

**FINAL RESULTS OF REMAND REDETERMINATION**  
*Asociación de Exportadores e Industriales de Aceitunas de Mesa, Aceitunas Guadalquivir, S.L.U., Agro Sevilla Aceitunas S. COOP. And., and Angel Camacho Alimentación, S.L. v. United States*

Court No. 18-00195, Slip Op. 20-8 (Ct. Int’l Trade January 17, 2020)

**I. SUMMARY**

The Department of Commerce (Commerce) prepared these final results of redetermination in accordance with the opinion and remand order of the U.S. Court of International Trade (the Court) in *Asociacion de Exportadores e Industriales de Mesa et al. v. United States*, Court No. 18-00195, Slip. Op. 20-08 (Ct. Int’l Trade January 17, 2020) (*Remand Order*). These final results of redetermination concern Commerce’s final determination in the countervailing duty investigation of ripe olives from Spain.<sup>1</sup>

In the *Remand Order*, the Court remanded two issues to Commerce: (1) Commerce’s determination that certain subsidies provided by the Government of Spain (GOS) to olive growers are *de jure* specific pursuant to section 771(5A)(D)(i) of the Tariff Act of 1930, as amended (the Act); and (2) Commerce’s analysis pursuant to section 771B(1) of the Act and finding that the demand for raw olives is “substantially dependent” on the demand for table olives.<sup>2</sup> With regard to the first issue, the Court held that Commerce’s *de jure* specificity

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<sup>1</sup> See *Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination*, 83 FR 28186 (June 18, 2018) (*Final Determination*) and accompanying Issues and Decision Memorandum; see also *Ripe Olives from Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 FR 37469 (August 1, 2018) (*Amended Final Determination and Countervailing Duty Order*).

<sup>2</sup> See *Remand Order* at 40.

determination “has not been sufficiently explained because Commerce did not provide an interpretation of the statute in reaching its determination based on the record.”<sup>3</sup> With regard to the second issue, the Court held that Commerce applied an impermissible interpretation of the term “substantially dependent,” pursuant to section 771B(1) of the Act, and deviated from its past practice without adequate explanation in determining that the demand for raw olives is substantially dependent on the demand for table olives.<sup>4</sup> The Court remanded these issues “to Commerce for further proceedings consistent with this opinion.”<sup>5</sup> The Court sustained all other challenged aspects of Commerce’s final determination, concluding that: Commerce’s application of section 771B(2) of the Act, that the processing of raw olives into ripe olives adds only “limited value,” was supported by substantial evidence on the record and in accordance with law; Commerce’s calculation methodology regarding the attribution of subsidy benefits to ripe olive producers was supported by substantial evidence on the record and in accordance with law; and, Commerce’s determination that the raw olive purchase data reported by Aceitunas Guadalquivir, S.L.U. (AG) was sufficiently indicative of its purchases of raw olives used to produce ripe olives is supported by substantial evidence.<sup>6</sup>

Consistent with the Court’s *Remand Order*, Commerce: (1) reopened and placed information on the record and provided interested parties an opportunity to comment or provide additional rebuttal or clarifying information; (2) further explains its interpretation of section 771(5A)(D)(i) of the Act for the *de jure* specificity finding; and, (3) reconsidered its interpretation and analysis of section 771B(1) of the Act. We made no changes to the *Amended Final Determination and Countervailing Duty Order* with this redetermination.

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<sup>3</sup> *Id.* at 18.

<sup>4</sup> *Id.*

<sup>5</sup> See *Remand Order* at 40.

<sup>6</sup> See *Remand Order* at 29.

## II. BACKGROUND

On June 18, 2018, Commerce published the *Final Determination* in the investigation of ripe olives from Spain.<sup>7</sup> In the *Final Determination*, Commerce determined that subsidies given to growers of raw olives were *de jure* specific under section 771(5A)(D)(i) of the Act and, pursuant to section 771B of the Act, we deemed those subsidies to have been provided with respect to the production of the processed product.<sup>8</sup> Therefore, using information collected from interested parties during its investigation, Commerce calculated countervailing duty rates applicable to imports of ripe olives from Spain.

On June 19, 2018, two of the mandatory respondents and the Coalition for Fair Trade in Ripe Olives (the petitioner) alleged that the *Final Determination* contained ministerial errors. Specifically, AG alleged that Commerce used the incorrect volume of olives purchased for purposes of calculating the benefit to AG from subsidies provided to the non-affiliated growers that supplied it with raw olives.<sup>9</sup> Angel Camacho Alimentacion, S.L. (Camacho) alleged that Commerce used an incorrect value in calculating the benefit for one subsidy program.<sup>10</sup> The petitioner alleged that Commerce used the incorrect sales value for one of Camacho's growers and that, for two of the programs, Commerce incorrectly attributed the benefit from Camacho's cross-owned input suppliers.<sup>11</sup> Commerce reviewed the record and, on July 12, 2018, agreed that certain allegations referenced in the petitioner's and Camacho's allegations constituted ministerial errors and disagreed that AG's allegation identified a ministerial error, within the

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<sup>7</sup> See *Final Determination*.

<sup>8</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at Comments 1 and 3.

<sup>9</sup> See AG's Letter, "Aceitunas Guadalquivir S.L.U. ("Guadalquivir") Ministerial Error Comments for the Final Determination," dated June 19, 2018.

<sup>10</sup> See Camacho's Letter, "Angel Camacho Alimentacion, S.L. ("Camacho") Ministerial error Comments for the Final Determination," dated June 19, 2018.

<sup>11</sup> See Petitioner's Letter, "CVD Investigation on Ripe Olives from Spain; Petitioner's Comments on Ministerial Errors in the Final Determination," dated June 19, 2018.

meaning of section 705(e) of the Act and 19 CFR 351.224(f).<sup>12</sup> On August 1, 2018, Commerce published the *Amended Final Determination and Countervailing Duty Order*, which reflected the corrections of the ministerial errors.<sup>13</sup>

The three mandatory respondents, Agro Sevilla Aceitunas S. COOP. And. (Agro Sevilla), Camacho, and AG, together with Asociacion de Exportadores e Industriales de Aceitunas de Mesa (ASEMESA) (hereafter collectively referred to as the respondents), challenged Commerce’s final determination arguing before the Court that: (1) Commerce improperly concluded that certain grants provided to olive growers by the Government of Spain are *de jure* specific subsidies under section 771(5A)(D)(i) of the Act; (2) Commerce improperly interpreted and applied section 771B(1) of the Act in concluding that the demand for raw olives is “substantially dependent” on the demand for processed table olives; (3) Commerce improperly interpreted and applied section 771B(2) of the Act in concluding that the processing operation for table olives adds only “limited value”; (4) Commerce improperly deviated from its general attribution practice for calculating the countervailing duty rates by attributing subsidies received by growers of raw olives “to sales of ripe olives rather than to sales of raw olives”; and, (5) Commerce improperly determined that AG’s reported raw olive purchase data were sufficiently indicative of its purchases of raw olives used to produce ripe olives.<sup>14</sup>

On January 17, 2020, the Court issued its decision sustaining, in part, and remanding, in part, Commerce’s final determination in the countervailing duty investigation of ripe olives from Spain. The Court upheld Commerce’s determination as it related to: Commerce’s application of section 771B(2) of the Act in determining that processing raw olives into table olives adds only

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<sup>12</sup> See Memorandum, “Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation,” dated July 12, 2018 (Ministerial Error Memorandum).

<sup>13</sup> See Amended Final Determination and Countervailing Duty Order.

<sup>14</sup> See *Remand Order* at 17-18.

“limited value”; Commerce’s calculation methodology regarding the attribution of subsidy benefits to ripe olive producers; and, Commerce’s determination that AG’s reported olive purchase data were sufficiently indicative of its purchases of raw olives used to produce ripe olives.<sup>15</sup> However, the Court remanded Commerce’s determination that certain grants provided to olive growers by the GOS are *de jure* specific pursuant to section 771(5A)(D)(i) of the Act and Commerce’s determination that the demand for raw olives is substantially dependent on the demand for processed table olives, pursuant to section 771B(1) of the Act.<sup>16</sup> With regard to Commerce’s *de jure* specificity determination, the Court found that Commerce did not sufficiently explain its determination “because Commerce did not provide an interpretation of the statute in reaching its determination based on the record.”<sup>17</sup> Specifically, the Court found Commerce’s explanation insufficient because it did not “explain how references to past subsidy programs as part of a larger subsidy calculation satisfy the ‘express’ requirement of the statute.”<sup>18</sup> As a result, the Court remanded for Commerce to explain its interpretation of the statute. With regard to Commerce’s determination that the demand for raw olives is substantially dependent on the demand for processed olives, the Court found that Commerce applied an impermissible interpretation of the term “substantially dependent” in section 771B(1) of the Act and deviated from its past practice without adequate explanation.<sup>19</sup>

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<sup>15</sup> *Id.* at 29-40.

<sup>16</sup> *Id.* at 18-29.

<sup>17</sup> *Id.* at 18.

<sup>18</sup> *Id.* at 20.

<sup>19</sup> *Id.* at 20-29.

### III. ANALYSIS

#### A. Commerce's Determination that Certain Subsidies to Olive Growers are *De Jure* Specific Pursuant to Section 771(5A)(D)(i) of the Act

##### 1. Commerce's *Final Determination*

In the investigation, Commerce examined programs implemented pursuant to the European Union's Common Agricultural Policy (CAP), which provided subsidies to olive growers, particularly under the Basic Payment Scheme (BPS).<sup>20</sup> The manner in which Spain implemented the BPS as it relates to the provision of, and the amount of benefits to, olive growers relied heavily of the provision of benefits under two predecessor programs: the Common Organization of the Market in Oils and Fats (the Common Market Program), which was in place from 1997 to 2003 and provided annual grants only to Spanish olive growers (the grants were provided on the basis of the volume of olive production, *i.e.*, olive growers received a grant amount in Euros per kilogram of olives produced with different rates applied to olives grown for olive oil and olives grown for processing into table olives); and the Single Payment Scheme (SPS), which replaced the Common Market Program and was in place from 2003 through 2014.<sup>21</sup> The BPS took effect in 2015 as the successor to the SPS, and provided grants during the period of investigation (POI) to Spanish farmers, including olive growers, that met the eligibility requirements and applied for subsidies.

The European Union (EU) claimed, during the investigation, that because the benefits paid under the BPS were "decoupled" from production (*i.e.*, the payment of benefits was no

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<sup>20</sup> The BPS encompasses three subprograms under which farmers can receive payments: Direct Payment, Greening (payments for farmers that undertake agricultural practices beneficial for the climate and the environment), and Aid to Young Farmers. See *Ripe Olives from Spain: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with the Final Antidumping Duty Determination*, 82 FR 56218 (November 28, 2017) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum at 18-21.

<sup>21</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 32-36; see also *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 21-23.

longer contingent on the production of a particular product), Commerce could not find them to be specific.<sup>22</sup> However, because the statute does not provide Commerce with the authority to dismiss as not specific subsidies that are claimed by an authority to be “decoupled,”<sup>23</sup> Commerce fulfilled its responsibility under the statute to investigate the provision of benefits under the BPS to determine whether they were provided on a specific basis pursuant to section 771(5A) of the Act.

The payments provided to farmers during the POI are based on a geographical indicator of farmland productivity prior to the implementation of these programs.<sup>24</sup> Under the Common Market Program, which operated between 1999 and 2002, the EU required each Member State (including Spain) to collect information regarding the hectares, volume, and value (which depended on whether the olives were grown for the production of olive oil or the production of table olives) for each farm.<sup>25</sup> Commerce observed that “{b}oth olive oil and table olives were specifically identified as products eligible to receive production aid under {the Common Market Program}, and the payments provided {between 1999 and 2002} were based on whether the olives were used to produce olive oil or table olives.”<sup>26</sup> Under the SPS, which operated from 2003 through 2014, the amount of aid each farmer was eligible to receive was calculated by

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<sup>22</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 33.

<sup>23</sup> Indeed, neither the statute nor the legislative history uses the terms “coupled” or “decoupled” in the context of specificity or otherwise. See Section 771(5A) of the Act; See also Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol 1(1994) (SAA) at 929-932.

<sup>24</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 33-36 (citing, *inter alia*, EU IQR at Exhibit 12 “Council Regulation (EC) No. 1782/2003”; EU IQR at Exhibit 13 “Council Regulation (EC) No. 1307/2013”; and GOS QR at Exhibits A001 “Royal Decree 1075/2014” and A002 “Royal Decree 1076/2014”); see also *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 19.

<sup>25</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 32-33; see also *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 19 (citing EU IQR Exhibit 11 “Council Regulation (EC) No. 1638/98”).

<sup>26</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 32 (citing EU IQR Exhibit 11 “Council Regulation (EC) No. 1638/98” and GOS SQR Exhibit 21 “Council Regulation (EC) No. 1782/2003” at Article 33 and Annex VI, which references production aid given to the olive oil sector during the reference period pursuant to “Council Regulation (EC) No. 136/66”) (internal footnote omitted).

multiplying the value per hectare by the area in hectares.<sup>27</sup> By reference to the value per hectare calculated using data collected during the operation of the Common Market Program, Commerce found that the SPS program preserved the access of olive farmers to the assistance previously available to them, on a *de jure* specific basis, under the Common Market Program.

In implementing the BPS, Spain used the data collected under the SPS to create 50 agricultural regions to facilitate payments.<sup>28</sup> Each region was assigned a rate based on its productive potential and its productive orientation (*i.e.*, rainfed, irrigated, permanent crops, and permanent pasture).<sup>29</sup> Olive groves are considered “permanent crops” and this designation is factored into the calculation of the regional rate, which, in turn, is used to determine each hectare of farmland’s “basic payment entitlement” and whether, and to what extent, a farmer was eligible to receive grants under the BPS.<sup>30</sup> Thus, Commerce concluded that the regional variations in BPS payments were a result of the use of the historical regional data that had been used to calculate the crop-specific subsidy payments under the SPS. Commerce’s analysis is summarized:

In summary, the annual grant amount provided to olive farmers under BPS is based on the annual grant amount provided to olive farmers under SPS. The grant amount provided to olive farmers under SPS is based on the average grant amount olive farmers received in 1999 through 2002 under the {Common Market Program}. The grant amount provided in 1999 through 2002 to eligible farmers, which included olive farmers, was based on the type of crop grown and the production value created from the crop. Therefore, the annual grant amount provided under BPS {is} based on annual grant amounts that were crop-specific,

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<sup>27</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 32-33; see also *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 22 (citing EU IQR at Exhibit 10 “Council Regulation (EC) No. 864/2004” and Exhibit 12 “Council Regulation (EC) No. 1782/2003”).

<sup>28</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 33 (citing GOS SQR at 26 and EU IQR at Exhibit 13 “Council Regulation (EC) No. 1307/2013”); see also *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 19.

<sup>29</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 33-34; see also *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 19-20.

<sup>30</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 34; see also *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 20.

thus the grant amounts received by olive growers under BPS in 2016 are directly related to the grant amount only olive growers received under the {Common Market Program}.<sup>31</sup>

This analysis was the basis of Commerce’s finding that the BPS provided subsidies that are *de jure* specific to olive growers. Because: the Common Market Program was available only to olive growers (*i.e.*, access to its benefits was “expressly limited” to the olive sector); the SPS calculated the grant amount based on data regarding the type of crop, and the volume and value of production collected under the Common Market Program (*i.e.*, preserving the limited access to benefits available to the olive sector under the Common Market Program); and, by law, access to the SPS grants provided the foundation of the BPS subsidy payments, the BPS retained the *de jure* specificity inherent in the Common Market Program.<sup>32</sup>

## **2. The Court’s *Remand Order***

In its opinion, the Court stated “Commerce did not set forth an interpretation of {section 771(5A)(D)(i) of the Act} in determining that BPS subsidies to olive growers are *de jure* specific, and thus without more the court cannot determine whether it was supported by substantial evidence and in accordance with law.”<sup>33</sup> The Court articulated its concern about what it identified as Commerce’s failure to explain how, in administering the BPS program, the authority “expressly limits” access to the subsidy to an enterprise or industry, as required by section 771(5A)(D)(i) of the Act.<sup>34</sup> In addition, the Court cited the respondents’ argument that the “payments are not dependent on the production of specific crops under {the BPS} program,

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<sup>31</sup> See *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 24.

<sup>32</sup> *Id.* at 18-27; *Final Determination* and accompanying Issues and Decision Memorandum at Comment 3

<sup>33</sup> See *Remand Order* at 18.

<sup>34</sup> *Id.* at 20.

and thus they have been decoupled from the olive industry.”<sup>35</sup> The Court held that Commerce’s *de jure* specificity finding was not sufficiently explained, stating, in relevant part:

{T}he Government fails to explain how a program expressly based on a program that limited access of payments to a specific crop is equivalent to a statement that BPS itself ‘expressly limit[s]’ access of payments to a specific crop, as the statute requires. . . . Nor does the Government explain how references to past subsidy programs as part of a larger subsidy calculation satisfy the ‘express’ requirement of the statute because neither Commerce nor the Government makes more than a conclusory statement about the application of the statute to the facts of this subsidy program. This does not constitute a sufficient explanation of why the BPS subsidies are expressly limited as the statute requires. Without such an explanation of Commerce’s interpretation of the statute, the court cannot analyze whether Commerce made a decision supported by substantial evidence and in accordance with law.<sup>36</sup>

The Court therefore remanded the *de jure* specificity determination for Commerce provide an explanation of its interpretation of the statute.<sup>37</sup>

### 3. Analysis

Commerce further clarifies for the Court the finding that the BPS provides benefits to Spanish olive producers that are *de jure* specific and explains how the authority “expressly limits” access to the subsidy, within the meaning of section 771(5A)(D)(i) of the Act. At the outset of this discussion, Commerce first wishes to express our concern that the Court is relying on the respondents’ characterization of the BPS subsidies as “decoupled” from production of a particular product as having meaning for the purposes of Commerce’s specificity analysis, or even as an indication of non-specificity.<sup>38</sup> A subsidy is specific as a matter of law if “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 statute makes no

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<sup>35</sup> *Id.* at 19.

<sup>36</sup> *Id.* at 20.

<sup>37</sup> *Id.*

<sup>38</sup> See *Remand Order* at 4 (“Specific subsidies are also referred to as ‘coupled’ subsidies. ‘Decoupled’ refers to the fact that a subsidy does not encourage production of a specific agricultural product, *i.e.*, is not a specific subsidy.”).

provision for Commerce to examine whether a subsidy is coupled to or decoupled from production. Indeed, those terms are not used in the statute; they are terms used by the EU in describing the provision of benefits under the CAP Pillar I programs. Sections 771(5A)(D)(i) and (ii) of the Act address *de jure* specificity.<sup>39</sup> The relevant inquiry is not whether the subsidy is “coupled” to or “decoupled” from current production of a particular crop. Rather, the relevant inquiry for specificity under section 771(5A)(D)(i) of the Act is whether access to the subsidy is expressly limited by law to an enterprise or industry. Moreover, under section 771(5A)(D)(ii) of the Act, a program is not *de jure* specific when the government or the legislation pursuant to which the program is administered establishes criteria or conditions governing the eligibility for, and the amount of, a subsidy, *i.e.*, criteria that do not favor one enterprise or industry over another. In any case, a respondent’s claim that a program is not specific is not a sufficient basis for Commerce to reach such a determination. Commerce is obligated by the statute to investigate each program and to determine, on the basis of record evidence, whether a program provides subsidies on a specific basis, whether *de jure* or *de facto*. Commerce did so in conducting its countervailing duty investigation of ripe olives from Spain.

As stated above, a subsidy is *de jure* specific under section 771(5A)(D)(i) of the Act if “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.”<sup>40</sup> The SAA explains Congress’s intent for Commerce “to apply the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign

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<sup>39</sup> See SAA at 929 – 930.

<sup>40</sup> See section 771(5A) of the Act (“{A}ny reference to an enterprise or industry is a reference to a foreign enterprise or foreign industry and includes a group of such enterprises or industries.”).

subsidies which truly are broadly available and widely used throughout an economy.”<sup>41</sup> The

SAA further explains the purpose of the specificity test:

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. Conversely, the specificity test was not intended to function as a loophole through which narrowly focussed {*sic*} subsidies provided to or used by discrete segments of an economy could escape the purview of the {countervailing duty} law.<sup>42</sup>

Regarding *de jure* specificity, the SAA states that “specificity exists where a government expressly limits eligibility for a subsidy to an enterprise, industry, or group thereof.”<sup>43</sup>

Moreover, 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.”<sup>44</sup>

Commerce’s implementing regulation regarding specificity is 19 CFR 351.502.

However, as explained in the *Preamble* issued in conjunction with Commerce’s countervailing duty regulations, Commerce’s regulation on specificity is not extensive because of the level of detail and clarity provided in section 771(5A) of the Act and the SAA.<sup>45</sup> As a result, Commerce limited its regulation “to those aspects of the specificity test that are not addressed explicitly in the statute or the SAA.”<sup>46</sup> Commerce’s regulations, at 19 CFR 351.502(d), do, however, provide a special rule for specificity applicable to agricultural subsidies:

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<sup>41</sup> See SAA at 929; *see also* Uruguay Round Agreements Act, P.L. 103-465, Title I, Subtitle A, § 102(d), 108 Stat. 4815, 4819 (1994) (codified at 19 U.S.C. § 3512(d)) (“The statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.”).

<sup>42</sup> See SAA at 929.

<sup>43</sup> *Id.* at 930.

<sup>44</sup> *Id.*

<sup>45</sup> See *Countervailing Duties; Final Rule*, 63 FR 65348, 65355 (November 25, 1998) (*Preamble*).

<sup>46</sup> *Id.*

*Agricultural Subsidies.* The Secretary 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 (domestic subsidy).

This regulation codified Commerce’s longstanding practice of considering the agricultural sector to constitute more than a single group of industries.<sup>47</sup> The *Preamble* provides the following:

Paragraph (d) . . . provides that the Secretary will not consider a domestic subsidy to be specific solely because it is limited to the agricultural sector. Instead, as under prior practice, the Secretary will find an agricultural subsidy to be countervailable only if it is specific within the agricultural sector, *e.g.*, a subsidy is limited to livestock, or livestock receive disproportionately large amounts of the subsidy. *See, e.g., Lamb Meat from New Zealand*, 50 FR 37708, 37711 (September 17, 1985).<sup>48</sup>

Commerce’s rule concerning specificity in the case of agricultural subsidies was upheld by the Court in *Roses Inc. v. United States*, in which the Court stated:

Commerce’s determination that a group composed of all agriculture, that is, whatever is not services or manufacturing, is not within the meaning of the statutory words “industry or group of industries” is a reasonable interpretation of the statute. While there is room for debate on the meaning of the stated words, Commerce’s interpretation is within the realm of acceptable definitions.<sup>49</sup>

Against this backdrop, Commerce undertakes its specificity analysis of a program that is available only to the agriculture sector. Commerce must be especially rigorous in its application of the so-called “agricultural exception,” lest a domestic industry be deprived of the remedy to which it is entitled under the Act. Commerce’s analysis is focused on determining whether a subsidy is specific to any subset of the agricultural sector. As articulated in *Asparagus from*

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<sup>47</sup> *See Final Negative Countervailing Duty Determination; Fresh Asparagus from Mexico*, 48 FR 21618, 21621 (May 14, 1983) (*Asparagus from Mexico*); *Fresh Cut Roses from Israel; Final Results of Administrative Review of Countervailing Duty Order*, 48 FR 36635, 36636 (August 12, 1983) (*Fresh Cut Roses from Israel*); and *Certain Fresh Cut Flowers from Mexico*, 49 FR 15007, 15008 (April 16, 1984).

<sup>48</sup> *See Preamble*, 63 FR at 65357-58.

<sup>49</sup> *See Roses Inc. v. United States*, 774 F Supp. 1376, 1383-1384 (Ct. Int’l Trade 1991).

*Mexico*,<sup>50</sup> *Certain Fresh Cut Flowers from Mexico*,<sup>51</sup> and *Fresh Cut Roses from Israel*,<sup>52</sup>

“benefits uniformly available to the agricultural sector did not constitute { countervailable subsidies } because the Department ‘consider[s] the agricultural sector to constitute more than a single group of industries.’”<sup>53</sup>

At the outset of its examination of the BPS, and despite the EU’s repeated contention that the programs were “decoupled” and were therefore not specific and not countervailable, Commerce sought to understand 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. This examination required Commerce to develop a record, requesting information from the EU and the GOS, that would demonstrate olive growers’ eligibility to receive benefits under the BPS, and how their access to and the amount of benefits they are eligible to receive was established. The goal of the inquiry was to determine whether there was evidence that demonstrated that the GOS or the EU, either in implementing the program or otherwise, had taken action that “expressly limits” access to the subsidy. When examining the agricultural sector, Commerce can find that the express limitation required by the statute is manifest when, by law, there is no uniform treatment across the agricultural sector in the provision of benefits. In other words, consistent with the framework described above for analyzing specificity of agricultural subsidies, Commerce was seeking to answer the question, “are benefits under the BPS uniformly available across the agricultural sector?” The answer that Commerce arrived at is that, as a matter of law, benefits under the BPS are not uniformly

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<sup>50</sup> See *Asparagus from Mexico*, 48 FR at 21621.

<sup>51</sup> See *Certain Fresh Cut Flowers from Mexico*, 49 FR at 15008.

<sup>52</sup> See *Fresh Cut Roses from Israel*, 48 FR at 36636.

<sup>53</sup> *Id.* (quoting *Asparagus from Mexico*, 48 FR at 21621).

available across the agricultural sector in Spain and therefore, in the words of the statute, “the authority providing the subsidy . . . expressly limits access to the subsidy to an enterprise or industry . . . .”<sup>54</sup>

Information provided by the GOS and the EU indicated that access to, and the amount of, benefits provided to olive growers under the BPS, as a matter of law, relied for reference on the provision of benefits under the SPS and, in turn, access to and the amount of benefits provided to olive growers under the SPS was determined by reference to the benefits provided under the Common Market program. Because the BPS legally incorporated by reference the eligibility criteria and benefits provided under the SPS and the Common Market Program, Commerce appropriately investigated those precursor programs to determine whether the BPS subsidies were uniformly available across the agricultural sector in Spain.<sup>55</sup> In this case, Commerce found that, as a result of the actions of the GOS and the EU in implementing the program, BPS subsidies were not uniformly available across the agricultural sector in Spain because access to the BPS subsidy for olive growers was, as a matter of law, based on eligibility for assistance provided under the Common Market Program, which expressly limited access to olive growers.<sup>56</sup>

The Common Market Program provided benefits on a *de jure* specific basis because access to the subsidy was expressly limited to olive growers. The benefits provided under this 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

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<sup>54</sup> Section 771(5A)(D)(i) of the Act.

<sup>55</sup> “. . . the regulations that govern the current annual grant-to-farmer program for olive growers {the BPS} state that the grant amount calculation is essentially based on an earlier form of the annual grant-to-farmer program. Because this earlier program determined annual grant amounts based on the type of crop and volume of production, the calculation of the current annual grant amount is effectively still based on the type of crop and the volume of production.” See *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 18.

<sup>56</sup> Because our analysis of this program indicated that it was *de jure* specific with respect to Spanish olive growers, there was no need to analyze whether the entire CAP program was specific under section 771(5A)(D) of the Act.

for table olive production). This value is unique to, and only accessed by, farms that grow olives. When this 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).<sup>57</sup> 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.<sup>58</sup> Instead, the SPS grant amounts were based on the amount of grants provided under the Common Market Program that were available only to olive growers, thereby entrenching the crop-specific nature of the subsidy under the Common Market Program into the criteria for determining the assistance that a farmer would be eligible to receive under the SPS. In this manner, the value of the grants provided under the Common Market Program (the access to which was expressly limited to the olive sector) was preserved in calculating the grants paid under the SPS. Thus, under the SPS, access to a subsidy based on the Common Market Program subsidies was expressly limited to olive growers. In implementing the SPS, the GOS and the EU developed a system that applied conditions that were not neutral or objective such that Commerce can consider the program to be not specific under section 771(5A)(D)(ii) of the Act; if a farm

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<sup>57</sup> See *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 22-23.

<sup>58</sup> 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.

produced a product that received certain amounts of assistance prior to the implementation of SPS, those amounts were factored into, and therefore preserved in, the calculation of the grant amounts to which farmers had access under the SPS. In this way, the SPS did not apply uniform treatment across the agricultural sector;<sup>59</sup> olive growers continued to benefit as they had, relative to other sub-sectors of the agricultural sector, under the Common Market Program, under which access to the subsidy was expressly limited to olive growers.

In implementing the BPS, the GOS again legislatively implemented a methodology regarding the distribution of benefits that relied on the access to grants provided under the SPS, not on any other neutral or objective criteria such as the total value of all crops produced on a farm, the area of the farm, the farmer's farm income, *etc.*, to determine the access to grants to provide under the BPS. The calculations incorporated adjustments to account for differences in productive orientation (whether rainfed land, irrigated land, permanent crops, and permanent pasture), and as well, a "convergence factor" that was to be applied in each of the five years of the operation of the BPS in order to bring the assistance provided to all recipients closer to a regional average.<sup>60</sup> However, the fact remains that under the Common Market Program, access to the subsidies was expressly limited to olive growers, and this limited access was legislatively

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<sup>59</sup> As explained above, uniform treatment across the agricultural sector is necessary to find non-specificity for a program that is limited to the agricultural sector. *See, e.g., Asparagus from Mexico*, 48 FR at 21622 ("{W}e found that water rates were provided to the entire agricultural sector as uniform rates. . . . Thus, we found that a specific industry or group of industries was not provided with special water rates as a result of any government-sponsored development program.").

<sup>60</sup> Although the convergence factor was intended to bring the value of assistance to each farmer closer to the regional averages, it will not completely eliminate the differences in assistance. The BPS, as developed by the EU, gave Member States options for how to effect convergence; Spain elected not to use a flat rate multiplied by the number of eligible hectares, but rather elected to use the convergence step that it recognized would gradually reduce, but would not eliminate, the disparity in grant amounts. Commerce found unavailing the argument that the application of a convergence factor eliminated the possibility of finding the assistance specific to olive growers. *See Final Determination and accompanying Issues and Decision Memorandum* at 33-36; *see also Memorandum, "Countervailing Duty Investigation of Ripe Olives from Spain, Verification Report: European Commission,"* dated April 2, 2018, at 3.

preserved in the implementation of the SPS and the BPS.<sup>61</sup> Commerce is required to evaluate this evidence, pursuant to 19 CFR 351.502(d), in examining whether there is uniform treatment in the provision of benefits across the agriculture sector. Commerce can find a subsidy to the agricultural sector to be not specific only if there is record evidence of such uniform treatment, or record evidence of neutral and objective criteria pursuant to section 771(5A)(D)(ii) of the Act. As Commerce concluded in the investigation, the result of the application of the legislatively preserved methodology regarding access to, and the distribution of, benefits was that “two farms of the same size can have two different total entitlement values if there is a historical difference in the amount of grant money the different regions previously received under SPS.”<sup>62</sup> In its implementation of the BPS, the GOS, just as it did with the SPS program, the eligibility criteria that limited access to benefits provided under the Common Market Program were incorporated as a matter of law and embedded the historical differences in crop entitlement amounts among different agricultural products. As a result, farmers who received larger relative amounts of assistance under SPS continue to receive larger amounts of assistance under BPS. Therefore, the entitlement values under the BPS for those farmers that grow olives retain the historical difference, *relative to other farmers*, that was inherent in the Common Market Program.

Finally, the Court expressed concern that Commerce relied on the operation of the predecessor programs to examine the specificity of the BPS.<sup>63</sup> Commerce examines specificity on a case-by-case basis;<sup>64</sup> every case presents unique facts and Commerce has an obligation to develop an approach to the analysis that fits those facts. In this case, because access to, and the

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<sup>61</sup> See *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 23 (“The current BPS program uses the amount farmers received under SPS in 2014, and this amount is based on the average amount a farmer received under {the Common Market Program}, which determined the grant amount on the type of crop.”).

<sup>62</sup> *Id.* at 21.

<sup>63</sup> *Remand Order* at 20.

<sup>64</sup> See SAA at 930.

amount of, subsidies provided under the BPS program was by law determined based on the access to, and the amount of, benefits under the SPS and Common Market Program, it was necessary for Commerce’s analysis to examine and understand how the BPS program’s reliance on those predecessor programs affected a farmer’s access to benefits and whether benefits were uniformly available. Commerce would not have fulfilled its statutory duty to investigate if it were to conclude that the program was not specific based on the respondents’ claim that benefits provided under the BPS are “decoupled” from production, or in the absence of an analysis of the eligibility for and the provision of benefits under the precursor programs, which underpin the access to assistance under the BPS. Such a conclusion would have ignored the fact that BPS legislatively incorporated by reference eligibility criteria from these earlier programs.

Additionally, we recall the purpose of the specificity test, as explained in the legislative history, “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.”<sup>65</sup> As explained above, benefits under the BPS were by law based on the benefits provided under the predecessor programs, which preserved the eligibility criteria for access to benefits provided under the Common Market Program and the historical differences in crop entitlement amounts among different agricultural products. An explicit reference to and reliance on another legal instrument, which sets forth the provision of subsidies for an earlier or separate program on a *de jure* specific basis, can satisfy the “expressly limits” requirement in section 771(5A)(D)(i) of the Act. To find a subsidy not specific merely because the *de jure* specific element of the program is set forth in a more detailed manner in other legal instruments would elevate form over substance. Interpreting the “expressly limits”

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<sup>65</sup> See SAA at 929-30.

language of the statute to require the BPS program to restate the entirety of the laws and regulations pursuant to which the SPS and Common Market Program were implemented would create a loophole through which foreign governments could provide countervailable subsidies in the guise of a “new” program and avoid the imposition of countervailing duties. We decline to adopt such a stringent interpretation of section 771(5A)(D)(i) of the Act because “the specificity test was not intended to function as a loophole through which narrowly focussed {sic} subsidies provided to or used by discrete segments of an economy could escape the purview of the {countervailing duty} law.”<sup>66</sup> Therefore, for the foregoing reasons, we continue to conclude that the BPS is *de jure* specific within the meaning of section 771(5A)(D)(i) of the Act.

**B. Commerce’s Interpretation and Analysis of Section 771B(1) of the Act**

**1. Commerce’s *Final Determination***

The petitioner alleged that certain subsidies to olive growers in Spain should be treated as countervailable with respect to ripe olives because the criteria set forth in section 771B of the Act are satisfied.<sup>67</sup> 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.<sup>68</sup> Commerce therefore analyzed

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<sup>66</sup> See SAA at 929-30.

<sup>67</sup> See Petitioner’s Letter, “Ripe Olives from Spain: Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as Amended, Volume III Countervailable Subsidies,” dated June 21, 2017, at 2-6.

<sup>68</sup> Section 771B of the Act reads as follows:

In the case of an agricultural product processed from a raw agricultural product in which –  
(1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and

whether section 771B of the Act applied in the countervailing duty investigation of ripe olives from Spain to determine if countervailable subsidies provided to producers of raw olives should be treated as though the countervailable subsidies have been provided with respect to producers of the processed product.

The first criterion of the analysis under section 771B(1) of the Act requires determining whether “the demand for the prior stage product is substantially dependent on the demand for the latter stage product.” In the investigation, we identified the “prior stage product” as raw olives for purposes of the analysis under section 771B(1) of the Act, because we found that raw olives are simply processed into either of two next-stage olive products, olive oil or table olives.<sup>69</sup> Commerce explained that processed table olives, the next-stage olive product that includes ripe olives, should be considered the “latter stage product” for purposes of the analysis of the criterion under section 771B(1) of the Act in this investigation.<sup>70</sup> Commerce found that the demand for the prior stage product, raw olives, is substantially dependent on the demand for the latter stage product, table olives, because if the demand for table olives were to cease, then, at a minimum, eight percent of the market, which accounts for millions of dollars in export sales to the United States and roughly 600,000 tons of raw olives, would be negatively affected.<sup>71</sup>

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(2) the processing operation adds only limited value to the raw commodity, countervailable subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.

<sup>69</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 21-22; see also *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 15.

<sup>70</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 21-22; see also *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 15.

<sup>71</sup> See *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 16.

## 2. The Court's *Remand Order*

The Court held that Commerce's conclusion regarding the first criterion under section 771B(1) of the Act is not in accordance with the law because "Commerce applied an impermissible interpretation of the statutory term 'substantially dependent' based on its plain language and legislative history."<sup>72</sup> The Court determined that, while Commerce found the amount of raw olives used for processing into table olives, eight percent of all raw olives, to be substantial and that the demand for raw olives was dependent on the demand for table olives, Commerce failed to assess whether the demand for raw olives was "substantially dependent" because "an analysis of 'substantially dependent' that does not link those two terms is an impermissible interpretation of the statute."<sup>73</sup> According to the Court, Commerce did not read the terms "substantially" and "dependent" in conjunction, but separated the terms to reach its conclusion that the demand for raw olives is substantially dependent upon the demand for table olives.<sup>74</sup>

Furthermore, the Court did not defer to Commerce's interpretation of "substantially dependent" because the Court concluded that "the statutory language is unambiguous regarding the threshold of demand required to satisfy {section 771B(1) of the Act}."<sup>75</sup> In reaching this conclusion, the Court explained that the legislative history of section 771B of the Act illuminates Congress's unambiguous intent for the meaning of "substantially dependent," citing *Pork from Canada*<sup>76</sup> and *Rice from Thailand*<sup>77</sup> as the administrative cases that contain the analysis that

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<sup>72</sup> See *Remand Order* at 21.

<sup>73</sup> *Id.* at 22.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 22-23.

<sup>76</sup> See *Final Affirmative Countervailing Duty Determination; Live Swine and Fresh, Chilled, and Frozen Pork Products from Canada*, 50 FR 25097 (June 17, 1985) (*Pork from Canada*).

<sup>77</sup> See *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Rice from Thailand*, 51 FR 12356 (April 10, 1986) (*Rice from Thailand*).

Congress intended to adopt with the enactment of the statute.<sup>78</sup> The Court observed that, in *Pork from Canada*, Commerce found that the first criterion would be satisfied if the demand for the prior stage good is derived almost exclusively from the demand for the latter stage product.<sup>79</sup> The Court noted that, in *Pork from Canada*, “Commerce also relied on the {International Trade Commission’s} industry analysis, which determined that producers of a raw agricultural product and producers of the processed product could be collapsed into a single industry where the raw product enters a single continuous line of production resulting in one end product.”<sup>80</sup> Similarly, the Court observed that, in *Rice from Thailand*, Commerce found that almost all of the raw agricultural product, paddy rice, is dedicated to the production of milled rice and stated that there was a single continuous line of production from paddy rice to milled rice.<sup>81</sup>

The Court further explained that after the enactment of section 771B of the Act Commerce developed a consistent practice of finding the first criterion satisfied when the demand for the latter stage product is “most or at least half of the demand of the raw agricultural product.”<sup>82</sup> However, the Court determined that Commerce deviated from its past interpretation of “substantially dependent” in the *Final Determination*.<sup>83</sup> The Court acknowledged that Commerce previously found that 44.7 percent satisfied the “substantially dependent” criterion in *Shrimp from China*,<sup>84</sup> but stated that “44.7 percent is significantly higher than eight percent.”<sup>85</sup>

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<sup>78</sup> See *Remand Order* at 23-26.

<sup>79</sup> *Id.* at 24 (quoting *Pork from Canada*, 50 FR at 25098).

<sup>80</sup> *Id.* at 24-25 (quoting *Pork from Canada*, 50 FR at 25099) (internal quotations omitted).

<sup>81</sup> *Id.* at 25 (quoting *Rice from Thailand*, 51 FR at 12358).

<sup>82</sup> *Id.* at 27 (citing *Fresh, Chilled, and Frozen Pork from Canada: Final Affirmative Countervailing Duty Determination*, 54 FR 30774 (July 24, 1989); and *Rice from Thailand: Final Results of Countervailing Duty Administrative Review*, 59 FR 8906 (February 24, 1994)).

<sup>83</sup> *Id.* at 26-28.

<sup>84</sup> *Id.* at 28 (discussing *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*)).

<sup>85</sup> *Id.*

In sum, the Court concluded that Commerce deviated from the plain language of the statute, Congress’s unambiguous intent, and Commerce’s practice in determining that the demand for raw olives is substantially dependent on the eight percent of raw olives used to produce table olives. The Court therefore remanded Commerce’s analysis under section 771B(1) of the Act for further proceedings consistent with the Court’s decision.<sup>86</sup>

### **3. Analysis**

In accordance with the Court’s *Remand Order*, Commerce: (1) reopened and placed information on the record and provided interested parties an opportunity to comment or provide additional rebuttal or clarifying information; and (2) reexamined whether the “substantially dependent” criterion under section 771B(1) of the Act is satisfied and revised the analysis in a manner that is supported by substantial evidence on the record and consistent with the statutory language, Congress’s intent, Commerce’s practice, and the Court’s decision. We conclude that section 771B(1) of the Act is satisfied because, as explained in greater detail below, the demand for the prior stage product is substantially dependent on the demand for the latter stage product and we continue to deem countervailable subsidies provided to producers of raw olives as though the countervailable subsidies have been provided with respect to the manufacture, production, or exportation of ripe olives. Accordingly, we made no changes to our calculations from the *Amended Final Determination and Countervailing Duty Order* for purposes of this redetermination.

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<sup>86</sup> *Id.* at 40.

**a. Section 771B(1) is Satisfied Because the Demand for the Prior Stage Product is Substantially Dependent on the Demand for the Latter Stage Product**

Section 771B of the Act directs Commerce 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. The first criterion of the analysis under section 771B(1) of the Act requires determining whether “the demand for the prior stage product is substantially dependent on the demand for the latter stage product.” In prior cases, Commerce has defined the “prior stage product” to be coterminous with the raw agricultural product.<sup>87</sup> Similarly, in the *Final Determination*, we defined the raw agricultural product and the prior stage product to be the same (*i.e.*, all raw olives).<sup>88</sup> However, as explained below, on remand we have reconsidered the definition of the prior stage product in our analysis of section 771B(1) of the Act in this investigation based on the language in the statute and new evidence submitted on the record of the remand proceeding.

The Act does not provide a specific definition of the term “raw agricultural product,” as that term is used in section 771B of the Act. For purposes of identifying the relevant industry for the domestic like product, section 771(4)(E)(iv) of the Act defines “raw agricultural product” as “any farm or fishery product.” Commerce has, through its practice, adopted a similar definition of the term “raw agricultural product” for purposes of section 771B of the Act.<sup>89</sup>

Similarly, there is no statutory definition of “prior stage product.” As noted above, in past cases and in the *Final Determination*, Commerce defined the raw agricultural product and

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<sup>87</sup> See, *e.g.*, *Shrimp from China* and accompanying Issues and Decision Memorandum at Comment 5.

<sup>88</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 22; see also *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 15-16.

<sup>89</sup> See generally *Shrimp from China*; *Rice from Thailand*; *Final Results of Countervailing Duty Administrative Review*, 59 FR 8906 (February 24, 1994).

the prior stage product to be the same. However, there is a “strong presumption that Congress expresses its intent through the language it chooses and that the choice of words in a statute is therefore deliberative and reflective.”<sup>90</sup> 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.<sup>91</sup>

Commerce recognized and applied this fundamental rule of statutory construction in defining the “latter stage product” in the *Final Determination*. In defining “latter stage product” as table olives, Commerce observed that section 771B(1) of the Act uses the term “latter stage product” rather than “subject merchandise” or “foreign like product,” and, for that reason, found that “the statutory language does not require the latter stage product to be the subject merchandise or the foreign like product.”<sup>92</sup> Congress would have used the words “subject merchandise” or “foreign like product” if it intended the analysis under Section 771B(1) to be limited to the demand for the class or kind of merchandise that is the subject of the investigation. Thus, Commerce declined to adopt a definition of “latter stage product” to include only subject merchandise or the foreign like product, and instead explained that table olives, the next-stage olive product inclusive of ripe olives, should be considered the latter stage product for purposes of the analysis under section 771B(1) of the Act.

Applying the same fundamental rule of statutory construction to the term “prior stage product,” for purposes of this redetermination, we no longer consider it accurate to define this term as necessarily encompassing all raw olives, because doing so would give “raw agricultural

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<sup>90</sup> See *KYD, Inc. v. United States*, 779 F. Supp. 2d 1361, 1367 (Ct. Int’l Trade 2011) (quoting *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004)) (internal quotes omitted).

<sup>91</sup> See *Kalle USA, Inc. v. United States*, 923 F.3d 991, 997 (Fed. Cir. 2019) (citing *Reiter v. Sonotone Corp.*, 442 US 330, 339 (1979)).

<sup>92</sup> See *Final Determination* and accompanying Issues and Decision Memorandum IDM at 21.

product” and “prior stage product” the same meaning, which is inconsistent with the language chosen by Congress. The language used in the statute (*i.e.*, prior stage product and latter stage product) shows that Congress contemplated that a raw agricultural product could undergo several stages of production and that each stage of production may produce a distinct processed agricultural product. 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. Accordingly, we have relied on this understanding of the term “prior stage product” for purposes of our analysis under section 771B(1) of the Act in this redetermination.

In the ongoing first administrative review of the order, ASEMESA, Agro Sevilla, and Camacho (collectively, ASEMESA) and Musco Family Olive Company (Musco) each submitted new factual information related to the analysis of whether the demand for the prior stage product is substantially dependent on the demand for the latter stage product. The information also addressed the appropriate identification of the prior stage product when the latter stage product is table olives. Given the relevance of that information to this remand proceeding, as noted above, we placed the information on the record of the remand and we invited interested parties to provide additional factual information to rebut or clarify the record information.<sup>93</sup> Both ASEMESA and Musco provided additional information for the remand record.<sup>94</sup>

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<sup>93</sup> See Memorandum, “Placing Factual Information on the Record,” dated February 20, 2020. Attachment 1 to this memorandum is ASEMESA’s Letter, “Factual Information on ‘Substantial Dependence,’” dated January 15, 2020 (ASEMESA’s January 15 Submission); Attachment 2 to this memorandum is Musco’s Letter, “Ripe Olives from Spain: 1<sup>st</sup> Administrative Review, Submission of New Factual Information,” dated February 5, 2020 (Musco’s February 5 Submission).

<sup>94</sup> See Musco’s Letter, “Ripe Olives from Spain; 1<sup>st</sup> Administrative Review; Response to Request for Additional Information,” dated February 25, 2020 (Musco’s February 25 Submission) at Exhibit 7B; *see also* ASEMESA’s Letter, “Response to the Request for Additional Information on Substantial Dependence, Ripe Olives from Spain (C-469-818),” dated February 21, 2020 (ASEMESA’s February 21 Submission) at Exhibit NFI-7.

ASEMESA provided an article about olives indicating that all olive varieties are dual use and there is no variety explicitly grown for purpose of processing into table olives.<sup>95</sup> In addition, ASEMESA provided production volumes, by variety, extrapolated from the Regional Government of Andalusia's BPS data and internal 2008 GOS reports, as well as statistics from the GOS's Food Information and Control Agency (AICA), which they explain provides the volume of production of each olive variety used for table olive purposes by campaign year.<sup>96</sup> Analyzing the production and end-use data, ASEMESA concluded that there are no olive varieties inherently dedicated to table olive use.

In contrast, Musco provided information from: the Spanish Ministry of Agriculture, Fisheries, Food and Environment (Ministry of Agriculture) on the fitness of the different olive varieties for different purposes;<sup>97</sup> the GOS agricultural insurance regulations on olive crops;<sup>98</sup> the Ministry of Agriculture's 2019 Survey on Areas and Yield;<sup>99</sup> and the Ministry of Agriculture's Statistical Yearbook.<sup>100</sup> According to Musco, this information and data demonstrate that: (1) certain raw olive varieties and their planted hectares are dedicated to table olive production; (2) certain raw olive varieties and their planted hectares are grown for dual use; and (3) certain raw olive varieties and their planted hectares are grown entirely for the purpose of producing olive oil.<sup>101</sup> Musco provided price data from the Junta de Andalusia's publication, *Observatorio de Precios y Mercados*, to support their contention that table olive varieties, dual-use varieties, and mill olives are distinct; these data demonstrate that olive growers of table and dual-use varieties

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<sup>95</sup> See ASEMESA's January 15 Submission at 10-11 and Exhibit 4, *Jamonarium*, "The Olive Oil, the Spanish Golden Liquid."

<sup>96</sup> See ASEMESA's February 21 Submission at 7-10.

<sup>97</sup> See Musco's February 5 Submission at 4-5 and Exhibit 2

<sup>98</sup> *Id.* at Exhibit 1.

<sup>99</sup> See Musco's February 25 Submission at Exhibit 4A.

<sup>100</sup> *Id.* at Exhibit 7B.

<sup>101</sup> See Musco's February 5 Submission at 2.

receive consistently higher farm gate prices than growers of mill olives.<sup>102</sup> In summary, Musco concludes that these data, when considered together, firmly demonstrate that for purposes of the analysis under section 771B(1) of the Act in this case, it is appropriate to consider the prior stage product to be the raw olives grown for the purpose of processing into table olives (the table olive varieties and the dual use varieties), and on this basis the demand for raw table olives is substantially dependent on the demand for processed table olives.

In light of the information provided by ASEMESA and Musco, Commerce has gained a better understanding of the Spanish olive industry. Specifically, the record now contains information and data from the GOS that confirms that the different olive varieties are grown for specific end uses. As in the *Final Determination*, we continue to identify the “latter stage product” as table olives. Information on the remand record demonstrates that there is recognition by the Spanish olive industry and by the GOS that certain olive varieties are grown for producing table olives, other olive varieties are grown as mill olives to be used to produce olive oil, and other olive varieties can be used for either purpose (so-called “dual use” olives).<sup>103</sup> Musco provided data from a GOS source that details the volume of table olive varieties and dual use olive varieties actually used to produce table olives; these data also report the volume of table olive varieties and the volume of dual-use olive varieties actually used to produce olive oil.<sup>104</sup> As a result of this new information and data, for the section 771B(1) analysis in this redetermination pursuant to remand, we identify the “prior stage product” in this investigation as the varieties of raw olives principally suitable for use in the production of table olives. This conclusion is supported by the manner in which GOS agencies collect and publicize data on

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<sup>102</sup> *Id.* at Exhibit 9.

<sup>103</sup> See Musco’s February 5 Submission at 3-5, Exhibits 1 and 2.

<sup>104</sup> See Musco’s Letter, “Ripe Olives from Spain; 1<sup>st</sup> Administrative Review; Response to Request for Additional Information,” dated February 25, 2020 (Musco’s February 25 Submission) at Exhibit 7B.

Spanish olive production and by Spanish industry data sources and reporting, both of which demonstrate that it is accepted in the olive sector that, at their source, raw olives, based on their varietal, are grown for one purpose or the other. For example, the GOS agricultural insurance regulations indicate that higher insurance premium rates apply to growers of table olive varietals than to growers of mill olive varietals, and, in general, those insuring dual-use varietals also pay higher premium rates than growers of mill olive varietals;<sup>105</sup> the International Olive Oil Council (IOC) has separate trade standards for table olives;<sup>106</sup> Spain's Ministry of Agriculture published a report on trends in Spain's table olive industry entitled "Diagnostics on the table olive sector in Spain";<sup>107</sup> and a chart from Interaceituna, a Spanish trade publication that tracks table olive production chart, by varietal.<sup>108</sup>

Next, we consider whether the demand for the prior stage product (the raw olives principally suitable for use in the production of table olives) is substantially dependent on the demand for the latter stage product (table olives). We have examined the production volume data, by varietal,<sup>109</sup> and we find that the demand for raw olive varietals principally suitable for use in the production of table olives (which includes "table olive" varietals and "dual use" varietals) is substantially dependent on the demand for processed table olives.<sup>110</sup> Based on this evidence, we find that section 771B(1) of the Act is satisfied.

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<sup>105</sup> See Musco's February 5 Submission at Exhibit 1.

<sup>106</sup> *Id.* at Exhibit 3.

<sup>107</sup> See Musco's February 25 Submission at Exhibit 8.

<sup>108</sup> *Id.* at Exhibit 11.

<sup>109</sup> See Musco's February 25 Submission at Exhibit 11.

<sup>110</sup> Based on the information provided from the GOS's statistics on crop surfaces and production, we find that 96 percent of the raw olives principally suitable for use in the production of table olives were used to produce table olives in harvest year 2016, the POI. See Memorandum, "Countervailing Duty Investigation of Ripe Olives from Spain: Analysis of the Draft Remand Results for Finding the First Criterion of Section 771B is Satisfied," dated April 2, 2020 (Draft Remand Analysis Memorandum).

In making this finding, Commerce reviewed the production information provided by each party and finds that ASEMESA's conclusions, drawn from the production data it provided, are unreasonable for several reasons. First, the production data that ASEMESA provided were not taken directly from a specific source; rather, these data were extrapolated using GOS statistics on surface area farmed by olive varietal. In addition, the data were extrapolated from two different sources: the BPS data for the 2018/2019 campaign, and an internal report dating from 2008. The mixing of data from two sources, one of which is significantly outdated, diminishes the reliability of the resulting production data. Second, although ASEMESA identified the source of these data, ASEMESA did not provide the underlying source data. Third, ASEMESA's estimate of the surface area dedicated to the production of table and dual-use olive varietals reports a total area of 490,529 hectares.<sup>111</sup> However, Musco provided published GOS data showing the surface area dedicated to olive production for 2019,<sup>112</sup> revealing that the total planted area in Spain for table olives and dual-use olives is 189,794 hectares. This includes 76,120 hectares for table olives and 113,674 hectares for dual-use olives. Thus, ASEMESA's *estimate* of the total surface area dedicated to the production of table and dual-use olive varietals is well over twice the area reported by published GOS data.<sup>113</sup> The use of this overstated surface area as a variable in calculating the production volume based on yield per hectare leads to the overstatement of production data.

Further, ASEMESA incorrectly places the total production data for table olive varietals and dual-use olive varietals in the columns titled "Production Used as Table." This is confirmed

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<sup>111</sup> See ASEMESA's February 21 Submission at 7. ASEMESA reports the surface area for each of the five principal varietals used in the production of table olives. The total is 490,529 hectares.

<sup>112</sup> See Musco's February 25 Submission at Exhibit 4A.

<sup>113</sup> See ASEMESA's February 21 Submission at 7.

by examining the AICA production data submitted by ASEMESA<sup>114</sup> as well as production data in the Interaceituna Publication<sup>115</sup> provided in Musco's submission. ASEMESA contends that there is a difference between these two figures, yet ASEMESA appears to use them interchangeably. This, combined with an overestimation of the hectare data to calculate the total production used as the denominator in this calculation, results in an incongruous substantial dependence calculation. In summary, ASEMESA's calculation methodology vastly overestimates the production volume of the prior stage product in a way that is favorable to their argument but inconsistent with other data ASEMESA placed on the record and with data provided by Musco. As demonstrated below, the data from Musco rely almost exclusively on GOS sources and contradict ASEMESA's calculations that rely on data from inconsistent sources and draw unreasonable conclusions.

To determine whether the information from Musco was reliable, we analyzed several tables that they provided from the Ministry of Agriculture's Statistical Yearbook for 2018 on Surfaces and Crop Productions for Olive Groves. We substantiated raw table olive production data in harvest 2016<sup>116</sup> by multiplying the area of hectares dedicated to raw table olive production,<sup>117</sup> as provided in ASEMESA's February 21 submission, by the yield per hectare. We conducted the same calculation to substantiate the production volume of mill olive varieties.<sup>118</sup> Similarly, we examined the Ministry of Agriculture's end-use production data, by

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<sup>114</sup> See ASEMESA's February 21 Submission at Exhibit NFI-2.

<sup>115</sup> See Musco's February 25 Submission at Exhibit 11.

<sup>116</sup> See Musco's February 25 Submission at Exhibit 7B.

<sup>117</sup> See ASEMESA's February 21 Submission at Exhibit NFI-1.

<sup>118</sup> *Id.*

region, of raw olives used for table and raw olives used for oil<sup>119</sup> and found that this data corresponded to the end-use production levels reported in other tables published by the GOS.<sup>120</sup>

Therefore, Commerce finds the data provided by Musco to be reliable. Information from the Ministry of Agriculture demonstrates that there are certain olive varieties (both table and dual-use) that are grown specifically for table olive production.<sup>121</sup> Information from the Ministry of Agriculture demonstrates that nearly all of the raw table olive varieties are used as table olives.<sup>122</sup> Likewise, the data show that only a small volume of the raw olive varieties grown as table olive varieties is used in the production of olive oil, and even a smaller proportion of raw olive varieties identified as mill olive varieties is used in the production of table olives.<sup>123</sup> Moreover, even if we were to rely on ASEMESA's proposed data, we find that the percentage of raw table olive varieties processed into table olives to be very similar to the percentage of raw shrimp processed into frozen shrimp in *Shrimp from China*, in which we found the demand for fresh shrimp to be substantially dependent on the demand for frozen shrimp.<sup>124</sup>

In summary, for purposes of this redetermination pursuant to remand, we reopened and placed information on the record related to the analysis of whether the demand for the prior stage product is substantially dependent on the demand for the latter stage product and provided

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<sup>119</sup> See Musco's February 25 Submission at Exhibit 7.

<sup>120</sup> See Musco's February 25 Submission at Exhibit 7B.

<sup>121</sup> *Id.* at Exhibit 2A and Exhibit 4A.

<sup>122</sup> *Id.* at Exhibit 7B. GOS data from this chart indicate that 96 percent of raw table olive varieties are processed into table olives during the POI. See Memorandum, "Countervailing Duty Investigation of Ripe Olives from Spain: Analysis of the Draft Remand Results for Finding the First Criterion of Section 771B is Satisfied," dated March 31, 2020.

<sup>123</sup> *Id.* at Exhibit 7B. The data reveal that only four percent of the olives grown as table varieties were used to produce olive oil, and only one percent of the mill varieties was processed into table olives during harvest year 2016.

<sup>124</sup> In *Shrimp from China*, Commerce found that because 44.7 percent of fresh shrimp were processed into frozen shrimp, the demand for fresh shrimp was substantially dependent on the demand for frozen shrimp. See *Shrimp from China* and accompanying IDM at 47. ASEMESA's data indicates that 39.56 percent of raw table olive varieties were processed into table olives during the 2016/2017 campaign which closely corresponds to the percentage of raw shrimp used as frozen shrimp in *Shrimp from China*. See ASEMESA's February 21 Submission at 10.

interested parties an opportunity to comment or provide additional rebuttal or clarifying information. We reconsidered the definition of the term “prior stage product” in our analysis of section 771B(1) of the Act based on the language and structure of the statute and on the new evidence submitted on the record of the remand proceeding; in addition, we identified raw olive varieties principally suitable for use in the production of table olives as the appropriate “prior stage product.” Based on the information on the remand record, we find that section 771B(1) of the Act is satisfied because the demand for the prior stage product (raw olive varieties principally suitable for use in the production of table olives) is substantially dependent on the demand for the latter stage product (table olives). Because the Court affirmed Commerce’s finding in the *Final Determination* for the second criterion under section 771B(2) of the Act, regarding the limited value added,<sup>125</sup> both requirements of section 771B of the Act are satisfied, and we continue to apply this provision of the statute that requires that “countervailable subsidies found to be provided to either the producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.” Therefore, for this redetermination, we have made no change to our identification and measurement of subsidies provided to olive growers and our determination that such subsidies benefit the production of ripe olives.

**b. Section 771B(1) of the Act, the Legislative History, and Commerce’s Practice Do Not Establish an Unambiguous Threshold of Demand Required to Satisfy the “Substantially Dependent” Criterion**

Our revised analysis of section 771B(1) of the Act in this remand proceeding satisfies the meaning of “substantially dependent,” pursuant to the Court’s *Remand Order*. However, given the importance of section 771B of the Act in addressing unfair subsidies that injure U.S.

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<sup>125</sup> See *Remand Order* at 29-33.

agricultural producers and processors, we now explain why we respectfully disagree with the Court’s holding that, under step one of the two-step framework set forth in *Chevron*,<sup>126</sup> the statutory language is unambiguous regarding the threshold of demand required to satisfy the “substantially dependent” criterion and that Commerce applied an impermissible interpretation of the statute in the *Final Determination*.

In passing the Trade Agreements Act of 1979, Congress gave express recognition to the “special nature of agriculture,” foreseeing that the analysis in antidumping and countervailing duty cases involving agricultural products would differ from the analysis in cases pertaining to industrial products.<sup>127</sup> Prior to the enactment of section 771B of the Act, Commerce included benefits to the producers of a raw agricultural product when determining the benefits to the producers of a processed agricultural product, where appropriate.<sup>128</sup> Although these past determinations involving the treatment of subsidies provided to producers or processors of raw agricultural products may be relevant to some degree, they cannot be interpreted as having established strict requirements for determining whether section 771B(1) of the Act is satisfied.

In *Pork from Canada*, Commerce considered subsidies to producers of live swine for purposes of determining the benefit to producers of fresh, chilled, and frozen pork products. In that case, Commerce found that it is inappropriate to consider something as an “input” into something else (for purposes of applying the upstream subsidy provision of the statute) when (a) there is a low level of value added at a given stage of processing and (b) if the processor was merely making the product ready for the next consumer.<sup>129</sup> Applying this test, Commerce found,

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<sup>126</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 US 837, 842-45 (1984).

<sup>127</sup> See S. Rep. No. 249, 96<sup>th</sup> Cong. 1<sup>st</sup> Sess. 88, 91.

<sup>128</sup> See *Pork from Canada*, 50 FR at 25098-100; see also *Rice from Thailand*, 51 FR at 12357-58.

<sup>129</sup> See *Pork from Canada*, 50 FR at 25098.

*inter alia*, that the demand for the slaughtered and quartered swine, the next-stage product, is the predominant determinant of the demand for live swine.<sup>130</sup> However, while Commerce found the demand for the prior stage product, live swine, to be predominantly dependent on the demand for the latter stage product, slaughtered swine, we did not articulate a finding that the demand for live swine was “almost exclusively” dependent on a specific end-use product, such as pork meat, ham, or bacon. Commerce stated that “{t}he salient criterion is the degree to which the demand for the prior stage product is dependent on the demand for the latter stage product.”<sup>131</sup> Commerce explained by way of example that this criterion would be satisfied if the demand for the prior stage product is derived almost exclusively from the demand for the latter stage product,<sup>132</sup> but we did not establish a minimum threshold of demand required to satisfy this criterion. Similarly, in *Rice from Thailand*, Commerce determined that the prior stage product, paddy or unmilled rice, was dedicated to the production of the latter stage product, milled rice,<sup>133</sup> but did not establish a minimum threshold of demand required to satisfy the demand criterion.

Additionally, in *Pork from Canada*, Commerce referenced the International Trade Commission’s (ITC) two-part test for determining whether to collapse producers and processors of a raw agricultural product into a single industry, for purposes of conducting the injury analysis.<sup>134</sup> Commerce did so because, at that time, section 771B of the Act did not exist and the ITC had more experience dealing with agricultural products.<sup>135</sup> Commerce simply noted that the ITC’s industry analysis for agricultural products provided further support, but made it clear that the purpose of the ITC’s test was to determine the relevant industry for purposes of the ITC’s

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<sup>130</sup> *Id.*, 50 FR at 25099.

<sup>131</sup> *See Pork from Canada*, 50 FR at 25098.

<sup>132</sup> *See Pork from Canada*, 50 FR at 25098.

<sup>133</sup> *See Rice from Thailand*, 51 FR at 12358.

<sup>134</sup> *See Pork from Canada*, 50 FR at 25099.

<sup>135</sup> *Id.*

injury analysis, it was not to address the distinct issue of whether countervailable subsidies provided to producers of a raw agricultural product should be considered for purposes of determining the benefit to the producers of a processed agricultural product.<sup>136</sup>

Commerce also recognized in *Pork from Canada*, that in the case of agricultural products, such as pork, producers can shift, very easily, to the production of the processed latter-stage products by making only minor changes to the product.<sup>137</sup> As Commerce explained in that case, it would be reasonable to assume that if countervailing duties were imposed only on live swine, those swine producers would be able to circumvent the imposition of countervailing duties by selling to pork packers in Canada, who simply slaughter and trim the swine, and then export the product to the United States in the form of pork meat. For this additional reason, Commerce considered subsidies that benefitted live swine producers to provide an equal benefit to the next-stage product and declined to treat live swine as an input product for which Commerce would need to conduct an upstream subsidy analysis.

In *Canadian Meat Council v. United States*, the Court held that Commerce's determination in *Pork from Canada* was not in accordance with the law and determined that if the statutory construct regarding the analysis of upstream subsidies is inadequate or inapplicable, it is the role of Congress to remedy any deficiency.<sup>138</sup> Shortly thereafter, Congress observed what Commerce had predicted. Rather than exporting the live swine to the United States for processing, Canadian producers of live swine began to send their live swine for slaughter in Canada and to export pork meat to the United States. As a result, U.S. producers of live swine experienced no relief from subsidized products, and the U.S. pork industry suffered injury from

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See *Canadian Meat Council v. United States*, 661 F. Supp. 622, 623-29 (Ct. Int' Trade 1987).

the diversion of the business to Canadian pork processors.<sup>139</sup> Congress also voiced strong concerns that circumvention would occur absent a change to the countervailing duty law. According to Congress, “the upstream subsidy test, if applied to agricultural commodities, would understate the magnitude of the subsidy and permit wholesale circumvention of the countervailing duty statute. *The trade statute would be rendered essentially useless in the case of subsidized agricultural commodities.*”<sup>140</sup>

Before enacting section 771B of the Act, Congress referenced raspberries to highlight its concern that foreign producers could avoid U.S. countervailing duties on agricultural products merely by minimally processing the raw agricultural product.<sup>141</sup> Congress referred to raspberries as an example of how the countervailing duty law could be circumvented if subsidies provided to raspberry farmers were not attributed to a further processed product, such as frozen raspberries,<sup>142</sup> and Congress stated that a duty on raspberries could be avoided by simply freezing the raspberries before they are shipped to the United States.<sup>143</sup> However, in this example, it is questionable whether the “substantially dependent” criterion under section 771B(1) of the Act would be satisfied if we examined only whether the demand for fresh raspberries was “almost exclusively” dependent on the demand for frozen raspberries. Indeed, the demand for fresh raspberries would also be dependent on the demand for other end-use products, such as raspberry jam. Further, we highlight for purposes of this redetermination that there is nothing in the legislative history or any prior countervailing duty case on raspberries that demonstrated that the demand for fresh raspberries is derived “almost exclusively” from the demand for frozen

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<sup>139</sup> See Senate Congressional Record, S. 8815.

<sup>140</sup> *Id.* (emphasis added).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

raspberries or that “almost all” fresh raspberries are “dedicated to the production” of frozen raspberries. In drafting this legislation, Congress’s intent was to close the gap in the law so that foreign growers or farmers of raw agricultural products could not avoid the application of countervailing duties to exports by merely marginally processing those products and having them reclassified as another product for export to the United States.<sup>144</sup>

In addition to raspberries, Congress also referenced countervailing duty cases on fish, lamb, “and many other products.”<sup>145</sup> Therefore, the facts referenced in both *Pork from Canada* and *Rice from Thailand* should not be considered to have established a specific threshold for what is considered “substantially dependent” under section 771B(1) of the Act because Congress intended that subsidies provided to raspberries, fish, and lamb should be actionable under the new provision. In *Groundfish from Canada* and *Lamb Meat from New Zealand*, both of which took place after *Pork from Canada*, Commerce simply aggregated the subsidies provided to both the producers of the raw product and the processors, without performing any analysis of the percentage of demand of the raw product that was derived from the demand for the processed product.<sup>146</sup>

In *Shrimp from China*, a more recent case, Commerce found that the “substantially dependent” criterion under section 771B(1) of the Act was satisfied, even though the demand for the prior stage product was not almost exclusively dependent on the demand for the latter stage product. In that case, Commerce found that 44.7 percent of the fresh shrimp market depends upon the demand for frozen shrimp, which satisfies section 771B(1) of the Act.<sup>147</sup> In addressing

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<sup>144</sup> *Id.*

<sup>145</sup> See 133 Senate Congressional Record S. 8787.

<sup>146</sup> See *Final Affirmative Countervailing Duty Determination; Certain Fresh Atlantic Groundfish from Canada*, 51 FR 10041 (March 24, 1986); *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Lamb Meat from New Zealand*, 50 FR 37708 (September 17, 1985).

<sup>147</sup> See *Shrimp from China* and accompanying Issues and Decision Memorandum at 47.

claims that 25 percent of fresh shrimp is ultimately used for processing into frozen shrimp, Commerce stated that section 771B(1) of the Act would still be met because a ratio of 25 percent constitutes a demand that is substantially dependent upon the demand for the latter stage (processed) product.<sup>148</sup> More specifically, Commerce determined that “where one quarter of the market depends upon the demand for frozen shrimp, we find it reasonable to consider this ‘substantial’ . . . we consider this proportion to demonstrate that the market for fresh shrimp is ‘dependent’ upon the demand for frozen shrimp in the sense that, were the demand for frozen shrimp to cease, one quarter of the fresh shrimp market would collapse.”<sup>149</sup>

Thus, while we agree with the Court that the term “substantially” modifies the term “dependent” in section 771B(1) of the Act, we believe the Court has misapplied, and too narrowly construed, the meaning of this section of the statute in a manner that is inconsistent with Congressional intent as evident in the cases and agricultural products cited by Congress when it enacted that section of the statute. The statute was enacted by Congress to capture subsidies provided to raw agricultural products that are processed into a next-stage product. In this investigation, a raw olive is simply processed into a next-stage olive product. In the *Preliminary Determination*, Commerce determined that the demand for the prior stage product, raw olives, is substantially dependent on the demand for the latter stage product, processed table olives, because if the demand for table olives were to cease, a sizeable sector of the raw olives market, which consists of only two next-stage olive products (*i.e.*, table olives and olive oil), would be negatively impacted.<sup>150</sup> Therefore, Commerce’s determination to deem subsidies provided to producers of raw olives as having been provided to the production of ripe olives

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<sup>148</sup> *Id.* at 46.

<sup>149</sup> *Id.*

<sup>150</sup> See *Preliminary Determination* and accompanying Preliminary Decision Memorandum at 16.

under section 771B of the Act was fully consistent with both congressional intent and the prior cases in which Commerce analyzed the degree to which the demand for the prior stage product is dependent on the demand for the latter stage product. While the Court states that “it would be more reasonable to consider the demand for raw olives to be ‘substantially dependent’ on the demand for olive oil, which constitutes 92 percent of the demand for raw olives,” the Court does not address whether olive oil, an olive product in a different form, would meet the second criterion under section 771B(2) of the Act. In the event that olive oil would not meet that criterion, the entire Spanish olive industry could avoid the application of countervailing duties on its exports to the United States and the U.S. olive industry may be deprived of the remedy to which it is entitled under the countervailing duty law in general and under section 771B of the Act in particular. The discussion of several agricultural products and industries in the legislative history (as noted above), all of which are different in structure and makeup, suggests that this possible result of the Court’s ruling, *i.e.*, deeming an entire agricultural industry outside the purview of the provision, is contrary to Congress’s intent.

The results of this redetermination pursuant to remand comport with the Court’s *Remand Order*. However, as noted in detail above, Commerce respectfully disagrees with the Court’s holding that the meaning of “substantially dependent” is unambiguous and establishes a minimum threshold of demand, based on the statutory language, the legislative history, and prior Commerce practice.

#### IV. Analysis of Comments

On April 2, 2020, Commerce released the draft results of redetermination and we invited comments from the interested parties.<sup>151</sup> We received timely filed comments from Musco, ASEMESA, and the Government of Spain.<sup>152</sup> We address the parties' comments below.

##### A. Commerce's Determination that Certain Subsidies to Olive Growers are *De Jure* Specific Pursuant to Section 771(5A)(D)(i) of the Act

##### Comment 1: Whether Commerce's Finding that the BPS program is *De Jure* Specific is Not Supported by Substantial Evidence and is Contrary to Law

###### *ASEMESA's Comments*

- Commerce's draft redetermination ignores the plain meaning of the terms used in section 771(5A) of the Act and jumps to the legislative history and practice without grounding either in a plain reading of the statute.
- Section 771(5A) of the Act is unambiguous in its use of the term "expressly limits access": "expressly" is defined as "in a way that is clear," "for a particular purpose," and "in a way that shows intention or choice"; "limit," when used as a verb, is defined as "to control something so that it is less than a particular amount or number"; the noun "access" is defined as "the right or opportunity to look at something," while as a verb, "access" is defined as "to be able to use or obtain something such as a service."
- Thus, under a plain reading of the statute, for the BPS program to be *de jure* specific to *olive growers*, Commerce must show that the purpose of the BPS program is to control eligibility

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<sup>151</sup> See Draft Results of Remand Redetermination: *Asociacion de Exportadores e Industriales de Mesa, Aceitunas Guadalquivir, S.L.U., Agro Sevilla Aceitunas S. Coop. And., and Angel Camacho Alimentacion, S.L. v. United States*, Court No. 18-00195, Slip Op. 20-8 (CIT January 17, 2020), dated April 2, 2020.

<sup>152</sup> See Musco's Letter, "Ripe Olives from Spain; Remand, Slip Op. 20-8; Comments on Draft Results of Remand Redetermination," dated April 17, 2020 (Musco's Comments); ASEMESA's Letter, "Comments on the Department's Draft Redetermination on Remand, Slip Op. 20-8, Court No. 18-00195, *Asociación de Exportadores de Aceitunas de Mesa et al. v. United States*, dated April 17, 2020 (ASEMESA's Comments); Government of Spain's Letter, "Countervailing Duty Investigation of Ripe Olives from Spain-Department of Commerce's Draft Remand Determination," dated April 17, 2020 (GOS's Comments).

for BPS payments such that *olive growers* have a right to, or use, BPS payments in a manner that is limited and more favorable than to another enterprise or industry.

*Musco's Comments*

- Section 771(5A)(D)(i) directs Commerce to treat a domestic subsidy as *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.”
- Commerce has addressed the Court’s question by clarifying in the Draft Redetermination how its finding of *de jure* specificity squarely comports with the statutory requirement.
- Commerce rightly noted that it must be especially rigorous in the application of the “agricultural exception,” which was established in a line of CVD cases involving agricultural products, and pursuant to which Commerce articulated that benefits uniformly available to the entire agricultural sector are not countervailable subsidies.
- Commerce identified the abundant record evidence that supports its conclusions regarding specificity.
- The proper inquiry is not whether BPS is “coupled” or “decoupled,” but whether BPS benefits in Spain are uniformly provided across Spain’s agricultural sector.
- Commerce has demonstrated that Spain’s BPS benefits are by law tied back to Common Market Program subsidies that explicitly limited access to enterprises engaged in the production of table olives and olives for oil.
- SPS payments were expressly based on the prior Common Market Program subsidies; BPS subsidies in turn have been inextricably pegged by law to SPS subsidies.
- By expressly embedding these Common Market Program crop-specific subsidies into BPS, and by expressly locking those payments into regions based on agronomic type (*i.e.*,

permanent crops, rain fed land, irrigated land), the EU and the GOS have created a system that on its face preserves favorable subsidy access for Spain's olive growers, and more broadly, established non-uniform subsidy access across Spain's agricultural sectors.

- Commerce properly found that because BPS by law enables the differentiated provision of benefits for equal-sized farms depending on the agronomic type the GS established for the region in which the farm is located, it is *per se* not uniform in the provision of benefits across agriculture, and thereby satisfies section 771(5A)(D)(i) of the Act.
- That BPS entitlements might be available to a producer of non-permanent crops in a region designated as a non-permanent crop region does not sever the express reliance on Common Market Program olive-specific benefits to farms in permanent crop regions built into the law.
- Commerce has fulfilled its statutory obligation by analyzing the BPS's explicit reference to, and express reliance on, the *de jure* subsidy entitlements of the SPS and Common Market Programs.

**Commerce's Position:** As a fundamental legal matter, we take issue with ASEMESA's sole focus on the phrase "expressly limits access" in section 771(5A)(D)(i) of the Act in a manner that is separate, and thus divorced, from both the entire statutory language of section 771(5A)(D)(i) and the interpretation and application of the *de jure* specificity provision that is set out in the SAA. We turn to the SAA because Congress declared it "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."<sup>153</sup> Therefore, we must disagree with ASEMESA that our draft

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<sup>153</sup> See Uruguay Round Agreements Act, P.L. 103-465, Title I, Subtitle A, § 102(d), 108 Stat. 4815, 4819 (1994) (codified at 19 U.S.C. § 3512(d)).

redetermination inappropriately overlooks a plain reading of the statute in favor of relying on the legislative history and practice.

The remand order from the Court instructed Commerce to provide further explanation of how the BPS program satisfies the “expressly limits access” requirement of the statute. In compliance with the Court’s remand order, Commerce exercised its authority and fulfilled its obligation to consider several factors, including: the context of section 771(5A)(D)(i) and (ii) of the Act and its relationship with other provisions related to *de jure* specificity; the interpretation of the statute as articulated in the SAA; the regulations and the *Preamble*; prior administrative cases in which Commerce analyzed whether agricultural subsidies are *de jure* specific; and, the court decisions that underlie it. Thus, in the draft redetermination, and now in this final redetermination, Commerce undertook its due diligence to review and apply all of the applicable foundational documents. Commerce refused to end its analysis, during the investigation and in this remand redetermination, by accepting as true the declarative statement offered by the EU and the GOS that the assistance that once was “coupled” is now “decoupled” and therefore is not countervailable. To have accepted this statement would have allowed respondent government authorities to pronounce non-countervailability based on terms and concepts not contemplated by the statute and without a thorough examination by Commerce of the operation of a program. The petitioner alleged that Spanish olive growers were receiving countervailable subsidies through the BPS, and supported that allegation with reasonably available information.<sup>154</sup> Therefore, Commerce had a statutory obligation to initiate and to conduct a countervailing duty

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<sup>154</sup> Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 And 731 of the Tariff Act of 1930, as Amended; Volume III: Countervailable Subsidies, dated June 21, 2017, at pages 19-27.

investigation to determine whether the BPS provided Spanish olive growers with a countervailable subsidies (*i.e.*, financial contribution, benefit, specificity).<sup>155</sup>

We further disagree with ASEMESA that the only way Commerce may reach a finding of *de jure* specificity is to show that the BPS program “makes clear” that its *purpose* is to provide payments to a group of enterprises in a manner that is limited and more favorable than to other enterprises or industries. Under the argument made by ASEMESA, *de jure* specificity can exist only if the GOS explicitly states an intent in the legislation that targets olive growers to receive subsidies or that indicates that olive growers are to receive a higher benefit than other agricultural producers. This contention is at odds with the definition and analysis of *de jure* specificity that is set forth in both the statute and the SAA. Under Section 771(5A)(D)(i) of the Act, Commerce is required to find a subsidy to be *de jure* specific “{w}here 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 subsidy is specific as a matter of law.” Therefore, because the investigated subsidy is provided pursuant to legislation under which the authority operates, the determination of *de jure* specificity is based upon the laws and regulations enacted by the government that created the subsidy. When finding that a subsidy is *de jure* specific, Commerce, as explicitly instructed by the SAA, must make this determination on a case-by-case basis.<sup>156</sup> The SAA states:

Although it has long been established that intent to target benefits is not a prerequisite for a countervailable subsidy, the *de jure* prong of the specificity test recognizes that where a foreign government expressly limits access to a subsidy to a sufficiently small number of enterprises, industries or groups thereof, further inquiry into the actual use of a subsidy is unnecessary.

As under existing law, clause (i) does not attempt to provide a precise mathematical formula for determining when the number of enterprises or

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<sup>155</sup> See section 702(b) of the Act.

<sup>156</sup> See SAA at 930.

industries eligible for a subsidy is sufficiently small so as to properly be considered specific. A proposal to establish such quantitative criteria was made during the Uruguay Round negotiations, and was quickly rejected by the United States and many other participants. Commerce can only make this determination on a case-by-case basis.

In other words, the SAA recognizes that once the “expressly limits access” requirement of the *de jure* prong of the specificity test has been met, Commerce is not required to assess whether a foreign government or administering authority has an “intent to target benefits” by analyzing use data.

Commerce also undertakes the analysis of *de jure* specificity based upon the language set forth in section 771(5A)(D)(ii) of the Act. Under clause (ii) of section 771(5A)(D) of the Act, 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 the subsidy, the subsidy is not specific as a matter of law. These criteria are if: eligibility is automatic, the criteria or conditions for eligibility are strictly followed, and the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document so as to be capable of verification. The statute states that “the term ‘objective criteria or conditions’ means criteria or conditions that are neutral and that do not favor one enterprise or industry over another.” The SAA states that clause (ii) is a corollary of the *de jure* test. Under clause (ii), a subsidy would not be *de jure* specific merely because it was bestowed pursuant to certain eligibility criteria; however, “the objective criteria or conditions must be neutral, and not favor certain enterprises or industries over another.”

Therefore, in our analysis of whether the BPS program is *de jure* specific, consistent with the explicit statutory language and SAA language, Commerce analyzed whether the legislation pursuant to which the GOS operates in administering this subsidy expressly limited access to the

subsidy as a matter of law and whether the criteria or conditions for eligibility set forth in the legislation of this subsidy are neutral and do not favor one enterprise or industry over another. Under the statute, in the context of an agricultural program such as BPS, the analysis and the application of the term “expressly limits” necessarily involve an examination pursuant to both section 771(5A)(D)(i) and (ii) because both clauses (i) and (ii) focus on the criteria governing access to the subsidy and define the test for *de jure* specificity.<sup>157</sup>

Under our analysis of whether the BPS program is *de jure* specific under section 771(5A)(D)(i) and (ii) of the Act, Commerce was required by the statute to base its analysis on the legislation governing the provision of that subsidy. ASEMESA is legally incorrect when it states that, in order to meet the statutory definition of *de jure* specificity, the BPS has to make clear that its purpose is to control the access to payments so that olive producers have limited access to higher payments. The term “expressly limits access” is not that narrowly construed. The statute requires only that the authority or the legislation pursuant to which the authority operates expressly limits access to the subsidy to an enterprise or industry, or a group of enterprises or industries. To determine access to payments under the BPS, and the criteria or conditions governing the eligibility for, and the amount of the subsidy, the BPS legislation expressly refers to prior legislation and incorporates by reference the eligibility criteria from the prior legislation. An examination of the prior legislation explicitly referenced in and incorporated by the BPS demonstrates a linkage between eligibility for the crop-specific

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<sup>157</sup> In most instances of *de jure* specificity, clause (ii) need not be referenced because the language in the legislation creating the subsidy clearly does not include “objective criteria or conditions,” as defined by the statute, *e.g.*, the legislation enacting the program provides subsidies solely to the iron and steel industry, the high tech industry, or to state-owned enterprises, *etc.* Here, we are investigating an agricultural program, and 19 CFR 351.502(d) provides that agricultural subsidies will not be specific, either *de jure* or *de facto*, solely because the subsidy is limited to the agricultural sector. As explained in this redetermination, for the agricultural exception to apply, the agricultural subsidy program must include all agricultural products and there must be uniform treatment across all agricultural products. Therefore, the clause (ii) corollary of the *de jure* specificity test is critical for agricultural subsidies when it may not be necessary for examining subsidies to industries that do not have a regulatory exception for specificity.

payments provided under the prior legislation and the current payments provided under the BPS. This link continued to entrench limited access and favored the olive industry. Thus, the statutory definition of *de jure* specificity set forth under 771(5A)(D)(i) and (ii) is met.

In addition, because the BPS references the prior legislation to dictate the access to and amount of payments to be made under the BPS, even using the separate dictionary definitions used by ASEMESA individually for the terms “expressly,” “limits,” and “access” outside the context of the entire statutory language of section 771(5A)(D) of the Act, the BPS does “expressly limits access.” The legislation governing the BPS program may not have explicitly stated that it intended to benefit olive growers; however, the BPS program expressly references prior legislation that dictates the access to and amount of BPS payments that, by law, provides expressly limited access to subsidies to olive growers. The SPS and BPS programs, by law, rely on “historical” reference periods to preserve the benefit amounts provided to growers of certain crops under predecessor programs. The GOS, as required by legislation, relied on volume, value, and area data, and prior subsidy amounts that were developed on a product-specific basis for the purpose of determining the amount of the subsidies provided to olive growers under the SPS, thereby preserving access to the subsidy that was expressly limited under the Common Market Program. Similarly, the GOS once again, by law, relied on a historical reference period to determine benefits under the BPS program, and therefore, once again, by law, entrenched benefits received under these past programs on a crop-specific basis. By designing two consecutive benefit schemes in this manner, the express terms of the legislation pursuant to which the GOS operates demonstrate that the GOS administers the current BPS payments to limit access to certain benefits to a subsector of the Spanish agricultural industry, olives.

As stated above, Commerce can find that the express limitation required by the statute is manifest when, by law, there is not uniform treatment across the agricultural sector in the provision of benefits. Commerce appropriately examined the legal design of the program and the criteria governing whether, and to what extent, a farmer receives benefits, to determine whether the program is *de jure* specific. We undertook such an analysis in this case, and we found that, despite the assertions of non-countervailability by the GOS and ASEMESA, BPS subsidies were not uniformly available across the agricultural sector in Spain because access to the BPS subsidy for olive growers was, as a matter of law, based on access to benefits under the Common Market Program, which expressly limited access to the subsidy to olive growers. We therefore affirm the finding that we made in the *Final Determination* that the BPS provides benefits that are *de jure* specific to olive growers.

**Comment 2: Whether Commerce’s Interpretation of Section 771(5A)(D) is Flawed**

*ASEMESA’s Comments*

- The words “coupled” and “decoupled” speak to the issue of limited access as those terms are used in section 771(5A)(D)(i); subsidies linked to production of a specific product necessarily limit access to a subsidy, while subsidies available to any farmer and not linked to production do not limit access.
- Contrary to Commerce’s contention that these words are offered to subvert the text of the statute, these words are offered because they speak directly to the text and the plain meaning of “expressly limits access” to a subsidy.
- Commerce appears to imply an inverse presumption in the statute’s prescription of what is not *de jure* specific, while ignoring the broader context of section 771(5A)(D)(ii) of the Act: “{w}here the authority providing the subsidy, or the legislation pursuant to which the

authority operates, establishes objective criteria governing eligibility for, and the amount of a subsidy, the subsidy is not specific as a matter of law, if certain conditions are found.”

- Section 771(5A)(D)(ii) of the Act is not a means of finding *de jure* specificity.
- Traditional rules of statutory construction do not countenance reading a statutory presumption of what is not something to suggest or claim an *a contrario* result.
- Commerce itself has argued that section 771(5A)(D)(ii) of the Act does not provide a test for *de jure* specificity in establishing what is *not de jure* specific:

Petitioners have misconstrued the structure of (D)(ii) and a finding of *de jure* specificity set forth under section 771(5A)(D)(i) of the Act. Section 771(5A)(D)(ii) of the Act does not mean that if one or more of the criterion listed under this section of Act is not met then the program is specific as a matter of law. To be specific as a matter of law the program must meet the standard set forth under section 771(5A)(D)(i) of the Act: the legislation under which the program operates expressly limits access to the subsidy to an enterprise or industry. Petitioners have failed to sufficiently allege or support a claim that this program is *de jure* specific under section 771(5A)(D)(i) of the Act.<sup>158</sup>

- Section 771(5A)(D)(ii) of the Act is not the test for *de jure* specificity; it speaks only to that test in terms of eligibility criteria or conditions that “favor one industry over another,” as in the case of “coupled” support, which is not a criterion or condition found in the BPS program.
- Commerce’s reliance on the SAA is equally misplaced in that it references language concerning Commerce’s authority to examine subsidies on a *de facto* specific basis, under section 771(5A)(D)(iii) of the Act, when Commerce finds that a subsidy is not *de jure* specific under section 771(5A)(D)(i) of the Act.

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<sup>158</sup> See ASEMESA’s comments at 7, citing *Certain Coated Paper Suitable for High-quality Print Graphics Using Sheet-Fed Presses from the People’s Republic of China: Initiation of Countervailing Duty Investigation*, 74 FR 53704 (October 30, 2009).

- Commerce’s reference to the “rule of reason” comprises both the *de jure* and *de facto* elements of the specificity test, as reflected in the SAA.
- The SAA addresses the concept that subsidies that are generally available (*i.e.*, those that do not “limit access”) are not countervailable, as reflected in *Carlisle Tire & Rubber Co. v. United States*.
- The SAA explains that the purpose of the specificity test is to function as an “initial screening mechanism to winnow out only those subsidies which *truly are* broadly available and widely used throughout an economy.”<sup>159</sup>
- The SAA distinctly explains the *de jure* specificity test first, and then the *de facto* test.
- The *de jure* test is the beginning of the analysis – the identification of subsidies that on their face do not expressly limit access to an enterprise or industry. In the absence of such limitation, Commerce may continue its examination on a *de facto* basis to ensure that subsidies, as the SAA expresses it, truly are broadly available and used – in this case within the agricultural sector.
- In “declining to adopt such a stringent interpretation of section 771(5A)(D)(i) of the Act,”<sup>160</sup> Commerce declines to apply the statute according to its plain meaning based on a textual analysis and legislative history that simply do not inform the interpretation of section 771(5A)(D)(i) of the Act, but instead concern section 771(5A)(D)(iii) of the Act.

**Commerce’s Position:** We disagree with ASEMESA’s contention that the terms “coupled” and “decoupled” have meaning for Commerce’s specificity analysis. In this investigation, and before this Court, parties have repeatedly claimed that assistance under the CAP, and BPS specifically,

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<sup>159</sup> See ASEMESA’s comments at 8, citing SAA at 929 (emphasis added).

<sup>160</sup> See Draft Redetermination at 19.

is “decoupled” from production and therefore not countervailable; however, the terms “coupled” and “decoupled” are not mentioned in any statutory or regulatory documents, in the SAA, or in the legislative history.<sup>161</sup> While the term “decoupled” may speak to ASEMESA’s proposed interpretation of limited access, that does not mean Commerce must consider the term equally, or at all, relevant for our specificity analysis of this program. Commerce was instructed by the Court to put forth an interpretation of section 771(5A)(D)(i) and provide further explanation of how the BPS program satisfies the “expressly limits” requirement in the statute. Commerce was not required to consider the term “decoupled” as dispositive evidence that this program is not specific. We continue to find in this redetermination that, despite claims that it is “decoupled,” the BPS program is *de jure* specific. As discussed above, when examining a subsidy provided to the agricultural sector, Commerce must adhere to its regulations and is necessarily guided by past practice and legislative history; as such, Commerce appropriately focuses its analysis on whether a program provides uniform treatment in the provision of benefits across the agricultural sector. Moreover, Commerce is not prohibited from finding that a subsidy is expressly limited, under section 771(5A)(D)(i) of the Act, to an enterprise or industry, or a group of enterprises or industries, even when the language of the implementing legislation does not identify recipients that are exclusively eligible or ineligible for benefits under a program. The “expressly limits” requirement in the statute can be satisfied in a number of ways.<sup>162</sup> It is completely within

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<sup>161</sup> Presumably, the term “decoupled” is a reference to “decoupled income support” under Annex 2 of the World Trade Organization Agreement on Agriculture. Section 771(5B)(F) of the Act states that Commerce shall not treat as countervailable “domestic support measures that are provided with respect to products listed in Annex 1 to the Agreement on Agriculture, and that the administering authority determines conform fully to the provisions of Annex 2 to that Agreement.” As explained in the *Final Determination*, section 771(5B)(G)(ii) of the Act implements a time limit for the application of subparagraph (F) and the requirement to treat agricultural subsidies as not countervailable ceased to apply after January 1, 2004. See *Final Determination*, and accompanying Issues and Decision Memorandum at 5-6.

<sup>162</sup> See, e.g., *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017), and

Commerce’s authority to examine the manner in which benefits are provided under a program to determine whether the program is specific. This finding, as has been discussed at length in the *Final Determination* and in this redetermination, is based on the manner in which benefits are determined for provision to olive growers, and on how the methodology for determining benefits incorporates the product-specific nature of the benefits that were provided, on a per unit basis, to olive growers under the Common Market Program. We have set forth an interpretation that the express limitation required by the statute can be manifest when, by law, there is no uniform treatment across the agricultural sector in the provision of benefits. The BPS subsidies are not uniformly available across the agricultural sector in Spain and, therefore, “the authority providing the subsidy... expressly limits access to the subsidy to an enterprise or industry.” Thus, the BPS program is *de jure* specific.

ASEMESA argues that it was inappropriate, in the draft redetermination, for Commerce to examine section 771(5A)(D)(ii) of the Act to inform its specificity analysis under section 771(5A)(D)(i) of the Act. However, the Court ordered Commerce to put forth an interpretation of section 771(5A)(D)(i) to enable its review of Commerce’s determination that the BPS is *de jure* specific to olive growers. The role and importance of clause (ii), particularly in the analysis of agricultural subsidies, is described in great detail above in Comment 1. The Court did not prohibit Commerce from using all of the available analytical tools in presenting its interpretation. While failure to meet the criteria enumerated in section 771(5A)(ii) of the Act, according to ASEMESA, is not indicative of *de jure* specificity, Commerce can certainly consider it an important contextual factor to inform its specificity analysis because the analyses under both clauses (i) and (ii) focus on the criteria governing access to the subsidy. Both Commerce’s past

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accompanying Issues and Decision Memorandum at Comment 68 (finding a tax program to be *de jure* specific on the basis of an activity-based restriction).

practice analyzing agricultural subsidies and the corollary to section 771(5A)(D)(i) of the Act support the notion that favoring certain enterprises or industries over others (*i.e.*, “non-uniform treatment”) is a key element of the specificity analysis for subsidies provided to the agricultural sector. Indeed, it is often the case that enterprises or industries, or group of enterprises or industries, are afforded favorable treatment by virtue of their limited access to the subsidy, regardless of the parties’ claims that the eligibility criteria are neutral and objective.<sup>163</sup>

Commerce must be as rigorous in examining the purported non-specificity of a program as it is in examining the alleged specificity. If one or more of the non-specificity criteria are not met, Commerce is obligated to continue examining whether a program is specific, on either a *de jure* basis under section 771(5A)(D)(i) of the Act, or on a *de facto* basis under section 771(5A)(D)(iii) of the Act. Respondent authorities and companies cannot merely incant the language of section 771(5A)(D)(ii) of the Act and expect Commerce to reach a finding of non-specificity without a thorough examination of the facts. Similarly, Commerce must examine all available information about a program before determining that it is not *de jure* specific and moving to an examination of *de facto* specificity.

ASEMESA also objects to our reliance on the SAA, claiming that 1) the language we cited refers to the *de facto* specificity analysis within the meaning of section 771(5A)(D)(iii); and 2) the “rule of reason” we refer to applies to both the *de jure* and the *de facto* provisions of the Act, and it is therefore inapplicable to this redetermination, in which the Court ordered Commerce to focus on the *de jure* specificity provision of the Act. As an initial matter,

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<sup>163</sup> See, e.g., *Silicon Metal from Australia: Final Affirmative Countervailing Duty Determination*, 83 FR 9834 (March 8, 2018), and accompanying Issues and Decision Memorandum at Comment 4; see also, *Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review*, 82 FR 18896 (April 24, 2017), and accompanying issues and Decision Memorandum at Comments 8 and 32.

ASEMESA's first claim is plainly incorrect. The language ASEMESA appears to take issue with, on page 12 of Commerce's draft redetermination and included in this final redetermination, is presented in the SAA under the *de jure* specificity heading. The language, in full, reads,

As under existing law, clause (i) does not attempt to provide a precise 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. A proposal to establish such quantitative criteria was made during the Uruguay Round negotiations, and was quickly rejected by the United States and many other participants. Commerce can only make this determination on a case-by-case basis.

This language clearly refers to "clause (i)," or the *de jure* specificity provision in the Act.

Therefore, ASEMESA's objection that we are relying on language from the SAA for a *de facto* analysis is misplaced.

In reference to ASEMESA's second objection, it is always appropriate for Commerce to look for guidance to the SAA, which Congress has declared to be the authoritative interpretation of the Act. Repeating here the language of the SAA, the "purpose of the specificity test . . . 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."<sup>164</sup> This introductory language in the SAA applies to the specificity test, writ large, and it articulates a high standard that must be met in order for Commerce to determine that a subsidy is *not* specific. In accordance with the SAA, Commerce reaches a finding of non-specificity only for subsidies that are truly broadly available and widely used throughout an economy. The language of the SAA indicates that the "initial screening mechanism" of the specificity test has a fine mesh, and Commerce will sift out only those subsidies that are truly broadly available, widely used, and spread throughout the economy; the rest are subject to further examination and the application of

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<sup>164</sup> See SAA at 929-30 (emphasis added).

countervailing duties, if other statutory criteria are met. In the case of the BPS, the application of the law to the facts supports a determination that the BPS expressly limits access to the subsidy to olive growers, in accordance with section 771(5A)(D)(i) of the Act, and is therefore *de jure* specific.

**Comment 3: Whether, by the Plain Meaning of Section 771(5A)(D)(i) of the Act, the BPS is Not *De Jure* Specific**

*ASEMESA's Comments*

- Commerce is not entitled to a “chain of specificity” based on the coupled support, *i.e.*, the express limitation on the access to subsidies, under a program terminated 14 years earlier.
- The Court acknowledged that neither the SPS program nor the BPS program links support to the production of any crop or the status or classification of any farmer.
- Commerce’s draft redetermination merely repeats the flawed logic of its final determination: benefits under SPS and BPS were based directly or indirectly on average disbursements made during a reference period in which the crop-specific Common Market Program was operational.
- Commerce’s finding conflates distinct concepts – how the amount of an entitlement is determined on the one hand, and who has access to that entitlement on the other; only the second is relevant for purposes of examining *de jure* specificity.
- Commerce wrongly asserts that how the BPS payments are valued, regardless of who may access them, is tantamount to “limited access” to “olive growers.”
- Commerce has made no reference to the BPS program and its authorizing legislation regarding who may access the subsidies, as required by section 771(5A)(D)(i) of the Act. Rather, Commerce wrongly concludes that retaining the vestige of the subsidy valuation two

degrees removed, “preserves” the limited access “to the olive sector under the Common Market Program.”

- However, eligibility for and the amount of the subsidies are not determined by the Common Market Program, the crop produced, or the farmer; they are determined by the land owned by the farmer and the BPS entitlement attached thereto, which are transferable and not contingent on production.
- Thus, Commerce cannot lawfully conclude that the BPS program is *de jure* specific within the meaning of section 771(5A)(D)(i).

**Commerce’s Position:** We disagree with ASEMESA that the analysis laid out in the final determination and in the draft redetermination impermissibly conflates the concepts of “access” to the entitlements under the BPS and the value of the entitlement. As noted in the draft redetermination and at several points in this final redetermination, the history of the so-called “agricultural exception” and Commerce’s past analysis of subsidy programs provided broadly to the agricultural sector show that our analysis should focus on whether the agricultural sector writ large was treated on a uniform basis or whether certain sub-sectors were treated more favorably than others. In the specific facts of this case, access to benefits was limited to olive growers under the Common Market Program. Subsequent schemes replaced the Common Market Program and thus, in this case, the examination of whether the treatment is “uniform” across the entire agricultural sector necessarily encompasses an analysis of the manner in which benefits are determined under the two successor programs, one of which was in operation during the POI. As has been discussed at length elsewhere in this redetermination, in identifying that the value of entitlements under the BPS incorporates the value of olive production per hectare (in that it relies on the calculation of benefits provided under the SPS), as recorded under the Common Market

Program, the BPS continues to treat the agricultural sector on a non-uniform basis and thus limits access to certain benefits to olive growers. Specifically, farmers on lands that produced olives during the reference period continue to have limited access to entitlement values, and therefore benefit amounts, that retain the historical difference, relative to other farmers on other lands, that was inherent in the crop-specific subsidies provided under the Common Market Program. Thus, we find that this program is *de jure* specific to olive growers within the meaning of section 771(5A)(D)(i) of the Act.

**Comment 4: Whether Commerce’s Factual Analysis of the BPS is Accurate and Correct**

*Government of Spain’s Comments*

- Commerce continues to substantiate its assessment on mistaken assumptions and interpretations of the European, Spanish, and Andalusian legislation.
- Commerce’s draft redetermination incorrectly stated that under the Common Market Program, “the EU required each Member State to collect information regarding the hectares, volume, and value,” and that reference to this value per hectare in the calculation of benefits preserved the access of olive farmers to assistance previously available on a *de jure* specific basis under the Common Market Program.”
- There was no value per hectare under the Common Market Program. As explained by the GOS in response to the initial questionnaire: “Aids were granted on the basis of the quantity of olive oil produced . . . Spain allocated part of its olive oil production aid to support for table olives . . . total funds devoted for table olives were much lower than olive oil . . . and depending {on} production level of each year.”<sup>165</sup>

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<sup>165</sup> See Government of Spain Comments on the Draft Redetermination, at PDF 1, citing Government of Spain Initial Questionnaire Response (IQR), dated September 18, 2020, at page 16.

**Commerce’s Position:** The GOS’s comments address the factual bases for Commerce’s determination in the investigation, to the extent that they were reiterated in the draft redetermination. The remand order from the Court asked Commerce to provide a legal interpretation of section 771(5A) of the Act so that the Court may analyze Commerce’s application of that legal interpretation and whether Commerce’s *de jure* specificity finding is supported by substantial evidence and in accordance with law. Nonetheless, we address the factual arguments made by the GOS to demonstrate, as we did in the *Final Determination* and the draft redetermination, that the facts support finding *de jure* specificity based on our interpretation of section 771(5A)(D)(i), as set forth in this remand redetermination.

On page 7 of the draft redetermination, Commerce stated that:

Under the Common Market Program, which operated between 1999 and 2002, the EU required each Member State (including Spain) to collect information regarding the hectares, volume, and value (which depended on whether the olives were grown for the production of olive oil or table olives) for each farm.... By reference to the value per hectare calculated under the Common Market Program Commerce found that the SPS program preserved the access of olive farmers to the assistance previously available to them, on a *de jure* specific basis, under the Common Market Program.<sup>166</sup>

In making the statement cited by the GOS, which Commerce made in its final determination, and in the draft redetermination, specifically the phrase “calculated under the Common Market Program,” Commerce did not conclude or intend to suggest that this value per hectare data was *used* in determining the amount of Common Market Program benefits provided to olive growers, whether for olive oil or table olives. Common Market Program benefits were based on olive production volume and were provided on a per unit basis to all producers of olives. In this

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<sup>166</sup> See Draft Redetermination at 7-8.

redetermination, we are highlighting, as we did in the *Final Determination*,<sup>167</sup> that this value per hectare data (which incorporates the volume, the value, and the area of production) was *collected* under the Common Market Program. This value per hectare data establish the starting value for the determination of the benefit amount under the SPS. In this way, the SPS payments were based on the value of olive crops produced during the period in which the Common Market Program operated. Therefore, contrary to the claims of the parties that, under the SPS, payments are decoupled from production, the calculation of SPS payments uses olive-specific production volume, value, and area data as important variables. In this manner, the foundation of the calculation of the SPS payment was the value per hectare data of the olives produced. The value of olive production is therefore preserved in, and determinative of, both the access to and the amount of the subsidy under SPS for olive growers. This approach to implementing the SPS preserved the relationship between the volume, value, and area of *olive production* and the amount of benefits that were given to olive growers under the Common Market Program, and thus preserved the *de jure* specificity of the Common Market Program. As discussed throughout this redetermination, the GOS implemented the BPS in a manner that relied on the access to benefits provided under the SPS and, in this way, the BPS preserved the eligibility criteria for access to benefits provided under the Common Market Program and the historical differences in crop entitlement amounts among different agricultural products.

#### **Comment 5: Whether Commerce’s References to Regional Variations are Correct**

##### *Government of Spain’s Comments*

- There was no regionalization under the SPS. Payments were made to individual farmers based on the average amount of various supports received in previous reference periods

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<sup>167</sup> See *Final Determination* and accompanying Issues and Decision Memorandum at 33.

under the crop-specific programs that were integrated into the SPS. Spain decided to implement the SPS based on a historical model, not a regional model.

- The model used for the application of BPS is based on the areas declared in 2013, not on information about the crop grown in the period when the Common Market Program was in force. The BPS regions were established on the basis of declarations made in 2013, when the SPS was in force, and a wide range of products are grouped together.

**Commerce's Position:** The GOS misconstrues the purpose of Commerce's discussion of the regional variations in BPS payments. In the *Final Determination*, Commerce concluded that there were regional variations in BPS payments, and that these variations were a result of their reliance on the historic regional data that had been used to calculate the crop-specific subsidy payments under the Common Market Program. This statement remains true as demonstrated by the information on the record. In implementing the SPS and subsequently the BPS, the GOS identified regions across Spain and relied on the value per hectare data collected during the reference period (*i.e.*, when the Common Market Program was in operation, and therefore based on the volume, value, and area under cultivation for olives) to determine the basis for allocating across the regions the total amount budgeted for SPS, and subsequently BPS. As the GOS says in its comments on the draft redetermination, "{i}n Spain, the BPS regime is regionalized in compliance with Article 23(1) of EU regulation 1307/2013. For each region an average unit value of BPS entitlement is calculated, taking into account the global amount of support received by all farmers in that region prior to the BPS." As such, in the region of Spain where the majority of olives are grown, Andalusia, the volume, value, and area of olive production were important variables in the GOS's determination of the regional distribution of benefits under the SPS and the BPS. In this manner, the geographic distribution of crop production and the

attendant crop-specific payments under the Common Market Program resulted in regional variations in agricultural value, and reliance on these historical values to determine benefits under the SPS and the BPS preserved these regional variations.

#### **Comment 6: Eligibility Criteria vs. BPS Payment Amounts**

##### *Government of Spain's Comments*

- Commerce mixes up eligibility criteria (or access to the scheme benefits) with the calculation of the BPS amounts.
- BPS is a direct payment scheme accessible to all farmers and decoupled from production; therefore, it is independent of the type of crop grown in each agricultural year, provided that the criteria for eligible hectares set out in Article 32(2) of EU regulation 1307/2013 are met.
- These criteria include being an active farmer; having been entitled to benefits under SPS; to apply for the allocation through the single application; and, to hold eligible hectares.
- The entitlement must be activated by the farmer each year, by demonstrating that the land is maintained in good environmental condition (which is not necessary to grow a particular crop, or even that the land is cultivated).
- For calculation of the amount, Spain opted for the historic model defined in Article 43 of regulation 1782/2003: each farmer was granted payment entitlements whose value was the average amount of aid payments received during the . . . reference period.
- The number of payment entitlements under SPS was equal to the average number of hectares farmed during the reference period under the former coupled support schemes. SPS is based on all the sectorial aids received by the farmer during the reference period; it is therefore impossible to draw any link between the SPS and the Common Market Program. The reference amount of each payment entitlement for each farmer is based on the total amounts

of payments the farmer received under the previous schemes during the reference period, which were decoupled and integrated into the SPS. For a farmer with a mixed crop production, all the payments for the sectors decoupled at the moment of introduction of the SPS and received during the reference period were taken into account and would be incorporated in the determination of the value of the farmer's payment entitlements.

- Since the single payment allocation in 2006, the regulations provide for various financial adjustments, such as modulation, financial discipline, the ceiling, and the national reserve. These elements further disconnect the amounts paid to farmers under SPS from the amounts paid during the reference period 1999-2002.
- A subsequent budget cut of 8.64 percent was applied across all SPS entitlements in 2014. This further decoupled the amounts received by farmers through the BPS in comparison to both the value of the 2006 single payment entitlements and the aid received in the reference period 1999-2002.
- Since the establishment of the SPS in 2006, entitlements are subject to purchase, sales, lease, or inheritance, or can be obtained by the national reserve, regardless of the crop grown by the new owner. As such, it is not possible to link an entitlement to the sector from which the initial value was calculated. Hence the amount of support provided to a farmer cannot be said to mirror what the farmer received prior to the introduction of the SPS under the different product-specific schemes in force at that time.
- The subsequent application of the convergence factor to the BPS entitlements aims to bring all BPS payments closer to the regional average. An increase in payments to farmers whose payments are less than 90 percent of the regional average is financed by a reduction in

payments to farmers whose payment is above the regional average. Both the increases and the decreases are applied incrementally.

- Convergence further demonstrates that the amount of support under SPS and BPS are not equivalent. In addition, it refutes the existence of the link between the value of the entitlement under the BPS and the production sector for which amounts were allocated in 2006 under the SPS, contrary to Commerce's claim.

*Musco's Comments*

- The EU and the GOS would not have included a convergence factor to be implemented over time if BPS payments were not *per se* differentiated among enterprises in Spain.

**Commerce's Position:** Under Section 771(5A)(D)(i) of the Act, a subsidy is *de jure* specific if the authority expressly limits access to the subsidy to an enterprise or industry. As discussed above, historically, when examining a program that is available only to the agriculture sector, Commerce's analysis has focused on determining whether a subsidy is specific to any subset of the agricultural sector. Therefore, Commerce's analysis here appropriately considered both the eligibility criteria and the process by which benefits were determined in analyzing the BPS for purposes of the *Final Determination* and this redetermination. We disagree with the GOS that our analysis must end with the consideration of the eligibility criteria. We also stated above that, "{w}hen analyzing the agricultural sector, Commerce can find that the express limitation required by the statute is manifest when, by law, there is no uniform treatment across the agricultural sector in the provision of benefits." Thus, Commerce sought to understand how this program treated the agricultural sector, writ large, and whether any sub-sector was afforded special treatment. Our analysis therefore appropriately drove further into the question of whether the manner in which subsidies were determined for across the agricultural sector under the BPS

was uniform, or whether certain sub-sectors were afforded different treatment that constituted limitations on the access to the subsidy such that the BPS would be *de jure* specific to olive growers. We found in the *Final Determination*, and we continue to find in this redetermination, that the reliance on factors specific to olive growers (*i.e.*, the volume, value, and area of olive production) in determining the amount of assistance provided to olive growers under the SPS and subsequently the BPS resulted, to an important degree, in the preservation of the product-specific basis on which benefits had been provided to olive growers under the Common Market Program. As noted at several points, benefits under the Common Market Program were available only to olive growers, and therefore incorporation of the non-uniform treatment of olive growers and the benefits they received into subsequent schemes also results in the provision of non-uniform benefits under the SPS and BPS programs. On this basis, we continue to find that the BPS limits access to the subsidy, on a *de jure* specific basis, to olive growers in Spain.

The application of several adjustment factors, including the convergence factor and the across-the-board budgetary reduction cited by the GOS, seeks to align all farmers' payments with a regional average. However, as we did in the *Final Determination*, we continue to find parties' arguments on this matter to be unavailing.<sup>168</sup> The GOS's explanation only serves to highlight the fact that even through the end of the operation of the BPS in its current form, at the end of 2019, there will continue to be broad disparities in the assistance provided to farmers under the BPS. Farmers whose payments are above the average will have their payments reduced over time by 30 percent; farmers whose payments are less than 60 percent of the average will have their payments increased over time to reach the 60 percent target. In application, farmers who historically received the highest payments will continue to receive the highest

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<sup>168</sup> See IDM at 36.

payments (which, although even when reduced by the full 30 percent applicable, could remain well above the target of 60 percent of the average), and farmers who historically received the lowest payments will continue to receive the lowest payments, capped at 60 percent of the average. We continue to find that these factors support our conclusion in the *Final Determination*, and in this redetermination, that access to the subsidy for olive growers is limited such that the BPS program is *de jure* specific.

**B. Commerce’s Interpretation and Analysis of Section 771B(1) of the Act**

**Comment 7: Whether Commerce Has Met the Standard Established by Section 771B(1) of the Act for Determining “Substantially Dependent” Demand**

*ASEMESA’s Arguments:*

- Section 771B of the Act is a codification of Commerce practice as set forth in *Pork from Canada* and *Rice from Thailand*.
- The concepts embedded in section 771B of the Act were borrowed from the ITC’s analysis for agricultural industries to determine whether producers of a raw product and processors of that raw product can be considered a single industry for purposes of determining injury.<sup>169</sup>

The fundamental purpose of collapsing industries was to determine whether the operational and financial integration of two industries is so extensive as to eliminate the line between them. To be considered a single industry, “the raw product can be sold in only one market; it enters a single, continuous line of production resulting in one end product.” When Commerce collapsed industries, it noted that “substantially *all* of the raw product was dedicated to the production of the product under investigation.”<sup>170</sup> Commerce has failed to

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<sup>169</sup> See ASEMESA’s Comments at 12.

<sup>170</sup> *Id.* at 13.

establish that there was a single continuous line of production from raw table olives to processed table olives.

- In *Pork from Canada* and *Rice from Thailand*, almost all of the demand for the prior stage product was derived from the demand for the latter stage product.<sup>171</sup>
- Commerce’s concern that applying too “narrow” an interpretation of “substantial dependence” could lead to an entire agriculture industry falling outside the application of the countervailing duty law is without merit.<sup>172</sup>

*Musco’s Arguments:*

- Commerce correctly disavowed strict numerical or minimum thresholds in establishing substantial dependence.<sup>173</sup>
- The Congressional drafters of section 771B(1) of the Act highlighted how they envisioned section 771B(1) of the Act would apply in their discussion of frozen raspberries. Even though frozen raspberries are only one downstream product for fresh raspberries, because fresh raspberries can also be used as dried, in jams and jellies, pureed, or in concentrate, Congress had no intention of creating strict minimum thresholds for establishing substantial dependence. Rather, Congress sought to prevent minimally processed next stage agricultural products that had been subsidized at the prior stage from escaping trade remedies. Moreover, Commerce’s determinations in *Groundfish*, *Lamb Meat*, and other products support Commerce’s finding that there is no specific threshold for determining substantial dependence under section 771B(1) of the Act.<sup>174</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 15.

<sup>173</sup> See Musco’s Comments at 8.

<sup>174</sup> *Id.*

**Commerce’s Position:** We find that the “substantially dependent” criterion under section 771B(1) is satisfied. The statute does not prescribe a specific methodology or analytical framework as to how Commerce should conduct the substantial dependence analysis. The “single continuous line of production” analysis is a part of the ITC’s statutory test for determining whether to collapse producers and processors of a raw agricultural product into a single industry, for purposes of conducting the ITC’s injury analysis.<sup>175</sup> 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 are U.S. government agencies that operate independently and pursuant to distinct statutory mandates and authorities.<sup>176</sup>

We acknowledge that in past cases we have referenced the ITC’s test and assessed whether a single continuous line of production exists as part of the analysis. In *Pork from Canada*, we considered whether there was a single continuous line of production from the raw agricultural product to the processed agricultural product because section 771B of the Act did not yet exist and the ITC had more experience dealing with agricultural products.<sup>177</sup> In that case, Commerce had to examine whether live swine should be considered an input into unprocessed pork, as the basis for an upstream subsidy analysis, or whether live swine was a prior stage product of pork meat, in which case, subsidies to both producers of live swine and to pork processors could be simply aggregated to calculate the countervailable subsidy rate. 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

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<sup>175</sup> See section 771(4)(E) of the Act.

<sup>176</sup> See *Mitsubishi Elec. Corp. v. United States*, 898 F.2d 1577, 1584 (Fed. Cir. 1990) (“Under the statutory scheme, {Commerce} and the Commission have separate and different, although related, duties and responsibilities.”).

<sup>177</sup> See *Pork from Canada*, 50 FR at 25099.

product could be collapsed into a single industry for purposes of examining injury. While Commerce found that the primary, if not the sole, purpose of live swine is to produce a single end product, pork meat,<sup>178</sup> Commerce did not rely solely on the continuous line of production analysis.<sup>179</sup> Indeed, Commerce stated that “{t}he salient criterion is the degree to which the demand for the prior stage product is dependent on the demand for the latter stage product.”<sup>180</sup> Commerce also made it clear that the purpose of the ITC’s framework was to determine the relevant industry and not to address the distinct issue of whether subsidies to producers of a raw agricultural product should be considered for purposes of determining the benefit to the producers of a processed agricultural product.<sup>181</sup>

Congress codified, as a distinct injury provision, the ITC’s single continuous line of production framework in the same legislation that enacted section 771B of the Act.<sup>182</sup> However, the single continuous line of production framework is not mentioned at any point in the legislative history for section 771B of the Act. Raspberries are specifically mentioned in the legislative history, yet there is no discussion of the requirement that there be a “single continuous line of production” between fresh raspberries and frozen raspberries, for example. The legislative history also mentions lamb, fish, and other products in the creation of section 771B of the Act. Further, in *Lamb Meat from New Zealand*,<sup>183</sup> which was issued shortly after *Pork from Canada* and prior to the enactment of section 771B of the Act, Commerce did not analyze

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* (“Given the congressional mandate to acknowledge the special nature of agriculture, our practice, the ITC’s past practice, which is now sanctioned by the Court of International Trade, and the reasonableness of treating the raw and next-stage product together for purposes of the subsidy analysis, we do not consider live swine to be an input into unprocessed pork.”).

<sup>180</sup> *Id.* at 25098.

<sup>181</sup> *Id.*

<sup>182</sup> See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 § 1326, 102 Stat. 1107 (1988).

<sup>183</sup> See *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Lamb Meat from New Zealand*, 50 FR 37708 (September 17, 1985).

whether lamb enters a single, continuous line of production resulting in one end-use product. Commerce did not distinguish between subsidies provided to livestock owners and subsidies provided to lamb meat processors/producers. We simply aggregated the subsidies provided to both livestock owners and lamb meat processors to calculate the countervailable subsidy rate applicable to lamb meat. More recently, in *Shrimp from China*, we acknowledged that the examination of the single continuous line of production can contribute to our analysis of whether section 771B of the Act applies, but made clear that it was not a necessary condition to satisfy the substantially dependent criterion under section 771B(1) of the Act.<sup>184</sup> We found that, even if “25 percent of fresh shrimp is ultimately used for processing into frozen shrimp, {Commerce} would, nonetheless, preliminarily determine that the criterion under section 771B(1) of the Act is met on the grounds that a ratio of 25 percent constitutes a demand that is substantially dependent upon the demand for the latter stage (processed) product.”<sup>185</sup> Therefore, we do not agree with ASEMESA’s contention that Commerce has “adopted” the ITC’s single continuous line of production framework or with ASEMESA’s suggestion that section 771B of the Act can apply only when it is appropriate for the ITC to collapse producers and processors of a raw agricultural product into a single industry for purposes of conducting the ITC’s injury analysis. Neither the statute, the legislative history, nor Commerce’s limited practice in examining agricultural products, both before and after the enactment of section 771B of the Act, places such importance on this consideration, let alone establishes a requirement that a single continuous line of production exist as a precondition to the applicability of section 771B of the Act.

ASEMESA repeatedly points to what it perceives as “an extremely high standard” both in the ITC’s single continuous line of production analysis and correspondingly Commerce’s

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<sup>184</sup> See *Shrimp from China* and accompanying Issues and Decision Memorandum at 47.

<sup>185</sup> *Id.* at 46.

analysis of section 771B(1) of the Act. To this point, we have explained in great detail in this final redetermination that, while in *Pork from Canada* we found that “substantially all” live swine are dedicated to the production of unprocessed pork<sup>186</sup> and in *Rice from Thailand* we found that paddy or unmilled rice was dedicated to the production of milled rice,<sup>187</sup> section 771B(1) of the Act does not establish a minimum threshold of demand to satisfy the criterion. The statutory provision itself does not include phrases such as “almost all” “predominant determinant,” or “derived almost exclusively.” Instead, the statute requires that the demand for the raw agricultural product be “substantially dependent” on the demand for the processed product.

Congress drafted section 771B of the Act to prevent foreign producers from evading subsidies by performing a minimal amount of processing to a raw agricultural product before exporting it to the United States,<sup>188</sup> regardless of whether the demand for the raw product was derived “almost exclusively” from the demand for the processed latter stage product. As noted above, in the legislative history Congress made repeated references to fresh raspberries and their concern that the countervailing duty law could be circumvented if subsidies provided to raspberry farmers were not attributed to a further processed product, such as frozen raspberries. Neither the legislative history nor any countervailing duty case on raspberries demonstrates that the demand for fresh raspberries is derived “almost exclusively” from the demand for frozen raspberries, or that “almost all” raspberries are dedicated to the production of frozen raspberries. Indeed, it was Congress’s intent to apply countervailing duties to a multitude of agricultural products, such as frozen raspberries made from subsidized fresh raspberries. Likewise, based on

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<sup>186</sup> See *Pork from Canada*, 50 FR at 25099.

<sup>187</sup> See *Rice from Thailand*, 51 FR at 12358.

<sup>188</sup> See Congressional Record-Senate S. 8815, June 26, 1987.

our affirmative findings for the criteria under section 771B of the Act, it is consistent with Congress’s intent that subsidies received by olive growers, such as those provided under the EU Common Agricultural Policy, the BPS, rural development program, etc., should be attributed to processors of minimally processed products, such as table olives, so that such subsidies may not escape the purview of the countervailing duty law.

The Court concluded in its *Remand Order* that “the statutory language is unambiguous regarding the threshold of demand required to satisfy {section 771B(1) of the Act}”<sup>189</sup> and indicated that the criterion would be satisfied when the demand for the latter stage product is “most or at least half of the demand of the raw agricultural product.”<sup>190</sup> Although for the reasons explained above we respectfully disagree with the Court’s conclusion that there is an unambiguous threshold of demand required by the statute, Commerce’s revised analysis and finding on remand regarding the substantially dependent criterion complies with the Court’s *Remand Order*.<sup>191</sup> Specifically, we relied on published statistics from the foreign government for our analysis in determining whether the demand for olive varieties principally suitable for use in table olive production is substantially dependent on the demand for table olives. We analyzed production data for all raw olive varieties (*i.e.*, table, dual-use, and mill) and industrial end use data from the GOS Ministry of Agriculture Agricultural Statistics on Annual Crop Surfaces and Productions, provided by Musco, and raw table olive production data from the GOS’s Statistical Yearbook 2018, provided by ASEMESA, to determine that 96 percent of raw table and dual use olive varieties identified as for table are processed into table olives. Therefore, the demand for

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<sup>189</sup> See *Remand Order* at 22-23.

<sup>190</sup> *Id.* at 27.

<sup>191</sup> Based on the information provided from the GOS’s statistics on crop surfaces and production, we find that 96 percent of the raw olives principally suitable for use in the production of table olives were used to produce table olives in harvest year 2016, the POI. See Draft Remand Analysis Memorandum.

raw table and dual-use varieties identified as for table is substantially dependent on the demand for table olives.

We also take issue with ASEMESA's characterization of Commerce's circumvention concerns as "speculative fear" that are "without merit." In the draft redetermination and this final redetermination, we did not "fault" the Court for failing to analyze section 771(B)(2), as ASEMESA claims. Commerce did, however, point out a legitimate concern and potential consequence of what we view as an overly narrow interpretation of "substantial dependence" under section 771B(1) of the Act – that an entire agricultural industry avoids the purview of the provision. ASEMESA did not specifically rebut the concerns we expressed to this point. Our discussion of the legislative history above makes clear that circumvention of the countervailing duty law by minimally processed agricultural products was a very real concern by Congress when enacting this provision. Therefore, we do not agree that the concerns noted here are "speculative fear" that are "without merit"; rather, they are the same concerns Congress expressed three decades ago.

**Comment 8: Whether Commerce's Analysis of "Substantially Dependent" Demand Must Begin with the "Raw Agricultural Product"**

*ASEMESA's Arguments:*

- Commerce misinterprets Congressional intent by arguing that Congress sought to differentiate between "prior-stage product" and "raw agricultural product."
- Commerce's treatment of "raw agricultural product" as distinct and exclusive from "prior stage product" is problematic. Commerce wrongly believes that it can choose any two stages to determine substantially dependent demand within the meaning of Section 771B(1) of the Act, irrespective of whether there is 1) "substantially dependent" demand between the raw

agricultural product and the “prior stage product” and 2) a single continuous line of production.<sup>192</sup>

- By establishing “raw olives suitable for use in the production of table olives” as the “prior stage product” and raw olives as the “raw agricultural product,” Commerce must show that table olive processors’ demand for raw olive varieties suitable for table olive production determines the demand for raw olives.<sup>193</sup>

**Commerce’s Position:** We disagree with ASEMESA that we have interpreted section 771B(1) of the Act in a manner that is contrary to Congress’s intent. As we stated earlier, Congress expresses its intent through the language it chooses in the drafting of a statute. We observed that both “prior stage product” and “raw agricultural product” are used in the statute and the Act does not provide definitions for these terms, as they are used in section 771B of the Act. Nor does the legislative history reveal definitions for these terms as they are used in this context. Therefore, it is within Commerce’s discretion to interpret these terms, as long as it is reasonable.<sup>194</sup> In construing a statute, we endeavor to give effect to every word because different terms used in the same statute presumptively have different meanings.<sup>195</sup> This is consistent with normal rules of statutory construction that require that a statute be interpreted so as to avoid rendering superfluous any provision of that statute.<sup>196</sup> According to the plain language and structure of the

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<sup>192</sup> See ASEMESA’s Comments at 16.

<sup>193</sup> *Id.* at 17.

<sup>194</sup> See *Ad Hoc Shrimp Trade Action Committee v. United States*, 596 F.3d 1365, 1368 (Fed. Cir. 2010) (“Commerce’s interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.” (internal quotations and citation omitted)); see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (recognizing deference where a statute is ambiguous and an agency’s interpretation is reasonable).

<sup>195</sup> See *Kalle USA, Inc. v. United States*, 923 F.3d 991, 997 (Fed. Cir. 2019) (citing *Reiter v. Sonotone Corp.*, 442 US 330, 339 (1979)).

<sup>196</sup> See *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1032 (Fed. Cir. 2007) (following the “cardinal principal of statutory construction that a statute ought ... to be so construed that ... no clause, sentence, or word shall be superfluous” (internal quotations and citation omitted)).

statute, we interpret 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. This analysis and determination will necessarily be based on the specific nature of the product we are investigating. For purposes of this redetermination, we are defining “raw agricultural product” as raw olives and defining the “prior stage product” as those raw olive varieties principally suitable for use as table olives.

In *Pork from Canada* and *Rice from Thailand*, Commerce identified the prior stage product as the same product as the raw agricultural product. However, these determinations were made based on the specific facts on the record of the products and industries at issue. A hog is a hog, and all hogs are principally suitable to be slaughtered into unprocessed pork.<sup>197</sup> No evidence to the contrary was presented in that case. Therefore, it logically follows that all live swine are considered the “prior stage product” in that particular analysis of substantial dependence. However, as noted previously, the legislative history of this provision references several kinds of agricultural products, all of which are different in makeup and structure. Therefore, we can surmise that section 771B of the Act was meant to be applied to a multitude of agricultural products on a case-by-case basis, as opposed to a one-size-fits-all rule. Therefore, we do not find that the “raw agricultural product,” in its entirety, must *always* be the prior stage of any substantial dependence analysis, as ASEMESA claims. That claim is in clear opposition to the statute, which uses both “raw agricultural product” and “prior stage product” separately.

ASEMESA claims that section 771B(2) of the Act reinforces their argument in that the second criterion states that “the processing operation must add ‘only limited value to the raw commodity,’ in reference to a ‘raw agricultural product.’” We disagree with ASEMESA’s

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<sup>197</sup> See *Pork from Canada*, 50 FR at 25099.

reading of the statute and find that the term “raw commodity” in section 771B(2) of the Act does not undermine our interpretation of “prior stage product.” The term “raw commodity” is a general reference to the raw agricultural good identified as the “prior stage product” for purposes of section 771B(1) of the Act. In other words, the raw agricultural good identified as the “prior stage product” and the processed good identified as the “latter stage product” determine the start and end point for the limited value analysis in section 771B(2) of the Act. We have interpreted “prior stage product” to mean 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. This interpretation does not conflict with the term “raw commodity” as it is used in section 771B(2) of the Act.

In cases involving a processed agricultural product, section 771B(1) of the Act directs Commerce to determine whether the demand for the prior stage product is substantially dependent on the demand for the latter stage product. The statute does not mandate that the “raw agricultural product” and “prior stage product” always be coterminous, nor does it prescribe a specific methodology for analyzing substantial dependence. Rather, Commerce conducts this analysis on a case-by-case basis. In this final redetermination, we have reconsidered the definition of the term “prior stage product” in our analysis of section 771B(1) of the Act and identified raw olive varieties principally suitable for use in the production of table olives as the appropriate “prior stage product.” This interpretation is based on the language and structure of the statute, as well as the new evidence submitted on the record of the remand. As in the *Final Determination*, we continue to identify the “latter stage product” as table olives. On this basis, we find section 771B(1) of the Act to be satisfied because the demand for the prior stage product,

varietals of raw olives principally suitable for use in the production of table olives, is substantially dependent on the demand for the latter stage product, table olives.

**Comment 9: Whether “Prior Stage Product” Can be a Subset of the “Raw Agricultural Product”**

*ASEMESA’s Arguments:*

- Commerce fails to define the varietals to which it refers by the term “principally suited for use.” It offers no qualitative or quantitative guidance regarding what it considers “principally suited for use” beyond stating that it includes table olive varietals and dual use varietals.<sup>198</sup> Commerce’s definition of the prior stage product as “olive varietals principally suitable for use in the production of table olives” is not administrable because Commerce has not explained how this term should be interpreted.<sup>199</sup>
- If “raw agricultural product” and “prior stage product” are given exclusive meanings, a “prior stage product” cannot be a subset of 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 statute. A “prior stage product” must be a distinct step in a process of development beyond the “raw agricultural product.” A “prior stage product” can encompass a “raw agricultural product” where it is the first stage in the line of production of the “latter stage product.”<sup>200</sup> Raw olives principally suitable for use in the production of table olives are still raw olives, not a product at a different stage. Because raw olives principally suitable for use in the production of table olives are not manufactured or processed into being, they cannot be a “prior stage product.”<sup>201</sup>

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<sup>198</sup> See ASEMESA’s Comments at 34.

<sup>199</sup> *Id.* at 36.

<sup>200</sup> *Id.* at 19.

<sup>201</sup> *Id.*

- This interpretation of “prior stage product” as precluding a subset of a “raw agricultural product” is substantiated by Congressional intent. In discussing section 771B of the Act, Senator Grassley identified the objective of section 771B of the Act as to prevent circumvention of countervailing duties, stating “a subsidy could be paid to the *commodity* producer and the countervailing duty be evaded by merely changing the form of the product – by subjecting it, for example to an added stage of production....”<sup>202</sup>
- Thus, Congressional intent of what constitutes a “stage of production” is clear, it must be at least one step further in the line of production from the raw agricultural product.<sup>203</sup>

*Musco’s Arguments:*

- Commerce properly reconsidered the definition of the “prior stage product” in its analysis of section 771B(1) of the Act, based on the language in the statute. Commerce was correct in finding that “prior stage product,” and “latter stage product” have their own meanings distinct from “raw agricultural product.” Commerce revised its “substantial dependence” analysis in a manner that is consistent with the statutory language, Congress’s intent, Commerce’s practice, and the Court’s decision.<sup>204</sup>

**Commerce’s Position:** As an initial matter, we disagree with ASEMESA’s contention that, to the extent “prior stage product” and “latter stage product” have different meanings, the prior stage product must be a step *in between* the raw agricultural product and the latter stage product. We set forth an interpretation that, based on the plain language and structure of the statute, Congress intended the “prior stage product” to be the raw agricultural product that the industry under examination considers principally suitable for use in the production of the latter stage

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<sup>202</sup> *Id.* at 20.

<sup>203</sup> *Id.* at 20-21.

<sup>204</sup> *See* Musco’s Comments on page 6.

product. Even using ASEMESA’s own “plain reading” of the statute using dictionary definitions of terms, the prior stage product need only be a product in an earlier step in the process of the manufacture of the latter stage product. This understanding does not conflict with Commerce’s interpretation of “prior stage product.” *Raw* olive varieties principally suitable for use in the production of table olives are indeed a product at an earlier step in the production of table olives. ASEMESA is at once trying to claim that the “raw agricultural product” must always be the same as the prior stage product, as discussed in Comment 8, while also claiming that the prior stage product must be a product at a separate and distinct step of processing *between* the raw product and the latter stage product. ASEMESA cannot have it both ways.

Indeed, the statute recognizes the connection between the prior stage product and the latter stage product in the production process. This analysis and determination will necessarily be based on the specific nature of the product we are investigating. We agree that in some cases the prior stage product is coterminous with the raw agricultural product.<sup>205</sup> Such a result is not *per se* contrary to the statute. However, we disagree that the “prior stage product” must *always* be interpreted as the entirety of the “raw agricultural product.” As explained above, such an interpretation would give “raw agricultural product” and “prior stage product” the same meaning, which is inconsistent with the language chosen by Congress. The statute gives Commerce the authority and the discretion to identify and examine the prior stage product on a case-by-case basis based on the facts of the industry at issue. Even in cases where the prior stage of production for the latter stage product involves a raw agricultural product, the specific nature of the processed product under investigation may require use of a “prior stage product” that does not encompass all of the “raw agricultural product.” For example, if we were investigating diced

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<sup>205</sup> See, e.g., *Pork from Canada*; and *Rice from Thailand*.

red tomatoes, in theory, we would likely consider the prior stage product to be raw red tomatoes. However, we would not include raw green tomatoes because raw green tomatoes have no role in the prior stage of production of diced red tomatoes.

Likewise, it would be illogical to include in our identification of the prior stage product mill olive varieties that are solely suitable in the production of olive oil. These mill olive varieties have virtually no role in the prior stage of production of table olives. Information on the remand record demonstrates that there is recognition by the Spanish olive industry and by the GOS that certain olive varieties are identified as suitable for producing table olives, other olive varieties are grown as mill olives to be used only to produce olive oil, and other olive varieties can be used for either purpose (so-called “dual use” olives).<sup>206</sup>

Specifically, the GOS’s Ministry of Agriculture’s website reveals that olive varieties are identified as for specific fitnesses, *i.e.*, table, dual-use, or mill.<sup>207</sup> According to the GOS, Seville Camomile, Granada Gordal, and Seville Gordal are identified as for use as table olives.<sup>208</sup> Information from the GOS website and industry sources indicate that table olive varieties tend to be larger than mill olive varieties.<sup>209</sup> Additionally, both the table olive varieties and dual-use varieties, such as hojiblanca and camomile cacereña, have a lower oil content than mill olive varieties.<sup>210</sup> Both the GOS and Musco report that table olive orchards and dual-use orchards growing olives for table require larger amounts of water than mill orchards, which Musco claims is due to differences in cultivation practices and quality requirements.<sup>211</sup> Data from the Ministry of Agriculture show that table olives often are grown in the south and western regions of Spain

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<sup>206</sup> See Musco’s February 5 submission at 3-5, Exhibits 1 and 2.

<sup>207</sup> See Musco’s February 25 submission at Exhibit 2.

<sup>208</sup> *Id.* at Exhibit 2A.

<sup>209</sup> *Id.* at Exhibit 2A and Exhibit 13.

<sup>210</sup> *Id.* at Exhibit 2A and Exhibit 2B.

<sup>211</sup> See GOS Verification Report at 3 and Musco’s February 5 Submission at 7.

where Musco explains there is higher rainfall.<sup>212</sup> Musco contends that table olive growers seek to maximize the water content of their fruit in order to increase the fruit size.<sup>213</sup> Industry sources indicate that the table olive orchards are pruned more extensively than mill orchards.<sup>214</sup> According to Musco, mill orchards do not prune trees so rigorously because more orchard branches equate to more olives per tree and smaller, more oil-dense olives for crushing.<sup>215</sup>

GOS insurance regulations provide further evidence that the GOS separates raw olive production into these three end-use categories.<sup>216</sup> The regulations reveal that the GOS delineates specific varieties as table, dual-use, or mill. Farmers purchase these policies in advance of the actual harvest,<sup>217</sup> and produce specific varieties for an intended end use. We find that the GOS agricultural insurance policy differentiates between dual-use olives, such as *hojiblanca*, grown as table olives and those grown as mill olives.<sup>218</sup> There is little interchangeability between their intended use and their actual use. This is evident in the GOS statistics on annual crop surfaces and production for olive groves during the POI.<sup>219</sup>

Additionally, the GOS Ministry of Agriculture collects data from farmers on the production volumes of their olive varieties identified as for table, including both table and dual-use varieties, and their destination.<sup>220</sup> Relatedly, the GOS explained that it tracks the production of dual-use olive varieties that are identified as for table olive use.<sup>221</sup> In other words, the GOS

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<sup>212</sup> See Musco's February 25 submission at Exhibit 5A.

<sup>213</sup> See Musco's February 5 submission at 7.

<sup>214</sup> See Musco's February 25 submission at Exhibit 13.

<sup>215</sup> See Musco's February 5 submission at 7.

<sup>216</sup> *Id.* at Exhibit 1.

<sup>217</sup> See GOS's Comments at 9.

<sup>218</sup> See Musco's February 5 submission at Exhibit 1.

<sup>219</sup> See Musco's February 25 submission at Exhibit 7B.

<sup>220</sup> See ASEMESA's February 21 Submission at Exhibit NFI-1; see also Musco's February 25 Submission at 7A, Annual Crop Surfaces and Productions.

<sup>221</sup> See GOS's Comments at 11; see also Musco's February 25 Submission at 7 and Exhibit 10B; ASEMESA's February 21 Submission at 5-7 and Exhibit NFI-2.

tracks the production of all olive varieties identified as for use as table olives, including manzanilla, gordal, hojiblanca, camomile cacerena, and carrasquena, and are included in the “table” production figures, whereas all olive varieties identified as for use as olive oil are included in the “mill” production figures. Therefore, Commerce can determine the volume of raw olives identified as for table use, which encompasses the olives that are principally suitable for use in the production of table olives, the prior stage product.<sup>222</sup> From these data, Commerce can determine whether the demand for raw table olives is substantially dependent on the demand for processed table olives. The data demonstrate that 99 percent of mill olive varieties and dual-use olives identified as for use as mill olives were used to produce olive oil, and 96 percent of table olive varieties and dual-use olives identified as for table were used to produce table olives

As a result of this information and data, for the section 771B(1) analysis in this redetermination, we identify the “prior stage product” in this investigation as the varieties of raw olives principally suitable for use in the production of table olives. This conclusion is supported by the language and structure of the statute, as well as the evidence on the record of the remand.

**Comment 10: Commerce Should Consider Only Ripe Olives as the “Latter Stage Product”**

*GOS’s Arguments:*

- Commerce should consider only ripe olives as the latter stage product because there are different treatments of table olives and only ripe olives are the subject of investigation.<sup>223</sup>

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<sup>222</sup> See Comment 12 for additional discussion on the separation of dual-use varieties into the “table” and “mill” categories in the GOS data.

<sup>223</sup> See Government of Spain’s Letter, “Countervailing Duty Investigation of Ripe Olives-Department of Commerce’s Draft Remand Determination,” dated April 17, 2020 (GOS’s Comments) at 8.

- There are different lines of production from raw olives to green olives and from raw olives to ripe olives, distinguished by different processes and equipment effecting the physical and chemical changes in the raw olive.<sup>224</sup>

*ASEMESA's Arguments:*

- Commerce fails to account for the fact that there are two independent and continuous lines of production from its “prior stage product” (*i.e.*, raw olives principally suitable for use in the production of table olives) that encompass what Commerce defines as the “latter stage product,” *i.e.*, table olives.<sup>225</sup>
- Commerce can find table olives constitute a single “latter stage product” only if they share common processes after the raw stage along a single, continuous line of production, as evidenced in *Pork from Canada*. In *Pork from Canada*, Commerce found there was a single continuous line of production from live swine to pork meat.<sup>226</sup>

**Commerce's Position:** Commerce identified table olives as the “latter stage product” in the *Final Determination* and no change has been made to the “latter stage product” for purposes of the section 771B(1) analysis on remand. The GOS wishes to revisit this aspect of Commerce's *Final Determination*, but the GOS is a nonparty in the litigation and it is inappropriate to consider an argument on remand where a party could have sought judicial review in the first instance and raised the argument in the initial appeal.<sup>227</sup> ASEMESA also makes arguments that

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<sup>224</sup> *Id.*

<sup>225</sup> See ASEMESA's Comments on page 21.

<sup>226</sup> See ASEMESA's Comments on page 21.

<sup>227</sup> See *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382-83 (Fed. Cir. 1999) (declining to allow “the untenable result that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost”) (internal quotations and citation omitted)); see also *Northwestern Indiana Telephone Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) (explaining that the waiver doctrine “prevents the bizarre result that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost” (internal quotations and citation omitted)).

attempt to undercut Commerce’s identification of the “latter stage product,” but its challenge to this aspect of Commerce’s *Final Determination* was waived and dismissed by the Court.<sup>228 229</sup>

### **Comment 11: Whether Commerce’s Use of Statistical Categories to Define End Uses is Devoid of Context and is Deeply Flawed**

*GOS’s Arguments:*

- Commerce’s change in the “prior stage product” is clear evidence that the previous analysis failed to demonstrate Commerce’s desired results on “substantial dependence.”<sup>230</sup>
- There is no criterion defined by Commerce to describe qualitatively or quantitatively this subset of raw olives. The GOS and ASEMESA have repeatedly made clear that all varieties of raw olives are suitable for both olive oil and table olive production. Therefore, it is not

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We note that ASEMESA, a party to the litigation, sought to challenge the same aspect of Commerce’s *Final Determination*, but the challenge was waived and dismissed by the Court. *See Remand Order* at 29.

<sup>228</sup> *See Remand Order* at 29.

<sup>229</sup> Nonetheless, for the benefit of the Court, as discussed in the *Final Determination* and restated above, we note that the statute does not require Commerce to consider ripe olives as the latter stage product. The statute does not provide a definition for the term “latter stage product” as used within section 771B(1) of the Act; as such, the statutory language does not require the latter stage product to be the “subject merchandise” or the “foreign like product.” Therefore, the “latter stage product” is not defined narrowly to include only subject merchandise, ripe olives. Consistent with the legislative history of the Act (*see* 133 Congressional Record S. 8814 (1987)), section 771B of the Act was enacted by Congress to capture the subsidies provided to raw agricultural products that are processed into a next-stage product, such as live swine into pork and paddy rice into milled rice. *See Pork from Canada*; and *Rice from Thailand*. In this investigation, similarly, a raw olive is simply processed into the next-stage olive product. Therefore, we find that all processed table olives should be included when considering the latter stage product in this context.

ASEMESA argues that the “latter stage product” must be the product after the raw stage along a single continuous line of production. As explained in greater detail above in Comment 7, Commerce is not statutorily required to examine whether there is a continuous line of production between the prior stage product, raw olives principally suitable for use in the production of table olives, and the latter stage product, table olives. Additionally, we disagree with ASEMESA’s argument that Commerce may identify the “latter stage product” as table olives only if the table olives share common processes after the raw stage along a single, continuous line of production. The statute contains no such requirement. Even in the few cases in which Commerce has considered whether a single continuous line of production exists, Commerce first identified the “prior stage product” and the “latter stage product” and then assessed whether a single continuous line of production exists. *See, e.g., Pork from Canada*, 50 FR at 25099. The single continuous line of production analysis was not applied as a method for identifying the “latter stage product.”

<sup>230</sup> *See GOS’s Comments* at 7.

possible to differentiate a portion of the raw agricultural product as more suitable for use in table olive production.<sup>231</sup>

- Information on the GOS webpage does not establish “dedicated” end uses for olive varieties. All olive varieties can be used interchangeably and without distinction for the production of either table olives or olive oil depending on the timing of the harvest and the methodology for extracting the oil.<sup>232</sup>
- The classification of raw olive groves into different varieties or categories is intended for statistical purposes only and does not correspond necessarily with the actual and final destination of olives. Thus, these publications do not reflect the reality of production<sup>233</sup> and Commerce cannot use this information to determine that the demand for raw table olives is substantially dependent on the demand for table olives.
- While Spain’s insurance regulations classify olive orchards into three categories—mill, table, and dual use—this is for the purpose of determining the capital insured regardless of the market price of the olive at the time of harvesting.<sup>234</sup>
- The IOC trade standard applies to the fruit of the cultivated olive tree which has been suitably treated or processed and which is offered for trade and for final consumption as table olives. Therefore, there is no restriction on the application of IOC standards to certain varieties of raw olives, only that they must have undergone the necessary treatment or processing.<sup>235</sup>

*ASEMESA’s Arguments:*

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 9.

<sup>233</sup> *Id.* at 8.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 11.

- Commerce altered its examination of “substantially dependent” demand from considering the demand for raw olives derived from the demand for table olives because it found that, under this framework, demand for raw olives was far below the “substantially dependent” standard.<sup>236</sup>
- Even if the analysis is narrowed to focus on only those main varieties of raw olives consumed in table olive production, the same negative conclusion must be rendered because the Spanish industry demonstrated with hard data that no more than 30 to 39 percent, by volume, of such varieties are consumed in table olive production.<sup>237</sup>
- Olive varieties generally understood to have a “fitness” for oil production are also used in table olive production, and table olives are also used to produce oil. Therefore, Commerce needs to examine varieties by all their end uses.<sup>238</sup>
- The fact that the IOC has separate standards for table olives is of little probative value. IOC standards do not list specific varieties as belonging to a “table olive” classification, nor do they establish that once an olive is classified as a table olive, it cannot be used for oil. The criteria established by the IOC are objective and can be applied to all varieties so long as the fruit is in accordance with the standards.<sup>239</sup>
- Data placed on the record by Musco demonstrate that, between 2016 and 2017, the volume of “table” raw olives sent to oil production increased by more than 142,000 metric tons (MT).<sup>240</sup> At the same time, the volume of “mill raw olives sent to table olive production increased by more than 135,000 MT. These massive shifts occurred in the span of a single year; they did

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<sup>236</sup> See ASEMESA’s Comments at 22.

<sup>237</sup> *Id.* at 23.

<sup>238</sup> *Id.* at 25.

<sup>239</sup> *Id.*

<sup>240</sup> See ASEMESA’s Comments at 26.

not occur over a period of years. Finally, the total amount of “table” raw olives actually used to produce oil, 160,899 MT, and “mill” olives actually used to produce table in 2017, 226,148 MT, equals 387,047 MT, which is larger than the volume of “table” raw olives actually used to produce table olives, 344,147 MT. These data expose the limits of blindly relying on statistical categories as a means to establish “substantially dependent” demand rather than an examination of actual olive varieties and their end uses.<sup>241</sup>

- Spain’s insurance regulations create different olive categories, including table, oil mill, and mixed. Oil mill olives are defined as olives produced on an orchard “where more than 85 percent of the produced olives are used for oil production.” This raises the possibility that production associated with “mill” olive hectares reported in Spanish government statistics include a portion, as high as 14.9 percent, that are processed into table olives. Putting that into perspective, in 2016, the period of investigation, there were 2,243,700 “mill” olive hectares in Spain in production, producing 6,571,400 MT of raw mill olives. If 14.9 percent of those olives are used to produce table olives, that would amount to 979,138 MT table olives being produced, amounting to over 198 percent of the total production of processed table olives in 2016 found by Commerce. This leaves open the possibility that the entire production of processed table olives in 2016 was grown from raw mill olives.<sup>242</sup>

**Commerce’s Position:** We disagree with ASEMESA and the GOS that Commerce’s reconsideration of its interpretation and analysis of section 771B(1) of the Act on remand is intended to achieve a certain outcome and is result oriented. On the contrary, Commerce reconsidered its interpretation and analysis of section 771B(1) of the Act in response to the Court’s *Remand Order*. The revised interpretation and analysis gives effect to the intent of

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 27.

Congress, as reflected in the plain language of the statute, and is based on the new factual information Commerce received from interested parties (both ASEMESA and Musco), which demonstrates that there is recognition by the Spanish olive industry and by the GOS that certain olive varieties are identified as table used for producing table olives, other olive varieties are identified as mill olives to be used to produce olive oil, and other olive varieties that can be identified as either table used for producing table olives or mill olives to be used to produce olive oil (dual-use olives). As such, Commerce has reached a finding that is supported both by the law and the facts of the case.

We also disagree with ASEMESA and the GOS that Commerce used statistical information provided by the Government of Spain out of context. Commerce finds the GOS's argument that the information published on its websites and in its publications was published for statistical purposes only and, therefore, does not reflect the reality of production to be unpersuasive. It is our practice to not scrutinize official government statistics and publications. We presume information from the foreign government to be reliable and credible, unless shown otherwise. Therefore, we find GOS agricultural statistics on annual crop surfaces and productions, indicating that, during harvest year 2016, 492,244 of the 511,122 metric tons of raw table and dual-use varieties identified as for table were sent to table olive production to be accurate.<sup>243</sup> The production data directly corresponds to the table production volume in the GOS Statistical Yearbook for 2016,<sup>244</sup> and the regional chart on the destination of table olives for 2016. The data demonstrate that 96 percent of the raw table and dual-use varieties identified as for table were processed as table olives, and, therefore, the demand for processed table olives is substantially dependent on the demand for those raw olives principally suitable for use in the

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<sup>243</sup> See Musco's February 25 submission at Exhibit 7B.

<sup>244</sup> See ASEMESA's February 21 submission at NFI-1, and Musco's February 25 submission at Exhibit 7A.

production of table olives. Commerce found no indication in the record information that this data is incorrect, and therefore we will continue to rely on the published information.

We disagree with the GOS's and ASEMESA's argument that all olive varieties can be used interchangeably such that all raw olive varieties are principally suitable for use in the production of table olives. Factual information provided on the record of this remand proceeding by both ASEMESA and Musco indicates that olive varieties are identified as for a specific "fitness," either for processing into table olives or for use in the mill for production of olive oil. We disagree with ASEMESA's and the GOS's claim that the fact that olive varieties that have a "fitness" for oil production can also be used in table olive production, and that olive varieties with a table olive "fitness" are used as olive oil, invalidates our conclusion regarding substantial dependence. This occurs in only rare circumstances. Data from the GOS's Ministry of Agriculture clearly demonstrate that the vast majority of mill olive varieties, *i.e.*, picual, arbequina, etc. are used in olive oil.<sup>245</sup> According to the GOS Statistical Yearbook, 99 percent of mill olive varieties were used as olive oil, and 96 percent of table olive varieties and dual-use varieties identified as for table were used as table olives; thus, these data demonstrate that there is little interchangeability between mill and table olive varieties and their end uses.<sup>246</sup> In addition, evidence on the record demonstrates that the GOS itself distinguishes between and separately tracks table and mill olive production and end use. Moreover, the significantly higher farm gate prices for table olive varieties make these varieties a less economically viable source of oil for Spain's olive oil producers.<sup>247</sup> Furthermore, the IOC considers the "table olive to be only the fruit of certain varieties of cultivated healthy olive trees."<sup>248</sup>

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<sup>245</sup> *Id.* at Exhibit 7B.

<sup>246</sup> *Id.*

<sup>247</sup> See Musco's February 5 Submission at Figure 5.

<sup>248</sup> See Musco's February 25 Response at Exhibit 2A.

We are unpersuaded by the GOS’s argument that the IOC trade standard “applies to the fruit of the cultivated olive tree which has been suitably treated or processed and which is offered for trade and for final consumption as table olives,” and therefore there is no restriction on the application of IOC standards to certain varieties of the raw olive. Information on the record of this investigation from the GOS’s Ministry of Agriculture states that the Quality Standard of the International Olive Council defines a table olive in the following manner: “A table olive is the fruit of certain *varieties* of the cultivated, healthy olive tree, taken in the state of adequate maturity and quality that, subject to the appropriate preparations, gives a product of consumption and good conservation as commercial merchandise.”<sup>249</sup> Therefore, we continue to find that only certain varieties of olives are considered for table.

We do not find ASEMESA’s argument that, based on the GOS insurance regulations, all olives used for table may have been mill olive varieties to be persuasive. The GOS records mill olive varieties that are used for table separately from raw table varieties used as table olives.<sup>250</sup> From the record, we know that only 90,404 MT of mill olive varieties were used in table olive production during the POI as opposed to the 979,138 MT figure proposed by ASEMESA.<sup>251</sup> This is because, in general, mill olives do not meet the IOC standards.<sup>252</sup> Table olive varieties tend to be larger and are produced in the wetter regions of Spain than mill olive varieties.<sup>253</sup>

There are also important differences in cultivation practices.<sup>254</sup> According to the GOS, table olive orchards are often irrigated,<sup>255</sup> and are located in the southern and western areas,<sup>256</sup>

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at Exhibit 2A and Exhibit 5A.

<sup>254</sup> See Musco’s February 5 submission at 7; see also Musco’s February 25 submission at Exhibit 13.

<sup>255</sup> See GOS Verification Report at 3; see also Musco’s February 5 submission at 7.

<sup>256</sup> See Musco’s February 25 submission at Exhibit 5A.

which, according to Musco, are the areas receiving higher amounts of rainfall. Table olive growers seek to maximize the water content of their fruit in order to increase the fruit size.<sup>257</sup> Industry sources indicate that the table olive orchards are pruned more extensively than mill orchards in order to increase the size of the fruit.<sup>258</sup> According to Musco, for raw table olive varieties to meet the IOC table olive standards, growers must follow specific irrigation, pruning, and pest management practices that are distinctly different from the cultivation practices for mill olives. Industry sources also indicate that the table olive orchards are pruned more extensively than mill orchards to increase the size of the fruit.<sup>259</sup> In contrast, growers of olives to be used as olive oil strive to maximize the oil content rather than produce large-size olives. Therefore, the olives identified as for mill use require less pruning as farmers seek to provide smaller, oil-dense olives that are ideal for use as oil. While the GOS argues that the insurance policies for olive groves do not reflect the market price of the olive, the GOS insurance regulations reveal that Spain separates its olive orchards according to their end use, designates certain olive varieties as table, mill, or dual-use olives, and provides a higher maximum unit price for damaged table olive varieties than for mill varieties.<sup>260</sup> This confirms that even the GOS considers there to be important value differences between the raw olive varieties.

ASEMESA notes that there was a significant shift in the volume of raw table olives sent to oil production from harvest year 2016 to 2017 and claims that this shift exposes the limits of Commerce's analysis. We disagree with this assessment. In harvest 2016, four percent of table olives were used in the production of olive oil. The percent climbed to 32 percent in harvest

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<sup>257</sup> See Musco's February 5 submission at 7.

<sup>258</sup> See Musco's February 25 submission at Exhibit 13, citing *El Cultivo del Olivo*, by Diego Barranco Navero, Rocardo Fernandez Escobar, and Luis Rallo Romero.

<sup>259</sup> *Id.*

<sup>260</sup> See Musco's February 5 Submission at Exhibit 1.

2017. We attribute this increase, at least in part, to the antidumping and countervailing duty investigations on ripe olives, which were initiated in 2017. Spanish olive processors sought to avoid the potential imposition of antidumping and countervailing duties on ripe olives by sending a substantially larger volume of raw table olive varieties to oil production. 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 mill varietal olives sent to table production remained at one or two percent.<sup>261</sup> Thus, absent the investigations, there has been little shift in the volume of raw table olives sent to oil production, and *vice versa*.

Finally, even if Commerce were to rely on the varietal production data extrapolated by ASEMESA as accurate, it demonstrates that 39 percent of raw table olives are processed into table olives. This percentage establishes that the demand for raw table olives is substantially dependent on the demand for table olives. In past cases, Commerce has found the demand for a prior stage product to be substantially dependent on the latter stage product when close to 40 percent of the demand for the raw product is dependent on the demand for the processed product. For example, in *Shrimp from China*, Commerce established that 44.7 percent of the demand for fresh shrimp is dependent on the demand for frozen shrimp. In that case, we concluded that, even if only 25 percent of the fresh shrimp market depends upon the demand for frozen shrimp, it was reasonable to consider this demand substantially dependent.<sup>262</sup> Therefore, we do not consider ASEMESA's arguments on this point to be convincing.

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<sup>261</sup> *Id.* at Exhibit 7B.

<sup>262</sup> See *Shrimp from China* and accompanying Issues and Decision Memorandum at 46.

## **Comment 12: Whether Commerce Wrongly Dismissed the GOS Varietal Hectare Data Utilized in the Spanish Industry's Varietal Analysis**

### *GOS's Arguments:*

- Commerce's calculation of substantial dependence must include dual-use varieties as well as those most suitable for table olives because it is not possible to differentiate their final destination until the last moment. The dual-use variety can always be used in its entirety to produce table olives.<sup>263</sup>
- ASEMESA's data on the surface area dedicated to production of table olive varieties is based on official sources.<sup>264</sup> The information on manzanilla, gordal, and hojiblanca was sourced from the regional government of Andalusia's Basic Payment Database. The area data are incomplete, as they only cover Andalusia, and farmers are not required to communicate this information. Data for the two remaining varieties, cacerena and carrasquena, have been obtained from an internal government report, which although not published, can be accessed if necessary.
- ASEMESA's analysis of the surface area dedicated to the production of table olive varieties reveals that none of the olive varieties is intrinsically involved in table olive production. Specifically, table olive varieties used for table olives account for less than 40 percent of total table olive production.<sup>265</sup>

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<sup>263</sup> See GOS's Comments at 13.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 14.

*ASEMESA's Arguments:*

- Commerce's criticism of mixed data sets and concerns over "diminished reliability" of ASEMESA's production data are without merit. Commerce could have focused on the more recent data sourced from Andalusia's BPS data for the 2018/2019 campaign year.<sup>266</sup>
- BPS data show that 952,360 MT of hojiblanca olives were grown in 2016. If there were 492,244 MT of table olives produced in 2016 from all varieties and 952,360 MT of hojiblanca produced in the same year, Commerce must conclude that raw table olive varieties are not substantially dependent on table olives.<sup>267</sup>
- While the data on manzanilla, gordal, and hojiblanca are not included in a statistical publication that could be provided, they were compiled by the regional government of Andalusia, which collects information on variety and surface area through BPS applications. Commerce ignores that the GOS expressly confirmed the accuracy of the data, and they are verifiable.<sup>268</sup>
- The idea that the varietal hectare data provided by the Spanish industry is merely an "estimate" is not supported by the record. The data on manzanilla, gordal, and hojiblanca is conservative because it comes from Andalusia.<sup>269</sup>
- Commerce claims that data on the record show that the total planted area in Spain for table and dual use olives is 189,794 hectares. Based on this data, Commerce contends that the Spanish industry's data is overstated.<sup>270</sup>

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<sup>266</sup> See ASEMESA's Comments at 28.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> See ASEMESA's Comments at 30.

- Commerce relies upon data that do not reflect an examination of varieties and all their end uses, but that merely represent a statistical category that offers no insight on varieties or how they are used.<sup>271</sup>
- In the 2018/2019 campaign year 587,000 MT of raw olives were sent to table production and the yield data for raw table olives has been in excess of 3 MT per hectare. These data lead to the following analysis: 76,120 hectares were dedicated to the production of raw table varieties multiplied by a yield of 3 MT per hectare demonstrates that 228,360 MT of raw table olive varieties were produced in the 2018/2019 campaign; 113,674 hectares were dedicated to growing dual use varieties, multiplied by a yield of 3 MT per hectare, shows that 341,022 MT of dual use olive varieties were produced. This suggests that the dual use statistical category exists in name only, and that “dual use” varieties are used almost entirely in table production. This defeats the need or purpose for such a statistical breakout since it is otherwise proven that both raw table olives and raw dual use olives are used to produce olive oil. Therefore, Commerce is misstating the facts.<sup>272</sup>
- Commerce considers the hojiblanca olive to meet its definition of prior stage product, because it is a variety understood to be a dual use olive. Hojiblanca is the largest single variety used for table olive production each year, Commerce has not considered how its analysis should change in light of the fact that a larger volume of hojiblanca olives is consumed in the production of olive oil than is used to produce table olives.<sup>273</sup>

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 35.

- According to Musco’s own evidence, the hojiblanca olive “occupies more than 265,000 hectares in the provinces of Cordoba, Malaga, Seville, and Granada.” This clearly indicates that the GOS data are in fact quite accurate.<sup>274</sup>
- Further, more hojiblanca olives are consumed in the production of oil than the entire volume of raw olives used in the production of table olives. This casts doubt on Commerce’s conclusion that hojiblanca is “principally suitable for use in the production of table olives.”<sup>275</sup>
- These observations demonstrate that Commerce’s definition of prior stage product is far afield from establishing that the demand for the prior stage product is substantially dependent on the demand for table olives.<sup>276</sup>

**Commerce’s Position:** Commerce continues to find it is appropriate to not rely on the hectare data provided by ASEMESA. Our filing instructions require that respondents include in their questionnaire responses the source of their information to establish the accuracy of the response.<sup>277</sup> ASEMESA provided no supporting evidence to substantiate its claim that the surface area dedicated to the production of each table olive varietal was collected by the Government of Spain or the Regional Government of Andalusia, or another reliable source. There is no explanation as to what exactly is collected in the BPS application or why, or whether ASEMESA is assuming that crops, and olives specifically, are grown on every single hectare claimed in the application. ASEMESA acknowledged that the data were incomplete, had been extrapolated,<sup>278</sup> and are not published.<sup>279</sup> Furthermore, the data were not obtained from one

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<sup>274</sup> *Id.* at 31.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> See Commerce’s Letter, “Countervailing Duty Investigation on Ripe Olives from Spain: Initial Questionnaire,” dated August 4, 2017, Section I, Part III, Filing Requirements and Guidelines

<sup>278</sup> See ASEMESA’s February 21 Submission at 6.

<sup>279</sup> *Id.* at 6.

specific source, but from two, one of which was an “internal” report from 2008, rendering the information obsolete.<sup>280</sup> Attempting to combine data from two different sources from two different time periods diminishes the reliability of the data. Even if we dismissed the data presented in the 2008 internal report and only focused on the more recent information as ASEMESA suggests we should, ASEMESA provided no evidence to substantiate its claim that the data gathered from the BPS applications was accurate.

In comparison, Musco provided published statistics from the GOS’s Ministry of Agriculture 2019 Survey on Areas and Yield, which included data on the number of hectares dedicated to the production of table, dual use, and mill olives, as well as statistics from the Ministry of Agriculture Statistical Yearbook on Crop Surfaces and Production on the volume of raw table olive varieties and mill olive varieties produced each year, and the end use of the table and mill olive varieties. Because we do not have data from these publications as to the end-use of each specific table or mill olive variety produced, it was reasonable for us to rely on the GOS published statistical information at hand.

ASEMESA has not provided evidence that 952,360 MT of hojiblanca olives were produced in 2016. ASEMESA claims to have “extrapolated” this production figure based on the volume of hectares dedicated to the production of the hojiblanca olive during the 2018/2019 campaign. ASEMESA has not provided supporting documentation demonstrating that the number of hectares dedicated to the production of the hojiblanca olive is accurate. Both the GOS and Musco confirmed that the GOS does not publish information on mill olive varieties, which would include the portion of hojiblanca varieties that are identified as for the mill.<sup>281</sup> Therefore, we had no manner in which to verify the area in hectares, by variety, identified as for processing

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<sup>280</sup> See ASEMESA’s February 21 Submission at 7.

<sup>281</sup> See GOS’s Comments at 11 and 13; see also Musco’s February 25 Submission at 8.

into olive oil. The GOS publishes production data, by varietal, only for table olive varieties identified as for table use.

In an effort to determine the volume of table and dual-use olive varieties identified as for processing into table olives, Commerce relied on information provided in the GOS's Survey on Areas and Yield which includes information on the area in hectares of farmland dedicated to the production of raw table olives as well as the area dedicated to the production of dual-use olives.<sup>282</sup> We agree with ASEMESA that the information reported in the GOS's Survey on Areas and Yield indicates that 76,120 hectares of farmland were dedicated to the production of raw table olives and 113,674 hectares were dedicated to the production of dual-use olives. Using this data, together with the yield per hectare statistics provided in the GOS Statistical Yearbook, we arrive at the same conclusion as ASEMESA, that 228,360 MT of raw table olives and 341,022 MT of dual use olives were produced in 2019, totaling 569,382 MT of olives.<sup>283</sup> We compared the volume of table and dual use olives produced in 2019 with data from the AICA for the 2018/2019 campaign. Data from the AICA revealed that 587,800 MT of raw table varieties identified as for processing into table olives were produced during this time, including 273,150 MT of hojiblanca.<sup>284</sup> Therefore, olives classified by the GOS as dual-use varieties are reported in GOS reports as olive varieties identified as for processing into table olives.

ASEMESA is correct that Spain's Ministry of Agriculture website, cited by Musco, identifies that there are 265,000 hectares of hojiblanca olives in Spain.<sup>285</sup> However, the GOS

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<sup>282</sup> See Musco's February 25 Submission at Exhibit 4A.

<sup>283</sup> *Id.*

<sup>284</sup> See ASEMESA February 21 Submission at Exhibit NFI-1. Because the only data on the record regarding the hectares of farmland dedicated to table, dual-use, and mill olives was based on 2019, after the POI, Commerce examined AICA data from the 2018/2019 campaign as facts otherwise available pursuant to section 776(a)(1) of the Act.

<sup>285</sup> See Musco's February 25 Submission at Exhibit 2A.

Survey on Areas and Yield lists only 113,674 hectares for dual-purpose olives, which would include the hojiblanca varietal.<sup>286</sup> This apparent discrepancy partially identified by ASEMESA leads us to conclude that a certain number of hectares of hojiblanca olives are identified in the official GOS data as hectares of “mill olives.” That certain hectares of hojiblanca olives would be identified as for mill olives in the GOS data comports with our understanding of the differences in cultivation practices between table olives and mill olives. Commerce has explained in this redetermination that there are differences in oil content, size, quality, pruning, water levels, etc. between those olives identified as for table and those grown to be crushed for oil. The differences in pruning, cultivation, and irrigation practices lead to obvious differences in quality, size, and oil content. There is no dispute that the hojiblanca varietal can technically be identified as for either, but the differences in cultivation practices and the manner in which the GOS collects data, as demonstrated above, indicate that certain hectares are identified as for oil production. Those hojiblanca olive hectares identified as for oil production undergo different cultivation practices during the growing season, and thus are not principally suitable for use in the production of table olives, the latter stage product at issue. However, the hectares of hojiblanca olives subjected to more intensive pruning and irrigation *are* principally suitable for use in the production of the latter stage product. We conclude that the GOS data being used in this redetermination has separated hojiblanca hectares of production and use into “table” and “mill” categories. Thus, those principally suitable for use in the production of table olives were considered part of the prior stage product and included in the analysis as such.

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<sup>286</sup> *Id.* at Exhibit 4A.

**Comment 13: Whether Commerce Properly Concluded that the Spanish Industry’s Varietal Analysis Wrongly Reported Total Production Data of Varietals Used in Table Olive Production**

*ASEMESA’s Arguments:*

- Commerce dismissed the Spanish industry’s varietal analysis on the basis that the analysis “incorrectly places the total production data for table olive varietals and dual use varietals in the column titled ‘Production Used as Table,’ thereby, vastly overestimating the production volume of the prior stage product.” This is untrue.<sup>287</sup>
- Data on the record from two sources indicate that the area in hectares devoted to hojiblanca production is in excess of 260,000, with hard GOS data that Commerce unreasonably declined to verify indicating that the figure is at least 311,000 hectares.<sup>288</sup>
- Unless Commerce is prepared to unreasonably conclude that hojiblanca yields are at or below one MT per hectare (figures reported as “production used as table” for hojiblanca are between 260,000 and 290,000 MT, which would be one-third the yield of either the raw “table” or raw “mill” statistical categories), Commerce’s finding cannot be reconciled with the record.<sup>289</sup>
- Even if Commerce accepts that the “dual use” raw olives can be used for either table olive production or olive oil production, Commerce must accept that only 40 percent of the hectares it finds “principally suited” for table olive production are actually “dependent” on that production, because the remaining portion could easily be used in oil production.<sup>290</sup>
- Data used by the Spanish industry for reporting the volume of specific varietals used in table olive production is sourced from a government report focused on end products not on the raw

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<sup>287</sup> *Id.* at 33.

<sup>288</sup> *See* ASEMESA’s Comments at 33.

<sup>289</sup> *Id.* at 33.

<sup>290</sup> *Id.* at 32.

products. The data are reported on an inventory basis of the volume, by variety, of olives *within* the table olive production chain, not total production of the raw olive varieties in question.<sup>291</sup>

**Commerce’s Position:** Commerce continues to conclude that ASEMESA’s production data are unreliable. ASEMESA supplied Commerce with information stating that 490,529 hectares of cropland were dedicated to the production of olive varieties used in table production, but, as stated above, provided no supporting documentation demonstrating the accuracy of the information. Furthermore, ASEMESA incorrectly reported the total production of table olive varieties used in table olive production by placing the volume of total production for each table olive variety identified as for table use in the column titled “Production Used as Table.” The data that ASEMESA relied on for “production used as table” directly correlate with the GOS’s AICA report on the total production of table olive varieties and dual-use varieties identified as for table olive production.<sup>292</sup> The report includes the origin and destination of table olive varieties identified for use as table and indicates that, in total, 596,110 MT of table olive varieties were grown during the 2016/2017 campaign year,<sup>293</sup> which corresponds to the data entered by ASEMESA for “Production Used as Table.”

Moreover, in certain situations, ASEMESA reports that the volume “Used in the Production of Table,” is higher than the total volume of table olive production. For instance, ASEMESA reports that, in the 2016/2017 campaign year, 32,960 MT of raw gordal olives were produced, but 47,400 MT of gordal olives were used in the production of table olives.<sup>294</sup>

Furthermore, as stated above, ASEMESA has failed to substantiate the production volume data

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<sup>291</sup> *Id.* at 33.

<sup>292</sup> See ASEMESA’s January 15, submission at Exhibit 6; see also February 21 submission at Exhibit NFI-2.

<sup>293</sup> See ASEMESA’s January 15 submission at Exhibit 6.

<sup>294</sup> See ASEMESA February 21 Submission at 10.

that they have reported. Using this unsubstantiated total production data and incorrect data for the volume of table varieties sent to table production, ASEMESA found that 39.59 percent of raw table olive varieties were processed into table olives.<sup>295</sup> Because of these apparent inconsistencies, we relied on the information provided by Musco.

Because we determined the information provided by ASEMESA to be unreliable, Commerce relied on published GOS data on the record indicated that the area of hectares dedicated to the production of table and dual-use varieties was significantly smaller. The GOS Survey on Areas and Yield established that 189,794 hectares were dedicated to the production of table and dual-use olives (76,120 hectares for table plus 113,674 hectares for dual-use olives).<sup>296</sup> Because the GOS expressly collected and published this information, we consider it to be accurate. As discussed above, based on GOS information, almost all of the hectares identified as dual-use olive orchards were actually used to produce table olives. Hojiblanca varieties that were identified as for use as olive oil were included in the data identifying the area in hectares dedicated to mill production.

Commerce relied on a multitude of evidence before concluding that the demand for raw olive varieties principally suitable for use in the production of table olives is substantially dependent on demand for table olives. In determining that the criterion of section 771B(1) of the Act has been met, Commerce examined information from AICA as well as the GOS Survey on Areas and Yield, and information on Crop Surfaces and Production. Only the “Industrial Use” table found in the Ministry of Agriculture’s agricultural statistics on annual crop surfaces and production focused on the end use of the olive varieties.

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<sup>295</sup> *Id.*

<sup>296</sup> These data relate to the 2019 campaign. Commerce did not receive published information showing the planted area for table and dual use olives during the POI, 2016.

ASEMESA has not provided any information to validate its argument that the data contained in the GOS Statistical Yearbook on Annual Crop Surfaces and Production is reported on an inventory basis of the volume, by variety, of olives *within* the table olive production chain, not total production of the raw olive varietal in question. Therefore, for this redetermination, Commerce stands by the analysis presented in the draft redetermination.

**V. Final Results of Redetermination**

Pursuant to the Court's *Remand Order*, Commerce has addressed how the BPS expressly limits access to the subsidy such that it is *de jure* specific under section 771(5A)(D) of the Act. In addition, Commerce has addressed, through the application of section 771B(1) of the Act, how the demand for the prior stage product is substantially dependent on the demand for the latter stage product.

5/29/2020

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Signed by: JEFFREY KESSLER

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Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance