

**FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND**

Hung Vuong Corporation, et al., v. United States
Court No. 19-00055, Slip Op. 20-174 (CIT December 3, 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 *Hung Vuong Corporation, et al., v. United States*, Court No. 19-00055, Slip Op. 20-174 (CIT December 3, 2020) (*Remand Order*). These final results concern the *Final Results* in the 14th administrative review of the antidumping duty (AD) order on certain frozen fish fillets (fish fillets) from the Socialist Republic of Vietnam (Vietnam) covering the period of review, August 1, 2016, through July 31, 2017.¹

In its holding, the Court sustained, in part, and remanded, in part, Commerce's determination to apply facts available with an adverse inference (AFA) to Hung Vuong Corporation (HVG).² In particular, the Court sustained Commerce's application of AFA to HVG, finding that substantial evidence supported Commerce's conclusion that a range of reporting failures undermined the reliability of HVG's sales and cost databases.³ However, the Court remanded the *Final Results* to Commerce to reconsider two aspects of its application of

¹ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Administrative Review; 2016–2017*, 84 FR 18007 (April 29, 2019) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).

² See *Remand Order* at 35.

³ *Id.* at 41 and 64 (finding the administrative record permitted application of AFA due to HVG's failure to retain source documents and failure to comply with Commerce's control number (CONNUM) reporting requirements).

AFA and, in turn, to consider whether application of total AFA (rather than partial AFA) remains appropriate.⁴ Moreover, the Court directed Commerce to reconsider the rate calculated for HVG.⁵ For the reasons discussed below, we continue to find that Commerce’s application of total AFA to HVG is warranted. Additionally, we continue to find that the application of a rate of \$3.87 per kilogram (kg) to HVG is appropriate.

II. BACKGROUND

A. Commerce’s *Final Results*

On October 16, 2017, Commerce initiated the 14th administrative review of fish fillets from Vietnam.⁶ On September 13, 2018, Commerce published the *Preliminary Results*.⁷ In the *Preliminary Results*, Commerce calculated a dumping margin for HVG.⁸ On March 4, 2019, Commerce notified HVG that it intended to verify its reported information.⁹ Commerce then conducted verification of HVG and subsequently issued its verification report.¹⁰

On April 29, 2019, Commerce published its *Final Results*.¹¹ In the *Final Results*, based on findings at verification, Commerce applied total AFA to HVG. Commerce’s decision to apply total AFA was premised on reporting deficiencies falling within the following categories: (1) failure to maintain/retain documents; (2) mischaracterization of HVG’s relationships with

⁴ *Id.* at 92.

⁵ *Id.*

⁶ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 FR 48051 (October 16, 2017).

⁷ 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; 2016–2017*, 83 FR 46479 (September 13, 2018) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

⁸ See *Preliminary Results*, 83 FR at 46480; see also Memorandum, “14th Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results Analysis Memorandum for the Hung Vuong Group,” dated September 4, 2018.

⁹ See Commerce’s Letter, “Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Verification Outline,” dated March 4, 2019.

¹⁰ See Memorandum, “Verification of the Sales and Factors of Production Response of Agifish and HVG in the 2016-2017 Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,” dated April 2, 2019 (Verification Report).

¹¹ See generally *Final Results* IDM.

customers; (3) inaccurate CONNUM reporting; and (4) inaccurate/unverifiable factors of production (FOP) reporting.¹² In the *Final Results*, Commerce made the following conclusions with regard to HVG's reporting in these four categories.

Failure to Maintain/Retain Documents

{P}ursuant to sections 776(a)(1) and (2)(A), (C), and (D) of the Act, we find that necessary information is missing from the record, and that HVG withheld information requested, significantly impeded the proceeding, and provided information which could not be verified. In accordance with section 776(b) of the Act, we find that an adverse inference is warranted because HVG has failed to cooperate to the best of its ability.... HVG is an experienced respondent and should have taken reasonable steps to keep and maintain full and complete records documenting the information that an experienced respondent should anticipate being called upon to produce.¹³

Mischaracterization of Its Relationships with Customers

{I}n accordance with sections 776(a)(1) and (2)(A), (C), and (D) of the Act, we find that HVG withheld information that has been requested by Commerce because it destroyed certain records, and would not provide production orders, and significantly impeded this proceeding by not retaining information needed for verification. Furthermore, in accordance with section 776(a)(2)(C) of the Act, we find that HVG has significantly impeded this proceeding by not revealing until verification that it works directly with ultimate purchasers and even visits ultimate purchasers.

In accordance with section 776(b) of the Act, we find that an adverse inference is warranted because HVG has failed to cooperate to the best of its ability.¹⁴

Inaccurate CONNUM Reporting

{I}n accordance with section 776(a)(2)(B), (C), and (D) of the Act, because HVG did not report accurate CONNUMs when it had the ability to do so, we find that HVG failed to provide sales and FOP data in the form or manner requested by Commerce and significantly impeded this proceeding. In accordance with section 776(b) of the Act, we find that an adverse inference is warranted because HVG has failed to cooperate to the best of its ability.... As AFA, because HVG did not properly report CONNUM-specific sales and FOP data, we find that we do not have

¹² *Id.* at Comment 1.

¹³ *Id.* at 23-24.

¹⁴ *Id.* at 28.

correct Section C and Section D databases with which to calculate an accurate margin for HVG.¹⁵

Inaccurate/Unverifiable FOP Reporting

Consistent with sections 776(a)(2)(A), (C), and (D) of the Act, by providing inaccurate FOP data, we find HVG fails to provide information in the form or manner requested by Commerce and significantly impeded this proceeding. We also find pursuant to section 776(a)(1) of the Act that necessary information is missing from the record because we do not have accurate data on HVG's FOPs. In accordance with section 776(b) of the Act, we find that an adverse inference is warranted because HVG has failed to cooperate to the best of its ability.... In this case, we find that HVG's FOPs are unreliable, and that HVG failed to cooperate to the best of its ability, because the foundation of its reporting is based on a mathematical impossibility. Moreover, we cannot verify that its basis for reporting labor hours is accurate.¹⁶

Furthermore, in the *Final Results*, Commerce also summarized the implications of HVG's pervasive reporting deficiencies.¹⁷ We explained why these deficiencies undermined both the sales and cost data HVG submitted, and required the application of total AFA, stating:

Due to the many deficiencies listed above, we are applying AFA in determining the margin for HVG for the final results of this review. As discussed above, with respect to the provision of information in Sections C and D of the questionnaires, as well as information related to its relationship with its customers, HVG failed to cooperate to the best of its ability by not providing complete and accurate responses to Commerce's requests for information in the form and manner requested, significantly impeded the proceeding, and provided information which could not be verified. In addition, certain necessary information is missing from the record.

Based on the facts of each proceeding involving a respondent's failure to cooperate to the best of its ability, Commerce may apply either partial or total AFA.¹⁸ The {Court of Appeals for the Federal Circuit (CAFC)} in *Mukand* found that the "use of partial facts available is not appropriate when the missing information is core to the {AD} analysis and leaves little room for substitution of partial facts without undue difficulty."¹⁹ The CAFC has also found that it is appropriate for Commerce to resort to total AFA when the "submitted data exhibited pervasive and persistent deficiencies that cut across all aspects of the data."²⁰

¹⁵ *Id.* at 32.

¹⁶ *Id.* at 35.

¹⁷ *Id.*

¹⁸ *Id.* at 35 (citing *Fresh Garlic Prod. Assoc. v. United States*, 121 F. Supp. 3d 1313, 1324 (CIT 2015)).

¹⁹ *Id.* (citing *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1307-1308 (Fed. Cir. 2014) (*Mukand*)).

²⁰ *Id.* (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011)).

Here, HVG's failure to cooperate has resulted in the lack of reliable Section C and D questionnaire responses. Without that information, we cannot accurately calculate a dumping margin for HVG pursuant to section 773(a) of the Act.

Therefore, Commerce has assigned HVG an AFA margin due to the pervasive and persistent nature of the deficiencies on the record with respect to the calculation. The use of partial AFA is not appropriate because the missing information, *i.e.*, data needed to calculate HVG's dumping margin, is core to our analysis and it would be unduly difficult to apply partial AFA by selecting from the facts available to remedy each of the deficiencies that impact each sale.

Finally, regarding our selection of a rate to apply to HVG, in the *Final Results*, Commerce stated:

In applying an adverse inference, pursuant to section 776(b)(2) of the Act, Commerce may rely on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record.²¹ In selecting an AFA rate, Commerce selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated ...

The Act also makes clear that, when selecting facts available with an adverse inference (*i.e.*, AFA), 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 reality" of the interested party.²² Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding, 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.²³

The highest margin applied in a separate segment of this proceeding and currently in effect is \$3.87/kg.²⁴ Accordingly, we determine that the AFA rate is the \$3.87/kg for purposes of this review, and have applied this rate to HVG. In accordance with section 776(c)(2) of the Act, this rate does not need to be corroborated because it is a calculated rate applied in a prior segment of this proceeding.²⁵

²¹ *Id.* at 36 (citing section 776(b) of the Act); *see also* Trade Preferences Trade Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015).

²² *Id.* (citing sections 776(d)(1)(B) and 776(d)(2) of the Act).

²³ *Id.* (citing section 776(d)(1)(2) of the Act).

²⁴ *Id.* (citing *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), unchanged in *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Amended Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 29323 (May 20, 2013)).

²⁵ *Id.* at 36-37.

The bases for certain of these conclusions are discussed further below.

HVG appealed Commerce's decision to apply total AFA and the assignment of a rate of \$3.87/kg.

B. *Remand Order*

On December 3, 2020, the Court issued its *Remand Order*.²⁶ The Court considered whether substantial evidence supported Commerce's AFA decision and our selection of a total AFA rate of \$3.87/kg. The Court examined each of the four bases underlying Commerce's AFA decision: (1) failure to maintain/retain source documents; (2) reporting and documentation relating to HVG's relationships with customers; (3) CONNUM reporting; and (4) FOP reporting. The Court affirmed Commerce's decisions to apply AFA to HVG based on considerations 1 and 3, in their entirety.

With regard to issue 2 (*i.e.*, HVG's reporting with respect to its relationship with customers), the Court sustained, in part, and remanded, in part, Commerce's determination. Commerce premised its analysis of HVG's deficient customer relationship reporting in the *Final Results* on four findings: (a) HVG deleted e-mails with its customers; (b) HVG discarded purchase orders; (c) HVG mischaracterized the degree to which its ultimate downstream customers were involved in the sales process; and (d) HVG's customers failed to respond to Commerce's request for information. The Court affirmed Commerce's decision to apply AFA insofar as it was based on findings (a)-(c). With regard to finding (d), however, the Court found that Commerce could not lawfully rely upon the failure of HVG's customers to answer Commerce's questionnaire as a basis for AFA, because Commerce gave no notice of the deficiency.²⁷ In this regard, the Court further stated that it "largely sustains Commerce's

²⁶ See *Remand Order*.

²⁷ *Id.* at 56.

decision to find facts otherwise available as to Hung Vuong’s customer relationships, but on remand Commerce must reconsider whether to apply partial facts available because it could not lawfully apply facts otherwise available based on the failure of Hung Vuong’s customers to answer Commerce’s questionnaires.”²⁸ The Court stated that, after Commerce reconsiders whether to apply partial facts available for the customer relationships issue, on remand Commerce must also consider whether to continue to apply an adverse inference—in whole or in part—on the issue.²⁹

With regard to issue 4 (*i.e.*, FOP reporting), the Court sustained, in part, and remanded, in part, Commerce’s determination. Commerce based its finding that HVG’s FOP reporting was deficient on two considerations: (a) unverifiable labor FOP reporting; and, (b) HVG’s by-product/overall FOP reconciliation. With regard to HVG’s labor FOP reporting, the Court affirmed Commerce’s decision to apply facts otherwise available, pursuant to section 776(a)(2)(D) of the Tariff Act of 1930, as amended (the Act).³⁰ With respect to HVG’s by-product/overall FOP reconciliation, the Court found that Commerce’s finding was not supported by substantial evidence.³¹ Specifically, the Court found that Commerce did not address HVG’s explanation for the by-products’ weight gain during the production process, which Commerce identified as a deficiency that undermined the overall reconciliation of material inputs to outputs in HVG’s reporting.³²

Moreover, the Court stated that, because Commerce cited this issue as a basis for discrediting all of HVG’s FOPs, the Court must remand Commerce’s AFA decision despite

²⁸ *Id.* at 59.

²⁹ *Id.* at 61.

³⁰ *Id.* at 81.

³¹ *Id.* at 84-85.

³² *Id.* at 86.

finding the remainder of Commerce’s analysis to be supported by substantial evidence.³³ In this regard, the Court stated that, on remand, Commerce must thoroughly address the by-product issue and must consider whether to apply partial facts available instead of total AFA to HVG’s FOPs.³⁴ Finally, the Court stated that after Commerce reconsiders the by-product issue in light of the record evidence, Commerce is to consider the extent to which its conclusion affects its decision on the adverse inference as to HVG’s FOP reporting, more broadly.³⁵ The Court stated that, in view of the findings discussed above, it is unclear from the existing record whether there was substantial evidence permitting Commerce to resort to facts otherwise available and, by extension, an adverse inference, regarding HVG’s customer relationship reporting and its FOP reporting.³⁶ The Court found that it was required, therefore, to vacate Commerce’s application of “total AFA” in view of those two findings, and ordered that, on remand, Commerce must reconsider whether partial AFA is appropriate.³⁷

Finally, the Court stated that, because it must remand this matter to Commerce for further consideration of HVG’s customer relationship reporting and FOP reporting, it must also remand Commerce’s application of the \$3.87/kg rate in this case.³⁸ The Court directed Commerce to reconsider the rate on remand, in conjunction with its reconsideration of the customer-questionnaire and by-product issues and the total adverse inference.³⁹

³³ *Id.* at 85.

³⁴ *Id.* at 86-87.

³⁵ *Id.* at 87.

³⁶ *Id.* at 90.

³⁷ *Id.*

³⁸ *Id.* at 91.

³⁹ *Id.* at 91-92.

On February 25, 2021, HVG submitted comments in advance of the draft results of redetermination.⁴⁰ On February 26, 2021, the petitioners⁴¹ submitted a letter requesting Commerce reject HVG's Pre-Draft Comments as containing new factual information.⁴² On February 26, 2021, Commerce issued a letter to HVG rejecting HVG's Pre-Draft Comments because they constituted untimely filed new factual information.⁴³ On March 1, 2021, HVG resubmitted revised comments.⁴⁴

Commerce released the Draft Results on March 16, 2021,⁴⁵ finding that total AFA continued to be warranted for HVG and that the application of the \$3.87/kg rate continued to be appropriate. The petitioners and HVG submitted comments on the Draft Results on March 22, 2021.⁴⁶

⁴⁰ See HVG's Letter, "Administrative Review of AD Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (08/01/16-07/31/17): HVG Comments in Advance of Draft Remand Pursuant to Court No. 19-00055," dated February 25, 2021 (HVG's Pre-Draft Comments).

⁴¹ The petitioners are: Catfish Farmers of America and individual U.S. catfish processors including America's Catch, Inc., Alabama Catfish, LLC d/b/a Harvest Select Catfish, Inc., Consolidated Catfish Companies, LLC d/b/a Country Select Catfish, Delta Pride Catfish, Inc., Guidry's Catfish, Inc., Heartland Catfish Company, Magnolia Processing, Inc. d/b/a Pride of the Pond, and Simmons Farm Raised Catfish, Inc.

⁴² See Petitioners' Letter, "Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: CFA's Request to Reject Untimely New Information in HVG's February 25, 2021 Comments in Advance of Commerce's Draft Redetermination," dated February 26, 2021.

⁴³ See Commerce's Letter, "Redetermination Pursuant to Court Order – Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Rejection of Unsolicited New Factual Information in Pre-Draft Remand Comments," dated February 26, 2021.

⁴⁴ See HVG's Letter, "Administrative Review of AD Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (08/01/16-07/31/17): HVG Resubmitted Comments in Advance of Draft Remand Pursuant to Court No. 19-00055," dated February 25, 2021.

⁴⁵ See Draft Results Of Redetermination Pursuant To Court Remand, *Hung Vuong Corporation, et al., v. United States*, Court No. 19-00055, Slip Op. 20-174 (CIT December 3, 2020), dated March 16, 2021 (Draft Results).

⁴⁶ See Petitioners' Letter, "Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: CFA's Comments on Commerce's Draft Remand Results," dated March 22, 2021 (Petitioners' Comments); and HVG's Letter, "Administrative Review of AD Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (08/01/16-07/31/17): HVG Comments on Draft Remand Redetermination Pursuant to Court No. 19-00055," dated March 22, 2021 (HVG's Comments), respectively.

III. ANALYSIS

A. Legal Standard for Facts Available under Sections 776(a) and 776(b) of the Act

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 sections 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.

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.”⁴⁷ In such a case, the Act permits Commerce to use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.⁴⁸ 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.”⁴⁹ The 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.⁵⁰ The CAFC acknowledged, however, that, while there is no willfulness requirement,

⁴⁷ See section 776(b) of the Act.

⁴⁸ *Id.*; see also Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, vol. 1 (1994) at 870 (SAA).

⁴⁹ See SAA at 870.

⁵⁰ See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel*).

“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.⁵¹ 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.⁵² 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.⁵³

B. Analysis

We continue to find that the application of total AFA with respect to HVG is appropriate. As the Court noted, Commerce’s decision to apply AFA was premised on four separate categories of reporting deficiencies. These substantial deficiencies render HVG’s reporting unreliable such that the data cannot be used as a basis for our overall margin calculation. Below, we discuss each of these reporting deficiencies and describe their impact on the data used in Commerce’s margin analysis.

Source Documents and CONNUM-Specific Reporting

As an initial matter, we note that the Court has fully sustained Commerce with respect to our decision to apply AFA due to HVG’s failure to maintain/retain source documents and failure to report accurately and completely its sales and FOP data on a CONNUM-specific basis. These deficiencies substantially undermine both the sales and cost databases relied on for Commerce’s margin analysis and render them unusable in this segment of the proceeding.

⁵¹ *Id.*, 337 F.3d at 1380.

⁵² *Id.*, 337 F.3d at 1382.

⁵³ *Id.*

HVG's FOP database is undermined because HVG: (1) failed to maintain and provide production orders, preventing verification of the net weight CONNUM characteristic in the FOP database;⁵⁴ and (2) failed to maintain and provide original fish feed consumption documents, thus preventing verification of this FOP.⁵⁵ HVG's U.S. sales database is undermined because HVG: (1) failed to maintain and provide production/purchase orders, preventing verification of the net weight CONNUM characteristic in the U.S. sales database;⁵⁶ (2) failed to maintain and provide sales correspondence emails, thus preventing verification of the terms of sale and the degree of involvement of its customers and ultimate downstream customers in the sales process;⁵⁷ and (3) did not report its net weight physical characteristic on a CONNUM-specific basis and, thus, did not report this information in the form and manner requested, prevented verification of the reported data, and significantly impeding the proceeding.⁵⁸

The Court acknowledged the significance of these failures and held that Commerce's finding – *i.e.*, that HVG's FOP data “could not properly be tied to the finished products” – was supported by substantial evidence.⁵⁹ Significantly, the Court stated that substantial evidence “permitted Commerce to find the databases unreliable”⁶⁰ and allowed Commerce to apply an adverse inference based on HVG's failure to retain crucial source documents, including missing feed consumption documents and other production records.⁶¹ The Court also sustained Commerce's conclusion that HVG's failure to cooperate resulted in the company's databases being unusable for purposes of calculating an accurate dumping margin.⁶² Therefore, the Court

⁵⁴ See *Remand Order* at 42-44.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 42-44.

⁵⁸ *Id.* at 65-75.

⁵⁹ *Id.* at 70-71.

⁶⁰ *Id.*

⁶¹ *Id.* at 49 and 51.

⁶² *Id.* at 77.

found that substantial evidence permitted Commerce to conclude that HVG failed to cooperate such that an adverse inference was appropriate.⁶³

HVG's CONNUM reporting and failure to retain documents, alone, would warrant application of total AFA. In a recent case addressing the 13th administrative review of the same antidumping duty order, *GODACO II*, the Court sustained Commerce's application of total AFA to a respondent, GODACO, based on its failure to report CONNUM-specific data properly.⁶⁴ In that case, the Court found that Commerce's application of AFA was reasonable because Commerce had afforded respondents prior notice that CONNUM-specific information would be required in this proceeding,⁶⁵ and GODACO had failed to obtain and produce the requested information.⁶⁶ The *GODACO II* Court also affirmed Commerce's explanation on remand that "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)," GODACO failed to act to the best of its ability.⁶⁷ As AFA, Commerce applied the same \$3.87/kg rate to GODACO⁶⁸ as it applied to HVG in this case, explained further below.

Similarly, here, HVG failed to report verifiable CONNUM-specific information in its U.S. sales and FOP databases, and the Court deemed these databases unreliable for calculating an accurate dumping margin because they cannot properly be tied to the finished products.⁶⁹ Reliable sales and FOP databases form the foundation of Commerce's dumping analysis, and without them Commerce cannot calculate an accurate dumping margin for HVG. Given that

⁶³ *Id.*

⁶⁴ See *Godaco Seafood Joint Stock Company, and Can Tho Import-Export Joint Stock Company, Et Al., v. United States*, Consol. Court No. 18-00063, Slip Op. 21-3 (January 6, 2021) (*GODACO II*).

⁶⁵ *Id.* at 15.

⁶⁶ *Id.*

⁶⁷ *Id.* at 14.

⁶⁸ *Id.* at 16-18

⁶⁹ See *Remand Order* at 70-71.

HVG's data are unreliable, it is impossible to determine its final dumping margin using partial AFA. Thus, here, as in *GODACO II*, the application of total AFA is warranted. Despite being an experienced respondent in this proceeding, HVG failed to maintain and provide important source documents, and these missing documents prevented verification of the U.S. sales and FOP databases. As a result, Commerce has no choice but to base its final dumping margin on total AFA.

Customer Relationships and FOP Reporting

As with HVG's failure to maintain important source documents or to report its data on a CONNUM-specific basis, the Court also sustained, in large part, Commerce's findings with respect to HVG's reporting of its customer relationships⁷⁰ and labor FOPs.⁷¹ Regarding HVG's relationships with its customers, the Court held that HVG: (a) failed to maintain and provide sales correspondence e-mails;⁷² (b) failed to maintain and provide purchase orders;⁷³ and (c) did not accurately report meetings with the ultimate downstream customers;⁷⁴ these failures prevented verification of price negotiations, the terms of sale, and the extent and degree of customer involvement in the sales process, and, thus, HVG significantly impeded the proceeding.⁷⁵ Accordingly, the Court concluded that substantial evidence supported Commerce's decision to apply AFA with respect to HVG's reported relationship with its customers based on its failure to retain production orders and e-mail correspondence with its customers.⁷⁶ Similarly, the Court concluded that substantial evidence supported Commerce's

⁷⁰ *Id.* at 59.

⁷¹ *Id.* at 81.

⁷² *Id.* at 56.

⁷³ *Id.*

⁷⁴ *Id.* at 58.

⁷⁵ *Id.* at 56-58.

⁷⁶ *Id.* at 60-61.

determination to apply AFA based on HVG's submission of inaccurate answers regarding its relationship with downstream customers.⁷⁷

As noted above, Commerce requested that HVG's customers provide certain information and these entities failed to respond to Commerce's requests. In evaluating the facts, the Court found that Commerce could not rely on this failure as one of the bases relied upon for total AFA because Commerce gave no notice of the deficiency, and it directed us to reconsider whether to apply partial facts available instead. However, Commerce's determination to apply total AFA to HVG was based on numerous and substantial reporting failures, including other failures relating to HVG's interactions with its customers such as the failure to retain emails with its customers and discarded purchase orders, which render the U.S. sales data unusable. We continue to find that total AFA is warranted because HVG provided misleading statements, undermining the reliability of its reported information, and because the record is missing important source documents, preventing verification of the terms of sale and the degree of involvement of HVG's customers and ultimate downstream customers in the sales process. Without the ability to verify those data, and combined with HVG's failure to report accurate CONNUM information, we continue to find the U.S. sales database unreliable in essential ways. This finding, compounded by our other findings affirmed by the Court, signifies that it is not possible to apply partial facts available here.

Finally, with respect to HVG's FOP reporting, the Court sustained Commerce's finding at verification that HVG did not properly report its labor FOP, and that such a finding was a proper basis to apply facts available.⁷⁸ The Court did not opine on Commerce's application of AFA with regard to the labor FOP, as this issue was intertwined with the by-product issue.

⁷⁷ *Id.* at 61.

⁷⁸ *Id.* at 81.

However, we continue to find that HVG failed to cooperate to the best of its ability such that an adverse inference is warranted with regard to the labor FOP because HVG failed to maintain labor records in a manner that could accurately substantiate its reporting, and thus prevented verification of its labor FOP.

The Court found that Commerce did not address HVG's explanation for by-product weight gain during the production process, and it directed us to address the by-product issue on remand. As part of its instruction, the Court also directed us to evaluate whether partial, rather than total, facts available is warranted with respect to HVG's FOPs, and to consider the extent to which this conclusion affects the adverse inferences made with respect to HVG's FOP reporting more broadly.

Commerce continues to have concerns regarding HVG's by-product reporting and, in turn, its reconciliation between inputs and outputs in its production process. At verification, we found that the sum of the outputs was many millions of kilograms more than the weight of the inputs.⁷⁹ We cited this weight discrepancy in the context of our broader analysis of whether HVG's FOP reporting was accurate, noting HVG's admission at verification that its reconciliation was "not exact."⁸⁰

As the Court has highlighted, in the underlying review HVG cited two considerations in support of its position that the by-products in question gain water weight, leading to the observed difference.⁸¹ First, HVG stated that it is inherent to the industry that by-products are comingled with water and, thus, increase in weight as a result of the collection process that takes place

⁷⁹ See Verification Report at 2.

⁸⁰ See *Final Results* IDM at 33.

⁸¹ See *Remand Order* at 83-84.

during production.⁸² Second, HVG submitted a worksheet which purported to reconcile HVG's input/output data, while accounting for water weight, to "confirm that in no case do{es} the sum of outputs exceed the sum of inputs."⁸³ With respect to the first point, we agree with HVG that, in the processing of whole live fish into final products, the outputs, including the by-products, may pick up water weight. Commerce does not dispute that, under these circumstances, the sum of the outputs may be greater than the weight of the whole, live fish. However, Commerce's ongoing concern relates to the extent to which HVG claims these outputs picked up water, which is a substantial percentage of the starting point. With respect to the second point, HVG's purported input/output reconciliation, HVG: (1) did not provide an explanation of how the figures in this worksheet tie to or reconcile with those in the verification exhibit,⁸⁴ *i.e.*, how the exhibit accounts for the millions of kilograms difference;⁸⁵ and (2) included items not germane when reconciling total whole fish input to total fish outputs (*i.e.*, HVG included as inputs all farming material inputs, processing chemicals, packing and other non-fish items instead of the weight of the whole fish grown from those materials; however, it is not clear why these materials would weigh the same as the harvested fish). In other words, crucially, while HVG reported purchased whole fish in this worksheet, HVG did not include the weight of the self-harvested fish, which represents a sizeable portion of the whole fish input, thus making any total fish in/out reconciliation, in this worksheet, not possible.

We understand this question to be one of fact, and we continue to find that HVG did not provide documentation at verification to support its FOP reconciliation. Furthermore, HVG's

⁸² *Id.* (citing HVG's Letter, "Administrative Review of AD Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (08/01/16-07/31/17): HVG Response to Supplemental Section D Questionnaire," dated July 27, 2018 (HVG July 27, 2018 SDR) at 34-35).

⁸³ *Id.* (citing HVG July 27, 2018 SDR) at 5).

⁸⁴ See Verification Report at Exhibit VE-10B at PDF page 20 "Fish/Output/By-product Comparison."

⁸⁵ *Id.* at 2 and 16.

two references to its questionnaire response do not amount to an answer to the question originally posed at verification to explain the extent of the difference, *i.e.*, many millions of kg.⁸⁶ As a result, we continue to have doubts about the accuracy of the reconciliation. Nonetheless, although Commerce believes HVG's explanation does not plausibly account for the observed weight difference, we find that HVG's other verification failures are so substantial that it is unnecessary to rely on this verification finding in our determination that HVG's FOP data are unusable, and that total AFA remains appropriate as a result of those other failures.

In summary, we are no longer relying on our prior findings with respect to HVG's by-product reporting and the failure of HVG's customer to respond to a request for information because the numerous deficiencies, described above, and sustained by the Court, demonstrate that the application of total AFA is still warranted. For instance, in a standalone discussion relating to CONNUM reporting deficiencies, we stated that "we find that we do not have correct Section C and Section D databases with which to calculate an accurate margin for HVG."⁸⁷ Additionally, in an independent analysis regarding maintenance of production records and fish feed consumption, we stated that various aspects of FOP reporting were unverifiable.⁸⁸ Thus, without regard to the by-product discussion, the record demonstrates that HVG's FOP data (in addition to its sales reporting, as detailed above) are unreliable.

Consistent with the discussion above, we continue to find that, pursuant to sections 776(a)(1) and (2)(A)-(D) of the Act, necessary information is missing from the record, that HVG withheld information requested, that HVG did not provide data in the form or manner requested, significantly impeded the proceeding, and provided information which could not be verified. In

⁸⁶ *Id.* at 16.

⁸⁷ *Id.* at 32.

⁸⁸ *Id.* at 19-21.

accordance with section 776(b) of the Act, we find that an adverse inference is warranted because HVG failed to collect, maintain and report information on the basis specified by Commerce, and, thus, failed to cooperate to the best of its ability.

Finally, regarding the selection of a rate to apply to HVG, we continue to find that the \$3.87/kg rate used in the *Final Results* is appropriate in light of the findings outlined above. When Commerce uses an inference that is adverse to the interests of a party in selecting among the facts otherwise available, the Act permits Commerce to use a dumping margin from any segment of the proceeding under the antidumping order.⁸⁹ The Act does not require Commerce to corroborate rates applied in a previous segment of the same proceeding.⁹⁰ Here, we continue to apply, as AFA, the calculated rate from the new shipper review (NSR) of the eighth administrative review of this proceeding.⁹¹ We also note that this \$3.87/kg rate is the same rate applied, and upheld by the Court, to the uncooperative respondent in *GODACO II*.⁹²

IV. COMMENTS ON THE DRAFT RESULTS OF REDETERMINATION

As noted above, Commerce released the Draft Results on March 16, 2021.⁹³ The petitioners and HVG submitted comments on March 22, 2021.⁹⁴

HVG's Comments

Customer Relationship and By-Product Issues⁹⁵

- Commerce has not adequately explained its revised treatment of the customer relationship and by-product issues. Regarding the customer relationship issue, the Court

⁸⁹ See section 776(d)(1)(B) of the Act; see also *Zhejiang Zhaofeng Mech. & Elec. Co. v. United States*, 416 F. Supp. 3d 1395, 1401 (CIT 2019).

⁹⁰ See section 776(c)(2) of the Act.

⁹¹ 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).

⁹² See *GODACO II* at 16-18.

⁹³ See Draft Results.

⁹⁴ See Petitioners' Comments; and HVG's Comments.

⁹⁵ See HVG's Comments at 4-5, and 9-10.

instructed Commerce to reconsider its decision to apply facts otherwise available and determine whether it should apply partial facts available, to reconsider whether to use an adverse inference, and to thoroughly explain why it reaches whatever decision it makes. Regarding the by-products issue, similarly, the Court directed Commerce to consider whether to apply partial facts available, instead of total facts available, as to HVG's FOPs, and whether to instead disallow the by-product offset as HVG had suggested. The Court instructed Commerce to reconsider whether to use an adverse inference as to the FOPs, and to thoroughly explain its decision on this issue.

- Rather than truly reconsider, explain, and justify its overall findings on the by-product and customer relationship issues, as the Court instructed, Commerce has instead simply disregarded its prior analysis and now it essentially rests its total AFA decision on other findings. This is not what the Court instructed Commerce to do and Commerce's decision, therefore, fails to comply with the Court's explicit instructions.
- Commerce has not thoroughly explained how its findings on the remaining issues adequately support its decision to rely on total AFA. Commerce's findings on these points are simply conclusory, *e.g.*, "these deficiencies substantially undermine both the sales and cost databases relied on for Commerce's analysis and render them unusable in this segment of the proceeding."⁹⁶ Commerce must more fully explain its rationale for applying total AFA, and explain how HVG's remaining deficiencies – alone – justify its decision to reject all of HVG's information and apply total AFA.

⁹⁶ *Id.* at 5 (citing *Remand Order* at 10).

*Application of Partial AFA Using Record Information*⁹⁷

- While Commerce clearly has concluded that HVG did not cooperate fully to the best of its ability in some aspects of its reporting (*i.e.*, CONNUMS, labor, production documents), it is clear that HVG did cooperate regarding many other pieces of information that passed verification. Commerce is essentially relying on three key deficiencies to support the use of total AFA; however, Commerce can correct each of these problems.
- First, with regard to HVG’s reporting of its total production quantity and its failure to maintain its production documents, Commerce fails to acknowledge that it verified other parts of HVG’s total production. Thus, a large portion of HVG’s production was verified and Commerce can therefore rely on this information and apply some sort of partial facts available.
- Second, with regard to HVG’s CONNUM reporting, HVG believes that its net weight “averaging” methodology was reasonable (and that Commerce should use HVG’s net weights as reported). Although the Court upheld Commerce’s findings that HVG incorrectly reported its net weights, Commerce can revise HVG’s net weights using information on the record should it wish to do so.
- Finally, with regard to labor hours, HVG again continues to believe it accurately and reasonably reported its labor hours. HVG acknowledges that Commerce disagrees, and the Court has upheld Commerce’s findings on this point. However, HVG notes that labor accounts for an extremely small portion of total costs, and such discrepancies should not

⁹⁷ *Id.* at 6-9.

form the basis to resort to total AFA. Commerce can apply an easy fix to HVG's purported labor deficiencies and apply partial AFA by simply assuming an 8-hour day.

*Application of 3.87/kg Rate*⁹⁸

- Commerce continued to apply a total AFA rate of \$3.87/kg to HVG in the Draft Results, yet in reaching this conclusion, Commerce fails to undertake an “evaluation of the situation” justifying the use of this highly punitive AD duty rate, as required under the Act.
- Commerce itself, in the *GODACO I Redetermination*, acknowledged that “it interpreted the ‘evaluation of the situation’ statutory language ‘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.’”⁹⁹ Commerce has not undertaken such an evaluation of the circumstances here, which is inconsistent with its own understanding of its obligations in this regard.
- Application of the \$3.87/kg rate here is inappropriate. The rate: (1) was a rate assigned to a new shipper DOCIFISH Corporation (DOCIFISH); and (2) appears to be based upon a single sale. The details of that sale, and the reason for and methodology used to determine this \$3.87 rate in the prior proceeding, are unclear from the public record. Given these circumstances, Commerce must make an objective determination based on record evidence as to why its use of such a high AFA rate is “appropriate” and otherwise “reasonable” here.

⁹⁸ *Id.* at 10-12.

⁹⁹ *Id.* at 11 (citing Final Results of Redetermination Pursuant to Court Remand (July 21, 2020), *GODACO Seafood Joint Stock Co. v. United States*, Court No. 18-00063 (*GODACO I Redetermination*) at 47-48).

*The Petitioners' Comments*¹⁰⁰

- In the Draft Results, Commerce complied with the Court's instructions by: (1) further explaining why its reliance on total, rather than partial, AFA continues to be appropriate and necessary; (2) explaining why it is no longer relying on its prior findings regarding HVG's by-product reporting and the failure of HVG's customers to respond to a request for information as a basis for facts available; and (3) explaining why it is appropriate to apply the total AFA rate of \$3.87/kg to HVG. The petitioners support Commerce's findings on remand.
- First, Commerce explained why the Court's independent upholding of Commerce's complete rejection of HVG's sales and FOP databases – because of the lack of CONNUM-specific reporting and other critical reporting deficiencies – makes any revised decision on the two remanded issues moot. The petitioners agree with Commerce's explanation, because no redetermination regarding HVG's customer relationship reporting or its by-product reporting could cure the problems in HVG's unusable databases. Without usable databases, Commerce correctly applied total AFA.
- Second, despite not relying upon certain aspects of HVG's customer reporting or the failures in its by-product reporting for its total AFA determination, Commerce further addressed these reporting issues in accordance with the Court's remand order.
- Commerce explained correctly that its decision to apply total AFA to HVG was based on HVG's numerous and substantial reporting failures, which were sustained by the Court and which are independent from HVG's customers' failure to respond to Commerce's requests. The petitioners agree that HVG's *own* failures regarding its maintenance and

¹⁰⁰ See Petitioners' Comments at 1-3.

provision of customer-related information makes its U.S. sales database unusable. This deficiency represents a separate basis for applying total AFA independent from the other Court-approved findings that invalidated that same database.

- The petitioners also agree with Commerce’s findings that HVG failed to maintain verifiable labor records and that HVG’s explanation for its water weight gain was mathematically unreasonable, unreconcilable, and unverified.
- Finally, Commerce explained why the \$3.87/kg rate is the correct AFA rate to apply to HVG based upon the law, Commerce’s practice, and the history of this proceeding. Accordingly, Commerce’s application of AFA, and the assignment of the \$3.87/kg rate to HVG, is appropriate and consistent with the Court’s remand order.

Commerce’s Position:

For the reasons stated below, we continue to find that application of total AFA to HVG is warranted. Additionally, we continue to find that the application of a rate of \$3.87/kg to HVG is appropriate.

In the Draft Results, Commerce extensively discussed the basis for its continued application of AFA in light of its revised analysis of the customer relationship and by-product issues. We disagree with HVG that we did not comply with the Court’s order to reconsider, explain, and justify our overall AFA decision in light of the Court’s concerns with our findings in these areas. The Court remanded our prior findings because Commerce relied on them in our overall application of total AFA in the *Final Results*. However, as explained in the Draft Results, Commerce reconsidered the facts of the case and is no longer relying on these prior findings as a basis for AFA. Nonetheless, our findings regarding the numerous other deficiencies, which were sustained by the Court, demonstrate that the application of total AFA is

warranted. In particular, we again emphasize that the Court affirmed Commerce’s findings on numerous, significant reporting deficiencies across four major issue areas.¹⁰¹ Contrary to HVG’s assertion, the fact that Commerce reconsidered two non-dispositive findings within this greater context of numerous, significant reporting deficiencies does not warrant a reversal of Commerce’s application of total AFA to HVG. Thus, Commerce has considered its determination to apply total AFA, explained how the information in the administrative record supports its decision, and justified its reasoning for applying total AFA independent of the by-product and customer relationship issues. As such, because the by-product and customer relationship issues no longer form part of the basis for the application of total AFA, there is no reason for Commerce to provide further discussion on these issues beyond that provided in the Draft Results.

We also disagree with HVG that Commerce can remedy certain deficiencies using verified information, make reasonable assumptions about unverifiable information, or apply “some sort of” unspecified partial AFA calls. In the *Remand Order*, the Court held that substantial evidence “permitted Commerce to find the databases unreliable”¹⁰² and allowed Commerce to apply an adverse inference based on HVG’s failure to retain and provide crucial source documents.¹⁰³ The Court also sustained Commerce’s conclusion that HVG’s failure to cooperate resulted in the company’s databases being unusable for purposes of calculating an accurate dumping margin.¹⁰⁴ Commerce’s determination, and the Court’s subsequent holdings in this regard, reflect the serious nature of HVG’s reporting deficiencies. Unverifiable source

¹⁰¹ As detailed above, Commerce’s decision to apply total AFA was based on HVG’s: (1) failure to maintain/retain source documents; (2) reporting and documentation failures relating to its relationships with customers; (3) inaccurate CONNUM reporting in both the FOP and U.S. sales databases; and (4) unverifiable FOP reporting.

¹⁰² See *Remand Order* at 70-71.

¹⁰³ *Id.* at 49 and 51.

¹⁰⁴ *Id.* at 77.

documents and misrepresentations regarding customers relationships are not the type of quantifiable deficiencies that can be addressed with modifications to the existing databases – rather, they speak fundamentally to the credibility of the reported data themselves. Because we have determined (and the Court has sustained our determination) that HVG’s data are unusable, it is not possible to use any of HVG’s data to determine its final dumping margin using partial AFA.

With respect to the application of the \$3.87/kg rate and HVG’s argument that Commerce fails to undertake an “evaluation of the situation” justifying the use of this AD rate as appropriate and otherwise reasonable, we similarly disagree. HVG’s assertion that the AFA rate assigned here is inappropriate because the rate was calculated in an NSR is without merit. As the Court explained in the *Remand Order*, the Act allows Commerce to use any dumping margin from any “segment of the proceeding under the applicable antidumping order,” including the highest such margin, as AFA.¹⁰⁵ Furthermore, 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 to assign a rate as AFA.¹⁰⁶ We did precisely that, and selected a rate calculated in a prior NSR in this proceeding. Moreover, the TPEA¹⁰⁷ 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 reality” of the interested party.¹⁰⁸ Commerce is also not required to corroborate any dumping margin

¹⁰⁵ *Id.* at 17.

¹⁰⁶ See section 776(b)(2) of the Act; see also 19 CFR 352.308(c).

¹⁰⁷ See section 505 of the Trade Preferences Extension Act of 2015, Pub. Law 114-27 (June 29, 2015) (TPEA); see also *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793, 46795 (August 6, 2015).

¹⁰⁸ See section 776(d)(3)(B) of the Act.

applied in a separate segment of the same proceeding,¹⁰⁹ 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.¹¹⁰

HVG asserts that the NSR rate is extremely high, suggesting the rate is aberrational, and, thus, it should not be the rate selected for HVG. We 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 an NSR is “unrepresentative or extremely distortive,” so as to suggest that the transaction should be excluded as a *non-bona fide* sale.¹¹¹ In conducting this analysis, Commerce considers a host of factors to assess whether the underlying sale(s) are unrepresentative of typical sales behavior.¹¹² Indeed, whether a sale is representative and reflective of standard business practices 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 otherwise reflect commercial reality.¹¹³ As a result, we find that the NSR rate selected here provides a usable rate to apply as the AFA rate for HVG within the meaning of section 776 of the Act.

¹⁰⁹ See section 776(c)(2) of the Act.

¹¹⁰ See section 776(d)(1)(2) of the Act.

¹¹¹ See *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1262–63, 641 F. Supp. 2d 1362, 1369 (CIT 2009).

¹¹² 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), and accompanying PDM at 3.

¹¹³ See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Reviews, Partial Rescission of Review, and Intent to Revoke Order in Part*, 77 FR 56180, 56181 (September 12, 2012); unchanged in *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), and accompanying IDM.

Finally, we address HVG’s argument that Commerce cannot apply the highest calculated rate on the record as AFA without the requisite statutory “evaluation of the situation.”¹¹⁴ 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,”¹¹⁵ 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.”¹¹⁶

In a recent case, *POSCO*, 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, given the situation leading to the application of an adverse inference.¹¹⁷ 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.¹¹⁸

We agree with HVG that, on remand, we should address this statutory language and are doing so now. As we explain above, the application of total AFA to HVG is warranted because Commerce was unable to use the information provided in its calculations, HVG failed to correct

¹¹⁴ See HVG’s Comments at 11 (citing *GODACO I* at 47-48).

¹¹⁵ See section 776(d)(3) of the Act.

¹¹⁶ See section 776(d)(2) of the Act.

¹¹⁷ See *POSCO v. United States*, 335 F. Supp. 3d 1283, 1285-1286 (CIT 2018) (*POSCO*).

¹¹⁸ *Id.*

its deficiencies when it had the opportunity and the ability to do so, and HVG otherwise did not act to the best of its ability. Further, the Act allows for Commerce to 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.¹¹⁹ Thus, the only question outstanding is if the record suggests that the rate applied to HVG, \$3.87/kg, is otherwise inappropriate. We find that there is no record evidence which undermines the reasonableness of the use of that rate in this case.

As noted above, the selected rate was a rate calculated in an NSR of the proceeding at issue for a producer/exporter named DOCIFISH.¹²⁰ 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.¹²¹

Despite HVG's claims that the rate calculated for DOCIFISH in that proceeding was extremely high, suggesting it was aberrational or distortive, HVG provides no evidence 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), no evidence on the record undermines Commerce's *bona fides* analysis from the NSR or our determination to apply that rate to HVG here, in accordance with section 776 of the Act. DOCIFISH's margin continues to be an appropriate rate to apply as AFA in this case. Therefore, consistent with *GODACO II* and section 776(d)(2) of the Act, we continue to apply the \$3.87/kg rate to HVG on remand.

V. FINAL RESULTS OF REDETERMINATION

Pursuant to the Court's *Remand Order*, and in light of the record evidence, Commerce: (1) explained why it continues to be necessary to apply total, rather than partial, AFA to HVG;

¹¹⁹ See section 776(d)(2) of the Act.

¹²⁰ See *8th AR and Aligned NSRs Final IDM*.

¹²¹ *Id.*

(2) explained that we are no longer relying on our prior findings with respect to HVG's by-product reporting and the failure of HVG's customer to respond to our request for information as a basis for facts available; and (3) explained why it is appropriate to apply the total AFA rate of \$3.87/kg to HVG. Accordingly, we have made no changes to the *Final Results*.

4/1/2021

X 

Signed by: CHRISTIAN MARSH

Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance