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June 25, 2021

MEMORANDUM TO: Ryan Majerus
Deputy Assistant Secretary
for Policy and Negotiations

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Ripe Olives from Spain: Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review; 2018-2019

I. SUMMARY

We analyzed the comments filed by interested parties in the administrative review of the antidumping duty (AD) order on ripe olives from Spain covering the period of review (POR), January 26, 2018, through July 31, 2019, described in the "Discussion of the Issues" section of this memorandum. The review covers three mandatory respondents, Agro Sevilla Aceitunas S. Coop. And. (Agro Sevilla), Camacho Alimentacion S.L. (Angel Camacho) and Alimentary Group Dcoop S. Coop. And. (Dcoop). Based on the analysis of the comments received, we made certain changes to the margin calculations for all three mandatory respondents. Below is a list of issues for which we received comments from interested parties:

Agro Sevilla

Comment 1: Home-Market Database
Comment 2: Constructed Export Price Offset
Comment 3: Major-Input Rule Adjustment

Angel Camacho

Comment 4: Price Comparisons for a Certain Product Control Number Sold in the U.S. Market
Comment 5: Cost Adjustment to Ending Inventory Value
Comment 6: General and Administrative Expenses
Comment 7: Certain Inland Freight Expenses
Comment 8: Beginning Dates in Programs

DCoop

Comment 9: Whether Commerce Should Apply Adverse Facts Available to Dcoop's Cost Database
Comment 10: Application of Adverse Facts Available to Dcoop's General and Administrative Expenses
Comment 11: Early Payment and Quantity Discounts
Comment 12: U.S. Freight and U.S. Indirect Selling Expenses
Comment 13: Rescission of the Administrative Review of Dcoop

II. BACKGROUND

On December 28, 2020, the Department of Commerce (Commerce) published the *Preliminary Results* of this administrative review and invited comments from interested parties.[1] On February 1, 2021, the domestic interested parties, Musco Family Olive Company (hereinafter, Musco) and Bell-Carter Foods, LLC (hereinafter, BCF), both members of the Coalition for Fair Trade in Ripe Olives, the petitioner in the original investigation, submitted case briefs.[2] Also on February 1, 2021, three mandatory respondents in this review, Agro Sevilla, Angel Camacho, and Dcoop submitted case briefs.[3] On February 8, 2021, Musco, Agro Sevilla, Angel Camacho, and Dcoop submitted respective rebuttal briefs.[4] On April 5, 2021, Commerce extended the deadline for the final results by 59 days to June 25, 2021.[5]

[1] *See Ripe Olives from Spain: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019*, 85 FR 84297 (December 28, 2020) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).
[2] *See* Musco's Letters, "Ripe Olives from Spain; 1st Administrative Review Musco Case Brief Concerning Agro Sevilla," dated February 1, 2021 (Musco's Case Brief for Agro Sevilla); "Ripe Olives from Spain; 1st Administrative Review Musco Case Brief Concerning Camacho," dated February 1, 2021 (Musco's Case Brief for Camacho), and "Ripe Olives from Spain; 1st Administrative Review Musco Case Brief Concerning Dcoop," dated February 1, 2021 (Musco's Case Brief for Dcoop); *see also* BCF's Letter, "Ripe Olives from Spain: Case Brief," dated February 1, 2021 (BCF's Case Brief).
[3] *See* Agro Sevilla's Letter, "Case Brief of Agro Sevilla Ripe Olives from Spain (A-469-817) POR1," dated February 1, 2021 (Agro Sevilla's Case Brief); *see also* Angel Camacho's Letter, "Case Brief of Camacho Alimentación S.L. Ripe Olives from Spain (A-469-817) POR1," dated February 1, 2021 (Angel Camacho's Case Brief); and Dcoop's Letter, "Ripe Olives from Spain: Case Brief," dated February 1, 2021 (Dcoop's Case Brief),
[4] *See* Musco's Letters, "Ripe Olives from Spain; 1st Administrative Review Musco Rebuttal Brief Concerning Agro Sevilla," dated February 8, 2021 (Musco's Rebuttal Brief for Agro Sevilla), "Ripe Olives from Spain; 1st Administrative Review Musco Rebuttal Brief Concerning Camacho," dated February 8, 2021 (Musco's Rebuttal Brief for Angel Camacho), "Ripe Olives from Spain; 1st Administrative Review Musco Rebuttal Brief Concerning Dcoop," dated February 8, 2021 (Musco's Rebuttal Brief for Dcoop), and "Ripe Olives from Spain; 1st Administrative Review Musco Rebuttal Brief Concerning BCF," dated February 8, 2021 (Musco's Rebuttal Brief for BCF); Agro Sevilla's Letter, "Rebuttal Brief of Agro Sevilla Ripe Olives from Spain (A-469-817) POR1," dated February 8, 2021 (Agro Sevilla's Rebuttal Brief), Angel Camacho's Letter, "Rebuttal Brief of Camacho Alimentación S.L. Ripe Olives from Spain (A-469-817) POR1," dated February 8, 2021 (Angel Camacho's Rebuttal Brief), and Dcoop's Letter, "Ripe Olives from Spain: Rebuttal Brief," dated February 8, 2021 (Dcoop's Rebuttal Brief).
[5] *See* Memorandum, "Ripe Olives from Spain: Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated April 5, 2021.

III. SCOPE OF THE *ORDER*

The products covered by the *Order*[6] are certain processed olives, usually referred to as "ripe olives." The subject merchandise includes all colors of olives; all shapes and sizes of olives, whether pitted or not pitted, and whether whole, sliced, chopped, minced, wedged, broken, or otherwise reduced in size; all types of packaging, whether for consumer (retail) or institutional (food service) sale, and whether canned or packaged in glass, metal, plastic, multilayered airtight containers (including pouches), or otherwise; and all manners of preparation and preservation, whether low acid or acidified, stuffed or not stuffed, with or without flavoring and/or saline solution, and including in ambient, refrigerated, or frozen conditions.

Included are all ripe olives grown, processed in whole or in part, or packaged in Spain. Subject merchandise includes ripe olives that have been further processed in Spain or a third country, including but not limited to curing, fermenting, rinsing, oxidizing, pitting, slicing, chopping, segmenting, wedging, stuffing, packaging, or heat treating, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in Spain.

Subject merchandise includes 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 – regardless of whether the smallest unit of packaging is included in a larger packaging unit (*e.g.*, display case, *etc*.) – contains a majority (*i.e.*, more than 50 percent) of ripe olives by net drained weight. The scope does not include the non-subject components of such product.

Excluded from the scope are: (1) Specialty olives[7] (including "Spanish-style," "Sicilian-style," and other similar olives) that have been processed by fermentation only, or by being cured in an alkaline solution for not longer than 12 hours and subsequently fermented; and (2) provisionally prepared olives unsuitable for immediate consumption (currently classifiable in subheading 0711.20 of the Harmonized Tariff Schedule of the United States (HTSUS)).

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[6] *See Ripe Olives from Spain: Antidumping Duty Order*, 83 FR 37465 (August 1, 2018) (*Order*).

[7] Some of the major types of specialty olives and their curing methods are:

- "Spanish-style" green olives: Spanish-style green olives have a mildly salty, slightly bitter taste, and are usually pitted and stuffed. This style of olive is primarily produced in Spain and can be made from various olive varieties. Most are stuffed with pimento; other popular stuffings are jalapeno, garlic, and cheese. The raw olives that are used to produce Spanish-style green olives are picked while they are unripe, after which they are submerged in an alkaline solution for typically less than a day to partially remove their bitterness, rinsed, and fermented in a strong salt brine, giving them their characteristic flavor.
- "Sicilian-style" green olives: Sicilian-style olives are large, firm green olives with a natural bitter and savory flavor. This style of olive is produced in small quantities in the United States using a Sevillano variety of olive and harvested green with a firm texture. Sicilian-style olives are processed using a brine-cured method, and undergo a full fermentation in a salt and lactic acid brine for 4 to 9 months. These olives may be sold whole unpitted, pitted, or stuffed.
- "Kalamata" olives: Kalamata olives are slightly curved in shape, tender in texture, and purple in color, and have a rich natural tangy and savory flavor. This style of olive is produced in Greece using a Kalamata variety olive. The olives are harvested after they are fully ripened on the tree, and typically use a brine-cured fermentation method over 4 to 9 months in a salt brine.
- Other specialty olives in a full range of colors, sizes, and origins, typically fermented in a salt brine for 3 months or more.

The merchandise subject to the *Order* is currently classifiable under subheadings 2005.70.0230, 2005.70.0260, 2005.70.0430, 2005.70.0460, 2005.70.5030, 2005.70.5060, 2005.70.6020, 2005.70.6030, 2005.70.6050, 2005.70.6060, 2005.70.6070, 2005.70.7000, 2005.70.7510, 2005.70.7515, 2005.70.7520, and 2005.70.7525 HTSUS. Subject merchandise may also be imported under subheadings 2005.70.0600, 2005.70.0800, 2005.70.1200, 2005.70.1600, 2005.70.1800, 2005.70.2300, 2005.70.2510, 2005.70.2520, 2005.70.2530, 2005.70.2540, 2005.70.2550, 2005.70.2560, 2005.70.9100, 2005.70.9300, and 2005.70.9700. Although HTSUS subheadings are provided for convenience and U.S. Customs purposes, they do not define the scope of the *Order*; rather, the written description of the subject merchandise is dispositive.

IV. CHANGES SINCE THE PRELIMINARY RESULTS

We made the following change to our calculations since the *Preliminary Results*:

- For Angel Camacho, we recalculated general and administrative expenses by including charges for inland freight transfers between Angel Camacho's production facilities.
- For Angel Camacho, we adjusted reported inland freight expenses from the production facility to the port of exit by reflecting the arm's length nature of transactions involving an affiliated party.
- For Angle Camacho, Agro Sevilla, and Dcoop, Commerce modified, where applicable, the beginning dates in the respective programs for each company.
- For Dcoop, we added the negative values reported in the early payment discounts and quantity discounts variables to the home-market gross unit prices to reflect a reduction in prices.
- For Dcoop, we recalculated general and administrative expenses.

V. DISCUSSION OF THE ISSUES

Agro Sevilla

Comment 1: Home-Market Database

Musco's Arguments

- Commerce should apply partial adverse facts available (AFA) to Agro Sevilla with respect to its comparison market sales.[8]
- An analysis of Agro Sevilla's monthly sales volume to its different home-market customers reveals a pattern that strongly suggests Agro Sevilla has carefully manipulated its domestic sales to generate a viable market that otherwise would not exist.[9]
    - Agro Sevilla made extraordinary and unexplained high-volume sales quantities to two customers in the last four months of the POR.[10]

[8] *See* Musco's Case Brief for Agro Sevilla at 2-9.
[9] *Id*. at 3-4.
[10] *Id*.

- Without the sales volumes to these customers, Agro Sevilla's home market would not be viable, just as it was not in the less-than-fair-value investigation.[11]
- Despite Agro Sevilla's claims to the contrary, neither of these two customers purchased any appreciable quantity of ripe olives from Agro Sevilla during the extended home-market reporting period prior to April 2019.[12]
- Once Agro Sevilla had recorded in its books a sufficient volume of sales to be able to base its home market viability claim on the alleged sales to these two customers, they both disappeared as suddenly as they had appeared, returning their ordering volumes to near zero immediately after the one or two months during which their unprecedented buying sprees had occurred.[13]
  - One of these customers suddenly purchased large volumes of olives from Agro Sevilla for two months, a purchasing pattern never replicated before or after during the extended POR and also presumably not during the preceding period given that Agro Sevilla did not have a viable home market in the investigation.[14]
- It is inconceivable that these were all legitimate sales made "normally" on an arm's length basis for consumption in the Spanish home market.[15]
- There are strong indications that these were in fact export sales masquerading as home-market sales, such as the dissonance between the paperwork provided by Agro Sevilla for these sales and that provided by Agro Sevilla for its normal home-market sales.[16]
- The only logical conclusion Commerce can reach from these facts is that Agro Sevilla arranged for these customers to purchase a large volume of ripe olives for export prior to the end of the POR while ensuring that the true, export destination of the olives was not set down in writing.[17]
- At this point in the review, it is far too late for Commerce to allow Agro Sevilla to report a third country sales database, as Agro Sevilla should have done from the start.[18]

- Agro Sevilla's manipulation of the reported home-market date of sale is another reason partial AFA is warranted.[19]
  - The documentation submitted by Agro Sevilla to support its claim that the factory order does not set the final quantity indicates that the product mix, quantity, and unit price were all unchanged from the production order.[20]
  - As a result, there is no evidence on the record to support Agro Sevilla's refusal to report the purchase order or production order date as the date of sale.[21]

[11] *Id*. at 4-5.
[12] *Id*. at 5.
[13] *Id*. at 5-6.
[14] *Id*. at 6.
[15] *Id*.
[16] *Id*. at 6-7.
[17] *Id*.
[18] *Id*. at 6.
[19] *Id.* at 9-11.
[20] *Id*. at 9.
[21] *Id*.

- The change that Agro Sevilla alleged as being demonstrated by the documentation is of a magnitude that should be considered within normal tolerance, not an indication that the quantity agreed upon as of the time of the purchase order had changed.[22]
- Because Agro Sevilla failed to respond to the best of its ability with regards to Commerce's inquiry regarding the appropriate date of sale, it can reasonably be assumed that the universe of sales that would have been reported by Agro Sevilla if the date of sale had been correctly reported as the production order date would have been meaningfully different from the universe of sales that Agro Sevilla placed on the record.[23]
- The record does not contain data that would enable Commerce to correct this reporting deficiency.[24]

- As partial adverse facts available Commerce should assign all of Agro Sevilla's home-market sales a starting price based on the weighted average price of its sales to its top two third country markets and calculate Agro Sevilla's dumping margins on that basis.[25]

Agro Sevilla's Arguments

- There is no justification for the application of AFA to Agro Sevilla.[26]
- Agro Sevilla prepared and submitted a complete home-market sales database pursuant to Commerce's instructions.[27]
  - Although the regulatory deadline for submitting a challenge to Agro Sevilla's home-market viability claim was December 29, 2019, Musco did not make any such allegation until nearly eleven months after the deadline.[28]
  - Musco's factual claim that Agro Sevilla made home-market sales outside the ordinary course of business is spurious.[29]
  - Agro Sevilla already fully explained to Commerce in response to specific questions about this issue that there is nothing nefarious nor suspicious about the home-market sales identified by Musco.[30]
  - These customers simply had larger needs and so they purchased more olives during these periods; in any list of customers, some will end up buying more than others.[31]
  - There is nothing unusual about the distribution of sales among various home-market customers, the number of transactions, the relative volumes, or the customers themselves.[32]
  - There is nothing unusual about the customers in question: Agro Sevilla's supply relationships with these customers precede the period of review by a number of years, and in one instance by more than decade; they are also all larger companies that can

[22] *Id*. at 10.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *See* Agro Sevilla's Rebuttal Brief at 3-10.
[27] *Id*. at 3-7.
[28] *Id*. at 3.
[29] *Id*. at 4.
[30] *Id*.
[31] *Id*.
[32] *Id*. at 4-5.

have more significant needs that would explain why they are buying larger volumes of olives.[33]
    - It is absurd to argue that Agro Sevilla somehow impeded Commerce's review by submitting a complete home-market sales database.[34]
    - Musco's claims are mere repetition of its pre-preliminary comments that Commerce implicitly dismissed in the *Preliminary Results*.[35]
- There is no justification for applying AFA to Agro Sevilla for choosing the invoice data as the date of sale.[36]
    - Agro Sevilla followed Commerce's practice – codified in the regulations – that the date of sale will normally be the invoice date.[37]
    - Commerce fully investigated the date of sale issue; Agro Sevilla responded to further questions from Commerce regarding this choice, justifying that selection as the appropriate date of sale for its U.S. and home-market sales.[38]
    - Other than old and already rejected arguments, Musco does not demonstrate any evidence of Agro Sevilla impeding the proceeding.[39]
    - Even if Commerce were to agree that some other date was a more appropriate date of sale, there is still no legal basis for AFA; Commerce must notify Agro Sevilla of the deficiency and provide an opportunity to remedy the defective data before it can lawfully resort to AFA.[40]

Commerce's Position: We disagree with Musco and have not applied AFA to Agro Sevilla. Sections 776(a)(1) and (2) of the Act provide that, if necessary information is missing from the record, or if an interested party: (A) withholds information that has been requested by Commerce, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the AD statute, or (D) provides such information but the information cannot be verified, Commerce shall, subject to section 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Although Musco speculates that Agro Sevilla manipulated its domestic sales to generate a viable market that otherwise would not exist, there is no evidence on the record indicating that Agro Sevilla made any of its home-market sales outside of normal business practices or that the timing of its sales was due to anything other than customer demand. The only "evidence" that Musco cites is the relatively large quantity and the timing of the sales to these customers. As an initial matter, we are not persuaded that the mere fact that Agro Sevilla made certain sales in the last four months of the POR, on its own, is sufficient to establish manipulation. While it is true that the two customers in question did not purchase significant quantities of ripe olives from Agro Sevilla during the home-market sales reporting period prior to April 2019, Agro Sevilla explained that these customers "are not new customers; Agro Sevilla's supply relationships with

[33] *Id*. at 5-6.
[34] *Id*. at 6.
[35] *Id*.
[36] *Id*. at 7-10.
[37] *Id*. at 7.
[38] *Id*.
[39] *Id*. at 8.
[40] *Id*. at 8-10.

these customers precede the POR by a number of years, and in one instance by more than a decade. Agro Sevilla also explained these customers are larger companies that can have more significant needs which would explain why they are buying larger volumes of olives."[41] Thus, the record contradicts Musco's claim that these customers "suddenly" appeared and presumably did not purchase olives from Agro Sevilla prior to the home-market sales reporting period.

Moreover, there is nothing in the sales documentation that Agro Sevilla provided with respect to these two customers to indicate that they were ultimately destined for export. Musco alleges that there is dissonance between the paperwork provided by Agro Sevilla for its sales to the two customers in question and the paperwork provided by Agro Sevilla for its other home-market sales. Musco bases its allegation on its claim that "Agro Sevilla's customers routinely indicate to Agro Sevilla the market for which their purchases are destined."[42] However, to support this claim, Musco cited a single purchase order from a single customer.[43] The fact that one customer indicated the ultimate market in its purchase order is not evidence that other customers "routinely" do so. In fact, the evidence on the record suggests otherwise. Agro Sevilla provided sales documentation for three customers in the Agro Sevilla SQR5, two of which are the customers in question.[44] However, the third customer also did not indicate the ultimate market in its purchase order.[45]

As a result of the above, we conclude that the evidence on the record does not support a finding that Agro Sevilla manipulated its domestic sales. With respect to date of sale, contrary to Musco's assertion, the documentation Agro Sevilla provided demonstrates that the quantity shipped and invoiced can and did differ from the quantity originally ordered.[46] Thus, we conclude that the invoice date is the appropriate date of sale.

For these reasons, we determine that none of the conditions specified in sections 776(a)(1) and (2) of the Act are met to support the application of facts available, much less adverse inferences, with respect to Agro Sevilla. Accordingly, we have not adopted Musco's suggestions that we use AFA with respect to Agro Sevilla.

Comment 2: Constructed Export Price Offset

Agro Sevilla's Arguments

- Commerce should grant Agro Sevilla a constructed export price (CEP) offset.[47]
  - Contrary to Commerce's assertions, Agro Sevilla responded fully to every request from Commerce for documentation.[48]

[41] *See* Agro Sevilla's Letter, "Agro Sevilla's 5th Supplemental Questionnaire Response: Ripe Olives from Spain," dated October 6, 2020 (Agro Sevilla SQR5).
[42] *See* Musco's Case Brief for Agro Sevilla at 6.
[43] *Id*. at 7.
[44] *See* Agro Sevilla SQR5 at Exhibit SB5-2.
[45] *Id.*
[46] *See* Agro Sevilla's Letter, "Agro Sevilla's 4th Supplemental Questionnaire Response: Ripe Olives from Spain," dated September 8, 2020 (Agro Sevilla SQR4) at Exhibit SA2-4.
[47] *See* Agro Sevilla's Case Brief at 2-4.
[48] *Id*. at 2-3.

- It is not at all clear what information Commerce wanted that Agro Sevilla has not provided.[49]
- The statute requires that, when the normal value is at a more advanced stage of distribution, a CEP offset shall be applied.[50]
- There is no dispute that its home-market sales being at a "more advanced" stage of distribution than its CEP sales.[51]
- Commerce should not impose impossible documentation requirements not required by the statute.[52]

Musco's Arguments

- Commerce should continue to deny a CEP offset to Agro Sevilla.[53]
  - In the *Preliminary Results*, Commerce correctly found that Agro Sevilla provided no source documentation establishing that certain reported selling activities were undertaken in certain channels and not in others nor did it provide the quantitative analysis requested by Commerce.[54]
  - In its case brief, Agro Sevilla failed to identify any place where it provided: (1) source documentation establishing that certain reported selling activities were undertaken in certain channels and not in others, and (2) a quantitative analysis, substantiated with source documents, showing how the expenses for sales made at different claimed LOTs impact price comparability.[55]
  - Agro Sevilla's claim that there is no dispute that its home-market sales being at a "more advanced" stage of distribution than its CEP sales is contradicted by Commerce's finding that there is insufficient information on the record to determine whether Agro Sevilla's home-market sales were made at a different LOT than its U.S. sales.[56]
  - Because Agro Sevilla did not provide a quantitative analysis, Commerce cannot evaluate whether the selling activities and associated expenses incurred in Spain for sales to the domestic market and for CEP sales to Agro Sevilla's U.S. affiliate differ significantly.[57]
  - Despite Agro Sevilla's claims of differences in activities between its home-market LOT and its CEP LOT, the amounts of indirect selling expenses incurred in Spain that are reported by Agro Sevilla do not reflect such differences.[58]
  - In its supplemental Section A response, Agro Sevilla confirmed that the expenses are not such that they can be reasonably attributed to one market or another.[59]
  - In its fourth supplemental response, Agro Sevilla failed to supply Commerce with the supporting documentation that Commerce explicitly requested; instead, Agro Sevilla

[49] *Id*. at 3.
[50] *Id*. at 3-4.
[51] *Id*. at 4.
[52] *Id*.
[53] *See* Musco's Rebuttal Brief for Agro Sevilla at 2-7.
[54] *Id*. at 2.
[55] *Id*. at 3.
[56] *Id*. at 4.
[57] *Id*.
[58] *Id*. at 5-6.
[59] *Id*. at 6.

submitted a series of Excel spreadsheets but provided no company documents to support the data in those spreadsheets.[60]

Commerce's Position: We disagree with Agro Sevilla and have not granted it a CEP offset. Section 773(a)(7)(B) provides that Commerce shall make a CEP offset when normal value is established at a level of trade (LOT) which constitutes a more advanced stage of distribution than the LOT of the CEP if the data available do not provide an appropriate basis to determine a LOT adjustment. Commerce's regulations state that sales are made at different LOTs if they are made at different marketing stages (or their equivalent).[61] Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing.[62] In order to determine whether the comparison market sales are at different stages in the marketing process than the U.S. sales, we examine the distribution system in each market *i.e.*, the chain of distribution, including selling functions and class of customer (customer category), and the level of selling expenses for each type of sale.[63] Commerce's methodology requires a quantitative analysis showing how the expenses in each sales channel impacts price comparability, and then requests that the respondent assign a level of intensity based on this quantitative analysis in a selling functions chart.[64]

In this review, we requested that Agro Sevilla "{p}rovide a quantitative analysis showing how the expenses assigned to {POR} sales made at different claimed levels of trade impact price comparability" and "{e}xplain how the quantitative analysis provided in response to the requests for information above support the claimed levels of intensity for the selling activities reported."[65] However, Agro Sevilla did not provide a quantitative analysis as requested. Instead, Agro Sevilla claimed that Commerce sought "information that is virtually impossible to provide."[66] Agro Sevilla further claimed that "significant selling activities are undertaken in connection with Agro Sevilla's home-market sales" but that "{t}hese same expenses are not incurred in connection with Agro Sevilla's U.S. sales to its affiliated reseller."[67] Agro Sevilla, however, did not provide any evidence to substantiate these claims.

We subsequently requested that Agro Sevilla "provide an explanation justifying the level of intensity {it} reported for each channel of distribution" in which it was to "describe specific differences in the level of selling activities and the associated expenses," and that it "explain how the levels of intensity {it} reported tie to the indirect selling expenses {it} reported in Exhibit B-14 of the section B response and Exhibit C-26 of the section C response."[68] In response, Agro

[60] *Id*. at 6-7.
[61] *See* 19 CFR 351.412 (c)(2).
[62] *Id*.; *see also Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010), and accompanying IDM at Comment 7.
[63] *See, e.g.*, *4th Tier Cigarettes from the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Negative Determination of Critical Circumstances*, 85 FR 79994 (December 11, 2020), and accompanying IDM at 30.
[64] *Id*. at 34.
[65] *See* Commerce's Letter, AD Questionnaire, dated October 29, 2019 (AD Questionnaire), at A-8.
[66] *See* Agro Sevilla's Letter, "Agro Sevilla's Section A Response: Ripe Olives from Spain," dated December 3, 2019 at 18.
[67] *Id*.
[68] *See* Commerce's Letter, Supplemental Questionnaire for Agro Sevilla, dated February 21, 2020, at 3-4.

Sevilla reported that it "quantified the resources available and utilized in connection with each channel of distribution, primarily based on the number of individuals from the sales team that are needed to complete each activity listed in the exhibit, or on the amount of time needed by the person in charge of these activities" and "then assigned a level of intensity using the ranged scores listed below."[69] Agro Sevilla further reported that "the level of intensity for the above-listed selling activities was determined based on the number of personnel and/or man hours required to perform these functions in each channel of distribution."[70]

We then requested that Agro Sevilla "provide personnel expenses documents and personnel-related expenses documents that you used to determine the level of intensity reported."[71] In response to our third request for information (the original request and two supplemental request), Agro Sevilla did not provide such documents, but instead provided "supporting worksheets demonstrating the methodology Agro Sevilla employed in conducting its quantitative analysis or selling function level of intensity during the POR."[72] Agro Sevilla explained that, under its methodology, it assigned levels of intensity based upon the number of man-hours worked per day.[73] However, Agro Sevilla acknowledged that "these worksheets reflect Agro Sevilla's best estimation, as they do not keep a record of personnel activity detail based on hours."[74] Agro Sevilla did not explain how it estimated the number of hours worked each day for each of the sales functions, nor did it provide any personnel-related expense documents as we requested.[75]

While it is Commerce's responsibility to determine whether a respondent qualifies for a CEP offset, it is the responsibility of the respondent requesting the CEP offset to provide the relevant evidence to Commerce.[76] The Court of International Trade (CIT) has noted that "{a} party seeking a CEP offset bears the burden of establishing that the differences in selling functions performed in the home and U.S. markets are 'substantial.'"[77] Because Agro Sevilla, when we afforded it a third opportunity to provide pertinent information such as a quantitative analysis and supporting documentation, stated that its supporting worksheets were based on estimates and neither explained the bases of its estimations nor provide any of the documentation requested, we find that Agro Sevilla has not demonstrated its entitlement to a CEP offset in this review. Accordingly, we find that Agro Sevilla failed to demonstrate that it is entitled to the offset, because it only provided estimates instead of actual information such as the requisite quantitative analysis and supporting documentation.

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[69] *See* Agro Sevilla's Letter, "Agro Sevilla's Supplemental A Response; Ripe Olives from Spain," dated March 19, 2020 at 4.
[70] *Id*. at 5.
[71] *See* Commerce's Letter, Supplemental Questionnaire for Agro Sevilla, dated August 5, 2020 (Agro Sevilla SQ4), at 3.
[72] *See* Agro Sevilla SQR4 at 2 and Exhibit SA2-1.
[73] *Id*.
[74] *Id*.
[75] *See* Agro Sevilla SQ4 at 3.
[76] *See* 19 CFR 351.401(b)(1) (noting that "{t}he interested party in possession of the relevant information must establish the amount and the nature of a desired judgment."); *see also Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27370 (May 19, 1997) ("{A}ll adjustments, including LOT adjustments, must be demonstrated to the satisfaction of the Secretary."); and *Corus Eng'g Steels, Ltd. v. United States*, 27 CIT 1286, 1290 (2003) ("{B}urden of proof is upon the claimant to prove entitlement {to a CEP offset}.")
[77] *See Hyundai Steel Co. v. United States*, 319 F. Supp. 3d 1327, 1335 (CIT 2018).

Comment 3: Major-Input Rule Adjustment

Agro Sevilla's Arguments

- Commerce should apply the major input rule on a contemporaneous basis consistent with the statute and with *Shrimp from Ecuador*.[78]
  - Commerce's analysis compared POR-wide prices without regard to the timing of the purchases, and sizes of the purchased olives.[79]
  - Actual market sales reflect the timing and size of the olives; no sales occur at a POR-wide average price, and no sales occur at an average price for all olives.[80]
  - In a similar case, Commerce made the comparison on a contemporaneous basis and between similar sizes of the products.[81]
  - Because prices were higher in the beginning of the POR, price comparisons must be done on a contemporaneous basis to ensure fair comparisons.[82]

Musco's Arguments

- Commerce properly applied the major-input rule.[83]
  - Agro Sevilla's proposed methodology is far from being in line with Commerce's practice.[84]
  - It is telling that, in seeking support for its position that Commerce should consider the purchase prices on a monthly basis, relying only on months where there was overlap, Agro Sevilla presented only a single case from 2004.[85]
  - Commerce's normal practice is to use POR average purchases as "a reasonable measure of the value of the commodity in the market under consideration since it quantifies what unaffiliated purchasers have paid for the commodity during the period" which "has been consistently applied by the agency, is predictable, is based on record evidence, and results in a reasonable reflection of market prices for purposes of the major input rule."[86]
  - Commerce explained that, "{i}f costs change significantly during the POR, {it} may resort to calculating the cost of the merchandise under consideration using shorter averaging periods (*i.e.*, quarterly costs)."[87]
  - Because Agro Sevilla's costs have not been shown to have changed so significantly during the POR to warrant calculating the cost of olives using a shorter averaging

[78] *See* Agro Sevilla's Case Brief at 4-7 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Ecuador*, 69 FR 76913 (December 23, 2004) (*Shrimp from Ecuador*)).
[79] *Id*. at 4-5.
[80] *Id*. at 5.
[81] *Id*. at 6 (citing *Shrimp from Ecuador* IDM at Comment 28).
[82] *Id*. at 6-7.
[83] *See* Musco's Rebuttal Brief for Agro Sevilla at 7-9.
[84] *Id*. at 7.
[85] *Id*.
[86] *Id*. at 8 (citing *Certain Welded Stainless Steel Pipes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 75 FR 27987 (May 19, 2010), and accompanying IDM at Comment 3).
[87] *Id*. (citing *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 54264 (September 11, 2014), and accompanying IDM at Comment 6.

period, *i.e.*, quarterly costs, Commerce has no reason to depart from its normal practice with regard to the major input rule.[88]

- Although Agro Sevilla contends that Commerce should also consider the size of Manzanilla olives purchased when making the price comparisons, Agro Sevilla does not explain how Commerce would then be able to translate any findings of price differences into the adjustments to Agro Sevilla's costs.[89]
- Because the control number does not include a code for size, Commerce cannot determine what sizes were consumed to produce different control numbers, and therefore the identification of a price differential based on size would not allow Commerce to make an adjustment to the reported cost that is any more accurate than the application of a single adjustment for all Manzanilla olives regardless of size.[90]

Commerce's Position: We disagree with Agro Sevilla and did not modify our calculation of the major-input adjustment for Agro Sevilla for these final results of this review. Our normal practice is to calculate an annual weighted-average cost for the merchandise under consideration for the POR.[91] As we have explained, a "POR average price to unaffiliated purchasers provides a reasonable measure of the value of the commodity in the market under consideration since it quantifies what unaffiliated purchasers have paid for the commodity during the period."[92] That said, if costs change significantly during the POR, we may resort to calculating the cost of the merchandise under consideration using shorter averaging periods (*i.e.*, quarterly costs).[93] However, in this case, costs have not changed significantly.[94] Given that there were no significant cost changes in this case, we determined to use our normal methodology of calculating an average annual cost of production.[95]

We also did not adopt Agro Sevilla's suggestion that we account for the size of olives in our calculation of the major-input adjustment. In the original investigation of this order, we "matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance: olive form, drain weight, package type and variety."[96] In this review, we used these same physical characteristics to match U.S. sales to foreign like products.[97] Commerce's normal practice is to compute costs on a control-number-specific

[88] *Id*. at 8-9.
[89] *Id*. at 9.
[90] *Id*.
[91] *See, e.g.*, *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 54264 (September 11, 2014) (*CTL Plate Korea 2012-13*), and accompanying IDM at 25.
[92] *See Certain Welded Stainless Steel Pipes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 75 FR 27987 (May 19, 2010), and accompanying IDM at 10.
[93] *See CTL Plate Korea 2012-13* IDM at 25.
[94] *See Preliminary Results* PDM at 15, where we stated, "We examined the respondents' respective cost data and determined that the quarterly cost methodology is not warranted for any of the three respondents and, therefore, we applied our standard methodology of using annual costs based on the reported data."
[95] *Id*.
[96] *See Ripe Olives from Spain: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 83 FR 3677 (January 26, 2018), and accompanying PDM at 9, unchanged in *Ripe Olives from Spain: Final Affirmative Determination of Sales at Less Than Fair Value*, 83 FR 28193 (June 18, 2018).
[97] *See* Memorandum, "Ripe Olives from Spain: Preliminary Analysis Memorandum for Agro Sevilla Aceitunas S.COOP Andalusia," dated December 18, 2020 at 2.

basis,[98] where "control number" is defined as "products with identical physical characteristics."[99] In other words, we determine costs on the basis of the physical characteristics we use to match U.S. sales to foreign like products, in this case, olive form, drain weight, package type and variety. In addition, Agro Sevilla has not sought any change to the criteria used for matching. Accordingly, we determine that it is not appropriate to create an additional matching category solely for purposes of calculating a major input adjustment and consider the size of olives for purposes of calculating the major-input adjustment.

Finally, we find Agro Sevilla's citation to *Shrimp from Ecuador* to be inapposite. In contrast to this proceeding, count size was the primary physical characteristic we used to match U.S. sales to foreign like products in *Shrimp from Ecuador*.[100] Furthermore, we found in *Shrimp from Ecuador* that "raw shrimp prices do vary significantly by count size and Promarisco did not always purchase the same products from affiliated and unaffiliated suppliers during the POI" and, because of this case-specific factor "we departed from our normal practice" of comparing average prices of affiliated and unaffiliated suppliers for the relevant period in *Shrimp from Ecuador*.[101] Because the same fact pattern does not apply in this review, we have not departed from our normal practice in this review.

Angel Camacho

Comment 4: Price Comparisons for a Certain Product Control Number Sold in the U.S. Market

Angel Camacho's Arguments

- Commerce failed to compare U.S. selling prices to home market selling prices of the most similar product with respect to a certain U.S. product control number (CONNUM).[102]
    - Commerce's legal obligations in establishing the physical characteristics, which serve as the basis for its model-match criteria, are rooted in the statutory definition of the foreign like product to be used as the basis for determining normal value.[103]
        - The very existence of the statutory hierarchy provided for in Section 771(16) of the Act, combined with the overarching mandate of the antidumping law (that a "fair comparison shall be made"), compels Commerce to ensure that its model-

[98] *See, e.g.*, AD Questionnaire at D-1 and D-2, where Commerce instructs respondents to report the total model-specific cost of the foreign like product and subject merchandise for purposes of calculating COP and CV, respectively, stating, at footnote 17, that there "should be a single weighted-average cost for each {control number} regardless of market destination as defined by Commerce's product characteristics"; and *Koenig & Bauer-Albert AG, et al. v. United States*, Court No. 96-10-02298, Slip Op. 99-25, "Final Results of Redetermination Pursuant to Second Court Remand," dated August 10, 1999.
[99] *See, e.g.*, AD Questionnaire at B-8 and C-6.
[100] *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from Ecuador*, 69 FR 47091, 47094 (August 4, 2004), unchanged in *Shrimp from Ecuador*.
[101] *See Shrimp from Ecuador* IDM at 55.
[102] The product control number is the concatenation of the physical characteristic codes used to identify the in-scope merchandise and to define identical and similar merchandise.
[103] *See* Angel Camacho's Case Brief at 2.

match methodology results in the comparing of prices of the most similar products.[104]

- Commerce's model matching identified several "most" similar home-market CONNUMs for a specific U.S. CONNUM.[105]
  - The home-market CONNUM that Commerce's model matching identified in the *Preliminary Results* differs in three of four product characteristics in comparison to the U.S. CONNUM in question.[106]
  - The monthly selling prices for the U.S CONNUM are very different from the monthly selling prices for the home-market CONNUM that Commerce identified as comparable.[107]
  - Commerce's own model-match methodology demonstrates that, on the basis of product characteristics alone, there are six other home-market CONNUMs that are more similar to the U.S. CONNUM in question than the home-market CONNUM that Commerce identified.[108]
  - Commerce is not legally required to discard more similar CONNUMs, as it did here, due to large variable cost differences, when all other circumstances demonstrate a more similar match.[109]

Musco's Arguments

- Commerce should reject Angel Camacho's argument and continue to apply the 20 percent difference-in-merchandise (DIFMER) cap, in accordance with its long-standing practice.
  - Commerce applies the 20 percent DIFMER cap to limit the potential differences in commercial value caused by physical differences, and Commerce's DIFMER Policy Bulletin clearly explains the reason this cap test exists.[110]
  - Angel Camacho's argument based on a comparison of monthly selling prices between the U.S. CONNUM in question and the home-market CONNUM it disfavors, is entirely misplaced.
    - The 20 percent DIFMER test is designed to measure the difference in cost, not in price, attributable to the difference in physical characteristics because, among other reasons, Commerce cannot determine the direct price effect of a DIFMER, and the selling price incorporates profit, which is not directly attributable to the difference in physical characteristics.[111]
  - Angel Camacho has not attempted to show that any of the six home-market CONNUMs that it proffers make for a better comparison, in light of the DIFMER

[104] *Id*. at 2-3 (citing Section 773(a) of the Act).
[105] Commerce is withholding the identification of specific CONNUMs in the contested model-match comparison because Angel Camacho claimed this information as business proprietary.
[106] *Id*. at 4-5.
[107] *Id*. at 5.
[108] *Id*. at 6-7.
[109] *Id*. at 7 (citing *Maverick Tube Corp. v. United States*, 107 F. Supp. 3d 1318, 1330 (CIT 2015); and *Fagersta Stainless AB v. United States*, 577 F. Supp. 2d 1270, 1281 (CIT 2008).
[110] *See* Musco's Rebuttal Brief for Angel Camacho at 2 (citing Import Administration Policy Bulletin, Number 92.2: Differences in Merchandise; 20% Rule (July 29, 1992) (DIFMER Policy Bulletin) at 2-3).
[111] *Id*. at 2-3 (citing DIFMER Policy Bulletin at 1-2).

percentages for these CONNUMs being well over the 20-percent cap (*i.e.*, having significant cost differentials).[112]

- Angel Camacho has failed to make any showing that the six CONNUMs it prefers are in any way more suitable than the model chosen by Commerce that has a DIFMER under 20 percent.[113]
- Commerce's practice is to consider any and all comparison-market models that meet the description of the scope of an AD order as possible similar comparisons, as long as they meet the criteria of Sections 771(16)(B) or (C) of the Act.[114]

Commerce's Position: We disagree with Angel Camacho that Commerce's dumping analysis erroneously identified the most similar product sold in the market whose prices are the basis for normal value for comparison with U.S. prices of a certain CONNUM. The model-match methodology we used in this case fully comports with the intent of section 771(16)(B) of the Act, which is to identify the single most-similar comparison-market product to a product sold in the U.S. market. Section 771(16)(B) of the Act provides three criteria for identifying a comparison-market model to be considered similar to the U.S. model: (1) the comparison-market model must be produced in the same country and by the same person as the subject merchandise; (2) the comparison-market model must be like the subject merchandise in component material or materials and in the purposes for which used; and (3) the comparison-market model must be approximately equal in commercial value to the subject merchandise. Section 771(16)(C) of the Act also lists three criteria for similar merchandise where matches are not found under section 771(16)(B) of the Act: (1) the comparison-market merchandise must be produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the order; (2) the comparison-market merchandise must be like that merchandise in the purposes for which used; and (3) the administering authority must determine that the comparison-market merchandise may reasonably be compared with the subject merchandise. Absent matches under section 771(16) of the Act, we resort to constructed value pursuant to section 773(e) of the Act.

Commerce is not persuaded by Angel Camacho's arguments that Commerce made an inappropriate model match because the CONNUM sold in the home market that was selected as the most similar to a CONNUM sold in the U.S. market is too dissimilar. Angel Camacho does not contend that Commerce's model match methodology is unlawful but, rather, that it resulted in a match comprising a home-market CONNUM that is more physically dissimilar than six other CONNUMs sold in the home market.

The fundamental problem with Angel Camacho's argument that the alternative home-market CONNUMs it identified, while physically more similar, is that it does not meet the other statutory requirements. Section 771(16)(B) of the Act requires, among other things, that the comparison-market merchandise must be approximately equal in commercial value to the subject merchandise. Further, section 771(16)(C) of the Act provides, among other things, that Commerce must determine that the comparison-market merchandise may reasonably be

[112] *Id*. at 3.
[113] *Id*. at 3-4.
[114] *Id*. at 4 (citing *Certain Cold-Rolled Steel Flat Products from Brazil: Final Determination of Sales at Less Than Fair Value*, 81 FR 49946 (July 26, 2016) (*Cold-Rolled Brazil LTFV*), and accompanying IDM at Comment 5).

compared with the subject merchandise. In AD proceedings, Commerce effectuates these statutory requirements by using the 20-percent "cap" on the DIFMER adjustment to determine whether two different models are approximately equal in commercial value.[115] Commerce applies the 20-percent "cap" on the DIFMER adjustment to narrow the potential differences in commercial value caused by physical differences.[116] Because we applied our normal methodology of disregarding potential matches with a DIFMER adjustment of greater than 20 percent, we regard the matched CONNUMs that we identified to be approximately equal in commercial value.[117] Thus, the comparison market CONNUM that was identified as most similar with respect to the U.S. CONNUM in question satisfies the requirement of sections 771(16)(B)(iii) of the Act. If a model meets the definition of "foreign like product," it is enough to make it "similar" for purposes of sections 771(16)(B) and (C) of the Act, as long as the DIFMER adjustment is 20 percent or less.[118] The alternative six CONNUMs, which Angel Camacho claims are more similar in terms physical characteristics, have failed the 20 percent DIFMER test and, thus, cannot be considered approximately equal in commercial value with the subject merchandise, as the statute requires. Accordingly, for our matching purposes, we are unable to use these six CONNUMs which, while more similar in physical characteristics, fail to meet the statutory requirements in other respects.

By arguing that the identified most similar CONNUM sold in the home market involves products of disparate commercial values (based on the comparison of selling prices of the CONNUM sold in the home market and the CONNUM sold in the U.S. market), making the identified comparison market CONNUM dissimilar to the U.S. CONNUM in question, Angel Camacho appears to focus on section 771(16)(B)(iii) of the Act. The criterion codified therein instructs that the comparison market CONNUM must be approximately equal in commercial value to the subject merchandise. However, a determination whether merchandise is approximately equal in commercial value cannot be based on comparison of home-market prices and U.S. market prices, as Angel Camacho appears to advocate, because, among other reasons, the prices contain a profit component, which cannot be attributed to physical characteristics of merchandise. Moreover, a comparison of the home-market price with U.S. price measures the amount of dumping and, thus, it does not make sense to adopt the same methodology for determining the most similar merchandise (*i.e.*, if the dumping is at a high level, the merchandise will never be found similar). Accordingly, the 20 percent DIFMER test is designed to measure the difference in cost, not in price, attributable to the difference in physical characteristics.[119]

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[115] *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review in Part*, 72 FR 58053 (October 12, 2007) (*AFBs from France, et al.*) IDM at Comment 3.

[116] *See* DIFMER Policy Bulletin at 2 ("When the variable cost difference exceeds 20%, we consider that the probable differences in values of the items to be compared is so large that they cannot reasonably be compared. Since the merchandise is not identical, does not have approximately equal commercial value, and has such large differences in commercial value that it cannot reasonably be compared, the merchandise cannot be considered similar under Section 771(16)(A), (B), or (C) of the statute.")

[117] *See AFBs from France, et al.* IDM at Comment 3.

[118] *Id*.

[119] *Certain Pasta from Italy*, 64 FR 6615, 6626 (February 10, 1999) ("Although the 20 percent difmer test is not mandated by the statute, the Department has used it continuously for a long period of time and in 1992 established a clear policy on its use.")(citing Policy Bulletin 92.2).

There is no question that the selected comparison market CONNUM was produced in Spain and by Angel Camacho, thus satisfying the requirement of sections 771(16)(B)(i) or 771(16)(C)(i) of the Act. Further, Commerce's practice has been that any and all comparison-market models that are within the class or kind of merchandise are possible similar comparisons as long as they meet the other criteria of sections 771(16)(B) or (C) of the Act.[120] That is, if merchandise fits the description of the scope of an AD order, we consider such products to be similar to the subject merchandise with respect to component material or materials and the purposes for which they are used.[121] There is no question, and Angel Camacho does not argue the contrary, that the product underlying the comparison market CONNUM matched to the U.S. CONNUM in question fits the description of the scope of the AD order on ripe olives from Spain. In fact, Angel Camacho treated it as such by appropriately reporting POR comparison market sales of the product at issue. Based on our analysis of the information on the record, we find that the comparison market model selected satisfies the requirements of sections 771(16)(B)(ii) or 771(16)(C)(ii) of the Act.

While Angel Camacho is correct in observing that certain other CONNUMs sold in the comparison market are more similar in physical characteristics to the CONNUM sold in the U.S. market, that comparison is based *solely* on physical characteristics. These models, however, were not identified as similar under our practice because the DIFMER adjustment exceeded the 20 percent "cap," and/or comparison market sales of underlying product did not meet the contemporaneity requirements established in 19 CFR 351.414(f) of our regulations. Angel Camacho does not provide administrative or legal precedent that supports the selection of the comparison market model as most similar merchandise, solely based on its physical similarity to the U.S. models, at the expense of ignoring the 20-percent DIFMER "cap" or contemporaneity requirement, or both. Based on our analysis, the alternative models advocated by Angel Camacho cannot be considered approximately equal in commercial value with the subject merchandise, as the statute requires. Accordingly, we find that the selected comparison market model, contested by Angel Camacho, is appropriate in light of the statutory instructions provided in section 771(16)(B) of the Act, and is in keeping with our practice of identifying what constitutes the most similar foreign like product.[122]

Comment 5: Cost Adjustment to Ending Inventory Value

Musco's Arguments

- Commerce should reject Angel Camacho's unwarranted adjustment to ending inventory values for changes in standard costs that were compared across two different fiscal periods.
    - Angel Camacho's claim that it values raw materials and finished goods inventories at their standard cost is unsupported by the inventory valuation description in its own audited financial statements.[123]
    - Angel Camacho claimed that its auditors had confirmed that the standard costs were sufficiently close to actual costs to be used to value inventory without materially

[120] *See AFBs from France, et al.* IDM at Comment 3; *see also Cold-Rolled Brazil LTFV* IDM at Comment 5.
[121] *Id*.
[122] *See, e.g., SKF USA v. United States*, 874 F. Supp. 1395, 1399 (CIT 1995) (citing section 771(16) of the Act).
[123] *See* Musco's Case Brief for Angel Camacho at 2-3.

distorting the company's financial position. In response to Commerce's questioning on this matter, however, Angel Camacho:[124]

- clarified that there was no specific evaluation process, or separate statement made by the external auditors with respect to inventory valuation; and
- did not provide any supporting documents demonstrating that its auditors had ever reviewed or considered in any way Angel Camacho's standard costs; and did not provide any documentation that supports Angel Camacho's claim.

- Angel Camacho claimed that the adjustment to the ending inventory values was made to revalue inventory as a result of the difference in the standard costs in 2018 and 2019, in order to have a comparable cost of manufacturing (COM) basis across both fiscal years.[125]
  - This explanation, which hinges on two sets of standard costs having been used for the inventory valuations in 2018 and 2019, is unsupported, and is inconsistent with the record evidence because, as discussed above, Angel Camacho's reported costs should have been on an actual basis.

Angel Camacho's Arguments

- It is incorrect for Musco to maintain that Commerce did not thoroughly investigate Angel Camacho's submitted costs of production (COP) including, specifically, Angel Camacho's inventory cost adjustment in question. As such, there is no legitimate reason for Commerce to reject Camacho's reported COP for the margin calculations.[126]
  - Angel Camacho reiterates specific record evidence in connection with Commerce's extensive examination of Angel Camacho's reported inventory adjustment in question.

Commerce's Position: We disagree with Musco's position that Commerce should reject Angel Camacho's adjustment to ending inventory values for changes in standard costs that were compared across two different fiscal periods**.** Commerce made extensive inquiries into the adjustment to ending inventory values inherent in Angel Camacho's methodology for reporting its COP.[127] Based on Angel Camacho's extensive explanations and provision of additional clarifying documentation on this matter,[128] Commerce finds the adjustment in question appropriate, in light of its cost-reporting methodology and record keeping, and finds no compelling reason to deny it for these final results.

[124] *Id*. at 4-5.
[125] *Id*. at 5-6.
[126] *See* Angel Camacho's Rebuttal Brief at 2-4 (numerous citations to the record omitted).
[127] *See* Commerce's Letters, Supplemental Questionnaires, dated February 27, 2020 (question 27 for section D), May 12, 2020 (question 8 for section D), and June 25, 2020 (question 1 for section D).
[128] *See* Angel Camacho's Letters, "Camacho's Supplemental Section D Response: Ripe Olives From Spain (01/26/2018-07/31/2019)," dated March 30, 2020 (AC's 1st SDQR) at 14-16 and Exhibits SD-13 and SD-14 (tab 2); "Camacho's Second Supplemental Questionnaire Response for Section A (Part 2), Section B, and Section D: Ripe Olives from Spain (01/26/2018-07/31/2019)," dated June 2, 2020 (AC's 2nd SQR) at 15-18 and Exhibits SD2-4 (tab 5) and Exhibit SD2-4 (tab 6); and "Camacho's Third Supplemental Questionnaire Response: Ripe Olives From Spain (01/26/2018-07/31/2019)," dated July 2, 2020 (AC's 3rd SQR) at 2-7 and Exhibit SD3-7.

Angel Camacho repeatedly stated on the record that its financial accounting practice is to value raw materials, work-in-process goods, and finished goods using standard costs.[129] Angel Camacho and its legal counsel certified as to the accuracy and completeness of the information provided in each submission pursuant to 19 CFR 351.303(g) of Commerce's regulations. Notwithstanding, with respect to raw materials for example, Angel Camacho provided POR monthly inventory movement schedules for the three most significant direct material inputs, which demonstrate the valuation at standard cost (*i.e.*, the per-unit values for opening stock, receipts, issues, and closing stock carry the same monthly figure and only change with a single update to standard costs at fiscal year-end).[130] The contested adjustment in question relates to the second portion of the cost reporting period, January 1, 2019 – July 31, 2019 (*i.e.*, start of Angel Camacho's 2019 fiscal year and end of the POR). As part of compiling actual COP for this period (for purpose of calculating a variance between actual and standard costs), in calculating total actual material costs, Angel Camacho was required to make an adjustment for a change in ending inventory values for work-in-process and raw materials between December 31, 2018 and July 31, 2019.[131] This was necessary to fully capture actual materials cost consumed during this period. However, to strictly and solely isolate and measure the change in ending inventory values for materials, uninhibited by ending inventory values on December 31, 2018 and July 31, 2019, that reflect, respectively, "old" and "new" standard material costs, an adjustment for a cumulative change in standard costs during this period was warranted, in order to have "an apples-to-apples" comparison.[132] In other words, based on the explanation that Angel Camacho provided on the record, which we find logical, it was necessary to extract from the mix of the ending inventory value differences the difference associated with the reevaluation of standard material costs, in order to only capture the resulting difference between beginning and ending inventory, for purpose of measuring inventory movement as a component of raw materials consumption.[133] Angel Camacho supported the total value of the adjustment in question by providing an itemized list for standard costs in effect during the 2018 and 2019 fiscal years.[134]

We disagree with Musco's assertion that Angel Camacho's valuation of raw materials and finished goods inventories at standard cost is unsupported by the inventory valuation description in its own audited financial statements. Musco simply claims that the mention of, "acquisition price...invoiced by the seller" of raw materials, in the financial statements implies that raw materials should be valued at such actual acquisition price; similarly, Musco's claim that the mention, "production cost is determined by adding to the acquisition price of raw materials…the costs directly attributable to the product," in the financial statements implies that finished goods should be valued as the sum of such actual acquisition price of raw materials and the production costs.[135] Musco, however, ignores the other evidence on the record. Angel Camacho

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[129] *See* Angel Camacho's Letter, "Camacho's Section D Response: Ripe Olives From Spain (01/26/2018-07/31/2019)," dated December 24, 2019 (AC's DQR) at 10; *see also* AC's 1st SDQR at 2-4; and AC's 2nd SQR at 11.
[130] *See* AC's DQR at 7 and Exhibit D-2.
[131] *See* AC's DQR at Exhibit D-11 Part 3 (Excel tab 4. "Actual Raw Material").
[132] *See* AC's DQR at Exhibit D-11 Part 3 (Excel tab 4. "Change in Inv").
[133] *See* AC's 3rd SQR at 7.
[134] *See* AC's 2nd SQR at 18 and Exhibit SD2-4 (Excel tab 6).
[135] *See* Musco's Case Brief for Angel Camacho at 2-3 (citing Angel Camacho's Letter, "Camacho's Section A

demonstrated on the record, supported by invoices and information from its costs accounting system, how the 2018 and 2019 standard cost for an exemplified direct material input (for which it provided inventory movement schedules discussed above) are developed (the standard costs consists of standard processing costs plus the standard cost of the raw olive input), where cost of the raw olive input was based on previous fiscal year's actual purchase prices of raw olives (*i.e.*, prevailing market prices).[136] Thus, the recordation of inventory values is based on actual acquisition prices, albeit from a previous fiscal year, which are incorporated into a current period's standard cost and, as discussed below, standard costs were not found materially unsuitable for purpose of inventory valuation, due to proximity to actual costs.

Angel Camacho's explicitly explained:

> Spanish GAAP indicates that inventory is valued at the purchase price, which comprises the amount invoiced by the seller, after deduction of any discounts, rebates or other similar items, plus any additional costs incurred to bring the goods to a saleable condition, such as transport, import duties, insurance and other costs directly attributable to the acquisition of inventories. Under this accounting rule, the auditor must conclude that the standard cost used by Camacho is close to actual cost or purchase price in order to issue a favorable opinion. In other words, the evidence to support the above statement "ACA's auditors have confirmed that standard costs are sufficiently close to actual costs {such} that standard costs can be used to value inventory without materially distorting the company's financial condition" is the audit report itself, with the favorable opinion of the external auditor, and not including emphasis of matter of inventory valuation.
>
> External auditors don't share their substantial audit work with clients. {Generally} speaking, and to the best of ACA's knowledge, the process is as follows: the auditors usually select a sample of materials and construct the actual cost by checking purchase invoices. The auditor then compare{s} this actual constructed cost with the standard cost. If the difference is not significant, the auditor conclude that the standard cost used is equivalent to the actual cost.[137]

The record is clear that the Independent Auditor's Report preceding Angel Camacho's 2018 fiscal year financial statements makes a specific mention of an audit procedure undertaken to confirm the reasonableness of the values Angel Camacho assigned to inventories.[138] Further, it provides, otherwise, a favorable opinion of the 2018 financial statements as a whole, without stating that Angel Camacho's normal business practices for inventory valuation poses a material risk to company's presented financial position.[139] Section 773(f)(1)(A) of the Act instructs Commerce to calculate costs based on a respondent's normal books and records if they are kept in accordance with home country generally accepted accounting principles (GAAP) and

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Response: Ripe Olives from Spain (01/26/2018-07/31/2019)," dated November 26, 2019 (AC's AQR) at Exhibit A-12 (containing Angel Camacho's audited 2018 financial statements at Note 4.9)).

[136] *See* AC's 1st SDQR at 3-4 and Exhibit SD-1.

[137] *See* AC's 2nd SQR at 11-12.

[138] *See* AC's AQR at Exhibit A-12 (containing Angel Camacho's audited 2018 financial statements).

[139] *Id*.

reasonably reflect the costs associated with the production and sale of the merchandise under consideration. Thus, unless a company's normal books and records kept in accordance with home country GAAP result in a distortion of the costs, Commerce will rely on the assurances of the company's independent accountants and auditors as the basis for calculating costs.[140] Here, there is no evidence that the recordation of inventory at standard costs is so distortive as to render Angel Camacho's basis for the adjustment in question in contradiction with the inventory valuation methodology described in its audited financial statements. To the contrary, the independent auditors concluded that the standard cost used by Angel Camacho is close to actual cost and issued a favorable opinion.[141] Accordingly, for these final results Commerce continues to rely on Angel Camacho's submitted costs data that reflects the adjustment to ending inventory values for changes in standard costs of material inputs between 2018 and 2019 fiscal year periods.

Comment 6: General and Administrative Expenses

Musco's Arguments

- Commerce should revise Angel Camacho's reported general and administrative (G&A) expenses calculations to include certain expenses.
  - Commerce should include charges for inland freight transfers from Angel Camacho's production facility in Espartinas to its production facility in Moron.[142]
    - Under Commerce's practice, a respondent's G&A expenses ratio calculation should cover the company's overall operations.
    - A portion of the excluded charges relates to the limited processing undertaken at the Espartinas production facility with respect to the merchandise under consideration (MUC).
  - Commerce should include certain expenses that Angel Camacho classified as extraordinary in its books and records, because these items relate to the overall operations of the company.[143]

Angel Camacho's Arguments

- Concerning certain expenses that were classified as extraordinary, the applicable legal standard is not, as Musco claims, whether the expenses related to the overall operations of the company.[144]
  - The statutory provisions of Sections 773(b)(1), 773(b)(3)(B), and 773(e)(2)(A) of the Act focus on "production" and "sales" of products under investigation, and not on more general activities unrelated to production of said merchandise. As such, the statute confirms that such unrelated costs should not be included in the cost of production of products under investigation.

[140] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Mexico*, 73 FR 35649 (June 24, 2008), and accompanying IDM at Comment 10.
[141] *See* AC's 2nd SQR at 11-12.
[142] *See* Musco's Case Brief for Angel Camacho at 6-7.
[143] *Id*.
[144] *See* Angel Camacho's Rebuttal Brief at 4-5.

- Concerning certain expenses that were excluded from the G&A expenses calculation, they were considered in Angel's Camacho's normal books and records as extraordinary items that occur outside the normal course of business.

Commerce's Position: We agree with Angel Camacho. For these final results, consistent with our practice,[145] Commerce finds that certain minor expenses that Angel Camacho classified as extraordinary items in its books and records (*i.e.*, in the normal course of business) were properly excluded from the G&A expenses calculations. The record demonstrates that the items in question are non-routine in nature and are unrelated to the general operations of the company.[146] Angel Camacho explained and the record confirms that the expenses in question were treated as extraordinary according to the requirements of Spanish GAAP, which mandate that exceptional items, given their nature, should not be recognized in general operations accounts of the company.[147]

With respect to charges for inland freight transfers from Angel Camacho's production facility in Espartinas to its production facility in Moron, Commerce agrees with Musco that these expenses should be included in the calculation of the G&A expenses ratio. The record shows that the Espartinas production facility undertook a limited amount of processing with respect to the MUC (*i.e.*, oxidization of raw olives).[148] Because a portion of the excluded charges for inland freight transfers pertains, indirectly, to the production of MUC, the charges in question are period expenses that relate to the general operations of the company which are, primarily, the production and sale of olives. Therefore, for the final results of this review, we included the full value of charges for inland freight transfers between Angel Camacho's production facilities and recalculated Angel Camacho's G&A expenses ratio accordingly.[149]

Comment 7: Certain Inland Freight Expenses

Musco's Arguments

- For CEP sales, Commerce should increase the reported inland freight expenses (from plant/warehouse to port of exportation, DINLFTPU) to reflect arm's length prices.
  - The comparison of tariff schedules shows that the freight tariff rate for the affiliated freight provider was on par with or less than those of unaffiliated freight providers.[150]

[145] *See, e.g., Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010), and accompanying IDM at Comment 12.
[146] *See* AC's 2nd SQR at 14-15 and Exhibit SD2-3 (Commerce is withholding the discussion of the nature of the expenses in question and the basis for exclusion because Angel Camacho claimed this information as business proprietary.); *see also* Memorandum, "Administrative Review of the Antidumping Duty Order on Ripe Olives from Spain: Final Analysis Memorandum for Angel Camacho Alimentacion S.L.; 2018-2019," dated concurrently with this memorandum (Angel Camacho Final Analysis Memorandum) for further discussion involving the use of Angel Camacho's business proprietary information.
[147] *Id*; *see also* AC's AQR at Exhibit A-12 (containing Angel Camacho's audited 2018 financial statements) and AC's DQR at Exhibit D-10 (for "Extraordinary Expenses" general ledger account used in capturing cost items in question and the grouping of expenses in this general ledger account into the "Exceptional Expenses" line item in 2018 Income Statement).
[148] *See* AC's 1st SDQR at 11.
[149] *See* Angel Camacho Final Analysis Memorandum for further details.
[150] *See* Musco's Case Brief for Angel Camacho at 7-8.

- Without the respective shipment quantities for affiliated and unaffiliated parties (which Commerce requested but Angel Camacho didn't provide) Commerce cannot calculate the overall freight prices charged by an affiliated party and all unaffiliated parties and on that basis then test the arm's length nature of the affiliated freight price.[151]
- Under these circumstances, Commerce's practice is to "true up" the freight expenses to match prices charged for freight services by one or more unaffiliated companies.[152]

Angel Camacho's Arguments

- Commerce should continue to utilize Angel Camacho's inland freight expenses reported in the DINLFTPU variable of the database.
  - Because Angel Camacho did not impede Commerce's investigation in any way *vis-à-vis* the reported inland freight costs, there is no legal justification for Commerce to refuse to use the reported DINLFTPU amounts in its margin calculations.[153]
    - In its subsequent supplemental questionnaires, Commerce did not request any addition information on the quantity of merchandise transported, nor did it request any information specific to the domestic inland freight.
    - Commerce did not ask for any clarification or any additional supporting documentation concerning non-affiliated tariff schedules that Angel Camacho submitted in the record for sample service providers, such as freight rates for the remaining unaffiliated freight companies.
  - In the alternative, should Commerce decide to make an adjustment to DINLFTPU for CEP sales, it must first calculate the percent difference between the affiliated tariff rate and the average of unaffiliated tariff rates, and then multiply the result by the share of the total freight value invoiced by the affiliated freight company.[154]

Commerce's Position: In determining whether to use transactions between affiliated parties, Commerce's practice is to compare the transfer price to either prices charged to other unaffiliated parties who contract for the same service or prices for the same service paid by the respondent to unaffiliated parties.[155] Although Angel Camacho provided the total value for inland freight charges invoiced by affiliated and unaffiliated parties, it did not provide the respective total shipment quantities, thus, limiting Commerce's ability to calculate an average transfer price for an affiliated company and the average market price for unaffiliated freight providers.[156] Angel Camacho did, however, provide the freight rate charged by an affiliated freight company as well as sample freight rates charged by a number of unaffiliated freight companies for inland freight

[151] *Id*. at 8.
[152] *Id*. (citing *Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014) (*OCTG Korea LTFV*), and accompanying IDM at Comment 11).
[153] *See* Angel Camacho's Rebuttal Brief at 5-7.
[154] *Id*. at 8.
[155] *See, e.g., Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 77 FR 63291 (October 16, 2012), and accompanying IDM at Comment 8; and *OCTG Korea LTFV* IDM at Comments 11 and 12.
[156] *See* Angel Camacho's Letter, "Camacho's Supplemental Section C Response: Ripe Olives from Spain (01/26/2018-07/31/2019)," dated March 22, 2020 at 12-13.

services using the same shipment origin and destination.[157] Based on the information available on the record, we were able to compare the freight rates charged by unaffiliated freight companies to the freight rate of an affiliated provider.

Specifically, we compared the average of all freight rates charged by unaffiliated freight companies that are available on the record to the affiliated freight provider's freight rate for transportation from the factory to the port for export shipments. Based on this comparison, we find that Angel Camacho's reported domestic inland freight-to-port expenses do not reflect an arm's-length nature of affiliated party transactions.[158] Therefore, for the final results of this review, to reflect arm's length prices, Commerce adjusted Angel Camacho's domestic inland freight expenses reported in the DINLFTPU variable, taking into account the share of total freight costs attributable to the affiliated freight company.[159]

Comment 8: Beginning Dates in Programs

Musco's Arguments

- For the final results of this review, Commerce should correct the ministerial error pertaining to the beginning date programmed in the comparison market and margin calculation programs.[160]
  - The beginning date in the comparison market program should be changed from August 1, 2017, to October 1, 2017.
  - The beginning date in the margin calculation program should be changed from June 1, 2017, to January 1, 2018.

Angel Camacho did not comment on this issue.

Commerce's Position: Commerce agrees with Musco that a ministerial error was made in setting the beginning dates in the comparison market and margin calculation programs. Contrary to the instructions in the MARGIN program to use the first day of the first month of U.S. sales, the beginning day in the MARGIN program should be the actual first day of the POR, namely January 26, 2018. This is the start of the POR and will be used along with the ending date of the POR, namely July 31, 2019, to define the universe of U.S. sales based on the date of the U.S. sales. As Commerce explained in the *Preliminary Results*, the date of sale in each market was based on the earlier of invoice date or shipment date.[161] Based on the earliest U.S. date of sale, the beginning date in the comparison market program in an administrative review represents the first day of the first month of the 90/60-day contemporaneous "window period," namely October 1, 2017. Therefore, for the final results of this review for Angel Camacho, the beginning date in

[157] *See* Angel Camacho's Letter, "Camacho's Section B Response: Ripe Olives From Spain," dated December 19, 2019 at 35-36 and Exhibit B-12.
[158] *See* Angel Camacho Final Analysis Memorandum for further details.
[159] *Id*.
[160] *See* Musco's Case Brief for Angel Camacho at 9.
[161] *See Preliminary Results* PMD at 9-10 (citing *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 76918 (December 23, 2004), and accompanying IDM at Comment 10 and *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany*, 67 FR 35497 (May 20, 2002), and accompanying IDM at Comment 2).

the COMPARISON MARKET program is October 1, 2017, while the beginning date in the MARGIN program is January 26, 2018. Lastly, we also examined the programming instructions pertaining to this issue with respect to Agro Sevilla and Dcoop and, where applicable, made similar corrections to the beginning dates in the margin calculation programs.

Dcoop

Comment 9: Whether Commerce Should Apply Adverse Facts Available to Dcoop's Cost Database

The cost database in question was submitted by Dcoop on August 21, 2020, in response to Commerce's supplemental questionnaire.[162] Musco filed pre-preliminary comments on November 18, 2020 asserting that Dcoop included only the costs of the products that were ultimately sold in Spain or the United States in its cost database and that Dcoop omitted identical products sold in third countries from the reported costs.[163] On December 1, 2020, Dcoop filed its Pre-preliminary Comments and acknowledged the error raised by Musco.[164] In that same submission, Dcoop claimed that the information necessary to correct its cost database to include the omitted products was already on the record and Dcoop explained how Commerce could use that information to calculate an adjustment to Dcoop's cost database for the *Preliminary Results*.[165] Musco filed a request to strike Dcoop's Pre-preliminary Comments on December 4, 2020, alleging that Dcoop's comments contained untimely, unidentified new factual information, upon which Dcoop constructed and submitted a radically revised cost database.[166] On December 7, 2020, Dcoop filed a request to strike Musco's request asserting that Dcoop's Pre-preliminary Comments contained no unidentified new factual information.[167] Musco filed, on December 9, 2020, a request to strike Dcoop's December 7, 2020 submission clarifying that while some of the information was on the record, certain information upon which Dcoop's arguments were based was new factual information.[168] On December 11, 2020, Dcoop filed a response declaring that information referred to by Musco in its December 9, 2020 submission was supported by record information.[169] In the *Preliminary Results*, Commerce relied on partial facts available to adjust Dcoop's reported CONNUM-specific costs to include the COM of identical products sold by Dcoop in third countries.[170]

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[162] *See* Dcoop's Letter, "Dcoop's 3rd Supplemental Questionnaire Response: Ripe Olives from Spain," dated August 21, 2020 (Dcoop's SQR3) at Exhibit SD3-13.
[163] *See* Musco's Case Brief for Dcoop at 2-10.
[164] *See* Dcoop's Case Brief at 2 (referencing Dcoop's Letter, " Pre-Preliminary Comments and Dcoop's Response to Musco's Pre-preliminary: Ripe Olives from Spain," dated December 1, 2020 (Dcoop's Pre-preliminary Comments).
[165] *Id*. at 3-7.
[166] *See* Musco's Letter, "Request to Strike Pre-Preliminary Comments for Dcoop: Ripe Olives from Spain," dated December 4, 2020 at 2-4.
[167] *See* Dcoop's Letter, "Response to Musco's request to Strike Pre-preliminary Results Comments: Ripe Olives from Spain," dated December 7, 2020 at 2-7.
[168] *See* Musco's Letter, "Request to Strike Dcoop's December 7th Letter: Ripe Olives from Spain," dated December 9, 2020 at 2.
[169] *See* Dcoop's Letter, "Response to Musco's Request to Strike Dcoop's December 7, 2020 Letter: Ripe Olives from Spain," dated December 112020, at 3.
[170] *See* PDM at 16; *see also* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for

A. Whether Dcoop's Pre-Preliminary Comments Constitute New Factual Information

Musco's Arguments[171]

- Commerce should not have accepted Dcoop's Pre-preliminary Comments or Dcoop's Request to Strike Musco's Comments because these filings contained new factual information.
- Dcoop did not provide justification for submitting the new factual information, the deadline for factual information had passed and Commerce did not address this issue in its *Preliminary Results*.
- Dcoop's new information attempted to remedy its failure to report large amounts of cost data.
- In Dcoop's Pre-Preliminary Comments, Dcoop included a worksheet showing the assignment of CONNUMs to product codes which previously did not have CONNUMs assigned to them and asserted that the products were MUC.
- The identification of product codes as MUC, as well as those that were not, was new information that was not traceable to any data already on the record.
- Nothing on the record supports Dcoop assertions made in its untimely filings that its product categorization system identifies "black" olives as "ripe" olives and thus MUC.
- The scope of this proceeding explicitly states that subject merchandise includes all colors of olives and that olive color cannot be used to determine which olives are within scope and which are not included.
- Both Commerce and Musco were deprived of the opportunity to ask questions about the product code information contained in the untimely filings.
- The new information in the untimely filings, relied on by Commerce as a neutral facts available adjustment, offers considerable benefits to Dcoop.
- Commerce treated all products with an "N" in them as MUC and all other products as non-MUC., *i.e.* outside of the scope of the order; timely record evidence submitted by Dcoop contradicts this assumption.
- When Commerce implemented its new factual information rule in 2013, Commerce explained why strict enforcement of deadlines benefited both Commerce and the parties such that Commerce and the parties have adequate time to ask about the information and test its veracity.
- Commerce's acceptance and reliance on Dcoop's new information in the *Preliminary Results* have been borne out by discovery of evidence that the new data is not consistent with evidence submitted by Dcoop earlier in the proceeding.
- Consistent with its practice, Commerce should apply total AFA to Dcoop's costs.[172]

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the Preliminary Results – Alimentary Group Dcoop S. Coop. And," dated December 18, 2020 (Dcoop Preliminary Cost Memorandum) at 1-3 and Attachment 1.

[171] *See* Musco's Case Brief for Dcoop at 3-9.

[172] *See* Musco's Case Brief for Dcoop at 7 (citing *Polyethylene Terephthalate Resin From Taiwan: Final Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances*, in Part, 83 FR 48287 (September 24, 2018) (*PTR from Taiwan*) and accompanying IDM at Comment 1 and *Cast Iron Soil Pipe Fittings From the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part*; 83 FR 33205 (July 17, 2018) (*Cast Iron from the PRC*) and accompanying IDM at Comment 6).

Dcoop's Arguments[173]

- The information submitted in Dcoop's Pre-preliminary Comments does not constitute new factual information.
- The completeness and accuracy of the review was confirmed by the fact that Commerce was able to replicate the identical analysis of existing record data.
- Contrary to Musco's claim, the product code key submitted in Dcoop's section A submission supports the assertion that "black" olives are synonymous with "ripe" olives and thus are MUC.
- The record also contains references to Dcoop's use of the term "green olives" as meaning non-subject and black olives meaning MUC based on the treatment of the olives.
- Dcoop explained that it applies different treatments to non-subject green olives than it does to subject ripe olives.
- In Dcoop's BQR, Dcoop explained that "table olives are divided into green (non-subject) and black olives (using product code)."[174]
- The existing record clearly supports Dcoop's characterizations of MUC and non-MUC based on how the olives were treated.
- Musco is incorrect in its assumption that certain sales in exhibit B-3 of Dcoop's BQR in conjunction with Dcoop's home-market sales reconciliation proves Dcoop's classification of olives as MUC or non-MUC; there is a clear explanation of these transactions within exhibit B-3 and their existence does not undermine the integrity of Commerce's use of product codes to assign CONNUMs in its adjustment to Dcoop's costs.
- Musco's claim that it and Commerce were deprived of the opportunity to ask questions is contradicted by the fact that Musco filed two subsequent submissions regarding Dcoop's Pre-preliminary Comments and Commerce, free to ask questions at any time, did not find it necessary to do so.
- It was Musco that withheld information until the last minute, not Dcoop.
- Musco's discovery of the apparent error, based on Dcoop's August 21, 2020 SQR, was not presented as a comment in response to Dcoop's SQR but rather held and included in Musco's Pre-preliminary Comments, the last moment Commerce could have considered the error in formulating its preliminary results.
- Dcoop immediately corrected the error as a result of Musco's identification of the issue.
- The facts in *PTR from Taiwan* differ from the instant case as Commerce in the aforementioned case found within its discretion to "either accept the data as reported or to request new factual information to correct errors and omissions after verification."
- Here, Commerce based its adjustments on information that was already on the record.
- Commerce's adjustment of Dcoop's cost data based on Dcoop's explanations supports the inference that the adjustments proposed by Dcoop in its Pre-preliminary Comments were clear and could easily be implemented by Commerce without the need for any new factual information.

[173] *See* Dcoop's Rebuttal Brief at 5-26.
[174] *See* Dcoop's Letter, "Section B and D Questionnaire Response: Ripe Olives from Spain," dated December 19, 2019 (Dcoop's BQR).

B. Whether Commerce's Preliminary Neutral Facts Available Adjustment to Dcoop's Cost Data Contains Significant Flaws

Musco's Arguments[175]

- Dcoop revealed in its August 21, 2020 supplemental response, ten months after it filed its original cost database, that it departed from Commerce's reporting instructions in reporting its cost database by reporting only those production items that were ultimately sold to Spain or the United States.
- Commerce instructed Dcoop in the original questionnaire to report weighted-average CONNUM-specific costs regardless of market destination.
- Dcoop failed to provide an explanation as to why it did not report those production items that were ultimately sold to countries other than Spain or the United States in its cost datafiles.
- A comparison of the corrected database included in Dcoop's untimely filing to its original cost database shows that Dcoop derived a considerable advantage from excluding those production items that were ultimately sold to Spain or the United States.
- Commerce's neutral facts available adjustment to correct Dcoop's reporting flaws was not "neutral" but rather highly favorable to Dcoop.
- Commerce's adjustment methodology classified certain products as non-MUC without any basis and consequently resulted in the exclusion of a significant volume of production of which an unknown amount may be MUC.
- Moreover, Commerce's methodology also set aside production volumes because complete CONNUM information was not reported by Dcoop.
- While Commerce stated that it could fix Dcoop's deficiencies because the information was on the record, this assertion overlooks the significance of the adjustment.
- Given the significant gap in Dcoop's reporting of its cost database, there is no way to determine the true costs of MUC at this late point in the proceeding.

Dcoop's Arguments [176]

- Contrary to Musco's claims, Commerce's adjustments to Dcoop's cost database in the *Preliminary Results* did not contain flaws and were not highly favorable to Dcoop.
- The methodology used to calculate Dcoop's weighted-average COM by CONNUM inadvertently was limited to product codes that Dcoop sold in the U.S. and home markets during the respective sales reporting periods.
- In using this methodology, Dcoop unintentionally omitted the product codes sold only to third countries that fell within the same CONNUMs as those sold to the U.S. and in the home market.
- Dcoop did however submit an excel file that contained the detailed materials, labor and overhead for every product code that it produced during the cost reporting period regardless of the market where the product was sold.
- In its Pre-preliminary Comments, Dcoop provided a clear roadmap for Commerce to use this record information to make its adjustments as well as an updated excel file that assigned CONNUMs to the products categorized as MUC.

[175] *See* Musco's Case Brief for Dcoop at 8-12.
[176] *See* Dcoop's Rebuttal Brief at 15-18.

- Musco failed to substantiate its claims that the adjustments Commerce made in the *Preliminary Results* were favorable to Dcoop; the comparison of the margin results using the originally reported data and Commerce's revised data shows that the adjustment had a 0.01 percent change to the dumping margin.
- As explained in Dcoop's Pre-preliminary Comments, Dcoop provided amended cost data using the master cost file submitted in its August 21, 2020 SQR that included the per-unit COM by product code of every product produced by the Table Olives division during the cost reporting period.
- As such, Dcoop provided Commerce, in the master cost file, the complete POR production data for every product code for in-scope merchandise regardless of where individual products within each CONNUM were sold.
- Dcoop is not requesting that Commerce use its originally reported data as alleged by Musco to be favorable to Dcoop; Musco's focus on that dataset in its arguments reveals nothing about the reasonableness or accuracy of Commerce's preliminary margin analysis or what Commerce should do in the final results.
- Musco's comparison of Dcoop's originally reported costs to the revised costs submitted in Dcoop's Pre-preliminary Comments grossly inflates the impact of the error and subsequent correction; Musco ignored that the total COM for MUC consists of all product codes sold globally including those that fall under CONNUMs that Dcoop sold only in third countries which Dcoop was not required to report (and are not considered in Commerce's dumping analysis).
- The percentage change between the originally reported costs for those CONNUMs used in the margin analysis and Commerce's corrected costs for those CONNUMs in the *Preliminary Results*, shows that the percentage change in the costs are significantly less than calculated by Musco.
- Contrary to Musco's assertions, the total quantity of certain products that Commerce determined were outside the scope of the proceeding was insignificant to the total quantity of olives produced by Musco and the description of these non-scope products include terms that would indicate that they do not fall within the scope of the order.
- Regarding Musco's claim that there are additional quantities missing from Commerce's *Preliminary Results* analysis, a review of Commerce's Preliminary Cost Memo attachments shows that Commerce simply carried forward only those CONNUMs relevant to Dcoop's reported sales and excluded the quantities of product that were sold only in third countries.
- The magnitude of a revision or correction does not have any bearing on the accuracy or reliability of the results of such a correction or revision.

C. Whether Dcoop Failed to Act to the Best of Its Ability

Musco's Arguments[177]

- Dcoop's manipulation of its cost reporting responsibilities must be viewed in light of its attempts to manipulate its reporting of COP data for growers and suppliers.

[177] *See* Musco's Case Brief for Dcoop at 12-23.

- While Dcoop claimed that it was not in a position, legally or operationally, to compel cooperation from the first-tier cooperatives, Dcoop does not dispute that the first-tier cooperatives that own and run Dcoop are affiliates.
- Dcoop's failure to provide data from these affiliates is an indicator of the unreliability of Dcoop's reported costs.
- The use of fact available or AFA does not require that Commerce find Dcoop intentionally impeded the proceeding; instead, section 776(b) of the Act justifies the use of AFA where a respondent has failed to cooperate to the best of its ability.
- Because the reporting error was significantly favorable to Dcoop and coupled with Dcoop's misrepresentations, something more intentional than gross negligence may have been the cause.
- Dcoop's gross carelessness in compiling a cost database and rendering it unusable is plainly a failure to act to the best of a respondent's ability.
- Commerce faced a similar situation in *PTR from Taiwan* where Commerce found the scope of the respondent's error to be the result of inattentiveness and carelessness and that accepting such revisions would amount to a wholly new response.
- In *Yama Ribbons and Bows*, the CIT noted that, "it is well established that…the burden falls on the interested party to place relevant information within its possession on the record."[178]
- While Commerce does not consider itself bound to apply AFA in one case just because it did so in another case, Commerce must have valid reasons for its decisions.
- It is unclear why Commerce salvaged Dcoop's deficient cost database for the *Preliminary Results* in this case while in past cases similarly situated respondents have been treated differently than Dcoop.
- In *Stainless Pressure Pipe from Thailand*, Commerce determined total AFA was warranted because the respondent failed to report all of its home-market sales.[179]
- Consistent with Commerce's findings in *Stainless Pressure Pipe from Thailand*, the language in Commerce's questionnaire was clear regarding its reporting requirements; Dcoop was obligated to report the cost of the in-scope items sold in third countries; Dcoop possessed the necessary records; Dcoop had the ability to report these costs but failed to cooperate, and Dcoop never requested clarification as to whether reporting costs of only those products sold in the United States or home market was sufficient in satisfying Commerce's requirements.
- Commerce's inability to conduct an on-site verification of Dcoop's costs calls into question Dcoop's omission of its costs.
- Commerce should apply an AFA rate of 151 percent, the simple average of the investigation margins of 78 and 223 percent.

[178] *See* Musco's Case Brief for Dcoop at 18 (citing Yama *Ribbons and Bows v. United States*, 865 F. Supp. 2d 1294,1299 (CIT 2012) (*Yama Ribbons and Bows*)).
[179] *See* Musco's Case Brief for Dcoop at 19 (referencing *Welded Stainless Pressure Pipe from Thailand: Final Determination of Sales at Less Than Fair Value*, 79 FR 3193 (May 30, 2014) (*SSPP from Thailand*), and accompanying Issues and Decision Memorandum (IDM) at Comment 1).

Dcoop's Arguments[180]

- Commerce does not have a basis to apply AFA based on the record of Dcoop's cooperation in this review.
- Commerce may only apply AFA where Commerce determines that an interested party had not acted to the best of its ability to comply with Commerce's information requests.
- In accordance with *Nippon Steel*, Commerce must "make two showings" before it concludes that a respondent "has not cooperated to the best of its ability."[181]
- Dcoop's error was a mistake made by a first-time respondent with no previous experience following Commerce's complex requirements and Dcoop sought to correct the realization of the error.
- The record is replete with evidence of Dcoop's cooperation in this proceed as Dcoop responded to each of Commerce's questionnaires in a timely manner, submitting well over 10,000 pages of responsive information all while exerting extensive efforts to cooperate with Commerce's requests under extremely difficult circumstances that included severe outbreaks of COVID-19 during the critical response preparation period.
- Nothing on the record indicates or implies that Dcoop withheld information or failed to maintain records.
- Dcoop has been fully transparent with Commerce in acknowledging errors in its reporting methodology, describing the basis of those errors, and assisting Commerce by providing clear explanation of how those errors may be corrected using the information on record.
- Musco's characterization of Dcoop's relationships with its first-tier cooperatives is incorrect and squarely contradicted by the record as Dcoop has submitted substantial information from its first-tier cooperatives (and their member growers) including extensive cost of production back-up for 22 first-tier cooperatives.
- In instances where Dcoop was not able to provide first-tier information, Dcoop has documented the significant efforts that it has undertaken to obtain the information.
- Dcoop acted to the best of its ability by continually providing Commerce with the first-tier information it would need to conduct its analysis by offering alternative reporting methods, even in the face of certain risks in maintaining Dcoop's relationship with its first-tier cooperative.
- Musco failed to show how the facts presented in *PTR from Taiwan*, where Commerce's observations regarding the respondent's inattentiveness and carelessness, are similar to this case.
- *PTR from Taiwan* involved a situation where Commerce would not be able to correct the error at issue without requesting new factual information late in the proceedings. That situation does not exist here, as Dcoop submitted the entirety of its cost production workbook on the record that Commerce relied upon in the *Preliminary Results* to correct the error in Dcoop's database.
- Musco's reliance on *Yama Ribbons and Bows Co.* is unavailing because Dcoop submitted all of its cost production information for all in-scope merchandise and, as such, fulfilled its burden to "place relevant information within its possession on the record."

[180] *See* Dcoop's Rebuttal Brief at 18-26.
[181] *See* Dcoop's Rebuttal Brief at 18-19 (citing Nippon *Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel)*).

- The facts of the present case are also incomparable with the facts in *SSPP from Thailand* where the respondent in that case provided only information regarding what it considered to be identical merchandise and Commerce found that it could not calculate an accurate normal value as a result of the respondent's failure to provide the necessary information.
- There are two important distinctions between SSPP *from Thailand* and the present case: in the present case, Dcoop did not substitute Commerce's instructions with its own discretion and Commerce was able to easily correct Dcoop's inadvertent error because Dcoop had already provided all of the information that was necessary to do so.
- In the cases in which Musco relied on to argue that Commerce should apply AFA, the respondent's failure to cooperate resulted in Commerce being unable to calculate an accurate dumping margin; these circumstances do not exist here.
- Because Dcoop has been forthcoming with its cost information throughout this proceeding, the record contains all of the information that Commerce needed to correct the error; as a result, there is no legal basis for the application of AFA to Dcoop's costs.

D. Whether, as an Alternative, Commerce Should Apply Partial Adverse Facts Available to Dcoop's Costs

Musco's Arguments

- If Commerce determines total AFA is not warranted, then Commerce should true up Dcoop's reported costs to the level of the respondent's own average production costs.
- The partial AFA adjustment should be calculated based on the difference between the average costs reported for the MUC and the average costs reported for the same components for all merchandise produced by Dcoop during the POR.
- This calculated rate is the only available adjustment that relies on Dcoop's timely filed information.
- The comparison of Dcoop's revised cost database and its reported cost database supports the reasonableness of Musco's suggested partial AFA rate.

Dcoop's Arguments

- Musco's proposed partial AFA adjustment is unreasonable because it includes the production costs of all green olives which are more expensive to produce than the MUC.
- Musco's calculated cost increase between Dcoop's originally reported costs and the costs presented in Dcoop's Pre-preliminary Comments does not corroborate Musco's suggested partial AFA rate.
- Moreover, Musco's calculated cost increase between the Dcoop's originally reported costs and the costs submitted by Dcoop in its preliminary costs is incorrect.
- The correct comparison should be the costs of Dcoop's originally reported costs (which includes only those products sold in the United States and HM) to the COM of those same CONNUMs sold in the United States or HM after calculating the CONNUM weighted average costs including third country markets.
- The proper comparison shows that the per-unit COMs declined after the correction.

Commerce's Position: After considering the comments from interested parties, we determine that Dcoop's Pre-preliminary Comments and Request to Strike Musco's Comments did not contain new factual information. Further, contrary to Musco's assertions, Commerce's

adjustment in the *Preliminary Results* did not contain significant flaws. Although Dcoop's August 21, 2020, cost database contained an error, when the error was discovered, Dcoop promptly acknowledged the error and identified relevant information on the record that can be used to correct the error in the database. All necessary information for correcting the error in the database is on the record. Therefore, having accessed Dcoop's actions, abilities and cooperation, including its identification of the existing information on the record that permits the correction of the error, we find there is no basis to determine whether Dcoop failed to cooperate to the best of its ability because the necessary information is on the record. For the final results of this review, we continue to adjust Dcoop's reported cost database to include the costs of the identical products sold in countries other than the home market or the United States or as we did in the *Preliminary Results*.[182]

With respect to timeliness arguments, Commerce's regulation at 19 CFR 351.301 sets forth the time limits for submitting factual information, as defined by 19 CFR 351.102(b)(21). Musco asserts that Dcoop submitted new factual information in its Pre-preliminary Comments and in Dcoop's Request to Strike Musco's Comments that identified those products excluded from the cost database that are MUC and those that are non-MUC. Musco also asserts that Dcoop failed to provide any justification for submitting the information. Dcoop counters that the information within its filings was already on the record or supported by record information. The core of the parties' arguments here is whether Dcoop's product codes, placed on the record by Dcoop as exhibit A-24 to its AQR, or any other information in Dcoop's submissions prior to Dcoop's comments at issue, identify black olives as MUC and green olives as non-MUC.[183] Exhibit A-24 shows that a certain value within Dcoop's product code depicts black olives while another value depicts green olives.[184] In the *Preliminary Results*, Commerce relied on these values within Dcoop's product code to sort MUC from non-MUC when determining its neutral facts available adjustment to Dcoop's reported costs.[185]

To address whether the information at issue was new factual information, a discussion of how olive color relates to the scope of this proceeding is necessary. The products covered by the order are "certain processed olives, usually referred to as 'ripe olives,'" and include "all colors of olives."[186] While it may appear that all olives are considered MUC, the scope of the order further states that excluded from the scope are "Specialty olives (including "Spanish-style," "Sicilian-style," and other similar olives) that have been processed by fermentation only, or by being cured in an alkaline solution for not longer than 12 hours and subsequently fermented."[187]

As such, olives that are processed by fermentation only are considered non-MUC. In response to Commerce's request that Dcoop explain whether the olives used as raw material inputs for MUC and non-MUC are interchangeable, Dcoop stated:

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[182] *See* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Results – Alimentary Group Dcoop S. Coop. And," dated concurrently with this memorandum (Dcoop Final Cost Memorandum) at 1.
[183] *See, e.g.*, Musco's Case Brief for Dcoop at 3-5; *see* Dcoop's Rebuttal Brief at 7-9.
[184] *See* Dcoop's Letter, "Section A Questionnaire Response: Ripe Olives from Spain," dated December 3, 2019 (Dcoop's AQR) at exhibit A-24.
[185] *See* Dcoop Prelim Cost Memorandum at 2.
[186] *See* PDM at 4.
[187] *Id*.

> Olives that are used to produce non-subject green olives and subject ripe olives are picked when the fruit has not reached maturity. Once the olives are picked, they are immediately placed in brine. The type of brine will determine if they can be processed into green or ripe olives. Once the brine is applied to the olives, they are not interchangeable.[188]

Dcoop further explained:

> for olives to be used in the production of green olives, the fruit is … placed in 10-ton tanks of brine from 9 to 10ºBé, where lactic fermentation takes place. Once fermentation is complete and the fruit takes on an appropriate color, the olives are placed on a hand selection line where they are sorted for quality.[189]

Regarding ripe olives, Dcoop stated:

> For olives to be used in the production of ripe olives, the fruit is stored in acidulated water containing acetic acid and other additives. After a brief period in brine, the olives are separated into different sizes and subject to one or more alkaline treatments, and additional processing.[190]

In its section A response, Dcoop described the merchandise under review produced and sold by Dcoop as Californian olives, or olives darkened by oxidation.[191] Dcoop referred to the International Olive Oil Council's "Standard Applying to Table Olives" where the IOC defines "Olives darkened by oxidation" as,

> Green olives or olives turning color preserved in brine, fermented or not, darkened by oxidation in an alkaline medium and preserved in hermetically sealed containers subjected to heat sterilisation; they shall be a uniform black colour.[192]

Further evidence shows that Dcoop consistently referred to black olives as oxidized olives (MUC) and green olives as fermented olives (non-MUC) in its submissions throughout this proceeding. For example, Dcoop noted in its discussion of how it developed the set of home-market sales reported in its home-market sales database that, **"**Table olive sales are divided into green (non-subject) and black olives (using product codes). The final sort equals the total quantity and value of black table olives in the Section B sales file."[193] In the DQR, Dcoop stated that its installations produce only table olives in three basic types: black olives (specifically, olives that are picked green and blackened by oxidation) (MUC), natural olives (mainly of the

[188] *See* Dcoop's Letter, "Response to Supplemental Questionnaire regarding the Cost of Production of First-tier Cooperatives: Ripe Olives from Spain," dated April 3, 2020 (Dcoop's SQR) at 2-3.
[189] *Id* at 3.
[190] *Id*.
[191] *See* Dcoop's AQR at 25.
[192] *Id* at 25-26.
[193] *See* Dcoop's Letter, "Section B and D Questionnaire Response: Ripe Olives from Spain," dated December 19, 2019 (Dcoop's BQR) at 6.

Kalamata variety), and green olives.[194] Therefore, because we find that Dcoop's reference to black olives as ripe olives (MUC) and green olives as non-MUC was on the record prior to its Pre-preliminary Comments and Dcoop's Request to Strike Musco's Comments, we find that these submissions did not contain new factual information as alleged by Musco.

We disagree with Musco that the transactions shown in exhibit B-3 contradict Dcoop's classification that black olives are MUC (oxidized) and green olives are non-MUC (fermented). Exhibit B-3 shows the reconciliation of Dcoop's sales of all table olive products to the total sales of MUC reported in its home-market database.[195] Musco asserts that because the tab name of one of the worksheets within the Excel version of exhibit B-3 refers to non-MUC and that particular worksheet contains both MUC and non-MUC transactions, that Dcoop's product code classification of MUC and non-MUC is therefore inconsistent and, as such, undermines Commerce's reliance on this information in the *Preliminary Results*.[196] We find Musco's argument unavailing. The transactions within the Excel worksheet in exhibit B-3 include both non-MUC and MUC sales.[197] The product codes of the MUC transactions, as defined by the product code key submitted in exhibit A-24, show that the products are for customers located outside of Spain.[198] While the name of the Excel tab refers to only certain transactions within the worksheet, when considered in the overall context of exhibit A-24 and other evidence on the record, we find that the name of one Excel tab does not outweigh the rest of record evidence, including the narrative descriptions and references made throughout Dcoop's submissions regarding classification of MUC and non-MUC.[199]

We also find that this case differs from *PTR from Taiwan* and *Pipe Fittings from China*. In both of those cases, Commerce found that the respondents provided new factual information at verification. Here, as explained above, we find that the information at issue was on the record prior to Dcoop's Pre-preliminary Comments and Request to Strike Musco's Comments. Therefore, Musco's reliance on these cases is off point.

In addition, we disagree with Musco that it was deprived of the opportunity to ask questions regarding Dcoop's reference to black olives as MUC (oxidized) and green olives as non-MUC (fermented). Dcoop relied on these references throughout this proceeding and Musco had an opportunity to comment on those submissions as evidenced by the comments Musco placed on the record.[200]

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[194] *See* Dcoop's Letter, "Dcoop's Questionnaire Response: Ripe Olives from Spain," dated December 19, 2019, (Dcoop's DQR) at 3; *see e.g.*, Dcoop's CR at 5 and Dcoop's SQR3 at 10 for additional references to black olives as MUC and green olives as non-MUC.
[195] *See* Dcoop's BQR.
[196] *See* Musco's Case Brief for Dcoop at 5.
[197] *See* Dcoop's BQR.
[198] *Id*. at Exhibit B-3.
[199] Moreover, we note that Musco did not raise this issue in its comments on Dcoop's section B submission (*see* Musco's Letter, "Deficiency Comments on Dcoop's Sections A-C Responses: Ripe Olives from Spain," dated January 16, 2020 (Musco's comments on Dcoop's Section ABCR)).
[200] *See e.g.*, Musco's Letters, "Petitioner's comments on Dcoop's Section ABCR", "Deficiency Comments on Dcoop Section D response: Ripe Olives from Spain," dated January 22, 2020 (Musco's comments on Dcoop's Section DR) and "Further Supplemental Deficiency Comments for Dcoop: Ripe Olives from Spain," dated July 2, 2020 (Musco's comments on Dcoop Further Supplemental Deficiencies).

Musco alleges that Commerce's neutral facts available adjustment to Dcoop's cost database contains significant flaws. We disagree. Musco's allegations stem from its argument that Dcoop's product code key and other record information failed to establish that Dcoop's reference to black olives as MUC and green olives as non-MUC. As discussed above, the record supports these classifications by Dcoop. Commerce in its partial facts available adjustment for the *Preliminary Results* used this information to determine the MUC sold in third countries that should have been included in Dcoop's cost database.

Musco asserts that Commerce erroneously excluded certain products from its analysis and that the record information fails to demonstrate whether those products include MUC or non-MUC.[201] We disagree. Based on the product codes and descriptions of these products as shown in exhibit SD2-2, the products are identified as other than black olives.[202] Therefore, we find it reasonable to continue to exclude these products from Commerce's adjustment.

Musco also alleges that because Commerce excluded those products to which Commerce could not assign a CONNUM, Commerce ignored a significant volume of Dcoop's production that calls into question the reliability of Commerce's analysis.[203] We disagree. Musco's allegation is based on the comparison of the total quantities from tabs "Black Olives Only" and "Weighted Average" of Attachment 1 of Commerce's Prelim Cost Memorandum.[204] However, as noted by Dcoop in its rebuttal, the products included in the "Weighted Average" tab are only those products assigned to a CONNUM that was reported by Dcoop in its home market and U.S. sales files.[205] The comparison of the total production quantities shown in the "Black Olives Only" tab to the "Sort" tab (the worksheet that sorts all of the products included in the "Black Olive Only' tab by CONNUM) shows all of the transactions included in the "Black Olives Only" tab are included in the Sort worksheet.[206] A comparison of the CONNUMs reflected in the "Sort" tab to the CONNUMs in the "Weighted-Average" tab directly corresponds to the comparison provided by Dcoop in its Rebuttal Brief.[207] Moreover, a comparison of the CONNUMs included in the "Sort" tab that were not included in the "Weighted-Average" tab to Dcoop's home market and U.S. sales files shows that these CONNUMs were not in Dcoop's sales files and were appropriately excluded from Commerce's adjustment for the *Preliminary Results*.[208]

Musco contends that section 776(b) of the Act justifies the application of AFA to Dcoop's cost database. We disagree. Sections 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that, if necessary information is not available on the record, or if an interested party: (1) withholds information requested by the Commerce; (2) fails to provide such information by the deadlines

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[201] *See* Musco's Case Brief for Dcoop at 9 (cites to a list of products in the Musco's Request to Strike Dcoop's Comment (12/4/20).
[202] *See* Dcoop's Letter, "Dcoop's Supplemental Section D Questionnaire Response: Ripe Olives from Spain," dated June 18, 2020, (Dcoop's SQR2).
[203] *See* Musco's Case Brief for Dcoop at 10.
[204] *Id*.
[205] *See* Dcoop's Rebuttal at 14-16. *See also*, Dcoop's Prelim Cost Memorandum at Attachment 1.
[206] *See* Dcoop's Prelim Cost Memorandum at Attachment 1.
[207] *Id*.
[208] *See* Dcoop's Prelim Cost Memorandum at Attachment 1. *See also* Dcoop's home market and U.S. sales databases "dcoophm03" and "dcoopus04," submitted under ACCESS barcodes 3988646-01 and 4010024-01, respectively.

for submission of the information, or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (3) significantly impedes a proceeding; or (4) provides such information but the information cannot be verified as provided in section 782(i) of the Act, Commerce shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination.

Section 782(c)(1) of the Act states that Commerce shall consider the ability of an interested party to provide information in the form and manner requested upon a prompt notification by that party that it is unable to submit the information in the form and manner required, and that party also provides a full explanation for the difficulty and suggests an alternative form in which the party is able to provide the information.

Section 782(d) of the Act states that if Commerce "determines that a response to a request for information ... does not comply with the request," it "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews ...".

Section 782(e) of the Act states further that Commerce shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that, if Commerce finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, Commerce may use an inference adverse to the interests of that party in selecting from among the facts otherwise available.[209] In so doing, Commerce is not required to determine, or make any adjustments to, estimated dumping margins based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.[210] In addition, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA) explains that Commerce may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[211] Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.[212] It is Commerce's practice to

[209] *See* 19 CFR 351.308(a); *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005); and *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002).
[210] *See* section 776(b)(1)(B) of the Act.
[211] *See* SAA, H.R. Doc. 103-316, Vol. 1 (1994) at 870; and *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007).
[212] *See, e.g., Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*); *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless-Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); and Preamble, 62 FR at 27340.

consider, in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation.[213]

Contrary to Musco's allegation, we do not find that the statutory requirements for the application of AFA are met in this instance. While Dcoop excluded merchandise sold in third country markets which had identical physical characteristics as the subject merchandise from the calculation of Dcoop's reported CONNUM-specific costs in its cost database, we find that the information regarding the costs of the excluded merchandise meets all of the criteria of section 782(e) of the Act.[214] The cost information of the excluded merchandise was reported in Dcoop's SQR2 which was submitted by the established deadline.[215] As evidenced by Commerce's adjustment in the *Preliminary Results*, the information was not so incomplete that it was not useable, nor did it prevent undue difficulties in adjusting Dcoop's costs.[216] Because the costs of the excluded merchandise were submitted by Dcoop in its SQR2, we find it unnecessary to address whether Dcoop failed to cooperate to the best of its ability.

We find the facts in the instant case are different from those found in the cases cited by Musco. In *PTR from Taiwan*, Commerce found that the scope of errors and omissions identified at verification were the result of inattentiveness and carelessness on behalf of the respondent and as a result the respondent's submission was incomplete and replete with errors and discrepancies.[217] Here, while the costs of the excluded products were omitted from Dcoop's cost database, the extensive, detailed cost data for the excluded products was submitted by Dcoop in its SQR2.[218] In this instance, we do not find that Dcoop's exclusion of the costs of the products sold in third countries from its cost database to be the result of inattentiveness or carelessness nor do we find Dcoop's submissions to be replete with errors or discrepancies as we did in *PTR from Taiwan* or *HWRP&T from Turkey*.[219] The instant case also differs from *Stainless Pressure Pipe from Thailand*, where the respondent failed to report certain home-market sales, in that Dcoop did not fail to report the costs of products sold in third countries that were identical to the products sold in the home or United States markets but rather erred in excluding those costs from its costs database.[220] We also find that consist with *Yama Ribbons and Bows*, Dcoop placed the relevant

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[213] *See, e.g., Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying IDM at 4, unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014).
[214] *See* Dcoop's SQR3 at 10; *see also* Dcoop's Letter, "Pre-Preliminary Comments and Dcoop's Response to Musco's Pre-preliminary: Ripe Olives from Spain," dated December 1, 2020 (Dcoop's Pre-preliminary Comments) at 2. *See* sections 782(e)(1), 782(e)(3), 782(e)(4), and 782(e)(5) of the Act, respectively. Consistent with 19 CFR 351.307(iv) and (v)(B), Commerce elected not to conduct verification in this administrative review. As such, Section 782(e)(2) of the Act is inapplicable here.
[215] *See* SQR2 at exhibit SD2-6.
[216] *See* Dcoop's Prelim Cost Memo at Attachment 1.
[217] *See* Accompanying IDM at Comment 1. Musco also refers to *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 81 FR 47355 (July 21, 2016) (*HWRP&T from Turkey*) and accompanying IDM at Comment 1. Similar to *PTR from Taiwan*, Commerce found numerous discrepancies including significant unresolved errors with a respondent's home-market sales.
[218] *See* Dcoop's SQR2 at exhibit SD2-6.
[219] *See* Accompanying IDM at Comment 1 for both cases.
[220] *See* Accompanying IDM at Comment 4.

information to adjust its costs to include the costs of the products sold in third countries on the record of this proceeding.[221]

We also disagree with Musco that a partial AFA adjustment is warranted to "true up" Dcoop's costs.[222] Musco alleges that such an adjustment is necessary because Dcoop failed to account for a large percentage of production and failed to support the classification of MUC versus non-MUC.[223] As discussed above, we find Musco's allegations regarding missing production quantities and the classification of MUC and non-MUC are unjustified. Therefore, we find that a partial AFA adjustment is not warranted here.

Comment 10: Application of Adverse Facts Available to Dcoop's General and Administrative Expenses

Dcoop's Arguments[224]

- Commerce should revise the adjustment to Dcoop's G&A expense ratio made in the *Preliminary Results* because Commerce did not have a basis to apply AFA as it was reasonable for Dcoop to report its G&A expense ratio on a divisional basis in light of its unique organization structure, which is highly segmented.
- If Commerce continues to apply facts available, or even adverse inferences, the adjustment applied by Commerce is impermissibly punitive and bears no relation to Dcoop's business reality; Commerce should at minimum revise its AFA adjustment to a more reasonable rate.
- Dcoop acted to the best of its ability and has demonstrated that the departure from Commerce's normal practice of calculating the G&A expense ratio on a company-wide basis is appropriate here, considering Dcoop's unique organizational structure.
- Commerce acknowledged that "there is no bright-line definition in the Act of what constitutes G&A expenses or precisely how to calculate a G&A expense rate."[225]
- Commerce has found that it may depart from its practice if a respondent "provides case-specific facts that clearly support a departure" from normal practice.[226]
- The CIT confirmed this authority, finding that Commerce may depart from its normal company-wide G&A expense ratio methodology when a company's structure warrants such departure.[227]
- Based on the rationale for calculating a G&A expense ratio on a company-wide basis, it logically follows that if G&A expenses do not relate to a respondent's general operations as a whole, but are strictly isolated to the operations of a specific division, it is reasonable for Commerce to deviate from its normal practice and calculate a G&A expense ratio on a divisional basis.

[221] *See* Dcoop's SQR2 at Exhibit S2D-6.
[222] *See* Musco's Case Brief for Dcoop at 24-25.
[223] *Id*.
[224] *See* Dcoop's Case Brief at 3-13 dated at February 1, 2021.
[225] *Id.* at 4 (citing *Acetone from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 85 FR 8252 (February 13, 2020) (*Acetone from the Republic of Korea*), and accompanying IDM at Comment 5).
[226] *Id.* (citing *Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India*, 71 FR 45012 (Aug. 8, 2006), and accompanying IDM at Comment 3).
[227] *Id.* at 5 (citing *Ass'n of Am. Sch. Paper Suppliers v. United States*, 791 F. Supp. 2d 1292, 1299 (CIT 2011).

- This logic is particularly strong if the divisional G&A ratio is higher than a reasonable calculation of a company-wide G&A ratio, confirming that a divisional calculation would not constitute a "result-oriented" approach to the benefit of the respondent company.
- Dcoop is established under the Andalusian Cooperative Law, which authorizes Dcoop to organize autonomous "sections" or "divisions" for the pursuit of specific product lines that operate separately from each other, producing and marketing a disparate array of agricultural products and services. [228]
- Dcoop by law must return all the revenues from each division's sales to the members of that division, after deducting all expenses, including G&A expenses, incurred by Dcoop in its production and sales activities.[229]
- This requirement leads to the segregation of G&A activities at the section/division level. Dcoop's table Olives section, for example, maintains its own functional units for control, finance and administration, human resources, sales, and purchases-the types of functions that traditionally fall under G&A expenses.[230]
- This strict organizational and accounting segregation is required because individual divisions do not want to be burdened with administrative expenses that are chargeable directly to different divisions.[231]
- Due to this strict segregation of operations, Dcoop reported its G&A expenses attributable to MUC at the divisional level, as maintained in its books and records.[232]
- In response to Commerce's request to provide a G&A expense ratio on a company-wide basis, Dcoop provided a reasonable company-wide G&A expense ratio calculation.[233]
- The divisional G&A expense ratio that Dcoop had reported for the Table Olives division was higher than its company-wide G&A expense ratio, meaning that the divisional calculation was averse to Dcoop.[234]
- Dcoop further revised its G&A expense ratio reporting in its November 2, 2020 response to consider labor and other factory expenses that would have been incurred and to provide a more complete estimate of the company-wide cost of manufacturing, *i.e.*, Dcoop started with the total revenues earned by the company and subtracted the G&A expenses.[235]
- Dcoop does not have any "revenues," but rather, total revenues ultimately equate to total costs. All costs can be categorized as either G&A expenses, selling expenses, or cost of manufacturing.
- Deducting G&A expenses from total revenue is a reasonable method of approximating the cost of manufacturing, even if some amount of selling expenses might be included in that amount.

[228] *Id.* at Exhibit A-10 (Andalusian Cooperative Laws, Article 12).
[229] *See* Dcoop's SQR, at 1.
[230] *See* Dcoop's AQR at 7 (citing Dcoop's AQR at A-6 to A-7).
[231] *See* Dcoop's SQR3 at 13-14.
[232] *See* Dcoop's DQR, at D-24 to D-25 and Exhibit D-11.
[233] *See* Dcoop's SQR3 at 13-14 and Exhibit SD3-12.
[234] *Id.* at Exhibit SD3-12.
[235] *See* Dcoop's SQR4 at 1-2 and Exhibit SD4-2.

- In applying facts available, Commerce may only apply an adverse inference where Commerce determines that an interested party has not acted to the best of its ability to comply with Commerce's information requests.[236]
- Commerce must "make two showings" before it concludes that a respondent "has not cooperated to the best of its ability."[237]
- Commerce has generally found it appropriate to apply AFA when an interested party has engaged in a deliberate attempt to impede Commerce's investigation, and when the interested party's actions had a substantial effect on Commerce's ability to calculate an antidumping margin."[238]
- Commerce does not have a basis to apply adverse inferences because Dcoop reported its G&A expense ratio to the best of its ability in light of its normal books and records as properly maintained under applicable law, and Dcoop put forth in its maximum efforts to examine and obtain the requested information from its records.
- In its questionnaire responses, Dcoop clearly explained that it was reporting its G&A expense ratio on a divisional basis, and when providing company-wide G&A, explained the basis upon which it was doing so.
- Where Commerce applies AFA, Commerce may only choose and apply an AFA adjustment using record information that replaces information that is unavailable on the record.[239]
- The court has held that an AFA rate must be "reasonable and have some basis in reality," and that such rate may not be "punitive, aberrational, or uncorroborated."[240]
- The bases for numerator (total G&A for ten divisions) and the denominator (total COM only for the table olives division), relied on by Commerce in the *Preliminary Results*, are fundamentally mismatched, and do not fill a gap in the record with alternative information corresponding to that gap.
- Commerce's, AFA methodology intentionally replaces the missing information with information that bears no relation to the missing information.
- Commerce's punitive application of AFA contravenes the purpose and boundaries of AFA as Commerce's G&A expense ratio bears no relationship to any level of G&A expenses that can reasonably be calculated from the existing record.
- The substantial difference between Commerce's punitive G&A expense ratio and all of the other ratios on the record itself indicates that Commerce's application of AFA is not grounded in reality.

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[236] *See* section 776(b)(1) of the Act.
[237] *See Nippon Steel at 1382*.
[238] Dcoop's Case Brief at 10 (citing *Lightweight Thermal Paper from Germany: Final Results of Antidumping Duty Administrative Review*; 2010-2011, 78 FR 23220 (April 18, 2013), and accompanying IDM at Comment 1).
[239] *See Dillinger France S.A. v. United States*, 350 F. Supp. 3d 1349, 1364 (CIT 2018)
(finding that the Department improperly applied AFA because the Department did not simply use AFA to fill in information but instead "replaced known, unchallenged record information . . . with adverse facts available" and "did not explain what authority permitted it to replace known information with adverse facts available"). *See also Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316, 1327 (CIT 2018)
(emphasis added).
[240] *See F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032, 1034 (Fed. Cir. 2000).

- To apply an AFA adjustment that comports with Commerce's obligation to reflect business reality, Commerce should adopt a fairer and more accurate alternative for the G&A expense ratio than that used in the *Preliminary Results*.
- The most appropriate alternative would be to use the G&A expense ratio calculated at the divisional level as reported by Dcoop.
- Alternatively, Commerce should apply the company-wide G&A expense rate calculated using the cost of materials only as the denominator, as reported by Dcoop as this method is a defensible "adverse facts" calculation because it greatly understates the company-wide denominator.

Musco's Arguments[241]

- Dcoop's failure to provide a company-wide G&A expense ratio calculation, despite repeated requests from Commerce, justifies Commerce's continued use of AFA with regard to Dcoop's G&A expense ratio.
- Commerce has a longstanding policy of calculating a company's G&A expense ratio at the company-wide level; the instructions in Commerce's initial Section D questionnaire made this clear.[242]
- Because the record does not contain a calculation at the company level that uses COGS in the denominator, as explicitly requested by Commerce from the outset of this review, Commerce properly resorted to AFA.
- Dcoop claims that Commerce's specific adjustment was too punitive, but the record provides no basis on which to make such determination because the true G&A expense rate is not on the record.
- Dcoop never showed or even argued that the requested information was not in its control, that Commerce's request was too burdensome, or that the calculation was too difficult to perform.
- Dcoop's claim that it "acted to the best of its ability and reported its G&A expenses in a reasonable manner that comports with Commerce's practice,"[243] is demonstrably false. Commerce was justified in using AFA for Dcoop's G&A expense ratio after rejecting Dcoop's proposed alternatives.
- The segment specific information Dcoop provided was unreliable, as it contained significant, unexplained differences from Dcoop's original G&A expense ratio calculation provided for the Table Olives segment.[244]
- Specifically, Dcoop reduced its G&A expense ratio in its initial calculation and its subsequent calculation; as the numerator was dropping, the denominator was increasing.[245]
- Furthermore, the original reporting of the G&A expense ratio is distortive, as it is applied to Dcoop's reported COM, and a review of the 2018 reconciliation shows that the COM is far less than what Dcoop based its G&A expense ratio calculation on.[246]

[241] Musco's Rebuttal Brief for Dcoop at 2-10.
[242] *See* Dcoop's DQR at D-24.
[243] Musco's Rebuttal Brief for Dcoop at 3 (citing Dcoop's Case Brief at 3).
[244] *See* Dcoop's SQR4 at Exhibit SD4-2.
[245] *See* Musco's Letter, "Pre-Preliminary Comments for Dcoop," dated November 18, 2020, at 8.
[246] *Id*. at 9.

- Dcoop's own citations to the legal requirements for application of AFA make clear that Commerce was fully justified in applying AFA to Dcoop's G&A.[247]
  - The first prong is met; the instructions were clear and Dcoop has not argued that it did not understand them.
  - The second prong is also met; Dcoop has not claimed that it was unable to report the requested information; it simply decided not to do so.
- Dcoop provided no explanation for its failure to provide the information in the manner in which it was requested other than that its own belief, not approved by Commerce, that an alternative approach was warranted.

Commerce's Position: We agree with Musco that Commerce should continue to apply AFA to Dcoop's G&A expense ratio because Dcoop failed to act to the best of its ability in responding to Commerce's repeated requests for a company-wide G&A expense ratio consistent with Commerce's practice. We also agree with Dcoop that the AFA G&A expense rate we used in the *Preliminary Results* was mismatched and that a different AFA G&A expense rate is appropriate in light of the facts on the record. Therefore, for the final results of this review, we revised the calculation of the AFA G&A expense ratio to reflect the highest company-wide G&A expense rate using information on the record of this proceeding. [248]

Section 776(a) of the Act provides that if necessary information is not on the record or if an interested party: (A) withholds information that has been requested by Commerce; (B) fails to provide such information by the deadlines for such information or in the form and manner requested; (C) significantly impedes a proceeding under the antidumping statute; or, (D) provides information which cannot be verified, Commerce shall, subject to sections 782(d) and (e), use the facts otherwise available in reaching the applicable determination.

Further, section 776(b) of the Act provides that, if Commerce finds an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, Commerce may use an inference adverse to the interests of the party in selecting the facts otherwise available. 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 investigation, a previous administrative review, or other information placed on the record.

Because there is no bright-line definition in the Act of what constitutes G&A expenses or precisely how to calculate a G&A expense rate, Commerce has developed a consistent and predictable approach to calculating and allocating G&A expenses.[249] This methodology is to calculate the ratio based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide COGS, and not on a divisional, or

[247] Musco's Rebuttal Brief for Dcoop at 4 (citing Dcoop's Case Brief at 9).
[248] *See* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Results – Alimentary Group Dcoop S. Coop. And," dated concurrently with this IDM(Dcoop Final Cost Memorandum).
[249] *See, e.g., Certain Steel Concrete Reinforcing Bars from Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination to Revoke in Part*, 70 FR 67665 (November 8, 2005) and accompanying IDM at Comment 14. See also, *Notice of Final Results of the Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part*, 70 FR 71464 (November 29, 2005), and accompanying IDM at Comment 5.

product-specific basis.[250] Commerce has adopted this practice to avoid distortions that may result if, for the company's own particular business reasons, greater amounts of company-wide general expenses are allocated disproportionately among divisions in its internal record keeping.[251] In addition to being consistent and predictable, we believe this methodology is a reasonable application of the statute that discourages "results-oriented" approaches to calculating G&A expense. [252]

In Commerce's original section D questionnaire, Commerce instructed Dcoop to compute a G&A expense ratio based on Dcoop's company-wide G&A expenses divided by Dcoop's company-wide COGS.[253] Dcoop did not comply with Commerce's request. Instead, even though its financial statements reflect company-wide costs, Dcoop reported a divisional G&A expense ratio based on the G&A expenses and COM of the its table olives division stating that a divisional G&A expense ratio was more appropriate to Dcoop's organizational structure than a company-wide G&A expense ratio.[254]

Commerce, in its 3rd SDQ, instructed Dcoop to revise its G&A expense ratio based on the G&A expenses and COGS reflected in Dcoop's company-wide audited financial statements as instructed in Commerce's original questionnaire.[255] In response, Dcoop reiterated that because its divisions are more akin to separate companies than typical intra-company departments, a divisional G&A expense ratio calculation is the more appropriate manner to calculate its G&A expense rate.[256] However, to comply with Commerce's request, Dcoop reported an "alternative" G&A expense ratio based on the company-wide G&A expenses divided by the company-wide COM.[257] As support for the calculation, Dcoop provided a worksheet showing each line of Dcoop's profit and loss statement (P&L) and the amounts of each line item allocated to each division's G&A expenses. The sum of all the divisions' G&A expenses was relied on by Dcoop as the numerator of the company-wide G&A expense ratio.[258] The sum of all divisions' COM was relied on as the denominator of the G&A expense ratio.[259] However, Dcoop failed to provide any supporting explanations or documentation of how it determined the amounts included in the divisional G&A expense calculations or the amounts allocated to the divisional COM.[260] Moreover, the sum of the amounts allocated to G&A expenses and company-wide COM by P&L line item did not add up to the total values shown in Dcoop's P&L.[261] Dcoop also failed to explain why, contrary to Commerce's questionnaire instructions, it relied on COM

[250] *Id.*
[251] *Id.*
[252] *See Silicon Metal From Norway: Affirmative Final Determination of Sales at Less Than Fair Value, Final Determination of No Sales, and Final Negative Determination of Critical Circumstances*, 83 FR 9829, (March 8, 2018) and accompanying IDM at Comment at 3.
[253] *See* Commerce's Letter, Section D questionnaire, dated October 29, 2019.
[254] *See* Dcoop's DQR at D-24 and Exhibit D-11.
[255] *See* Commerce's Letter, 3rd Section D Supplemental Questionnaire, dated August 7, 2020 (3rd SDQ) at question 10.
[256] *See* Dcoop's SQR3 at 13.
[257] *Id.* at Exhibit SD3-12.
[258] *Id*.
[259] *Id*.
[260] *Id* at question 10 and Exhibit SD3-12.
[261] *Id.* at Exhibit SD3-12.

rather than COGS in the denominator of the "alternative" G&A expense ratio.[262]

Commerce asked Dcoop in Commerce's 4th SDQ to provide additional information about its "alternative" G&A expense ratio because it was not clear that all company-wide costs had been appropriately captured in either the G&A expenses or company-wide COM.[263] In response, Dcoop stated that the company discovered that it had not used the company-wide COM as the denominator for the previously reported "alternative" company-wide G&A expense ratio as Dcoop previously reported.[264] Instead, the G&A expense ratio reported in its SQR3 was calculated using the G&A expense ratio based on the company-wide G&A expenses divided by the company-wide material purchases.[265] Dcoop did not provide a revised G&A expense ratio based on company-wide COM or COGS as requested in the 3rd SDQ, which could have potentially corrected the deficiency in its prior response.[266] Instead, Dcoop revised the calculation of the denominator of the ratio to reflect the total company-wide revenue less the G&A expense to derive a COGS equivalent.[267] Dcoop stated that this was the appropriate way to calculate a COGS equivalent because Dcoop is a cooperative and it returns all revenues to its members.[268] However, Dcoop's assertion that all revenue is returned to its members is contradicted by information within its financial statements.[269] Therefore, Dcoop's assertion that total company-wide revenue less G&A expenses results in a COGS equivalent is off-point. In support for the revised denominator, Dcoop also provided a worksheet that showed a breakout by P&L line item for each division, those expenses categorized as G&A expenses and the "rest of costs."[270] In its narrative response, Dcoop stated that the "rest of costs" represented COM and selling expenses and that this breakout of expenses was based on accounting departmental codes.[271] Dcoop also provided copies of downloaded information from its accounting system that show direct and allocated G&A expenses, only for the olive division.[272]

In the *Preliminary Results*, we relied on AFA for Dcoop's G&A expense rate because Dcoop failed to provide a company-wide G&A expense ratio.[273] We calculated the AFA G&A expense ratio using Dcoop's reported company-wide G&A expenses as the numerator of the ratio and the claimed COM of Dcoop's olive division as the denominator of the ratio.[274]

We agree with Musco that FA is warranted in this case.[275] Commerce requested, in its original DQ, 3rd SDQ and 4th SDQ, that Dcoop report a company-wide G&A expense ratio in a manner consistent with Commerce's normal practice (*i.e.*, company-wide G&A expenses divided by

[262] *See* Dcoop's SQR3 at 13and Exhibit SD3-12.
[263] *See* Commerce's Letter, 4th Section D Supplemental Questionnaire, dated October 21, 2020 (4th SDQ) at question 2.
[264] *See* Dcoop's SQR4 at 1-2.
[265] *Id.*
[266] *Id.*
[267] *See* Dcoop's SQR4 at Exhibit SD4-2.
[268] *See* Dcoop's SQR4 at 1.
[269] *See* Dcoop's ADR at Appendix II.
[270] *See* Dcoop's SQR4 at Exhibit SD4-2.
[271] *See* Dcoop's SQR4 at 2-3.
[272] *See* Dcoop's SQR4 at exhibit SD4-1.
[273] *See* PDM at 16.
[274] *See* Dcoop Preliminary Cost Memorandum.
[275] *See* section 776(a)(A) of the Act.

company-wide COGS).[276] Dcoop failed to provide a G&A expense ratio consistent with Commerce's requests and agency practice.[277] Dcoop argues that the departure from Commerce's normal practice of calculating a G&A expense on a company-wide basis is warranted in this case because of its organizational structure. As support, Dcoop cites to *Acetone from the Republic of Korea,* stating that Commerce has acknowledged that "there is no bright-line definition in the Act of what constitutes G&A expenses or precisely how to calculate G&A expense rate."[278] Dcoop argues that, similar to the respondent in *Acetone from the Republic of Korea*, that because each of its division operates fundamentally different businesses in the ordinary course of business and the divisions manage their own accounts, a division-specific G&A expense ratio is more appropriate than a company-wide G&A expense ratio.[279] Dcoop in its SQR4 provided a download of information from its accounting system that it claims shows that the G&A expenses assigned to the olive division are direct G&A expenses.[280] However, examination of that evidence shows that certain G&A expenses are allocated to the olive division rather than directly incurred by the olive division as alleged by Dcoop.[281] Furthermore, the evidence of allocated G&A expenses for the olive division, contrary to Dcoop's claims, calls into question whether the G&A expenses for Dcoop's other divisions are also allocated.[282] As can be seen from this exhibit, significant amounts of the company-wide G&A expenses are assigned to divisions other than the olive division and Dcoop never provided any details or explanation on how such divisional allocations were made. [283] As such, we are unable to determine whether greater amounts of company-wide G&A expenses are allocated disproportionately to Dcoop's other divisions. As we have articulated in past cases, G&A expenses by their nature are indirect expenses that relate to the company as a whole, and are not directly related to a process or a product.[284] Accordingly, we disagree with Dcoop that the facts of this case are so unique and different from every other case handled by Commerce, that we should deviate from our normal company-wide approach and rely on their internal divisional G&A cost allocations.

With respect to *Acetone from the Republic of Korea,* Commerce disagreed with the respondent in that case that a division-specific G&A expense ratio was warranted because the respondent's G&A expense ratio calculation failed to include those expenses that were shown as general expenses in the company's company-wide financial statements.[285] The facts here are similar to those in *Acetone from the Republic of Korea* in that it appears that Dcoop incurs expenses on behalf of the divisions that are general in nature as evidenced by the record information in this proceeding.[286]

As noted above, Dcoop did not provide a company-wide G&A expense ratio consistent with

[276] *See* Commerce's Letter, Section D questionnaire, dated October 29, 2019 (DQ) at III.D, 3rd SDQ at question 10 and 4th SDQ at question 2.
[277] See Dcoop's DQR at Exhibit D-11, SQR3 at Exhibit SD3-12 and SQR4 at Exhibit SD4-2.
[278] *See* Dcoop's Case Brief at 4 (citing *Acetone from the Republic of Korea* and accompanying IDM at Comment 5).
[279] *Id*.
[280] *See* Dcoop's SQR4 at exhibit SD4-1.
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from the Republic of Korea*, 77 FR 75988 (December 26, 2012) and accompanying IDM at Comment 7.
[285] *See Acetone from the Republic of Korea* and accompanying IDM at Comment 5.
[286] *See* Dcoop's SQR4 at exhibit SD4-1.

Commerce's requests in accordance with its practice. Dcoop thereby failed to provide this information by the deadlines and in the manner requested by Commerce. We agree with Musco that the application of AFA is warranted in this case. We find that Dcoop has not acted to the best of its ability because despite Commerce's repeated requests, Dcoop failed to provide the company-wide G&A expense rates. Dcoop also failed to provide the information necessary for Commerce to calculate an accurate company-wide G&A expense rate.[287] As Musco noted, Dcoop never stated that the requested information was not in its control, that Commerce's request was too burdensome, or that the calculation was too difficult to perform nor did Dcoop seek guidance from Commerce on how to properly calculate the G&A expense rate in a manner consistent with Commerce's practice.

To support its argument that AFA is not warranted, Dcoop cited to *Nippon Steel Corp. v. United States*, stating that Commerce "must make two showings" before it concludes that a respondent "has not cooperated to the best of its ability."[288] However, the two showings (prongs) have been met. First, Commerce's questionnaire requests that a respondent calculate their G&A expense rate based on company-wide G&A expenses and COGS, which Dcoop failed to provide. Given the language of Commerce's questionnaires, Dcoop knew or should have known that the requested information was required.[289] Second, after identifying the deficiency in Dcoop's original response, Commerce requested that Dcoop revise the numerator and the denominator of its G&A expense rate to reflect company-wide G&A expenses and COGS and Dcoop failed to provide the requested information.[290] After Commerce again issued a fourth supplemental questionnaire questioning the accuracy and completeness of Dcoop's response to the third supplemental questionnaire, Dcoop acknowledged the G&A expense ratio reported in its SQR3 was calculated using the G&A expense ratio based on the company-wide G&A expenses divided by the company-wide material purchases.[291] However, rather than correcting this error, Dcoop's SQR 4 failed to report information that Commerce requested and instead Dcoop proposed yet another alternative calculation methodology by revising the calculation of the denominator of the ratio to reflect the total company-wide revenue less the G&A expense to derive a COGS equivalent. Rather than providing a full and complete response to basic information that Commerce requests in virtually every antidumping proceeding, and despite multiple supplemental questionnaires, Dcoop kept providing different information from the information that Commerce requested. The court also stated in *Nippon Steel Corp. v. United States* that, "The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent." Dcoop was responsible for providing the requested information, but Dcoop disregarded Commerce's repeated requests to report the G&A expense ratio based on company-wide G&A expenses divided by company-wide COGS consistent with Commerce's practice. Because Dcoop failed to report the requested information, we continue to find that AFA is warranted pursuant to section 776(b) of the Act.

Regarding Dcoop's reliance on *Dillinger France S.A. v. United States* to assert that Commerce

[287] *See* DQR at D-24; *see also* SQR3 at 13; and SQR4 question 2 at 2.
[288] *See* Dcoop's Case Brief at 9.
[289] *See* DQ at D-15.
[290] *See* DQR at D-24 and Exhibit D-11; *see also* SQR3 at 13; and SQR4 question 2 at 2.
[291] *Id.*

may only apply an AFA adjustment that replaces information that is unavailable on the record, we note that the court found in that case that Commerce improperly applied AFA because it did not only fill in the missing information, but that it replaced known information.[292] That is not the case here. Dcoop failed to provide a company-wide G&A expense ratio as well as the information necessary to calculate an accurate company-wide G&A expense ratio consistent with Commerce's practice. Therefore, we continue to apply AFA to Dcoop's reported G&A expense ratio.

We agree with Dcoop that Commerce's G&A expense ratio calculated for the *Preliminary Results* was mismatched in that the numerator of the ratio attempted to represent company-wide G&A expenses while the denominator represented the olive division's COM rather than the company-wide COM.[293] Therefore, for the final results of this review, we have revised the calculation of the AFA G&A expense ratio to reflect the highest company-wide G&A expense ratio using information available on the record.[294]

Comment 11: Early Payment and Quantity Discounts

Dcoop's Arguments

- For the final results of this review, Commerce should correct the ministerial error it made in the *Preliminary Results* by adding to, instead of deducting from, home-market gross unit prices, the early payment discounts, and quantity discounts.[295]
    - The values reported in the corresponding and respective variables, EARLPYH and QTYDISH, are negative values which should be added to result in the reduction in the home-market gross unit price.

Musco did not comment on this issue.

Commerce's Position: Commerce agrees with Dcoop. For the final results of this review, Commerce added the negative values reported in the early payment discounts and quantity discounts variables to the home-market gross unit prices to effectuate a reduction in prices.[296]

Comment 12: U.S. Freight and U.S. Indirect Selling Expenses

Musco's Arguments

- For reported CEP sales, Commerce should adjust U.S. freight and U.S. indirect selling expenses for a portion of the POR for which Dcoop's former U.S. affiliate's, Acorsa USA's (Acorsa's) data was reported (*i.e.*, January 26, 2018 – February 28, 2019, including a period of September 1, 2018 – February 28, 2019, during which Acorsa was defunct).

[292] *See Dillinger France S.A. v. United States*, 350 F. Supp. 3d 1349, 1364 (CIT 2018).
[293] *See* Dcoop Preliminary Cost Memorandum.
[294] *See* Dcoop Final Cost Memorandum.
[295] *See* Dcoop's Case Brief at 14.
[296] *See* Memorandum, "Administrative Review of the Antidumping Duty Order on Ripe Olives from Spain: Final Analysis Memorandum for Alimentary Group Dcoop S.Coop. And; 2018-2019," dated concurrently with this memorandum (Dcoop Final Analysis Memorandum) for further details.

- Dcoop's methodology for reporting U.S. freight expenses for Acorsa suffers from four fundamental deficiencies.[297]
  - The methodology is overly broad. Dcoop has taken trial balance account totals and allocated them to shipments made during disparate periods - this falls short of Commerce's expectations under 19 CFR 351.401(g)(2) for how freight information should be reported.
  - Acorsa's trial balance data was largely based on accruals - Commerce requires the use of actual expenses unless the use of accruals can be justified.
  - Acorsa's trial balance data were not audited, and BCF made certain adjustments to Acorsa's raw trial balance data when transferring the Acorsa's results into its financial accounting system upon transition.
  - Dcoop's methodology results in artificially lower expenses, as evident when its results are compared to those from the reliable methodology it used for sales made through Dcoop's succeeding U.S. importer, BCF, during the final portion of the POR, March 1, 2019 – July 31, 2019).
- For freight reported during the January 26, 2018 – August 31, 2018, period (when Acorsa existed as a company) Commerce should use, as neutral facts available, the average values based on BCF's experience reported for the March 1, 2019 – July 31, 2019, period.[298]
- For freight reported during the transition period of September 1, 2018 – February 28, 2019 (when Acorsa was defunct) Commerce should use, as partial AFA, the maximum values based on BCF's experience reported for the March 1, 2019 – July 31, 2019, period.[299]
- Dcoop's methodology for reporting U.S. indirect selling expenses similarly suffers from three of four deficiencies identified above: it is based largely on accruals, on trial balance data that was not audited, and it results in artificially lower expenses.[300]
- In addition, there is no justification for using Acorsa's data as the basis for reporting U.S. indirect selling expense during the transition period when Acorsa did not exist.
  - BCF owned Acorsa during this period. Relying on the Acorsa data ignores the fact that the U.S. indirect selling expense ratio should be for BCF as a whole - during the transition period, BCF had its own books and records, its own operations and selling expenses.[301]
- For U.S. indirect selling expenses reported during the transition period of September 1, 2018 – February 28, 2019 (when Acorsa was defunct) to reflect BCF's entire operations, Commerce should use, as neutral facts available, Dcoop's reported rate for calendar year 2018, which is based on audited financial statements and reflects year-end adjustments.[302]

[297] *See* Musco's Case Brief for Dcoop at 25-29 and Attachment 4.
[298] *Id*. at 28 and Attachment 4.
[299] *Id*. at 29 and Attachment 4.
[300] *Id*. at 29.
[301] *Id*.
[302] *Id*. at 30.

Dcoop's Arguments

- Commerce should not adjust Dcoop's reported U.S. freight and U.S. indirect selling expenses.
  - Contrary to Musco's contention, Dcoop's reporting methodology is not "overly broad."
    - Following BCF's acquisition and Acorsa's quick shut down of operations, BCF had to continue using Acorsa's accounting system to operate the business - all revenues and expenses continued to be posted in the Acorsa accounting system until March 1, 2019.[303]
    - The existing data do not have links or ties that would allow Dcoop to assign expenses in a more specific manner.
      1. Longstanding precedent prevents Commerce from requiring allocations if the existing books and records do not have the sufficient information to make them.[304]
      2. In CEP situations, Commerce regularly allows expenses to be allocated to the U.S. entity's sales to the unaffiliated customer, when most of the expenses are associated with incoming shipments, which cannot be traced to outgoing sales.[305]
  - Musco misunderstands the meaning of "accruals."
    - In its responses, Dcoop used the term "accrual" simply to depict a basic accounting methodology that is distinguished from a "cash" accounting methodology. Under the former, actual revenue or expense are booked upon issuance/receipt of invoices, and not upon payment of cash.[306]
    - Commerce should accept Dcoop's "accrual" methodology, as it accurately matches costs to the corresponding sales. In fact, Commerce prefers "accrual" to "cash" accounting, as it more accurately assigns costs temporally to their corresponding actions or events.[307]
  - Whether Acorsa's trail balance was audited is not material to Commerce's decisions.[308]
    - Acorsa's accounting records were never audited, even in years prior to BCF's acquisition.
    - Certain adjustments made to Acorsa's raw data upon transfer to BCF's accounting system are small in nature.
  - Dcoop's reporting did not result in artificially lower expenses.[309]

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[303] *See* Dcoop's Rebuttal Brief at 27-28.
[304] *Id*. at 28 (citing *Certain Softwood Lumber Products from Canada: Final Results of the Antidumping Duty Administrative Review; 2003–2004*, 70 FR 73437 (December 12, 2005) (*Lumber from Canada AR 03-04*), and accompanying IDM at Comment 15; and *Ferrosilicon from the Russian Federation: Final Determination of Sales at Not Less than Fair Value*, 79 FR 44393 (July 31, 2014) (*Ferrosilicon from Russia LTFV)* and accompanying IDM at Comment 15).
[305] *Id*. (citing *Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part*, 72 FR 58809 (October 17, 2007), and accompanying IDM at Comment 7).
[306] *Id*. at 28-29.
[307] *Id*. at 29 (citing *Notice of Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy*, 61 FR 30326, 30358 (June 14, 1996) (*Pasta from Italy LTFV*).
[308] *Id*.
[309] *Id*. at 30.

        - Musco only points to an alleged quantitative difference between the expenses of a predecessor (Acorsa) and those of a successor (BCF) but has not provided any evidence as to how Acorsa's reported expenses may be inaccurate or deficient.
    - Because freight expenses were booked in Acorsa's SAP system during the September 2017 – February 2018 period, Dcoop's reporting of freight expenses based on Acorsa's data accurately reflects Commerce's normal practice of relying on expenses as they are reflected in the company's books and records.[310]
    - There are clear methodological problems in Musco's analysis that claims to show significant differences in the freight charges paid by Acorsa and BCF, respectively.[311]
        - Musco's calculations show a column for "total movement expenses" that does not match the sum of constituent freight costs.
        - It is not true that Acorsa's freight amounts are systematically lower than those of BCF. A review of Musco's own calculations shows that most of the Acorsa and BCF freights costs are similar - in fact, some Acorsa average freight costs are higher than those of BCF.
        - It is reasonable to expect that averages for international freight and brokerage expenses would differ solely based on the mix of destination warehouses.
    - Musco offers no basis for Commerce to apply partial AFA for U.S. freight expenses reported during the transition period. Musco simply states its disagreement with Dcoop's reporting methodology, but completely ignores, however, the legal basis for the application of partial AFA.[312]
    - Similar to its reporting of U.S. freight expenses, Dcoop reported U.S. indirect selling expenses in accordance with the books and records in which these expenses were booked.[313]
        - Dcoop explained in the record that all of the importation and sales operations for its product continued to be posted through the Acorsa accounting books and records through March 1, 2019.
        - Dcoop also demonstrated that BCF maintained all of its revenues and expenses for the Acorsa business separately and transferred the totality of these expenses to its own records through journal entries. Thus, the expenses booked in the Acorsa system are the expenses incurred by BCF during the transition period.

Commerce's Position: We disagree with Musco and do not find that any adjustment to Dcoop's reported U.S. freight and U.S. indirect selling expenses is warranted. There is no basis in finding that Dcoop's methodology for reporting the expenses in question for Acorsa, for the January 26, 2018 – February 28, 2019, period, suffers from any deficiency or were not reported accurately or appropriately. Dcoop explained on the record that the expenses in question for Acorsa and BCF were reported based on the time period in which all revenues and expenses were recognized in the respective entity's SAP system.[314] Notwithstanding Acorsa's time of cessation as a going business concern at the end of August 2018, the revenues and expenses continued to be booked

[310] *Id*. at 31.
[311] *Id*. at 31-32 (citing Musco's Case Brief for Dcoop at Attachment 4).
[312] *Id*. at 32.
[313] *Id*. at 33.
[314] *See* Dcoop's Letter, "Ripe Olives from Spain: Supplemental Sections A-C Questionnaire Response," dated March 18, 2020 (Dcoop's A-C SQR) at 13, 22-23.

in Acorsa's financial accounts through the end of February 2019.[315] Specifically, all expenses associated with the importation of Dcoop's products and the selling of such products in the United States continued to be recognized in Acorsa books and records through March 1, 2019.[316] Thus, for CEP sales made during the January 26, 2018 – February 28, 2019, period (including the September 1, 2018 – February 28, 2019, transition period), Acorsa's data was used to report the expenses in question, while for the March 1, 2019 – July 31, 2019, period, BCF's data was used.[317] We agree with Dcoop that its reporting of U.S. freight and U.S. indirect selling expenses during the January 26, 2018 – February 28, 2019, period, based on Acorsa's data, accurately reflects Commerce's normal practice, consistent with the statutory guidance, of relying on cost and expenses as they are reflected in the company's books and records.[318]

We disagree with Musco that Dcoop's methodology for reporting Acorsa's U.S. freight expenses was overly broad or, otherwise, inaccurate. Musco has not demonstrated that the allocation of Acorsa's freight expenses could have been performed on a more specific basis or explained why the allocation methodology undertaken by Dcoop causes inaccuracies or distortions. Dcoop explained on the record that, given certain limitations in Acorsa's accounting system, the expenses information available from it was at the summary trial balance level.[319] Further, Dcoop explained on the record that it is not able to match reported U.S. CEP sales to unaffiliated customers with the entry information on incoming shipments from Spain.[320] Thus, consistent with our practice, Dcoop's allocation of freight expenses over the volume of shipments made during the relevant periods was reasonable in light of the information available in its books and records, *i.e.*, the most specific method available.[321] Our practice does not disallow similar allocations when the freight expenses that are associated with shipments from an exporting country cannot be traced or linked to the subsequent U.S. sales to unaffiliated customer.[322]

Musco erroneously alleges that Dcoop's methodology for reporting Acorsa's U.S. freight expenses and U.S. indirect selling expenses is fundamentally deficient because the underlying trial balance figures are based on accruals and, thus, do not represent actual expenses. It is well known that the accruals are, in fact, actual expenses - under an accrual accounting method an expense is recognized in a company's books and records at the time the expense is incurred (*e.g.*, upon receipt of an invoice from a vendor or a receipt of a product/service), rather than at the time

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[315] *Id*., at 13; *see, also*, Dcoop's Letter, "Ripe Olives from Spain: Supplemental Sections A-C Questionnaire Response," dated June 22, 2020 (Dcoop's A-C 2nd SQR), at 4-5 and Exhibits S-3 and S-4.
[316] *Id*.
[317] *See* Dcoop's A-C SQR at 13, 22-23, and Dcoop's A-C 2nd SQR at 7.
[318] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Mexico*, 73 FR 35649 (June 24, 2008), and accompanying IDM at Comment 10; *see, also*, section 773(f)(1)(A) of the Act (instructing that costs must be based on a respondent's normal books and records that reasonably reflect the costs associated with the production and sale of the merchandise under consideration).
[319] *See, e.g.*, Dcoop's A-C SQR at 17-18, 20-21.
[320] *Id*., at 3-4, 21.
[321] *See Lumber from Canada AR 03-04* and accompanying IDM at Comment 15 ("Record evidence indicates that Buchanan reported freight expenses in the most specific method that was feasible based on its accounting records, in accordance with 19 CFR 351.401(g)(3).").
[322] *See Ferrosilicon from Russia LTFV* and accompanying IDM at Comment 15 ("We find that RFAI's movement of ferrosilicon, where discrete lot numbers do not exist from production to U.S. sale by the CEP entity (and, thus, do not link) required RFAI to use an allocation methodology to calculate the U.S. movement expenses indicated above. We accepted this allocation methodology because RFAI reported in as specific a manner as it could.").

at which a payment for the purchased good/service is remitted (under a cash accounting method). To this end, Dcoop's methodology more accurately matches expenses to an event that is responsible for generating the expenses (*i.e.*, sales), and that, in fact, Commerce prefers an accrual accounting method for reporting expenses, as the costs are temporally linked to their corresponding actions or events, thus resulting in a more representative reporting.[323]

Musco does not explain why the unaudited nature of Acorsa's financial accounts renders Dcoop's methodology for reporting U.S. freight and U.S. indirect selling expenses deficient. Although independently audited data may offer some additional degree of reliability, it is not uncommon for Commerce to rely on information that the respondent reports using unaudited data.[324] The respondent and its legal counsel certify that such information is complete and accurate, pursuant to 19 CFR 351.303(g), and the information is subject to verification, pursuant to 19 CFR 351.307 of Commerce's regulations. Further, Musco also observes that BCF made certain reclassifications to Acorsa's raw trial balance data for certain periods upon the transfer of Acorsa's data to BCF's financial accounting system, following the transition. However, the record shows that the total value of adjustment relating to Acorsa's total operating expenses is small and, thus, any impact on constituent U.S. freight and U.S. indirect selling expenses, appear to be insignificant.[325] Importantly, Dcoop explained that the reclassifications in question were strictly made to address differences between BCF's and Acorsa's accounting systems with respect to how certain expense items are treated (*i.e.*, COGS vs. selling, G&A expenses).[326] Lastly, Commerce did not require Dcoop to identify whether any of BCF's reclassifications specifically affected Dcoop's reporting of Acorsa's U.S. freight and U.S. indirect selling expenses, and make a refinement to its reporting as a result.

We disagree with Musco that Dcoop's methodology for reporting Acorsa's U.S. freight expenses results in artificially lower expenses. Musco makes comparisons of freight expenses reported based on Acorsa's accounts with those reported based on BCF's accounts. These comparisons do not, however, take into account the three distinct periods of time for which Acorsa's and BCF's respective expenses were reported, fail to consider the different methodologies that Dcoop used to report the expenses, and ignore the fact that the varying mixes of destination U.S. warehouses can materially affect the calculations for a number of significant freight expenses, such as ocean freight. Notwithstanding, even if Commerce were to ignore all these flaws in Musco's comparisons, Musco's own comparisons show that the average per-unit factors reported for Acorsa's freight expenses are not categorically and/or systematically lower than those

[323] *See Pasta from Italy LTFV*.
[324] *See Solvay Solexis S.p.A. v. United States*, 33 C.I.T. 1179 (2009) (finding that Commerce could use Italian exporter's unaudited financial statements when calculating its G&A ratio in antidumping duty review, where the statements were prepared for Italian tax purposes and complied with Italian GAAP); *see, also, Certain Steel Concrete Reinforcing Bars From Turkey: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 67 FR 66110 (October 30, 2002), and accompanying IDM at Comment 4 (Commerce accepted unaudited statements that were prepared in the normal course of business and not created specifically for a dumping proceeding).
[325] *See* Dcoop's Letter, "Ripe Olives from Spain: Supplemental Sections A-C Questionnaire Response," dated August 4, 2020, at 4-5 and Exhibits 5-A, 5-B, and 5-C.
[326] *Id*. at 5.

reported for BCF - in fact, certain of Acorsa's values are higher than those for BCF for certain freight expenses.[327]

We find that Dcoop's reporting of Acorsa's U.S. freight and U.S. indirect selling expenses has not been shown to be deficient and, thus, there is no necessary information that is missing from the record or cannon be verified, as provided in Section 776(a) of the Act. Accordingly, we find that an application of facts otherwise available is not warranted with respect to the expenses in question.

Comment 13: Recission of the Administrative Review of Dcoop

BCF's Arguments

- Commerce should rescind the administrative review of Dcoop.
  - The administrative review was predicated on comments filed by a party with no independent standing.[328]
    - Musco's comments on U.S. Customs and Border Protection (CBP) data, requesting an individual examination of Dcoop in this review, were filed by a party that had not, at the time, entered an appearance independent of the one filed by the Coalition for Fair Trade in Ripe Olives (the Coalition), and did not reflect the view of the Coalition.
    - Musco's comments on the CBP data should be stricken from the record. For this reason, and due to absence of POR entries in the CBP data, the review of Dcoop should be terminated.
  - The request for administrative review was terminally flawed due to a conflict of interest.
    - The comments filed on behalf of Musco were directly contrary to the interests of BCF. The counsel for Musco had confidential BCF information and took actions directly against BCF's interests, both while BCF was a client and afterwards. Only on January 3, 2020, did counsel for Musco file an amended entry of appearance (EOA) for the first time on behalf of Musco itself. [329]
    - In *Makita*, based in part on the Model Rules of Professional Conduct, the Court found the conflict of interest for an attorney who appeared on behalf of Makita Corp., before the U.S. International Trade Commission in a Section 337 investigation, and later appeared on behalf of the petitioner before Commerce in an AD investigation. Here, the conflict of interest is explicit and involves the same administrative review.[330]
    - The comments on the CBP data filed on behalf of Musco were adverse to BCF and were prohibited by the conflict of interest that is applicable to representations before Commerce, as gleaned from the DC Bar Rules of Professional Conduct (DC-RPC).[331]

[327] *See* Musco's Case Brief for Dcoop at Attachment 4.
[328] *See* BCF's Case Brief at 2-3.
[329] *Id*. at 3.
[330] *Id*. at 4 (citing *Makita Corp. v. United States*, 17 CIT 240, 251, 819 F. Supp. 1099, 1108 (1993)).
[331] *Id*. at 4-6 (citing DC-RPC Rule 1.7(a), 1.7(b), and 1.9).

        - The DC-RPC are also clear that in the case of conflict between multiple clients (*i.e.*, Musco and BCF/the Coalition), the legal counsel should withdraw from representation. Instead, in this review, Musco's legal counsel has continued to participate in this review and took actions adverse to BCF's interests.[332]
        - But for the continued adverse actions of Musco and its legal counsel, Commerce would never have selected DCoop as a respondent and would have accepted the withdrawal of the request for review as filed by BCF and the Coalition on December 31, 2019.[333]
    - The request for a review was timely withdrawn by the requesting entity, the Coalition and, consistent with legal precedent, the review should be rescinded.
        - In *Coalition for Fair Trade in Garlic*, Commerce on remand found that a domestic association's review request was void *ab initio* because a majority of the individuals who comprised the domestic association did not credibly establish that they qualified as domestic producers at the time of the request and, thus, the domestic association lacked standing as an interested party under section 771(9)(E) of the Act.[334]
        - Notably, in *Coalition for Fair Trade in Garlic*, both Commerce and the Court recognized that the association in question existed on an *ad hoc* basis solely for the purpose of filing the trade action. Governing documents or bylaws of the association in question were not a factor taken into consideration.[335]
        - Similar to the fact pattern in the underlying review that was litigated in *Coalition for Fair Trade in Garlic*, the request for review was made only on behalf of the Coalition. Because BCF is a majority member of and controls the Coalition, a timely withdrawal of the request for review was made by the Coalition.[336]

Musco's Arguments

- There is nothing new in BCF's case brief that would warrant Commerce to overturn its well-considered previous determination to continue to conduct this review with respect to Dcoop.[337]
- The review of Dcoop was not predicated on comments filed by a party with no standing.[338]
    - Whether Musco had filed an EOA in its own name, independent of the one filed by the Coalition, has no bearing on Musco's right to file comments as an interested party in this review.

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[332] *Id*. at 6-7.
[333] *Id*. at 7.
[334] *Id*. at 7-8 (citing *Coalition for Fair Trade in Garlic v. United States*, 463 F. Supp. 3d 1380, 1382 (CIT 2020) (*Coalition for Fair Trade in Garlic*)). Section 771(9)(E) of the Act requires a majority of individual members of a trade or business association to have standing as interested parties within the meaning of section 771(9)(C) of the Act.
[335] *Id*. at 8.
[336] *Id*. at 8-9.
[337] *See* Musco's Rebuttal Brief for BCF at 2-3 (citing *Preliminary Results* and accompanying PDM at 5; and Commerce's Letter dated February 5, 2020).
[338] *Id*. at 3-4.

- The Coalition's EOA did in fact specifically identify as interested parties both BCF and Musco, the two producer members of the Coalition. As such, the EOA covered both companies individually and as members of the Coalition.
- BCF has not shown that Commerce's respondent selection in this review was dependent on Musco's CBP data comments. The Coalition had timely requested a review of three companies, and Commerce decided to individually examine all three.

- The request for review was not terminally flawed due to a conflict of interest.[339]
  - BCF submitted no evidence in support of its claim that the legal counsel for Musco had a conflict of interest.
  - BCF has not shown that the legal counsel for Musco relied on confidential BCF information in making any submission in this review. The submissions made by Musco's legal counsel have been based entirely on public documents, Musco's own data, or information released by Commerce under APO.
  - There was no legal adversity at the time of Musco's CBP data comments. At that time, the Coalition, including BCF, was seeking a review of Dcoop. Musco and its legal counsel could not predict at that time that BCF would ultimately and subsequently seek to withdraw the review request for Dcoop.[340]
  - The case of *Makita* cited by BCF is not to the contrary. The *Makita* case involved a lawyer who switched sides, whereas this case involves a client that has "switched sides." These are very different situations, under the law, ethics rules, and principles of equity.
  - The situation at hand falls squarely within the parameters of DC-RPC. No one could have reasonably foreseen at the outset of representation of domestic interested parties that Dcoop would become a part owner of BCF, or that BCF would elect to reverse course concerning the review of Dcoop.[341]
  - Notwithstanding what the CBP data showed, Commerce acted well within its discretion in deciding to review all three companies for which a review was requested by the Coalition. If any company had been found to have had no shipments during the POR, as suggested by the CBP data for Dcoop, Commerce would have rescinded the review of it in accordance with its normal practice.
- The request for review was not timely withdrawn by the requesting entity.
  - Following a partial acquisition of BCF by Dcoop, although BCF remained a member of the Coalition and, as part of the Coalition, joined in the timely request for review, BCF later sought to withdraw the review request, despite Musco's objections.[342]
  - Commerce rightly rejected to BCF's withdrawal request. Each of the Coalition's producer members was unquestionably entitled to request a review of foreign producers under the statute and Commerce's regulations.[343] The Coalition's review request effectively was a request by each of its constituent members, and Commerce's regulations did not require the Coalition, as an interested party itself, to

[339] *Id*. at 4-7.
[340] *Id*. at 5 (citing DC-RPC Rule 1.7(b)).
[341] *Id*. at 6 (citing DC-RPC Rule 1.7(d)).
[342] *Id*. at 8.
[343] *Id*. (citing section 751(a) of the Act and 19 CFR 351.213).

separately designate each domestic processor as an individual requestor separate and apart from the Coalition.[344]

- Nothing in Commerce's regulations grants one member of a coalition the authority to unilaterally withdraw a review request that is made by the group jointly.[345]
- BCF's continuing opposition to the review of its new Spanish owner has the potential to undermine the US-based ripe olive grower and processor industry.[346]
- In stark contrast to the circumstances present in *Coalition for Fair Trade in Garlic*, in this review all parties concede that all of the producer members of the Coalition, at the time of the review request, were interested parties within the meaning of section 771(9)(C) of the Act, and thus that the Coalition had standing to request this review under section 771(9)(G) of the Act. For this reason, Commerce found *Coalition for Fair Trade in Garlic* to be inapposite.[347]
- With respect to BCF's argument that it is the majority member of the Coalition, Commerce already found that BCF has provided no direct support (*e.g.*, the Coalition's bylaws or governing rules) for the notion that the largest individual member is entitled to speak on behalf of or to represent the Coalition, thus making its withdrawal of the Coalition's review request in force.[348]
- Likewise, there is no evidence that supports BCF's claim that it alone "controls the Coalition," much less that BCF had the right to unilaterally withdraw the Coalition's review request over the objections of its fellow Coalition member, Musco.[349]

Commerce's Position: Commerce disagrees with BCF and continues to find in these final results that the rescission of an administrative review with respect to Dcoop is not warranted. Commerce disagrees with BCF that a review of Dcoop was predicated on Musco's CBP data comments. In the *Initiation Notice*, Commerce stated that, in the event Commerce limits the number of respondents for individual examination, Commerce intends to select respondents based on CBP data for U.S. imports during the POR.[350] Commerce typically places CBP data on the record regardless of whether it ultimately determines to limit the number of respondents it intends to examine individually. In this review, Commerce determined to examine all three companies for which the Coalition requested an administrative review. In other words, in consideration that the review in question is the first administrative review of the order, Commerce determined not to limit the number of respondents for individual examination, given the Coalition's fairly narrow request for review of only three companies, with Dcoop being the only company which Commerce did not examine individually during the original investigation. If the information developed during the course of the review confirmed what Commerce's CBP data originally inferred, in accordance with its practice, Commerce would have made a finding of no shipments during the POR concerning Dcoop.[351] Nonetheless, we agree with Musco that,

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[344] *Id*.
[345] *Id*. at 8-9.
[346] *Id*. at 9.
[347] *Id*. a 10 (citing *Preliminary Results* and accompanying PDM at 5).
[348] *Id*. at 11 (citing Commerce's February 5, 2020, letter).
[349] *Id*.
[350] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 FR 53411 (October 7, 2019) (*Initiation Notice*).
[351] *See, e.g.*, *Certain Oil Country Tubular Goods from Turkey: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 64107, 64108 (December 13, 2018)

although the EOA was made on behalf of the Coalition, it nevertheless identified Musco as a domestic processor of ripe olives, thus qualifying Musco as an interested party in this review under section 771(9)(C) of the Act, permitting it to comment on the CBP data in its own right.

Commerce cannot determine here that the Coalition's request for an administrative review was withdrawn by the requesting entity (*i.e.*, BCF's December 31, 2019, letter does not constitute a withdrawal of the Coalition's review request). The regulations at 19 CFR 351.213(b)(1) state that a domestic interested party may request that Commerce conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order. In this case, the request for an administrative review of Dcoop was made on behalf of the coalition representative of U.S. processors of ripe olives, a domestic interested party as defined by section 771(9)(G) of the Act.[352] The domestic interested party's EOA in this review was made on behalf of the Coalition and specifically identified BCF and Musco as U.S. domestic processors comprising the Coalition.[353] BCF and Musco, each a domestic interested party as defined by section 771(9)(C) of the Act was entitled, individually, to request an administrative review of a foreign producer or exporter. Here, however, the review request was made on behalf of the Coalition and, therefore, it reflects the collective and joint intent of individual members of the Coalition. Accordingly, the withdrawal of the Coalition's request for a review cannot be effectuated unless individual members of the Coalition collectively agree to it. In this review, although BCF alleges that it withdrew the Coalition's review request, the record is clear that Musco opposed BCF's request. Thus, there is no collective agreement between members of the Coalition concerning the withdrawal of the administrative review of Dcoop.

BCF renews its arguments that it withdrew the Coalition's request for a review of Dcoop claiming its ability to do so on the basis of being the largest member of the Coalition and having control over the Coalition. However, there is nothing in the statute, or Commerce's regulations or practice that allows one member of a coalition the authority to unilaterally withdraw a review request that is made jointly by members of a coalition, as a group, particularly over express and explicit objections of other member(s). Further, Commerce previously rejected BCF's assertions, finding no evidence that an individual member is entitled to speak on behalf of or to represent the Coalition:

> …neither {BCF} nor Musco has demonstrated that individually one of the Coalition's member companies is authorized to speak on behalf of or to represent the Coalition. {BCF} claims that it has such authority by virtue of being the largest domestic ripe olive processor in the Coalition. However, even if Commerce were to agree that {BCF} is, in fact, the largest domestic ripe olive processor in the Coalition, {BCF} has provided no direct support (*e.g.*, the Coalition's bylaws or governing rules) for the notion that the largest individual member is entitled to speak on behalf of or to represent the Coalition. Without such a showing, {BCF's} letter cannot constitute a withdrawal of the Coalition's review request.

[352] *See* the Coalition's Letter, "Ripe Olives from Spain; 1st Administrative Review; Petitioner Request for Antidumping Duty Administrative Review," dated September 3, 2019.
[353] *See* the Coalition's EOA dated October 10, 2019.

> …neither {counsel for Musco} nor {counsel for BCF} has proffered clear evidence regarding whether the Coalition continues to function as an entity and, if so, whether individually one of the Coalition's member companies has the authority to make decisions on behalf of the Coalition.[354]

BCF does not raise any new arguments or facts in its case brief that warrant a reversal of our original decision finding no grounds to rescind an administrative review of Dcoop.

We disagree with BCF that the facts in this review parallel those in the review subject to the litigation in *Coalition for Fair Trade in Garlic*. The only similarity is that there, it was found that the request for review was filed on behalf of a domestic association only, while here the request for review was filed on behalf of a coalition only. However, as Commerce noted in the *Preliminary Results*, the issue in *Coalition for Fair Trade in Garlic* was that the association was found to lack standing to request an administrative review as an interested party under section 771(9)(E) of the Act and, thus, the association's review request was found to be void *ab initio*.[355] Here, Commerce explicitly determined that the Coalition, as an interested party under section 771(9)(G) of the Act, had standing to request an administrative review.[356] Thus, the Coalition's September 3, 2019, request for an administrative review of Dcoop was valid. Notwithstanding, BCF argues that in *Coalition for Fair Trade in Garlic*, the governing documents or bylaws of the association in question were, nevertheless, not a factor taken into the consideration. However, the issue in *Coalition for Fair Trade in Garlic* was not which constituent member of association represents or has the authority to make decisions on behalf of the association, as BCF argues here with respect such entitlements concerning the Coalition. In *Coalition for Fair Trade in Garlic*, the underlying issue central to the issue of whether the association in question had standing to request a review was an examination of whether a majority of the individuals who comprised the association in question credibly established that they qualified as domestic producers at the time of the association's request.[357] Thus, Commerce continues to find that *Coalition for Fair Trade in Garlic* is inapposite to the facts at hand and does not provide any support for BCF's request to rescind the administrative review with respect to Dcoop.

Finally, to the extent that BCF alleges that Musco's counsel may have had a conflict of interest and may have violated DC Bar Rules of Professional Conduct, this is not a matter for Commerce to resolve because Commerce is not an appropriate tribunal for resolving allegations of professional misconduct by DC Bar members. Accordingly, we refer BCF and its counsel to Rule 8.3 & Comment 3 (Reporting Professional Misconduct) of DC Bar Rules of Professional Conduct for further guidance.

[354] *See* Commerce's Letter dated February 5, 2020.
[355] *See Preliminary Results* and accompanying PDM at 5 (citing *Coalition for Fair Trade in Garlic*, 463 F. Supp. 3d at 1382).
[356] *See* Memorandum, "Antidumping Duty Administrative Review of Ripe Olives from Spain; 2018-19: Petitioner's Standing to Request Administrative Review," dated February 5, 2020.
[357] *Preliminary Results* and accompanying PDM at 5.

VI. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of this administrative review and the final weighted-average dumping margins in the *Federal Register*.

☒	☐
_____	_____
Agree	Disagree

X 

Signed by: RYAN MAJERUS

Ryan Majerus
Deputy Assistant Secretary
for Policy and Negotiations