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November 18, 2019

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Xanthan Gum from the People's Republic of China; 2017-2018

I. SUMMARY

After considering the comments and rebuttal comments on the *Preliminary Results*[1] of this review, we determine that the companies under review did not make sales of subject merchandise below normal value during the period of review (POR). We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of the issues for which we have received comments from interested parties:

Comment 1: Commerce Should Make No Changes to the Calculations Not Raised in the Case Briefs of the Parties to the Review
Comment 2: Commerce Should Not Deduct from the U.S. Price Any Amount for Value-Added Tax
Comment 3: Whether Commerce Should Modify Customs Instructions
Comment 4: Commerce Should Include Reported Energy Factors of Production in its Normal Value Calculation
Comment 5: Commerce Incorrectly Valued Cornstarch in its Calculation of the Average Unit Value of Malaysian Imports
Comment 6: Commerce Should Accept Green Health International's Separate Rate Application

[1] *See Xanthan Gum from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review, and Preliminary Determination of No Shipments; 2017-2018*, 84 FR 26813 (June 10, 2019) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum.

II. BACKGROUND

The Department of Commerce (Commerce) published the *Preliminary Results* on June 10, 2019. In accordance with 19 CFR 351.309(c)(1)(ii) and (d)(1)-(2), we invited interested parties to comment on the *Preliminary Results*. On July 17, 2019, Deosen Biochemical (Ordos) Ltd./Deosen Biochemical Ltd. (collectively, Deosen), Meihua Group International Trading (Hong Kong) Limited, Langfang Meihua Biotechnology Co., Ltd., and Xinjiang Meihua Amino Acid Co., Ltd. (collectively Meihua), and Tate and Lyle (a U.S. importer) filed case briefs.[2] On July 24, 2019, the petitioner refiled its case briefs after correcting a filing error.[3] Furthermore, on July 24, 2019 the petitioner, Meihua, and CP Kelco (Shandong) filed rebuttal briefs.[4] The final results of this review are currently due on November 7, 2019.

III. SCOPE OF THE ORDER

The scope of this order covers dry xanthan gum, whether or not coated or blended with other products. Further, xanthan gum is included in this order regardless of physical form, including, but not limited to, solutions, slurries, dry powders of any particle size, or unground fiber.

Xanthan gum that has been blended with other product(s) is included in this scope when the resulting mix contains 15 percent or more of xanthan gum by dry weight. Other products with which xanthan gum may be blended include, but are not limited to, sugars, minerals, and salts.

Xanthan gum is a polysaccharide produced by aerobic fermentation of *Xanthomonas campestris*. The chemical structure of the repeating pentasaccharide monomer unit consists of a backbone of two P-1,4-D-Glucose monosaccharide units, the second with a trisaccharide side chain consisting of P-D-Mannose-(1,4)- P-DGlucuronic acid-(1,2) -a-D-Mannose monosaccharide units. The terminal mannose may be pyruvylated and the internal mannose unit may be acetylated.

Merchandise covered by the scope of this order is classified in the Harmonized Tariff Schedule (HTS) of the United States at subheading 3913.90.20. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope is dispositive.

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[2] *See* Deosen's Case Brief, "Administrative Review of Antidumping Order on Xanthan Gum from the People's Republic of China: Case Brief," dated July 17, 2019 (Deosen Case Brief); *see also* Meihua's Case Brief, "Xanthan Gum from People's Republic of China, A–570–985; Case Brief," dated July 17, 2019 (Meihua Case Brief); Tate and Lyle's Case Brief, "Xanthan Gum from China: Case Brief; Case Brief," dated July 17, 2019 (T&L Case Brief).

[3] *See* Petitioner's Case Brief, "Xanthan Gum from the People's Republic of China: Petitioner's Resubmitted Case Brief," dated July 24, 2019 (Petitioner Case Brief).

[4] *See* Meihua's Rebuttal Case Brief, "Xanthan Gum from People's Republic of China, A–570–985; Rebuttal Brief," dated July 24, 2019 (Meihua Rebuttal Brief); *see also* CP Kelco (Shandong)'s Rebuttal Case Brief, "Xanthan Gum from the People's Republic of China: CP Kelco (Shandong) Biological Company Limited's Rebuttal Brief," dated July 24, 2019 (CP Kelco Shandong Rebuttal Brief); and Petitioner's Rebuttal Case Brief, "Xanthan Gum from the People's Republic of China: Petitioner's Rebuttal Brief," dated July 24, 2019 (Petitioner Rebuttal Brief).

IV. DISCUSSION OF THE ISSUES

Comment 1: Commerce Should Make No Changes to the Calculations Not Raised in the Case Briefs of the Parties to the Review

Meihua

- Pursuant to 19 CFR 351.301(c)(2), case briefs "must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results … ."
- Thus, if no party presents an argument on a specific point, Commerce should assume that such argument has been waived and should not change the decisions it made in the preliminary results.
- If Commerce were to do otherwise, it would deprive parties of the opportunity to present counterarguments regarding the issue.

Commerce's Position:

As an initial matter, Meihua's argument is not relevant to these final results because we do not find it appropriate to change, and have not changed, the decisions made in the *Preliminary Results* except in response to parties' comments, comments which Meihua had the opportunity to rebut. We disagree, however, with the principle advocated by Meihua. First, the regulatory provision cited by Meihua[5] does not govern Commerce's ability to make changes to its determinations in the preliminary results of an administrative review but describes what should be included in case briefs.

Second, Commerce has the authority to make such changes. In *Pasta from Italy*, a party argued that the "Department should not make changes in final results unless they are based on comments filed in conjunction with the proceeding."[6] In response to that argument, Commerce explained that it "has the authority to make other changes or correct errors to ensure accurate results even in situations in which the issue is not raised by a party to the proceeding."[7] Indeed, the courts have held that Commerce has the authority to act on its own accord to correct errors it discovers in its final determinations and final results.[8] Moreover, the Court of International Trade (CIT) has held that Commerce "is not bound by the positions taken or methodologies employed in its preliminary determinations."[9] Therefore, we find that Meihua's argument lacks merit.

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[5] Meihua incorrectly cited 19 CFR 351.301(c)(2). The regulatory provision referenced by Meihua is found at 19 CFR 351.309(c)(2).

[6] *See Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Pasta From Italy*, 67 FR 300 (January 3, 2002) and accompanying Issues and Decision Memorandum at Comment 23.

[7] *Id.*

[8] S*ee, e.g.*, *Am. Signature, Inc. v. United States*, 598 F.3d 816, 826 (Fed. Cir. 2010).

[9] *See United States Steel Corporation v. United States*, 712 F. Supp. 2d 1330, 1335 (CIT 2010) (citing *Peer Bearing Co. v. United States*, 12 F. Supp. 2d 445, 456 (CIT 1998)).

Comment 2: Commerce Should Not Deduct from the U.S. Price Any Amount for Value-Added Tax

Meihua

- The Chinese value-added tax (VAT) is not an "export tax, duty, or other charge" within the meaning of section 772(c)(2)(B) of the Tariff Act of 1930, as amended (the Act), that is deducted from the gross U.S. price to calculate export price (EP) or constructed export price (CEP). Thus, irrecoverable[10] VAT should not be deducted from U.S. prices in calculating EP.
- The statutory export tax adjustment, referenced above, does not apply to Chinese VAT contained in the prices of materials used to produce subject merchandise.
- Commerce should follow the recent CIT decision in *Guizhou Tyre Co., Ltd. v. United States*, 389 F. Supp. 3d 1350 (CIT 2019) (*Guizhou Tyre)*, where the CIT rejected the practice of deducting VAT from U.S. prices when calculating EP and CEP, and found that such a deduction is contrary to law.

Petitioner

- Commerce should not accede to Meihua's request to change its current practice based on the reasoning in *Guizhou Tyre* because that case does not represent the consensus of CIT rulings that have found Commerce's treatment of irrecoverable VAT to be lawful.
- Commerce should continue to treat irrecoverable VAT as it did in *Preliminary Results* and deduct it from U.S. sales prices.

Commerce's Position:

We disagree with Meihua's claim that irrecoverable VAT is not an expense covered by section 772(c)(2)(B) of the Act (*i.e.*, an export tax, duty, or other charge imposed upon exportation). Section 772(c)(2)(B) of the Act authorizes Commerce to deduct from EP or CEP the amount, if included in the price, of any "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise." Commerce's current methodology has been in place since 2012, when Commerce announced it would begin adjusting U.S. price for irrecoverable VAT in non-market economy (NME) proceedings in accordance with section 772(c)(2)(B) of the Act.[11] In this announcement, Commerce stated that the statute provides that when an NME government imposes an export tax, duty, or other charge on subject merchandise from which the respondent was not exempted, Commerce will reduce the respondent's U.S. price by the amount of the tax, duty, or charge paid, but not rebated.[12]

VAT is an indirect, *ad valorem*, consumption tax imposed on the purchase or sale of goods. It is levied on the purchase or sale price of the good, *i.e.*, it is paid by the buyer and collected by the

[10] Meihua refers to the VAT at issue as "nondeductible" VAT; however, we believe that Meihua is referencing irrecoverable VAT, and thus we have used that term in discussing this issue.
[11] *See Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, in Certain Non-Market Economy Antidumping Proceedings*, 77 FR 36481 (June 19, 2012).
[12] *Id.*, 77 FR at 36482-83.

seller for remittance to the government.[13] VAT is typically imposed at each step in the chain of commerce. A party (1) pays VAT on its purchases of inputs and raw materials (*i.e.*, VAT-in) as well as (2) collects VAT on its sales of their output products (*i.e.*, VAT-out). Thus, this indirect consumption tax is passed through each party in the chain of commerce, and it is paid by the ultimate consumer of the goods where the amount of VAT-out includes the amount of paid VAT-in and the VAT assessed on the value added by the company. The ultimate consumer is the party which ends, or breaks, the repetitive chain that normally involves (1) paying the VAT-in, (2) passing through the VAT-in to the next party in the chain of commerce, and (3) collecting the VAT-out on behalf of the government. Further, in a typical VAT system, VAT-out is fully refunded or not collected by reason of exportation of the merchandise.

For a given company in the chain of commerce, the company calculates its "net VAT liability" as the difference between the VAT-out that it collected on behalf of the government and the VAT-in that it paid to its suppliers. This amount is the total amount of money which the company must remit to the government. This calculation is done on a company-wide basis.[14]

The Chinese VAT system is governed by the *2008 Chinese VAT Regulation* and *2012 VAT Circular*.[15] Article 1 of the *2008 Chinese VAT Regulation* states that "All units and individuals engaged in the sales of goods, provision of processing, repair and replacement services, and importation of goods within the territory of the People's Republic of China are taxpayers of Value-Added Tax … and shall pay VAT in accordance with these Regulations." Article 5 states that "{t}he output tax for a taxpayer selling goods or providing taxable services shall be the VAT calculated based on the sales amounts and the tax rates prescribed in Article 2 of these Regulations and collected from the purchasers."[16] Article 2.1 establishes that for most goods the VAT rate shall be 17 percent, and Article 2.3 adds that "{t}he tax rate for taxpayers exporting goods shall be 0%, except as otherwise stipulated by the State Council."[17] Thus, the Chinese VAT system is consistent with the general description of the VAT tax system above – Entities and individuals …. within the territory of the People's Republic of China …. shall pay VAT …. at the tax rate as prescribed in Article 2.

Consistent with the general description of a VAT system above, Article 5 further provides that the amount of the VAT shall be

output tax = sales amount * tax rate

[13] For example, if the purchase price is $100 and the VAT rate is 15%, the buyer pays $115 to the seller, which consists of $100 paid for the goods and $15 paid in VAT.
[14] For example, a company pays $60 million in VAT-in for all input purchases and collect $100 million in VAT-out for all sales. The company will remit to the government $40 million of the $100 million in VAT-out that it collected on behalf of the government because the company can claim the $60 million paid for input VAT-in as a credit against the collected VAT-out. The $40 million remittance to the government (*i.e.*, net VAT liability) is the tax on the value added by the company and is the transfer to the government of this VAT paid by and collected from the company's customers.
[15] *See* Meihua's December 10, 2018 Section C Questionnaire Response, at Exhibit C-6 and C-7 (*2008 Chinese VAT Regulation*) and Exhibit C-8 (*2012 VAT Circular*).
[16] *See 2008 Chinese VAT Regulation.*
[17] *Id.*

The term "output tax" (*i.e.*, VAT-out) in this formula refers to any transaction between the "taxpayer" (*i.e.*, a company) and its customer, and represents an amount of VAT collected by the taxpayer from the customer on behalf of the government. The tax amount for the transaction between a supplier and a company (*i.e.*, VAT-in) represents the amount of VAT paid by the company to its supplier, as also calculated by this formula (in other words, it is the "output tax" from the supplier's point of view).

Article 4 of the *2008 Chinese VAT Regulation* states that "Tax payable = Output tax payable for the period - Input tax for the period." Thus, a taxpayer's obligation to the government of China is to remit an amount equal to the total amount of VAT-out collected on the government's behalf less the total amount of VAT-in that the taxpayer has paid on its purchases.

Lastly, Article 25 of the *2008 Chinese VAT Regulation* addresses exportation of merchandise which is eligible for a rebate for, or exemption from, VAT. Article 25 states that "detailed measures shall be formulated by the competent finance and tax authority under the State Council."

For the purposes of making it easier for tax authorities and taxpayers to understand and implement the export taxation policies systemically and accurately, the Ministry of Finance and State Administration of Taxation has sorted out and classified the VAT policies and consumption tax policies on exported goods and foreign-oriented processing, repair and fitting services (hereafter referred to as the "exported goods and services," including the "goods deemed as exported goods") which were enacted successively in recent years, and clarified several problems reflected in the actual implementation.[18]

Article 1 defines the "export enterprises," "production enterprises" and "export goods" that "The VAT exemption and refund policy (hereinafter referred to as the "VAT refund (exemption) policy")" shall be applied. Article 2 provides for the "exemption, offset and refund" of VAT and Article 3 defines the VAT refund rate for exported goods. Article 3.1, consistent with Article 2.3 of the *2008 Chinese VAT Regulation*, states:

> Except for the VAT export refund rates specified by the Ministry of Finance and the State Administration of Taxation in accordance with the decisions of the State Council (hereinafter referred to as the "tax refund rates"), the tax refund rates for exported goods shall be the applicable tax rates. The State Administration of Taxation shall, according to the aforesaid provision, publish the tax refund rates through the tax refund rate library for exported goods and labor services, for implementation by both tax collectors and taxpayers.

Thus, unless otherwise defined, the VAT refund rate will be the applicable VAT rate for the exported goods, and, consequently, as stated in Article 2.3 of the *2008 Chinese VAT Regulation*, "the tax rate … shall be 0%." Further, the Chinese tax authorities will publish the applicable VAT refund rates in the "Tax Refund Rate Catalogue of Exported Goods and Services."

[18] *See 2012 VAT Circulator.*

Article 4 provides for the calculation of the amount of the VAT refund because of exportation and the basis on which this amount is calculated. The basis for the VAT refund "shall be calculated on the basis of the actual FOB of exported goods and labor services" or "determined on the basis of the FOB price of exported goods minus the amount of customs bonded imported materials included in exported goods." Consistent with Article 4, Article 5.1 then provides the following formula for the amount of the "Tax which may not be exempted or offset," *i.e.*, the irrecoverable VAT.[19]

Irrecoverable VAT = (P – c) x **(T_1 – T_2)**,

where,

P = "FOB of exported goods;"
c = "Price of duty-free raw materials purchased;"
T_1 = "Tax rate applicable to exported goods;" and
T_2 = "Tax refund rate for exported goods."

This formula can be applied on a shipment-specific basis as well as to accumulated values over a defined period of time. This amount, the irrecoverable VAT, cannot be exempted or offset by reason of exportation of the goods, and thus must be passed on by the company exporting the goods to its customer. It represents the amount of input VAT paid by the exporter to its supplier and which must be borne by the exporter's customer, *i.e.*, implicitly embedded in the export price charged to the exporter's customer.

Lastly, Article 5.3 of the *2012 VAT Circulator* provides that "the tax refund rate is lower than the applicable tax rate, the tax for the difference calculated accordingly shall be included in the cost of exported goods and labor services."[20] The amount of irrecoverable VAT must be borne by the exporter just as the VAT must be borne by the ultimate consumer of the goods. In essence, the exporter is the ultimate consumer of the goods in the chain of paying, passing on, and collecting the VAT. The exporter breaks that chain of commerce along which the indirect consumption tax is passed through to the ultimate consumer, but unlike an ultimate consumer inside the domestic market, the exporter has the benefit that some or all of the VAT is refunded or exempted by the Chinese government.

Thus, the *2012 VAT Circular* provides for the imposition by the government of China of a cost of goods sold when such goods are exported from China. This cost is imposed in the context of the reduction in the amount of the credit which a taxpayer receives for its paid VAT-in. The amount of this irrecoverable credit for VAT-in is a "tax, duty, or other charge" which is imposed by the government of China, the cost for which would not be incurred *but for* the exportation of the subject merchandise. As such, this amount of "irrecoverable VAT" constitutes an "export tax, duty, or other charge imposed by the exporting country on the exportation" of the subject merchandise consistent with section 772(c)(2)(B) of the Act.

[19] *See 2012 VAT Circulator.*
[20] *Id.*

Meihua cites the CIT's decision in *Guizhou Tyre* in support of its argument that Commerce's practice of deducting VAT from U.S. price is contrary to law. Nonetheless, as Commerce explained in *Cast Iron Soil Pipe* Fittings, where we continued to adjust U.S. price by the reported amount of irrecoverable VAT, "the {CIT} has yet to speak in one voice on this issue."[21] We continue to find that our long-standing practice of finding VAT to be an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise" to be a reasonable interpretation of the statute. As an initial matter, the Act does not define the term(s) "export tax, duty, or other charge imposed" on the exportation of subject merchandise. The Act considers whether U.S. price includes "any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States."[22] Commerce's reading of section 772(c)(2)(B) of the Act is whether there exists "any export tax, duty, or other charge imposed by the exporting country" included in the U.S. price at the time of exportation; Commerce does not interpret the phrase "on the exportation of the subject merchandise to the United States" to be limited to "by reason of the exportation of the subject merchandise to the United States."[23] To "impose" means to "{t}o charge; impute;" "{t}o subject (one) to a charge, penalty or the like;" "{t}o lay as a charge, burden, tax, duty, obligation, command, penalty, etc."[24] The "imposition" in the case of China's irrecoverable VAT occurs as a result of exportation, which is a permissible interpretation of the statute.[25]

Therefore, we find it reasonable to interpret these terms as encompassing irrecoverable VAT because the irrecoverable VAT is a cost that arises as a result of export sales.[26] The CIT has upheld our interpretation as a permissible interpretation of the statute.[27] Additionally, the irrecoverable VAT is set forth in Chinese law, and, therefore, can be considered to be "imposed" by the exporting country upon exportation of subject merchandise. Further, an adjustment for irrecoverable VAT falls under section 772(c)(2)(B) of the Act, as it reduces the gross U.S. price charged to the customer to a tax neutral net U.S. price received by the seller. This deduction is consistent with our longstanding policy, which is in turn consistent with the intent of the statute, that dumping margin calculations be tax-neutral.

Furthermore, as discussed in detail above, the *2008 Chinese VAT Regulations* and *2012 VAT Circular* establish that the Chinese VAT system can impose a cost on export sales of subject merchandise which must be recovered by the exporter through the U.S. price. As such, the U.S. price incorporates an "export tax, duty, or other charge imposed by the exporting country on the exportation" of the subject merchandise which is not reflected in the comparable normal value.

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[21] *See Cast Iron Soil Pipe Fittings from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part*, 83 FR 33205 (July 17, 2018) and accompanying Issues and Decision Memorandum (*Cast Iron Soil Pipe Fittings*).
[22] *See, e.g., Diamond Sawblades Manufacturers' Coalition v. United States*, 301 F. Supp. 3d 1326, 1335 (CIT 2018) (*Diamond Sawblades Manufacturers' Coalition*).
[23] *Id.*
[24] *Id.* (citing Webster's New International Dictionary of the English Language Unabridged, at 1251 (2nd ed. 1956)).
[25] *Id.* ("The satisfaction of any such imposition is not necessarily concurrent with the act of imposition, which may occur at any time, and the vagueness of the statutory language neither precludes nor requires such interpretation.").
[26] *Id.*
[27] *See Aristocraft of Am., LLC* v. *United States*, 269 F. Supp. 3d 1316, 1324 (CIT 2017); *Jacobi Carbons AB* v. *United States*, 222 F. Supp. 3d 1159, 1186-1188 (CIT 2017); *Fushun Jinly Petrochemical Carbon Co.* v. *United States*, Ct. No. 14-00287, Slip Op. 16-25 (CIT 2016).

Thus, section 772(c)(2)(B) of the Act is squarely applicable to the question at hand. Commerce finds that the comparison of U.S. price with normal value must be tax neutral,[28] in order to ensure a fair comparison.[29] Therefore, the amount of any such "charge" must be deducted from the reported U.S. price. In particular, as recently explained in *Jacobi Carbons II*, and as is the final determination here, "{t}o interpret section {772}(c)(2)(B) {of the Act} as unambiguously barring Commerce from adjusting EP/CEP for these taxes when comparing those prices to a tax-exclusive normal value would be to require that it understate the margin of dumping."[30] Furthermore, the *2008 Chinese VAT Regulation* and *2012 VAT Circular* clearly demonstrate that the cost associated with "irrecoverable VAT" is imposed on export sales, including export sales of subject merchandise.

Nowhere does the Chinese VAT system provide an exception for Meihua as a taxpayer and Meihua cites to no such exemption. The cost for "irrecoverable VAT" is imposed on the taxpayer as a reduction in the credit which the taxpayer may claim for VAT-in paid to its suppliers. Further, this offset to the taxpayer's VAT-in credit (and consequential increase in the taxpayer's net VAT liability) is on a company-wide basis. Theoretically, a taxpayer could pay no VAT-in for inputs to produce subject merchandise (*e.g.*, VAT-exempt inputs are imported from which subject merchandise is produced and exported) and yet the Chinese VAT system would still impose a cost on the taxpayer for export sales consistent with the *2008 Chinese VAT Regulations* and the *2012 VAT Circular*. This is demonstrated by the deduction of the amount of "Price of duty-free raw materials purchased" in the formula from the *2012 VAT Circular*, which defines the calculation of "irrecoverable VAT."

Accordingly, for these final results, Commerce has continued to adjust Meihua's U.S. price for irrecoverable VAT consistent with section 772(c)(2)(B) of the Act to ensure a fair comparison of U.S. price with normal value that is tax neutral.

Comment 3: Whether Commerce Should Modify Customs Instructions

Meihua

- Commerce's draft liquidation instructions contain a list of specific liquidation rates for the importers/customers identified by the mandatory respondents in this review. However, in those instructions, Commerce directs U.S. Customs and Border Protection (CBP) to liquidate entries into the United States that were imported under the mandatory respondent's company number (ACE number) by any importer/customer not identified in the instructions at the China-Wide rate.
- Sales of subject merchandise where the sale was made and reported in a respondent's U.S. sales database in one POR, but the merchandise entered into the United States in the next POR, may be improperly liquidated at the China-Wide rate based on these instructions. This could occur if the customer/importer for the sale is not a customer/importer in the next POR, and thus not listed in Commerce's liquidation instructions to CBP for the next POR.

[28] *See Jacobi Carbons AB v. United States*, Slip Op. 19-27, at 30-32 (CIT 2019) (*Jacobi Carbons II*) ("{T}he principle that dumping margin calculations should be tax-neutral supports Commerce's adjustment").
[29] *See* section 773(a) of the Act.
[30] *See Jacobi Carbons II*, at 33.

- Commerce should add the following language to its CBP instructions to address this issue:

> Any entry of merchandise invoiced prior to the start of the POR and entered after the start of the POR by an importer not specified in paragraph ___, shall be liquidated at the rate calculated as the cash deposit rate so long as the importer can establish that it purchased the goods from the exporter.

Commerce's Position:

We do not find it appropriate to add the language suggested by Meihua to the liquidation instructions for this review. As an initial matter, Meihua has not provided any evidence that a sale covered by this review, or an entry made during the POR, may be incorrectly assigned an antidumping duty (AD) rate based on the China-wide rate. Without evidence of this issue arising in this administrative review, there is no basis to modify the liquidation instructions for the review.

Moreover, adopting the language proposed by Meihua could contravene the following practice established in the notice *Non-Market Economy Antidumping Proceedings, Assessment of Antidumping Duties*:

> For entries that are not reported in the reviewed company's U.S. sales databases submitted to the Department during an administrative review, or otherwise determined not covered by the review (*i.e.*, the reviewed exporter claims no shipments), the Department will instruct CBP to liquidate such entries at the NME-wide rate as opposed to the company-specific rate declared by the importer at the time of entry. [31]

Accordingly, using the language proposed by Meihua's in our CBP liquidation instructions, without any information as to whether the sales/entries were reported to Commerce and covered by this administrative review, could undermine the established practice described above.

Additionally, in the questionnaire for administrative reviews, Commerce instructs respondents to "{r}eport each U.S. sale of merchandise entered for consumption during the POR." Therefore, Meihua should have reported U.S. sales of merchandise entered for consumption during the POR where it knew the entry date of the merchandise. Under this reporting methodology, the situation described by Meihua (a sale reported in one POR where the merchandise that was sold entered the United States in the next POR) would not be an issue.

[31] *See Non-Market Economy Antidumping Proceedings, Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011).

Comment 4: Commerce Should Include Reported Energy Factors of Production in its Normal Value Calculation

Petitioner

- Commerce should have used the quantities of energy consumed in producing subject merchandise that were reported by the mandatory respondents to calculate the energy costs included in normal value. However, Commerce disregarded the quantities of energy consumed and did not use them to calculate normal value but concluded that energy costs were already reflected in the manufacturing overhead ratio that it used to calculate normal value and that it derived from Ajinomoto (Malaysia) Berhard's (Ajinomoto (Malaysia)) financial statements.
- Commerce's practice is to treat material inputs as direct materials in its factors of production methodology when the materials are either continuously used, required, essential, not incidental, or significant to the manufacturing process. Commerce should treat energy inputs, which are critical to the production of subject merchandise, in a similar manner and directly value energy inputs.
- Commerce's practice is to only exclude energy factors of production from its calculations when record evidence demonstrates that doing so would result in double-counting.
- In this case, it is not clear that double-counting occurred. There is no record evidence: (1) that energy inputs were included in Commerce's calculation of manufacturing overhead, using the financial statements of Ajinomoto (Malaysia); or (2) to suggest that Commerce would be "double-counting" by directly valuing the mandatory respondents' energy inputs.
- Where there is no definitive evidence that a factor of production (FOP) is included in a surrogate financial ratio, Commerce must analyze the record to determine the best methodology for valuing the FOP.
- The energy FOP at issue here is direct energy used in production, not indirect energy that could be considered a general expense that would be classified as manufacturing overhead. Commerce has a preference for valuing energy inputs using an FOP methodology (*i.e.*, valuing the FOP directly based on the quantities consumed).
- Commerce addressed this very issue with respect to Ajinomoto (Thailand) Co., Ltd.'s (Ajinomoto (Thailand)) financial statements in the underlying investigation and found it appropriate to calculate energy costs for the respondents using the quantities of energy that they consumed.

Meihua

- Ajinomoto (Malaysia)'s financial statements do not separately identify energy expenses.
- Ajinomoto (Malaysia)'s financial statements differentiate between "raw materials" and "direct materials and labor and a proportion of manufacturing overheads." This differentiation makes it clear that the energy expenses are not included under direct materials expenses.
- Thus, direct energy expenses would necessarily have been included either in "Depreciation and Amortization" expenses and/or other operating expenses on the financial statements (expenses already included in the financial ratios used to calculate normal value).

- In cases such as this where there are no separately stated energy costs in the financial statements, energy inputs must not be separately valued in order to avoid doubling-counting them as both a direct FOP cost and as part of the financial ratios used to calculate normal value.

Commerce's Position:

We disagree with the petitioner's position that the respondents' reported energy factors should be included in the normal value calculation as direct material inputs. We recognize that during the investigation in this proceeding, Commerce decided to value respondents' energy despite the fact that Ajinomoto (Thailand)'s financial statements did not separately list energy expenses.[32] However, there are significant differences between Ajinomoto (Thailand) and Ajinomoto (Malaysia)'s financial statements.

In the investigation in this proceeding, we stated that although the "financial statements do not contain the full level of detail that {Commerce} may prefer, we note that by including only depreciation in the calculation of Ajinomoto {(Thailand)'s} overhead, we explicitly exclude energy costs from the surrogate financial ratios. In this way, the respondents' own energy FOPs may be included in normal value in accordance with section 773(c)(3) of the Act."[33] However, Ajinomoto (Malaysia)'s income statement, which we used to calculate financial ratios in the instant review, is a comprehensive income statement in a different reporting format than Ajinomoto (Thailand)'s income statement. Unlike Ajinomoto (Thailand)'s income statement, Ajinomoto (Malaysia)'s income statement does not a have cost of goods sold (COGS) line item. Production energy expenses would normally be part of COGS because such costs are product costs rather than period costs. Thus, in the underlying investigation Commerce was able to determine that it was not including production energy expenses in the financial ratios that it calculated (*i.e.*, production energy expenses were not in the numerator of the ratios) because the COGS from the financial statement was used in the denominator of the calculation. However, Ajinomoto (Malaysia)'s income statement does not have a COGS line item but only lists changes in inventories of finished goods, work in progress and goods-in-transit, and separate line items for the following expenses: raw materials and packaging materials consumed, finished goods purchased, employee benefits, depreciation of property, plant and equipment, and other operating expenses. Production energy expenses are likely included in the "other operating expenses" line item and cannot be separately identified; thus, production energy expenses will be part of the SG&A ratio. Therefore, consistent with Commerce's practice,[34] because Ajinomoto (Malaysia)'s income statement does not separately identify energy expenses, and such expenses cannot be excluded from the financial ratios calculated from Ajinomoto (Malaysia)'s financial statements, we have not separately valued respondents' energy inputs to avoid double counting.[35]

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[32] *See Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) and accompanying Issues and Decision Memorandum at Comment 2.
[33] *See id.*
[34] *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 74 FR 16838 (April 13, 2009) and accompanying Issues and Decision Memorandum at Comment 2.
[35] *See, e.g., Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 77323 (December 14, 2015) and accompany Issues

Comment 5: Commerce Incorrectly Valued Cornstarch

Deosen

- Despite noting in its Surrogate Value Memorandum[36] that it valued cornstarch using the average unit value (AUV) of Malaysian imports of HTS 1108.12.0000, Commerce applied a value of 14.66 Malaysian Ringgit (RM) per kilogram (kg) to Deosen's cornstarch. The AUV of Malaysian imports of HTS 1108.12.0000 is 1.83 RM/kg.[37] This AUV is almost identical to the AUV that Commerce used to value Meihua's cornstarch (1.85 RM/kg.).
- Additionally, Commerce inappropriately used July 2018 import data to calculate Meihua's cornstarch value.
- Commerce must correct these errors.

CP Kelco (Shandong)

- If Commerce revises Deosen's dumping margin, it should revise the dumping margin assigned to all separate rate recipients.

Commerce's Position:

We agree with Deosen that we used the incorrect surrogate value of 14.66 RM/kg to value Deosen's cornstarch. The correct surrogate value based on the AUV of Malaysian imports of HTS 1108.12.0000 is 1.83 RM/kg. We have corrected this error[38] and revised the separate rate dumping margin to account for this change to Deosen's dumping margin calculation.

Comment 6: Commerce Should Accept Green Health International's Separate Rate Application

Tate & Lyle

- Commerce should accept Green Health International's (GHI) separate rate application (SRA) for the following reasons.
- Commerce initially accepted GHI's SRA, providing it with two extensions of the deadline to file the SRA, but later rejected GHI's SRA on the basis that GHI had not requested an administrative review. The rejection is unlawfully inconsistent with Commerce's initial decision.
- Commerce's notice *Non-Market Economy Antidumping Proceedings, Assessment of Antidumping Duties* indicates that interested parties have "a right to request an

and Decision Memorandum at Comment 5; *Certain Steel Wheels from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 77 FR 17021 (March 23, 2012) and accompanying Issues and Decision Memorandum at Comment 3.

[36] *See* Memorandum, "Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China" Deosen's Preliminary Surrogate Value Memorandum," dated June 4, 2019.

[37] *See* Petitioner's Letter, "Petitioner's Surrogate Value Submission," dated February 26, 2019 at Exhibit 2.

[38] *See* Memorandum, "Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China: Final Results Dumping Margin Calculation for Deosen," dated concurrently with this memorandum.

administrative review of their entries, *or to participate in an administrative review*" (emphasis added). Rejecting GHI's SRA violated this right, acknowledged by Commerce."[39]

- In accordance with 19 CFR 351.104(a)(1), the official record will contain "all factual information {or other material} developed by, presented to or obtained by the Secretary." GHI's SRA information was presented to Commerce, and was timely, based on Commerce's extended deadline, and, therefore, it should be accepted for the record. The SRA was also timely under 19 CFR 351.301(c)(5), as other factual information submitted 30 days before the date of the preliminary results of review.
- If Commerce considers GHI's SRA to be untimely (even though it was filed on time) because there was no request to review GHI, this is unlawful under court precedent.[40]
- Moreover, GHI's SRA could effectively be viewed as a review request.
- The statute instructs Commerce to conduct a review, if a review has been requested, without placing any limits on the breadth or coverage of the review. Reviews were requested for this segment of the proceeding. Therefore, GHI can be reviewed under the statutory provision.
- Furthermore, Commerce has the broad authority to self-initiate a review at any time.[41] Commerce can do so here to avoid unlawful conduct.
- Commerce's practice is that there is only a presumption of Chinese government control (warranting the China-wide rate) if the exporter is in China.[42] As such, the China-wide rate cannot apply to an exporter not in China, which is the case here.
- Moreover, Commerce cannot be inconsistent between market and non-market economy cases. Market economy companies that are not mandatory respondents receive the "all-others rate" in market economy cases. No basis has been provided to treat third-country market economy exporters inconsistently here by applying the China-wide rate to such exporters.

Petitioner

- Commerce received no requests to review shipments by GHI and did not initiate a review of this company. Thus, Commerce's decision to reject GHI's SRA and remove it from

[39] *See Non-Market Economy Antidumping Proceedings, Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011).
[40] *See* T&L Case Brief (citing to *Artisan Manufacturing Corp. v. United States*, 978 F. Supp. 2d 1334, 1338, 1344-45 (CIT 2014); *Usinor Sacilor v. United States*, 872 F. Supp. 1000, 1008 (CIT 1994); *Grobest & I-Mei Indus. (Viet.) Co. v. United States*, 815 F. Supp. 2d 1342, 1367 (CIT 2012); *Hebei Metals and Minerals Imp. & Exp. Co. v. United States*, Slip Op. 04-88 at *10 (CIT July 19, 2004); *NTN Bearing Corp. v. United States*, 74 F.3d. 1204, 1207 (Fed. Cir. 1995); *Timken Corp. v. United States*, 434 F.3d 1345, 1353-54 (Fed. Cir. 2006); *Nippon Steel v. United States*, 146 F. Supp. 2d 835 (CIT 2001); *Chapparal Steel Co. v. United States*, 901 F. 2d 1097, 1103-04 (Fed. Cir. 1990); *U.S. Magnesium LLC v. United States*, 895 F. Supp. 2d 1319, 1325 (CIT 2013); *Wuhu Fenglian Co., Ltd. v. United States*, 836 F. Supp. 2d 1398, 1404-05 (CIT 2012); *Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254, 1267 (CIT 2012); *Dupont Teijin Films v. United States*, Ct No. 12-00088, Slip Op. 13-111 at *5 (CIT August 21, 2013)).
[41] *See* T&L Case Brief (citing to *e.g., BMW of North America LLC v. United States*, 926 F.3d 1291 (Fed. Cir. 2019); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352 (Fed. Cir. 2018)).
[42] *See* T&L Case Brief (citing to *Prime Time Commerce LLC v. United States*, Slip Op. 19-86 at 20-21 (CIT 2019)).

the record is supported by substantial record evidence and is otherwise in accordance with law.

Commerce's Position:

We disagree with Tate & Lyle. Commerce does not accept SRAs from companies not under review and GHI is not under review. We published a *Federal Register* notice in which we notified eligible parties of the opportunity to request an administrative review in this segment of the proceeding.[43] In that notice, we specified a deadline for parties to request a review, which was the final day of the anniversary month of this order, which is July 31, 2019. No party requested a review of GHI by this deadline; therefore, we did not initiate a review of GHI.[44] Furthermore, Commerce did not self-initiate a review of GHI. Because Commerce did not initiate a review of GHI, GHI is not under review, and thus, there is no basis to consider GHI's SRA.

We mistakenly granted GHI an extension of time to file an SRA because we did not anticipate that a company not under review would submit an SRA. Once we realized that GHI was not under review, we corrected this error by rejecting GHI's SRA. At the time that we granted GHI an extension of time to file its SRA, we never considered the issue of whether GHI should be allowed to submit an SRA even though it was not under review because we did not realize it was not under review; thus, we never "accepted" GHI's SRA.

Tate & Lyle's reliance on the notice *Non-Market Economy Antidumping Proceedings, Assessment of Antidumping Duties*, Commerce's regulations, and the statute is misplaced. The notice *Non-Market Economy Antidumping Proceedings, Assessment of Antidumping Duties*, contains a sentence indicating that interested parties have "a right to request an administrative review of their entries or to participate in an administrative review." Examining the context surrounding this sentence shows that the point being made is that interested parties have several avenues to ensure that U.S. entries of subject merchandise would be liquidated at the rate that they believed to be appropriate. Commerce did not indicate in that notice that these two avenues for participating in a proceeding were identical in terms of the party's status in a review, that the right to participate in a review was the same as being under review, or that the right to participate in a review negates the statutory and regulatory requirements for eligible parties seeking a review of themselves to timely request a review of themselves.

While Tate & Lyle claims that the statutory provision for requesting a review places no limits on the breadth or coverage of the review, Commerce's regulations, which provide procedures and rules for applying the statute, indicate otherwise. Specifically, 19 CFR 351.213(b)(1) and (2) notes that:

> {e}ach year during the anniversary month of the publication of the antidumping duty order … a domestic interested party … may request in writing that the

[43] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 83 FR 31121 (July 3, 2018).
[44] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 45596 (September 10, 2018) (*Initiation Notice*).

> Secretary conduct an administrative review under section 751(a)(1) of the Act of *specified individual exporters or producers* covered by an order …
>
> an exporter or producer covered by an order … may request in writing that the Secretary conduct an administrative review *of only that person*. (emphasis added).

Thus, it is clear that parties must be named in a timely review request in order to be under review. No party named GHI in a timely review request for this segment of the proceeding. Hence, GHI is not under review and there is no basis for Commerce to consider GHI's separate rate application, or to conduct any separate rate analysis with respect to GHI.

Furthermore, Commerce noted in the "Separate Rates" section of the *Initiation Notice* that "{a}ll firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below."[45] It is clear that the "firms listed below" in the *Initiation Notice* are the specific companies for which Commerce received requests for administrative review. This demonstrates that Commerce's practice is to only accept SRAs from firms for which it initiated a review.

Tate & Lyle's reliance on 19 CFR 351.104(a)(1) is also unavailing. Tate & Lyle contends that Commerce should not have rejected and removed its SRA from the record because, pursuant to 19 CFR 351.104(a)(1), the official record will contain "all factual information {or other material} developed by, presented to, or obtained by the Secretary." Tate & Lyle maintains that GHI timely presented its SRA to Commerce and thus Commerce must accept the SRA and retain it as part of the record. However, this provision does not override the requirement that a company must be under review in order to participate as a respondent. Companies under review file SRAs and GHI is not under review; hence there is no basis to retain GHI's SRA on the record.

Moreover, Tate & Lyle failed to quote the full provision in that portion of the regulations. The full provision reads: "The Secretary will include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding *that pertains to the proceeding*."[46] GHI's SRA does not pertain to the review because GHI is not under review.

Additionally, the deadline for submitting factual information in 19 CFR 351.301(c)(5) (*i.e.*, 30 days before the date of the preliminary results of review) does not apply because GHI's SRA is not other factual information but a separate rate application for which Commerce established a separate filing deadline.

In addition, the case precedents Tate & Lyle cited in support of its position are not applicable. These cases relate to the timely submission of factual information (*i.e.* surrogate value data,

[45] *See Initiation Notice*, 83 FR 45596.
[46] *See* 19 CFR 351.104(a)(1).

downstream sales data, etc.) and Commerce's rejection of such information. Here, we rejected GHI's SRA because GHI is not under review.

Commerce has addressed this issue previously and determined that a company that failed to follow the statutory and regulatory requirements to request and participate in an administrative review does not qualify for a separate rate.[47] Specifically, in *Passenger Tires*, Commerce explained that it:

> … continues to find that Hongsheng, Yongdao, and Poplar do not qualify for a separate rate in this administrative review. Hongsheng *et al* have no statutory entitlement to a rate determined in this administrative review, as each company failed to follow the statutory and regulatory requirements to timely request and participate in an administrative review. … All parties to this review concede that Hongsheng, Yongdao, and Poplar did not self-request an administrative review and that no other party requested an administrative review of any of these three companies within the established deadline. … In an administrative review, the Courts have interpreted section 751(a)(2) of the Act to limit the application of the final results of an administrative review to those entities covered by the review. As noted previously, none of these exporters were subject to {this review}. Therefore, we continue to find that these entities cannot qualify for separate rate status in this review nor should we review Hongsheng, Yongdao and Poplar's separate rate applications.[48]

In the instant case, GHI did not meet the statutory and regulatory requirements for requesting a review of itself; no party timely requested a review of GHI, Commerce did not initiate a review of GHI, and consequently GHI is not under review. Thus, we did not consider GHI's SRA.

Lastly, Tate & Lyle argue that the China-wide rate only applies to entities located in China (GHI is reportedly located in Hong Kong), not entities outside of China. Tate & Lyle also claims that GHI obtained subject merchandise from a Chinese company with a separate rate; thus, the China-wide rate does not apply to GHI. These arguments are irrelevant. Commerce is not determining a dumping rate for GHI in this review because GHI is not under review. Moreover, we have not assigned the China-wide rate to GHI in this review or made any determination with respect to its separate-rate status in this review because GHI is not under review. We simply left GHI in the same position it was in before we conducted this review. GHI has not been granted separate-rate status before this review, based on a separate rate analysis, or a determination that it is wholly foreign owned, and as such, its status remains unchanged in this review.[49]

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[47] *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2015-2016 Antidumping Duty Administrative Review*, 83 FR 11690 (March 9, 2018) and accompanying Issues and Decision Memorandum at Comment 11 (*Passenger Tires*).
[48] *See Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015-2016*, 83 FR 11690 (Marc 16, 2019) and accompanying Issues and Decision Memorandum at Comment 11.
[49] *See Xanthan Gum from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Partial Discontinuation of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 65143 (December 19, 2018) and accompanying Issues and Decision Memorandum at Comment 1.

V. CONCLUSION

We recommend applying the above methodology for these final results of review.

☒	☐
Agree	Disagree

11/18/2019

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance