Slip Op. 18–151

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL and SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Plaintiff, v. UNITED STATES, Defendant, and COOPER TIRE & RUBBER COMPANY, CHINA RUBBER INDUSTRY ASSOCIATION, and CHINA CHAMBER OF COMMERCE OF METALS, MINERALS AND CHEMICALS,
Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00078

[Sustaining in part and remanding in part the U.S. International Trade Commission's final negative material injury determination in the antidumping and countervailing duty investigations of truck and bus tires from the People's Republic of China.]

Dated: November 1, 2018

Geert M. De Prest and *Jennifer M. Smith*, Stewart and Stewart, of Washington, D.C., argued for Plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC. With him on the brief were *Elizabeth J. Drake*, *Terence P. Stewart*, and *Philip A. Butler*. *Nicholas J. Birch*, *Lane S. Hurewitz*, and *Patrick J. McDonough* also appeared.

David A.J. Goldfine, Attorney, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for Defendant United States. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Ned H. Marshak, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, N.Y., argued for Defendant-Intervenors China Rubber Industry Association and China Chamber of Commerce of Metals, Minerals and Chemicals. With him on the brief were *Max F. Schutzman* and *Jordan C. Kahn*. *Andrew T. Schutz* and *Eve Q. Wang* also appeared.

Gregory C. Dorris, Pepper Hamilton, LLP, of Washington, D.C., appeared for Defendant-Intervenor Cooper Tire & Rubber Company.

OPINION AND ORDER

Choe-Groves, Judge:

This action involves a negative material injury determination regarding truck and bus tires from the People's Republic of China ("China"). Tires covered by this case include new pneumatic rubber tires certified by the U.S. Department of Transportation for on-road or highway use. *See Truck and Bus Tires From China*, USITC Pub. 4673 at 6, Inv. Nos. 701-TA-556 and 731-TA-1311 (Mar. 2017), *available at* https://www.usitc.gov/publications /701_731/pub4673.pdf (last visited Oct. 26, 2018) ("USITC Pub. 4673"). The tires are designed for use with vehicles that transport heavy cargo and passengers on roads

and highways. *See id.* Plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union AFL-CIO, CLC ("USW") challenges the final negative material injury determination of the U.S. International Trade Commission ("Defendant," "ITC," or "Commission") in the antidumping and countervailing duty investigations of truck and bus tires from China. *See Truck and Bus Tires From China*, 82 Fed. Reg. 14,232 (Int'l Trade Comm'n Mar. 17, 2017); *see also* USITC Pub. 4673; Final Consolidated Staff Report and Views, CD 384, Doc. No. 612161 (May 18, 2017).

Before the court is a Rule 56.2 motion for judgment on the agency record filed by USW. *See* Pl.'s Rule 56.2 Mot. J. Agency R., Sept. 1, 2017, ECF No. 29; *see also* Pl.'s Mem. P. & A. Supp. Mot. J. Agency R., Sept. 1, 2017, ECF No. 31 ("Pl.'s Mem."). Plaintiff contends that the Commission's final determination that imports of truck and bus tires from China have not materially injured the U.S. truck and bus tire industry is unsupported by substantial evidence and is not in accordance with the law. *See* Pl.'s Mem. 1–3. The ITC opposes the Rule 56.2 motion and requests that the court sustain the final determination. *See* Def. U.S. Int'l Trade Comm'n's Mem. Opp'n Pl.'s Mot. J. Agency R., Oct. 31, 2017, ECF No. 37 ("Def.'s Resp."). Defendant-Intervenors China Rubber Industry Association, China Chamber of Commerce of Metals, Minerals & Chemical Importers (collectively, "CRIA"), and Cooper Tire & Rubber Company (collectively, "Defendant-Intervenors") support the ITC's position. *See* Def.-Intervenors' Resp. Pl.'s Rule 56.2 Mot. J. Agency R., Oct. 31, 2017, ECF No. 35 ("Def.-Intervenors' Resp.").

For the reasons set forth below, the court sustains in part and remands in part the Commission's final determination. Plaintiff's motion for judgment on the agency record is granted in part.

PROCEDURAL HISTORY

USW filed antidumping and countervailing duty petitions on truck and bus tires with the U.S. Department of Commerce ("Commerce") and the ITC on January 29, 2016. *See* USITC Pub. 4673 at 1. The Commission initiated an investigation and determined preliminarily that there was a reasonable indication that the domestic industry was materially injured or threatened with material injury by reason of subject imports. *See Truck and Bus Tires From China*, 81 Fed. Reg. 14,888, 14,888 (Int'l Trade Comm'n Mar. 18, 2016) (preliminary determination).

The Commission published its final determination on March 17, 2017. *See Truck and Bus Tires From China*, 82 Fed. Reg. at 14,232. A majority of the Commissioners found that the domestic industry was neither materially injured nor threatened with material injury by reason of imports of the subject merchandise from China. *See id.*

USW initiated proceedings in this court, contesting various aspects of the Commission's final determination. The court held oral argument on Plaintiff's Rule 56.2 motion for judgment on the agency record on May 15, 2018. *See* Confidential Oral Argument, May 15, 2018, ECF No. 58.

ISSUES PRESENTED

The court considers the following issues:

1. Whether the Commission's findings regarding the conditions of competition, particularly substitutability, tiers, and relative importance of price, are supported by substantial evidence;

2. Whether the Commission's negative adverse price effects determination is supported by substantial evidence and in accordance with the law;

3. Whether the Commission's negative adverse impact determination is supported by substantial evidence and in accordance with the law; and

4. Whether the Commission's negative threat determination is supported by substantial evidence and in accordance with the law.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and Section 516A(a)(2)(B)(ii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(ii), which grant the court authority to review actions contesting the ITC's final negative injury determination following an antidumping or countervailing duty investigation. The court will uphold the ITC's determinations, findings, or conclusions unless they are unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i); *see also Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1369 (Fed. Cir. 2015). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the court from holding that the Commission's determinations, findings, or conclusions are supported by substantial evidence. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (citing *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir.

2001)); *see also Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

DISCUSSION

I. Legal Framework

In order to make an affirmative material injury determination, the ITC must find that (1) material injury existed and (2) the material injury was caused by reason of the subject imports. *See Swiff-Train Co. v. United States*, 793 F.3d 1355, 1359 (Fed. Cir. 2015) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997)). Material injury is defined by statute as harm that is not inconsequential, immaterial, or unimportant. 19 U.S.C. § 1677(7)(A). To determine whether a domestic industry has been materially injured or threatened with material injury by reason of unfairly subsidized or less than fair value imports, the Commission considers:

> (I) the volume of imports of the subject merchandise,
>
> (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
>
> (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States.

Id. § 1677(7)(B)(i). The Commission may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports. *Id.* § 1677(7)(B)(ii). No single factor is dispositive and the significance to be assigned to a particular factor is for the ITC to decide. *See* S. Rep. No. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474.

The statute neither defines the phrase "by reason of" nor provides the ITC with guidance on how to determine whether the material injury is by reason of subject imports. The Court of Appeals for the Federal Circuit has interpreted the "by reason of" statutory language to require the Commission to consider the volume of subject imports, their price effects, their impact on the domestic industry, and to establish whether there is a causal connection between the imported goods and the material injury to the domestic industry. *See Swiff-Train Co.*, 793 F.3d at 1361; *see also* S. Rep. No. 96–249, at 57–58, 74–75 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 443– 44, 460–61.

II. The Parties' Challenges to the Commission's Final Negative Material Injury Determination

USW disputes various findings made by the Commission that contributed to the final negative material injury determination. The court addresses each finding in turn.

A. The Commission's Assessment of the Conditions of Competition

USW contends that the Commission's findings on the conditions of competition, specifically regarding substitutability, tiers, and relative importance of price, are not supported by substantial evidence. *See* Pl.'s Mem. 6–17. In analyzing the conditions of competition, the Commission determined that purchasers would buy higher-priced tires due to perceived differences between domestic and Chinese tires in quality, warranties, tiers, and other non-price features. *See* USITC Pub. 4673 at 20–26.

The Commission must "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry" when considering the impact of subject imports on the domestic industry. 19 U.S.C. § 1677(7)(C)(iii). The statute does not provide further guidance, giving the Commission discretion to assess the conditions of competition in a particular industry. The Commission's findings regarding competition and market conditions must be supported by substantial evidence in the record. *See* 19 U.S.C. § 1615a(b)(1)(B)(i); *see also Siemens Energy, Inc.*, 806 F.3d at 1369.

Plaintiff asserts that the record evidence does not support the Commission's determination that there is a moderate-to-high degree of substitutability between the domestic and Chinese tires. *See* Pl.'s Mem. 13. The court disagrees. The degree of substitutability between domestic and imported truck and bus tires depends on quality, price, and availability. *See* USITC Pub. 4673 at 23. The Commission's investigation found that among the six domestic producers, five domestic producers reported that the domestic-like products and subject imports were always or frequently interchangeable. *See id.* In response to the Commission's questionnaires on interchangeability by country, most U.S. producers reported that U.S. produced truck and bus tires are always interchangeable with Chinese-produced truck and bus tires. *See id.* at Table II-15. Most importers also reported that U.S.-produced truck and bus tires are frequently or sometimes interchangeable with Chinese-produced truck and bus tires. *See id.* A plurality of purchasers reported that U.S.-produced truck and bus tires are frequently interchangeable with Chinese-produced truck and bus tires. *See id.* With respect to interchangeability by tire type, the data compiled in response to the Commission's questionnaires indicate that U.S. producers were split on whether radial truck and bus tires are interchangeable with bias ply truck and bus tires. *See id.* at Table II-16. A majority of U.S. importers indicated that radial truck and bus tires are sometimes or never interchangeable with bias with

tube or bias tubeless tires. *See id.* U.S. purchasers reported that radial truck and bus tires are always interchangeable with bias with tube and bias tubeless tires. *See id.* Because the Commission provided substantial evidence to support its determination of a moderate-to-high degree of substitutability through its investigation of production and purchasing decisions, the court finds Plaintiff's argument unpersuasive.

Plaintiff contends that although the record establishes a tiered market for tires, most domestic and Chinese tires overlapped in tiers. *See* Pl.'s Mem. 1. Plaintiff argues that most purchasers reported inter-tier competition based on price, and purchasers and producers reported shifting between tiers. *See id.* at 2, 20. For these reasons, Plaintiff asserts that the ITC's findings with regard to tiers is unsupported by substantial evidence. *See id.* at 14. The Commission determined that market participants generally reported that the U.S. tire market was divided into three tiers reflecting trade-off and performance. *See* USITC Pub. 4673 at 24–25. According to the Commission's investigation, half of the responding producers (three of six) and the majority of importers (thirty-one of thirty-five) and purchasers (fourteen of eighteen) reported that bus tires were sold in tiers. *See id.* at II-16. The record shows that a vast majority of U.S. producers reported only selling products in tiers one, two, and three, whereas importers reported selling a majority of their tires in the third tier. *See id.* The Commission provided substantial evidence that there is broad recognition of three distinct tiers in the market.

The Commission also provided sufficient evidence that eleven of the fifteen responding purchasers perceived competition between different tiers of truck and bus tires. *See* USITC Pub. 4673 at II-16. Purchasers reported advertising different tiers through websites and allowing customers to choose between tiers. *See id.* Additionally, a majority of purchasers (eight of fifteen) indicated that their firms' purchases of truck and bus tires shifted between the categories since 2013. *See id.* Producers noted very small shifts (less than three percent) between categories. *See id.* The court concludes that the Commission's findings on tiers are supported by substantial evidence.

Plaintiff maintains that purchasing decisions focused on the price of tires over other non-price factors, and argues that most purchasers who switched from purchasing domestic tires to Chinese tires did so primarily on the basis of price. *See* Pl.'s Mem. 2, 16. The Commission found that while price was an important factor in purchasing decisions for truck and bus tires, non-price factors were also important to purchasers. The Commission determined that non-price factors, in-

cluding brand, warranty, retreadability, technical support, reliability of supply, and product consistency were important in purchasing decisions. *See* USITC Pub. 4673 at 23–25. The majority of purchasers (eleven of twenty) reported that they only sometimes purchase the lowest priced product. *See id.* at 23, II-12. When asked about the significance of differences other than price between domestically-produced truck and bus tires and subject imports, most responding purchasers reported that differences other than price were always or frequently important in purchasing decisions for truck and bus tires. *See id.* at 23. Nine of the eighteen responding purchasers reported that price was a primary reason for purchasing imported product rather than U.S.-produced product. *See id.* at V-17. Purchasers also identified availability and quality as non-price reasons for purchasing imported rather than U.S.-produced product. *See id.* The court concludes that the Commission supported with substantial evidence its determination regarding non-price factors in the purchasing decisions of the subject merchandise.

B. The Commission's Price Effects Determination

USW contests the Commission's price effects analysis as unsupported by substantial evidence and contrary to law. *See* Pl.'s Mem. 17. In evaluating the effect of imports on prices, the statute directs the Commission to consider whether

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

With regard to underselling, the Commission found that underselling was pervasive during the period of investigation, but was mitigated by three factors: (1) non-price differences between domestic and Chinese tires permitted domestic producers to compete at higher prices; (2) underselling did not lead the domestic industry to forego significant shipments or output, particularly given their rate of capacity utilization; and (3) there was no price suppression or price depression. *See* USITC Pub. 4673 at 29–30. The Commission determined further that the subject imports did not depress prices or prevent price increases. *See id.* at 28–29. The Commission explained that the industry experienced price declines from 2013 to 2015, but

this trend was attributed to sharp declines in raw material costs. *See id.* This observation, combined with the domestic industry's declining cost of goods sold to net sales ratio, led the Commission to find that the subject imports did not have the effect of depressing or suppressing prices. *See id.* The Commission concluded that the subject imports did not have significant adverse price effects. *See id.* at 30.

The Commission noted in its final determination that three factors mitigated the prevalent effect of underselling during the period of investigation. One factor was the lack of price depression and price suppression, which the Commission mentioned briefly in one sentence. The Commission failed to give further details, did not reference any statistics, and neglected to explain how its observation supported its conclusion with regard to underselling. By merely relying on its finding for price suppression and price depression, the Commission conflated the two-pronged analysis mandated by the statute. The court concludes that the Commission's final determination regarding price effects is not supported by substantial evidence, and remands the final determination for the Commission to reconsider its findings in accordance with this opinion.

C. The Commission's Impact Determination

As part of the material injury analysis, the Commission must consider "the impact of [subject imports] on domestic producers of domestic like products, but only in the context of production operations within the United States." 19 U.S.C. § 1677(7)(B)(i)(III). The statute specifies a number of factors that are relevant in determining whether subject imports have had an adverse impact on domestic producers:

> (I) actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

> (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

Id. § 1677(7)(C)(iii). The Commission is directed to "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.*

The Commission determined that the subject imports did not impact the domestic industry significantly. Although U.S. demand for truck and bus tires increased by 21.3 percent from 2013 to 2015, subject imports increased nearly twice that amount, by 41.9 percent. *See* USITC Pub. 4673 at 45. As a result, the market shares for companies of the subject imports grew by 4.9 percent, while the market shares for domestic producers dropped by 7.7 percent. *See id.* at 50. The Commission found that the domestic industry was able to increase production, shipments, employment, wages, productivity, gross profits, operating income, net income, and capital expenditures, and maintain a high capacity utilization rate. *See id.* at 30–34. Because the domestic industry was able to show success despite the high rate of subject imports, the Commission concluded that the subject imports did not impact the domestic industry. *See id.* at 36.

Plaintiff argues that the Commission's impact determination is contrary to law because the Commission failed to analyze the domestic industry's performance within the context of the business cycle and the conditions of competition. *See* Pl.'s Mem. 27. The Commission considered the U.S. demand for truck and bus tires and several markers of success in the domestic industry, in light of the increased market share of subject imports. These aspects show that the Commission did consider the domestic industry's performance within the context of the business cycle and conditions of competition as required by the statute. Plaintiff's contention lacks merit.

USW argues that the Commission's attribution of the industry's lack of growth to factors other than rising imports, such as high rates of domestic capacity utilization, is unsupported by substantial evidence. *See* Pl.'s Mem. 32–39. USW contends that the Commission failed to consider contrary arguments and facts proffered in the final determination. *See id.* This argument is simply unfounded. The Commission addressed and rebutted each of USW's contentions in its final determination. See USITC Pub. 4673 at 34–36. To the extent that Plaintiff argues that the Commission should have considered other facts or find other witness statements more credible, Plaintiff's assertions are an impermissible reweighing of the evidence, which is not allowed under the applicable standard of review. The court concludes

that the Commission's negative impact determination is in accordance with the law and supported by substantial evidence.

D. The Commission's Negative Threat Determination

The statute directs the Commission to consider several enumerated factors, "among other relevant economic factors," when determining whether an industry in the United States is threatened with material injury by reason of imports of subject merchandise. *See* 19 U.S.C. § 1677(F)(i). Those factors are:

> (I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement), and whether imports of the subject merchandise are likely to increase,
>
> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
>
> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
>
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
>
> (V) inventories of the subject merchandise,
>
> (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,
>
> (VII) in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1671d(b)(1) or 1673d(b)(1) of

this title with respect to either the raw agricultural product or the processed agricultural product (but not both),

(VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

Id. The Commission shall consider the factors as a whole when making its determination, and the "presence or absence of any factor . . . shall not necessarily give decisive guidance with respect to the determination." *Id.* at §1677(F)(ii).

The Commission analyzed the statutory factors and discussed its findings using the same volume, price, and impact framework as its material injury analysis. *See* USITC Pub. 4673 at 36–37 n.233. The Commission found that reported production capacity in China increased from 2013 to 2014, but decreased thereafter, with production projected to be at similar levels in the future. *See id.* at 37 n.234–35. The Commission noted that non-U.S. markets account for a large majority of the Chinese industry's exports. *See id.* at 37 & n.236. When considering the likelihood of substantially increased imports through an examination of antidumping and countervailing duty orders in third-country markets in 2015, the Commission found that the volume of subject imports did not increase rapidly. *See id.* 38 n.237. Inventories of truck and bus tires held by subject producers in China increased irregularly from 2013 to 2015, but were projected to decline. *See id.* at 38. U.S. importers' inventories of subject merchandise increased in the same period, but were stable overall relative to total U.S. shipments of imports. *See id.*

The Commission found, based on information available on the record, that product shifting was not an issue because most responding Chinese producers reported that they could not switch production from truck and bus tires to other products. *See id.* at 38 n.237. The Commission determined further that imports were unlikely to cause significant price effects in the imminent future because "although underselling coincided with declines in prices for the domestic like product, those price declines resulted from substantial declines in raw material costs." See *id.* at 39–40. The Commission did not find the domestic industry to be vulnerable to actual and potential nega-

tive impacts, and "subject imports from China [were] not likely to have a significant impact on the domestic industry in the near future." *Id.* at 40. As a result, the Commission determined that the domestic industry was not threatened with material injury by reason of subject imports. *See id.* at 41. USW asserts that this determination is unsupported by substantial evidence and contrary to law for several reasons. *See* Pl.'s Mem. 39.

USW contends that the Commission's conclusion regarding the nature of subsidies is erroneous, and asks the court to remand on this issue. *See* Pl.'s Mem. 40–41. Defendant argues that the Commission's finding on this issue is reasonable and supported by substantial evidence. *See* Def.'s Resp. 41. Defendant-Intervenors concede that the Commission may have erred in finding that none of the programs constitute export subsidies, but argue that the error is insignificant, harmless, and does not warrant a remand because the Commission considered several factors in its threat analysis, only one of which is export subsidies. *See* Def.-Intervenors' Resp. 41–42. Here, the Commission noted that in the parallel countervailing duty investigation, Commerce found fifteen subsidy programs to be countervailable. *See* USITC Pub. 4673 at 38– 39 n.237. The ITC determined that the subsidization would result in increased volumes of imports after considering the nature of the subsidy programs, "none of which Commerce found to be an export subsidy." *Id.* The relevant documents show, however, that Commerce found "evidence of countervailable subsidies contingent upon export that are inconsistent with the World Trade Organization Agreement on Subsidies and Countervailing Measures" in the related countervailing duty determination in this proceeding. *See* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Truck and Bus Tires from the People's Republic of China; and Final Affirmative Determination of Critical Circumstances, in Part at 7, C-570–041 (Jan. 19, 2016), *available* at https://enforcement.trade.gov/frn/summary/ prc/2017–01862–1.pdf (last visited Oct. 26, 2018) ("Final IDM"); *see also Truck and Bus Tires From the People's Republic of China*, 82 Fed. Reg. 8,606 (Dep't Commerce Jan 27, 2017) (final affirmative countervailing duty determination, final affirmative critical circumstances determination, in part). Two of the countervailable subsidy programs identified by Commerce are clearly export-related as evidenced by their names: "Export Seller's Credits from State-Owned Banks" and "Export Buyer's Credits from State-Owned Banks." *See* Final IDM at 20. Based on the record, there is a clear discrepancy between Commerce's statement and the Commission's findings. The court remands the Commission's final determination

with instructions for the Commission to reconsider its finding on the nature of export subsidies consistent with this opinion.

Plaintiff asserts that the Commission's negative threat determination with respect to price effects is unreasonable because it is premised on the Commission's present price effects finding. Because the court remands the final determination to reconsider the present price effects finding, as explained *supra*, the court directs the Commission to reconsider the negative threat determination on this basis as well.

The court defers on analyzing Plaintiff's other challenges to the Commission's findings regarding volume and impact in the threat determination at this time.

CONCLUSION

For the foregoing reasons, the court concludes that:

1. The Commission's findings regarding the conditions of competition, particularly substitutability, tiers, and relative importance of price, are supported by substantial evidence;
2. The Commission's negative adverse price effects determination is not supported by substantial evidence;
3. The Commission's negative adverse impact determination is supported by substantial evidence and in accordance with the law; and
4. The Commission's negative threat determination is not supported by substantial evidence.

The court remands the Commission's final determination for reconsideration consistent with this opinion. USW's Rule 56.2 motion for judgment on the agency record is granted in part. Accordingly, it is hereby

ORDERED that the Commission shall file its remand redetermination on or before January 4, 2019; and it is further **ORDERED**that the Commission shall file the administrative record on remand on or before January 18, 2019; and it is further

ORDERED that the Parties shall file any comments on the remand redetermination or before February 4, 2019; and it is further

ORDERED that the Parties shall file replies to the comments on or before March 6, 2019; and it is further

ORDERED that the joint appendix shall be filed on or before March 20, 2019.

Dated: November 1, 2018
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 18–152

THUAN AN PRODUCTION TRADING AND SERVICE CO., LTD. and GOLDEN QUALITY SEAFOOD CORPORATION, Plaintiff and Consolidated Plaintiff, v. UNITED STATES, Defendant. and CATFISH FARMERS OF AMERICA et al., Defendant-Intervenors and Consolidated Defendant Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 17–00056

[Remanding Commerce's use of a country-wide NME antidumping rate, remanding Commerce's application of the NME rate to Plaintiff, and sustaining Commerce's requirement of CONNUM-specific FOP reporting.]

Dated: November 5, 2018

Matthew Jon McConkey, Mayer Brown LLP, of Washington, DC, for plaintiff Thuan An Production Trading and Service Co., Ltd.

Andrew Brehm Schroth, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Hong Kong, S.A.R., and *Jordan Charles Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC, for consolidated plaintiff Golden Quality Seafood Corporation.

Kara Marie Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel was *Kristen McCannon*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jonathan Mario Zielinski, Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenors and consolidated defendant-intervenors Catfish Farmers of America; America's Catch; Alabama Catfish Inc.; Consolidated Catfish Companies LLC; Delta Pride Catfish, Inc.; Guidry's Catfish, Inc.; Heartland Catfish Company; Magnolia Processing, Inc.; Simmons Farm Raised Catfish, Inc.

OPINION

Kelly, Judge:

This action is before the court on a motion for judgment on the agency record. *See* Thuan An Production Trading and Service Co., Ltd.'s R. 56.2 Mot. J. Agency R., Nov. 16, 2017, ECF No. 42; Consol. Pl. Golden Quality Seafood Corp.'s Mot. J. Agency R., Nov. 16, 2017, ECF No. 41. Plaintiff and Consolidated Plaintiff challenge various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the twelfth administrative review of the antidumping duty ("ADD") order covering certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam"). *See Certain Frozen Fish Fillets from [Vietnam]*, 82 Fed. Reg. 15,181 (Dep't Commerce Mar. 27, 2017) (final results and partial rescission of [ADD] administrative review; 2014–2015) ("*Final Results*"), and accompanying Certain Frozen Fish Fillets from [Vietnam]: Issues and Decision

Memorandum for the Final Results of the Twelfth [ADD] Administrative Review; 2014–2015, A-552–801, (Mar. 20, 2017), ECF No. 25–2 ("Final Decision Memo"); *see also* Certain Frozen Fish Fillets From [Vietnam], 68 Fed. Reg. 47,909 (Dep't Commerce Aug. 12, 2003) (notice of [ADD] order) ("*ADD Order*").

Plaintiff, Thuan An Production Trading and Service Co., Ltd. ("Tafishco"), and Consolidated Plaintiff, Golden Quality Seafood Corporation ("Golden Quality"), commenced separate actions pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012), which were later consolidated.[1] *See* Summons, Mar. 31, 2017, ECF No. 1; Compl., Apr. 5, 2017, ECF 8; Order, July 26, 2017, ECF No. 28 (consolidating Court No. 17–00056, Court No. 17–00087, and Court No. 17–00088 under Court No. 17–00056).[2] Tafishco and Golden Quality challenge several aspects of Commerce's final determination as not supported by substantial evidence or otherwise not in accordance with law. *See* Mem. Law Supp. Pl.[']s Rule 56.2 Mot. J. Agency R. at 1, 3–12, Nov. 16, 2017, ECF No. 42 ("Tafishco Br."); Mem. Law Supp. Consol. Pl. Golden Quality Seafood Corp.'s Mot. J. Agency R. at 1, 8–20, Nov. 16, 2017, ECF No. 41 ("Golden Quality Br."); *see also* 19 U.S.C. § 1516a(b)(1)(B)(i). First, Tafishco contends that Commerce lacks statutory authority to issue the Vietnam-wide non market economy ("NME") rate in the twelfth administrative review. *See* Tafishco Br. at 3–7. Second, Tafishco argues that Commerce's assignment of a $2.39 per kilogram ("kg") rate on the Vietnam-wide entity, and thus Tafishco, is not supported by substantial evidence. *See* Tafishco Br. at 7–12. Third, Golden Quality argues that Commerce erred by requiring that it report its factors of production ("FOP") on a CONNUM-specific basis. *See* Golden Quality Br. at 7–20. For the reasons set forth below, the court remands Commerce's asserted legal grounds to issue the Vietnam-wide NME rate in this review, remands Commerce's assignment of a $2.39 per kg rate to Tafishco, and sustains Commerce's requirement that Golden Quality report its FOPs on a CONNUM-specific basis.

BACKGROUND

On June 16, 2003, Commerce found that certain frozen fish fillets from Vietnam were being, or were likely to be, sold in the United States at less than fair value ("LTFV"). *See Certain Frozen Fish Fillets from [Vietnam]*, 68 Fed. Reg. 37,116 (Dep't Commerce June 23,

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[2] Court No. 17–00087 was later severed and stayed. *See* Memorandum and Order, Nov. 14, 2017, ECF No. 27.

2003) (notice of final [ADD] determination of sales at [LTFV] and affirmative critical circumstances) and accompanying Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from [Vietnam], A-552–801, (June 16, 2003), *available at* http://ia.ita.doc.gov/frn/summary/vietnam/03–15794–1.pdf (last visited Oct. 31, 2018). Each year during the anniversary month of the publication of an ADD duty order, interested parties may request that Commerce conduct an administrative review of that order. *See*19 C.F.R. § 351.213; *see also* 19 U.S.C. § 1677 (for definition of interested parties). On October 6, 2015, pursuant to a request from the petitioners, The Catfish Farmers of America and individual U.S. catfish processors, Commerce initiated the twelfth administrative review of the ADD order covering certain frozen fish fillets from Vietnam, for which the period of review was August, 1, 2014 through July, 31, 2015. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 60,356, 60,358 (Dep't Commerce Oct. 6, 2015).

On March 3, 2016, pursuant to its authority under 19 U.S.C. § 1677f-1(c)(2),[3] Commerce selected Tafishco and Golden Quality as mandatory respondents for the review. *See* Certain Frozen Fish Fillets from [Vietnam]: Selection of Respondents for Individual Review at 1–2, 7, PD 88, bar code 3446449–01 (Mar. 3, 2016).[4] On March 22, 2016, Commerce issued ADD questionnaires to both parties.[5] *See* Initial Questionnaire to Tafishco, PD 90, bar code 3451250–01 (Mar. 22, 2016); Initial Questionnaire to Golden Quality, PD 89, bar code

[3] In both reviews and investigations, 19 U.S.C. § 1677f-1(c)(2) provides Commerce with alternative methodologies for determining dumping margins where it is not practicable for Commerce to individually examine every producer or exporter because of the large number of entities involved. The statute permits Commerce to examine, instead of every producer or exporter, either a statistically valid sample of producers and exporters, or the exporters and producers that account for the largest volume of subject merchandise from the country in question "that can be reasonably examined." *See* 19 U.S.C. § 1677f-1(c)(2). Commerce did the latter, selecting Tafishco and Golden Quality because they accounted for the largest volume of exports of all exporters/producers subject to review. *See* Selection of Respondents for Individual Review at 1–2, 7, PD 88, bar code 3446449–01 (Mar. 3, 2016).

[4] On June 22, 2017, Defendant submitted an index to the public administrative records, which can be found at ECF No. 25. *See* Administrative Record, June 22, 2017, ECF No. 25. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these administrative records.

[5] Commerce's practice is to send ADD questionnaires to the mandatory respondents selected. The questionnaires require the respondents to provide information about the organization and its accounting practices, sales of the merchandise under review, sales of the subject merchandise in the United States market, the organization's FOPs of subject merchandise sold in the United States, and about further manufacturing or assembly operations conducted in the United States prior to delivery to unaffiliated U.S. customers. *See, e.g.*, Initial Questionnaire to Tafishco at G2, PD 90, bar code 3451250–01 (Mar. 22, 2016).

3451246–01 (Mar. 22, 2016). In its questionnaires, Commerce requested that the mandatory respondents report their FOPs[6] on a control-number ("CONNUM") specific basis.[7] *See, e.g.*, Initial Questionnaire to Golden Quality at D-2, PD 89, bar code 3451246–01 (Mar. 22, 2016).

On April 8, 2016, Tafishco submitted a letter to Commerce stating its intention not to participate in the review. Tafishco Letter Declining Participation, PD 100, bar code 3457788–01 (Apr. 8, 2016). On April 19, 2016, Golden Quality submitted a similar letter to Commerce stating its intention not to participate in the review. Golden Quality Letter Declining Participation, PD 108, bar code 3460924–01 (Apr. 19, 2016).

On September 19, 2016, Commerce published its preliminary results and accompanying Preliminary Decision Memorandum. *See Certain Frozen Fish Fillets from [Vietnam]*, 81 Fed. Reg. 64,131 (Dep't Commerce Sept. 19, 2016) (preliminary results and partial rescission of the [ADD] administrative review; 2014–2015) ("*Preliminary Results*") and accompanying Certain Frozen Fish Fillets from [Vietnam]: Decision Memorandum for the Preliminary Results of the 2014–2015

[6] Commerce uses FOPs to construct the value of the merchandise sold by the respondent in the U.S. market. Specifically, Commerce uses the FOP inputs provided by respondents, along with an input value chosen from a surrogate country, to determine the normal value, i.e., the price at which the product is sold or offered for sale in the exporting country, of the subject merchandise sold by the respondent in the U.S. market. *See, e.g.*, Initial Questionnaire to Golden Quality at D-1, PD 89, bar code 3451246–01 (Mar. 22, 2016); *see also* 19 U.S.C. § 1677B(A)(1)(B). Generally, Commerce calculates the FOPs based on the best available information regarding the values of such factors in a market economy country considered economically comparable by Commerce. *See* 19 U.S.C. § 1677b(c)(1)(B).

[7] "CONNUMs" are control-numbers created by Commerce and specific to the subject merchandise under review. They are unique because they identify the key physical characteristics that are commercially meaningful to the U.S. market and have an impact on sale price and cost of production of the subject merchandise. Commerce uses CONNUMs to distill the pertinent product characteristics down to a single number so that it can match the home market sales of that number with U.S. market sales of products with the same characteristics. Based on the comparison between the home market sales data and the U.S. market sales data, Commerce determines the dumping margin. *See* Certain Frozen Fish Fillets from [Vietnam]: Issues and Decision Memorandum for the Final Results of the Eleventh [ADD] Administrative Review; 2013–2014 at 10, A-552–801, (Mar. 18, 2016), *available at* https://enforcement.trade.gov/frn/summary/vietnam/2016–07072–1.pdf (last visited Oct. 31, 2018) (citing e.g., *Large Residential Washers from the People's Republic of China*, 81 Fed. Reg. 1,398, 1,399 (Dep't Commerce Jan. 12, 2016) (initiation of less-than-fair-value investigation; *see also Stainless Steel Sheet and Strip in Coils from Korea*, 64 Fed. Reg. 30,664, 30, 679 (Dep't Commerce June 8, 1999) ("The cost test compares the price and cost of all comparison market sales, by model (identified by control number, or 'CONNUM.')"); *Stainless Steel Wire Rod from Sweden*, 73 Fed. Reg. 12,950 (Dep't Commerce Mar. 11, 2008) (final results of [ADD] review) and accompanying Issues and Decision Memorandum for the Final Results of the Administrative Review of Stainless Steel Wire Rod from Sweden at 2–14, A-401–806, (Mar. 5, 2008), *available at* http://ia.ita.doc.gov/frn/summary/sweden/ E8–4824–1.pdf (last visited Oct. 31, 2018). The control numbers are provided to respon- dents in the questionnaires issued by Commerce. *See, e.g.*, Initial Questionnaire to Golden Quality at D-2–D-11, PD 89, bar code 3451246–01 (Mar. 22, 2016).

[ADD] Administrative Review, PD 222, bar code 3504073–01 (Sept. 6, 2016) ("Preliminary Decision Memo"). Commerce preliminary assigned the Vietnam-wide rate[8] of $2.39 per kg to entries of subject merchandise from Tafishco and Golden Quality, noting that both mandatory respondents declined to respond to the ADD questionnaire, and therefore failed to demonstrate eligibility for a separate rate.[9] *See* Preliminary Decision Memo at 10. On March 27, 2017, Commerce published its final results, in which it continued to assign the Vietnam-wide rate to both respondents, and determined that both respondents failed to demonstrate eligibility for a separate rate. *See* Final Decision Memo at 11.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to section 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the Court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

[8] The current Vietnam-wide entity rate was established in the final results of the tenth administrative review. *See Certain Frozen Fish Fillets from [Vietnam]*, 80 Fed. Reg. 2,394, 2,396 (Dep't Commerce Jan. 16, 2015) (final results of [ADD] Administrative Review; 2012–2013). There, Commerce noted that the Vietnam-wide entity failed to cooperate to the best of its ability with the investigation, and thus it was appropriate to assign the Vietnam-wide entity a rate based on total adverse facts available ("AFA"). *Id.* at 2395. Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b); 19 C.F.R. § 351.308(a)–(c).

[9] For NME countries, Commerce employs a rebuttable presumption that all companies within an NME are subject to government control, and should therefore be assigned a single antidumping rate. *See* Preliminary Decision Memo at 7. Commerce considers Vietnam an NME country, and treated it as such for this review. *See id.* at 6. Commerce's policy is to assign all exporters of the subject merchandise in the NME country a single rate, unless the exporter can prove its independence from the government. *See id.* at 7; *see also* 19 C.F.R. § 351.107(d). Here, Commerce found that both mandatory respondents failed to qualify for a separate rate because they opted not to participate in the review. *See* Preliminary Decision Memo at 1; Final Decision Memo at 11. Although Golden Quality submitted a separate-rate certification, Commerce found that Golden Quality's decision not to participate in the review precluded the granting of a separate rate, since Commerce announced in its initiation of the administrative review that for exporters who apply for separate-rate status and are selected as mandatory respondents, these exporters will only remain eligible for separate-rate status if they respond to all parts of the questionnaire. *See* Final Decision Memo at 14 (quoting *Initiation of [ADD] and [CVD] Administrative Reviews*, 80 Fed. Reg. 60,356, 60,358 (Dep't Commerce Oct. 6, 2015).

DISCUSSION

I. Commerce's Authority to Assign a Vietnam-wide Rate.

Tafishco challenges Commerce's statutory authority to impose a Vietnam-wide rate in this review. *See* Tafishco Br. at 3–7. Defendant argues that Tafishco did not raise this challenge in its complaint, and thus the court lacks jurisdiction to hear the claim. *See* Def.'s Resp. Pls.' Mots. J. Agency R. at 9–10, Apr. 20, 2018, ECF No. 55 ("Def.'s Br."). Defendant argues that, even if the court hears the claim, Commerce has authority to impose a country-wide rate that is neither an individual rate nor an all-others rate. *See* Def.'s Supplemental Br. Resp. Ct.'s July 25, 2018 Order at 2, Aug. 30, 2018, ECF No. 67 ("Def.'s Supplemental Br.") (citing 19 C.F.R. § 351.107(d) and *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997)). For the reasons that follow, Commerce's asserted legal grounds for imposing a country-wide rate is remanded.

As a preliminary matter, the court may hear Tafishco's challenge to Commerce's statutory authority.[10] In an action brought under 28 U.S.C § 1581(c), the complaint serves as a notice document. As long as the complaint contains a reference to the relevant administrative determination, a statement of the issues presented, and a demand for judgment, the complaint provides Defendant with sufficient notice. *See* USCIT R. 8, Practice Comment. Here, Tafishco's complaint satisfies the Rule 8 requirements because it cites to Commerce's *Final Results*, it alleges that Commerce's application of adverse facts available ("AFA") and the rate applied were "not supported by substantial evidence" and "not in accordance with law," *see* Compl. at ¶ 19, and it contains a prayer for relief. Further, Commerce can point to no prejudice because Tafishco raised—and Commerce addressed—the issue of Commerce's statutory authority in the administrative hearing below. *See* Final Decision Memo at 9–12. The court may therefore hear Tafishco's claim.

With respect to the merits of Tafishco's claim, 19 U.S.C § 1673d instructs that Commerce may establish two kinds of rates. *See* 19 U.S.C § 1673d. After a finding that subject merchandise is being sold at LTFV, Commerce must "determine the estimated weighted average

[10] Defendant claims that Tafishco's failure to specifically articulate a challenge to Commerce's statutory authority to impose a country-wide NME rate in its complaint deprives this Court of jurisdiction. *See* Def.'s Br. at 9–10. Defendant's argument is best described as a waiver argument, not a jurisdictional argument, as Defendant argues that by not raising this specific argument in its complaint, Tafishco should be precluded from making the argument here. As described above, however, Tafishco properly commenced this action, and adequately set forth the issues presented. Defendant's waiver claim is therefore unpersuasive.

dumping margin for each exporter and producer individually investigated," and "determine . . . the estimated all-others rate for all exporters and producers not individually investigated." *See* 19 U.S.C § 1673d(c)(1)(B)(i)(I)–(ii). The statute thus distinguishes between rates applied to individually investigated entities, and the all-others rate.[11]

Tafishco maintains that Commerce lacks statutory authority to impose a Vietnam-wide rate as it did in this review, because 19 U.S.C § 1673d only contemplates two types of rates. *See* Tafishco Br. at 3–7. Defendant contends that the Vietnam-wide rate assigned here was lawful because Commerce has authority to establish a third type of rate, an NME-wide or country wide rate, pursuant to from 19 C.F.R. § 351.107(d). *See* Def.'s Supplemental Br. at 2.

First, the court cannot agree with Tafishco that Commerce lacks authority to apply any NME-entity rate, because Commerce may apply a statutorily authorized rate to an NME entity.[12] As Defendant points out, Def.'s Br. at 13, this court and the Court of Appeals have affirmed the imposition of a single, NME entity-wide rate on numer- ous occasions. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997); *Transcom, Inc. v. United States*, 294 F.3d 1371, 1381 (Fed. Cir. 2002); *Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1392 (Fed. Cir. 2014). Nonetheless, the court cannot sus- tain Commerce's final determination as the Defendant here asserts that the Vietnam-wide rate is something other than one of the two statutorily authorized rates, i.e., it is not an individual rate or an all-others rate. *See* Def.'s Supplemental Br. at 1 (explaining that Commerce does not treat the Vietnam-wide rate as an individual rate or as an "all-others" rate). On the legal grounds provided by Defen- dant, Commerce's assignment of a Vietnam-wide rate to Tafishco cannot stand.

[11] Although 19 U.S.C. § 1673d, on its face, applies only to investigations, the statute applies with equal force to administrative reviews. *See Albemarle Corp. v. United States*, 821 F.3d 1345, 1352 (Fed. Cir. 2016). The statutory framework requires that Commerce use the same methods for calculating dumping margins in administrative reviews as it does in initial investigations. *See* 19 U.S.C. § 1675(a) (In carrying out administrative reviews, Commerce must "determine the dumping margin" to calculate "the amount of any antidumping duty," exactly as it would in an investigation); *see also id.* at 1352. Also, despite the fact that the statute applies on its face only to market economy proceedings, Commerce has adopted it in NME proceedings as well. *See id.* at 1352, n.6. In this review, Commerce assigned "the Vietnam-wide rate" to Tafishco. Final Decision Memo at 11. As explained below, Defendant failed to ground this rate in statutory authority.

[12] Tafishco also argues that the Vietnam-wide rate cannot be an individually investigated rate because Commerce did not conduct a review of the Vietnam-wide NME entity. *See* Tafishco Br. at 5. Because Defendant asserts that the Vietnam-wide rate is not an individual rate or an all-others rate, Def.'s Supplemental Br. at 1, the court does not reach this issue.

The regulation invoked by Defendant, 19 C.F.R. § 351.107(d), provides that in antidumping proceedings involving imports from an NME country, "'rates' may consist of a single dumping margin applicable to all exporters and producers." *See* 19 C.F.R. § 351.107(d). Under this regulation, Commerce may apply a single rate to all entities in an NME country. For example, Commerce could establish an individual rate for the Vietnam entity and apply that rate to all entities that do not satisfy the criteria for a separate rate. *See, e.g.*, *Certain Frozen Fish Fillets From [Vietnam]*, 80 Fed. Reg. 2,394, 2,396 (Dep't Commerce Jan. 16, 2015) (final results of [ADD] administrative review; 2012–2013) (determining, inter alia, the Vietnam-wide rate, which applied to several companies that failed to qualify for separate rates); *see also Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in [ADD] Proceedings and Conditional Review of the [NME] Entity in NME [ADD] Proceedings*, 78 Fed. Reg. 65,963, 65,964 (Dep't Commerce Nov. 4, 2013) (describing Commerce's practice with respect to reviewing the NME entity). This court does not hold that Commerce lacks the power to assign a single dumping margin to all entities in an NME country, so long as that the rate assigned is one authorized by statute.

Yet, Defendant insists that Commerce did not establish an individual rate for the Vietnam entity here. *See* Def.'s Supplemental Br. at 1. Defendant asserts that Commerce established something called "a single country-wide rate," *see* Def.'s Br. at 12, a rate that is not an individual rate or an all-others rate.[13] Def.'s Supplemental Br. at 1. The regulation does not, however, grant Commerce authority to create a new kind of rate; Commerce may determine individual rates and an all-others rate. *See* 19 U.S.C § 1673d(c)(1)(B)(i)(I)–(ii). Defendant's interpretation of 19 C.F.R. § 351.107(d) is thus not based in the statute, and therefore contravenes the requirement that Commerce ground its conduct in statutory authority. *See, e.g.*, *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943) (explaining that the court's job is complete when it finds "that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979) (explaining that in order for an

[13] Commerce, in its Final Decision Memo, describes the rate assigned to Tafishco as the "Vietnam-wide rate," Final Decision Memo at 11, and also refers to the "NME country rate," Final Decision Memo at 11, and the "NME-wide entity rate." Final Decision Memo at 12. Commerce could conceivably qualify these labels, and in particular, the "NME-wide entity rate" label, as an individual rate, and therefore ground the rate in 19 U.S.C § 1673d. In response to the court's request for supplemental briefing, however, Defendant insisted that the rate assigned to Tafishco—however it is described—is not an individual rate or an all-others rate. Def.'s Supplemental Br. at 1.

agency's regulations to become law, "it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress"); *CS Wind Vietnam Co., Ltd. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (stating that in explaining its reasoning, Commerce "must reasonably tie the determination under review to the governing statutory standard and to the record evidence by indicating what statutory interpretations the agency is adopting and what facts the agency is finding").

Further, the statute contains no grant of legislative authority for Commerce to promulgate regulations creating additional categories of rates. Congress has spoken to the precise statutory question. *See Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("[i]f the intent of Congress is clear, that is the end of the matter ").[14] Accordingly, Defendant's asserted legal grounds for assigning Tafishco a Vietnam-wide rate in this case must fail.

Defendant-Intervenors argued in their responsive brief that the NME entity is an individual entity, and therefore the Vietnam-wide rate should be considered an individually investigated rate. *See* Defendant-Intervenors' Resp. Opp. Pls.' Rule 56.5 Mot. J. Agency R. at 8–9, Apr. 20, 2018, ECF No. 56 ("Def.-Intervenors' Br."). Had Defendant advanced the same rationale, the court may have been able to sustain Commerce's determination. As described above, however, Defendant did not advance this position, and therefore it is not before the court. Only Commerce may supply the legal grounds for its actions, and the court may not replace or supplement the agency's rationale with its own. *See, e.g.*, *Sec. and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (explaining that "a reviewing

[14] Moreover, there is no statutory "gap" warranting deference. *See* Def.-Intervenors' Resp. Def.'s Supplemental Br. Resp. Ct.'s July 25, 2018 Order at 1–2, Sept. 5, 2018, ECF No. 68 ("Def.-Intervenors' Supplemental Br.") (citing *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Defendant-Intervenor invokes *Michaels Stores, Inc. v. United States*, 766 F.3d 1388 (Fed. Cir. 2014), for the proposition that the court has already found 19 U.S.C. § 1673d(c) to be ambiguous "when it comes to how Commerce should assign rates to [NME] entities." *See* Def.-Intervenors' Supplemental Br. at 2. *Michaels Stores*, however, is distinguishable. There, the court found an ambiguity in 19 C.F.R. § 351.107, specifically pertaining to whether the "noncombination rate" referred to in 19 C.F.R. § 351.107(b)(2) includes the NME-wide rate prescribed by § 351.107(d). *See Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1392 (Fed. Cir. 2014). 19 C.F.R. § 351.107(b)(2) provides that where subject merchandise is exported to the United States by a non-producing exporter, "if the Secretary has not established previously a combination cash deposit rate . . . for the exporter and producer in question or a noncombination rate for the exporter in question, the Secretary will apply the cash deposit rate established for the producer." The ambiguity therefore pertained to whether, for an exporter from an NME country, the "noncombination rate" referred to in subsection (b)(2) includes the NME-wide rate referred to in subsection (d). *See* 19 C.F.R. § 351.107(b)(2) and (d). The *Michaels Stores* analysis thus falls short of holding that the statute is unclear with respect to the two rates that Commerce has authority to determine pursuant to 19 U.S.C. § 1673d(c). Commerce must ground its conduct in the statute. *See CS Wind Vietnam Co.*, 832 F.3d at 1377. Therefore, Defendant-Intervenors' argument is unpersuasive.

court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency"); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284–85 (1974) (explaining that a reviewing court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," but "may not supply a reasoned basis for the agency's action that the agency itself has not given"); *Rovalma, S.A. v. Bohler-Edelstahl GmbH & Co. KG*, 856 F.3d 1019, 1024 (Fed. Cir. 2017) (same). Defendant expressly denies that the Vietnam-wide rate in this case is an individually investigated rate. *See* Def.'s Supplemental Br. at 1. The court may not, therefore, uphold Commerce's assignment of the Vietnam-wide rate to Tafishco on the basis that the Vietnam-wide rate is an individual rate. That issue is not before the court.

Defendant argues that the line of cases upholding Commerce's practice of presuming state control of an exporter in an NME country authorizes Commerce to apply a country-wide rate in the manner it did here. Def.'s Br. at 12 (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997); *Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002); *Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1392 (Fed. Cir. 2014)). This precedent is inapposite.[15] In *Sigma*, the Court of Appeals for the Federal Circuit held that Commerce had authority to employ a rebuttable presumption of state control for exporters in an NME country, and that Commerce may place the burden on such exporters to show a lack of government

[15] Defendant cites *Transcom* and *Michaels Stores* for the same idea, i.e., that courts have upheld Commerce's practice of employing a rebuttable presumption of state control of exporters in an NME country, and that Commerce's imposition of the Vietnam-wide rate here is lawful under such precedent. Neither case controls, however. In *Transcom*, the court held that Commerce could employ a rebuttable presumption that exporters in an NME country are government-controlled, and where certain companies did not establish their independence from the state, Commerce could determine their rates using best information available ("facts otherwise available" under the current version of the state) pursuant to 19 U.S.C. § 1677e. *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1381 (Fed. Cir. 2002). The court reasoned that the fact that the producer cooperated in Commerce's investigation was not dispositive because it did not impact the presumption in NME countries that producers are part of the NME entity until they show otherwise. *See id.* at 1381. *Transcom* therefore did not address the issue of Commerce's assigning an NME-wide rate that is neither an individual rate nor an all-others rate. In *Michaels Stores*, the court recognized that Commerce's policy is to assign a single rate to all exporters in NME countries unless the exporter can establish independence from the government. *See Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1392 (Fed. Cir. 2014). The issue in *Michaels Stores*, however, was whether, under 19 C.F.R. § 351.107(b)(2) and 19 C.F.R. § 351.107(d), a non-producing exporter could use its producers' dumping margins to import goods into the United States. *See id.* at 1391. *Michaels Stores* did not, therefore, address Commerce's authority to impose a country-wide rate that is neither an individual rate nor an all-others rate.

control. *See Sigma*, 117 F.3d at 1405. The question of whether Commerce may presume state control under such circumstances, however, is distinct from the issue of whether Commerce has statutory authority to impose a country-wide rate that is neither an individual rate nor an all-others rate. The plaintiff in *Sigma* did not challenge Commerce's statutory authority to impose a country-wide rate as described, and accordingly, the Court did not address the issue. *See id.*

Defendant-Intervenors argue that Commerce's assignment of the Vietnam-wide rate was lawful because the courts have upheld Commerce's practice with respect to the rebuttable presumption described above, and such rulings were based on a "direct analysis of the statute."[16] *See* Def.-Intervenors' Br. at 7 (citing *Diamond Sawblades Manufacturers Coalition v. United States*, 866 F.3d 1304, 1311 (Fed. Cir. 2017) ("*Diamond Sawblades*")). The *Diamond Sawblades* comparison misses the mark because, as in *Sigma*, there was no evidence that Commerce attempted to assign a country-wide rate that is neither an individual rate nor an all-others rate. *See Diamond Sawblades*. The issue in *Diamond Sawblades* was whether Commerce could lawfully assign an NME-wide rate where the rate was calculated using AFA and the respondent cooperated with the investigation. *See Diamond Sawblades*, 866 F.3d at 1310. The Court held that Commerce's assignment of the NME-wide rate was lawful, despite the fact that respondent's cooperation would typically foreclose the possibility of AFA. *Id.* at 1312. The court reasoned that such cooperation has no bearing on whether the respondent is under the control of its government. *Id.* at 1312–13. Where an exporter fails to rebut the presumption of state control, Commerce may assign an NME-wide rate. Nevertheless, *Diamond Sawblades* says nothing of Commerce's authority to assign an NME rate that is neither an individual rate nor an all-others rate, and therefore does not control here.

In its supplemental brief, Defendant argues that "[t]he presumption of government control and the [NME] rate are linked," seemingly arguing that together, the jurisprudence described and 19 C.F.R. § 351.107(d) provide Commerce with the requisite authority to apply a Vietnam-wide rate in the manner it did here. *See* Def.'s Supplemental Br. at 2–3. First, this position ignores the statute. Second, such an approach is unavailing, given that the case law relied upon addresses Commerce's rebuttable presumption of state control, rather than

[16] Although Defendant-Intervenors argued that the Vietnam-wide rate was an individual rate in their responsive brief, Defendant-Intervenors changed their argument in their supplemental brief, instead arguing, as Defendant did, that the Vietnam-wide rate is neither an individual rate nor an all-others rate. *See* Def.-Intervenors' Br. at 6, 8; *see also* Def.-Intervenors' Supplemental Br. at 1–2.

Commerce's statutory authority to issue a country-wide rate that is neither an individual rate nor an all-others rate.

Although it is true that Commerce "has broad authority to interpret the antidumping statute and devise procedures to carry out the statutory mandate," *see Sigma*, 117 F.3d at 1405, Commerce nonetheless must reasonably ground its actions in its statutory authority. *See CS Wind Vietnam Co., Ltd. v. United States*, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (explaining that an agency must ground its action in the statutory standard, and an agency's statement of what it usually does may not substitute for an explanation of why such action comports with the statute). That courts have permitted Commerce to presume state control in an NME country does not address the problem of Commerce lacking statutory authority for a country-wide rate that is neither an individually investigated rate nor an all-others rate. Although Defendant-Intervenors argued initially that the country-wide rate in this case was indeed an individual rate, Defendant expressly denied that the Vietnam-wide rate in this case is an individual rate. *See* Def.-Intervenors' Br. at 8–9; *see also* Def.'s Supplemental Br. at 1.

II. Commerce's Assignment of the $2.39 Rate to Tafishco

Tafishco argues that Commerce was obligated to corroborate the Vietnam-wide rate of $2.39 per kg, and failed to do so. *See* Tafishco Br. at 7–12; *see also* 19 U.S.C. § 1677e(c); 19 C.F.R. §§ 351.308(c) and (d).[17] Tafishco argues that because the Vietnam-wide entity is still a party to this review, any adverse inference held against it must meet the AFA requirements generally. *See id.* at 7. Accordingly, Tafishco argues, Commerce was required to demonstrate that the Vietnam-wide rate was grounded "in commercial reality." *Id.* at 8 (quoting *Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010). Further, the Vietnam-wide rate is not based in commercial reality, Tafishco argues, because subsequently determined rates are lower, four review periods have passed since Commerce calculated the rate, the rate was based on different surrogate values, and it was calculated prior to Commerce requiring CONNUM-specific reporting. *See id.* at 12–13.

Defendant counters that Commerce was not required to corroborate the rate because the Vietnam-wide entity was not subject to this review, since Commerce's practice is to review the NME entity in ADD administrative reviews only upon request. *Def.'s Br.* at 18–19 (citing

[17] When Commerce relies on secondary information instead of information obtained in the current investigation or review, 19 U.S.C. § 1677e(c) requires that Commerce, "to the extent practicable, corroborate that information from independent sources" reasonably at its disposal.

Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in [ADD] Proceedings and Conditional Review of the [NME] Entity in NME [ADD] Proceedings, 78 Fed. Reg. 65,963 (Dep't Commerce Nov. 4, 2013)). Accordingly, Defendant argues, Commerce did not apply AFA to the Vietnam entity in this review, and therefore does not need to corroborate the rate. *Id.* Additionally, Defendant argues that under the Trade Preferences Extension Act of 2015, Commerce is not required to corroborate a dumping margin applied in a separate segment of the proceeding, as was the case here. *Id.* at 19–20; *see also* 19 U.S.C. § 1677e(c)(2).

In light of the above conclusion regarding Commerce's lack of statutory authority to impose a country-wide rate that is neither an individual rate nor an all-others rate, Commerce's assignment of the $2.39 Vietnam-wide rate to Tafishco is not in accordance with law. Pursuant to 19 U.S.C. § 1516a(b), the court must hold unlawful any determination found "not in accordance with law." *See* 19 U.S.C. § 1516a(b). It is not necessary to address the parties' arguments regarding corroboration, and the court declines to do so.

III. Commerce's Requirement That Golden Quality Report FOPs on a CONNUM-Specific Basis

Golden Quality argues that Commerce's requirement that respondents provide CONNUM-specific FOP reporting is not supported by substantial evidence. *See* Golden Quality Br. at 7–20. Golden Quality maintains that Commerce did not previously require reporting of this kind, *see* Golden Quality Br. at 8–12, and that Commerce's decision to require it for the twelfth administrative review was retroactive and not supported by substantial evidence, since it contravenes Golden Quality's "reliance interest" developed over the course of previous administrative reviews. *Id.* at 14 (quoting *Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 386–87, 795 F. Supp. 417, 420 (1992)). Defendant counters that Commerce's request was not retroactive, and that Golden Quality had sufficient notice that CONNUM-specific reporting would be required. Def.'s Br. at 24. For the reasons that follow, Commerce's requirement that Golden Quality provide CONNUM-specific FOP reporting is in accordance with law and supported by substantial evidence.

When Commerce conducts an ADD investigation, it must determine whether subject merchandise is being, or is likely to be, sold at less than fair value. *See* 19 U.S.C. § 1677b(a). The statute provides that in determining whether merchandise is being sold at less than fair value, "a fair comparison shall be made between the export price or

constructed export price and normal value." *Id.* Commerce, in administering the antidumping statute, must determine what constitutes "normal value," i.e., the price at which the product is sold or offered for sale in the exporting country. *See* 19 U.S.C. § 1677b(a)(1)(B). Where the producer or exporter in question is from an NME country, and Commerce finds that available information does not permit an accurate determination of the merchandise's normal value, Commerce must determine normal value based on the FOPs utilized to produce the merchandise.[18] *See* 19 U.S.C. § 1677b(c); *see also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, Vol. 1, at 808–809. Commerce uses the respondents' CONNUM-specific FOPs "to construct the value of the product sold by [the respondent] company in the United States" to ensure that a fair comparison is made between the U.S. price and normal value. *Certain Frozen Fish Fillets from [Vietnam]*, 81 Fed. Reg. 17,435 (Dep't Commerce Mar. 29, 2016) (final results of administrative review). It is, generally, standard procedure for Commerce to request product-specific data in antidumping investigations. *See, e.g.*, *Mukand, Ltd. v. Unied States*, 767 F.3d 1300, 1307 (Fed. Cir. 2014).

Vietnam is an NME country. Further, Golden Quality does not dispute that Commerce's practice generally is to request CONNUM-specific FOP reporting. Rather, it argues that Commerce's decision to require such reporting here is unsupported by substantial evidence because Commerce failed "to consider the 'reliance interest' engendered by the decade's worth of proceedings under this AD order " Golden Quality Br. at 17.

Golden Quality's argument is unpersuasive because Commerce put Golden Quality and other respondents on notice as early as the eighth administrative review of the *ADD Order*. *See* Certain Frozen Fish Fillets from [Vietnam]: Issues and Decision Memorandum for the Final Results of the Eighth Administrative Review and Aligned New Shipper Reviews at 43–44, A-552–801, (Mar. 13, 2013), *available at* http://ia.ita.doc.gov/frn/summary/vietnam/2013–06550–1.pdf (last visited Oct. 31, 2018) (specifying that Commerce, in future reviews, "may require respondents to report FOPs on a CONNUM-specific basis that will reflect the different production costs required to produce the different types of fish fillets, which may require respondents to maintain original accounting and production records on a monthly, product-specific basis."). Commerce also provided Golden Quality and other respondents with notice of its intent to require CONNUM-

[18] In addition to FOPs, Commerce must also include "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1)(B).

specific reporting in the ninth administrative review, stating that, "[f]or all future reviews, the Department intends to require Vinh Hoan and other respondents to report [their] FOPs on a CONNUM-specific, product-specific . . . basis." *Certain Frozen Fish Fillets from [Vietnam]*, 79 Fed. Reg. 19,053 (Dep't Commerce Apr. 7, 2014) (final results of administrative review) and accompanying Certain Frozen Fish Fillets from [Vietnam]: Issues and Decision Memorandum for the Final Results of the Ninth Administrative Review and Aligned New Shipper Review at 74, A-552–801, (Mar. 28, 2014), *available at* https://enforcement.trade.gov/frn/summary/vietnam/2014–077141.pdf (last visited Oct. 31, 2018).[19] Golden Quality therefore had ample notice of the requirement that it report FOPs on a CONNUM-specific basis, and Commerce acted reasonably in requiring such reporting.

Golden Quality argues that Commerce unjustifiably changed its practice with respect to the CONNUM-specific reporting requirement. Yet, Golden Quality proffers no evidence to undermine Defendant's position that Commerce has consistently requested this type of reporting in the past. *See* Final Decision Memo at 14; *see also* Golden Quality Br. Although Commerce excused respondents in the original investigation from reporting FOPs on a CONNUM-specific basis, Golden Quality cannot claim a reliance interest in such treatment because Commerce advised potential respondents in future reviews that reporting methodology would be closely scrutinized, and that any failure to distinguish between products would bring the risk of having AFA applied. *See Certain Frozen Fish Fillets from [Vietnam]*, 68 Fed. Reg. 37,116 (June 23, 2003) and accompanying Issues and Decision Memorandum for the [ADD] Investigation of Certain Frozen Fish Fillets from [Vietnam] at 92, A-552–801, (June 23, 2003), available at https://enforcement.trade.gov/frn/summary/vietnam/03–15794–1.pdf (last visited Oct. 31, 2018). Golden Quality's argument that Commerce unjustifiably reversed its practice is therefore unpersuasive.

Finally, Golden Quality argues that by requiring CONNUM-specific reporting in the twelfth administrative review, Commerce is asking

[19] Commerce also provided notice in the eleventh administrative review, stating that although some parties had not submitted FOPs on a CONNUM-specific basis in the past, "the supplemental questionnaires serve as a notification that in this review and going forward, [FOPs] must be reported on a CONNUM-specific basis, or the respondent must then explain in detail why it is unable to do so and provide a reasonable allocation methodology." *See Certain Frozen Fish Fillets from Vietnam*, 81 Fed. Reg. 17,435 (Dep't Commerce Mar. 29, 2016) (final results and partial rescission of [ADD] administrative review; 2013–2014) and accompanying Certain Frozen Fish Fillets from [Vietnam]: Issues and Decision Memorandum for the Final Results of the Eleventh [ADD] Administrative Review; 2013–2014 at 11, A-552–801, (Mar. 18, 2016), *available at* https://enforcement.trade.gov/frn/summary/vietnam/2016–07072–1.pdf (last visited Oct. 31, 2018).

Golden Quality to provide information that does not exist, since the period of review had already passed when Commerce made its request. Golden Quality Br. at 18–19. Golden Quality maintains that such information does not exist because, in accordance with its reliance interest, no efforts were undertaken to collect this data or provide an explanation of efforts to report the FOPs by use of an alternate methodology.[20] *Id.* at 19–20. This argument fails. Golden Quality made a decision not to collect data in accordance with Commerce's chosen methodology, despite being notified multiple times of the requirement, and attempts to justify it by emphasizing its supposed reliance on the previous reporting practice. Golden Quality's argument that the information does not exist does not carry the day; the information does not exist because Golden Quality chose to ignore Commerce's notifications. Therefore, Commerce's requirement that Golden Quality provide CONNUM-specific FOP reporting is supported by substantial evidence.

CONCLUSION

Commerce's asserted legal grounds to issue the NME rate in this review and its assignment of a $2.39 per kg rate to Tafishco are not in accordance with law. Commerce's requirement that Golden Quality report its FOPs on a CONNUM-specific basis is in accordance with law and supported by substantial evidence. Therefore, it is

ORDERED that Commerce's asserted legal grounds to issue the NME rate in this review is remanded; and it is further

ORDERED that Commerce's application of a $2.39 per kg rate on Tafishco is remanded; and it is further

ORDERED that Commerce's requirement that Golden Quality report its FOPs on a CONNUM-specific basis is sustained; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to comments on the remand redetermination.

[20] Golden Quality relies on *Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 795 F. Supp. 417 (1992), for its reliance argument, a case Golden Quality describes as "strikingly similar" to this case. Golden Quality Br. at 14. *Shikoku Chemicals* is readily distinguishable. There, in an attempt to comply with the U.S. antidumping law, the plaintiffs adjusted their prices in accordance with the methodology consistently employed by Commerce. *See id.*, 16 CIT at 386, 795 F. Supp. at 420. No such reliance occurred here. Indeed, despite being notified by Commerce of the requirement for CONNUM-specific FOP reporting, Golden Quality took no action to collect such information.

Dated: November 5, 2018
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE