C-469-818
Administrative Review
POR: 11/28/2017 – 12/31/2018
Public Document
E&C/OI: Team

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: Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Ripe Olives from Spain; 2017-2018

I. SUMMARY

The Department of Commerce (Commerce) has completed its administrative review of the *CVD Order*[1] on ripe olives from Spain covering the period of review (POR) November 28, 2017, through December 31, 2018. After analyzing the comments raised by interested parties in their case and rebuttal briefs, we made changes to the calculations from the *Preliminary Results*.[2] Below is the complete list of issues in this review for which we received comments from interested parties:

Comment 1: Whether Commerce Properly Interpreted and Applied the Standard Established by Section 771B(1) of the Act for Determining "Substantially Dependent" Demand
Comment 2: Whether the EU CAP Pillar I – BPS is *De Jure* Specific
Comment 3: Whether Commerce Used an Incorrect Sales Denominator To Calculate Agro Sevilla's Subsidy Rate
Comment 4: Whether Commerce Should Exclude Re-Sales and Purchases of Molinos Not Used to Produce Subject Merchandise from Camacho's Subsidy Rate Calculation
Comment 5: Whether the PROSOL Program is Specific

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[1] *See Ripe Olives from Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 FR 37469 (August 1, 2018) (*CVD Order*).
[2] *See Ripe Olives from Spain: Preliminary Results of Countervailing Duty Administrative Review; 2017-2018*, 85 FR 84294 (December 28, 2020) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

Comment 6: Whether the ICO – National Investment Program is Specific
Comment 7: Whether the Andalusia Energy Agency for Sustainable Energy Development for Andalusia Scheme is Specific
Comment 8: Whether the European Investment Fund Loans Program is Specific
Comment 9: Whether Commerce Should Allocate Olive Subsidy Benefits to Sales of Olives Only
Comment 10: Whether Commerce Should Adjust its Calculation for Yield Loss
Comment 11: Whether Commerce Should Revise its Calculation for the Two Coop Respondents to Eliminate Double Counting of Grower Quantities
Comment 12: Whether Commerce Should Apply AFA to Agro Sevilla's First-Tier Coops and Member Growers
Comment 13: Whether Commerce Should Correct Ministerial Errors for Agro Sevilla
Comment 14: Whether Commerce Should Correct Ministerial Errors for Camacho
Comment 15: Whether Commerce Should Apply AFA to Camacho's Growers
Comment 16: Whether Commerce Should Apply AFA to Dcoop's First-Tier Coops and Member Growers
Comment 17: Whether Commerce Should Find that All Dcoop's Growers Received Greening Benefits
Comment 18: Whether Commerce Should Use Dcoop's Calendar Year 2018 Grower Data or, in the Alternative, Should Correct Ministerial Errors

II. BACKGROUND

On December 28, 2020, Commerce published the *Preliminary Results* for this administrative review.[3] On January 22, 2021, we issued post-preliminary supplemental questionnaires to the Government of Spain (GOS) and Alimentary Group Dcoop S.Coop. And. (Dcoop) requesting information on the programs for which we deferred our analysis in the *Preliminary Results*.[4] On January 27, 2021, and February 1, 2021, we received requests for a hearing from Bell-Carter Foods, LLC (Bell-Carter), a petitioner and member of the Coalition for Fair Trade in Ripe Olives, and Dcoop, respectively.[5] We received timely supplemental questionnaire responses from the GOS on February 11, 2021[6] and Dcoop from February 9 through 26, 2021.[7] On April

[3] *Id.*
[4] *See* Commerce's Letter, "First Administrative Review of the Countervailing Duty Order on Ripe Olives from Spain: Fifth Supplemental Questionnaire to the Government of Spain," dated January 22, 2021; *see also* Commerce's Letter, "First Administrative Review of Ripe Olives from Spain Order: Supplemental Questionnaire," dated January 22, 2021.
[5] *See* Bell-Carter's Letter, "Ripe Olives from Spain: Request for Hearing," dated January 27, 2021; *see also* Dcoop's Letter, "Ripe Olives from Spain: Request for a Public Hearing," dated February 1, 2021.
[6] *See* GOS' Letter, "Response of Government of Spain to the Fifth Supplemental Questionnaire (Administrative Review) issued by the Department of Commerce on January 22, 2021," dated February 11, 2021.
[7] *See* Dcoop's Letter, "Ripe Olives from Spain: Post-Preliminary Supplemental Questionnaire Response (Part 1)," dated February 9, 2021; *see also* Dcoop's Letter, "Ripe Olives from Spain: Post-Preliminary Supplemental Questionnaire Response (Part 2)," dated February 19, 2021; Dcoop's Letter, "Ripe Olives from Spain: Post-Preliminary Supplemental Questionnaire Response (Part 3)," dated February 26, 2021.

22, 2021, we issued a post-preliminary analysis memorandum.[8] Subsequently, on May 7 and May 12, 2021, Commerce received timely case briefs from the European Investment Fund (EIF); ASEMESA, Agro Sevilla Aceitunas S.Coop.And. (Agro Sevilla), and Angel Camacho Alimentación, S.L. (Camacho); the GOS, Musco Family Olive Company (Musco), a petitioner and member of the Coalition of Fair Trade in Olives; and Dcoop.[9] On May 13 and 14, 2021, Bell-Carter Foods, LLC and Dcoop, respectively, withdrew their requests for a hearing.[10] On May 14, 2021, we received rebuttal briefs from Dcoop, ASEMESA, Agro Sevilla and Camacho, and Musco.[11]

III. SCOPE OF THE *ORDER*

The products covered by the *Order* 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, multi-layered 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 review if performed in Spain.

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[8] *See* Memorandum, "Decision Memorandum for the Post-Preliminary Analysis of the 2017-2018 Countervailing Duty Administrative Review of Ripe Olives from Spain," dated April 22, 2021 (Post-Preliminary Analysis).
[9] *See* EIF's Letter, "2019 Administrative Review of the CVD Order on Ripe Olives from Spain-Case brief," dated May 7, 2021 (EIF Case Brief); ASEMESA, Agro Sevilla, and Camacho's Letter, "Case Brief of ASEMESA, Agro Sevilla Aceitunas S.Coop.And. ('Agro Sevilla'), and Angel Camacho Alimentacion, S.L. ('Camacho') Ripe Olives from Spain (C-469-818)," dated May 7, 2021 (Agro Sevilla/Camacho Case Brief); GOS' Letter, "Case of the Government of Spain in Relation to the Post-Preliminary Determination, issued by the Department of Commerce on April 22, 2021, Regarding the First CVD Administrative Review of Ripe Olives from Spain," dated May 7, 2021 (GOS' Case Brief); Musco's Letter, "Ripe Olives from Spain; 1st Administrative Review-Case Brief of Musco," dated May 7, 2021 (Musco's Case Brief); Dcoop's Letter, "Ripe Olives from Spain: Resubmission of Case Brief," dated May 12, 2021 (Dcoop's Case Brief).
[10] *See* Bell-Carter's Letter, "Ripe Olives from Spain: Withdrawal of Hearing Request," dated May 13, 2021; *see also* Dcoop's Letter, "Ripe Olives from Spain: Dcoop's Withdrawal of Hearing Request," dated May 14, 2021.
[11] *See* Dcoop's Letter, "Ripe Lives from Spain: Rebuttal Brief," dated May 14, 2021 (Dcoop's Rebuttal Brief); ASEMESA, Agro Sevilla, and Camacho's Letter, "Rebuttal Brief of ASEMESA, Agro Sevilla and Camacho—Ripe Olives from Spain (C-469-818)," dated May 14, 2021 (Agro Sevilla/Camacho Rebuttal Brief); Musco's Letter, "Ripe Olives from Spain: 1st Administrative Review-Rebuttal Brief of Musco," dated May 14, 2021 (Musco's Rebuttal Brief).

Excluded from the scope are: (1) specialty olives[12] (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)).

The merchandise subject to this review 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 US Customs purposes, they do not define the scope of the review; rather, the written description of the subject merchandise is dispositive.

IV. SUBSIDIES VALUATION

A. Allocation Period

We made no changes to, and interested parties raised no issues in their case briefs regarding, the allocation period or the allocation methodology used in the *Preliminary Results*. For a description of the allocation period and the methodology used for these final results, *see* the *Preliminary Results*.[13]

[12] 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.

[13] *See Preliminary Results* PDM at 9.

B. Attribution of Subsidies

For the purposes of these final results, we made changes since the *Preliminary Results* with regard to the attribution of subsidies received by Agro Sevilla and Dcoop. Subsidies received by these two second-tier cooperatives should be attributed to their consolidated sales, in accordance with 19 CFR 351.525(b)(6)(iii). For a description of this correction, *see* Comment 3.

In response to arguments from parties, we also adjusted the methodology used to calculate the weighted-average per kilogram benefit for certain subsidies provided to growers and first-tier cooperatives for Agro Sevilla and Dcoop. Accordingly, for all programs that provided benefits to growers and first cooperatives, we split our calculation table into two parts to calculate a weighted-average benefit received by growers and a separate weighted-average benefit received by first-tier cooperatives. We then added these two weighted-average per kilogram benefits to get a combined weighted-average benefit which we then multiplied by the respondent's purchases of raw olives for ripe olives to calculate the total subsidy benefit applicable to the respondent. For a description of this correction, *see* Comment 11.

C. Denominators

In accordance with 19 CFR 351.525(b)(1)-(6), Commerce considers the basis for a respondent's receipt of benefits under each program when considering the appropriate denominator for purposes of measuring the countervailable subsidy, *e.g.*, the respondent's total sales, sales of subject merchandise, or export sales. For these final results, we made changes since the *Preliminary Results* with regard to the denominators used for purposes of measuring the countervailable subsidy. In the *Preliminary Results*, Dcoop was unable to provide 2018 calendar year data from its first-tier cooperatives and growers because these suppliers maintain their records on a harvest year basis. Therefore, for the *Preliminary Results* we relied on harvest year sales data as denominators when calculating Dcoop's countervailable subsidy rates. However, Dcoop has now provided 2018 calendar year sales for its first-tier suppliers and growers in response to a post-preliminary supplemental questionnaire. As a result, we have recalculated Dcoop's subsidy rates using 2018 calendar year denominators for the final results. The denominators we used to calculate the countervailable subsidy rates for the various subsidy programs in this review are explained in further detail in the "Discussion of the Issues," section below and in the final calculation memoranda, dated concurrently with these final results.

D. Application of Section 771B of the Act

Section 771B of the Tariff Act of 1930, as amended (the Act), addresses the calculation of countervailable subsidies on certain processed agricultural products:

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

Interested parties submitted information and arguments on the record of this administrative review regarding the applicability of section 771B of the Act. In the *Preliminary Results*, Commerce analyzed the applicability of section 771B of the Act and found that both prongs were satisfied.[14] During the review, ASEMESA, Agro Sevilla, Camacho and Musco provided new factual information related to whether section 771B of the Act applies. As a result, we have re-evaluated whether the substantial dependence prong of section 771B has been satisfied in light of the new information. We continue to find that both criteria have been met. Therefore, we deemed countervailable subsidies provided to olive growers and first-tier suppliers as provided to processors of ripe olives, in accordance with section 771B of the Act. Interested parties submitted comments in their case and rebuttal briefs regarding whether the "substantially dependent" prong under section 771B(1) has been satisfied, which we have addressed in Comment 1 below. For the final results, we are continuing to find both prongs of section 771B are satisfied. Therefore, we are continuing to attribute subsidies received by the olive growers and first-tier suppliers to our mandatory respondents, the olive processors.

V. LOAN INTEREST RATE BENCHMARKS AND DISCOUNT RATES

Interested parties submitted no comments regarding the benchmarks and interest rates used in the *Preliminary Results.* For the final results we made no changes to the interest rate benchmarks and discount rates used in the *Preliminary Results* and the Post-Preliminary Analysis.

VI. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

A. Legal Standard

Sections 776(a)(1) and (2) of the Act provide that Commerce shall, subject to section 782(d) of the Act, apply "facts otherwise available" if necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by Commerce, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly

[14] *See Preliminary Results* PDM at 14-17.

impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Section 776(b) of the Act further provides that Commerce may use an adverse inference in selecting from among the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. Further, 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. When selecting an adverse facts available (AFA) rate from among the possible sources of information, Commerce's practice is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide {Commerce} with complete and accurate information in a timely manner."[15] Commerce's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[16]

In *Nippon Steel*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that, while the statute does not provide an express definition of the "failure to act to the best of its ability" standard, the ordinary meaning of "best" is "one's maximum effort."[17] Thus, according to the Federal Circuit, the statutory mandate that a respondent act to the "best of its ability" requires the respondent to do the maximum it is able to do. The Federal Circuit indicated that inadequate responses to an agency's inquiries would suffice to find that a respondent did not act to the best of its ability. While the Federal Circuit noted that the "best of its ability" standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.[18] The "best of its ability" standard recognizes that mistakes sometimes occur; however, it requires a respondent to, among other things, "have familiarity with all of the records it maintains," and "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of" its ability to do so.[19] Moreover, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.[20]

Section 776(c) of the Act provides that, when Commerce relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.[21] Secondary information is defined as "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or

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[15] *See, e.g.*, *Drill Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011); *see also Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8932 (February 23, 1998).
[16] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. I (1994) (SAA) at 870.
[17] *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*).
[18] *Id.* at 1382.
[19] *Id.*
[20] *Id.* at 1382-83; *see also Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997).
[21] *See* 19 CFR 351.308(d).

any previous review under section 751 concerning the subject merchandise."[22] It is Commerce's practice to consider information to be corroborated if it has probative value. In analyzing whether information has probative value, it is Commerce's practice to examine the reliability and relevance of the information to be used. However, the SAA emphasizes that Commerce need not prove that the selected facts available are the best alternative information.

Finally, under section 776(d) of the Act, when applying AFA, Commerce may use any countervailable subsidy rate applied for the same or similar program in a countervailing duty (CVD) proceeding involving the same country, or, if there is no same or similar program, use a CVD rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates. Additionally, when selecting an AFA rate, Commerce is not required for purposes of section 776(c) of the Act, or any other purposes, to estimate what the countervailable subsidy rate would have been if the interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.

Application of Facts Available: Unaffiliated Growers

We requested that each company respondent solicit information from a certain number of their suppliers of raw olives.[23] Each respondent provided information from numerous suppliers, and from numerous olive growers that provided raw olives to the non-grower suppliers, and this information is sufficient for us to examine subsidies provided to olive growers for purposes of

[22] *See* SAA at 870.

[23] *See* Commerce's Letters, "First Administrative Review of the Countervailing Duty (CVD) Order of Ripe Olives from Spain: Supplemental Questionnaire," "First Administrative Review of the Countervailing Duty (CVD) Order of Ripe Olives from Spain; Questionnaire on Sources of Raw, Semi-Processed, and Ripe Olives," and "First Administrative Review of the Ripe Olives from Spain Order: Questionnaire for Unaffiliated Suppliers of Alimentary Group Dcoop S.Coop And.," all dated February 28, 2020; *see also* Agro Sevilla and Camacho's Letter, "Request to Clarify Olive Supplier Questionnaires and Adjust Reporting: Ripe Olives from Spain POR1," dated March 3, 2020; Dcoop's Letter, "Ripe Olives from Spain: Request to Adjust Reporting Requirements for the Department's February 28, 2020 Questionnaire on "Unaffiliated Suppliers of Alimentary Group Dcoop S.Coop And.," dated March 4, 2020; Dcoop's Letter, "Ripe Olives from Spain: Notification of Reporting Difficulty and Proposal for Alternative Reporting," dated March 26, 2020; Agro Sevilla and Camacho's Letter, "Ripe Olives from Spain: Notification of Reporting Difficulty and Proposal for Alternative Reporting Ripe Olives from Spain (C-469-818)," dated March 30, 2020 (Agro Sevilla and Camacho's Reporting Difficulty Letter); Dcoop's Letter, "Ripe Olives from Spain: Notification of Reporting Difficulty and Proposal for Alternative Reporting for Grower Suppliers," dated April 10, 2020; Commerce's Letter, "Clarifications and Reporting for Agro Sevilla and Angel Camacho," dated March 6, 2020; Commerce's Letter, "Clarifications and Reporting for Dcoop," dated March 9, 2020; Memorandum, "Additional Clarification Regarding Reporting for Dcoop's First Tier Cooperatives and Growers," dated March 18, 2020; Commerce's Letter, "Ripe Olives from Spain: Reporting for Alternative Growers," dated April 8, 2020; Commerce's Letter, "Ripe Olives from Spain: Reporting for Alternative Growers," dated April 9, 2020; Commerce's Letter, "Ripe Olives from Spain: Reporting for Alternate Suppliers/Growers," dated April 14, 2020; Agro Sevilla's Letter, "Agro Sevilla Supplemental Questionnaire Response Regarding Suppliers/Growers Ripe Olives from Spain (C-469-818)," dated April 15, 2020; Camacho's Letter, "Camacho Supplier/Grower Supplemental Questionnaire Response Ripe Olives from Spain (C-469-818)," dated April 15, 2020; and Dcoop's Letter, "Ripe Olives from Spain: Response to Questionnaire for Unaffiliated Suppliers of Alimentary Group Dcoop S. Coop.And.," dated April 23, 2020.

this review. However, no respondents were able to provide responses for all suppliers for which we originally requested information. We find that necessary information is missing from the record, and that Agro Sevilla, Camacho, and Dcoop were unable to provide certain requested information despite their efforts to do so. Thus, Commerce must rely on "facts otherwise available" for purposes of these final results with regard to calculating the benefit to the olive processors from the assistance provided to the olive growers, pursuant to sections 776(a)(1) and 776(a)(2)(B) of the Act. Thus, for those olive growers for which the respondents were not able to provide the amount of assistance they received, and for whom we cannot calculate a weighted-average per kilogram benefit, we are using, as partial facts available, the simple average of the weighted-average per kilogram benefit for all reporting growers or suppliers which reported producing raw olives and provided a questionnaire response. Interested parties raised issues with this application of partial facts available, and we made changes to Agro Sevilla's subsidy rate calculation as a result of these comments. *See* Comments 12, 15, and 16 below.

Application of Adverse Facts Available – Government of Spain – State Foundation for Training in Employment (FUNDAE) – Specificity

In the *Preliminary Results*, we relied on "facts otherwise available," including AFA, to find that the FUNDAE program is specific within the meaning of section 771(5A)(D)(iii) of the Act. For a description of this decision, *see Preliminary Results*.[24] We have not made any changes to our decision in the *Preliminary Results* to use facts otherwise available and AFA.

VII. ANALYSIS OF PROGRAMS

A. Programs Determined to Be Countervailable

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

Interested parties submitted comments in their case and rebuttal briefs regarding the specificity and calculation methodology of this program. These comments are addressed in Comments 2 and 9. As discussed further in Comment 12, for Agro Sevilla, we are applying facts available to one additional non-responsive grower from whom we requested but did not receive information.

Dcoop:	17.32 percent *ad valorem*
Agro Sevilla:	3.85 percent *ad valorem*
Camacho:	3.37 percent *ad valorem*

2. EU CAP Pillar I– BPS Greening

Interested parties submitted comments in their case and rebuttal briefs regarding the specificity and calculation methodology of this program. These are addressed in Comments 2 and 9. As discussed further in Comment 12, for Agro Sevilla, we are applying facts available to one additional non-responsive grower from whom we requested but did not receive information.

[24] *See Preliminary Results* PDM at 20-21.

Dcoop: 3.71 percent *ad valorem*
Agro Sevilla: 1.99 percent *ad valorem*
Camacho: 1.74 percent *ad valorem*

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

Interested parties submitted comments in their case briefs and rebuttal briefs regarding this program. Modifications to the calculation methodology are discussed in Comments 3, 9, 11, 12 and 16.

Dcoop: 1.33 percent *ad valorem*
Agro Sevilla: 1.04 percent *ad valorem*
Camacho: 0.09 percent *ad valorem*

4. Spanish Agricultural Insurance System (SAIS)

No parties commented on this program. As discussed further in Comment 12, for Agro Sevilla, we are applying facts available to one additional non-responsive grower from whom we requested, but did not receive, information.

Dcoop: not measurable
Agro Sevilla: 0.02 percent *ad valorem*
Camacho: not measurable

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

Interested parties submitted comments in their case briefs and rebuttal briefs regarding the specificity of this program. These comments are addressed in Comment 7. Modifications to the calculation methodology are discussed in Comments 11 and 12.

Dcoop: not measurable
Agro Sevilla: 0.01 percent *ad valorem*
Camacho: not used

6. Spanish Official Credit Institute (ICO)– International Financing

No parties commented on this program. Modifications to the calculation methodology are discussed in Comment 3.

Dcoop: not measurable
Agro Sevilla: 0.01 percent *ad valorem*
Camacho: not measurable

7. ICO –National Investment

Interested parties submitted comments in their case briefs and rebuttal briefs regarding the specificity of this program. These comments are addressed in Comment 6. Modifications to the calculation methodology are discussed in Comments 11 and 12.

Dcoop:	not used
Agro Sevilla:	0.02 percent *ad valorem*
Camacho:	not used

8. Income Tax Credit for Foreign Trade Fair Expenses

No parties commented on this program. As discussed in Comment 3, for Agro Sevilla and Dcoop, we have made changes to the sales denominator for the calculation of subsidy benefits under this program.

Dcoop:	not used
Agro Sevilla:	0.05 percent *ad valorem*
Camacho:	not used

9. European Investment Fund Loans

Interested parties submitted comments in their case briefs and rebuttal briefs regarding the specificity of the program. These comments are addressed in Comment 8. As discussed in Comment 3, for Agro Sevilla and Dcoop, we have made changes to the sales denominator for the calculation of subsidy benefits under this program.

Dcoop:	not used
Agro Sevilla:	0.01 percent *ad valorem*
Camacho:	not used

10. FUNDAE

No parties commented on this program. As discussed in Comment 3, for Agro Sevilla and Dcoop, we made changes to the sales denominator for the calculation of subsidy benefits under this program.

Dcoop:	Not measurable
Agro Sevilla:	0.01 percent *ad valorem*
Camacho:	0.03 percent *ad valorem*

B. Programs Determined to Not Confer a Measurable Benefit During the POR

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

The GOS submitted comments in its case brief regarding the specificity of this program. *See* Comment 5. Modifications to the calculation methodology are discussed in Comment 11. As a result of certain calculation changes (including updated calendar year data received from Dcoop's growers, as addressed in Comment 18), this program no longer confers a measurable benefit in these final results for Dcoop. Camacho and Agro Sevilla did not use this program.

2. *EU Program for the Environment and Climate Action (LIFE)*
3. *EU ERDF and Agency of Innovation and Development of Andalusia (IDEA)*
4. *EU CAP Pillar I – Aid to Young Farmers*
5. *Occupational Safety and Health Investments for Micro and SME Grants provided by the Department of Employment*
6. *Agencia Andaluza de Promocion Exterior (EXTENDA)*
7. *Technical Corporation of Andalusia (CTA)*
8. *Andalusia Employment Service*
9. *Collective Layoff Procedure 2005/2015*
10. *Creation for Employment for Youth*
11. *Andalusia Workplace Health and Safety*
12. *Andalusia Equine Sector*
13. *Assistance from the Chamber of Commerce*
14. *Bonificaciones Prevencion – Fremap*
15. *Torres Quevedo Program – Agencia Estatal de Innovacion*
16. *Cooperative Integration Grant*
17. *Spanish Ministry of Employment and Social Security Measures*
18. *Reversal of Impairment of Assets*
19. *Research & Development & Innovation*
20. *FOCAL Grants*
21. *ICEX Espana Exportacion e inversions Grants*
22. *National Program of Applied Research Projects (NPARP)*
23. *Centre for the Development of Industrial Technology (CDTI) Financing*
24. *CDTI Grants*
25. *European Investment Bank Loans*
26. *Limitation on Fixed Assets Depreciation Program*

C. Programs Determined to Be Not Used during the POR

1. *ICO – Exporters*
2. *EU CAP Single Payment Scheme*
3. *EU Promotion Aid Scheme*
4. *EU Producer Organization Work Programs*
5. *Programa de Incentivo al Vehiculo Eficiente (PIVE) (Grants to acquire vehicles)*
6. *Obligatory Reserve Fund Tax Deduction for Coops*
7. *Dividend Exemption Tax Program*
8. *Fundacion Corporation de Andalusia Financing*

D. Programs Determined to Be Not Countervailable

1. Income Tax Exemption from the Transfer of Securities of Resident Entities

E. Programs Determined to be Tied to Non-Subject Merchandise

1. Private Storage Aid for Certain Agricultural Products

F. Programs for Which we are Deferring Examination

1. Spanish Electricity Special Tax Reduction

Agro Sevilla reported that it did not directly receive benefits under this program; however, its growers benefitted from this program. In the *Preliminary Results*, we found this program to confer not-measurable benefits during the POR, and therefore, we did not analyze the countervailability of this tax reduction program. However, as discussed in Comments 11 and 12 below, we made calculation changes due to our application of facts available for an additional grower and our adjustment of the calculation methodology for growers and first-tier cooperatives for Agro Sevilla, which now results in a measurable benefit for this program. As a result, we examined the information on the record for purposes of analyzing the countervailability of the Spanish Electricity Special Tax Reduction program. The GOS provided no information on this program as all three respondents reported not receiving benefits from this program during the POR, and we did not identify the need for this additional information until we adjusted our calculations for these final results in response to interested party comments. At this stage of the administrative review, we do not have sufficient time to gather the necessary additional information; therefore, in accordance with 19 CFR 351.311(c)(2), we are deferring our examination of this program until a subsequent administrative review, if any.

VIII. ANALYSIS OF COMMENTS

Comment 1: Whether Commerce Properly Interpreted and Applied the Standard Established by Section 771B(1) of the Act for Determining "Substantially Dependent" Demand

Agro Sevilla/Camacho Case Brief[25]

- Section 771B(1) of the Act is a codification of Commerce practice set out in two prior decisions—*Pork from Canada 1985* and *Rice from Thailand 1986*.[26] To meet the requisite standard, "the raw product can be sold in only one market; it enters a single, continuous line of production resulting in one end product."

[25] *See* Agro Sevilla/Camacho Case Brief at 3-19.

[26] *Id.* at 3 (citing *Live Swine and Fresh, Chilled and Frozen Pork Products from Canada: Final Affirmative Countervailing Duty Determination*, 50 FR 25097 (June 17, 1985) (*Pork from Canada 1985*), and *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Rice from Thailand*, 51 FR 12356 (April 10, 1986) (*Rice from Thailand 1986*)).

- In the *Preliminary Results*, Commerce modified the analysis used in the original investigation by changing its denominator from "raw olives" to "varietals of raw olives principally suitable for use in the production of table olives." This change reflects serious errors of law and logic, and results in errors of fact.
- Section 771B of the Act applies in "the case of an agricultural product processed from a raw agricultural product." Thus, the statute contemplates a "processed agricultural product" and a "raw agricultural product." The statute also introduces "prior stage product," "latter stage product," and the concept of "substantially dependent" demand. These terms must be given meaning in relation to each other. There is sound reason that Commerce has found the raw agricultural product and the prior stage product to be coterminous in past cases—the structure of the statute demands it. The chapeau to section 771B of the Act states "in case of an agricultural product processed from a raw agricultural product … The starting point of the analysis is clear—the raw agricultural product." This is reinforced by section 771B(2) of the Act, which states that the processing operation must add "only limited value to the raw commodity," referencing the raw agricultural product.
- Commerce's definition of "prior stage product" as "varietals of raw olives principally suitable" for "use in the prior stage of production of the latter stage product," is contrary to the plain meaning of the statute. "Stage" refers to "one of a series of positions or stations, one above the other." In other words, "prior stage product" must mean a product that is at an earlier step in the process of the manufacture of the "latter stage product." Commerce subverts the plain meaning of these terms by finding a subset of raw agricultural product that is somehow "used" in a prior stage when no such "use" step has occurred in the process.
- In altering its examination of "substantially dependent" demand in its *Preliminary Results*, Commerce effectively accepts that the demand for all raw olives derived from table olive demand cannot meet the "substantially dependent" standard. All varietals of raw olives can be used to produce oil and are used to produce oil. Commerce has offered no evidence to the contrary, accepts that certain varietals are recognized as "dual use", and does not dispute that mere swings in annual production of raw olives used for oil completely overwhelm the total volume of raw olives consumed in table olive production.
- Commerce's finding of "substantial dependence" in the *Preliminary Results* is based on data demonstrating that 555,033 tons of raw table olive varietals were produced, of which 431,898 tons, or 78 percent were used for production of table olives. But Commerce did not consider how "dual use" varietal embedded in this data affect its analysis. The hojiblanca variety is the third largest olive variety in Spain. It occupies more than 265,000 hectares. This implication is evidence that "dual use" olives classified as "table" can readily shift to oil applications.
- The only actual varietal analysis found on the record was performed by the respondents. Using data on surface area by varietal provided to the respondents by the GOS and other published GOS data, the respondents demonstrated that less than 40 percent of the volume of varietals principally suited for use in the production of table olives are actually used in table olive production. This data demonstrates that Commerce's analysis is

simply wrong and there is no substantially dependent demand relationship between "raw olive varietals principally suited for use in the production of table olives" and table olives.
- Commerce's own data demonstrate that there cannot be "substantially dependent" demand, because it does not account for "dual use" varietals in its substantial dependence analysis. For example, between 2016 and 2017, the volume of "table" raw olives sent to oil production increased by more than 142,000 metric tons.

Dcoop's Case Brief[27]

- Dcoop supports and adopts all arguments regarding Commerce's interpretation and application of section 771B of the Act as set forth in the Agro Sevilla/Camacho Case Brief. Furthermore, Dcoop highlights core flaws in Commerce's definition of "prior stage product," as it relates to its statutory interpretation that is fundamental to Commerce's attribution of the alleged subsidies.
- Dcoop disagrees with Commerce's distinction between "raw agricultural products," and "prior stage products," which appears in section 771B(1) of the Act. By distinguishing the "raw agricultural product" from the "prior stage product," Commerce effectively eliminates the role of "raw agricultural products" in the statute, allowing it to define "substantial dependence" between any two stages of the production process.
- Commerce compounded that error by introducing a "use" requirement that does not appear in the actual text. Section 771B(1) of the Act does not explicitly or implicitly tie the prior stage product's definition to its use. Congress directed Commerce to examine an entirely different question—whether the demand for the prior stage product substantially depends on the demand for the latter stage product.
- Commerce's finding that the "prior stage product" is "varietals of raw olives principally suited for use in the production of table olives" and not "raw olives" is both overly narrow and overly broad. It is overly narrow because, by limiting the definition of prior stage products to those "principally suited" for production of table olives, Commerce takes a results-driven approach that artificially restricts prior stage products to only those that would meet the statutory standard.
- At the same time, Commerce's interpretation is overly broad because the record fails to establish a clear dividing line between raw olives that are principally suited for use in the production of table olives versus other products, such as olive oil. The ultimate use of an olive may be determined by factors that include application of grading standards, oil content, flavor, and market conditions.

Musco's Rebuttal Brief[28]

- The respondents provide no evidence that section 771B(1) of the Act establishes a very high standard for determining "substantially dependent" demand. Nowhere does the statute establish a standard for Commerce to make this finding, much less a "very high" standard.

[27] *See* Dcoop's Case Brief at 2-7.
[28] *See* Musco's Rebuttal Brief at 5-17.

- The respondents' allegation that section 771B(1) of the Act "is a codification of {Commerce's} practice as set out in two prior decisions," is also incorrect. There is no evidence that Congress considered Commerce's methodologies in *Pork from Canada 1985* and *Rice from Thailand 1986* to be so final that the agency would not have the discretion to adopt different methodologies in cases on other products. Congressional drafts showcased how the new law would apply to frozen raspberries—where frozen raspberries is only one of many outlets for the raw product (fresh, frozen, dried, jams, jellies, puree, concentrate). This makes clear that Congress had no intention of creating high numerical hurdles to establish substantial dependence.
- Commerce's definition of the "prior stage product" as "varietals of raw olives principally suitable for use in the production of table olives" conforms to the statutory scheme. There is no evidence that Congress did not intend that the "prior stage product" cannot be a subset of the raw agricultural product. Furthermore, this contention is irrelevant, because Commerce did find that the prior stage product, raw olives principally suitable for use in the production of table olives, is at an earlier step in the process of the manufacture of the latter stage product, table olives.
- Dcoop's argument that a "use" requirement does not appear in the text of section 771B of the Act is specious. The substantial dependence determination requires Commerce to determine whether the demand for the prior stage product substantially depends on the demand for the latter stage product, and the concept of "demand" hinges on use. If hardly anyone uses the prior stage product to produce the latter stage product, the demand for prior stage product will not have much impact on the demand for the latter stage product. Congress did not mean to preclude a CVD remedy for processed products, such as diced tomatoes, raspberry jam, fish fillets, and ripe olives simply because only some varieties of the raw agricultural product are suitable for processing into the finished product that is the subject merchandise.
- The respondents' argument that raw olives principally suitable for use in the production of table olives cannot be deemed substantially dependent on table olive demand given the lack of a single, continuous line of production to table olives is meritless. The statute does not require there to be a single, continuous line of production from prior stage product to the latter stage product. In *Pork from Canada 1985*, Commerce referenced the two-part test used by the International Trade Commission (ITC) for determining whether to collapse producers and processors of a raw agricultural product into a single industry. Commerce clarified that the ITC's test had a purpose entirely distinct from Commerce's task of determining whether subsidies provided to raw product producers should be considered in determining the benefit to processors of that product. The single, continuous line of production framework is not mentioned in the legislative history for section 771B of the Act.
- The record amply supports Commerce's finding that the demand for the prior stage product is substantially dependent on the demand for a latter stage product. Commerce properly found that mill olive varietals, grown for the production of olive oil, have virtually no role in the prior stage of production of table olives and should not be included in the "prior stage product." Commerce examined all relevant data and found convincing evidence that "certain raw olive varietals are grown for producing table

olives, other olive varietals are grown as mill olives to be used to produce olive oil, and other olive varietals can be used for either purpose."

- Commerce correctly accounted for dual-use olives in its substantial dependence analysis. Commerce cross-checked published GOS agricultural statistics, regional charts on olive destinations, and national olive yield statistics to determine that the overwhelming majority of the raw table and dual-use varietals identified as being for table olive production were in fact processed as table olives. Even in post AD/CVD order years, based on the figures reproduced in the Agro Sevilla/Camacho Case Brief, the vast majority of harvested "Table Olives" (including dual-use olives) were used to produce table olives and virtually all harvested "Mill Olives" were used to make olive oil.
- The respondents' arguments fail to address notable cultivation differences between orchards devoted to table olives and those devoted to mill olives, as well as distinctly different farm-gate prices. Data in Musco's submission demonstrate that there are differences in oil content, size, quality, pruning, water levels, *etc*. between olives identified as for table olives and those grown to be crushed for oil, and that differences in pruning, cultivation, and irrigation practices lead to differences in quality, size, and oil content. The hojiblanca varietal can technically be identified as for either use, but the differences in cultivation practices and the manner in which the GOS collects data indicate that certain hectares are identified as for oil production. Those hojiblanca olive hectares identified as for oil production undergo different cultivation practices.
- Commerce reasonably chose not to rely upon the respondents' data, which show that 40 percent of raw table and dual-use olive varieties are used to produce table olives. Commerce relied on GOS data, rather than the respondents' data, because the respondents' calculations are based on extrapolated data.
- Even if the respondents' data were used to determine substantial dependence, the data show that 40 percent of the demand for raw olives is used to make table olives in Spain.

Commerce's Position: In accordance with section 771B of the Act, Commerce is directed to deem countervailable subsidies provided to producers of a raw agricultural product as though they have been provided with respect to the manufacture, production, or exportation of the processed agricultural product, if two criteria are met: (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product; and (2) the processing operation adds only limited value to the raw commodity. In the investigation, we found that both prongs of section 771B of the Act were satisfied. Because parties provided additional evidence on the record of this review that was not on the record of the original investigation, we evaluated whether the criteria for section 771B(1) of the Act were satisfied. As a result of our analysis in this review, we preliminarily found that both prongs of section 771B of the Act were satisfied. The mandatory respondents have submitted comments on our preliminary finding that section 771B(1) of the Act is satisfied. As explained below, we continue to find that section 771B(1) of the Act is satisfied because the demand for the prior stage product (*i.e.*, raw olive varietals principally suitable for use in the production of table olives) is substantially dependent on the demand for the latter stage product (*i.e.*, processed table olives).

The Act does not provide a specific definition of the term "raw agricultural product" or "prior stage product," as those terms are used in section 771B of the Act. The Act defines "raw

agricultural product" as "any farm or fishery product" for purposes of identifying the relevant industry for the domestic like product.[29] Commerce has, through practice, adopted a similar definition of the term "raw agricultural product" for purposes of section 771B of the Act. In past cases, Commerce defined the raw agricultural product and the prior stage product to be the same.[30] In the investigation, Commerce defined the raw agricultural product and the prior stage product to be coterminous and identified "raw olives" as the "prior stage product."[31] However, there is a "strong presumption that Congress expresses its intent through the language it chooses and the choice of words in a statute is therefore deliberative and reflective."[32] Therefore, in construing the statute, we endeavor to give effect to every word because different terms used in the same statute presumptively have different meanings.[33]

In some cases, the prior stage product may be coterminous with the raw agricultural product. In *Pork from Canada 1985*, for example, Commerce identified the prior stage product as the same product as the raw agricultural product. This determination was made based on the specific facts on the record of the product and industry at issue. A hog is a hog, and all hogs are principally suitable to be slaughtered into unprocessed pork. No evidence to the contrary was presented in that case.[34] Therefore, all live swine were considered the "prior stage product" in that particular analysis of substantial dependence. However, Commerce disagrees that the "prior stage product" must always be interpreted as the entirety of the "raw agricultural product." The statute recognizes the connection between the prior stage product and the latter stage product in the production process. The plain language and structure of the statute signals that Congress intended the "prior stage product" to be the raw agricultural product that the industry under examination considers principally suitable for use in the prior stage of production of the latter stage product. Section 771B of the Act was meant to be applied to a multitude of agricultural products and Commerce identifies the prior stage product on a case-by-case basis. Based on the specific facts on the record of this review regarding raw olives varietals, we no longer consider it accurate to define "prior stage product" as encompassing all raw olives.

Further, we disagree with Dcoop's argument that we are introducing a "use" requirement to measure substantial dependence. To determine whether the demand for the prior stage product, raw table olive varietals, is substantially dependent on the demand for the latter stage product, processed table olives, it is logical to consider whether the raw table olive varietals suitable to be produced into processed table olives are, in fact, used to produce processed table olives. The

[29] *See* section 771(4)(E)(iv) of the Act.
[30] *See, e.g.*, *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013), and accompanying Issues and Decision Memorandum (IDM) at Comment 5.
[31] *See Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination*, 83 FR 28186 (June 18, 2018), and accompanying IDM at Comment 1 (*Investigation Final Determination*).
[32] *See KYD, Inc. v. United States*, 779 F. Supp. 2d 1361, 1367 (CIT 2011) (quoting *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004)) (internal quotes omitted).
[33] *See Kalle USA, Inc. v. United States*, 923 F.3d 991, 997 (Fed. Cir. 2019) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).
[34] *See Pork from Canada 1985*, 50 FR at 25099.

extent to which a prior stage product is used to create a later stage product is indicative of prior stage product's dependence on the demand for the latter stage product.

Furthermore, Commerce is not statutorily required to examine whether there is a "single continuous line of production" between the prior stage product and the latter stage product.to determine whether section 771B(1) of the Act is satisfied. Commerce and the ITC operate independently and pursuant to distinct statutory mandates and authorities.[35] We acknowledge that in past cases we referenced this test and assessed whether a single continuous line of production exists from the raw agricultural product to the processed agricultural product. In *Pork from Canada 1985*, Commerce examined whether live swine should be considered an input into unprocessed pork, as the basis for an upstream subsidy analysis, or whether live swine is a prior stage product of pork meat. To assist in that analysis, Commerce referenced the ITC's single continuous line of production framework that the ITC developed for determining whether producers and processors of a raw agricultural product could be collapsed into a single industry for purposes of examining injury. However, Commerce did not rely solely on the continuous line of production analysis, and stated that the "salient criterion is the degree to which the demand for the prior stage product is dependent on the demand for the latter stage product."[36] In this analysis, Commerce clarified that the purpose of the ITC's framework was to determine the relevant industry, not to address the issue of whether subsidies to producers of the raw agricultural product should be considered for purposes of determining the benefit to the producers of a processed agricultural product.

Furthermore, the single continuous line of production analysis is not mentioned at any point in the legislative history for section 771B of the Act. Raspberries are mentioned, yet there is no discussion of a "single, continuous line of production" requirement between fresh raspberries and a particular end product, such as frozen raspberries.[37] Indeed, many end products can made from fresh raspberries. The legislative history also discusses lamb and fish in the creation of section 771B of the Act. In *Lamb from New Zealand*,[38] which was issued shortly after *Pork from Canada 1985*, Commerce did not examine whether lamb enters a single, continuous line of production resulting in one end-use product. More recently, in *Shrimp from China*, we acknowledged that the examination of a single continuous line of production can contribute to our analysis as to whether section 771B the Act applies, but clarified that it was not a necessary condition to satisfy section 771B(1) of the Act.[39] Thus, neither the Act, the legislative history, nor Commerce's practice in examining agricultural products, both before and after the enactment of section 771B of the Act, places importance on this consideration, l*et al*one establishes a requirement that a single continuous line of production exist as a precondition to the applicability of section 771B of the Act.

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[35] *See Mitsubishi Elec. Corp. v. United States*, 898 F.2d 1577, 1584 (Fed. Cir. 1990) ("Under the statutory scheme, {Commerce} and the {ITC} have separate and different, although related, duties and responsibilities.").
[36] *See Pork from Canada 1985*, 50 FR at 25098.
[37] *See* 133 Congressional Record S. 8814 (1987).
[38] *See Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Lamb Meat from New Zealand*, 50 FR 37708 (September 17, 1985).
[39] *See Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) (*Shrimp from China*).

While the respondents argue that the only actual varietal analysis was performed by Agro Sevilla and Camacho, we did not use their varietal analysis because it was taken from two different sources: data gathered from BPS applications for the 2018/2019 campaign, and an internal report dating from 2008. Secondly, these data were unpublished.[40] Rather, they were extrapolated using GOS statistics on surface area from two different sources. Combining data from two sources, one of which was outdated, diminished its reliability. Further, in performing the substantial dependence analysis, we find that the respondents' estimate of the total surface area dedicated to the production of table and dual-use olive varietals was over twice the area reported by published GOS data.[41] Agro Sevilla and Camacho also incorrectly placed the total production data for table and dual-use olive varietals in the columns titled "Production Used as Table."

We agree with Musco that the record evidence indicates that certain raw olive varietals are grown for producing table olives, other olive varietals are grown as mill olives to be used for producing olive oil, and other olive varietals can be used for either purpose.[42] Spain's Ministry of Agriculture website states that the "table olive is the fruit of certain *varieties* of the cultivated, healthy olive tree...."[43] In addition, Spain's agricultural insurance system specifically separates raw olive orchards into three categories: table, mixed or dual use, and oil mill, and it identifies the varietals that are considered part of each group.[44] Olive growers register their hectares as table olive, mill olive, or dual-use to qualify for insurance. As part of the insurance regulation, the GOS provides premiums for specific varietals that are grown as table, a premium for specific varietals grown as dual use, such as hojiblanca, and a premium for mill varietals.[45] In general, table olive orchards and dual-use orchards require larger amounts of water and more pruning than mill orchards as table olive growers seek to maximize their fruit size and increase the symmetry of the olive.[46] Data from the Ministry of Agriculture indicate that table olives often are grown in the south and western regions of Spain where there is higher rainfall.[47] In contrast, farmers growing mill olives do not prune trees so rigorously because more orchard branches equate to more olive per tree and smaller, more oil-dense olives for crushing.[48] Thus, differences in physical characteristics (*e.g.*, oil content and size), cultivation practices (*e.g.*, pruning and geographic location of orchards to maximize water content and size of table olives), and quality

[40] *See* ASEMESA, Agro Sevilla, and Camacho's Letter, "Response to the Request for Additional Information on Substantial Dependence-Ripe Olives from Spain (C-469-818)," dated February 21, 2020 at 5-7.
[41] *See* Musco's Letter, "Ripe Olives from Spain; 1st Administrative Review; Response to Request for Additional Information," dated February 25, 2020 at Exhibit 4A. Exhibit 4A provides information from the Spain's Ministry of Agriculture showing the surface area dedicated to olive production for 2019, revealing that the total planted area in Spain for table olives and dual-use olives is 189,794 hectares. ASEMESA's estimate of the total surface area is well over twice the area reported by published GOS data.
[42] *Id.* at Exhibit 2.
[43] *Id.* at Exhibit 2A.
[44] *See* Musco's February 5th Response at Exhibit 1.
[45] *Id.*
[46] *See* Musco's Letter, "Ripe Olives from Spain, 1st Administrative Review, Submission of New Factual Information," dated February 5, 2020 (Musco's February 5 Response) at 7.
[47] *See* Musco's Letter, "Ripe Olives from Spain; 1st Administrative Review; Response to Request for Additional Information," dated February 25, 2020 (Musco's February 25th Response) at Exhibit 5A.
[48] *See* Musco's February 5 Response at 7.

requirements (*e.g.*, raw olives for table olives must meet specific industry standards distinct from those for oil) distinguish raw olives that are for table olives from those that are for oil.

In an effort to determine the volume of table and dual-use olive varietals identified as for processing into table olives, Commerce relied on published information provided in the Survey on Areas and Yield by the GOS, which contained data on the number of hectares of farmland dedicated to the production of raw table olive varietals, the number of hectares dedicated to the production of dual use varietals, and the number of hectares dedicated to mill production.[49] Information reported in the 2019 Survey revealed that 76,120 hectares of land were dedicated to the production of raw table olive varietals and 113,674 hectares were dedicated to the production of dual-use olives.[50] Multiplying the number of hectares dedicated to the production of raw or dual use olives by the yield per hectare statistics provided in the GOS Statistical Yearbook, we concluded that 228,360 MT of raw table olive varietals and 341,022 MT of dual use olive varietals were produced in 2019, totaling 569,382 MT of olives. We compared the volume of table and dual use olives produced in 2019 with data from Spain's Food Information and Control Agency (AICA) for the 2018/2019 campaign and found that data from the AICA closely corresponded to our estimated production data. Data from the AICA revealed that 587,800 MT of raw table and dual use varietals grown for table were produced during this period, including 273,150 MT of hojiblanca.[51]

We find that olives classified by the GOS as dual-use varietals are reported in the GOS varietals grown for table. This is consistent with what the GOS and Musco reported. Both confirmed that the GOS does not publish data on mill olive varietals. While we have no production data on dual-use varietals, such as hojiblanca, grown for processing into olive oil, we find that the record contains the production data on dual-use varietals grown for table use. Our finding that the GOS only publishes data on dual-use varietals grown for table use is also supported when examining the GOS insurance premiums for olive growers. Spain's insurance program reveals that there is one premium for dual use varietal,[52] such as hojiblanca, and another premium hojiblanca grown to be used as a mill olive. Farmers purchase these policies in advance of the actual harvest, indicating that they know beforehand if their olives will be used as table or mill olives.

Contrary to the respondents' argument, record evidence indicates that table and dual use olives grown for table olives are not interchangeable with mill olives. Table olives have a lower oil content, require larger amounts of water than mill olives, and need to be pruned extensively to grow large, symmetrically shaped olives. We disagree with respondents' argument that there was a significant shift in the volume of raw table olives sent to oil production from harvest year 2016 to 2017 and that this shift exposes the limits of our substantial dependence analysis. In harvest, 2016, only four percent of raw table olives were used in the production of olive oil. The percent climbed to 32 percent in harvest year 2017. However, in harvest 2018, the percent of raw table olives used in the production of oil dropped to 22 percent, while only two percent of

[49] *See* Musco's February 25th Response at 4A.
[50] *Id.*
[51] *See* ASEMESA, Agro Sevilla, and Camacho's Letter, "Response to the Request for Additional Information on Substantial Dependence-Ripe Olives from Spain (C-469-818)," dated February 21, 2020 at Exhibit NFI-2.
[52] *See* Musco's February 5th Response at Exhibit 1.

raw mill olives were used for table. We find it reasonable to attribute this increase, not to interchangeability between raw table and raw mill olives, but to the imposition of antidumping and countervailing duties on ripe olives. It is important to note that the portion of raw table olives sent to oil production remained at less than 10 percent during each harvest year from 2010 through 2016, and the portion of raw mill olives sent to table production remained at one or two percent. Farmers need to decide early on whether they intend for dual olives to be grown as table or mill as different cultivation practices are required for each category. In addition, growers receive higher prices for table olives, which makes it unlikely that farmers would readily shift from producing table olives to mill olives. Similarly, farmers would not readily shift from producing dual use varietals grown for the mill to table production because they are unlikely to meet the International Olive Council (IOC) standards for table olives, which would involve specific irrigation, pruning, and pest management practices that are distinctly different from those for mill olives. For the above reasons, we found it appropriate to modify our definition of "prior stage product" to raw olives principally suitable for use in the production of table olives.

Comment 2: Whether the EU CAP I – BPS is *De Jure* Specific

Agro Sevilla/Camacho Case Brief[53]

- In reaching its finding of *de jure* specificity with respect to BPS and Greening payments, Commerce never looks at the plain meaning of the statutory terms used in section 771(5A)(D)(i) of the Act. The key operative phrase in the statute is "expressly limits access." Under a plain reading of the statute, for the BPS program to be *de jure* specific to olive growers, Commerce must show that the BPS program is clear that its purpose is to control eligibility for BPS payments such that olive growers have a right to, or use, BPS payments in a manner that is limited to them.
- The SAA explains that the "specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability and use of a subsidy, the benefit of the subsidy is spread throughout an economy."
- The *de jure* test identifies subsidies that on their face do not expressly limit access to an enterprise or industry. If there is no express limitation, then a rebuttable presumption arises that a subsidy is not specific.
- Commerce's regulations do not regard a subsidy as being specific solely because the subsidy is limited to the agricultural sector. The *CVD Preamble*[54] clarifies that Commerce will not find agricultural subsidies to be *de jure* specific because they are limited to the agriculture sector. Rather, Commerce will examine the subsidies within the agricultural sector to determine if they are *de jure* specific or *de facto* specific within the meaning of the statute and the SAA.
- BPS benefits are not being determined for provision to olive growers, are not limited to the olive subsector, and do not retain any special treatment for farmers that grow olives. Commerce cites no evidence to the contrary. These facts prevent Commerce from

[53] *See* Agro Sevilla/Camacho Case Brief at 19-23.
[54] *See Countervailing Duties,* 63 FR 65348, 65402 (November 25, 1998) (*CVD Preamble*).

lawfully concluding that the BPS program is *de jure* specific under section 771(5A)(D)(i) of the Act. Thus, Commerce's finding that the BPS program is *de jure* specific is not supported by substantial evidence and is contrary to the law.

Dcoop's Case Brief[55]

- Commerce did not base its specificity finding with respect to the BPS Direct Payment program as it is existed during the POR, but rather, on the historical origin of the program. Commerce considered that the BPS program was implemented "with reference to the operations of its two predecessor programs, the Single Payment Scheme (SPS) and the Common Organisation of Markets in Oils and Fats." Because "olive oil and table olives were specifically identified as products eligible to receive production aid under this program" and "the payments provided were based on whether the olives were used to produce olive oil or table olives," Commerce found that "benefits under this program were expressly limited to olive growers."
- Section 771(5A)(D)(i) of the Act requires a finding that the subsidy is specific as a matter of law – *i.e.*, the authority providing the subsidy, expressly limits access to the subsidy to an enterprise or industry. An agricultural subsidy can be found to be countervailable under section 771(5A)(D) of the Act only if it is specific within the agricultural sector. There is nothing in the BPS program – express or implied – that limits access to a particular product, enterprise, or industry within the agricultural sector. Commerce's reliance on these "predecessor" programs ignores the fact that eligibility under the BPS program – whether express or otherwise – bears no relation to any product or industry within the agricultural sector. Under the BPS program, eligible farmers will receive payments, regardless of the type if crop they produce, or whether they produce any crops at all.
- Record evidence establishes that any payment received under the BPS program is linked to activating the entitlements but not to the production of any product. If the farmer holds entitlements and activates them on a corresponding number of eligible hectares, the farmer will receive the payments regardless of what type of crop the farmer grows, or even if he decides not to produce anything.

Musco's Rebuttal Brief[56]

- The respondents' reading of the statute is unsupported by the text of the statute, legislative history, or prior rulings. Section 771(5A)(D)(i) of the Act is satisfied in the agricultural sector when, by law, there is no uniform treatment across the agricultural sector in the provision of benefits, regardless of whether such unequal treatment purposely limits eligibility or use to a specific product.
- Commerce correctly found in this review that no new evidence was presented by any party which would warrant revisiting, let alone reversing, the determination that the BPS program remains *de jure* specific.

[55] *See* Dcoop's Case Brief at 7-10.
[56] *See* Musco's Rebuttal Brief at 17-24.

- Section 771(5A)(D)(i) of the Act provides that a subsidy is *de jure* specific "where the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry." This language accords Commerce latitude to examine the phrase "expressly limits access" in several ways, including by examining whether the manner of providing the benefits by law limits access to the subsidy. The SAA instructs Commerce to consider *de jure* specificity on a case-by-case basis without recourse to a "mathematical formula."[57] Moreover, for agricultural subsidies, where the *de jure* specificity analysis requires the further step of considering the agricultural exception, prior rulings have confirmed the application of that exception to agricultural subsidies that accord uniform treatment across all agricultural products, requiring Commerce to review the manner in which those subsidies are conferred.
- The preamble to Commerce's CVD regulations relating to agricultural subsidies calls on Commerce, pursuant to 19 CFR 351.502(e), to assess whether an agricultural subsidy is specific to any subset of the agricultural sector. In prior rulings, Commerce has clarified that the agricultural exception applies only when benefits are "uniformly available to the agricultural sector."[58]
- The key elements of the BPS program that render it *de jure* specific are: (1) BPS payments by law are determined based on specific agronomic classifications, including "permanent crops," which cover olives; (2) those permanent-crop payments are by law linked back to the Common Organisation of the Market payments available only to olive growers, of which the value per hectare has been preserved in the amount of BPS payments for the "permanent crop" classification; (3) the BPS payments are determined by law based on the Common Organization of the Market olive payments are subject to an expressly differentiated adjustment coefficient pegged specifically to the "permanent crop" classification (the "permanent crop" classification receives a coefficient of 1.0 percent; the "permanent pastures" classification receives a very different coefficient of 0.376 percent.); (4) the GOS law provides payments are available only to "active farmers" holding land on which olives were grown during the prior program periods, and the EU and GOS have included a "convergence factor" to be implemented in principle over time because BPS payments are differentiated among enterprises in Spain.

Commerce's Position: Section 771(5A)(D)(i) examines whether "the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry." The SAA reveals that Commerce has latitude in how to consider *de jure* specificity. According to the SAA, "the specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of widespread availability and use of a subsidy, the benefit of the subsidy is spread throughout an economy."[59] However, Congress also explained that "the specificity test was not

[57] *See* SAA at 930.
[58] *See* Musco's Rebuttal Brief at 21 (citing *Final Negative Countervailing Duty Determination: Fresh Asparagus from Mexico*, 48 FR 21618 (May 14, 1983) (*Fresh Asparagus from Mexico*); *see also Certain Fresh Cut Flowers from Mexico*, 49 FR 15007 (April 16, 1984) (*Fresh Cut Flowers from Mexico*); and *Fresh Cut Roses from Israel: Final Results of Administrative Review of Countervailing Duty Order*, 48 FR 36635 (August 12, 1983)).
[59] *See* SAA at 930.

intended to function as a loophole through which narrowly focused subsidies provided to or used by discrete segments of an economy could escape the purview of the CVD law."[60] The SAA states that there is no "mathematical formula for determining when the number of enterprises or industries eligible for a subsidy is sufficiently small so as to properly be considered specific" and "Commerce can only make this determination on a case-by-case basis."[61]

Commerce's implementing regulation regarding specificity for agricultural products is 19 CFR 351.502(d), which states that Commerce "will not regard a subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to the agricultural sector." Moreover, the *CVD Preamble* states that Commerce "will find an agricultural subsidy to be countervailable only if it is specific within the agricultural sector, *e.g.*, a subsidy is limited to one specific agricultural product, or the particular product receives disproportionately large amounts of the subsidy."[62] Thus, based on the *CVD Preamble* and past Commerce practice,[63] Commerce's analysis of an agricultural subsidy is focused on determining whether the subsidy is specific to any subset of the agricultural sector, how the agricultural sector, writ large, was treated by the program, and whether any sub-sector of the agricultural sector was afforded special treatment by an express limitation on access to the subsidy.

Commerce analyzed the countervailability of the BPS program, including whether the subsidies provided under the program are specific, in the investigation.[64] The BPS program provides annual grants to farmers and is funded by the EU under CAP Pillar I. Specifically, as we noted in the investigation, Spain implemented the Pillar I programs with reference to the operations of its two predecessor programs, the SPS and the Common Organisation of Markets in Oils and Fats (the Common Market Program), and the amount of assistance provided under the BPS program was, by law, determined by assistance provided under these two predecessor programs. Because the amount of assistance provided to olive farmers under the Common Market Program formed the foundation for determining the amount of assistance provided to olive farmers under the successor programs, *i.e.*, the SPS and CAP Pillar I BPS programs, it was necessary to evaluate the Common Market Program. The Common Market Program provided production aid in the form of annual grants to farmers based on type of crop and the volume of production. Both olive oil and table olives were specifically identified as products eligible to receive production aid under this program and the payments provided were based on whether the olives were used to produce olive oil or table olives, and thus benefits under this program were expressly limited to olive growers.

The benefits provided under the Common Market Program were calculated with a rate of euros per kilogram of a farmer's production of olives for oil and olives for table olive production (different rates were applied to olives for oil and olives for table olive production). When this

[60] *Id.*
[61] *Id.*
[62] *See CVD Preamble*, 63 FR at 65357-58 (citing *Lamb Meat from New Zealand*, 50 FR at 37711); *see also Roses Inc. v. United States*, 774 F. Supp. 1376, 1383-84 (CIT 1991) (upholding treatment of agricultural sector, as a whole, to constitute more than a single group of industries).
[63] *See Fresh Asparagus from Mexico*; *Fresh Cut Roses from Israel*; and *Fresh Cut Flowers from Mexico*.
[64] *See Investigation Final Determination* IDM at Comment 3; *see also Preliminary Results* PDM at 22.

program transitioned into the SPS program, the SPS benefits were based on the value of each hectare in a farm, which was determined using the average amount of grants provided to that area from 1999 through 2002 (*i.e.*, when the Common Market Program was in operation). The grant amounts under SPS were not based on the total value of a farm's overall production, or given a flat rate based only on the size of the farm in hectares, or a combination of the two, or any other neutral or objective criteria pursuant to section 771(5A)(D)(ii) of the Act.[65] Rather, the SPS grant amounts were based on the amount of grants provided under the Common Market Program. These grants were available only to olive growers, which thereby entrenched the crop-specific nature of the subsidy under the Common Market Program.

Because the BPS program references prior legislation to dictate the access to, and amount of, payments to be made under the BPS program, the BPS program expressly limits access, as outlined under section 771(5A)(D)(i) of the Act, to olive growers. Therefore, in the investigation we found that the BPS program is *de jure* specific. Interested parties have commented on whether the BPS program should be treated as *de jure* specific in this administrative review. However, in an administrative review, Commerce does not revisit specificity determinations made in a prior segment of the proceeding, absent the presentation of new facts or evidence.[66] There is no new evidence with respect to this program on the record of this review that would necessitate revisiting Commerce's analysis and conclusion from the investigation. Therefore, we continue to find this program *de jure* specific within the meaning of section 771(5A)(D)(i) of the Act.

Comment 3: Whether Commerce Used an Incorrect Sales Denominator To Calculate Agro Sevilla's Subsidy Rate

Agro Sevilla/Camacho's Case Brief[67]

- Commerce failed to apply the parent company attribution rule by relying on Agro Sevilla's unconsolidated sales as the sales denominator rather than consolidated sales net of intercompany sales for subsidies received by Agro Sevilla.

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[65] Section 771(5A)(D)(ii) of the Act provides:

> (ii) Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, the subsidy is not specific as a matter of law, if-
>
> (I) eligibility is automatic
>
> (II) the criteria or conditions for eligibility are strictly followed, and
>
> (III) the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document, so as to be capable of verification.
>
> For purposes of this clause, the term "objective criteria or conditions" means criteria or conditions that are neutral and that do not favor one enterprise or industry over another.

[66] *See Magnola Metallurgy, Inc. v. United States*, 508 F.3d 1349, 1353-1356 (Fed. Cir. 2007) (*Magnola*); *see also Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2015-2016*, 84 FR 11749 (March 28, 2019), and accompanying IDM at Comment 3; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 80 FR 41003 (July 14, 2015), and accompanying IDM at 27 n.130.

[67] *See* Agro Sevilla/Camacho's Case Brief at 24-27.

- In the *Preliminary Results*, Commerce found that the Rural Development program during 2014-2018 was "tied to investment in the table olive, olive oil, and other olive-derived products sector" but then disregarded the sales of olive oil made by Aceites Agro Sevilla, S.A. (Aceites AS) and instead used Agro Sevilla's unconsolidated sales of olives and olive-derived products.
- In the *Preliminary Results*, Commerce found that the loans under the ICO – International Financing program and the Income Tax Credit for Foreign Trade Fair Expenses program constituted export subsidies but did not use Agro Sevilla and Aceites AS's total FOB export sales, net of intercompany sales, when it should have used these values under the parent company attribution rule.
- In the *Preliminary Results*, Commerce found that EIF loans and FUNDAE were countervailable subsidies but Commerce used Agro Sevilla's unconsolidated total FOB sales rather than Agro Sevilla's consolidated sales, which would include Agro Sevilla sales, as well as sales for subsidiaries A.S. Comercio y Servicios, S.A. (ASCyS) and Aceites, net of intercompany sales, under the parent company attribution rule.

Musco's Rebuttal Brief[68]

- The record makes clear, and Agro Sevilla does not contend otherwise, that the program subsidies at issue were only paid to and received directly by Agro Sevilla for its sole benefit and not to or for its subsidiaries.
- Commerce was fully justified in applying its general corporation attribution rule by attributing the subsidy to the products produced by the corporation that received the subsidy. Commerce should reject Agro Sevilla's request to revise the calculations.

Commerce's Position: We agree with Agro Sevilla's claim that Commerce erred in its calculations by attributing subsidies received by Agro Sevilla to Agro Sevilla's company-specific sales rather than its consolidated sales. According to 19 CFR 351.525(b)(6)(iii), "{i}f the firm that received a subsidy is a holding company, including a parent company with its own operations, the Secretary will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries." In the investigation of *Certain Vertical Shaft Engines from China*, Commerce stated:

> The possibility that a parent company might also be a producer of subject merchandise or a supplier of inputs, however, is contemplated by the regulations as indicated by the language just quoted {19 CFR 351.525(b)(6)(iii)}, which notes specifically that a parent might have its own operations.[69]

Accordingly, the fact that Agro Sevilla is a producer of subject merchandise does not automatically negate the application of the parent company attribution rule. The *CVD Preamble* explains that a holding company "is intended to mean any company that owns or controls

[68] *See* Musco's Rebuttal Brief at 24-25.

[69] *See Certain Vertical Shaft Engines Between 225cc and 999cc, and Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 86 FR 1933 (January 11, 2021) (*Certain Vertical Shaft Engines from China*), and accompanying IDM at Comment 10.

subsidiaries through the ownership of voting stock or other means.[70] Further, the attribution rule under 19 CFR 351.525(b)(6)(iii) is intended to apply to "investment companies with no business of their own (commonly referred to as holding companies) as well as companies with their own operations (commonly referred to as parent companies)."[71] Given the specific facts of this case, we believe Agro Sevilla is best characterized as a parent company for purposes of applying the attribution rules.

Agro Sevilla demonstrated on the record that it is a parent company with two wholly-owned subsidiaries in Spain, ASCyS and Aceites AS.[72] The evidence on the record does not suggest, nor does any interested party claim, that Agro Sevilla merely serves as a conduit for the transfer of the subsidy it receives to its subsidiaries. Therefore, pursuant to 19 CFR 351.525(b)(6)(iii), we will be using the applicable consolidated sales of Agro Sevilla (which includes Agro Sevilla's company sales, ASCyS' sales, and Aceites AS sales, net of intercompany sales) as the denominator for calculating the subsidy rate for all programs that Agro Sevilla reported receiving benefits.

Record evidence indicates that Dcoop is also a parent company with a Spanish subsidiary.[73] Therefore, we are attributing benefits directly received by Dcoop to its consolidated sales. This change in denominator sales is limited to subsidies received by Agro Sevilla and Dcoop and does not affect their first-tier supplier or grower calculations because, due to our calculation methodology pursuant to section 771B of the Act, these calculations use sales of subject merchandise as the denominator and Agro Sevilla and Dcoop are the sole producers of subject merchandise amongst their Spanish consolidated holdings.

Comment 4: Whether Commerce Should Exclude Re-Sales and Purchases of Molinos Not Used to Produce Subject Merchandise from Camacho's Subsidy Rate Calculation

Agro Sevilla/Camacho Case Brief[74]

- In the *Preliminary Results*, Commerce calculated Camacho's benefit for grower subsidies by multiplying the total volume of raw and semi-processed olives purchased to produce ripe olives by the per-kilogram benefit.
- This calculation overstates the benefit attributable to subject merchandise because it does not account for *molinos* not used to produce subject merchandise, or resales.[75]

[70] *See CVD Preamble*, 63 FR at 65402.
[71] *Id.*
[72] *See* Agro Sevilla's Letters, "Agro Sevilla Affiliation Questionnaire Response Ripe Olives from Spain (C-469-818)," dated January 21, 2020 (Agro Sevilla Affiliation Response) at Exhibit AS-2; "Agro Sevilla Initial Questionnaire Response Ripe Olives from Spain (C-469-818)," dated February 26, 2020 at 9-10 and Exhibits AS-12, AS-13, and AS-14; and "Response to the Supplemental Questionnaire of Agro Sevilla Ripe Olives from Spain (C-469-818)," dated November 2, 2020.
[73] *See* Dcoop's Letter, "Ripe Olives from Spain: Initial Questionnaire Response," dated February 26, 2020 at Exhibit IQR-3
[74] *See* Agro Sevilla/Camacho Case Brief at 27-29.
[75] *Id.* at 28.

- To account for the quantity of *molinos* not usable for the production of subject merchandise and the quantity of resales, Commerce should deduct the total quantity of *molinos* and the quantity of resales reported by Camacho from the reported total quantity of raw and semi-processed olive purchases.
- To account for *molinos* and resales associated with Camacho's cross-owned growers, Commerce should calculate an upward adjustment based on the ratio of Camacho's cross-owned affiliate volume and the total purchase volume.

Musco's Rebuttal Brief[76]

- Commerce's calculations of the growers' per-kilogram subsidy benefits did not make a distinction for the olives' end use.
- Further, there is insufficient information on the record to determine the volume of purchased olives that may be *molinos* or other waste by-products; Camacho could only determine the volume of *molinos* well after the purchase of ripe olives.
- Not only should Commerce not exclude *molinos* from Camacho's olive purchase volume, it should make an upward adjustment to the volume of semi-processed olive purchases reported by Camacho to account for the likely exclusion of *molinos* from the reported total volume.
- Further, the resale volume for which Camacho requested adjustment is inconsistent with the volume reported in its sales reconciliation data.[77]
- Therefore, Commerce should not adjust for *molinos* or resales in the final results.

Commerce's Position: In the *Preliminary Results*, we calculated Camacho's benefit under the grower programs (*i.e.*, BPS Direct Payments and the Greening Program) using the total reported volumes for each grower's sales of raw and semi-processed olives for the production of ripe olives.[78] While Camacho argues that Commerce should exclude *molinos* from the calculation of the benefit, no party has adequately defined the term *molino*, and Camacho has not explained how *molinos* can be distinguished from processable olives, or described the extent to which (if at all) *molinos* can be processed into ripe olives. Furthermore, if Commerce were to exclude *molinos* from the purchase volumes, Commerce would require additional information such as that above to confirm, and the data provided by Camacho on the record of this review are insufficient to make such an adjustment.

Camacho reports *molinos* and resales only as a single number, determined after the time of purchase. Camacho states that "since this raw material is co-mingled, it was not possible to trace these re-sales and *molinos* back to the original purchase source on an accurate basis."[79] Furthermore, as Camacho notes, it was unable to determine the volume of *molinos* and resales that are associated with Camacho's cross-owned growers, whose benefits under the BPS and

[76] *See* Musco's Rebuttal Brief at 25-28.
[77] *Id.* at 27.
[78] *See Preliminary Results* PDM at 11 and footnote 56.
[79] *See* Agro Sevilla/Camacho Case Brief at 28.

Greening Programs are calculated separately from Camacho's unaffiliated growers.[80] Therefore, we cannot simply subtract the volume of *molinos* and resales from the olive purchase quantity used to calculate the benefit.

Camacho suggests applying a multiplier, based on the ratio of total *molinos* to total purchases of raw and semi-processed olives, to estimate the volume of *molinos* and resales associated with unaffiliated growers, as opposed to cross-owned growers.[81] However, Camacho's proposed multiplier relies on an unsupported assumption that there is little to no variation in the ratio of *molinos* to processable olives supplied between growers. There is insufficient information regarding the nature of *molinos* on the record of this review to determine whether that is a reasonable assumption. Therefore, because we cannot determine the quantity of *molinos* or resales associated with each grower, we are not excluding this quantity from Camacho's benefit calculation for the grower programs.

Comment 5: Whether the PROSOL Program is Specific

GOS' Case Brief[82]

- The "Services" sector benefitted the most from the PROSOL grants, accounting for 81 percent of the total number of projects financed and 40 percent of the total volume of grants.
- The "agro-food" industry accounted for only 8 percent of the total number of projects financed and 36 percent of the total volume of aid.
- In absolute terms, the "agro-food" sector lags behind the "services" sector simply reflecting the industrial and economic structure of the Andalusian region.
- The higher volume of PROSOL assistance to the agro-food industry compared to other branches of industry reflects the higher volume of investment made by the "agro-food" sector.

Musco's Rebuttal Brief[83]

- The fact that a few other beneficiaries received a disparate share of funding does not refute Commerce's finding that the agri-food industry, of which the respondents are members, received a disproportionately large amount of the subsidy provided under Government of Andalusia (GOA) funding.

Commerce's Position: As a result of calculation changes for these final results (*see* Comments 11 and 18), this program no longer confers measurable benefits to Dcoop during the POR. Therefore, we have not analyzed, for these final results, whether the funding provided by the

[80] *Id.* at 29.
[81] *Id.* at 28-29.
[82] *See* GOS' Case Brief at 3-4.
[83] *See* Musco's Rebuttal Brief at 29.

GOA under this program is specific based on the program usage information submitted by the GOS on the record of this review.

Comment 6: Whether the ICO – National Investment Program is Specific

GOS' Case Brief[84]

- The ICO – National Investment program does not constitute a financial contribution from the GOS as the loans are granted by private banks.
- The GOS disagrees with Commerce's finding that the loan was disproportionate because the amount of the loan granted to the company is proportional to the size of the company and its employees. As shown in the table provided in GOS' Case Brief, 18 percent of loans granted exceeded one million euros.[85]

Musco's Rebuttal Brief[86]

- Commerce should affirm its determination regarding the ICO loans in the final results because Commerce is correct in recognizing that the program functions via the ICO, a state-owned financial agency, and therefore these loans constitute a financial contribution in the form of direct transfer of funds from the GOS.

Commerce's Position: As we stated in the Post-Preliminary Analysis, the ICO is a public business entity attached to the Ministry of Economic Affairs and Digital Transformation.[87] The ICO is legally considered a credit institution and is classified as a government financial agency.[88] Consistent with our findings in the investigation, and since there is no new information or evidence of changed circumstances on the record of this review, we continue to find that loans provided under ICO-funded programs constitute a financial contribution within the meaning of section 771(5)(D)(i) of the Act.

With regard to the GOS' argument that the ICO loan was not disproportionately used by the respondent company, we disagree that the size of the receiving company relative to the amount of the loan granted is a relevant factor in determining whether the funding is disproportionate. Section 771(5A)(D)(iii)(III) of the Act does not require us to examine funding relative to a company's size or number of employees. In addition, the same table that the GOS cites as a demonstration that the loan amount was not disproportionate shows that 98 percent of the number of loan transactions were for loan amounts up to 500,000 Euros.[89] Agro Sevilla's grower members received more assistance under this program than over 98 percent of companies who received assistance. Further, as noted in the Post-Preliminary Analysis, Agro Sevilla's first-tier cooperative received a loan amount many times larger than the average amount given for this

[84] *See* the GOS' Case Brief at 4-5.
[85] *Id*. at 5-6.
[86] *See* Musco's Rebuttal Case Brief at 29-30.
[87] *See* Post-Preliminary Analysis at 4.
[88] *See* GOS IQR at 142.
[89] *See* GOS' Case Brief at 5

loan program.[90] Therefore, consistent with section 771(5A)(D)(iii)(III) of the Act, we continue to find that these loans are *de facto* specific because Agro Sevilla's first-tier cooperative received a disproportionately large amount of the subsidy.

Comment 7: Whether the Andalusia Energy Agency for Sustainable Energy Development for Andalusia Scheme is Specific

GOS' Case Brief[91]

- The GOS claims that Commerce misinterpreted the seven grants awarded under this program in 2018.
- No new applications were accepted in 2018 and the seven grants were the result of legal appeals against refusals of aid from previous periods when the program was still in force.
- If the nature of the program is not specific, then the resolution of appeals filed by applicants to the program cannot be qualified as such either.

Musco's Rebuttal Brief[92]

- Commerce only considered the GOA-funded portion of the program in the Post-Preliminary Analysis and already found the GOS-funded portion to be countervailable.
- Commerce was correct in finding *de facto* specificity regarding the GOA-funded portion of the program because only seven companies received funding which constitutes a limited number of benefit recipients. Commerce should reject the GOS' arguments as they have provided no evidence to counter the facts underlying the specificity finding.

Commerce's Position: We disagree with the GOS that we misinterpreted the nature of the seven grants awarded during the POR. As we stated in the Post-Preliminary Analysis, after appeals for reconsideration, the GOA provided assistance to seven companies during the POR.[93] Section 771(5A)(D)(iii)(I) of the Act does not require us to consider the reasons why the assistance was granted and disbursed during the POR. The record of this review shows that the GOA approved the requests of seven companies for assistance and disbursed these grants during the POR. The fact that these grants were based on appeals for assistance related to other payment periods is irrelevant in determining whether the recipients of the subsidy during the POR are limited in number.

The GOS' statement that "{i}f the nature of the program is not specific, the resolution of appeals filed by applicants to such a program cannot be qualified as such either" is misplaced.[94] Nowhere on the record have we determined that the "nature" of this program is not specific. In the investigation, we determined that the EC-funded and the GOS-funded portions were regionally specific and determined that the GOA-funded portion was not regionally specific.[95]

[90] *See* Post-Preliminary Analysis at 4-5.
[91] *Id.* at 4-5.
[92] *See* Musco's Rebuttal Brief at 29-30.
[93] *See* Post-Preliminary Analysis at 7.
[94] *See* GOS' Case Brief at 6.
[95] *See* Post-Preliminary Analysis at 6.

This determination does not mean we did not find the GOA-funded portion to be not specific at all, and based on newly updated information on the record of this review, we determined to reexamine whether the funding provided by the GOA was specific within the meaning of section 771(5A)(D) of the Act.

The GOS has not provided any evidence that counters the facts underlying this *de facto* specificity finding that the actual recipients of this subsidy during the POR were limited in number within the meaning of section 771(5A)(D)(iii)(I) of the Act. Therefore, we continue to find the GOA-funded portion of this program to be *de facto* specific.

Comment 8: Whether the European Investment Fund Loans Program is Specific

EIF Case Brief[96]

- Commerce has several times determined that loans and loan guarantees under EIB programs are not countervailable because they are available throughout Europe to many entities in various sectors. The World Trade Organization Appellate Body has also affirmed the non-specific nature of EIB's operations.
- Commerce has determined that EIF is part of the EIB Group and the EIF has demonstrated on the record that it implements loan guarantees in a similar manner as other EIB loans and loan guarantees that Commerce has found to be not specific in the past.
- Commerce has not provided an explanation for departing from its practice when determining whether such programs are specific. Commerce finding this program specific is because "4,279 companies in the EU were approved for assistance" contradicts its previous determination that EIB loans are not specific because they are available to "thousands of SMEs within the EU." In the final results, Commerce should find the EIF loans to be not specific.
- In 2016, the Innovfin program, which Agro Sevilla received loans from, was available to all 28 EU member states and associated countries.
- The record demonstrates that thousands of entities were eligible and selected for EIF financing because of objective criteria.
- The EIF Funding at issue, through Innovfin, is so widely disbursed that the amount received by Agro Sevilla is far less than 1 percent of the total provided to recipients within the initiative.
- The number of entities applying for the program can vary over the years as well as the number of final recipients of the program, therefore, the number of entities that receive EIF's intermediated guarantee is irrelevant to whether the program was specific to a "limited number" of entities. Commerce should find this program not specific.
- Even if Commerce finds the EIF loans to be specific, they are not countervailable under 19 CFR 351.527 which states that Commerce cannot find a subsidy to exist when it is provided as part of a project funded by "an international lending or development institution."

[96] *See* EIF Case Brief at 8-11.

Musco's Rebuttal Brief[97]

- The cases cited by the EIF are dated and bear no relevance to the facts of this CVD review of ripe olives.
- The EIF has not presented anything that refutes Commerce's finding that in 2016, the year Agro Sevilla received its EIF loan, EIF loans were not widely available throughout the EU economy. In the final results, Commerce should affirm its countervailability finding.

Commerce's Position: Commerce determines *de facto* specificity in accordance with section 771(5A)(D)(iii) of the Act, which states that a subsidy may be specific if:

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

For the Innovfin program under the EIF, we continue to find that 4,279 companies, which were approved for assistance across the whole of the EU economy, represent a limited number of recipients.[98] The SAA highlights the purpose of our specificity test, stating that it "is to function as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available *and* widely used throughout an economy."[99] We continue to find that 4,279 companies within the entire jurisdiction of the EU does not constitute "widely used." Having made this finding, the fact that the range of recipients may represent a diverse set of industries does not detract from our finding that the number of recipients, as represented by the 4,279 companies, is limited, as the EIF seems to suggest.

We acknowledge that the EIF, in its case brief, pointed to prior cases where Commerce found EIB programs to be not specific because "thousands" of companies used the program. However, neither in the EIF's case brief, nor in the public decision documents of the cases cited, are there any figures more specific than a general reference to "thousands." Absent more detailed information, we are unable to make a useful comparison between the cases cited by the EIF, all of which were completed many years ago, and the current review. Moreover, each case record stands on its own and the specificity analysis is, by its nature, a fact – and case-specific analysis. Because there were only 4,279 recipients of the subsidy within the entire EU during the approval year of the loan, we continue to find, for purposes of these final results, that the EIF Innovfin loan guarantee program is *de facto* specific within the meaning of section 771(5A)(iii)(I) of the Act.

[97] *See* Musco's Rebuttal Case Brief at 30.
[98] *See Preliminary Results* PDM at 29-30.
[99] *See* SAA at 929.

Regarding the EIF's argument that this program is not countervailable based on 19 CFR 351.527, as confirmed in prior cases, the focus of the regulation is on whether the funding for the subsidy is supplied in accordance with, and as part of, a program or project funded by … an international lending or development institution.[100] Multiple documents on the record, including responses from the relevant parties, indicate that the funding for this guarantee program comes from the EU.[101] Furthermore, the EIF is an entity that operates pursuant to several European Commission (EC) mandates, provides lending products to European entities, and provides assistance almost exclusively to companies within the EU.[102] Therefore, we find that the exception provided for under 19 CFR 351.527 for funding from "international lending or development institutions" does not apply here.

Comment 9: Whether Commerce Should Allocate Olive Subsidy Benefits to Sales of Olives Only

Musco's Case Brief[103]

- In the investigation and in the *Preliminary Results*, Commerce determined that grants provided to olive farmers under the BPS Direct Payment and Greening programs are tied to the production of olives.[104]
- Consistent with 19 CFR 351.525(b)(5)(i), Commerce should attribute subsidy benefits from these programs only to the respondents' sales of olives. In the *Preliminary Determination*, Commerce attributed benefits to the percentage of total sales accounted for by raw olives (*i.e.*, *Total Benefits * (Olive Sales / All Sales) = Benefits for Olives*).
- This attribution methodology assumes that each of the growers and first-tier suppliers sold only products that they grew themselves, which is unsupported by record evidence.
- Because the burden to provide such evidence is on the respondents and they have not done so, Commerce should assign all of the reported benefits to the production of raw olives for each reporting grower, supplier, and respondent for the following programs: BPS, Greening, Rural Development, SAIS, Electricity Tax, European Investment Bank, Andalusian Employment Service, ERDF, ICO, and PROSOL.

Agro Sevilla/Camacho Rebuttal Brief[105]

- The BPS and Greening programs are not *de jure* specific to olive growers and, therefore, are not countervailable.[106]

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[100] *See Phosphate Fertilizers from the Kingdom of Morocco: Final Affirmative Countervailing Duty Determination*, 86 FR 9482 (February 16, 2021), and accompanying IDM at Comment 19.
[101] *See* the EC's Letter, "Section II Questionnaire Reply RTD," dated February 26, 2020 at 7.
[102] *See* the EC's Letters, "Section II Questionnaire Reply RTD," dated February 26, 2020 at Exhibit RTD Annex 6 and "Response to Section II European Union Standard Questions Appendix," dated February 26, 2020 at EIB Exhibit 4-6; *see also* Agro Sevilla's Letter, "Agro Sevilla Initial Questionnaire Response Ripe Olives from Spain (C-469-818)," dated February 26, 2020 at Exhibit EIF-1.
[103] *See* Musco's Case Brief at 6-14.
[104] *Id.* at 6 (citing *Investigation Final Determination* IDM at Comment 3; and *Preliminary Results* PDM at 22-23).
[105] *See* Agro Sevilla/Camacho Rebuttal Brief at 3-8.
[106] *Id.* at 3.

- Musco's argument conflates the concepts of specificity and attribution. In the *Investigation Final Determination*, Commerce stated that under the SPS program, aid provided to farmers was converted to entitlements linked to the land area and completely decoupled from production.[107]
- Because entitlements under these programs are decoupled from olive production, Commerce's sales denominator is too narrow, and should be adjusted to include total sales.[108]
- Because BPS and Greening programs are neither *de jure* specific nor tied to the production of olives, there is no need for growers or first-tier suppliers to provide additional sales data.[109]

Dcoop's Rebuttal Brief[110]

- Musco cites the *Investigation Final Determination* to show that Commerce found that the BPS and Greening programs are tied to the production of olives; however, the cited excerpt focuses on whether the BPS program is *de jure* specific.[111]
- Whether a subsidy is specific to the production of subject merchandise is distinct from whether benefits under that program are tied to the production of subject merchandise.[112]
- Further, because BPS benefits are decoupled from the actual production of olives, benefits are not limited to the sales of olives that producers grew themselves.[113]
- Musco does not substantiate the argument that Dcoop's reported sales values include "sales of services and products sourced from other parties."[114]
- Finally, Musco does not explain why Commerce should attribute subsidies for programs other than the BPS, exclusively to olives.[115]

Commerce's Position: To calculate the benefits under these programs for the *Preliminary Results*, we multiplied each grower's received subsidy by the proportion of olive sales to total sales, then divided that number by each grower's total raw olive production to determine a per-kilogram benefit, and calculated a weighted average based on the proportion of olives each grower supplied to the respondent.[116] We multiplied that weighted-average per-kilogram benefit by the respondent's total purchases of raw and semi-processed olives for the production of ripe olives from all suppliers during the POR to determine the benefit to the respondent, and divided that benefit by the respondent's sales of subject merchandise.[117]

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[107] *Id.* at 6 (citing *Investigation Final Determination* IDM at 33).
[108] *Id.* at 7.
[109] *Id.* at 7-8.
[110] *See* Dcoop's Rebuttal Brief at 21-25.
[111] *Id* at 21.
[112] *Id.* at 21-22.
[113] *Id.* at 23.
[114] *Id.* at 24.
[115] *Id.* at 25.
[116] *See*, *e.g.*, Memorandum, "Preliminary Results Calculations for Angel Camacho Alimentacion S.L.," dated December 18, 2020 (Camacho Prelim Calculations Memo) at 3-4.
[117] *Id.*

In the *Preliminary Results*, we stated that assistance under the BPS Direct Payment and Greening programs is tied to the production of olives, pursuant to 19 CFR 351.525(b)(5).[118] We acknowledge the petitioner's argument on whether this tying finding necessitates a calculation change to deem the entire amount of benefit under these programs attributable to olives. However, after further consideration, we no longer find it appropriate to determine that benefits under the BPS Direct Payment and Greening Program are tied to the production of olives. As stated in the *CVD Preamble*, one possible interpretation of "tying" suggests that "a grant is 'tied' when the intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy," but further notes that "we are not promulgating an all-encompassing definition of 'tied'" and that "we intend to apply the term 'tied' on a case-by-case basis."[119] The *CVD Preamble* goes on to state that the "tying rules are an attempt at a simple, rational set of guidelines for reasonably attributing the benefit from a subsidy based on the stated purpose of the subsidy or the purpose we evince from record evidence at the time of bestowal."[120] As identified during the investigation, and as described in the program documentation on the record of the current review, growers do not need to produce any particular crop to be eligible for benefits under these programs and must be active farmers with entitlements and eligible hectares.[121] Therefore, we determine that we cannot evince a stated purpose of the BPS program at the time of bestowal to only benefit olives, and therefore, do not find that the BPS program is "tied" to olives.

As the respondents note, Musco appears to be conflating the concepts of specificity and attribution.[122] Specificity and "tying" for attribution purposes are distinct concepts, and a finding of *de jure* specificity does not necessarily always to lead to a finding of "tying." Each of these determinations depend on the specific facts at issue for the program and case at hand. As noted above, we continue to find that benefits under the BPS and Greening program are *de jure* specific to olive growers based on the way the GOS implemented the BPS program and its reliance on predecessor programs. However, that these benefits are *de jure* specific does not mean that they are attributable exclusively to olives. As noted, such a tying finding is dependent on whether Commerce can evince a stated purpose of the subsidy at the time of bestowal. A finding of *de jure* specificity and tying for attribution purposes are distinct concepts with different standards.

Commerce's regulations direct it to attribute domestic subsidies "to all products sold by a firm, including products that are exported."[123] Therefore, given the above finding that the BPS program is not "tied" to olives, we find it is appropriate to continue using a proportion of olive

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[118] *See Preliminary Results* PDM at 23.
[119] *See CVD Preamble*, 63 FR at 65402 (citing *Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Belgium*, 58 FR 37273 (July 9, 1993)).
[120] *Id.* at 65403.
[121] *See Ripe Olives from Spain: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 82 FR 56218 (November 28, 2017), (*Investigation Preliminary Determination*), and accompanying PDM at 18-21; *see also* GOS IQR at Exhibit ARI – A001.
[122] *Id.* at 4.
[123] *See* 19 CFR 351.525(b)(3).

sales to total sales in determining the amount of benefit applicable to olives in our calculation of the weighted-average per-kilogram benefit..

With respect to the other programs listed by Musco, we also disagree that any change is appropriate. As the respondents note, for most other programs, Musco did not substantiate its comments as to how or why Commerce should change its calculation methodology from the *Preliminary Results*. With respect to the CAP Pillar II Rural Development Program, we found in the investigation that the Rural Development program is comprised of a number of subprograms, some of which are tied to investment in the olive sector.[124] However, because we do not have documentation from the respondents' suppliers demonstrating under which measure benefits were granted, Rural Development benefits received by the respondent companies cannot be delineated between programs for olives and non-olive products and we are unable to apply Musco's suggested calculation with respect to this program.

Accordingly, for the final results, we find that benefits under the BPS Direct Payment and Greening Program are not attributable exclusively to olives. Because in the *Preliminary Results* we calculated the per-kilogram benefit under these programs using the share of olives to non-olive sales, we are making no changes to the calculations of these programs on this basis for these final results.

Comment 10: Whether Commerce Should Adjust its Calculation for Yield Loss

Musco's Case Brief[125]

- In reporting the volume of raw olives supplied by growers and first-tier coops to the respondents, Camacho included *molinos*, which are returned to the mill to produce oil, while Agro Sevilla and Dcoop have excluded *molinos*.[126]
- Because Commerce calculates a per-kilogram benefit for growers based on all olives produced, and because the subsidies are attributed to olive production, the purchase volume should be adjusted to include *molinos*.[127]
- Commerce should adjust the purchase volumes reported by Agro Sevilla and Dcoop by the ratio reported by Camacho to calculate their total purchases of semi-processed olives, inclusive of *molinos*.[128]

Agro Sevilla/Camacho Rebuttal Brief[129]

- Commerce instructed the respondents to report the purchase volume of raw olives used to produce subject merchandise, which is the volume reported by Agro Sevilla.[130]

[124] *See Investigation Preliminary Determination* PDM at 28-29.
[125] *See* Musco's Case Brief at 10-14.
[126] *Id.* at 10-13.
[127] *Id.* at 12.
[128] *Id.* at 12-13.
[129] *See* Agro Sevilla/Camacho Rebuttal Brief at 8-10.
[130] *Id*. at 9.

- Agro Sevilla's first-tier cooperatives pre-sort the olives prior to delivery, independent of any processing by Agro Sevilla; therefore, there is no yield loss for Agro Sevilla to report.[131]

Dcoop's Rebuttal Brief[132]

- Dcoop reported the total volume of raw and semi-processed olives obtained from first-tier cooperatives, as requested by Commerce; Commerce did not request that Dcoop account for *molinos* in their reporting.[133]
- Further, Dcoop does not purchase raw and semi-processed olives, but rather provides processing and marketing services for first-tier cooperatives.[134]
- No record evidence indicates that Dcoop received *molinos* from first tier-cooperatives that were not processed into ripe olives.[135]

Commerce's Position: We disagree with Musco that it is necessary to make a yield loss adjustment to account for the alleged volume of *molinos* received by Agro Sevilla and Dcoop. In the *Investigation Final Determination*, we received a similar argument from the petitioner regarding yield-loss adjustments to the volume of raw olives.[136] Specifically, the petitioner argued that the respondents reported their olive purchases net of unusable olives and debris.[137] We disagreed, stating that record evidence showed that the reported volumes were recorded after the removal of debris and un-usable olives.[138]

Here, Agro Sevilla states that olives they receive from first-tier cooperatives are sorted prior to delivery, and that *molinos* "do not arise as a consequence of any processing at Agro Sevilla."[139] Dcoop notes that there is no record information indicating that they received *molinos* from first-tier cooperatives, nor that they were unable to process any of the received raw or semi-processed olives into ripe olives.[140] Therefore, we find there's no evidence that Agro Sevilla and Dcoop did not accurately report the purchases of raw and semi-processed olives processed into ripe olives, per Commerce's request in the questionnaire. The factual circumstances relating to Camacho, which co-mingles certain *molinos* and decides to send for processing into mill or table olives after purchasing, are distinct from that of the other two respondents.

Because Camacho's purchasing arrangements and inventory management practices differ substantially from those of Agro Sevilla and Dcoop, we cannot infer from the information on the

[131] *Id.*
[132] *See* Dcoop's Rebuttal Brief at 25-28.
[133] *Id.*at 26.
[134] *Id.*
[135] *Id.* at 26-27.
[136] *See Investigation Final Determination* IDM at Comment 22.
[137] *Id.* at 71.
[138] *Id.* at 71-72.
[139] *See* Agro Sevilla/Camacho's Rebuttal Brief at 9; *see also* Agro Sevilla's Letter, "Agro Sevilla Sources of Raw and Ripe Olives Questionnaire Response Ripe Olives from Spain (C-469-818)," dated January 31, 2020 at 4.
[140] *See* Dcoop's Rebuttal Brief at 26-27; *see also* Dcoop's Letter, "Ripe Olives from Spain: Response to Questionnaire on Sources of Raw and Ripe Olive," dated January 31, 2020.

record that it is appropriate to make a yield loss adjustment. Therefore, we are not changing our calculation methodology from the *Preliminary Results* to make a yield loss adjustment.

Comment 11: Whether Commerce Should Revise its Calculation for the Two Coop Respondents to Eliminate Double Counting of Grower Quantities

Musco's Case Brief[141]

- Commerce should update its calculations with respect to Dcoop and Agro Sevilla to account for the fact that growers and first-tier coops are at different stages of the production process.
- Commerce's current methodology double counts the grower quantities in that the quantity is included once for each grower and again as a portion of the quantity in the first-tier coops' sales volumes.
- Commerce should split its calculation into two parts: first, calculating a per-kilogram grower benefit that serves as a proxy average benefit bestowed on olives that are received by first-tier coops; second, calculating a per-kilogram benefit at the supplier level that serves as a proxy for average benefit bestowed on olives while at first-tier coop level; and finally adding these two per-kilogram values to represent average per-kilogram benefit bestowed upon olives that are received by the second-tier cooperative.
- Musco provides an updated version of Commerce's calculations for the Rural Development program using this methodology and urges Commerce to also apply this methodology to the following programs: SAIS, Electricity Tax, EIB loans, Andalusian Employment Service, ERDF, ICO, and PROSOL.[142]

No other interested parties submitted comments.

Commerce's Position: Commerce agrees with Musco that the current calculation methodology for first-tier cooperative and grower subsidies led to double counting of olive sales volumes, thus diluting the actual subsidy benefits applicable to olives. In the methodology used in the *Preliminary Results*, first-tier cooperatives and their growers' sales information were calculated together in a single table that summed their olives sales volumes into a denominator that was used to calculate each first-tier cooperative and grower's weighted per-kilogram benefit.[143] However, this methodology did not account for the fact that the growers and first-tier cooperatives are on two separate levels along the production chain for ripe olives and subsidies are received by the growers and first-tier cooperatives within each level. Growers supply their raw olives to the first-tier cooperatives who then supply raw olives to the respondents.[144] The current methodology inadvertently inflates the denominator (total olive production volume) by double-counting the raw olive sales volume because the actual raw olives present in the sales

[141] *See* Musco's Case Brief at 14-15.
[142] *Id.* at Exhibit 1.
[143] *See* Memoranda, "Preliminary Results Calculations for Agro Sevilla Aceitunas S.Coop.And," and "Preliminary Results Calculations for Alimentary Group Dcoop S. Coop. And.," dated December 18, 2020.
[144] *See* Agro Sevilla Affiliation Response at 5-8; *see also* Dcoop's Letter, "Ripe Olive from Spain: Affiliation Questionnaire Response," dated January 24, 2020 (Dcoop Affiliation QR) at 4.

volumes that each grower reports are also present in the sales volume that the first-tier cooperatives report. By inadvertently inflating the total volume, the methodology dilutes the per-kilogram weighted benefit for olives, which ultimately dilutes the subsidy rates for programs that are available to both first-tier cooperatives and growers.

Upon review, we find that Musco's suggested calculation methodology is more accurate than the one that we used in the *Preliminary Results* for approximating the actual subsidy benefits received by first-tier cooperatives and growers. By calculating the weighted-average per-kilogram benefit at each level of production (one weighted average solely for growers and one weighted average solely for first-tier cooperatives) and then summing the two weighted averages together to calculate the total subsidy per kilogram, we avoid double-counting the sales volume of olives by isolating and applying grower benefits to total grower olive sales volumes and then doing the same for first-tier cooperatives. Additionally, this calculation method is consistent with our finding that the criteria of section 771B of the Act are met and, thus, that the subsidies provided to the raw agricultural product are deemed to be provided with respect to the manufacture, production, or exportation of the processed product. Accordingly, for these final results, we have used Musco's suggested calculation methodology to calculate subsidy benefits received by first-tier cooperatives and growers, in the calculations for Agro Sevilla and Dcoop. This change affects the calculation for the following programs where Agro Sevilla and Dcoop's growers and first-tier cooperatives received benefits: Rural Development Program, Spanish Electricity Special Tax Reduction, EIB loans, Andalusian Employment Service Program, ERDF and Sustainable Energy Development of Andalusia Scheme, PROSOL, and ICO – National Investment loans.[145]

Comment 12: Whether Commerce Should Apply AFA to Agro Sevilla's First-Tier Coops and Member Growers

Musco's Case Brief[146]

- The record in this review establishes that as a second-tier coop, Agro Sevilla is cross-owned with its first-tier coop members and their grower members; therefore, Commerce should revisit and reverse its preliminary finding concerning cross-ownership among Agro Sevilla's coop members.
- Agro Sevilla's bylaws confirm that its relationship with its first-tier members has the singular purpose of ensuring that those members produce and deliver "table olives, bulk and packaged" to Agro Sevilla for processing, storage, distribution, and sale.
- As the second-tier coop, Agro Sevilla, directs and approves olives covered by its first-tier supply arrangements and uses them as if they were its own.
- The bylaws do not permit the first-tier coop members to have relationships with entities that overlap with any of the activities with Agro Sevilla's purpose and purview without Agro Sevilla's express consent.

[145] *See* Memoranda, "Final Results Calculations for Agro Sevilla Aceitunas S.Coop.And.," and "Final Results Calculations for Alimentary Group Dcoop S. Coop. And.," dated June 25, 2021.
[146] *See* Musco's Case Brief at 15-26.

- First-tier coop members are not simply free to leave and reclaim their capital contribution and are further constrained by their heavy dependency on Agro Sevilla for their sale volumes of raw olives and their deep integration into the management of Agro Sevilla through the Consejo Rector.
- Agro Sevilla's bylaws obligate first-tier coops to provide "any corporate (or) economic … product information" that may be requested by Agro Sevilla.
- In the final results, Commerce should account for all of the countervailable subsidies received by all of Agro Sevilla's first-tier cooperatives and grower members because they are all cross-owned.
- To estimate the countervailable subsidy benefits for all of Agro Sevilla's first-tier cooperatives, Commerce should apply AFA to each of the remaining seven non-responsive coop members using the highest single subsidy amount reported by a responding coop member. At minimum, Commerce should apply neutral facts available.[147]
- Commerce's reporting methodology greatly limits the universe of reported subsidies, thereby magnifying the misreporting of subsidy benefits.
- Because there were two growers that did not provide information, despite being the "next company up," there should be two counts of facts available, not just one.
- Agro Sevilla failed to describe in detail its efforts to collect the requested information for the second and third largest growers of COOP3, and it provided no explanation as to why company records would not be available for these growers.
- In the final results, Commerce should apply AFA for the non-responding growers using the highest single per-kilogram benefit for any responding grower rather than relying on neutral facts available.

Agro Sevilla/Camacho's Rebuttal Brief[148]

- None of the first-tier cooperatives can use or direct the assets of Agro Sevilla as their own, nor exercise control over Agro Sevilla, nor can Agro Sevilla use or direct the assets of its members as its own, nor exercise control over said members.
- Musco offers no new evidence which would reverse Commerce's findings in the investigation or the preliminary results that Agro Sevilla is not cross-owned with its first-tier member cooperatives.
- Musco's arguments are based on misinterpretations of record evidence like Agro Sevilla's bylaws and the Andalusian Cooperative Societies Law.
- The bylaw to which Musco cites as an indication that Agro Sevilla can compel its first-tier coops and members to provide legal information only requires that the first-tier cooperatives notify Agro Sevilla how many kilograms of olives they expect to receive from their growers and to provide supporting phytosanitary documentation concerning such olives.

[147] *Id*. at Attachment 1.
[148] *See* Agro Sevilla/Camacho Rebuttal Brief at 11-26.

- The bylaw to which the Musco cites as an indication that Agro Sevilla's first-tier cooperative members are directly responsible for handling legal cases involving Agro Sevilla through the Consejo Rector only gives the Consejo Rector power of attorney and allows it, as a collective body, to represent Agro Sevilla in any case.
- Musco cannot point to a specific provision in the bylaws as an indication that Agro Sevilla can impose fines or sanctions on members. Instead, these bylaws are boilerplate text that refer to usual obligations for any cooperative member similar to obligations of a shareholder in a corporation.
- Musco's opinion that the reporting sample size is too small does not mean Agro Sevilla was unwilling to cooperate as Agro Sevilla provided all information requested that it had available or was able to obtain from other parties. Therefore, Commerce should not use AFA nor use the methodology suggested by Musco.
- Commerce may only apply AFA when an interested party fails to cooperate by not acting to the best of its ability, whereas Agro Sevilla has acted to the best of its ability in this case. In the instances when Agro Sevilla was unable to provide information, it was for good cause and an explanation was provided as to why it was unable to do so.

Commerce's Position: We continue to find that Agro Sevilla is not cross-owned with its first-tier suppliers and that it is inappropriate to apply AFA to first-tier cooperatives and their grower members. In the investigation, we found that the relationships between Agro Sevilla and its members did not differ materially from the relationship between a corporation and its shareholders.[149] We found that none of the cooperative members had made a capital contribution that represented a majority of the cooperative's capital and that each cooperative member had one representative entitled to a vote on the Consejo Rector.[150] We further find that Agro Sevilla does not exercise control over its member cooperatives, that a member cooperative was free to leave and have its capital contribution returned, that these first tier cooperatives represent operational associations with hundreds of individual olive growers managed by their own by laws, and that many of these member cooperatives have member farmers who produce agricultural products other than olives.[151] We find no reason to question this characterization of the facts of Agro Sevilla's organization and its relationship with member cooperatives in this review.

While we acknowledge that Agro Sevilla's first-tier suppliers are subject to supply, pricing, quality, selling, and delivery terms, this does not establish that Agro Sevilla exercises control over its first-tier suppliers. Rather, we find these requirements and restrictions appear to be basic elements of a commercial agreement between two parties that establishes reciprocal obligations. Furthermore, Agro Sevilla provides explanations for some of these requirements. The supply quotas are determined upon admission, and Agro Sevilla's bylaws allow for the adjustment of these quotas to factor in unforeseen circumstances.[152] Pricing of products are negotiated between

[149] *See Investigation Final Determination* IDM at Comment 8.
[150] *Id*.
[151] *Id*.
[152] *See* Agro Sevilla's Letter, "Agro Sevilla Response to Supplemental Questionnaire on Affiliation and General Questions Ripe Olives from Spain (C-469-818)," dated June 3, 2020 (Agro Sevilla Affiliation Supplemental) at 5 and at Exhibit AS-28 at Article 2.3(D).

Agro Sevilla and its first-tier cooperatives, with the first-tier cooperatives being the ones to approve the final price with no single member being able to dictate the final pricing.[153] Agro Sevilla's bylaws also allow for first-tier members to voluntarily leave after a mandatory period and be refunded their capital contribution.[154] Furthermore, despite the petitioner's claims that first-tier member cooperatives are not free to leave and reclaim their capital contribution, record evidence belies this claim. Agro Sevilla noted a case on the record where a first-tier cooperative chose to withdraw from Agro Sevilla after only a few months of membership and incurred no penalties and was refunded their capital contribution.[155] Therefore, we continue to find that Agro Sevilla is not cross owned with its member cooperatives.

Furthermore, Musco contends that, even if we find Agro Sevilla not to be cross-owned with its first-tier members, Agro Sevilla's bylaws obligate its first-tier coop members to provide economic information that may be requested by the second-tier coops. However, there is nothing in Agro Sevilla's bylaws to require coop members to provide *all* economic data requested by Agro Sevilla, such as subsidy programs used by suppliers. These by-laws only require first-tier members to provide information such as kilogram volumes of table olives received from its partners and phytosanitary information.[156] Agro Sevilla made every attempt to obtain the requested information but was unsuccessful.[157] To confirm that an attempt was made, Agro Sevilla provided affidavits and emails from its first-tier cooperative managers documenting their unsuccessful attempts to obtain requested information from growers.[158] Therefore, we continue to find that since there is no cross-ownership between Agro Sevilla and its member cooperatives, and absent evidence that Agro Sevilla can compel a response from a first-tier member or their member growers two or more steps removed, we will not apply AFA to these entities.

The petitioner also suggests in its case brief that Commerce should apply AFA to all non-responding entities, even those for which Commerce never requested a response. As highlighted in the investigation and this review, given the application of 771B and the numerous reporting requirements associated with this proceeding, Commerce limited its reporting requirements to the five largest first tier cooperative members, and the two largest grower suppliers for each of these members.[159] When the second largest grower and third largest grower from COOP3 could not respond, Agro Sevilla asked Commerce for permission to provide information for the first largest and fourth largest grower.[160] Commerce granted Agro Sevilla's request to provide subsidy information for the first and fourth largest grower from COOP3 instead of the top two largest growers.[161] We find no basis to apply AFA to any first-tier cooperative or grower for

[153] *Id*. at 16.
[154] *Id*. at 20-22 and Exhibit AS-28 at Article 2.11.
[155] *See* Agro Sevilla Affiliation Response at 10-11 and Agro Sevilla Affiliation Supplemental at 11-12.
[156] *See* Agro Sevilla Affiliation Supplemental at Exhibit AS-28 at Article 2.3(K)
[157] *See* Agro Sevilla and Camacho's Reporting Difficulty Letter.
[158] *See* Agro Sevilla's Letter, "Agro Sevilla Supplemental Questionnaire Response Regarding Suppliers/Growers Ripe Olives from Spain (C-469-818)," dated April 15, 2020 at 4-5 and Exhibits AS-COOP2-11 and AS-COOP4-11.
[159] *See* Commerce's Letter, "First Administrative Review of the Countervailing Duty (CVD) Order of Ripe Olives from Spain: Supplemental Questionnaire," dated February 28, 2020.
[160] *See* Agro Sevilla and Camacho's Reporting Difficulty Letter.
[161] *See* Commerce's Letter, "Ripe Olives from Spain: Agro Sevilla's Request to Report for Alternative Growers," dated April 8, 2020.

which *we did not request a response* and will continue to find facts available, rather than adverse facts available, for suppliers and growers for which we requested information but did not receive a response.

We do, however, agree with Musco's final argument that there should be two counts of facts available, not just one, because there were two growers from COOP3 that did not provide information, despite being the "next company up." As stated above, we requested information from the top two growers from each first-tier cooperative. COOP3 provided information from their first and fourth grower because their second and third growers were unable to provide information. In the *Preliminary Results*, we only applied facts available to the second grower when we should have applied it to both the second and third largest growers. Accordingly, we will also apply facts available to the other non-responsive grower from Agro Sevilla's COOP3.

Comment 13: Whether Commerce Should Correct Ministerial Errors for Agro Sevilla

Musco's Case Brief[162]

- For the final results, Commerce should include corrections to formulas and values in several tabs in Agro Sevilla's Preliminary Results Calculations and include the subsidy rate calculated for the Andalusia Energy Agency program.

No other interested parties submitted comments.

Commerce's Position: We agree with Musco, and we revised our preliminary subsidy rate calculations to correct instances in which we made ministerial errors, such as updating formulas that were incorrectly summing benefit amounts or other erroneous values. With regard to the Andalusia Energy Agency program, we deferred our determination on this program to a post-preliminary analysis, where we then found a countervailable subsidy rate.[163] We are including the additional programs that we found countervailable in the Post-Preliminary Analysis, the ICO – National Investment Program and Sustainable Energy Development of Andalusia Scheme, with the programs we found countervailable in the *Preliminary Results* for these final results.

Comment 14: Whether Commerce Should Correct Ministerial Errors for Camacho

Musco's Case Brief[164]

- In its calculation of Camacho's subsidy rate under the BPS and Greening programs, Commerce included sales unrelated to olives in the total sales denominator of one grower/supplier.
- Non-olive sales should be excluded from the total sales denominator for each grower/supplier.

[162] *See* Musco's Case Brief at 27.
[163] *See* Post-Preliminary Analysis at 5-7
[164] *See* Musco's Case Brief at 27-28.

No other interested parties submitted comments.

Commerce's Position: In the *Preliminary Results*, to determine the amount of grower subsidies attributable to olives, we divided each grower's olive sales by their total sales. As noted above in Comment 9, we are no longer finding the BPS and Greening programs under Pillar I to be tied to the production of olives. Therefore, we disagree with Musco that all "non-olive sales" should be excluded from the denominator for each grower/suppler. We acknowledge Musco's argument that the total sales for one of Camacho's growers includes sales that are potentially not crop-related. However, as noted above, BPS payments are eligible to active farmers with entitlements and eligible hectares.

In other contexts related to service revenue, Commerce has stated that we "assess whether to include or exclude certain service revenue in the denominator on a case-by-case basis, but generally will include such revenue unless there is a strong argument for excluding it where the service in question bears no relation at all to the company's productive operations."[165] Similarly, here, we lack the record evidence necessary to determine whether the portion of sales in question are completely unrelated to agricultural operations or capital (*e.g.*, agricultural land or buildings which may benefit from BPS payments). Therefore, for the purposes of these final results, absent sufficient evidence, we are not excluding this portion of sales from the grower's total sales denominator for the purposes of calculating the per-kilogram benefit under the BPS Direct Payment and Greening programs.

Comment 15: Whether Commerce Should Apply AFA to Camacho's Growers

Musco's Case Brief[166]

- In the *Preliminary Results*, Commerce assigned, as facts available, the average per-kilogram benefit to Camacho's grower/suppliers which did not provide information requested by Commerce.[167]
- However, the application of neutral facts available effectively rewards Camacho's unresponsive growers for their non-cooperation; Commerce should instead apply adverse facts available to calculate the per-kilogram benefit for non-cooperating growers.[168]
- If Commerce continues to apply neutral facts available, it should recalculate a simple average using the per-kilogram benefit based on information from the growers originally requested and assign a facts available rate to the additional growers substituted for the non-responsive growers.[169]

[165] *See Utility Scale Wind Towers from Canada: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 85 FR 40245 (July 6, 2020), and accompanying IDM at Comment 7.
[166] *See* Musco's Case Brief at 28-30.
[167] *Id.* at 28.
[168] *Id.* at 29-30.
[169] *Id.* at 30.

Agro Sevilla/Camacho's Rebuttal Brief[170]

- Camacho did not self-select responding growers; rather it followed Commerce's framework for selecting the five largest grower suppliers and moved to the next largest supplier when a grower refused to cooperate.[171]
- Camacho documented its efforts to obtain cooperation from the non-cooperative growers and moved to the next largest growers only after obtaining authorization from Commerce.[172]
- Camacho acted to the best of its ability in its attempts to obtain the information requested by Commerce.[173]

Commerce's Position: Consistent with our findings in the investigation, we continue to find that Camacho is not cross owned with its unaffiliated grower suppliers. Camacho has no ownership of these unaffiliated grower suppliers,[174] and there is no information on the record indicating that Camacho can otherwise compel these unaffiliated grower-suppliers to provide the requested information. As a result, we do not consider Camacho to have the capacity to induce cooperation from these non-cooperative grower suppliers. In addition, Camacho documented its efforts to obtain the requested information from the non-cooperative olive growers and suppliers and proposed alternative suppliers following the appropriate methodology.[175] Therefore, we do not find that the incomplete reporting by the unaffiliated suppliers warrants the application of AFA under section 776(b) of the Act, and we will continue to apply neutral facts available in calculating the per-kilogram benefit of Camacho's non-cooperative grower suppliers.

Comment 16: Whether Commerce Should Apply AFA to Dcoop's First-Tier Coops and Member Growers

Musco's Case Brief[176]

- Although Dcoop claims to have no ability to control the assets of its first-tier members as if they were its own, the claim is belied by its own bylaws and actual operations. Dcoop's control and ability to "use or direct" the committed products of its first-tier members and growers extends to every dimension of the products under commitment by its first-tier members.

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[170] *See* Agro Sevilla/Camacho Rebuttal Brief at 27-29.
[171] *Id.* at 27.
[172] *Id.*
[173] *Id.* at 28.
[174] *See* Camacho's Letter, "Angel Camacho Alimentación, S.L. Response to Section III Identifying Affiliated Companies and Olive Suppliers Ripe Olives from Spain (C-469-818)," dated January 21, 2020 at Exhibits C1 and C2.
[175] *See* Camacho's Letter, "Ripe Olives from Spain: Notification of Reporting Difficulty and Proposal for Alternative Reporting Ripe Olives from Spain (C-469-818)," dated March 30, 2020; *see also* Camacho's Letter, "Camacho Supplier/Grower Supplemental Questionnaire Response Ripe Olives from Spain (C-469-818)," dated April 15, 2020 at Exhibits C-SUPPLY-1, C-SUPPLY-2, and C-SUPPLY-3.
[176] *See* Musco's Case Brief at 31-41.

- Dcoop exerts control over the committed supply requirements of each of its first-tier suppliers and over the amount of activities and services that third parties can perform for its first-tier members.
- All of Dcoop's member cooperatives are involved to a limited extent in certain aspects of Dcoop's management through Dcoop's General Assembly.
- Even if Dcoop is not cross-owned with its first-tier members, its bylaws expressly obligate all coop members to provide information relating, not only to themselves, but also to their grower-members, and must do so upon Dcoop's request.
- Commerce should apply AFA to the cross-owned first-tier member coops and member growers that failed to report relevant information. Commerce should allocate benefits hat first-tier members received over sales of olives only because the first-tier members providing the subsidy information were part of Dcoop's olive division and the subsidies at issue were specific to olives.

Dcoop's Rebuttal Brief[177]

- Dcoop is not cross-owned with its first-tier members. Dcoop cannot use or direct the individual assets of its first-tier member cooperatives in the same manner it can use its own assets. None of its first-tier members owned a majority of Dcoop's shares or made a capital contribution that represents the majority of Dcoop's capital. None of its first-tier cooperatives had more than 50 percent of the vote in the General Assembly or Section Assembly.
- Dcoop's bylaws prohibit members of Dcoop's Governing Board from representing any first-tier cooperatives in the General Assembly. Dcoop had no voting rights in any of its first-tier cooperatives that process olives.
- Dcoop does not unilaterally "control" any of the aspects of its first-tier cooperatives' businesses.
- While first-tier coops are subject to minimum supply requirements, they have negotiating power over the agreed amount. Musco's observation that the minimum supply requirements roughly align with the actual volumes supplied by the first-tier cooperatives holds no weight. The amounts are determined through negotiation and agreement.
- First-tier cooperatives are free to leave Dcoop at any time.
- Dcoop's bylaws do not obligate its first-tier cooperatives to share detailed commercial information with Dcoop. Its bylaws only obligate its members to share very general information with them.
- Commerce should reject Musco's proposed adjustments based on adverse facts available. They ignore the fact that, for the first-tier cooperatives for which Dcoop was not able to obtain information, Dcoop sought and received permission to report on an alternative basis and continued to seek cooperation for the suppliers that Commerce initially selected.
- Musco argues that Commerce should allocate subsidy benefits that Dcoop received over Dcoop's sales of only olives, given that they are maintained on a division-by division

[177] *See* Dcoop's Rebuttal Brief at 5-13.

basis. However, Musco ignores the corollary to its statement: Commerce should not include subsidy benefits that are tied to Dcoop's non-table olive divisions in its benefit calculation for olives.

Commerce's Position: We continue to find that Dcoop is not cross-owned with its first-tier suppliers. Given the conceptual and factual similarities between the makeup and structure of Dcoop and Agro Sevilla as second-tier cooperatives, we find there is no evidence that Dcoop is cross owned with its member cooperatives. We disagree with Musco that evidence of Dcoop's control over its first-tier suppliers can be found in examining the minimum supply requirements that Dcoop has with its first-tier cooperatives. While Dcoop's bylaws do require each first-tier supplier to establish a minimum supply requirement with Dcoop, Dcoop does not dictate the amount each first-tier cooperative will supply.[178] Rather, these supply requirements are decided by the Section Assembly of each section on a yearly basis, based on discussions with the first-tier cooperatives, as a normal business supplier relationship would. Musco suggests that, since the volume of olives supplied by each of the first-tier cooperatives closely aligns with the minimum supply requirements of that cooperative, this demonstrates that Dcoop exerts control over the member cooperative. We find this argument unpersuasive. Given that Dcoop is in a commercial agreement with its first suppliers, it is not surprising that the actual volume of olives supplied by Dcoop's first-tier members closely parallels its minimum supply requirements because most first-tier cooperatives join a second-tier cooperative to utilize the processing services provided by the second-tier cooperatives.

Furthermore, Dcoop submitted information showing the percentage of capital each first-tier cooperative had in its table olives division and the percentage of voting rights each cooperative held.[179] No first-tier member contributed a majority share of the capital in Dcoop's table olives division and none held a majority of the voting rights. Likewise, we find that Dcoop does not exert control over its members, as evidenced by the member cooperatives' other activities. Many of its farmers produce agricultural products other than olives, such as asparagus, saffron, lamb, and belong to other cooperatives that promote these other products.[180] Dcoop does not have voting rights in its first-tier olive cooperatives, and member cooperatives are able to leave Dcoop once certain requirements are met.[181] Thus, we continue to find that Dcoop is not cross-owned with its member first-tier coops, much less the growers that are an additional step removed.

Furthermore, we disagree that Dcoop can compel a response from its first tier member cooperatives or their growers, as there is nothing in Dcoop's bylaws that require cooperative members to provide *all* economic data requested by Dcoop, such as subsidy programs used by suppliers. Dcoop made multiple attempts to gather sales and program usage data from its

[178] *See* Dcoop's Letter, "Ripe Olives from Spain: Supplemental Questionnaire Response," dated July 1, 2020 (Dcoop 1SQR) at 11.
[179] *Id.* at S-2.
[180] *See* Dcoop Affiliation QR at 7.
[181] *Id.*at 6; *see also* Dcoop 1SQR at 1.

suppliers.[182] Despite continued efforts, most suppliers continued to decline to provide the necessary information. Dcoop provided a declaration of its efforts with local counsel in Spain to obtain cooperation from these parties. Therefore, we continue to find that FA, not AFA, should be applied to Dcoop's non-reporting suppliers and growers for which we requested information.

Finally, to the extent the petitioner is suggesting that Commerce should apply AFA to all suppliers and growers, even those for which Commerce did not request a response, we disagree. As noted above in Comment 12 and elsewhere in this proceeding, Commerce limited reporting requirements only to certain growers and suppliers, and find it is not appropriate to apply facts available, adverse or otherwise, *to growers from whom Commerce never requested information*.

Comment 17: Whether Commerce Should Find That All Of Dcoop's Growers Received Greening Benefits

Musco's Case Brief[183]

- Commerce should not accept Dcoop's claim that a few of its growers received BPS Direct Payment benefits but no Greening benefits.
- In its revised initial response, the EC stated that a farmer entitled to BPS payments is automatically eligible under the Greening program if he/she applies the agricultural practices on parts of his/her holding covered by arable land and permanent grassland …" Further, the EC response states that "{w}hen the Greening payment is a percentage of the BPS payment, logically it will follow the same convergence path of the BPS payment.".

Dcoop's Rebuttal Brief[184]

- Mere eligibility for a program does not mean that a particular grower participated in the program.
- Musco did not provide evidence that the growers received payments under the program.

Commerce's Position: We agree with Dcoop and are not modifying our calculations. According to the EC, "The Greening payment is decoupled income support available to all EU farmers who are eligible for payments under the BPS Program."[185] To be eligible for BPS payments, the grower must meet the following requirements: (1) classify as a farmer; (2) hold a payment entitlement; (3) declare an eligible hectare; and (4) activate his payment entitlements.[186] While all farmers that are eligible to receive assistance under the BPS-direct payment program

[182] *See* Dcoop's Letter, "Ripe Olives from Spain: Documentation of Efforts to Obtain Information from Suppliers," dated June 18, 2020; *see also* Dcoop's Letter, "Ripe Olives from Spain: Supplemental Questionnaire Responses (Part 3) and Erratum," dated August 31, 2020 at Exhibit S-4.
[183] *See* Musco's Case Brief at 41.
[184] *See* Dcoop's Rebuttal Brief at 13.
[185] *See* European Commission's Letter, "Administrative Review of the CVD Order on Ripe Olives from Spain—revised initial questionnaire response," dated April 24, 2020 (EC IQR) at Standard Questions Appendix for Greening Program.
[186] *See* EC IQR at 5-6.

are also eligible to receive Greening benefits, we found nothing on the record which demonstrates that Greening payments are automatically disbursed if a farmer received BPS-direct payments. Dcoop reported that most, but not all, of its growers received assistance under the BPS-greening program.[187] In a supplemental questionnaire, we asked once again if the suppliers that reported no benefits did receive Greening benefits. Once again, Dcoop confirmed that these growers did not receive greening benefits.[188] Because there is no record evidence that all growers that receive BPS-direct payment assistance receive Greening benefits, we have no reason to doubt the growers' subsidy reporting on this issue and the evidence on the record is insufficient to support an inference that growers received greening benefits if they received assistance under the BPS-direct payment program. However, we intend to examine this issue more closely in subsequent reviews if Commerce encounters this fact pattern again.

Comment 18: Whether Commerce Should Use Dcoop's Calendar Year 2018 Grower Data or, in the Alternative, Should Correct Ministerial Errors

Musco's Case Brief[189]

- Dcoop provided Commerce with updated grower and Tier 1 supplier sales figures corresponding to calendar year 2018. Commerce should update its *Preliminary Results* calculations using this new information.
- If Commerce does not make this update, Commerce should correct ministerial errors. First, Commerce relied on the FOB sales values for olives but the unadjusted sales values for total sales because Commerce did not have the FOB sales value for total sales. Commerce should correct this error by using unadjusted olive sales.
- Commerce used an incorrect olive production total for grower 5.1.
- Commerce failed to include the simple average of the weighted benefit for one non-cooperating grower in the "BPS direct payment suppliers" tab.
- With respect to the rural development and PROSOL programs, Commerce included only the total sales of olives, rather than olives and olive-derived products, for supplier 4. This is not correct because in the *Preliminary Results* Commerce found the rural development plan tied to olives and olive-derived products.

No other interested parties submitted comments.

Commerce's Position: We are addressing each of the petitioner's proposed changes in turn. First, for the final results, we are updating Dcoop's supplier sales with calendar year 2018 sales that were provided after the *Preliminary Results*. We requested this information because 2018 calendar year data aligns with the POR and is necessary for calculating accurate rates for this review. Second, we disagree that we used an incorrect olive production total for one grower.

[187] *See* Dcoop's Letter, "Ripe Olives from Spain: Response to Questionnaire for Unaffiliated Suppliers of Alimentary Group Dcoop S. Coop. And.," dated April 22, 2020 at Exhibits 5-B-1, 5-C-1, and 5-E-1.
[188] *See* Dcoop's Letter, "Ripe Olives from Spain: Supplemental Questionnaire Response-Part 1," dated August 5, 2020 at 2.
[189] *See* Musco's Case Brief at 44

The production figure that Musco claims we should use is the grower's total volume of sales, not the volume of production. Because the production figure is correct, we do not intend to make this change. Third, we agree that we did not include the simple average of the weighted benefit for one non-cooperating grower in the "BPS-Direct Payments" tab. We are making this correction for these final results. Fourth, we disagree that we should use the sales value for olives and olive-derived products for one first-tier supplier for Pillar II, or rural development grants. While we did find a subprogram under Pillar II to be tied to the olive sector, suppliers can also receive benefits under Pillar II for non-olive purposes.[190] Because we do not have the documentation from suppliers demonstrating under which measures of the Regional GOA's rural development plan that Dcoop received benefits,[191] we do not intend to make this change. In addition, making this change for one supplier and not attributing the benefit to olive and olive-derived product sales for the other suppliers who also received rural development benefits would create inconsistency in our methodology. Moreover, as it relates to PROSOL, we never stated that PROSOL is tied to olives and olive-derived products. Therefore, we are not changing our methodology with respect to that program.

IX. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related countervailable subsidy rates accordingly. If these positions are accepted, we will publish the final results in the *Federal Register*.

☒	☐
Agree	Disagree

6/25/2021

X 

Signed by: RYAN MAJERUS

Ryan Majerus
Deputy Assistant Secretary
for Policy and Negotiations

[190] *See Preliminary Results* PDM at 25.

[191] *See* Commerce's Letter, dated March 6, 2020; and Commerce's Letter, dated March 9, 2020, explaining that we are requesting binary use/non-use information on programs and are not requesting supporting documentation.