U.S. Court of International Trade

Slip Op. 20–41

BMW OF NORTH AMERICA LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 15–00052

[Sustaining the U.S. Department of Commerce's second remand redetermination in the 2010–2011 administrative review of the antidumping duty order on ball bearings and parts thereof from the United Kingdom.]

Dated: March 26, 2020

Max F. Schutzman, Ned H. Marshak, and *Kavita Mohan*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of New York, N.Y. and Washington, D.C., for Plaintiff BMW of North America LLC. *Andrew T. Schutz* and *Jordan C. Kahn* also appeared.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Mykhaylo A. Gryzlov*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C. *Alexander O. Canizares* and *Jessica M. Link* also appeared.

OPINION

Choe-Groves, Judge:

BMW of North America LLC ("BMW" or "Plaintiff") brought this action challenging the final determination in the 2010–2011 administrative review of the antidumping duty order on ball bearings and parts thereof from the United Kingdom. *See Ball Bearings and Parts Thereof From Japan and the United Kingdom*, 80 Fed. Reg. 4248 (Dep't Commerce Jan. 27, 2015) (final results of 2010–2011 administrative review), *as amended*, 80 Fed. Reg. 9694 (Dep't Commerce Feb. 24, 2015) (amended final results of 2010–2011 administrative review) (collectively, "*Final Results*"). Before the court are the Final Results of Remand Redetermination, ECF No. 113 ("*Second Remand Results*"), filed by the U.S. Department of Commerce ("Commerce") pursuant to the court's second remand order, ECF No. 103 ("Second Remand Order"), following the U.S. Court of Appeals for the Federal Circuit's decision in *BMW of North America LLC v. United States*, 926 F.3d 1291 (Fed. Cir. 2019). For the following reasons, the court sustains the *Second Remand Results*.

I. BACKGROUND

The court presumes familiarity with the facts and procedural history set forth in its prior opinions and recounts the facts relevant to

the court's review of the *Second Remand Results*. *See BMW of N. Am. LLC v. United States*, 41 CIT __, 255 F. Supp. 3d 1342 (2017), *vacated*, 926 F.3d 1291 (Fed. Cir. 2019), and *BMW of N. Am. LLC v. United States*, 41 CIT __, 208 F. Supp. 3d 1388 (2017).

In 1989, Commerce issued an antidumping duty order on ball bearings from the United Kingdom. *See Antidumping Duty Orders and Amendments to the Final Determinations of Sales at Less Than Fair Value: Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof From the United Kingdom*, 54 Fed. Reg. 20,910 (Dep't Commerce May 15, 1989) ("Order"). Commerce assigned weighted-average margins of 61.14% and 44.02% to the two cooperating respondents and 54.27% to all other exporters. *Id.* In 2011, Commerce revoked the Order and discontinued the 2010–2011 administrative review, in response to challenges to the International Trade Commission's determination in the second sunset review of the Order. *See NSK Corp. v. United States*, 35 CIT 432, 774 F. Supp. 2d 1296 (2011); *Ball Bearings and Parts Thereof From Japan and the United Kingdom: Revocation of Antidumping Duty Orders*, 76 Fed. Reg. 41,761 (Dep't Commerce July 15, 2011). After the ruling in *NSK Corp. v. U.S. International Trade Commission*, 716 F.3d 1352 (Fed. Cir. 2013), Commerce reinstated the Order and resumed the 2010–2011 administrative review. *Ball Bearings and Parts Thereof From Japan and the United Kingdom: Notice of Reinstatement of Antidumping Duty Orders, Resumption of Administrative Reviews, and Advance Notification of Sunset Reviews*, 78 Fed. Reg. 76,104, 76,104 (Dep't Commerce Dec. 16, 2013). To effectuate the reinstatement, Commerce notified all respondents' counsel of a forthcoming quantity and value ("Q&V") questionnaire, published a corresponding notice in the Federal Register, and emailed the questionnaire to all interested parties. *Id.* at 76,105–06; U.S. Department of Commerce Memo to File Regarding E-mail Sent to BMW's Counsel Forwarding the Quantity and Value Questionnaire, PD 65 (Dec. 12, 2013); U.S. Department of Commerce Letter to Interested Parties Granting Extension of Time to File Quantity and Value Questionnaire Responses, PD 9 (Dec. 20, 2013). Counsel for BMW asserted that he "did not see and/or receive that email." Compl. ¶ 13, ECF No. 7. BMW did not return the Q&V questionnaire, withdraw its request for a review, or otherwise cooperate. *See* USDOC: Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Reviews: Ball Bearings and Parts Thereof From Japan and the United Kingdom, PD 64, at 6 (Sept. 17, 2014). Commerce selected NSK Europe Ltd. and NSK Bearings Europe Ltd. (collectively, "NSK") as the sole mandatory respondent. *See Ball Bearings and Parts Thereof From Japan and the United King-*

dom: Preliminary Results of Antidumping Duty Administrative Review; 2010–2011, 79 Fed. Reg. 56,771, 56,772 (Dep't Commerce Sept. 23, 2014).

In the *Final Results* issued on January 21, 2015, Commerce determined that BMW had not cooperated to the best of its ability, applied an adverse inference against BMW in selecting from facts otherwise available ("AFA"), and assigned BMW a dumping margin of 254.25%. Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Ball Bearings and Parts Thereof from the United Kingdom; 2010–2011, PD 81 (Jan. 21, 2015) ("I&D Memorandum"), *see Final Results* at 4248, *as amended*, 80 Fed. Reg. at 9694. Commerce assigned all other exporters a rate of 1.55%, which was amended to 1.43%. *Id.* The court upheld Commerce's determination to resume the administrative review and to apply AFA against BMW, but rejected the rate for lack of substantial evidence and remanded to Commerce for a different analysis or redetermination of the AFA rate. *BMW of N. Am. LLC*, 208 F. Supp. 3d at 1398. In the first remand order, the court sustained Commerce's revised AFA rate of 126.44% based on a transaction-specific margin calculated for the mandatory respondent, NSK. *See BMW of N. Am. LLC*, 255 F. Supp. 3d at 1346–47. On appeal, the U.S. Court of Appeals for the Federal Circuit affirmed the court's approval of the resumption of the 2010–2011 administrative review and Commerce's decision to apply AFA for BMW's failure to cooperate, but vacated the court's order and remanded for consideration of whether the AFA rate was unduly punitive in light of BMW's level of culpability and the "procedural irregularities" of resuming a discontinued review. *BMW of N. Am. LLC*, 926 F.3d at 1302. The court remanded to Commerce for reconsideration. *Second Remand Order*.

In the *Second Remand Results*, Commerce applied the Trade Preferences Extension Act of 2015 ("TPEA") and assigned an AFA rate of 61.14%. *Second Remand Results* at 13. Plaintiff opposes Commerce's application of the TPEA and the 61.14% rate. *See* Pl.'s Comments, ECF Nos. 115, 116.

II. JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The court will uphold Commerce's determination unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

III. DISCUSSION

BMW challenges the *Second Remand Results* on the grounds that (1) Commerce applied the TPEA impermissibly and (2) the AFA rate of 61.14% is unlawfully punitive, unsupported by substantial evidence, and inconsistent with the mandate of the U.S. Court of Appeals for the Federal Circuit. *See* Pl.'s Comments at 7–24.

A. The TPEA Does Not Apply to Pre-Enactment Conduct

Plaintiff avers that the TPEA does not apply retroactively because the issue of the AFA rate is an ongoing challenge stemming from the 2010–2011 administrative review that predates the TPEA's entry into force. *Id.* at 5–10. The court agrees and concludes that the TPEA does not apply retroactively to this remand determination.

Commerce issued the *Final Results* before the TPEA was enacted. *See I&D Memorandum*. In the first remand, Commerce applied the TPEA and BMW disagreed, but neither this court nor the U.S. Court of Appeals for the Federal Circuit reached the issue of the TPEA's applicability because Commerce used primary information that does not require corroboration either pre-TPEA or after enactment of the TPEA. *BMW of N. Am. LLC*, 926 F.3d at 1301 n.3; *BMW of N. Am. LLC*, 255 F. Supp. 3d at 1346 n.4. In the second remand, Commerce again applied the TPEA, arguing that the reduction of the AFA rate to 61.14% in the second remand was a new determination subject to the TPEA. *Second Remand Results* at 7–8, 14–15; Def.'s Reply 7–12, ECF No. 117. The 61.14% rate is based on secondary information, which requires different standards of corroboration depending on whether the TPEA applies.

When Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b)(1)(A). Commerce may use information from the petition, a final determination in the investigation, any previous review, or any other information on the record when selecting an AFA rate. *See id.* § 1677e(b)(2). Commerce need not corroborate the use of information on the record that was obtained during the instant segment of the proceeding (i.e., primary information). *See id.* § 1677e(c). However, "[w]hen [Commerce] relies on secondary information[1] rather than on information obtained in the course of an

[1] Commerce's regulations reflect that information from the petition, a final determination in the investigation, or any previous review constitutes secondary information. *See* 19 C.F.R. §§ 351.308(c)(1)–(2) & (d).

investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal . . . ." *Id.*

President Obama signed the TPEA into law on June 29, 2015. Section 502, amending 19 U.S.C. § 1677e, relaxes the corroboration requirement when Commerce assigns an AFA rate to an uncooperative respondent based on secondary information. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1348 (Fed. Cir. 2015). The TPEA amended the corroboration of secondary information in 19 U.S.C. § 1677e as follows: "The administrative authority . . . shall not be required to corroborate any dumping margin . . . applied in a separate segment of the same proceeding . . . ."

When considering the retroactive application of a federal statute, a court conducts a two-step analysis. First, the court must "determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). If the plain language resolves this issue, then the court applies the statute because "there is no need to resort to judicial default rules" of interpretation. *Id.* When "the statute contains no such express command," the court looks at whether the legislation would have "retroactive effect." *Id.* A statute would operate retroactively when it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* "[R]etroactivity is a matter on which judges tend to have sound . . . instinct[s] and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.* at 270 (internal citations and quotation marks omitted). Absent clear expression of congressional intent, the *Landgraf* presumption against retroactive application controls and the court will not apply the statute to pre-enactment conduct.

In this case, the TPEA language and legislative history are silent as to its effective date. Commerce issued an interpretive rule explaining that Commerce applies the TPEA to all determinations made on or after August 6, 2015. *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,794 (Aug. 6, 2015) ("Interpretive Rule"). The U.S. Court of Appeals for the Federal Circuit has held that the TPEA applies prospectively, but has not addressed whether the TPEA's lower corroboration standard applies to post-TPEA remand determinations of pre-TPEA final determinations. *Ad Hoc Shrimp Trade Action Comm.*, 802 F.3d at 1352; *see Tai Shan City Kam Kiu Aluminum Extrusion Co., Ltd. v. United States*, 39 CIT __, 125 F. Supp. 3d 1337, 1342 n.5 (2015). Courts in the

Federal Circuit have concluded that the TPEA does not apply to "remand determinations . . . where the Commerce determination that is being litigated predates the new TPEA standard." *Shenzhen Xinboda Indus. Co. v. United States*, 43 CIT __, 361 F. Supp. 3d 1337, 1359–60 (2019) (citing *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1328–33 (2015) ("*FGPA*")). In *FGPA*, the Court analyzed the application of the TPEA to remand determinations and concluded that the TPEA did not apply. *FGPA*, 121 F. Supp. 3d at 1332. The Court was not persuaded by Commerce's arguments that the conduct regulated by the TPEA was Commerce's conduct, that applying the TPEA to "new" remand determinations did not constitute retroactive application, and that "trade remedy laws are . . . inherently retroactive." *Id.* at 1331. The Court reasoned that, for evaluating the retroactive application of the TPEA, the controlling date was when Commerce assigned total AFA for a respondent's failure to cooperate to the best of its ability because that was the decision that affected the uncooperating respondent's rights. *Id.* at 1332. There, the Court concluded that the TPEA did not apply because the date on which Commerce assigned total AFA was before the TPEA's date of enactment. *Id.* at 1333.

Without distinguishing the *FGPA* line of cases and raising many of the same arguments as in *FGPA*, Commerce asks this court to reach the opposite conclusion. Def.'s Reply at 12. Commerce argues that because the TPEA does not "regulate primary conduct," but rather governs Commerce's decision-making, it is appropriate for Commerce to apply the TPEA to post-TPEA determinations. *Id.* at 10. Commerce asserts that the controlling date here is October 1, 2019, when Commerce decided "to select a rate based on secondary information." *Id.*

The court concludes that the TPEA does not apply to remand determinations of administrative reviews where the decision to apply AFA predated the TPEA's enactment. As to the Interpretive Rule regarding the TPEA, a remand determination is not a new determination. The administrative record on which Commerce's remand determination is based was compiled pre-TPEA. *See* Pl.'s Comments at 9–10. The controlling date in this case is January 21, 2015, when Commerce published the *Final Results* and announced its decision to apply AFA for BMW's failure to cooperate to the best of its ability. The publication date of the *Final Results* applying AFA is the date of the decision that affected the uncooperating respondent's rights. In addition, a remand determination only occurs if there is some defect in the final determination that must be remedied before the determination can stand. *See FGPA*, 121 F. Supp. 3d at 1332 ("To apply § 502 on

remand would be in effect to apply the law retroactively by applying it to a determination that occurred before the new law became effective.").

The *Landgraf* analysis also opposes application of the TPEA to remand determinations. Because Congress has not provided an effective date, the court looks to the retroactive effect. *See Landgraf*, 511 U.S. at 280. Altering the corroboration requirement mid-litigation has the potential to "increase a party's liability for past conduct." *See id.* It is clear that "[applying the TPEA] would [] serve to treat parties differently merely because Commerce made an error in one case and not in another decided at the same time." *FGPA*, 121 F. Supp. 3d at 1332. "[F]amiliar considerations of fair notice, reasonable reliance, and settled expectations" favor the use of a consistent corroboration standard through each remand redetermination such that a plaintiff understands Commerce's discretion and requirements in selecting an AFA rate. *See Landgraf*, 511 U.S. at 270. Accordingly, the court holds that the TPEA does not apply to remand determinations of pre-enactment final results. The court concludes that Commerce erred by applying the TPEA to the AFA rate selected in the second remand redetermination for BMW.

As discussed below, however, the court can continue to a pre-TPEA analysis in this case because, despite arguing that Commerce did not need to corroborate the selection of the AFA rate under the TPEA, Commerce nonetheless provided its corroboration analysis and reasons why the AFA rate was appropriate here. The court will proceed to analyze whether the AFA rate is supported by substantial evidence and in accordance with the pre-TPEA law.

B. The AFA Rate is Supported by Substantial Evidence and in Accordance with the Law

The U.S. Court of Appeals for the Federal Circuit directed Commerce to consider whether the AFA rate of 126.44% was unduly punitive relative to the procedural anomaly preceding BMW's failure to cooperate. *BMW of N. Am. LLC*, 926 F.3d at 1302. BMW argues that Commerce did not consider BMW's level of culpability, i.e., that its failure to cooperate was due to the attorney's "mistake," as opposed to "a deliberate decision not to cooperate with Commerce or to intentionally submit false information." Pl.'s Comments at 21. BMW asserts that any rate over 54.27%—BMW's cash deposit rate and the all-others rate calculated in 1989—is punitive and that Commerce failed to justify the 61.14% rate. Specifically, BMW contends that Commerce failed to explain how a rate forty times higher than the 1.43% rate assigned to all other respondents in the *Final Results* is nonpunitive. *Id.* at 14.

The court finds that Commerce complied with the mandate of the U.S. Court of Appeals for the Federal Circuit. *Second Remand Results* at 9–13 (citing *BMW of N. Am. LLC*, 926 F.3d at 1302 ("Our case law establishes that Commerce must consider the totality of the circumstances in selecting an AFA rate, including, if relevant, the seriousness of the conduct of the uncooperative party."). In its analysis of the totality of circumstances, Commerce acknowledged the unusual procedure here in discontinuing and resuming the administrative review. *Id.* at 11–12. Commerce recounted that, to effectuate the resumption, Commerce emailed the Q&V questionnaire to counsel for all respondents and published a notice in the Federal Register. *Id.* at 10. Commerce fulfilled its duty to notify the public about the resumption of the administrative review when it published the notice in the Federal Register and directly emailed all attorneys of record (including BMW's attorney, who said that he made a "mistake" and was not aware of the resumption of the administrative review). It was reasonable to expect that BMW should have been on notice of the resumption of the administrative review and should have cooperated, as indicated both by the publication of the notice in the Federal Register and the direct notification to its attorney of record. Commerce considered the fact that BMW did not complete the questionnaire, withdraw from review, or participate in any way when it evaluated BMW's culpability. *Id.* Upon consideration of the totality of circumstances, Commerce reduced the AFA rate in the second remand from 126.44% to 61.14%.[2] *Id.* at 12–13.

Commerce bases the 61.14% AFA rate on secondary information. Def.'s Reply at 11. As noted above, Commerce applied the TPEA and asserted that the new AFA rate based on secondary information does not need to be corroborated under the new TPEA standard. Notwithstanding this assertion, Commerce argued in the alternative assuming that the court might find that the pre-TPEA law applied, and Commerce provided a corroborating analysis in its *Second Remand Results* when it selected the new rate of 61.14%. *Second Remand Results* at 25–27; Def.'s Reply at 12 ("Even assuming that the pre-TPEA requirements applied to this remand proceeding, this [c]ourt should affirm the remand redetermination because Commerce provided the requisite factual analysis needed for this [c]ourt to confirm that the rate has probative value."). Because Commerce provided its

[2] BMW responds that "Commerce seems to believe that the mere fact it has selected a rate lower than 126.44 is sufficient to demonstrate the rate is not punitive." Pl.'s Comments at 14. The court notes that Commerce did not reduce the rate by one or two percentage points, but rather by more than half, given no other instruction than to consider BMW's level of culpability.

corroborating analysis in the *Second Remand Results* as an alternative argument, the court will consider whether Commerce corroborated the new rate properly under the pre-TPEA framework.

