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Remand
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E&C/V: PW

Final Results of Redetermination Pursuant to
Thuan An Production Trading and Service Co., Ltd. v. United States
Consol. Court No. 17-00056 (November 5, 2018)

I. SUMMARY

The U.S. Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT) in *Thuan An Production Trading and Service Co., Ltd. v. United States*, Consol. Court No. 17-00056 (November 5, 2018) (*Tafishco* or Court's Order). This remand addresses one issue in the 12th administrative review of the antidumping duty order on certain frozen fish fillets (fish fillets) from the Socialist Republic of Vietnam (Vietnam), specifically, the Vietnam-entity rate.[1] As we explain below, on remand we have reconsidered our past interpretation of the statute and Commerce's authority to apply the Vietnam-rate in accordance with the statute, and addressed that issue accordingly.

For this remand, Commerce has provided further analysis of its decision to apply the nonmarket economy (NME)-entity rate to Thuan An Production Trading and Service Co., Ltd. (Tafishco).[2] Commerce continues to find that it has the statutory authority to apply the NME-entity rate to Tafishco in this administrative review under Section 751(a) of the Tariff Act of 1930, as amended (the Act). The NME-entity rate was determined in the investigation underlying this order pursuant to Section 735(c)(1)(B)(i)(I) of the Act, which authorizes the

[1] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review; 2014–2015*, 82 FR 15181 (March 27, 2017) (*Final Results*) and accompanying Issues and Decision Memorandum (IDM).
[2] *See* Court's Order at 8.

application of "individually investigated" rates in investigations. That rate then continued to exist following the investigation and was changed in a subsequent administrative review of the Order pursuant to Commerce's practice at that time. Commerce has provided further explanation concerning its authority to determine and maintain an NME-entity rate and had concluded that no changes to its calculations are warranted this remand redetermination.

II. ANALYSIS

In antidumping proceedings involving NME countries, Commerce presumes that, absent *de jure* and *de facto* evidence that they are separate from the centralized government for purposes of export activities, all exporters are considered part of the central government and therefore part of the "NME entity."[3] As the Court explained in its Order, this presumption was upheld by the Court of Appeals for the Federal Circuit (CAFC) in *Sigma*.[4] The presumption can be rebutted, however, as companies have the opportunity to demonstrate entitlement to a rate separate from that of the NME entity by showing that the government does not have *de jure* or *de facto* control over their export activities.[5] As the CAFC has recognized, the NME-entity rate is often based on adverse facts available, pursuant to Sections 776(a) and (b) of the Act, because "some part" of the NME entity "has not cooperated in the proceeding" and "those that have responded do not account for all imports of the subject merchandise" from that entity.[6]

In the *Final Results* of the 12th administrative review, Commerce determined that Tafishco had failed to cooperate with Commerce's administrative review and had not demonstrated that it was independent from the government with respect to its export activities.[7]

[3] *See Sigma Corp. v. United States*, 117 F.3d 1401, 1407 (Fed. Cir. 1997) (*Sigma*).
[4] *See* Court's Order at 15 (citing *Sigma*, 117 F.3d at 1405).
[5] *See Coalition for the Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 44 F. Supp. 2d 229, 248 (CIT 1999) (*Brake Drum*).
[6] *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373 (Fed. Cir. 2013) (*Bestpak II*).
[7] *See* IDM at Comment 2.

Accordingly, Commerce determined Tafishco was part of the NME entity and applied the NME-entity rate to the company.[8] The rate being applied to the NME entity was originally set in the underlying investigation,[9] and was then revised in the tenth administrative review when Commerce reviewed the NME entity.[10]

In the *Final Results*, the NME entity was not reviewed, and Commerce did not revise the NME-entity rate.[11] However, this Court nevertheless remanded the *Final Results* to Commerce for further explanation of Commerce's statutory authority to apply the NME-entity rate.[12] As we explain on remand, the NME-entity rate applied in the *Final Results* is in accordance with law.

A. Commerce Initially Determines the NME-Entity Rate in an Investigation Pursuant to Section 735(c)(1)(B)(i)(I) of the Act

Section 731 of the Act states that if Commerce determines that a "class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" and the International Trade Commission finds a domestic industry is being injured as a result of dumping, "there shall be imposed upon such merchandise an antidumping duty." Furthermore, Sections 735(a)(1) and 735(c)(1)(B)(i) of the Act state that if Commerce makes an

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[8] *See* IDM at Comment 2.

[9] *See Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 37116 (June 23, 2003) and accompanying IDM (*LTFV Investigation Final Determination*).

[10] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Antidumping Duty Administrative Review*; 2012-2013, 79 FR 40059 (July 11, 2014) and accompanying PDM at 1, and 8-12, unchanged in *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 80 FR 2394 (January 16, 2015) (*10th AR Final Results*) and accompanying IDM at Comment XXI. On November 4, 2013, Commerce modified its prior practice of "conditionally" reviewing the NME entity whenever an exporter requesting a separate rate was unable to demonstrate that it was separate from the NME-wide entity. *See Announcement of Change in Dep't Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963, 65970 (November 4, 2013) (*Announcement of Change in Dep't Practice*). Commerce's current practice is to conduct an administrative review of NME-wide entities only if it receives a request for a review of that entity, or if it elects to self-initiate a review of that entity. *Id.* These changes were not in effect for the 10th AR, and Commerce thus conditionally reviewed the NME entity. *Id.* at 65964.

[11] Commerce did not review the NME entity in the administrative review at issue because the *Announcement of Change in Dep't Practice* had already gone into effect by the time this administrative review was initiated. *See Announcement of Change in Dept' Practice*, 78 FR at 65964.

[12] *See* Court's Order at 12.

affirmative final determination of dumping, then Commerce "shall (I) determine the estimated weighted average dumping margin for each exporter and producer individually investigated, and (II) determine, in accordance with paragraph (5), the estimated all-others rate for all exporters and producers not individually investigated."[13]

Commerce investigations of NME countries are factually distinctive from market economy antidumping investigations, and although many of the statutory provisions governing antidumping investigations of market economy countries also apply equally to investigations of NME countries, the explicit dichotomy of "investigated margins" and "all-others rates" does not directly apply in NME investigations.[14] This is because in the vast majority of NME investigations, Commerce does not calculate an "all others" rate. Instead, in NME investigations, Commerce normally calculates rates for mandatory respondents, the rate for the NME entity, and a rate calculated for separate rate companies (separate rate), which is a rate for companies that have successfully demonstrated independence from the government in their export activities.[15]

[13] There are two methods described in the statute for calculating the all-others rate, each of which apply in different situations. Section 735(c)(5)(A) of the Act applies when at least one individually investigated company received a margin that was not zero, *de minimis*, or based entirely on facts available, while Section 735(c)(5)(B) applies when all individually investigated companies received margins that were zero, *de minimis* or based entirely on facts available. *See* Sections 735(c)(5)(A)-(B) of the Act.

[14] *See Albemarle Corp v. United States*, 821 F.3d 1345, 1352, fn. 6 (Fed. Cir. 2016) ("The statute explicitly applies only to market economy proceedings, but Commerce has adopted it in non-market economy proceedings as well").

[15] *See Sigma*, 117 F.3d at 1407; *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 783 F. Supp. 2d 1343, 1349 (CIT 2011) (*Bestpak I*) (noting that when calculating the separate rate, "Commerce normally relies on the statutory provision {that} describes the all-others rate used in market economy investigations."); *rev'd on other grounds, Bestpak II*, 716 F.3d at 1374; *Amanda Foods (Vietnam) v. United States*, 647 F. Supp. 2d 1368 (CIT 2009) ("To determine the dumping margin for non-mandatory respondents in NME cases…Commerce normally relies on the 'all others rate...'".)); *see also Soc Trang Seafood Joint Stock Co. v. United States*, 321 F. Supp. 3d 1329, 1334 (CIT 2018) ("Commerce has a practice of calculating the separate rate in the same manner as the all-others rate in investigations…"); *Bristol Metals L.P. v. United States*, 703 F. Supp. 2d 1370, 1377-78 (CIT 2010) ("{W}hen calculating an NME 'sample pool' rate, Commerce is guided by the 'all others rate' provision…Commerce typically need not calculate an 'all others' rate").

To the extent the Court has requested clarification from Commerce to explain under what statutory authority Commerce determined the NME-entity rate in the underlying investigation, as the Court recognized, the CAFC has "affirmed the imposition of a single, NME entity-wide rate on numerous occasions."[16] It has not, however, stated expressly under what provision in the Act the NME entity-wide rate was authorized. After reconsideration of the issue on remand, and in light of the Court's concerns, Commerce acknowledges that the NME-entity rate in the underlying investigation was an individually investigated rate. As the Court stated, the Act provides under section 735 for at least "two statutorily authorized rates," either "an individual rate or an all-others rate."[17] Because Commerce did not apply the "all others" provision in the *LTFV Investigation Final Determination*, Commerce is clarifying on remand that the NME-entity rate in the *LTFV Investigation Final Determination* was determined in accordance with Section 735(c)(1)(B)(i)(I) of the Act. To be clear, Commerce is explaining in this remand redetermination that the Vietnam-entity in the *LTFV Investigation* was "individually investigated" and the Vietnam-entity rate was determined pursuant to adverse facts available, in

[16] *See* Court Order at 10, citing *Sigma* at 1405-06; *Transcom, Inc. v United States*, 294 F.3d 1371, 1381 (Fed. Cir. 2002) and *Michaels Store Inc. v. United States*, 766 F.3d 1388, 1392 (Fed. Cir. 2014).

[17] *Id.* at 11. It appears from its decision that the Court may believe that the Act only allows Commerce the authority to calculate an antidumping margin in two scenarios – determining a rate for individually investigated respondents and calculating an "all others rate." We disagree with this interpretation of Commerce's authority because the Act, in fact, does provide Commerce with the authority to determine antidumping margins in additional scenarios. For example, Section 777A(c)(2) of the Act allows Commerce to apply a weighted average of the rates of the individually investigated respondents ("accounting for the largest volume of subject merchandise" or based on a statistical sample) to those companies not selected, using the same methodology as that set forth in the all-others provision. Likewise, as we have explained, although the CAFC has affirmed Commerce's use of the methodology derived from the "all others rate" provision in the context of determining a separate rate, the CIT and CAFC have both explained that exporters or producers receiving a separate rate in NME investigations are not covered by the "all-others rate" provision and that rate does not apply to those companies in future administrative proceedings. *See Bestpak II*, 716 F.3d at 1374; *Bestpak I*, 783 F. Supp. 2d at 1349; *Amanda Foods*, 647 F. Supp. 2d at 1368; *Soc Trang Seafood*, 321 F. Supp. 3d at 1334; and *Bristol Metals*, 703 F. Supp. 2d at 1377-1378. We do not believe either of these scenarios are accounted for in Sections 735(c)(1)(B)(i)(I) and 735(c)(1)(B)(i)(II) of the Act.

accordance with Section 776(a) and (b) of the Act.[18] As the Court recognized, the CAFC has "affirmed the imposition of a single, NME entity-wide rate on numerous occasions."[19]

B. Commerce Usually Does Not Determine a New NME-Entity Rate in an Administrative Review Unless a Review is Requested

The *LTFV Investigation Final Determination* is not before the Court in this case and the litigation at hand is a challenge to an administrative review, conducted pursuant to Section 751 of the Act. In an administrative review, Commerce is directed to "review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty."[20] Section 751(a)(2) of the Act describes that in calculating the amount of the antidumping duty, Commerce must determine a dumping margin for "each entry of the subject merchandise,"[21] for producers or exporters *for which a review was requested*.[22] Section 751 of the Act does not mention either individually investigated rates or all-others rates.[23]

