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Scope Inquiry
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TO: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

THROUGH: Susan Kuhbach
Office Director
AD/CVD Operations, Office 1

Yasmin Nair
Program Manager
AD/CVD Operations, Office 1

FROM: Christopher Siepmann
International Trade Compliance Analyst
AD/CVD Operations, Office 1

RE: Citric Acid and Certain Citrate Salts: Final Determination on Scope Inquiry for Blended Citric Acid from the People's Republic of China and Other Countries

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SUMMARY:

On July 26, 2010, Global Commodity Group LLC ("GCG") requested that the Department of Commerce ("the Department") find that the citric acid it imports, containing 35 percent citric acid from the People's Republic of China ("PRC") and 65 percent citric acid from other countries, is outside the scope of the antidumping ("AD") and countervailing duty ("CVD") orders on citric acid and certain citrate salts from the PRC ("the Orders"). See Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China: Antidumping Duty Orders, 74 FR 25703 (May 29, 2009); see also Citric Acid and Certain Citrate Salts From the People's Republic of China: Notice of Countervailing Duty Order, 74 FR 25705 (May 29, 2009). GCG also requested that the Department find that sodium citrate containing 35 percent sodium citrate from the PRC and 65 percent sodium citrate from other countries is outside the scope of the Orders. We recommend that the Department find, as it did in the Preliminary Ruling, that the PRC-origin portion of GCG's "blended" citric acid is subject to the Orders and dutiable according to the amount of citric acid from the PRC that it contains. See Memorandum to Christian Marsh, Citric Acid and Certain Citrate Salts: Scope Ruling for Blended Citric Acid from the People's Republic of China and Other Countries (March 7, 2011) ("Preliminary

Ruling").

BACKGROUND:

On March 7, 2011, the Department issued the Preliminary Ruling finding GCG's PRC-origin citric acid to be within the scope of the Orders. The Department also declined to issue a scope ruling regarding GCG's sodium citrate. We invited parties to submit comments and rebuttals related to the decision. On March 22, 2011, the Department received comments from Archer Daniels Midland Company, Cargill Incorporated, and Tate & Lyle Americas (collectively, "Petitioners") and GCG. We received rebuttals from both parties on each others' comments on March 29, 2011. The Department's summary of these comments and accompanying analysis follows below.

SCOPE:

The scope of the orders includes all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend. The scope of the orders also includes all forms of crude calcium citrate, including dicalcium citrate monohydrate, and tricalcium citrate tetrahydrate, which are intermediate products in the production of citric acid, sodium citrate, and potassium citrate. The scope of the orders does not include calcium citrate that satisfies the standards set forth in the United States Pharmacopeia and has been mixed with a functional excipient, such as dextrose or starch, where the excipient constitutes at least 2 percent, by weight, of the product. The scope of the orders includes the hydrous and anhydrous forms of citric acid, the dihydrate and anhydrous forms of sodium citrate, otherwise known as citric acid sodium salt, and the monohydrate and monopotassium forms of potassium citrate. Sodium citrate also includes both trisodium citrate and monosodium citrate, which are also known as citric acid trisodium salt and citric acid monosodium salt, respectively. Citric acid and sodium citrate are classifiable under 2918.14.0000 and 2918.15.1000 of the Harmonized Tariff Schedule of the United States ("HTSUS"), respectively. Potassium citrate and crude calcium citrate are classifiable under 2918.15.5000 and 3824.90.9290 of the HTSUS, respectively. Blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.90.9290 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

REGULATORY FRAMEWORK:

The regulations governing the Department's AD and CVD scope determinations can be found at 19 CFR 351.225. On matters concerning the scope of an order, the Department's initial basis for determining whether a product is included within the scope of an order is the descriptions of the

product contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the International Trade Commission ("ITC"). See 19 CFR 351.225(d) and 351.225(k)(1). Such scope determinations may take place with or without a formal inquiry. See 19 CFR 351.225(d) and 351.225(e). If the Department determines that these descriptions are dispositive of the matter, it will issue a final scope ruling as to whether or not the merchandise is covered by the order. See 19 CFR 351.225(d).

Conversely, when the descriptions of the merchandise are not dispositive, the Department will consider the following additional criteria set forth in 19 CFR 351.225(k)(2): i) the physical characteristics of the product; ii) the expectations of the ultimate purchasers; iii) the ultimate use of the product; iv) the channels of trade in which the product is sold; and v) the manner in which the product is advertised and displayed. These factors are known commonly as the Diversified Products criteria. See Diversified Products Corp. v. United States, 572 F. Supp. 883 (CIT 1983). The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all record evidence before the Department.

ANALYSIS:

The Department preliminarily found that the scope is dispositive regarding blends of one citrate with another.[1] In part, the scope description states that it "includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend." We found, "The scope intentionally breaks blends of citric acid and blends with other ingredients out into separate clauses, and only applies the 40 percent threshold to the latter." Thus, because the product imported by GCG was a blend of citric acid, we preliminarily determined that the 40 percent threshold did not apply to it. We also noted that the scope's use of sugar as an example supported our determination that the term "other ingredients" was intended to apply to materials other than citrate products.

According to GCG, the Department's Preliminary Ruling was in error because "the class or kind of merchandise is defined in terms of origin, as well as physical description." See Letter to the Secretary of Commerce from Global Commodity Group LLC at 4 (March 22, 2011). In GCG's view, the country of origin of an order is implicit in the language of the scope. Therefore, GCG asserts that since "the first sentence {of the scope} covers only citric acid, sodium citrate and potassium citrate *from China*," the reference to blends of those products in the first clause of the second sentence must also only cover blends of products from the PRC. Thus, GCG's blend of subject and non-subject citric acid would not qualify under that clause. As a result, GCG argues that the non-subject citric acid in GCG's blend qualifies as an "other ingredient" – since in its

[1] The Department also preliminarily determined: 1) to not rule on GCG's sodium citrate because GCG failed to demonstrate that it was in production, 2) that the mixing performed by GCG's tolling agent in the Dominican Republic does not result in substantial transformation, and 3) that U.S. Customs and Border Protection should apply duties to GCG's citric acid according to the amount of PRC-origin citric acid in the product.

view, any product that is not citric acid, sodium citrate or potassium citrate from the PRC would qualify as an "other ingredient."

In the Preliminary Ruling, the Department also cited comments by Petitioners during the investigation that appear to show Petitioners' intent to group citrate products separately from "other ingredients." GCG asserts that rather than establishing "the separation between citric acid and other ingredients," these comments actually support GCG's position that Petitioners only intended the first clause of the second sentence of the scope to cover blends consisting entirely of subject merchandise.

Finally, GCG argues that "the HTSUS references {named by the scope} play an important role in defining the scope of the order, beyond simply identifying the tariff provisions applicable to the various products covered." The scope notes that blends of citrate products are classifiable under heading 3824.90.9290 of the HTSUS. GCG alleges that since blends of subject and third-country citric acid (such as the blend in question) are classifiable under heading 2918.14.0000, the scope's references to the HTSUS demonstrate that "the blends referenced in the first clause, second sentence of the order are blends consisting entirely of different forms of in-scope merchandise."

Petitioners dispute GCG's claims and contend that the description of the subject merchandise and the name of the country in which the subject merchandise is produced are separate components of an AD or CVD duty order. Accordingly, they assert that GCG's insertion of the words "from China" into the scope language is improper because the country of origin is not part of the physical description of an order. Petitioners agree with GCG's assertion that there is "nothing to indicate that the same words mean one thing in one sentence {of the scope definition} and something different in the next sentence," but note that this argument by GCG is based upon GCG's insertion of the words "from China" into the scope. According to Petitioners, if the scope is taken on face value, it simply says that citric acid, sodium citrate and potassium citrate are covered by the orders, both in their pure and their blended forms. Since the scope does not contain geographical references, Petitioners argue that there is no basis for GCG's belief that the scope only conceives of subject citrate products and that non-subject citric acid can be an "other ingredient."

Petitioners also observe that in the discussion between the Department and Petitioners that was cited to in the Preliminary Ruling, there is "no limitation on the discussion of the physical characteristics of the subject merchandise according to the country of origin, because that parameter of the scope definition was clear." Likewise, Petitioners argue that their statements in the transcript of the ITC's preliminary conference do not refer to a blend of Chinese citrates, but only to a blend of citrate products. Finally, Petitioners observe that the scope itself rebuts GCG's claim that the HTSUS references play an "important role in defining the scope of the Orders" with the reminder that "the written description of the merchandise is dispositive," and argue that "a blend of citric acid itself from different countries is still just citric acid for customs purposes, and entries of such a blend would be reported under the citric acid HTS subheading,

2918.14.0000." Thus, Petitioners urge the Department to affirm the conclusions it came to at the Preliminary Ruling in this final determination.

Department's Position

As an initial matter, we note that GCG did not address the Department's decisions in the Preliminary Ruling regarding sodium citrate, substantial transformation or the proper application of AD and CVD duties. Our bases for these decisions have not changed, and we recommend affirming them in this final ruling.

However, careful review of both parties' comments on the Preliminary Ruling has led us to alter our analysis of GCG's PRC-origin citric acid in light of the case record. At the outset of the original investigation, Petitioners' proposed scope language unambiguously included the pure (as in, not mixed with any other material) forms of citric acid, sodium citrate and potassium citrate. However, the proposed language did not clearly include blends of these products, so the Department asked Petitioners to clarify whether they meant to include such blends. In response, Petitioners added a sentence to their proposed scope language. This sentence explicitly covered blends of citrates, as well as blends of citrates with "other ingredients" in certain quantities. See Letter to the Secretary of Commerce from Global Commodity Group LLC at 9 (March 22, 2011); see also Letter to Secretary of Commerce from Petitioners at 1 (April 22, 2008).

This discussion helps to frame the meaning of the term "blend" in this proceeding. The scope initially included pure citrates. Thus, the language added by Petitioners was intended to cover something other than pure citrates, i.e., different citrates mixed with one another or with non-citrate products. Furthermore, Petitioners observed during the aforementioned discussion that creating such a blend was "simply a matter of mixing different types of citric products together."

Accordingly, we recommend determining that GCG's product is not a "blend" as envisioned by the scope. It is commingled citric acid, and for all intents and purposes, commingled citric acid is still just citric acid. Functionally and chemically, it is indistinguishable from citric acid that comes from a single source. GCG conceded as much when it stated that its product is "identical to other forms of purified, USP citric acid products in size, shape, chemical composition, microstructure and other respects." See Letter to the Secretary of Commerce from Global Commodity Group LLC at 10 (November 15, 2010); see also the Preliminary Ruling at 9.

Since commingled citric acid is indistinguishable from other citric acids, there was no need to add a sentence to the scope covering "blends" of citric acid with citric acid. Such a product is already covered by the first sentence. This conclusion is supported by comments from both GCG and Petitioners, who effectively advocated for this position in their arguments regarding the scope's HTSUS references. The scope description states that "blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.90.9290 of the HTSUS." In its March 22, 2011 comments, GCG asserts that this language "bolsters {its} position that the blends referenced in the first clause, second sentence of the order are blends consisting entirely

of different forms of in-scope merchandise." We agree that the first clause of the second sentence refers to mixtures of different citrate products. GCG goes on to argue that a "blend" of subject and third country merchandise would be classified in HTSUS item 2918.14.0000 as citric acid, and not in item 3824.90.9290. This argument is consistent with GCG's initial filing with the Department, in which it stated that its own "blend" of subject and third country citric acid is classifiable under 2918.14.0000. See Letter to the Secretary of Commerce from Global Commodity Group LLC at 2 (July 26, 2010). In part, Petitioners agree with GCG's assessment, stating that "a blend of citric acid itself from different countries is still just citric acid for customs purposes, and entries of such a blend would be reported under the citric acid HTS subheading, 2918.14.0000." This is the tariff classification for pure (as in, unmixed) citric acid, which is plainly covered by the scope.

GCG cannot have it both ways: if its product is not a blend under the first clause of the second sentence of the scope because of the scope's HTSUS references, it also cannot be a blend under the second clause of that sentence that references blends with other ingredients, since the same HTSUS number applies to the entire sentence. Notwithstanding this, we agree with Petitioners and GCG that citric acid from different countries is still citric acid. Therefore, we recommend finding GCG's citric acid from the PRC to be included in the first sentence of the scope, as further described below.

GCG and Petitioners have commented extensively on the question of what is comprised by the class or kind of an AD or CVD order. Essentially, GCG argues that "the class or kind of merchandise is defined in terms of {country of} origin, as well as physical description." Petitioners counter that GCG's position amounts to an inappropriate conflation of the separate concepts that govern an order. Both parties cite several statutes and regulations to support their arguments, such as 19 CFR § 351.202(b)(5)-(6) of the Department's regulations and Sections 701 and 731 of the Tariff Act of 1930, as amended. Both parties also cite the decision of the Court of International Trade in Ugine & ALZ Belgium, N.V. v. United States, 517 F. Supp. 2d 1333 (CIT 2007). The Court's opinion, in part, reads as follows:

> Commerce's ADD and CVD orders must specify both the class or kind of merchandise and the particular country from which the merchandise originates. See, e.g., Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 58 Fed. Reg. 37,062, 37,065 (Dep't Commerce Jul. 9, 1993)... "For merchandise to be subject to an order, it must meet both parameters, i.e., product type and country of origin." Id. Conversely, if merchandise does not meet one of the parameters — either class or kind, or country of origin — it is outside the scope of the ADD or CVD order. Ugine, 517 F. Supp. 2d at 1345. (emphasis added)

The position we have recommended is consistent with the arguments put forward by both GCG and Petitioners. GCG has not disputed that its product contains "citric acid *from China*" that "meet{s} both parameters" required for that citric acid to be subject to the Orders. Likewise, since the citric acid from non-subject countries in GCG's product does not meet both parameters, the Department did not find it to be subject to the Orders at the Preliminary Ruling. Subject

merchandise does not cease to be subject merchandise[2] simply because it is commingled with the identical product from a non-subject country.[3]

Finally, in support of our recommendation, we note the absurd result of GCG's position. If GCG's arguments were adopted, an importer could, by the same reasoning, attempt to import a product containing 39 percent citric acid from the PRC (which is subject merchandise under one Order) that has been commingled with 39 percent citric acid from Canada (which is subject merchandise under another Order) and exempt the entire mixture from the Orders' coverage, even though it contains almost 80 percent merchandise that the Department has found to be dumped. This outcome was clearly not the intent of Petitioners when they applied for relief under the AD/CVD laws, and illustrates how concurring with certain elements of GCG's reasoning would undermine the efficacy of both of the Orders.

RECOMMENDATION:

For the reasons outlined above, we recommend determining that the portion of GCG's commingled citric acid that originates from the PRC is subject to the Orders. We also recommend instructing U.S. Customs and Border Protection to apply duties to the commingled citric acid product according to the methodology outlined in the Preliminary Ruling, with which neither party expressed disagreement.

Agree ✓ Disagree _____

Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

5/2/11
Date

[2] Merchandise of the same class or kind from the subject country.
[3] Since GCG's commingled citric acid does not qualify for exclusion from the scope as a blend, the subject merchandise in GCG's citric acid remains dutiable irrespective of the percentage the subject merchandise represents of the total commingled product.