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

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

SUBJECT: Issues and Decision Memorandum for the Final Affirmative
Determination in the Less-Than-Fair-Value Investigation of
Ceramic Tile from the People's Republic of China

I. SUMMARY

The Department of Commerce (Commerce) finds that ceramic tile from the People's Republic of China (China) is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is October 1, 2018 through March 31, 2019. The mandatory respondents subject to this investigation are Belite¹ and Foshan Sanfi Import & Export Co., Ltd. (Foshan Sanfi).

After analyzing the comments submitted by interested parties, we made changes to the *Preliminary Determination* with respect to Belite and Foshan Sanfi.² Below is the complete list of the issues in this investigation for which we received comments from interested parties:

Comment 1: Separate Rate Status of Belite
Comment 2: Separate Rate Status of Foshan Sanfi
Comment 3: Calculation of the Separate Rate
Comment 4: Other Issues

¹ We have collapsed Belite Ceramics (Anyang) Co., Ltd., Beilitai (Tianjin) Tile Co., Ltd. (Beilitai) and Tianjin Honghui Creative Technology Co., Ltd., collectively hereafter referred to as Belite. See Memorandum, "Investigation of Ceramic Tile from the People's Republic of China: Affiliation and Collapsing of Belite Ceramics (Anyang) Co., Ltd., Beilitai (Tianjin) Tile Co., Ltd., and Tianjin Honghui Creative Technology Co., Ltd.," dated November 6, 2019.

² See *Ceramic Tile from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Negative Critical Circumstances Determination, and Postponement of Final Determination*, 84 FR 61877 (November 14, 2019) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM); see also *Ceramic Tile from the People's Republic of China: Notice of Correction to the Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 84 FR 68114 (December 13, 2019) (*Correction to the Preliminary Determination*).

After analyzing the comments submitted by interested parties, we made changes to the *Preliminary Determination* as noted below in the “Discussion of the Issues” section of this memorandum.

II. BACKGROUND

On November 14, 2019, Commerce published in the *Federal Register* its preliminary affirmative determination in the LTFV investigation of ceramic tile from China. We invited parties to comment on the *Preliminary Determination*. On November 22, 2019, Foshan Sanfi withdrew from participation in verification.³ Between December 2 through 6, 2019, we conducted verification of Belite.⁴ On January 14, 2020, Belite,⁵ the separate rate companies,⁶ and the petitioner⁷ filed case briefs. On January 21, 2020, Belite,⁸ the SR Companies,⁹ and the petitioner¹⁰ filed rebuttal briefs.

III. SCOPE COMMENTS

During the course of this investigation Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope case and rebuttal briefs.¹¹ We address parties’ comments in the memorandum “Ceramic Tile from the People’s Republic of China: Scope Decision Memorandum for the Final Determinations,” dated concurrently with this memorandum. Based on our analysis of interested parties’ comments we have made no changes to the language of the scope.

³ See Foshan Sanfi’s Letter, “Ceramic Tile from the People’s Republic of China – Notice of Intention Not to Participate in Verification,” dated November 22, 2019 (Foshan Sanfi’s Withdrawal Letter).

⁴ See Memorandum, “Verification of the Questionnaire Responses of Belite Ceramics (Anyang) Co., Ltd. (Belite), in the Antidumping Investigation of Ceramic Tile from the People’s Republic of China,” dated January 6, 2020 (Belite Verification Report).

⁵ See Belite’s Letter, “Belite’s Case Brief in the Antidumping Duty Investigation on Ceramic Tile from the People’s Republic of China,” dated January 14, 2020 (Belite’s Brief).

⁶ The separate rate companies are Quanzhou Lans Ceramic Products Co., Ltd., Yekalon Industry Inc., and Soho Studio Corp. (collectively, SR Companies). See SR Companies’ Letter, “GDLSK Respondents Case Brief in the Antidumping Duty Investigation on Ceramic Tile from the People’s Republic of China,” dated January 14, 2020 (SR Companies’ Brief).

⁷ The petitioner is The Coalition for Fair Trade in Ceramic Tile. See Petitioner’s Letter, “Antidumping Duty Investigation of Certain Tile from the People’s Republic of China: Petitioner’s Case Brief,” dated January 14, 2020 (Petitioner’s Brief).

⁸ See Belite’s Letter, “Belite’s Rebuttal Brief in the Antidumping Duty Investigation of Ceramic Tile from the People’s Republic of China,” dated January 21, 2020.

⁹ See SR Companies’ Letter, “GDLSK Respondents Rebuttal Brief in the Antidumping Duty Investigation on Ceramic Tile from the People’s Republic of China,” dated January 21, 2020 (SR Companies’ Rebuttal Brief).

¹⁰ See Petitioner’s Letter, “Antidumping Duty Investigation of Certain Tile from the People’s Republic of China: Petitioner’s Rebuttal Case Brief,” dated January 21, 2020 (Petitioner’s Rebuttal Brief).

¹¹ See Memorandum, “Ceramic Tile from the People’s Republic of China: Scope Comments Decision Memorandum for the Preliminary Determinations,” dated September 6, 2019 (Preliminary Scope Memorandum), issued concurrently with *Ceramic Tile from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 84 FR 48125 (September 12, 2019), and accompanying PDM.

IV. SCOPE OF THE INVESTIGATION

The product covered by this investigation is ceramic tile. For a complete description of the scope of the investigation, *see* this memorandum's accompanying *Federal Register* notice at Appendix I.

V. CHINA-WIDE RATE

For the final determination, we continue to base the China-wide rate on adverse facts available (AFA). Consistent with sections 776(b)(2) and 776(d)(2) of the Act, in an investigation, Commerce's practice with respect to the assignment of an AFA rate is to select the higher of: (1) the highest dumping margin alleged in the petition; or (2) the highest calculated dumping margin of any respondent in the investigation.¹² In selecting the AFA rate for the China-wide entity, Commerce's practice is to select a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.¹³ In the *Preliminary Determination*, Commerce used as the China-wide dumping margin the rate of 356.02 percent, which was the highest petition rate,¹⁴ which was corroborated by Belite's highest calculated transaction-specific dumping margin.¹⁵ As discussed below in Comment 1, we find that Belite is a part of the China-wide entity for the final determination based on certain findings at verification with respect to Belite's separate rate information. However, there were no findings with respect to Belite's reported sales and factors of production (FOP) information.¹⁶ Therefore, we continue to find that Belite's sales and FOP information are reliable for purposes of corroborating the rate assigned to the China-wide entity. As such, we continue to rely on Belite's highest calculated transaction-specific dumping margin for corroboration with respect to the China-wide rate for the final determination.

VI. ADJUSTMENT TO CASH DEPOSIT RATE FOR EXPORT SUBSIDIES

In antidumping duty (AD) investigations where there is a concurrent countervailing duty (CVD) investigation, it is Commerce's normal practice to calculate the cash deposit rate for each respondent by adjusting the respondent's weighted-average dumping margin to account for export subsidies found for each respective respondent in the concurrent countervailing duty investigation. Doing so is in accordance with section 772(c)(1)(C) of the Act, which states that U.S. price "shall be increased by the amount of any countervailing duty imposed on the subject merchandise... to offset an export subsidy."¹⁷

¹² *See, e.g., Certain Uncoated Paper from Indonesia: Final Determination of Sales at Less Than Fair Value*, 81 FR 3101 (January 20, 2016).

¹³ *See, e.g., Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 85 FR 11953, 11954 (February 28, 2020).

¹⁴ *See Preliminary Determination PDM* at 21 – 22.

¹⁵ *Id.*

¹⁶ *See, generally*, Belite Verification Report. Moreover, the fact that data is reliable for corroboration does not make it reliable for other purposes. *See, e.g., Papierfabrik August Koehler S.E. v. United States*, 7 F. Supp. 3d 1304, 1316 n.8 (CIT 2014).

¹⁷ *See Carbazole Violet Pigment 23 from India: Final Results of Antidumping Duty Administrative Review*, 75 FR 38076, 38077 (July 1, 2010), and accompanying Issues and Decision Memorandum (IDM) at Comment 1.

In the *Preliminary Determination*, we made this adjustment for Belite, Foshan Sanfi, the SR Companies, and the China-wide entity because each benefitted from certain subsidy programs contingent on exports, totaling 10.54 percent.¹⁸ For this final determination, we have continued to adjust the AD cash deposit rates for the SR Companies and the China-wide entity to account for export subsidies found for each company in the concurrent CVD investigation. We find that the export subsidy adjustment of 25.33 percent is warranted because this is the export subsidy rate included in the CVD all-others rate.¹⁹

VII. CRITICAL CIRCUMSTANCES

Section 735(a)(3) of the Act provides that Commerce will determine that critical circumstances exist in an LTFV investigation if: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at LTFV and that there was likely to be material injury by reason of such sales; and (B) there have been massive imports of the subject merchandise over a relatively short period. Further, 19 CFR 351.206 provides that imports must increase by at least 15 percent during the “relatively short period” to be considered “massive,” and defines a “relatively short period” as normally being the period beginning on the date the proceeding begins (*i.e.*, the date the petition is filed) and ending at least three months later.²⁰ The regulation also provides, however, that if Commerce finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, Commerce may consider a period of not less than three months from that earlier time.²¹

We continue to find that, while Commerce previously has not imposed an AD order on the subject merchandise, there exists several orders on Chinese ceramic tile in other countries, notably the European Union, India, South Korea, Mexico, and Pakistan,²² and therefore, we found a history of injurious dumping of the subject merchandise, pursuant to section 735(a)(3)(A)(i) of the Act.²³

We continue to find that, because we have found a history of dumping and material injury by reason of dumped ceramic tile under section 735(a)(3)(A)(i) of the Act, it is not necessary to determine whether importers knew or should have known that exporters were selling the subject merchandise at less than fair value, pursuant section 735(a)(3)(A)(ii) of the Act.²⁴

Pursuant to section 735(a)(3)(B) of the Act, as well as 19 CFR 351.206(h), Commerce will not consider imports to be massive unless imports during a relatively short period (comparison period) have increased by at least 15 percent over imports in an immediately preceding period of

¹⁸ See *Preliminary Determination* PDM at 34 – 35.

¹⁹ We deducted the subsidy rates from the concurrent CVD final determination with respect to the Export Buyer’s Credit Program, Export Seller’s Credit Program and Export Credit Insurance Subsidies from SINOSURE.

²⁰ See 19 CFR 351.206(i).

²¹ *Id.*

²² See Petitioner’s Letter, “Ceramic Tile from the People’s Republic of China: Petitioner’s Allegation of Critical Circumstances,” dated August 16, 2019 (CC Allegation), at 5.

²³ See *Preliminary Determination* PDM at 7.

²⁴ *Id.*

comparable duration (base period). Commerce normally considers the comparison period to begin on the date that the proceeding began (*i.e.*, the date the petition was filed) and to end at least three months later.²⁵

We have continued to rely on the largest possible periods by comparing the period December 2018 to April 2019 (*i.e.*, the base period), with the period May to September 2019 (*i.e.*, the comparison period), to determine whether imports of subject merchandise were massive, and found that Belite's and Foshan Sanfi's U.S. imports did not increase by 15 percent from the base to the comparison period.²⁶ However, as discussed further in Comments 1 and 2 below, we now find that Belite and Foshan Sanfi are a part of the China-wide entity.

In the *Preliminary Determination*, we found that that the information provided in the critical circumstances allegation did not show that imports of subject merchandise were massive during a relatively short period.²⁷ With respect to the China-wide entity, however, we erred in relying on the data provided in the critical circumstances allegation. Consistent with our practice,²⁸ for this final determination, we find that imports of subject merchandise for the China-wide entity were "massive" over a "relatively short period," as AFA, based on the China-wide entity's failure to cooperate by not acting to the best of its ability to comply with requests for information.²⁹ In light of the dumping margins and the massive surge in imports, we find that for this final determination critical circumstances exist for imports of ceramic tile from the China-wide entity pursuant to sections 735(a)(3)(A) and (B) of the Act and 19 CFR 351.206. With respect to the SR Companies, we continue to find that the U.S. Census Bureau data provided by the petitioner in the CC Allegation³⁰ does not show that imports of subject merchandise were massive during a relatively short period, and that critical circumstances do not exist for imports of ceramic tile from the SR Companies pursuant to sections 735(a)(3)(A) and (B) of the Act and 19 CFR 351.206.

VIII. DISCUSSION OF THE ISSUES

Comment 1: Separate Rate Status of Belite

Petitioner's Comments

- In the separate rate application (SRA), Commerce asked Belite whether the individual owners of Belite's ultimate shareholding entity held office at any level of the Chinese

²⁵ See 19 CFR 351.206(i).

²⁶ See *Preliminary Determination* PDM at 8.

²⁷ *Id.*

²⁸ See, e.g., *Mattresses from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances, in Part*, 84 FR 56761 (October 23, 2019), and accompanying IDM at Comment 1.

²⁹ See *Preliminary Determination* PDM at 20 – 21.

³⁰ *Id.*; see also CC Allegation.

government during the past three years,³¹ and Belite stated that they had not.³² This statement is unequivocally false.

- When considering whether membership in the government demonstrates a lack of *de facto* independence, Commerce is guided by the Court of International Trade's (CIT) decision in *Jiangsu Jiasheng 2014*.³³ In that case, the CIT considered a situation where companies' senior managers/board of directors were members of the National People's Congress (NPC), and concluded that while those facts alone were not dispositive of the *de facto* autonomy inquiry, they do speak to the "*possibility* for governmental control over export activities through these persons."³⁴ In that case, while Commerce granted those respondents separate rates, it did so only after issuing supplemental questionnaires, and those questions were answered to Commerce's satisfaction.³⁵
- Commerce has on other occasions found that the standard laid out in *Jiangsu Jiasheng 2014* was satisfied. In *Brake Rotors*, for example, Commerce considered a situation where there was significant overlap between shareholders and members of a local government village committee.³⁶ Based on a number of factors - including the control of the village committee over personnel decisions, profit distribution, and contract negotiations - Commerce found that the committee was "inextricably involved in export-related decisions" of the company, and therefore, denied it a separate rate.³⁷
- Belite is distinguishable from the respondents in *Jiangsu Jiasheng 2014*. Belite was unequivocally dishonest about Mr. X's³⁸ government position in a People's Committee, *i.e.*, legislature. By failing to disclose this information to Commerce until verification, Belite impeded the ability of both Commerce and the petitioner to pursue the type of analysis that Commerce conducted in *Jiangsu Jiasheng 2014* and *Brake Rotors*. Commerce was never able to ask follow-up inquiries regarding Mr. X's government position, including questions about whether the government was involved in Belite's export pricing, personnel decisions, profit distribution, or contract negotiations.³⁹
- Belite's belated explanation at verification that Mr. X does not receive a salary, and thus is not a public servant, is not compelling.⁴⁰ Commerce's SRA asked Belite whether any of the

³¹ See Petitioner's Brief at 4, citing Belite's Letter, "Separate Rate Application for Belite Ceramics (Anyang) Co., Ltd. Antidumping Duty Investigation on Ceramic Tile from the People's Republic of China," dated June 7, 2019 (Belite's SRA). Beilitai also submitted an SRA with identical information. See Beilitai's Letter, "Beilitai Tianjin Separate Rate Application in the Antidumping Duty Investigation on Ceramic Tile from the People's Republic of China," dated June 7, 2019. Honghui, the third company in the collapsed Belite entity, is not an exporter, and therefore, did not submit a SRA.

³² *Id.* at 3, citing Belite's SRA at 19.

³³ *Id.* at 6, citing *Jiangsu Jiasheng Photovoltaic Tech. Co., Ltd. v. United States*, 28 F. Supp. 3d 1317 (CIT 2014) (*Jiangsu Jiasheng 2014*).

³⁴ *Id.*, citing *Jiangsu Jiasheng 2014*, 28 F. Supp. 3d 1348.

³⁵ *Id.* at 6 – 7, citing *Jiangsu Jiasheng 2014*, 28 F. Supp. 3d 1350.

³⁶ *Id.* at 7, citing *Brake Rotors from the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937 (November 18, 2005) (*Brake Rotors*), and accompanying IDM at Comment 7.

³⁷ *Id.*, citing *Brake Rotors* at Comment 7.

³⁸ We have referred to this individual as "Mr. X" for purposes of this memorandum because the name of the individual is designated as business proprietary information. "Mr. X" refers to the individual identified in the Belite Verification Report at 3 and Verification Exhibit 3.

³⁹ *Id.* at 7 – 8, citing *Jiangsu Jiasheng 2014*, 28 F. Supp. 3d at 1350; and *Brake Rotors* IDM at Comment 7.

⁴⁰ *Id.* at 8, citing Belite Verification Report at 3 – 4.

owners of its shareholder entities “hold office at any level of the {People’s Republic of China} government” and did not make any exception for offices that are not salaried.⁴¹

- Belite’s belated explanation that members of the legislature are not government officials is also incorrect. Commerce has already concluded that members of legislatures are “government officials.” In *Graphite Electrodes*, Commerce found that membership in a legislature made a company official a “government official.”⁴²
- Because Belite did not disclose Mr. X’s role as a government official, Belite failed to cooperate to the best of its ability and significantly impeded Commerce’s investigation. For the final determination, Commerce should find, as an adverse inference, that Belite is part of the China-wide entity because it concealed the fact that Mr. X is a government official in its questionnaire responses.

Belite’s Comments

- Belite’s answers in its SRA were correct for the following reasons: (a) Mr. X has not held, and does not hold, office in the Chinese government or any government agency in the past three years; (b) is a well-known fact that the legislature has never been a government agency, and it is not part of Chinese government; and (c) the verifiers accepted a statement in a verification exhibit which states that Mr. X is not a government official, as government officials cannot be engaged in business.⁴³
- The respondents in *Graphite Electrodes*, which was cited by the petitioner in its brief, correctly stated that the NPC is a legislative body of elected representatives and it’s not an executive or administrative authority that can exercise regulatory power or exert control over the export operations of companies.⁴⁴
- In the *Preliminary Determination*, Commerce properly granted Belite separate rate status because the record evidence indicated that there was an absence of *de jure* and *de facto* control by the Chinese government over the operations of Belite.⁴⁵ This case is similar to *Graphite Electrodes* because the record there indicated that the positions in government bodies held by respondents’ managers and directors outweighed the record evidence of autonomy on the part of the respondents to set prices, negotiate and sign agreements, select management, or decide how to dispose of profits or finance losses with respect to export activities.⁴⁶ As such, Belite should continue to receive a separate rate for the final determination.

Commerce’s Position: We agree with the petitioner. For the final determination, we have denied Belite a separate rate and find that it is a part of the China-wide entity, as detailed below.

⁴¹ *Id.*, citing Belite’s SRA at 19.

⁴² *Id.* at 8 – 9, citing *Small Diameter Graphite Electrodes from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 62474 (September 9, 2016) (*Graphite Electrodes*), and accompanying IDM at Comment 1 (where Commerce concluded that members of legislatures are government officials).

⁴³ See Belite’s Brief at 2, citing Belite Verification Report 3 – 4.

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 4 – 5.

⁴⁶ *Id.* at 5 – 6.

Legal Framework – Separate Rates

Commerce considers China to be a non-market economy (NME) country under section 771(18) of the Act. In AD proceedings involving NME countries, such as China, Commerce has a rebuttable presumption that the export activities of all firms within the country are subject to government control and influence.⁴⁷ Commerce analyzes whether each entity exporting the merchandise under consideration is sufficiently independent under a test established in *Sparklers*⁴⁸ and further developed in *Silicon Carbide*.⁴⁹ According to this separate rate test, Commerce will assign a separate rate in NME proceedings if a respondent can demonstrate the absence of both *de jure* and *de facto* government control over its export activities. In determining *de facto* government control of an enterprise's export functions, Commerce examines: (1) whether the export prices are set by, or are subject to the approval of, a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses.⁵⁰ Companies which do not demonstrate an absence of both *de jure* and *de facto* government control are assigned the rate established for the China-wide entity, which applies to all imports from any exporter that has not established its eligibility for a separate rate.

The separate-rate test, where the respondent must demonstrate the absence of both *de jure* and *de facto* government control over its export activities, has been subject to litigation in the courts. In *Sigma*, the Court of Appeals for the Federal Circuit (CAFC) affirmed that it was within Commerce's authority to employ a presumption for state control in an NME country and place the burden on the exporters to demonstrate an absence of central government control.⁵¹ The CAFC found that sections 771(18)(B)(iv)-(v) of the Act recognized a close correlation between an NME economy and government control of prices, output decisions, and allocation of resources and, therefore, Commerce's presumption of government control was reasonable.⁵² In *Jiangsu Jiasheng 2015*, the CIT ruled that Commerce could "make reasonable inferences from

⁴⁷ See, e.g., *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 20197 (April 15, 2015), and accompanying IDM at Comment 1.

⁴⁸ See *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) (*Sparklers*).

⁴⁹ See *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*).

⁵⁰ See *Silicon Carbide*, 59 FR at 22586 – 89.

⁵¹ See *Sigma Corp v. United States*, 117 F. 3d 1401, 1405 – 06 (Fed. Cir. 1997) (*Sigma*) ("We agree with the government that it was within Commerce's authority to employ a presumption of state control for exporters in a non-market economy, and to place the burden on the exporters to demonstrate an absence of central government control. The antidumping statute recognizes a close correlation between a non-market economy and government control of prices, output decisions, and the allocation of resources. Moreover, because exporters have the best access to information pertinent to the 'state control' issue, Commerce is justified in placing on them the burden of showing a lack of state control.") (internal citations omitted).

⁵² *Id.*; see also *Coalition for Preservation of Am. Brake Drum & Rotor Mfrs v. United States*, 44 F. Supp. 2d 229, 243 (CIT 1999) (quoting *Sigma*, 117 F. 3d at 1405 ("Under the broad authority delegated to it from Congress, Commerce has employed 'a presumption of state control for exporters in a non-market economy'... Under this presumption, all exporters receive one non-market economy country (NME) rate, or country-wide rate, unless an exporter can 'affirmatively demonstrate' its entitlement to a separate, company-specific margin by showing 'an absence of central government control, both in law and in fact, with respect to exports'")).

the record evidence” when examining the totality of the circumstances in determining whether a respondent had demonstrated *de jure* and *de facto* control of its export activities.⁵³ The CIT recognized that majority ownership by a government entity, either directly or indirectly, precludes a respondent’s ability to demonstrate an absence of *de facto* control.⁵⁴ Commerce has previously explained why evidence of indirect or direct government ownership is a sufficient evidentiary basis on which to conclude that an NME government has the ability to exercise control over a company such that the company is ineligible for a separate rate.⁵⁵ Commerce’s application of the separate-rate test in NME cases, post-*Advanced Technology*, has developed to address circumstances where the government entity holds either majority ownership (such that the potential for control exists based on ownership alone), or where the government entity holds minority ownership, but the government might also be able to exercise, or have the potential to exercise, control of a company’s general operations through its minority ownership under certain factual scenarios.

Legal Framework – Application of AFA

Sections 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that if necessary information is not available on the record or if an interested party or any other person (1) withholds information that has been requested by Commerce; (2) fails to provide information within the established deadlines or in the form or manner requested, subject to section 782(c)(1) and section 782(e) of the Act; (3) significantly impedes a proceeding; or (4) provides information but the information cannot be verified, then Commerce shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Moreover, section 776(b) of the Act provides that, if Commerce finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information, Commerce may use an inference adverse to the interests of that party in selecting the facts otherwise available. In addition, the SAA explains that Commerce may employ an adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”⁵⁶

⁵³ See *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 121 F. Supp. 3d 1263, 1266 (CIT 2015) (*Jiangsu Jiasheng 2015*) (citing *Jiangsu Jiasheng 2014*, 28 F. Supp. 3d 1317, 1339 (quoting *Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 FR 61754, 61759 (November 19, 1997) and *Sigma*, 117 F. 3d at 1405 (citation omitted), respectively; and citing *Daewoo Elecs. Co. v. United States*, 6 F. 3d 1511, 1520 (Fed. Cir. 1993) (explaining that substantial evidence may include “reasonable inferences from the record”) (citation omitted))).

⁵⁴ See *Jiangsu Jiasheng 2015*, 121 F. Supp. 3d at 1267, citing *Advanced Technology and Materials Co. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013) (*Advanced Tech. II*), *aff’d*, 581 Fed. App’x 900 (Fed. Cir. 2014) (*Advanced Tech. III*) (“Specifically, as a result of litigation challenging Commerce’s separate rate determinations in the diamond sawblades proceedings, Commerce has clarified its practice with regard to evaluating NME companies’ *de facto* independence from government control. This revised practice, which was sustained by this Court and subsequently affirmed by the Court of Appeals, holds that ‘where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter {or producer},’ such majority ownership holding ‘in and of itself’ precludes a finding of *de facto* autonomy”).

