

***Archer Daniels Midland Co., et al. v. United States*, Consol. Court No. 11-00537
Slip Op. 13-66 (May 28, 2013)**

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND

SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination (Final Remand Results) pursuant to the remand order of the U.S. Court of International Trade (Court) in *Archer Daniels Midland Co., et al. v. United States*, Consol. Court No. 11-00537, Slip Op. 13-66 (May 28, 2013) (*Archer Daniels*). The Court's opinion and remand order were issued in connection with *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) (*Final Results*), as well as the accompanying Corrected Issues and Decision Memorandum (February 10, 2012) (Corrected I&D Memo).

In *Archer Daniels*, the Court remanded two issues to the Department. First, it remanded, for further explanation, our determination regarding the countervailability of the alleged subsidy involving the provision of steam coal for less than adequate remuneration (LTAR). Second, it remanded our selection of the benchmarks to value the benefit from the provision of sulfuric acid, instructing the Department to consider certain evidence pertaining to comparability that was placed on the record by RZBC Co., Ltd., RZBC Import & Export Co., Ltd., and RZBC (Juxian) Co., Ltd. (collectively, RZBC).

As discussed below, on remand, we find that the record evidence does not demonstrate that the provision of steam coal for LTAR is specific within the meaning of section 771(5A) of

the Tariff Act of 1930, as amended (the Act). Further, we have examined the evidence relating to the sulfuric acid benchmarks submitted by RZBC and find that it does not undermine the benchmarks we used in the *Final Results*.

We released our draft results of remand redetermination to interested parties on July 17, 2013 (Draft Remand Results) and provided parties the opportunity to comment. We received comments separately from Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas LLC (collectively Petitioners) on June 11, 2013.¹

BACKGROUND

In the underlying administrative review, the Department investigated whether the respondent companies received steam coal for LTAR. In the *Preliminary Results*, we found that the provision of steam coal was specific, because the industries using steam coal were “limited in number” within the meaning of section 771(5A)(D)(iii)(I) of the Act.² The Department found that, according to the Government of the People’s Republic of China (GOC), steam coal is used by six major industrial categories, the first three of which could be broken down into 40 more specific categories.³

In the *Final Results*, we re-visited our preliminary specificity finding. We stated that “[u]pon closer inspection of the industrial user list, the large number and diverse array of industries identified does not support our preliminary finding that steam coal is provided to a limited number of industries.”⁴ We noted that “we do not have sufficient record evidence pointing to predominant or disproportionate use,” and also that “there is no indication that steam

¹ See Petitioners’ Comments dated July 29, 2013, Yixing Union Biochemcial Co., Ltd.’s (Yixing Union) Comments dated July 29, 2013, and RZBC’s Comments dated July 29, 2013.

² See *Citric Acid and Certain Citrate Salts from the People’s Republic of China: Preliminary Results of Countervailing Duty Administrative Review*, 76 FR 33219 (June 8, 2011) (*Preliminary Results*).

³ *Id.*, 76 FR at 33234.

⁴ See Corrected I&D Memo at 51.

coal is *de jure* specific.”⁵ Accordingly, the Department did not calculate a subsidy rate for the provision of steam coal. We stated that “we intend to revisit the *de facto* specificity of this program in a future review.”⁶

The Court examined our conclusion and stated:

{I}t is difficult to discern exactly what action Commerce took with regard to the alleged steam coal subsidy, which the court must do for the purpose of deciding what legal review to afford. In some respects the *Final Results* reflect a final determination on the issue; in others it appears that Commerce was attempting to defer making a determination.⁷

The Court then explained why, on the one hand, it appeared that the Department deferred making a determination while, on other hand, it appeared that the Department determined that the alleged steam coal subsidy was not specific and not countervailable in this particular review.⁸ The Court remanded “so that the agency can better explain its conclusion regarding the countervailability of the alleged steam coal provision.”⁹

Also, in the underlying review, we examined whether the respondents received sulfuric acid for LTAR. Petitioners alleged the provision of sulfuric acid for LTAR on December 15, 2010.¹⁰ Petitioners’ allegation included information on benchmark prices.¹¹ On December 27, 2012, RZBC responded to this allegation, submitting information pertaining to the proposed benchmark prices provided by Petitioners.¹²

The Department initiated an investigation of whether the respondents received sulfuric acid for LTAR.¹³ On April 5, 2011, we solicited information from interested parties pertaining

⁵ *Id.*

⁶ *Id.*

⁷ See *Archer Daniels* at 9-10.

