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November 20, 2013

**MEMORANDUM TO:** Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

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

**SUBJECT:** Issues and Decision Memorandum for the Final Determination of  
Sales at Less-Than-Fair-Value: Silica Bricks and Shapes from the  
People's Republic of China

**SUMMARY:**

We have analyzed the case and rebuttal briefs, submitted by interested parties in the antidumping duty investigation of silica bricks and shapes from the People's Republic of China ("PRC"). As a result of our analysis, we have made changes to the Preliminary Determination.<sup>1</sup>

We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this investigation for which we received comments.

**Case Issues:**

- Comment 1: Verification Corrections**
- Comment 2: Scope Exclusion for Fused Silica and Silicon Carbide Bricks and Shapes**
- Comment 3: Silica Sand Surrogate Value**
- Comment 4: Iron Scale Surrogate Value**
- Comment 5: Natural Gas Surrogate Value**
- Comment 6: Brokerage and Handling Surrogate Value**
- Comment 7: Facts Available for New Century Group's Unreported U.S. Sales**
- Comment 8: Value Added Tax**

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<sup>1</sup> See Silica Bricks and Shapes from the People's Republic of China: Preliminary Determination of Antidumping Duty Investigation and Postponement of Final Determination, 78 FR 37203 (June 20, 2013) ("Preliminary Determination").



## **Background:**

The Department of Commerce (“Department”) published its preliminary determination of sales at less than fair value and postponement of final determination on June 20, 2013.<sup>2</sup>

Between June 24, 2013 and July 1, 2013, the Department conducted a verification of Tianjin New Century Refractories Co., Ltd.; Tianjin New World Import & Export Trading Co., Ltd.; and XinYi American Advanced Material Co., Ltd. (collectively, “New Century Group”)<sup>3</sup> and its unaffiliated producer, Dengfeng Yuzhong Refractories Co. Ltd. (“Dengfeng Yuzhong”).<sup>4</sup>

In the Preliminary Determination, we found that 100 percent of New Century Group’s export sales confirm the existence of a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods. Further, we determined that the average-to-average method can appropriately account for such differences because there is not a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method. For the final determination, the Department has continued to use the average-to-average method for all U.S. sales in making comparisons of export price or constructed export price and normal value for the New Century Group.

On July 30, 2013, New Century Group submitted surrogate value (“SV”) comments<sup>5</sup> and on August 12, 2013, Utah Refractories Corporation (“Petitioner”) submitted rebuttal SV comments.<sup>6</sup>

On August 17, 2013 and August 19, 2013, New Century Group and Fedmet Resources Corporation (“Fedmet”), respectively, submitted case briefs.<sup>7</sup> On September 3, 2013, Petitioner submitted a rebuttal brief.<sup>8</sup>

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<sup>2</sup> See Preliminary Determination.

<sup>3</sup> In the Preliminary Determination, the Department determined to treat these companies as a single entity and continues to do so. See Memorandum from Rebecca Pandolph, International Trade Analyst, AD/CVD Operations, Office 4 through Howard Smith, Program Manager, AD/CVD Operations, Office 4 to Abdelali Elouaradia, Office Director, AD/CVD Operations, Office 4, “Silica Bricks and Shapes from the People’s Republic of China: Affiliation and Single Entity Status,” dated June 13, 2013.

<sup>4</sup> See Memorandum to the File through Abdelali Elouaradia, Office Director, AD/CVD Operations, Office 4 and Howard Smith Program Manager, AD/CVD Operations, Office 4 from Rebecca Pandolph, Senior International Trade Analyst, AD/CVD Operations, Office 4 and Jonathan Hill, International Trade Analyst, AD/CVD Operations, Office 4, “Verification of the Sales and Factors of Production Information Submitted by New Century Group in the Antidumping Duty Investigation of Silica Bricks and Shapes from the People’s Republic of China,” dated July 30, 2013 (“Verification Report”).

<sup>5</sup> See Letter from New Century Group to the Secretary of Commerce, “Silica Bricks and Shapes from the People’s Republic of China: Tianjin New Century Refractories, Co. Ltd. – Post-Prelim Surrogate Value Comments,” dated July 30, 2013 (“New Century Group’s Post-Prelim SV Comments”).

<sup>6</sup> See Letter from Petitioner to the Secretary of Commerce, “Petition for the Imposition of Antidumping Duties: Silica Bricks and Shapes from the People’s Republic of China,” dated August 12, 2013.

<sup>7</sup> See Letter from New Century Group to the Secretary of Commerce, “Silica Bricks & Shapes from the People’s Republic of China: Case Brief of Tianjin New Century Refractories Co. Ltd.,” dated August 17, 2013; see also letter

As explained in the memorandum from the Assistant Secretary for Enforcement and Compliance, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1, through October 16, 2013.<sup>9</sup> Therefore, all deadlines in this proceeding have been extended by 16 days. If the new deadline falls on a non-business day, in accordance with the Department's practice, the deadline will become the next business day. Thus, the revised deadline for the final determination in this investigation is November 20, 2013.

