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MEMORANDUM TO:	Paul Piquado Assistant Secretary for Enforcement and Compliance
FROM:	Christian Marsh Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations
SUBJECT:	Potassium Permanganate from the People's Republic of China: Issues and Decision Memorandum for the Final Results

SUMMARY

The Department of Commerce (the "Department") has analyzed the case and rebuttal briefs submitted by Pacific Accelerator Limited ("PAL") and Carus Corporation ("Petitioner"), in the 2014 administrative review of the antidumping duty order on potassium permanganate from the People's Republic of China ("PRC").[1] Following the *Preliminary Results*,[2] and the analysis of the comments received, we have made changes for the final results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

Case Issues

Comment I	Surrogate Country
Comment II	Surrogate Value for Manganese Ore/Manganese Dioxide
Comment III	Surrogate Financial Ratios
Comment IV	Treatment of Value Added Tax
Comment V	Application of Adverse Facts Available to PAL

[1] *See Antidumping Duty Order; Potassium Permanganate from the People's Republic of China*, 49 FR 3897 (January 31, 1984).
[2] *See Potassium Permanganate from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2013*, 81 FR 7751 (February 16, 2016) ("*Preliminary Results*") and accompanying Preliminary Decision Memorandum ("PDM").

Background

This review covers one exporter of potassium permanganate from the PRC, PAL.[3] On February 10, 2015, the Department published the *Preliminary Results* of this administrative review. Between July 15 and 20, 2016, PAL and Petitioner submitted case and rebuttal briefs.[4] On August 3, 2016, the Department held a public hearing regarding this review.

Scope of the Order

Imports covered by this order are shipments of potassium permanganate, an inorganic chemical produced in free-flowing, technical, and pharmaceutical grades. Potassium permanganate is currently classifiable under item 2841.61.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS item number is provided for convenience and customs purposes, the written description of the merchandise remains dispositive.

DISCUSSION OF THE ISSUES

Comment I: Surrogate Country

PAL's Comments

- The Department has found that Mexico is within the range of countries which are economically comparable to the PRC.
- In *Isos*, the Department selected Mexico as a surrogate country for valuing chlorinated isocyanurates, a similar chemical product, and determined that Mexico has reliable and usable surrogate data, as well as being a significant producer of a similar product, calcium hypochlorite.[5]
- Mexico provides more reliable and specific surrogate value ("SV") information than South Africa, and to the extent that the Department believes that it is missing any small inputs in the Mexican data, it can refer to the information in *Isos*.

Petitioner's Comments

- Mexico is not a significant producer of comparable merchandise.[6] The record does not contain SVs to value all factors of production ("FOPs") and movement expenses from Mexico, and consistent with 19 CFR 351.408(c)(2), it is the Department's preference to value all factors of production from a single surrogate country.

Department's Position: We agree with the Petitioner, and have continued to select South Africa as the primary surrogate country for these final results. Because the PRC is being treated as an non-market economy ("NME") country for antidumping duty purposes, when calculating normal value ("NV"), pursuant to section 773(c)(4) of the Tariff Act of 1930, as amended ("the Act"), the Department is valuing the FOPs, to the extent possible, in a surrogate country that is (a)

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3 *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 FR 11401 (February 28, 2014) ("*Initiation Notice*").
4 *See* PAL's July 15, 2016 and July 20, 2016 submissions; Petitioner's July 15, 2016 and July 20, 2016 submissions.
5 *Id*.
6 *See* PDM at 6-7.

at a level of economic development comparable to the PRC, and (b) a significant producer of comparable merchandise.[7] As we noted in the *Preliminary Results*, in this review we relied on the surrogate country list reflecting 2014 GNI data[8], and found, consistent with section 773(c)(4)(A) of the Act, that Bulgaria, Ecuador, Mexico, Romania, South Africa and Thailand are at the level of economic development of the PRC.[9] The Department relied on the surrogate country list reflecting 2014 GNI data because it is contemporaneous with the POR, it contains the Department's most recent analyses of GNI data, and it was placed on the record within the timeframe the Department specified for surrogate value submissions.[10]

Section 773(c)(4)(B) of the Act requires the Department to value, to the extent possible, FOPs in a surrogate country that is a significant producer of comparable merchandise. Neither the statute nor the Department's regulations provide further guidance on what may be considered comparable merchandise. Given the absence of any definition in the statute or regulations, the Department looks to other sources such as the *Policy Bulletin* for guidance on defining comparable merchandise. The *Policy Bulletin* states that "in all cases, if identical merchandise is produced, the country qualifies as a producer of comparable merchandise."[11] It additionally states that if identical merchandise is not produced, then a country producing comparable merchandise is sufficient in selecting a surrogate country.[12]

Further, the statute grants the Department discretion to examine various data sources for determining the best available information.[13] Moreover, while the legislative history provides that the term "significant producer" includes any country that is a "significant net exporter,"[14] it does not preclude reliance on additional or alternative metrics. The *Policy Bulletin* provides that the "extent to which a country is a *significant* producer should not be judged against the NME country's production level" or those countries on the surrogate country list, but rather "a judgment should be made consistent with the characteristics of world production of, and trade in, comparable merchandise (subject to the availability of data on these characteristics)."[15]

In the *Preliminary Results*, we examined 2014 United Nations Comtrade export data for HTS 2841.61, "Potassium Permanganate," which indicates that only Bulgaria (450 kilograms ("kg")),

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[7] *See Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process* (March 1, 2004) ("*Policy Bulletin*").

[8] We note that PAL submitted the 2014 GNI data, specifically surrogate country lists from other administrative reviews using 2014 GNI data from the World Bank, to advocate for the selection of Mexico as the primary surrogate country. *See* PAL's August 5, 2015 submission.

[9] *See* PDM at 4-5.

[10] In certain other cases where a party has placed contemporaneous GNI data on the record in a timely fashion, the Department has found this data to be the most appropriate for use in identifying countries that are comparable to the PRC in terms of level of economic development. *See, e.g., Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014,* 81 FR 1167 (January 11, 2016) and accompanying Issues and Decision Memorandum at Comment 1.

[11] *See Policy Bulletin* at 2.

[12] The *Policy Bulletin* also states that "if considering a producer of identical merchandise leads to data difficulties, the operations team may consider countries that produce a broader category of reasonably comparable merchandise." *Id.* at note 6.

[13] *See* Section 773(c) of the Act; *see also Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1990).

[14] *See* Conference Report to the 1988 Omnibus Trade & Competitiveness Act, H.R. Rep. No. 100-576, at 590.

[15] *See Policy Bulletin* (emphasis in original).

Mexico (92 kg) and South Africa (65,992 kg) had exports of identical merchandise.[16] The *Policy Bulletin* states that "if considering a producer of identical merchandise leads to data difficulties, the operations team may consider countries that produce a broader category of reasonably comparable merchandise."[17] The record of this segment of the proceeding contains data for identical merchandise, and this has not led to factor valuation difficulties. Further, we found in the *Preliminary Results* that South Africa's export volume indicated significant production, while Bulgaria and Mexico's respective export volumes are low, no party contested this assessment of the data. In addition, Ecuador, Romania and Thailand had zero exports in 2014. As such, we continue to find that, of the countries on the surrogate country list, only South Africa has met the requirements of section 773(c)(4)(B) of the Act, and is a significant producer of comparable merchandise.

PAL has not identified any record information that supports a finding that Mexico is a significant producer of comparable merchandise. Instead, PAL cites *Isos*, in which the Department found that Mexico was a significant producer of a chemical comparable to the subject merchandise in that case. However, none of the data underlying the Department's finding in *Isos* is on the record here. Accordingly, based on the record of this review, we find that South Africa is the only country that is both economically comparable to the PRC and a significant producer of comparable merchandise. As such, South Africa is the only country which may be selected as the primary surrogate country. Moreover, South Africa is the only country for which the record contains information to value all factors of production, which fulfills the Department's preference to value all factors from a single surrogate country.

Comment II: Surrogate Value for Manganese Ore/Manganese Dioxide

PAL's Comments

- In the *Preliminary Results*, the Department valued the manganese ore consumed by Chongqing Changyuan Chemical Corporation Ltd. ("Changyuan"), PAL's affiliated producer of potassium permanganate, using an HTS for manganese dioxide. While the important component in the ore is the manganese dioxide, in the same way that the important element in gold ore is the gold, the actual input is manganese ore. The fact that it is described internally as manganese dioxide is simply a reference to the active ingredient in the ore, but the record is clear that the input consumed is manganese ore.[18]
- For the final results, the Department should value manganese ore using Harmonized Tariff Schedule ("HTS") 2602.00 ("manganese ores and concentrates").

Petitioner's Comments

- PAL's reported FOP is for manganese dioxide, not manganese ore, as noted in its questionnaire responses.[19] For the final results, the Department should continue to use the surrogate value for manganese dioxide to calculate NV.

[16] *See* Petitioner's July 7, 2015 submission at Exhibit 2; PDM at 6.
[17] *See Policy Bulletin* at 2.
[18] *See*, *e.g.*, PAL's October 28, 2015 submission at 17-18.
[19] *Id.* at Exhibit SD-10 and FOP PAL 002; PAL's May 26, 2016 submission at Exhibit S2D-5, line F.

Department's Position: We agree with the Petitioner, and have continued to value this input using HTS 2820.10.00. We note that at times in its submissions PAL makes reference to manganese ore, however, a careful review of the record indicates that this input is, in fact, manganese dioxide.

PAL describes the initial production process of potassium permanganate in the following manner: "The three step chemical reaction production process for making potassium permanganate by Changyuan begins by reacting manganese dioxide, potassium hydroxide and compressed air with heat to produce potassium manganite."[20] In multiple places in its questionnaire responses PAL lists the inputs as manganese dioxide. The Production Process Diagram submitted by PAL lists its input as "manganese dioxide (MnO_2)," as does the Description of the Production Flow Chart ("MnO_2").[21] The FOP variable name PAL assigned to this input, as noted in the FOP Summary Chart, is "manganese dioxide (MnO_2)."[22] PAL also notes that "Changyuan measures usage for production purposes according the manganese dioxide content."[23] This statement is supported by an examination of the FOP usage ratio reported by PAL for manganese dioxide, which indicates that it reported in its numerator the amount of manganese dioxide consumed.[24] The input is also listed as manganese dioxide in the cost reconciliation.[25] Based on the purity of the manganese dioxide Changyuan reported consuming, we find that the correct FOP is manganese dioxide rather than unrefined manganese ore.[26]

In its supplemental Section D questionnaire response, PAL argues that it is normal to refer to manganese ore as manganese dioxide, and that these terms are used interchangeably world-wide.[27] However, if PAL's assertion were true, and purity content were not a factor in determining which term to use, Thailand and Mexico, for example, would not require imports of manganese ore to enter under HTS 2602.00, while imports of manganese dioxide would enter under HTS 2802.10.[28] We find PAL's argument that a company that uses unrefined gold ore would refer synonymously to that input as refined gold unpersuasive. In responding to the Department's questionnaires regarding its factors of production, PAL was required to address fully any such distinctions in its inputs. If PAL in fact started with unrefined ore, it failed to describe a step in its production process where it converted magnesium ore to magnesium

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20 See PAL's June 11, 2015 submission at 4-5.
21 *Id*. at Exhibits 1 & 2.
22 *Id*. at Exhibit 4.
23 *See* PAL's October 28, 2015 submission at 17.
24 *Id*. at Exhibit SD-10 for the FOP database; Exhibit SD-1 for the numerator used in calculating the manganese dioxide FOP ratio.
25 *Id*. at Exhibit V-B-1.
26 The purity content is proprietary. *Id*. at Exhibit 3. It is possible that Changyuan consumed manganese ore to produce other products (*e.g.*, sodium permanganate). An examination of the purity content indicates these ores were not consumed to produce potassium permanganate. *Id*. Moreover, while manganese ore may be used to produce potassium permanganate, the purity levels consumed, again, lead the Department to conclude manganese dioxide was consumed, not manganese ore. *Id*. at Exhibit 4.b, pages 12-13. The Department has explained its analysis of this issue in Memorandum to the File, from Paul Walker, "Administrative Review of Potassium Permanganate from the People's Republic of China: Analysis for the Final Results," dated concurrently with this memo ("Final Analysis Memo").
27 *Id*. at 17.
28 *See* PAL's August 5, 2015 submission at Exhibits SV-2 & 6.

dioxide. In sum, based on the record evidence, we find the FOP consumed by Changyuan to be manganese dioxide, and have continued to value this FOP with the appropriate South African HTS number, 2820.10.00, described as "manganese dioxide."

Comment III: Surrogate Financial Ratios

PAL's Comments

- The Department has found that South African financial statements do not adequately break out expenses, thus preventing accurate financial ratios from being calculated.[29] The financial ratios relied on by the Department for the *Preliminary Results* are similarly flawed in that they do not sufficiently break out expenses. Thus, the calculated financial ratios, by not breaking out the expenses sufficiently, means that overhead expenses are being double counted.
- Record evidence indicates that one company relied upon in the *Preliminary Results*, Spanjaard Limited ("Spanjaard") is not involved in the manufacture and sale of products sufficiently similar to potassium permanganate, and is instead a producer of petroleum-based lubricants. For example, a Spanjaard Brochure, which appears to be a comprehensive listing of the products it produces, states that the: "Spanjaard Group of Companies has grown into a globally respected manufacturer and distributor of specialised lubricants and allied chemical products for the industrial, automotive, marine and household markets."[30] Thus, Spanjaard is not in the business of manufacturing and selling chemical products. This disqualifies its information for use in calculating financial ratios in this review.
- PAL submitted rebuttal information concerning surrogate companies to demonstrate the range of reasonable financial ratios for other chemical companies. In the end PAL deemed it not necessary to use this information, but it was within the boundary of permissible rebuttal for the purposes submitted. Petitioner made no showing in its brief that it previously objected to this information, which was submitted more than 11 months ago. Under the doctrine of *laches*, Petitioner is tardy in making its objection.

Petitioner's Comments

- While PAL points to a case where the Department found that one South African financial statement did not adequately break out expenses, it did not indicate any similar issues with the financial statements of Rolfes Holdings Limited ("Rolfes") and Spanjaard, the two South African chemical companies used to calculate ratios in the *Preliminary Results*.
- In fact, the data in both the Rolfes and the Spanjaard statements are highly specific, and the baselessness of PAL's assertion regarding the breakout of overhead cost items in South African financial statements is also underscored by the fact that the Department has in the past few years relied in several cases on data from the financial reports of South African companies.[31]

[29] *See Boltless Steel Shelving Units Prepackaged for Sale from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 80 FR 51779 (August 26, 2015) ("*Steel Shelves*") and accompanying Issues and Decision Memorandum at Comment 1.
[30] *See* PAL's August 17, 2015 submission at Exhibit RSV-9 ("Spanjaard Brochure").
[31] *See, e.g., Certain Uncoated Paper from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 80 FR 51768 (August 26, 2015) and accompanying Preliminary Decision Memorandum at 14.

- While PAL argues Spanjaard is a producer of lubricants, lubricants are a type of chemical. Spanjaard, like Rolfes, is a producer of a broad array of chemical products and can adequately serve as a producer with an analogous financial experience.
- The Department should reject certain rebuttal factual information submitted by PAL as untimely.[32]
- For the final results the Department should not deviate from the financial ratios selected for the *Preliminary Results*.

Department's Position: We agree with Petitioner and have continued to value surrogate financial ratios using data from Rolfes and Spanjaard. PAL misinterprets the Department's finding in *Steel Shelves* as disqualifying all South African surrogate companies due to a lack of specificity concerning costs in their financial statements. In *Steel Shelves* we stated: "the BSi Steel financial statements do not break out the company's expenses such that accurate financial ratios may be calculated."[33] This finding was made with respect to a single South African company, BSi Steel, in that particular antidumping duty investigation, not all South African companies.

Moreover, while PAL asserts that the overhead expenses for Spanjaard are not sufficiently detailed, we note that Spanjaard reported overhead in an identical manner as Rolfes. Specifically, for overhead expenses, both companies reported two line items in their financial statements, non-inventory costs of sales and depreciation.[34] PAL has not indicated what information may be missing from the statements in order to calculate an accurate overhead ratio. It is the Department's practice to use financial statements that contain sufficient detail to adequately calculate surrogate financial ratios, and in this case both Rolfes and Spanjaard contain the information necessary to calculate an overhead cost.[35] Although PAL argues that because Rolfes' and Spanjaard's expenses are not sufficiently broken out, and that overhead expenses are double counted, PAL has not elucidated which expenses are missing from the ratio calculations, or in what manner overhead may be double counted. Without this information, we are unable to address PAL's concerns.

Regarding PAL's arguments concerning the Spanjaard Brochure, we agree with PAL that this brochure indicates Spanjaard produces and sell lubricants, but the brochure also indicates Spanjaard sells other chemical products as well. According to its financial statement and website, Spanjaard is: **"**a developer, manufacturer and distributor of specialised lubricants and allied chemical products for the industrial, automotive, marine, mining, electrical and household markets."[36] We note that PAL has focused on one line of chemicals produced by Spanjaard, lubricants, and omits a discussion of the other types of chemicals it produces, namely chemicals for the industrial, automotive, marine, mining, electrical and household markets. The

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[32] *See* PAL's August 17, 2015 submission at Exhibits RSV-5 – 9.
[33] *See Steel Shelves* at Comment 1.
[34] *See* Final Surrogate Values Memo at Exhibit 7.
[35] *See, e.g., 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 1; *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review*, 76 FR 9753 (February 22, 2011) and accompanying Issues and Decision Memorandum at Issue 1.
[36] *See* Petitioner's August 5, 2015 submission at Exhibit 12.

Department's criteria for choosing surrogate financial statements from which we derive the financial ratios are the availability of contemporaneous financial statements, comparability to the respondent's experience, and publicly available information.[37] Moreover, for valuing factory overhead, selling, general and administrative expenses ("SG&A"), and profit, the Department normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.[38] In addition, the CIT held that in the selection of surrogate producers, the Department may consider how closely the surrogate producers approximate the NME producer's experience.[39] In this case Spanjaard (and Rolfes) produces a variety of chemical products, as does Changyuan, thus, we consider their production experiences to be similar.[40] PAL has not offered any evidence to the contrary, as it merely assumes, based on its characterization of Spanjaard as a lubricant producer, that Spanjaard is insufficiently comparable without explaining any relevant differences in financial experience.

Regarding Petitioner's request to reject PAL's surrogate value rebuttal information, we disagree. PAL timely submitted its surrogate value rebuttal information.[41] Moreover, this information was clearly labelled as rebuttal information[42], and PAL didn't argue that the Department should use the rebuttal information as a source from which to calculate financial ratios, which would be improper.[43]

Comment IV: Treatment of Value Added Tax

PAL's Comments

- In a value added tax ("VAT") system, the seller of merchandise subject to VAT collects the VAT by a VAT included price from the buyer, and then transmits the collected tax to the tax authority.[44] It is the final user of the merchandise who pays the VAT, rather than the producer or seller. In the PRC, VAT may be imposed on domestic purchases of inputs, but it is it is not imposed on exports of finished goods, as exports are specifically exempt from the

[37] *See*, *e.g.*, *Certain Polyethylene Terephthalate Resin from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 80 FR 62024 (October 15, 2015) unchanged in *Certain Polyethylene Terephthalate Resin from the People's Republic of China: Final Determination of Sales at Less Than Fair Value***,** 81 FR 13331 (March 14, 2016).

[38] *See*, *e.g.*, *Diamond Sawblades* at Comment 2.

[39] *See Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1253-1254 (CIT 2002); *see also Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 6836 (February 9, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

[40] *See*, *e.g.*, PAL's October 28, 2015 submission at Exhibit SA-1a; PAL's May 12, 2015 submission at Exhibit 12 (Changyuan business license lists 14 different chemicals it produces: liquefied chlorine, potassium permanganate, chloroacetic acid, hydrogen peroxide, synthetic hydrochloric acid, potassium hydroxide, methyl chloroacetate, methyl dichloroacetate, sodium permanganate, hydrochloric acid, potassium silicate fluoride, chloroacetic acid mother liquid, chloroacetic acid liquid residue and industrial sulfuric acid).

[41] *See* Memo to the File, from Javier Barrientos, Senior Case Analyst, "Antidumping Duty Administrative Review of Potassium Permanganate from the People's Republic of China: Extension of Deadline to Submit Surrogate Values and rebuttal Comments," dated July 22, 2015.

[42] *See* PAL's August 17, 2015 submission at Exhibits RSV-5 – 9.

[43] *See* PAL's July 20, 2016 submission at 11.

[44] For example, in a domestic sale of merchandise under consideration, if the sale price is 100, the seller will collect 100 (payment for goods) plus 100*17 percent (VAT) from the buyer.

payment of VAT.[45] The language of the PRC's *Interim Regulations* is clear and unambiguous- selling potassium permanganate to the United States does not result in any VAT liability.

- Just like many other countries, the PRC ensures global competitiveness by sometimes rebating the VAT paid by the exporter to its up-stream sellers to the exporter on exportation of the merchandise. The rebated VAT is that paid for the inputs ("input tax") purchased for producing the exported merchandise, not the VAT collected from the buyer of the subject merchandise ("output tax"). In other words, the export VAT rebate, if any, relates to the manufacturing cost rather than the sale price of the merchandise. However, in an NME antidumping case, the cost (NV) of the merchandise is constructed by taking the input amounts and applying SVs. Thus, whether or not, and how much, the VAT is included in the manufacturing cost is totally irrelevant to the dumping margin calculation since that calculation is determined by the factors of production and SVs. In other words, there is no direct correlation between the sale price, and the price in the PRC in which domestic sales are subject to VAT. Thus, it would be error to impute that the VAT is an export tax (which it is not) and to deduct any imputed amount from the U.S. price.
- Moreover, in an NME antidumping case, VAT paid to suppliers of inputs and VAT credits received cannot be tied. As noted above, exports of potassium permanganate are not subject to VAT. If they were subject to VAT, the amount would be based on the value and PAL would receive a credit for the amount of the VAT it paid, however, as a Hong Kong entity, PAL is not subject to the PRC VAT. Thus, the amount of any theoretical VAT to PAL would be based on the value added. The purpose of the reduced reimbursement rate would be to prevent PAL from receiving an excessive credit for the VAT, but since PAL did not pay VAT, and did not receive a credit, it would be error to ascribe to it any VAT amount.
- *Chevron* provides the standard which the Department must follow in administering the statute.[46] Where a statute is clear and unambiguous, the Department has no discretion to construe it other than what the clear language states and is required to interpret it strictly in accordance with its terms, as written by Congress.[47] 19 USC 1677a (c)(2)(B) contains no ambiguity, and addresses only "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States..." The statutory language "export tax" is the key: VAT imposed on domestic goods in the PRC is not an export tax "imposed by the exporting country on the exportation of the subject merchandise to the United States." The record clearly shows that the PRC does not impose VAT on the exportation of potassium permanganate to the United States. Thus, *Chevron* mandates that the Department recognize the plain language of the statute and not expand its plain meaning beyond what Congress intended. For the reasons noted above, no deduction of VAT should be made to PAL's export price.
- Should there be any adjustment for VAT, it must be made on a free-on-board ("FOB") price. For the sales under review, certain adjustments must be made to these prices to ensure they

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[45] *See* PAL's May 26, 2016 submission at Exhibit S2C-1, *Interim Regulations of the People's Republic of China on Value-added Tax*, Order No. 538 of the State Council (November 10, 2008) ("*Interim Regulations*"), which states: "for taxpayers that export goods, the tax rate shall be zero."
[46] *See* PAL's July 15, 2016 submission at 16, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *see also, e.g., Wind Tower Trade Coalition v. United States*, 741 F.3d 89 (Fed. Cir. 2014).
[47] *Id*. at 17, citing *Dorbest v. United States*, 604 F.3d 1363, 1371, 1372 (Fed. Cir. 2010).

are on a FOB basis. To not make these adjustments would represent double-counting of these expenses.

Petitioner's Comments

- The record indicates no basis for Changyuan to be exempt from paying VAT on its inputs and its inputs incur 17 percent VAT.[48] Also, PAL reported that there is no refund of VAT for exports of potassium permanganate.[49] It is the Department's practice to treat this irrecoverable VAT on exports as an extra charge on exports as compared with domestic sales, and thus, it is an export tax, which needs to be subtracted from the U.S. price.[50]
- The fact that the Department uses SVs for such inputs in determining NV for antidumping margin calculations is irrelevant to whether Changyuan paid VAT on the inputs it used to produce the material exported to the United States. Nor has PAL provided any evidence to cause the Department to deviate from its practice of offsetting the U.S. price by a fixed percentage to account for irrecoverable VAT.
- PAL is correct in stating that the amount of unrecovered VAT should be calculated with reference to FOB value. Given the sales terms reported by PAL, and the discrepancy between the U.S. price and entered value, the Department should apply the unrecovered 17 percent rate to PAL's calculated net U.S. price ("USNETPRI").

Department's Position: For the reasons explained below, we made an adjustment to PAL's U.S. price for irrecoverable VAT for the final results. The Department's practice in NME cases is to adjust the export price ("EP"), or the constructed export price ("CEP"), for the amount of any unrefunded VAT, in accordance with section 772(c)(2)(B) of the Act.[51] When an NME government imposes an export tax, duty, or other charge on subject merchandise, or on inputs used to produce subject merchandise, from which a respondent was not exempted, the Department will reduce the respondent's EP and CEP prices accordingly by the amount of the tax, duty or charge paid, but not rebated.[52] Where the irrecoverable VAT is a fixed percentage of EP, or CEP, the final step in arriving at a tax neutral dumping comparison is to reduce the U.S. EP, or CEP, downward by this same percentage.[53] The Department's methodology, as explained above and applied in this review, is to determine the irrecoverable VAT on subject merchandise, and to reduce the U.S. price by the amount (or rate) of irrecoverable VAT.[54]

In a typical VAT system, companies incur no VAT expense; they receive, on export, a full rebate of the VAT which they pay on purchases of inputs used in the production of exports ("input

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[48] *See* PAL's October 28, 2015 submission at revised Exhibit D-6.
[49] *See* PAL's July 5, 2016 submission at 2.
[50] *See Seamless Refined Copper Pipe and Tube from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review: 2012-2013*, 80 FR 32087 (June 5, 2015) and accompanying Issues and Decision Memorandum at Comment 1.
[51] *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) ("*Methodological Change*").
[52] *See Methodological Change*; *see also Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 4875 (January 30, 2014) and accompanying Issues and Decision Memorandum at Comment 5A.
[53] *Id*.
[54] *See Frontseating Service Valves from the People's Republic of China; Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 71385 (December 2, 2014) ("*FSVs*") and accompanying Issues and Decision Memorandum at Comment 5.

VAT"), and, in the case of domestic sales, the company can credit the VAT they paid on input purchases for those sales against the VAT they collected from customers.[55] This typical model stands in contrast to the PRC's VAT regime, where some portion of the input VAT that a company paid on purchases of inputs used in the production of exports is not refunded.[56] Thus, this amounts to an export tax, duty, or other charge imposed on exported merchandise that is not imposed on domestic sales and we, accordingly, disagree with PAL's assertions that irrecoverable VAT should not be deducted from its U.S. price. Where the irrecoverable VAT is a fixed percentage of the U.S. price, the final step in arriving at a tax-neutral comparison of NV with EP, or CEP, is to reduce the U.S. price by this same percentage.[57]

Irrecoverable VAT is (1) the FOB value of the exported good, applied to the difference between (2) the standard VAT levy rate and (3) the VAT rebate rate applicable to exported goods.[58] The first variable, export value, is unique to each respondent and sale while the rates in (2) and (3), as well as the formula for determining the amount of irrecoverable VAT, are each explicitly set forth in the PRC's laws and regulations.[59] PAL cites the *Interim Regulations* for support that the tax rate on subject merchandise should be zero, however, nowhere in the documents on the record does it say that exporters of potassium permanganate should not be liable for VAT upon export of the merchandise, and PAL does not point to a specific exhibit number or page number where this information can be found on the record. To the contrary, the record makes clear that exporters of potassium permanganate will pay 17 percent VAT and receive no refund.

PAL's reliance on *Chevron* is misplaced. In *Chevron*, the United States Supreme Court held that "{w}hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions."[60] The Supreme Court explained that the first question is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter … the agency must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute."[61] We disagree with PAL's argument that Section 772(c)(2)(B) of the Act clearly does not intend to authorize the Department to deduct from EP, or CEP, amounts of VAT not refunded.

Section 772(c)(2)(B) of the Act authorizes the Department to deduct from EP, or CEP, the amount, if included in the price, of any "export tax, duty, or other charge imposed by the

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[55] *See*, *e.g.*, *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 35723 (June 24, 2014) ("*Diamond Sawblades*") and accompanying Issues and Decision Memorandum at Comment 6; *Methodological Change*, 77 FR at 36483.
[56] *See*, *e.g.*, *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 23272 (April 20, 2016) and accompanying Issues and Decision Memorandum at Comment 3. *See also Methodological Change*, 77 FR at 36483.
[57] *See Methodological Change*, 77 FR at 36483.
[58] *See Prestressed Concrete Steel Rail Tie Wire from the People's Republic of China*, 79 FR 25572 (May 5, 2014) ("*Rail Tie Wire*") and accompanying Issues and Decisions Memorandum at Comment 1, footnote 35.
[59] *Id*. at Comment 1, footnote 36.
[60] *See Chevron*, 467 U.S. 837, 842-43 (1984).
[61] *Id*. at 843.

exporting country on the exportation" of the subject merchandise.

PAL's argument that irrecoverable VAT is not an export tax, and that under Section 772(c)(2)(B) of the Act the Department cannot adjust for taxes that are not export taxes, has misstated the issue. Irrecoverable VAT, as defined in PRC law, is a net VAT burden that arises solely from, and is specific to, exports. It is VAT paid on inputs and raw materials (used in the production of exports) that is non-refundable and, therefore, a cost.[62] Irrecoverable VAT is, therefore, an "export tax, duty, or other charge imposed" on exportation of the subject merchandise to the United States.[63] The statute does not define the terms "export tax, duty, or other charge imposed" on the exportation of subject merchandise, and thus PAL's argument based on step one of the *Chevron* analysis is unavailing. We find it reasonable to interpret these terms as encompassing irrecoverable VAT because the irrecoverable VAT is a cost imposed by the government that arises as a result of the exportation of the subject merchandise. The irrecoverable VAT is set forth in PRC law and, therefore, can be considered to be "imposed" by the exporting country on exportation of subject merchandise.[64] Here, although PAL is a Hong Kong entity, the subject merchandise was produced in and exported from, the PRC. Thus, the irrecoverable VAT is a cost imposed by the PRC government on the merchandise PAL sells to the United States that was produced in the PRC. An adjustment for irrecoverable VAT achieves what is described 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 price received by the seller. This deduction applied to PAL's U.S. price is consistent with our longstanding policy, and consistent with the intent of the statute, that dumping margin calculations be tax-neutral.[65]

We agree with Petitioner and PAL that the VAT adjustment should be on an FOB basis, consistent with Department practice.[66] As such, for the final results we made certain adjustments to PAL's U.S. price to ensure it is on a FOB basis before adjusting to the irrecoverable VAT.[67]

[62] *See Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 57508 (September 25, 2014) ("*Graphite Electrodes*") and accompanying Issues and Decision Memorandum at Comment 7.
[63] *See, e.g.*, *Diamond Sawblades* at Comment 6; *FSVs* at Comment 5.
[64] *See Graphite Electrodes* at Comment 7.
[65] *See* PAL's July 5, 2016 submission at Exhibit S3-2, *Notice of the Ministry of Finance and the State Administration of Taxation on the Policies of Value-added Tax and Consumption Tax Applicable to Exported Goods and Services*, Cai Shui {2012} No.39 (May 25, 2012) at Article 5(3), which states, "Where the Tax Refund Rate is lower than the applicable tax rate, the amount of tax calculated according to the difference in rates shall be included in the costs of the Exported Goods and Services." *See also Methodological Change*, 77 FR at 36483; *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27369 (May 19, 1997) (citing the SAA).
[66] *See, e.g.*, *Rail Tie Wire* at Comment 1.
[67] *See* Final Analysis Memo.

Comment V: Application of Adverse Facts Available ("AFA") to PAL

Petitioner's Comments

- PAL has not differentiated its FOPs used to produce potassium and sodium permanganate, both of which are produced using many of the same FOPs, such as manganese dioxide. PAL has not described how Changyuan makes sodium permanganate and how Changyuan's sodium permanganate can possibly have no common inputs with potassium permanganate. In view of this stonewalling, the Department should take PAL's non-response as a refusal to respond and impose appropriate adverse inferences.
- In view of PAL's failure to provide adequately differentiated cost information and its similar failure to explain the discrepancy between the invoice amount and entered value, the Department should find that the net price of the subject merchandise to be the entered value reported by PAL.
- Due to a discrepancy between PAL's invoice amount and the entered value it reported, it is unclear in this review what the net return to PAL was on its sale of the subject merchandise. When asked to explain the discrepancy between its invoiced price and its entered value, PAL did not provide an explanation, but provided Customs regulations that require certain elements to be excluded from import value and excerpts from a Customs broker's examination. PAL has not provided any kind of enumeration of the deductions. Absent the values of these deductions, the Department is left with no way to reconcile the invoice amount and entered value.

PAL's Comments

- While Petitioner makes an amorphous claim that there has been a failure to differentiate between the "costs" of potassium permanganate and sodium permanganate, if the input amounts were in any way incorrect, one would expect Petitioner to have argued that the amounts of the inputs underreported, but there is no such direct allegation. PAL has fully cooperated with the Department and answered its questions concerning the production of potassium permanganate and sodium permanganate.
- There is no discrepancy in the information supplied by PAL. The application of different statutes (the Antidumping law and the Customs Law) require that there must be different calculations. Customs Law, 19 USC 1401a(b)(3)(ii)(B), indicates that the entered value should not include transportation costs after importation or customs duties and other Federal taxes currently payable on the imported merchandise. By contrast, the antidumping law, 19 USC 1677a(c)(2)(A), and as interpreted by the Department, does not allow deduction from the starting price of antidumping duties. This is a longstanding practice by the Department which has been upheld by the courts.[68] Essentially Petitioner argues that the Department should ignore its longstanding practice to not deduct antidumping duties from EP.
- While the Petitioner also states that PAL failed to show a calculation, PAL submits that it responded fully to the questions of the Department, which included a calculation and explanation of the discrepancy in question.[69]

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[68] *See, e.g., Apex Exports et al. v. U.S. et al.*, Slip Op. 13-158 (CIT, December 31, 2013).
[69] *See* PAL's May 26, 2016 submission at 7.

Department's Position: We have not applied AFA to PAL.[70] Sections 776(a)(1) and (2) of the Act provide that the Department shall apply "facts otherwise available" if necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. The Department issued questionnaires to PAL, to which it responded in a timely manner, concerning, among other things, how it differentiates material consumed in the production of potassium permanganate and sodium permanganate. PAL responded to these questions, and indicated that potassium permanganate is produced in a facility which is physically separate from that of sodium permanganate, there are completely separate accounts and accounting records for potassium permanganate and sodium permanganate production, and sodium permanganate is neither a co-product nor by-product of potassium permanganate production.[71] Thus, we find no basis to apply AFA to PAL based on its responses concerning this topic.

We have also not applied AFA to PAL concerning its entered value. The Department issued questionnaires to PAL, to which it responded in a timely manner, concerning, among other things, how it determined the entered value reported in its Section C database.[72] PAL explained that the entered value does not include certain specified costs that are considered non-dutiable which must be deducted from the invoice value, such as transportation charges, duties, taxes and fees.[73] Thus, we find no basis to apply AFA to PAL based on its responses concerning this topic.

However, we continue to find that an examination of PAL's entered values, when compared with its prices and relevant adjustments, indicates that a discrepancy continues to exist, and have followed our practice to ensure the correct duties are collected. As we explained in the *Preliminary Results*, in past cases, where entered values are understated, resulting in an under-collection of antidumping duties by Customs and Border Protection ("CBP"), the Department has calculated per-unit cash deposit and assessment rates, as opposed to *ad valorem* rates.[74] Here we compared PAL's entered values to the estimated customs values, and although PAL has provided an explanation for any differences, we do not find their arguments to be persuasive.[75] Normally, the difference between entered value and ex-factory net U.S. price plus foreign

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[70] While Petitioner does not explicitly use the term AFA, we have interpreted their phrasing "impose appropriate adverse inferences" to mean AFA.
[71] *See* PAL's June 11, 2015 submission at 7; PAL's October 28, 2015 submission at 15; PAL's May 26, 2016 submission at 12.
[72] *See* PAL's June 4, 2015 submission at 27, Exhibit 7; PAL's May 26, 2014 submission at 6.
[73] *See* PAL's May 26, 2014 submission at 6.
[74] *See, e.g., Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 75 FR 70208 (November 17, 2010) and accompanying IDM at Comment 3; Memorandum to the File, from Paul Walker, "Analysis for the Preliminary Results of the Administrative Review of Potassium Permanganate from the People's Republic of China," dated February 2, 2016, at 2.
[75] Because this analysis proprietary, *see* Final Analysis Memo.

movement expense (*i.e.*, estimated customs value) is relatively small.[76] This is because the net U.S. price calculated in the Department's margin program has been stripped of various expenses so it reflects an approximation of an ex-factory price.[77] Once foreign movement expenses are added back to U.S. net price, the resulting value approximates a FOB foreign port value.[78] Because of the apparent discrepancy on the record in this case, we have continued to rely upon per-unit cash deposit and assessment rates, to ensure the correct amount of antidumping duties are collected for the final results. Moreover, if there is a discrepancy concerning a respondent's entered value, this concern is the purview of CBP and should be properly addressed through and by CBP, which has the authority to address such issues.[79] The Department intends to refer this matter to CBP and will provide CBP any relevant information, as appropriate, to assist that agency in fulfilling its statutory mission relating to antidumping and countervailing duty collection and enforcement.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If accepted, we will publish the final results of review and the final dumping margins in the *Federal Register*.

AGREE ✓ DISAGREE ______

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

15 August 2016
Date

[76] *See, e.g.*, *Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 61172 (October 9, 2015) ("*Activated Carbon*") and accompanying Issues and Decision Memorandum at Comment 3.

[77] Specifically, the Department's margin program starts with a respondent's gross unit price and we remove all expenses associated with selling the product in the United States, as well as an amount for international movement expenses and profit to arrive at an ex-factory net U.S. price. *See also Florida Citrus Mut. v. United States*, 515 F. Supp. 2d 1324 (CIT 2007) ("Constructed export price is an approximation of an ex-factory price.").

[78] *See, e.g.*, *Activated Carbon* at Comment 3.

[79] The Department notes that such concerns can be addressed through CBP's Post-Entry Amendment process.