UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

C-469-818
Investigation
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DATE: June 11, 2018

MEMORANDUM TO: 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

FROM: James Maeder
Associate Deputy Assistant Secretary
for Enforcement and Compliance
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain

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I. Summary

The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of ripe olives from Spain, as provided in section 705 of the Tariff Act of 1930, as amended (the Act).[1] Below is the complete list of issues in this investigation for which we received comments from interested parties:

Comment 1: Whether Section 771B of the Act is Applicable in this Investigation
Comment 2: Whether a Pass-Through Analysis is Required
Comment 3: Whether the EU CAP Pillar I –BPS, SPS, and Greening Programs are Countervailable
Comment 4: Whether EU CAP Pillar II Agricultural Fund for Rural Development is Specific
Comment 5: Whether Commerce Should Apply AFA to the Non-Cooperating Growers
Comment 6: Whether Commerce used the Correct Calculation Methodology to Measure Subsides Received by the Respondents
Comment 7: Whether Commerce Should Remove Non-Growers and Adjust the Calculation of Benefits to Exclude the Olive Volume of Non-Producing Suppliers

[1] *See also* section 701(f) of the Act.

II. Background

A. Case History

The selected mandatory company respondents in this investigation are Angel Camacho Alimentacion S.L. (Angel Camacho), Aceitunas Guadalquivir S.L.U. (Aceitunas Guadalquivir), and Agro Sevilla Aceitunas S.Coop.And (Agro Sevilla). On November 28, 2017, Commerce published its *Preliminary Determination* and, at the petitioner's request, we aligned the final

countervailing duty (CVD) determination with the final determination in the antidumping duty investigation of ripe olives from Spain.[2]

Following the *Preliminary Determination*, we requested additional information from the European Commission (EC), the Government of Spain (GOS), Angel Camacho, Agro Sevilla, and Aceitunas Guadalquivir. We received timely responses from all parties.[3] From February 5, 2018, through February 23, 2018, we conducted verification of the questionnaire responses from the EC, the GOS, Angel Camacho, Agro Sevilla, and Aceitunas Guadalquivir. The EC, GOS, Angel Camacho, Agro Sevilla, and Aceitunas Guadalquivir submitted verification corrections and verification exhibits.[4] We released the verification reports on March 23, 2018, for Aceitunas Guadalquivir and on April 4, 2018, for the EC, the GOS, Agro Sevilla, and Angel Camacho.[5] On April 24, 2018, Commerce issued a Post-Preliminary Analysis Memorandum.[6]

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[2] *See Ripe Olives from Spain: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination,* 82 FR 56218 (November 28, 2017) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM). On January 28, 2018, Commerce issued a memorandum regarding ministerial error allegations, finding that the alleged errors were not "significant" within the meaning of 19 CFR 351.224(g). *See* Memorandum, "Countervailing Duty Investigation of Ripe Olives from Spain: Allegations of Ministerial Errors," January 8, 2018 (Ministerial Error Memorandum).

[3] *See* Aceitunas Guadalquivir's December 21, 2017 Supplemental Questionnaire Response; *see* Angel Camacho's December 22, 2017 Supplemental Questionnaire Response; *see* Agro Sevilla's December 22, 2017 Supplemental Questionnaire Response; *see* GOS' December 22, 2017 Supplemental Questionnaire Response (GOS December 22 SQR); *see* GOS January 17, 2018 Supplemental Questionnaire Response; *see* EC's December 26, 2017 Supplemental Questionnaire Response; *see* Angel Camacho's December 29, 2017 Supplemental Questionnaire Response; *see* Aceitunas Guadalquivir's December 29, 2017 Supplemental Questionnaire Response; *see* Agro Sevilla's January 5, 2018 Supplier Questions Supplemental Questionnaire Response (Agro Sevilla January 5 SQR); *see* Agro Sevilla's January 5, 2018 Supplemental Questionnaire Response (Agro Sevilla January 5 Supplier SQR); *see* Angel Camacho's January 5, 2018 Supplemental Questionnaire Response; *see* Aceitunas Guadalquivir's January 5, 2018 Supplemental Questionnaire Response; *see* GOS' January 10, 2018 Supplemental Questionnaire Response; *see* EC February 20, 2018 Supplemental Questionnaire Response; *see* GOS' February 20, 2018 Supplemental Questionnaire Response.

[4] *See* EC's Letter, "Verification Exhibits collected by the Department During Verification in Brussels," March 13, 2018; *see* GOS' Letter, "Documents Requested During the Verification Visit," February 14, 2018; *see* Angel Camacho's Letter, "Minor Corrections and Verification Exhibits of Angel Camacho Alimentación, S.L.," February 20, 201; *see* Agro Sevilla's Letter, "Minor Corrections and Verification Exhibits of Agro Sevilla S.Coop. And.," February 20, 2018; *see* Aceitunas Guadalquivir's Letter, "Minor Corrections and Verification Exhibits of Aceitunas Guadalquivir," February 26, 2018.

[5] *See* Memorandum, "Verification of the Questionnaire Responses of Aceitunas Guadalquivir, S.L.U.," March 22, 2018 (Aceitunas Guadalquivir Verification Report); *see* Memorandum, "Verification Report: European Commission," April 2, 2018 (EC Verification Report); *see* Memorandum, "Verification Report: Government of Spain," March 29, 2018 (GOS Verification Report); *see* Memorandum, "Verification of the Questionnaire Response of Agro Sevilla Aceitunas S.Coop.And.," March 29, 2018 (Agro Sevilla Verification Report); and *see* Memorandum, "Verification of the Questionnaire Responses of Angel Camacho Alimentación S.L.," March 29, 2018 (Angel Camacho Verification Report).

[6] *See* Memorandum, "Decision Memorandum for the Post-Preliminary Analysis in the Countervailing Duty Investigation of Ripe Olives from Spain," April 24, 2018 (Post-Preliminary Analysis).

On December 18, 2017, the petitioner and the three respondent companies requested that Commerce hold a hearing.[7] On May 16, 2018, Commerce held a hearing. Interested parties submitted case and rebuttal briefs between April 23, 2018, and May 8, 2018.[8]

B. Period of Investigation

The period of investigation (POI) is January 1, 2016, through December 31, 2016.

III. Scope of the Investigation

The products covered by this investigation are ripe olives from Spain. For a complete description of the scope of this investigation, *see* the "Scope of the Investigation" in Appendix I of the *Federal Register* notice.

IV. Scope Comments

In accordance with the preamble to Commerce's regulations,[9] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.*, scope).[10] No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice* during the scope comment period.[11] For the *Preliminary Determination*, we did not modify the scope language as it appeared in the *Initiation Notice*. For a summary of events since the *Preliminary Determination*, including product coverage comments and rebuttal responses submitted to the record for this final determination, and accompanying discussion and analysis of all comments timely received, *see* Comment 30, below.[12]

[7] *See* Angel Camacho, Agro Sevilla, and Aceitunas Guadalquivir's Letter, "Request for Hearing," December 18, 2017; and *see* the petitioner's Letter, "Request for Hearing," December 18, 2017.
[8] *See* EC's April 23, 2018 Case Brief (EC's Case Brief A); *see* GOS' April 27, 2018 Case Brief (GOS Case Brief A); *see* the petitioner's April 23, 2018 Case Brief (Petitioner's Case Brief A); *see* Angel Camacho, Agro Sevilla, Aceitunas Guadalquivir and ASEMESA's April 23 Case Brief (Respondent's Case Brief A); *see* EC's May 3, 2018 Case Brief (EC's Case Brief B); *see* GOS' May 10, 2018 Case Brief (GOS' Case Brief B); *see* GOS' May 10, 2018 Verification Case Brief; *see* the petitioner's May 3, 2018 Case Brief (Petitioner's Case Brief B); *see* Angel Camacho, Agro Sevilla, Aceitunas Guadalquivir and ASEMESA's May 3, 2018 Case Brief (Respondent's Case Brief B); *see* EC May 8, 2018 Rebuttal Brief (EC's Rebuttal Brief); *see* GOS May 10, 2018 Rebuttal Brief (GOS Rebuttal Brief); *see* the petitioner's May 8, 2018 Rebuttal Brief (Petitioner's Rebuttal Brief); *see* Angel Camacho, Agro Sevilla, Aceitunas Guadalquivir and ASEMESA's May 10, 2018 Rebuttal Brief (Respondent's Rebuttal Brief); and *see* Association of Food Industries, Inc., Acme Food Sales, Inc., Mario Camacho Foods, Rema Foods Inc., Atlanta Corporation, Acorsa USA Inc., Schreiber Foods International, Inc., and Mitsui Foods, Inc (AFI) May 8, 2018 Rebuttal Brief (AFI Rebuttal Brief).
[9] *See Antidumping Duties; Countervailing Duties*, *Final Rule*, 62 FR 27296, 27323 (May 19, 1997).
[10] *See Ripe Olives from Spain: Initiation of Countervailing Duty Investigation, 82 FR 33050 (July 19, 2017) (Initiation Notice).*
[11] *Id.*
[12] *See* Comment 30.

V. Subsidies Valuation

A. Allocation Period

Commerce has made no changes to the allocation period methodology used in the *Preliminary Determination* and no issues were raised by interested parties in briefs regarding this topic. For a description of the allocation period and the methodology used for this final determination, *see* the *Preliminary Determination*.[13]

B. Attribution of Subsidies

Commerce has made no changes to the methodology for attributing to the respondents subsidies provided to the respondents' cross-owned input suppliers, as applied in the *Preliminary Determination* and no issues were raised by interested parties in briefs regarding the attribution of subsidies methodology. For a description of the methodologies used for all programs in the final determination, *see* the *Preliminary Determination*.[14] However, as discussed in Comment 6, below, we have revised our calculation methodology for applying section 771B of the Act and measuring the benefit to the respondents of subsidies provided to the unaffiliated olive growers who supply them.

C. Denominators

In accordance with 19 CFR 351.525(b)(1)-(5), Commerce considers the basis for a respondent's receipt of benefits under each program when considering the appropriate denominator for purposes of measuring the countervailable subsidy, *e.g.*, the respondent's total sales, sales of subject merchandise, or export sales. The denominators we used to calculate the countervailable subsidy rates for the various subsidy programs in this investigation are explained in further detail in the "Discussion of the Issues," section below and in the final calculation memoranda, dated concurrently with this final determination.[15]

D. Applicability of Section 771(5B)(F) of the Act

Commerce is guided by the statute in conducting this investigation. Section 771(5B)(F) of the Act, which addresses the implementation of the World Trade Organization (WTO) Agreement on Agriculture, states the following:

> Domestic support measures that are provided with respect to products listed in Annex 1 to the Agreement on Agriculture, and that the administering authority determines conform fully to the provisions of Annex 2 to that Agreement, shall be treated as non-countervailable.

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[13] *See Preliminary Determination* and accompanying PDM at 8.
[14] *See Preliminary Determination* and accompanying PDM at 8-11.
[15] *See* Memoranda, dated concurrently with this memorandum, "Final Determination Calculations for Aceitunas Guadalquivir, S.L.U." (Aceitunas Guadalquivir Final Calculation Memorandum); "Final Determination Calculations for Agro Sevilla Aceitunas S.Coop.And," (Agro Sevilla Final Calculation Memorandum); and, "Final Determination Calculations for Angel Camacho" (Angel Camacho Final Calculation Memorandum).

However, section 771(5B)(G)(ii) of the Act implements a time limit for the application of this provision, stating, in relevant part, "{s}ubparagraph (F) shall not apply to imports from a WTO member country at the end of the 9-year period beginning on January 1, 1995."

As further explained in the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act,[16] the Act is consistent with the obligations under Article 31 of the Agreement on Subsidies and Countervailing Measures (ASCM):

> Under Article 31 of the {ASCM}, Article 8 {"Identification of Non-Actionable Subsidies"} expires in five years unless there is an agreement to extend its application . . . . Pursuant to Article 13 of the Agreement on Agriculture, Annex 2 domestic support measures are non-actionable only for the duration of the implementation period, which, pursuant to Article 1(f) of that Agreement, is the nine-year period commencing in 1995.

Thus, for purposes of administering the Act, the requirement to treat agricultural subsidies as not countervailable no longer applies to imports from WTO Member countries – in this case, Spain – after January 1, 2004. With regard to the European Union, a similar interpretation applies. As of the expiration of the nine-year period, Commerce is not required under the Act to consider assistance provided by the EU or the GOS to agricultural products as not countervailable. As such, Commerce initiated, and has conducted, this investigation under the authority granted by the Act.

E. Applicability of Section 771B of the Act

Section 771B of the Act addresses the calculation of countervailable subsidies on certain processed agricultural products:

> In the case of an agricultural product processed from an agricultural product in which—
>
> (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and
>
> (2) the processing operation adds only limited value to the raw commodity,
>
> countervailable subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.

In the *Preliminary Determination*, Commerce analyzed the applicability of section 771B of the Act, and found that both prongs were satisfied.[17] Therefore, we found that the benefits provided to olive growers benefit the processors of ripe olives, in accordance with section 771B of the

[16] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. I at 870 (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199 (SAA) at 870.
[17] *See Preliminary Determination* and accompanying PDM at 12-17.

Act, and preliminarily calculated a weighted-average per kilogram benefit using the information provided by all of the reporting olive growers.

Interested parties submitted comments in their case and rebuttal briefs regarding the application of section 771B of the Act. We have addressed these comments below in Comment 1. Commerce continues to find that both prongs of section 771B of the Act have been met, based on record evidence.

VI. Loan Interest Rate Benchmarks and Discount Rates

Commerce has made no change to the interest rate benchmarks and discount rates used in the Post-Preliminary Analysis except in regard to certain loans financed by the Spanish Official Credit Institute (ICO) for Angel Camacho, *see* below at Comment 17. For a description of the interest rate benchmarks and discount rates used for the final determination, *see* the *Preliminary Determination* and Post-Preliminary Analysis.[18]

VII. Application of Facts Otherwise Available and Use of Adverse Inferences

A. Legal Standard

Sections 776(a)(1) and (2) of the Act provide that Commerce shall, subject to section 782(d) of the Act, apply "facts otherwise available" if necessary information is not on the record or an interested party or any other person: withholds information that has been requested; fails to provide information within the deadlines established, or in the form and manner requested by Commerce, subject to subsections (c)(1) and (e) of section 782 of the Act; significantly impedes a proceeding; or provides information that cannot be verified as provided by section 782(i) of the Act. Where Commerce determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that Commerce will so inform the party submitting the response and will, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. If the party fails to remedy or satisfactorily explain the deficiency within the applicable time limits, subject to section 782(e) of the Act, Commerce may disregard all or part of the original and subsequent responses, as appropriate.

Section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available (adverse facts available or AFA) when a party fails 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 countervailable subsidy rate based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information. Furthermore, 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 countervailing duty investigation, a previous administrative review, or other information placed on the record.

Under section 776(d) of the Act, Commerce may use AFA as a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or, if

[18] *See Preliminary Determination* and accompanying PDM at 17; *see* Post-Preliminary Analysis at 4-5.

there is no same or similar program, a CVD rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates. Additionally, when selecting an AFA rate, Commerce is not required for purposes of section 776(c) of the Act, or any other purpose, to estimate what the countervailable subsidy rate would have been if the non-cooperating interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.[19]

Consistent with section 776(d) of the Act and our established practice, for each of the programs discussed below, we selected as AFA the highest calculated rate for the same or similar program.[20] When selecting rates in an investigation, we first determine if there is an identical program in the investigation and use the highest calculated rate for the identical program (excluding zero rates). If no such identical program with a rate above zero exists in the investigation, we then determine if an identical program was examined in another CVD proceeding involving the same country, and apply the highest calculated rate for the identical program (excluding rates that are *de minimis*).[21] If no such identical program exists, we then determine if there is a similar/comparable program (based on the treatment of the benefit) in another CVD proceeding involving the same country and we apply the highest calculated rate for the similar/comparable program, excluding *de minimis* rates. Where there is no comparable program, we apply the highest calculated rate from any non-company specific program in any CVD case involving the same country, but we do not use a rate from a program if, based on eligibility criteria, the industry under investigation cannot use that program.[22]

Section 776(c) of the Act provides that, when Commerce relies on secondary information rather than on information obtained in the course of an investigation or review, 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 or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."[23] The SAA provides that to "corroborate" secondary information, Commerce will satisfy itself that the secondary information to be used has probative value.[24]

Due to the failures of the GOS, Angel Camacho, Agro Sevilla, and Aceitunas Guadalquivir to cooperate to the best of their ability for certain information requested by Commerce, for each of the programs discussed below, Commerce has applied AFA, in accordance with section 776(b) of the Act. Because the rates on which we are relying as AFA rates are subsidy rates calculated in this proceeding, they are primary information and the corroboration requirement of section 776(c) of the Act does not apply.

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[19] *See* section 776(d)(1) of the Act.
[20] *See, e.g., Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) (*Shrimp from China*) and accompanying Issues and Decision Memorandum (IDM) at 13; *see also Essar Steel Ltd. v. United States*, 753 F.3d 1368, 1373-1374 (Fed. Cir. 2014) (upholding "hierarchical methodology for selecting an AFA rate").
[21] *See Pre-Stressed Concrete Steel Wire Strand from China, Final Affirmative Countervailing Duty Determination,* 75 FR 28557 (May 21, 2010) and accompanying IDM at 13-14.
[22] *See Shrimp from China* and accompanying IDM at 13-14.
[23] *See* SAA at 870.
[24] *Id.*

B. Application of AFA and Selection of AFA Rates

1. Unreported Rural Development Grants to Agro Sevilla's First-Tier Member Cooperatives

On January 29, 2018, and February 2, 2018, the GOS and the respondents, respectively, reported that they had inadvertently omitted additional Pillar II payments made to Agro Sevilla's first-tier suppliers from their questionnaire responses. In these submissions, they claimed that this information was found on an older database that had not been used in years. Because of the number and magnitude of the grants, and the fact that they were reported well after the deadline as outlined in 19 CFR 351.30l(c)(5), we rejected the additional information.

We find that the GOS and Agro Sevilla failed to provide complete information in response to our questions regarding Agro Sevilla's first-tier members' use of this program. Pursuant to section 776(a)(2)(B) of the Act, when a party fails to provide requested information by the deadlines established by Commerce, Commerce uses facts otherwise available. Additionally, by not reporting the complete receipt of this assistance in a timely manner, as well as the magnitude of the additional information submitted, the GOS and respondents failed to cooperate to the best of their ability by not timely submitting this information when requested. Accordingly, pursuant to section 776(b) of the Act, we find that it is appropriate to apply AFA to the Pillar II payments received by Agro Sevilla's first-tier suppliers.

As AFA, we find that a benefit within the meaning of section 771(5)(E) of the Act is conferred. To calculate the benefit to Agro Sevilla resulting from the first-tier suppliers' receipt of benefits under Pillar II, we are using the highest rate that was calculated as the weighted per kilogram benefit for a first-tier supplier member in the *Preliminary Determination* as the AFA weighted per kilogram benefit for each of the first-tier members.[25] As a result, we have calculated a program rate of 0.96 percent *ad valorem for* Agro Sevilla. *See* Comment 23 for further discussion on Commerce's use of AFA for Agro Sevilla's first-tier suppliers.

2. Unreported Rural Development Grants to Aceitunas Guadalquivir's Unaffiliated Suppliers and to Angel Camacho's Cross-Owned Affiliates

As discussed in detail in Comment 23 below, because the information provided by the GOS and the respondents could not properly be considered a minor correction to previously submitted information, the additional Pillar II payments reported by the GOS and the respondents represented new factual information. As new factual information, it is subject to the 19 CFR 351.301, which is the regulatory provision that governs the time limits for the submission of factual information. Subsection 351.301(c)(1) of Commerce's regulations states that "the Secretary will not consider or retain in the official record of the proceeding unsolicited questionnaire responses or untimely filed questionnaire responses. The Secretary will reject any untimely filed or unsolicited questionnaire response …." Given that the GOS and respondents did not submit the new factual information at issue until well after November 20, 2017, when

[25] *See* Agro Sevilla Final Calculation Memorandum for a discussion of this proprietary rate.

Commerce issued its *Preliminary Determination* – the deadline for filing such information clearly had expired.

Therefore, we find that necessary information is not available on the record, and that Aceitunas Guadalquivir and Angel Camacho withheld information requested by Commerce. In accordance with sections 776(a)(1) and 776(a)(2)(A) of the Act, we determine that the use of facts otherwise available is warranted in calculating each companies' benefit from this program. Moreover, because these companies failed to provide complete details regarding the usage of this program, we find that these companies failed to cooperate to the best of their ability in providing requested information that was in their possession; thus, the application of AFA is warranted, pursuant to section 776(b) of the Act, in determining the benefit. Relying on AFA, we find, as discussed below under Comment 23, that these companies each benefited from this program at the rate of 0.96 percent *ad valorem*, the rate calculated for the identical program used by Agro Sevilla in this proceeding.

3. Unreported Grant Provided to Angel Camacho in 2008

Angel Camacho and the GOS presented information about a grant that was previously unreported. Commerce declined to accept this information.[26] At verification, Commerce officials did not collect information concerning the amount of the grant described as being for a research project and provided in 2008 by the Andalusia Energy Agency.[27] Commerce's initial questionnaire response requests respondents to report "other subsidies" and it is clear in instructing respondents to report "any other forms of assistance to your company."[28] Angel Camacho and the GOS provided information regarding other assistance, and in doing so, Angel Camacho and the GOS demonstrated that they have the tools to identify such assistance. However, the disclosure at the outset of verification that a grant should have been previously reported in response to the question about other forms of assistance demonstrates Angel Camacho's efforts to identify and report other forms of assistance were incomplete. Indeed, Angel Camacho reported other assistance it had received over the AUL in its initial questionnaire response.[29]

We find that Angel Camacho failed to provide complete information in response to our questions about other forms of assistance provided by the GOS. By not divulging the receipt of this unreported assistance prior to verification in the initial and subsequent questionnaire responses requesting information on "other subsidies," Angel Camacho precluded Commerce from an adequate examination of the grant (*e.g.* Commerce did not receive timely, complete responses to the questions in the relevant appendices regarding this grant and was unable to issue a supplemental questionnaire to the GOS concerning the extent to which this program constituted a financial contribution or are specific under sections 771(5)(D) and 771(5A) of the

[26] *See* Angel Camacho Verification Report at 4.
[27] *See* Angel Camacho Verification Report at 4; *see* GOS Verification Report at 2.
[28] *See* Letter to the GOS, "Countervailing Duty Investigation on Ripe Olives from Spain: Initial Questionnaire," August 4, 2017 (IQR), at Section III at 19.
[29] See Letter from Angel Camacho, "Initial Questionnaire Response of Angel Camacho Alimentación, S.L. Ripe Olives from Spain (C-469-818)," September 19, 2017, at 64-76.

Act). Therefore, consistent with prior determinations,[30] we find that Angel Camacho has not cooperated to the best of its ability. Pursuant to section 776(a)(2)(B) of the Act, when a party fails to provide requested information by the deadlines established by Commerce, Commerce uses facts otherwise available. Further, pursuant to section 776(b) of the Act, we find that Angel Camacho, by virtue of its failure to provide timely information and complete answers to Commerce's inquiries, failed to cooperate by not acting to the best of its ability. Pursuant to Commerce's authority under section 775 of the Act and 19 CFR 351.311(b), we have included this grant in our investigation and we determine the application of AFA to be warranted. We are finding that, as AFA, this discovered form of assistance provides a financial contribution and is specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. A benefit is conferred, pursuant to section 771(5)(E) of the Act.

Under our AFA hierarchy, we would first look to a rate from an identical program in the current investigation. However, because the record indicates that the grant was given by the Andalusia Energy Agency in 2008, but not the specific program under which it was given, we cannot identify the identical program from the current investigation. Next, we would consider a rate for an identical program in another CVD proceeding involving the same country, but again, we cannot select a rate under this step of the hierarchy because the record does not identify under which program the unreported grant was given. As such, we would then look to a rate for a similar/comparable program (based on the treatment of the benefit) in another CVD proceeding involving the same country. Although Commerce has investigated similar/comparable programs in Spain in other CVD proceedings, we find that those rates are not appropriate here, because they were calculated using a prior methodology. However, because this step of the hierarchy contemplates using a similar or comparable program based on the treatment of benefit, we have evaluated whether there are similar or comparable programs in this investigation that might serve as the source of an AFA rate. We find that the rate for another program administered by the Andalusia Energy Agency, *the Andalusia Energy Agency Sustainable Energy Development of Andalusia Scheme*, is the most appropriate source for an AFA rate for Angel Camacho's unreported grant, because it is not a grower program to which section 771B of the Act applies. Therefore, based on the hierarchy for selecting rates for purposes of applying AFA, we are using the highest company-specific rate in this investigation for grants provided under the *Andalusia Energy Agency Sustainable Energy Development of Andalusia Scheme*, which is 0.07 percent *ad valorem*. Therefore, we are applying a rate of 0.07 percent *ad valorem* for Angel Camacho's unreported grant.

[30] *See Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from the People's Republic of China: Final Affirmative Determination*, 81 FR 13337 (March 14, 2016) and accompanying IDM at 19; *see Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 FR 63535 (October 20, 2015) and accompanying IDM at 12-13 and 153-155; *see also Shrimp from China* and accompanying IDM at 75-78.

VIII. Analysis of Programs

A. Programs Determined to Be Countervailable

1. European Union (EU) Common Agricultural Policy (CAP) Pillar I– Basic Payment Scheme (BPS)

Interested parties submitted comments in the case briefs and rebuttal briefs regarding this program. The countervailability of the program is discussed below in Comment 3.

Angel Camacho	7.66 percent *ad valorem*
Aceitunas Guadalquivir	17.29 percent *ad valorem*
Agro Sevilla	4.26 percent *ad valorem*

2. EU CAP – Greening

Interested parties submitted comments in the case briefs and rebuttal briefs regarding this program. The countervailability of the program is discussed in Comment 3.

Angel Camacho	4.24 percent *ad valorem*
Aceitunas Guadalquivir	8.72 percent *ad valorem*
Agro Sevilla	2.14 percent *ad valorem*

3. EU CAP Pillar II – Agricultural Fund for Rural Development (Rural Development)

Interested parties submitted comments in the case briefs and rebuttal briefs regarding this program. The countervailability of the program is discussed in Comment 4. Modifications to the calculation methodology are discussed in Comments 8 and 23.

Angel Camacho	0.96 percent *ad valorem*
Aceitunas Guadalquivir	0.96 percent *ad valorem*
Agro Sevilla	0.96 percent *ad valorem*

4. Spanish Agricultural Insurance System (SAIS)

Interested parties submitted comments in the case briefs and rebuttal briefs regarding this program. The countervailability of the program is discussed in Comment 14.

Angel Camacho	0.11 percent *ad valorem*
Aceitunas Guadalquivir	0.04 percent *ad valorem*

5. EU Program for the Environment and Climate Action (LIFE)

Interested parties submitted comments in the case briefs and rebuttal briefs regarding this program. The countervailability of the program is discussed in Comment 13.

Angel Camacho 0.06 percent *ad valorem*

6. EU Regional Development Fund (ERDF) and Andalusia Energy Agency Sustainable Energy Development of Andalusia Scheme (Sustainable Energy Development of Andalusia Scheme)

Interested parties submitted comments in the case briefs and rebuttal briefs regarding this program. The countervailability of the program is discussed in Comments 9 and 10.

Angel Camacho 0.07 percent *ad valorem*

7. EU ERDF and Agency of Innovation and Development of Andalusia (IDEA)

Interested parties submitted comments in the case briefs and rebuttal briefs regarding this program. The countervailability of the program is discussed in Comment 12.

Agro Sevilla 0.02 percent *ad valorem*

8. EU ERDF and Andalusian Promotion of Renewable Energy Installations (PROSOL)

Interested parties submitted comments in the case briefs and rebuttal briefs regarding this program. The countervailability of the program is discussed in Comment 11.

Agro Sevilla 0.03 percent *ad valorem*

9. Centre for the Development of Industrial Technology (CDTI) Financing

Interested parties submitted comments in the case briefs and rebuttal briefs regarding this program. The countervailability of the program is discussed in Comments 18 and 19.

Aceitunas Guadalquivir 0.01 percent *ad valorem*

10. ICO – Exporters

We have not changed our methodology from the Post-Preliminary Analysis and no parties commented regarding this program.

Angel Camacho 0.04 percent *ad valorem*

11. ICO – International Financing

In the Post-Preliminary Analysis, we found that the loans that Angel Camacho received under this program provided benefits that were not measurable, and we did not examine the countervailability of this program.[31] However, the petitioner commented that we erred in our calculation by using a benchmark interest rate from the incorrect year. As discussed in

[31] *See* Post-Preliminary Analysis at 21.

Comment 16, we agree with the petitioner and we have corrected the interest rate benchmark. This correction results in a benefit that is measurable. Therefore, we are examining the countervailability of this program.

We noted in the Post-Preliminary Analysis that the criteria vary for each ICO financing program.[32] For the "ICO International Financing," the purpose of such financing is to "provide self-employed people and Spanish companies with the financing needed to make investments in Spain and meet the liquidity needs to enter a foreign market."[33] As discussed in more detail in Comment 15 below, ICO is an authority within the meaning of section 771(5)(B) of the Act; as such, loans provided by ICO constitute a direct transfer of funds under section 771(5)(D)(i) of the Act. As discussed in more detail in Comment 15 below, ICO is an authority within the meaning of section 771(5)(B) of the Act; as such, loans provided by ICO constitute a direct transfer of funds under section 771(5)(D)(i) of the Act. The loans for international financing are available only to exporters, and they are specific as an export subsidy under section 771(5A)(A) and (B) of the Act. Finally, these loans provide a benefit in the amount of the difference between the interest that is paid on the loan and the interest that would be paid on a comparable commercial loan, in accordance with section 771(5)(E)(ii) of the Act. To calculate the benefit, we used as a benchmark the interest rates on short-term commercial loans provided to Angel Camacho as discussed above at "Loan Interest Benchmarks Discount Rates." We compared the effective interest that the companies paid to the effective interest the companies would have paid using the company-specific interest rate benchmarks. We summed the difference between the interest paid and divided each company's benefit amount by its total FOB export sales, in accordance with 19 CFR 351.525(b)(2).[34]

Angel Camacho	0.01 percent *ad valorem*

12. Income Tax Credit for Foreign Trade Fair Expenses

At verification, the team examined Agro Sevilla's tax return and saw that Agro Sevilla benefitted from a tax credit applied relating to the costs of attending international trade fairs and the costs of international marketing. Information on the tax return demonstrates that, in each year from 2001 through 2013, Agro Sevilla earned these tax credits. The tax credits earned under this program are valid for a period of 15 years.

The tax return shows the amount of each year's credit that remains available, the amount of the available credit that is being applied to the current year's tax liability, and the remaining available balance of each year's credit for use in future years. Agro Sevilla provided a worksheet generated from the accounting system showing the total tax credits earned in the years 2001 through 2008 (credit balances from these years were used to reduce the tax liability in the current year). The 2015 tax return, filed during the POI, was provided in the initial

[32] *Id*., at 8.
[33] *See* GOS December 22 SQR at Appendix 8 at 14-16.
[34] S*ee* Angel Camacho Final Calculation Memorandum.

questionnaire response and indicates that Agro Sevilla benefitted from this tax credit during the POI.[35]

We determine that the tax credit confers a countervailable subsidy within the meaning of section 771(5) of the Act. The tax credit provides a financial contribution under section 771(5)(D)(ii) of the Act in the form of revenue foregone by the GOS and confers a benefit in the amount of the tax credit used by Agro Sevilla during the POI to reduce its tax obligation. We find the tax credit is export specific within the meaning of section 771(5A)(A) and (B) of the Act because it is granted for expenses incurred to attend international trade fairs and for international marketing, activities by which companies seek to expand their export sales. In accordance with 19 CFR 351.524(c), we treated the tax credit as a recurring benefit. To calculate the countervailable subsidy, we divided the amount of the tax credit applied to reduce Agro Sevilla's tax obligation during the POI, by Agro Sevilla's export sales during the POI.[36]

Agro Sevilla 0.11 percent *ad valorem.*

13. Unreported Grant to Angel Camacho Presented at Verification

At verification, Angel Camacho and the GOS presented information about a grant received in 2008 that was not previously reported in questionnaire and supplemental questionnaire responses. As discussed above in the section. "Use of Facts Otherwise Available and Adverse Inferences," Commerce declined to accept this information as a minor correction, and we are relying on AFA to determine that this grant is countervailable and are applying an AFA rate to determine the subsidy rate, as discussed in Comment 20.

Angel Camacho 0.07 percent *ad valorem*

B. Programs Determined to Be Not Used or to Not Confer a Measurable Benefit During the POI

1. EU CAP Single Payment Scheme (SPS)

At verification, Commerce noted that the companies' reported SPS payments were actually residual BPS – Direct Payments from prior years.[37] We have included these payments in the subsidy rate calculated for BPS – Direct Payment program.

2. *EU Promotion Aid Scheme*
3. *EU CAP Pillar I – Aid to Young Farmers*
4. *EU Producer Organization Work Programs*
5. *Occupational Safety and Health Investments for Micro and SME Grants provided by the Department of Employment*
6. *Programa de Incentivo al Vehiculo Eficiente (PIVE) (Grants to acquire vehicles)*

[35] *See* Letter from Agro Sevilla, "Initial Questionnaire Response of Agro Sevilla S.Coop.And. Ripe Olives from Spain (C-469-818)," September 19, 2017 (Agro Sevilla IQR), at Exhibit AS-12.
[36] *See* Agro Sevilla Final Calculation Memorandum.
[37] *See* Aceitunas Guadalquivir Final Calculation Memorandum.

7. *CDTI Grants*
8. *Agencia Andaluza de Promocion Exterior (EXTENDA)*
9. *Technical Corporation of Andalusia (CTA)*
10. *Andalusia Employment Service*
11. *Collective Layoff Procedure 2005/2015*
12. *Creation for Employment for Youth*
13. *Andalusia Workplace Health and Safety*
14. *Andalusia Equine Sector*
15. *Spanish Electricity Special Tax Reduction*
16. *EU Investment Fund Financing*
17. *Fundacion Corporation de Andalusia Financing*

C. Programs Determined to Be Tied to Non-Subject Merchandise

1. *Voluntary Coupled Support (VCS)*
2. *Canary Island Supply Regime*
2. *Market Measures*

These three programs provide assistance only to a list of eligible products. For these programs, the list of eligible products does not include ripe olives. Therefore, any benefits provided under these programs are tied to non-subject merchandise.[38]

D. Programs Determined to Be Not Countervailable

1. *ICO – Company and Entrepreneur Financing*

In the Post-Preliminary Analysis, we found that the loans that Angel Camacho received under this program provided benefits that were not measurable, and we did not examine the countervailability of this program. However, the petitioner commented that we erred in our calculation by using a benchmark interest rate from the incorrect year. As discussed in Comment 16, we agree with the petitioner and we have corrected the interest rate benchmark. This correction results in a benefit that is measurable. Therefore, we are examining the countervailability of this program. This loan program provides financing to all sectors on the same financing terms, and there is no limitation in the program's administration on the availability of loans by industry or enterprise. Therefore, the loans are not provided on a *de jure* specific basis. With respect to *de facto* specificity, the program provided more than 231,000 loans, valued at more than €16 billion, in 2014. We find that this does not represent a limited number of recipients. Moreover, the fruit and vegetable processing sector received just 581 loans, valued at €123 million, for the years 2013, 2014, and 2016. This does not represent a dominant or disproportionate share of the loans given to the sector that includes olive processors. As such, we also find that this program is not *de facto* specific; therefore, we determine that this program is not countervailable.

[38] *See* EU IQR Exhibit "Commission Delegated Regulation (EU) No. 639/2014" Chapter 3, Article 38; *see also* Aceitunas Guadalquivir October 10, 2017 supplier QR at AG Annex IV-7; Angel Camacho October 10, 2017 supplier QR at Camacho Annex I-12-13, Camacho Annex IV-9-10, Camacho Annex V-6-7; Agro Sevilla October 10, 2017 Supplier SQR at Exhibit I.G. *See also* EU Verification Report at 7-9.

D. Program for Which we are Deferring Examination

European Investment Bank (EIB) Loans

Agro Sevilla and Angel Camacho, in response to our question about their receipt of assistance under other subsidy programs, reported receiving loans financed by the EIB, an international financial institution owned by the European Member States. In the Post-Preliminary Analysis, we found that the benefits received by Agro Sevilla and Camacho were not measurable, and we did not analyze the countervailability of the EIB loans. However, as discussed in Comment 17 below, the petitioner identified an error in the calculation that, when corrected, results in a measurable benefit for Agro Sevilla. As a result, we have examined the information in the record for purposes of analyzing the countervailability of the EIB loans. The EC provided some information, but not all of the information we need, to conduct a full *de facto* specificity analysis, and we did not identify the need for this additional information until we corrected our calculations in response to the petitioner's comment. At this stage of the investigation, we do not have sufficient time to gather the additional information; therefore, in accordance with 19 CFR 351.311(c)(2), we are deferring our examination of this this program until a subsequent administrative review, should this investigation result in the issuing of a CVD order, and a review is requested.

IX. Discussion of the Issues

Comment 1: Whether Section 771B of the Act is Applicable in this Investigation

GOS' Comments[39]

- Given that section 771B of the Act does not define "the latter stage product," it is unreasonable that Commerce defines this term as any processed product obtained from raw olives rather than as ripe olives.
- "[T]he" latter stage product is singular, indicating that Congress intended it to apply to only the product under investigation. If "any processed product" was intended, as Commerce suggests, then "the latter stage product" would have been plural.
- If "the latter stage product" is not limited to the product under investigation, then this prong of section 771B of the Act will always be met.
- Additionally, if "the latter stage product" is not limited to subject merchandise, Commerce is in violation of WTO rules that require a pass-through analysis.
- Commerce is incorrect in concluding that there is substantial dependence between raw olive and ripe olive demand. The GOS has provided information to show that table olives represent only eight percent of all the olives grown in Spain, and ripe olives represent only three percent.
- The olive must be fully transformed from the raw olive into either a ripe olive or olive oil.
- Even though all raw olives can be used for the production of olive oil, certain varieties can be used for either olive oil or table olives, and prevailing market conditions may determine their use. The lack of dependence of demand between raw and ripe olives is also

[39] *See* GOS Case Brief A at 28-32.

demonstrated by the production of ripe olives, which varies each marketing year both in volume and in percentage of production as a portion of Spanish table olives.

- Even if Commerce finds that a dependency exists, between either raw olives and table olives or raw olives and ripe olives, it is not substantial, neither eight nor three percent are "substantial" amounts.
- Furthermore, *Shrimp from China* does not support this assertion, because 25 percent of fresh shrimp were processed into frozen shrimp – the product under investigation. There is a large difference between 25 percent and eight percent and an even larger difference between 25 percent and three percent.
- The second prong of section 771B of the Act, that the processing operation adds only limited value to the raw commodity, is also not met. There is a big difference between raw olives and ripe olives: raw olives are inedible; it takes significant processing to make them edible. Although both products are olives, they are very different in nature and, therefore, distinguishable products.
- Packaging is a relevant and essential element of production. Commerce is unreasonable in disregarding such costs.
- Each type of processed olive involves different preparations and these should be assessed on a case-by-case basis.
- Commerce notes that only the petitioners have provided evidence on manufacturing costs; however, this ignores claims made by the GOS and respondents that the added value of the processed product is higher. The GOS also provided information on the manufacturing costs at verification.

Respondents' Comments[40]

- The facts on the record fully support a finding that: the demand for raw olives is not substantially dependent on the demand for ripe olives; and, the processing operation for ripe olives adds more than limited value to the raw olive.
- Although Commerce may interpret the statute at its discretion, substantial evidence supports a very different conclusion from how Commerce defined "the latter stage product." Although section 771B of the Act does not define "the latter stage product" to be the subject merchandise, it also does not require that the "latter stage product" encompass all processed forms of raw olives.
- While the petitioner argues that Congress would have used more specific language if it intended subject merchandise only, the petitioner ignores the language that Congress did use. If Congress meant for a broad interpretation it would not have used the language "the latter stage product." If it meant *all* later stage products Congress would have used such language.
- The latter stage product is singular, and the legislative history offers no guidance to the contrary.
- In the case that led to the adoption of section 771B of the Act, *Live Swine from Canada*,[41] the subject processed products were all meat cuts of the live hog. In contrast, this

[40] *See* Respondent's Case Brief A at 11-17.
[41] *See Final Affirmative Countervailing Duty Determination; Live Swine and Fresh, Chilled and Frozen Pork Products from Canada*, 50 FR 25097 (June 17, 1985) (*Live Swine from Canada*).

investigation targets a small processing segment, ripe olives; *Live Swine from Canada* was not a case against pork chops, hams or another discrete processed product of the hog.

- In *Rice from Thailand,*[42] the scope of the investigation included "all Thai rice including rice in the husk (paddy or rough); husked (brown) rice including basmati and other; semi-milled or wholly-milled rice, whether or not polished or glazed, including parboiled and other; and broken rice."[43]
- The processed product in *Live Swine from Canada* and *Rice from Thailand*, aligned the definition with the scope in question, and covered demand for the raw agricultural product in question.
- Here, the scope is just ripe olives, which is a narrower by comparison with *Rice from Thailand* or *Live Swine from Canada*.
- The Petition notes that "all olives must be processed to be edible."[44] Processing, namely de-bittering and, in most cases, oxidization makes ripe olives edible for consumption. Clearly this is a change in the "the essential character" of the raw olives – going from an inedible olive to an edible olive.
- Additionally, the value added by processing is also greater than the "limited value" required by the statute. Consumers cannot make use of ripe olives outside of their packaging, which includes the olives, their solution, and the container; the packaging is essential. In the antidumping duty investigation, the packaging is a product characteristic.
- The petitioner itself claims that the total processing costs including packaging constitute 60 percent of the cost of the delivered product, substantially more than the cost of the raw olives.
- Commerce noted in the *Preliminary Determination* that, in prior cases, it did not include in its analysis of value added any costs associated with packaging, labeling or "similar post-processing activities" when considering the value added.[45] However, packaging is not a "post-processing activity," it is part of the production process of ripe olives. Without the packaging, consumers cannot make use of the ripe olives. It is an inherent characteristic of the product and includes sterilization. Here, precedent is not a constraint, Commerce can explain its change in practice.

European Commission Comments[46]

- Section 771B of the Act is also not applicable, because the demand for raw olives is dependent on the demand for olive oil, which represents more than 90 percent of the demand for raw olives.

[42] *See Rice from Thailand; Final Results of Countervailing Duty Administrative Review*, 59 FR 8906 (February 24, 1994) (*Rice from Thailand*).
[43] *Id.*
[44] *See* Letter from the petitioners, "Petition for the Imposition of Antidumping and Countervailing Duties Volumes I through III Countervailable Subsidies, Ripe Olives from Spain," June 21, 2017 (Petition), at 2.
[45] *See Preliminary Determination* at 16.
[46] *See* EC's Case Brief A at 12-14.

Petitioner's Rebuttal Comments[47]

- In the *Preliminary Determination*, Commerce correctly determined that the demand for the prior stage product – raw olives – is entirely dependent on demand for the latter stage product – processed olives.
- There is no statutory requirement or statutory intent that the latter stage product be interpreted to mean only the subject merchandise.
- The respondents argue that, because only some raw olives are processed into ripe olives, the prior stage product is not dependent on the latter stage product – but this claim overlooks Commerce's past practice, the statutory intent, and the clear text of section 771B of the Act.
- The respondents argue that Congress must have intended for "the latter stage product" to refer to a singular product, because the text uses the singular "the" – however, this ignores that "latter stage product" itself is a general non-specific term. "The latter stage product" of any raw agricultural commodity must include all of the processed versions of that raw commodity, not just one subset.
- If Congress intended the restrictive meaning that the respondents suggest, it would have used well-defined terms as it does elsewhere in countervailing duty law, such as "foreign like product" or "subject merchandise."[48] Instead, Congress chose the term "latter stage product" to permit Commerce to attribute subsidies on raw agricultural products to subject merchandise without requiring that subject merchandise be the only or even majority "latter stage product" processed from the raw commodity.
- The respondents ignore the Congressional intent of section 771B of the Act, to ensure that Commerce is legally able to address in any countervailing duty action involving a processed agricultural product the full measure of countervailable subsidies provided to the raw agricultural product used to make the processed product. Senator Baucus made this clear when he stated that this provision allows Commerce to "place duties on processed agricultural products if the raw agricultural product is subsidized."[49]
- Interpreting "latter stage product" as only subject merchandise ignores the plain language of the statute and would deny relief to products like ripe olives, no matter how substantial the subsidies.
- In *Shrimp from China*, Commerce attributed subsidies on the raw product to subject merchandise processed from that raw product regardless of whether the raw product could be processed into other non-subject merchandise.
- The respondents' attempt to distinguish this case from *Live Swine from Canada* and *Rice from Thailand*, because more subject merchandise was made from the raw products in those cases, is misguided. Similar to those cases, here too, the raw agricultural product (raw olives) has no use or outlet other than as a processed product (processed olives). The demand for the prior stage product – raw olives – is 100 percent dependent on the demand for the latter stage product – processed olives.
- The U.S. International Trade Commission also confirmed there is a continuous line of production from raw olives – Commerce has correctly recognized this as strong evidence that demand for the prior stage product is dependent on the demand for the latter stage product.

[47] *See* Petitioner's Rebuttal Brief at 11-20
[48] *See* section 771 of the Act.
[49] *See* Congressional Record, S. 8814, June 26, 1987.

- Commerce was correct to determine that processing raw olives into ripe olives adds limited value because the cost of processing is minimal. Processing is limited to cleaning and curing olives which amounts to about three percent of the total cost of the finished product.[50] The respondents have not refuted this. Rather they acknowledge that processing involves merely de-bittering and in most cases oxidization.
- The respondents argue that value of processing should include all packaging operations. Commerce was correct to reject this argument in the *Preliminary Determination* and should do so again. The plain language of the statute refers to "the processing operation," not to all the activities that occur between harvesting the raw product and its end use.
- Commerce precedent has not included canning, labeling or packaging in its consideration of "processing operations." In *Shrimp from China*, Commerce stated it looked to "the nature of the processing operation itself" in determining whether an operation should be included in the second prong of section 771(B) of the Act.[51] In *Live Swine from Canada*, Commerce considered only the operations that directly involved the raw product, such as the killing, evisceration and splitting of the hog, not any packaging or labeling.[52] Similarly, in *Rice from Thailand* Commerce did not consider packaging or labeling costs.[53]
- Commerce should also not consider the product characteristics used in the antidumping duty investigation, because what is considered relevant in that proceeding for matching sales is not relevant to what constitutes "processing operations."
- Processing raw olives into ripe olives adds limited value, because it does not change the essential character of the olives. The legislative history makes clear that the raw agricultural product and the processed agricultural product should be considered the same for countervailing duty attribution purposes.
- In *Rice from Thailand*, Commerce found that, after processing, the processed agricultural product (milled rice), while not identical to the raw agricultural product (paddy rice), remained essentially unchanged in composition.[54]
- The respondents argue that because an olive is processed from inedible to edible, the essential character is changed. However, there is no mistaking an olive for another type of fruit or another type of food product, whether raw or processed. They are olives when they are raw and olives when they are processed into ripe olives. Raw olives retain their essence after processing into ripe olives, just as paddy rice retains its essence after processing into milled rice and just as hogs retain their essence after processing into pork.

Commerce's Position: There is no new or additional information on the record that would lead us to change our preliminary finding that section 771B of the Act is applicable in this investigation. As we explained in the *Preliminary Determination,* we find both prongs of section 771B of the Act satisfied. First, the statute does not provide a definition for the term "latter stage product" as used within section 771B of the Act; as such, the statutory language does not require the latter stage product to be the subject merchandise or the foreign like product. Therefore, "the latter stage product" is not defined narrowly to include only subject

[50] *See* Petition Volume III at 5-6.
[51] *See Shrimp from China* and accompanying IDM at 50.
[52] *See Live Swine from Canada*.
[53] *See Rice from Thailand*.
[54] *See Rice from Thailand*, 59 FR at 8909.

merchandise, ripe olives. Consistent with the legislative history of the Act,[55] section 771B of the Act was enacted by Congress in order to capture the subsidies provided to raw agricultural products that are processed into a next-stage product, such as live swine into pork and paddy rice into milled rice.[56] In this investigation, similarly, a raw olive is simply processed into the next-stage olive product. Therefore, we find that all processed olives should be included when considering the latter stage product in this context.

The GOS also contends that, in *Shrimp from China*, Commerce established a 25 percent threshold for determining whether the demand for the raw agricultural product is dependent upon the demand for the latter stage product. This assertion is incorrect. Section 771B does not provide a statutory threshold, nor does it provide the analysis to be applied by Commerce in determining whether the demand for the prior stage product is substantially dependent on the demand for the latter stage product. The legislative history demonstrates that Congress enacted section 771B of the Act to ensure that Commerce can "place duties on processed agricultural products if the raw agricultural product is subsidized."[57] Commerce's determination in *Shrimp from China* was based on the facts and record evidence present in that proceeding. With respect to the raw olives at issue here, we find based on the facts and the circumstances present, that the demand for those olives is substantially dependent on the demand for both table and ripe olives.

Consistent with the *Preliminary Determination,* we also continue to find, in accordance with section 771B(2) of the Act, that record evidence shows that there is a three percent value for processing the raw input and that this level represents a limited value added to the raw commodity,. Further, we continue to find that, irrespective of the relationship between cost and value, the processing operation does not change the essential character of the olive.

While the GOS contends that it provided information on the manufacturing costs at verification, based on information on the record, we find that the information provided by the GOS does not support a change in our determination. The GOS verification report stated that, according to GOS officials, processing operations add value "such that the processed olives have a value that is 40 to 60 percent higher than the value of the raw olive, which includes the processing accomplished from the harvest to the canning."[58] The GOS verification report notes that, "{w}hen we asked GOS officials to support that level of value added, they explained that this data is based on estimates prepared by olive industry experts and it is not based on official collection, analysis or reporting of data."[59] Thus, it was apparent at verification that this information was not developed by the GOS in the course of its normal monitoring of the olive industry or for any other purpose, and there was no basis for a further discussion of this information or an examination of the reliability of its underlying sources during the verification. As such, the only reliable information demonstrating the value of processing is the information submitted by the petitioner in the CVD petition.[60] We, therefore, continue to find that record

[55] *See* CVD Petition at Exhibit III-19 (citing 133 Congressional Record S8814 (1987)).
[56] *See Live Swine from Canada.*
[57] *See* Congressional Record, S. 8814, June 26, 1987.
[58] *See* GOS Verification Report at 3.
[59] *Id.*
[60] *See* "Countervailing Duty Investigation Initiation Checklist: Ripe Olives from Spain," July 12, 2017 (Initiation Checklist) at 6-7.

evidence shows that there is a three percent value for processing the raw input and that this level represents a limited value added to the raw commodity, in accordance with section 771B(2) of the Act.[61]

The GOS and the respondents continue to argue that Commerce should include packaging as an essential element of the processing operation; however, they have not provided information that would support a departure from our practice in this case. We also disagree with respondents that, because packaging is used as a product characteristic for matching purposes in the antidumping context, it must be used here. This is not a meaningful comparison to our consideration of the value added by processing and does not demonstrate that we should consider the value added by processing to include the costs of packaging operations and packaging materials. The matching criteria in the antidumping analysis do not affect our consideration in a CVD proceeding (which is conducted in accordance with section 701 of the Act) of what may or may not constitute a processing operation in terms of a section 771B of the Act analysis, and our analysis of whether the value added to the raw commodity is limited, for the purposes of measuring subsidy benefits to subject merchandise. Therefore, in line with the precedent of *Pork from Canada* and *Rice from Thailand*, we continue to exclude packing and packaging activities from our analysis.[62]

We are also not persuaded by the respondents' claim that rendering an olive edible changes its essential character and continue to find that the processing operation does not change the essential character of the olive. As stated in our *Preliminary Determination*, Commerce has found the second prong of section 771B of the Act to be met where processing operations do not change the "essential character" of the raw product. In this case, while processing may remove bitterness and add flavor and tenderness, it does not change the essence of the product – they are olives when they are raw and olives when they are processed.[63]

Finally, the respondents' attempt to draw a distinction between the narrow scope of this investigation and the broader scopes at issue in *Rice from Thailand* or *Live Swine from Canada,* is unavailing. The differences in the breadth of the scopes are immaterial. Section 771B of the Act does not require a scope analysis, nor does the scope of the investigation determine how Commerce defines "the latter stage product" for the purposes of the Act. The legislative history of section 771B of the Act also does not address the scope of the investigation with relation to the latter stage product. Rather, as explained in the legislative history, "a foreign nation could avoid a U.S. countervailing duty on an agricultural product merely by doing some minor processing of the agricultural product before it is exported to the United States…{we} are today offering an amendment to the trade bill that directs the Commerce Department to place duties on processed agricultural products if the raw agricultural product is being subsidized."[64] Consistent with the legislative history of the Act, section 771B of the Act was enacted by Congress to capture the subsidies that are provided to raw agricultural products that are processed into a next-stage product. As stated in the *Preliminary Determination*, here, the raw

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[61] *Id.*

[62] *See Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada,* 54 FR 30774, 30775 (July 24, 1989) (*Pork from Canada*); *see also Rice from Thailand* at 8909.

[63] *See Preliminary Determination* and accompanying PDM at 15-16.

[64] *See* Petition at Exhibit III-19 (citing 133 Congressional Record S8814 (1987)).

olives are simply processed into a next-stage product, and nothing in the legislative history or the language of the statute precludes such an interpretation.

Comment 2: Whether a Pass-Through Analysis is Required

European Commission Comments[65]

- Even if SPS, BPS and the Greening program provide countervailable subsidies, the amounts received by the producers of the input product, raw olives, cannot automatically be attributed to the subject merchandise. In order to proceed with attribution, Commerce must first prove that the subsidies granted to the Spanish olive growers were passed through and reflected in the prices of ripe olives exported to the United States.
- Article 10 of the ASCM and Article VI:3 of the General Agreement on Tariffs and Trade (GATT) require a pass-through analysis. In *U.S. Softwood Lumber IV,*[66] the WTO Appellate Body required a pass-through analysis. Furthermore, the Appellate Body noted that it is the obligation of the investigating authority to establish the precise amount of the subsidy.
- Even if section 771B of the Act is applicable, according to the WTO, a pass-through analysis is required. The WTO Panel concluded that, even though Commerce determined that the conditions of 771B of the Act were met, that could not be considered a determination based on all facts necessary to meet the requirements of Article VI:3 of the GATT.[67] Specifically, section 771B of the Act could not justify the conclusions that the subsidies granted to swine producers had led to a decrease in prices for swine paid by pork producers below the prices for swine from other commercially available sources of supply, and that this decrease was equivalent to the full amount of the subsidy.[68]
- In addition, because raw olives must be transformed into ripe olives, there is a change between the input product and the subject merchandise. The WTO, in its *Airbus* panel decision, noted that a pass-through analysis was not required where an input product and a further manufactured product are both covered by the definition of the product subject to the countervailing duty investigation.

GOS' Comments[69]

- Even if aid granted to EU farmers is countervailable, section 771B of the Act does not meet the standard set by WTO jurisprudence, which requires a pass-through analysis.
- According to *U.S.-Softwood Lumber IV* and *US-Washing Machines*, the investigating authority must demonstrate that the aid granted to the producers of raw materials is transferred, and that it confers a benefit on the final processor. The administering authority is also required to show that this benefit is reflected in the price of the product under investigation. Finally, the administering authority must determine the exact benefit of the

[65] *See* EC's Case Brief A at 12-14.
[66] *See* Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (adopted Feb. 17, 2004) (*U.S. Softwood Lumber IV*).
[67] *See* Panel Report, United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, SS7/R/38S/30, (adopted July 11, 1991) (*U.S. – Pork from Canada*).
[68] *See U.S. – Pork from Canada*, DS7/R – 38S/30, pages 12-15.
[69] *See* GOS' Case Brief A at 25 -32.

aid that has been transferred to the final producer for the purpose of quantifying the countervailing duties.

- In *Mexico – Olive Oil*, the WTO makes clear that pass-through cannot be assumed, especially when different sectors are being considered or there is a change between the input product and the product under investigation. In this investigation, the raw olives are changed to ripe olives after processing.
- Section 771B of the Act assumes a pass-through analysis has already taken place when it has not. Section 771B of the Act assesses only whether there is substantial dependence between the raw and processed product and the amount of value added. It does not look at the elements of a transfer of a subsidy between the parties and a necessary quantification of the benefit that is passed through, as the WTO requires.

Respondents' Comments[70]

- Section 771B of the Act is inconsistent with WTO obligations, because it presumes a complete pass-through of subsidies from the recipient of the subsidies to companies under investigation without any examination of whether such pass-through occurs.
- In *U.S. – Pork from Canada*, the GATT Panel determined that authorities must examine price effects when determining whether a downstream industry benefits from subsidies received by an upstream industry. The Panel found that the two factors of section 771B of the Act, "could not justify the conclusion that the subsidies granted to swine producers had led to a decrease in the level of prices for Canadian swine paid by Canadian pork producers below the level they have to pay for swine from other commercially available sources of supply and that this decrease was equivalent to the full amount of the subsidy."[71]
- In *U.S. – Softwood Lumber III*, the Panel cited to the Appellate Body in *U.S. Lead and Bismuth II*, and stated that an authority "may not assume that a subsidy provided to producers of the 'upstream' input product automatically benefits unrelated producers of downstream products, especially if there is evidence on the record of arm's-length transactions between the two."[72]
- In *U.S. Softwood Lumber IV*, the Appellate Body confirmed that if "countervailing duties are intended to offset a subsidy granted to the producer of an input product, but the duties are to be imposed on the processed product (and not on the input product), it is not sufficient for an investigating authority to establish only for the input product the existence of a financial contribution and the conferral of a benefit to the input producer."[73]
- For a subsidy to exist, there must be a financial contribution by the government that confers a benefit to the recipient. If the subsidy is conferred on an input product, the producer of the processed product can be the indirect recipient of such benefit only if the administering authority can prove that the benefit flows through to the processed product.

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[70] *See* Respondents' Case Brief A at 6-11.
[71] *See U.S. – Pork from Canada*, para. 4.10.
[72] *See* Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, para 7.71 (adopted Nov. 1, 2002) (citing Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled lead and Bismuth Carbon Steel Products originating in the UK*, WT/DS138/AB/R, para. 68 (adopted June 7, 2000)).
[73] *See U.S. Softwood Lumber IV* at para. 142 (adopted Feb. 17, 2004).

AFI Rebuttal Comments[74]

- Section 771B of the Act is not consistent with U.S. obligations under the GATT 1994 and WTO ASCM.

Petitioner's Rebuttal Comments[75]

- The respondents' WTO arguments are designed to divert attention. Long-standing Commerce practice makes clear that it is bound to apply current U.S. law, regardless of the WTO assertions that are made.[76]
- Courts have consistently upheld this principle. In *Corus Staal.* the Federal Circuit held that, "{n}either the GATT nor any enabling international agreement outlining compliance therewith…trumps domestic legislation; if United States statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress."[77]

GOS' Rebuttal Comments[78]

- There should be no presumption that aid granted to olive farmers has been passed directly and entirely to ripe olive produces.
- No direct transfer exists and Commerce must conduct a pass-through analysis.
- Commerce must quantify the exact benefit that has been transferred from the producer of the raw olives to the responding companies.

Commerce's Position: The GOS, EC and respondents argue that Commerce must conduct a pass-through analysis in order to establish that benefits provided to olive growers also benefitted the respondent olive processing companies. However, the statutory scheme contains distinct provisions for the investigation of upstream subsidies, *see* section 771A of the Act,[79] and the subsidies provided to raw agricultural products that are manufactured into a processed product, *see* section 771B of the Act. In light of the applicability of section 771B of the Act, *see* Comment 1, above, a pass-through analysis that would be conducted in the context of an upstream subsidy investigation is not relevant to whether the respondents received a benefit. Therefore, we disagree that we are required to conduct such an analysis in this investigation.

Parties in favor of Commerce conducting a pass-through analysis cited to numerous WTO Panel and Appellate Body decisions. We do not find these decisions relevant to the instant investigation. Commerce has conducted this investigation in accordance with the Act and Commerce's regulations, and our CVD laws are consistent with our WTO obligations. Moreover, it is the Act and Commerce's regulations that have direct legal effect under U.S. law, and not the WTO Agreements or WTO reports.[80] In this regard, WTO reports "do not have any power to change U.S. law or to order such a change."[81]

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[74] *See* AFI Rebuttal Brief at 2-3.
[75] *See* Petitioner's Rebuttal Brief at 11-13.
[76] *Id.* at 13 note 52 citing numerous Commerce decisions.
[77] *See Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005) (*Corus Staal BV*).
[78] *See* GOS Rebuttal Brief at 5-6, 11.
[79] *See also* 19 CFR 351.523 (governing the investigations of upstream subsidies).
[80] *See Countervailing Duty Investigation of Fine Denier Polyester Staple Fiber from India: Final Affirmative Determination*, 83 FR 3122 (January 23, 2018) and accompanying Issues and Decision Memorandum (*PSF from India* IDM) at Comment 1.
[81] *See id.*; SAA at 659.

Comment 3: Whether the EU CAP Pillar I – BPS, SPS, and Greening Programs are Countervailable

European Commission Comments[82]

- Commerce's finding that the BPS, SPS, and Greening programs are specific is based on the erroneous reasoning that "the current annual grant amount is effectively still based on the type of crop and the volume of production" and "{t}he crop type determines the grant amounts provided under this program due to the direct reliance on the grant amounts provided under previous programs, which based grant amounts on the crop type."
- Commerce's conclusion that there is a continuity and causality link between the Common Organisation of Markets in Oil and Fats[83] (Common Market) program and SPS is not tenable, because the SPS program was different in design, rationale, and payment format.
- New CAP "direct income support" is provided in accordance with the WTO Agreement on Agriculture, Annex 2 paragraph 6.
- In accordance with Council Regulation 1782/2003 Article 37(1), farmers received an amount of aid under SPS based on a reference period, which averages the payments the farmer was granted under the Common Market program in marketing years 1999/2000 through 2002/2003.
- The aid received by farmers under the Common Market program was converted into entitlements, rights granted to receive aid that is an average of the aid received during marketing years 1999/2000 through 2002/2003; this support is decoupled.
- The entitlement is not automatic; it has to be activated annually by documenting that there is agricultural activity or that the land is kept in the required condition.
- Olive growers received rights to an amount of aid calculated based on olive production in the reference period (1999 through 2003), but the aid is provided regardless of future olive production and even olive production is partially or completely replaced with other activities.
- The payment is linked to the activating of entitlements and not to production.
- Payment entitlements during 2016 through 2017 were based on previous forms of payments and the decoupling process ended in 2010.
- The reliance on coupled payments that were provided during the historical reference period does not convert the grants provided under the SPS program into a product-specific subsidy, because the assistance under the program is no longer coupled to any product or production.
- Coupled payments for the olive sector were discontinued in 2010.
- The SPS program was replaced by the BPS program, and by extension the Greening program, in 2015. The BPS program is a new scheme which is not a continuation of SPS or any other previous EU aid schemes that have been terminated.
- The BPS program provides better distribution of support across the EU through external and internal convergence.
- The BPS and Greening programs are decoupled direct payment schemes that do not require production of crops, do not categorize types of farmers, and provide general support

[82] *See* EC's Case Brief A at 7-10.

[83] The EC describes this program as the "Common Organisation of Markets in Oil," but the full name is the "Common Organisation of Markets in Oil and Fats."

throughout the agricultural sector. Therefore, the payments are not beneficial to a processing industry or exporters.

- The BPS entitlements were allocated in 2015 for each eligible hectare declared by a farmer; eligibility of a hectare is not linked to production or any sector.
- The value of each entitlement was determined using different principles than those used under the SPS program. The overall policy objective is to narrow the gap between the values of entitlements allocated to different farmers by 2019. Differences in the value of entitlements may exist among farmers due to the calculation method applied. The calculation method divides a reference amount for the farmer by the number of entitlements allocated in 2015 and then an additional calculation is applied for internal convergence, to increase or decrease the final value to move it toward a flat rate by 2019. The reference amount used in the BPS entitlement calculation is a percentage of the payments received by the farmer in 2014 under the SPS program, per EU Regulation 1307/2013 Article 26(2).
- The value of the BPS entitlements does not reflect the value of SPS entitlements due to many factors and it is not possible to make general approximations. The result of these changes is that the payments per hectare, while very different depending on the crop produced in the reference period, have converged over the years.
- Type of crop is not an eligibility criterion for the aid and, therefore, is not a pre-condition for granting support under the BPS program.
- The application form submitted by the farmer states the type of crop intended to be cultivated, but this information is used only for administrative purposes and is not linked to the concession or granting of payments under the BPS program.
- The Greening program is available to all farmers who are eligible for payments under the BPS program and undertake practices that are environmentally beneficial, such as crop diversification and maintaining existing permanent grassland.
- EU Regulation 1307/2013 Article 43.1 does not state that payments under the Greening program are explicitly limited to olive groves. The Greening program is not specific under the WTO ASCM Article 2.1(a) and section 771(5A)(D)(i) of the Act.
- Under BPS, the EU direct payments to farmers is more distant from any production references than under the SPS program.
- It is not possible to compare benefits by crop type at the EU level for the SPS, BPS, or Greening programs, because the subsidies are not provided by crop type and, therefore, the data are not available. The only available information regarding subsidies provided to specific crop sectors relates to the 10 percent of direct payments that are provided under the Voluntary Coupled Support program. Spain chose not to provide funding to the olive sector under the Voluntary Coupled Support program.
- The record contains sufficient information for a comprehensive assessment of whether the subsidies under the SPS, BPS, and Greening programs are specific in accordance with the ASCM Article 2.1(a); Commerce's *Preliminary Determination* was based on a biased analysis that focused only on certain aspects of the program.
- Commerce failed to prove that the SPS, BPS, and Greening programs are specific within the meaning of ASCM Article 2.1(a) and section 771(5A)(D)(i) of the Act.

GOS' Comments[84]

- The SPS program replaced the previous coupled-payment systems with a new format of payment, "direct income support." The program operated in Spain from 2006 through 2014 in accordance with WTO Agreement on Agriculture, Annex 2, paragraph 6. The BPS program was implemented in 2015.
- Neither payments provided to farmers under the BPS or SPS programs are linked to a specific product or a specific level of yield or production. Neither the BPS nor Greening programs require farmers to produce certain crops or any crops; in these decoupled programs, the assistance is not categorized by types of farmers or crops; it is not possible to determine the amount of assistance provided to a particular crop sector.
- Under the Common Market program, before 2003, aid was linked to specific crops; in the replacement programs, SPS and BPS, aid is linked to entitlements, which are an administrative concession to the farmer that guarantees income support, regardless of farming activity or type of crop grown. The use of entitlements, which is a right to receive aid, decoupled payments from crop type because the payment received is linked to activating the entitlements on the designated land area and not to the production of a product or a volume of production.
- Entitlements were initially allocated under SPS to farmers who had received aid during a reference period, generally from 2000 through 2002, and for the olive sector from 1999 through 2002. Farmers with entitlements, which are associated with eligible areas, receive a grant annually if the farmer "activates" the entitlement and demonstrates that the land associated with the entitlement continues to meet the eligibility criteria, *i.e.*, is kept in the required environmental condition.
- In Spain, the SPS program was applied as a historical model, where the SPS entitlements were calculated for each individual farmer based on a reference period, per Council Regulation 1782/2003 Article 37(1). The BPS program was applied under a regional model in 2015.
- The value of the entitlements held by a farmer is based on the crops grown by the farmer during the reference period for each crop. The overall value of all entitlements may be adjusted for national reasons, such as the 2014 national budget reduction.
- A farmer may sell, buy, or rent entitlements. An olive farmer may own an entitlement associated with land that produces cereal crops and, thus, the aid value corresponds with the reference period average amount for cereal crops.
- The entitlement reference periods are not linked to the Aid to Olive Groves program. There is no evidence that the respondents received amounts derived from the aid to olives groves program.
- Entitlement values are not reviewed after allocation.
- Grants provided under the Voluntary Coupled Support scheme are coupled to specific crops; olive crops are not included. Coupled payments to the olive sector ceased in 2010.
- Commerce is not able to prove that the value of an entitlement held and activated by a current olive grower is from the aid provided under the Common Market program, because that program ended, and any entitlements held by olive farmers could have been bought, rented, or inherited.

[84] *See* GOS' Case Brief A at 19.

- The GOS demonstrated at verification the lack of a link between the entitlement held by an olive grower and the product grown, because the type of crop is not considered in the calculation or the approved payment amount.
- There were variations in the SPS amounts received by farmers based on the activated entitlements but these payments were not linked to a specific crop or crop production.

Respondents' Comments[85]

- Commerce found specificity under section 771(5A)(D)(i) of the Act, where the government "expressly limits access to the subsidy to an enterprise or industry," but the SPS and BPS programs are not limited to olive growers.
- Commerce found *de jure* specificity based on the current programs' use of grant amounts provided that were based on particular crops, but the current programs provide assistance that is decoupled from particular crops.
- The SPS and BPS programs' reliance on a reference period during which assistance was provided on a coupled basis, does not make the SPS and BPS programs crop-specific.
- The BPS and SPS programs are not linked as directly as Commerce suggests. Programs subsequent to the Common Market program underwent a significant transformation.
- The SPS program replaced the coupled payment program, the Common Market program, with a form of "direct income support." In accordance with Council Regulation 1782/2003, Article 37(1), the amount of the grant under this program was based on the average of total payments granted to a farmer under the olive oil support program from 1999 through 2003.
- The right to receive aid is not automatic; it must be activated.
- Activation of the entitlement does not require olive production, only that the land is kept in good environmental condition. Verification proved that a farmer's current production or lack of production was not a factor in the process or evaluation of a farmer's application for an income grant under SPS.
- BPS is also a decoupled support program that does not require farmers to produce certain crops or any crops to receive aid. Farmers may access benefits under the SPS and/or BPS program regardless of whether they grow olives or any crop.
- Commerce's attempt to illustrate "daisy chain linkage" from the Common Market program to SPS and BPS is unavailing, because the SPS and BPS programs are new, decoupled, programs with no crop production obligations.
- Convergence, introduced under the BPS program, is used to ensure a flat rate per hectare (entitlement) by the year 2019, to narrow the gap between the values of entitlements allocated to different farmers.
- Added factors ensure that BPS entitlements do not reflect the value of SPS entitlements held by the farmer.

[85] *See* Respondent Company's Case Brief A at 18-22.

Petitioner's Rebuttal Comments[86]

- In the *Preliminary Determination*, Commerce found *de jure* specificity in accordance with section 771(5A)(D)(i) of the Act for the CAP I programs. Similarly, in *LTP from China*,[87] *Geogrids from China*,[88] and *Pneumatic OTR Tires from India*,[89] Commerce found *de jure* specificity under section 771(5A)(D)(i) of the Act, where the government maintains a policy to encourage and support the growth and development of an industry.
- Commerce identified a clear regulatory and operational link tying the BPS program's subsidy entitlements for olive growers during the POI to entitlements established in the SPS program, which were tied to payments provided under the "coupled" grant program that operated during the reference period 1999 through 2002.
- The "coupled" grant program, the Common Market program, operated from 1997 through 2003, provided an annual grant to farmers based on crop type, and production levels, and expressly including olives.
- Commerce properly concluded that "the crop type determines the grant amounts provided under (these programs) due to the direct reliance on the grant amounts provided under the previous program, which based grant amounts on the crop type."
- The respondents, the GOS, and the EC argue that the subsidies are "generally available agricultural subsidies;" that Commerce's reasoning is "overly simplistic;" that recipients of the grants do not need to produce any crops; and, that convergence will end the disparate subsidy levels across crops and regions. These arguments fail to disprove the clear textual and operation linkage that ties subsidy eligibility and payments under the SPS and BPS programs to the product-specific, coupled subsidy payment criteria of the predecessor program.
- Case briefs submitted by the respondents, the GOS, and the EC restate the linkage between SPS, BPS, and the olive grower-specific predecessor program using a historical reference period in the calculation of the entitlement value for the SPS and BPS programs. Commerce confirmed the linkage across the three programs at verification.
- Programs are limited to olive growers because the programs remain specific to olives through the implementing regulations which tie the current program, BPS, to the predecessor programs that provided coupled support to olive growers.
- The respondents and the governments have not demonstrated that BPS's use of a convergence methodology has "converged" the disproportionately large subsidy benefits historically provided to olive farmers.
- Commerce determined and verified that the regulatory procedures establishing the funding levels across the 50 designated agricultural regions in Spain have been designed to protect the disproportionately higher payment amounts for olive farms.
- The absence of industry-specific data is not evidence that specificity cannot be established but, rather, is evidence of the non-transparency of these payments. The contention that crop- or industry- specific data are unavailable does not reconcile with the grant applications

[86] *See* Petitioner's Rebuttal Brief at 4-10.
[87] *See Lightweight Thermal Paper from China, Preliminary Countervailing Determination*, 73 FR 13850 (March 14, 2008).
[88] *See Final Determination in Countervailing Duty Investigation on Certain Biaxial Integral Geogrid Products from China*, 82 FR 3282 (January 11, 2017) (*Geogrids from China*) and accompanying IDM at 21.
[89] *See Final Determination in Countervailing Duty Investigation on Certain New Pneumatic Off-the-Road Tires from India*, 82 FR 2946 (January 10, 2017) (*Pneumatic OTR Tires from India*) and accompanying IDM at 38.

which require farmers to identify and quantify their specific crops as demonstrated in the Petition and the petitioner's October 10 submission.

- Commerce is correct in finding that the BPS and SPS programs are specific to olive growers and the record supports this finding. The respondents have not discredited the regulatory analysis and identification of explicit textual language linking payments under the governing subsidy rules to payments made from 1997 to 2003 on the basis of crop type.
- CAP Pillar I programs that still expressly link payments to annual grant amounts that were crop-specific are specific to the olive sector, within the meaning of section 771(5A)(D)I of the Act.
- The BPS and SPS programs are also specific under sections 771(5A)(D)(iii)(II), (III), and 771(5A)(D)(iv) of the Act because Spanish olive growers located in Andalusia receive a disproportionately large amount of CAP Pillar I subsidies compared to other agricultural industries located in other regions.
- Information provided in the Petition confirms that each of Spain's 50 agricultural regions has an assigned 'unit of value' which varies based on differences in the amounts farmers received under SPS in those agricultural regions. The agricultural regions are defined by "agroeconomic, socioeconomic, regional potential, productive purpose, and agrarian potential. This information was verified by Commerce.
- Olive growers remain the predominant user, regardless of the decoupled status of the BPS program, due to the factors used to assign a 'unit of value' to each of the 50 agricultural regions. Olive growers received an estimated 20 percent of total EU CAP aid to Spain, but represent three percent of Spain's total agricultural output.
- The SPS and BPS programs are regionally specific per 771(5A)(D)(iv) of the Act, because they are administered on a regional basis.

Commerce's Position: We continue to find, for purposes of this final determination, that assistance provided under the CAP Pillar I programs Basic Payment Scheme (BPS) and Greening is *de jure* specific and, therefore, countervailable. As we explained in the *Preliminary Determination*,[90] our finding of *de jure* specificity is based on the manner in which Spain implemented the Pillar I programs with reference to the operations of its two predecessor programs, the Single Payment Scheme and the Common Organisation of Markets in Oils and Fats (the Common Market Program), and the manner in which the amount of assistance was determined under these two programs. The earliest of these programs, the Common Organisation of Markets in Oils and Fats, was in place from 1999 through 2003, and provided production aid in the form of annual grants to farmers on the basis of type of crop and the volume of production.[91] Both olive oil and table olives were specifically identified as products eligible to receive production aid under this program,[92] and the payments provided during this period were based on whether the olives were used to produce olive oil or table olives. Specifically, the payment for hectares that grew olives for olive oil production used the equation "132.25/100kg" to calculate the value of the payment per hectare; the payment for hectares that

[90] *See* PDM at 18-23.
[91] *See* CVD Petition Exhibit III-7, and *see* EU IQR at Exhibit 10 "Council Regulation (EC) No. 864/2004."
[92] Olive oil is listed in Annex VI and references Council Regulation (EEC) No. 136/66 Article 5 and notes "production aid." *See* EU IQR Exhibit 11 "Council Regulation (EC) No. 1638/98," and GOS SQR Exhibit 21, which references Council Regulation (EC) No. 1782/2003 Annex VI.

grew olives to produce table olives used a different calculation, in which the ratio of 100 kg of processed table olives was equal to 11.5 kg of olive oil eligible for production aid.[93] Once the value per hectare was determined using this calculation, a farmer would apply for aid in the amount of the number of hectares multiplied by the value of each hectare.

We recognize that the Common Market Program is no longer in operation and ceased providing benefits to olive growers in 2003, and we are not rendering a decision regarding whether the assistance provided under this program was specific under section 771(5A) of the Act. However, because the amount of assistance provided to olive farmers and the methodology for determining it under this program forms the foundation for determining the amount of assistance provided to olive farmers under the successor programs SPS and CAP Pillar I BPS and Greening, it is necessary to evaluate the specificity of this program separately. In doing so, we consider that, because the Common Market Program provided annual payments only to producers of oilseed crops, including olives, we would find this program to be *de jure* specific, as explained in further detail below.

As the EC points out, when the SPS program was implemented in Spain, the aid provided to farmers was converted into "entitlements," rights to receive payments, that were linked to land area and completely decoupled from production.[94] That is, under SPS, the amount of the payment is dependent on the annual activation of the entitlement, and is not dependent on the type or volume of crop produced.[95] Crucially, however, the amount of each farmer's payment was calculated as a percentage of the average annual grant payments previously provided over a reference period.[96] In the case of olives and olive oil, this reference period was from 1999 through 2002, when the Common Market Program was in operation. Because the Common Market Program provided benefits on a *de jure* specific basis, the benefits provided under the SPS retained the *de jure* specificity inherent in the Common Market Program.

According to the EU, the BPS program implemented in 2015 is a new scheme, not a continuation of the SPS program, that aims to provide a better distribution of assistance that is decoupled from crop type or production volume, and does not categorize farmers by the crops they produce. As we discussed in more detail in the *Preliminary Determination*, in implementing this program, Spain created 50 regions, using farmland data that were collected in 2003 for purposes of implementing the SPS.[97] These data included the area in hectares, the types of crops, and the volume of production during the period 1999 to 2002 or 2000 to 2002, and the amount provided under the annual grant-to-farmer program for those same periods.[98] These 50 agricultural regions were created to facilitate the identification and distribution of

[93] *See* EU IQR at 11, *see* EU SQR at response to Question 26, and *see* GOS SQR at 20.
[94] *See e.g.*, EU IQR Exhibit 9 and 12.
[95] *See Preliminary Determination* and accompanying PDM at 21-23; *see also* EU IQR at Exhibit 10.
[96] *Id*.
[97] The GOS states that the regional application model of BPS in Spain was implemented based on Article 23.1 of Council Regulation (EC) No. 1307/2013. *See* GOS SQR at 26; *see also* EU IQR at Exhibit 13"Council Regulation (EC) No 1307/2013."
[98] *See* EU IQR at Exhibit 12 "Council Regulation (EC) No 1782/2003;" *see also* GOS SQR at 26. Also, Spain's GIS system is called "the geographic identification system of agricultural plots (SIGPAC). *See* GOS SQR at Exhibit 18.

payments under BPS. The characteristics of each region, which were categorized to reflect "the traditional agronomic practices being carried out in them…have, as an indicative element, a reference value represented by a regional rate," are used in the calculation of the grant amount a farmer is eligible to receive under the BPS – Direct Payment and BPS- Greening programs.[99]

Each region has shared agronomic characteristics[100] and a territorial definition based on its "productive potential and the productive orientation determined in the 2013 campaign…." This "productive orientation" is categorized as "rainfed land, irrigated land, permanent crops and permanent pastures;"[101] olive groves are considered permanent crops.[102] This territorial definition determines each region's "regional rate," which is used to determine the value of each hectare of farmland's "basic payment entitlement." As a result, each basic payment entitlement amount is weighted by the regional reference value to which it corresponds. In addition, the entitlement value used to determine the amount of funds beneficiaries received in 2014 under the SPS is used in determining the amount of funds Spain should receive under BPS Direct Payment and Greening by using each region's "regional rate."[103]

As we noted above, a regional rate is used to calculate the eligible grant amount under BPS and Greening. The calculation begins with determining an "initial value," as instructed by Council Regulation (EC) 1307/2013 Article 26 and implemented by Royal Decree 1076/2014.[104]

Under Regulation (EU) 1307/2013, Article 26 (3), the initial value is

> {a} fixed percentage of the *value of the entitlements*, including special entitlements, which the farmer held on the date of submission of his application for 2014 *under the single payment scheme*, in accordance with Regulation (EC) No 73/2009, shall be divided by the number of payment entitlements he is allocated in 2015, excluding those allocated from the national or regional reserves in 2015.[105]

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[99] Specifically, the "entitlement payment," which is also described as the "basic payment right" is determined using the region's rate. *See* GOS SQR Exhibits 18 "Official Spanish Gazette: Order AAA/544/2015," 19 "Newsletter No 2: Basic Payment Entitlement Allocation," 19, and 20 "Official Spanish Gazette: Order AAA/1747/2016."
[100] *See* GOS SQR at 26 and Exhibits 18 "Official Spanish Gazette: Order AAA/544/2015," and 20 "Official Spanish Gazette: Order AAA/1747/2016," which states that Royal Decree 1076/2014, of December 19th, implemented the allocation of BPS rights and established a "uniform national implementation model based on agricultural regions, which took into account the three basic criteria cited in Council Regulation (EC) No. 1307/2013…." The "basic criteria" cited are administrative criteria, agronomic characteristics, and socioeconomic impact of crops on agricultural districts.
[101] The "2013 campaign" refers to the SPS program. The weights assigned to each characteristic are: rainfed land (0.568), irrigated land (1,717), permanent crop (1), and permanent pastures (0.376). *See* GOS IQR at 8-9, and *see* GOS SQR at 26 and Exhibit 18 "Official Spanish Gazette: Order AAA/544/2015" and 19.
[102] *See* GOS IQR at 44.
[103] *See* GOS SQR at 26 and Exhibits 18 "Official Spanish Gazette: Order AAA/544/2015" and 19.
[104] *See* EU IQR Exhibit 13 "Council Regulation (EC) No 1307/2013," *see* EU IQR Exhibit 9 "Council Regulation (EC) No. 73/2009, and *see* GOS QR at 20-22 and Exhibits A001 "Royal Decree 1075/2014" and A002 "Royal Decree 1076/2014."
[105] Emphasis added.

The Spanish regulations regarding the implementation of BPS, Royal Decree 1076/2014, state that

> {f}or the calculation of the initial unitary value, the level of payments received in the 2014 campaign, before deduction and exclusions, corresponding to the aid schemes paid in that campaign, amounts of which remain uncoupled or are partially or totally decoupled from 2015 onwards, shall be taken as a reference. These amounts correspond to the single payment scheme as a decoupled payment . . . .[106]

Based on these regulations, a region's value is the initial value multiplied by an adjustment coefficient divided by the number of hectares with entitlement values. These regulations also state that the initial value is based on the amounts provided under SPS.[107] These regulations also state that the adjusted coefficient incorporates into the equation the amount of payments received in 2014 under SPS.[108] Therefore, the value that a farmer received per hectare in 2014 under SPS is used in calculating each region's value. In Spain, this value is also multiplied by the "productive orientation" weight, *e.g.* permanent crops and permanent pasture classifications receive weights of 1 percent and 0.376 percent, respectively.[109] Using this methodology, each of Spain's 50 regions has an assigned "unit of value" which varies based on the differences in the amounts farmers received under SPS in those regions. The Council Regulation (EC) 1307/2013 (22) acknowledges these variations in individual payments and that the differences are based on the use of historical references, stating:

> Due to the successive integration of various sectors into the single payment scheme and the subsequent period of adjustment granted to farmers, it has become increasingly difficult to justify the existence of significant individual differences in the level of support per hectare, resulting from use of historical references.[110]

The application to receive grants under the BPS Direct Payment and Greening programs includes the total entitlement value for the farm and this determines the amount of assistance the farmer will receive under these two BPS subprograms. To calculate a farm's total entitlement value, the number of hectares is multiplied by that location's regional value.[111] Therefore, two farms of the same size can have two different total entitlement values if there is an historical

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[106] *See* GOS IQR Exhibit A002 "Royal Decree 1076/2014."
[107] *See* EU IQR Exhibit 13 "Council Regulation (EC) No 1307/2013," *see* EU IQR Exhibit 9 "Council Regulation (EC) No. 73/2009, and *see* GOS QR at 20-22 and Exhibits A001 "Royal Decree 1075/2014" and A002 "Royal Decree 1076/2014."
[108] *See* GOS IQR Exhibit A002 "Royal Decree 1076/2014" Section 9, and *see* GOS SQR at Exhibit 18 "Official Spanish Gazette: Order AAA/544/2015," 19 "Newsletter No 2: Basic Payment Entitlement Allocation," and 20 "Official Spanish Gazette: Order AAA/1747/2016."
[109] *See* GOS QR at Exhibit A002 "Royal Decree 1076/2014," and *see* GOS SQR at Exhibit 18 "Official Spanish Gazette: Order AAA/544/2015."
[110] *See* EU IQR Exhibit 13 "Council Regulation (EC) No 1307/2013, and *see* EU IQR Exhibit 9 "Council Regulation (EC) No. 73/2009."
[111] *See* GOS QR Exhibits A001 "Royal Decree 1075/2014" and A002 "Royal Decree 1076/2014." and *see* GOS SQR at Exhibit

difference in the amount of assistance provided in the different regions previously received under SPS.[112]

In summary, the annual grant amounts provided to olive farmers under BPS Direct Payment and Greening derive from the amount of SPS grants that were provided to each farmer in 2013.[113] As explained above, the calculation of the grant amount under SPS retains the *de jure* specificity inherent in the Common Market Program. Therefore, the annual grant amounts provided under BPS Direct Payment and Greening in 2016 are directly related to, and continue to retain the *de jure* specificity of, the grants provided to olive growers under the Common Market Program.

Despite the arguments from the EC, the GOS, and the respondents, that because the BPS programs provide benefits that have been decoupled from production, they are not specific, we continue to find that the reliance on earlier assistance programs that were specific to determine the amounts of assistance under the current program, renders specific the benefits under the BPS programs. Moreover, we find unavailing the arguments that the application of a convergence factor over time is eliminating the disparities in payments among recipients and, therefore, the possibility of finding the assistance specific to olive growers. We understand that the application of the convergence factor results in adjustments to individual payments to bring them closer to an average over time by reducing the highest payments and increasing the lowest payments. However, the convergence factor is applied to payments to olive growers that retain the specificity inherent in the Common Market Program. Therefore, while any adjustments resulting from convergence may ultimately affect the final amount of assistance, the grant amounts awarded to farmers under the BPS program are still based on, and thus retain, the *de jure* specificity of prior programs as explained above.

Comment 4: Whether EU CAP Pillar II Agricultural Fund for Rural Development is Specific

GOS' Comments[114]

- The aim of the EU's Rural Development policy is to reduce social disparities by seeking and maintaining the best quality of life in EU rural areas, with attention to areas with special needs. The EU rural development policy also contributes significantly to the environment and to the climate.
- The EU regulatory framework for rural development policy provides a menu of available measures that the EU Members can tailor to their particular needs. These regulations establish the maximum percentages of aid to be granted and the conditions, eligibility requirements, and the selection criteria that must be met to receive benefits.
- To ensure that the measures to be implemented are adapted to the local needs, studies and evaluations analyze the strengths, weaknesses, threats and opportunities, to determine the

[112] *See* EU IQR Exhibit 13 "Council Regulation (EC) No 1307/2013, and *see* EU IQR Exhibit 9 "Council Regulation (EC) No. 73/2009."
[113] *See* EU IQR Exhibit 13 "Council Regulation (EC) No 1307/2013" (22), and EU IQR Exhibit 9 "Council Regulation (EC) No. 73/2009."
[114] *See* GOS Case Brief A at 22-25.

needs at the regional level. These needs will be addressed through measures that are designed specifically for the needs of the different regions of Europe.

- Therefore, Commerce cannot conclude that the measures are specific to certain rural regions of Europe, because all measures are available for programming in all regions of the EU and are accessible to all companies in rural areas.
- The PDM indicates that aid provided under the thematic subprogram of the olive grove is coupled with the production of olives. The measures and operations of this subprogram are the same as those included in the EU Rural Development policy and are mainly oriented toward agri-environment-climate purposes, organic farming, investment in physical assets, knowledge transfer, and cooperation activities to promote systems respectful to the environment, as well as the best management of natural resources, among others.
- None of the operations that constitute the subprogram are linked to the production of olives, because aid is based on grants to cover a percentage of eligible expenses as established in annex II of Regulation 1305/2013. Furthermore, area-related payments under the rural development program are granted on the basis of multiannual commitments to practices that are respectful of the environment and the climate, and not on the basis of the productive activity.
- Therefore, the PDM is incorrect in stating that support granted under this thematic subprogram was aimed at providing assistance to beneficiaries, with the purpose of "improving the competitiveness of their holding and/or production and, in particular, for enlarging their facilities and improving their manufacturing process and the quality of their products."
- Commerce did not demonstrate that the thematic sub-program is tied to the production of olives as stated in the PDM. The majority of the measures under the thematic subprogram areas are related to agri-environment and climate purposes, set at the EU level, and are not specific to the production of olives. Few or none of the Pillar II payments received by the mandatory respondents or their suppliers during the AUL were granted under this sub-program.
- The EU rural development policy complies with WTO requirements and is a Green Box measure as defined by Article 1 of Annex 2 of the Agreement on Agriculture. Measures taken under Annex 2 are, by definition, non-trade distorting and, therefore, not countervailable.

Respondents' Comments[115]

- Commerce's *Preliminary Determination* that the availability of assistance under the Agricultural Fund for Rural Development was limited to companies in rural regions of the EU and, therefore, was *de jure* specific under section 771(5)(D)(i) of the Act was over-simplistic, focusing on language devoid of context. "Rural regions" is simply another basis for referring to agricultural regions. Thus, the program is a generally available agriculture subsidy that is not countervailable under Commerce's regulations.

[115] *See* Respondent's Case Brief A at 23.

Petitioner's Rebuttal Comments[116]

- In its *Preliminary Determination*, Commerce correctly found that the rural development program is specific with the meaning of section 771(5A)(D)(iv) of the Act, because funds under the program are limited by the regulations to enterprises located in designated regions of Spain.
- Commerce further determined that, because the Regional Government of Andalusia administers aspects of the program that specifically identify olive growers for assistance, the program is also *de jure* specific under section 771(5A)(D)(i) of the Act.
- The respondents' argument that Commerce was "over-simplistic" in its focus on the language of the implementing regulations and its claim that "rural regions" is simply another basis for referring to agricultural regions is incorrect. As the EC itself stated, the EU's rural development policy is aimed at areas affected by industrial transition, and regions with severe and permanent natural or demographic handicaps.
- Because the respondents do not point to any evidence on the record to refute Commerce's proper reading of this policy and the Regional Government of Andalusia's administration of the rural development program, Commerce must affirm in the final determination that the CAP Pillar II rural development policy programs are specific under subsections 771(5A)(D)(i) and/or (iv) of the Act.

Commerce's Position: We continue to find that the EC's CAP Pillar II, rural development program is specific within the meaning of section 771(5A)(D)(iv) of the Act, because funds under this program are limited to enterprises located in rural areas, which are designated geographical regions within the EC. Contrary to the GOS' claim that the program is not specific because all measures are available for programming in all regions of the EU, the EC rural development regulations in effect during the AUL, EC Regulations 1257/1999, 1698/2005, and 1305/2013, demonstrate that support is available only to companies operating in specific locations that the EC has designated as rural areas. EC officials reiterated this point at verification when stating that the EU Rural development program has always provided assistance to farmers or enterprises located in specific areas identified as "rural" based on certain socioeconomic and environmental criteria.[117] EU officials explained that the EU generally adopts the Organisation for Economic Co-operation and Development's definition of "rural," but each Member has the discretion to adopt its own definition of "rural."

We continue to find the rural development program of 2014-2020 to be specific under 771(5A)(D)(i) of the Act, because there is a thematic subprogram that provides assistance only to olive groves and enterprises involved in the processing of olives.[118] For example, Operation 4.1.2., provides assistance for farmers who invest in physical assets to improve the performance and overall sustainability of olive farms; Operation 4.2.2. provides support for investments in the processing, marketing, or development of new agricultural products in the olive oil and table olive sector.[119]

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[116] *See* Petitioner's Rebuttal Brief at 10-11.
[117] *See* EC Verification Report.
[118] *See* Letter from the GOS, "Response of Government of Spain to the Department's August 3, 2017 Initial Questionnaire," September 18, 2017 (GOS IQR), at 71.
[119] *Id.* at 72.

We, therefore, find that the Regional Government of Andalusia's sub-thematic program for olives is specific to the olive sector for the 2014-2020 period, as the GOS is providing assistance to beneficiaries with the purpose of improving the competitiveness of the olive industry and its products. Because we find the sub-thematic program to be specific to the olive sector during the 2014-2020 period, and tied, not to production, but to investment in the olive sector, we are continuing to conduct the 0.5 percent test for non-recurring benefits provided during this period using the recipient's sales of olives.

Comment 5: Whether Commerce Should Apply AFA to the Non-Cooperating Growers

Petitioner's Comments[120]

- Commerce required each respondent to provide production, sales, and subsidy benefit information from selected affiliated and unaffiliated olive suppliers, and, where such suppliers were not themselves growers, to provide the relevant information from the top five actual growers who supplied them with raw olives.
- Because each respondent failed to provide this requested information for some suppliers and/or growers, Commerce correctly decided to rely on facts otherwise available to calculate a per kilogram benefit received by those olive growers.
- Commerce was unduly lenient under the statutory and policy purposes for applying AFA.
- The respondents clearly had an incentive to omit information from the record that demonstrated higher than average benefits received by any of their olive suppliers, because the per kilogram grower benefit is a critical component of the subsidy rate calculation for each respondent.
- Commerce's extremely lenient approach flies in the face of the AFA statutory directive and case precedent, which requires Commerce to employ AFA to ensure respondents do not obtain more favorable results "by failing to cooperate than if they had cooperated fully" and to deter future non-cooperation.
- Given the incentive the respondents had to report olive supplier information that minimized the calculation of grower subsidy benefits in this investigation, the proper application of AFA for this aspect of the investigation is critical to ensuring that the respondents are neither rewarded for failing to provide complete olive grower data nor encouraged to do the same in future administrative reviews.
- In the *Preliminary Determination*, Commerce's use of facts available did not meaningfully affect the overall subsidy rates for respondents, thereby rewarding their failure to respond and encouraging their future non-cooperation.
- Commerce should assign to each non-responding grower/supplier as AFA a subsidy benefit rate equal to the highest rate determined for any responding grower/supplier and should then assign the average volume of olive sales from the reporting suppliers and include these companies as part of the overall allocation.

Respondents' Comments[121]

- Commerce requested substantial information on the raw olive suppliers of the three respondents. In all instances, the company respondents fully cooperated and provided

[120] *See* Petitioner's Case Brief A at 16-18.
[121] *See* Respondent's Rebuttal Brief at 12-14.

extensive information, as well as documented their efforts to obtain the information from the unaffiliated suppliers, over which they had no control.
- The petitioner's claim that the respondents selectively filtered grower responses is unfounded.
- In difficult circumstances, the respondents provided substantial information across a wide range of suppliers. The sample collected and used by Commerce to calculate subsidy benefits was greater than in other cases.[122]
- In this investigation, even after being required to go back to their unaffiliated suppliers with multiple questionnaires at the height of harvest season, the respondents were still able to provide the majority of the information that Commerce required for its calculations.
- This record does not demonstrate non-cooperation by the respondents or lack of information. The petitioner has not produced any evidence to the contrary. Therefore, Commerce must dismiss the petitioner's call for the application of AFA.

Commerce's Position: As we explain in Comment 8, the record of this investigation shows that Agro Sevilla is not cross-owned with its olive growers and non-grower suppliers. Likewise, Angel Camacho and Aceitunas Guadalquivir are not cross-owned with their unaffiliated growers. In some cases, the growers are more than two or three steps removed in the supply chain of the mandatory respondent. As a result, we do not consider that the mandatory respondent has the ability to induce cooperation from these suppliers. In addition, the mandatory respondents documented their effort to obtain the requested information from the olive growers and suppliers. Moreover, because of the time required over the course of the proceeding to develop an understanding of the steps in the production process between the olive grower, non-producing supplier, and respondent, we made only one request for this information.[123] This is because we only had time to make one request for this information prior to the *Preliminary Determination*. Therefore, we do not find that the incomplete reporting by the unaffiliated suppliers warrants the application of AFA under section 776(b) of the Act. Finally, we do not find persuasive the petitioner's claim that the respondents provided information only for suppliers that received small amounts of subsidies. The petitioner has not identified record information to support its argument. In addition, because of the unusual fact patterns in this investigation, there was no way for any party to anticipate, prior to the issuance of the *Preliminary Determination*, the calculation methodology we would employ to measure the benefit to the mandatory respondents from the subsidies provided to olive growers, and to cherry-pick the reporting suppliers to influence the outcome of the calculations.

[122] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 78 FR 50387 (August 19, 2013) and accompanying IDM.
[123] See Letter to Agro Sevilla, "Countervailing Duty (CVD) Investigation of Ripe Olives from Spain: Supplemental Questionnaire to Agro Sevilla S.Coop.And.," October 25, 2017; *see also* Letter to Angel Camacho, "Countervailing Duty (CVD) Investigation of Ripe Olives from Spain: Supplemental questionnaire to Angel Camacho Alimentacion S.L.," October 25, 2017; *see also* Letter to Aceitunas Guadalquivir, "Countervailing Duty (CVD) Investigation of Ripe Olives from Spain: Supplemental Questionnaire to Aceitunas Guadalquivir, S.L.U.," October 25, 2017.

Comment 6: Whether Commerce Used the Correct Calculation Methodology to Measure Subsides Received by the Respondents

Petitioner's Comments[124]

- In order to calculate BPS and SPS subsidy benefits attributable to respondents as fully and accurately as possible, Commerce should do so exclusively for subject merchandise.
- Commerce's practice requires it to calculate CVD rates applicable to subject merchandise as accurately as possible. Commerce should ensure that its calculations do not dilute the subsidy benefit actually received for ripe olives.
- The respondents provided incomplete and confusing data regarding their growers' subsidies. Given the uncertainty, the most accurate way for Commerce to match the data in the numerator and denominator of its grower subsidy attribution calculations is to do so exclusively for subject merchandise.
- Agro Sevilla and Angel Camacho appear to have properly provided relevant data for their olive purchases and sales of subject merchandise that can be used for this calculation.
- The calculation methodology used in the *Preliminary Determination* distorted downward the calculated subsidy rates. To correct this inaccuracy, Commerce must base its calculations exclusively on subject merchandise.
- Commerce should apply AFA in the final determination for benefits received by respondents' suppliers under CAP Pillar II; in the alternative Commerce should follow the ripe olives-only methodology.
- Aceitunas Guadalquivir has not reported its purchased olive volumes used only for making ripe olives. In the absence of this information, Commerce should derive an approximation for Aceitunas Guadalquivir using a yield ratio based on Angel Camacho's purchases.
- In the alternative, Commerce should make sure that the numerator and denominator used to measure the benefit to the olive respondents from the subsidies received by the olive growers includes *all* olives purchased by the respondent.
- For Aceitunas Guadalquivir, this would include the additional volume of semi-processed olive purchases, previously unreported and discovered at verification; for Angel Camacho, the appropriate volume would include all of the olives used to make processed olive products.
- Aceitunas Guadalquivir explained that it had not reported this additional volume of olive purchases because Commerce requested only purchases of ripe olives and, therefore, Aceitunas Guadalquivir reported only olives that could be processed into ripe olives. However, Commerce later requested all three respondents to report, "the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used." Although Agro Sevilla and Angel Camacho updated their data, Aceitunas Guadalquivir did not.
- This omission highlights the mismatching of the numerator and denominator, and further supports the notion that both should be limited to subject merchandise.
- Angel Camacho's verification exhibit makes clear that additional purchases of olives were not reported.[125] However, the total unreported amount is not given. To overcome this

[124] *See* Petitioner's Case Brief A at 6-15.
[125] *See* Angel Camacho Verification Report at Exhibit VE-5 p.4.

mismatch, Commerce should limit the numerator and denominator to subject merchandise only.
- Commerce should also limit the numerator and denominator used in the calculation to measure the benefit to the respondent companies from benefits received by the olive growers under the Spanish agricultural insurance program. [126]

Respondents' Comments[127]
- Commerce asked the mandatory respondents to report their "raw olive" purchases. Specifically, Commerce asked "that you respond to the questions outlined in Attachment I to this letter and provide the requested information on your company's sources of raw olives that were processed into ripe olives during the period of investigation."[128]
- Commerce later clarified and required respondents to report "{i}nformation regarding its suppliers of raw olives to include the volume and value of all raw olives purchased from each supplier, regardless if the processed olive product for which the raw olives were used."[129]
- To the extent that Commerce continues to apply section 771B of the Act, Commerce should limit any countervailing measure to exclude olive purchases tied to the production of non-subject olives, consistent with its initial instructions to the mandatory respondents.
- There are three types of olive purchases: (1) raw olives as harvested from trees that can be used for more various applications, (2) raw olives stored in acetic acid or similar solution; and (3) "green olives" that already reflect an initial stage of processing that makes it impossible to use them in the production of ripe olives.
- Commerce should apply its traditional tying rules and exclude purchases of fermented green olives when calculating the benefit to the respondents. Commerce's practice is to attribute the benefit from a subsidy based on the stated purpose of the subsidy or the purpose Commerce determined based on record evidence at the time of bestowal. At the time a "green olive" is purchased, it is not intended for the production of subject merchandise. Commerce should not measure benefits on these purchases.
- Additionally, section 771B of the Act concerns the attribution of subsidies received by the raw product to the processed product. Green olives are semi-processed, they are not a raw agricultural product, and, therefore, Commerce cannot measure benefits from the purchases of "green olives" on the basis of section 771B of the Act.
- Including green olives would also be contrary to Commerce's own requests, which consistently referred to "raw olives." Green olives are not raw olives.

Petitioner's Rebuttal Arguments[130]
- The "ripe olives-only" approach is both fair and reasonable. It recognizes that ripe olives are distinguishable from other olive products and that the subsidies received by olive

[126] *See* Petitioner's Case Brief B at 3-4
[127] *See* Respondent's Case Brief A at 24-28.
[128] *See* Letter to the Mandatory Respondents, "Countervailing Duty (CVD) Investigation on Ripe Olives from Spain: Questionnaire on Sources of Raw and Ripe Olives," August 4, 2017, at 1 (Sources of Raw Olives Questionnaire).
[129] *See* Memorandum, "Ripe Olives from Spain Countervailing Duty Investigation: Clarification of the Department's September 26, 2017 Letter," September 27, 2017 (Clarification Memorandum).
[130] *See* Petitioner's Rebuttal Brief at 20-23.

growers benefit ripe olive production and sales at different levels than the production and sales of other olive products.

- Although the respondents agree with the ripe olives only approach and urge Commerce to measure subsidies only for those olives that are used to make ripe olives, they mislead Commerce by urging it to allocate the subsidies over the sales of all olive products, which would result in gross undercounting of the subsidies provided to the responding companies.
- It appears that neither Agro Sevilla nor Angel Camacho reported "green olive" purchases as defined by the respondents.
- To satisfy its statutory obligation to determine subsidy levels as accurately as possible, Commerce must ensure that the numerator and denominator are properly matched in the allocation of subsidies to the respondents' sales.

Commerce's Position: Section 701 of the Act directs Commerce to measure the countervailable subsidy provided to the subject merchandise. Specifically, it states that if "the administering authority determines that the government of a country …is providing…a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported or sold…for importation…then there shall be imposed upon such merchandise a countervailing duty . . . equal to the amount of the net countervailable subsidy."[131] Thus, the basic statutory requirement imposed by Congress is that the administering authority of the CVD law must ensure that any methodology used to determine the amount of the net countervailable subsidy accurately measures the subsidies conferred upon the subject merchandise. Toward that end, Commerce implemented a set of attribution rules at 19 CFR 351.525. However, the *Preamble* to our attribution rules makes clear that our tying rules are an attempt at a simple, rational set of guidelines for reasonably attributing the benefit from a subsidy based on the stated purpose of the subsidy or on the purpose of the subsidy at the time of bestowal, as evinced by the record evidence.[132] The *Preamble* also makes clear that our attribution rules do not account for all situations that may arise, because if Commerce tried to account for all possible permutations, the result would be an extremely lengthy set of rules that could prove unduly rigid.[133] The *Preamble* also states that our intent is to apply these attribution rules as harmoniously as possible, recognizing that unique and unforeseen factual situations may make complete harmony among these rules impossible.[134] Tellingly, while 19 CFR 351.525 addresses the treatment of input products, and the *Preamble* references both input products and upstream subsidies, neither directly references or addresses the treatment of agricultural subsidies that are analyzed under section 771B of the Act. However, in this investigation, we have found that section 771B of the Act is applicable. When this provision applies, it directs Commerce to deem the subsidies provided to the producers of a raw agricultural product as provided with respect to the manufacture, production, or exportation of the processed product.

Based upon the explicit language within section 701 of the Act, and the lack of clear regulatory language provided under 19 CFR 351.525 with respect to the attribution of agricultural subsidies analyzed under section 771B of the Act, Commerce first determined the amount of

[131] *See* section 701(a)(1) and (2) of the Act.
[132] *See Countervailing Duties; Final Rule*, 63 FR 65348, 65401 (November 25, 1998) (*Preamble*) at 65403.
[133] *Id.* at 65399.
[134] *Id.* at 65400.

subsidies conferred upon the raw olive. In the *Preliminary Determination*, when calculating the weighted average per kilogram benefit using the information provided by all the reporting olive growers, we did not limit our calculations to the raw olives used to produce ripe olives. For this final determination, we have calculated the weighted average per kilogram benefit in a similar manner. However, for this final determination, we recognize that the applicability of section 771B of the Act, combined with the intent of section 701 of the Act to measure the countervailable subsidies provided to the subject merchandise, requires us to refine our methodology with regard to measuring the benefit provided to the production of subject merchandise. We find it to be an appropriate application of the statutory provisions to measure the benefit by multiplying the weighted average per kilogram benefit by the volume of each respondent's purchases of raw olives to produce subject merchandise, and to divide the resulting benefit by the sales of subject merchandise. This methodology comports with the statutory intent set forth within section 701 of the Act, because we have accurately measured the subsidy conferred upon the subject merchandise.

The petitioner contends that Aceitunas Guadalquivir did not report all of its purchases of raw olives that ultimately became ripe olives and, as a result, we are missing information that is necessary to calculate the benefit to Aceitunas Guadalquivir. This is incorrect. As the respondents noted, Commerce asked all companies to provide information on their "sources of raw olives that were processed into ripe olives during the period of investigation."[135] All companies responded to this questionnaire by reporting their raw olive purchases. Later, we asked that Agro Sevilla resubmit the information regarding its suppliers of raw olives to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used.[136] We further stated, "*{i}f* it is necessary to correct the reporting in this manner for the other two mandatory respondents, we request that the information be resubmitted."[137] While Agro Sevilla and Angel Camacho found it necessary to submit additional information, Aceitunas Guadalquivir did not. Thus, Aceitunas Guadalquivir's originally reported information is indicative of its raw olives purchases that were used to produce subject merchandise.[138] This information was verified,[139] and it is this information that we will be using as updated by minor corrections.

Because we are electing to measure the benefit to the respondents based on their purchases of raw olives for the production of subject merchandise, we need not evaluate the alternative option put forth by the petitioner – to include all olive purchases in the calculation regardless of the ultimate end product.

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[135] *See* Sources of Raw Olives Questionnaire at 1.
[136] *See* Clarification Memorandum at 2.
[137] *Id.*
[138] *See* Letter from Aceitunas Guadalquivir, "Fourth Supplemental Questionnaire Response of Aceitunas Guadalquivir S.L.U. Ripe Olives from Spain (C-469-818)," January 5, 2018, at 6.
[139] *See* Aceitunas Guadalquivir Verification Report at 7.

Comment 7: Whether Commerce Should Remove Non-Growers and Adjust the Calculation of Benefits to Exclude the Olive Volume of Non-Producing Suppliers

Respondents' Comments[140]

- In the *Preliminary Determination*, Commerce found countervailable subsidies received by suppliers of raw olives who are not the growers of those olives.
- Section 771B of the Act pertains to the attribution of subsidies received by "producers" of the raw agricultural product (*i.e.*, growers) to the processors of that product. Countervailable subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.[141] The statute does not contemplate attribution of subsidies to processors received by suppliers of the raw product who are not themselves producers (*i.e.* growers), contrary to the methodology applied by Commerce in the *Preliminary Determination*.
- However, this does not mean that Commerce can exclude non-grower sales volume from its per-unit subsidy calculation for olive purchases. While section 771B of the Act directs Commerce to exclude non-grower subsidies, sales volume is still relevant based on Commerce's per-unit methodology, both directly and in the calculation of the facts available rate for growers who did not supply sufficient information. Commerce cannot arbitrarily eliminate from the per-unit calculation olive purchase volume simply because a supplier is not a grower, whether or not it receives subsidies.
- In its *Preliminary Determination*, Commerce adopted methodologies in its calculation of supplier subsidies attributable to the mandatory respondents that do not comport with its duty under the statute. In particular, its approach to the calculation of a per-unit subsidy for raw olive purchases made by the three mandatory respondents was biased and distortive. Subsidy rates were determined using arbitrary criteria for keeping cooperating non-grower supplier volume in or excluding it from the per-unit calculation based on whether they reported subsidies rather than relying on an assessment of the extent to which the raw olives they sold generated grower subsidies.
- The outcome of these calculations was higher calculated subsidy rates where a supplier did not report subsidies than in situations where the supplier did report subsidies. The result was punitive and disregarded the full cooperation of the reporting parties, contrary to the statute governing the use of facts available.
- Commerce should not eliminate cooperating supplier volumes because the supplier is not a grower and did not receive a subsidy. In a countervailing duty investigation, both the existence and non-existence of subsidies is relevant.
- Commerce's methodology disregards the reported volume from fully cooperating non-grower suppliers who did not receive a subsidy. These are generally first-tier suppliers who are selling the production of the second-tier and third-tier suppliers below them. However, not all of this production volume is accounted for by this sample of second- and third-tier suppliers collected by Commerce. By ignoring this volume, Commerce dramatically reduces the volume sample collected from cooperating suppliers, and thereby its "total

[140] *See* Respondent's Case Brief A at 30-36.
[141] *See* section 771B of the Act

production" denominator is based on criteria that have nothing to do with the existence or magnitude of subsidies allegedly present in that disregarded volume.
- Commerce must revise its per-unit subsidy calculation for raw olive purchases. Commerce must take into account reporting non-grower supplier volume not accounted for by their respective reporting grower suppliers.
- Commerce must include non-grower supplier volume in its per-unit calculation after deducting the volume from their reporting grower suppliers. It can then assign a facts available "grower plug" to that net supplier volume. This approach recognizes that the raw olives in question originated with growers who are not themselves part of the volume sample, but are, nonetheless, captured in the volume of the reporting non-grower supplier.
- This approach takes into account the volume reported by cooperating non-grower suppliers who did not report subsidies. It utilizes facts available on the record in a neutral manner, rather than dismissing useable data from cooperating parties. It also creates a larger sample size associated with "total production" than was used by Commerce in its preliminary results, thereby more accurately weighting per-unit benefits.
- Commerce's approach with respect to its "FA plug" was to effectively weight benefits by using an arbitrarily low production volume, because it did not have volume data from suppliers who did not respond. In other words, Commerce's "FA plug" likely over-weighted subsidy benefits because the plug was based on the limited volume of the reporting growers and then applied to non-reporting growers irrespective of their volumes, thereby unreasonably magnifying the per-unit subsidy amount.
- This approach eliminates the need to assign an "FA plug" to suppliers who did not respond, because their volume would be captured through the cooperating non-grower volume data.
- Alternatively, Commerce could create a per-unit subsidy plug for responding non-grower suppliers using a simple average of the per-unit subsidy measured for each of the responding growers. The per-unit subsidy plug could then be considered in the context of total production that includes non-grower volume and then weighted in the same manner as the reporting grower suppliers.

Petitioner's Rebuttal Comments[142]
- The respondents agree with the petitioner that Commerce must ensure that its grower subsidy calculations exclude suppliers who are not themselves growers by arguing that Commerce should exclude from its per kilogram subsidy calculation subsidies received by non-grower suppliers.
- The respondents' argument, however, that Commerce should include non-grower supplier volume in the denominator, ignores the subsidies on that olive volume in the numerator of the per kilogram grower benefit calculation in order to achieve more favorable countervailing duty results.
- Commerce must reject this dilutive approach.
- To derive the level of countervailable subsidies benefitting the raw olives to be attributed to the processed product under section 771B of the Act, Commerce required information from actual olive growers, rather than from non-grower suppliers that are merely distributors, because 771B provides for attributing subsidy benefits for a "raw agricultural product" to the processed agricultural product. Commerce, thereby, obtained an incomplete sample of

[142] *See* Petitioner's Rebuttal Brief at 20-25.

data on the benefits provided to olive growers for their olive production. Commerce calculated an average per-kilogram benefit provided to this small subset of olive growers, which was then used as a proxy for the benefits provide to all olive growers.

- The respondents correctly claim that the methodology used in calculating the countervailing duty rates associated with the grower subsidies in the *Preliminary Determination* distorted the actual benefits.
- However, their analysis, calculation hypotheticals, and proposals depart from a realistic and accurate approach and would lead to a gross undercounting of subsidies.
- The respondents' proposed calculations obscure the fact that olives supplied by non-grower suppliers are subsidized at the grower level, not at the supplier level. Non-grower suppliers are simply distributors of the olives; the olives that they receive from other distributors and/or growers are subsidized through payments made to the growers, not to the distributors.
- Commerce should disregard the respondents' hypothetical calculations and the corresponding arguments for including non-grower olive volume in the countervailing duty calculations without accounting for the subsidies associated with those olives that were received by the growers by of those olives.
- The respondents' argument that olive volume from non-grower suppliers must be included in the subsidy calculations fails to acknowledge that Commerce actually accounted for these volumes in the purchases by the respondents of olives for processing included in the numerator of the calculation for attributing the grower subsidy.
- The non-grower suppliers, by definition, do not receive grower subsides associated with the olives they sell. The inclusion of this volume without also including subsidies associated with that volume in the per kilogram benefit calculation would inaccurately deflate the actual level of subsidies benefits associated with the olives included in the purchased volume reported by respondents.
- The respondents further mislead Commerce by relying in on stale data that have been revised and corrected on the record. Commerce should ensure that only verified, updated data are used in the final determination.

Commerce's Position: We disagree with the respondents that there is no basis to eliminate cooperating supplier volumes from the calculation of the per kilogram benefit under programs provided to olive growers when the supplier is not itself a grower and did not receive a subsidy. Therefore, upon examination of our calculation, we find it appropriate to revise our methodology for calculating the weighted per kilogram benefit for the BPS-Direct Payment and Greening programs. Because these programs provide financial assistance only to the growers, it is appropriate to remove the non-producing suppliers from our calculations, regardless of whether they reported receiving a subsidy under these programs. Whether they were a cooperating non-producing supplier is immaterial to whether their volume of olive sales should be included in the calculation.

Therefore, for purposes of this final determination, we are excluding from our calculation of the per kilogram benefit, the volume of olives sold by suppliers that was not grown by the supplier. As we stated in our letter limiting the reporting of supplier responses, we intended to include in our calculation the per kilogram benefit the five largest growers, in terms of volume, for each

non-producing supplier to our mandatory respondent.[143] We agree with the petitioner that including a non-producing supplier's total olive volume in the calculation of the per kilogram benefit, without accounting for all the subsidies received by its growers, improperly dilutes the overall weighted average per kilogram benefits. Furthermore, we are revising the "total sales of all products" and "total sales of raw olives" columns in our BPS direct payment and greening supplier benefit calculations to include only the sales of products that were produced by the grower itself.

However, because eligibility for financial assistance under the CAP Pillar II - Rural Development Program is based on being located in a rural area rather than on production,[144] we are continuing to include in the calculation of the per kilogram benefit the volume of all olives supplied by the suppliers whether or not grown by the supplier, and are we not modifying the "total sales of all products" and "total sales of raw olives" columns.[145] In addition, for this program, we have used the volume of each supplier's raw olive sales rather than its olive production, in determining the benefit per kilogram of olives.

Comment 8: Whether Commerce Should Apply AFA to Agro Sevilla Regarding Cross-Ownership with its First-Tier Suppliers

Petitioner's Comments[146]

- Agro Sevilla provided misleading and non-responsive information regarding the structure of the cooperative and its relationships with its member cooperatives.
- Agro Sevilla failed to clarify that the first-tier member cooperatives form and own Agro Sevilla.
- In its January 5, 2018 SQR, Agro Sevilla admitted that second-tier coops are "formed by two or more first-tier agricultural S. Coops," and that second tier S. Coops "serve for the development and fulfillment of common economic purposes of the member first-tier S.Coops," making clear that the first-tier cooperatives formed and *own* Agro Sevilla.
- Agro Sevilla's financial statement demonstrates that the eleven coop members own Agro Sevilla.
- Because cross-ownership exists, countervailable subsidies provided to the first-tier coop members must be attributed to the entire Agro Sevilla cross-owned entity.
- Moreover, non-responsiveness by Agro Sevilla's cross-owned first-tier suppliers must be treated as non-responsiveness by the entire Agro Sevilla cross-owned entity. Because Agro Sevilla did not disclose the cross-ownership between Agro Sevilla and its first-tier suppliers, Commerce was prevented from conducting a proper CVD investigation of the entire Agro Sevilla entity, under which Agro Sevilla and its first-tier cooperative members would be treated as one and the same for countervailing duty purposes. Therefore, Commerce should apply AFA to the calculations of Agro Sevilla's subsidy rates.

[143] *See* Clarification Memorandum at 1.
[144] *See e.g.*, EU IQR at Exhibit 13, EC November 13, 2017 SQR at Annex 10, and GOS IQR at Exhibits S-8 and S-16.
[145] *See* Aceitunas Guadalquivir Final Calculation Memorandum; Agro Sevilla Final Calculation Memorandum; Angel Camacho Final Calculation Memorandum.
[146] *See* Petitioner's Case Brief A at 18-21.

- At a minimum, Commerce should apply AFA to account for the fact that several of the first-tier suppliers failed to report the required grower information.

Respondents' Rebuttal Comments[147]
- The petitioner's claim that Agro Sevilla is cross-owned with its first-tier cooperatives and that it wrongly "denied" such affiliation is incorrect based on the facts and the law.
- The petitioner offers no evidence which would reverse Commerce's *Preliminary Determination* that Agro Sevilla is not cross-owned with its first-tier member cooperatives or Commerce's verification findings confirming this fact.
- The petitioner wrongly asserts that "ownership" is dispositive of cross-ownership.
- In accordance with 19 CFR 351.525(b)(6)(vi), cross-ownership exists "where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same way it can use its own assets."
- The petitioner's theory of cross-ownership would lead to absurd results. Under the petitioner's theory, cross-ownership would exist under all ownership scenarios because there will always be some number of shareholders that jointly hold a majority interest in a company.
- The petitioner's definition of cross-ownership does not speak to the control relationship among the shareholders themselves, and whether one or more could control the other's assets as if they were its own.
- The first-tier member cooperatives do not "own" Agro Sevilla; rather, membership is based on their capital contributions to Agro Sevilla. Membership in Agro Sevilla is not unconditional. Any first-tier cooperative can be fined and/or expelled from Agro Sevilla.
- Commerce confirmed at verification that no control relationship exists among the first-tier cooperatives and no control relationship exists between Agro Sevilla and the first-tier cooperatives.

Commerce's Position: We do not agree with petitioner's claim that Agro Sevilla has not fully reported the nature of its relationship with its member cooperatives or has withheld information that would demonstrate there is cross-ownership between Agro Sevilla and its member cooperatives. While the petitioner correctly recognizes that information of the record shows that each of Agro Sevilla's eleven first-tier member cooperatives owns a share of the cooperative and that Agro Sevilla, as a second-tier cooperative, exists to fulfill the common economic purposes of the member first-tier S. Coops,[148] this does not indicate that Agro Sevilla is cross-owned with any one of its first-tier member cooperatives. According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the corporation(s) in essentially the same ways it can use its own assets. In keeping with this definition, we have examined whether any one of the eleven individual first-tier cooperatives can use or direct the assets of Agro Sevilla as if they were its own. For purposes of our examination of control, we do not consider that the relationships between Agro Sevilla and its members differs materially from the relationship between a corporation and its shareholders. Thus, we considered whether any one of the eleven

[147] *See* Respondent's Rebuttal Brief at 14-16.
[148] *See* Letter from Agro Sevilla, "Supplemental Questionnaire Response of Agro Sevilla Aceitunas S.Coop.And. Ripe Olives from Spain (C-469-818)," October 20, 2017, at AS-Exhibit 41 at 34; *see also* Agro Sevilla January 5 Supplier SQR at 6.

members has a sufficient "shareholding," in terms of its capital contribution to the cooperative, to exercise control over Agro Sevilla. However, in the absence of a majority shareholder, and shareholder voting rights that are commensurate with the percentage of shareholding, we would be unable to find that a particular shareholder, or in this case cooperative member, exercises the control required to meet the standard set forth within 19 CFR 351.525(b)(6)(vi). Our examination of Agro Sevilla's financial statements shows that, although the capital contributions vary among the members, no one of the eleven cooperative members has made a capital contribution that represents a majority of the cooperative's capital. Moreover, according to Agro Sevilla's by-laws,[149] and as discussed in its questionnaire response,[150] each cooperative member has one representative who is entitled to one vote on Agro Sevilla's Consejo Rector, or Advisory Council, the functional equivalent of the Board of Directors. In reading Agro Sevilla's by-laws, we find that Advisory Council oversees the management, and makes the high-level decisions, of Agro Sevilla, including investments, acquisitions, and budget approvals.[151]

Furthermore, Agro Sevilla explained that, according to the by-laws, each cooperative member is entitled to a single vote at the General Meeting, the meeting at which the operational decisions are made.[152] Those votes are not commensurate with the percentage of capital contributed by each member. Additionally, Agro Sevilla has explained that there are professional managers below the Consejo Rector, comprised of the chief executive officer, chief financial officer, human resources director, purchasing director, commercial director and industrial production director; these professionals manage the day to day business decisions of Agro Sevilla. Article 5(7) of the by-laws confirms that the CEO cannot be a member of the board.[153] Thus, no cooperative member exercises the control over Agro Sevilla that is required to meet the standard set forth within 19 CFR 351.525(b)(6)(vi).

Likewise, Agro Sevilla has demonstrated that it does not exercise control over its member cooperatives. As stated in the by-laws, if a member cooperative no longer wishes to be part of Agro Sevilla, it is free to leave and its capital contribution will be returned.[154] Each of these first-tier cooperatives represents operational associations of hundreds of individual olive growers, and their management is governed by their own by-laws, implemented by their members. At verification, Agro Sevilla demonstrated that many of its member cooperatives themselves have member farmers who produce agricultural products other than olives, such as wheat, sunflowers, and cotton, and they may belong to other cooperatives that promote the marketing of those other products. Almost all member cooperatives responded that they also sold other products to companies other than Agro Sevilla.[155]

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[149] *See* Letter from Agro Sevilla, "Agro Sevilla Aceitunas S.Coop.And.'s Affiliations Questionnaire Response Ripe Olives from Spain (C-469-818)," August 18, 2017 (AS IQR), at Exhibit AS-3 at Article 4(4) and 4(6).
[150] *Id.*, at 6.
[151] *Id.*, at exhibit AS-3 at Article 4(4).
[152] *Id.*, at Exhibit AS-3 at 3(15).
[153] *Id.,* at Exhibit AS-3, Article 5(7).
[154] *Id.*, at 5 and Exhibit AS-3 at 2(11).
[155] *See* Agro Sevilla January 5 SQR at Exhibit AS-81.

Moreover, Agro Sevilla does not have any voting rights in its member cooperatives; it does not have the power to appoint a member of the governing body of a member cooperative; it has not signed an agreement that allows it to hold the right to vote in a member cooperative; and, none of the members of the governing councils of the member cooperatives has a business or labor relationship with Agro Sevilla.[156] Moreover, our review of the financial statements of Agro Sevilla's eleven member cooperatives provides no indication that Agro Sevilla can exercise control over them.[157]

Thus, on the basis of the information discussed above, for purposes of this final determination, we continue to find that the relationships between Agro Sevilla and its first-tier cooperatives do not demonstrate either that any one of the member cooperatives can use and control Agro Sevilla's assets as though they are its own assets, or that Agro Sevilla can use and control the assets of its member cooperatives, as required for a finding of cross-ownership under 19 CFR 351.525(b)(6)(vi). Moreover, there is no indication in the record that any of the eleven members of the cooperative themselves are cross-owned with one another, such that we would treat all eleven members, or any number less than all eleven, as though they are one entity. Only a finding of cross-ownership among the eleven members (or a number less than all that might account for a majority of the capital contributions), together with voting rights commensurate with the percentage of the capital contribution, would possibly permit us, in this situation, to find that there is cross-ownership between Agro Sevilla and its member cooperatives.

Because we have found there is no cross-ownership, we are not relying on 19 CFR 351.525(b)(6) to attribute to Agro Sevilla subsidies received by the member cooperatives. Moreover, in light of a record that we find to be complete with respect to cross-ownership, there is no basis for us to conclude that the provision of incomplete responses by growers that are members of the member cooperatives amounts to non-responsiveness by Agro Sevilla itself. Thus, we find that there is no basis for the broad application of AFA to Agro Sevilla, as argued by the petitioner.

Comment 9: Whether Grant Funding Sourced from the ERDF is Regionally Specific

European Commission Comments[158]

- Eligibility criteria for the grants funded by the ERDF budget are based on GDP/GNI ratings and not on designated geographical regions.
- EU Regulation 1303/2013 Article 90 and Annex VII point 1, and EU Regulation 1059/2003 as amended by EU Regulation 105/2007 provide the eligibility criteria.[159]
- Hundreds of regions, and hundreds of thousands of projects, are eligible and funded under the ERDF.

[156] *See* Agro Sevilla January 5 SQR at 6.
[157] *See* AS October 20, 2017 SQR at AS-Exhibit 41.
[158] *See* EC's Case Brief B at 4.
[159] It is noted that neither EU Regulation 1059/2003 nor EU Regulation 105/2007 is on the record of this investigation. *Id.*

GOS' Comments[160]

- Commerce incorrectly interpreted granting authority jurisdiction.
- WTO law and its case law require an analysis of both the "granting authority" and its "jurisdiction" in a conjunctive manner.
- The ASCM Article 2(2) describes the conditions for a subsidy to be regionally specific and limits the analysis of the criteria and specificity conditions to the jurisdiction of the granting authority of the aid.
- The Appellate Body Report on *US – Countervailing Measures (China)* states that "{i}f the granting authority was a regional government, a subsidy available to enterprises throughout the territory over which that regional government had jurisdiction would not be specific."
- The specificity analysis of a grant provided by a regional government should be limited to the regional government and not to the funding sources, if the funding sources are not also within the jurisdiction of the granting authority.
- The analysis of the specificity of all three aid programs, Sustainable Energy, IDEA, and PROSOL, should be limited to the Andalusia region.
- Commerce misunderstood the design and distribution of the ERDF funds.
- ERDF funds are intended to reduce the differences between the levels of development throughout the EU through various actions, such as ensuring environmental protection and sustainable development.
- ERDF funds are distributed in almost all EU regions, in accordance with EC Regulation 1083/2006, and in all regions, in accordance with EC Regulation 1303/2013.
- The amount of funds available in each region varies and is based on neutral criteria, such as per capita income and population.
- The funds are widely disseminated, and their distribution is horizontal in nature, and based on legal principles.
- EU regulations establish general principles and the national and regional rules implement the basic criteria and procedure for the granting of ERDF aid.
- Subsidies granted under the ERDF funds are not regional aid according to the WTO rules and are, therefore, not specific.

Respondents' Comments[161]

- Budgetary sources should not serve as a basis for the regional specificity finding in the context of local jurisdiction programs.
- Commerce should analyze whether the local jurisdiction administering the program is distinguishing among regions within its jurisdiction.
- All three programs provide benefits to the local jurisdiction of Andalusia without any distinction among the regions within Andalusia. Therefore, the funds deployed by the GOA are not regionally specific.
- Commerce confuses the EU and the GOS budgetary outlays with the idea that the EU and the GOS are directing funds to recipients within Andalusia and other regions. The EU and the GOS are not directing funds to the beneficiaries, but funding the GOA and the GOA acts at its own discretion to craft and administer programs under the frameworks provided. The Post-Preliminary Analysis described this understanding "{t}he GOA implements Spain's

[160] *See* GOS' Case Brief B at 17-19.
[161] *See* Respondent's Case Brief B at 7-8.

national energy strategy in its Regional Strategic Framework for Andalusia and specifically implements the ERDF strategy through the Regional Programme ERDF Andalusia 2007-2013."
- Because Commerce determined that the funds provided by the GOA are not regionally specific, Commerce must also find that the funds provided by the EC and the GOS are not regionally specific, because the GOA administered the funds provided by the EC and GOS.

Petitioner's Rebuttal Comments[162]
- Each program is an EU regime that targets the subsidies to specific regions in the EU, including Andalusia.
- The administration of these programs by the GOA does not remove the regional specificity of funding for these programs because the administration by the regional authority is overseen and guided by the EC, as described by Commerce in the Post-Preliminary Analysis.
- The EC is the "authority providing the subsidy" under section 771(5A)(D)(iv) of the Act for these programs, not the GOA.
- The respondents implicitly acknowledge that these programs are EC programs with EC funding, but propose an interpretation of the regional specificity provision by arguing that Commerce should analyze only the administration of the programs, regardless of the funding sources, thus eliminating the phrase "authority providing the subsidy."
- Commerce should find that these programs are wholly regionally specific, including portions funded by the GOA, under section 771(5A)(D)(iv) of the Act.

Commerce's Position: We disagree with the EC, the GOS, and the respondents. First, as stated previously in Comment 2, we do not find WTO Panel and Appellate Body decisions relevant to the instant investigation. Commerce has conducted this investigation in accordance with the Act and Commerce's regulations, and our CVD laws are consistent with our WTO obligations.[163] Second, the EC has indicated that the aim of the ERDF is to improve provide economic and social cohesion in the European Union by correcting imbalances among different regions.[164] While all regions are ostensibly eligible, certain regions receive more based on their GDP ranking. EU sources maintain that the ERDF budget is part of the European Structural and Investment Funds (ESIF) budget, which is divided into three categories: convergence, regional competitiveness and employment, and European territorial cooperation. In EC Regulation 1083/2006 Article 17 and EC Regulation 1080/2006 Article 3(2), the convergence budget category provides funds based on a region's GDP ranking in comparison to other European countries.[165] Specifically, regions with a GDP that is less than seventy-five percent of the community average are eligible to receive funding from the ERDF budget.[166] Because there is a disparity in the budgetary allocations provided among regions based on their GNP ranking,

[162] *See* Petitioner's Rebuttal Brief at 28-29.
[163] *See PSF from India* IDM at Comment 1.
[164] *See* letter from the EU, "Countervailing Duty Investigation of Ripe Olives from Spain-First Supplemental Questionnaire Response (December 26, 2017).
[165] *See* EC December 22 SQR at Exhibit Q3.4.5 Annex 12.
[166] *See* EC December SQR at Exhibit Q3.4.5 Annex 10 and Q3.4.5 Annex 12.

we continue to find the program to be regionally specific, as provided in section 771(5A)(D)(iv) of the Act.

Comment 10: Whether the EU Sustainable Energy Development of Andalusia Scheme Program is Specific

GOS' Comments[167]

- The program is managed by the Andalusia Energy Agency and its aim is to promote the development of sustainable energy in Andalusia without imposing any legal obligation on companies or citizens of the region.
- The subsidies granted under this program are not trade distorting, because beneficiaries are not obligated to carry out energy improvement actions and the implementation of energy improvement actions does not allow beneficiaries to increase production or improve the quality of their products.
- The subsidies provided offset the extra costs incurred by companies in adopting environmentally friendly behavior.
- In accordance with Spanish Decree 22/2007 of January 30, 2007, which established the regulatory framework of this program, the grants do not confer an advantage to the beneficiaries because the eligible costs are "limited to the additional cost necessary to achieve the environmental objectives…."
- Funds provided during 2007 through 2013 were a total of €368,266,454 and the EC provided 33 percent, the GOS provided 29 percent, and the GOA provided 37 percent.
- Funds provided during 2014 through 2020 were a total of €460,195,806 and the EC provided 79 percent, the GOS provided 0 percent, and the GOA provided 21 percent.
- The aid provided is not specific in the EU framework and is not specific at Spain's national level because all regions in Spain receive aid under this program without the consideration of a region's GDP.
- The GOA drafts the legislation regarding this program; the reach of the program is limited to the GOA's jurisdiction and authority.
- The aid is provided based on objective criteria and defined in regulations, as contemplated by ASCM Article 2, and is not limited to any sector or area in the region of Andalusia.

Respondents' Comments[168]

- Budgetary sources should not serve as the basis for a regional specificity finding in the context of local jurisdiction programs.
- Whether the funding for the local jurisdictional program comes from outside the locality is immaterial. The relevant question is whether or not the local authority administering the program is distinguishing among regions within its jurisdiction.
- In this instance, fund administration is centered in Andalusia for Andalusia without any distinction among regions in Andalusia. Thus, there is no regional specificity.
- Budgetary outlays do not mean that the EU and/or GOS are directing funds to recipients within Andalusia.

[167] *See* GOS' Case Brief B at 20-22.
[168] *See* Respondents' Case Brief B at 7-8.

Petitioner's Comments[169]

- Commerce should have found regional specificity because the estimation of recipients used for the Post-Preliminary Analysis lacked the relevant information on the total value of grants provided under this program, which is key feature to the estimation calculation.
- Relevant information on the program was not translated and therefore Commerce should apply AFA and find that all portions of funding provided to this program are specific.

GOS' Rebuttal Comments[170]

- The information provided by the GOS throughout the investigation, and confirmed by Commerce at verification, proves that aid provided under this program is not *de facto* specific or regionally specific.
- Commerce did not consider the factors described in the ASCM Article 2.1.
- The program was not limited to certain enterprises or predominantly used by certain enterprises.
- The granting authority did not exercise discretion when providing aid.

Commerce's Position: We disagree that it is the administering of the funds, rather than the source of the funding, upon which specificity is contingent. Section 771(5A)(D)(iv) of the Act states that "where a subsidy is limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy, the subsidy is specific." For this program there are three authorities providing the subsidy: (1) the EU, (2) the GOS, and (3) the GOA.[171] These same administering authorities also provide funding for the program. Therefore, the EU and the GOS have elected to provide funds to Andalusia, a designated geographical region, within the jurisdiction of both the EU and the GOS. The fact that these two administering authorities do not ultimately choose who receives the funding is immaterial.

Therefore, we continue to find that the portion of the funding provided by both the EU and the GOS is regionally specific under section 771(5A)(D)(iv) of the Act. We also continue to find that the portion of the funding provided by the GOA is not regionally specific, because the GOA does not limit the eligibility for funding to specific regions of Andalusia, whether designated on a geographic basis or on the basis of GDP ranking.

The GOS argues that in finding portions of the subsidy provided under this program to be specific, Commerce failed to account for the fact that the program recipients were not limited to certain enterprises, nor were the subsidies predominantly used by certain enterprises; these arguments are misplaced and rely upon a misunderstanding of the statute. The specificity criteria referenced by the GOS, number of users and predominant use, are criteria of specificity that are only relevant when Commerce is analyzing whether a subsidy is *de facto* specific within the meaning of section 771(5A)(D)(iii) of the Act. As we stated above, we found this program

[169] *See* Petitioner's Case Brief B at 8.
[170] *See* GOS Rebuttal Brief at 14.
[171] *See* EC IQR at 71, *see* EC December 22 SQR at section "reply to question 3,4, and 5;" and *see* EC February 20 SQR at 3. *See also* GOS IQR at 132-140 and Exhibit B12; *see* GOS September SQR at 178-179; *see* GOS December SQR at Appendix 3 and Exhibits 3.1 – 3.11. The GOS did not contribute funds during the 2007 through 2013 period, but does contribute funding for the 2014-2020 period.

regionally specific under section 771(5A)(D)(iv) of the Act and this section of the Act does not include the specificity criteria that is argued for by the GOS.

The GOS also argues that the program is not specific because the eligibility for the program is based on objective criteria. Here again, the GOS' arguments are misplaced. The factor of "objective criteria" is only part of a *de jure* specificity analysis that is conducted under section 771(5A)(D)(i) and (ii) of the Act. As we stated above, we found this program regionally specific under section 771(5A)(D)(iv) of the Act and this section of the Act does not include the specificity criteria that is argued for by the GOS.

Comment 11: Whether the PROSOL Program is Specific

GOS' Comments[172]

- The PROSOL program ceased to operate in 2005.
- Agro Sevilla was approved for a grant in 2003 and, subsequently, received funds at the beginning of the AUL.
- The program was managed by the former Department of Employment and Technology Development of the Junta de Andalucía and aimed to promote the use of renewable energy.
- The grant provided under this program partially compensated a company for the costs incurred to become more environmentally friendly.
- Agro Sevilla received a grant that partially offset the costs of a biomass boiler, to improve the use of olive pits as a renewable and ecological fuel. Neither the production nor the product quality was affected by the purchase and, therefore, the aid had no trade distorting effects.
- The funds provided during 2003 through 2006 totaled €368,266,454, of which the EU provided 26 percent and the GOA provided 74 percent.
- Because most of the funding was provided by the GOA, Commerce should limit its examination of the jurisdiction of the granting authority to the GOA.
- Commerce's determination that the funds provided by the EC are regionally specific is not justified.
- While unable to provide exact details about the program due to its obsolescence, it can be inferred by the information provided to Commerce at verification that the program was widely used. Because most of the beneficiaries were individuals, it is unrealistic for Commerce to estimate that the program only had 50 beneficiaries.

Commerce's Position: We disagree with the GOS' comment that, because most of the financing was provided by the Regional Government of Andalusia, we should limit our examination of the financing to the GOA. Our regulations require us to examine the specificity of each financial contribution. Financing for the PROSOL program was provided from two sources—the ERDF and the Regional Government of Andalusia. As stated above, we find that the assistance provided by the ERDF for this program is regionally specific, given that only selected areas of Spain, those with a lower GDP ranking, are eligible for this assistance.

[172] *See* GOS' Case Brief B at 24-25.

Additionally, we continue to find that the grant that Agro Sevilla received from the GOA is *de facto* specific. While the GOS indicates that it believes that there was a very large number of recipients of the program, the GOS cited to no information on the record to support its assertion. Furthermore, in situations where complete information is not available for a particular program, section 776(a)(1) of the Act requires us to rely on facts available and, based upon facts available, we determined in our Post-Preliminary Analysis that there were a limited number of recipients; thus, the program was specific within the meaning of section 771(5A)(D)iii) of the Act.[173] The comments raised by the GOS do not warrant a change of that determination.

Comment 12: Whether the EU Regional Development Fund and IDEA Program is Specific

GOS' Comments[174]

- IDEA is the Regional Development Agency of Andalusia, which is a public body associated with the GOS, and operates in the region of Andalusia.
- The specificity analysis of the benefits provided under this program should be limited to the region for which IDEA is the administrating authority, *i.e.*, the region of Andalusia.
- Aid provided under IDEA is for promoting research and development activities; is not trade-distorting.
- The regional regulations established the criteria and procedures that regulate the "granting" of IDEA support programs.
- IDEA support programs are open to all industrial sectors and companies in Andalusia, along with some entrepreneurial associations. No distinction is made based on a company's location within the region of Andalusia.
- Grants provided under IDEA are based on objectives and criteria which are published in a specific issue of the Regional Official Bulletin.
- Commerce verified that numerous companies from all industrial sectors within the region of Andalusia received benefits under this program and that a small number of these companies belonged to the agri-food sector.
- The IDEA program and its source of funds meet the criteria described in the ASCM Article 2 and it is, therefore, not specific.
- The program is not regionally specific and does not provide countervailable benefits.

Commerce's Position: We disagree with the GOS that IDEA is directly and exclusively linked to the GOA. In the GOS' February response, the GOS stated that this program was financed using only ERDF funds during the period 2007 through 2013.[175] Because ERDF funds are available only to regions with a lower GDP ranking, *see* Comment 9, we continue to find this program regionally specific, as provided in section 771(5A)(D)(iv) of the Act.

[173] *See* Post-Preliminary Analysis at 20.
[174] *See* GOS' Case Brief B at 22-23.
[175] *See* Letter from the GOS, "The Government of Spain provides the response to the Department's February 12, 2018 clarification of supplemental questionnaire issued on February 06, 2018," February 20, 2018, at 7.

Comment 13: Whether the EU Environment and Climate Action (LIFE) Program is Specific

European Commission Comments[176]

- Grants provided under the EU LIFE program are not *de jure* specific within the meaning of Article 2.1(a) and (b) of the ASCM. Article 2.1 of the ASCM governs the establishment and implementation of the EU LIFE program and does not explicitly limit access EU LIFE grants to certain enterprises. On the contrary, these grants are automatically available throughout the EU to any EU enterprise which fulfills the objective eligibility and award criteria relating to projects for environmental and climate action as required by point (b) of Article 2.1 of the ASCM.
- Grants provided under the EU LIFE program are not *de facto* specific within the meaning of Article 2.1 (c) of the ASCM, which focuses on the allocation or use of a subsidy. Commerce's reasoning that the grants are *de facto* specific is incomplete. Commerce did not take into account the number of industries in the EU that use the grants in order to determine whether the number of industries using the grants is large or small. Rather, Commerce focused not on the number of industries, but on the number of enterprises only (2,200) which received grants under the EU LIFE program.
- Article 2.1(c) of the ASCM focuses on indicia of *de facto* specificity, stating that, in evaluating *de facto* specificity, account shall be taken of the diversification of economic activities within the jurisdiction of the granting authority and of the length of time that the subsidy program has been in operation.
- Commerce failed to address the length of time during which the program has been in operation. The EU LIFE program is still ongoing and will be operational until 2020. Between 2014 and 2016, out of the €3.5 billion which were allocated for this program, only €680 million was committed to projects which involve the 2,200 enterprises, which represent a broad spectrum of EU industries. [177]
- In sum, Commerce failed to provide sufficient evidence as required by Article 2.4 of the ASCM to substantiate its *Preliminary Determination* that the grants available under the EU LIFE program are *de facto* specific within the meaning of Article 2.1(c) of the ASCM. Specifically, Commerce failed to explain why, given the diversification of the EU economy and the length of time the EU Life program has been in operation, the grants in question were found to be used by a "limited number of certain enterprises."
- Commerce failed to establish that the EU LIFE program grants were bestowed directly or indirectly to the manufacture, production, or export of Spanish ripe olives. As such, Commerce is not permitted under the ASCM to impose countervailing duties on the mandatory respondents.

Respondents' Comments[178]

- Commerce's finding that the EU LIFE program is *de facto* specific within the meaning of 771(5A)(D)(iii)(I) of the Act because "2,200 projects, provided in an economy the size of the EU, does not demonstrate that the subsidies provided under this program are widely used throughout the EU," is not supported by substantial evidence.

[176] *See* EC's Case Brief B at 1-4.
[177] *See* Annex 1 to the EU Supplemental Questionnaire Response submitted on February 20, 2018.
[178] *See* Respondent's Case Brief B at 5-7.

- Commerce makes no effort to place the 2,200 projects in context. The SAA states that Commerce can take into account the number of industries in the economy in question in determining whether the number of industries using a subsidy is large or small. However, the statute requires Commerce to take into account "the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy."
- However, Commerce has provided only a simple assertion that "2,200 projects, provided in an economy the size of the EU, does not demonstrate that the subsidies provided under this program are widely used throughout the EU." This is an insufficient analysis of whether the number of recipients is small among the industries within the EU economy and it is not supported by substantial evidence.
- The statute directs Commerce to consider "the length of time during which the subsidy program has been in operation." Commerce failed to take this factor into account. This is important, because the program has been operating only since 2014; as a new program, it is, perhaps, not yet fully deployed across all sectors and industries. Commerce's failure to consider this factor is a legal error.
- Commerce must reverse its preliminary finding and conclude that the EU LIFE program is not specific within the meaning of the statute.

Commerce's Position: Commerce's determination here is consistent with U.S. law, which, in turn, is consistent with U.S. WTO obligations. It is the Act and Commerce's regulations that have direct legal effect under U.S. law, and not the ASCM.[179] Commerce determines *de facto* specificity in accordance with section 771(5A)(D)(iii) of the Act, which states that a subsidy may be specific if:

> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number;
> (II) An enterprise or industry is a predominant user of the subsidy;
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy; or
> (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

In the case of EU Life, we continue to find that 2,200 projects across the whole of the EU economy, which is very large, represents a limited number of recipients.[180] Having satisfied that factor, which alone establishes *de facto* specificity, we need not address the other factors, as the parties contend. Thus, contrary to the EC's arguments, because we have already found the number of recipients on an enterprises basis to be limited, there is no need to consider the whether the breadth of industry sectors represented by the recipients is indicative of *de facto* specificity or not. This approach is codified in the language of section 771(5A)(D)(iii) of the Act, which provides that a subsidy "may be specific if *one or more*" of the factors above exist. This sequential application of the *de facto* specificity factors is also directly addressed in the

[179] *See PSF from India* IDM at Comment 1.
[180] *See* Post-Preliminary Analysis at 11.

SAA, which states that "where the number of enterprises or industries using a subsidy is not large, the first factor alone would justify a finding of specificity…."[181]

The SAA also addresses how Commerce will consider the additional factors cited by the parties in the arguments: the extent of diversification of economic activities in the economy in question and the length of time the subsidy program is in operation. The SAA states that "these additional criteria serve to inform the application of, rather than supersede or substitute for, the enumerated specificity factors. (That is, while they are not additional indicators of whether specificity exists, these criteria may provide a clearer context within which the *de facto* factors would be analyzed.) Thus, in determining whether the number of industries using a subsidy is small or large, Commerce could take account of the number of industries in the economy in question."[182]

The industry sector information provided by the EU was very broad, and showed that there was a wide diversification of industries that conducted projects funded by EU Life. However, in light of the limited number of projects receiving funding under this program, the fact that the range of recipients represents a diverse set of industries, across the highly diversified EU economy, does not detract from our finding that the number of recipients, as represented by the 2,200 projects funded, is limited. Moreover, in considering the length of time that the program is in operation, when we examine the limited number of users in the context of the three-year period that this program has been in operation (out of the seven-year period that the program is authorized to operate) we do not find that the limited number of users is a consequence of the length of time the program has been in operation. Because there were only 2,200 recipients of the subsidy within the entire EU during the three-year period in which the program has been in use, we continue to find, for purposes of this final determination, that the EU Life program is *de facto* specific within the meaning of section 771(5A)(iii)(I) of the Act.

Comment 14: Whether the SAIS Program is Specific

GOS' Comments[183]

- The subsidy provided by the regional government may be supplemented by additional amounts granted by the central government. Together, the amount cannot exceed a cap established by the EU Guidelines. For crop insurance, the cap is 65 percent of the total cost.[184]
- SAIS does not cover market risks, it only covers losses caused by natural disasters; therefore, the subsidy is independent of the market price applying to the insured production and of the inputs used by the farmer.
- The GOS also does not grant disaster relief payments to the farmers affected by losses caused by risks that are insurable under SAIS. Damages covered by SAIS are not compensated otherwise. Therefore, SAIS is not a support program but, rather, a risk management policy.

[181] *See* SAA at 931.
[182] *Id.*
[183] *See* GOS' Case Brief B at 3-8; *see also* GOS Rebuttal Brief at 12.
[184] *See* Letter from the GOS, "The Government of Spain provides Comments on the Verification Report," May 2, 2018, at 5.

- The subsidy is not automatically provided to the farmers.
- The subsidy provided in the form of an insurance premium discount does not provide a benefit, because it excludes the disaster relief payments that could otherwise be made to the farmers affected by natural disasters.
- SAIS is also not specific. It is available to all farmers for all agricultural and livestock production. It is not limited to certain types of crops or production.
- There are different insurance lines under SAIS, because it is a public/private system. The differentiating of insurance lines enables the insurance companies to identify clearly the goods covered by the contract; it does not equate to specificity, it is an administrative necessity.
- All farmers have access to the aid, regardless of the type of crop.
- Most insurance lines for plant crops have an "increasing" modular structure, under which each line offers different insurance modules (1, 2, 3, P). For each line, a subsidy level is established in the annual Agricultural Insurance Plans for each available module. The subsidy for a certain module is generally the same among the different insurance lines. However, five insurance lines did have different rates for the same module.
- The budget available for the insurance subsidies is not managed in a way that is sector specific. The budget is not allocated to any specific crops or productions.
- Because the insurance is voluntary, the total amount of subsidies paid at the end of the year and the distribution among subsectors will depend on the number of policies in place.
- Commerce must demonstrate that a transfer of a subsidy has occurred. The insurance subsidy is provided to the olive growers and not to the respondent companies; a pass-through analysis is required.
- SAIS does not confer a benefit, is not specific and is only given to farmers, not producers or exporters of the subject merchandise.
- Only one mandatory respondent and some cross-owned affiliates received insurance subsidies related to olives.

Commerce Position: We continue to find that this program is *de jure* specific under section 771(5A)(D)(i) of the Act, because the State Entity for Agricultural Insurance (ENESA) establishes a different base subsidy and insurance premium discount for each insurance line.

As stated in the Post-Preliminary Analysis, the Combined Agricultural Insurance Plan (AIP) establishes the subsidy levels applicable to the various insurance lines.[185] The AIP for the year 2015 covers the 2016 harvest, the harvest during the POI. The annex to the AIP lists the various insurance lines by product and the base grant applicable to each line.[186] The GOS argues that, within each line, there are various insurance "modules" and that modules across all lines are allocated the same base grant. However, this is both immaterial and incorrect. First, as the GOS itself says in its case brief and as is demonstrated by the AIP, several insurance lines did have different base rates for the same modules.[187] The GOS also overlooks the 2015 amendments to the Annex to the AIP that establishes the base grant rates.[188] This amendment

[185] *See* Post-Preliminary Analysis at 7-8.
[186] *See* Letter from the GOS, "Response of the Government of Spain to the Department's October 25, 2017 Supplemental Questionnaire," November 7, 2017 at Exhibit S-23 (GOS November 7 SQR).
[187] *See* GOS Case Brief B at 6, *see also* GOS November 7 SQR at Exhibit S-23.
[188] *See* GOS IQR at Exhibit A-057.

resulted in increases in the base grant for only nine insurance lines (out of more than 27 lines overall), and the line that covers insurance for olive grove holdings was among the nine. This selective increasing of the subsidy available to certain lines demonstrates that the assistance provided under this program is provided in a manner that renders it *de jure* specific.

Second, the GOS' claim does not negate the fact that the AIP has different base grant subsidies and insurance premium discounts for each insurance line. For example, the base subsidy available to pomegranates ranges from 17 to 29 percent, and the base subsidy available to wine grapes ranges from 17 to 40 percent.[189] There are also additional modules, SB+GA1, GA2, GA3, each of which is associated with different base subsidies that are not consistent.[190] When we asked the GOS how the base grants were originally derived, it responded that they are established in the AIP on the basis of several factors including farm policy priorities, availability of budget, and insurance penetration in the different farm sectors. The GOS also stated that "a company may receive different base grants only in case it contracts different insurance policies for different production."[191] This indicates that there are, indeed, as shown in the AIP, different base grants for each insurance line. Therefore, we continue to find that this program is *de jure* specific under section 771(5A)(D)(i) of the Act.

The GOS also argues that because these insurance premium discounts are provided to the olive farmers and not to the olive processors, we cannot find that there is a benefit to the mandatory respondents. As discussed in our response to Comment 1, because we find that section 771B of the Act is applicable in this investigation, we need not conduct a pass-through analysis or any other analysis to find that olive processors benefit from subsidies provided to olive growers.

Comment 15: Whether Financing Sourced from the Spanish Official Credit Institute (ICO) is Countervailable

GOS' Comments[192]

- Loans provided by the ICO are not a direct transfer of funds to the beneficiaries of the loan.
- The ICO is a credit entity with management autonomy, legal status, and its own assets and treasury.
- The ICO's General Board is comprised of ten members with six members sourced from the public sector. The four non-public sector members hold a double vote in the assets and liability operations. The head of the ICO also has a vote and is selected by the Council of Ministers.
- The ICO is ascribed to the Ministry of Economy, Industry and Competitiveness but is not part of the ministry because it has a separate legal identity and separate assets.
- The ICO does not receive funds from the Ministry of Economy, Industry and Competitiveness but sources funding from the domestic and international market. The ICO references Royal Decree 706/1999 Article 24, the ICO's by-laws, and its 2016 annual report.

[189] *See* GOS November 7 SQR at Exhibit S-23.
[190] *Id.*
[191] *See* GOS December 22 SQR at 24-25.
[192] *See* GOS' Case Brief B at 8-11.

- The GOS does not transfer funds to the ICO to grant financing and, therefore, financing provided by ICO should not be considered subsidies or countervailable aid.
- The GOS did not have access to the short-term commercial loans provided by the respondents as a benchmark referenced in the Post-Preliminary Analysis.
- ICO loans are granted to the final client through private banks at interest rates that are based on market conditions.
- Interest rates provided to the borrowers by private bank may be lower than the maximum interest rate determined by ICO. The private bank pays ICO the interest rate that corresponds to the 6-month Euribor plus a short-term differential.
- The beneficiaries of the ICO loans did not receive a benefit and if a profit was made, then it was from the private bank that managed the ICO financing program.

Commerce's Position: As we stated in the Post-Preliminary Analysis, the Spanish Official Credit Institute (ICO) is a public business entity attached to the Ministry of Economy, Industry, and Competitiveness via the State Secretariat for Economics and Business Affairs. The ICO is legally considered a credit institution and is treated as a State Financial Agency.[193] Regardless of ICO's separate legal identity, we continue to find that it is a government entity that operates to further GOS economic goals by making financing available consistent with those goals. As such, loans that are provided under ICO-funded programs constitute a financial contribution within the meaning of section 771(5)(D)(i) of the Act.

The GOS argues that there is no subsidy, because ICO sources its funding on international capital markets, and makes its funding available through intermediary banks in accordance with market principles; however, these arguments are unavailing. There is no requirement in CVD law that a government must provide the direct transfer of funds from its own treasury accounts. ICO's access to the international capital market allows it to borrow with the backing of the GOS, and to make financing available to achieve the GOS' objectives. That ICO's operations are not funded from the treasury, and that the interest rates charged on its loans are greater that its cost of funds, does not remove the potential that ICO loans may provide countervailable benefits to the recipients.

Our standard for evaluating a countervailable benefit is not the cost to the government, as the GOS argues, but, rather, the benefit to the recipient. As stated in section 771(5)(E) of the Act, "a benefit shall normally be treated as being conferred where there is a benefit to the recipient…." That ICO is required to adhere to lending principles in making financing available to borrowers through intermediary banks does not eliminate the benefit to the recipient of loans at interest rates that are lower than comparable commercial rates. The involvement of private banks in making available to borrowers funds that originate with ICO also does not eliminate the benefit to the recipient if the loans are provided to borrowers at interest rates that are lower than the interest rates on comparable commercial loans (obtained through banking institutions that are not sourcing their funds from ICO). The GOS does not allow for the possibility that ICO itself can make the financing available at terms that are favorable to itself, and the intermediary banks can do the same, while at the same time, providing financing to the individual borrower at terms that are more favorable than the terms available from a commercial

[193] *See* Post-Preliminary Analysis at 8.

bank. Consistent with section 771(5)(E)(ii) of the Act and 19 CFR 351.505(a)(1), our determination of whether ICO loans provide countervailable benefits is based on a comparison of the interest that the company paid on ICO loans during the POI and the interest the company would have paid on comparable commercial loans.

Comment 16: Whether Commerce Should Adjust the Interest Rate Used in Certain Long-Term ICO Financing to Angel Camacho

Petitioner's Comments[194]

- The benefit calculation for the financing provided to Angel Camacho used an incorrect interest rate for certain loans financed through two ICO-Other programs. The loan calculation should use a benchmark rate from 2014 and not from 2015.
- The result of this correction calculates a measurable benefit.

GOS' Rebuttal Comments[195]

- Submissions and verification show that ICO financing is not a subsidy and not countervailable, because it is an independent entity.

Commerce's Position: We agree with the petitioner that we erred in selecting the interest rate benchmark for the calculation of loan benefits under the ICO loan programs. Correcting the interest rate benchmark renders the benefits measurable for Angel Camacho. As such, we have examined the two ICO loan programs under which Angel Camacho had loans outstanding during the POI. We have determined that ICO International Financing is countervailable, because it is specific as an export subsidy, and that ICO Companies and Entrepreneurs Financing is not countervailable because it is not *de jure* specific, it is not an export subsidy, and it is not *de facto* specific.[196] These findings are discussed above in the sections, "Programs Determined to be Countervailable," and "Programs Determined to be Not Countervailable." The GOS' argument that, because ICO is an "independent entity," the loans it provides are not a subsidy, is conclusory, and overlooks the analysis required by the statute regarding financial contribution and benefit, as discussed more fully in Comment 15, above.

Comment 17: Whether Commerce Should Adjust the Calculation of European Investment Bank (EIB) Financing Received by Agro Sevilla

Petitioner's Comments[197]

- In the Post-Preliminary Analysis, Commerce calculated a subsidy rate for loans received by Agro Sevilla from the EIB, but preliminarily found that the benefits received by Agro Sevilla under this program were not measurable.
- However, in reaching this conclusion, Commerce mistakenly relied on figures in the "Interest Rate Reported" column rather than the "Benchmark Rate" column when calculating the "Benchmark Payments" amount.

[194] *See* Petitioner's Case Brief B at 5.
[195] *See* GOS Rebuttal Brief at 13.
[196] *See* Post-Preliminary Analysis at 8-9.
[197] *See* Petitioner's Case Brief B at 5.

- Commerce should correct this mistake. Correction of this error results in a measurable countervailable benefit of 0.01 percent.

Commerce's Position: We agree with the petitioner that we erred in our calculation of the benefits received by Agro Sevilla under the EIB loan program. Correcting the calculation results in benefits that are measurable. However, as discussed in the "Analysis of Programs" section above, we are deferring our examination of this this program until a subsequent administrative review, should this investigation result in the issuing of a CVD order.

Comment 18: Whether to Apply AFA to the CDTI Program

Petitioner's Comments[198]
- Aceitunas Guadalquivir failed to report all required information, and this prevented Commerce from fully accounting for benefits received under the CDTI loan program. Specifically, Aceitunas Guadalquivir failed to provide information relating to certain commercial loans that could have served as a benchmark loan interest rate for comparison to its CDTI loan.
- As a result, Commerce should apply AFA to address Aceitunas Guadalquivir's failure to report all loans completely.

Respondents' Rebuttal Comments[199]
- The purpose of reporting additional commercial loans is to provide the possibility of a benchmark.
- Comparable commercial loans, according to Commerce's regulations and in the context of CDTI, are long-term loans, the terms of which were established during, or immediately before, the year in which the terms of the government-provided loan were established. Commerce routinely rejects as benchmarks interest rates from loans that do not meet this standard.
- Commerce's loan appendix asks the respondents to report "commercial debt with principal and interest outstanding during the POI that was obtained contemporaneously with and that is comparable to the loan(s) in question." Aceitunas Guadalquivir had no such contemporaneous loan.
- The terms of the CDTI loan were established in 2013, while the additional loans reviewed by Commerce at verification were granted in 2014 and 2016. Furthermore, Commerce did not reach any conclusions at verification that the loans were "comparable" – an express qualification before respondents have a reporting requirement.
- Contrary to the petitioner's contention, these loans could not serve as benchmarks under Commerce's regulations and were not required to be reported.

Commerce's Position: We disagree with the petitioner's claims that Aceitunas Guadalquivir did not fully report its CDTI loans and that we should apply AFA when calculating a rate for this program. As stated in the verification report for Aceitunas Guadalquivir, we were able to

[198] *See* Petitioner's Case Brief A at 25-26; *see* Petitioner's Case Brief B at 9.
[199] *See* Respondent's Rebuttal Brief at 19-20, 22.

trace in Aceitunas Guadalquivir's accounting system both the loan and grant portion of the CDTI loan, as well as all interest payments made.[200] We also reviewed Aceitunas Guadalquivir's short- and long-term loan accounts, and we traced the totals in these accounts to the balance sheet.[201] Although we did find that there were additional commercial bank loans that Aceitunas Guadalquivir had not reported, because these loans were provided in 2014 and 2016, the interest rates on these loans do not meet the requirements of 19 CFR 351.505(a)(2)(iii) for use as benchmarks for measuring the benefits from the CDTI loan to Aceitunas Guadalquivir, because the terms of these loans were established after the initial CDTI loan agreement, which was signed in 2013.[202] Contrary to the petitioner's contention, the verification report shows that Aceitunas Guadalquivir did fully respond to our request to report "commercial debt with principal and interest outstanding during the POI that was obtained contemporaneously with and that is comparable to the loans(s) in question."[203] Because the additional loans were not provided under the CDTI program, and because they were not contemporaneous with the CDTI loans under investigation, by not reporting them, Aceitunas Guadalquivir did not fail to cooperate with respect to this program. As such, we find no basis to rely on AFA, for purposes of this final determination, in determining a rate for this program.

Comment 19: Whether the CDTI Program is Export Specific

GOS' Comments[204]

- This program is not specific under section 771(5A)(A) of the Act, because it is not contingent upon export performance.
- CDTI loans promote research and development and are available to all companies, in any industry or sector. Export performance is not considered in determining eligibility for the receipt of assistance.
- The five eligibility criteria include: the applicant is a company registered in Spain; the applicant is not in financial difficulties; the project is a research and development project; the project meets budget standards; and, the aid will have an incentive effect.
- Non-compliance with any of the eligibility criteria results in the rejection of the proposal. Moreover, because export performance is not one of the criteria, a company may qualify for assistance that is not going to export or has no export capacity.
- If a company meets all of the eligibility criteria, it is subject to a technical and financial evaluation. The technical evaluation criteria and the financial evaluation criteria are further broken down into sub-criteria. A company must have a positive evaluation for both the technical and financial evaluation for the project to be approved.
- Potential export performance is only one of the 34 technical sub-criteria; thus, it has a relatively small impact in the whole technical evaluation process.
- Aceitunas Guadalquivir's technical evaluation indicates that its potential export performance is "low." Despite the expected low export performance, Aceitunas

[200] *See* Aceitunas Guadalquivir Verification Report at 11.
[201] *Id.*
[202] *See* Letter from Aceitunas Guadalquivir, "Initial Questionnaire Response of Aceitunas Guadalquivir S.L.U.: Ripe Olives from Spain (C-469-818)," September 19, 2017, at 58.
[203] *See* IQR at Section III Loan Benchmark and Loan Guarantee Appendix.
[204] *See* GOS' Case Brief B at 12-16.

Guadalquivir was approved for the loan based on its total technical evaluation score and a good financial evaluation.

Respondents' Comments[205]

- In its Post-Preliminary Analysis, Commerce found CDTI to be specific based on section 771(5A)(A) of the Act, because it is contingent upon export performance as one of two or more conditions of eligibility the GOS considers. Commerce also stated that "{a}mong the criteria the GOS considers are several items relating to the impact on exports. However, there are hardly "several items," as Commerce only indicated two.
- Furthermore, these are not export contingencies; rather, they are evaluation factors.
- The GOS has five eligibility criteria, and the technical and financial evaluations are carried out only after verifying that a company has complied with all five criteria. Those two evaluations are not part of the eligibility criteria.
- The GOS also identified "selection criteria" applied in selecting eligible candidates, including the technical quality of the project and degree of innovation, the financial and technical capacity of the company to implement the project, the capacity of the company to exploit the output, and the social, economic and environmental impact of the project. Export performance or export potential are not taken into account in determining eligibility.
- Commerce's verification report noted no discrepancies with the GOS' responses and did not indicate that there was a discussion concerning export contingency.

Petitioner's Rebuttal Comments[206]

- The respondents and the GOS contend that Commerce based its determination on an incomplete examination of the record and a mistaken interpretation of facts, and that this program is not export specific. However, this argument ignores the ample evidence on the record suggesting this program is export specific.
- The GOS itself states, "potential export performance" is one of the "technical subcriteria" considered for obtaining a CDTI loan.[207]

Commerce's Position: In the Post-Preliminary Analysis, Commerce found the loans provided by the CDTI to be specific under sections 771(5A)(A) and (B) of the Act, because they are contingent upon export performance as one of two or more conditions that the GOS considers. The GOS and Aceitunas Guadalquivir contend that Commerce erred in this export subsidy specificity finding because CDTI loans are not contingent upon export performance. The GOS and Aceitunas Guadalquivir assert that there are only five criteria upon which eligibility is evaluated and export performance or capacity is not among them.

However, both the GOS and Aceitunas Guadalquivir fail to address the record information indicating that these five criteria are only the *threshold* criteria for CDTI loans.[208] Only a company that successfully fulfills these criteria will be considered in the second stage of the evaluation process, which addresses a technical and financial evaluation. These evaluations are

[205] *See* Respondent's Case Brief B at 3-5.
[206] *See* Petitioner's Rebuttal Brief at 27.
[207] *See* GOS Case Brief B at 14.
[208] *See* GOS December 22 SQR, at Appendix TQ-7 at 10.

made on a numerical basis, the details of which neither the GOS nor Aceitunas Guadalquivir provided,[209] and several of the 34 subcriteria used to "grade" the technical evaluation refer to exports. These include criteria such as "export possibilities," and other criteria that remain proprietary.[210] The GOS reported that if the technical and financial assessment "proves to be successful," then the application is submitted to a Board of Directors which may approve the assistance. Additionally, the GOS stated that, if the company "does not meet the eligibility *or* the selection criteria," the application is rejected.[211] This indicates that the company must comply with the five eligibility criteria and pass the technical and financial evaluations. Thus, there are more than five eligibility criteria, and at least one criterion includes export contingency.

Further, as we noted in the Post-Preliminary Analysis, Royal Decree 1407/1986, which approves and promulgates the regulations of the CDTI, states that one of the functions of the CDTI is to "promote industrial use of the technologies developed on the initiative of the Centre itself or of other public or private Centres and to support the manufacture of pre-series and the commercialization of new products and processes, *especially, in overseas markets*" (emphasis added).[212] On this basis we continue to find this program specific under section 771(5A)(A) and (B) of the Act.

Comment 20: Whether Commerce Should Apply AFA to Angel Camacho's Unreported Grant Presented at Verification

Petitioner's Comments[213]

- Commerce rejected the information presented by the GOS and Angel Camacho at verification regarding additional grants under the Rural Development Program and in 2008 under the Andalusia Energy Program, because the information was not previously reported.
- The verification reports' description of the unreported grant information presented by the GOS and Angel Camacho clearly show that the respondents did not provide to Commerce information regarding additional programs.

GOS' Rebuttal Comments[214]

- The grant presented by the GOS, and rejected by Commerce before verification, was not provided under the Rural Development program.
- The grant was provided under the State Research Agency (AEI) and information regarding this agency was provided to Commerce in GOS September 18 SQR.
- The grant was not initially reported due to the age of the file.
- Angel Camacho located the grant and AEI was able to find related information.

[209] Although the GOS provided Aceitunas Guadalquivir's evaluation, there was no explanation as to the scoring system, or the weight each criterion carries. *See* GOS December 22 SQR at Exhibit 7.4.
[210] *See* Aceitunas Guadalquivir Final Calculation Memorandum for a discussion of all criteria.
[211] *See* GOS December 22 SQR at Appendix TQ-7 at 9.
[212] *Id.*, at Exhibit TQ-7.2 at Article 3.3.
[213] *See* Petitioner's Case Brief B at 7.
[214] *See* GOS' Rebuttal Brief at 14-15.

- The grant was for an R+D+I project and the potential beneficiaries of the program varied and, therefore, the grant should not be considered specific or countervailable.

Respondents' Rebuttal Comments[215]
- Commerce should reject the petitioner's argument regarding the application of AFA to Angel Camacho for the Andalusia Energy Program.
- The statute states that AFA may only be applied where "necessary information" is not provided by the responding party, and information about subsidies not related to initiated programs is not "necessary" to Commerce's determination and is beyond Commerce's inquiry.
- Commerce should defer any action if it lacks sufficient time to examine the discovered subsidy.

Commerce's Position: As an initial matter, we have separately addressed the first rejection of factual information referenced by the petitioner, relating to the unreported grants to Angel Camacho's cross-owned suppliers under Rural Development, described in Angel Camacho Verification Report under "Corrections Not Accepted."[216] This issue is addressed in Comment 23.

Regarding the other factual information that we declined to accept at verification, the information described the same unreported grant. The GOS and Angel Camacho verification reports describe that we did not accept information regarding an unreported grant provided to Angel Camacho in 2008.[217] In the GOS verification report, the unreported 2008 grant is also described as being a grant to fund research project that was provided by the Andalusia Energy Agency.[218] The verification report for Angel Camacho describes a previously unreported grant that was provided in 2008 and that was overlooked in preparing the questionnaire responses due to the age of the grant.[219]

While the respondents argue that Commerce should defer action regarding this grant and not apply AFA, we disagree. The deadlines for providing factual information, as delineated in 19 CFR 351.301, are in place to provide Commerce sufficient time to review and analyze information provided by interested parties. Therefore, it is critical that parties provide information by the established deadline or timely request an extension of such a deadline. Timely filings and timely extension requests contribute to Commerce's efficient administration of the numerous cases before it. Conversely, untimely-filed information hinders the efficient conduct of our proceedings, and the Federal Circuit has upheld Commerce's discretion to reject or refuse to consider information that is submitted late in the proceeding.[220] Accordingly, for the efficient conduct of its proceedings, it is critical that parties adhere to the deadlines established by Commerce. When it becomes apparent that respondents have not cooperated to

[215] *See* Respondent's Rebuttal Brief at 21.
[216] *See* Letter to the GOS, "Countervailing Duty Investigation on Ripe Olives from Spain: Rejection of the GOS Submission of January 29, 2018," February 2, 2018.
[217] *See* Angel Camacho Verification Report at 4; *see* GOS Verification Report at 2.
[218] *See* GOS Verification Report at 2.
[219] *See* Angel Camacho Verification Report at 4.
[220] *See Dongtai Peak Honey Industry Co., Ltd. v. United States of America*, 777 F.3d 1343 (Fed. Cir. 2015).

the best of their ability to timely and fully respond to our requests for information, and this lack of cooperation has impeded our investigation, section 776 of the Act provides for the reliance on facts available with the application of adverse inferences. As discussed above in the section "Application of Facts Available with Adverse Inferences," we find, for purposes of this final determination, that it is appropriate to rely on AFA for purposes of determining a subsidy rate for this unreported grant.

Comment 21: Whether Commerce Should Rely on "Unverified" Information

Petitioner's Comments[221]

- The statute and the regulations require Commerce to verify all information relied on for the final determination.
- In the Post-Preliminary Analysis, Commerce relied on information provided by the GOS after the completion of verification, too late to be verified.
- Commerce has not justified its decision to find no regional specificity, on the basis of unverified information, for the portion of funding provided by the Government of Andalusia under the EU Sustainable Energy Development of Andalusia Scheme.

GOS' Rebuttal Comments[222]

- Commerce was able to conduct verification of this program, and the PROSOL program, at which GOS provided explanations of how the programs operate.

Respondents' Rebuttal Comments[223]

- The petitioner, remarkably, lays blame on with the GOS for the timing of the provision of the information.
- The petitioner overlooks the timing of Commerce's supplemental questionnaire, which was issued in the midst of verification, and is procedurally unfair.
- Commerce should forgo any findings on programs for which information was not verified due to a lack of time.

Commerce Position: We reject the petitioner's, the GOS' and the respondents' arguments calling for either the reviewing of our post-preliminary decision or the deferral of the decisions on programs for which we received information after the completion of verification. In issuing the supplemental questionnaire of February 6, 2018, we exercised our authority to gather information we find necessary for purposes of conducting the investigation. We relied on the information provided by the GOS in response to this supplemental questionnaire to develop the decisions in the Post-Preliminary Analysis. Contrary to the petitioner's interpretation, the requirement to verify information relied on for the final determination does not obligate Commerce to verify *all* of the factual information provided in the record; Commerce simply does not have the resources to implement the statutory requirement in this manner, and must choose the programs and the information it seeks to verify. In addition, when we determined not to verify certain information, this did not constitute a finding that it was unreliable, absent other factors that may call into question the reliability of the information; nor do we determine

[221] *See* Petitioner's Case Brief A at 6.
[222] *See* GOS Rebuttal Brief at 11.
[223] *See* Respondents' Rebuttal Brief at 21.

that our decision not to verify information regarding a particular program renders any information about that program insufficient to support our analysis and decision-making such that we must defer a decision on the program. As such, we continue to examine the EU Sustainable Energy Development of Andalusia Scheme and the PROSOL program, on the basis of the information provided in response to the February 6, 2018 supplemental questionnaire.

Comment 22: Whether Commerce Should Adjust the Volume of Raw Olives Purchased to Account for Waste Loss

Petitioner's Comments[224]

- Information on the record indicates that the olive suppliers and the olive processors are not recording their olive volumes on the same basis.
- The olive suppliers' production data includes the weight of the harvested raw olives, as well as debris, waste, and unusable olives, including olives not used for processing into black or green olives.
- The respondents reported their olive purchase volumes net of debris, as confirmed at verification.
- Because the un-useable olives and debris would not be stored in a solution for further processing, the waste quantities would not be captured in the respondents' olive purchase data.
- Therefore, a "yield loss" adjustment must be made to account for this volume of olives reported by the suppliers, but not by the respondents.
- Aceitunas Guadalquivir is the only respondent for which there is information on the record (in a whose verification exhibit) relating to yield loss. As such, the yield loss information in this exhibit should be applied to all respondents to make an appropriate adjustment.
- Information in Aceitunas Guadalquivir's verification exhibits demonstrates that Guadalquivir's net purchase weight, as indicated on its invoices, contains not only olives destined for processing, but also unusable olives and debris, such as leaves and stems.

Respondents' Rebuttal Comments[225]

- The petitioner's argument for a volume adjustment to account for waste loss must be rejected. The petitioner's attempt to suggest a discrepancy between reported sales and purchases is grossly inaccurate and misunderstands the record.
- No "yield loss" adjustment is required and none can be supported by the record.
- The petitioners suggest that Guadalquivir's reported purchases were net of "unusable" olives. This is incorrect.
- Aceitunas Guadalquivir's verification report demonstrates that non-prime olives are included in its purchase totals: "{t}he totals for each olive type correspond to Guadalquivir's ultimate invoices and the amount that was paid…Volumes recorded on the truck list are broken down according to olive type, but then further divided among the categories that are included in the total reported volume: smallest, hail, bruised, 'molino'…."
- These lower quality olives are used in processing as is noted in the verification report.

[224] *See* Petitioner's Case Brief A at 22-23.
[225] *See* Respondent's Rebuttal Brief at 16-17.

- The petitioners have not established that the production and sales volumes reported by the suppliers are reported on a gross basis, only that the truck invoices issued in the case of Aceitunas Guadalquivir are issued on a gross basis.
- Finally, no yield loss adjustment should apply, even if supplier production data are reported on a gross basis. The production figure reflects all aspects of the supplier production process and product sold by the supplier. Any subsidy benefit is properly attributed to the entire gross volume.
- The fact that the respondents in question do not purchase certain aspects of that gross unit is purely an attribution issue.
- Commerce should not attribute subsidies to the respondents based on alleged subsidized units they did not purchase. This would wrongly overstate any attributed benefit.

Commerce's Position: We do not agree with the petitioner that it is necessary to adjust the volume of olives sold by each supplier to account for a yield loss attributable to the inclusion of debris and poor quality or damaged olives. The record does not establish that the volumes sold included debris; to the contrary, the record demonstrates that the olive volumes sold by the growers are net of such debris. At verification of Agro Sevilla, the verification team asked the cooperative on what basis the weight of its olives is recorded.[226] Agro Sevilla verified that "only olives are included in the weight."[227] Similarly, at the verification of Angel Camacho, company officials indicated that that "all raw olives are purchased and booked 'clean'," meaning without stems, leaves, stones etc. The company officials explained that the weight after the initial cleaning of sticks and stones is the first weight entered into their accounting system and is the weight used in calculating the payment to the supplier."[228]

Likewise, at the verification of Aceitunas Guadalquivir, the verification team asked the same question. Aceitunas Guadalquivir explained that the weight recorded for their purchases of raw olives is net of debris, sticks, leaves, etc.[229] Aceitunas Guadalquivir, for example, explained how a supplier's invoices can be linked to Aceitunas Guadalquivir's truck list that is created for each truck coming into its facility.[230] This truck list accounts for each truck load received by the supplier and type of olive. Aceitunas Guadalquivir explained that the suppliers' "invoices can be linked to the truck list created by {Aceitunas Guadalquivir}."[231] The totals on the supplier's invoice for each olive type correspond to Guadalquivir's payment documentation. As shown by the Aceitunas Guadalquivir documents reviewed at verification, the volumes recorded on the truck list are broken down according to olive type, but then further divided among the categories that are included in the total reported volume: smallest, hail, bruised, "molino" (mill/press); as well as the categories that are not included in the total reported volume, such as, the smallest olives, rocks, insects, and leaves.

As such, the record shows that the volume of olives purchased by each mandatory respondent is recorded on the same basis as the volume of olives sold by any supplier; the record also shows

[226] *See* Agro Sevilla Verification Report at 12.
[227] *Id.*
[228] *See* Angel Camacho Verification Report at 9.
[229] *See* Aceitunas Guadalquivir Verification Report at 8.
[230] *Id.*
[231] *Id.*

that the reported volumes sold by the suppliers are not because they do not include debris and un-useable olives. Therefore, there is no basis for making a "yield loss" adjustment, as the petitioner advocates, for purposes of this final determination.

Comment 23: Whether Commerce Should Accept Rejected Submission from the GOS and the Respondents

European Commission Comments[232]

- Commerce was incorrect in rejecting the additional information that the GOS submitted at the beginning of verification.
- Commerce's rejection of this information is not justified in light of its obligations under the WTO ASCM. The GOS acted to the best of its ability to cooperate and explained that it found the information later, because it was contained in a database that which was not easily accessible and not comprehensively searchable, that was very old, largely unused, and archived in remote locations.
- Article 12.11 of the ASCM clearly states that "*The authorities shall take due account of any difficulties experienced by interested parties…in supplying information requested, and shall provide any assistance practicable."* In *US –Hot-Rolled Steel,* the Appellate Body clarified that Article 6.13 of the WTO Antidumping Agreement, whose wording is equivalent to Article 12.11 of the ASCM, underscores that 'cooperation' is a two-way process involving joint effort. This provision requires investigating authorities to make allowances for, or take action to assist, interested parties in supplying information.
- The GOS verification report clearly demonstrates that Commerce failed to take account of the genuine difficulties experienced by the GOS with respect to the requested information.
- Contrary to Commerce's claims, the magnitude of the corrections was minor because they did not relate to any new subsidy program and they represented only a minor adjustment of the benefit information.
- Even though the corrections were submitted after the deadline, Commerce should recognize that, despite this delay they were still submitted within a reasonable period of time: 1) the rejected corrections were submitted before verification; 2) the process of collecting the information in the investigation was not completed at this time; and, 3) in the *US-Anti-Dumping and Countervailing Duties (China)*, the Panel observed that "*pursuant to the plain language of Article 12.7 of the SCM Agreement, recourse to facts available is permissible only under the limited circumstances where an interested Member or interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. Our interpretation is also consistent with that of prior panels and Appellate Body's that have considered this provision.*"[233] These circumstances clearly demonstrate that Commerce did not have lawful grounds under Article 12.7 of the ASCM to reject the corrected information. The conditions envisaged by this Article were not fulfilled, in

[232] *See* EC's Case Brief A at 16-17.

[233] *See* Appellate Body Reports on Japan—DRAMS (Korea), para. 235 and Mexico-Anti-Dumping Measures on Rice, para. 291; Panel Reports on Japan -DRAMS (Korea), para. 7.383 and EC – Countervailing Measures on DRAM Chips, para. 7.245; see also Panel Report, US- Anti-Dumping and Countervailing Duties (China), paras. 16.9, 16.16.

particular those under (ii) and (iii) above, which provide not only the grounds for the rejection of the submitted information, but also for the application of facts available, to replace such rejected information.

GOS' Comments[234]

- Commerce's decision not to accept the Pillar II rural development program information that had not been reported was incorrect. This information was detected by a complete involuntary error.
- This information was provided to Commerce before the GOS was aware of verification. Most of the additional Pillar II information was contained in old databases that were no longer in use and, or there was no digital information available, and some files were archived in remote locations.
- Under Article 12 of the ASCM, Commerce is required to take into account these difficulties and accept this information.
- Commerce's decision to reject this information is unjustified and, Commerce cannot rely on these circumstances to base its final determination on "adverse facts available."

Respondents' Comments[235]

- Commerce requested a substantial amount of data and information from numerous parties which spanned a 12-year period and required governmental authorities to consult older databases and records that have not been in use for years.
- The GOS recognized that it was missing certain benefit data which was inadvertently omitted because of its aging databases. The GOS and the three mandatory respondents attempted to supplement the record by submitting the revised supplier subsidy data.
- The information submitted by the GOS and the mandatory respondents related to the CAP programs, which had been fully analyzed by Commerce. The revisions were just additional data points that could have easily been incorporated in the Commerce's analysis.
- This scenario in this case is very different from others when an entirely new program is discovered late in an investigation, and Commerce has no information about how the program operates. The data submitted on January 29, 2018, and on February 2, 2018, corrected benefit information and did not alter or change the substance of the program.
- Since this was not a new program, Commerce had no basis for rejecting the data submitted. Commerce had more than ample time to verify the revised data, because none of the verifications had begun.
- The revisions were provided to Commerce more than seven days in advance of verification of the GOS and more than two weeks before any of the suppliers of raw olives were verified. There is no basis to conclude that the information was not reliable, could not be verified, or that it could not be used by Commerce. Commerce should exercise its discretion and incorporate the revised benefit data into its analysis rather than resort to facts available or AFA.
- Rejecting these data is at odds with the posture adopted by Commerce during verification with the GOS. Commerce issued a supplemental questionnaire to the GOS on the same day

[234] *See* GOS Case Brief A at 4-5.
[235] *See* Respondent's Case Brief A at 45-50.

on which verification of the GOS commenced, in order to clarify the operation of some programs. The deadline for responding to the questionnaire was after verification.

Petitioner's Comments[236]

- In the *Preliminary Determination,* Commerce correctly found that Pillar II, the Agricultural Fund for Rural Development, is a countervailable program. Commerce also found that the growers and the suppliers of the three respondents received benefits under this program during the POI and the AUL.
- Based on incomplete GOS, respondent, and supplier responses, Commerce preliminarily determined subsidy rates that significantly understate the actual benefits received by respondents and their growers under the rural development program.
- Commerce was correct in rejecting the new information, filed just prior to verification, which disclosed that the GOS made significant Rural Development Fund payments to a number of respondents' suppliers.
- In rejecting the late submissions, Commerce clarified that the submissions were untimely and that the factual information was not properly explained and did not constitute minor corrections that could be acceptable before verification.
- What is left on the record is a clear indication that the corrections were not minor and that rural development benefits, separate and in addition to those previously reported, were received by respondents and/or their suppliers and growers.
- Because the level of these rural development benefits is unclear, and unverified, Commerce must apply AFA to determine a countervailing duty rate applicable to these benefits to ensure that the respondents are neither rewarded for failing to respond timely with relevant subsidy information, nor induced to the same in the future.
- Commerce should add to the verified rural development benefits for each respondent an additional rural development rate equal to the highest countervailable subsidy rate found for any similar program, including the BPS program.

European Commission Rebuttal Comments[237]

- Commerce is not entitled to reject the corrected/revised information, which was submitted by the respondents within a reasonable period and not verified during Commerce's verification.
- Article 12.6 and Article 12.6 and Annex VI of the ASCM provide that the investigating authorities may carry out verification visits in order to verify provided information. However, they are not obliged to do so.
- Article 12.7 of the ASCM explains that Commerce is not entitled to reject information that was submitted within a reasonable period.
- Commerce should refrain from applying AFA in a WTO-inconsistent manner which would punish the mandatory respondents with excessive and unjustified subsidy margins. If it determines that facts available are required, Commerce should respect the provisions of Annex II to the WTO Antidumping Agreement, meaning that Commerce is obliged to fill in the potential gaps caused by missing/rejected data only with the information that is best, not

[236] *See* Petitioner's Case Brief A at 23-25.
[237] *See* EC's Rebuttal Brief at 2.

simply useful, but most fitting or most appropriate information available for the case at hand.

Commerce's Position: Commerce conducts its investigations in accordance with regulations that establish time limits for the provision of factual information. The time limits are implemented to ensure transparency in the investigation by establishing the timing of the opportunity for parties to provide information. During an investigation, respondent parties have an obligation to ensure that they have provided Commerce with complete information because we make our determinations based on the information timely provided. At verification, we examined the information provided by the GOS and the respondents to determine whether they constituted minor corrections and determined that the information could not be so considered. The information identified a large number of additional grants, substantially increasing the total value of the Pillar II grants received by the respondents' suppliers. For example, as indicated in the GOS verification report,[238] the GOS identified additional CAP Pillar II grants to Agro Sevilla's first-tier member cooperatives amounting to an additional 40 percent, by value, in reported benefits. Additionally, Aceitunas Guadalquivir presented information regarding additional grants to their unaffiliated growers and Angel Camacho presented information regarding additional Pillar II grants to their cross-owned input suppliers.[239] In all cases, we rejected this information, because we considered it not to represent minor corrections and to represent a sizeable increase in the total Pillar II benefits that were reported.

Because the information at issue could not properly be considered minor corrections to previously submitted information, the additional Pillar II payments reported by the GOS and the respondents represented new factual information. As new factual information, it is subject to the time limits established by 19 CFR 351.301, which is the regulatory provision that governs the time limits for the submission of factual information. Section 351.301(c)(1) of Commerce's regulations states that "the Secretary will not consider or retain in the official record of the proceeding unsolicited questionnaire responses or untimely filed questionnaire responses. The Secretary will reject any untimely filed or unsolicited questionnaire response …." Given that the GOS and respondents did not submit the information at issue (requested in previous questionnaires) until January 29, 2018, and February 2, 2018, respectively – well after November 20, 2017, when Commerce issued its *Preliminary Determination* – the deadline for filing such information clearly had expired.

We find the parties' arguments concerning the ASCM unavailing. It is the Act and the Commerce's regulations that have direct legal effect under U.S. law, and not the ASCM.[240] The fact that the new factual information was related to the Pillar II program, which was under investigation, is immaterial to the fact that this new factual information was submitted months after it was requested and, therefore, outside the time limits of our regulations for accepting new factual information. Moreover, the fact that we issued an additional questionnaire, limited to specific grant and loan programs that were not included in the initial questionnaire issued to parties, concurrent with verification does not require us to accept the new factual information on

[238] *See* GOS Verification Report at Minor Corrections at 2.
[239] *See* Aceitunas Guadalquivir Verification Report at 3; see also Angel Camacho Verification Report at 4.
[240] *See PSF from India* IDM at Comment 1.

Pillar II benefits.[241] The supplemental questionnaire sought, for the first time, additional information on discrete programs that we identified as necessary to the investigation. The new factual information that we rejected at verification was information that should have been provided in response to the initial questionnaire or supplemental questionnaires, by the applicable deadline.

As a result, we consider unreliable the Pillar II benefits reported by Agro Sevilla for the first-tier suppliers, and consistent with sections 776(a) and (b) of the Act, we have applied AFA in our calculations for the Pillar II program, as described above under "Application of Facts Otherwise Available and Use of Adverse Inferences." For Agro Sevilla, we have relied on AFA to identify a proxy for the weighted per kilogram Pillar II benefits provided to its member cooperatives. For Angel Camacho, because the incomplete reporting relates to its cross-owned suppliers, and we treat a respondent and its cross-owned input suppliers as one entity for purposes of calculating countervailable subsidy rate, for purposes of this final determination, we are relying on our AFA hierarchy to identify a rate applicable to Angel Camacho.[242] In accordance with the hierarchy, we are relying on the rate calculated for Agro Sevilla as AFA for Angel Camacho. Finally, for Aceitunas Guadalquivir, because the circumstances of the Pillar II calculations do not permit the reliance on AFA to identify a proxy for the weighted per kilogram Pillar II benefits provided to its unaffiliated suppliers, we have used the countervailable subsidy rate calculated for Agro Sevilla as the countervailable subsidy rate for Angel Camacho.[243]

Comment 24: Comments on the Verification Reports

Both the EC and the GOS provided comments regarding the verification reports, identifying areas where, they contend, the reports did not fully or accurately convey the information provided at verification. The comments addressed the following programs:

- EU CAP Pillar I – BPS. Topics included: market intervention measures, decoupled, entitlements, timeline of previous programs, convergence, EU CAP budget, co-efficients used in entitlement calculations, and financial discipline calculation.[244]
- EU CAP Pillar I – Greening. Topics included: Differences between this program and BPS, the EU budget for the program, decoupled and national programs are determined by Member State.[245]
- EU CAP Pillar I – SPS. Topics included: discontinuation of the program, SIGPAC system, application process, crop declarations.[246]
- Rural Development. Topics included: shared management, implementation, and budget allocation.[247]

[241] *See e.g.*, Letter to the GOS, "Countervailing Duty (CVD) Investigation of Ripe Olives from Spain: Supplemental Questionnaire to the Government of Spain," February 6, 2018.
[242] *See* Angel Camacho Final Calculation Memorandum.
[243] *See* Guadalquivir Final Calculation Memorandum; *see also* Agro Sevilla Final Calculation Memorandum.
[244] *See* EC Case Brief B at 5-9; *see* GOS Case Brief B at 2-4.
[245] *See* EC Case Brief B at 9.
[246] *See* GOS Case Brief B at 1.
[247] *See* EC Case Brief B at 10; *see* GOS Case Brief B at 4-5.

- SAIS. Topics included: regional government involvement and subsidy cap.[248]
- ICO Financing. Topics included: organization, decision making body, interest rates, financing conditions, and blended funding.[249]

Commerce's Position: We reviewed the comments the EC and the GOS submitted regarding the verification reports. The verification reports are final documents that represent the discussions at verification and are based on the reporting of the verification team. Although Commerce does not revise verification reports based on comments from interested parties, parties have the opportunity to use the information provided in the verification report to make arguments that Commerce must consider for the final determination. Accordingly, we have not revised the verification reports, but we have considered all of the arguments that the EC and the GOS have made in their case briefs with regard to all of the programs under investigation, including those identified above.

Comment 25: Whether Commerce's Conduct of this Investigation Meets the Requirements of the ASCM

GOS' Comments[250]

- Commerce issued six questionnaires, one during verification; each requested an enormous quantity of information within very tight deadlines.
- The number of companies for which information was requested increased over time. Initially limited to the respondents and affiliates, later, the GOS had to provide information for a large number of raw olive suppliers. This was especially burdensome for mandatory respondents that were obliged to present information about companies over which they had no control and, therefore, any deficiencies related to that information should not lead to the use of AFA.
- The complaint presented by the petitioner was limited to the subsidies under Pillar I and Pillar II of the CAP, as well as the Agricultural Insurance System of Spain. However, Commerce required that the GOS provide extensive information on aid and loans granted to mandatory respondents that are outside the purview of this investigation.
- The GOS considers this approach to be excessive in light of Article 13 the of the ASCM, which requires investigating authorities to give to the government of the affected country the opportunity for consultations before investigating aid.
- Nevertheless, the GOS has shown maximum cooperation and transparency and provided detailed information on these "other aid programs."

European Commission Comments[251]

- Commerce failed to prove the following:
  - that the benefits received by the Spanish olive farmers were countervailable under Article 1.2 of the ASCM;
  - that the benefits received by the Spanish olive farmers in 2016 under SPS, BPS and Greening programs were specific under Article 2.1 of the ASCM.

[248] *See* GOS Case Brief B at 5.
[249] *Id.*, at 5-6.
[250] *See* GOS Case Brief at 2-5.
[251] *See* EC's Case Brief A at 2-3.

- The benefits received by the Spanish olive farmers were passed-through to the mandatory respondents in light of the relevant provisions of the ASCM, with which the U.S. is obliged to comply.
- That the conditions envisaged by Article 12.7 of the ASCM were met when it rejected the corrected information submitted by the GOS on February 2, 2018.

Respondents' Comments[252]

- Article 11 of the ASCM establishes most of the basic requirements for initiation of a countervailing duty investigation.
- Article 13 of the ASCM places an important obligation on investigating authorities, in that "as soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members of the WTO that produce merchandise subject to such investigation, shall be invited for consultations with the aim of clarifying the situation as to matters referred to in paragraph 2 of Article 11…."

Commerce's Position: We disagree with the GOS and the respondents' claim that our requests for information were excessive and that we asked for information that was outside the purview of this investigation. Although parties argue that Commerce's requests for information were incongruent with the United States' international obligations, our investigation is governed by U.S. law, which is consistent with our WTO obligations. Moreover, the GOS' and the respondents' reading of the ASCM, in this context, has no bearing upon these proceedings because it is the Act and Commerce's regulations that have direct legal effect under U.S. law.[253] Contrary to the GOS' claim, Commerce did conduct consultations with the EC and the GOS prior to initiation of this investigation.[254] Further, this investigation was initiated on the basis of a petition filed by a U.S. industry that Commerce found met the requirements of the Act for initiation, as explained in our initiation checklist.[255]

Additionally, under section 775 of the Act, Commerce is obligated to investigate potential subsidies it discovers in the course of the proceeding. Specifically, in the course of an investigation, Commerce may "discover {} a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in the countervailing duty petition."[256] In such a case, Commerce "shall include the practice, subsidy, or subsidy program in the proceeding."[257] Thus, section 775 of the Act imposes an affirmative obligation on Commerce to "consolidate in one investigation…all subsidies known by petitioning parties to the investigation or by {Commerce} relating to {subject} merchandise" to ensure "proper aggregation of subsidization practices."[258]

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[252] *See* Respondent's Case Brief A at 40-42.
[253] *See PSF from India* IDM at Comment 1.
[254] *See* Memorandum, "Ripe Olives from Spain Countervailing Duty Petition: Consultations with Officials from Spain and European Union," July 11, 2017.
[255] *See* Initiation Checklist
[256] *See* section 775 of the Act.
[257] *Id.* (emphasis added).
[258] *See* S. Rep. No. 96-249, at 98 (1979); *see also* Allegheny I, 112 F. Supp. 2d at 1150 n.12 ("Congress clearly intended that all potentially countervailable program regardless of when evidence on these programs became reasonably available.").

Thus, our questionnaires to the growers and suppliers, as well as the questionnaires to the respondents regarding other assistance they received, were necessary for us to effectuate our obligation to investigate practices "that appear to be a countervailable subsidy." Moreover, our issuance of such questionnaires is consistent with our authority to seek information we deem relevant to our investigation.

Comment 26: Whether Other Subsidies Should be Included in this Investigation and Whether Other Assistance Can Form the Basis for Applying AFA

Respondents' Comments[259]

- Commerce has employed a practice in countervailing duty investigations, including this one, of requesting its respondents to disclose all "other subsidies." These "other" subsidies are not the subject of an allegation by the petitioner, of any formal initiation, nor are they defined by Commerce.
- This "other" subsidy request has been used by Commerce as a basis to apply AFA and to impose additional countervailing duties at punitive rates when Commerce discovers what appears to be a subsidy has not been disclosed by the respondent in response to the request.
- Article 11 of the ASCM establishes most of the basic requirements for the initiation of countervailing duty investigation. Article 11.1 states that "an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry." Further to this requirement, Article 11.2 states that "an application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy…Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph." Article 11.3 states that "the authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation." Finally, Article 11.6 states that in "special circumstances," an authority may self-initiate an investigation, but "they shall proceed only if they have sufficient evidence of the subsidy." Additionally, Article 13 obligates investigating authorities to invite the affected government for consultations, "with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution." Such consultations are to be held before an investigation is initiated.
- The provisions demonstrate that a specific process must be followed before an investigation may occur. Under Article 11.1, allegations and investigations are subsidy-specific. Evidence presented to support the investigation of one alleged subsidy does not permit an authority to engage in a wide-ranging investigation beyond that alleged subsidy. Each investigation must be justified by sufficient evidence and be preceded by consultations and formal initiation.
- The U.S. statute, regulations, and Commerce practice mirror the obligations found in Articles 11 and 13 of the ASCM. Under section 702 of the Act, investigations may only begin after sufficient evidence of financial contribution, specificity and benefit is found or presented. Commerce also engages in an allegation-by-allegation review to establish whether each allegation is properly framed and supported by sufficient evidence. This is reflected in the initiation checklist which clearly shows that each allegation is met with an

[259] *See* Respondent's Case Brief A at 42-45.

allegation-specific examination. Initiation in response to an allegation is not a doorway into open-ended inquiries.

- These provisions and practices do not preclude Commerce from incorporating additional subsidy findings in the final determination. The petitioners are permitted to raise new subsidy allegations within an applicable time limit. Commerce's practice is to examine each allegation and determine whether the allegation and supporting information warrants initiation consistent with the requirements of section 702 of the Act.
- Commerce will examine apparent subsidy practices "discovered" during the course of an investigation and will include in its investigation a discovered practice that appears to provide a countervailable subsidy if it concludes that "sufficient time remains before the scheduled date for the final determination." However, if "insufficient time remains before the date for the final determination" Commerce will (1) "allow the petitioner to withdraw the petition without prejudice and resubmit it with an allegation with regard to the newly discovered practice; or (2) "defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any."
- Commerce's regulations reinforce that the discovery of an apparent subsidy practice is not determinative of either a subsidy or whether it is countervailable. There must be evidence to give rise to the appearance of a subsidy.
- Moreover, the discovery does not permit the application of AFA, findings of countervailability, or the imposition of additional countervailing duty deposits or duties.
- Such a discovery must be followed by "examination." If the discovery occurs late in the proceeding, such that no examination may occur, Commerce must either give petitioners an opportunity to resubmit an amended petition, or defer a determination until a subsequent review.
- Subsidies discovered by Commerce that were not disclosed in response to the "other" subsidies question cannot be subject to the application of AFA. AFA may only be applied where "necessary information" is not provided by the responding party.[260] Commerce may not deem information on undisclosed subsidies not related to initiated programs as "necessary" to its determination, as such information is beyond the reach of Commerce's inquiry. Consistent with its regulations, Commerce must defer any action if it lacks sufficient time to examine the discovered subsidy.[261]

GOS' Comments[262]

- Commerce has required extensive information related to all types of aid and loans granted to the mandatory respondents, including those outside the framework of agriculture and, therefore, also outside the bounds of this investigation. This approach is excessive in light of the requirements of the ASCM.
- In particular, Article 13 establishes that, before investigating a certain type of aid, the investigating authority must provide the opportunity for consultations. With regard to the "other aid programs," Commerce has not satisfied the obligation for consultations.

[260] *See* section 776 of the Act.
[261] *See* 19 CFR 351.311.
[262] *See* GOS Case Brief A at 2.

- Nevertheless, the GOS has shown maximum cooperation and transparency on these "other aid programs." The information provided clearly demonstrates that they are non-specific, non-distorting aid schemes and they are also *de minimis* aid (as referred under the ASCM), because the benefit amounts are not meaningful.

AFI Rebuttal Comments[263]

- Commerce should not apply AFA to this case, as the GOS and mandatory respondents fully participated and cooperated and provided the necessary information requested by Commerce.
- The application of AFA against respondents is inconsistent with U.S. international obligations under the ASCM and U.S. law.
- AFI agrees with the respondents that there is no legal basis for Commerce to investigate these programs.

Commerce' s Position: We disagree with the respondents and the GOS that our requests for information regarding "Other Assistance" is outside the purview of this investigation. Although parties argue that Commerce's requests for information are inconsistent with U.S. obligations under the ASCM, our investigation is governed by U.S. law, is consistent with our WTO obligations. Moreover, the respondents' and the GOS' reading of the ASCM, in this context, has no bearing upon these proceedings, because it is the Act and Commerce's regulations that have direct legal effect under U.S. law.[264]

This investigation was initiated on the basis of a petition filed by a U.S. industry that Commerce found met the requirements of the Act for initiation. However, as explained above, the CVD law, in section 775 of the Act, requires Commerce to investigate potential subsidies it discovers in the course of the proceeding. Specifically, in the course of an investigation, Commerce may "discover {} a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in the countervailing duty petition."[265] In such a case, Commerce "shall include the practice, subsidy, or subsidy program in the proceeding."[266] Thus, section 775 of the Act imposes an affirmative obligation on Commerce to "consolidate in one investigation…all subsidies known by petitioning parties to the investigation or by {Commerce} relating to {subject} merchandise" to ensure "proper aggregation of subsidization practices."[267] Thus, our questionnaires to respondents regarding other assistance they received are necessary for us to effectuate our obligation to investigate practices "that appear to be a countervailable subsidy."

At verification of Agro Sevilla, the team reviewed Agro Sevilla's tax return, which indicated that Agro Sevilla received a tax credit for expenses incurred for attending international trade

[263] *See* AFI Rebuttal Brief.
[264] *See PSF from India* IDM at Comment 1.
[265] *See* section 775 of the Act.
[266] *Id.* (emphasis added).
[267] *See* S. Rep. No. 96-249, at 98 (1979); *see also* Allegheny I, 112 F. Supp. 2d at 1150 n.12 ("Congress clearly intended that all potentially countervailable program regardless of when evidence on these programs became reasonably available.").

fairs and for the cost of international marketing. In their initial questionnaire responses, the respondents identified assistance they had received over the AUL under the "other assistance" section of the questionnaire.[268] Commerce followed its normal practice for investigating this other assistance identified by the respondents, including issuing supplemental questionnaires and including appropriate programs in our analysis for the Post-Preliminary Analysis. For example, Agro Sevilla reported its use of PROSOL under other assistance.[269] Commerce requested additional information, and in the Post-Preliminary Analysis, based on the record evidence, Commerce determined a countervailable subsidy rate for this program.[270] However, Commerce was only able to reach a determination because the record contained all of the necessary information required to examine the countervailability of this program as well as the necessary benefit information When an interested party has failed to cooperate by not acting to the best of its ability to comply with Commerce's requests for information, including with respect to programs that would be reported as other assistance, section 776 of the Act directs Commerce to apply AFA, as appropriate. Commerce has continued to follow our practice in this investigation regarding other assistance programs.

For example, during verification at Agro Sevilla, the team reviewed Agro Sevilla's tax return which indicated that Agro Sevilla received a tax credit for expenses incurred for attending international trade fairs and for the cost of international marketing. This tax credit is clearly shown on Agro Sevilla's tax return which was provided in its initial questionnaire response.[271] In accordance with section 775 of the Act, we are including this program in our investigation. *See* the discussion of this program under "Programs Determined to Be Countervailable."

Comment 27: Whether Commerce Should Include the Corrections of the Alleged Ministerial Errors

Respondents' Comment[272]

- Commerce should include in the final determination the corrections addressed in the Ministerial Error Memorandum, especially the correction to Angel Camacho's sales denominator.

Commerce's Position: We agree with the respondents, and consistent with our findings in our Ministerial Error Memorandum, we have made corrections to our preliminary subsidy rate calculations to correct instances in which we made ministerial errors.

Comment 28: Commerce Must Use Corrected and Revised Data in the Calculations

Petitioner's Comments[273]

- The respondents and their suppliers have submitted a number of significant corrections and revisions to the data previously submitted.

[268] *See e.g.*, Agro Sevilla IQR at 30-41.
[269] *Id.*

[271] *Id.*, at Exhibit AS-12.
[272] *See* Respondent's Case Brief A at 50.
[273] *See* Petitioner's Case Brief A at 15.

- The corrections and revisions are confirmations that several responding suppliers are not olive growers or their olive production volume is substantially different than previously reported and used in the *Preliminary Determination.*

Commerce's Position: We have used the corrected and revised data in our calculations for the final determination.

Comment 29: Whether to Clarify the Scope of the Investigation to Include Ripe Olives Contained in Cocktail Mixes

Respondents' Comments
- AG and Camacho accept the scope clarification language in Commerce's Post-Preliminary Scope Decision Memorandum regarding the classification of cocktail mixes.
- However, Commerce's language may be confusing to interpreters of the scope with respect to cocktail mixes consisting of less than 50 percent ripe olives and, therefore, the scope may not be interpreted in accordance with Commerce's intention.
- AG's and Camacho's concern arises from Commerce's statement in the Post-Preliminary Scope Decision Memorandum that "{w}e preliminarily find that ripe olives contained in cocktail mixes are in the scope, but that the remaining ingredients are not in the scope,"[274] and this statement can be read to include cocktail mixes that have any amount of ripe olives in them, regardless of quantity. For this reason, AG and Camacho argue that Commerce should add the following language to further clarify the scope: *The scope does not include ripe olives that otherwise meet the definition above that are packaged together with non-subject products, where the smallest individual packaging unit (e.g., can, pouch, jar, etc.) of any such product contains less than 50 percent ripe olives by net drained weight.*

AFI Comments
- Commerce should include the additional scope language proposed by AG and Camacho.
- Including the proposed scope language will prevent confusion by U.S. Border Patrol and Protection and is consistent with Commerce's scope.

Petitioner's Comments
- The preliminary scope language is perfectly clear and, therefore, should be retained without addition.
- AG and Camacho's recommended additional scope language is redundant and adding another sentence that means the same thing as the previous sentence will confuse future interpreters of the scope.

Commerce's Position: We continue to find that ripe olives contained in cocktail mixes are subject to the scope of this proceeding, and that the remaining ingredients are not within the scope of this proceeding. As discussed in Post-Preliminary Scope Decision Memorandum, it is our normal practice to provide ample deference to the petitioner with respect to products for

[274] Citing to Post-Preliminary Scope Decision Memorandum at 5.

which it seeks relief in the investigation,[275] and we find no reason to depart from this practice in this investigation. The petitioner expressed concern that, by not including ripe olives in cocktail mixes as part of the scope, there is a risk for circumvention and, therefore, cocktail mixes containing ripe olives should be included in the scope.[276] After analyzing information submitted by interested parties concerning cocktail mixes, we find that ripe olives contained in cocktail mixes, which otherwise meet the plain language of the scope as it appeared in the *Initiation Notice*, are in-scope merchandise and, therefore, it is appropriate to add language clarifying the scope with respect to cocktail mixes to prevent potential circumvention.

We also find that the scope clarification language proposed in the Post-Preliminary Scope Decision Memorandum[277] is clear and, therefore, does not require changes or additions for the final determination. Specifically, we find that the scope language appropriately captures our intent, as agreed to by interested parties, to include in the scope the ripe olives in cocktail mixes where ripe olives comprise the majority (*i.e.*, more than 50 percent) of the net drained weight of the cocktail mix. Moreover, we find that, because the scope language affirmatively states what is included in the scope, *i.e.*, ripe olives in cocktail mixes where the ripe olives comprise the majority (*i.e.*, more than 50 percent) of the cocktail mix by net drained weight, the scope language at the same time clearly qualifies what is excluded from the scope, *i.e.*, ripe olives in cocktail mixes where the ripe olives comprise 50 percent or less of the cocktail mix by net drained weight, as well as non-ripe olives.

We disagree with AG, Camacho and AFI that the current scope may be confusing to interpreters of the scope as written unless language is added to affirmatively state that cocktail mixes that do not have a majority (*i.e.*, more than 50 percent) ripe olive content are excluded from the scope. In fact, as the petitioner argues correctly, adding the language AG and Camacho propose would itself be confusing because it is redundant and adds no further substantial directive to interpreters of the scope. AG and Camacho's concern with our recommendation in Comment 1 of the Post-Preliminary Scope Decision Memorandum, *i.e.*, "{w}e preliminarily find that ripe olives contained in cocktail mixes are in the scope, but that the remaining ingredients are not in the scope," is inapposite, as this recommendation does not pertain directly to the language of the scope but, rather, a general discussion of it, *i.e.*, whether cocktail mixes containing ripe olives should be considered in-scope merchandise. We clarify that our recommendation in Comment 1 was not intended to modify the scope of this investigation. Moreover, in Comment 2, we provided the scope clarification language with respect to ripe olives in cocktail mixes (which, notably, does not include the language of the recommendation in Comment 1). We further clarify that our recommendation in Comment 1 should not be construed to mean that "cocktail mixes that have any amount of ripe olives in them, regardless of quantity, are included in the

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[275] *See*, *e.g.*, *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017) and accompanying IDM at Comment 90 ("While {Commerce} possesses the authority to determine the scope of an investigation, {Commerce's} standard practice is to provide ample deference to the petitioner with respect to the definition of the product(s) for which it seeks relief during the investigation phase of an AD or CVD proceeding."); *see also Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from the Republic of Korea*, 77 FR 75988 (November 26, 2012) and accompanying IDM at Comment 1 (same).

[276] *See* the petitioner's Letters, "Re: Ripe Olives from Spain Comments regarding Cocktail Mixes," dated January 29, 2018 (Petitioner Cocktail Mix Comments), at 3

[277] *See* Attachment to Post-Preliminary Scope Decision Memorandum.

scope." Instead, as discussed above, the current scope clarification language affirmatively states what is included in the scope with respect to cocktail mixes and, at the same time, it clearly qualifies what is excluded from the scope with respect to cocktail mixes and, thus, requires no further modification to that end.

Accordingly, because we determine that ripe olives contained in cocktail mixes are in the scope, and that the scope clarification language proposed appropriately captures our intent, as agreed to by interested parties, to include in the scope the ripe olives in cocktail mixes where ripe olives comprise the majority (*i.e.*, more than 50 percent) of the net drained weight of the cocktail mix, we have added to the scope of this investigation the scope clarification language we proposed in the Post-Preliminary Decision Memorandum, without modification.[278]

Comment 30: The Products to Which the Countervailing Duty Applies

GOS' Comments[279]

- With reference to the HTSUS subheadings under which the merchandise subject to this investigation is classified, green (fermented) olives cannot be used to produce ripe olives, which is the subject merchandise. Green olives should be excluded from any subsidy calculation as being tied to the production of non-subject merchandise.

Commerce's Position: As an initial matter, if we understand the GOS comment as a concern about the definition of the product covered by this investigation, and therefore potentially subject to countervailing duties, in the Post-Preliminary Scope Decision Memorandum, we provided interested parties an opportunity to comment on the scope of this investigation. The deadline for providing such comments was April 16, 2018, and the GOS had an opportunity to comment on the scope of the proceeding at that time. Regardless, with regard to the HTSUS subheadings, as referenced by the GOS, we emphasize that HTSUS subheadings are provided for convenience and U.S. Customs purposes and that they do not define the scope of the investigation; rather, the written description of the subject merchandise is dispositive. Finally, if we understand the GOS concern as relating to the calculation methodologies we are using to calculate the countervailable subsidy rates, we have identified the appropriate sales denominators to use for purposes of calculating the rates based on whether the subsidies are tied to the production and sales of a particular product or tied to export sales. The bases for selecting a particular denominator for a particular program are discussed throughout this memorandum.

[278] *See* Appendix I to the *Federal Register* notice.
[279] *See* GOS' Case Brief A at 6.

X. Recommendation

We recommend approving all of the above positions. If these positions are accepted, we will publish the final determination in the *Federal Register* and will notify the U.S. International Trade Commission of our determination.

☒	☐
Agree	Disagree

6/11/2018

X 

Signed by: GARY TAVERMAN

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