⁵⁵ See, e.g., *Carbon and Certain Alloy Steel Wire Rod from the People’s Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances, in Part*, 79 FR 53169 (September 8, 2014), and accompanying PDM at “Separate Rates,” unchanged in *Carbon and Certain Alloy Steel Wire Rod from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 79 FR 68860 (November 19, 2014).

⁵⁶ See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103 – 316, vol. 1 (1994) (SAA) at 870.

In *Nippon Steel*, the 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 “one’s maximum effort.”⁵⁷ 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 inquiries 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.⁵⁸ The “best of its ability” standard recognizes that mistakes sometimes occur; however, it requires a respondent to, among other things, “have familiarity with all of the records it maintains,” and “conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of” its ability to do so.⁵⁹

Factual Analysis

Interested parties cite to *Jiangsu Jiasheng 2014* and *Graphite Electrodes* with respect to this issue in their briefs. We have summarized the relevant facts of these cases below. In *Jiangsu Jiasheng 2014*, the CIT found that record evidence did not show that the membership of senior managers or directors in government bodies resulted in overcoming the record evidence of autonomy on the part of the companies to set prices, negotiate and sign agreements, select management, or decide how to dispose of profits or finance losses.⁶⁰ The CIT, in *Jiangsu Jiasheng 2014*, stated the following:

Because Commerce possesses both expertise and relevant first-hand knowledge – sending follow-up questionnaires and conducting on-sight verification as needed – the court will not reweigh the evidence before the agency. Here, Commerce relied on certifications from the companies, each of which affirmed that they independently managed their own sales negotiations and set their own export prices. As needed, Commerce sent follow-up inquiries, all of which were answered to Commerce’s satisfaction. The agency’s conclusion was that, despite the systemic cross-contamination of personnel between the government and the commercial sector within the PRC, these companies exhibited sufficient localized control over their own export activities during the POI to warrant individualized rates.⁶¹

The respondents in *Jiangsu Jiasheng 2014* reported their company officials’ memberships in government bodies, and Commerce issued supplemental questionnaires on this issue, to which the respondents responded.⁶² In *Jiangsu Jiasheng 2014*, certain company officials were

⁵⁷ See *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382 – 83 (Fed. Cir. 2003) (*Nippon Steel*).

⁵⁸ *Id.* at 1382.

⁵⁹ *Id.*

⁶⁰ See *Jiangsu Jiasheng 2014*, 28 F. Supp. 3d at 1350.

⁶¹ *Id.* at 1349 – 50 (internal citations omitted).

⁶² *Id.*

members of People's Committees, which the CIT referred to as government officials.⁶³ In *Graphite Electrodes*, the respondents reported in their questionnaire responses the membership of company officials in government bodies, and Commerce issued supplemental questionnaires to these respondents, to which they responded.⁶⁴ Importantly, we found once again that legislative bodies, such as People's Committees, were government bodies.⁶⁵ In sum, in each of the above cited cases, respondents reported the membership of company officials in government bodies, and responded to supplemental questionnaires on the issue. This provided Commerce an opportunity to conduct a full analysis of whether officials holding concurrent positions in a respondent company and the government affected Commerce's *de facto* separate rates criteria. Belite's withholding of information concerning Mr. X's government position until verification precluded Commerce from conducting any such analysis in this investigation. Moreover, contrary to Belite's assertion that it is a well-known fact that Chinese legislatures are not government agencies, Commerce and the CIT have found the opposite in *Jiangsu Jiasheng 2014* and *Graphite Electrodes*.

Belite stated that Mr. X is the chairman of the board of directors, general manager, exercises day-to-day control over each of the companies comprising Belite, coordinates all business among the Belite companies, and makes final pricing decisions.⁶⁶ Unlike *Jiangsu Jiasheng 2014* and *Graphite Electrodes*, in this case Belite was entirely silent on the subject of Mr. X's government position until verification, and did not report Mr. X's government position in the relevant sections of its questionnaire responses, as required.⁶⁷ In fact, rather than reporting outright Mr. X's government position, Belite made multiple false statements in its SRA with respect to Mr. X's involvement with the government. We discuss below the multiple false assertions Belite made in its SRA.

1. Question 4.A, Section IV, of the SRA asks:

For each of the applying firm's top ten shareholders (individuals and non-individual firm or government entities) and all of their entity shareholders, at any time during period of investigation/review, report in detail any significant relationship with any of the following:

- PRC state asset management company (government-owned and/or private chartered)
- The PRC national government and/or its ministries/agencies;
- PRC provincial governments;
- PRC local/municipal/village government(s)/agency(ies).⁶⁸

⁶³ *Id.* at 1351 ("...notwithstanding the dual roles played by some company officials as both company managers and members of government...").

⁶⁴ See *Graphite Electrodes* IDM at Comment 1.

⁶⁵ *Id.*; see also *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 76970 (December 23, 2014), and accompanying IDM at Comment 6.

⁶⁶ See Belite's October 1, 21019 submission at 9.

⁶⁷ See, generally, Belite's SRA.

⁶⁸ See, e.g., Belite's SRA at question 4.A.

Belite made no mention of Mr. X in response to this question.⁶⁹ In fact, question 4.A goes so far as to define a significant relationship as to include “ownership, control, affiliation, significant transactions, *etc.*,” which would clearly include Mr. X, as he is a government official who owns and controls the companies comprising Belite.⁷⁰

Moreover, in response to a supplemental question regarding a minority shareholder that is a state owned enterprise, when discussing managers and directors, Belite stated the answers in its SRA were based on its own definition of “relationship.”⁷¹ Belite stated a relationship existed between the managers/directors and the government only if the managers/directors also worked for the government.⁷² Thus, by its own definition of “relationship,” Belite should have reported Mr. X’s position in the Chinese government.

2. Question 5, Section IV, of the SRA requests:

For the top ten individual owners of the intermediate and ultimate shareholder entities (*i.e.*, shareholders that are not individuals) of the applying firm, please state whether they hold office at any level of the PRC government (*e.g.*, national, provincial, local) or held office at any PRC government agencies during the past three years. If so, for each individual, identify the office held, the level of the government and/or agency with which the office is held, and describe the official role of each.⁷³

Belite made no mention of Mr. X in response to this question, instead stating that to “the best knowledge of the Applicant, none of the individual owners of the intermediate or ultimate entity shareholders of the Applicant holds or has held office in the government or government agencies in the past three years.”⁷⁴ Again, Commerce and the CIT have found that the government includes People’s Congresses.⁷⁵

3. With respect to question 6, Section IV, of the SRA, Belite certified that “its export prices are not set by, subject to the approval of, or in any way controlled by a government entity at any level (national, provincial, local).”⁷⁶ However, this question also clarifies that it includes, but is not limited to, the presence of government officials at any meeting where export and pricing decisions are discussed.⁷⁷ As noted above Mr. X is a government official, and Mr. X sets the prices for Belite.⁷⁸

⁶⁹ *Id.*

⁷⁰ See Memorandum, “Investigation of Ceramic Tile from the People’s Republic of China: Affiliation and Collapsing of Belite Ceramics (Anyang) Co., Ltd., Beilitai (Tianjin) Tile Co., Ltd., and Tianjin Honghui Creative Technology Co., Ltd.,” dated November 6, 2019; Belite’s July 11, 2019 submission at Exhibit 4, which contains the ownership structure of Belite and its affiliates.

⁷¹ See Belite’s October 1, 2019 submission at 4.

⁷² *Id.*

⁷³ See, *e.g.*, Belite’s SRA at question 5.

⁷⁴ *Id.*

⁷⁵ See, *e.g.*, *Graphite Electrodes* IDM at Comment 1.

⁷⁶ See, *e.g.*, Belite’s SRA at question 6.

⁷⁷ *Id.*

⁷⁸ *Id.*; see also Belite’s October 1, 2019 submission at 4.

4. For question 12, Section IV, Belite certified that none of its “managers or board members worked for the government, at any level (national, provincial, local), or any government entities, in the past three years...”⁷⁹ As noted above, Mr. X is a government official, thus its answer to this question is untrue.

The courts have long held that the burden of creating a complete and accurate administrative record lies with the respondents and not with Commerce.⁸⁰ Indeed, Commerce possesses no inherent knowledge of a company’s information if that information is not on the record.⁸¹ Based on the false information included in Belite’s initial responses, information that Belite certified was “accurate and complete,”⁸² which omitted significantly pertinent information with respect to Mr. X’s government position, Commerce would have had to issue additional supplemental questionnaires to Belite with respect to its separate rate information. In this investigation, we find Belite has not provided a complete and accurate administrative record with respect to its *de facto* separate rates information.

At verification Belite provided a written statement with respect to Mr. X’s government position.⁸³ Specifically, it states Mr. X is not a government official because he cannot engage in business, yet Mr. X was elected because of his business acumen and advocates for his business in the legislature.⁸⁴ We find these to be contradictory statements, as Mr. X cannot be both an impartial official with no business interests and advocate for his business in the legislature. In addition, while Belite argues that our acceptance of its written statement as a verification exhibit should, in essence, overturn prior case and court precedent concerning whether Mr. X holds a government position, we disagree. It is Commerce’s practice to not make decision or conclusions of fact or law at verification.⁸⁵ As clearly stated in the verification report:

The purpose of this verification report is to provide parties with a factual report of the methods and procedures followed, and the results obtained, during Commerce’s verification. *See* 19 CFR. 351.307(c). This report does *not* draw conclusions as to whether the reported information was successfully verified, or how the facts obtained at verification will ultimately be treated in Commerce’s determinations.⁸⁶

⁷⁹ *See, e.g.*, Belite’s SRA at question 12.

⁸⁰ *Id.*; *see also Ta Chen Stainless Steel Pipe. Inc. v. United States*, 298 F. 3d 1330, 1336 (Fed. Cir. 2002) (the respondent “bore the burden of creating an accurate record,” citing *Zenith Elecs. Corp. v. United States*, 988 F. 2d 7513,1583 (Fed. Cir. 1993) (“The burden of production {belongs} to the party in possession of the necessary information.”); *Alloy Piping Prods. v. United States*, 201 F. Supp. 2d 1267,1284 (2002) (“The general rule with regard to a respondent’s submission of data to Commerce during the course of an AD investigation or review is that the respondent bears the burden and responsibility of creating an accurate record within the statutory timeline.”) (citations omitted), *affid.*, 334 F. 3d 1284 (Fed. Cir. 2003).

⁸¹ *See Yarn IDM* at Comment 1.

⁸² *See SRA* at Company Certification.

⁸³ *See Belite Verification Report* at Verification Exhibit 3.

⁸⁴ *Id.*

⁸⁵ *See Certain Steel Grating from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 32362 (June 8, 2010), and accompanying IDM at Comment 5.

⁸⁶ *See Belite Verification Report* at 1 (emphasis not added).

Belite submitted false statements in its SRA and admitted for the first time at verification that Mr. X holds a government position.⁸⁷ Therefore, we find that the application of facts available is appropriate under sections 776(a)(1) and (2) of the Act. Specifically, as evidenced by information obtained at verification, it is clear that Belite possessed the necessary records to provide a complete and accurate response to the questions found in the SRA, but failed to do so. Therefore, in accordance with section 776(a)(1) of the Act, the record therefore lacks the necessary separate rate information. Further, we find that Belite withheld information that Commerce requested, failed to provide information by the deadlines for submission of the information in the form and manner requested, and impeded this proceeding, in accordance with sections 776(a)(2)(A), (B), and (C) of the Act.

In addition, we find that Belite's failures to report the requested information, accurately and in the manner requested, using the records over which it maintained control, indicates that Belite did not act to the best of its ability to comply with our requests for information. As the CAFC has previously found, "concealment of data shows that {a party} was not acting to the best of its ability."⁸⁸ Hence, we find that the application of AFA is appropriate under section 776(b) of the Act for Belite's concealment of Mr. X's government position.

We are applying partial AFA, pursuant to section 776(b) of the Act, to Belite's separate rate information. As partial AFA, we find that Belite is partnered with the Government of China due to Mr. X's government position and Belite's admission that Mr. X advocates for Belite as a part of his duties as a government official. Thus, we find that Belite is unable to rebut the presumption of *de facto* government control. Accordingly, we have denied Belite a separate rate for the final determination and find that it is a part of the China-wide entity.

Comment 2: Separate Rate Status of Foshan Sanfi

Petitioner's Comments

- Commerce should apply total AFA to Foshan Sanfi because it refused to participate in verification.⁸⁹ Because Foshan Sanfi refused to participate in verification, none of the information it submitted has been verified and Foshan Sanfi has significantly impeded the proceeding. In addition, Foshan Sanfi's lack of participation in verification indicates a failure to cooperate to the best of its ability. Commerce should therefore apply total AFA to Foshan Sanfi pursuant to Section 776(b) of the Act.

No other party commented on this issue.

Commerce's Position: Section 782(i) of the Act requires that we verify all information upon which we rely in making a final determination in an investigation. Although Foshan Sanfi provided requested information during the course of this investigation, we cannot verify this information in accordance with sections 782(i) of the Act. Specifically, Foshan Sanfi withdrew from the investigation on November 22, 2019, thereby preventing Commerce from verifying its information.⁹⁰

⁸⁷ *Id.* at 3 – 4.

⁸⁸ See *Papierfabrik August Koehler v. United States*, 843 F. 3d 1373, 1383 (Fed. Cir. 2016).

⁸⁹ See Petitioner's Brief at 10 – 11, citing Foshan Sanfi's Withdrawal Letter.

⁹⁰ See Foshan Sanfi's Withdrawal Letter.

Section 782(i) of the Act requires the verification of information Foshan Sanfi submitted for us to determine the separate rate eligibility and calculate a dumping margin. By denying us the opportunity to verify its submissions in this investigation, we are unable to rely on Foshan Sanfi's submitted information in considering its eligibility for a separate rate.

Given that Foshan Sanfi has withdrawn from participation in this investigation, such that we cannot verify the information Foshan Sanfi submitted to demonstrate its eligibility for separate rate status, we have denied Foshan Sanfi separate rate eligibility and treated it as part of the China-wide entity for this final determination.

Comment 3: Calculation of the Separate Rate

SR Companies' Comments

- Commerce should continue to grant the SR Companies a separate rate, and if Foshan Sanfi receives an AFA rate, Commerce should not rely on an adverse inference in the separate rate calculation in the final determination.⁹¹ Put differently, it is unreasonable for Commerce to impute the non-cooperation of Foshan Sanfi to the separate rate respondents, as they have not failed to cooperate.
- Commerce should not, under any circumstances, apply a rate based on AFA to the SR Companies.⁹² The statute has no separate provision authorizing the calculation of a "separate rate" for non-reviewed respondents in NME reviews, but both Commerce and the courts have agreed that the calculation of a separate rate should be governed by section 735(c)(5) of the Act.⁹³
- There is a clear statutory mandate that "any margins" determined entirely under section 776 of the Act (determinations on the basis of facts available), should be excluded when calculating the rate for cooperative non-selected separate rate companies.⁹⁴
- When the only rates established for all exporters and producers are zero, *de minimis*, or based entirely on facts available, the statute directs Commerce to use any "reasonable" method. However, if the only rates on the record are AFA rates, the petitioner's proposal of applying a simple average of the Petition rates, the highest of which was applied as AFA to the China-wide entity in this case, would not be "reasonable" under the circumstances, as such a rate would be punitive as to the SR Companies.⁹⁵ Moreover, the SAA expressly requires that the rate applied to cooperative companies that are not individually investigated must be "reasonable" and "reflective of potential dumping margins for non-investigated producers."⁹⁶

⁹¹ See SR Companies' Brief at 1 – 2.

⁹² See SR Companies' Rebuttal Brief at 2, citing *Amanda Foods (Vietnam) Ltd. v. United States*, 647 F. Supp. 2d 1368, 1379 (CIT 2009).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 3, citing *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F. 3d 1370, 1378 (Fed. Cir. 2013) ("While various methodologies are permitted by the statute, it is possible for the application of a particular methodology to be unreasonable in a given case."), citing *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F. 3d 1077, 1085 (Fed. Cir. 2001).

⁹⁶ *Id.*, citing the SAA.

In addition, the courts have also rejected the application of an AFA rate to cooperative, separate rate companies.⁹⁷

- The SR Companies timely submitted quantity and value responses, provided complete responses to SRA questionnaires and supplemental questionnaires, and cooperated to the best of their ability.⁹⁸ It is, therefore, unreasonable to use an AFA rate or take a simple average of the Petition⁹⁹ margins, the highest of which was applied as AFA to the China-wide entity.¹⁰⁰

Petitioner's Comments

- Commerce may determine the “all others” rate using “any reasonable method” if all individually investigated rates are determined entirely pursuant to facts available.¹⁰¹
- Commerce ordinarily calculates the separate rate in NME cases pursuant to the same methodology as the “all others” rate in market economy cases.¹⁰² If Commerce assigns a rate to both mandatory respondents based entirely on facts available, consistent with Commerce’s past practice in other NME cases, Commerce should calculate the separate rate using a simple average of the Petition margins.¹⁰³

Commerce’s Position: In proceedings involving NME countries, Commerce begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single dumping margin.¹⁰⁴ It is Commerce’s policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent to be entitled to a separate rate.¹⁰⁵

In the *Preliminary Determination* and *Correction to the Preliminary Determination*, we found that certain companies were eligible for separate rate status because they demonstrated that they operated under an absence of *de jure* and *de facto* government control.¹⁰⁶ Based on the information on the record of this investigation, we continue to find that these companies are eligible for a separate rate, with the exceptions of Belite and Foshan Sanfi, as discussed above.

Neither the statute nor Commerce’s regulations address how we are to determine the dumping margin for separate rate companies not selected for individual examination where Commerce limits its examination in a LTFV investigation pursuant to section 777A(c)(2) of the Act. Our

⁹⁷ *Id.* at 3 – 5, citing, e.g., *Yantai Oriental Juice Co. v. United States*, 27 CIT 477 (CIT 2003); *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F. 3d 1367, 1378 – 79 (Fed. Cir. 2012); and *SKF USA Inc. v. United States*, 675 F. Supp. 1264, 1276 (CIT 2009).

⁹⁸ *Id.* at 6.

⁹⁹ See Petitioner’s Letter, “Petition for the Imposition of Antidumping Duties on Imports of Ceramic Tile from the People’s Republic of China,” dated April 10, 2019 (the Petition). The Petition rates were updated in the Petitioner’s Letter, “Antidumping Duty Investigation of Ceramic Tile from the People’s Republic of China: FTCT’s Response to the Department’s Supplemental Questions on the Petition,” dated April 17, 2019 (Petition Supplement), at Exhibit II-21.

¹⁰⁰ See SR Companies’ Rebuttal Brief at 6.

¹⁰¹ See Petitioner’s Brief at 11.

¹⁰² *Id.*

¹⁰³ *Id.*, citing *Carton Closing Staples from the People’s Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 83 FR13236, 13238 (March 28, 2018) (*Staples*).

¹⁰⁴ See *Preliminary Determination* PDM at 15 – 16.

¹⁰⁵ See *Initiation Notice*.

¹⁰⁶ For a complete list of these companies, with the exception of Belite and Foshan Sanfi, see *Preliminary Determination* at 84 FR 68178 – 86; and *Correction to the Preliminary Determination* at 84 FR 68114 – 15.

practice in this regard has been to look to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others rate in an investigation,¹⁰⁷ as a general rule, and assign this dumping margin to separate-rate companies that were not individually examined. Section 735(c)(5)(A) of the Act provides that Commerce shall calculate the all-others rate equal to the weighted-average of the margins calculated for the individually examined respondents, excluding margins that are zero, *de minimis*, or based entirely on facts available. Section 735(c)(5)(B) of the Act provides that if all dumping margins for the individually examined respondents are zero, *de minimis*, or based entirely on facts available, then Commerce may use any reasonable method, including averaging the dumping margins for the individually examined respondents. The SAA also provides that the expected method to apply when using any reasonable method in situations where the dumping margins for all of the exporters and producers that are individually investigated are determined entirely on the basis of the facts available, or are zero or *de minimis*, is to “weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided the volume data is available.” The SAA stipulates, however, that if the method is not feasible or if it “results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers,” Commerce may use any other reasonable method.¹⁰⁸

As noted above, for the final determination, Commerce has found that Belite and Foshan Sanfi are a part of the China-wide entity. Furthermore, Commerce continues to determine that the use of facts available is warranted in determining the rate of the China-wide entity,¹⁰⁹ pursuant to sections 776(a)(1) and (a)(2)(A)-(C) of the Act, as the facts regarding the China-wide entity have not changed since the *Preliminary Determination*. For the final determination, we have continued to apply the highest petition rate of 356.02 percent as the AFA rate to the China-wide entity.¹¹⁰

Because we are determining the China-wide rate based on AFA, we look to section 735(c)(5)(A)-(B) of the Act for guidance and “any reasonable method” to determine the rate for exporters that are not being individually examined and found to be entitled to a separate rate, as we did in the *Preliminary Determination*. As “any reasonable method,” we find it appropriate to assign the simple average of the petition rates (*i.e.*, 229.04 percent) to the SR Companies not individually examined.¹¹¹ Although the SR Companies argue this is an application of AFA to them, we have found petition rates to be reasonable and reliable for purposes of establishing a separate rate. For example, in *Lawn Groomers* all of the mandatory respondents ceased participating in that investigation after the preliminary determination.¹¹² Although the petitioner

¹⁰⁷ See section 735(c)(5) of the Act; and *Antidumping Duty Investigation of Stainless Steel Sheet and Strip from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 9716 (February 8, 2017) (*Stainless Steel Sheet and Strip*), and accompanying IDM at “Separate Rates.”

¹⁰⁸ See SAA; and *Stainless Steel Sheet and Strip* IDM at “Separate Rates.”

¹⁰⁹ In the *Preliminary Determination*, Commerce preliminarily relied upon facts otherwise available, with adverse inferences, for the China-wide entity, including Foshan Foson Tiles Co., Ltd. and Foshan Ibel Import and Export Ltd., pursuant to sections 776(a) and (b) of the Act. See *Preliminary Determination* PDM at 20 – 21.

¹¹⁰ *Id.* at 21 – 22.

¹¹¹ See Petition Supplement at Exhibit II-21. The petitioner calculated three individual petition margins (127.33 percent, 203.77 percent and 356.02 percent), the simple average of which is 229.04 percent.

¹¹² See *Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People’s Republic of China: Final Determination of Sales at Less than Fair Value*, 74 FR 29167 (June 19, 2009) (*Lawn Groomers*), and accompanying IDM at Comment 3.

in that case argued that Commerce should assign the separate rate companies the rate calculated for one of the mandatory respondents in the preliminary determination, we found the petition rates reasonable and reliable for purposes of establishing a separate rate.¹¹³ Further, in *Bristol Metals*, the Court sustained Commerce's application of a petition rate to the companies eligible for a separate rate, when the only individually examined respondent had a dumping margin entirely based on AFA, stating:

Commerce's chosen methodology of applying an average of the initiation margins is also consistent with what Commerce has done in other NME investigations in which the individually investigated rates are based entirely on adverse facts available, and with what Commerce has done in market economy proceedings in which the individually investigated rates are zero, *de minimis*, or based entirely on adverse facts available.¹¹⁴

Based on the foregoing, and consistent with our long-standing practice,¹¹⁵ we find it appropriate to assigned to the non-individually examined SR Companies the simple average of the petition rates, *i.e.*, 229.04 percent.¹¹⁶

Comment 4: Other Issues

Belite's Comments and the Petitioner's Comments

- Parties have raised arguments concerning the use of databases revised to include minor corrections,¹¹⁷ the application of brokerage and handling to certain sales,¹¹⁸ the treatment of waste tile,¹¹⁹ the surrogate country,¹²⁰ surrogate values for water,¹²¹ truck freight¹²² and natural gas.¹²³

Commerce's Position: As stated above, for this final determination we have treated Belite and Foshan Sanfi as a part of the China-wide entity. As such, we have not calculated a dumping margin for any respondent in this investigation. As the issues listed above concern only the margin calculation, and we are not calculating any margin for this final determination, these issues are moot.

¹¹³ *Id.*

¹¹⁴ See *Bristol Metals L.P. v. United States*, 703 F. Supp. 2d 1370, 1378 (CIT April 20, 2010) (*Bristol Metals*).

¹¹⁵ See, e.g., *Staples IDM at Comment 3*; *Galvanized Steel Wire from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 17430, 17432 (March 26, 2012); *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 FR 31970 (June 5, 2008), and accompanying IDM at Comment 7.

¹¹⁶ See Petition Supplement at Exhibit II-21.

¹¹⁷ See Belite's Case Brief at 2.

¹¹⁸ *Id.* at 5.

¹¹⁹ *Id.* at 2.

¹²⁰ *Id.* at 6 – 21; and Petitioner's Rebuttal Brief at 1 – 11.

¹²¹ *Id.* at 4; and Petitioner's Rebuttal Brief at 11.

¹²² *Id.* at 21.

¹²³ See Petitioner's Brief at 9.

IX. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination of the investigation and the final estimated dumping margins in the *Federal Register*.

Agree

Disagree

3/30/2020

X



Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance