April 19, 2019

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations


I. SUMMARY

The Department of Commerce (Commerce) analyzed the comments submitted by the petitioners,1 NTSF Seafoods Joint Stock Company (NTSF), and The Hung Vuong Group (HVG)2 in the fourteenth administrative review of the antidumping duty (AD) order on certain frozen fish fillets (fish fillets) from the Socialist Republic of Vietnam (Vietnam). Following the Preliminary Results,3 and the analysis of the comments received, we made changes to the margin calculations for the final results. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

II. CASE ISSUES

Comment 1: Assignment of AFA Rate to HVG
Comment 2: Whether to Apply AFA to NTSF
Comment 3: NTSF’s Plastic Bags Packing Factor
Comment 4: Fingerling Surrogate Value Conversion Factor

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1 The Catfish Farmers of America and individual U.S. catfish processors (collectively, the petitioners).
Comment 5: Fingerling Inflator
Comment 6: Surrogate Financial Ratios
Comment 7: Rate to Apply to Companies Not Selected for Individual Review
Comment 8: Green Farms’ Separate Rate Certification
Comment 9: Golden Quality’s Separate Rate Status
Comment 10: Surrogate Values to Value HVG’s FOPs
Comment 11: Treatment of Fish Oil and Fish Meal

III. BACKGROUND

On October 16, 2017, Commerce initiated the fourteenth administrative review of fish fillets from Vietnam. On September 13, 2018, Commerce published the Preliminary Results of this administrative review. On January 28, 2019, Commerce tolled the deadlines in this case and the final results by 40 days. On February 14, 2019, Commerce extended the deadline for the final results to April 19, 2019. Between March 13, 2019, and April 9, 2019, interested parties submitted case and rebuttal briefs.

IV. SCOPE OF THE ORDER

The product covered by the order is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species Pangasius Bocourti, Pangasius Hypophthalmus (also known as Pangasius Pangasius) and Pangasius Micronemus.

Frozen fish fillets are lengthwise cuts of whole fish. The fillet products covered by the scope include boneless fillets with the belly flap intact (“regular” fillets), boneless fillets with the belly flap removed (“shank” fillets) and boneless shank fillets cut into strips (“fillet strips/finger”), which include fillets cut into strips, chunks, blocks, skewers, or any other shape.

Specifically excluded from the scope are frozen whole fish (whether or not dressed), frozen steaks, and frozen belly-flap nuggets. Frozen whole, dressed fish are beheaded, skinned, and eviscerated. Steaks are bone-in, cross-section cuts of dressed fish. Nuggets are the belly-flaps.

5 See Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, “Deadlines Affected by the Partial Shutdown of the Federal Government,” dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.
7 See the petitioners’ March 13, 2019 submission (The petitioners’ Brief); the petitioners’ March 18, 2019 submission (The petitioners’ Rebuttal Brief); NTSF/Vinh Quang’s March 13, 2019 submission (NTSF/Vinh Quang’s Brief) (we note that NTSF/Vinh Quang was required to resubmit their case brief three times to ensure new factual information was not placed on the record); NTSF/Vinh Quang’s March 18, 2019 submission (NTSF/Vinh Quang’s Rebuttal Brief) (we note that NTSF/Vinh Quang was required to resubmit their rebuttal brief to ensure new factual information was not placed on the record); HVG’s April 5, 2019 submission (HVG’s Brief); the petitioners’ April 5, 2019 submission (The petitioners’ HVG Brief); HVG’s April 9, 2019 submission (HVG’s Rebuttal Brief); and the petitioners’ April 9, 2019 submission (The petitioners’ HVG Rebuttal Brief).
The subject merchandise will be hereinafter referred to as frozen “basa” and “tra” fillets, which are the Vietnamese common names for these species of fish. These products are classifiable under tariff article code 0304.62.0020 (Frozen Fish Fillets of the species *Pangasius*, including basa and tra), and may enter under tariff article codes 0305.59.0000, 1604.19.2100, 1604.19.3100, 1604.19.4100, 1604.19.5100, 1604.19.6100, and 1604.19.8100 of the Harmonized Tariff Schedule of the United States (HTSUS).8

The order covers all frozen fish fillets meeting the above specifications, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

V. APPLICATION OF ADVERSE FACTS AVAILABLE

Section 776(a)(1) and 776(a)(2)(A)-(D) of the Tariff Act of 1930, as amended (the Act) provide that if necessary information is not available on the record or if an interested party: (A) withholds information that has been requested by Commerce; (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the AD statute; 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.

Section 782(c)(1) of the Act provides that if an interested party “promptly after receiving a request from {Commerce} for information, notifies {Commerce} that such party is unable to submit the information requested in the requested form and manner,” Commerce shall consider the ability of the interested party and may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if Commerce determines that a response to a request for information does not comply with the request, Commerce shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person an opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, Commerce may, subject to section 782(e), disregard all or part of the original and subsequent responses, as appropriate.

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8 Until June 30, 2004, these products were classifiable under HTSUS 0304.20.6030, 0304.20.6096, 0304.20.6043, and 0304.20.6057. From July 1, 2004, until December 31, 2006, these products were classifiable under HTSUS 0304.20.6033. From January 1, 2007, until December 31, 2011, these products were classifiable under HTSUS 0304.29.6033. On March 2, 2011, Commerce added two HTSUS numbers at the request of U.S. Customs and Border Protection (CBP) that the subject merchandise may enter under: 1604.19.2000 and 1604.19.3000, which were changed to 1604.19.2100 and 1604.19.3100 on January 1, 2012. On January 1, 2012, Commerce added the following HTSUS numbers at the request of CBP: 0304.62.0020, 0305.59.0000, 1604.19.4100, 1604.19.5100, 1604.19.6100, and 1604.19.8100.
Section 782(e) of the Act states that Commerce shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Further, section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. In so doing, Commerce is not required to determine, or make any adjustments to, a weighted average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.9

In determining whether a company has failed to cooperate to the best of its ability, and whether the application of adverse facts available (AFA) is warranted, Commerce follows the guidance set forth in Nippon Steel:

Before making an adverse inference, Commerce must examine respondent’s actions and assess the extent of respondent’s abilities, efforts, and cooperation in responding to Commerce’s requests for information. Compliance with the “best of its ability” standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping. It assumes that importers are familiar with the rules and regulations that apply to the import activities undertaken and requires that importers, to avoid a risk of an adverse inference determination in responding to Commerce’s inquiries: (a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all of the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the importers’ ability to do so.10

Section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the AD investigation, a previous administrative review, or other information placed on the record.11 In addition, the SAA explains that Commerce may employ an adverse inference “to ensure that the party does not

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9 See section 776(b)(1)(B) of the Act; TPEA, section 502(1)(B).
10 See Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (CAFC 2003) (internal citation omitted) (Nippon Steel).
11 See also 19 CFR 351.308(c).
obtain a more favorable result by failing to cooperate than if it had cooperated fully.”

An adverse inference prevents interested parties from controlling the outcome of a proceeding by selectively providing information. Further, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.

With respect to the accuracy of Commerce’s calculations, to calculate normal value (NV) in an AD proceeding involving a non-market economy (NME), the Act states:

the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.

To construct the value of the product sold by the respondents in the United States, Commerce determines the NV of the subject merchandise based on the FOPs utilized in producing such merchandise. Commerce’s instructions in the AD questionnaire specifically request:

If you are not reporting factors of production (FOPs) using actual quantities consumed to produce the merchandise under review on a CONNUM-specific basis, please provide a detailed explanation of all efforts undertaken to report the actual quantity of each FOP consumed to produce the merchandise under review on a CONNUM-specific basis. Additionally, please provide a detailed explanation of how you derived your estimated FOP consumption for merchandise under review on a CONNUM-specific basis and explain why the methodology you selected is the best way to accurately demonstrate an accurate consumption amount.

In order to compare NVs to U.S. prices on an apples-to-apples basis, the Act instructs Commerce to determine the NV of the subject merchandise based on the FOPs utilized in producing the merchandise. To achieve this end, Commerce utilizes a CONNUM which defines the key physical characteristics of the subject merchandise as those that are commercially meaningful in the U.S. marketplace, and impact costs of production. In NME proceedings in particular,

13 See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States, 40 F. Supp. 2d 466, 475 (CIT 1999) (a “major purpose” of Section 776(b) of the Act is “to permit Commerce, and not respondents” to control Commerce’s proceedings); Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185, 1191 (Fed. Cir. 1993) (the provisions of Section 776(b) of the Act are designed to prevent Commerce, which lacks subpoena power, from being “left merely to the largesse of the parties at their discretion to supply {Commerce} with information”).
14 See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan, 65 FR 42985 (July 12, 2000); Antidumping Duties, Countervailing Duties, 62 FR 27296, 27340 (May 19, 1997); Nippon Steel, 337 F.3d 1373, 1382-83.
15 See 19 USC 1677 b(c) of the Act.
16 See Original Questionnaire at Section D.
17 See 19 USC 1677b(a) and (b) of the Act.
18 See, e.g., Large Residential Washers from the People’s Republic of China: Initiation of Less-Than-Fair-Value Investigation, 81 FR 1398, 1399 (January 12, 2016) (Washers Initiation); Stainless Steel Wire Rod from Sweden: Final Results of Antidumping Duty Administrative Review, 73 FR 12950 (March 11, 2008) and accompanying IDM
Commerce requires respondents to report FOPs that are specific to each CONNUM sold to the United States “to construct the value of the product sold by {the respondent} company in the United States.” Commerce applies these considerations to the facts and issues below in Comment 1.

VI. SEPARATE RATES

In the Preliminary Results, we determined that the following companies met the criteria for separate rate status: 1) C.P. Vietnam Corporation (C.P. Vietnam); 2) Cuu Long Fish Joint Stock Company (CL-Fish); 3) Green Farms Seafood Joint Stock Company (Green Farms); 4) Vinh Quang Fisheries Corporation (Vinh Quang); 5) HVG; and 6) NTSF.

With respect to all companies except Green Farms, we have not received any argument since the issuance of the Preliminary Results that provides a basis for reconsideration of these determinations. Therefore, Commerce continues to find that these companies meet the criteria for a separate rate. With regard to Green Farms, we received arguments regarding its eligibility for a separate rate. However, as discussed below we continue to find that Green Farms is entitled to a separate rate.

In its Preliminary Results, Commerce inadvertently omitted Golden Quality Seafood Corporation (Golden Quality) from its separate rate analysis. However, as described below Golden Quality has failed to demonstrate its eligibility for a separate rate. As such, we find that Golden Quality is part of the Vietnam-wide entity and assign it the Vietnam-wide rate.

VII. DISCUSSION OF THE ISSUES

Comment 1: Assignment of AFA Rate to HVG

HVG’s Arguments

- While at verification of HVG, Commerce obtained a few email chains regarding HVG’s contact with both its customers and its downstream customers, such correspondence relates only to post-sale logistical and clerical follow-up discussions, most of which were

at Comment 1 (where Commerce stated that, consistent with our practice, model-matching criteria were developed to account for the salient characteristics of the subject merchandise and not the specific experience of any one respondent).

19 See Commerce’s Letter to HVG re: Original AD Questionnaire, issued on January 18, 2018, (Original Questionnaire), at Section D.
20 See PDM at 7.
21 See Comment 8 below.
22 See Comment 9 below.
23 Id.
24 HVG has several customers and importers, at different times these companies will act in different roles, but for ease of reference, we have referred to these companies as HVG’s customers. We refer to the customers of HVG’s customers as the ultimate purchasers.
undertaken directly between HVG and its customers.\textsuperscript{25} HVG occasionally communicated with some of its downstream customers, but only to assist with logistics and final delivery of the merchandise.\textsuperscript{26} HVG did not negotiate sales with the downstream customers, it does not have detailed information about its customers’ sales to the downstream customers, nor does it otherwise control any of its U.S. customers.\textsuperscript{27} None of these emails relate to the negotiation of prices, quantities, and sale terms with the downstream customers.\textsuperscript{28} Moreover, all such correspondence occurred well after the sales were negotiated with HVG’s customers.\textsuperscript{29}

- Contrary to the petitioners’ assertions, these email chains do not demonstrate any type of sinister effort by HVG and its customers to mislead Commerce.\textsuperscript{30} It is patently absurd for HVG to have engaged in any such effort to obfuscate the facts or the truth in terms of its relationships with its U.S. customers or downstream customers because it had no way of knowing that it would be selected as a mandatory respondent either at the time these emails were sent (\textit{i.e.}, a year before it participated in this AD review) or during the proceeding.\textsuperscript{31}
- Based one email chain discovered by Commerce that discusses the price to the downstream customer, HVG likely would have benefitted by characterizing the sales to downstream customers as affiliated sales because it could report the downstream price as its own sales price.
- HVG tried its best to obtain as much information as possible from the downstream customers as part of Commerce’s supplemental customer questionnaire, but its customers refused to provide all of the information requested by Commerce due to confidentiality concerns.\textsuperscript{32}
- Regarding the petitioners’ comments concerning the existence of any type of agency agreement between or among HVG and its U.S. customers or any type of “principal/agent” relationship, HVG has explained steadfastly that there is no such agency agreement, or any similar type of agreement, nor have the petitioners pointed to any such agreement.\textsuperscript{33}
- HVG explained it has some contact with, and knowledge of, the downstream customers due to its general knowledge of the industry in the U.S., and because some of the downstream customers visit HVG’s factories in Vietnam to observe the manufacturing process for quality control and other such reasons.\textsuperscript{34} This is a normal and typical practice in an industry involving the international production, sale, and distribution of food for customers in the downstream chain of distribution to know about the identity and manufacturing processes

\textsuperscript{25} See HVG’s Brief at 2 – 3.
\textsuperscript{26} Id.
\textsuperscript{27} See HVG’s Rebuttal Brief at 2 – 12.
\textsuperscript{28} See HVG’s Brief at 2 – 3.
\textsuperscript{29} Id.
\textsuperscript{30} See HVG’s Rebuttal Brief at 2 – 12.
\textsuperscript{31} Id.
\textsuperscript{32} Id., citing HVG’s December 21, 2018 submission.
\textsuperscript{33} Id., citing HVG’s October 24, 2018 submission at 2 and at Appendix (Noting that HVG has no specific agreements with any of its U.S. customers, other than the individual contracts for each sale, that HVG negotiates and executes for its U.S. sales directly with its three U.S. customers using contracts and commercial invoices. HVG states that its customers are wholesalers, who then resell the merchandise to the ultimate purchasers. HVG claims that it does not negotiate prices with the ultimate purchasers, nor does HVG otherwise pay a commission to its U.S. customers regarding the initial sale or any downstream sale.).
\textsuperscript{34} See HVG’s Rebuttal Brief at 2 – 12, citing HVG’s October 24, 2018 submission at 8-10 and 14, and the Appendix.
and practices of the producer. However, this does not constitute a “principal/agent” relationship under Commerce’s practice.

- In *SSB from India*, Commerce analyzed the establishment of a “principal/agent” relationship using seven factors, including the following: (1) the producer’s role in negotiating prices and other terms of sale; (2) the extent of a foreign producer’s interaction with U.S. customers; (3) the producer’s marketing of the product during the pre-sale period; (4) whether the identity of the producer on sales documents inferred an agency relationship; (5) whether the agent/reseller takes title to the merchandise and bears risk of loss; (6) whether the agent/reseller takes inventory; and (7) whether the agent/reseller processes or otherwise adds value to the merchandise.35

- In other cases, Commerce determined that similar minimal contacts between a producer and the ultimate downstream customer are not sufficient to find a principal/agent relationship, particularly where, as here, there is no formal agency agreement and the parties do not otherwise negotiate prices or other material terms of sale.36 In *SSB from India*, Commerce noted that there was no formal agency agreement, and there was no evidence of direct communication between the producer and downstream customer as to “negotiating the price or any other terms of the sales.”37 Importantly, Commerce emphasized there was no evidence that the producers were in contact with the downstream customers during “the price negotiation phase of the sale,” nor did Commerce find any evidence of “commissions” paid to the reseller.38

- The two cases cited by the petitioners regarding principal/agent relationships are readily distinguishable.39 In *SSSS from Taiwan*, Commerce determined there was a principal/agent relationship based largely upon the facts that (1) there was an explicit agency agreement (that respondent was unable to rebut); (2) the reseller failed to maintain any inventory of the merchandise, and (3) the producer had substantial contact with the ultimate purchaser regarding “material terms of sales” including an active role during the “negotiation” process.40 Similarly, in *Gas Turbo Compressors*, the evidence showed that the producer effectively “controlled the price” during the negotiation phase, and that it also engaged in extensive marketing during the “pre-sale” period.41 Moreover, the evidence showed that the reseller did not enter the merchandise into its inventory, and that there was very little

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35 *Id.*, citing *Stainless Steel Bar from India: Final Results of Antidumping Duty Administrative Review*, 74 FR 47198 (September 15, 2009) (*SSB from India*) and accompanying IDM at Comment 2.
36 *Id.*, citing *Chlorinated Isocyanurates from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 5243 (February 6, 2018) (*Isos*) and accompanying IDM at Comment 1; and *Final Determination of Sales at Not Less Than Fair Value; Certain Forged Steel Crankshafts from Japan*, 52 FR 36984, 36985 (October 2, 1987) (*Crankshafts*) at Comment 3.
37 *Id.*, citing *SSB from India* at Comment 2.
38 *Id.*
40 *Id.*
41 *Id.*, citing *Gas Turbo Compressors*, 62 FR at 24403.
difference between the price charged to the reseller, and the subsequent price charged by the reseller to the ultimate purchaser.\footnote{Id.}

- Although the verification report indicates a discrepancy between the weight of total production and by-products versus the total weight of introduced live fish, HVG previously explained that the difference between these amounts is attributed to the weight of the water that is included in the reported weight of the by-products.\footnote{See HVG’s Brief at 4 – 5, citing HVG’s July 27, 2018 submission at 41, and Exhibits 63 and 65; HVG’s Rebuttal Brief at 13 – 15.} Specifically, HVG stated that it is normal due to the weight of water that is encompassed within the various by-products collected and reported as such, that by-products are collected as they accumulate which includes some amount of water that commingles with the by-products in the production process, and that this additional water weight is then included as part of the by-product weight that is sold to those consuming the by-products.\footnote{See HVG’s Brief at 4 – 5; HVG’s Rebuttal Brief at 13 – 15.}

- Even though the petitioners assert that HVG’s FOP data cannot be reconciled with the total volume of HVG’s production because there is a discrepancy between total inputs versus total outputs, there is no question as to the accuracy and completeness of the underlying FOP data.\footnote{See HVG’s Rebuttal Brief at 13 – 15.} The only issue is whether the by-product amounts used for the by-product offset are inaccurate. HVG has explained this discrepancy, thus rendering its by-product amounts accurate and complete.\footnote{Id.} Nevertheless, should Commerce disagree, it should only consider disallowing the by-product offset, and it would be wholly unjustified in disqualifying all of HVG’s reported FOPs, as the petitioners suggest.\footnote{Id.}

- While the verification report indicates that Commerce was unable to trace the farming feed consumption to handwritten daily delivery records, it is of no consequence because HVG transfers all of this information to monthly Feed Movement Reports, which HVG retains and which it relied upon to obtain and report its feed consumption.\footnote{See HVG’s Brief at 5 – 7. The monthly feed movement report includes total deliveries of feed into inventory, consumption from inventory, total value and quantity (in kilograms(kg)) of all feed delivered and consumed, and track protein content.} Discarding the daily reports is HVG’s normal business practice, and it is consistent with the practice in the industry.\footnote{Id.} As such, HVG adequately and thoroughly verified its feed consumption amounts using its monthly records, which it prepares and maintains in the normal course of business, and Commerce reconciled to the financial statements.\footnote{Id.}

- Commerce never indicated it was unable to verify HVG’s farming records as the petitioners claim. Commerce only stated that it did not trace feed consumption to daily records because HVG does not maintain daily records, nevertheless, all of HVG’s farming records, including feed consumption, were verified using other contemporaneous business documents prepared in the normal course of business, including monthly feed movement reports, invoices, general ledger, and audited financial statements.\footnote{Id.}
• HVG disagrees with the petitioners’ assertion that HVG inaccurately reported fish feed because the average feed consumption ratio (FCR) calculated for the POR compared with the FCR from HVG’s October 2016 Aquaculture Operation Report (AOR) is distorted.\(^52\) Commerce verified HVG’s reported October fingerlings, feed, and harvested fish, as well as HVG’s October 2016 AOR and the reported FCRs, all of which were reconciled to HVG’s general ledger, fingerlings or feed delivery notes, or pond usage reports without discrepancy.\(^53\)

• The petitioners’ comparison of the FCR to the October 2016 AOR is inaccurate due to the petitioners having compared data regarding incompatible time periods. In their comments, the petitioners compared the final number from the FCR to the October 2016 AOR. However, the October AOR reports the FCRs for several ponds on HVG’s farms.\(^54\) The petitioners also compare the FCR for one pond to the weighted average FCR for all farms during the POR.\(^55\) This is not an apples-to-apples comparison because the specific pond’s FCR represents a feed consumption rate based on the date fingerlings were put into the ponds as compared to the date that live fish were harvested from that pond.\(^56\) However, the POR weighted average feed consumption rate calculated by the petitioners represents the overall feed consumption for all farms during the POR.\(^57\) This aside, even though the comparison is distorted, the difference is minimal.\(^58\)

• Even though Commerce notes in the verification report that HVG does not maintain all production orders related to POR sales, this is of no consequence as HVG did not use its production orders for any information provided in its response, nor are the production orders themselves otherwise relevant to its response.\(^59\) As noted in the verification report, the production orders are used simply to assist the planning of the factory to fill existing orders.\(^60\)

• The documents recording the actual production of finished goods that are important to HVG’s response and its reported FOP files are the Daily Production Reports, which were documented numerous times in this proceeding.\(^61\) HVG constructed its FOP database based on the amounts recorded in its Daily Production Reports because they track actual production and consumption of all finished goods and important raw materials, which Commerce verified without incident and tied to the financial statements.\(^62\)

• With respect to other database information, it was reasonable for HVG to use a weighted-average net weight variable (i.e., soaking percentage) in its U.S. sales database while reporting specific net-weights (i.e., soaking percentages) in its FOP database.\(^63\) HVG used this reasonable “weighted-average” methodology to report net weights in its sales database to account for the fact that it often produces identical merchandise used to fill an invoice over

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\(^{52}\) Id.

\(^{53}\) Id., citing VR at VE 28, at 101 – 121.

\(^{54}\) Id., citing VR at VE 28, at 102; HVG’s July 27, 2018 response at Exhibits SDQ-55 & 56.A.

\(^{55}\) Id.

\(^{56}\) Id., citing HVG’s August 16, 2018 submission at 27 – 28.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) See HVG’s Brief at 7 – 8.

\(^{60}\) See HVG’s Brief at 7 – 8, citing VR at 19.

\(^{61}\) See HVG’s Brief at 7 – 8, citing, e.g., HVG’s May 29, 2018 submission at Exhibit 2.

\(^{62}\) See HVG’s Brief at 7 – 8, citing VR at 20 - 22 and VE 13.

\(^{63}\) See HVG’s Brief at 8 – 11; HVG’s Rebuttal Brief at 21 – 23.
several days, resulting in slight variations in actual net weights (i.e., soaking percentages) for the identical product sold to the customer under a specific invoice.\textsuperscript{64}

- This methodology is reasonable because HVG has confirmed that there are only very minor variations in the individual soaking percentages of the separate production runs used to fill a specific invoice. HVG had no feasible alternative as HVG had to report a single soaking percentage for a single line item on its sales list.\textsuperscript{65} Had HVG not weight averaged the net weights as it did, HVG would have had to split out a single line item of an invoiced sale by segregating it into multiple line items with slightly different net weights.\textsuperscript{66} Indeed, the individual soaking percentages of a production run used to fill an invoice (as reported in its Master Files) typically were either exactly the same, or they varied typically by no more than one or two percentage points.\textsuperscript{67}

- In this regard, HVG notes that such grouping or averaging of similar merchandise may be considered as “identical” for CONNUM reporting purposes under the relevant statutory provision.\textsuperscript{68} Indeed, the Federal Circuit has recognized that the meaning of the term “identical” for this purpose includes merchandise having “minor differences”, particularly if such differences “are not commercially significant.”\textsuperscript{69} Clearly, as noted above, any such differences between the net weights of the individual production runs and the averaged net weights reported for a single U.S. sale are extremely minor and they are not commercially significant.\textsuperscript{70}

- HVG disagrees with the petitioners’ contention that HVG does not actually weigh the live fish or the interim fillet after the trimming stage.\textsuperscript{71} As HVG has explained during this proceeding, and as demonstrated and documented at verification, HVG weighs the input live fish each day at the factory, and weighs the further processed fish meat at multiple intervals during production, including after filleting, after skinning, after trimming, and after soaking.\textsuperscript{72}

- In rebuttal of another of the petitioners’ arguments, HVG disagrees with the contention that HVG made sales of unsoaked product to the United States during the POR. As an initial matter, the petitioners’ entire argument relies on a single label from a questionnaire response where the petitioner notes that product is coded as having gained water weight, yet no preservatives are listed on the ingredients list, nutrition label, and packaging.\textsuperscript{73} The petitioners assume that a single reference in the label neglecting to note the minor addition of sodium tripoly phosphate (STTP) somehow proves that the product was not soaked.\textsuperscript{74} HVG

\textsuperscript{64} See HVG’s Brief at 8 – 11; HVG’s Rebuttal Brief at 21 – 23.
\textsuperscript{65} See HVG’s Rebuttal Brief at 21 – 23.
\textsuperscript{66} Id.
\textsuperscript{67} See HVG’s Brief at 8 – 11, citing, e.g., HVG’s July 27, 2018 submission at Exhibits SDQ-1(a) through (j); HVG’s Rebuttal Brief at 21 – 23.
\textsuperscript{68} See HVG’s Brief at 8 – 11, citing 19 USC 1677(16)(A); HVG’s Rebuttal Brief at 21 – 23.
\textsuperscript{69} See HVG’s Brief at 8 – 11, citing, e.g., Pesquera Mares Australas Ltd. v. United States, 266 F.3d 1372, 1384 (Fed. Cir. 2001) (Pesquera Mares); HVG’s Rebuttal Brief at 21 – 23.
\textsuperscript{70} See HVG’s Brief at 8 – 11, citing 19 USC 1677(16)(A); HVG’s Rebuttal Brief at 21 – 23.
\textsuperscript{71} See HVG’s Rebuttal Brief at 20.
\textsuperscript{72} Id., citing, e.g., VE 8 at the revised factory flow chart for Europe, which indicates the weigh stations, which was requested by Commerce officials.
\textsuperscript{73} See HVG’s Rebuttal Brief at 23 – 25, citing HVG’s July 20, 2018 submission.
\textsuperscript{74} Id.
explained, it is the contracts and invoices that specify whether a product is “soaked,” not the packaging labels.75

- The petitioners’ arguments about the live fish yields are misleading because they selectively cite only a small portion of the Daily Production Report for one HVG Europe (the FOP factory Commerce verified).76 The petitioners’ argument regarding daily yields is inaccurate as the petitioners cite only one of the seven product groups contained in the Daily Production Report as having been produced on the day the petitioners examined. The petitioners then allege that the daily yields for all such products that day have the same yield rate.77 The petitioners fail to disclose that they have deleted the other six product groups from this Daily Production Report, which actually contains production and yield information for seven different categories of products produced that day, all with different yields.78

- With respect to its daily production data, the only aspect of the daily yield that HVG does not track separately is the yield difference (if any) attributed to different sizes of the same product, but HVG has explained previously that it simply does not track such yield differences by product size daily.79 It has no reason to do so, as this is not the way it processes or tracks the production of finished products and yields, nor does HVG believe there are significant yield variations due solely to size.80

- Commerce’s verification report notes that HVG does not specifically track the actual number of hours worked, but that it instead assumes an eight-hour work day. However, an eight-hour workday is HVG’s normal business practice and this is the way it tracks labor in the normal course of business.81 Moreover, even though HVG does not track actual labor hours in the normal course of business, HVG states it has reasonably assumed that its workers work a standard eight-hour shift which is reasonable as most factories use a standard eight-hour shift, and Commerce often makes this assumption in many different contexts.82 Moreover, HVG’s own records (as verified by Commerce) show that HVG tracks actual days worked for its workers, including personal and scheduled days off, half days worked, and double shifts.83 Thus, HVG tracks actual days worked for its workers, and it then assumes eight hours per day for a full day worked (and four hours per day for a half day worked).84

- Commerce should reject the petitioners’ claims that HVG improperly understated its reported labor because it did not account for labor when working days were longer than eight hours.

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75 Id., citing HVG’s August 16, 2018 submission at 3-5.
76 See HVG’s Rebuttal Brief at 18 – 20.
77 Id.
78 Id. and Attachment 1, citing HVG’s July 27, 2018 submission at Exhibit SDQ-43. HVG states that its Daily Production Report assigns and tracks different daily yields for different products and different forms of products. It does so daily by factory, and there is considerable variation in yields depending on the product and the form. Indeed, on the day the petitioners reference the yields vary greatly, depending on the product form, as would be expected.
79 Id., citing HVG’s August 16, 2018 submission at 4-16.
80 Id.
81 See HVG’s Brief at 11 – 12.
82 Id. In fact, Commerce’s policy in valuing labor is to “convert that data to an hourly basis based on the premise that there are 8 working hours per day, 5.5 working days a week and 24 working days per month,” “where data is not available on a per-hour basis.” See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 FR 36092, 36094, (June 21, 2011) at footnote 4.
83 See HVG’s Brief at 11 – 12, citing VR at 26.
84 See HVG’s Brief at 11 – 12, citing VR at 26.
and moreover that HVG improperly allocated direct labor in a manner that disregarded product form or size. HVG notes that it fully disclosed its labor methodology (i.e., based on an eight-hour day assumption) in its questionnaire responses. With regard to CONNUM specific reporting, because HVG incurs direct labor on a given day for all products produced on that day, the use of the multiplier to allocate direct labor (and all major cost elements based on live fish usage), reasonably accounts for labor differences as between different product forms (i.e., such as more trimmed and less trimmed fish, etc.). This allocation methodology is reasonable and accounts for labor differences attributed to CONNUM differences.

The Petitioners’ Arguments

- HVG reported export price sales to its three U.S. customers. The principals for two of these companies are former employees of HVG, although HVG has strenuously insisted that its U.S. customers are not affiliated with HVG throughout this review. Commerce’s verification uncovered that “HVG knows the details of its customers’ downstream transactions and also discuss the coordination of various sales-related matters.”

- A threshold issue with respect to HVG’s U.S. sales is whether the data is the proper basis for calculating AD margins. Although HVG provided its sales to three allegedly unrelated U.S. customers, if those importers were affiliated, the data supplied by HVG cannot be the basis for a final determination pursuant to 19 USC 1677a(b).

- Foreign producers and U.S. customers/importers may be affiliated for purposes of 19 USC 1677a(b) when there is a principal-agent relationship between the buyer and seller. To identify such an agency relationship, Commerce generally considers a range of criteria, including but not limited to, the following: (1) the foreign producer’s role in negotiating price and other terms of sale; (2) the extent of the foreign producer’s interaction with the U.S. customer; (3) whether the identity of the producer on sales documentation inferred such an agency relationship during the sales transactions; (4) whether the agent/reseller maintains inventory; (5) whether the agent/reseller takes title to the merchandise and bears the risk of loss; (6) whether the agent/reseller further processes or otherwise adds value to the merchandise; and (7) the means of marketing a product by the producer to the U.S. customer in the pre-sale period. Commerce has found that “although agency relationships are

85 See HVG’s Rebuttal Brief at 16 – 17.
86 Id., citing HVG’s March 7, 2018 submission at 21.
87 Id., citing HVG’s August 16, 2018 submission at 25-26.
88 See The petitioners’ HVG Brief at 4 – 17, citing, e.g., HVG’s February 20, 2018 submission at 11 & 14.
89 HVG is a collapsed entity, and as such, we have referred to the collapsed entity rather that its individual members for ease of reference, and as Commerce considers a collapsed entity to be a single entity.
90 Id., citing, e.g., HVG’s February 13, 2019 submission at 3; HVG’s July 20, 2018 submission at 28 and Exhibit SAC-18; HVG’s October 24, 2018 submission at Exhibit 60-D; VR at VE 10.C.
91 Id., citing VR at 2.
92 Id., citing, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan, 62 FR 24394, 24403 (May 5, 1997) (Gas Turbo Compressors); Stainless Steel Sheet and Strip from Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 6682 (February 13, 2002) (SSSS
frequently established by a written contract, this is not essential.”93 Indeed, Commerce has found the existence of a principal-agent relationship without a written contract between the parties.94

- In this case, HVG is involved in negotiating the prices and terms of sale because the ultimate purchasers had actual knowledge that the pangasius fillets they were purchasing were produced and shipped by HVG. The customers also received specific instructions from HVG with respect to these sales, and as such, it is reasonable to infer that the ultimate purchasers understood that HVG’s former employees were acting as HVG’s agents with respect to sales of subject merchandise.95

- With respect to HVG’s interaction with the U.S. customer, the principals of two of HVG’s customers are former HVG employees, and in these roles were involved in sales of subject fillets to customers in the United States.96 As such, companies that formerly purchased from HVG and its U.S. affiliate would know that HVG’s former employees were now selling pangasius fillets produced by HVG. In addition, the record contains further information that indicates a continued link between these former employees and HVG.97 It must be noted that HVG and its customers took great care to avoid identifying the ultimate purchasers on invoices.98 Given these actions to suppress any evidence of HVG’s active role in the U.S. sales process, Commerce should infer that HVG was in fact directly involved with the ultimate customers.

- Regarding the risk of loss, although HVG’s customers allegedly take title to the imported pangasius fillets, it is HVG that bears the risk of loss, and record information indicates that HVG’s customers do not bear the risk of loss.99

- Regarding the marketing undertaken by HVG in the pre-sale period, when asked to explain their sales process, HVG’s customers refused to answer any questions.100 However, the emails found at verification indicate that HVG was involved in this process.

- Although there is no evidence that HVG’s customers added any value to the merchandise, the record and information found at verification, establishes that HVG’s U.S. customers acted on its behalf and at the direction of HVG with respect to POR sales. As in other cases, here Commerce should find that HVG and its customers are affiliated under 19 USC 1677(33)(G) because, by definition, a principal controls its agent.101

- HVG actively attempted to mislead the agency with false claims that were not discovered until verification.102 HVG also failed to maintain records relevant to its U.S. sales, such as

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93 Id., citing, e.g., Gas Turbo Compressors, 62 FR at 24403.
94 Id.
95 Id., citing SSSS from Taiwan at Comment 23; The petitioners’ HVG Rebuttal Brief at 4 – 11.
96 Id., citing HVG’s July 20, 2018 submission at 30-31, and Exhibit SAC-19.
97 Id., citing VR at 27.
98 Id. at 15; The petitioners’ HVG Rebuttal Brief at 4 – 11.
99 Id., citing, e.g., HVG’s March 7, 2018 submission at Exhibit 3; VR at VE 10.C; HVG’s July 20, 2018 submission at 33 and Exhibit SAC-20.
100 Id., citing HVG’s December 21, 2018 submission at Attachment 1, at paragraph 21.
101 Id., citing Gas Turbo Compressors, 62 FR at 24403.
102 Id., citing VR at 2, 14-15; The petitioners’ HVG Rebuttal Brief at 4 – 11.
email communications and production orders.\textsuperscript{103} HVG claimed that it “discards” production orders which are “issued sometimes a month or two before the sales contract is issued.”\textsuperscript{104} Such a practice defies common business practice and is inconsistent with traceability requirements of the FSIS Siluriformes (including frozen pangasius fillets) inspection program and similar programs of the Aquaculture Stewardship Council (ASC) (considering HVG is ASC-certified).\textsuperscript{105}

- Moreover, HVG’s case brief simply ignores the background in which Commerce discovered the email communications, as well as the discovery during verification that HVG was regularly destroying email communications and production orders between the supplier and its three U.S. customers.\textsuperscript{106}

- The foregoing, and the record, firmly establishes that HVG’s and its customers’ failure to cooperate by not acting to the best of their abilities in reporting critical constructed export price data to Commerce justifies the application of a margin based entirely on AFA pursuant to 19 USC 1677e(b), especially given that Commerce endeavored three times to obtain clarifying information from HVG and its alleged U.S. customers to no avail.\textsuperscript{107}

- The record shows that there is a fundamental imbalance between the volume of inputs (whole live fish) reported by HVG and the volume of outputs (frozen fish fillets and by-products).\textsuperscript{108} Although alchemy is not possible, HVG could not explain how it was able to convert the volume of its whole live fish input into the larger total volume of unsoaked fillets and by-products it reported.\textsuperscript{109} HVG’s explanation was that “the math was not exact.”\textsuperscript{110} Commerce cannot reasonably rely on FOP data that could not be reconciled to the total production data and for which there was no explanation during the verification.\textsuperscript{111}

- As noted by Commerce at verification, HVG discarded pond and daily feed consumption records pertaining to the POR.\textsuperscript{112} Thus, Commerce was unable to verify HVG’s harvested whole live fish, fingerlings, and feed consumption data on a pond-specific basis or tie reported feed consumption FOPs to the daily records. Per \textit{Nippon Steel}, HVG should have

\begin{footnotesize}
\textsuperscript{103} Id. at 2, 19; See The petitioners’ HVG Rebuttal Brief at 4 – 11, 15 – 16.

\textsuperscript{104} Id.; The petitioners’ HVG Rebuttal Brief at 4 – 11.

\textsuperscript{105} Id. at VE-28.

\textsuperscript{106} See The petitioners’ HVG Rebuttal Brief at 4 – 11, citing VR at 14; The petitioners’ HVG Rebuttal Brief at 15 – 16.

\textsuperscript{107} Id., citing, \textit{generally}, HVG’s July 20, 2018 submission; HVG’s October 24, 2018 submission; HVG’s December 21, 2018 submission; The petitioners’ HVG Rebuttal Brief at 4 – 11.

\textsuperscript{108} See The petitioners’ HVG Brief at 17 – 19, citing the petitioners’ August 6, 2018 submission at 38-41, and Exhibit 1; VR at 2 & 16 (where Commerce noted that “the company was unable to explain this discrepancy”); The petitioners’ HVG Rebuttal Brief at 11 – 13.

\textsuperscript{109} See The petitioners’ HVG Brief at 16; The petitioners’ HVG Rebuttal Brief at 11 – 13.

\textsuperscript{110} See The petitioners’ HVG Brief at 17 – 19; The petitioners’ HVG Rebuttal Brief at 11 – 13.

\textsuperscript{111} See The petitioners’ HVG Brief at 17 – 19, citing, \textit{e.g.}, \textit{Krupp Thyssen Nirosta Gmbh v. United States}, 24 C.I.T. 666, 670-671, 2000 CIT LEXIS 91, *14-15, 22 Int’l Trade Rep. (BNA) 1718, Slip Op. 2000-89 (concerning, \textit{inter alia}, Commerce’s determination to rely on a total AFA rate for resellers because at verification Commerce noted several errors in their further manufacturing cost database, including, “in some cases the output weight exceeded the input weight.”) This decision was remanded, in part. However, Commerce’s determination was ultimately affirmed on remand in \textit{Krupp Thyssen Nirosta Gmbh v. United States}, 25 C.I.T. 1198, 2001 CIT LEXIS 125, 23 Int’l Trade Rep. (BNA) 2216, Slip Op. 2001-123; The petitioners’ HVG Rebuttal Brief at 11 – 13.

\textsuperscript{112} See The petitioners’ HVG Brief at 19, citing VR at 2, 23-24; The petitioners’ HVG Rebuttal Brief at 13 – 15.
\end{footnotesize}
maintained these records. Accordingly, HVG’s farming FOP data should be disregarded pursuant to 19 USC 1677e(b).

- HVG reported that it does not track labor by the hour but by the working day using the employee attendance sheets and assumes that each working day is comprised of eight hours of labor. HVG calculated the total number of labor hours by multiplying the total working days by the assumed eight hours per day. At verification, Commerce observed that HVG tracks attendance and that the overall output was divided evenly amongst the workers in one department, but in another, workers were paid on a production basis which can vary greatly. In other words, the eight-hour work-day assumption on which HVG calculated total labor hours could not be verified and understates the actual labor usage rate.

- Commerce found at verification that the “net weight variable in the US sales database (NETWGTU) is a weighted average of several NETWGTUs, while the NETWGTU in the FOP database is not weight averaged.” This means that the CONNUMs HVG assigned to its U.S. sales do not correctly correspond with the CONNUMS identified in the FOP dataset. The data, therefore, cannot be used for U.S. price-to-NV comparisons pursuant to 19 USC 1677b(a).

- HVG has claimed that it “is completely reasonable for HVG to average together the soaking percentages for merchandise used to fill an invoice but produced on different days.” HVG is wrong. It is not reasonable for HVG to report average weight gains in the net weight field in its U.S. sales database when it does not match the FOP database. HVG states, “[p]roducts contained in any particular invoice can take more than one day to produce. In such situations, HVG reports the weighted-average percentage.” This means that HVG’s net weight CONNUM reporting in the U.S. sales database is not on the same basis as its net weight FOP CONNUM reporting.

- HVG cites Pesquera Mares, which held that distinctions between premium and ultra-premium salmon were not determining factors in identifying identical or similar merchandise. Pesquera Mares is distinguishable from this review because it has already been decided that the net weight of different fish fillets does identify different CONNUMs and different merchandise for purposes of the less-than-fair-value calculation.

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113 See The petitioners’ HVG Brief at 19, citing Nippon Steel, at 1382-83; The petitioners’ HVG Rebuttal Brief at 11 – 13.
114 See The petitioners’ HVG Brief at 19 – 21, citing VR at 26; The petitioners’ HVG Rebuttal Brief at 18 – 19.
115 Id. at VE 20.
117 See The petitioners’ HVG Brief at 25 – 30, citing the petitioners’ August 6, 2018 submission at 20, 24 - 25; The petitioners’ HVG Rebuttal Brief at 16 – 18.
118 See The petitioners’ HVG Brief at 25 – 30, citing HVG’s August 16, 2018 submission at 16, footnote 16; The petitioners’ HVG Rebuttal Brief at 16 – 18.
120 See The petitioners’ HVG Brief at 25 – 30, citing HVG’s February 20, 2018 submission at 9; The petitioners’ HVG Rebuttal Brief at 16 – 18.
121 See Pesquera Mares, 266 F.3d 1372.
122 See The petitioners’ HVG Rebuttal Brief at 16 – 18, citing, e.g., Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Determination of No Shipments, and Partial Rescission of the Antidumping Duty Administrative Review; 2015-2016, 82 FR 42785 (September 12, 2017) and accompanying PDM at 12-16; Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results, Final Results of
Moreover, the record demonstrates that HVG sold unsoaked products to the U.S. during the POR, despite reporting to the contrary. Specifically, the ingredients list, nutrition label, and packaging label pertaining to one of HVG’s CONNUMs with a certain net weight due to soaking, was, in fact, not a soaked product. Otherwise, the ingredients list would have specified the use of an additive to increase the water content. Although HVG claims that “nutritional labels do not always list all ingredients, even when the ingredients are present,” American and Vietnamese law require that they do. Thus, HVG did not correctly report the amount of soaking water weight assigned to this product which results in and incorrect water weight for a substantial number of sales and FOPs.

At verification, HVG offered its Daily Production Reports to support “the quantity of live fish consumed and the quantity of finished goods produced by product category.” However, a review of these reports show that the yields are not CONNUM specific when examining the fish yield and soaking percentage for all its production of well-trimmed soaked fillets destined for the United States at a particular factory on a particular day. This is because the claimed yields are not based on actual data, and cannot even be tested against actual record data because in the Daily Production Report the weights are derived using the same formula for each production run. In fact, HVG does not dispute that its fish yields are not specific to product size and net weight CONNUM characteristics. It admits that it does not actually weigh the live fish input nor does it actually weigh the interim input after the trimming stage. Indeed, as shown in the Daily Production Report, these weights are derived using the same formula. As HVG’s allocation methodology ignores distinct differences in the physical characteristics of different CONNUMs, it has failed to comply with Commerce’s reporting requirement for these CONNUM characteristics – just as it did in the 11th administrative review, and as such, Commerce cannot rely on the FOPs submitted by HVG for purposes of its final results.

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123 See The petitioners’ HVG Brief at 25 – 30, citing HVG’s July 20, 2018 submission at Exhibits SAC-4 and SAC-14; HVG’s October 24, 2018 submission at Exhibit Q.22D.
124 Id.
126 Id., at 21 – 25, citing VR at 25 & 29; see also HVG’s July 27, 2018 submission at Exhibits SDQ-43 & 44.
127 See The petitioners’ HVG Brief at 21 – 25, citing the petitioners’ August 6, 2018 submission at 16 - 20.
128 Id., at 21 – 25, citing HVG’s August 16, 2018 submission at 15 - 16.
129 Id., at 21 – 25, citing HVG’s August 16, 2018 submission at 12.
130 Id., at 21 – 25, citing HVG’s July 27, 2018 submission at Exhibit SDQ-43.
131 See The petitioners’ HVG Brief at 21 – 25, citing Certain Frozen Fish Fillets from the Socialist Republic of Vietnam; Final Results and Partial Rescission of Antidumping Duty Administrative Review; 2013-2014, 81 FR 17435 (March 29, 2016) (Eleventh Review) and accompanying IDM at Comment I.
**Commerce’s Position:** For these final results we have applied total AFA in determining the rate for HVG for the reasons discussed below.

*HVG Destroyed Documents Kept in the Normal Course of Business*

A large and experienced company such as HVG, represented by experienced counsel, should be expected to maintain essential records concerning the production of frozen fish fillets and be able to respond to Commerce’s reporting requirements. HVG is a collapsed entity made up of the following companies: An Giang Fisheries Import & Export Joint Stock Company (Agifish), Asia Pangasius Company Limited, Europe Joint Stock Company, Hung Vuong Joint Stock Company, Hung Vuong Mascato Company Limited, Hung Vuong – Vinh Long Co., Ltd., and Hung Vuong – Sa Dec Co., Ltd. Agifish was a mandatory respondent as far back in time as the *Investigation*, and Commerce conducted a verification of Agifish’s questionnaire responses. Agifish was a separate rate respondent in many administrative reviews. Hung Vuong Corporation was also a separate rate respondent in an administrative review. In the *Ninth Review*, Commerce collapsed several companies into HVG, including Agifish, and selected HVG as a mandatory respondent. In addition to the *Ninth Review*, HVG was also a mandatory respondent in the *Tenth Review* and *Eleventh Review*. Notably, in the *Eleventh Review*, Commerce conducted a verification of HVG’s questionnaire responses in November 2015. HVG was again a separate rate respondent in the *Thirteenth Review*. As such, because HVG or one of its collapsed members, Agifish, have been respondents in many

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134 In its March 29, 2018 submission, when requesting that Commerce reconsider its rejection of HVG’s untimely Section D response, HVG stated that “The complexity of [Commerce’s] antidumping (AD) proceedings and questionnaires requires the assistance of experienced counsel…. this is precisely why HVG engaged experienced counsel.” See HVG’s March 29, 2018 submission at 2.


139 See *Ninth Review* and accompanying IDM at 3.


141 See *Eleventh Review* and accompanying IDM at 2.

administrative reviews and the investigation, and in several of those segments were verified, thus HVG is an experienced respondent.

During verification, Commerce discovered that HVG did not maintain source documents beyond a few months for certain key areas of inquiry during verification. Specifically, HVG stated that it does not maintain source documents for farming feed consumption, production orders related to its POR sales, and sales correspondence emails. We examine each of these below.

a. Feed Consumption

In past segments of this case, Commerce has determined that the fish feed FOP is important for respondents who are vertically integrated, i.e., respondents who farm the fish they process into fillets, as feed is a vertically integrated producer’s largest farming cost. Because this FOP is one of the driving factors in the NV for integrated respondents, Commerce issued specific questions on feed consumption in the initial questionnaire, i.e., case-specific questions which are not a part of the standard AD questionnaire. Moreover, in a supplemental questionnaire, Commerce asked for more information on HVG’s fish feed FOP. An examination of HVG’s responses to these questions shows that HVG provided monthly summary charts of feed inventory and usage, purchase invoices and daily inventory in and out records. It was unexpected, therefore, that when attempting to examine the source documents kept by HVG in the normal course of business HVG announced it had discarded its fish feed source documents and only kept the monthly summary sheets for Commerce to examine. In fact, HVG stated that it only keeps such source documents for a few months before discarding them. This is in sharp contrast to other FOPs that Commerce examined at verification, where HVG did keep various original source documents. For example, HVG retained source documents for the Daily Production Report consistent with the narrative from its questionnaire responses. It is also in sharp contrast to its answers in its questionnaire responses, where it stated it kept such records for many years.

b. Production Records

See, e.g., Eleventh Review at Comment IX; Tenth Review at Comment IV.

See Commerce’s January 8, 2018 letter (Original Questionnaire) at Appendix X, questions 18 – 25. Question 20, for example, asks HVG to provide farming records showing the individual amounts (kg) of fish feed entered into each pond during the POR for one farm, as well as fish feed purchase records to substantiate the reported quantities (in kg).

See Commerce’s July 6, 2018 letter at 14, questions 57 – 59. Question 57 requested, among other things, that HVG confirm the total amount of fish feed consumed for each POR month is accurate, and if not to revise the reported quantities, and to provide records kept in the normal course of business for April 2017 and March 2017. Question 58 requested that HVG provide feed consumption and purchase quantities for fingerlings. Question 59 requested that HVG reconcile the actual amount of feed entered into each pond to the number of whole live fish harvested, tied to internal reports and farming records kept in the normal course of business.

See HVG’s July 27 submission at 27 to 29, Exhibits SDQ 57 – 59.

See VR at 23 - 24.

Id.

See, e.g., VR at 24 (where HVG provided all of its live fish delivery notes).

See HVG’s May 29, 2018 submission at Exhibit 12.
In past segments of this case, Commerce has expressly stated that respondents must report CONNUM-specific information. Commerce stated this specifically with respect to HVG, for example, in the Eleventh Review, and applied facts available to HVG in that review for failing to report FOPs on a CONNUM-specific basis that reflected its production of fillet types it sold to the United States during the POR, and failing to report FOPs that accurately accounted for the water soaking levels of the fillets they sold to the United States. We also found in the Eleventh Review that Commerce’s requests for CONNUM-specific information were clear, that record evidence showed that HVG was aware of its obligation to report accurate FOP data, and that HVG had ample notification of the centrality of this issue to our analysis.

Because the importance of CONNUM-specific reporting, which Commerce has noted in many past segments of this proceeding, we issued additional questions concerning HVG’s production process in the initial questionnaire, i.e., case-specific questions which are not a part of the standard AD questionnaire. The Original Questionnaire repeatedly requests source documents. Moreover, in a supplemental questionnaire, Commerce asked for more

151 See Eleventh Review at Comment I. The water weight gained due to soaking fillets in preservatives is reported in field 3.7, “Net Weight Factor” (NETWGTU), and requires HVG to report “the percentage of weight as sold accounted for by any and all added ice, water, glazing, soaking etc. Report this item as a two-digit numeric variable. For example, if the product is glazed and soaked with a weight gain additive, and this total glazing and soaking accounts for 23 percent of the weight of the merchandise as sold, report the numeric characters “23” in this field. In another example, if the product is soaked with a weight gain additive, but is not glazed, and additional soaking weight accounts for 15 percent of the weight of the merchandise as sold, report the numeric characters “15” in this field.” See Original Questionnaire at C-7.

152 See Eleventh Review at Comment I. These warnings were also repeated in the cover letter to the Original Questionnaire.

153 See, e.g., Investigation at Comment 18; Eighth Review at Comment XXII; Eleventh Review at Comment I; and Thirteenth Review at Comment I.

154 See Original Questionnaire at Appendix X, questions 7 & 8. Question 7 requests that HVG “confirm that all per-unit FOP calculations account for only the production of frozen fish fillets having the same physical characteristics as subject fillets entered the United States during the POR in both the FOP numerator and denominator. Please provide production records from June 2017 to substantiate the FOP numerators and inventory records from June 2017 to substantiate the FOP denominator for two sample CONNUMs along with calculation worksheets.” Question 8 asks that HVG “identify the relevant documents that permitted your company to report CONNUM-specific FOPs to {Commerce} in this administrative review, and point to the relevant information in each document that allowed your company to derive CONNUM-specific FOPs.” Moreover, question 13 asks that HVG “provide copies of all production records which allowed your company and its affiliates to calculate the whole live fish weights, semi-finished fillet weights, finished fillet weights, as well as FOPs reported in the Section D response.” (emphasis not added). Id. Question 14 asks HVG to “explain in detail and identify all production records used to calculate the amounts of water added to products produced in during the POR as reported in the Section D response. Additionally, please provide June 2017 production records substantiating the amounts of water added to the two production runs reported in question 10, above.” Id. Question 15 requests that HVG “detail the manner in which your company and its affiliates were able to distinguish the amounts of water added to subject fillets that were entered into the United States during the POR from all other products (non-subject fillets and non-fillet products).” (emphasis in original). Id.

155 Under the “General Instructions Section,” under “Format” the questionnaire asks HVG to identify its source of information, requests copies of source documents necessary to understand the response and notes this information will be used by Commerce prepare for verification. Id. at General Instructions. Further, under the “General Instructions Section,” under “Instructions for Preparing the Response,” the questionnaire asks that HVG identify any
CONNUM-specific data, that the data be tied to source documents,156 and asked that, for “each reporting company, please provide a detailed description of the production process utilized for the production of the merchandise under consideration.”157 In several responses, HVG provided a description of the production process.158 In each instance, HVG stated that the production process begins with receiving whole live fish.159 Moreover, HVG reiterated on several occasions that the only production related documents that it produces are the Daily Production Report and finished goods inventory report.160

However, at verification, while examining whether HVG’s net weight variable in the CONNUM was accurate, Commerce discovered that the production process does not start with receiving the whole live fish; the production process begins with a production order, which is the document that instructs each factory on the quantity and specifications, i.e., CONNUM, to be produced.161 At verification, company officials explained for the first time that production orders are issued months in advance of sales contracts, because the production order is generated by the owner, and is a hand-written document he provides to the “HVG staff with production details because he knows what certain customers want.”162 At verification, HVG stated that only after receiving the production order do the factories produce the order, and that the factories have a general target for the amount of water weight gain by soaking for the fillets.163 When Commerce requested to examine the source document to verify the stated water weight gain target, among other things, company official stated they discarded all production orders.164 Although in its questionnaire responses HVG stated that its keeps this type of original production source documents for many years,165 in the end, Commerce was unable to examine any production orders at verification.166 This is in sharp contrast to other production documents Commerce examined at verification, where HVG did keep various source documents. For example, HVG retained source documents for the Daily Production Report and finished goods inventory report consistent with the narrative from its questionnaire responses.167

source documents maintained in the normal course of business, and again states that this information will be used by Commerce for verification purposes. Id.

156 See Commerce’s July 6, 2018 letter. For example, questions 43 - 46 request that HVG answer certain questions “using POR-specific production records.”
157 Id., at question 50.
158 See HVG’s March 7, 2018 submission at 7-8 and Exhibit 12; HVG’s July 20, 2018 submission at 11-12 and Exhibit SAC-12; HVG’s July 27, 2018 submission at 18-19 and Exhibit SDQ-50.
159 See HVG’s March 7, 2018 submission at 8; HVG’s July 20, 2018 submission at 11; HVG’s July 27, 2018 submission at 18.
160 See, e.g., HVG’s March 7, 2018 submission at D-9 and Exhibit D-12; HVG’s October 24, 2018 submission at 6; see also HVG’s July 27, 2018 submission at 2.
161 See VR at 19.
162 Id.
163 Id.
164 Id.
165 See HVG’s May 29, 2018 submission at Exhibit 12. We note that HVG bracketed the number of years these documents would be kept, however, that time period had not elapsed when Commerce conducted verification of HVG in March 2019.
166 See VR at 19.
167 See e.g., VR at 24-25 (where HVG provided daily records for the Daily Production Report and finished goods inventory report of processed fish).
c. Sales Negotiations

The Original Questionnaire requires HVG to “Describe how your company sets the prices of the merchandise it exports to the United States. Does your company negotiate prices directly with your customers? Are these prices subject to review by or guidance from any governmental organization? Provide evidence of any price negotiations.” It also requires HVG to “Describe your agreement(s) for sales in the United States (e.g., long-term purchase contract, short-term purchase contract, purchase order, order confirmation). Provide a copy of each type of agreement and all sales-related documentation generated in the sales process (including the purchase order, internal and external order confirmation, invoice, shipping and export documentation, and Customs entry documentation) for a sample sale in the U.S. market during the POR.” In its response to these questions, HVG provided evidence of sales negotiations which occurred well before the date of its submission. Furthermore, HVG provided additional evidence of sales negotiations in a supplemental response as well.

As an experienced respondent which has undergone verification before, HVG is well aware that for many, many years the verification outline has stated that for sales traces Commerce will examine sales negotiation correspondence. However, at verification, Commerce observed that “HVG does not keep emails that confirm sales for more than a few months, in order to save space and reduce clutter in the company records. Company officials stated that the emails from a sales person during the POR, …, were deleted in their entirety because she is no longer employed by HVG. According to company officials, …, the Managing Director of HVG, gives final approval to prices, quantities, and other terms of sales. As noted below, we were unable to verify the negotiation of prices, quantities, and terms of sales because HVG deleted the emails that would have provided this information.” Despite HVG’s assertions to the contrary, we were able to retrieve some email correspondence during the POR, which we discuss below.

In sum, HVG prevented Commerce from examining key source documents during verification. Specifically, as noted above, HVG discarded its source documents for fish feed, production records that would allow Commerce to trace what CONNUMs were produced, and sales negotiation emails. As such, in accordance with sections 776(a)(2)(A) and (C) of the Act, we find that HVG withheld information that has been requested by Commerce because it claims to have destroyed certain records that Commerce found at verification, and significantly impeded this proceeding by not retaining information it should have known Commerce would examine at verification.

While HVG claims that its discarding of production orders is of no consequence because HVG did not rely on information in the production orders in its response, and because the orders

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168 See Original Questionnaire at question 2.g.
169 Id., at question 4.c.
170 See HVG’s January 30, 2018 submission at Exhibit 7.
171 See HVG’s July 20, 2018 submission at Exhibits SAC–1 & 2.
172 See, e.g., Commerce’s March 4, 2019 letter at 12.
173 See VR at 8.
174 Id., at 14 – 15.
themselves are not relevant to its response, we disagree. Production orders are an integral part of HVG’s sales, as they are one of the key documents that reflects the terms of sale between the buyer and the seller. Production order are therefore required for the sales trace during verification. In particular, Commerce uses the production orders to link production documents to the invoices and other sales documents, i.e., production orders help to tie the information reported in a respondent’s Section D submission to the information reported in its Section C submission. In this particular case, production orders take on an added importance because HVG appears to know months in advance the exact specifications (quantity, product form, size, net weight due to soaking, etc.) of the fish fillets its customers will order at a future date.175 In addition, production orders are especially important in determining the relationship between HVG and its customers, as they could indicate shipping terms, customer names, the names of the ultimate purchasers, or whether HVG’s customers were functioning as its agents. HVG’s convenient discarding of these documents precludes Commerce from examining any of this information through the production orders.

As a result of the above, pursuant 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. While the courts have held the application of AFA impermissible where companies do not keep records in the ordinary course of business,176 this is not the case here. Moreover, while the standard for cooperation does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.177 As detailed extensively above, HVG produces the records sought by Commerce in the ordinary course of business, but chose to discard them so that Commerce would not be able to examine them at verification.178 To allow HVG to determine which source documents it will allow Commerce to examine at verification is to allow HVG to control this proceeding. While HVG stated it is its normal business practice and industry practice to not “bother” to keep such records,179 the courts have found that the statute “does not condone inattentiveness, carelessness, or inadequate record keeping.”180 In Thyssen Stahl, the Court of Appeals for the Federal Circuit (CAFC) also found that “internally generated documents cannot, for the purposes of verification, replace the actual source documents.”181 As detailed above, HVG is an experienced respondent and should have taken reasonable steps to keep and maintain full and complete records documenting the information

175 See Verification report at 19.
177 See Nippon Steel.
178 In its March 29, 2018 submission, when requesting that Commerce reconsider its rejection of HVG’s untimely Section D response, HVG stated that it “has participated in numerous segments of these proceedings, and it knows well the extent of information required in these cases. See HVG’s March 29, 2018 submission at 2.
179 HVG stated, “like any other seafood processor simply does not bother keeping daily handwritten records for a long time once the necessary data has been transferred to more regularized monthly or computerized reports.” See Nippon Steel.
that an experienced respondent should anticipate being called upon to produce.\(^\text{182}\) In future reviews, should HVG be selected as a respondent, Commerce may examine these types of original source documents.

**HVG’s Relationships with its Customers**

The relationship between HVG and its U.S. customers/importers of record (for brevity’s sake, we will refer to these companies as the customers) was extensively probed during the course of this review, due to these companies’ employment of ex-HVG employees, and due to the sales terms offered to these companies. Throughout the review Commerce issued extensive questions concerning HVG’s relationship with its customers.\(^\text{183}\) Although HVG stated it is not affiliated with its customers and its sales are made at arm’s-length,\(^\text{184}\) we note that one of HVG’s prior employees was a manager at Agifish, was involved in selling frozen fish fillets to the U.S. market, and is now employed by one of HVG’s U.S. customers.\(^\text{185}\) This individual incorporated a company in the United States, whose name bears a striking resemblance to HVG’s, and then changed the name of this company during the POR.\(^\text{186}\) In response to Commerce’s questions about this company, HVG stated that it “had no role in the establishment and dissolution of this entity.”\(^\text{187}\) HVG also stated that the “formation and dissolution of this company is not relevant to this case,” however, we disagree.\(^\text{188}\) We sought additional information about why a former HVG employee would use HVG’s name in beginning a business in the United States, and why HVG would then seek this individual out to conduct business transactions, and issued supplemental questions to HVG’s customers. We note that HVG’s customers did not answer many of Commerce’s supplemental questions, which HVG acknowledged in its response.\(^\text{189}\)

For each customer, the following questions went unanswered:

Please provide a list of all individuals and companies affiliated or formerly affiliated with your company. In responding to this question, refer to the definition of “affiliated person” provided in the “Glossary of Terms” at the Attachment. Describe also the activities of each affiliated company, with particular attention to those involved with the merchandise under consideration. For those affiliated through stock ownership, specify the percentage of ownership and cross ownership among the companies listed.\(^\text{190}\)

\(^{182}\) See Nippon Steel.

\(^{183}\) See Commerce’s July 6, 2018 letter at questions 31 – 38, where Commerce notes that HVG was affiliated with M&T Seafood in prior reviews and that key personal from M&T were employed at HVG’s U.S. customers/importers of record during the POR. See also the entirety of Commerce’s October 12, 2018 letter and Commerce’s December 14, 2018 letter, both of which focus exclusively on this issue.

\(^{184}\) See, e.g., HVG’s October 24, 2018 submission at 9.

\(^{185}\) See HVG’s July 20, 2018 response at 31.

\(^{186}\) See the petitioners’ March 13, 2018 submission at Exhibit 1. Although the name of the company can easily be found in public records, the actual name has been bracketed by parties.

\(^{187}\) See HVG’s October 24, 2018 submission at 4.

\(^{188}\) Id.

\(^{189}\) See, generally, HVG’s December 21, 2018 submission. “HVG believes its customers have now provided all information they are willing to provide. Id. at 3.

\(^{190}\) One of the three customers answered this question; however, its identity is proprietary.
Please explain whether any individuals currently or formerly employed by your company are or were at any time employed by another firm that import(ed) the merchandise under consideration. If so, provide the name(s) of any such individuals and the firm(s) in question.

Provide copies of any and all agreements (including, but not limited to, service, duty reimbursement, or purchase/supplier agreements, etc.) between your company and any and all member(s)/affiliates(s) of HVG, including any of HVG’s employees, directors, managers, and/or owners.191

Please discuss in detail the process you followed in order to purchase the subject merchandise from HVG. Describe the sales negotiations between you and HVG for the subject merchandise. Identify the names and titles of all individuals who were involved in the sales negotiation process, including any third-party individuals (e.g., your resale customers, ultimate U.S. purchasers). Provide copies of all sales negotiation documents (e.g., contracts, proposals, purchase orders, correspondence, etc.).

Please describe the process of how your company found its ultimate U.S. buyers of the subject merchandise covered by this review. Additionally,

- Explain whether you introduced these purchasers to HVG or vice versa. How did these introductions take place (e.g., over the phone, by email, or in person, etc.)?

- Describe the roles played by all individuals or entities within and outside your company involved in this process.

- Describe the process of how you set prices and volume for the subject merchandise.

Provide evidence of price negotiations between HVG, your company, and the ultimate U.S. purchaser for invoices

Provide all sales documents (including invoices you issued to your U.S. customers) pertaining to your resales of the merchandise you purchased from HVG pursuant to invoices … Also provide documentation demonstrating that you received payment from your U.S. customer(s) for each of these resales.192

These questions were an attempt to probe HVG’s possible affiliation with these companies, the roles of its ex-employees at these companies, how HVG does business with these companies and whether these sales are made at arm’s length, and information about sales to the ultimate purchasers, among other things.

191 One of the three customers answered this question; however, its identity is proprietary.
192 See, generally, HVG’s December 21, 2018 submission.
As noted above, at verification Commerce found that HVG discarded email correspondence with its customers. However, at verification, Commerce discovered some email chains from the POR.\footnote{See VR at 2.} Although the bulk of the email chains are proprietary, they indicate the following:

- HVG inquires directly with the ultimate purchasers’ customers about payment and movement logistics;
- The ultimate purchasers’ names cannot appear on any import documents;
- One email provided terms of sale which were not what HVG reported for that sale, and company officials could not explain why;
- Production orders from the ultimate purchaser were referenced by HVG.

HVG would not provide the purchase orders referenced in these emails. In fact, when examining this issue at verification, Commerce requested the purchase order for this sale and others, and company officials stated that they do not have copies of the referenced POs and believed that they were between the importer and the ultimate purchaser.\footnote{Id., at 14 – 15.}

Moreover, in its questionnaire responses HVG stated that:

Neither HVG personnel nor personnel of any HVG affiliates conduct sales or marketing visits in the United States to visit the ultimate purchasers of HVG’s U.S. customers for the purposes noted above. HVG does not sell subject merchandise to the downstream ultimate customers of its U.S. customers. HVG does send its representatives to the U.S. occasionally (\textit{i.e.}, several times a year) to visit its U.S. customers and attend trade fairs. HVG’s customers may introduce HVG to the ultimate U.S. purchasers at these trade fairs. But these are typical general promotional visits and activities to explain the types, quality, and availability of the seafood products it supplies to the U.S.\footnote{See HVG’s October 24, 2018 submission at 9.}

However, at verification Commerce discovered that HVG officials directly visited both customers and ultimate purchasers once or twice a year. HVG did not only interact with the ultimate purchasers at trade fairs, as HVG claimed.\footnote{See VR at 8 (“We asked company officials about \{HVG’s owner\} May 2017 visit to Los Angeles, and nature of his meeting with \{his former employee, now employed at one of HVG’s three customers\}. Company officials explained that \{HVG’s owner\} often visits various customers and ultimate customers in the U.S. from time to time, typically once or twice a year. According to company officials, the visits are typically general in nature to discuss possible sales, products, prices and markets in the future. HVG stated that \{its owner\} will visit them at trade fairs, such as the Boston Seafood show, or at their offices.”).} This finding at verification directly contradicts HVG’s questionnaire responses. Moreover, HVG admits that the ultimate purchasers also visit HVG.\footnote{See HVG’s October 24, 2018 submission at Exhibits Q.7 & Q.8.} The continued interaction between HVG, its customers, and the ultimate purchasers could explain how it is that HVG’s owner knows months in advance the exact orders its customers will place, and personally creates the production order in advance of those orders.\footnote{Id.} Furthermore, HVG’s customers’ refusal to answer questions about their relationship
with HVG (including a potential affiliation relationship), the discovery of allegedly deleted emails at verification that indicate that HVG works directly with ultimate purchasers, its refusal to provide production orders requested at verification, and HVG’s belated admission that it directly visits its ultimate purchasers seriously call into questions HVG’s statement that it is not affiliated with its customers and its sales are made at arm’s-length.199

Further, this raises the concern that HVG may be in a principal/agent relationship with its customers. Commerce has previously found principal/agent relationships to exist where there is no formal agreement, and in such situations, Commerce examines a range of criteria, as explained in *SSBs from India*: (1) the producer’s role in negotiating prices and other terms of sale; (2) the extent of a foreign producer’s interaction with U.S. customers; (3) the producer’s marketing of the product during the pre-sale period; (4) whether the identity of the producer on sales documents inferred an agency relationship; (5) whether the agent/reseller takes title to the merchandise and bears risk of loss; (6) whether the agent/reseller takes inventory; and (7) whether the agent/reseller processes or otherwise adds value to the merchandise.200 HVG has noted that in some past cases Commerce found that minimal contact between a producer and the ultimate purchasers are not sufficient to find a principal/agent relationship where there is no formal agency agreement and the parties do not otherwise negotiate prices or other material terms of sale.201

Based on the above, we do not have the necessary information to determine the full extent of the relationship between HVG and its customers, including any potential affiliate relationship or any principal/agent relationship. Further, the evidence we do have suggests, in part, that there is at least a principal/agent relationship with respect to certain criteria. For the second criterion, unlike *SSBs from India*, where we found there was no evidence of direct communication between the producer and ultimate purchasers, we find here that there is evidence of communication between HVG and the ultimate purchasers, as detailed above. We also agree with the petitioners that there is at least some evidence that, under the fifth criterion, HVG still bears the risk of loss for the sale.202

At least three important pieces of information are missing from the record. First, at verification, Commerce would have examined HVG’s role in negotiating prices and other terms of sale with its customers and the ultimate purchasers, the extent of HVG’s interaction with its customers and ultimate purchasers, and HVG’s marketing of the fish fillets during the pre-sale period. However, HVG precluded Commerce from doing so because it preferred to “save space and reduce clutter in the company records,” and therefore deleted numerous emails confirming sales.203 This lack of information impeded Commerce’s ability to accurately assess the first, second and third criteria. Second, as noted above, HVG’s customers also did not provide answers to Commerce’s questions, which could have shed light on numerous other affiliation and principal/agent relationship criteria. Third, with respect to the discarded production orders, we find these documents are key to understanding the terms of sale between the buyer and the seller.

199 See, e.g., HVG’s October 24, 2018 submission at 9.
200 See, e.g., *SSB from India* at Comment 2.
201 See, e.g., *SSB from India* at Comment 2; Isos at Comment 1; *Crankshafts* at Comment 3.
202 See Verification Report at Exhibits 11A – 12E.
203 See VR at 8.
Commerce uses the production orders to link production documents to the invoices and other sales documents. In this particular case, production orders take on an added weight because HVG knows months in advance the exact specifications of the fish fillets its customers will order at an unspecified future date. In addition, production orders are especially important in determining the relationship between HVG and its customers, as they could indicate shipping terms, customer names, the names of the ultimate customers, or whether HVG’s customers were functioning as its agents. HVG’s convenient discarding of these documents precludes Commerce from examining these criteria through the production orders, and impedes Commerce’s ability to fully consider at least the first and second criteria.

Therefore, in 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. While the courts have held the application of AFA impermissible where companies do not keep records in the ordinary course of business,204 this is not the case here. Moreover, while the standard for cooperation does not require perfection and recognizes that mistakes sometimes occur, it does not condone inadequate record keeping.205 As detailed extensively above, HVG produces the records sought by Commerce in the ordinary course of business, but chose to discard them (emails) or not provide them (production orders) so that Commerce would not be able to examine them at verification.206 Furthermore, by not providing these emails until verification, and admissions by HVG at verification precluded Commerce from further probing HVG’s relationships with its customers. To allow HVG to determine which source documents it will allow Commerce to examine at verification is to allow HVG to control this proceeding. As detailed above, 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.207

We find that HVG has failed to cooperate in responding to requests for information with respect to its relationship with its customers. As such, we cannot determine whether we have a correct Section C database which would include the selling expenses incurred by HVG’s U.S. selling agent, with which to calculate a margin for HVG. The scale of the problem is such that

204 See De Cecco, 216 F.3d 1027; Borden, 4 F. Supp. 2d 1221, 1247.
205 See Nippon Steel.
206 In its March 29, 2018 submission, when requesting that Commerce reconsider its rejection of HVG’s untimely Section D response, HVG stated that it “has participated in numerous segments of these proceedings, and it knows well the extent of information required in these cases. See HVG’s March 29, 2018 submission at 2.
207 See Nippon Steel.
Commerce cannot use HVG’s Section C questionnaire responses to determine an accurate and reliable dumping margin.208

Inaccurate CONNUM Reporting

As stated above, in past segments of this case, Commerce has expressly stated that respondents must report CONNUM-specific information. Commerce stated this specifically with respect to HVG, for example, in the Eleventh Review, and applied facts available to HVG in that review for failing to report FOPs on a CONNUM-specific basis that reflected their production of fillet types it sold to the United States during the POR, and failing to report FOPs that accurately accounted for the water soaking levels of the fillets they sold to the United States.209 We also found in the Eleventh Review, that Commerce’s requests for CONNUM-specific information were clear, that record evidence showed that HVG was aware of its obligation to report accurate FOP data, and that HVG had ample notification of the centrality of this issue.210 The court has sustained our determination with respect to HVG in the Eleventh Review, including our decision to require HVG to maintain records on a CONNUM-specific basis.211

Because the importance of CONNUM-specific reporting, which Commerce has noted in many past segments of this proceeding,212 we issued additional questions concerning HVG’s production process in the initial questionnaire, i.e., case-specific questions which are not a part of the standard AD questionnaire.213 The Original Questionnaire repeatedly requests source

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208 See Certain Kitchen Appliance Shelving and Racks from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 36656 (July 24, 2010) (Kitchen Racks) and accompanying IDM at Comment 16; Certain Biaxial Integral Geogrid Products from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 82 FR 3284 (January 11, 2017) (Geogrids) and accompanying IDM at Comment 1.

209 See Eleventh Review at Comment I. The water weight gained due to soaking fillets in preservatives is reported in field 3.7, “Net Weight Factor” (NETWGTU), and requires HVG to report “the percentage of weight as sold accounted for by any and all added ice, water, glazing, soaking etc. Report this item as a two-digit numeric variable. For example, if the product is glazed and soaked with a weight gain additive, and this total glazing and soaking accounts for 23 percent of the weight of the merchandise as sold, report the numeric characters “23” in this field. In another example, if the product is soaked with a weight gain additive, but is not glazed, and additional soaking weight accounts for 15 percent of the weight of the merchandise as sold, report the numeric characters “15” in this field.” See Original Questionnaire at C-7.

210 See Eleventh Review at Comment I.


212 See, e.g., Investigation at Comment 18; Eighth Review at Comment XXII; Eleventh Review at Comment I; and Thirteenth Review at Comment I.

213 See, e.g., Original Questionnaire at Appendix X, questions 7, 8, 13 - 15. Question 14 asks HVG to “explain in detail and identify all production records used to calculate the amounts of water added to products produced during the POR as reported in the Section D response.” Id. Question 15 requests that HVG “detail the manner in which your company and its affiliates were able to distinguish the amounts of water added to subject fillets that were entered into the United States during the POR from all other products (fillets and non-fillet products).” (emphasis not added). Id. We also referenced this in the cover letter to the Original Questionnaire.
documents. Moreover, in a supplemental questionnaire, Commerce asked for more CONNUM-specific data, that the data be tied to source documents.

Vietnamese fish fillet producers soak their fillets in preservatives, and as a result, the fillets gain water weight, which respondents are required to accurately report in the CONNUM in the field “NETWGTU.” At verification, Commerce found that when reporting the NETWGTU part of the CONNUM, HVG reported the weighted average of the production runs for an invoice, rather than the precise amount of water weight gained by fillets during each production run. HVG stated it has only a general target for the amount of water weight gain by soaking for the fillets, rather than a precise amount that is replicated across all production runs. Thus, in order to know exactly how much water weight was gained by fillets, Commerce would need to know which soaking formula HVG used to soak its fillets for each production run. This information likely would have been on HVG’s production orders because, as we found at verification, the production runs begin with a production order. Again, HVG discarded all of its production orders. While HVG provided one soaking formula, and asserts that this formula was used throughout the POR, it is dated before the POR. We therefore cannot confirm which formulas HVG used throughout the POR, or exactly how much water weight was gained by the fillets in each production run, in part because we lack HVG’s production orders.

At verification we observed that HVG’s invoices, rather than reflecting the various actual CONNUMs produced, instead represent an average of several CONNUMs. More specifically, an examination of the Daily Production Report indicates that for each sale, production occurs over several days, and at the end of an order, HVG sums up the unsoaked and soaked fillet weights to calculate an average NETWGTU for that particular sale. The value reflected in the invoice is therefore an average of all the productions runs for that sale.

For some invoices, for example the first preselected sales trace, an examination of the daily production shows that rounding each day’s production to the nearest decimal results in the same NETWGTU for each line item as well as the report’s total, and therefore, for the entire sale. In other words, reporting one NETWGTU, and therefore one CONNUM, for that invoice is accurate, as the value of NETWGTU for the different daily production runs are all equal. However, for other sales, for example the first surprise sales trace, an examination of the daily production report shows that rounding the daily production to the nearest decimal results in five different NETWGTUs, and therefore, five CONNUMs should have been reported, but HVG only reported one CONNUM for that sale. In response, HVG essentially argues that it would be too burdensome for it to report these different CONNUMs. However, we note the Daily

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214 See Original Questionnaire at the “General Instructions Section,” under “Format” and “Instructions for Preparing the Response.”
215 See Commerce’s July 6, 2018 letter.
216 See Eleventh Review at Comment 1; see also Original Questionnaire at c-7 (“if the product is soaked with a weight gain additive, but is not glazed, and additional soaking weight accounts for 15 percent of the weight of the merchandise as sold, report the numeric characters ‘15’ in this field”).
217 See VR at 19.
218 Id., at VE 24. We note this soaking formula contains no target water weight gain percentages.
219 Id. at VE 11a.
220 Id., at VE 12a.
Production Report lists each production run separately. HVG therefore could have properly reported their sales on a CONNUM-specific basis using the information in the Daily Production Report.\textsuperscript{221} Put another way, HVG has not reported CONNUM-specific sales data as required by Commerce’s repeated warnings in this case, and Commerce’s instructions.

In the Eleventh Review we found that HVG uses very different soaking formulas based on the requirements of different markets, and that when HVG comingles products with different soaking percentages Commerce cannot make an apples-to-apples comparison between FOPs and sales.\textsuperscript{222} This determination has been sustained by the court.\textsuperscript{223} We face a nearly identical situation in this review, where we find that HVG did not accurately report the water included in the weight of the product as sold, and that HVG has the data that would have enabled it to accurately report the water weight, but chose not to. In other cases, Commerce has found that allocation methodologies that average CONNUM characteristics may result in a reporting methodology that is not accurate because there is less variation in the calculation of NV, even though there are clear differences in the physical characteristics of the CONNUMs and in the actual amount of inputs used.\textsuperscript{224}

With respect to parties’ arguments that HVG does not weigh the live whole fish or the fillets after the trimming stage, at verification we observed HVG weighing these inputs.\textsuperscript{225} Thus, we find that HVG does weigh the live whole fish or the fillets after the trimming stage.

Regarding parties’ arguments concerning the mislabeling of certain sales and whether HVG soaked the fillets sold to the United States, we find that it has. We note that besides the whole live fish, preservatives which cause the fillet to gain water weight, such as STTP, is a commercially significant FOP reported by HVG.\textsuperscript{226} This is because preservatives like STTP allow HVG’s fillets to gain a great deal of water weight, allowing HVG to essentially sell water to its customers. Put another way, a fillet weighing 0.75 pounds, can be sold as a one-pound fillet after soaking, increasing profit and reducing costs on that fillet. Due to the commercial importance of soaking chemicals such as STTP, we disagree with HVG that the exclusion of such chemicals from the ingredients list, nutrition label, and packaging is minor. However, we also find that the Daily Production Reports reviewed by Commerce at verification indicate that HVG’s sales to the United States during the POR underwent soaking because they indicate the weight of the fillets before soaking and the weight of the fillets after soaking.\textsuperscript{227}

Nevertheless, the petitioners argue that HVG mislabeled some of its sales to the United States, as reflected on the ingredients list, nutrition label, and packaging. With respect to this irregularity, Commerce takes such allegations seriously, and we share with CBP any such evidence gathered.

\textsuperscript{221} See HVG’s Rebuttal Brief at 21 – 23.
\textsuperscript{222} See Eleventh Review at Comment 1.
\textsuperscript{224} See Certain Kitchen Appliance Shelving and Racks from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 36656 (July 24, 2009) and accompanying IDM at Comment 16; Geogrids at Comment 1.
\textsuperscript{225} See VR at 10 and Exhibit 14A.
\textsuperscript{226} HVG states that its fillets gain 30%, plus or minus 5%, or 25 - 35%. See Verification Report at 9 and 19.
\textsuperscript{227} See, e.g., VR at 19 and VE 11A – 12E.
in the course of our proceedings. Furthermore, Commerce fully complies with each CBP request for information, in accordance with U.S. law.\textsuperscript{228} As such, this concern is best addressed directly under CBP’s authority under section 592 of the Act to investigate fraud, gross negligence, and negligence.\textsuperscript{229}

With respect to parties’ arguments about the live fish yields based on product forms, we find that HVG reported different yields based on the forms and did not report the same yield rate for all forms. The Daily Production Report cited by HVG indicates as much.\textsuperscript{230}

In addition, in 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. While the courts have held the application of AFA impermissible where companies do not keep records in the ordinary course of business\textsuperscript{231}, this is not the case here as HVG had the records available to it to report accurate CONNUMs in its U.S. sales and FOP databases. As detailed above, 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.\textsuperscript{232} This Court has already sustained Commerce’s decision to require HVG to maintain records on a CONNUM-specific basis.\textsuperscript{233} Moreover, while the standard for cooperation does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.\textsuperscript{234} As AFA, because HVG did not properly report CONNUM-specific sales and FOP data, we find that we do not have correct Section C and Section D databases with which to calculate an accurate margin for HVG. Commerce therefore cannot use HVG’s Section C and Section D questionnaire responses to determine an accurate and reliable dumping margin.\textsuperscript{235}

\textbf{HVG Failed to Demonstrate the Accuracy of its FOPs}

HVG reported that it consumes whole live fish to produce frozen fish fillets, and that the remainder of the fish is by-products such as fish skin and fish waste.\textsuperscript{236} To report FOPs for whole live fish and various by-products, in a simple example, HVG divides the amount of whole live fish consumed (numerator) by the amount of fillets produced (denominator), resulting in a

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 76 FR 2336 (January 13, 2011) and accompanying IDM at Comment 4.
\item See Globe Metallurgical Inc. v. United States, 722 F. Supp. 2d 1372, 1381 (CIT 2010).
\item See, e.g., HVG’s July 27, 2018 submission at Exhibit SDQ-43.
\item See De Cecco, 216 F.3d 1027; Borden, 4 F. Supp. 2d 1221, 1247.
\item See Nippon Steel.
\item See An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States, 287 F. Supp. 3d 1364, 1371 (CIT 2018) (“Commerce’s decision to require CONNUM-specific reporting and to apply facts otherwise available to HVG and TAFISHCO is reasonable.”).
\item Id.
\item See Kitchen Racks at Comment 16; Geogrids at Comment 1.
\item See, e.g., HVG’s May 29, 2018 submission at 8.
\end{enumerate}
\end{footnotesize}
ratio of the amount of whole live fish needed to produce one kg of fillet.\textsuperscript{237} The same holds true for by-products. When reporting FOPs for whole live fish and various by-products, HVG uses the same denominator – fillets produced.

HVG reported consumption amounts for whole live fish, fish fillets and by-products, which Commerce verified.\textsuperscript{238} At verification, however, Commerce discovered that the POR weight total of unsoaked fillets, plus the total weight of the by-products was many millions of kgs higher than the total weight of the whole live fish consumed by HVG during the POR.\textsuperscript{239} Put another way, the output was much higher than the input, which is a mathematical impossibility. Commerce asked HVG to explain this discrepancy at verification and it stated that each of the numbers was correct, the “math was not exact,” and it could not explain how the output was so much higher than the input.\textsuperscript{240} This calls into question the accuracy of all of HVG’s FOPs, and not just its whole live fish and by-products FOPs, because it is the weight of the fillets that is the denominator for all of HVG’s FOPs.

Although at verification HVG could not explain this discrepancy, in its briefs it attempts to explain away this discrepancy as water weight gain by the by-products. As discussed above, HVG soaks its fillets in preservatives such that they gain a considerable amount of water weight. HVG, however, has never claimed that it soaks its by-products to add to their weight, and there is no compelling evidence on the record to support such a contention. Assuming, \textit{arguendo}, that HVG’s by-products retain some\textsuperscript{241} extra water weight while being processed, it seems highly improbable that the weight gain would be in the millions of kgs. In fact, an examination of the weight gains for fillets due to soaking, and the water HVG claims its by-products absorbs, indicates that the two share almost the same percent of water weight gain.\textsuperscript{242} Put another way, HVG claims its by-products gained a significant amount of water weight simply through the production process without soaking. If this were true, there may be little need for HVG to soak its fillets because they too might naturally absorb water like its by-products.

HVG argues that unsoaked fillets, by-products and whole live fish were correctly reported and verified by Commerce.\textsuperscript{243} HVG also argues that should Commerce disagree, it should only consider disallowing a by-product offset for HVG. Given that these figures tied to HVG’s financial statements, and given that these figures result in a mathematical impossibility, we have not limited our findings to just HVG’s by-products, but to HVG’s unsoaked fillets and whole live fish figures as well. In other cases, where a respondent has reported mathematically impossible consumption and production figures, Commerce has applied AFA.\textsuperscript{244} The importance underlying FOP data is clearly expressed in our practice of verifying a respondent’s FOPs, which

\textsuperscript{237} See, e.g., Original Questionnaire at Section D.
\textsuperscript{238} See VR at 16 and VE 10B.
\textsuperscript{239} Id., at 2 and 16.
\textsuperscript{240} Id., at 16.
\textsuperscript{241} See HVG’s Case Brief at 4. In fact, HVG states that “some amount” of water may be gained.
\textsuperscript{242} See VR at VE 10.B, sections 2 & 4.
\textsuperscript{243} See HVG’s Rebuttal Brief at 14.
\textsuperscript{244} See Steel Wire Garment Hangers from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 2012–2013, 80 FR 13332 (March 13, 2015) and accompanying IDM at Comment 1 (“It is mathematically impossible to create one kg of subject merchandise with less than one kg of raw materials.”).
forms the basis of the NV calculation. For example, in STR, Commerce resorted to the use of total AFA when the verifiers were unable to reconcile the total production quantity that was the underlying denominator for a respondent’s FOP data.

With respect to labor, HVG notes that it previously reported that it assumes an eight hour work day. At verification we attempted to determine whether this was an accurate estimate, but rather than stating that the regular work day at HVG was eight hours, we found that HVG does not track workers hours at all, just attendance. HVG stated that workers are paid based on their production, and assumes workers work an eight hour day, but also admitted that workers work until there are no more fillets to process. As such, contrary to HVG’s arguments, we cannot assume that an eight hour work day is a reasonable estimate of the number of hours worked.

With respect to the petitioners’ argument that labor is not tracked on a CONNUM-specific basis, we find this argument to be moot. As HVG is unable to report accurate labor hours, we cannot say whether they were correctly reported on a CONNUM-specific basis.

With respect to parties’ arguments that HVG’s fish feed FOP is not accurate, we note that the reporting period for farming FOPs was raised in the Tenth Review. In that review, HVG requested to report farming FOPs based on the following: the fingerlings’ growth in the ponds into live whole fish, which are then shipped to the processing plants, i.e., reporting data that follows the fish through the farming stage. This would necessarily means reporting farming FOPs consumed many months before the POR. In that review, Commerce declined to adopt such a reporting methodology because record evidence indicated that the farming of pangasius, and hence the production of frozen pangasius fillets, is not seasonal. Because in this review HVG reported feed consumption based on the POR, and did not follow the fish through the farming stage, its POR FCR would not match the FCR from the October 2016 AOR. While the petitioners provide an analysis of these numbers, we find that comparing different time periods is not an apples-to-apples comparison.

With respect to parties’ comments on HVG discarding pond and daily feed consumption records pertaining to the POR, and therefore, Commerce was unable to verify HVG’s harvested whole live fish and fingerlings, we find that we were able to verify those two FOPs. More specifically,

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245 See Certain Steel Threaded Rod from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 8907 (February 27, 2009) (STR) and accompanying IDM at Comment 5; Small Diameter Graphite Electrodes from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 55680 (September 11, 2013) and accompanying IDM at Comment 3.

246 See STR at Comment 5.

247 See HVG’s Brief at 11.

248 See VR at 26.

249 Id., at 26.

250 See Tenth Review at Comment XX.

251 Id.

252 Id.

253 Id. Even the Vietnam Association of Seafood Exporters and Producers indicated that the growing of pangasius was seasonal until about 1999, but is no longer seasonal. Id.
the verification report indicates that HVG’s destruction of its daily farming records precluded Commerce from verifying feed consumption data, not whole live fish and fingerling data.254

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. While the standard for cooperation does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.255 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. As AFA, because HVG’s FOPs are unreliable, we find that we do not have a reliable Section D database with which to calculate an accurate margin for HVG. Commerce therefore cannot use HVG’s Section D questionnaire responses to determine an accurate and reliable dumping margin.256

Total AFA

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 request, 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.257 The 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.”258 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.”259

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.

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254 See VR at 23 – 24.
255 Id.
256 See Kitchen Racks at Comment 16; Geogrids at Comment 1.
257 See Fresh Garlic Producers, 1212 F. Supp. 3d at 1324.
258 See Mukand, Ltd. v. United States, 767 F.3d 1300, 1307-1308 (Fed. Cir. 2014).
259 See Zhejiang DunAn Hetian Metal Co. v. United States, 652 F.3d 1333, 1348 (Fed. Cir. 2011).
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.

Selection of AFA Rate

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.” 260 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. 261 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.” 262 The Court of Appeals for the Federal Circuit (CAFC), in Nippon Steel, provided an explanation of the “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. 263 The CAFC acknowledged, however, that while there is no willfulness requirement, “deliberate concealment or inaccurate reporting” would certainly be sufficient to find that a respondent did not act to the best of its ability, although it indicated that inadequate responses to agency inquiries “would suffice” as well. 264 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. 265 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. 266

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. 267 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. 268 Commerce is not required to determine, or make any adjustments to, a weighted average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information. 269

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260 See section 776(b) of the Act.
261 Id.; see also SAA at 870.
262 See SAA at 870.
263 See Nippon Steel, 337 F.3d at 1382.
264 Id., at 1380.
265 Id., at 1382.
266 Id.
268 See SAA at 870.
269 See section 776(b)(1)(B) of the Act.
Section 776(c) of the Act provides that, in general, when Commerce relies on secondary information rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise. However, under the new section 776(d) of the Act, Commerce may use a dumping margin from any segment of the proceeding under the applicable AD order when applying an adverse inference, including the highest of such margins. 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. 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.

The highest margin applied in a separate segment of this proceeding and currently in effect is $3.87/kg. 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.

Comment 2: Whether to Apply AFA to NTSF

The Petitioners’ Arguments

- NTSF’s standard inputs and resulting per-unit fish factors are not CONNUM-specific with respect to product form, product size, and net weight physical characteristics, and thus, Commerce should apply facts available with an adverse inference.
- Regarding NTSF’s reported certain input data, some input rates are not specific with respect to product size (PRODSIZE) as larger fillets require more inputs than smaller fillets.
- NTSF inappropriately included products that should not have been included in its reported product form (PRODFORM), and thus, the FOPs are not specific and distorted.

270 See also 19 CFR 351.308(d).
271 See SAA at 870.
272 See section 776(d)(1)(B) and 776(d)(2) of the Act.
274 See section 776(c)(2) of the Act.
275 See section 776(d)(1)(2) of the Act.
• Regarding its reported net weights, NTSF reported that a certain percentage difference between its un-soaked and soaked production figures can be attributed to the amount of soaking. However, NTSF reported varying soaking percentages that are not in line with this certain percentage.\textsuperscript{277}

• NTSF’s data is unreliable because NTSF reported, for example, one invoice which specified a certain moisture level for different fish fillet brands, resulting in different soaking percentage according to NTSF’s reporting. However, NTSF reported just one soaking percentage for this invoice.\textsuperscript{278}

• NTSF has provided no explanation as to why it has deemed it appropriate to report two different values for products reported to contain the same amount of added soaking water.\textsuperscript{279}

• With respect to the actual data, NTSF did not report FOPs using the actual quantities consumed to produce the frozen fish fillets on a CONNUM-specific basis.

• NTSF did not provide any explanation regarding the efforts it undertook to report the actual quantity/cost of each FOP consumed to produce the merchandise under review on a CONNUM-specific basis as requested by Commerce.

**NTSF’s Arguments**

• The petitioners’ argument regarding product size has not established with any evidence that the consumption rate would vary between products that are identical with respect to all characteristics except for the size of the fillet.

• Moreover, unlike product form (\textit{i.e.}, type of level of trimming) and soaking percentage, fill, record evidence indicates that fillet size is not a characteristic that significantly influences yields.

• Regarding product form, NTSF agrees with the petitioners that belly-on products should have a product form (PRODFORM) as 01. But this minor CONNUM-coding error that is both insignificant and easily fixed should not result in throwing out NTSF’s entire FOP database.

• \textit{NTN Bearing Corp}\textsuperscript{280} requires Commerce to make corrections for clerical errors here, such as described by NTSF for its PABAG FOP.

• Regarding the difference between the un-soaked and the soaked production figures and NTSF’s reported NETWGTU levels, the petitioners’ citing the high and low ends of a set of data does not undermine the average.\textsuperscript{281}

• If the contract specifies a moisture level of a certain percentage or less, then a moisture content less than that specified would satisfy the terms of the contract.\textsuperscript{282}

• Regarding the petitioners’ argument of products that have two different usage rates for products with the same soaking code and have the same product form, the reason is that

\begin{footnotes}
\textsuperscript{277} See The Petitioners’ Case Brief at 13.
\textsuperscript{278} Id., at 15.
\textsuperscript{279} Id., at 16.
\textsuperscript{280} NTN Bearing Corp. v. United States, 74 F.3d 1204, 1207-1209 (Fed. Cir. 1995)
\textsuperscript{281} See NTSF Rebuttal Brief at 9.
\textsuperscript{282} Id.
\end{footnotes}
they are products that fall within the same product form reporting characteristic but are fillets that have been processed/trimmed to differing degrees.\textsuperscript{283}

- NTSF reported that it had relied on its standard usage rates maintained in its normal course of business, and part of its cost system, to report CONNUM-specific FOPs.
- Relying on this standard usage rates, with corroborated variances, fulfills Commerce’s requirements for CONNUM-specific FOP reporting.\textsuperscript{284}
- Furthermore, NTSF confirmed that its standard costing system maintains its whole fish consumption standards on basis of species, product form, product coating, product size, frozen form, preservatives, ice weight and soaking weight.\textsuperscript{285}
- NTSF never stated that it does not track actual weights, and actually does as evidenced by the tracked weights used to corroborate the variance.

**Commerce’s Position:** We agree with NTSF, in part.

**Product Size**
Regarding the petitioners’ argument that NTSF’s whole fish consumption is not CONNUM-specific with regard to PRODSIZE, the petitioner has not established with any compelling record evidence that the consumption rate would vary between products that are identical with respect to all characteristics except for the size of the fillet. It is true that, for example, larger raw fillets require larger amounts of inputs. However, smaller raw fillets require lesser amounts of inputs, and Commerce has yet to see any compelling information establishing that there is any meaningful difference regarding the per-unit consumption of inputs with regard to raw fillet size on an un-soaked basis. Moreover, this comparison becomes blurred as Commerce requires parties to submit FOPs and sales on a soaked basis, not an un-soaked basis. For example, two fillets may be the same size at the end of processing, but the un-soaked weights of those fillets can vary significantly, \textit{i.e}., one fillet may have significant amounts of soaking while the other many have minimal, and to say that these two soaked fillets consume equal amounts of factors would be misleading.

**Product Form**
Regarding the petitioners’ argument that NTSF’s whole fish consumption is not CONNUM-specific with regard to PRODFORM, NTSF admits that it made an error with reporting less than a quarter of one percent of product. Furthermore, NTSF claims that Commerce should correct this minor correction the same as with its plastic bag factor (explained below).

However, on April 15, 2019, Commerce rejected NTSF rebuttal brief because it contained new factual information pertaining to this error.\textsuperscript{286} In its refiled rebuttal brief, NTSF explains that it made an error in reporting it’s a small amount of product. However, NTSF did not provide a way to correct this error using information/methodologies already on the record. Thus, we agree with the petitioner that in \textit{Potassium Permanganate}, Commerce only permitted the correction.

\textsuperscript{283} Id., at 10.
\textsuperscript{284} See NTSF Section D Response, at D-3.
\textsuperscript{285} Id., at pages D-9 and D-10.
\textsuperscript{286} See Commerce’s April 15, 2018 letter to NTSF.
because there was sufficient information on the record to correct this clerical error.  This is not
the case in this review.

Finally, NTSF disagreed with Commerce’s rejections of its rebuttal brief. However, we
rejected this submissions because we found certain narrative constituted untimely filed new
factual information. We further explained that “The briefing process is not an opportunity to
submit new information, such as databases, worksheets or comments/methodologies, more
appropriately responsive to Commerce’s supplemental questionnaire.” As such, we rejected
this submission because the new reporting methodologies and revisions to NTSF’s calculations
were untimely.

Although we agree that this small error is not enough to impugn NTSF’s entire FOP database,
absent any record information to establish the basis for correcting the data, and given that the
data necessary to correct it were not timely submitted, Commerce will not make any adjustment
for the final results regarding this error.

**Net Weight**

Regarding the petitioners’ arguments, that NTSF did not report its data on a CONNUM-specific
basis with regard to NETWGTU, we note that the petitioner provided several examples.

Regarding Example 1, the petitioners calculated that for NTSF’s overall production, Exhibit
Supp CD-37 showed added water of a certain percentage, which is reasonable. The petitioners
imply that this average is somehow unreliable or unexpected because NTSF reported that
soaking amounts can be within a certain range. However, citing the high and low ends of a set
of data does not undermine the reliability of the average of that data.

Regarding Example 2, the petitioners make claims that NTSF’s data is unreliable because NTSF
reported a certain soaking percentage for all items on an invoice where the terms were for
varying moisture levels. However, the contract term specified that the moisture level should
be a certain percentage or less, so it is reasonable that the moisture content was less than that
specified would satisfy the terms of the contract.

Regarding Example 3, the petitioners’ question why NTSF has reported two different usage rates
for products with a specific soaking code and a specific product form. However, a closer
examination demonstrates that the product codes with a higher usage rate are products that have

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287 See *Potassium Permanganate* at Comment 6.
288 See NTSF’s April 16, 2019, submissions.
289 See Commerce’s April 15, 2018 letter to NTSF.
290 Id. See also, generally, 19 C.F.R. 351.301(c)(1).
291 See, e.g., *AR13 Final Results*, IDM at Comment 1; see also, *See Tri Union Frozen Prods. v. United States*, 163 F.
    Supp. 3d 1255, 1287-89 (CIT 2016) (affirming Commerce’s rejection of untimely new reporting methodologies).
293 Id., at 15.
294 See NTSF’s Section C Response at Exhibit Appendix C-1.
295 See The Petitioners Brief at table 5, page 17.
been trimmed to a higher degree than the product codes with a lower usage rate,\textsuperscript{296} e.g., a shank fillet is a shank fillet no matter how much you trim/process it. As such, usage rates are expected to differ when the fillets have been processed trimmed to varying degree even though they may have the same product form.

**Actual Data**

Finally, regarding the petitioners’ argument that NTSF’s reporting is not based on actual data, and that it did not report actual cost, in its original section D response, NTSF explained that it had relied on its standard usage rates maintained in its normal course of business (\textit{i.e.}, standard cost system) to report CONNUM- specific FOPs. NTSF confirmed that its standard costing system maintains its whole fish consumption standards on basis of species, product form, product coating, product size, frozen form, preservatives, ice weight and soaking weight.\textsuperscript{297} In the same response, NTSF explained how it used the standard consumption rates for each product code and how it calculated a variance between the standard consumption and the actual (using actual production data) consumption.\textsuperscript{298}

In the supplemental response, NTSF further explained standard consumption rates by product code to calculate costs and assign material to finished production.\textsuperscript{299} NTSF explained that it calculates its expected or “standard” consumption rate for 5 product groups, which is reported in the Consumption Rate for Material of Pangasius table and that this table is prepared each month by the quality department.\textsuperscript{300} NTSF provided the standard consumption rates determined by NTSF’s quality department for the month and summarized for the POR.\textsuperscript{301} NTSF explained how it incorporates the standard consumption rates to calculate cost and assign raw material to production in the Standard Input Allocation of Raw Material Report.\textsuperscript{302} NTSF then explained and demonstrated how the actual fish raw material consumed for each month is supported by the inventory and production records.\textsuperscript{303} NTSF further explained how it calculates the variance between the total standard consumption and the actual consumption, using actual production figures.\textsuperscript{304}

As explained, NTSF’s Consumption Rate for Material of Pangasius table is prepared each month. This process is only circular in reasoning\textsuperscript{305} in that the quality department may adjust the standards slightly each month based on the actual operations that month. That being said, the standard consumption and the actual consumption are very close to each other, and NTSF demonstrated that the variance for the entire POR is almost insignificant.\textsuperscript{306} As explained, NTSF

\textsuperscript{296} See NTSF Section A Questionnaire Response and Appendix IV Response, dated December 19, 2017 and Exhibit A-15.  
\textsuperscript{297} \textit{Id.}, at D-9 and D-10.  
\textsuperscript{298} \textit{Id.}, at page D-12.  
\textsuperscript{299} NTSF Supplemental CD Response, pages Supp CD 7-9.  
\textsuperscript{300} \textit{Id.}, at Supp CD-7, \textit{citing} Exhibit Supp CD-14.A.  
\textsuperscript{301} \textit{Id.}, at Supp CD-8, \textit{citing} Exhibit Supp CD-14.B and 14.C.  
\textsuperscript{302} \textit{Id.}, at Supp CD-8, \textit{citing} Exhibit Supp CD-14.D.  
\textsuperscript{303} \textit{Id.}, at Supp CD-8-9, \textit{citing} Exhibit Supp CD-14.E & F.  
\textsuperscript{304} \textit{Id.}, at Supp CD-8-9, \textit{citing} Exhibit Supp CD-14.D.  
\textsuperscript{305} See The Petitioners’ Brief, at 6.  
\textsuperscript{306} See NTSF Supplemental CD Response, Exhibit Supp CD-04, variable h.
first developed the standards from historical production experience\textsuperscript{307} and the accuracy of those standards is confirmed or adjusted slightly on a monthly basis by the Consumption Rate for Material of Pangasius table. Furthermore, NTSF applied the variance between standard consumption and actual consumption to each product-code thus establishing that NTSF captured all of the actual consumption on a CONNUM-specific basis.

Finally, we note that Commerce has used a similar methodology, \textit{i.e.}, standard usage multiplier, and the Court upheld Commerce’s usage of the standard multiplier.\textsuperscript{308}

Thus, NTSF has: fully explained the standard consumption rates it used; demonstrated that the standard consumption so closely matches the actual consumption of those standards; and demonstrated that it captured its costs appropriately. As such, we find NTSF’s reporting reasonable in this respect.

\textbf{Comment 3: NTSF’s Plastic Bags Packing Factor}

\textit{NTSF’s Arguments}

- For PABAG, the allocation formula NTSF used in the \textit{Preliminary Results} was mathematically incorrect and only became understood by NTSF until after the \textit{Preliminary Results}.
- NTSF used three types of PABAG and when determining the amount of PABAG to allocate to each product code, NTSF determined the correct percentage share of that product code’s consumption of that type of PABAG.
- However, NTSF then, by clerical error, applied that ratio to the total withdrawal of all three types of PABAG, and this error overstated the PABAG amount.
- NTSF had no opportunity to correct this mistake, and Commerce elected not to verify NTSF in this review. Thus, NTSF had no opportunity to avail itself of Commerce’s practice of considering minor corrections at the commencement of verification.
- Commerce’s practice and legal precedent require that Commerce correct clerical or mathematical errors in respondent’s data.\textsuperscript{309}
- In \textit{NTN Bearing}, a respondent discovered clerical errors it made after the preliminary results and the Court of Appeal for the Federal Circuit (CAFC) held that refusal to correct clerical errors would be an abuse of discretion.

\textit{The Petitioners’ Arguments}

- The data relied upon by NTSF were not submitted on a timely basis, and the accuracy of the data cannot be verified from any objective information already on the record.

\textsuperscript{307} See The Petitioners’ Brief, at 5, citing, NTSF Section D Response, Appendices 3&4.
\textsuperscript{308} See \textit{An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States}, 287 F. Supp. 3d 1364 (CIT 2018).
\textsuperscript{309} See, e.g., \textit{Potassium Permanganate from the People’s Republic of China: Final Results of Anti-dumping Duty Administrative Review; 2015, 82 FR 28044}, (June 20, 2017) (\textit{Potassium Permanganate}) and accompanying IDM at Comment 6, citing \textit{NTN Bearing Corp. v. United States}, 74 F.3d 1204, 1207-1209 (Fed. Cir. 1995)
• Thus, Commerce should reject the revised data and deny the adjustment.
• In Potassium Permanganate, Commerce only permitted the correction “because the information is on the record to correct this clerical error.”310 Here, the figures used by NTSF in its PABAG correction calculation are nowhere to be found on record.
• Absent any record information to establish the basis for correcting the data, and given that new factual information was not timely submitted, Commerce should not make any adjustment to the Preliminary Results.311

Commerce’s Position: We agree with the petitioner. On April 10, 2019, Commerce rejected NTSF case brief because it contained new factual information pertaining to NTSF’s plastic bag packing factor.312 On April 11, 2019, Commerce rejected NTSF case brief for the second time because it still contained new factual information pertaining to NTSF’s plastic bag packing factor.313 On April 15, 2019, Commerce rejected NTSF case brief for the third time because it still contained new factual information pertaining to NTSF’s plastic bag packing factor.314 Thus, relying on NTSF’s 3rd refiling of its case brief, NTSF explains that it made an error in reporting its plastic bag packing factor. However, it does not provide a way to correct the plastic bag FOP using information/methodologies already on the record. Thus, we agree with the petitioner that in Potassium Permanganate, Commerce only permitted the correction because the information is on the record to correct this clerical error.315 This is not the case in this review.

With respect to NTSF’s argument that it did not have an opportunity to correct this alleged mistake as a minor correction because Commerce did not verify it, we note that the respondents in this review are not entitled to verification. In addition, while Commerce has a practice of accepting minor corrections to information already on the record at verification, there is no statutory or regulatory provision that requires Commerce to accept minor corrections after the publication of the Preliminary Results from companies that were not verified.316

Finally, NTSF disagreed with Commerce’s rejections of its case brief.317 However, we rejected these submissions because we found certain worksheets and the narrative portion pointing to the new worksheets constituted untimely filed new factual information.318 We further explained that “{t}he briefing process is not an opportunity to submit new information, such as databases, worksheets or comments/methodologies, more appropriately responsive to Commerce’s supplemental questionnaire.”319 As such, we rejected this submission because the new reporting methodologies and revisions to NTSF’s calculations were untimely.320

310 See Potassium Permanganate at Comment 6 (emphasis added).
311 See, e.g., Thirteenth Review at Comment 1.
312 See Commerce’s April 10, 2018 letter to NTSF.
313 See Commerce’s April 11, 2018 letter to NTSF.
314 See Commerce’s April 15, 2018 letter to NTSF.
315 See Potassium Permanganate at Comment 6.
317 See NTSF’s April 11, 2019, April 12, 2019, and April 16, 2019, submissions.
319 Id. See also, generally, 19 CFR 351.301(c)(1).
320 See, e.g., Thirteenth Review at Comment 1; see also, Tri Union Frozen Prods. v. United States, 163 F. Supp. 3d 1255, 1287-89 (CIT 2016) (affirming Commerce’s rejection of untimely new reporting methodologies).
As such, absent any record information to establish that the data was incorrect, or for establish a basis for correcting the data, and given that the corrected data were not timely submitted, Commerce will not make any adjustment to the Preliminary Results regarding NTSF’s plastic bag FOP.

**Comment 4: Fingerling Surrogate Value Conversion Factor**

*NTSF’s Arguments*

- In the Preliminary Results, Commerce valued NTSF’s fingerling consumption using the Rukmono Fingerling Data, and then converted the per piece fingerling price to a per-kg basis using the Rukmono conversion factor.
- However, Commerce should instead use NTSF’s reported conversion factor to convert the IDR/piece surrogate value to IDR/kg, as this is NTSF’s experience.
- Moreover, the Rukmono fingerling conversion rates used in the Preliminary Results is contradicted by NTSF data and the petitioners’ other (non-Rukmono) data.

*The Petitioners’ Arguments*

- The source of the surrogate value for Indonesian fingerlings, itself, expressed the values on a per-kg, or per-piece basis (e.g., the Dr. Rukmono affidavit).
- For consistency, the Rukmono values must be converted using the conversion factors from the same source.
- The fact that NTSF can calculate a per-piece or a per-kg usage rate for its own production must not be confused with the expression of the surrogate value – itself taken from a different source – on a per-kg, or a per-piece basis.

**Commerce’s Position:** We agree with the petitioner. In the Preliminary Results, Commerce valued NTSF’s fingerling consumption using the Rukmono Fingerling Data which is expressed on an Indonesian Rupiah (IDR) per piece basis. For the sizes used by NTSF, 5 – 6 inches and up, Commerce then applied the Rukmono conversion of pieces to kg to derive an IDR/kg surrogate value.

NTSF argues that Commerce should use NTSF’s own conversion rates to calculate the per-kg Indonesian surrogate value for fingerlings. NTSF also makes an argument that Rukmono data is contradicted by other data on the record. However, the source of the surrogate value for Indonesian fingerlings itself expressed the values on a per-kg, or per-piece basis (e.g., the Dr. Rukmono affidavit). Mixing NTSF’s conversion rate with Indonesian surrogate values taken from Dr. Rukmono is not internally consistent and will distort the ending value. This is because the conversion of pieces to kg is controlled, set and vetted by the data collector by the time of

321 See Preliminary Surrogate Value Memorandum, at Attachment 1.
322 Id.
323 See NTSF/Vinh Quang Case Brief at 5-7.
324 Id.
reporting/publication. By the same token it would be inappropriate to use the Rukmono conversion to convert NTSF’s fingerling FOP to a per piece or per kg one way or the other.

The fact that NTSF can calculate a per-piece or a per-kg usage rate for its own production must not be confused with the expression of the surrogate value, itself taken from a different source, on a per-kg or a per-piece basis. Both fingerling lengths (sizes) and corresponding weights are needed to calculate appropriate surrogate values, given that the relationship between fingerling lengths and weights are not linear. Given this, Commerce has relied on pangasius fingerling pricing data from Rukmono in prior reviews of this proceeding.325 These datasets contain both fingerling lengths (sizes) and corresponding conversion weights in order to derive fingerling surrogate values on a per-kg basis, i.e., the Dr. Rukmono datasets contain both of these critical fingerling length (size) and corresponding conversion weight information.

In this instance, conversion rates must not be confused with usage rates, as the Rukmono conversion ratio simply express the Rukmono surrogate values in the same units that NTSF reported its usage rates. Thus, for consistency and accuracy, the Rukmono values must be converted using the conversion factors from the same source.

Commerce has therefore correctly expressed the Indonesia surrogate on a per-kg basis using the Indonesia conversion rate from the same source that provides the surrogate value for NTSF. This approach is logical, reflects past practice,326 and will be continued for the final results.

Comment 5: Fingerling Inflator

NTSF’s Arguments

- In the Preliminary Results, Commerce valued NTSF’s fingerling consumption by inflating the 2012 Rukmono 400 IDR/piece fingerling price to the POR using the Producer Price Index (PPI) rates for Indonesia as published by the International Monetary Fund.327
- The use of the Rukmono data is not in and of itself so problematic, but the inflation of the 2012 data is clearly erroneous and produces anomalous results.
- When compared to the other fingerling pricing data on the record,328 the crude and anomalous PPI adjustment results in inflated Rukmono prices that exceed the other prices by up to 66%.
- As such, Commerce should use the contemporaneous Pusdatin (larger-sized fingerling data) and MMAF data to value NTSF’s fingerling consumption.

325 See Tenth Review at Comment III.A (pp. 31-33); Eleventh Review at Comment X (pp. 36-38). Both of Commerce’s determinations were upheld by the U.S. Court of International Trade (CIT).
326 See Ninth Review at Comment III; Tenth Review at Comment III.A; Eleventh Review at Comment X; the petitioners’ August 3, 2018 submission at Exhibit 3 (containing an excerpt from 2013-2014 Commerce’s Preliminary Results Surrogate Value Memorandum (August 31, 2015)).
327 See Surrogate Value Memorandum, at 2.
328 From the Indonesian Ministry of Marine Affairs & Fisheries (MMAF) data and the Pusdatin Fingerling Data.
The Petitioners’ Arguments

- The inflated surrogate value data does not produce aberrational results, as some of the contemporaneous data that NTSF points to is actually higher than the inflated data used in the Preliminary Results.
- Thus, Commerce should continue to follow its normal practice and use the Indonesian WPI data to inflate the fingerling values from the 2012 Rukmono affidavit.

Commerce’s Position: We agree with the petitioner. As an initial matter, Commerce actually used the Indonesian Wholesale Price Index (WPI) data, rather than PPI data, as NTSF argues, to inflate the surrogate values.\(^{329}\) Having said that, NTSF acknowledges that the use of the Rukmono data is not in and of itself so problematic, but the that the inflation of the data produces anomalous results. However, the inflated Rukmono data is not anomalous as NTSF claims. This can be seen when comparing the surrogate values Commerce used in the Preliminary Results. Looking at the “Surrogate Values Summary” table indicates that the inflation-adjusted prices for 5-6 inch fingerlings derived from the 2012 Rukmono affidavit are not out of place compared to the other fingerling prices that NTSF had no objection to.\(^{330}\) In fact, 13 of the 17 fingerlings inflated prices are lower than the uninflated fingerling price that was calculated from contemporaneous data.\(^{331}\) Moreover, sometimes the prices of the larger fingerlings was higher, and sometimes lower than the smaller fingerlings.\(^{332}\) Thus, not establishing a general upwards or downwards trend in prices, \textit{i.e.}, they are fairly similar. As such, we do not find that the inflating of the 2012 Rukmono price using the Indonesian WPI produces aberrational values and Commerce will continue to inflate the Rukmono fingerling prices using the Indonesian WPI as per its normal practice for the \textit{Final Results}.\(^{333}\)

Comment 6: Surrogate Financial Ratios

NTSF’s Arguments

- In its \textit{Preliminary Results}, Commerce calculated surrogate financial ratios using the 2016/2017 financial statement from Indonesian companies, PT Dharma Samudera Fishing Industries (DSFI), and Japfa Comfeed Indonesia (Japfa Comfeed).\(^{334}\)
- Commerce preliminarily determined that both DSFI and Japfa Comfeed are both fish fillet producers.\(^{335}\)

\(^{329}\) See Preliminary Surrogate Value Memorandum, at Attachment 1.
\(^{330}\) Id.
\(^{331}\) Id.
\(^{332}\) Id.
\(^{333}\) See, \textit{e.g.}, \textit{Qingdao Sea-Line Trading Co. v. United States}, 766 F.3d 1378, 1385-1387 (Fed. Cir. 2014) (where the U.S. Court of Appeals for the Federal Circuit upheld the CIT’s ruling that Commerce’s reliance on WPI rates to inflate surrogate garlic prices was reasonable and supported by substantial evidence); \textit{Notice of Final Determination of Sales at Less Than Fair Value: Ferrovanadium from the People’s Republic of China}, 67 FR 71137 (November 29, 2002) and accompanying IDM at Comment 16 (where Commerce explained that it normally relies on WPI rates to inflate surrogate values and has only relied on PPI rates when WPI rates are not available).
\(^{334}\) See Preliminary Surrogate Value Memorandum, at 6, citing the petitioners’ March 22, 2018 submission at Exhibits I-10.
\(^{335}\) Id., at 6.
• However, nowhere in Japfa Comfeed’s financial statements does it state that it is a producer of fish fillets and, as such, its operations are otherwise not comparable to NTSF’s fish fillet production.
• Moreover, Japfa Comfeed consolidated operations include divisions not in the surrogate country, and the vast majority of its activities are not related to fish processing or farming.
• Accordingly, Japfa Comfeed should not be used to value NTSF’s surrogate financial ratios.

The Petitioners’ Arguments

• Japfa Comfeed’s website and the summary of its articles of association indicate that it is involved in “fisheries” operations.
• Moreover, on this website, Japfa Comfeed boasts that its tilapia operations are fully integrated and produces frozen fish fillets.
• Furthermore, a review of Japfa Comfeed’s 2017 audited financial statements confirm that it had tilapia operations during the POR.
• Commerce has relied on consolidated financial statements of multinational corporations with world-wide operations that produce an array of products including comparable merchandise for surrogate financial valuation in other cases.
• Using multiple financial statements allows Commerce to normalize any potential distortions from using a single source and allows for a broad-based surrogate valuation.

Commerce’s Position: We agree with the petitioner. In the Preliminary Results, Commerce relied on the 2016 audited financial statements of PT Dharma Samudera Fishing Industries (DSFI) and Japfa Comfeed to calculate surrogate financial ratios. Although not articulated in the Preliminary Results, the record demonstrates that both companies, including Japfa Comfeed, are producers of comparable merchandise, and their financial statements are suitable for valuation of respondents’ surrogate financial ratios.

Regarding NTSF’s claim that Japfa Comfeed is not a producer of comparable merchandise and that its operations are not comparable, as acknowledged by NTSF, excerpts from Japfa Comfeed’s website and the summary of its articles of association indicate that it is involved in “fisheries” operations. Specifically, on its website, Japfa Comfeed boasts that its “tilapia operation is fully integrated and the largest of its kind in Indonesia” and highlights several products that it produces including frozen tilapia fillets (e.g., “Tilapia Deep Skinned” available in “3-5, 5-7, 7-9, 9-11 oz” individually quick frozen (IQF) or vacuum pack). Moreover, a review of Japfa Comfeed’s 2017 audited financial statements confirm that it had tilapia operations during the POR.
Nevertheless, in selecting surrogate financial statements, Commerce examines how similar a proposed surrogate producer’s production experience is to the NME producer’s production experience. However, contrary to NTSF’s claims, this analysis is not dependent upon matching the exact production experience of the respondent.

Regarding NTSF’s argument that Japfa Comfeed’s financial statements are: 1) consolidated; 2) include world-wide operations; and 3) include products not comparable to frozen fish fillets, we note that Commerce has relied on consolidated financial statements of multinational corporations with world-wide operations that produce an array of products including comparable merchandise for surrogate financial valuation in other cases.

Moreover, the Courts have recognized Commerce’s discretion when choosing appropriate companies’ financial statements to calculate surrogate financial ratios. In fact, in exercising its discretion, Commerce has used multiple financial statements even when the majority of them included countervailable subsidies. Nevertheless, Commerce reasoned that using multiple financial statements to calculate surrogate financial ratios allows the agency to average FOH, selling, general and administrative (SG&A) and profit ratios in order “to normalize any potential distortions that may arise” from using the statements of a single producer and to “arrive at a broader-based surrogate valuation that minimizes the particular circumstances of any one producer.” Thus, Commerce generally prefers to rely on more than one surrogate financial statements when calculating a respondent’s dumping margin.

Taken together, the foregoing establishes, and the record supports, that Japfa Comfeed’s financial statements are viable for purposes of calculating surrogate financial ratios in the instant review. As such, Commerce will continue to use Japfa Comfeed’s (and DSFI’s) financial statements to value NTSF’s financial ratios for the final results.

342. See NTSF/Vinh Quang Case Brief at 14-16.
343. See Nation Ford Chem. V. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999).
344. See, e.g., OCTG from China at Comment 13; Hydrofluorocarbon Blends and Components Thereof from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 81 FR 42314 (June 29, 2016) (HFC Blends) and accompanying IDM at Comment 30; 1,1,1,2 Tetrafluoroethane (R-134a) from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part, 82 FR 12192 (March 1, 2017) (“Tetra”) and accompanying IDM at Comment 6.
345. See, e.g., FMC Corp. v. United States, 27 CIT 240, 251 (2003) (finding that Commerce “has wide discretion in choosing among various surrogate sources” and affirming Commerce’s reliance on Calibre’s financial statement for calculating the SG&A ratio in that case), aff’d FMC Corp. v. United States, 87 Fed. Appx. 753 (Fed. Cir. 2004).
346. See OCTG from China at Comment 13.
347. See Certain Activated Carbon from the People’s Republic of China; 2010-2011; Final Results of Antidumping Duty Administrative Review, 77 FR 67337 (November 9, 2012) and accompanying IDM at Comment 1.F.
348. See, e.g., OCTG from China at Comment 13; HFC Blends at Comment 30 (citing Fresh Garlic from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 70 FR 34082 (June 13, 2005) and accompanying IDM at Comment 3); Certain Preserved Mushrooms from the People’s Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17, 2006) and accompanying IDM at Comment 1); Tetra at Comment 6.
Comment 7: Rate to Apply to Companies Not Selected for Individual Review

The Petitioners’ Arguments

- Commerce should assign separate rate companies a rate based on all non-AFA, non-de minimis rates calculated in its final results of review.

Green Farm’s Arguments

- Commerce should determine the “All Others” rate based on all non-AFA rates.

Commerce’s Position: We agree with petitioners. In this review, there is only one calculated rate, which is not de minimis, and not based on AFA, i.e., NTSF’s calculated margin. As such, we will apply NTSF’s rate to those companies not selected for individual review and which were granted a separate rate. This practice is consistent with our practice and the statute.349

Comment 8: Green Farms’ Separate Rate Certification

The Petitioners’ Arguments

- Green Farms made incorrect claims in its Separate Rate Certification and should not be rewarded for its reporting failure and submitting untimely corrections to the agency.
- Commerce gave Green Farms a second opportunity to disclose its affiliations with its U.S. customer and U.S. importer, but again, failed to disclose these affiliations.
- The Court of Appeals for the Federal Circuit (Federal Circuit) has repeatedly held that Commerce may disregard all of a respondent’s information when a deficient response implicates “core” information.
- As Commerce is aware, the separate rate certification is in it of itself “core” to the agency’s determination as to a respondent’s eligibility for separate-rate status.
- Because Green Farms’ “core” information is in question, it should be disregarded by Commerce and, accordingly, the agency should find Green Farms to be part of the Vietnam-wide entity and assign it the Vietnam-wide rate of $2.39/kg.

Green Farm’s Arguments

- Green Farms did not intentionally submit an incorrect certification, but rather, Green Farms inadvertently assumed the form it used for the current review was the same as in prior reviews.
- Green Farms acknowledged before the Preliminary Results that its initial separate rate certification was not correct regarding the disclosure of all “affiliations.”350
- Commerce granted Green Farms a separate rate in the Preliminary Results and should do so for the final results.

349 Section 705(c)(5) of the Act.
350 See Letter from Green Farms Re: Green Farms Response to Petitioners’ Pre-Preliminary Comments (August 16, 2018) (Green Farms’ Correction Letter).
**Commerce’s Position:** We agree with Green Farms. While we agree with the petitioner that the separate rate certificate is core information, Green Farms corrected its deficiency in a timely manner. In addition, Green Farms stated early in this proceeding that its initial separate rate certification was not correct as submitted regarding the disclosure of all “affiliations.” But, as Green Farms explained in its filings, it did not intentionally submit a false certification, nor did it intentionally place an incorrect certification on the record. Rather, Green Farms staff sought to prepare its certification in this current review consistently with its certifications in prior reviews, including the certification form and narratives. Green Farms explained that the certification form it used for the current review is different from the one it had used in prior reviews. The current certification form for this review only provides one option (i.e., “unaffiliated”) for the relevant box (i.e., Box 21). Green Farms simply checked this box. Previously, the certification had provided an option to check either “affiliated” or “unaffiliated” (or both). Green Farms explained that it checked the only box available in the current proceeding (unaffiliated) and it also prepared its narrative statements consistent with those used in the most recent review.

Green Farms explained that once this mistake was brought to its attention, it corrected this mistake, and it clarified for the record that it was affiliated with its U.S. customer and U.S. importer for purposes of completing this certification. Green Farms then requested that Commerce approve its separate rate application with these changes noted. Commerce accepted Green Farms’ Separate Rate Certification as corrected in the subsequent submissions.

In this regard, Green Farms has cooperated fully and completely in this proceeding. It provided all information requested, and it responded to all supplemental questionnaires. It also promptly corrected any mistakes once it was aware of the mistake. As such, Commerce will continue to grant Green Farms a separate rate for the Final Results.

**Comment 9: Golden Quality’s Separate Rate Status**

*The Petitioners’ Arguments*

- Commerce should find that Golden Quality Seafood Corporation (“Golden Quality”) is not eligible for a separate rate in this review because it failed to demonstrate its autonomy from the Vietnamese government.

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351 *Id.*
352 *Id.*
353 *Id.*
354 *Id.*
355 *Id.*
356 *Id.*
357 *Id.*
358 *Id.*
359 *Id.*
360 *Id.*
Golden Quality’s Arguments

- Golden Quality did not provide any comments on this issue.

Commerce’s Position: We agree with the petitioner. Commerce initiated the instant review with respect to several Vietnamese producer/exporters, including Golden Quality. Golden Quality’s review request was not withdrawn and, therefore, the record demonstrates that it continues to be subject to this review. On November 13, 2017, Golden Quality, requested that Commerce extend its deadline for submitting its separate rate application. Commerce did so. Nevertheless, Golden Quality failed to file a timely application or certification for a separate rate. Accordingly, because Golden Quality failed to demonstrate that it is sufficiently independent so as to be entitled to a separate rate, and following our long-established practice, we find that Golden Quality is part of the Vietnam-wide entity and assign it the Vietnam-wide rate of $2.39/kg.

Comment 10: Surrogate Values to Value HVG’s FOPs

HVG’s Arguments

- In the Preliminary Determination, Commerce only used the SV information submitted by the petitioners and not HVG.
- In the Final Results, Commerce should use the SV information submitted by HVG to value its factor of production or explain why it has not used this information.
- Commerce relied on fingerling prices that were initially on a per piece basis, and it then converted them to kg amounts based on petitioners’ proposed conversion factor.
- However, HVG reported fingerling consumption data in both kg and on a per piece basis.
- As such, Commerce could instead simply use the per piece SV with no conversions needed to value HVG’s fingerlings.
- In the Preliminary Results, Commerce based the SV’s for fish waste on the petitioners’ submitted Indonesian price quotes, and it used a simple average of these price quotes.

363 Commerce acknowledged this failure in its January 5, 2018 Replacement Respondent Selection Memorandum, “Golden Quality did not submit a separate rate application or a separate rate certification within the specified deadlines in the Initiation Notice.” Therefore, Commerce declined to consider Golden Quality for respondent selection purposes. See Commerce Memorandum, “Second Selection of Respondent for Individual Review,” dated January 5, 2018 at 2.
365 Such a finding is also consistent with the Preliminary Results, that by failing to respond to Commerce’s supplemental questionnaire regarding its separate rate certification, Hoang Long Seafood Processing Company Limited was not eligible for separate-rate status in this review. See PDM at 8.
• However, at a minimum, Commerce should include HGV’s reported price quotes in the
calculation of the fish waste average SVs to value HVG’s fish waste, or it should explain
why it has failed to do so.

The Petitioners’ Arguments

• HVG argues that surrogate values for various raw materials, packing materials, labor, and
electricity should be replaced from different sources that were unused by Commerce in the
preliminary results.
• The proposed surrogate values are not specific to the inputs actually used by HVG, or the by-
products actually recovered, and that the proposed labor and electricity rates are not
contemporaneous with the POR.

Commerce’s Position: We note that parties submitted arguments for and against using certain
surrogate values to value HVG’s FOPs. However, given that we are applying total AFA to
HVG, this issue is moot.

Comment 11: Treatment of Fish Oil and Fish Meal

NTSF’s Arguments

• In the Preliminary Results, Commerce did not value or use the fish oil and fish meal sold by
NTSF.
• While Commerce explained how it valued the head and bones used to produce fish oil and
fish meal, Commerce did not explain why it did not use these by-product factors reported by
NTSF.
• Furthermore, Commerce’s calculation is not on a CONNUM-specific basis whereas NTSF’s
reporting of by-product factors was on a CONNUM-specific basis.
• As such, Commerce should use NTSF’s reported fish meal and fish oil for the final results.

The Petitioners’ Arguments

• NTSF’s processed fish products and by-products exceed the volume of whole live fish
entered into production and are, thus, not credible.
• This impossibility is further evidenced by an analysis of the total inputs and outputs for each
POR month reported by NTSF’s unaffiliated toller.
• A review of NTSF’s so-called CONNUM-specific by-products worksheet, demonstrates that
its fish oil and fish meal are not product-specific.

Commerce’s Position: We agree with NTSF in part. NTSF reported that it produces broken
meat, fish fat, and head and bone by-products. Near the end of the POR (May 2017), NTSF used
its head and bone by-products to produce fish oil and fish meal. NTSF reported that it sold its

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366 See NTSF’s January 18, 2018 submission at 16.
head and bone by-product to another unaffiliated company that produced fish oil and fish meal.367 In other words, NTSF does not produce any fish oil or fish meal.

Commerce’s practice is to grant the respondents an offset to NV for by-products generated during the production of the merchandise under consideration if evidence is provided that such by-product has commercial value.368 Because NTSF sells its fish head and bone to a company that produces fish oil and fish meal, we have only granted a by-product offset for the fish head and bone NTSF sold, and not the downstream products produced by the unaffiliated processor.

We agree with NTSF that our calculation of the fish head and bone FOP ratios is not CONNUM specific, and have corrected this for these final results.

**VIII. RECOMMENDATION**

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting the margin calculation program accordingly. If accepted, we will publish the final results of review and the final dumping margins in the *Federal Register*.

☐  □

 Agree          Disagree

4/19/2019

Signed by: JEFFREY KESSLER  
Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance

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367 See NTSF’s May 15, 2018 submission at 40.
368 See Polyethylene Terephthalate Film, Sheet, and Strip from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 35245 (June 12, 2013) and accompanying IDM at Comment 10; Eleventh Review at Comment XIV.a.