This means that after requests for review are filed with the agency, Commerce will normally, if resources do not allow for it to calculate "individual weighted average dumping margin(s) for each known exporter and producer of the subject merchandise," pursuant to Sections 777A(c)(1) and (2) of the Act, select a limited number of exporters to review because it is "not practicable to make individual weighted average dumping margin determinations …

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[18] *See LTFV Investigation Final Determination*, 68 FR at 37119-37120.
[19] *See* Court Order at 10, citing *Sigma* at 1405-06; *Transcom, Inc. v United States*, 294 F.3d 1371, 1381 (Fed. Cir. 2002) and *Michaels Store Inc. v. United States*, 766 F.3d 1388, 1392 (Fed. Cir. 2014).
[20] *See* Section 751(a)(1)(B) of the Act.
[21] *See* Section 751(a)(2) of the Act.
[22] *See* Section 751(a)(1) of the Act (clarifying that Section 751(a)(1)(B) and (a)(2) apply "if a request for such a review has been received") (emphasis added).
[23] *Id*. In administrative reviews of market economies, the all-others rate that was set in the investigation continues to have effect. This rate usually *does not change*. (Commerce may usually only change the all-others rate if it conducts a changed circumstances review under Section 751(b) of the Act.). This rate is an "all-others rate" within the meaning of Section 735(c)(1)(B)(i)(II) of the Act and continues to have effect after the imposition of the order pursuant to that provision of the statute. Because Section 751(a) applies to producers and/or exporters for *which a review was requested*, the all-others rate from the investigation continues to apply to companies for which no subsequent administrative reviews are requested.

because of the large number of exporters or producers involved in the investigation or review." Commerce will then usually apply a weighted average of the rates determined for the selected respondents to those not selected,[24] or, in the case of a NME country, Commerce will apply that same methodology to the non-selected companies who have satisfied the requirements for a separate rate.[25] In either case, although the methodology being applied to those non-selected companies is similar to that determined under the "all others" provision applied in investigations, it is still different because it is calculated based on the rates assigned to the individually-examined respondents *in the administrative review*, rather than being carried over from the investigation. The rate for the non-selected respondents therefore usually *changes* from one review to the next, if for no other reason than that the respondents from review to review frequently are different, while the all-others rate remains the same. Commerce has the authority to apply these rates, as the CIT has found that "the statute is silent on the method Commerce must use in determining a rate to be applied to non-reviewed respondents."[26]

To the extent that a review is requested of the NME entity in an administrative review, under its current practice, Commerce will review the entity and determine a rate potentially different from the rate determined in the underlying investigation. For example, Commerce recently completed a review of the China-wide entity in the *Aluminum Extrusions Review* when a review of that entity was requested.[27] As a result of that review, a different rate from that

[24] *See. e.g. Ball Bearings and Parts Thereof From France, Germany, and Italy: Preliminary Results of Antidumping Duty Administrative Reviews and Rescission of Antidumping Duty Administrative Reviews in Part*, 77 FR 33159, 33161 (June 5, 2012) ("Generally we have looked to Section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents not selected for individual review.").
[25] *See e.g. Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 53214 (October 22, 2018).
[26] *See Asahi Seiko Co., Ltd. v. United States*, 751 F. Supp. 2d 1335, 1340 (CIT 2010).
[27] *See Aluminum Extrusions from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 52265 (Nov. 13, 2017) (reviewing an NME entity when Commerce received a review

determined in the *Aluminum Extrusions* antidumping investigation was applied to the China-wide entity.[28]

As explained above, under Commerce's former practice, Commerce would sometimes determine an NME-entity rate in the context of an administrative review even if no review of the NME entity was requested, if it determined that a given respondent in a review was, in fact, part of the NME entity. This former practice was reflected in the tenth review of this Order, in which Commerce recalculated the NME-entity rate which is now assigned to Tafishco.[29] However, as noted above, under Commerce's current practice, when no request to review the NME entity is filed with Commerce, Commerce does not change the rate applied to the NME entity.

It is well established that Commerce has the authority to apply NME-entity rates to entities who have not proven that their export activities are separate from the government in administrative reviews. In 1998, in light of the CAFC's decision in *Sigma*, this Court held in *Transcom I* that "{t}he *logical implementation* of the CAFC-endorsed presumption requires that certain named exporters inevitably will be subject to review by default and assessed country-wide margins."[30] The issue of Commerce's practice of applying NME-entity rates in administrative reviews was explicitly raised in *Transcom I*.[31] The Court's findings in that case were later reversed on the grounds that Commerce did not provide adequate notice of the

request for the entity) (*Aluminum Extrusions Review*); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 FR 60356 (October 6, 2015).

[28] *Id.*

[29] The NME-entity rate applied to Tafishco had been applied to the NME entity since the tenth administrative review, which was the last segment of this proceeding in which the NME entity was under review. *See 10th AR Final Results*, 79 FR at 40055. *See Announcement of Change in Dep't Practice*, 78 FR at 65964.

[30] *See Transcom, Inc. v. United States*, 5 F. Supp. 2d 984, 990 (Apr. 7, 1998) (*Transcom I*).

[31] *See Transcom I*, 5 F. Supp. 2d at 988 (noting that Commerce argued that its "employment of the {China} rate and its calculation utilizing BIA are consistent with the statute, regulations and case law."); *Id*. at 989 ("The Court agrees that Commerce's use of a country-specific rate for unnamed exporters in this case is supported by substantial evidence."). The Court's decision on this issue was part of its overall judgment and was not *dicta*, as alleged by Tafishco in its CIT submissions.

administrative review to exporters comprising the NME entity, but the CAFC did not overturn the Court's legal conclusions with respect to Commerce's authority to apply NME-entity rates to exporters who had not proven they should receive a separate rate in an administrative review.[32]

Courts have also affirmed Commerce's authority to apply NME-entity rates in administrative reviews when the issue was intertwined with another claim raised by a party. For example, the CAFC later considered in *Transcom IV* whether Commerce lawfully used the best information available (BIA) – a precursor to facts available – to calculate the rate for an NME entity.[33] The plaintiff in that case was assigned the NME-entity rate, which was calculated based on BIA because certain exporters within the NME entity failed to respond to Commerce's request for information.[34] The plaintiff argued that Commerce could not use BIA to calculate its rate because it had never individually failed to cooperate with Commerce's review.[35] Although this challenge ostensibly involved Commerce's use of BIA, the *only basis* that Commerce had to assign a BIA rate to a company that cooperated with its review *was* Commerce's authority to assign a single, NME-entity rate to any company that failed to overcome the presumption of government control, regardless of whether that company cooperated or not. The CAFC, thus, *necessarily* had to consider whether Commerce had that authority to rule on the plaintiff's claim. Like the Court's holding in *Transcom I*, the CAFC linked its reasoning to its holding in *Sigma*:

> If producers are assumed from the outset to be part of the NME entity, then Commerce's conclusion that the NME entity is subject to a BIA-based rate *logically requires* Commerce to apply the same BIA-based rate to all other producers within the scope of the review that have not proved their independence from the state.[36]

[32] *See Transcom Inc. v. United States*, 183 F.3d 876, 881 (Fed. Cir. 1999) (*Transcom II*).
[33] *See Transcom Inc. v. United States*, 294 F.3d 1371, 1381 (Fed. Cir. 2002) (*Transcom IV*).
[34] *Id.* at 1380.
[35] *Id.*
[36] *Id.* at 1381 (emphasis added).

The CAFC in *Transcom IV* thus upheld Commerce's authority to apply a single rate to the NME entity in an administrative review.

The CAFC most recently considered this issue in *Diamond Sawblades* in 2017.[37] In *Diamond Sawblades*, the CAFC considered a claim similar to the claim raised in *Transcom IV*. The respondent in that case, ATM, argued that Commerce could not apply an NME-entity rate based on adverse facts available to a cooperating party in an administrative review merely because the party failed to demonstrate independence from the entity.[38] The CAFC affirmed Commerce's authority to apply the rate to ATM, explaining that "{b}ecause the statutory framework does not directly apply to administrative review proceedings involving a NME country, Commerce maintains its broad authority to devise alternate procedures to carry out the statutory mandate."[39] Like this Court's decision in *Transcom IV*, the CAFC also relied on *Sigm*a in its *Diamond Sawblades* holding:

> Because ATM failed to rebut the presumption of government control, Commerce's conclusion that the {China}-wide entity is subject to an AFA-based rate *logically requires* Commerce to apply the same AFA-based rate to all members of the {China}-wide entity that have not proven their independence from the state, including ATM. Commerce's decision, therefore, is not contrary to law.[40]

The CAFC therefore also upheld Commerce's authority to apply an NME-entity rate based on adverse facts available, pursuant to Sections 776(a) and (b) of the Act, to ATM due to ATM's failure to overcome the presumption of the central government's control of export activities.[41]

In sum, the Court's remand order asks if Commerce's application of the Vietnam-entity rate to Tafishco in the twelfth administrative review of the order on certain fish fillets from

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[37] *See Diamond Sawblades Mfrs. Coalition v. United States*, 866 F.3d 1302, 1312 (Aug. 7, 2017) (*Diamond Sawblades*).
[38] *See Diamond Sawblades*, 866 F.3d at 1313.
[39] *Id.* at 1312.
[40] *Id.* at 1313 (emphasis added) (internal citations omitted).
[41] *Id.* at 1312 ("Because ATM failed to rebut the presumption of government control, Commerce's decision to apply the {China}-wide entity rate to ATM was not contrary to law").

Vietnam is statutorily authorized. Commerce was authorized in the underlying investigation to calculate and apply the Vietnam-entity rate, and as we've explained above, the CAFC has upheld Commerce's authority to apply such a rate to exporters in the context of an administrative review. Accordingly, the answer to the question is in the affirmative.

III. COMMENTS BY INTERESTED PARTIES

Commerce released the draft remand results on March 12, 2019. Interested parties submitted comments on March 18, 2019.[42]

Interested Parties' Comments

The petitioners

- In the draft, Commerce complied with the CIT's instructions by explaining its statutory authority for applying a nonmarket economy (NME)-entity rate and explaining that it correctly applied that rate to Tafishco because that company is a part of the NME-entity. Commerce's reasoning is supported by substantial evidence, is in accordance with law, and is reasonable.[43]

Golden Quality

- The draft does not comply with the CIT's instruction to assign an AD rate to the Vietnam-wide rate in a manner authorized by the statute. More specifically, the CIT found that the Vietnam-wide rate assigned in AR12 was *ultra vires* because the statute only allows Commerce to assign AD rates "for each exporter and producer individually examined" and

[42] *See* Letter from the petitioners, "Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Petitioners' Comments on Commerce's Draft Remand Results," dated March 18, 2019 (The petitioners' Comments); Letter from Golden Quality, "Golden Quality's Comments on Draft Remand Redetermination, 2014-2015 Administrative Review of the Antidumping Duty Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam," dated March 18, 2019 (Golden Quality's Comments).
[43] *See* The petitioners' Comments at 1-2.

the "all-others rate for all exporters and producers not individually examined."[44] Commerce concedes that the Vietnam-wide rate assigned in AR12 was neither, but instead constituted a rate that was calculated for the Vietnam-wide entity years ago in AR10 and carried forward, which underscores rather that resolves the CIT's concern that the Vietnam-wide rate assigned in AR12 violated the statutory parameters for AD rates that can be assigned.[45] As Commerce assigned an unlawful rate to Golden Quality in AR12 and the draft, Commerce should select a lawful rate for Golden in the final remand determination.

Commerce's Position: Golden Quality's comments appear to confuse the difference between Commerce's authority to apply an individual rate or an all-others rate in investigations versus administrative reviews. The Court stated that section 735 of the Act provides for – "an individual rate or an all-others rate."[46] Section 735 of the Act applies to investigations, not to administrative reviews. Pursuant to the Court's order, Commerce explained in the draft that Commerce's authority to apply the NME-entity rate in the *LTFV Investigation Final Determination* was derived from Section 735(c)(1)(B)(i)(I) of the Act, which authorizes the application of individually investigated rates, and was determined pursuant to adverse facts available, in accordance with Section 776(a) and (b) of the Act.[47]

We disagree with Golden Quality's assertion that the Court found that the application of an NME-entity rate was *ultra vires* and not in accordance with the statute.[48] Indeed, the Court

[44] *See* Golden Quality's Comments at 2, citing *Tafishco* at 8-19.
[45] *Id*.
[46] *See* Court Order at 11, citing *Sigma* at 1405-06; *Transcom, Inc. v United States*, 294 F.3d 1371, 1381 (Fed. Cir. 2002) and *Michaels Store Inc. v. United States*, 766 F.3d 1388, 1392 (Fed. Cir. 2014).
[47] *See LTFV Investigation Final Determination*, 68 FR at 37119-37120.
[48] *See* Golden Quality's Comments at 2, citing *Tafishco* at 8-19.

specifically recognized that the CAFC has "affirmed the imposition of a single, NME entity-wide rate on numerous occasions."[49]

Furthermore, Commerce explained in the draft that its current practice for administrative reviews is that Commerce will only review the NME entity, and determine a rate potentially different from the rate determined in the underlying investigation, when a review of the NME entity is requested.[50] For example, Commerce recently completed a review of the China-wide entity in the *Aluminum Extrusions Review* when a review of that entity was requested, and in the end a different rate than the one assigned in the investigation was applied to the China-wide entity.[51] Commerce also explained that under its former practice, at times, we would determine an NME-entity rate in the context of an administrative review even if no review of the NME entity was requested when Commerce found that a respondent was part of the NME entity. Golden Quality's NME-entity rate was assigned in the tenth review of this Order, in which Commerce recalculated the NME-entity rate pursuant to its former practice.[52] Therefore, the NME-entity rate assigned to Golden Quality was not under review in this proceeding.

Moreover, in the draft, citing *Sigma*, *Transcom I*, *Transcom IV* and *Diamond Sawblades*, Commerce noted that in many instances, the Courts have upheld Commerce's authority to apply

[49] *See* Court Order at 10, citing *Sigma* at 1405-06; *Transcom, Inc. v United States*, 294 F.3d 1371, 1381 (Fed. Cir. 2002) and *Michaels Store Inc. v. United States*, 766 F.3d 1388, 1392 (Fed. Cir. 2014).
[50] As noted above, under Commerce's current practice, when no request to review the NME entity is filed with Commerce, Commerce does not change the rate applied to the NME entity.
[51] *See Aluminum Extrusions Review*, 82 FR 52265 (reviewing an NME entity when Commerce received a review request for the entity); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 FR 60356 (October 6, 2015).
[52] The NME-entity rate applied to Tafishco had been applied to the NME entity since the tenth administrative review, which was the last segment of this proceeding in which the NME entity was under review. *See 10th AR Final Results*, 79 FR at 40055. *See Announcement of Change in Dep't Practice*, 78 FR at 65964.

NME-entity rates to entities who have not proven that their export activities are separate from the government in administrative reviews, as was the case for Golden Quality.[53]

In sum, we disagree with Golden Quality that Commerce may not apply a rate to the Vietnam-entity which was determined in an earlier investigation or review, when no review of the Vietnam-entity is being conducted in the ongoing proceeding. Indeed, multiple holdings from the CIT and CAFC have held otherwise.

Accordingly, we conclude that Commerce's analysis on remand is in compliance with law and otherwise consistent with the Court's Order.

3/29/2019

X 

Gary Taverman
Signed by: GARY TAVERMAN
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

[53] *See Sigma*, 117 F.3d 1401, 1407; *Transcom I*, 5 F. Supp. 2d at 988; *Transcom IV*, 294 F.3d 1371, 1381; *Diamond Sawblades*, 866 F.3d 1302, 1312, respectively.