

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND
GODACO Seafood Joint Stock Co. v. United States
Court No. 18-00063, Slip Op. 20-42 (CIT April 1, 2020)

I. SUMMARY

The U.S. Department of Commerce (Commerce) prepared these final results of redetermination in accordance with the opinion and remand order of the U.S. Court of International Trade (the Court) in *GODACO Seafood Joint Stock Co. v. United States*, Court No. 18-00063, Slip Op. 20-42 (CIT April 1, 2020) (*Remand Order*). These final results of redetermination concern the *Final Results* in the 13th administrative review of the antidumping duty order on certain frozen fish fillets (fish fillets) from the Socialist Republic of Vietnam (Vietnam) covering the period of review (POR) August 1, 2015 through July 31, 2016.¹

In accordance with the *Remand Order*, Commerce is providing further information regarding its application of adverse facts available (AFA) with respect to GODACO Seafood Joint Stock Company (GODACO), pursuant to sections 776(a)-(b) of the Tariff Act of 1930, as amended (the Act). Commerce is also considering the substantive arguments presented by Southern Fishery Industries Co., Ltd. (South Vina) regarding our assignment of a separate rate to companies not selected for individual examination in this review (separate rate companies). For the reasons discussed below, we continue to find that the application of AFA to GODACO is

¹ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results, Final Results of No Shipments, and Partial Rescission of the Antidumping Duty Administrative Review; 2015–2016*, 83 FR 12717 (March 23, 2018) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).

warranted. Additionally, we continue to find that the assignment of GODACO's rate to the separate rate companies, including South Vina, is appropriate.²

II. BACKGROUND

On October 14, 2016, Commerce initiated the 13th administrative review of fish fillets from Vietnam.³ On February 22, 2017, Commerce selected the two largest exporters, including GODACO, for individual review.⁴

On September 12, 2017, Commerce published the *Preliminary Results*.⁵ In the *Preliminary Results*, pursuant to sections 776(a) and (b) of the Act, Commerce applied AFA to assign a dumping margin to GODACO.⁶ As AFA, we assigned the Vietnam-wide margin, *i.e.*, \$2.39/kilogram (kg), to GODACO. Commerce also assigned this margin to the separate rate companies.⁷

On March 13, 2018, Commerce published its *Final Results*.⁸ In the *Final Results*, Commerce continued to find that GODACO failed to provide information that was requested of it and did not act to the best of its ability in responding to our requests for information; accordingly, Commerce continued to apply AFA in assigning a margin to GODACO.⁹ However, Commerce determined that a different margin than the one selected in the *Preliminary Results* –

² As discussed below, our analysis regarding the assignment of a separate rate to South Vina is conducted under protest.

³ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 FR 71061 (October 14, 2016).

⁴ See Memorandum, "Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review," dated February 22, 2017.

⁵ See *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 FR 42785 (September 12, 2017) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

⁶ See *Preliminary Results*, 82 FR at 42785; see also *Preliminary Results* PDM at 11-18.

⁷ See *Preliminary Results*, 82 FR at 42785. As noted below, Commerce inadvertently failed to determine preliminarily whether South Vina was eligible for a separate rate. However, Commerce corrected this omission in the *Final Results*.

⁸ See *Final Results*.

⁹ *Id.* at 83 FR at 12717; see also *Final Results* IDM at Comment 1.

the highest margin calculated in the proceeding, *i.e.*, \$3.87/kg – should be applied to GODACO.¹⁰ In turn, this margin was also applied to the separate rate companies.

In the *Final Results*, Commerce found for the first time that South Vina was entitled to a separate rate.¹¹ Specifically, Commerce inadvertently omitted any discussion of South Vina’s separate rate status from the *Preliminary Results* and, therefore, Commerce first addressed the company’s separate rate status with the issuance of the *Final Results*. South Vina first commented on its separate rate status, and the assignment of a rate, in a motion to the Court.¹²

On April 1, 2020, the Court issued its *Remand Order*.¹³ The *Remand Order* addressed seven issues: (1) whether Commerce’s application of AFA to GODACO was supported by substantial evidence; (2) whether Commerce acted in accordance with section 782(d) in applying AFA to GODACO; (3) whether Commerce’s refusal to verify GODACO’s submissions was in accordance with the law; (4) whether Commerce’s rejection of GODACO’s rebuttal comments and case brief as untimely filed new factual information was supported by substantial evidence; (5) whether Commerce’s rejection of the withdrawal of review request filed by Golden Quality, a mandatory respondent, was in accordance with the law; (6) whether South Vina exhausted administrative remedies; and (7) whether Commerce’s selection of the rate applied to the separate rate companies was supported by substantial evidence and in accordance with the law. The Court affirmed Commerce’s decision, in full, with respect to issues 2, 3, 4, and 5. With respect to issue 6, the Court determined that South Vina was not required to comment on the *Preliminary Results* due to the company’s omission from Commerce’s preliminary analysis; the Court found, therefore, that South Vina did not fail to exhaust its administrative remedies and

¹⁰ See *Final Results* IDM at Comments 1 and 2.

¹¹ *Id.* at 3.

¹² See South Vina’s Motion for Judgment on the Agency Record at 6-7 (ECF No. 33) (Brief of South Vina).

¹³ See *Remand Order*.

Commerce must consider the company's arguments regarding the assignment of a separate rate. As a consequence, the *Remand Order* is limited to issues 1 and 7.

With regard to issue 1, the Court remanded Commerce's determination, in part. The Court determined that, in applying AFA to GODACO, Commerce must provide additional explanation to meet the requirements of sections 776(a) and 776(b) of the Act.

First, the Court determined that Commerce partially failed to explain which information was necessary and missing from the record, consistent with the requirements of section 776(a) of the Act, when it applied facts otherwise available in the *Final Results*.¹⁴ Specifically, Commerce specified four deficiencies in the record. For three of these deficiencies, the Court affirmed Commerce's finding that certain requested information was missing from the record, and that application of facts available was warranted: (i) the narrative of GODACO's factors of production (FOPs) submission could not be fully reconciled to its FOP worksheets in the same submission; (ii) Commerce relied correctly on facts otherwise available as to GODACO's net weight reporting; and, (iii) GODACO misallocated its FOPs because it co-mingled subject and non-subject products that had higher water content.¹⁵ However, for the fourth deficiency Commerce identified, *i.e.*, GODACO's reporting of its farming FOPs, the Court found that Commerce simply stated that "GODACO failed to provide 'necessary . . . complete farming {factors of production}' information in the form and manner Commerce had requested" and in support provided only a general reference to earlier questionnaire responses.¹⁶ The Court found that Commerce's citation directing the reader to "{s}ee Original Questionnaire and Supplemental Questionnaire" did not satisfy Commerce's burden to provide enough information to allow the

¹⁴ See *Remand Order* at 17-18.

¹⁵ *Id.* at 12-17.

¹⁶ *Id.* at 17-18.

Court to discern which particular evidence Commerce determined was missing, pursuant to 776(a) of the Act, in making this finding.¹⁷

Second, the Court also determined that Commerce did not adequately explain its justification for applying an adverse inference to GODACO, consistent with the requirements of 776(b) of the Act.¹⁸ Although Commerce stated the legal standard for the application of adverse inferences in applying facts available, the Court found that Commerce did not provide an analysis based on the facts of this case.

With respect to issue 7, the Court instructed Commerce to consider whether the margin assigned to the separate rate companies is supported by substantial evidence and in accordance with the law,¹⁹ and to consider South Vina's substantive arguments regarding the assignment of a separate rate.²⁰

III. ANALYSIS

A. Facts Available under Section 776(a)

Sections 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that, if necessary information is not available on the record, or if an interested party (A) withholds information that has been requested by Commerce, (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding, or (D) provides such information but the information cannot be verified as provided for in section 782(i) of the Act, Commerce shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

¹⁷ *Id.*

¹⁸ *Id.* 18-19.

¹⁹ *Id.* at 29.

²⁰ *Id.* at 27-28. The Court stated that, because the rate applied to the separate rate companies is tied to the rate that Commerce applied to GODACO, the Court was not yet able to consider the separate rate assignment.

Here, we find that the application of facts available with respect to GODACO is warranted. In our *Final Results*, we noted four key deficiencies with GODACO's response. With respect to three of the deficiencies, the Court affirmed our *Final Results*, and we continue to find that such deficiencies lead to the absence of necessary information on the record, pursuant to 776(a) of the Act. With respect to the fourth deficiency, we found that GODACO failed to report control number (CONNUM)-specific farming FOPs, as requested. Thus, GODACO withheld information that was requested of it, failed to provide data in the form and manner requested, and significantly impeded this proceeding.

In the *Final Results*, in the discussion of GODACO's reporting of its farming factors, Commerce stated:

Pursuant to sections 776(a)(1) and (2)(A), (B), and (C) of the Act, Commerce determines that the use of facts otherwise available is warranted with respect to GODACO. During the course of this review, Commerce discovered that GODACO withheld key information that was requested by Commerce for calculating an accurate margin for GODACO. Specifically, GODACO failed to provide in the form and manner requested by Commerce the following necessary information: ... (3) complete farming FOPs.²¹

At the end of this passage, in the corresponding footnote, Commerce stated: “*See* Original Questionnaire and Supplemental Questionnaire.” Pursuant to the Court's *Remand Order*, Commerce is further explaining which specific information was necessary and is missing from the record, warranting application of facts otherwise available to GODACO.

Commerce's initial questionnaire required GODACO to report its FOPs on a CONNUM-specific basis.²² However, despite this clear instruction, in its original questionnaire response,

²¹ See *Final Results* IDM at Comment 1.

²² See Commerce's Letter to GODACO, dated February 24, 2017 (Initial Questionnaire) at D-1 (“A. Factors of Production: The reported amounts should reflect the factors of production used to produce one unit of the merchandise under consideration.”) and D-2 (“E. Reporting Factors of Production: please provide a detailed explanation of how you derived your estimated FOP consumption for merchandise under review on a CONNUM-

GODACO reported its farming FOPs on a harvested-whole-live-fish basis, and not on a CONNUM-specific basis, as requested by Commerce.²³ In a subsequent supplemental questionnaire, Commerce asked GODACO, again, to report all of its FOPs on a CONNUM-specific basis:

CONNUM-Specific Reporting

37) Please revise all per-unit FOP calculations to account for only the production of frozen fish fillets having the same physical characteristics as subject fillets entered into the United States during the POR in both the FOP numerator and denominator...²⁴

GODACO answered this question, in part, regarding its processing FOPs (*i.e.*, whole live fish, preservatives, packing material, *etc.*) but failed to address this CONNUM-specific question with respect to its farming FOPs.²⁵

In its SQR, GODACO directed Commerce to the specific allocations regarding its main farming input FOPs, *i.e.*, fish feed and fingerlings.²⁶ Regarding fingerlings, GODACO stated that it allocated the consumption of fingerlings over the quantity of harvested fish during the POR.²⁷ An examination of the referenced exhibit confirms that GODACO reported its fingerling FOPs on a harvested-whole-live-fish basis.²⁸ Regarding fish feed, GODACO did not provide a narrative of how (*i.e.*, on what basis) it allocated its fish feed FOPs.²⁹ However, the referenced exhibit confirms that GODACO reported its revised fish feed FOPs on a harvested-whole-live-

specific basis and explain why the methodology you selected is the best way to accurately demonstrate an accurate consumption amount”).

²³ See GODACO’s Letter, “Section D Response,” dated April 19, 2017 (Section D Response) at Exhibits D-9.5, D-9.6, D-17 through D-21.

²⁴ See Commerce’s Letter, “Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Supplemental Questionnaire,” dated June 13, 2017 (Supplemental Questionnaire) at Question (Q) 37.

²⁵ See GODACO’s Letter, “Supplemental Section A, C and D Response,” dated July 17, 2017 (SQR) at Q.37.

²⁶ *Id.* at Q.40; see also SQR at Q.57 and Exhibit S-26 (for fingerlings); SQR at Q.63 and Exhibit S-28 (for fish feed).

²⁷ *Id.* at Q.57.

²⁸ *Id.* at Exhibit S-26(b) (*e.g.*, Fingerling 1 FOP = Finger1 Total (kg) / Live fish Harvested {sic} Qty (Kg)).

²⁹ *Id.* at Q.63.

fish basis.³⁰ Regarding its other farming FOPs (medicine, nutrition, environmental treatment, lime, salt, electricity, and labor), GODACO did not revise these in its SQR, but instead continued to report these FOPs as reported in its original questionnaire response, *i.e.*, allocated on a harvested-whole-live-fish basis.³¹

Thus, GODACO failed to report farming FOPs on a frozen-fish-fillets basis, much less on the basis of frozen fish fillets having the same physical characteristics as subject fillets, as requested by Commerce first in its Initial Questionnaire and, again, in Commerce's Supplemental Questionnaire, as explained above. As such, GODACO failed to provide, in the form and manner requested by Commerce, this necessary information which prevented Commerce from calculating an accurate dumping margin for the company.

B. Application of an Adverse Inference Under Section 776(b)

The Court also determined that Commerce did not adequately explain its justification for applying an adverse inference to GODACO with respect to the requirements of 776(b) of the Act.³² Pursuant to the *Remand Order*, Commerce is providing this explanation.

In selecting from among the facts otherwise available, pursuant to section 776(b) of the Act, an adverse inference is warranted when Commerce has determined that a respondent has “failed to cooperate by not acting to the best of its ability to comply with a request for information.”³³ In such a case, the Act permits Commerce to use an inference that is adverse to

³⁰ *Id.* at Exhibit S-28 (*e.g.*, Feed 1 FOP = Feed1 Quantity (KG) / Live fish Qty harvest (KG)).

³¹ See Section D Response at Exhibit D-19 (relating to medicine, nutrition, environmental treatment, lime, and salt), Exhibit D-20 (relating to labor), Exhibit D-21 (relating to electricity), Exhibit D-9.5 and Exhibit D-9.6.

³² See *Remand Order* at 18-19.

³³ See section 776(b) of the Act.

the interests of that party in selecting from among the facts otherwise available.³⁴ Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”³⁵ The Court of Appeals for the Federal Circuit (CAFC), in *Nippon Steel*, provided an explanation of the phrase “failure to act to the best of its ability,” stating that the ordinary meaning of “best” means “one’s maximum effort,” and that the statutory mandate that a respondent act to the “best of its ability” requires the respondent to do the maximum it is able to do.³⁶ The CAFC acknowledged that, while there is no willfulness requirement, “deliberate concealment or inaccurate reporting” would certainly be sufficient to find that a respondent did not act to the best of its ability, although it indicated that inadequate responses to agency inquiries “would suffice” as well.³⁷ Compliance with the “best of its ability” standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation or review.³⁸ The CAFC further noted that, while the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.³⁹

GODACO failed to cooperate to the best of its ability in this proceeding by not developing a methodology to report CONNUM-specific sales and cost information (which is essential to the accurate calculation of GODACO’s dumping margin), as Commerce requested on multiple occasions as explained above. Applying AFA under these circumstances is appropriate and consistent with past practice. For example, in a recent *Shrimp from India*

³⁴ *Id.*; see also *Statement of Administrative Action accompanying the Uruguay Round Agreements Act*, H.R. Rep. 103-316, vol. 1 (1994) at 870 (SAA).

³⁵ See SAA at 870.

³⁶ See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel*).

³⁷ *Id.*, 337 F.3d at 1380.

³⁸ *Id.*, 337 F.3d at 1382.

³⁹ *Id.*

review, we applied AFA to a respondent because it had several reporting deficiencies, the most significant of which was that it did not provide data that demonstrated the extent to which its submitted costs reasonably reflected differences in the merchandise's physical characteristics (*i.e.*, CONNUM-specific reporting).⁴⁰ Similarly, in the specific context of FOPs, we have found that a failure to provide CONNUM-specific FOPs may warrant application of AFA. For instance, in *Copper Pipe from China*, we explained that “{b}ecause the Hailiang Group has continued to report FOP values that are identical for all CONNUMs despite {Commerce’s} multiple requests to provide this data on a more specific basis, all the information necessary for {Commerce} to calculate an accurate dumping margin for the Hailiang Group is not on the record and available for use in the final determination.”⁴¹ In these circumstances, application of AFA was appropriate because not only was information missing from the record, but the respondent failed to respond to essential portions of Commerce’s questionnaire(s), even though it was within the respondent’s ability to do so. Therefore, we find that GODACO failed to act to the best of its ability, within the meaning of section 776(b) of the Act, in this administrative review.

We find application of AFA especially appropriate here in light of our prior public statements regarding the FOP reporting requirements in this proceeding. We previously stated

⁴⁰ See *Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 57847 (October 29, 2019) (*Shrimp from India*), and accompanying IDM at Comment 2.

⁴¹ See *Seamless Refined Copper Pipe and Tube from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 60725 (October 1, 2010) (*Copper Pipe from China*), and accompanying IDM at “Use of FA and AFA”; see also *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part*, 75 FR 60725 (September 21, 2010), and accompanying IDM at Comment 27 (applying AFA in light of the respondent’s “failure to provide the necessary information on the record that would substantiate its actual usage of steel strap on a CONNUM-specific basis, and our determination that TPCO failed to cooperate by not acting to the best of its ability”).

that respondents in this proceeding must report FOPs on a CONNUM-specific basis.⁴² This constituted notice to potential respondents. The Court has affirmed Commerce’s practice of putting respondents, and potential respondents, on notice of reporting requirements. For instance, in *An Giang Fisheries*, the Court rejected respondents’ assertions that CONNUM-specific reporting was not appropriate.⁴³ There, the Court observed that Commerce put respondents “on notice of future enforcement of the CONNUM-specific reporting requirement as early as the eighth administrative review,” and explained that “{t}his is the eleventh administrative review ... Given the advance notice afforded to respondents, the court cannot find that Commerce’s request for CONNUM-specific reporting, here, was unreasonable.”⁴⁴ Similarly, in *Thuan An Production*, the Court explained that, where a respondent “made a decision not to collect data in accordance with Commerce’s chosen methodology, despite being notified multiple times of the requirement ... Commerce’s requirement that {the respondent} provide CONNUM-specific FOP reporting is supported by substantial evidence.”⁴⁵ Against this backdrop, where Commerce placed respondents on notice of such reporting requirements on multiple occasions, GODACO’s failure to comply with these requirements demonstrates that it did not put forth its maximum effort in responding to our requests for information.

Accordingly, we find that GODACO failed to act to the best of its ability to comply with Commerce’s requests for information. Therefore, we used an adverse inference in selecting among the facts otherwise available pursuant to section 776(b) of the Act.

⁴² See *Final Results IDM* at 7-8 (“As a result, in the investigation, Commerce placed respondents on notice that in future segments it would require CONNUM-specific FOPs. In the *8th AR Final*, Commerce reminded respondents of their obligation to report CONNUM-specific FOPs, noting that Commerce “may require Vinh Hoan and other respondents to report {their} FOPs on a CONNUM-specific basis...”).

⁴³ See *An Giang Fisheries v. United States*, Court No. 16-00072, Slip. Op. 18-10 (CIT 2018) (*An Giang Fisheries*) at 11.

⁴⁴ *Id.*

⁴⁵ See *Thuan An v. United States*, Court No. 17-00056 Slip Op. 18-152 (CIT 2018) (*Thuan An Production*) at 23-24.

C. Assignment of a Separate Rate

In the *Final Results*, Commerce determined that South Vina was entitled to a separate rate and assigned South Vina GODACO's rate of \$3.87/kg. South Vina did not submit a case brief following issuance of our *Preliminary Results*, despite the fact that: (1) the methodology for assigning separate rates to eligible companies was fully discussed there; (2) Commerce's regulations at 19 CFR.351.309(c)(2) require that parties present all arguments that continue to be relevant for the final results in their administrative case briefs; and (3) the CAFC has held that companies must exhaust their administrative remedies by raising relevant issues in their case briefs before requesting judicial relief. Instead of submitting a case brief to argue that Commerce's preliminary rate assignment methodology was improper,⁴⁶ South Vina contested that rate assignment methodology for the first time in a motion to the Court. Therefore, this is Commerce's first opportunity to address South Vina's substantive arguments on this point.⁴⁷ Accordingly, we continue to believe that South Vina did not exhaust its administrative remedies, and we consider its substantive arguments regarding a separate rate under respectful protest.⁴⁸

For the reasons stated, we continue to find that our methodology chosen to assign a dumping margin to the separate rate companies was appropriate, and that GODACO's rate of \$3.87/kg is properly applied to South Vina.⁴⁹ The Act and Commerce's regulations do not directly address the establishment of a rate to be applied to companies not selected for individual

⁴⁶ See *QVD Food Co. v. United States*, 658 F.3d 1318, 1328 (Fed. Cir. 2011) (quoting 19 CFR 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to {Commerce's} final determination or final results ...")).

⁴⁷ Although Commerce inadvertently omitted an analysis of South Vina from our *Preliminary Results*, the question of South Vina's eligibility for a separate rate is distinct from the question of how to assign that separate rate. South Vina could have submitted a brief on the issue or submitted a rebuttal brief addressing this point (as the general matter of separate rate assignment was raised by other parties). However, it failed to do so.

⁴⁸ See *Viraj Group Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003).

⁴⁹ We note that, while two companies, Cadovimex II Seafood Import-Export and Processing Joint Stock Company and Hoang Long Seafood Processing Co., Ltd., received rates higher than the AFA rate applied to GODACO, these adjusted rates were based on a finding of duty reimbursement.

examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks 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 companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally “an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.”

Where all of the dumping margins calculated for the individually-examined respondents are zero, *de minimis*, or based entirely on facts available, establishment of a separate rate is governed by section 735(c)(5)(B) of the Act. Section 735(c)(5)(B) of the Act permits, in this situation, the use of “any reasonable method” to establish the estimated all-others rate for exporters and producers not individually investigated, including “averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.” This provision of section 735(c)(5)(B) of the Act – which is identified as the “*expected* method” in the SAA – demonstrates that the Act clearly envisions that Commerce base the separate rate on the experience of all of the individually examined respondents, including those assigned an AFA rate, where all of the dumping margins calculated for the individually examined respondents are zero, *de minimis*, or based entirely on facts available. Our approach in the *Final Results*, therefore, was consistent with the statutory language and the SAA.