⁸ *Id.* at 10-11.

⁹ *Id.* at 11.

¹⁰ See Petitioners’ Additional Subsidy Allegations (December 15, 2010).

¹¹ *Id.* at Exhibit 18.

¹² See RZBC Rebuttal Comments (December 27, 2010).

¹³ See New Subsidy Allegation (NSA) Analysis Memorandum (February 22, 2011).

to world market prices for sulfuric acid, for potential use as benchmarks.¹⁴ On April 15, 2011, Petitioners responded to our request by placing additional sulfuric acid benchmark information on the record, to supplement what they submitted in Petitioners' Additional Subsidy Allegations.¹⁵ RZBC did not submit any information in response to the Department's request.

In the *Final Results*, the Department found that the respondent companies received sulfuric acid from "authorities" within the meaning of section 771(5)(B) of the Act and that, for benefit purposes, the Chinese sulfuric acid market was distorted by government involvement.¹⁶ Accordingly, we used "tier two" benchmarks to measure the benefit from the provision of sulfuric acid.¹⁷ We used the information placed on the record by Petitioners, which consisted of export prices for sulfuric acid from Canada, the European Union, India, Thailand, and the United States.¹⁸ The Department also acknowledged RZBC's argument that the benchmark prices covered grades of sulfuric acid that were different than those used by RZBC.¹⁹ However, we found this argument to be "untimely," and we noted that RZBC never responded to our request for benchmark information.²⁰

The Court sustained the Department's determination to use tier two benchmarks. However, the Court remanded our determination regarding the specific benchmark prices to use.²¹ The Court found that we "wrongly concluded" that RZBC's arguments pertaining to the grades of sulfuric acid were untimely.²² The Court found that, to the extent that the RZBC

¹⁴ See Solicitation of Factual Information (April 5, 2011).

¹⁵ See Petitioners' Submission of Factual Information (April 15, 2011).

¹⁶ See Corrected I&D Memo at 16-17.

¹⁷ *Id.* at 17.

¹⁸ *Id.*

¹⁹ *Id.* at 58.

²⁰ *Id.*

²¹ See *Archer Daniels* at 17-18.

²² *Id.* at 18.

Rebuttal Comments raised issues with respect to benchmark comparability, the Department was obligated to address these issues.²³

ANALYSIS

I. Provision of Steam Coal for LTAR

In *Archer Daniels*, the Court remanded the *Final Results* with respect to the alleged steam coal subsidy program “so that the agency can better explain its conclusion regarding the countervailability of the alleged steam coal provision.”²⁴ The Court found that it was “difficult to discern exactly what action Commerce took with regard to the alleged steam coal subsidy,” because “{i}n some respects the *Final Results* reflect a final determination on the issue; in others it appears that Commerce was attempting to defer making an examination.”²⁵ After noting and further explaining these two possible interpretations of the *Final Results*, the Court remanded the issue to the Department.

The question in the *Final Results* and in this remand redetermination is whether the provision of steam coal is specific within the meaning of section 771(5A) of the Act. A subsidy is *de jure* specific if “the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry.”²⁶ Even if not *de jure* specific, a subsidy can be specific as a matter of fact, if one or more of the following factors exist: (1) the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number; (2) an enterprise or industry is a predominant user of the subsidy; (3) an enterprise or industry receives a disproportionately large amount of the subsidy; (4) the manner in which the authority providing the subsidy has exercised discretion in the

²³ *Id.*

²⁴ See *Archer Daniels* at 11.

²⁵ *Id.* at 9.

²⁶ See section 771(5A)(D)(i) of the Act.

decision to grant the subsidy indicates that an enterprise or industry is favored over others.²⁷

Section 771(5A) of the Act provides that the reference to “enterprise or industry” includes a group of enterprises or industries.

In the *Final Results*, we found that “there is no indication that steam coal is *de jure* specific under 771(5A)(D)(i) of the Act.”²⁸ This remains our finding. There is no evidence on the record that the authority providing the subsidy, or that the legislation pursuant to which the authority operates, expressly limits access to steam coal to an enterprise or industry.

Turning to *de facto* specificity, we note that in the *Preliminary Results*, the Department found that steam coal was used by a limited number of industries, and therefore was specific within the meaning of section 771(5A)(D)(iii)(I) of the Act.²⁹ The Department stated that, according to the GOC, steam coal is used by six major industrial categories, the first three of which could be broken down into 40 more specific categories.³⁰ However, in the *Final Results*, we found that the users of steam coal were not limited in number:

Upon closer inspection of the industrial user list, the large number and diverse array of industries identified does not support our preliminary finding that steam coal is provided to a limited number of industries. Users of steam coal listed in the GOC’s Industrial Classification for National Economic Activities range from producers of electricity, heat suppliers and manufacturers of processed food and nuclear fuel to offices, hotels and caterers. Within the major industrial category of manufacturing alone users include food processors, nuclear fuel processors, smelters and pressers of ferrous and non-ferrous metal, and manufacturers of textiles, medicine, chemicals, transport equipment, among many others.³¹

In this Remand Redetermination, we continue to find that the users of steam coal are not limited in number, for the same reasons described in the *Final Results*. Exhibit 6 of the GOC’s March

²⁷ See section 771(5A)(D)(iii) of the Act.

²⁸ See Corrected I&D Memo at 51.

²⁹ See *Preliminary Results*, 76 FR at 33234.

³⁰ *Id.*

³¹ See Corrected I&D Memo at 51.

18, 2011, NSA Questionnaire Response indicates that steam coal is, in the words of the Statement of Administrative Action (SAA), “widely used throughout {the} economy.”³²

The next question in our *de facto* specificity analysis is whether an enterprise or industry (or a group of enterprises or industries) was a predominant user of the subsidy or received disproportionately large amounts of the subsidy.³³ Normally, the Department seeks such usage information from the relevant government. Here, although the Department pursued a line of questioning with the GOC touching upon the question of predominance or disproportionality, there was not sufficient evidence, based on the record of the underlying administrative review, indicating that certain industries were the predominant users of steam coal or received disproportionately large amounts of steam coal.³⁴ Accordingly, in the *Final Results*, we stated that “we do not have sufficient record evidence pointing to predominant or disproportionate use.”³⁵ We continue to find that the evidence on this record does not show predominant or disproportionate use.

Finally, turning to section 771(5A)(iii)(IV) of the Act, we find that there is no evidence on the record that the manner in which the authority providing steam coal has exercised discretion in the decision to provide steam coal indicates that an enterprise or industry (or group thereof) is favored over others.³⁶

In sum, we find that the evidence on this record does not support a finding that the provision of steam coal is specific within the meaning of section 771(5A) of the Act.

³² See SAA accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994), at 929.

³³ See section 771(5A)(D)(iii)(II)-(III) of the Act.

³⁴ See April 14, 2011, 1st NSA Supplemental Questionnaire, at 3.

³⁵ See Corrected I&D Memo at 51.

³⁶ We note, also, that there is no indication on the record that the provision of steam coal is an export subsidy, an import substitution subsidy, or is regionally specific.

Accordingly, in this Remand Redetermination, we determine that the alleged provision of steam coal for LTAR is not countervailable in this administrative review.

II. Sulfuric Acid Benchmark Prices

The Court has instructed the Department to inquire into the comparability of sulfuric acid benchmark price and grade information placed on the record by RZBC, which was not explicitly addressed by the Department in the *Final Results*.³⁷ Specifically, the Court stated that rather than addressing the arguments raised by RZBC regarding the sulfuric acid benchmark price (*see* RZBC Rebuttal Comments), the Department concluded RZBC's argument was untimely. Therefore, on remand, we are addressing the RZBC Rebuttal Comments and RZBC's contention that the benchmarks used in the *Final Results* were inappropriate.

The RZBC Rebuttal Comments was submitted in response to Petitioners' Additional Subsidy Allegations. In the RZBC Rebuttal Comments, RZBC disputed that the alleged provision of sulfuric acid for LTAR provided a financial contribution, benefit, or was specific to the citric acid industry. Because our determination that the provision of sulfuric acid for LTAR constitutes a countervailable subsidy has not been called into question, we now only address the RZBC Rebuttal Comments as they relate to the Department's benchmark selection for this subsidy program. Specifically, we address RZBC's claims that the sulfuric acid benchmark prices submitted by Petitioners were 1) not specific to the sulfuric acid used by RZBC; 2) were "overly broad," and did "not distinguish between concentration levels and grades of sulfuric acid, which have vastly different pricing"; and 3) were based on countries "cherry picked" by Petitioners in developing their benchmark.³⁸

³⁷ See *Archer Daniels* at 17-18.

³⁸ See RZBC Rebuttal Comments at 2.

With respect to the first point, we find RZBC's assertion is not supported by record evidence. Contrary to RZBC's claims, the record indicates that RZBC's purchases of sulfuric acid from foreign suppliers (those purchases which RZBC asserted in its case brief³⁹ should be used as tier-one benchmark prices) were comparable to the inputs related to Petitioners' benchmark prices. Specifically, we note that RZBC imported sulfuric acid under the same harmonized tariff schedule number as the products Petitioners used in their world market price benchmarks.⁴⁰ Thus, RZBC's claims that Petitioners' benchmarks are incomparable to the sulfuric acid consumed by RZBC are without merit and, instead, the record shows Petitioners' benchmark prices are of comparable inputs to RZBC's.

In addition, RZBC's claim that it uses "industrial grade" sulfuric acid (*see* RZBC Case Brief at 29) was not mentioned on the record previously. Based on the record at the time, the Department could not ascertain the validity of this statement or the consequential argument that Petitioners' benchmarks were not comparable to this "industrial grade." Thus, we found RZBC's argument to be untimely.⁴¹ On remand, we determine that this argument is simply unsupported by record evidence. RZBC did not cite to any record evidence supporting its argument that it used industrial grade sulfuric acid, and it did not cite to any evidence that the benchmarks submitted by Petitioners (and used by the Department in the *Preliminary Results*) omitted industrial grade sulfuric acid.⁴²

Regarding the second point, while the supporting documentation provided by RZBC shows varying prices of non-technical grades of sulfuric acid, it does not show that Petitioners' benchmarks are distorted or incomparable. First, the price information RZBC submitted consists

³⁹ *See* RZBC Case Brief (October 24, 2011) (RZBC Case Brief).

⁴⁰ *See* RZBC Rebuttal Comments at Attachment 1.

⁴¹ *See* Corrected I&D Memo at 58.

⁴² In its RZBC Rebuttal Comments, RZBC stated that it did not use non-technical grade sulfuric acid, but did not elaborate or provide any further information on the grades it did use until the RZBC Case Brief.

of U.S. price quotes for small quantities of sulfuric acid that, according to RZBC, are used for laboratory purposes. RZBC did not state whether, or provide evidence that, these grades of sulfuric acid are traded internationally. Further, RZBC did not provide any evidence demonstrating that non-technical grades of sulfuric acid were included in Petitioners' benchmarks, nor did it provide evidence demonstrating that those non-technical grades of sulfuric acid comprise a significant percentage of the world benchmark prices presented by Petitioners. Thus, despite RZBC's accusation, the Department could not reasonably conclude that non-technical grades of sulfuric acid were included in Petitioners' benchmarks, or that they distort the benchmarks to a degree that would render them unusable.

On the third point that Petitioners "cherry picked" the benchmark countries, we find that apart from this brief claim, RZBC did not provide any evidence or explanation demonstrating how or why the benchmark countries put forth by Petitioners were poor or distortive selections for tier-two benchmarks. Therefore, RZBC's arguments are unsupported and do not undermine the reasonableness of the countries used for the sulfuric acid benchmark in the *Final Results*.

Finally, we note that RZBC's benchmark comments in the RZBC Rebuttal Comments were filed prior to the Department's initiation of an investigation of the alleged subsidy program and were presented in the context of whether the information put forth in Petitioners' allegation supported a finding of financial contribution or benefit for initiation purposes. These comments were not submitted in response to our Solicitation of Factual Information, and they were not submitted in response to Petitioners' benchmark information in Petitioners' Submission of Factual Information. Apart from its RZBC Case Brief, RZBC did not comment on the benchmark selection for this subsidy program subsequent to the Department's initiation of the subsidy program, nor did it take advantage of the opportunity to submit its own benchmark

information in response to our explicit invitation for parties to do so. *See Solicitation of Factual Information*. Petitioners' submission of benchmark information in Petitioners' Submission of Factual Information, which the Department ultimately used in the *Preliminary Results* and the *Final Results*, constituted the only benchmark information on the record. Even if RZBC's ultimate view was that the Department should use tier-one benchmarks, if RZBC took issue with the only tier-two benchmarks on the record, it could have submitted its own tier-two benchmark information and still argued for the use of tier-one benchmarks for the *Final Results*. Because it did not do so, however, once we determined that tier-two benchmarks were appropriate in this case (a determination upheld by the Court), we only had Petitioners' benchmarks to select from. Moreover, as explained above, the Department did not find record evidence showing that Petitioners' benchmarks were not suitable. Thus, the use of these benchmarks was and is appropriate in this case.

COMMENTS ON THE DRAFT REMAND RESULTS

Comment 1: Steam Coal Determination

Petitioners argue that the Department's Draft Remand Results are contrary to law because it failed to consider or even acknowledge information regarding predominant and disproportionate use that Petitioners placed on the record as part of their new subsidy allegation. Alternatively, Petitioners argue that the Department has not met its obligation to investigate a properly alleged subsidy program because it failed to request usage information from the GOC.

Petitioners contend that record evidence from their allegation demonstrates that the power industry is the predominant user of coal in China. Petitioners also note that neither respondent company rebutted this information.

Next, Petitioners urge that if the Department finds that the current record is insufficient to support a specificity finding, the Department should reopen the record and request usage information from the GOC. Citing to the Department's Corrected I&D Memo, Petitioners argue that the Department has admitted that it failed to obtain that information in accordance with its usual practice; Petitioners also note that the Department's failure stands in contrast to the second administrative review of this proceeding in which it did request that information.

Yixing Union, the second mandatory respondent in this proceeding, agrees that the record does not demonstrate that the alleged provision of steam coal for LTAR is specific.

Department's Position

We disagree with Petitioners and continue to find that the information on the record of this review does not support a finding that the provision of steam coal for LTAR was *de facto* specific in this administrative review, pursuant to section 771(5A)(D)(iii)(II-IV) of the Act.

Petitioners are correct that we normally rely on GOC data to make *de facto* specificity determinations.⁴³ In this review, the GOC reported that it did not disaggregate coal data by different segments of the coal industry, and therefore did not have information specific to steam coal. However, the GOC did report a list of industries in China that purchased steam coal directly, but this list did not include usage data.⁴⁴ The GOC relied on information from the Coal Transportation and Sale Association (CTSA) to report the total volume of domestic *steam coal* consumption for 2007-2009.⁴⁵ The GOC also relied on information from the China National

⁴³ See, e.g., *Galvanized Steel Wire From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 17418 (March 26, 2012), and the accompanying Issues and Decision Memorandum at IV.A.1. ("Provision of Wire Rod for Less than Adequate Remuneration") and *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 the accompanying Issues and Decision Memorandum at Comment 18.

⁴⁴ See March 21, 2011 GOC NSA Questionnaire Response.

⁴⁵ *Id.* at 10.

Coal Association (CNCA) to identify the top ten Chinese steam coal producers.⁴⁶ Next, the GOC calculated the percentage of domestic steam coal consumption accounted for by domestic steam coal production by deducting the total volume of steam coal imports from the total volume of domestic steam coal consumption reported by the CTSA.⁴⁷ Finally, the GOC explained and documented relevant pricing controls, distribution activities, and applicable taxes.⁴⁸

The Department's April 14, 2011, supplemental questionnaire directed the GOC to explain its efforts to compile information specific to steam coal, and requested that the GOC provide the amount of steam coal purchased by each of the steam coal-consuming industries in the GOC's previous response for the years 2005-2009.⁴⁹ The GOC explained those efforts and further stated, "The amount of yearly coal purchases for particular industries is not information that is maintained or gathered by the {CTSA} in the ordinary course of business. The GOC cannot provide the requested information."⁵⁰

As the Department explained in the Draft Remand Results, and demonstrates above, both our original and supplemental questionnaires solicited information relevant to predominance or disproportionality.⁵¹ Information received from the GOC did not provide sufficient evidence indicating that certain industries were the predominant users or received disproportionately large amounts of steam coal. We did not request additional information on this issue from the GOC. Thus, the record evidence does not show predominance or disproportionality and, therefore, there is no substantial evidence on the record of this proceeding that would support Petitioners' preferred finding of *de facto* specificity.

⁴⁶ *Id.* at 11.

⁴⁷ *Id.* at 10.

⁴⁸ *Id.* at 13-14.

⁴⁹ *Id.* at 3.

⁵⁰ See May 4, 2011, 2011 GOC NSA Supplemental Questionnaire Response at 10-11 and April 27, 2011, 2011 GOC NSA Supplemental Questionnaire Response at 5.

⁵¹ See Draft Remand Results at 6.

This determination is not undermined by Petitioners' data. Although Petitioners' new subsidy allegation contained usage information regarding the coal industry as a whole, that evidence is not specific to steam coal.⁵² The GOC's March 21, 2011 questionnaire response makes clear that references to the "coal" industry and "coal" consumption can include both steam coal and coking coal unless specified otherwise. For example, although the GOC's coal data were industry-wide, the CTSA produced some segment-specific statistics upon request, and the CNCA had segment-specific knowledge.⁵³ As we clarified in our initiation memorandum, Petitioners' allegation applied solely to steam coal, not all coal.⁵⁴ Accordingly, we continue to find that the record evidence does not demonstrate specificity.

Additionally, regarding Petitioners' argument that the Department should reopen the record, we note that the Court ordered Commerce to "provide a clearer explanation of its conclusion regarding the countervailability of steam coal," *Archer Daniels* at 29, and we have done that.

Comment 2: Sulfuric Acid Benchmarks

RZBC argues that none of the sulfuric acid benchmarks submitted by Petitioners are the same HTS number that corresponds to the inputs used by RZBC. RZBC claims the record shows its imports of sulfuric acid were of "industrial grade [] sulfuric acid" and asserts that [] sulfuric acid "is synonymous with the term 'industrial grade.'"⁵⁵ RZBC states that the information submitted by Petitioners shows that certain of the benchmarks (*i.e.*, Canada, EU, and India) were at the four- and six-digit HTS level, both of which are different from the ten-digit HTS number submitted in RZBC Rebuttal Comments at Attachment 1. RZBC contends that

⁵² The only specific reference to "steam coal" is in Exhibit 24, which refers to movements in the price of steam coal. *See* Petitioners' December 15, 2010 NSA Submission at Ex. 24.

⁵³ *See* March 21, 2011 GOC NSA Questionnaire Response at 8-11.

⁵⁴ *See* February 22, 2013 NSA Initiation Memorandum at 4, n. 12.

⁵⁵ *See* RZBC Comments on Draft Remand Results at 3-4.

because these benchmarks are not at the same level of specificity as the goods it imported, they are not representative of RZBC's purchases. RZBC also notes that the Department did not address all of the benchmarks on the record, particularly the benchmark prices from India, Peru, and the Philippines.

RZBC claims that the Thai benchmarks Petitioners submitted are specific to three eleven-digit level HTS numbers.⁵⁶ RZBC also contends that the data for these three HTS numbers were incorrectly averaged together by the Department. With specific regard to the three HTS numbers included in Petitioners' Thai benchmarks, RZBC claims that HTS 2807.0000.101 is not comparable because the concentration level of that sulfuric acid is lower than that used by RZBC. RZBC then argues that HTS 2807.0000.202 is not comparable "given that export information reports small non-bulk quantities."⁵⁷ Therefore, RZBC concludes that only one of the three HTS numbers from Thailand, 2807.0000.102, is comparable to the sulfuric acid used by RZBC.⁵⁸ RZBC also states that the U.S. benchmark "which was obtained from the same HTS as described by RZBC," would be appropriate for use as a benchmark in the Department's calculations.⁵⁹

RZBC disagrees with the Department's statement in the Draft Remand Results that there is no record evidence that non-technical grades of sulfuric acid are traded internationally. In support, RZBC points to the Thai benchmark data submitted by Petitioners and asserts that HTS

⁵⁶ These HTS numbers are 2807.0000.101 ("sulphuric acid not exceeding 50% w/w (KGM)"), 2807.0000.102 ("sulphuric acid more than 50% w/w (KGM)"), and 2807.0000.202 ("sulphuric acid fuming (oleum) more than 50% w/w (KGM)"). We note that throughout its comments on the Draft Remand Results, RZBC incorrectly referred to these numbers as 2807.0000.001, 2807.0000.002, and 2807.0000.003, respectively. In these Final Remand Results, we refer to the correct HTS numbers, as reported in the Petitioners' December 15, 2010 NSA Submission at Exhibit 18.

⁵⁷ See RZBC's Comments on Draft Remand Results at 5.

⁵⁸ *Id.* at 6-7.

⁵⁹ *Id.*

2807.0000.202 shows that small quantities of different grades of sulfuric acid are traded internationally.

Finally, with respect to its claims that Petitioners “cherry picked” the benchmark data it selected, RZBC states that it made the Department and other parties aware of the problems it had with the benchmarks early on in the review.⁶⁰ RZBC claims that it did not submit additional benchmarks because it believed that its imports of sulfuric acid represented the best available benchmark information. Therefore, RZBC concludes that the limited amount of useable benchmark data on the record is not RZBC’s doing, but rather is the fault of Petitioners.

Department’s Position

We disagree with RZBC and continue to find that the benchmark prices used in the *Final Results* are comparable to the goods RZBC purchased and appropriate, pursuant to 19 CFR 351.511(a)(2)(ii).

First, RZBC’s comments on the Draft Remand Results are the first time it has claimed that the word “[]” is equivalent to “industrial grade” sulfuric acid. RZBC had never made this distinction clear on the record, in the RZBC Rebuttal Comments or otherwise. It is unclear how the Department could have reasonably inferred that a single instance of the word “[],” a term typically used to describe a quantity, somehow related to the grade of RZBC’s inputs.⁶¹ Moreover, we continue to find that nothing on the record or in RZBC’s comments on the Draft Remand Results demonstrates clearly what “industrial grade” is or indicates that the benchmarks used in the *Final Results* exclude “industrial grade” sulfuric acid. Rather, as discussed below, the record indicates that the goods RZBC (and Yixing Union) purchased were comparable to the benchmarks used in the *Final Results*.

⁶⁰ See RZBC Rebuttal Comments.

⁶¹ Indeed, even RZBC’s comments on the Draft Remand Results use the term “[]” to refer to a quantity. See RZBC’s Comments on Draft Remand Results at 5; see also RZBC Rebuttal Comments at Attachment 1.

Next, we note that although not all the HTS numbers corresponding to Petitioners' benchmarks are at the same ten-digit level of detail as RZBC's imported purchases, one is exactly the same ten-digit HTS number ([]), and all of the benchmarks pertain to sulfuric acid. Though RZBC contends the Petitioners' benchmarks are not "representative" of its purchases, we note that the guiding regulation at issue, 19 CFR 351.511(a)(2)(ii), as well as the order from the Court, directs the Department to address whether the benchmarks are *comparable*, not *identical* to a respondent's purchases. For the reasons explained in the *Final Results* and in these Final Remand Results, we continue to find the benchmarks used in the *Final Results* are comparable.

With respect to the U.S. benchmark price, though RZBC notes that the Department's verification showed RZBC imported sulfuric acid under HTS [], RZBC later recognizes that "the U.S. benchmark {i.e., 2807000000}...was obtained from the same HTS as described by RZBC," and RZBC does not suggest or demonstrate that the U.S. benchmark is otherwise unusable. Rather, RZBC states that the U.S. benchmark is comparable and would be appropriate.⁶² Therefore, we find that the record demonstrates that the U.S. benchmark is comparable.

Turning to the Thai benchmark prices, Petitioners' submission shows that the Thai benchmark information was derived from searches conducted at the eight-digit level that matches the first eight digits of the HTS code RZBC submitted in the RZBC Rebuttal Comments at Attachment 1.⁶³ Though this information includes a breakout of further detailed eleven-digit HTS numbers, those individual HTS numbers were not selected as benchmarks. Rather, the sum of the monthly quantities and values for those detailed numbers represent the total monthly

⁶² RZBC's Comments on Draft Remand Results at 6-7; *see also* Petitioners' April 15, 2011 Factual Submission at Ex. 4.

⁶³ *See* Petitioners' December 15, 2010 NSA Submission at Ex. 18.

quantity and value for the broader eight-digit HTS number. It is that eight-digit HTS number and corresponding data that the Department used in the *Final Results*. We find that benchmarks matching RZBC's imports at this level of detail support a finding of comparability.

Additionally, we note that contrary to RZBC's claims, the data for each of the three Thai benchmarks were not averaged by the Department. Rather, as stated above, we summed the monthly quantities and values of all the eleven-digit numbers falling under HTS 2807.0000 to calculate the total quantity and value for each of those HTS numbers during the POR.⁶⁴ The fact that relatively small quantities of HTS 2807.0000.202 were exported from Thailand does not, by itself, lead to the conclusion that the broader 2807.0000 benchmark (which includes the three more specific eleven-digit codes) is not comparable. Finally, RZBC has not shown any evidence that indicates that the prices of these varieties, regardless of the concentration levels or export quantities, of sulfuric acid are distortive for benchmark purposes or that they do not reflect market prices,

In response to RZBC's comments that the Department failed to discuss the India, Peru, and the Philippines benchmark prices, we note that those benchmarks relate to sulfuric acid at the six-digit HTS detail (*i.e.*, "Sulphuric Acid; Oleum, (HTS 2807.00)"), were obtained from *World Trade Atlas*, and were submitted by another mandatory respondent in the underlying administrative review, Yixing Union.⁶⁵ Yixing Union provided this information in response to the Department's request for benchmark information for 2008 and was the only party that submitted sulfuric acid benchmarks for that period. No interested party commented on the comparability of those benchmarks.

⁶⁴ Those monthly sums were, however, included in the averaging the Department did conduct with the other benchmark information on the record, pursuant to 19 CFR 351.511(a)(2)(ii).

⁶⁵ See Yixing Union's August 12, 2011 Submission at 2 and Ex. 3.

As we have previously discussed in the Draft Remand Results, there is simply no record evidence defining “industrial grade” or “[] grade” sulfuric acid, and there is no evidence that the data for India, Peru and the Philippines within these six-digit codes that explicitly cover sulfuric acid are not comparable to “industrial” or “[]” grade sulfuric acid. Accordingly, we continue to find that these data constitute appropriate benchmarks. Additionally, we find that, in light of its status as a citric acid producer and its extensive knowledge of its own products, Yixing Union’s decision to submit data at the six-digit level supports our determination that data at that level were comparable for use in measuring the benefits received for sulfuric acid inputs during the period of review.

On this basis, it follows that the Canadian benchmarks Petitioners submitted (which are at the exact same six-digit level and heading of “Sulfuric acid; oleum”) are also comparable to the inputs used by RZBC. Furthermore, apart from noting that the remaining benchmarks submitted by Petitioners for the EU and India are at a less-specific level of detail (*i.e.*, four-digit HTS numbers), RZBC has not provided any evidence showing how or why those benchmarks are not comparable or that they are distortive. Rather, the evidence on the record shows that the EU and Indian benchmarks fall under the same heading as all the other benchmarks on the record, *i.e.*, “Sulphuric Acid; Oleum.” Accordingly, we reiterate our previous statements that neither the record nor RZBC’s arguments demonstrate that an HTS category explicitly covering sulfuric acid is not comparable to RZBC’s “industrial” grade or “[]” sulfuric acid.

Finally, we note that RZBC still has not provided any justification or documentation supporting its assertion that Petitioners “cherry picked” benchmark countries in a way that prejudiced RZBC or distorted the benchmarks. RZBC simply claims that it raised its concerns

regarding the problems of using benchmark information that was non-specific to its inputs.⁶⁶ It did not, however, submit alternative benchmarks, or any evidence at all, demonstrating the prejudicial nature of Petitioners' benchmarks. Though RZBC explains that it did not submit alternative benchmarks because it felt that tier one benchmarks based on its own imported purchases were more appropriate, as we stated in the Draft Remand Results and again in these Final Remand Results, “{e}ven if RZBC’s ultimate view was that the Department should use tier-one benchmarks, if RZBC took issue with the only tier-two benchmarks on the record, it could have submitted its own tier-two benchmark information and still argued for the use of tier-one benchmarks for the *Final Results*.”

In addition, as stated in the Draft Remand Results, RZBC’s original comments on Petitioners’ benchmarks responded to the new subsidy allegation regarding sulfuric acid and whether the Department had sufficient information to initiate on the alleged program.⁶⁷ RZBC did not renew its arguments regarding those benchmarks until its case brief. We again note that during the interim period (*i.e.*, the ten months between the RZBC Rebuttal Comments and the deadline for the submission of case briefs), the Department specifically invited parties to submit benchmark information. Though Petitioners and Yixing Union took advantage of those opportunities, RZBC did not. In this regard, we note that RZBC bears the responsibility for its ongoing dissatisfaction with the administrative record, and the Department has based its decision in these Final Remand Results on the record as it exists.

⁶⁶ See RZBC’s Comments on Draft Remand Results at 8.

⁶⁷ *Id.*, at 8.

E. Final Remand Results

Pursuant to the Court’s order, the Department has: (1) provided further explanation of our determination regarding the countervailability of the alleged subsidy involving the provision of steam coal for LTAR, and 2) addressed the comparability of the benchmarks used in the *Final Results*. Based on this analysis, the Department has not revised its subsidy calculations for RZBC or Yixing Union.

Paul Piquado
Assistant Secretary
for Import Administration

Date