disagree with the GOC and continue to find specificity with regard to the provision of sulfuric acid and steam coal for these final results. Concerning sulfuric acid, in the initial questionnaire, we notified the GOC that "we do not intend to reevaluate the countervailability of this program. However, if there were any changes to the operation of the program during the POR, please explain the changes and answer all relevant questions in Appendix 1."[148] In its questionnaire response, the GOC did not respond to Appendix 1 or report any changes related to the provision of sulfuric acid for LTAR.[149] A previous countervailability determination creates a situation in which the burden is on the challenging party to present new evidence that would cause the Department to revisit its prior finding. The GOC, however, failed to present new evidence.

In the first administrative review, based on information reported by the GOC, the Department considered users in three major industrial categories reported by the GOC: Mining; Manufacturing; and Electric Power, Gas and Water Production and Supply for the specificity analysis of sulfuric acid.[150] Within these three major categories, there are 44 more specific

[144] *See Preliminary Results*, 77 FR at 33176.
[145] *Id*. at 33169-70; *see also Ansaldo*, 628 F. Supp. at 205 ("it is Commerce, not the respondent, that determines what information is to be provided").
[146] *See* GOC POR 2 Administrative Case Brief (July 12, 2012) (GOC Case Brief) at 18.
[147] *See* RZBC Companies Second SQR at 8.
[148] *See* Initial Questionnaire at Section II, "Provision of Sulfuric Acid for LTAR."
[149] *See* GOC IQR at II-9, 10.
[150] *See* Citric Acid First Review Decision Memorandum at "Provision of Sulfuric Acid for LTAR" and Comment 7.

categories, 37 of which fall under Manufacturing.[151] We concluded that those facts denoted a concentration of users in the major industrial area that clearly includes citric acid production.[152] Further, the finding that the citric acid industry is part of a limited group of users was reinforced by the fact that a number of 37 subcategories identified in the Manufacturing major industrial category appear to be closely related to the citric acid industry in terms of processes and outputs.[153] Those subcategories include the specific activities of manufacturing of raw chemicals, chemical products, household chemical products, food and beverages.[154] The GOC itself has observed that the Department, in determining whether a particular industry or enterprise fits within the term "limited," does not necessarily limit its consideration to the number of enterprises, but must also be focused on the make-up of the users.[155] The make-up of the users and the number of industries or enterprises they represent are both factors in the Department's analysis of whether the users of sulfuric acid are limited in number.

Consistent with Department's finding in the first administrative review, we continue to find the three major groups originally identified by the GOC are a limited number consistent with section 771(5A)(D)(iii)(I) of the Act.[156] As discussed in that review, the concentration of sub-categories in the Manufacturing industry only reinforces the finding that the number of types of users is limited.[157] While there is some variety among the Manufacturing sub-categories, we found that there is clearly a close relationship between many of the sub-categories (*e.g.*, the chemical processors) that indicates a limited group of users. As indicated above, no new evidence was presented in this review that would reverse the Department's finding in the first review. Therefore, consistent with *Citric Acid First Review*, we continue to find that the industries named by the GOC, as consumers of sulfuric acid in the PRC, are limited in number and, hence, the subsidy is specific, within the meaning of section 771(5A)(D)(iii)(I) of the Act.

We also disagree with the GOC with regard to the specificity of steam coal. First, contrary to the GOC's statement, the Department did not affirmatively find the provision of steam coal for LTAR to be not specific in the first administrative review. In the final results of that review, given insufficient information on the record, the Department stated that it was unable to determine whether steam coal is provided to a specific industry or enterprise or group of industries or enterprises and stated that we would revisit the *de facto* specificity of this program in a future review.[158] In this instant review, we issued two questionnaires to the GOC requesting information necessary to determine whether steam coal is provided to a specific industry or enterprise or group of industries or enterprises.[159] In those questionnaires we asked the GOC to submit volume and value data for the industries that use/consume steam coal.[160]

Unlike for steam coal production data, the GOC never stated that it did not have data on purchasers of steam coal. In fact, in response to the Department's requests for value and volume data for industries that use/consume steam coal, the GOC submitted a list of industries that

[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] *Id*.
[155] *See* GOC Case Brief at 12 – 15.
[156] *See* Citric Acid First Review Decision Memorandum at "Provision of Sulfuric Acid for LTAR" and Comment 7.
[157] *Id*.
[158] *Id.* at Comment 6.
[159] *See* Department's February 1, 2012, supplemental questionnaire and March 8, 2012, supplemental questionnaire.
[160] *Id*.

purchase steam coal directly.[161] Based on its submissions, the GOC clearly maintains data on steam coal purchasers. However, despite two opportunities to report the volume of steam coal purchased by those industries, the GOC chose to not provide such data, nor did it suggest any alternative forms of data.[162] Therefore, as discussed in "Use of Facts Otherwise Available and Adverse Inferences," we find that, the GOC failed to cooperate by not acting to the best of its ability in responding to the Department's information request about the PRC industries that use steam coal and the volume of steam coal used/consumed by each of those industries.

To the GOC's assertion that it is the Department's responsibility to seek alternative information for its analysis, we disagree. Since the initiation of the provision of steam coal for LTAR program in the first administrative review, the GOC was made aware of the type of information required by the Department, as evidenced by the questionnaires issued in the first administrative review and the instant review. If the GOC does not maintain the information in the form and manner requested, then it is the GOC's responsibility to provide responsive information that it maintains, so that the Department can analyze such information and determine a reasonable method to measure the volume of steam coal purchased, used, or consumed by PRC industries. Only the GOC has knowledge of how its agencies and organizations compile and maintain data and, therefore, the onus was on the GOC, and not the Department, to propose and present alternative data that could be used by the Department to determine whether there is predominant or disproportionate use of steam coal by an industry(ies) reported by the GOC. *See* section 782(c)(1) of the Act. However, as the record is devoid of any evidence that would allow the Department to conduct such an analysis, an adverse inference is warranted in the application of facts available with regard to the specificity of the provision of steam coal for LTAR. We, therefore, continue to find that the provision of steam coal for LTAR is *de facto* specific, under section 771(5A)(D)(iii) of the Act, based on the information on the record of this review.

Lastly, the GOC is mistaken that the Department has knowledge of the wide variety of industrial users of steam coal based on prior investigations of PRC industries. The *Citric Acid First Review* was the very first PRC CVD proceeding in which the Department examined the provision of steam coal in the PRC. The GOC also is mistaken that the Department's examination of the provision of steam coal for LTAR program was specific to Yixing Union and its affiliated power generator. As indicated in the "Analysis of New Subsidy Allegations" memorandum, Petitioners cited Cogeneration (Yixing Union's parent company) as an example, but they alleged that "many Chinese citric acid producers receive steam coal for LTAR to operate their own electricity plants."[163] The questionnaire issued in this review in no way limited the program to power generators or to producers with an affiliated power generator. In fact, the questionnaire for the GOC states "with respect to individual suppliers of steam coal to the respondent companies, please coordinate with the mandatory company respondents to ensure that you have a complete list of each of their suppliers of steam coal" and, similarly, the questionnaire for the respondent companies states "please provide the information requested in Attachment 2 for steam coal purchases in the POR."[164] On the record of this review, RZBC Co.

[161] *See* GOC's Part A First SQR at 5 and Exhibit 2.
[162] *Id*. and GOC's March 29, 2012 SQR at 4.
[163] *See* Memorandum to Susan Kuhbach, Senior Office Director, AD/CVD Operations, Office 1, from David Layton and Seth Isenberg, International Trade Compliance Analysts, AD/CVD Operations, Office 1, regarding "Analysis of New Subsidy Allegations" at 4 – 6, placed on the record of this review via Memorandum to the File from Kristen Johnson, Trade Analyst, AD/CVD Operations, Office 3, regarding "First Review – New Subsidy Allegations," dated concurrently with these final results.
[164] *See* Initial Questionnaire at II-7 and III-11.

and RZBC Juxian reported that they purchased steam coal during the POR.[165] Additionally, RZBC Co. stated that it "generate{s} steam by itself," {s}team is used in the production process" of citric acid, and that it "consumes the coal and produces the steam."[166]

Comment 5: Use of Tier One Benchmark for Sulfuric Acid and Steam Coal

RZBC states that the record indicates that it imported significant quantities of sulfuric acid from unaffiliated private parties at market-determined prices.[167] Nonetheless, the Department failed to consider these tier one benchmark import prices. They contend that, based on the Department's past practice, the use of a tier one benchmark should be the preference, citing to *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 74 FR 20923 (May 6, 2009), and accompanying Issues and Decision Memorandum at Comment 11 (stating a preference for "actual transactions between the {respondent} and another private party, that is, an actual import"); *Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1293 (CIT 2010) (upholding the Department's preference of actual transactions between the respondent and another private party, that is an actual import); and *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1274 (Fed. Cir. 2012) (upholding the CIT's and the Department's finding that Essar's purchases from a foreign supplier are tier one benchmarks). Therefore, because tier one prices are available, RZBC asserts that the Department should calculate, for the final results, the sulfuric acid LTAR benefit using a tier one benchmark.

The GOC also argues that the Department should use tier one benchmarks for sulfuric acid and steam coal because record evidence demonstrates that SOEs do not dominate the sulfuric acid and steam coal markets in the PRC. The GOC argues that the Department's analysis of relying solely on the number of SOEs in a market is inadequate and fails to satisfy the regulatory directive to apply a tier one benchmark unless "actual transaction prices are significantly distorted as a result of the government's involvement in the market."[168]

The GOC notes that the Department relied on *Softwood Lumber from Canada* as support for its distortion finding and use of second tier benchmarks. However, the GOC states that a critical review of that case reveals deficiencies in the Department's decision not to use tier one benchmarks. In *Softwood Lumber from Canada*, the GOC notes that the Department analyzed whether stumpage was provided to lumber producers for LTAR in circumstances where 83 to 99 percent of the stumpage in each province was controlled by the provincial governments. The GOC states that despite the policy of undertaking an in-depth analysis of potential market distortions as reflected in *Softwood Lumber from Canada*, the Department's analyses in PRC CVD cases has been cursory and limited to the issue of the percentage of the relative market accounted for by SOEs.

The GOC states that the percentage of SOE sulfuric acid and steam coal production is just barely a majority,[169] and argues that percentages alone cannot be conclusive of SOE

[165] *See* RZBC Companies Second SQR at "RZBC Co." and "RZBC Juxian" - "Provision of Steam Coal for LTAR."
[166] *Id*. at "RZBC Co." - "Provision of Steam Coal for LTAR."
[167] *See, e.g.*, Memorandum to the File from Patricia M. Tran, International Trade Compliance Analyst, AD/CVD Operations, Office 3, regarding "Preliminary Results Memorandum for RZBC Companies" (May 30, 2012) at "RZBC Co. Sul_Acid Benefit" worksheet.
[168] *See Preamble*, 63 FR at 65377.
[169] In its case brief (at 23-24), the GOC states that in the first administrative review, it reported SOE production of sulfuric acid in 2009 at 54% (*see* Citric Acid First Review Decision Memorandum at Comment 9); reported SOE

domination of an industry. Even where SOEs constitute a majority, the GOC asserts that the Department is required to determine whether it is "reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market."[170]

Further, the GOC notes that the Department recognized in the Georgetown Steel Memorandum that "although price controls and guidance remain on certain 'essential' goods and services in China, the PRC Government has eliminated price controls on most products; market forces now determine the prices of more than 90 percent of products traded in China," and that "SOEs have the legal right and obligation to act as independent economic entities under the 1994 Company Law (as amended in 2006), including independent import and export decisions on both amounts and price."[171]

In rebuttal, Petitioners reply that the Department did not ignore RZBC's import purchases of sulfuric acid. To the contrary, they note that the Department explained that import prices into the PRC cannot serve as a benchmark for the same reason domestic PRC prices cannot serve as tier one benchmarks and cite to the first review results, in which the record showed that "Chinese domestic production accounted for 97.09 and 95.47 percent of domestic consumption of sulfuric acid."[172] Petitioners reiterate that no new information was presented in this review to call into question that finding.

Petitioners add that the approach taken by the Department in this review is consistent with its approach in other PRC CVD proceedings, citing to *Rectangular Pipe from the PRC*, and accompanying Rectangular Pipe Decision Memorandum at Comment 7 (where the Department stated: "we are not relying on trade statistics showing the unit values of HRS imported into China as a tier one benchmark because the import quantities are small relative to Chinese domestic production of HRS"). Petitioners also note that in *Rectangular Pipe from the PRC*, the Department further explained that "the government's overwhelming involvement" in the market would render use of a tier one benchmark "akin to comparing the benchmark to itself (*i.e.*, such a benchmark would reflect the distortions of the government presence").

To the GOC's arguments, Petitioners counter that the GOC offers no reason for the Department to discard use of a tier two benchmark for sulfuric acid. They explain that the GOC did not submit any new evidence in this review that would call into question the Department's finding in the first review that "actual transaction prices for sulfuric acid in China are significantly distorted by the government's involvement in the market."[173]

Concerning steam coal, Petitioners argue that the GOC's suggestion that "market forces" determine the prices of coal, including steam coal, in the PRC is not supported by the record. Petitioners note that the record indicates that Chinese wholly state-owned or state controlled coal producers accounted for 60.59, 61.94, and 59.13 percent of gross industry revenue in 2008, 2009, and 2010, respectively.[174] Additionally, Petitioners point to information that they submitted on the record, which they assert demonstrates the involvement by the GOC in all aspects of coal

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steam coal production in 2010, at 59.13% (*see* GOC Part A First SQR at 2); and that in 2010, the steam coal industry consisted of over 9,000 individual producers, only 800 of which were SOEs (*see* GOC Part A First SQR at 2).

[170] *See Preamble*, 63 FR at 65377.

[171] *See* Memorandum for David M. Spooner, Assistant Secretary for Import Administration, regarding "Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China - Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy" (March 29, 2007) (Georgetown Steel Memorandum).

[172] *See Preliminary Results*, 77 FR at 33175.

[173] *Id.*

[174] *Id.* at 33176-77.

production, capacity, and planning.[175] Petitioners therefore argue that the Department should continue to find that actual transaction prices are significantly distorted as a result of the government's involvement in the market.

Department's Position:

Based on the record, we continue to rely on tier two benchmarks for sulfuric acid and steam coal for these final results. With regard to sulfuric acid, in the initial questionnaire, we notified the GOC that "we do not intend to reevaluate the countervailability of this program. However, if there were any changes to the operation of the program during the POR, please explain the changes and answer all relevant questions in Appendix 1."[176] In its questionnaire response, the GOC did not respond to Appendix 1 or report any changes to the operation of the provision of sulfuric acid.[177] A previous countervailability determination creates a situation in which the burden is on the challenging party to present new evidence that would cause the Department to revisit its prior finding. The GOC, however, failed to present new evidence.

In the first administrative review, the GOC reported that government-owned manufacturers accounted for 54 to 56 percent of sulfuric acid production for the 2008-2009 POR.[178] The GOC data also showed that domestic production of sulfuric acid accounted for 90 percent of domestic consumption, indicating that Chinese imports of this input are negligible.[179] The predominant share of the market accounted for by state-owned production supported a finding of significant distortion in the PRC market for sulfuric acid whether produced domestically or imported.[180] As noted above, no new evidence was presented in this review that would reverse the Department's finding in the first review that actual transaction prices for sulfuric acid in the PRC are significantly distorted by the government's involvement in the market. To RZBC's argument on the use of import prices, the Department considers imports as tier one, given that imports are priced according to the market to which they are being imported into and, thus, not an appropriate benchmark. As such, for these stated reasons, we continue to apply a tier two benchmark for sulfuric acid.

Concerning steam coal, the GOC was unable to provide the production/industry information requested by the Department as discussed in "Use of Facts Otherwise Available and Adverse Inferences," above. The GOC provided some information on general coal and informed the Department that such information "will provide a reasonable indication of nature of the steam coal industry."[181] The GOC reported that wholly state-owned or controlled coal producers accounted for 60.59, 61.94, and 59.13 percent of gross industry revenue in 2008, 2009, and 2010, respectively.[182] Given that Chinese state-owned enterprises were responsible for such a large percentage of domestic production volume, as reflected in their share of gross industry revenue, we preliminarily found, and continue to find, that it is reasonable to conclude that actual

[175] *See* Petitioners "Factual Information Submission" (February 27, 2012)
[176] *See* Initial Questionnaire at Section II, "Provision of Sulfuric Acid for LTAR."
[177] *See* GOC IQR at II-9, 10.
[178] *See* Citric Acid First Review Decision Memorandum at Comment 9.
[179] *Id*.
[180] *Id*.
[181] *See* GOC Part A First SQR at 1.
[182] *Id*. at 2.

transaction prices are significantly distorted as a result of the government's involvement in the market.[183]

As such, there is no basis to apply a tier one benchmark for steam coal and we continue to rely on a tier two benchmark for steam coal for these final results.

Comment 6: Whether Certain Input Suppliers Are Government Authorities

The GOC argues that, contrary to the Department's preliminary finding, there is sufficient information to make an "authority" determination for the input producers and that the Department can only apply an adverse inference to missing information and not to its entire authority analysis.

The Department preliminarily applied AFA to the GOC for failing to provide information the Department stated was necessary to make an "authority" determination. As a result, the Department stated that it was "assuming adversely that all of the respondents' suppliers of sulfuric acid {and steam coal} are 'authorities.'"[184] The GOC argues that this adverse determination is overly broad and does not follow the Department's mandate to only apply an adverse inference to information missing from the record, citing to *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333 (Fed. Cir.2011) ("it is clear that Commerce can only use facts otherwise available to fill a gap in the record").

The GOC contends that the information missing in this case is not whether or not the various suppliers are government authorities. The GOC states that the only information arguably missing is whether or not the owners, managers, or board of director members of certain suppliers were government or CCP officials. Thus, the only adverse inference that the Department is permitted to apply is on this missing piece of information, according to the GOC, with reference to *Zhejiang Dunan* and *Gerber Food (Yunnan) Co. v. United States*, 387 F. Supp. 2d 1270 (CIT 2005).

The GOC opines that merely deciding to apply adverse inferences to this missing information does not end the analysis; the Department must make two additional findings: (1) what adverse facts to apply to "remedy" the missing information, and (2) how this adverse inference can affect the government authority determination.

The GOC states that while it is "within Commerce's discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative... Commerce's discretion in these matters.., is not unbounded."[185] The GOC adds that the Department's selection of adverse facts must be supported by record evidence and must "have some grounding in commercial reality."[186] The GOC asserts that because it did not provide information on whether individuals are government or CCP officials does not automatically mean that they are officials.

The GOC contends that the record demonstrates that owners, directors, or managers of a company cannot be government officials. The GOC states that the Chinese law prohibits government officials from participating or holding positions in a Chinese company and, therefore, the Department cannot adversely infer that the owners, managers, or directors of

[183] *See Preamble*, 63 FR at 65377.
[184] *See Preliminary Results*, 77 FR at 33170.
[185] *See F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).
[186] *See Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010).

respondents' suppliers are government officials.[187] The GOC asserts that the only adverse inference the Department can apply is that owners, managers, or directors are CCP officials or representatives of the "seven entities" identified in Appendix 1, but this does not render the supplier an "authority."

The GOC states there are Chinese laws on the record demonstrating that the government has no influence or control over a publicly owned company even if the owners, managers, or directors are CCP officials or representatives. With reference to the *Company Law*,[188] the GOC asserts that shareholders, directors, and managers of a company are only responsible to the company and that the operation and management of the company shall not be interfered with by any organization outside of the company. Therefore, the GOC argues that even if the owners, directors, or managers are members or representatives in the seven entities, the entities do not have any influence over or ability to interfere in the individuals' exercise of their duties within the company, in accordance with the provisions of the *Company Law*.[189]

According to the GOC, even if owners, managers, or directors are CCP officials or representatives, the Department must establish a factual link between the adverse finding and its public body determination. The GOC discusses that the WTO Appellate Body recently confirmed that majority government ownership, or even "meaningful" government control of an entity does not alone establish that a government has bestowed the entity with "governmental authority," a requisite finding to establish that an entity is a "public body" within the meaning of the SCM.[190] The GOC further states that the Appellate Body ruled that it is the duty of the investigating WTO member to evaluate the relevant evidence to ensure that its determination is based on a sufficient factual basis, and not the burden of respondents to submit evidence to overcome a presumption that majority ownership alone meets the evidentiary requirement to find an entity is an "authority" or a "public body." The GOC, therefore, asserts that not having conducted this analysis, the Department cannot make an AFA finding as to "government authority" for the suppliers in this review.

In rebuttal, Petitioners state that the GOC's argument can only apply to one sulfuric acid supplier for whom the GOC provided incomplete responses in Appendices 5 and 6.[191] However, the Department properly found, Petitioners argue, that the requested information that the GOC refused to provide is necessary to determine whether the producer is an authority within the meaning of section 771(5)(B) of the Act. Despite multiple opportunities to respond, Petitioners state that the GOC never informed the Department of any difficulty in obtaining the information or suggested alternative forms of responsive information, but rather simply said that the information was irrelevant.

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[187] The GOC cites to Article 53 of the *Civil Servant Law*, which provides that "civil servants shall observe disciplines and shall not have following acts: (14) undertake or participate in any profit-making activities, holding position in enterprises or in other profit-making organizations." *See* GOC IQR at Exhibit 3.

[188] *See* GOC IQR at Exhibit 2.

[189] The GOC adds that the *Electoral Law of the National People's Congress and Local People's Congresses of the People's Republic of China* and the *Law of the People's Republic of China on Deputies to the National People's Congress and to the Local People's Congresses at Various Levels* further confirm this fact. *See* GOC Case Brief at 31-32. The GOC claims that these laws detail the rights and responsibilities of people's congress representatives, and nowhere do they include a requirement that representatives implement government policies in their private business activities.

[190] *See WTO AB Decision*, paras. 318, 346.

[191] Petitioners note that with the exception of one sulfuric acid producer, the GOC did not challenge the Department's "authority practice." With regard to the steam coal producers, Petitioners note that the GOC reported that those firms are state-owned enterprises. *See* Petitioners' Rebuttal Brief (July 23, 2012) at 36.

As such, Petitioners opine that the Department was correct to find that the GOC withheld necessary information that was requested of it and, thus, had to rely on facts otherwise available to analyze the sulfuric acid producer. Petitioners assert that the GOC also failed to cooperate to the best of its ability and that the Department appropriately found that an adverse inference is warranted. On that basis, Petitioners argue that the Department should continue to find that the sulfuric acid producer for which the GOC did not provide complete information is an "authority" within the meaning of section 771(5)(B) of the Act.

Department's Position:

As noted by Petitioners, the GOC's arguments here relate only to one sulfuric acid producer. We disagree with the GOC that the missing information is not necessary to our "authority" analysis. Information as to the affiliations of the owners, managers, and directors is essential information to our "authority" analysis to determine whether there is government control over a producer.

To the extent that the owners, managers, or directors of the producer are CCP officials or otherwise influenced by certain entities, the Department has inquired into the means by which the GOC may exercise control over company operations and CCP-related information. The Department has explained its understanding of the CCP's involvement in the PRC's economic and political structure in the current, as well as past PRC CVD proceedings, and has explained to the GOC that it considers the information regarding the CCP's involvement in the PRC's economic and political structure to be important because public information suggests that the CCP exerts significant control over activities in the PRC. This is supported by the background report from the U.S. Department of State,[192] and prior PRC CVD cases.[193]

More fundamentally, as mentioned above in "Use of Facts Otherwise Available and Adverse Inferences," it is for the Department, and not the respondents, to determine what information is necessary and must be provided.[194] By substantially failing to respond to our questions, the GOC withheld information that was requested of it regarding the CCP's role in the ownership and management of the relevant input producer. As such, for that sulfuric acid producer for which the GOC did not provide the requested information, we find, as AFA, that the owners, managers and board members of the firm are CCP officials, and that the presence and role of such officials is sufficient to render this producer an "authority" within the meaning of section 771(5)(B) of the Act.

Regarding the arguments concerning the *WTO AB Decision*, that decision involved an "as applied" challenge to the eight AD and CVD determinations at issue in that case, and the Department's recent implementation applied only to those eight AD and CVD determinations. *See Section 129 Implementation*. Neither the decision nor the implementation applies to this administrative review. The Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.[195]

[192] *See* Additional Documents Memorandum at Attachment IV.
[193] *See, e.g.,* Seamless Pipe Decision Memorandum at Comment 7.
[194] *See, e.g., Ansaldo*, 628 F. Supp. at 205.
[195] *See Corus I*, 395 F.3d 1347-49; *Corus II*, 502 F.3d 1375; and *NSK Fed. Cir.*, 510 F.3d 1380.

Comment 7: Rejection of RZBC's Submission

RZBC argues that the Department should not have rejected its November 28, 2011, submission. RZBC asserts that this submission rebutted, clarified or corrected Petitioners' November 17, 2011, factual filing by challenging the accuracy of the world market price submitted by Petitioners, who, RZBC claims, excluded several countries. RZBC states that the additional benchmark information, in its November 28, 2011, filing, rebutted or, at least, corrected the world market price submitted by Petitioners.

As such, RZBC argues that the Department should include the additional benchmark data in the sulfuric acid LTAR calculation for the final results. However, if the Department decides not to use that information, then at the very least such information rebuts the world market price as distortive and rebuts the fact that the countries submitted by Petitioners do not represent the largest world exporters of sulfuric acid and, thus, refutes the use of Petitioners' information.

Petitioners rebut by stating that, contrary to RZBC's assertion, its submission did not respond to another party's prior submission within the meaning of 19 CFR 351.30l(c)(1). The Department, therefore, appropriately found that "RZBC's submission of new factual information" was untimely.[196] Petitioners note that the Department explained that the "submission does not rebut, clarify, nor correct factual information submitted by Petitioners on November 17, 2011," and found that "this submission simply contains new benchmark information."[197] As a result, Petitioners assert that the Department properly rejected "the November 28, 2011, submission in its entirety because it contains untimely filed information."[198]

Petitioners discuss that the Department's regulations state that, "in making any determination ... {the Department} will not use factual information, written argument, or other material that the Secretary returns to the submitter."[199] Thus, in accordance with its regulations, Petitioners argue that the Department cannot consider for the final results RZBC's November 28, 2011, filing which was rejected from the record.

Department's Position:

The Department carefully considered RZBC's November 28, 2011, submission as well as the arguments related to the rejection of that submission. We find that the Department properly acted within its authority in rejecting the submission as untimely filed new factual information. As explained in the Department's December 15, 2011, rejection letter, [200] we examined RZBC's November 28, 2011, submission and determined that it did not adhere to the guidelines set forth under 19 CFR 351.301(c)(1). RZBC's submission did not rebut, clarify, or correct factual information submitted by Petitioners on November 17, 2011. Analysis of the November 28,

[196] *See* Letter from the Department regarding "Rejection of Factual Information Submission Filed By RZBC Co., Ltd. and Affiliates," (December 15, 2011) (RZBC Rejection Letter) at 1.
[197] *Id*.
[198] *Id*.
[199] *See* 19 CFR 351.104(a)(2); *see also Multilayered Wood Flooring from the People's Republic Of China: Final Determination of Sales At Less Than Fair Value*, 76 FR 64318 (October 18, 2011), and accompanying Issues and Decision Memorandum at Comment 43 (where the Department explained that "The Act imposes no requirement that the Department retain or use submissions that contain improperly filed information. To the contrary, the Department's regulations require the Department to return such unsolicited information to the submitting party and prohibits the Department from considering or otherwise using rejected information.").
[200] *See* RZBC Rejection Letter.

2011, filing led the Department to determine that the submission, instead of timely rebutting, clarifying or correcting information on the record, was an attempt on behalf of RZBC to provide additional new benchmark pricing data, for which the Department had set a filing deadline of November 17, 2011.

Specifically, nowhere in the November 28, 2011, submission did RZBC explain how the information presented "rebuts" (*i.e.*, challenges the accuracy of), "clarifies" (*i.e.*, makes clearer by explaining in greater detail), or "corrects" (*i.e.*, identifies and changes errors) the information that had been previously submitted by Petitioners. RZBC's November 28, 2011, submission was simply a filing of new pricing data with no accompanying explanation of the data. There was no narrative that attempted to rebut, clarify or correct Petitioners' data; rather, the document was simply a placement on the record of new data. It was RZBC's burden at the time of filing the November 28, 2011, submission – and not in the case brief – to explain how the pricing data rebutted, clarified or corrected Petitioners' factual information of November 17, 2011. It is not the Department's responsibility to guess at the meaning of data that is placed on the record with no explanation or narrative. As such, the Department properly rejected the November 28, 2011, submission filed by RZBC because it was untimely filed new factual information, and such information has not been considered for these final results.

Comment 8: Export Prices for Sulfuric Acid from India and Thailand

RZBC states that export prices for sulfuric acid from India and Thailand were included in preliminary benchmark calculation. It argues that India and Thailand, however, do not represent the type of world market prices that would be available to it. Specifically, it states that India's and Thailand's exported quantities of sulfuric acid consistently fell short of the company's monthly average purchases. Therefore, RZBC states that neither country would have been able to supply it with enough sulfuric acid throughout the POR.

The RZBC Companies contend that a requisite of whether a benchmark price is a representative price would be that the country in question exports quantities that would be able to meet the demand of the company. Where a country cannot meet demand, they assert that the reported export price from that country is not the type that would be available to the company. Therefore, because both India and Thailand did not export quantities of sulfuric acid that could meet RZBC demands throughout the POR, RZBC argues that those countries should be excluded from the Department's benchmark.

Consistent with *Bricks from the PRC*,[201] Petitioners argue that the Department must reject RZBC's argument. In that determination, the Department considered a respondent's argument that certain countries selected to calculate world market prices under a tier two benchmark were not significant magnesia producers. In response, the Department explained that this argument "conflated the standard for selecting a tier two benchmark in a CVD case with one of the criteria in selecting a surrogate country in an NME AD case."[202] Petitioners note that the Department further explained that 19 CFR 351.511(a)(2)(ii) "contains no requirement that the Department calculate world market prices only from significant producers."[203]

[201] *See Certain Magnesia Carbon Bricks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 45472 (August 2, 2010) (*Bricks from the PRC*), and accompanying Issues and Decision Memorandum at Comment 7.
[202] *Id*.
[203] *Id*.

Petitioners assert that RZBC could have purchased some or all of the exported sulfuric acid from India and/or Thailand. They add that the benchmark does not consist solely of those prices, but is based on record evidence for Canada, the EU, Thailand, India, and the United States for 2010.[204]

Department's Position:

For the final results, we have not excluded from the sulfuric acid benchmark export prices from India and Thailand. The Department's regulations at 19 CFR 351.511(a)(2) set forth the basis for identifying appropriate market-determined benchmarks for measuring the adequacy of remuneration for government-provided goods. For the reasons outlined in "Provision of Sulfuric Acid for LTAR," above, we continue to apply a tier two benchmark, *i.e.*, a world market price available to purchasers in the PRC, as the sulfuric acid benchmark price to which to compare RZBC's reported purchases.

RZBC neither argues that India and Thailand prices are not world market prices nor that the sulfuric acid from India and Thailand was not available to PRC purchasers. Rather, RZBC argues that the countries are not significant sulfuric acid exporters. As Petitioners note, RZBC has conflated the standard for selecting a tier two benchmark in a CVD case with one of the criteria in selecting a surrogate country in an NME AD case. We note that in measuring the adequacy of remuneration for government-provided goods, 19 CFR 351.511(a)(2)(ii) requires that the Department compare the government price to a world market price, and this provision contains no requirement that the Department calculate world market prices only from significant exporters. Under 19 CFR 351.511(a)(2)(ii), the Department is to compare the government price to a world market price where it is reasonable to conclude such a price would be available to purchasers in the country under examination. In this case, there is no information on the record to indicate that exports of sulfuric acid from India and Thailand would not be available to PRC purchasers.

[204] *See Preliminary Results*, 77 FR at 33176.

RECOMMENDATION

We recommend that you accept the positions described above. If accepted, we will publish the final results of review and the final dumping margin in the Federal Register.

✓

Agree

Disagree

Ronald K. Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

November 29, 2012

Date