PUBLIC VERSION

Slip Op. 23-97

UNITED STATES
COURT OF INTERNATIONAL TRADE

Court No. 21-00380

CATFISH FARMERS OF AMERICA
and eight of its individual members,

Plaintiffs,

v.

UNITED STATES,

Defendant,

and

QMC FOODS, INC.; COLORADO BOXED BEEF COMPANY; VINH HOAN CORPORATION; and NAM VIET CORPORATION,

Defendant-Intervenors.

Before: M. Miller Baker, Judge

OPINION

[The court partially grants and partially denies Plaintiffs' motion for judgment on the agency record. The court grants judgment to Plaintiffs as to the issue of surrogate country selection and remands that issue to the Department of Commerce. The court grants judgment to Defendant-Intervenors QMC Foods and Colorado Boxed Beef as to their standing to request administrative reviews and to Defendant and Defendant-

Intervenors Vinh Hoan and Nam Viet as to separate rate issues.]

Dated: July 7, 2023

Nazak Nikakhtar, Wiley Rein LLP of Washington, DC, argued for Plaintiffs. With her on Plaintiffs' reply brief were *Maureen E. Thorson* and *Stephanie M. Bell*. On the opening brief for Plaintiffs were *Jonathan M. Zielinski*, *James R. Cannon, Jr.*, and *Nicole Brunda*, Cassidy Levy Kent (USA) LLP of Washington, DC.

Kara M. Westercamp, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, argued for Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Hendricks Valenzuela*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Matthew McConkey, Mayer Brown LLP of Washington, DC, argued for Defendant-Intervenors Vinh Hoan Corporation and Nam Viet Corporation.

Robert L. LaFrankie, Crowell & Moring LLP of Washington, DC, on the brief for Defendant-Intervenors QMC Foods, Inc., and Colorado Boxed Beef Company.

Baker, Judge: In this latest battle of what might be called the Twenty Years' Catfish War, domestic produ-

cers challenge the Department of Commerce's final determination in an administrative review of its antidumping order as to fish imported from Vietnam. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019*, 86 Fed. Reg. 36,102 (Dep't Commerce July 8, 2021); Appx1088–1091. For the reasons explained below, the court sustains that determination in part and remands in part.

I

The genesis of this case is Commerce's 2003 antidumping order as to imported Vietnamese fish that compete with home-grown catfish. *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47,909 (Dep't Commerce Aug. 12, 2003). In its investigation leading to that order, the Department found that importers were selling frozen fish at less than normal value and imposed antidumping duties to make up the difference. Because Vietnam has a non-market economy, Commerce's order imposed specific rates on certain exporters and applied a Vietnam-wide single rate to all other exporters. *Id.* at 47,909–10.

The catfish antidumping order has undergone repeated administrative reviews in the ensuing years. The Department began the 16th such review in 2019 following requests from various domestic producers.

See Initiation of Antidumping and Countervailing Duty Administrative Reviews, 84 Fed. Reg. 53,411, 53,415–16 (Dep't Commerce Oct. 7, 2019); Appx1012. The period of review was August 1, 2018, to July 31, 2019. *See* 84 Fed. Reg. at 53,415.

In brief, a non-market economy antidumping administrative review involves Commerce (1) selecting one or more surrogate countries for valuing factors of production, (2) selecting mandatory respondents and issuing questionnaires to them about their factors of production, (3) receiving "separate rate applications" from other exporters not selected as mandatory respondents who wish not to receive the single country-wide rate, (4) issuing a preliminary determination, (5) receiving case briefs from the parties, and (6) issuing a final determination.[1]

A

In its preliminary determination, Commerce explained its general policy is to

> select[ ] a surrogate country that is *at the same level* of economic development as the [non-market economy] country unless it is determined that none of the countries are viable options . . . .

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[1] For a primer on the relevant statutory and regulatory background, *see Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1334–41 (CIT 2020) (14th administrative review).

> Surrogate countries that are *not at the same level* of economic development as the [non-market economy] country, but still at a level of economic development *comparable to* the [non-market economy] country, *are selected only to the extent that data considerations outweigh the difference in levels of economic development*. To determine which countries are *at the same level* of economic development, Commerce generally relies on per capita gross national income (GNI) data from the World Bank's World Development Report.

Appx1022 (emphasis added).

The Department then noted that earlier in the proceeding, it had identified Angola, Bolivia, Egypt, Honduras, Nicaragua, and India as surrogate country candidates because they were "at *the same level* of economic development as Vietnam based on per capita 2018 GNI data." *Id.* (emphasis added). Commerce did not elaborate on why it chose those six countries over other countries within the same overall band of GNI per capita or what criteria it employs in determining what GNI level is "the same."

In response to the Department's identification of its six surrogate country candidates, Catfish Farmers of America and several of its constituent members (collectively, Catfish Farmers) urged the Department to instead select Indonesia as the primary surrogate.

Nevertheless, Commerce preliminarily selected India "because it is: (1) at the same level of economic development as Vietnam; (2) a significant producer of merchandise comparable to the subject merchandise; and (3) provides the best useable data and information with which to value" factors of production. *Id.*

After Commerce issued its preliminary determination, Catfish Farmers continued to urge the Department to use Indonesia as the primary surrogate country. They argued that Indonesia's economic development is comparable to Vietnam's and that Indonesia was closer to Vietnam in terms of GNI per capita than it was during seven prior administrative periods of review for which Commerce selected Indonesia as the primary surrogate country.

The final determination upheld the selection of India as the primary surrogate country. In so doing, the Department acknowledged that it had indeed selected Indonesia as the primary surrogate in previous administrative reviews, "even when it was not on the non-exhaustive list of countries," when the other countries on the list either were not significant producers of comparable merchandise or lacked suitable data. Appx1057. But in this review, India was on the list, was a significant producer of comparable merchandise, and had "useable data for the primary material inputs (*i.e.*, fingerlings, fish feed, and whole fish)" that accounted for "the majority" of the necessary calculations. *Id.*

B

Several companies sought separate rates, including, as relevant here, Seafood Joint Stock Company No. 4 Branch Dongtam Fisheries Processing Company (referred to by the parties as Dotaseafood), Vinh Hoan Corporation, and Nam Viet Corporation. Appx1012–1013.

There are two methods by which a respondent can seek a separate rate. When a company has applied for, and received, a separate rate in a prior segment of the proceeding, Commerce requires it to submit a "certification" establishing continued eligibility for a separate rate. Appx1019 (citing 84 Fed. Reg. at 53,412–13). Vinh Hoan and Dotaseafood, both of whom had received separate rate status in prior segments, submitted such certifications.

A company that has not previously received a separate rate instead submits an "application." *Id.* Nam Viet used this method and responded to a supplemental questionnaire Commerce issued to the company. Appx1019.

Under Commerce's policies, "[e]xporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents . . . will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents." 84 Fed.

Reg. at 53,413. Because Commerce selected both Vinh Hoan and Dotaseafood as mandatory respondents, they had to respond to the Department's questionnaire to renew their separate rate status.

1

Nam Viet and Vinh Hoan both timely responded to Commerce's supplemental questionnaires. Dotaseafood, however, did not, and accordingly the Department concluded that it "has not demonstrated the absence of *de jure* and *de facto* government control and is not eligible for separate rate status." Appx1019. Commerce preliminarily assigned Dotaseafood the Vietnam-wide rate of $2.39/kg. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Partial Rescission of the Antidumping Duty Administrative Review; 2018–2019*, 85 Fed. Reg. 84,300, 84,300–01 & n.12 (Dep't Commerce Dec. 28, 2020) (noting that Dotaseafood was one of 27 companies considered part of the Vietnam-wide entity because of failure to establish eligibility for a separate rate); *id.* at 84,302 ("[F]or all Vietnam exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the Vietnam-wide entity (*i.e.*, $2.39 per kilogram) . . . .").

Commerce also preliminarily determined that Vinh Hoan and Nam Viet showed both de *jure* and *de facto*

independence from Vietnamese government control and thus presumptively qualified for separate-rate status. Appx1020–1021. Because Nam Viet was not a mandatory respondent and thus was not subject to individual examination, Commerce had to decide how to calculate the applicable rate.[2] The Department noted that in making such a calculation, the Tariff Act prohibits Commerce from using any rates that are zero, *de minimis*, or based entirely on the use of facts available. Appx1021 (citing 19 U.S.C. § 1673d(c)(5)(A)). But the Department also noted that the statute directs that if the rates for all individually investigated com-

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[2] "For investigations involving a nonmarket-economy country," the Tariff Act gives no direction on how Commerce should determine the "separate rate" applied to non-individually investigated respondents that "have established their independence from that country's government. But Commerce generally uses the same methodology to determine a separate rate for non-individually investigated firms in nonmarket-economy countries that it employs to determine the all-others rate in market-economy cases, and we have found that approach acceptable." *Changzhou Hawd Flooring Co. v. United States*, 947 F.3d 781, 788 (Fed. Cir. 2020) (cleaned up). The methodology for determining the "all-others" rate in a market economy case is "either weight-averaging the non–*de minimis* margins for the individually investigated firms—excluding margins determined under [19 U.S.C.] § 1677e (addressing cases of certain information or process deficiencies—or by 'any reasonable method' (with the 'expected method' being weight-averaging) where all such firms have zero or de minimis margins." *Id.* (citing, *inter alia*, 19 U.S.C. § 1673d(c)(5)).

panies fall within those categories, Commerce may use "any reasonable method" for determining an "all-others rate," including "averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." *Id.*; *see also* 19 U.S.C. § 1673d(c)(5)(B). Commerce preliminarily determined that because it had calculated a non-zero, non–*de minimis* rate for Vinh Hoan (9¢/kg, *see* Appx1004) without using facts available, the Department would apply that rate to Nam Viet. Appx1021.

2

Once Commerce issued its preliminary determination, no party disputed Vinh Hoan's entitlement to a separate rate. Appx1045. The Department's final determination assigned Vinh Hoan a dumping margin of zero, *see* Appx1087, Appx1089, which no party challenges.

Catfish Farmers disputed whether Nam Viet was entitled to a separate rate, arguing that the company failed to report its affiliated companies and to demonstrate that none of those affiliates were subject to government influence. Commerce rejected that argument and determined that "the information [Catfish Farmers] point to largely pre-dates the [period of review] and/or is otherwise not dispositive regarding affiliation." Appx1082–1083. Commerce assigned Nam Viet the same rate—zero—Vinh Hoan received and cited

19 U.S.C. § 1673d(c)(5)(A) as the basis for that decision. Appx1089.

Catfish Farmers also argued that Commerce had been too lenient in preliminarily assigning Dotaseafood the Vietnam-wide rate of $2.39/kg. They argued that Dotaseafood's rate should be $3.87/kg based on the use of facts otherwise available with an adverse inference because the company failed to respond to the Department's supplemental questionnaire. Appx1080. The Department rejected these arguments because "[i]t is Commerce's practice that, once a company fails to demonstrate the absence of *de jure* and *de facto* government control, the company is not eligible for a separate rate. In the absence of a separate rate, the company must be treated as part of the country-wide entity and is assigned the country-wide rate." Appx1081.

C

After Commerce issued its final determination, Catfish Farmers filed a "ministerial error allegation" challenging Nam Viet's dumping margin. They argued that "by citing [subparagraph (A) of § 1673d(c)(5)],[3]

[3] The Federal Register notice of the determination stated that Commerce assigned Nam Viet the same zero margin calculated for Vinh Hoan based on 19 U.S.C. § 1673d(c)(5)(A). Appx1089 (referring to "section 735(c)(5)(A) of the Tariff Act of 1930"). "[T]he estimated all-others rate shall be an amount equal to the weighted

Commerce intended in the *Final Results* to assign [Nam Viet] the weighted average of the rates determined for individually examined companies, without taking into account any zero or *de minimis* rates." Appx21955. They contended that Commerce "committed a ministerial error when it overlooked the rate determined" for Dotaseafood because that company received the Vietnam-wide rate, which was "not based entirely on adverse facts available, is not zero, and is not *de minimis*, and therefore must be included in the rate determined for non-examined companies under" § 1673d(c)(5)(A). *Id.* Catfish Farmers also asserted that it was erroneous to include Vinh Hoan's zero margin: "[C]onsistent with [§ 1673d(c)(5)(A),] Commerce intended to assign [Nam Viet] the final dumping margin of $2.39/kg established for" Dotaseafood. Appx21956.

In response, Commerce acknowledged that it made an error, but not the one Catfish Farmers alleged—rather, the Department found the statutory citation was a typo meant to reference subparagraph (B) of

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average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title." 19 U.S.C. § 1673d(c)(5)(A).

§ 1673d(c)(5), rather than subparagraph (A).[4] Commerce further found that "the methodology used and rate assignment itself were not made in error" and explained that it "intentionally relied on the only margin calculated during this review, which was zero, to assign [Nam Viet's] separate rate" under § 1673d(c)(5)(B). Appx21963. "This rate assignment represents a methodological decision by Commerce and, thus, is not a ministerial error as defined in the Act or regulation." *Id.* In short, Commerce corrected the typo in the citation, found that it made no error in its choice of methodology and rate assignment, and concluded that in any event those choices were not properly the subject of a ministerial error allegation.

II

Dissatisfied with the final determination, Catfish Farmers timely brought this action under 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(ii). *See* ECF 1 (summons); ECF 12 (complaint). The court has subject-

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[4] "If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 1677e of this title, [Commerce] may use 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." 19 U.S.C. § 1673d(c)(5)(B).

matter jurisdiction over such actions under 28 U.S.C. § 1581(c).

QMC Foods and Colorado Boxed Beef intervened as defendants (ECF 21), as did Vinh Hoan and Nam Viet (ECF 30). Catfish Farmers moved for judgment on the agency record. ECF 48 (confidential); ECF 49 (public). The government (ECF 54, confidential; ECF 53, public) and the intervenors (ECF 47, Vinh Hoan/Nam Viet; ECF 52, QMC Foods/Colorado Boxed Beef) opposed. Catfish Farmers replied. ECF 50 (confidential); ECF 51 (public). The court then heard oral argument.

In actions such as this brought under 19 U.S.C. § 1516a(a)(2), "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

III

In their motion for judgment on the agency record, Catfish Farmers challenge the selection of India as the primary surrogate country and the rates assigned to Dotaseafood and Nam Viet.[5] The court considers these issues in turn.

A

In selecting a surrogate country in antidumping cases involving goods imported from a country with a nonmarket economy, Commerce must use, "to the extent possible," one or more market economy countries that are "at a level of economic development *comparable to* that of the nonmarket economy country." 19 U.S.C. § 1677b(c)(4) (emphasis added).

Catfish Farmers argue that Indonesia is economically comparable to Vietnam and that Commerce

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[5] Catfish Farmers' complaint also challenged whether Colorado Boxed Beef and QMC Foods had standing to request reviews of Vietnamese suppliers. ECF 12, at 6 ¶ 22. Catfish Farmers' opening brief does not address this issue, and their reply admits that they therefore abandoned it. ECF 51, at 1 n.1. As that is the only issue addressed by Colorado Boxed Beef and QMC Foods, the court grants judgment on the agency record to them as unopposed.

failed to explain why it did not include Indonesia on its list of potential surrogate countries: "Without explanation, and despite Indonesia's GNI being closer to Vietnam's than it had been in previous years where Commerce included Indonesia, Commerce did not include Indonesia on its list, *i.e.*, it determined that Indonesia was not economically comparable to Vietnam." ECF 49, at 14. They assert that the Department failed to explain both why it did not consider Indonesia's GNI "comparable" to Vietnam's and "the reasonableness of limiting its definition of economic comparability to a six-country, exclusively GNI-based list. It simply said circularly that Indonesia was not comparable to Vietnam because Commerce did not include it on its comparability list." *Id.* at 15.

The Department's analysis included more detail than Catfish Farmers claim. In responding to their arguments below, Commerce stated that Indonesia's GNI per capita was $3,840, Vietnam's was $2,400, and the highest GNI per capita on the six-country list was Angola's $3,370. "Therefore, we determine that Indonesia *is not at the same level* of economic development as Vietnam." Appx1058 (emphasis added; footnote references omitted). This phrasing indicates that Commerce regarded the six countries on its list of potential surrogates as being at "the same level of economic development" as Vietnam.

The statute, however, directs the Department to use "the prices or costs of factors of production in one

or more market economy countries that are . . . at a level of economic development *comparable to* that of the nonmarket economy country." 19 U.S.C. § 1677b(c)(4)(A) (emphasis added). Something that is "the same" is inherently "comparable," but the converse is not necessarily true—something may be "comparable" yet not be "the same."

The administrative record shows that Commerce (correctly) understands "the same" and "comparable" levels of economic development to represent different concepts. A Department memorandum notes the statutory requirement to use a surrogate country "at a level of economic development comparable to that of Vietnam." Appx14103. The memo explains that

> [c]ountries on the case record that are at the same level of economic development as Vietnam should be given equal consideration for the purposes of selecting a surrogate country. Countries that are not at the *same level* of economic development as Vietnam's, but still at a level of economic development *comparable to* Vietnam, *should be selected only to the extent that data considerations outweigh the difference in levels of economic development.*

Appx14104 (emphasis added). It offers no information, however, on what constitutes "the same" or "comparable" levels of economic development other than implying that any country whose GNI per capita falls within

the two extremes of the six-country list should be considered to be at "the same" level.

The passage quoted above shows that the Department seeks to avoid selecting a surrogate country that is at "a comparable level" of economic development. It also shows that here Commerce did not simply conflate "the same" and "comparable" as though those terms are always interchangeable—rather, it shows a conscious choice to disregard the statutory standard.

Thus, Catfish Farmers are correct that Commerce misapplied the statutory standard by presumptively excluding countries that fall within the "comparable" category. And the Department has given no indication as to what criteria it employs (other than looking to a range of GNI chosen via unspecified means) to determine what constitutes either "the same" or "a comparable" level of economic development.

The government, however, contends that "Commerce explained why it rejected [Catfish Farmers'] argument that Indonesia was nonetheless economically comparable to Vietnam" and cites the Department's findings that " 'Indonesia's per-capita GNI of $3,840 is not at the same level of economic development as Vietnam,' which is '$2,400, and the highest GNI reflected on the Surrogate Country List is Angola's GNI of $3,370.' Indonesia's GNI is thus 60 percent greater than that of Vietnam's." ECF 53, at 26 (quoting Appx1058). But the government's argument conflates

"the same" and "comparable" and is belied by the very language the government quotes. Commerce did not reject Catfish Farmers' argument that Indonesia is at a "comparable" level of economic development. Rather, it rejected a hypothetical argument—one not made by Catfish Farmers—that Indonesia is "at the same level" of economic development. But, as explained above, not being "at the same level" is not disqualifying under the statute if the country is at a "comparable" level.

Furthermore, the government's argument that Indonesia is not economically comparable because its GNI per capita is "60 percent greater" than Vietnam's does not withstand scrutiny. Commerce nowhere cited such percentages, so it is improper for the government to try to backfill the Department's analysis by using them. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court . . . must judge the propriety of [administrative] action solely by the grounds invoked by the agency" and "is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."). Although the Federal Circuit has explained that *Chenery* is not to be applied "inflexibly," the situations in which a reviewing court may sustain agency action on a different ground are where "the new ground is not one that calls for a determination or

judgment which an administrative agency alone is authorized to make" and where "it is clear that the agency would have reached the same ultimate result had it considered the new ground." *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998) (cleaned up). Neither of those situations applies here.

Because the administrative record shows that Commerce applied the wrong legal standard in its surrogate country selection, and because there is nothing in the administrative record showing what GNI level Commerce considered "economically comparable," Commerce's surrogate country selection is both contrary to law and not supported by substantial evidence. The court therefore remands that issue for the Department to conduct a new analysis using the correct standard.

B

1

Catfish Farmers argued before Commerce, and argue now, that Dotaseafood failed to cooperate to the best of its ability and therefore should have received a higher rate via application of "adverse facts available." Appx1080; ECF 49, at 42–54. In its final determination, the Department disagreed: "It is Commerce's practice that, once a company fails to demonstrate the absence of *de jure* and *de facto* government control, the company is not eligible for a separate rate. In the

absence of a separate rate, the company must be treated as part of the country-wide entity and is assigned the country-wide rate." Appx1081.

In a somewhat related argument, Catfish Farmers also contend that because Dotaseafood failed to demonstrate its entitlement to a separate rate *and* failed to cooperate in its questionnaire responses, the company was part of the Vietnam-wide entity such that *both* Dotaseafood *and* the Vietnam-wide entity should be assigned an "adverse facts available" rate. Appx1054.

Commerce disagreed. First, no party asked the Department to review the Vietnam-wide rate, so it was not subject to change. Appx1055. Second, Dotaseafood had a separate rate during the period of review and was not part of the Vietnam-wide entity during either that period or the administrative review. "While Dotaseafood will lose its separate rate status in the final results of this review, Dotaseafood could not have been considered a constituent part of the Vietnam-wide entity at the time the request was submitted." *Id.*

Catfish Farmers acknowledge that in a non-market economy proceeding all entities receive the country-wide single rate unless they apply for, and receive, a separate rate. ECF 49, at 42. They note, however, that "[u]nder a separate provision of the statute, Commerce may apply adverse inferences to companies that fail to cooperate to the best of their ability during a

proceeding." *Id.* They contend that the Department had to explain why it did not impose an adverse inference when Dotaseafood stopped cooperating, arguing that Commerce's lack of explanation "ignores its statutory obligation to enforce its antidumping duty laws." *Id.* at 43–44.

Catfish Farmers' argument misconstrues the relevant statute, which does not permit Commerce simply to apply adverse inferences to companies that fail to cooperate. Instead, it prescribes a two-step process. *See Hung Vuong*, 483 F. Supp. 3d 1336–39.

In the first step, if Commerce identifies a hole in the administrative record, it must fill that hole by using "facts otherwise available." 19 U.S.C. § 1677e(a). In the second, if the Department finds that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "*may* use an inference that is adverse to the interests of that party *in selecting from among the facts otherwise available*." *Id.* § 1677e(b)(1)(A) (emphasis added).

The final part of the latter clause is significant: "The statute . . . allows the use of an adverse inference only for purposes of 'selecting from among the facts otherwise available.' This means that Commerce's use of an adverse inference in any matter is limited by how Commerce employs facts otherwise available." *Dalian Meisen Woodworking Co. v. United States*, 571

F. Supp. 3d 1364, 1370 (CIT 2021) (citation to § 1677e(b)(1)(A) omitted). "Once Commerce finds it necessary to resort to facts otherwise available[,] the Department *may (but need not)* take the second step of determining whether the respondent 'failed to cooperate by not acting to the best of its ability to comply' with Commerce's 'request for information.' " *Id.* (emphasis added) (quoting 19 U.S.C. § 1677e(b)).

Thus, the statute precludes the Department from applying an adverse inference unless it first finds one of the prerequisite conditions. Commerce did not find that any of those conditions existed here, and Catfish Farmers have nowhere argued otherwise—instead, they simply jump ahead to the adverse inference stage. Because they have not attempted to show that Commerce erred in not finding that any of the "facts otherwise available" conditions applied, the court finds that the Department's decision on Dotaseafood's rate was supported by substantial evidence.[6]

Even if Catfish Farmers had demonstrated that Commerce was required to apply facts otherwise available, the Federal Circuit has affirmed the Department's use of facts otherwise available to apply a country-wide single rate to a non-market economy respondent that withdrew from the proceeding and removed

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[6] Catfish Farmers also overlook that the statute's adverse inference provision is permissive—as noted above, it provides that Commerce "may" apply an adverse inference.

its confidential information from the record. *AMS Assocs., Inc. v. United States*, 719 F.3d 1376, 1378–79 (Fed. Cir. 2013). In that case, the Department cited 19 U.S.C. § 1677e(a)(2)(C) and (D)—two subparagraphs in the "facts otherwise available" statute—and determined the respondent had significantly impeded the proceeding and prevented verification of information. "Commerce concluded that Aifudi's withdrawal from participation and removal of its confidential information meant that Commerce did 'not have any record evidence upon which to determine whether Zibo Aifudi [was] eligible for a separate rate for this review period,' so Aifudi would be subjected to the country-wide rate." *Id.* (brackets in original) (quoting *Laminated Woven Sacks from the People's Republic of China*, 76 Fed. Reg. 14,906, 14,909 (Dep't Commerce Mar. 18, 2010)). The Federal Circuit held that "the absence of verifiable information that would be necessary for Aifudi to carry its burden" of affirmatively demonstrating its independence from the Chinese government made it appropriate for Commerce to apply the country-wide rate. *Id.* at 1380–81. The same principle applies here, and the court therefore finds no error in Commerce's application of the Vietnam-wide rate to Dotaseafood.

2

Catfish Farmers also argue that Commerce should have denied Nam Viet a separate rate, contending that the company did not report all of its affiliated

companies and prove that none of them is subject to government influence. "If any affiliated entity is subject to government influence, then Commerce does not assign the respondent a separate rate." ECF 49, at 54–55 (citing, *inter alia*, *Zhaoqing New Zhongya Aluminum Co. v. United States*, 70 F. Supp. 3d 1298, 1308 (CIT 2015)).

Catfish Farmers contend that the administrative record showed that Nam Viet was affiliated with [[ ]], because both Nam Viet "and related entities" were owned and operated by [[ ]]. ECF 48, at 55 (citing Appx6870–6871). Furthermore, [[ ]]. *Id.* at 56 (citing Appx3139–3605).[7]

[7] Catfish Farmers argue that while the [[ ]] refers to [[ ]]. ECF 48, at 56. It is unclear to the court [[ ]].

Catfish Farmers argue that one Nam Viet shareholder was listed as [[ ]], ECF 48, at 56–57 (citing Appx12973–13015, Appx13078–13079, Appx13066), and that Nam Viet [[ ]], *id.* at 57 (citing Appx1122–1128, Appx13023–13025, Appx13078–13079).

Catfish Farmers also contend that the record shows that Nam Viet was affiliated with its own U.S. customer but failed to disclose it. They assert that the record establishes that Nam Viet's U.S. customer was owned and operated by a person who also owned and managed a company that Commerce had previously found to be [[ ]]. ECF 48, at 58. "The record indicates that these entities continue to be related during the review period." *Id.* at 59.

Commerce disagreed with Catfish Farmers, finding that the information about the shareholder was from before the period of review. Appx1083. The Department acknowledged Catfish Farmers' argument that the alleged affiliation extended into the period of review but found the information in the record inconclusive—"[a]lthough it appears that a person with a name similar to the name of a [Nam Viet] shareholder was involved with Exporter X, it is not clear, from the (third party) company profile web page, what the effective date of that information is. Therefore, the only reliable evidence concerning the dates of the alleged affiliation are more than a decade before the" period of

review. *Id.* Commerce found that merely sharing an address "does not automatically confer affiliation" and that the information in the administrative record was insufficient to verify whether the shared address was still current during the period of review. *Id.* "Commerce considers a range of factors in determining whether two companies are affiliated; the information on the record does not demonstrate that the traditional indicia of affiliation are necessarily met here." *Id.*

In responding to Catfish Farmers' arguments before this court, the government invokes 19 U.S.C. § 1677(33) and 19 C.F.R. § 351.102. The statute defines seven categories of "persons [who] shall be considered to be 'affiliated' or 'affiliated persons,' " and the government describes it as providing that "a claim that two entities are affiliated turns on whether one entity 'controls' another." ECF 53, at 62 (quoting 19 U.S.C. § 1677(33)). Similarly, the government characterizes the regulation as providing "further guidance on factors considered in evaluating affiliation, such as whether control over another exists in 'corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships.' " *Id.* (quoting 19 C.F.R. § 351.102(b)(3)). The government notes, however, that the regulation also states that the Department " 'will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning

the production, pricing, or cost of the subject merchandise or foreign like product,' considering such things as the 'temporal aspect of a relationship in determining whether control exists . . . .' " *Id.* (quoting 19 C.F.R. § 351.102(b)(3)).

Applying those statutory and regulatory provisions, the government argues that substantial evidence supports Commerce's findings that (1) the information indicating that a Nam Viet shareholder was [[ ]] predated the period of review because it was dated [[ ]], ECF 54, at 63 (citing Appx1083 and ECF 48, at 55–56); (2) the web page Catfish Farmers cited as further support for its arguments expressly disclaimed accuracy, *id.* at 63–64 (citing Appx13031–13192); (3) while the cited web page gave an [[ ]] during the period of review, it was unclear what information was [[ ]] at that time, *id.* at 64; and (4) perhaps most significantly, Catfish Farmers acknowledge that Nam Viet [[ ]] the current period of review, *id.* (citing ECF 48, at 56, and Appx1247–1367). The government also notes that the particular Nam Viet shareholder who was [[ ]] owned only [[ ]] of Nam Viet's shares. *Id.* (citing Appx12973–13015). Finally, as to the issues about Nam Viet's U.S. customer, the government notes that the entire chain depends on there being an affiliation between Nam Viet and [[ ]] because all the other alleged

affiliations were with an [[ ]] affiliate. *Id.* at 65 (citing ECF 48, at 58–59, and Appx1083).

For their part, Nam Viet and Vinh Hoan simply argue that "the lack of contemporaneous data demonstrating a control relationship between [Nam Viet] and the alleged affiliated company during the period of review shows that Commerce did not err . . . ." ECF 47, at 14.

On reply, Catfish Farmers assert that the evidence in the administrative record shows that Nam Viet and [[ ]] did indeed operate out of the same address during the review period. ECF 50, at 32 (citing Appx13832 and Appx4000–4001). But that fails to respond to Commerce's eminently reasonable finding that a shared address, without more, does not automatically demonstrate affiliation.

Catfish Farmers' reply further contends that the government's argument about the chain of affiliations fails for two reasons—(1) "Commerce's conclusion regarding [[ ]] is inadequately explained and supported," *id.*, and (2) "Commerce[ ] failed to address [Catfish Farmers'] argument that [Nam Viet's] U.S. customer and [[ ]] were [[ ]]," *id.* (citing, *inter alia*, Appx13832–13833). These contentions, however, do not address in any meaningful way the basis for Commerce's findings. Instead, they ask the court to reweigh the evidence. "It is not for this court . . . to

reweigh the evidence or to consider questions of fact anew." *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992); *see also Carbon Activated Tianjin Co. v. United States*, 586 F. Supp. 3d 1360, 1370 (CIT 2022) ("Plaintiffs fail to identify any error in the agency's analysis. Instead, they largely reassert the arguments they made to the agency. However, the court does not reweigh evidence.") (citing, *inter alia*, *Trent Tube*, 975 F.2d at 815).

Accordingly, the court sustains Commerce's finding that Nam Viet was entitled to a separate rate. That does not end the analysis for Nam Viet, however, because Catfish Farmers also dispute how Commerce calculated the company's rate. The court therefore turns to that issue.

3

After Commerce issued its final determination, Catfish Farmers submitted a ministerial error allegation contending that even if the Department properly granted Nam Viet a separate rate, Commerce miscalculated that rate by ignoring the rate assigned to Dotaseafood. In response, the Department acknowledged that its statutory citation contained a typographical error, but it also found that its determination was otherwise correct and that Catfish Farmers' arguments related to a "methodological" issue that

was not properly the subject of a ministerial error allegation. Appx21963.

In this court, the government contends that Catfish Farmers failed to exhaust their administrative remedies as to how Commerce calculated Nam Viet's rate because their arguments before the Department focused on *whether* Nam Viet should receive a separate rate. The government asserts that Catfish Farmers never raised what should happen if Commerce disagreed and granted Nam Viet a separate rate. ECF 53, at 69–70 (citing Appx13831, Appx13834). Only after the Department granted the separate rate did Catfish Farmers change course by filing a ministerial error allegation. *Id.* at 70 (citing Appx21953–21960). The government contends it was improper for Catfish Farmers to omit the issue from their case brief and then try to resurrect it via a ministerial error allegation. *Id.* at 71.

Catfish Farmers respond that they did exhaust their administrative remedies:

> The purpose of the exhaustion doctrine is to ensure that Commerce has the opportunity to consider parties' arguments administratively. [Catfish Farmers] made its arguments at the administrative level, and Commerce responded to them. [Catfish Farmers'] Ministerial Error Comments . . . , Appx21954–21957; Commerce's Ministerial Error Allegation Memorandum . . . ,

> Appx21961–21964. Therefore, the exhaustion doctrine has been satisfied.

ECF 51, at 34. In other words, Catfish Farmers readily admit that they did not raise the issue in their case brief, but they contend that fact is irrelevant.

Catfish Farmers are mistaken for three reasons. First, Nam Viet received a separate rate—the same one assigned to Vinh Hoan—in the *preliminary* determination. Appx1021. There, Commerce found Dotaseafood ineligible for a separate rate, assigned it the Vietnam-wide rate, and did not include that in calculating Nam Viet's rate. Appx1019, Appx1021. Thus, Catfish Farmers were on notice, at the time of the preliminary determination, that the Department did not intend to use Dotaseafood's rate in calculating Nam Viet's rate, yet Catfish Farmers did not address the issue in their case brief.

Second, a preliminary determination is, by definition, just that. Vinh Hoan's rate of 9¢/kg was subject to being increased or decreased in Commerce's final determination. If Catfish Farmers had concerns about that rate, or a revised version of that rate, being applied to Nam Viet, they had the opportunity to address it in their case brief but did not do so. Vinh Hoan's case brief, in contrast, raised several issues relating to how Commerce should calculate its rate, and Commerce accepted three of those four points and adjusted the calculations, resulting in Vinh Hoan receiving a zero rate.

The Department stated that no other party (i.e., including Catfish Farmers) commented on any of the Vinh Hoan calculation issues. Appx1086–1087.

Third, Commerce's regulations require parties to use their case briefs to call the Department's attention to issues they consider significant—the case brief "must present all arguments that continue in the submitter's view to be relevant to the Secretary's determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results." 19 C.F.R. § 351.309(c)(2). "Both Commerce and reviewing courts normally find an argument not presented in a party's case brief to be waived unless the argument could not have been raised in the case brief." *NTSF Seafoods Joint Stock Co. v. United States*, Ct. Nos. 20-00104 and 20-00105, Slip Op. 22-38, at 24, 2022 WL 1375140, at *8 (CIT Apr. 25, 2022). But "[t]he Department's regulations do recognize that in some cases, a mistake might first appear in the final determination, when it would be too late for a party to address the issue via the (already-filed) case brief," in which case a party may submit comments about a "ministerial error" within five days. *Id.* (citing 19 C.F.R. § 351.224(c)(1)–(2)).

Here, two issues relate to whether it was proper for Catfish Farmers to raise the calculation issue for the first time via a ministerial error allegation. The first is that, as noted above, the alleged error to which

Catfish Farmers object appeared in the preliminary determination; the final determination then carried it over without change. "Comments concerning ministerial errors made in the preliminary results of a review should be included in a party's case brief." 19 C.F.R. § 351.224(c)(1).[8] The second is that, as Commerce stated in rejecting Catfish Farmers' allegation, the alleged error is not a "ministerial error" at all: "*[M]inisterial error* means an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of *unintentional* error which the Secretary considers ministerial." *Id.* § 351.224(f) (second italicization added).

The word "unintentional" is critical here because Commerce explained that the method it used to assign a rate to Nam Viet was a "methodological decision," not an "unintentional error." Appx21963. Therefore, while the Department's citation to the wrong statutory subparagraph is precisely the sort of matter encompassed by the "ministerial error" regulation (a typo), the substantive question of how to calculate a respondent's rate is not. The Department's finding is consistent with its regulation.

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[8] Despite the regulation's use of "should," its provisions are mandatory. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1328 (Fed. Cir. 2011) ("[I]nterested parties must point out any ministerial errors in their case briefs.").

As a result, the court agrees with the government: Catfish Farmers could and should have objected to Commerce's chosen methodology for calculating Nam Viet's rate in their case brief. The court recognizes that Catfish Farmers believe that Nam Viet should not have received a separate rate at all. But the Department's decision to award the company Vinh Hoan's rate in the preliminary determination was enough to put Catfish Farmers on notice that they needed to address the issue in their case brief if they thought it merited attention. Instead, they put all their eggs in the "no separate rate" basket. That was their intentional, considered choice, and the consequence is that they failed to exhaust their administrative remedies as to the separate-rate methodology.

* * *

For the foregoing reasons, the court grants partial judgment on the agency record to Catfish Farmers as to Commerce's surrogate country selection and remands that issue, but otherwise denies their motion. The court grants partial judgment on the agency record to Defendant-Intervenors Colorado Boxed Beef and QMC Foods as to their standing to request administrative review of Vietnamese suppliers. The court also grants partial judgment on the agency record to the government and Defendant-Intervenors Vinh Hoan and Nam Viet as to the rate assigned to Dotaseafood, whether Nam Viet was entitled to a separate rate, and the method Commerce used to determine

Nam Viet's rate. *See* USCIT R. 56.2(b). A separate remand order will issue.

Dated: July 7, 2023
New York, NY

/s/ *M. Miller Baker*
Judge