## **DISCUSSION OF THE ISSUES**

### **Comment 1: Verification Corrections**

#### *New Century Group's Argument:*

- The Department should revise its calculation of New Century Group's weighted-average dumping margin to account for the following corrections reported at verification:
  - Changes to the consumption of iron scale, direct and indirect labor usage rates, and electricity rates that were reported as minor corrections at verification.
  - The freight distances between suppliers of inputs and New Century Group's factory which were corrected at verification using a global positioning map.
  - Changes to the reported packing factors of production which were identified by the Department's verifiers based on measurements undertaken at verification.
  - The entered value reported for one sales invoice.

#### *Petitioner's Rebuttal Arguments:*

- The Department should follow its normal practice in determining whether adjustments or corrections are needed. However, several of the proposed corrections demonstrate inattentiveness to questionnaire responses provided to the Department and the reasons for the errors are not fully explained by the respondent.

### **Department's Position:**

The above-cited changes in the consumption of iron scale, labor, and electricity were reported as minor corrections in accordance with the Department's verification outline instructions.<sup>10</sup> The Department's verification outline, sent to respondent on June 14, 2013, states that at the beginning of verification, the respondent should present minor changes, if any, to the responses resulting from verification preparation.<sup>11</sup> The Department accepted the minor corrections

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from Fedmet to the Secretary of Commerce, "Silica Bricks and Shapes from the People's Republic of China: Case Brief of Fedmet Resources Corporation," dated August 19, 2013.

<sup>8</sup> See Letter from Petitioner to the Secretary of Commerce, "Petition for the Imposition of Antidumping Duties: Silica Bricks and Shapes from the People's Republic of China," dated September 3, 2013.

<sup>9</sup> See Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Shutdown of the Federal Government" (October 18, 2013).

<sup>10</sup> See Verification Report at 1-2.

<sup>11</sup> See the June 14, 2013 letter entitled "Silica Bricks and Shapes from the People's Republic of China: Verification Agenda."

submitted at verification, confirmed the accuracy of selected items, and noted no discrepancies to the corrected consumption rates.<sup>12</sup> Therefore, we took these changes into account in calculating the weighted-average dumping margin for New Century Group in this final determination.

In addition to the changes presented as minor corrections at verification, the Department measured the distance from suppliers to Dengfeng Yuzhong's factory, noting four discrepancies, the greatest being a two-kilometer difference between what was reported and what was examined at verification.<sup>13</sup> Further, as part of its examination of packing factors of production at verification, the Department weighed each reported packing input and noted small discrepancies in the reported weight of five inputs (pallet, film, tape, buckle, and paper). Because the Department obtained the correct distances and weights at verification we will use this correct information in calculating the weighted-average dumping margin for New Century Group in this final determination.<sup>14</sup> The Department also revised the incorrect entered value reported for one invoice.

While Petitioner claims that the reason for some of the corrections reported at verification are not fully explained and demonstrate inattentiveness in reporting data to the Department, New Century Group has either fully explained, or the Department was able to identify, the nature of each error cited above. In this regard, we find that the discrepancies identified (e.g., two-kilometer difference in reported vs. verified distance and weight discrepancies for inputs) are small enough that they do not demonstrate a failure to cooperate or a failure to put forth sufficient effort. Further, as noted above, the Department was able to verify the corrected information. For all these reasons, the Department is using these data corrected at verification for the final determination.

## **Comment 2: Scope Exclusion for Fused Silica and Silicon Carbide Bricks and Shapes**

### *Fedmet's Argument:*

- In the Preliminary Determination the Department excluded from the scope of the investigation certain products that are manufactured from non-crystalline (i.e., fused) silica. The Department should continue to exclude such materials from the scope of this investigation.
- Also, the Department should specifically exclude from the scope of the investigation silicon carbide bricks and shapes, as silicon carbide bricks can be entered into the United States under the same HTS category as subject merchandise but silicon carbide bricks are manufactured differently and have separate end uses. Further, silicon carbide may be burnt off in tests performed by U.S. customs authorities on imports of silicon carbide bricks, leaving a residue of silica that may create confusion in determining whether silicon carbide bricks are subject merchandise.
- If the Department does not specifically exclude silicon carbide bricks from the scope of the investigation in order to avoid confusion on the part of U.S. Customs and Border Protection

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<sup>12</sup> See Verification Report at 31-33 with regard to labor and iron scale, and at 35 with regard to electricity.

<sup>13</sup> See Verification Report at 33.

<sup>14</sup> See Verification Report at 33.

(CBP), the Department should confirm that the scope does not cover silicon carbide bricks and shapes.

*Petitioner's Rebuttal Argument:*

- It is not necessary for the Department to modify the scope. The scope already excludes certain fused silica bricks and shapes. Moreover, the Department has previously noted that bricks and shapes of predominately silicon carbide or even of 10 percent or more silicon carbide are not covered by the scope of the investigation.

**Department's Position:**

Given that the Department's practice is to provide ample deference to the Petitioner with respect to narrowing the definition of the product for which it seeks relief during the investigation phase of an antidumping duty or countervailing duty proceeding,<sup>15</sup> in the Preliminary Determination we accepted Petitioner's proposed exclusion language regarding bricks and shapes which include non-crystalline silica. Specifically, we excluded refractory bricks and shapes, regardless of size, that are made, in part, from non-crystalline silica (commonly referred to as fused silica) where the silica content of the brick or shape is less than 50 percent, by weight, crystalline silica. No party has argued against this exclusion and we have continued to exclude such products from the scope of this investigation.

Further, given that “{t}he products covered by the scope of this investigation are refractory bricks and shapes, regardless of size, that contain *at least 90 percent silica (SiO<sub>2</sub>)...*,” it is already clear that bricks and shapes of 10 percent or more silicon carbide are already outside the scope of the investigation.<sup>16</sup> Petitioner has already noted that the scope of the investigation would not cover refractory bricks and shapes made primarily or principally of silicon carbide.<sup>17</sup> While Fedmet has speculated that there could be various reasons for confusion on the part of CBP with respect to silicon carbide bricks, we believe the scope description is clear and that there is no need to add a specific exclusion for bricks and shapes made of silicon carbide.

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<sup>15</sup> See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 51788, 51789 (September 5, 2008); see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products From Canada, 67 FR 15539 (April 2, 2002), and accompanying Issues and Decision Memorandum under Scope Issues (stating that the Department possesses the authority to define or clarify the scope of an investigation throughout the investigation); see also Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Outboard Engines from Japan, 69 FR 49863, 49871 (August 12, 2004) (citing Final Determination of Sales at Less Than Fair Value: Certain Carbon Alloy Wire Rod from Japan, 59 FR 5987, 5988-5989 (February 9, 1994), and accompanying Issues and Decision Memorandum at Comment 1).

<sup>16</sup> See Memorandum from Howard Smith, Program Manager, Office 4, Antidumping and Countervailing Duty Operations and Rebecca Pandolph, International Trade Analyst, Office 4 Antidumping and Countervailing Duty Operations through Abdelali Elouaradia, Director Office 4, Antidumping and Countervailing Duty Operations to Christian Marsh, Deputy Assistant Secretary, Antidumping and Countervailing Duty Operations, “Antidumping Duty Investigation of Silica Bricks and Shapes from the People's Republic of China: Scope Modification,” dated May 14, 2013 at 1.

<sup>17</sup> See Letter from Petitioner to the Secretary of Commerce, “Petition for the Imposition of Antidumping Duties: Silica Bricks and Shapes from the People's Republic of China,” dated April 18, 2013 at 1.

### **Comment 3: Silica Sand Surrogate Value**

#### *New Century Group's Argument:*

- The Harmonized Tariff System (“HTS”) heading 2505.10 used in the Preliminary Determination to value silica sand is a broad category that includes imports of both low and high-grade material. Using this HTS heading to value silica sand leads to distortions in the SV as well as the weighted-average dumping margin because the silica sand used to produce the subject merchandise was the lowest grade available in the market.
- The record contains the U.S. Geological Survey’s 2011 Minerals Yearbook (“2011 Yearbook”) which shows significant national price variations for various types of silica sand. The Department must reduce the silica sand SV by either 32%, the percentage difference between the highest priced silica sand in the 2011 Yearbook and the price of foundry grade sand which is the type of silica sand most closely related to the silica sand used to produce silica bricks, or 42%, the percentage difference between the highest priced and lowest priced silica sand in the 2011 Yearbook.

#### *Petitioner's Rebuttal Argument:*

- The 2011 Yearbook and other information concerning grades and costs of silica sand cited by New Century Group does not show that the HTS heading used to value silica sand is overly broad, containing import data for both high and low grades of silica. At most the 2011 Yearbook simply discusses price ranges in the United States for different grades of silica sand.
- The information relied upon by the New Century Group (e.g., the 2011 Yearbook ) was only submitted at verification, which was after the deadline for the submission of new factual information, and thus it is untimely submitted factual information that should be rejected by the Department.
- The record of this investigation contains no information demonstrating that silica refractory bricks are made from the lowest grade of silica sand. The record indicates that Petitioner uses “some of the purest silica rock known in the world which allows them to produce a very high quality {of silica refractory bricks}.”<sup>18</sup>
- There is no support for New Century Group’s claim that the silica sand used to produce silica bricks is most closely related to foundry production.
- While New Century Group appears to claim that the lowest grade silica sand was used to manufacture the product that it sold, this is immaterial when it comes to selecting Ukrainian SVs. There is nothing on the record that sheds light on the grade of sand used to manufacture silica refractory bricks and shapes in Ukraine.
- New Century Group cites to no authority which would allow the Department to reduce the silica sand SV.

#### **Department's Position:**

We find New Century Group’s arguments for adjusting the Ukrainian import values for HTS heading 2505.10 that were used to calculate the SV for silica sand unpersuasive for the following

reasons. First, New Century Group's argument is premised on there being both lower and higher grades of silica sand imports reported in the Ukrainian import data. However, as opposed to the 2011 Yearbook placed on the record which identifies the grade of silica sand corresponding to each price, the Ukrainian import data on the record do not identify the grade of the imported merchandise.<sup>19</sup> Second, New Century Group has failed to demonstrate how the pricing differences seen in the 2011 Yearbook are applicable to the Ukrainian import data in the Global Trade Atlas ("GTA"). Third, according to New Century Group, page 8 of the Petition states that manufacturers of silica refractory bricks use the lowest quality silica sand. However, there is no information on page 8 concerning the grade of silica sand used to produce silica refractory bricks.<sup>20</sup> Given that it is objecting to the SV used in the Preliminary Determination, New Century Group bears the burden to prove the inadequacy of the SV, or alternatively, to show that the use of another SV is more appropriate.<sup>21</sup> For the reasons noted above, New Century Group has not made such a demonstration here. Moreover, excluding certain imports from our valuation of silica sand would contradict the Department's clear and well-established preference of using the full GTA dataset.<sup>22</sup> This practice ensures an accurate SV based on a broad dataset and avoids the problems that would ensue if parties were able to argue for a subset of cherry-picked import data in an SV calculation. The Department has "found WTA import data to represent the best information available for valuation purposes because when taken as a whole -- after excluding non-market, unspecified, and subsidized data points -- they represent an average of multiple price points within a specific period and are tax-exclusive."<sup>23</sup> No party has disputed that imports of the silica sand input in question would be categorized under HTS heading 2505.10 ("Silica Sands And Quartz Sands, Natural"), which is the HTS heading that the Department used to value New Century Group's silica sand input in the Preliminary Determination.<sup>24</sup> This HTS heading was identified by New Century Group itself as well as Petitioner as the category under which imports of its silica sand input would be classified.<sup>25</sup>

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<sup>19</sup> See Verification Report at Exhibit 4; see also Memorandum from Rebecca Pandolph, International Trade Analyst, Office 4 Antidumping and Countervailing Duty Operations through Howard Smith, Program Manager, Office 4, Antidumping and Countervailing Duty Operations to the file "Antidumping Duty Investigation of Silica Bricks and Shapes from the People's Republic of China: Factor Valuation Memorandum," dated June 13, 2013 at Attachment 1.

<sup>20</sup> See November 15, 2012 "Petition for the Imposition of Antidumping Duties: Silica Bricks and Shapes from the People's Republic of China," at 8.

<sup>21</sup> See Tapered Roller Bearings and Parts Thereof Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 3987 (January 22, 2009) ("TRBs/PRC (January 2009)"), and accompanying Issues and Decision Memorandum at Comment 6; see also Laminated Woven Sacks from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 35646 (June 24, 2008), and accompanying Issues and Decision Memorandum at Comment 2, Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Review, 73 FR 14216 (March 17, 2008), and accompanying Issues and Decision Memorandum at Comment 6, Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 47587 (August 14, 2008), and accompanying Issues and Decision Memorandum at Comment 4, Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008), and accompanying Issues and Decision Memorandum at Comment 10.

<sup>22</sup> See TRBs/PRC (January 2009), and accompanying Issues and Decision Memorandum at Comment 7.

<sup>23</sup> Id.

<sup>24</sup> See Preliminary Determination SV Memo at 1.

<sup>25</sup> See New Century Group's March 13, 2013 submission at Exhibit 4 and Petitioner's November 26, 2012 submission at Exhibit 5.

Therefore, we have continued to value silica sand using the same, unadjusted HTS category that was used to value silica sand in the Preliminary Determination.

With regard to Petitioner's claim that the information relied upon by the New Century Group (e.g., the U.S. Geological Survey) was submitted after the deadline for submitting new information, we note that the information was not submitted independently by the New Century Group but was collected by the Department at verification and included as a verification exhibit and is, thus, properly on the record.

#### **Comment 4: Iron Scale Surrogate Value**

##### *New Century Group's Argument:*

- As explained at verification, due to a mistranslation, one input was identified as iron phosphate; however the material certificates for the input show it does not contain phosphate. The input is actually iron scale which contains iron and slag and which is a waste product from the production of steel.
- The correct SV for iron scale is derived from imports under HTS heading 2619.00 "Slag, Dross (Other Than Granulated Slag), Scalings And Other Waste From The Manufacture Of Iron Or Steel."

##### *Petitioner's Rebuttal Argument:*

- New Century Group has not offered sufficient support for the Department to alter its preliminary determination concerning iron scale. It is unclear whether HTS heading 2619.00 is the proper classification for this input, and the Department's Verification Report is silent on this HTS classification issue.

#### **Department's Position:**

As part of the minor corrections presented at verification, New Century Group explained that the input reported as iron phosphate powder should have been reported as iron scale. Officials explained that this error occurred because the wrong Chinese character was used in the documents maintained by New Century Group's unaffiliated producer and by the suppliers of its iron scale.<sup>26</sup> In support of this explanation New Century Group provided the certificate of analysis for purchases of this input during the POI showing the chemical composition of the input.<sup>27</sup> This certificate of analysis supports New Century Group's description of the input.<sup>28</sup> Petitioner, in its rebuttal brief, provided no evidence or argument as to why the record is unclear concerning this matter, or as to why the evidence is insufficient to support a change in the Department's preliminary decision concerning this input. Furthermore, New Century Group stated that the iron scale input is "purely the dregs and waste product containing iron and slag

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<sup>26</sup> See Verification Report at 2.

<sup>27</sup> *Id.* at Exhibit FOP-3.

<sup>28</sup> This information is proprietary. For details regarding this proprietary information, see memorandum from Jonathan Hill, International Trade Compliance Analyst to the File "Proprietary Information Relating to Issues in the November 20, 2013, Issues and Decision Memorandum," dated concurrently with this memorandum ("BPI Memorandum") at Note 1.

from the production of steel.” This claim by New Century group is also unchallenged by Petitioner, and the record does not include any evidence to the contrary. Therefore, based on the record and the analysis above, the Department has used HTS heading 2619.00 for “Slag, Dross (Other Than Granulated Slag), Scalings And Other Waste From The Manufacture Of Iron Or Steel)” to value the iron scale input in the final determination. This is the correct HTS heading for iron scale because it is consistent with the description of the product provided at verification (i.e., the input is a byproduct from steel production).<sup>29</sup>

#### **Comment 5: Natural Gas Surrogate Value**

##### *New Century Group’s Argument:*

- New Century Group’s unaffiliated producer is an industrial consumer which has natural gas delivered via a pipeline. Thus, the Department should use the Gas Authority of India, Ltd.’s (“GAIL”) industrial rate or the Ukrainian price in an International Gas Union Report to value natural gas rather than Ukrainian GTA data which are distorted due to the inclusion of residential, commercial, and industrial rates for gas delivered in cylinders or canisters. This is in keeping with Department practice to use prices more specific to the product consumed.<sup>30</sup>
- The International Gas Union Report indicates that the average wholesale price for natural gas in Ukraine is significantly lower than the value from GTA data used in the Preliminary Determination and reports prices adjusted for variations in modes of transportation (i.e., whether by canister or pipeline). Also, evidence supports concluding that New Century Group’s unaffiliated producer purchases natural gas at a “citygate” price, which is the price of natural gas that is pumped from interstate or intrastate pipelines to a local utility company. These facts show that the Ukrainian GTA price for natural gas does not reflect the appropriate industrial rates for natural gas.

##### *Petitioner’s Rebuttal Argument:*

- The Department should continue to use GTA import data to calculate the SV for natural gas. Contrary to New Century Group’s allegation the GTA data are not distorted. Ukraine’s National Commission for Energy Regulation and Ukraine’s Energy and Coal Industry Minister identified natural gas prices, including prices for industrial consumers,<sup>31</sup> that are consistent with the SV for natural gas used in the Preliminary Determination.
- The International Gas Union Report referenced by the New Century Group contains wholesale prices for 2010, thus these prices are not contemporaneous with the POI. Also, the Ukrainian price in the International Gas Union Report is represented by a bar chart which does not clearly identify the exact price.
- New Century Group’s definition of “citygate” price shows that it is likely a price for a utility, not a factory. Moreover, the International Gas Union Report indicates that its wholesale

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<sup>29</sup> See Verification Report at 2.

<sup>30</sup> See Certain Oil Country Tubular Goods from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 2035 (April 19, 2010), and accompanying Issues and Decision Memorandum at Comment 25.

<sup>31</sup> See Letter from Petitioner Responding to May 6, 2013 Comments Concerning Surrogate County Values, dated May 16, 2013.

prices could be “citygate” prices in countries with no imports or exports. However, Ukraine is a significant importer of natural gas. Hence, “citygate” prices are irrelevant here. In fact, the International Gas Union Report indicates that it is more likely that the Ukrainian wholesale price from the report is a “border” price.<sup>32</sup>

### **Department’s Position:**

The Department has continued to use GTA import data to calculate the SV for natural gas. In selecting SVs for factors of production, section 773(c)(1) of the Tariff Act of 1930, as amended (the “Act”) directs the Department to use the “best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administrating authority.” In determining the “best available information,” it is the Department’s practice to consider a number of factors, including: (1) whether the information represents a broad market average; (2) public availability; (3) product specificity; (4) tax and duty exclusivity; and (5) contemporaneity of the data.<sup>33</sup> We have determined that the GTA import data best satisfies these criteria when compared to the other SV data advocated by the New Century Group.

As an initial matter, the GAIL data referred to by New Century Group are data pertaining to India.<sup>34</sup> Pursuant to 19 CFR 351.408(c)(2), the Department “normally will value all factors in a single surrogate country.” The Court of International Trade (“CIT”) has also upheld this practice, stating that “the court must treat seriously the Department’s preference for a single surrogate country.”<sup>35</sup> In its opinion, the CIT explained that the preference for using a single surrogate country is reasonable because it “limits the amount of distortion introduced into the calculation.”<sup>36</sup> Therefore, it is the Department’s preference to select data from the primary surrogate country.<sup>37</sup> As Ukraine is the primary surrogate country and we have usable data from Ukraine to value natural gas, we have decided not to value natural gas based on GAIL data.

Next we compared the Ukrainian GTA data with data from the International Gas Union Report. Both data sources are publically available. The Ukrainian GTA data are broad averages because they are based on country-wide imports for the POI. The wholesale prices from the International Gas Union Report appear to be based on a survey of specific entities that are members of the International Gas Union; however it is not clear how many entities participated in the survey nor

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<sup>32</sup> See Letter from New Century regarding Post-Prelim Surrogate Value Comments, dated July 30, 2013 at Exhibit 1 at 8.

<sup>33</sup> See Fresh Garlic from the People’s Republic of China: Final Results of the 2009-2010 Administrative Review of the Antidumping Duty Order, 77 FR 34346, (June 11, 2012), and accompanying Issues and Decision Memorandum at Comment 4.

<sup>34</sup> See Letter from Respondent regarding Section C&D Questionnaire Response dated March 13, 2013, at 103

<sup>35</sup> See, e.g., Clearon Corp. v. United States, 2013 CIT LEXIS 27, Slip Op. 13-22, Ct. No. 08-00364 (February 20, 2013) at 12.

<sup>36</sup> Id at 13 and 20.

<sup>37</sup> See, e.g., Peer Bearing Co. Changshan v. United States, 804 F.Supp.2d 1337, 1353 (CIT 2011) (citation omitted) (“the preference for use of data from a single surrogate country could support a choice of data as the best available information where the other available data ‘upon a fair comparison, are otherwise seen to be fairly equal.’”); see also Bristol Metals L.P. v. United States, 703 F.Supp.2d 1370, 1374 (CIT 2010).

is it clear whether the wholesale prices are representative of broad market prices.<sup>38</sup> Also, as noted by Petitioner, the Ukrainian wholesale natural gas price taken from the International Gas Union Report is based upon data collected in 2010<sup>39</sup> whereas the GTA data are for the POI (April 1, 2012, through September 30, 2012). Further, the record does not clearly indicate that the wholesale prices from the International Gas Union Report are necessarily more specific to the natural gas being valued than GTA data in terms of method of delivery or type of purchaser. While the New Century Group claims that the GTA data are not specific because they are for natural gas delivered in canisters whereas its unaffiliated producer receives natural gas via a pipeline, the International Gas Union report indicates that its wholesale prices could include border prices.<sup>40</sup> Thus the evidence does not demonstrate that such prices exclude gas delivered in canisters or that such prices are limited to gas delivered via a pipeline. The International Gas Union Report noted that, within each country, gas consumption can come from both domestic production or imports by pipeline or liquefied natural gas.<sup>41</sup> In fact, the International Gas Union Report stated that in countries where gas is imported, the wholesale price could typically be a border price.<sup>42</sup> Ukraine is an importer of gas. Moreover, the International Gas Union Report noted that the definition of wholesale prices is wide and could include wellhead or city-gate prices. The record indicates that wellhead prices are wholesale natural gas prices at the point of production while city-gate prices are prices at “the point where natural gas is transferred from an interstate or intrastate pipeline to a local natural gas utility.”<sup>43</sup> Neither of these definitions indicates that these are the prices to industrial consumers. For all these reasons the Department finds that the record evidence does not support concluding that the wholesale natural gas prices from the International Gas Union Report are more specific to industrial consumers such as New Century Group’s unaffiliated producer. Given the above, we have continued to value natural gas using GTA data.

### **Comment 6: Brokerage and Handling Surrogate Value**

#### *New Century Group’s Argument:*

- The Department should not assign an SV to domestic brokerage and handling or separately deduct this expense from U.S. price because domestic brokerage and handling costs were included in the U.S. dollar international freight fees that the New Century Group was charged and that it reported in the field INTNFRU. By deducting both the amount reported in the INTNFRU field and surrogate domestic brokerage and handling expenses from U.S. prices, the Department double-counted brokerage and handling costs in the Preliminary Determination.

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<sup>38</sup> See Letter from New Century regarding Post-Prelim Surrogate Value Comments, dated July 30, 2013, at Exhibit 1 at 8. Additionally, New Century Group did not explain or otherwise support what price it used to derive the Ukrainian price.

<sup>39</sup> Id. at Exhibit 1 at 15.

<sup>40</sup> Id. at Exhibit 1 at 8, 9, and 15.

<sup>41</sup> Id. at Exhibit 1 at 8.

<sup>42</sup> Id.

<sup>43</sup> Id. at Exhibit 2.

### *Petitioner's Rebuttal Argument*

- The Department should continue to assign an SV to domestic brokerage and handling expenses. There is no support for New Century Group's argument.
- Section 773(c)(1) of the Act requires the Department to value factors of production in NME cases using SVs, regardless of whether the cost was paid in U.S. dollars, rather than valuing factors of production using a respondent's NME costs.

### **Department's Position:**

We agree with the New Century Group that brokerage and handling costs were included in the market economy international freight charges reported to the Department. At verification, the Department examined New Century Group's records and found that "{t}he service contract states that domestic brokerage and handling expenses are included in the charge for international freight. Additionally, the freight payment contract separately lists brokerage and handling as one of the items included in the total amount that {was} paid in U.S. dollars." <sup>44</sup>

In the Preliminary Determination we subtracted brokerage and handling costs from the U.S. sales price. However, based on the above analysis, brokerage and handling costs were included in the market economy international freight charges subtracted from the U.S. price. Therefore, for the final determination, in order to avoid double counting the brokerage and handling expense, we did not separately subtract brokerage and handling charges, based on an SV, from U.S. price.

### **Comment 7: Facts Available for New Century Group's Unreported U.S. Sales**

#### *New Century Group's Argument:*

- New Century Group inadvertently overlooked reporting certain sales which were discovered at verification; however the sales account for a small percentage of total reported sales and thus no margin need be assigned to these sales. However, if a dumping margin is assigned to these sales, as facts available, the Department should assign the weighted-average dumping margin of all of New Century Group's reported and verified sales. An adverse inference should not be used in assigning a dumping margin to the unreported sales.
- None of the statutory criteria for using adverse facts available (i.e., withholding information, failing to provide information on time or in the requested manner, significantly impeding a proceeding, providing information that cannot be verified) are applicable here. New Century Group has fully cooperated throughout the proceeding and at verification by providing full and complete responses; thus a minor omission does not constitute failure to provide information requested by the Department. The minor omission did not significantly impede the proceeding because the Department was able to calculate a weighted-average dumping margin for the Preliminary Determination and to complete verification. The unreported sales information was fully verifiable.

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<sup>44</sup> See Verification Report at 22.

### *Petitioner's Rebuttal Argument*

- The Department should follow its practice and use an adverse inference with respect to the unreported sales.

### **Department's Position:**

After considering the arguments on this issue, we find that it is appropriate to assign a dumping margin to New Century Group's unreported sales based on adverse facts available, in accordance with section 776(a) of the Act. Section 776(a) of the Act provides that, if necessary information is not available on the record or if an interested party (1) withholds information that has been requested by the Department, (2) fails to provide such information by the deadlines established, or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act, (3) significantly impedes the proceeding, or (4) provides such information but the information cannot be verified, the Department shall use, subject to section 782(d) of the Act, the facts otherwise available in reaching the applicable determination. Further, pursuant to section 776(b) of the Act, the Department may use information that is adverse to the interest of that party when the party fails to cooperate by not acting to the best of its ability in responding to the Department's request for information.<sup>45</sup>

The antidumping duty questionnaire requires that a respondent report all U.S. sales relevant to the investigation.<sup>46</sup> During the course of the verification of the U.S. sales information submitted by the New Century Group, the Department discovered that New Century Group did not report all of its U.S. sales.<sup>47</sup> New Century Group explained that it failed to report these sales because "the customer in this transaction normally does not buy the merchandise under consideration, but, for this sale, it had purchased some of the merchandise under consideration for testing purposes."<sup>48</sup> Upon discovering these unreported sales, the Department reviewed the invoices for these sales at verification.<sup>49</sup> In addition, the Department also reviewed other records with company officials at verification to ensure that there were no additional unreported U.S. sales.<sup>50</sup>

By not reporting all of its U.S. sales prior to verification, the New Century Group withheld requested information and failed to provide information within the deadlines established, as required by section 776(a) of the Act. Although the New Century Group argues that a minor omission cannot be viewed as withholding information in light of all of the other information that it provided, the fact remains that the New Century Group did not provide requested information and thus necessary information is not on the record. Further, as evident by the Department's ability to review the invoices specific to the unreported U.S. sales at verification, it is clear that New Century Group possessed the necessary records to provide the Department with a complete U.S. sales list prior to verification.<sup>51</sup> Also, New Century Group argues that the

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<sup>45</sup> See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) ("Nippon").

<sup>46</sup> See questionnaire issued to New Century on January 15, 2013, at Section C. II. ("prepare a separate computer data file containing each sale made during the POI of the merchandise under consideration").

<sup>47</sup> See Verification Report at 19.

<sup>48</sup> *Id.* at 19-20.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 20.

<sup>51</sup> *Id.* at 19-20.

unreported sales were fully verifiable. However, the purpose of verification is to verify the accuracy of information previously submitted to the record by the respondent, not to collect new sales information that had been previously requested but not reported.<sup>52</sup> Therefore, while the Department reviewed the invoices for the unreported sales at verification, the Department did not verify information regarding these sales (e.g., price adjustments).

The New Century Group believes that no dumping margin need be assigned to these unreported sales because they are such a small percentage of total reported U.S. sales. However, prior to verification the New Century Group never requested that the Department exclude these sales from its margin calculation or showed that these sales involved exceptional circumstances such that they constitute one of the limited situations where the Department would exclude U.S. sales from its analysis. Furthermore, simply ignoring these sales would provide no incentive for respondents to fully cooperate by reporting all of their U.S. sales. Thus, for the reasons explained above, we find that necessary information is missing from the record and it is appropriate to rely on facts available in determining a dumping margin for the unreported sales pursuant to section 776(a) of the Act.

Additionally, we find that New Century Group failed to cooperate by not acting to the best of its ability to comply with our request for information because it failed to report all of its U.S. sales of the merchandise under consideration during the POI. In Nippon, the United States Court of Appeals for the Federal Circuit (“CAFC”) noted that while the statute does not provide an express definition of the “failure to act to the best of its ability” standard, the ordinary meaning of “best” is “ones maximum effort.” Thus, according to the CAFC, the statutory mandate that a respondent act to the “best of its ability” requires the respondent to do the maximum it is able to do. The CAFC indicated that inadequate responses to an agency’s inquires would suffice to find that a respondent did not act to the best of its ability. While the CAFC noted that the “best of its ability” standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping. New Century Group explained that it failed to report the sales in question because “the customer in this transaction normally does not buy the merchandise under consideration, but, for this sale, it had purchased some of the merchandise under consideration for testing purposes.”<sup>53</sup> By reporting U.S. sales based on knowledge of customers’ typical purchases rather than thoroughly examining sales records, New Century Group did not do the maximum it was able to do to report all of its U.S. sales of the merchandise under consideration. Thus, we have determined that the New Century Group failed to cooperate by not acting to the best of its ability to comply with our request for information.

Because New Century Group failed to cooperate to the best of its ability in this regard, we find that the use of information that is adverse to its interests as facts otherwise available is appropriate pursuant to section 776(b) of the Act.<sup>54</sup> Therefore, we assigned, as partial adverse

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<sup>52</sup> See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review, 76 FR 22871 (April 25, 2011), and accompanying Issues and Decision Memorandum at Comment 4.

<sup>53</sup> See Verification Report at 19-20.

<sup>54</sup> See, e.g., Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006), and accompanying Issues and Decision Memorandum at Comment 8; Notice of Final Determination of Sales at Less

facts available, a dumping margin to the unreported U.S. sales equal to the highest transaction specific rate calculated for the final determination. This is consistent with Department practice regarding unreported sales.<sup>55</sup>

### **Comment 8: Value Added Tax**

#### *New Century Group's Argument:*

- As demonstrated during verification, New World paid a value added tax (“VAT”) at a rate of 2.16 percent. The Department should utilize this VAT rate in deducting VAT from U.S sales prices.

#### *Petitioner's Rebuttal Argument*

- The Department should use its best judgment in determining whether the VAT reported by New Century Group at verification is accurate and substantiated.

### **Department's Position:**

The Department disagrees with New Century Group's proposed per-unit VAT rate adjustment for the U.S. sales price. Due to the proprietary nature of this issue, a detailed explanation of the Department's position has been included in a memorandum regarding “Value Added Tax Adjustment to U.S. Sales Price.”<sup>56</sup>

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Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Brazil, 67 FR 62134 (October 3, 2002), and accompanying Issues and Decision Memorandum at Comment 1 (in both cases the Department relied on adverse facts available to establish a margin for unreported U.S. transactions).

<sup>55</sup> See Certain Lined Paper Products From India: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 22232, 22233 (April 15, 2013).

<sup>56</sup> See Memorandum from Christian Marsh, Deputy Assistant Secretary, Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary, Enforcement and Compliance, “Value Added Tax Adjustment to U.S. Sales Price,” dated November 20, 2013.

**RECOMMENDATION:**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of this investigation and the final weighted-average dumping margins in the Federal Register.

AGREE ✓

DISAGREE \_\_\_\_\_

  
Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

20 NOVEMBER 2013  
Date