Commerce selected 61.14% because it is equivalent to the higher of the dumping margins calculated for the two cooperating respondents in 1989, 61.14% and 44.12%. *See Second Remand Results* at 13; Pl.'s Comments at 28 (citing Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Spherical Plain Bearings and Tapered Roller Bearings) and Parts Thereof From the United Kingdom; and Final Determination of Sales at Not Less Than Fair Value: Spherical Plain Bearings Parts Thereof From the United Kingdom, 54 Fed. Reg. 19,120, 19,120–21 (May 3, 1989)). Further, Commerce selected the 61.14% rate because: 1) the rate is higher than the all-others rate of 54.27% previously applied to BMW; 2) the rate is not punitive because it was calculated for a cooperating respondent in this proceeding; and 3) the rate was previously applied as AFA with requisite corroboration. *Second Remand Results* at 13. BMW contends that the 61.14% rate is unsupported by substantial evidence and is unduly punitive. *See* Pl.'s Comments at 14.

In the pre-TPEA framework applied by the court here, Commerce must independently corroborate the use of secondary information.[3] 19 U.S.C. § 1677e(c); *see also* Statement of Administrative Action Accompanying Uruguay Round Agreements Act, H.R. Doc. 103–316, 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 (1994) ("SAA"). "Corroborate" means that Commerce will satisfy itself "that the secondary information to be used has probative value." SAA at 870; *see also* 19 C.F.R. § 351.308. The SAA notes the importance of appropriate corroboration as "secondary information may not be entirely reliable because, for example, as in the case of the petition, it is based on unverified allegations." SAA at 870. In addition, the purpose of AFA is to "provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). Therefore, in a pre-TPEA case, Commerce must adequately corroborate a rate derived from a secondary source and ensure that the rate is not punitive or aberrational. *See id.* The balance between incentive and punishment "will depend upon the facts in a particular case." *BMW of N. Am. LLC*, 926 F.3d at 1301

[3] "Secondary information is information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise or any previous review under [19 U.S.C. § 1675] concerning the subject merchandise." Statement of Administrative Action Accompanying Uruguay Round Agreements Act, H.R. Doc. 103–316, at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 (1994).

(quoting *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1347 (Fed. Cir. 2016)).

The corroboration requirement constrains Commerce to select an AFA rate that is a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032. Thus, Commerce may select an AFA rate that denies a noncooperating respondent "a more favorable result by failing to cooperate than if it had cooperated fully." SAA at 870. The selection of a high rate based on secondary information, even one significantly higher than the final calculated margins, can withstand judicial scrutiny if Commerce is able to appropriately corroborate that rate. *See KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010).

BMW contends that if it had cooperated, "the record clearly demonstrates that [BMW's] rate would have been 1.43 percent," Pl.'s Comments at 22, which was the weighted-average margin calculated for all respondents, *id.* at 17. BMW argues for an AFA rate based on the commercially reasonable 1.43% rate, and asserts that an AFA rate should be no greater than double 1.43% to account for deterrence. *Id.* On appeal, BMW did not contest Commerce's application of AFA, which this court sustained. Although a 1.43% margin may be one possible inference supported by the record, Commerce may draw an adverse inference as long as it is supported by substantial evidence, as it is here.

In selecting the AFA rate of 61.14%, Commerce chose the all-others rate applied to BMW of 54.27% as a starting point. *Second Remand Results* at 18 ("Having never been subject to a review since the imposition of this order prior to the instant review, the weighted-average dumping margin applicable to BMW prior to this administrative review was the all-others rate, which is 54.27 percent."). Commerce argues that assigning an AFA rate lower than 54.27% would reduce the rate applied to BMW and would confer a benefit, despite BMW's noncooperation. *Id.* Although BMW argues that its counsel's "inadvertent mistake" involved a low level of culpability, the level of culpability does not change the fact that BMW failed to cooperate, leaving Commerce to select an AFA rate in the absence of BMW's information.

In the pre-TPEA framework, Commerce must corroborate the secondary information basis for the AFA rate. Commerce selected an AFA rate of 61.14%, equivalent to the highest calculated antidumping

margin for a cooperating respondent in this proceeding.[4] *Second Remand Results* at 13. As a margin calculated from a cooperating respondent's information, Commerce regarded the 61.14% rate as reliable. *See* Def.'s Reply at 13. When applied to the cooperating respondent, Commerce did not include a "built-in increase" or deterrence. *See id.* Commerce considered that applied to BMW, 61.14% was marginally higher, 12.7%, than the 54.27% all-others rate previously applied to BMW, and the marginal increase was appropriate for deterrence. *See Second Remand Results* at 18–19; Def.'s Reply at 13. The court finds that 61.14% is not punitive or aberrational in light of the reasons provided by Commerce. Based upon the totality of circumstances, the court concludes that the rate of 61.14% applied to BMW as an AFA rate is adequately corroborated under the applicable pre-TPEA framework. In sum, the 61.14% AFA rate is supported by substantial evidence and is in accordance with the law.

IV. CONCLUSION

For the foregoing reasons, the court sustains the AFA rate of 61.14%.

Judgment will be entered accordingly.

Dated: March 26, 2020
New York, New York

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

[4] There were two calculated antidumping margins for cooperating respondents in this proceeding. The other calculated rate was 44.02%. Commerce did not select 44.02% as the AFA rate because a 44.02% rate would be lower than the all-others 54.27% rate and therefore not adverse. *See Second Remand Results* at 18.

Slip Op. 20–42

GODACO SEAFOOD JOINT STOCK COMPANY, Plaintiff, and CAN THO IMPORT-EXPORT JOINT STOCK COMPANY et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA et al., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00063

[Sustaining in part and remanding in part the U.S. Department of Commerce's *Final Results* of the thirteenth administrative review of the antidumping duty order on *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*.]

Dated: April 1, 2020

Andrew B. Schroth, Jordan C. Kahn, and *Ned H. Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of Washington, D.C., argued for Plaintiff GODACO Seafood Joint Stock Company. With them on the briefs was *Dhramendra N. Choudhary. Andrew T. Schutz* and *Michael S. Holton* also appeared.

Kenneth N. Hammer, Trade Pacific, PLLC, of Washington, D.C., argued for Consolidated Plaintiff Can Tho Import-Export Joint Stock Company. With him on the briefs were *Robert G. Gosselink* and *Jonathan M. Freed*.

Jordan C. Kahn, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of Washington, D.C., argued for Consolidated Plaintiff Golden Quality Seafood Corporation. With him on the briefs was *Andrew B. Schroth. Andrew T. Shutz, Dhramendra N. Choudhary, Michael S. Holton*, and *Ned H. Marshak* also appeared.

Kenneth N. Hammer, Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington, D.C., argued for Consolidated Plaintiffs Vinh Quang Fisheries Corporation, NTSF Seafoods Joint Stock Company, Green Farms Seafood Joint Stock Company, and Hung Vuong Corporation.

John J. Kenkel, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Consolidated Plaintiff Southern Fishery Industries Company, Ltd. With him on the briefs were *Alexandra H. Salzman, Judith L. Holdsworth*, and *J. Kevin Horgan*.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Kara M. Westercamp*, Trial Attorney. Of counsel was *Ian A. McInerney*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce. *Kristen E. McCannon* also appeared on the briefs.

Jonathan M. Zielinski, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for Defendant-Intervenors Simmons Farm Raised Catfish, Inc., Magnolia Processing, Inc. (doing business as Pride of the Pond), Heartland Catfish Company, Guidry's Catfish, Inc., Delta Pride Catfish, Inc., Consolidated Catfish Companies LLC (doing business as Country Select Catfish), Catfish Farmers of America, America's Catch, and Alabama Catfish Inc. (doing business as Harvest Select Catfish, Inc.). With him on the briefs was *James R. Cannon, Jr. Heather K. Pinnock, Jeffrey B. Denning, Nina R. Tandon*, and *Robert C. Cassidy, Jr.* also appeared.

OPINION AND ORDER

Choe-Groves, Judge:

This action arises from the thirteenth administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam

("Vietnam") by the U.S. Department of Commerce ("Commerce"). *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 83 Fed. Reg. 12,717 (Dep't. Commerce Mar. 23, 2018) (final results, final results of no shipments, and partial rescission of the antidumping duty administrative review) ("*Final Results*"); *see* Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Mem. for the Final Results of the Thirteenth Antidumping Duty Administrative Review, P.R. 337 (Mar. 14, 2018) ("IDM"). Before the court are six motions for judgment on the agency record filed by Plaintiff GODACO Seafood Joint Stock Co. ("GODACO"), Consolidated Plaintiff Golden Quality Seafood Corp. ("Golden Quality"), Consolidated Plaintiffs Vinh Quang Fisheries Corporation ("Vinh Quang"), NTSF Seafoods Joint Stock Co. ("NTSF Seafoods"), Green Farms Seafood Joint Stock Co. ("Green Farms"), Hung Vuong Corp. ("Hung Vuong"), Can Tho Import-Export Joint Stock Co. ("CASEAMEX"), and Southern Fishery Industries Co., Ltd. ("South Vina"). For the reasons that follow, the court sustains in part and remands in part the *Final Results* to Commerce for further consideration.

ISSUES PRESENTED

This case presents the following issues:

1. Whether Commerce's application of adverse facts available to GODACO is supported by substantial evidence;
2. Whether Commerce acted in accordance with 19 U.S.C. § 1677m;
3. Whether Commerce's refusal to verify GODACO's submissions is in accordance with the law;
4. Whether Commerce's rejection of GODACO's rebuttal comments and case brief on the basis of untimely filed new factual information is supported by substantial evidence;
5. Whether Commerce's rejection of Golden Quality's review request withdrawal is in accordance with the law;
6. Whether South Vina exhausted administrative remedies; and
7. Whether the rate applied to the separate rate respondents is supported by substantial evidence and in accordance with the law.

BACKGROUND

Commerce initiated the thirteenth administrative review of the antidumping duty order on certain frozen fish fillets from Vietnam covering shipments for the period of August 1, 2015 through July 31, 2016. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 71,061, 71,063–64 (Dep't. Commerce

Oct. 14, 2016). Commerce selected GODACO and Golden Quality as mandatory respondents. Commerce's Selection of Respondents for Individual Review Mem., P.R. 73 (Feb. 22, 2017).

Parties seeking to withdraw from the administrative review were required to request withdrawal within ninety days of publication of the notice of initiation, by January 12, 2017. 81 Fed. Reg. at 71,062. On January 12, 2017, the petitioners in the administrative action below withdrew their review request for forty-eight companies, including Golden Quality. Petitioner's Withdrawal Request, P.R. 69 (Jan. 12, 2017). Golden Quality sought to withdraw its request for review on January 23, 2017. Golden Quality Withdrawal Request, P.R. 71 (Jan. 23, 2017). Commerce issued nonmarket economy ("NME") antidumping duty questionnaires to GODACO and Golden Quality on February 24, 2017. Commerce's Antidumping Duty Questionnaire and Accompanying Appendices to GODACO, P.R. 79–82 (Feb. 23, 2017); Commerce's Antidumping Duty Questionnaire and Accompanying Appendices to Golden Quality, P.R. 75–78 (Feb. 23, 2017). Golden Quality's Section A Questionnaire was due on March 17, 2017. Letter from U.S. Dep't. of Commerce to Golden Quality Seafood Corp., P.R. 75–78 (Feb. 24, 2017). In March, prior to the Section A Questionnaire due date, Golden Quality reiterated its intention not to participate in the thirteenth administrative review. Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to U.S. Dep't. of Commerce, P.R. 85 (Mar. 4, 2017). GODACO's Section A Questionnaire Response was due on March 17, 2017, and the Section C and D responses were due on April 2, 2017. Commerce's Antidumping Duty Questionnaire and Accompanying Appendices to Golden Quality, P.R. 79–82 (Feb. 23, 2017). Commerce granted GODACO an extension to submit its Section A Questionnaire Response until March 24, 2017. U.S. Dep't. of Commerce Mem. to File from P. Walker, P.R. 89 (Mar. 14, 2017).

Commerce issued a supplemental questionnaire to GODACO on June 13, 2017. Supplemental Questionnaire for GODACO, P.R. 176, C.R. 142 (June 13, 2017) ("GODACO's Suppl. Questionnaire"). On June 20, 2017, GODACO asked Commerce to limit the scope of its reporting requirements for certain questions in GODACO's Suppl. Questionnaire. Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to U.S. Dep't. of Commerce, P.R. 184 (June 20, 2017). Commerce issued revisions to its supplemental questionnaire. Letter from U.S. Dep't. of Commerce to GODACO Seafood Joint Stock Co., P.R. 193, C.R. 156 (July 5, 2017). GODACO responded to the revised supplemental questionnaire. GODACO Seafood Joint Stock Company

Supplemental Questionnaire Response, P.R. 197–98, C.R. 158–59, C.R. 160–186 (July 17, 2017) ("GODACO's SQR").

The eventual Defendant-Intervenors in this action filed comments on GODACO's SQR. Letter from Cassidy Levy Kent (USA) LLP to U.S. Dep't. of Commerce, P.R. 233–37, C.R. 189–93 (Aug. 1, 2017). GODACO requested an extension to submit rebuttal comments, which Commerce granted, and GODACO submitted timely rebuttal comments. GODACO Seafood Joint Stock Co. Rejected Rebuttal Comments, P.R. 265, C.R. 202–04 (Aug. 14, 2017) ("GODACO's Rejected Rebuttal"); U.S. Dep't. of Commerce Mem., P.R. 262 (Aug. 9, 2017). Commerce rejected GODACO's rebuttal comments. Letter from U.S. Dep't. of Commerce to GODACO Seafood Joint Stock Co., P.R. 274 (Aug. 15, 2017) ("Commerce's Rejection of GODACO's Rebuttal"). GODACO submitted revised rebuttal comments. GODACO Seafood Joint Stock Co. Revised Rebuttal Comments, P.R. 275, C.R. 225–27 (Aug. 16, 2017).

Commerce issued its Preliminary Results on September 12, 2017. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Determination of No Shipments, and Partial Rescission of the Antidumping Duty Administrative Review; 2015–2016*, 82 Fed. Reg. 42,785 (Sept. 12, 2017) ("PDM"). Commerce noted GODACO's failure to respond to Commerce's request for CONNUM-specific factors of production.[1] PDM at 15–18. In the Preliminary Results, Commerce assigned: (1) GODACO a rate of $2.39/kg as facts available with an adverse inference, (2) Golden Quality the Vietnam-wide entity rate of $2.39/kg because it did not demonstrate eligibility for a separate rate, and (3) GODACO's rate to the separate rate respondents. *Id.* Commerce omitted South Vina from the Preliminary Results' separate rate analysis and omitted South Vina in its list of separate rate companies. *Id.*

Commerce rejected GODACO's administrative case brief as containing untimely filed new factual information. GODACO's Rejected Admin. Case Br., P.R. 317 (Feb. 5, 2018) ("GODACO's Rejected Br."); Rejection of GODACO's Admin. Case Br., P.R. 327 (Feb. 14, 2018) ("Commerce's Rejection of GODACO's Br."). GODACO refiled its brief with the requested redactions. GODACO Seafood Joint Stock Co. Refiled Case Br., P.R. 329, C.R. 244 (Feb. 15, 2018). South Vina did not submit an administrative case brief.

[1] "A CONNUM is a contraction of the term control number, and is simply Commerce jargon for a unique product (defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding)." *Union Steel v. United States*, 36 CIT 288, 291 (2012) (internal quotation marks and citation omitted). The CONNUMs at issue in this case are at the most abstract level a set of characteristics. Each characteristic is described by a subset of single-digit integers, and all of these integer subsets are concatenated to form a long string of numbers describing the subject merchandise. *See* IDM at 9.

Commerce published the *Final Results* on March 23, 2018. *Final Results* at 12,717. In the *Final Results*, Commerce continued to find that it was appropriate to use adverse facts available to calculate a rate for GODACO and applied a rate of $3.87/kg. IDM at 12–14. Commerce applied a rate of $3.87/kg to the separate rate respondents. *Id.* at 17–18. Commerce found that Golden Quality had never requested that Commerce extend the withdrawal deadline and assigned Golden Quality the Vietnam-wide entity rate of $2.39/kg. *Final Results* at 12,718.

Plaintiff initiated this action on March 29, 2018 challenging certain aspects of Commerce's *Final Results*. Summons, Mar. 29, 2018, ECF No. 1; Compl. ¶ 1, Mar. 29, 2018, ECF No. 6. The court entered a statutory injunction on April 2, 2018. Order for Statutory Inj. Upon Consent, Apr. 16, 2018, ECF No. 10. The Catfish Farmers of America and individual catfish processors, America's Catch, Alabama Catfish Inc. (doing business as Harvest Select Catfish, Inc.), Consolidated Catfish Companies LLC (doing business as Country Select Catfish), Delta Pride Catfish, Inc., Guidry's Catfish, Inc., Heartland Catfish Co., Magnolia Processing, Inc. (doing business as Pride of the Pond), and Simmons Farm Raised Catfish, Inc. (collectively, "Defendant-Intervenors"), intervened on April 20, 2018. Order, Apr. 20, 2018, ECF No. 16. The administrative record was filed on May 14, 2018. Letter from Kristen McCannon, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, to Mario Toscano, Clerk of the Court, U.S. Court of International Trade, May 14, 2018, ECF No. 18.

The court consolidated this case with Court Nos. 18–00064, 18–00065, 18–00069, and 1800071 on June 7, 2018. Order, June 7, 2018, ECF No. 21. Plaintiff and Consolidated Plaintiffs filed motions for judgment on the agency record. Pl.'s Mots. For J. on the Agency R., Sept. 19, 2018, ECF Nos. 31, 32; Consol. Pl. Golden Quality Seafood Corp.'s Mot. for J. on the Agency R., Sept. 19, 2018, ECF No. 27 ("Golden Quality's Mot."); Consolidated Pls. Vinh Quang, NTSF Seafoods, Green Farms, and Hung Vuong's R. 56.2 Mot. for J. on the Agency R., Sept. 19, 2018, ECF No. 28; Consol. Pl. CASEAMEX's R. 56.2 Mot. for J. on the Agency R., Sept. 19, 2018, ECF No. 30; Consol. Pl. Southern Fishery Indus. Co., Ltd.'s R. 56.2 Mot. for J. Upon the Agency R., Sept. 19, 2018, ECF No. 33 ("South Vina's Mot.").

The court stayed this case following the lapse in appropriations for the Department of Justice on January 15, 2019. Order, Jan. 15, 2019, ECF No. 38. The court lifted the stay following the restoration of appropriations on February 1, 2019. Third Am. Scheduling Order, Feb. 1, 2019, ECF No. 40.

Defendant and Defendant-Intervenors responded. Def.'s Resp. to Pls.' Mots. For J. Upon the Agency R., Mar. 24, 2019, ECF No. 46 ("Def.'s Resp."); Def.-Inters.' Resp. in Opp. to Pl.'s and Consol. Pls.' R. 56.2 Mots. For J. on the Agency R., Mar. 24, 2019, ECF No. 48 ("Def.-Inters.' Resp. Br."). Plaintiff and Consolidated Plaintiffs replied. Pl.-Inter. Southern Fishery Indus. Co., Ltd. Reply Br., June 21, 2019, ECF No. 52 ("South Vina's Reply Br."); Reply Br. of Consol. Pls. Vinh Quang Fisheries Corp., Can Tho Import-Export Joint Stock Co., NTS Seafoods Joint Stock Co., Green Farms Joint Stock Co., and Hung Vuong Corp., June 21, 2019, ECF No. 54; Reply Br. of Consol. Pl. Golden Quality Seafood Corp., June 21, 2019, ECF No. 55 ("Golden Quality's Reply Br."); and Reply Br. of Pl. GODACO Seafood Joint Stock Co., June 21, 2019, ECF No. 57 ("GODACO's Reply Br."). The joint appendix was filed on July 3, 2019. Joint App'x to Opening, Resp., and Reply Brs. Regarding Pls.' Mot. for J. on the Agency R. Pursuant to R. 56.2, July 3, 2019, ECF Nos. 58, 58–1, 58–2, 58–3. The court heard oral argument. Oral Argument Hr'g, Oct. 29, 2019, ECF No. 69. Plaintiff filed a notice of supplemental authority. Notice of Suppl. Authority, Dec. 30, 2019, ECF No. 70.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (B)(iii). The court will hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

I. Commerce's Application of Adverse Facts Available to GODACO

The first issue is whether Commerce's application of adverse facts available to GODACO is supported by substantial evidence.

If "necessary information is not available on the record," or an interested party: (1) "withholds information that has been requested," (2) "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," (3) "significantly impedes a proceeding," or (4) "provides such information but the information cannot be verified," then Commerce may rely on facts otherwise available. 19 U.S.C. § 1677e(a)(1), (2)(A)–(D). If a party fails to cooperate to the best of its ability, Commerce may use an inference adverse to the interests of that party in selecting from among the facts otherwise available. 19 U.S.C. § 1677e(b). The U.S. Court of Appeals for the Federal Circuit has interpreted 19 U.S.C. §

1677e subsections (a) and (b) to have different purposes. *See Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1232 (Fed. Cir. 2014) (discussing 19 U.S.C. § 1677e(a)–(b)).

Subsection (a) applies "whether or not any party has failed to cooperate fully with the agency in its inquiry." *Id.* A respondent's "mere failure . . . to furnish requested information—for *any reason*—requires Commerce to resort to other sources of information to complete the factual record." *Id.* (internal citations omitted).

Subsection (b) applies only when Commerce makes a separate, additional determination that the respondent failed to cooperate by not acting to the best of its ability. 19 U.S.C. § 1677e(b); *see Canadian Solar Int'l Ltd. v. United States*, 43 CIT __, __, 378 F. Supp. 3d 1292, 1320 (2019) (noting that "Commerce must invoke subsection (a) to reach subsection (b)"). A party fails to cooperate to the best of its ability when it does not "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of [its] ability to do so." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (noting that "intentional conduct, such as deliberate concealment or inaccurate reporting . . . evinces a failure to cooperate"); *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012). Commerce may consider an adverse inference when a respondent fails "to cooperate to the best of [the] respondent's ability, regardless of motivation or intent." *Nippon Steel Corp.*, 337 F.3d at 1383. This standard "does not require perfection and recognizes that mistakes sometimes occur, but it does not condone inattentiveness, carelessness, or inadequate record keeping." *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1378 (Fed. Cir. 2016) (quoting *Nippon Steel Corp.*, 337 F.3d at 1382) (internal quotation marks omitted). When making an adverse inference, Commerce may rely on information derived from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record. *See* 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c).

A. *Application of Facts Available*

GODACO argues that the record does not support the application of facts available. GODACO contends that: (1) its responses provided all necessary information on the record, (2) the record is complete, (3) it did not withhold information, (4) it complied fully with all requests for information in a transparent and timely fashion, (5) all information provided was in the form and manner requested, and (6) it did not impede the administrative proceeding. Pl.'s Mot. For J. on the

Agency R., Sept. 19, 2018, ECF No. 32 at 34–35 ("GODACO's Br."). GODACO also argues that Commerce failed to support properly its argument that the record is missing "complete farming [factors of production]." *Id.* at 14–15; GODACO's Reply Br. at 9–10; IDM at 12.

Commerce relied upon 19 U.S.C. §§ 1677e(a)(1) and (2)(A)–(C) in determining that the use of facts otherwise available was warranted. IDM at 12. Defendant argues that substantial evidence supports Commerce's application of facts available. Defendant contends that GODACO failed to provide either a reliable U.S. sales database or a reliable factors of production database, and that the record did not contain necessary information. Def.'s Resp. at 20; IDM at 11, 14. Defendant-Intervenors concur, claiming that GODACO: (1) failed to substantiate whether its factors of production methodology resulted in CONNUM-specific data, (2) failed to report NETWGTU correctly, (3) reported inaccurate factors of production because it misreported non-subject merchandise, and (4) failed to report correctly farming factors of production. Def.-Inters.' Resp. Br. at 8, 9, 12, 13.

1. *GODACO's factors of production submission did not reconcile with all of the CONNUMs at issue*

The court first examines whether Commerce relied correctly on facts otherwise available as to GODACO's factors of production.

GODACO was required to provide Commerce with factors of production information that reconciled to all of the CONNUMs at issue. *Mueller*, 753 F.3d at 1232 (holding that regardless of the reason, a respondent's failure to provide requested information requires Commerce to resort to other sources of information); IDM at 12 (noting that GODACO was to report factors of production information on a CONNUM-specific basis); GODACO's SQR at 16 (requesting information reconciling factors of production information to a particular CONNUM in response to Supplemental Question 40).[2] Commerce identified, however, a "pattern of missing formulas and numbers that [did] not reconcile to the reported allocation methodology" in GODACO's submitted material. IDM at 11; U.S. Dep't of Commerce Mem. at 3, P.R. 292, C.R. 235 (Aug. 31, 2017) (describing a significant discrep-

[2] GODACO's argument that Supplemental Question 37 did not direct GODACO to reconcile the one day of production run data to its larger factors of production reporting and all ratios for all CONNUMs is inapposite. GODACO's Reply Br. at 12. GODACO's response to Supplemental Question 40 states sample reconciliations to a particular CONNUM were provided in response to Supplemental Questions 37 and 38. GODACO's SQR at 16. Additionally, GODACO's response to Supplemental Question 39 adds that the information responding to Supplemental Questions 37 and 38 "contain the detail of how GODACO reported CONNUM-specific [factors of production] to [Commerce]." *Id.* In light of GODACO's responses to Supplemental Questions 37–40, GODACO's argument that Supplemental Question 37 did not specifically direct GODACO to reconcile its production run data to its factors of production reporting and all ratios for all CONNUMs is unpersuasive.

ancy between the reported ratio of preservative used to manufacture the subject product and the reported overall quantity of preservative used) ("BPI Memo").

Commerce found, and GODACO concedes, that the factors of production information submitted by GODACO does not reconcile with all of the CONNUMs at issue. IDM at 8 n.26; BPI Memo at 3; GODACO's Reply Br. at 11 (conceding that GODACO's response was "never intended to exhaustively reconcile each final [factors of production] ratio for every CONNUM reported"). Because this administrative review required CONNUM-specific reporting, and the reconciliation between factors of production and all of the CONNUMs at issue was critical to achieve CONNUM-specific reporting, the court finds that Commerce determined correctly that the record did not contain necessary information. IDM at 7–8.

The court concludes that GODACO did not provide requested information, and Commerce's reliance on facts otherwise available as to GODACO's factors of production database is supported by substantial evidence.

2. *Commerce relied correctly on facts otherwise available as to GODACO's net weight reporting*

The court next examines whether Commerce relied correctly on facts otherwise available as to the net weight information GODACO reported in two specific fields in the U.S. sales database.

Commerce directed GODACO twice to report the subject merchandise's net weight in the U.S. sales database: first in a field named NETWGTU, and second in a field named NETWGT2U.[3] GODACO Section C Questionnaire Response: Sales to the United States at 11,

[3] Commerce's Section C Questionnaire instructed GODACO to report the following for the Net Weight Factor ("NETWGTU") field:

> the percentage of weight as sold accounted for by any added ice, water, glazing, soaking *etc*. . . . [I]f the product is soaked with a weight gain additive and additional water weight accounts for 15 percent of the weight of the merchandise as sold, report the numeric characters "15" in this field. If weight as sold does not include ice, water, glazing, etc., report "00" in this field.

GODACO's Section C Resp. at 11.

In response, GODACO provided data in a field named NETWGTU. *Id.* at 12, Ex. C-1. Commerce, concerned that GODACO's NETWGTU reporting did not tell the whole story, instructed GODACO to:

> revise the U.S. sales database to include a NETWGT2U field and report in this field the amount of water added to the fillets by soaking, tumbling, injection, etc. either (1) directly without the use of chemical additives, or (2) through the use of chemical additives (*e.g.*, STTP). For example, for a fillet that incorporates 5% added water, report the numeric characters "05" in this field.

GODACO's Suppl. Questionnaire at 6.

In response, GODACO provided data in a new field named NETWGT2U. GODACO's SQR at 7, Ex. S-9. GODACO did not remove the field named NETWGTU. GODACO's Br. at 24–25. GODACO also did not revise its U.S. sales database or update its CONNUMs.

P.R. 124–125, C.R. 91–93 (Apr. 13, 2017) ("GODACO's Section C Resp."); GODACO's Suppl. Questionnaire at 6.

GODACO claims that it excluded added moisture from NETWGTU because Commerce's NETWGTU reporting definition requested "the percentage of weight as sold . . . ." GODACO's Section C Resp. at 11. GODACO argues that because: (1) it sells its fillets on a "net weight" basis, meaning the price of its fillets excludes added moisture, and (2) the NETWGTU definition requests specifically weight reporting on an "as sold" basis, GODACO's NETWGTU reporting is correct. GODACO's Br. at 5–6. Additionally, GODACO's argument that Commerce confirmed GODACO's understanding of NETWGTU in a memorandum is unpersuasive because the memorandum pointed out an internal inconsistency within GODACO's submission. BPI Memo at 2; Def.'s Resp. at 35. Because (1) GODACO's sales contracts do not define the term "net weight" and (2) Commerce did not "confirm" anything about GODACO's incorrect understanding of NETWGTU, Commerce's conclusions regarding GODACO's NETWGTU reporting methodology are supported by substantial evidence. *See, e.g.*, GODACO Seafood Joint Stock Co. Section A Questionnaire Response at Ex. A-10, P.R. 102–103, C.R. 55–56 (Mar. 29, 2017) (describing the subject merchandise's sales terms, but failing to define "net weight"); IDM at 9–10.

Commerce's conclusions as to GODACO's NETWGT2U reporting methodology are also supported by substantial evidence. GODACO claims that Commerce asked GODACO to add a new field called NETWGT2U to the U.S. sales database, not replace the existing NETWGTU field with the NETWGT2U field. GODACO's Br. at 10, 24, 27. Because GODACO's Supplemental Questionnaire directed GODACO specifically to revise the U.S. sales database to "include a NETWGT2U field" instead of "add a NETWGT2U field," GODACO should have replaced the NETWGTU field with the NETWGT2U field. GODACO's Suppl. Questionnaire at 6. GODACO's argument is not persuasive because Commerce differentiates between "add" and "include." For example, the immediately preceding page of GODACO's SQR reproduces Commerce's directive to "add a field to the Section C database" to describe a different characteristic of the subject merchandise. GODACO's SQR at 6.

Significantly, the issue of NETWGTU and NETWGT2U information should be viewed in the context of Commerce's repeated directions to GODACO to update its CONNUMs. NETWGTU is one component of the CONNUMs at issue, and GODACO refused to update its CONNUMs when it provided the NETWGT2U information. *See* GODACO's Br. at 24–25. Changing one field of information affects the

total CONNUMs calculation, and it was reasonable for Commerce to request that GODACO update its CONNUMs when one component changed. Similarly, it was reasonable for Commerce to conclude that GODACO could not merely add a NETWGT2U field to the U.S. sales database and fail to update its CONNUMs. IDM at 9–10.

Because GODACO did not report correctly the net weight information that Commerce had requested, the court concludes that Commerce's reliance on facts otherwise available as to GODACO's NETWGTU and NETWGT2U reporting is supported by substantial evidence.

3. Failure to report accurate factors of production because it misreported non-subject merchandise

Next, the court examines whether Commerce's use of GODACO's misreporting of non-subject merchandise and resultant failure to report accurate factors of production as a basis for the application of facts otherwise available is supported by substantial evidence.

Commerce required GODACO to report correctly its factors of production information. *Mueller*, 753 F.3d at 1232 (holding that regardless of the reason, a respondent's failure to provide requested information requires Commerce to resort to other sources of information). Substantial evidence supports Commerce's determination that GODACO included information improperly for non-subject merchandise in its reported factors of production. Def.'s Resp. at 36–37; *see* Def.-Inters.' Resp. Br. at 12–13. GODACO concedes that "[i]f product sold to another country [fell] within the same CONNUM as subject merchandise, GODACO was *required* to report the [factors of production] of that product as merchandise under consideration." GODACO's Br. at 29. GODACO acknowledges that two CONNUMs contained "a small amount of merchandise exported to third country markets . . . [with] higher amounts of water added by soaking than the subject merchandise." GODACO's Reply Br. at 8–9. Because the record shows that GODACO misreported non-subject merchandise, the court concludes that Commerce's reliance on facts otherwise available on GODACO's misreporting of non-subject merchandise and resultant failure to report accurate factors of production is supported by substantial evidence.

4. Commerce applied incorrectly facts otherwise available regarding GODACO's "complete farming [factors of production]"

The court examines whether Commerce's conclusion that information concerning GODACO's "complete farming [factors of production]"

was both necessary and missing from the record is supported by substantial evidence. GODACO's Br. at 14–15; GODACO's Reply Br. at 9–10; IDM at 12.

When Commerce's discussion "lacks record citations supporting the agency's findings . . . the court cannot reasonably discern . . . which particular information Commerce determined was missing." *Hyundai Heavy Indus. Co. v. United States*, 42 CIT __, __, 332 F. Supp. 3d 1331, 1349 (2018). Defendant's general citation to an extensive attachment, without citing specific record evidence, does not suffice as support for its position. *Id.*

Here, Commerce stated only that GODACO failed to provide "necessary . . . complete farming [factors of production]" information in the form and manner Commerce had requested. IDM at 12. The associated footnote directs the reader simply to "[*s*]*ee* Original Questionnaire and Supplemental Questionnaire." *Compare id.* at 12 n.48 *with Hyundai Heavy Indus. Co.*, 332 F. Supp. 3d at 1349. Commerce did not explain its finding of what specific information was necessary and missing from the record, and provided no additional record citations in support of its findings. IDM at 12.

Commerce's footnote citation directing the reader to "[*s*]*ee* Original Questionnaire and Supplemental Questionnaire" does not satisfy Commerce's burden to provide enough information to allow the court to discern reasonably which particular evidence Commerce determined was missing. Defendant-Intervenors attempt to provide some analysis in their brief, but this ex post facto speculation is not a permissible explanation that assists the court with understanding how Commerce arrived at its conclusion. *See* Def.-Inters.' Resp. Br. at 13–15. Absent an adequate explanation of its reasoning, Commerce cannot use the purported absence of necessary information concerning GODACO's "complete farming [factors of production]" as a basis for the application of facts otherwise available. *See* 19 U.S.C. § 1677e(a); *Mueller*, 753 F.3d at 1232.

The court concludes that Commerce's application of facts otherwise available as to GODACO's "complete farming [factors of production]" is not supported by substantial evidence because Commerce did not support its analysis with proper explanations and citations to material in the administrative record.

B. *Commerce Did Not Apply an Adverse Inference Correctly*

Commerce's application of an adverse inference to GODACO is improper because Commerce did not set forth its rationale for applying an adverse inference to GODACO. *See* IDM at 12–13. The relevant section of the IDM merely states the legal standard for the

application of an adverse inference. *Id.* The IDM is silent as to the reasoning why it was appropriate to apply an adverse inference to GODACO. *Id.* The statement of a legal standard for the application of an adverse inference is distinct from the application of that legal standard to the facts in the matter before Commerce. *See Am. Silicon Techs. v. United States*, 24 CIT 612, 625 (2000) (remanding to Commerce a determination to apply an adverse inference where Commerce's reasoning stated merely the standard for the application of facts available).

Defendant's references in its brief to Commerce's factual findings do not suffice here. The court notes that Commerce failed to set forth any analysis in the Final IDM as to how the factual findings were considered with respect to the requirements imposed by 19 U.S.C. § 1677e(b). Although Defendant has addressed some of the relevant issues in its briefing, the court concludes that Commerce's application of an adverse inference is not supported by substantial evidence because Commerce failed to provide any analysis in its Final IDM. Because this matter must be remanded in any case, the court will not attempt to discern Commerce's reasoning regarding an adverse inference from the record. The court finds it more efficient for Commerce to state clearly its findings as it will have an opportunity to do so on remand. The court remands this issue to Commerce for further consideration consistent with this opinion.

II. Commerce Acted in Accordance With 19 U.S.C. § 1677m

The second issue is whether Commerce acted in accordance with 19 U.S.C. § 1677m(d). If Commerce determines that a response to a request for information is deficient, Commerce shall inform the person submitting the response promptly as to the nature of the deficiency and, to the extent practicable, shall provide that person with an opportunity to remedy or explain the deficiency in light of the relevant time limits. 19 U.S.C. § 1677m(d). If that person submits further information, but Commerce finds that the response is either unsatisfactory or not submitted timely, Commerce may disregard all or part of the original and subsequent responses. *Id.*

As described in Section I.A *supra*, Commerce notified GODACO promptly that its submissions were deficient and provided GODACO with several opportunities to remedy or explain the deficiencies. For example, Commerce advised GODACO that its factors of production and net weight reporting were deficient and provided a path to remediate those deficiencies. *See, e.g.*, GODACO's SQR at 7 (requesting updated net weight information); GODACO's SQR at 10 (noting an inconsistency in factors of production information provided in

GODACO's first submission). The court concludes that Commerce's actions in this proceeding as to 19 U.S.C. § 1677m are in accordance with the law.

III. Commerce's Refusal to Verify GODACO's Submissions is in Accordance With The Law

The third issue is whether Commerce's refusal to verify GODACO's submissions is in accordance with the law. Commerce will verify information relied upon in the final results of an administrative review if: (1) a domestic interested party requests timely verification and no verification under the relevant paragraph occurred during either of the two immediately preceding administrative reviews, or (2) the Secretary of Commerce determines that "good cause" for verification exists. 19 C.F.R. § 351.307(b)(1)(iv)–(v).

GODACO argues that good cause exists because it submitted timely ample data with extensive documentation and detailed explanations of the underlying methodology. GODACO also cites 19 C.F.R. § 351.307(b)(1)(v). GODACO's Br. at 45; *see* GODACO's Reply Br. at 18.

Defendant counters that it is not obliged to verify a respondent's submission when necessary information is missing from the record. Def.'s Resp. at 51–52; IDM at 10 n.39. Defendant contends also that verification under 19 C.F.R. § 351.307(b)(1)(iv) is unavailable to GODACO because Commerce conducted a verification in the eleventh administrative review of the products at issue. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 81 Fed. Reg. 44,272 (Dep't. of Commerce July 7, 2016) (final results of admin. review) and accompanying Issues and Decision Mem. at 2; Def.'s Resp. at 51. Defendant-Intervenors argue that Commerce declined properly to verify GODACO's submissions. Def.-Inters.' Resp. Br. at 22–24.

The court concludes that Commerce was justified in refusing to verify GODACO's submissions because, as discussed in Section I.A.1 *supra*, Commerce identified a pattern of missing formulas and numbers that did not reconcile with the reported allocation methodology in GODACO's submitted material. 19 C.F.R. § 351.307(b)(1)(v); IDM at 11; BPI Memo at 3. Additionally, Commerce conducted a verification in one of the two prior administrative reviews of the products at issue, rendering 19 C.F.R. § 351.307(b)(1)(iv) unavailable to GODACO. The court concludes that Commerce's refusal to verify GODACO's submissions is in accordance with the law because none of the reasons for conducting verification under 19 C.F.R. § 351.307(b)(1)(iv)–(v) are applicable to GODACO in this case.

IV. Commerce's Rejection of GODACO's Rebuttal Comments and Case Brief on The Basis That They Contained Untimely Filed New Factual Information is in Accordance With The Law

The fourth issue is whether Commerce's rejection of GODACO's rebuttal comments and case brief as untimely filed new factual information is supported by substantial evidence.

Antidumping duty determinations are subject to strict statutory guidelines. 19 U.S.C. § 1675(a)(3). Commerce's regulations specify deadlines for submitting factual information. 19 C.F.R. § 351.301(c). Commerce must cease collecting information before making a final determination, and Commerce must provide the parties with a final opportunity to comment on the information obtained by Commerce upon which the parties have not previously had an opportunity to comment. 19 U.S.C. § 1677m(g). Commerce must disregard comments containing new factual information. *Id.* Commerce's interpretation of what constitutes factual information is upheld unless an "alternative reading is compelled by the regulation's plain language or by other indications of . . . intent at the time of the regulation's promulgation." *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1287 (2016) (internal quotation marks and citations omitted).

Commerce rejected GODACO's rebuttal comments and case brief on the basis that the submissions contained untimely filed new factual information. GODACO's Rejected Rebuttal; GODACO's Rejected Br.; Letter from U.S. Dep't. of Commerce to GODACO Seafood Joint Stock Co., P.R. 274 (Aug. 15, 2017); Commerce's Rejection of GODACO's Br.[4]

GODACO argues that neither GODACO's Rejected Rebuttal nor GODACO's Rejected Brief contained new factual information; instead, GODACO claims that what Commerce identified as new factual information was actually previously submitted record information. GODACO's Br. at 38–39. GODACO attempts to distinguish *Tri Union* by arguing that, unlike the case brief in *Tri Union*, the rejected rebuttal comments at issue here directly addressed Defendant-Intervenors' arguments. GODACO's Reply Br. at 15.

Defendant counters that even if some of the information at issue was previously represented in the record, GODACO's offerings of "new reporting methodologies and substantive revisions to GODACO's calculations were substantive and untimely submitted

[4] Although the IDM only explicitly references Commerce's rejection of GODACO's Rejected Rebuttal, the record reflects both Commerce's rejection of GODACO's Rejected Rebuttal and GODACO's Rejected Br. and documents the reasons why. IDM at 11; Commerce's Rejection of GODACO's Rebuttal; Commerce's Rejection of GODACO's Br. Defendant argues that both documents were properly rejected. Def.'s Resp. at 42.

new factual information." Def.'s Resp. at 44; IDM at 12. Defendant-Intervenors concur. Def.-Inters.' Resp. Br. at 15–17.

GODACO does not deny that the rebuttal comments and case brief at issue were submitted past the deadline for new factual information. *See* GODACO's Br. at 31–33; *see* GODACO's Reply Br. at 15–16. GODACO submitted entirely new U.S. sales and factors of production databases with substantial revisions that advanced a different margin for GODACO. Def.'s Resp. at 44–45. GODACO's Rejected Rebuttal comments include information compiled from other sources in the record, broken out newly by CONNUM. *Compare* GODACO's Section D Response at Ex. D-9.1 *with* GODACO's Rejected Rebuttal at Ex. 13 (Revised Ex. D9.1); *see* GODACO's SQR, Exs. S-26(b), S-43 (serving as a reference for GODACO's Rejected Rebuttal at Ex. 13 (Revised Ex. D-9.1)). GODACO's argument that it "simply summarized the Excel cell location of all formulas previously submitted in digital form" is unsupported by the record. GODACO's Reply Br. at 16. It was reasonable for Commerce to view GODACO's documents as new factual information because the documents did not merely summarize prior-submitted information, but provided new reporting methodologies, substantive revisions to margin calculations, and new explanations of formulas. IDM at 11–12; GODACO's Rejected Br., Ex. 7. In this case, the court concludes that Commerce's determination that GODACO's changes to the information rendered the rebuttal comments and case brief untimely filed new factual information is supported by substantial evidence.

V. Commerce's Decision to Reject Golden Quality's Request to Rescind The Administrative Review

The fifth issue is whether Commerce's rejection of Golden Quality's request to rescind the administrative review is in accordance with the law. Commerce will rescind an administrative review if a party requests rescission within ninety days of the date the notice of initiation of the requested review was published. 19 C.F.R. § 351.213(d)(1). The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so. *Id.* Reasonableness, as set out in 19 C.F.R. § 351.213(d)(1), is "the only legally applicable standard" that Commerce may apply in determining whether to extend the time limit for parties to file withdrawal requests of administrative reviews. *Glycine & More, Inc. v. United States*, 880 F.3d 1335, 1345 (2018).

On January 12, 2017, the petitioners in the administrative action below withdrew their review request for forty-eight companies, including Golden Quality. Petitioner's Withdrawal Request, P.R. 69 (Jan. 12, 2017). Golden Quality did not file a request to withdraw by the deadline of January 12, 2017, which is ninety days from the

publication of the initiation notice. On January 23, 2017, eleven days after the applicable deadline, Golden Quality filed a letter informing Commerce that it was "withdraw[ing] its request for an administrative review" and "ask[ed] that the Department accept this withdrawal." Letter from Mayer Brown LLP to U.S. Dep't. of Commerce, P.R. 71 (Jan. 23, 2017). Golden Quality did not file a request to extend the deadline.

First, the court finds that Commerce's rejection of Golden Quality's request to rescind the administrative review was reasonable under the first clause of 19 C.F.R. § 351.213(d)(1) because Golden Quality failed to request rescission within ninety days of the date the notice of initiation of the requested review was published (i.e., January 12, 2017). 19 C.F.R. § 351.213(d)(1). The parties do not dispute that Golden Quality filed its late request for withdrawal on January 23, 2017, and thus Commerce was justified in not granting the withdrawal on this basis.

Second, the court finds that Commerce's decision that Golden Quality's request to rescind the administrative review should not be deemed a de facto request to extend the time limit under 19 C.F.R. § 351.213(d)(1) was reasonable. Golden Quality argues that even though it filed an untimely request for withdrawal, and even though it did not request an extension of the ninety-day withdrawal period, Commerce should have regarded the late-filed request for withdrawal as an effective request for extension. Golden Quality contends that "this is a difference without distinction, because the record makes clear that Golden Quality was asking Commerce to extend the 90-day deadline." Golden Quality Br. at 17. Commerce refused to "reach a decision as to whether it should grant Golden Quality an extension . . . because [Golden Quality] made no such request." IDM at 24. Commerce noted in its Final IDM that Golden Quality "offered *no* explanation as to why Commerce should have accepted its late withdrawal request. . . . Commerce was not even required to apply the reasonableness test under its regulations in this case because Golden Quality never actually asked Commerce to extend the deadline to accept the untimely withdrawal request." Def.'s Resp. at 70; IDM at 24.

In support of its argument, Golden Quality describes the requirement to file an actual request to extend the deadline as a "mother may I" request and a "hollow . . . and rigid adherence to formality." Golden Quality's Mot. at 17. Golden Quality concedes that it did not frame its untimely withdrawal request as a request to extend the deadline under 19 C.F.R. § 351.213(d)(1). *Id.* Golden Quality's assertion that the record shows that Golden Quality had asked Commerce for an

extension of the regulatory deadline is unsupported by the record. Golden Quality's withdrawal request did not solicit or otherwise consider an extension of the deadline under 19 C.F.R. § 351.213(d)(1). Letter from Mayer Brown LLP to U.S. Dep't of Commerce, P.R. 71 (Jan. 23, 2017) (failing to consider an extension of the deadline under 19 C.F.R. § 351.213(d)(1)). The court does not reach Golden Quality's argument about the appropriate standard Commerce should employ in evaluating requests made under 19 C.F.R. § 351.213(d)(1) because Golden Quality's failure to request an extension of the deadline meant that the withdrawal request was not properly before Commerce. 19 C.F.R. § 351.213(d)(1); Golden Quality's Mot. at 10–16.[5]

The court finds that Golden Quality: (1) failed to file a proper request to withdraw its administrative review by the applicable deadline and (2) failed to request an extension of the ninety-day deadline because it merely filed a late request for withdrawal and never asked for an extension of the deadline. The court concludes accordingly that Commerce's refusal to decide whether to grant an extension was reasonable because Commerce should not be required to decide a request that was not made by a party. The court sustains Commerce's decision to reject Golden Quality's request to rescind the administrative review.

VI. South Vina Did Not Fail to Exhaust its Administrative Remedies

The sixth issue is whether South Vina exhausted its administrative remedies. The court requires the exhaustion of administrative remedies where appropriate. 28 U.S.C. § 2637(d). Generally, exhaustion requires that a party submit an administrative case brief to Commerce that presents all arguments that continue to be relevant to Commerce's final determination or results. *U.S. Steel Corp. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1248, 1260 (2018). A party may seek judicial review of an issue not raised in a party's case brief if Commerce neglected to address the issue until Commerce's final

[5] Golden Quality claims that a party's untimely withdrawal request in *Diamond Sawblades Mfrs. Coal. v. United States*, 301 F. Supp. 3d 1326 (CIT 2018) "was not framed as a request to extend the withdrawal deadline . . . ." Golden Quality's Reply Br. at 6. This statement is unsupported by the record in that case. The *Diamond Sawblades* party requesting withdrawal under 19 C.F.R. § 351.213(d)(1) specifically referenced both withdrawal and an extension of the deadline to withdraw. Joint Appendix at 87, 90, *Diamond Sawblades Mfrs. Coal. v. United States*, Consol. Court No. 16–00124 (CIT 2018), ECF No. 70. Unlike in *Diamond Sawblades*, Golden Quality's withdrawal request did not additionally solicit or otherwise consider an extension of the deadline under 19 C.F.R. § 351.213(d)(1). Letter from Mayer Brown to U.S. Dep't of Commerce, P.R. 71 (Jan. 23, 2017) (failing to consider an extension of the deadline under 19 C.F.R. § 351.213(d)(1)). Similarly, the *Glycine* party requested withdrawal under 19 C.F.R. § 351.213(d)(1) specifically referencing both withdrawal and an extension of the deadline to withdraw, unlike the facts in the instant matter.

decision. *Qingdao Taifa Grp. Co. v. United States*, 33 CIT 1090, 1093 (2009) (noting that otherwise the party would not have had a full and fair opportunity to raise the issue at the administrative level).

South Vina argues that it neither failed to exhaust its administrative remedies nor failed to adhere to Commerce's regulations. South Vina's Reply Br. at 1. Defendant argues that both regulatory authority and the doctrine of exhaustion preclude South Vina's substantive arguments. Def.'s Resp. at 54; 19 C.F.R. § 351.309(c)(2) (requiring that parties submit case briefs presenting all arguments continuing in the submitter's view to be relevant to the final determination or final results). Defendant notes that South Vina did not file an administrative case brief and that no party's administrative case brief raised the substantive arguments South Vina has raised in its brief here. Def.'s Resp. at 55.

Commerce concedes that it "inadvertently omitted" South Vina from the Preliminary IDM's separate rate analysis. IDM at 3; *see* PDM at 8. The Preliminary IDM did not present South Vina with a separate rate issue to brief; consequently, South Vina did not file an administrative case brief raising the issues it now wishes to address. PDM at 8; South Vina's Reply Br. at 1. Because Commerce neglected to address South Vina in the separate rate analysis until the Final IDM, South Vina should not be faulted for failing to exhaust its administrative remedies. The court concludes that South Vina acted in accordance with 19 C.F.R. § 351.309(c)(2) and South Vina's substantive arguments cannot be precluded on this basis. On remand, the court directs Commerce to consider South Vina's substantive arguments as described in both its Memorandum of Law in support of its motion and its reply brief. Mem. of Law in Supp. of South Vina's Mot., Sept. 19, 2018, ECF No. 33–1; South Vina's Reply Br.

VII. Whether The Rate Applied to The Separate Rate Respondents is Supported by Substantial Evidence and in Accordance With The Law

The seventh issue is whether the rate applied to the separate rate respondents is supported by substantial evidence and in accordance with the law. As discussed above, the court remands the issue of Commerce's application of adverse facts available to GODACO. The rate applied to the separate rate respondents by Commerce in the underlying proceeding is tied to the rate that Commerce applied to GODACO. Because the court cannot yet consider the rate on remand, the court cannot reach the issue of whether the rate applied to the separate rate respondents is supported by substantial evidence and in accordance with the law. Commerce must reevaluate GODACO's rate on remand consistent with this opinion.

CONCLUSION

For the foregoing reasons, the court remands this matter to Commerce for future proceedings in accordance with this opinion. Accordingly, upon consideration of all papers and proceedings in this action, it is hereby

ORDERED that this action shall proceed in accordance with the following schedule:

1. Commerce must file its remand determination on or before June 30, 2020;
2. Commerce must file the administrative record on or before July 14, 2020;
3. The Parties' comments in opposition to the remand determination must be filed on or before August 13, 2020;
4. The Parties' comments in support of the remand determination must be filed on or before September 14, 2020;
5. The Joint Appendix must be filed on or before September 28, 2020.

Dated: April 1, 2020
New York, New York

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