Our assignment of GODACO’s dumping margin to the separate rate companies -- rather than relying on a rate obtained by the separate rate companies in a prior proceeding, as South Vina urges -- is also consistent with CAFC precedent and Commerce practice. Commerce has

noted that, in *Albemarle*, the “{t}he CAFC determined that the statute would not permit Commerce to pull forward rates from a prior segment of the proceeding under the circumstances before it – finding that ‘{t}here is no basis to simply assume that the underlying facts or calculated dumping margins remain the same from period to period.’”⁵⁰ As the CAFC explained:

“{I}f the facts remained the same from period to period, there would be no need for administrative reviews.” Thus, Commerce itself has explained that “it is well established and upheld practice that Commerce must base its decisions on the record of the administrative proceeding before it in each review.” In short, as we have previously recognized, “there is a clear congressional intent” that administrative reviews “be as accurate and current as possible.” The legislative history “emphasized the importance of using current information with respect to making determinations. ‘The Committee intends that the Authority and the {U.S. International Trade Commission} should always use the most up-to-date information available.’” In light of this established doctrine, it is not open to Commerce to argue that prior review data is reliable simply because it is “temporally proximate.” The government’s rationale contravenes this fundamental premise of periodic administrative reviews that each “administrative review is a separate exercise of Commerce’s authority that allows for different conclusions based on different facts in the record.”⁵¹

Therefore, consistent with this precedent, Commerce cannot simply assume that South Vina’s prior dumping margin(s) reflects the company’s POR dumping.⁵²

⁵⁰ See *Diamond Sawblades and Parts Thereof from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 17527 (April 20, 2018) (*Diamond Sawblades from China*), and accompanying IDM at 26 (citing *Albemarle Corp. v. United States*, 821 F. 3d 1345, 1356 (Fed. Cir. 2016) (*Albemarle*)).

⁵¹ See *Albemarle*, 821 F. 3d at 1356 (internal citations omitted).

⁵² See, e.g., *Light-Walled Rectangular Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017-2018*, 85 FR 21829 (April 20, 2020) (*LWRP from Mexico*), and accompanying IDM at 31 (applying the “expected method” and noting that “we are unable to assume that {the respondent} is not dumping during the POR based on the fact that it obtained a zero percent rate in the 2013-2014 administrative review”); and *Certain Steel Nails from Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2018-2019*, 85 FR 19138 (April 6, 2020) (*Nails from Taiwan*), and accompanying PDM at 10 (“{W}e determined the estimated dumping margin for each of the individually examined respondents to be based entirely on AFA. Thus, in accordance with the expected method, and consistent with the Court of Appeals for the Federal Circuit’s decision in *Albemarle*, in this review, we have preliminarily assigned the non-selected companies the rate assigned to {respondents}, 78.17 percent...”).

Since the CAFC's decision in *Albemarle*, Commerce has repeatedly stated that pulling forward rates from previous review segments for non-selected respondents is inappropriate,⁵³ with two exceptions: (1) "where there is evidence that the overall market and the dumping margins have not changed from period to period;" and (2) where AFA was applied with respect to a non-participating mandatory respondent in a previous review, "a prior dumping margin imposed against an exporter in an earlier administrative review continues to be valid if the exporter fails to cooperate in a subsequent administrative review."⁵⁴ Neither of these exceptions is applicable here, because the antidumping margins calculated over the course of this proceeding have fluctuated widely, and because Commerce did not apply a rate based on AFA to South Vina in any previous administrative review that could be applied to the company in the event that it was a non-participating mandatory respondent in this review.

Commerce's practice in this regard is reflected in numerous recent cases.⁵⁵ For instance, in *LWRP from Mexico* we declined to assign a respondent a dumping margin that had been

⁵³ See, e.g., *Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 4 1/2 Inches) from Japan: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2014-2015*, 81 FR 45126 (July 12, 2016), and accompanying PDM at 8, unchanged in *Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 4 1/2 Inches) from Japan: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 81 FR 80635 (November 16, 2016); *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Under 4 1/2 Inches) from Japan: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2014-2015*, 81 FR 45124 (July 12, 2016), and accompanying PDM at 8, unchanged in *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Under 4 1/2 Inches) from Japan: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 81 FR 80640 (November 16, 2016); *Xanthan Gum from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 82 FR 11428 (February 23, 2017), and accompanying IDM at 38; and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review, and Preliminary Rescission of New Shipper Review; 2014-2015*, 81 FR 45455 (July 14, 2016), and accompanying PDM at 9, unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, and Rescission of New Shipper Review; 2014-2015*, 82 FR 4844 (January 17, 2017); *Nails from Taiwan* PDM at 5; and *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2016-2017*, 84 FR 38002 (August 5, 2019), and accompanying IDM at 24-25.

⁵⁴ See *Albemarle*, 821 F. 3d at 1357-58.

⁵⁵ See *Diamond Sawblades from China* IDM at 26 (citing *Albemarle*, 821 F. 3d at 1356) (noting that the "{t}he

calculated for it in a previous review. In that review, we relied on *Albemarle* to explain that we cannot assume that a respondent's dumping behavior was the same in a subsequent period.⁵⁶ In *Flanges from Italy*, we stated that,

in accordance with the U.S. Court of Appeals for the Federal Circuit's decision in *Albemarle Corp. v. United States*, we are applying to the nonselected companies a rate based on the simple average of the individual rates applied to {mandatory respondents} ASFO and Forgital in this administrative review. This {rate, assigned on the basis of AFA} is the only rate determined in this review for individual respondents and, thus, should be applied to the 25 non-selected companies under section 735(c)(5)(B) of the Act.⁵⁷

Notably, the rate established for ASFO and Forgital in that administrative review, 204.53 percent, was based on the rates for these companies in the investigation, which were in turn based entirely on AFA. Similarly, in *Pipe and Tube from Turkey*, the sole mandatory respondent, Noksel Celik Boru Sanayi A.S. (Noksel), did not participate in the review and, therefore, Commerce applied total AFA to it.⁵⁸ Following *Albemarle*, Commerce applied Noksel's AFA rate to the non-selected respondents.⁵⁹ These cases demonstrate that, pursuant to *Albemarle*, Commerce routinely applies the expected method in assigning separate rates to non-individually-examined companies. Consistent with these cases, we continue to find application of the expected method appropriate here.

CAFC determined that the statute would not permit Commerce to pull forward rates from a prior segment of the proceeding under the circumstances before it" where "{t}here is no basis to simply assume that the underlying facts or calculated dumping margins remain the same from period to period."); and *Finished Carbon Steel Flanges from Italy: Final Results of Antidumping Duty Administrative Review; 2017– 2018*, 85 FR 21825 (April 20, 2020) (*Flanges from Italy*).

⁵⁶ See *LWRP from Mexico* IDM at 31.

⁵⁷ See *Flanges from Italy*, 85 FR at 21826.

⁵⁸ See *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017-2018*, 84 FR 64455 (November 22, 2019) (*Pipe and Tube from Turkey*).

⁵⁹ *Id.* (“{I}n accordance with the U.S. Court of Appeals for the Federal Circuit's decision in *Albemarle Corp. v. United States*, we continue to find that a reasonable method for determining the rate for the non-selected companies is to use the dumping margin applied to Noksel in this review”).

South Vina’s arguments to the Court relating to our assignment of a separate rate are unavailing. First, South Vina asserts that *Albemarle* is not relevant here because that case did not involve the application of adverse inferences.⁶⁰ Essentially, South Vina asks us to find that the expected method – and the statutory language itself – is only controlling when there are not companies receiving AFA. However, that interpretation is directly contrary to the plain language of the Act, which applies when the “dumping margins calculated for the individually examined respondents are zero, *de minimis*, or based entirely on facts available.”) (emphasis added). Under the Act, and in practice, application of the expected method is not limited solely to the assignment of rates based entirely on AFA margins; rather, Commerce has incorporated zero or *de minimis* margins for mandatory respondents when they are available.⁶¹

Additionally, South Vina asserts to the Court that we applied an AFA margin to the company without an analysis of whether South Vina should, independently, be assigned AFA. This is a mischaracterization of our separate rate assignment procedure.⁶² As noted above, the Act explicitly permits reliance on an AFA-based margin in determining the separate rate to assign to companies that were not individually reviewed; in fact, doing so is referred to as “expected” in the SAA. Neither the Act nor the SAA states that Commerce must conduct a separate analysis to determine whether a separate rate company would have, independently,

⁶⁰ See Brief of South Vina at 8.

⁶¹ See, e.g., *Multilayered Wood Flooring from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2016-2017*, 84 FR 38002 (August 5, 2019) (providing separate rate companies with a rate based on the average of a zero rate and a total AFA rate); see also *Certain Lined Paper Products from India: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 84 FR 23017 (May 21, 2019) (providing non-selected companies with a zero rate when both mandatory respondents received zero rates).

⁶² See Brief of South Vina at 7-17.

received the same margin as the company(ies) whose rate comprises the separate rate calculation. Eligibility for a separate rate requires different considerations than rate assignment itself.⁶³

Second, South Vina asserts to the Court that the AFA rate is not contemporaneous with the POR.⁶⁴ While the AFA rate being assigned to GODACO in this review is based on a rate from a prior segment of the proceeding, this is permissible under the Act.⁶⁵ The Act provides that an adverse inference may include reliance on information derived from: the petition; a final determination in the investigation; any previous review; or any other information placed on the record.⁶⁶ Therefore, the Act specifically contemplates that an AFA margin can be – and, in practice, often is – based on information from a prior segment. However, regardless of when the AFA margin was first applied, its application to GODACO in this review makes it a contemporaneously-applied margin.

Finally, we further find that South Vina’s citations to recent cases purportedly showing application of Commerce’s “reach back” policy (*i.e.*, where Commerce assigns separate rate companies margins based on prior segment)⁶⁷ are not on point. In *Sinks from China*,⁶⁸ we assigned a separate rate company a margin from a prior segment of that proceeding. However, in that case, there were no individually-examined respondents, given that the mandatory respondents in that administrative review were found to be part of the China-wide entity, and the

⁶³ See *Deosen Biochemical Ltd. v. United States*, 301 F. Supp. 3d 1372, 1380 (CIT 2018) (stating that “{t}he question of separate rates is entirely detached from the imposition of AFA...”).

⁶⁴ See Brief of South Vina at 14.

⁶⁵ See section 776(d)(1)(B) of the Act.

⁶⁶ See section 776(b)(2) of the Act; see also *Viet I-Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1110 (Fed. Cir. 2016) (*Viet I-Mei Frozen Foods*).

⁶⁷ See Brief of South Vina at 17-19.

⁶⁸ See *Drawn Stainless Steel Sinks from the People’s Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016-2017*, 83 FR 658 (January 5, 2018) (*Sinks from China*), and accompanying PDM at 12, unchanged in *Drawn Stainless Steel Sinks from the People’s Republic of China: Final Results of the Antidumping Duty Administrative Review; 2016-2017*, 83 FR 23424 (May 21, 2018).

China-wide entity was not under review in that segment of the proceeding.⁶⁹ Accordingly, there was no margin calculated for, or assigned to, an individually-examined respondent; therefore, application of the expected method was not possible. For similar reasons, South Vina’s citation to *TRBs from China*⁷⁰ is inapposite. As we noted in that case, “{f}or these final results, we have not calculated any individual rates or assigned a rate based on facts available.”⁷¹

South Vina’s arguments regarding *Fish Fillets from Vietnam 2014-15* (i.e., the 12th administrative review) are, similarly, misplaced.⁷² As with the cases discussed above, the mandatory respondents in *Fish Fillets from Vietnam 2014-15* were determined to be part of the Vietnam-wide entity, and no party remained under individual examination in the review.⁷³ Therefore, application of the expected method in accordance with section 735(c)(5)(B) of the Act was also not possible. With respect to the particular rates selected in that review, the rates are not contemporaneous with the POR in that segment, whereas the \$3.87/kg rate being applied to South Vina is contemporaneous because it is being applied to GODACO during *this* POR.⁷⁴

For the reasons stated above, our assignment of GODACO’s rate to South Vina is consistent with the Act, the SAA, legal precedent, and Commerce practice. The rate assigned to

⁶⁹ See *Sinks from China* PDM at 12.

⁷⁰ See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, and Rescission of New Shipper Review; 2015-2016*, 83 FR 1238 (January 10, 2018) (*TRBs from China*).

⁷¹ *Id.* at 1239.

⁷² See Brief of South Vina at 12.

⁷³ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review; 2014-2015*, 81 FR 64131 (September 19, 2016), and accompanying PDM (explaining that “{Commerce} has determined that all of the mandatory respondents in this segment are part of the Vietnam-wide entity, an entity which is not under review in this segment,” and as a result “there is no POR margin information available for {Commerce} to consider in assigning a margin for eligible separate rate companies not individually examined.”), unchanged in *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 26050 (June 6, 2017).

⁷⁴ See section 776(b)(2) of the Act; see also *Viet I-Mei Frozen Foods*, 839 F.3d at 1110. As we noted above, the Act specifically contemplates that a contemporaneous AFA margin can be – and, in practice, often is – based on information from a prior segment of a proceeding.

the separate rate companies is reflective of the potential dumping here, as it represents the POR dumping margin assigned to the sole individually-examined respondent remaining under review in this segment of the proceeding.⁷⁵ Applying the method set forth in section 735(c)(5)(B) of the Act, which is described as the “expected method” in the SAA, we have continued to assign South Vina the same rate (*i.e.*, GODACO’s margin) that we assigned the other separate rate companies.

III. COMMENTS ON THE DRAFT RESULTS OF REDETERMINATION

Commerce released the Draft Results of redetermination on June 11, 2020.⁷⁶ Interested parties submitted comments on June 16, 2020.⁷⁷ In its submission, GODACO requested additional time to comment on Commerce’s Draft Results.⁷⁸ Commerce provided all interested parties an opportunity to comment until June 23, 2020.⁷⁹ On June 23, 2020, only the petitioners provided comments.⁸⁰ GODACO requested that Commerce reject petitioners’ comments. However, Commerce accepted the petitioners’ comments and, contrary to GODACO’s claims, did not find that they constituted rebuttal comments; rather, the petitioners’ arguments were

⁷⁵ We note that Commerce selected multiple respondents for individual review in this proceeding. However, one company did not qualify for a separate rate and was found to be part of the Vietnam-wide entity, which was not under review.

⁷⁶ See DRAFT RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND, *GODACO Seafood Joint Stock Co. v. United States*, Court No. 18-00063, Slip Op. 20-42 (CIT April 1, 2020), dated June 11, 2020 (Draft Results).

⁷⁷ See GODACO’s Letter, “GODACO Comments on Draft Remand Redetermination Pursuant to Court Order in the Thirteenth Administrative Review of the Antidumping Duty Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,” dated June 16, 2020 (GODACO Comments); TPL Consolidated Plaintiff’s Letter, “Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Comments on Draft Results of Remand Redetermination Pursuant to Court Remand, *GODACO Seafood Joint Stock Co. v. United States*, Court No. 18-00063, Slip. Op. 20-42,” dated June 16, 2020; and Petitioners’ Letter, “Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Petitioners’ Comments on Commerce’s Draft Remand Results,” dated June 16, 2020.

⁷⁸ See GODACO Comments at 3.

⁷⁹ See Memorandum, “Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Deadline Extension for Comments on Draft Results of Redetermination,” dated June 16, 2020.

⁸⁰ See Petitioners’ Letter, “Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Petitioners’ Comments on Commerce’s Draft Remand Results,” dated June 23, 2020 (Petitioners Comments).

responsive to positions and cases raised in Commerce’s Draft Results.⁸¹ No party commented regarding the assignment of a separate rate to South Vina.

GODACO’s Comments

(i) *GODACO’s Farming FOPs*

- GODACO accurately reported its farming FOPs based on GODACO’s farming records, in the identical manner that every respondent has reported upstream farming inputs in prior and subsequent segments of the proceeding of this order, *i.e.*, FOP allocations based on total harvests of live fish.
- Prior to this administrative review, *i.e.*, covering 2015-2016 (AR13), Commerce had not required CONNUM-specific farming FOP reporting; however, it is now taking this unreasonable position.
- There was no prior precedent or guidance from Commerce regarding FOPs for intermediate raw material (farming) inputs in this review.
- Commerce takes the untenable position that farming inputs, which are consumed to grow an intermediate raw material (whole live fish), must be tied to specific finished products (CONNUMs).⁸² However, GODACO’s farming FOP allocation methodology is logical, obvious, and evident on the record.
- Fish are farmed from the young fingerling stage at dozens of individual ponds over many months, with fish feed, nutrients, chemicals, *etc.*, introduced several times a day to produce a mature, whole live fish.⁸³ These mature farmed fish are then harvested *en*

⁸¹ See GODACO’s Letter, “GODACO’s Request to Reject CFA’s Rebuttal Comments,” dated June 24, 2020; Petitioners’ Letter, “Petitioners’ Comments on GODACO’s June 24th Request,” dated June 25, 2020; and GODACO’s Letter “GODACO’s 2nd Request to Reject CFA’s Rebuttal Comments,” dated June 26, 2020.

⁸² See GODACO Comments at 14 (citing Draft Results at 6-8).

⁸³ *Id.* at 12 (citing Section D Response at 6-7, 20-24, 36-41, Exhibit D-2 (production process), D-15 (farming process); Exhibits D-17—D-21 (farming input factors); and SQR at 27-35, Exhibits S-19—S-20, S-25, S-27, S-30.

masse from dozens of ponds, transported to the factory, and introduced *en masse* to the processing stage. Then, many hundreds of tons of comingled live fish are introduced and then processed *en masse* to produce a final, finished frozen fillet product. Farming operations do not track/tag farming inputs from initial grow out through to the harvesting stage. In addition, at the factory, harvested whole live fish cannot be traced to a final frozen finished product. Thus, it is unreasonable for Commerce to require CONNUM-specific reporting under these conditions.

- GODACO reported its farming FOPs as it did because there is no conceivable way to trace specific fingerlings and the individual FOP inputs consumed to grow that fingerling to its full maturation at harvesting to a final CONNUM-specific fish product. If a specific reporting methodology is impossible, then Commerce's instruction to report all FOPs on a CONNUM-specific basis is equally impossible, *i.e.*, GODACO did not refuse to follow this instruction; instead, it simply could not follow it.
- In the Draft Results, Commerce claims that it requested CONNUM-specific farming FOP information in the underlying administrative review.⁸⁴ However, these generic references to reporting were not specific to farming FOPs and Commerce never specifically requested that GODACO alter its farming FOP reporting methodology to tie such farming inputs to individual CONNUMs. Had Commerce found this reporting deficient, it was required by statute to give notice and an opportunity to remedy or explain the deficiency.⁸⁵

⁸⁴ *Id.* at 14 (citing Draft Results at 6-7 (citing Questionnaire at D-1; Q.37)).

⁸⁵ *Id.* at 15 (citing section 782(d) of the Act).

(ii) *Use of Adverse Inference*

- Commerce may only apply AFA after first making the statutory findings to support facts available, and thereafter making the statutory finding that the respondent “failed to cooperate by not acting to the best of its ability to comply with a request for information.”⁸⁶
- Statutory structure and judicial precedent require Commerce to provide a non-conclusory basis for AFA which details the supposed substantial non-cooperation by GODACO that is both distinct from the facts available bases and a recitation of the legal standard itself.⁸⁷
- Commerce, in continuing to apply AFA in the Draft Results, made neither the requisite objective nor subjective findings required by the Act.⁸⁸
- Contrary to Commerce’s assertion,⁸⁹ GODACO did in fact develop and implement a methodology to report CONNUM-specific sales and cost information.⁹⁰
- While GODACO respectfully disagrees with the Court’s ruling with respect to facts available, Commerce has again failed to make separate findings required to apply AFA. Commerce failed to articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation.⁹¹

⁸⁶ See GODACO Comments at 16 (citing section 776(b) of the Act).

⁸⁷ *Id.* at 17 (citing *Nippon Steel*, 337 F.3d at 1382-83).

⁸⁸ *Id.*

⁸⁹ *Id.* at 18 (citing Draft Results at 9).

⁹⁰ *Id.* at section I.

⁹¹ *Id.* at 19 (citing *CITIC Trading Co. v. United States*, 27 CIT 356, 372 (2003) (*CITIC Trading*) (quoting *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 839 (1999) (*Mannesmannrohren-Werke AG*)); and *Nippon Steel*, 337 F.3d at 1382).

- Here, as in *Borden*, Commerce made no finding that the respondent refused to cooperate or could have provided the information requested but did not, thereby justifying the use of adverse inferences.⁹² The unreliability of data, standing alone, does not demonstrate that an interested party failed to act to the best of its ability.⁹³
- Facts available and AFA are governed by separate statutory sub-sections and require independent findings that are supported by substantial evidence.⁹⁴
- The Draft Results do nothing to support AFA application, other than to proffer the incorrect and unsound basis of an undeveloped CONNUM-specific reporting methodology and to recite the legal standard.⁹⁵ While the Draft Results conclude with cursory statements of AFA propriety,⁹⁶ the Court confirms that “Commerce may not simply provide the conclusory statement that a party ‘has failed to cooperate by not acting to the best of its ability.’”⁹⁷
- Moreover, Commerce could not have made any such AFA finding based on GODACO’s exhaustive efforts to timely report voluminous information, including scores of original source documents and detailed narrative explanations of its CONNUM-specific reporting, as requested.⁹⁸ The complexities of this review and the level of cooperation and support provided by GODACO throughout are summarized below:

⁹² *Id.* at 19 (citing *Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 488-489 (2001) (*SAIL*) (citing *Borden Inc. v. United States*, 4 F.Supp. 2d 1221, 1246 (CIT 1998) (*Borden*))).

⁹³ *Id.*

⁹⁴ *Id.* at 21 (citing sections 776(a) and (b) of the Act; and *POSCO v. United States*, 337 F. Supp. 3d at 1273).

⁹⁵ *Id.* at 20 (citing Draft Results at 8-9).

⁹⁶ See Draft Results at 10-11 (“Therefore, we find that GODACO failed to act to the best of its ability, within the meaning of section 776(b) of the Act, in this administrative review. . . . Accordingly, we find that GODACO failed to act to the best of its ability to comply with Commerce’s requests for information. Therefore, we used an adverse inference. . . .”).

⁹⁷ *Id.* at 20 (citing *CITIC Trading*, 27 CIT at 372 (quoting *Mannesmannrohren-Werke*, 23 CIT at 839)).

⁹⁸ *Id.* at 20.

- GODACO adopted its production and accounting procedures to provided FOPs on a CONNUM-specific basis, as requested, including thousands of pages of supporting documentation.
 - Complicating the FOP reporting is that GODACO is 100% vertically integrated, from fish feed production to farming, to processing.
 - GODACO was the only mandatory respondent in the review, with no other contending data to compare, contrast, or support its data.
 - The questionnaire was received very late in the review proceeding, as was the extensive supplemental questionnaire. Given the short time to review the responses, Commerce was hard-pressed to appreciate the complexities in the FOP and sales data reported on a CONNUM-specific basis.
 - Commerce requested extensive explanations and information and GODACO fully cooperated with all such requests.
- Total AFA remains unwarranted because the record does not evidence GODACO’s being uncooperative in this review, let alone not having acted to the best of its ability. As the Court recently explained: “Adverse inferences are not record evidence.”⁹⁹
 - In the most recently completed administrative review (*i.e.*, the 15th), Commerce faulted the mandatory respondent for not having reported farming FOPs on a CONNUM-specific basis¹⁰⁰ and Commerce did not apply total AFA, but, instead, calculated a margin.¹⁰¹ GODACO acted to the best of its ability and in good faith when reporting its

⁹⁹ *Id.* at 22 (citing *JSW Steel Ltd. v. United States*, 315 F Supp. 3d 1379, 1384 (CIT 2018)).

¹⁰⁰ *Id.* at 15 (citing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017–2018*, 85 FR 73756 (April 29, 2020) (*AR15 Final Results*), and accompanying IDM at Comment 3.

¹⁰¹ *Id.* at 15 (citing *AR15 Final Results*, 85 FR at 73757).

farming FOPs, undermining Commerce’s attempt to justify its application of total AFA. GODACO fully explained, with supporting documentation, how it allocated its farming inputs. GODACO was transparent about its allocation methodology and provided supporting documentation and detail to justify its farming FOP allocations.¹⁰² It is simply impossible to report farming FOPs on a CONNUM-specific basis and this decision should be reversed for the final results of redetermination.

- The Draft Results unpersuasively relies on the most recently-completed administrative review of the AD order on *Shrimp from India*.¹⁰³ *Shrimp from India* can be distinguished from this case in several important respects. Commerce issued the Elque Group a second supplemental questionnaire when Commerce found its initial and first supplemental questionnaires were found deficient, whereas Commerce issued GODACO only a single supplemental questionnaire. Moreover, GODACO was a first time mandatory respondent with fully integrated farming, production and byproduct facilities who had only first been reviewed two reviews prior, whereas one of the three entities that comprise the Elque Group was subject to all prior twelve reviews in *Shrimp from India*.¹⁰⁴
- In *Shrimp from India*, the respondent failed: (1) to provide requisite explanations and documentation; (2) to explain how its reported costs were derived, and the extent to which such costs reasonably reflect cost differences according to Commerce’s physical characteristics; (3) to provide a complete/accurate cost reconciliation; (4) to provide

¹⁰² *Id.* at 12.

¹⁰³ *Id.* at 22 (citing Draft Results at 10; and *Shrimp from India* IDM 9-19).

¹⁰⁴ *Id.* at 22-24.

size-specific FOP information; and (5) to report CONNUM-specific FOPs. In contrast, GODACO provided or reported all of these.

- Commerce also misplaces reliance on an instance where it applied “partial” AFA in *Line Pipe from China*.¹⁰⁵ However, *Line Pipe from China* can be distinguished. Therein, Commerce discovered an unreported FOP at verification and applied AFA with respect to that particular input.¹⁰⁶ GODACO, by contrast, was never found to have concealed its FOPs from Commerce and was deprived of an opportunity to have its reporting verified.
- *Copper Pipe from China* also does not support Commerce’s analysis in the Draft Results. There, Commerce applied partial AFA because the Hailiang Group continued to report FOP values that are identical for all CONNUMs, despite Commerce’s multiple requests to provide this data on a more specific basis.¹⁰⁷ By contrast, GODACO was assigned total AFA and yet properly reported specific FOP information by individual CONNUM.
- Also, unlike *Copper Pipe from China* and *Shrimp from India*, GODACO did not report the same FOP values across all CONNUMs but, instead, reported FOPs on a CONNUM-specific basis.¹⁰⁸ Indeed, *Copper Pipe from China* underscores the impropriety of total AFA for GODACO because Commerce there expressly declined to apply partial facts available to the Hailiang Group for another FOP, “line sets.”¹⁰⁹

¹⁰⁵ *Id.* at 25 (citing Draft Results at 10 n.41).

¹⁰⁶ *Id.* at 26 (citing *Certain Seamless Carbon and Alloy Standard, Line, and Pressure Pipe from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, and Critical Circumstances, in Part*, 75 FR 57449 (September 21, 2010) (*Line Pipe from China*), and accompanying IDM at Comment 27).

¹⁰⁷ *Id.* at 26 (citing *Copper Pipe from China* IDM 31).

¹⁰⁸ *Id.* at 27 (citing GODACO Comments at Section I).

¹⁰⁹ *Id.* at 27 (citing *Copper Pipe from China* IDM at 31).

- *Copper Pipe from China* demonstrates Commerce’s practice of using verification as a means of ensuring the accuracy of reported data, as well as an administrative tolerance for errors that may occur in the reporting process. That the Court has already affirmed that Commerce’s bases for using facts available, which could have been easily addressed at verification as in *Copper from China*, does not justify the application of total AFA to GODACO.
- The Draft Results likewise unpersuasively rely on administrative precedent from previous segments of this AD order.¹¹⁰ In particular, the fact that respondents were required to have reported their FOPs on a CONNUM-specific basis in the eleventh and twelfth administrative reviews – and that such requirement was affirmed by the Court – is inapposite because GODACO did in fact report its FOPs on a CONNUM-specific basis. GODACO supplied voluminous supporting documents and detailed narrative explanations for all of its FOP reporting methodologies at the factory, farming, and byproduct levels. Thus, Commerce improperly applied total AFA.

(iii) *The AFA Rate Assigned to GODACO*

- Even assuming *arguendo* that AFA was warranted, Commerce unlawfully selected a rate of \$3.87/kg, the rate assigned in a new shipper review (NSR) five years before the POR in this review.¹¹¹ NSRs differ dramatically from administrative reviews, as each type of proceeding is conducted under a distinct statutory and regulatory procedure.

¹¹⁰ See Draft Results at 10 and n.43-44 (citing *An Giang*, 287 F. Supp. 3d at 1367-71; *Thuan An Prod. Trading & Serv. Co. v. United States*, 384 F. Supp. 3d 1340, 1352-55 (CIT 2018)).

¹¹¹ *Id.* at 28 (citing *Final Results IDM* at 14; and *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2010–2011*, 78 FR 17350, 17853 (March 21, 2013)).

- Moreover, the \$3.87/kg NSR rate resulted from a single sale, made under entirely different commercial conditions, as compared with GODACO’s sales here.¹¹²
- Commerce does not have *carte blanche* authority to employ as AFA the highest rate in the history of the AD order pursuant to the Trade Preferences Extension Act (TPEA).¹¹³ The Court recently clarified that Commerce, despite the TPEA amendment, cannot assign an AFA rate based on an aberrational transaction.¹¹⁴ A sale is aberrational when it deviates from the usual or normal practice and cannot be regarded as typical.¹¹⁵
- Moreover, the NSR sale in question was aberrational, as evidenced by the rate being nearly \$1.50/kg more than the second-highest rate in the AD order, *i.e.*, the \$2.39/kg Vietnam-wide rate.¹¹⁶ The Court recently rejected an AFA rate selection where Commerce selectively read TPEA to ignore its statutory responsibility.¹¹⁷ Similarly, here, Commerce impermissibly selected a “true outlier{ }” as the AFA rate.¹¹⁸
- Moreover, the TPEA places a critical limitation on Commerce. The amended statute authorizes Commerce to select an AFA rate, “including the highest such rate or margin, based on an evaluation by {Commerce} of the situation that resulted in the {Department} using an adverse inference in selecting among {FA}.”¹¹⁹ Yet the Draft

¹¹² *Id.* at 28 (citing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review, and Intent to Revoke Order in Part*, 77 FR 56180, 56181 (September 12, 2012) (at n.17 “Bona Fide Analysis of Docifish Corporation’s New Shipper Sale”)).

¹¹³ *Id.* at 29 (citing Pub. L. No. 114-27 (2015)).

¹¹⁴ *Id.* at 29 (citing *Hyundai Steel Co. v. United States*, 2018 Ct. Intl. Trade LEXIS 93, *59-60 (June 28, 2018) (*Hyundai Steel*)).

¹¹⁵ *Id.* at 29 (citing *Hyundai Steel* at *59 (citing WEBSTER’S THIRD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED)).

¹¹⁶ *Id.* at 30 (citing *Final Results* IDM 13-14; and Draft Results at 19).

¹¹⁷ *Id.* at 29 (citing *Hyundai Steel* at *60; PDM at 18; and *Final Results* IDM at 14).

¹¹⁸ *Id.* at 30 (citing *Hyundai Steel* at *60).

¹¹⁹ *Id.* at 30 (citing section 776(d)(2) of the Act).

Results continue using the “highest such rate” without the requisite “evaluation.”¹²⁰

Commerce committed this exact error in the Draft Results, which “failed to explain why this case justified its selection of the highest rate { }.”¹²¹

- Moreover, Commerce has not justified assigning a fully cooperative GODACO a rate nearly \$1.50/kg more than the non-cooperative respondents in this review, who each declined to participate altogether.¹²² Thus, the rate assigned to GODACO was disproportionate to the conduct for which AFA was applied.
- The application of the \$3.87/kg rate inexplicably reversed course from longstanding Commerce practice of applying the AD rate for the nonmarket economy (NME) country-wide rate as the AFA rate.¹²³ At the very least, Commerce must provide the necessary “explanation as to why it depart {ed}” from its practice of using the country-wide rate as AFA.¹²⁴ Commerce has not provided any explanation for selecting the \$3.87/kg rate as the AFA rate here, let alone met the heightened justification required to reverse longstanding agency practice.¹²⁵
- Based on the foregoing, GODACO requests that Commerce recalculate GODACO’s AD margin using neutral facts available data on the record for those instances where the Court has affirmed Commerce’s finding that the record is missing information (albeit not with respect to farming FOPs, as that facts available basis remains invalid).

The Petitioners’ Comments

(i) GODACO’s Farming FOPs

¹²⁰ *Id.* at 30 (citing section 776(d)(2) of the Act; *Final Results* IDM 13-14; and Draft Results at 19).

¹²¹ *Id.* at 31 (citing *POSCO v. United States*, 296 F. Supp. 3d 1320, 1349 (CIT 2018)).

¹²² *Id.* at 31 (citing *Final Results*, 83 FR at 12718).

¹²³ *Id.* at 31 (internal citations omitted).

¹²⁴ *Id.* at 31 (citing *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283 (Fed. Cir. 2004)).

¹²⁵ *Id.* at 31 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

- The Court has already affirmed Commerce’s reliance on facts otherwise available for GODACO’s entire FOP database. Hence, Commerce does not need to make a separate finding that GODACO failed to report its farming FOPs on a CONNUM-specific basis because the Court has already affirmed that they are unusable.
- Nevertheless, the record demonstrates that GODACO failed to report farming FOPs on a CONNUM-specific basis. Throughout this review, Commerce required GODACO to report all of its FOPs, including upstream material inputs (*e.g.*, farming factors) for its whole live fish input, on a CONNUM-specific basis.
- The Court has found that this requirement has been unambiguous since the 11th administrative review. In that review, Commerce adjusted a respondent’s farming FOPs using facts available because it had reported its farming FOP consumption data over the total quantity of harvested whole live fish, rather than its total production of frozen shank fillet products.
- Despite this consistent failure by several respondents during the course of this proceeding, GODACO refused to develop a reasonable methodology, even though the record demonstrates it was possible.
- Commerce provided GODACO ample opportunity to revise its reporting but GODACO, by its own admission, continued to allocate its farming FOPs over non-CONNUM specific merchandise (*i.e.*, harvested whole live fish). Therefore, Commerce’s Draft Results are correct because, without the CONNUM-specific farming factors, Commerce cannot calculate an accurate dumping margin and must rely upon the facts otherwise available. In addition, AFA is appropriate because it deters future non-cooperation.

(ii) Use of Adverse Inference

- Commerce correctly applied AFA because, after multiple request from Commerce, GODACO failed to cooperate to the best of its ability in this proceeding by not developing a methodology to report CONNUM-specific sales and cost information which is essential to the accurate calculation of a dumping margin. Accordingly, Commerce articulated why it concluded that GODACO failed to act to the best of its ability and, critically, why the absence of this information is significant.¹²⁶
- GODACO failed to cooperate by actively refusing “to provide Commerce with FOP information that reconciled to all of the CONNUMs at issue.”¹²⁷
- Commerce repeatedly directed GODACO to substantiate its FOP allocation methodology, but GODACO instead told Commerce that its response was “never intended to exhaustively reconcile each final FOP ratio for every CONNUM reported.”¹²⁸ GODACO did not even attempt to reconcile its per-unit FOPs for each reported CONNUM, despite Commerce’s instructions.
- The lack of data requires facts available, but this “intentional conduct” and failure to “put forth its maximum efforts to investigate and obtain the requested information from its records” requires an adverse inference.¹²⁹
- Additionally, following repeated directions from Commerce to update its CONNUMs and FOP data because they were not CONNUM-specific, GODACO claimed falsely that “all factors” were reported on a CONNUM-specific basis and reflected production

¹²⁶ See Petitioners Comments at 6 (citing *CITIC Trading* (quoting *Mannesmannrohren-Werke AG*)); see also Draft Results at 9-11; and *Nippon Steel*, 337 F.3d at 1382).

¹²⁷ *Id.* at 7 (citing *Remand Order* at 12).

¹²⁸ *Id.* at 7 (citing GODACO Reply Br. at 11 and GODACO’s February 15, 2018 Revised Case Brief at 9-10 (“{Commerce’s} attempt to corroborate and reconcile FOPs for the full period using this exhibit are entirely futile and misplaced.”)).

¹²⁹ *Id.* at 7 (citing *Nippon Steel*, 337 F.3d at 1382-83).

costs for identical CONNUMs only.¹³⁰ However, the Court affirmed this was not true, explaining that GODACO refused “to update its CONNUMs when it provided the NETWGT2U information.”¹³¹

- Similarly, GODACO refused to update its farming FOPs to ensure they were allocated over the total quantity of frozen well-trimmed, shank fillets produced during the POR, rather than harvested whole live fish (the intermediate raw material input).¹³² In analogous cases where Commerce has found respondents’ reporting to be proven false, Commerce has found it appropriate to resort to AFA to deter future noncooperation.¹³³
- GODACO also failed to cooperate by refusing to provide accurate U.S. sales and FOP data that were on the same basis.¹³⁴ This failure is significant because it renders any comparisons between GODACO’s reported U.S. prices and normal values meaningless.¹³⁵

¹³⁰ *Id.* at 7 (citing SQR at 15 (“{N}o revisions {were} necessary for the reported FOPs as all factors account for only the production of frozen fish fillets having the same physical characteristics as subject fillets entered into the United States during the POR”) (emphasis added)).

¹³¹ *Id.* at 8 (citing *Remand Order* at 16).

¹³² *Id.* at 8 (citing Draft Results at 6-8; SQR at 6-7).

¹³³ *Id.* at 8 (citing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of Antidumping Duty Administrative Review; 2016-2017*, 84 FR 18007 (April 29, 2019), and accompanying IDM at Comment 1 (where Commerce applied AFA to respondent because of its failure, *inter alia*, to report accurate CONNUM-specific sales and FOP data and substantiate the accuracy of its FOP data); *Shrimp from India* IDM at Comment 2 (“For example, in response to . . . Commerce’s original questionnaire, which asks how the company accounted for cost differences according to product physical characteristics, the Elque Group responded that ‘all physical characteristics were incorporated in its reporting methodology,’ {h}owever, our analysis of the submitted cost data showed that, even though some products clearly require more processing than others, the Elque Group did not report product-specific conversion costs (*i.e.*, it reported conversion costs which were identical for all products.”); *Steel Bar from India* IDM at Comment 6 (where Commerce applied AFA to respondent for failing to report CONNUM-specific cost data and otherwise substantiate its reporting), *aff’d by Mukand, Ltd. v. United States*, Slip Op. 2013-41 and *Mukand, Ltd. v. United States*, 767 F. 3d 1300 (Fed. Cir. 2014).

¹³⁴ *Id.* at 9 (citing section 773(a) of the Act (“In determining . . . whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value”); and section 773(c) of the Act (Commerce “shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise”)).

¹³⁵ *Id.*

- Therefore, the shortcomings in the record are due to GODACO’s repeated failure to cooperate to the best of its ability.
- In *Nippon Steel*, the CAFC found that, if a respondent fails to expend maximum effort to supply the information requested by Commerce, then an adverse finding is justified.¹³⁶ Applying the same rationale in *PAM, S.p.A.*, the CAFC again stressed that “parties and attorneys filing documents with the Department of Commerce have an obligation to provide complete and correct information” and that the application of AFA is appropriate when “a respondent is uncooperative by failing to provide or withholding information.”¹³⁷ In these instances, the use of adverse facts is appropriate and particularly important “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”¹³⁸
- In line with this precedent, Commerce correctly relied on its determination in *Shrimp from India*¹³⁹ because both GODACO and the respondent in that case, the Elque Group, failed to: (1) explain how their reported costs were derived; (2) reconcile/substantiate their reported costs and underlying FOP allocation methodology; (3) demonstrate the extent to which their submitted costs reasonably reflect cost differences according to Commerce’s physical characteristics; (4) provide complete/accurate cost reconciliations and other information necessary for Commerce to meaningfully analyze the

¹³⁶ *Id.* at 9 (citing *Nippon Steel*, 337 F.3d at 1382).

¹³⁷ *Id.* at 9 (citing *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1339-40 (Fed. Cir. 2009) (*PAM, S.p.A.*)).

¹³⁸ *Id.* at 9 (citing SAA at 870).

¹³⁹ *Id.* at 10 (citing Draft Results at 9-10 (citing *Shrimp from India* IDM at Comment 2)).

respondent's reported costs;¹⁴⁰ and (5) properly account for differences in net weight reporting,¹⁴¹ similar to shrimp sizes.

- GODACO further failed to account for the differences in physical characteristics of non-subject merchandise (*i.e.*, whole live fish) and frozen fish fillets having the same physical characteristics as subject fillets in reporting its FOPs.¹⁴²
- Thus, Commerce correctly concluded that GODACO, like the respondent in *Shrimp from India*, exhibited a pattern of not providing the information in the manner and form requested by Commerce, while offering little information concerning its cost reporting methodology, despite multiple requests for information and clarification.”¹⁴³
- Conversely, this case is not like *Copper Pipe from China*, where Commerce declined to apply partial facts available to the Hailiang Group for its line sets FOP. Unlike GODACO, in *Copper Pipe from China*¹⁴⁴ the respondent: (1) submitted actual data, rather than inaccurately estimated or allocated data; (2) did not withhold information that was requested by Commerce; (3) did not significantly impede the proceeding;¹⁴⁵ and, (4) provided verifiable data.¹⁴⁶

(iii) *The AFA Rate Assigned to GODACO*

- Commerce correctly assigned GODACO a \$3.87/kg rate as AFA. As the Court recognized, when making an adverse inference, Commerce may rely on information

¹⁴⁰ *Id.* at 10 (citing *Remand Order* at 13 (where the Court highlighted GODACO's concession that its SQR was “never intended to exhaustively reconcile each final FOP ratio for every CONNUM reported” (internal citation omitted))).

¹⁴¹ *Id.* at 10 (citing *Final Results* IDM at 9-12).

¹⁴² *Id.* at 11 (citing *Id.* at 10; SQR at 26).

¹⁴³ *Id.* at 11 (citing *Shrimp from India* IDM at 15 and *Remand Order* at 12-17, 21).

¹⁴⁴ *Id.* at 11 (citing *Copper Pipe from China* IDM at “Use of FA and AFA” section and Comment 11).

¹⁴⁵ *Id.* at 11 (citing *Final Results* IDM at 11-12).

¹⁴⁶ *Id.* at 11 (citing *Final Results* IDM at 10).

derived from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record pursuant to the statute and its regulations.¹⁴⁷ Commerce's AFA selection here is lawful and supported by substantial record evidence because the rate was a rate calculated in "a previous administrative review" and Commerce's determination to rely on AFA is supported by the record.

Commerce's Position: We disagree with GODACO's assertion that Commerce inappropriately applied AFA as a result of its FOP reporting. For the reasons discussed below, we continue to find that information we requested regarding GODACO's farming factors was missing from the record. We also find that GODACO's multiple reporting deficiencies represent a failure to act to the best of its ability, warranting an adverse inference in selecting from among the facts available. Finally, we find that selection of a rate from a prior segment, \$3.87/kg is appropriate.

GODACO's Farming FOPs

As an initial matter, as we noted in our Draft Results, the Court has already determined that Commerce's decision to apply facts available to address multiple reporting deficiencies was supported by substantial evidence. The Court sustained Commerce's finding that certain requested information was missing from the record because: (i) the narrative of GODACO's FOPs submission could not be fully reconciled to its FOP worksheets in the same submission; (ii) Commerce relied correctly on facts otherwise available as to GODACO's net weight reporting; and, (iii) GODACO misallocated its FOPs because it co-mingled subject products with non-subject products that had higher water content. Given these deficiencies, application of facts available is appropriate.

¹⁴⁷ *Id.* at 12 (citing *Remand Order* at 11).

With respect to GODACO's reporting of its farming factors, as explained in the Draft Results, GODACO's reporting reflects a failure to report a vital piece of information on an adequate basis. Specifically, GODACO reported its fish feed, fingerlings and other farming FOPs (medicine, nutrition, environmental treatment, lime, salt, electricity, and labor) on a whole live fish basis. As a result, GODACO failed to report farming FOPs on a frozen-fish-fillet basis, much less on the basis of frozen fish fillets having the same physical characteristics as subject fillets, as requested by Commerce first in its Initial Questionnaire and, again, in Commerce's Supplemental Questionnaire. This deficiency undermines the basis upon which Commerce can calculate an accurate margin.

GODACO argues that Commerce requires that a specific farming input be tied to specific finished products (CONNUMs) (*e.g.*, a specific fingerling to a specific CONNUM-specific product) and that this is an impossible reporting standard. This is not accurate. Commerce, in the Draft Results, merely stated that farming FOPs, as all other FOPs, must be reported on a basis reflecting the same physical characteristics as the merchandise sold to the United States.¹⁴⁸ Commerce did not impose a requirement that particular inputs, *e.g.*, fingerlings, be traced through the harvesting and processes stages to the final products.

GODACO's explanation of how farming inputs are not tracked to specific harvested fish or to specific final products is inapposite. As noted above, Commerce does not impose such a requirement. Rather, it is up to each respondent to provide a methodology to properly develop an appropriate approach to FOP reporting and to explain why that methodology is a reasonable reflection of the company's experience during the period.

¹⁴⁸ See Draft Results at 8.

GODACO further argues that Commerce’s request for CONNUM-specific FOP’s were generic and not specific to farming FOPs. However, as enumerated above, and sustained by the Court, Commerce’s requests for CONNUM-specific reporting were directed at all of GODACO’s FOPs, including its farming FOPs.¹⁴⁹ To the extent GODACO was unable to report its farming factors on a CONNUM-specific basis, it was incumbent on the company to develop a methodology to report its FOPs as accurately as possible.

Regarding GODACO’s argument that, had Commerce found this reporting deficient, it was required by statute to give notice and an opportunity to remedy or explain the deficiency, we note that a similar argument was made in the underlying review which Commerce addressed:

GODACO further claims that Commerce provided no notice to GODACO that its responses were deficient, and provided no opportunity to seek guidance and amend such deficiency. However, Commerce provided more than adequate notice beginning in the original questionnaire wherein Commerce stated that “If you have any questions regarding how to compute the factors of the merchandise under consideration, please contact the official in charge before preparing your response to this section of the questionnaire.” In addition, Commerce submitted a lengthy supplemental questionnaire wherein it provided GODACO an opportunity to correct its deficiencies...¹⁵⁰

Furthermore, the Court sustained Commerce’s finding that Commerce *had* notified GODACO of its deficiencies.¹⁵¹

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... The court concludes that Commerce’s actions in this proceeding as to {section 782 of the Act} are in accordance with the law.

¹⁴⁹ See Supplemental Questionnaire at Q.37 (directing GODACO to “revise all per-unit FOP calculations”).

¹⁵⁰ See *Final Results* IDM at Comment 1.

¹⁵¹ See *Remand Order* at 20

GODACO makes several arguments regarding reporting requirements in other proceedings/segments; these arguments are not persuasive. As an initial matter, each segment of an antidumping duty case contains its own independent record and constitutes a separate, distinct proceeding.¹⁵² With regard to GODACO's argument that Commerce has not required CONNUM-specific reporting before this review, we find GODACO's arguments unpersuasive. GODACO makes a blanket statement and points to no administrative review or respondent, prior to here, where Commerce did not ask for CONNUM-specific information. Furthermore, contrary to GODACO's claim that respondents have reported their farming FOPs on a whole live fish basis prior to this review, GODACO similarly points to no administrative review or respondent in support of its claim. Moreover, Commerce specifically outlined that it had placed respondents on notice since the investigation and had applied facts available to respondents for failing to report their FOPs on a CONNUM-specific basis:¹⁵³

Commerce has consistently requested CONNUM-specific FOP information in each questionnaire issued in every segment of this case since the investigation. In fact, the agency's requirement for CONNUM-specific FOPs is explicitly set forth in Commerce's standard NME questionnaire, which has been publicly available on Commerce's website for years.¹⁵⁴ Although the respondents participating in the original investigation were excused from reporting CONNUM-specific FOPs, Commerce recognized the inaccuracies that could result in future administrative reviews if respondents did not report CONNUM-specific FOPs.¹⁵⁵ As a result, in the investigation, Commerce placed respondents on notice that in future segments it would require CONNUM-specific FOPs.¹⁵⁶ In the 8th AR Final, Commerce reminded respondents of their obligation to report CONNUM-specific FOPs, noting that Commerce "may require Vinh Hoan and other respondents to report {their} FOPs on a CONNUM-specific basis..."¹⁵⁷ In the 11th AR Final, Commerce

¹⁵² See *Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (2005) (*Shandong Huarong*).

¹⁵³ See *Final Results* IDM at Comment 1.

¹⁵⁴ See <http://enforcement.trade.gov/questionnaires/questionnaires-ad.html>.

¹⁵⁵ 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) (*Investigation*), and accompanying IDM at Comment 18.

¹⁵⁶ *Id.*

¹⁵⁷ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2010-2011*, 78 FR 17350 (March 21, 2013) (8th AR and Aligned

applied facts available to the respondents because they failed to report their FOPs on a CONNUM-specific basis.¹⁵⁸ In the subsequent *NSR Final*, Commerce applied facts available to the respondent for again failing to report its FOPs on a CONNUM-specific basis.¹⁵⁹

Moreover, Commerce provided more than adequate notice beginning in the original questionnaire wherein Commerce stated that “If you have any questions regarding how to compute the factors of the merchandise under consideration, please contact the official in charge before preparing your response to this section of the questionnaire.”¹⁶⁰

Use of Adverse Inference

GODACO asserts that Commerce’s use of adverse inferences is not justified because Commerce has not made a finding that GODACO refused to cooperate to the best of its ability or that GODACO could have provided the information requested of it but did not. Accordingly, GODACO asserts, Commerce improperly applied an adverse inference in selecting from the facts otherwise available. This is incorrect.

We explained that GODACO failed to cooperate to the best of its ability in this review by not developing a methodology to report CONNUM-specific sales and cost information (which is essential to the accurate calculation of GODACO’s dumping margin), as Commerce requested on multiple occasions.¹⁶¹ We requested such information, and required that such information reconcile to the company’s records. GODACO did not provide such information. As the Court noted, GODACO did not “provide Commerce with factors of production information that reconciled to all of the CONNUMs at issue,” notwithstanding Commerce’s multiple requests for

NSRs Final), and accompanying IDM at Comment XXII.

¹⁵⁸ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*; 2013–2014, 81 FR 17435 (March 29, 2016) (*11th AR Final*), and accompanying IDM at Comment 1.

¹⁵⁹ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty New Shipper Review*; 2014–2015, 81 FR 44272 (July 7, 2016) (*NSR Final*), and accompanying IDM at Comment 1.

¹⁶⁰ See Original Questionnaire at D-1.

¹⁶¹ See Draft Results at 9.

it to do so. Failing to substantiate reported costs and underlying FOP allocation methodology, and failing to demonstrate the extent to which its submitted costs reasonably reflect cost differences, according to Commerce's physical characteristics, is a critical deficiency.

The Court has already sustained Commerce's determination that GODACO failed to properly report several key pieces of information, warranting the use of facts available. Although, as GODACO asserts, Commerce's finding regarding missing information is independent from a finding that an adverse inference is warranted, we find the collective and repeated reporting deficiencies relevant to our consideration of whether GODACO reported to the best of its ability. In any case, there are several instances relating to GODACO's reconciliation and weight reporting deficiencies (deficiencies identified by Commerce and sustained by the Court) that demonstrate that GODACO did not cooperate to the best of its ability. For example, as the Court observed, GODACO acknowledged that its response was "never intended to exhaustively reconcile each final {factors of production} ratio for every CONNUM reported."¹⁶² However, providing accurate, and reconcilable data to Commerce is clearly a fundamental requirement of cooperative respondents, and GODACO had the ability to provide such data but it failed to do so. In the context of GODACO's NETWGTU/NETWGT2U reporting, the Court observed that the issue "should be viewed in the context of Commerce's repeated directions to GODACO to update its CONNUMs" noting that "NETWGTU is one component of the CONNUMs at issue, and GODACO refused to update its CONNUMs when it provided the NETWGT2U information."¹⁶³ These considerations demonstrates that GODACO failed to act to the best of its ability as GODACO had the ability to provide such data but it failed to do so.

¹⁶² See *Remand Order* at 13.

¹⁶³ *Id.* at 16.

GODACO did not “expend maximum” effort to supply the information requested by Commerce,¹⁶⁴ and ultimately failed to provide information requested of it.¹⁶⁵ In these instances, the use of adverse facts is appropriate and particularly important to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.

Accordingly, an adverse inference is warranted here in selecting from among the facts available.

Citing to a more recent segment of this proceeding, GODACO asserts that in the *AR15 Final Results*, Commerce faulted the mandatory respondent for not reporting farming FOPs on a CONNUM-specific basis, but did not apply total AFA. However, the facts of that case were different in that Commerce found that the respondent did in fact report CONNUM-specific FOPs, and that the application of partial AFA was for other deficiencies, *i.e.*, for reporting some of its affiliates’ FOPs for the first time at verification.¹⁶⁶ More importantly, as described in detail above, Commerce’s application of AFA was not premised on GODACO’s reporting of its farming factors alone – despite GODACO’s effort to narrowly construe the basis for Commerce’s adverse inference. Rather, we determined that GODACO failed to cooperate to the best of its ability in its reporting of other FOP data, in addition to the farming FOPs.

GODACO claims that it cooperated to the best of its ability and that facts available, much less AFA, is not warranted. However, given our findings with regard to the processing FOPs (that they are not useable), and given that the Court has found that the FOP database is already impugned, GODACO has not proffered any explanation that would render the FOP database useable. In fact, the opposite is true, Commerce’s more detailed explanation upon remand further demonstrates that GODACO’s FOP database is not usable. GODACO’s FOP database is

¹⁶⁴ See *Nippon Steel*, 337 F.3d at 1382.

¹⁶⁵ See *PAM, S.p.A.*, 582 F.3d at 1339-40.

¹⁶⁶ See *AR 15 Final Results* IDM at Comments 1 and 3.

inconsistent in the way it reported its FOPs, *i.e.*, on a whole fish basis for farming FOPs and on a non-CONNUM-specific frozen products basis for processing FOPs. This further undermines Commerce's ability to calculate an accurate antidumping duty margin for GODACO.

We also find that the *Shrimp from India* case cited in the Draft Results is the case that most closely approximates the situation here.¹⁶⁷ GODACO attempts to draw distinctions between the reporting of GODACO and the respondent in that case, the Elque Group. GODACO references the number of questionnaires issued to the two respondents, and the relative experience of the parties. However, GODACO had been given an opportunity to address its own reporting deficiencies and did not do so. Commerce is not required to repeatedly ask the same questions in the hope that a respondent eventually meets the necessary reporting requirements. Additionally, although GODACO asserts that it had relatively less notice of Commerce's reporting requirements in this proceeding than one of the Elque Group companies had in the shrimp proceeding, that is a mischaracterization. While we acknowledge that one of the Elque Group affiliates had been involved in *Shrimp from India* for multiple prior administrative reviews, Commerce had never individually examined it as a respondent in any of those segments. GODACO, in contrast, had previously been reviewed as a new shipper;¹⁶⁸ therefore, the company had ample familiarity with the reporting process and notice of the requirements in this case. The procedural distinctions between GODACO's review and the

¹⁶⁷ The *Copper Pipe from China* case cited above is also instructive. There, Commerce determined that, because "the Hailiang Group continued to report FOP values that are identical for all CONNUMs, despite the Department's multiple requests to provide this data on a more specific basis," AFA was warranted. *See Copper Pipe from China* IDM at Comment 12. Here, GODACO failed to fully report its FOP data in an accurate, reconcilable and CONNUM-specific manner, despite multiple requests that it do so. Taken together, these deficiencies warrant the application of AFA.

¹⁶⁸ *See 8th AR and Aligned NSRs Final* IDM.

Elque Group's review, and the parties' relative experience, do not warrant differing results across the cases.

In terms of substantive differences across the cases, GODACO's distinctions also are without merit. GODACO emphasizes that the Elque Group failed: (1) to provide requisite explanations and documentation; (2) to explain how its reported costs were derived, and the extent to which such costs reasonably reflect cost differences according to Commerce's physical characteristics; (3) to provide a complete/accurate cost reconciliation; (4) to provide size-specific FOP information; and (5) to report CONNUM-specific FOPs. The majority of these deficiencies are present here. GODACO failed to report costs reasonably reflective of cost differences attributable to differences in physical characteristics, failed to provide reconcilable data, and failed to report CONNUM-specific FOPs (including FOPs which were tailored to the size of the final fish product). Ultimately, both GODACO and the Elque Group failed to substantiate their reported costs and underlying FOP allocation methodology, despite Commerce's requests that they do so. We applied AFA in *Shrimp from India* and find that a similar outcome here is appropriate and consistent with past practice.

Pursuant to the Court's *Remand Order*, we have further articulated why GODACO failed to act to the best of its ability and have further explained why the absence of this information is significant to the progress of its investigation. Accordingly, we continue to find that application of AFA to GODACO is appropriate.

Selection of AFA rate

With respect to GODACO's assertion that the AFA rate assigned here is inappropriate because Commerce relied on a rate obtained in an NSR, this assertion is without merit. As the Court noted in the *Remand Order*, 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 pursuant to the statute and its regulations to assign a rate as AFA.¹⁶⁹ We did precisely that, and selected a rate calculated in a prior (new shipper) review under this order.

GODACO asserts that the new shipper's rate is "aberrational" and should not be the basis for GODACO's AFA rate selection. We again disagree. In conducting an NSR, a threshold inquiry relates to the *bona fide* nature of the sale(s) in question, and their representativeness for calculating a margin. In such proceedings, Commerce employs a "totality of the circumstances" test to determine if a sale involved in a NSR is "unrepresentative or extremely distortive," so as to suggest that the transaction should be excluded as a *non-bona fide* sale.¹⁷⁰ In conducting this analysis, Commerce considers a host of factors to assess whether the underlying sale(s) are atypical.¹⁷¹ Indeed, whether a sale is representative and reflective of standard business practice is often the fundamental issue in Commerce's NSRs. In the underlying NSR, upon which the \$3.87/kg rate was based, Commerce made no finding that the sales under review were atypical, aberrational, or distortive, nor that they did not reflect commercial reality.¹⁷² As a result, we find that the NSR rate selected here provides a sound basis on which to derive an AFA rate for subsequent segments of this proceeding.

Finally, we note that GODACO identifies various margins calculated for, or assigned to, other participants in this proceeding in an effort to show that its rate was unwarranted. First, GODACO references the fact that Golden Quality, a company that did not receive a separate

¹⁶⁹ See *Tianjin Tiancheng Pharm. Co. v. United States*, 29 CIT 256, 259, 366 F. Supp. 2d 1246, 1249 (CIT 2005).

¹⁷⁰ See *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1262–63, 641 F. Supp. 2d 1362, 1369 (CIT 2009).

¹⁷¹ See e.g., *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty New Shipper Review; 2014-2015*, 81 FR 5709 (February 3, 2016) PDM at 3.

¹⁷² See 8th AR and Aligned NSRs Final IDM.

rate, was found to be part of the Vietnam-wide entity and thus a lower rate of \$2.39/kg now applies to it. However, Golden Quality's failure to establish its eligibility for a separate rate does not warrant a different conclusion here. In NME proceedings, Commerce begins with a rebuttable presumption that all entities within the economy in question are subject to government control and, thus, should be assigned a single country-wide antidumping duty deposit rate. When a company fails to rebut this presumption by submitting information regarding its separate rate eligibility, it is Commerce's long-standing practice to consider the company to be part of the country-wide entity and assign the country-wide rate to that company. That is precisely what happened here. Golden Quality was determined to be part of the Vietnam-wide entity. The Vietnam-wide entity currently has a rate of \$2.39/kg, and the entity was not under review in this segment. Accordingly, any company that failed to establish its entitlement to a separate rate, such as Golden Quality, receives this rate.¹⁷³

Second, GODACO references the rate received by a respondent in a subsequent administrative review under this order. However, such a rate is not relevant, as it was calculated for a company that did not receive total AFA. Thus, the rate has no bearing on GODACO's total AFA rate. In any case, the various rates cited to by GODACO are irrelevant; the TPEA makes clear that, when selecting facts available with an adverse inference, Commerce is *not* required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated, or to demonstrate that the dumping margin reflects an "alleged commercial

¹⁷³ GODACO asserts that this represents a reversal of "longstanding agency practice." This is incorrect. Although the AFA rate is often the same as a country-wide rate – which itself is often established by a rate from the underlying petition – there is no requirement that AFA rates are equivalent to country-wide rates. 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 pursuant to the statute and its regulations. *See Remand Order* at 11 (internal citations omitted).

reality” of the interested party.¹⁷⁴ Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding,¹⁷⁵ and Commerce may use any dumping margin from any segment of a proceeding under an AD order when applying an adverse inference, including the highest of such margins.¹⁷⁶

Finally, regarding GODACO’s argument that the Draft Results apply the highest calculated rate on the record as AFA without the requisite statutory “evaluation of the situation” addressed in the *POSCO* litigation, it is important to note that after remanding the issue to Commerce in that litigation, the Court affirmed Commerce’s remand redetermination addressing the matter in full, including the language cited by GODACO.¹⁷⁷ Although the Act does not require Commerce to make an estimate of what a dumping margin “would have been if the interested party found to have failed to cooperate under subsection (b)(1) had cooperated” or “to demonstrate” that a “dumping margin” “reflects an alleged commercial reality of the interested party,”¹⁷⁸ it nonetheless states that in applying the highest rate on the record, Commerce should use that rate “based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available.”¹⁷⁹

In the remand redetermination in the *POSCO* litigation, Commerce explained that it interpreted the “evaluation of the situation” statutory language of section 776(d)(2) of the Act to require Commerce, as part of its determination of applying the highest rate, to review the record to determine if there was something inappropriate or otherwise unreasonable about that rate,

¹⁷⁴ See section 776(d)(3)(B) of the Act.

¹⁷⁵ See section 776(c)(2) of the Act.

¹⁷⁶ See section 776(d)(1)(2) of the Act.

¹⁷⁷ See *POSCO v. United States*, 335 F.Supp. 3d 1283, 1285 (CIT 2018) (*POSCO*).

¹⁷⁸ See section 776(d)(3) of the Act.

¹⁷⁹ See section 776(d)(2) of the Act.

given the situation leading to the application of an adverse inference. Commerce found that there was nothing that suggested that the use of that rate was inappropriate on remand, and the Court affirmed Commerce's interpretation of that language in accordance with law and the use of the highest rate on the record as supported by substantial evidence on the record.¹⁸⁰

We agree with GODACO that on remand we should address this statutory language and are doing so now. As we explain above, the application of total AFA to GODACO is warranted because Commerce was unable to use the information provided in its calculations, GODACO failed to correct its deficiencies when it had the opportunity and the ability to do so, and GODACO otherwise did not act to the best of its ability. Further, the Act allows for Commerce to use the highest rate on the record as AFA.¹⁸¹ Thus, the only question outstanding is if the record suggests that the rate applied to GODACO, \$3.87/kilogram, was otherwise inappropriate. We find that there is no record evidence which undermines that reasonableness of the use of that rate as total AFA in this case.

As noted above, that rate was a calculated rate in an NSR of the AD Order at issue for a producer/exporter named DOCIFISH.¹⁸² As noted above, as part of its *bona fides* analysis, Commerce determined in that NSR that there was nothing atypical about the transaction used to calculate the dumping margin.¹⁸³

Despite GODACO's claims that the rate calculated for DOCIFISH in that proceeding was aberrational or distortive, it provides no evidence on this record to substantiate that claim. Accordingly, we find that after consideration of the situation which warranted the application of total AFA, under section 776(d)(2), that no evidence on the record undermines Commerce's

¹⁸⁰ *POSCO*, 335 F. Supp. 3d. at 1285-1286.

¹⁸¹ See section 776(d)(2) of the Act.

¹⁸² See 8th AR and Aligned NSR Final IDM.

¹⁸³ *Id.*

bona fides analysis from the NSR, and that DOCIFISH's margin continues to be an appropriate rate to apply as AFA in this case. We have therefore continued to apply that rate on remand.

IV. FINAL RESULTS OF REDETERMINATION

Pursuant to the Court's order, Commerce: (1) further explained what specific information is necessary and missing from the record in applying facts otherwise available regarding GODACO's farming FOPs; (2) further explained why it is appropriate to apply an adverse inference to GODACO in the selection of facts otherwise available, consistent with the requirements of 776(b) of the Act; and (3) considered our assignment of GODACO's dumping margin to the separate rate companies, in light of South Vina's substantive arguments regarding the rate assignment.

7/21/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance