UNITED STATES – ANTI-DUMPING AND COUNTERVAILING DUTIES ON RIPE OLIVES FROM SPAIN

(DS577)

U.S. COMMENTS ON THE EU'S RESPONSES TO QUESTIONS FROM THE PANEL FOLLOWING THE SECOND VIRTUAL SESSION

March 11, 2021

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I. SPECIFICITY CLAIMS

Question 1 (*To both parties*) In paragraph 28 of its second written submission, the United States reiterates its position that the USDOC identified *a discrete component* of the BPS programme to which access was limited. Is such identification sufficient to establish *de jure* specificity under Article 2.1(a) of the SCM Agreement, which requires that access to *a subsidy* is explicitly limited?

Response:

1. In its response, the EU identifies no reason that the requirement that access be limited to "a subsidy" supports its narrow reading of "limits access" under Article 2.1(a). As the United States explained in its response to this question, "a subsidy", with "such subsidy" in the next clause, identifies which subsidy is the subject of the Article 2.1(a) inquiry. It does not direct that the access limitation take a particular form, other than that it be explicit.[1]

2. The EU's response restates its nontextual interpretation of "limits access" and its misrepresentation of the USDOC's findings. First, the EU argues that *de jure* specificity cannot be based on a limitation on access to a discrete component of a subsidy program because the SCM Agreement does not contain the "notion of a discrete component of a subsidy program".[2] In the EU's words, "[a] measure is either a subsidy program or it is not."[3] This non sequitur fails to support the EU's position. As a matter of logic, the general "limits access" language includes the particular forms that an access limitation may take. "[L]imits access" is general: it neither prescribes – nor proscribes – a particular manner in which access to a subsidy may be limited, provided that the limitation is explicit and limited to certain enterprises.[4] Article 2.1(a) employs that general language rather than a narrow limitation or a list of the particular types of access limitation which an investigating authority could consider.[5]

3. For example, Article 2.1(a) does not list amount and eligibility-based limitations, even though both are listed under Article 2.1(b). That Article 2.1(a) does not explicitly list both types of access limitation does not mean that it excludes them. Indeed, to apply the EU's own logic – that Article 2.1(a) excludes access limitations which are not specifically listed – would invalidate the EU's own interpretation that "limits access" means eligibility-based limitations. Because

[1] *See* U.S. February 25 responses to Panel questions, paras. 1-3.

[2] EU February 25 responses to Panel questions, paras. 1-3.

[3] EU February 25 responses to Panel questions, para. 2.

[4] *See* U.S. June 10 responses to Panel questions, paras. 3-15; U.S. September 8 responses to Panel questions, paras. 1-4; U.S. first virtual session opening statement, paras. 11-19; U.S. SWS, paras. 8-15.

[5] In contrast, where the SCM Agreement limits a general concept to particular forms, it explicitly indicates as much. For example, Article 1.1(a)(1) and Article 1.1(a)(2) list the particular circumstances in which there is a financial contribution.

eligibility-based limitations are not listed under Article 2.1(a), they would be out-of-bounds. Thus, in addition to lacking any basis in the text, the EU's interpretation of Article 2.1(a) is logically untenable.

4. Furthermore, it is the burden of the EU to establish that "limits access to a subsidy" under Article 2.1(a) has a narrower meaning such that it excludes the type of access limitation identified by the USDOC. In making this case, the EU argues that "limits access to a subsidy" is subject to two conditions: (i) it must be limited based on eligibility and (ii) that eligibility limitation must be at the threshold point of the subsidy program.[6] As the United States has demonstrated, these conditions conflict with the actual text of Article 2.1(a). Furthermore, it would create a dangerous loophole through which granting authorities could easily evade the disciplines of the SCM Agreement merely by sheltering legally specific programs under the cloak of a broader program.[7]

5. Second, the EU continues to misrepresent the U.S. arguments as "elaborated ex-post to try to justify the USDOC findings".[8] The extent of the EU's argument is that the United States has summarized the access limitation in question as a "discrete component" of the SPS Program and BPS Programs. As the United States has shown, that summary captures the USDOC's findings concerning the interoperation of the BPS Programs and the antecedent SPS Program and Oils and Fats Program.[9] Furthermore, in response to question 2, the United States pointed to the record support underlying the USDOC's determination that olive production-based subsidy payments based on the Oils and Fats Program reference period were accessible only to certain enterprises.[10] In any event, there is nothing magical about the phrase "discrete component", which the United States has used as helpful shorthand in responding to the Panel's questions about the application of Article 2.1(a) to the legislation at issue.

Question 2 (*To the United States*) Article 2.1(a) of the SCM Agreement requires that access to a subsidy be *explicitly* limited. Please explain where in the relevant EU or Spanish legislation that explicit limitation to a discrete component of the BPS and Greening programmes is found and how specifically it is referred to and explained in the USDOC's determinations.

[6] *See, e.g.*, EU June 10 responses to Panel questions, paras. 8-10; *see also* EU September 8 responses to Panel questions, paras. 16-18.

[7] *See* U.S. June 10 responses to Panel questions, paras. 7-8; U.S. September 8 responses to Panel questions, paras. 2-3; U.S. opening statement, paras. 17, 19.

[8] EU February 25 responses to Panel questions, para. 5.

[9] *See* U.S. first virtual session opening statement, paras. 21-25; U.S. November 12 responses to Panel questions, paras. 18-23; U.S. September 8 responses to Panel questions, paras. 11-15 (citing Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32 and 35-36).

[10] U.S. February 25 responses to Panel questions, paras. 4-10.

Response:

6. The EU did not respond to this question.

Question 3 (*To the European Union*) In paragraphs 8 and 10 of its 3 February 2021 oral statement at the second substantive meeting of the Panel, the United States submits that: (i) access to the component of entitlement values based on historic olive production under the COMOF programme was not available to all farmers; and (ii) the European Union does not dispute that "certain entitlement holders, not all farmers, could under the BPS Program access that discrete component of the subsidy program". Pursuant to the legislation governing the BPS programme, could, in theory, any farmer have access to the "discrete component" discussed by the United States?

Response:

7. As an initial matter, we note that the EU does not dispute either of the two propositions underlying the Panel's question. Before answering the Panel's question, the EU concedes that the support received under the Oils and Fats Program – i.e., payments for producing olives – was used to calculate farmers' entitlement values under the SPS Program.[11] Under the SPS Program, and later the BPS Programs, that historic olive production-based component could, as a matter of law, be accessed by certain entitlement holders, not all farmers.

8. Nonetheless, the EU argues that "no *direct* correspondence can be established" to historic olive production subsidies under the Oils and Fats Program.[12] As the United States observed in its first written submission, the EU's argument is not that the SPS Program or BPS Programs discontinued the role of the Oils and Fats Program in determining access to subsidy payments, but rather that it changed that role.[13] As we have explained, the distinctions raised by the EU do not detract from the USDOC's determination or suggest that it breached any requirement under Article 2.1(a).

9. First, the EU argues that because olive production-based subsidies may not be the only sector-specific subsidies used to calculate subsidy amounts under the SPS Program (and BPS Programs) "there is no discrete subcomponent that can be individualized" and it is "artificial to split that value in subcomponents linked to previous sector specific subsidy programs."[14] There is no need to speculate in the abstract about whether one could "individualize" the olive production-based subcomponent; the USDOC's examination of the interoperation of the BPS Programs, the SPS Program, and the Oils and Fats Program, showed precisely how that

[11] EU February 25 responses to Panel questions, para. 9.

[12] EU February 25 responses to Panel questions, para. 9 (italics added).

[13] In its first written submission the United States explained in more detail why these arguments are unavailing. *See* U.S. FWS, paras. 68-77.

[14] EU February 25 responses to Panel questions, para. 10.

component was derived and the manner in which only certain enterprises enjoyed access to it.[15] In addition, the EU provides no support for its contention that having multiple sector-specific subsidies makes examination of those subsidies "artificial", or how that has any bearing on the inquiry under Article 2.1(a).

10. Second, the EU highlights several adjustments factored into the SPS Program and BPS Programs, such as the convergence "to reduce disparities in the value of the payment entitlements" (but not eliminate those disparities).[16] The USDOC addressed these adjustments in its determination, and explained why they did not discontinue the link between the BPS Programs and the Oils and Fats Program.[17] The EU's response to this question further demonstrates the illogic of its arguments. The EU states "that in 2019 all values of the entitlements converged towards 90% of the national or regional reference value."[18] In the first place, the disparity in access may be reduced but, as the USDOC underlined, it continued – because the disparity in access continued.[19] Furthermore, the EU's purported progress toward convergence in 2019 came after the period of investigation (i.e., 2016) and therefore is not relevant to this dispute.

11. Third, the EU argues that the operational link between the BPS Programs and the Oils and Fats Program was broken by (i) the absence of a requirement under the BPS Programs that legacy entitlement holders continue to produce olives and (ii) the possibility that a legacy entitlement holder could transfer its entitlement to a farmer who during the period of investigation did not produce olives.[20] The United States has explained that the USDOC's *de jure* specificity determination was based on access to historic olive production subsidies under the Oils and Fats Program, and that the ability to transfer these entitlements does not alter the limitation on access.[21] Furthermore, the EU's insistence that the USDOC should have based specificity on current or continued production is a misapplication of the concept of "decoupled production" to Article 2.1(a), where it is irrelevant.[22] The possibility that during the period of

[15] The U.S. response to question 2 highlighted for the Panel some of the record information relied upon by the USDOC. U.S. February 25 responses to Panel questions, paras. 12, 14, 20.

[16] EU February 25 responses to Panel questions, paras. 12, 14, 20.

[17] *See* U.S. FWS, paras. 47-52 (citing Final Issues and Decision Memorandum (Exhibit EU-2), p. 36), 68-77.

[18] EU February 25 response to Panel questions, para. 20.

[19] *See* U.S. FWS, paras. 75-76.

[20] EU February 25 response to Panel questions, paras. 11, 13, 22.

[21] *See* U.S. SWS paras. 21-25; U.S. June 10 responses to Panel questions, paras. 32-38; U.S. FWS, paras. 62-67.

[22] *See* U.S. FWS, paras. 65-76 (explaining that "decoupled income support" under Annex 2 of the Agreement on Agriculture has no place in analyzing Article 2 of the SCM Agreement).

investigation a particular entitlement holder may not have produced olives is a hypothetical that has no bearing on the USDOC's determination.[23]

12. For these reasons, the EU is wrong to assert that under the BPS Programs any farmer "could legally have access to that 'discrete component'" because "payment[] entitlements can be transferred between farmers."[24] As a matter of law, during the period of investigation, only certain entitlement holders could access the BPS Programs' entitlement value that was based on historic olive production subsidies. The EU argument depends on the counterfactual that, if an excluded farmer had been situated differently during the period of investigation she could have enjoyed access. Specifically, the EU posits a counterfactual world where the excluded farmer either was a legacy entitlement holder or where a legacy entitlement holder had transferred the entitlement to the excluded farmer. The EU's counterfactual supposition has no basis in Article 2.1(a) and, if it did, could be used to defeat any *de jure* specificity finding.

Question 4 In paragraph 101 of its 12 November 2020 responses, the European Union observes that the United States "marked no disagreement" with the interpretation of Article 2.1(b) of the SCM Agreement developed by the European Union.

a. (*To the United States*) Does the United States agree with the European Union's proposed interpretation of Article 2.1(b) of the SCM Agreement?

Response:

13. The EU did not respond to this question.

b. (*To both parties*) In paragraphs 274-275 of its first written submission, the European Union suggests that the amounts of support received in a previous period is a criterion which is economic in nature pursuant to footnote 2 of the SCM Agreement. (i) Please discuss whether "criteria or conditions" governing eligibility for, and the amount of, a subsidy, must meet *all* the conditions specified in footnote 2 of the SCM Agreement to be considered "objective" within the meaning of Article 2.1(b).

Response:

14. The EU does not directly answer the Panel's question, but rather describes footnote 2 as "an explanation [that] must be apprehended holistically" rather than "a list of conditions". To

[23] *See US – Upland Cotton (Panel)*, para. 7.1148 (observing the "fact that some of the subsidies go to farmers who may produce different commodities, or, in theory, may not produce a given commodity does not mean, by some process of reverse reasoning, that the specificity that is apparent from the face of the grant instrument no longer exists.").

[24] EU February 25 responses to Panel questions, para. 23.

inform its "holistic" explanation, the EU points to the dictionary definitions of the adjective "objective" and asserts that the concepts in footnote 2 are "broadly overlapping".

15. As an initial matter, the EU's exploration of the meaning of the adjective "objective" is irrelevant because footnote 2 defines precisely what "objective criteria or conditions" are. It is a defined term. As the United States explained in response to question 4.a, to the extent the EU interprets "objective criteria or conditions" as something other than what is defined in footnote 2, that interpretation is incorrect.[25]

16. The EU is similarly incorrect to suggest that footnote 2 is part of "an explanation" rather than a list of conditions that must each be satisfied to qualify as "objective criteria or conditions". The U.S. response to this question explains in more detail, but the use of the conjunction "and" establishes that each condition listed in footnote 2 must be satisfied. Put differently, if the "criteria or conditions" are not "neutral" or "favour certain enterprises over others" or are not "economic in nature and horizonal in application", then they are not "objective". Whether or not the footnote 2 conditions "tend to describe overlapping if not very similar concepts", as the EU asserts, each must be satisfied.

17. The EU also argues that because footnote 2 contains the clause "such as number of employees or size of enterprise", it is an "explanation" rather than a "list of conditions".[26] But the clause undermines the EU's interpretation. Specifically, the clause follows immediately after, and modifies, the condition "which are economic in nature and horizontal in application". As written, it provides examples of that condition. In no way do those examples of one of the three conditions listed in footnote 2 suggest that any of the three listed conditions may be ignored. The United States refers the Panel to its more detailed original response to this question.[27]

18. The EU then applies its flawed interpretation of Article 2.1(b) to the USDOC's *de jure* specificity determination. Specifically, the EU argues that the SPS Program and BPS Programs satisfy footnote 2 because "they constitute 'generally available support programme[s] whose normal operation . . . result in financial contributions on pre-determined terms (that are therefore not tailored to the recipient company)' or to [sic] particular class of farmers."[28] First, the EU's statement is legally irrelevant because it is not based on the conditions listed under footnote 2. The standard the EU advances in the place of the text of footnote 2 is language from the panel report in *Japan – DRAMs (Korea)*. That panel discussed how to determine if an individual

[25] U.S. February 25 responses to Panel questions, paras. 14-15.

[26] EU February 25 responses to Panel questions, para. 31.

[27] U.S. February 25 responses to Panel questions, para. 20.

[28] EU February 25 responses to Panel questions, para. 32.

transaction is specific.[29] That discussion did not concern the conditions of footnote 2 of Article 2.1(b) and, in fact, concerned a particular fact pattern that is not at issue here.

19. Second, the EU's claim is factually erroneous because it is based on the incorrect premise of general availability. To recall, the criteria or conditions "governing eligibility for, and the amount of" a subsidy must be "objective", as defined by footnote 2. That was not the case, as amply demonstrated by the USDOC in its final determination. Specifically, under the BPS Programs only certain enterprises could access the entitlement value based on olive production subsidies under the Oils and Fats Program; this entitlement value was not available to all farmers. Indeed, in its response to question 3, the EU concedes this fact.

> **(ii) Could an unbiased and objective investigating authority determine that the amount of support received under previous programmes is an "objective criteria or condition[]" governing the amount of a subsidy within the meaning of Article 2.1(b) of the SCM Agreement?**

Response:

20. Rather than address the Panel's question, the EU again repeats several arguments concerning *de jure* specificity that the United States refuted in its first written submission. For avoidance of doubt, we will briefly address those arguments, but refer the Panel to our earlier, more detailed arguments.

21. First, the EU repeats its misleading claim that the SPS Program and BPS Programs criteria to determine eligibility and amount were "applied to all EU farmers".[30] The USDOC's determination was based on the fact that a component of these subsidy programs – i.e., the entitlement value based on olive production under the Oils and Fats Program – was not available to all farmers. The EU recognizes the distinction in arguing that, for purposes of Article 2.1(a), the USDOC should have discounted the interoperation of the Oils and Fats Program with the SPS Program and BPS Programs.[31] However, for purposes of Article 2.1(b), the EU attempts to ignore the role of the Oils and Fats Program in determining the entitlement value available to certain enterprises. In evaluating "the legislation" for purposes of Article 2.1(a) and Article 2.1(b), the USDOC properly considered that role.

22. Second, the EU argues that under "the SPS Program any farmer can produce whatever crop or no crop at all and receive SPS payments."[32] Here the EU repackages its earlier arguments that the programs were not subject to the SCM Agreement because they were supposedly "decoupled" from production. The United States has amply explained that the EU's

[29] *Japan – DRAMs (Korea) (Panel)*, para. 7.374.

[30] EU February 25 responses to Panel questions, para. 35.

[31] *See, e.g.*, EU FWS, paras. 205-206.

[32] EU February 25 responses to Panel questions, para. 35.

argument is factually irrelevant (the USDOC's determination was not based on current olive production) and legally irrelevant (the concept of "coupled" or "decoupled" production is irrelevant to Article 2.1(a) and Article 2.1(b)).[33]

23. Third, the EU argues that "the amount of support previously received is just the basis of the calculation" because other adjustments were applied.[34] In essence, the EU position is that the granting authority may launder a covered subsidy simply by adding a supposedly neutral criterion, or by placing it and another covered subsidy in the same umbrella program. The United States refuted these arguments in its first written submission.[35]

24. Finally, the EU asserts that "the US provided some example[s] of objective calculation criteria that are not so different from the one discussed here."[36] The EU appears to refer to the following examples of "neutral or objective criteria" listed by the USDOC: "total value of all crops produced on a farm, area of the farm, the farmer's farm income."[37] How these examples are "not so different" is unclear. In contrast to the examples, the USDOC explained that the Government of Spain implemented the SPS Program and BPS Program in a manner designed to favor a narrower subset of the agriculture sector – namely, enterprises holding an entitlement value based on historic olive production during the Oils and Fats Program. The manner in which the Government of Spain implemented the SPS Program and BPS Programs "embedded the historical differences in crop entitlement amounts among different agricultural products."[38] Unlike a criterion which might broadly apply to all farmers, such as those identified by the USDOC, the EU and Government of Spain devised one that limited access based on having produced olives and having been subsidized for that production. The United States notes that the EU ignores the USDOC's explanation as to how this criterion was not objective because it was not neutral.[39]

25. As the United States has explained, the EU has failed to establish that the USDOC's *de jure* specificity determination breached Article 2.1(b).

Question 5 (*To both parties*) In paragraphs 102-104 of its 12 November 2020 responses, the European Union argues that the USDOC failed to evaluate in its remand redetermination whether the calculation criteria of the SPS, BPS and Greening programmes complied with

[33] *See* U.S. SWS paras. 21-25; U.S. June 10 responses to Panel questions, paras. 32-38; U.S. FWS, paras. 62-67.

[34] EU February 25 responses to Panel questions, para. 36.

[35] *See* U.S. FWS, paras. 72-76.

[36] EU February 25 responses to Panel questions, para. 41.

[37] Exhibit EU-80, p. 17.

[38] Exhibit EU-80, p. 18.

[39] *See* Exhibit EU-80, pp. 16-18

***all* of the requirements of Article 2.1(b) of the SCM Agreement. Is an investigating authority required to evaluate whether a subsidy program complies with *all* the requirements under Article 2.1(b), assuming that it has properly established that at least one of the requirements is not met for a subsidy to be non-specific pursuant to Article 2.1(b)?**

Response:

26. The EU recognizes that if one of the requirements of Article 2.1(b) is not met, then the investigating authority "could conclude that Article 2.1(b) does not apply."[40] The United States agrees for the reasons outlined in its response to this question.

27. Contradictorily, the EU asserts that the requirements of Article 2.1(b) are nonetheless "cumulative" and "[i]t would be normal for an impartial and reasonable investigative authority to take all of those requirements into consideration and explain its view on each of them."[41] The EU claims such an examination is part of a "complete analysis" and "would not seem to impose . . . an undue or unreasonable administrative burden."[42] To the extent the EU is suggesting that an investigating authority would breach Article 2.1(b) simply by not examining each requirement of Article 2.1(b) where one of those requirements is not satisfied, that suggestion has no basis in the text.

28. Article 2.1(b) imposes no such requirement on investigating authorities. If any requirement listed under Article 2.1(b) is not satisfied, then the "specificity shall not exist" result is not triggered. Similarly, if the requirements of Article 2.1(a) are not satisfied, then "such subsidy shall be specific" result is not triggered. There is no other "complete analysis" obligation that the investigating authority go beyond what the two articles require. Nor does the extent of the administrative burden suggest that the investigating authority must go beyond what the plain language of Article 2.1(b) requires.

29. Finally, the United States agrees that a "mere assertion or assumption" may not suffice to demonstrate that for purposes of Article 2.1(b) "objective criteria or conditions" do not exist. Article 2.4 requires that specificity determinations "be clearly substantiated on the basis of positive evidence." However, the EU's bald assertion that USDOC's determination lacked "any substantiation" misconstrues the USDOC's findings and what Article 2.1(b) requires.[43] The EU appears to fault the USDOC for not having conducted a comparative analysis of benefits received under the BPS Programs by other recipients. As the United States has explained, the *de jure* specificity analysis under Article 2.1 imposes no such burden on the investigating

[40] EU February 25 responses to Panel questions, para. 46.

[41] EU February 25 responses to Panel questions, paras. 42-43.

[42] EU February 25 responses to Panel questions, para. 45.

[43] *See* EU February 25 responses to Panel questions, paras. 48-49.

authority.[44] The USDOC demonstrated how, by limiting access to entitlement values based on historic olive production subsidies, the BPS Programs favored certain enterprises as a matter of law.[45]

Question 6 (*To both parties*) Is it correct to assume that a finding of specificity under Article 2.1(a) of the SCM Agreement can be reversed or overridden by a finding of non-specificity under Article 2.1(b)?

Response:

30. To support its argument that an affirmative determination under Article 2.1(b) would override or reverse an affirmative finding under Article 2.1(a), the EU excerpts passages from two Appellate Body reports.[46] The United States notes initially that the Panel's task is to interpret Article 2.1(a) and Article 2.1(b) based on the ordinary meaning of their terms in context.[47] Where the text does not support an interpretation, prior panel or Appellate Body reports cannot be relied on to provide such support. In any event, the EU does not explain how either passage it cites supports its position – indeed, neither does.

31. The first passage, from *US – Anti-Dumping and Countervailing Duties (China)*, outlines how the chapeau of Article 2.1 sets forth "principles" – namely, 2.1(a), (b), and (c) – that "shall apply" in determining whether a subsidy is specific to certain enterprises.[48] The passage in no way suggests that one of these articles may reverse or override another. To the contrary, the report indicates that the proper understanding of specificity under Article 2.1 "must allow for the concurrent application of these principles . . . ."[49] Because the principles may be applied concurrently, it necessarily is not the case that one may reverse or override another. Were it the case that a finding under 2.1(b) reversed or overrode a finding under 2.1(a), it would not be the case that the two could be applied concurrently. Rather, a finding under Article 2.1(b) would obviate any inquiry under 2.1(a), an outcome which would contravene the text of Article 2.1 and Article 2.1(a).

[44] *See* U.S. November 12 responses to Panel questions, paras. 32-34; U.S. February 3 opening statement, para 9; U.S. SWS, para. 19.

[45] *See, e.g.*, U.S. FWS, paras. 80-84.

[46] EU February 25 responses to Panel questions, paras. 50-52.

[47] Under DSU Article 11, the function of the Panel is to assist the DSB in discharging its responsibilities under the DSU, including by making an objective assessment of the applicability of and conformity with the covered agreements. DSU Article 3.2 establishes that WTO adjudicators are to make that assessment by applying customary rules of interpretation of public international law to the text of the covered agreements.

[48] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.

[49] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371.

32. The second passage, from *US – Large Civil Aircraft (2nd Complaint)*, concerns whether, under Article 2.1(a), the investigating authority must evaluate either "the granting authority" or "the legislation pursuant to which the granting authority operates".[50] In rejecting the EU's argument that the investigating authority can evaluate either but not both, the report observed that it is not "a binary choice" and "the assessment should normally look at both".[51] The passage is unrelated to how Article 2.1(a) interacts with Article 2.1(b), and certainly does not support that Article 2.1(b) may reverse or override Article 2.1(a).

33. The EU's hypothetical about a 10-employee subsidy is equally unavailing. First, this fact pattern does not arise in this dispute – here, the requirements of Article 2.1(a) were satisfied and those of Article 2.1(b) were not. In addition, that a subsidy could satisfy the requirements of both Article 2.1(a) and Article 2.1(b), if true, does not mean that one article may reverse or override the other. Instead, the task for the investigating authority, as directed by Article 2.1, would be to apply both principles in determining whether the subsidy in question is specific to certain enterprises. That is also consistent with the chapeau of Article 2.1 and with the findings in previous reports such as *US – Anti-Dumping and Countervailing Duties (China),* discussed above.

Question 7 (*To the European Union*) In paragraph 82 of its first written submission, the European Union explains that the payments newcomers receive under the SPS programme "are linked neither to their past production nor to any particular crop". Is the same true for the payments newcomers receive under the BPS programme? Please explain the rules for calculating amounts of assistance for newcomers under the (i) SPS programme; and (ii) the BPS programme, and where they can be found in the relevant legislation.

Response:

34. As an initial matter, as the United States has noted, the investigation record contains no evidence of payments under the BPS Programs based on inherited or transferred payment entitlements.[52] It similarly contained no such evidence with respect to a particular subset of hypothetical inheritors or transferees – i.e., what the EU labels "newcomers". If the EU possessed information or arguments to demonstrate that the possibility of these newcomers detracted from the USDOC's specificity determination, it could have, but failed to, provide it to the USDOC.

35. Even so, the EU's speculation about the existence of newcomers is consistent with, and firmly supports, the USDOC's specificity determination. Specifically, the newcomer hypothesized by the EU would fall under one of two categories. If during the period of investigation the hypothetical newcomer did not hold an entitlement value based on historic olive production subsidies, then she was not among the group of certain enterprises identified by the

[50] *US – Large Civil Aircraft (2nd Complaint) (AB)*, paras. 758-759.

[51] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 759.

[52] *See* U.S. November 12 responses to Panel questions, paras. 16-17.

USDOC. In other words, as a matter of law, the newcomer would be excluded from the group of certain enterprises that could access the entitlement value based on historic olive production subsidies. It therefore is not the case, as discussed in response to question 3 above, that all farmers could access the Oils and Fats Program-based entitlement value in question. Furthermore, if the newcomer, through transfer or inheritance, could access the entitlement value, then she would be among the certain enterprises.

36. The salient point is that even where entitlements might have been inherited or transferred, that fact would not break the link to the access limitation identified by the USDOC. Under the relevant legislation, only the holders of legacy entitlements based on historic olive production subsidies could apply for and receive the subsidy amounts reserved for that class of certain enterprises. That those entitlement holders might themselves transfer these rights – e.g., to a newcomer – does not alter the scope of access, and the resulting specificity. The EU's argument to the contrary is rooted in the same fallacy as its arguments concerning the supposed "decoupling" of subsidies from olive production.[53] As summarized in response to question 3, that during the period of investigation a particular entitlement holder may not have produced olives has no bearing on the USDOC's determination of whether *de jure* specificity exists.

37. In paragraph 65, the EU speculates about the possibility of newcomers being allocated payment entitlements from the reserve. Again, this does not change the fact that the newcomer would need to hold the entitlement to legally qualify for access. In any event, as the EU acknowledges, the information it cites was not on the USDOC's administrative record because, when the EU submitted the relevant regulation to the USDOC, it omitted the article in question. Because the information in paragraph 65 was not part of the record, it was not among the "information and arguments" upon which the USDOC could base its determination.[54] Accordingly, the Panel should disregard this information.

Question 8 (*To both parties*) Is an investigating authority able to consider a subsidy to be specific where objective criteria or conditions governing the eligibility for, and the amount of, the subsidy are not established by the granting authority or by the legislation pursuant to which the granting authority operates?

Response:

38. The United States agrees with the EU that the same facts which produce a negative determination under Article 2.1(b) could also produce affirmative determinations under Articles 2.1(a), 2.1(c), or 2.2. Indeed, the same subsidy program could be specific under two or more of these provisions.[55] That is because nothing in the text of these articles directs that a finding

[53] *See* EU February 25 responses to Panel questions, para. 57 (arguing that "newcomers were not engaged in agricultural activity" and theoretically could have "receive[d] a payment entitlement by transfer . . . .").

[54] *See* SCM Agreement, Art. 12.2 ("Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation . . . .").

[55] In other words, it could be *de jure* specific, *de facto* specific, and/or regionally specific.

under one article must preclude a finding under another. Within Article 2.1, only Article 2.1(c) refers to another of these articles, and that is to emphasize that specificity may exist under Article 2.1(c) "notwithstanding" what is found with respect to Articles 2.1(a) and 2.1(b).

39. The converse is equally true. An affirmative finding under Article 2.1(b) (i.e., that each of its requirements is satisfied) does not preclude a specificity finding under Articles 2.1(a), 2.1(c), or 2.2. Each of these three articles provides an independent basis to identify specificity. Furthermore, two of the three articles – 2.1(a) and 2.2 – direct that a subsidy "shall be specific" if the conditions of that article are satisfied.[56] Neither 2.1(a) nor 2.2 indicates that, to trigger the "shall be specific" result, any conditions not mentioned in the article must also be satisfied. And unlike Article 2.1(c), neither 2.1(a) nor 2.2 even refers in the first instance to another article.

40. The United States will not comment on the hypotheticals presented by the EU, which are not relevant to this dispute. However, we note that the EU's discussion of objective criteria or conditions applies an erroneous interpretation of Article 2.1(b).[57] The EU hypothesizes cases where an eligibility criterion "would not be objective" or where the granting authority "has a wide discretion in deciding which enterprises may access the program".[58] In the first place, whether "criteria or conditions" are objective, as in "objective criteria or conditions", is a question of whether the definition of "objective criteria or conditions" in footnote 2 is satisfied. As explained in the U.S. responses to questions 4.a and 4.b, that definition is satisfied where the criteria or conditions "are neutral", "do not favour certain enterprises over others", and "are economic in nature and horizontal in application" (e.g., "number of employees or size of enterprises").[59] The abstract concept of "objective" is not part of the Article 2.1(b) analysis, nor is whether "wide discretion" exists or not.

II. "PASS-THROUGH" OF BENEFIT CLAIMS

Question 9 (*To both parties*) Would it be sufficient to establish a law is WTO-inconsistent "as such" by showing that the law requires WTO-inconsistent conduct in certain situations in which it is applied, but not in all factual scenarios?

Response:

[56] Emphasis added. The U.S. response to question 6 elaborated on this directive with respect to Article 2.1(a). *See* U.S. February 25 responses to Panel questions, paras. 26-28.

[57] The U.S. response to question 4.a discussed the EU's flawed interpretation of Article 2.1(b). *See* U.S. February 25 responses to Panel questions, paras. 12-19.

[58] *See* EU February 25 responses to Panel questions, para. 67.

[59] *See* U.S. February 25 responses to Panel questions, paras. 14-15 and 20.

41. Consistent with its prior submissions, the EU's arguments regarding Section 771B are disjointed and fail to align with the legal obligations that exist in the provisions under which the EU has brought its claims.

42. First, the EU has continued to claim that the United States misrepresents its argument and created a "fabricated claim" against which to argue.[60] The EU argues that one argument it has made is that Section 771B does not constitute a pass-through analysis because "a price comparison is required".[61] However, despite the EU's dissatisfaction with our argument, there is no way of reading the EU's argument as other than one that attempts to read a legal obligation into Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement requiring an investigating authority to conduct a price comparison analysis. As the United States has explained, no such legal obligation exists in those provisions.[62]

43. Moreover, the EU has failed to make any other argument as to why Section 771B is "as such" inconsistent with the provisions the EU cited. The EU claims that the Panel's question need not be answered because it has demonstrated that every single application of Section 771B will necessarily lead to a violation of the provisions it cited in its request for the establishment of a panel.[63] However, this statement is necessarily premised on the proposition that a *specific* methodology is *required* – a price comparison analysis – and that this methodology is not reflected in Section 771B. Unless the Panel agrees with the EU's non-textual interpretation of the provisions it cites, the EU has provided no basis upon which the Panel can conclude that Section 771B is "as such" inconsistent with U.S. obligations.

44. The EU also criticizes the conditions in Section 771B for not calculating benefit as required by Articles 1 and 14 of the SCM Agreement.[64] In particular, the EU notes that a determination of benefit under Article 1.1(b) of the SCM Agreement "seeks to identify whether the financial contribution has made 'the recipient 'better off' than it would otherwise have been, absent that contribution'".[65] These arguments are irrelevant to the EU's claims, however, as the EU has not brought claims under either of these provisions.[66]

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[60] EU February 25 response to Panel question 9, para. 73.

[61] EU February 25 response to Panel question 9, para. 73.

[62] U.S. September 8 response to Panel question II.a; U.S. SWS, para. 33; U.S. February 25 responses to Panel questions, paras. 43-44.

[63] EU February 25 response to Panel question 9, para. 73.

[64] EU February 25 responses to Panel questions, paras. 77 and 83.

[65] EU February 25 responses to Panel questions, para. 77 *citing Canada – Aircraft (AB)*, para. 157.

[66] *See* U.S. SWS, para. 36.

45. Irrespective of the fact that the EU's new arguments are beyond the terms of reference, the United States has demonstrated throughout these proceedings that the legal justification for Section 771B derives from the flexibilities in the SCM Agreement, which do not require any specific methodology.[67] The statute accounts for the specific factual and economic circumstances through the cumulative conditions that must be fulfilled in order for the USDOC to attribute benefit received by raw agricultural product producers to the producers of processed products. In other words, it is designed to determine whether producers of processed products are "better off". Therefore, the EU's attempt to fault the U.S. statute under these other provisions – which it has not formally raised – also fails.

Question 10 (*To both parties*) In paragraph 76 of the European Union's second written statement, it is said that the only way it can be established whether there was a pass-through of a subsidy on an input product is to assess whether, and to what extent, the price of the input was lowered as a result of the subsidy. This, it is said, should be done by comparing the actual input price with a market price. These questions arise:

> **a. Is it not fair to say that the receipt of a subsidy by a producer, or the promise of same, provides incentives to a producer that might cause it to produce an input when it otherwise might not have done so, even if the ultimate price at which the input was sold was a market price?**

Response:

46. The EU agrees with the premise set out by the Panel in its questions, that an economic consequence of a subsidy can be that more of the subsidized products are being produced. However, the EU errs in describing this as "irrelevant" to the current dispute.[68] Instead, the EU argues, this dispute only concerns the issue of the determination of benefit within the meaning of Article 1.1(b) of the SCM Agreement.[69] The United States recalls that the EU has not brought a claim under Article 1.1(b), and so its argument about the meaning of that provision is irrelevant. In addition, the EU's logic is again fundamentally flawed.

47. As the EU argued in its response to Panel question 9, the concept of benefit under Article 1.1(b) requires a determination of whether the recipient is "better off".[70] Section 771B creates a set of cumulative conditions that provide the USDOC with a methodology for determining whether a benefit received by an upstream agricultural producer may be attributed to downstream agricultural producer. The Panel's question recognizes that a price comparison of input prices may not always be the appropriate way to make such an attribution, in spite of the

[67] *See, e.g.*, U.S. February 25 responses to panel questions, para. 36.

[68] EU February 25 responses to Panel questions, para. 88.

[69] EU February 25 responses to Panel questions, para. 89.

[70] EU February 25 response to Panel question 9.

EU's adamance that the "essence of pass-through" is to conduct some form of price comparison on the basis of a benchmark price.[71]

> **b. Is the Panel asked to reassess what appears to be the established interpretation of the word "indirectly" in Article VI:3 of GATT 1994, which is that it serves as a rule requiring the measurement of the degree to which a subsidy "passes through" to the production of the (say) processed product, rather than it simply being a description of the subsidy that was wholly provided in the course of production of the processed product, even if not provided directly to the processor?**

Response:

48. The EU notably agrees with the United States that the Panel is not to assess or reassess prior interpretations of Article VI:3. However, the EU erroneously requests the Panel to rely on the so-called "established" interpretation of that provision. The United States reiterates that there is no "established" interpretation set out by prior dispute settlement reports. Under DSU Article 11, the function of the Panel is to assist the DSB in discharging its responsibilities under the DSU, including by making an objective assessment of the applicability of and conformity with the covered agreements. DSU Article 3.2 establishes that WTO adjudicators are to make that assessment by applying customary rules of interpretation of public international law to the text of the covered agreements. Following these provisions of the DSU, what is required is that the Panel interpret Article VI:3 of the GATT 1994 based on the ordinary meaning of its terms in their context.[72]

49. In addition, the EU errs when it argues that, based on its reading of a single prior Appellate Body report, Article VI:3 requires an investigating authority to "measure the degree" of pass-through benefit.[73] There is no textual basis to support the EU's conclusion. As the United States has explained, while that provision is *related* to the determination of benefit, it presupposes that such a determination has already been made.[74] This is apparent from the terms of the provision, which provide that an investigating authority may not impose duties in excess of the subsidy determined to have been granted. It is therefore inappropriate for the EU to attempt to read into Article VI:3 additional legal obligations that are unsupported by the terms contained therein.

III. INJURY

Question 11 (*To the United States*) In paragraph 138 of its second written submission, referring to footnote 624 of the panel report in *Mexico – Corn Syrup*, the European Union contends that "a previous panel already determined that the fact that a sector constitutes a

[71] EU June 10 responses to Panel questions, para. 81; EU FWS, para. 407.

[72] *See*, U.S. February 25 response to Panel question 10(b).

[73] EU February 25 responses to Panel questions, para. 94.

[74] U.S. February 25 response to Panel questions, para. 43.

major proportion of the domestic industry does not permit a focus of the analysis on that sector". Please comment.

Response:

50. The EU did not respond to this question.

Question 12 (*To the United States*) In paragraph 210 of its first written submission, the United States submits that "responding purchasers - upon whose data the Commission largely relied in assessing price effects - were predominantly distributors". Please indicate where in its injury determination did the USITC consider whether, or indicate that, the subject imports undersold the domestic like product specifically in the segment of the domestic industry comprising distributors (and not institutional customers or retailers).

Response:

51. The EU did not respond to this question.

Question 13 (*To the European Union*) In paragraph 196 of its 12 November 2020 responses, the European Union argues that "even if the US did use industry wide economic indicators, its actual impact analysis was also flawed, *inter alia*, because it failed to properly examine the explanatory force of subject imports for the state of the domestic industry. In fact, the US only examined the explanatory force of subject imports in the retail channel […]." Please explain if Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement support the separation of examination of economic indicators from what the European Union characterizes as the "actual impact analysis".

Response:

52. The EU's interpretation of the first sentences of Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement as containing two independent requirements is untenable from either a textual or analytical perspective. Textually, the EU's proffered interpretation is at odds with a plain reading of the first sentences of these provisions, which each consists of a single clause. Once again, the EU would have the Panel read certain treaty terms, this time the phrase "shall include," out of the text of these provisions in order to split the subject of the sentence ("[t]he examination of the impact of the [dumped or subsidized] imports on the domestic industry concerned") from its predicate ("shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry") in order to create two sentence fragments purportedly conveying independent requirements concerning the sentence's subject "examination" and its object "evaluation." Such a rewriting of the text of the first sentences of Articles 3.4 and 15.4 fundamentally alters its meaning and should be rejected by the Panel.

53. Additionally, the EU's references to "actual impact analyses" concern the causal and non-attribution analyses addressed by Articles 3.5 and 15.5, and not the analyses of Articles 3.4 and 15.4. The EU's contention that "the existence of negative economic indicators does not necessarily mean that subjects [sic.] imports have explanatory force for the state of the

industry"[75] is, essentially, a restatement of the first sentences of Articles 3.5 and 15.5, which contemplate that it "must be demonstrated that the [dumped or subsidized] imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement." In fact, the "new and separate paragraph on page 24" of the USITC determination that the EU cites to support its interpretation of Articles 3.4 and 15.4 articulates the USITC's finding of a causal link, not impact.[76]

54. The EU's apparent confusion concerning the distinction between the USITC's analysis of impact and its finding of a causal link is an inadequate basis for its conflating these two issues, particularly when they are addressed by distinct provisions in the Agreements. As the United States has repeatedly emphasized in these proceedings, an investigating authority's analysis of impact under Articles 3.4 and 15.4 focuses on factors concerning the state of the domestic industry that are distinct from those considered in analyses of subject import volume and price effects under Articles 3.2 and 15.2 and a causal link analysis under Articles 3.5 and 15.5.[77] Adopting the EU's view that an authority's analysis of the discrete impact factors listed in Articles 3.4 and 15.4 must contain distinct causation and non-attribution analyses is inconsistent with the framework of the Articles 3 and 15.

Question 14 (*To both parties*) In paragraph 196 of its 12 November 2020 responses, the European Union asserts that "the use of non-segmented economic indicators after the US 'segmented' the industry in the context of Article 15.2 SCMA is in itself WTO-inconsistent". Please comment on whether this assertion constitutes a claim distinct from the claims presented by the European Union in its first written submission concerning the USITC's impact analysis.

Response:

55. The EU again seeks to introduce new claims – this time concerning the USITC's purported "cherry picking" of domestic industry data contrary to the requirements of Article 16.1 of the SCM Agreement[78] – that were neither included in the EU's consultations request nor its panel requests. These claims thus fall outside the Panel's terms of reference and should be rejected by the Panel.

56. As the United States previously explained, the EU's contention that it has been unable to fully formulate its claims due to the USITC's nondisclosure of BCI is at odds with its argument that it did not need any the BCI to make its case in these proceedings and is, accordingly, a

[75] EU February 25 responses to Panel questions, para. 100.

[76] U.S. FWS, para. 239.

[77] U.S. opening statement at the second virtual session, paras. 45-46.

[78] EU February 25 responses to Panel questions, para. 104.

canard that the Panel should ignore.[79] Moreover, the EU's claim that the USITC purportedly switched between "segmented" and "non-segmented" analyses in its examination of impact is based entirely upon information contained in the USITC publication, which issued in July 2018.[80] The EU, accordingly, had more than a year and a half between issuance of the publication and the deadline for submission of its first written submission to formulate this claim, relative to the one month and 19 days afforded to the United States to parse through the 70 pages of injury argumentation filed by the EU pursuant to the Panel's timetable.[81] That the EU encountered any difficulty in addressing "all the WTO-inconsistencies exhaustively" in such a timeframe strains credibility and is, in any event, entirely of its own making. Rather, it can reasonably be ascertained from the context surrounding the EU's November 2020 response that it introduced this claim after determining that it could no longer credibly pursue the argument that the USITC's impact analysis was based on data for only a portion of the domestic industry.

Question 15 (*To both parties*) In paragraph 125 of its 19 October 2020 oral statement at the first substantive meeting of the Panel, the European Union asserted that the USITC's finding of price undercutting by subject imports in the retail segment of the domestic industry was not supported by positive evidence. Please comment on whether this assertion constitutes a claim distinct from the claims presented by the European Union in its first written submission concerning the USITC's price effects analysis.

Response:

57. The United States previously explained that the EU presented three claims against the USITC's purportedly segmented analysis of price effects, none of which relate to the EU's new claim that the USITC's price effects analysis lacked positive evidence.[82] The EU, while acknowledging this in its response, nevertheless maintains that it "pointed to the lack of positive evidence for price undercutting in the retail channel in the context of its claim to consider a price effects [*sic*.]for the industry as a whole."[83]

58. The EU's reference to a "claim to consider a price effects [*sic*] for the industry as a whole" is void of meaning. Presumably the EU meant to refer to a "claim *concerning the failure* to consider a price effect for the industry as a whole," which runs counter to its new claim that the USITC purportedly failed to find underselling in the retail channel.[84] Indeed, any argument

[79] *See* U.S. February 4, 2021 letter to the Panel, p. 1.

[80] *See* U.S. June 10, 2020 Responses to Panel Questions, para. 69, n.67.

[81] The Panel's timetable required the EU to file its first written submission by January 27, 2020, and the U.S. to file its first written submission by March 17, 2020.

[82] U.S. February 25 responses to Panel questions, paras. 50-51.

[83] EU February 25 responses to Panel questions, para. 106.

[84] The claim in the EU first written submission to which it refers in a footnote was that "{t}he USITC's analysis of price effects is flawed because the USITC only considered effects for the retail "segment" not for the domestic

by the EU that the USITC failed to find price effects in the retail channel would have run counter to the false narrative it has advanced throughout most of these proceedings that the USITC segmented its injury analyses, and *only* calculated an underselling margin for that segment. Accordingly, the EU tries to have it both ways by contending that it challenged USITC's analysis of price effects as lacking positive evidence "in the context of its claim [that it failed] to consider a price effects [*sic*.]for the industry as a whole."

59. Additionally, the EU's contention that the USITC could *only* have justified its determination that subject imports caused market share losses in the retail channel "by providing an undercutting margin specifically for the retail channel" attempts, once again, to create requirements that are unsupported by the text of Articles 3.2 and 15.2. The United States notes that nothing in the text of the Agreements requires an authority to provide underselling margins at all, let alone underselling margins by channel of distribution.

60. Positive evidence supported the USITC's finding that subject imports undersold the domestic industry in products sold in the retail sector. As the United States previously explained, the USITC collected quarterly pricing data on four representative pricing products covering a significant portion of subject import and domestic industry shipments.[85] Two of these pricing products concerned ripe olive products processed and packaged for sale by retailers.[86] The USITC report indicates that subject imports of these two pricing products undersold the domestic like product in 13 of 24 available quarterly price comparisons, and notes that all instances of overselling concerning these products occurred earlier in the POI.[87] Moreover, the USITC, in its analysis of price effects, explicitly determined that pervasive underselling by these subject imports led the domestic industry to lose market share for products sold by retailers.[88] Last, the USITC's price effects analysis also considered record data on lost sales, which corroborated the domestic industry's loss of market share for products sold to retailers.[89] Accordingly, the EU's contention that "there may well have been no undercutting at all in the

industry as a whole." *See* EU February 25 responses to Panel questions, para. 106 n.59 *citing* EU FWS, p. 168. Additionally, the introductory paragraph of that claim, which predicates that it is "independent of the question [*sic*.] whether there was a price effect as regards the domestic industry as a whole," directly contradicts the EU's statement, at paragraph 106 of its response, that its claim addressed "a price effects [*sic*.] for the industry as a whole."

[85] U.S. February 25 responses to Panel questions, para. 46.

[86] USITC Pub. 4805 (Exhibit EU-5) at 20 and Table V-9.

[87] USITC Pub. 4805 (Exhibit EU-5) at V-11 and Table V-10.

[88] USITC Pub. 4805 (Exhibit EU-5) at 20.

[89] USITC Pub. 4805 (Exhibit EU-5) at 21.

retail channel" is false and contradicts what the Spanish respondents argued in the underlying proceedings.[90]

Question 16 (*To the United States*) In paragraph 48 of its 3 February 2021 oral statement at the second substantive meeting of the Panel, the European Union submits that "the existence of such uniform standards and of uniform processing requirements across distribution channels only confirms the EU's position that all ripe olives are homogeneous and substitutable and that no segmentation under Article 15 SCMA could be undertaken in these circumstances". Was there evidence on record to contradict this view?

Response:

61. The EU did not respond to this question.

Question 17 (*To both parties*) In paragraph 32 of its 3 February 2021 oral statement at the second substantive meeting of the Panel, the United States observes that the conjunction "whether" in the first sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement contemplates one or more possible alternatives, and this relates to the directionality of subject import volume trends, which can decrease. Could this term alternatively be understood to refer to three alternatives that subject imports may either: (i) increase in absolute terms, (ii) increase relative to production, or (iii) increase relative to consumption in the importing Member?

Response:

62. The United States has previously explained why the EU's proffered interpretation of the requirement of Articles 3.2 and 15.2 cannot stand in light of the meaning imparted upon the directionality of subject import volume through the conjunction "whether" and the definition of the verb "consider," which is not synonymous with the verbs "find" or "determine."[91] The United States has also explained in this regard why the EU's argument is in tension with the last sentences of Articles 3.2 and 15.2, which contemplate that "[n]o one or several of these factors [concerning volume or price effects] can necessarily give decisive guidance."[92]

63. Insofar as the EU contends that the *US – DRAMS (CVD)* panel report provides any support for its position that an authority's "consideration" of the evolution of subject import volume is tantamount to a "determination" of "volume effects," the United States notes that the panel stated the opposite at footnote 224 of its report:

[90] *See*, e.g., ASEMESA's Prehearing Brief (Exhibit USA-43) at 36 (conceding that there was underselling in the pricing products sold to the retail channel in 2016 and 2017).

[91] U.S. February 25 response to Panel question 17.

[92] *See, e.g.*, U.S. opening statement at the second virtual session, paras. 28-32, 35; U.S. February 25 responses to Panel questions, para. 54.

> Although this issue is not disputed by the parties in this case, we note that the language of Article 15.2 would seem to suggest that an injury determination may be consistent with Article 15 of the SCM Agreement *even in the absence of a determination that (as opposed to consideration whether) there has been a significant increase in the volume* of subsidized imports.[93]

64. The EU's arguments appear to bear this same inconsistency, inasmuch as it accepts, at paragraph 116 of its response, that a CVD measure can be issued in a WTO-consistent manner in the absence of any increase in subject import volume, while positing the exact opposite in paragraph 117.[94] As the United States previously explained, the Safeguards Agreement provides important context to this issue. Where trade negotiators wanted to impose a rigid obligation that an investigating authority find an increase in import volume, they did so explicitly.[95]

65. Last, the EU's makeshift analysis of the United States' injury statute is irrelevant to the instant proceedings. The validity of the statute is not at issue in this dispute; suffice it to say that the EU's last-minute effort to ascribe meaning and motive to the statute is confusing and not reflective of the history of that legislation.

Question 18 (*To the European Union*) In paragraph 45 of its 3 February 2021 oral statement at the second substantive meeting of the Panel, the United States submits that an analysis of impact under Articles 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement focuses on factors reflecting the state of the domestic industry during the POI that are distinct from those considered in its analysis of subject import volume in the first sentences of Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement, or an analysis of the effect of subject import prices on the domestic industry in the second sentences of Articles 3.2 and 15.2. Does this support the view that inquiries under Articles 3.2 and 3.4 can be undertaken independently?

Response:

66. Contrary to the EU's contention, the United States does not "[try] to portray the two inquiries as being entirely distinct and unrelated."[96] As the United States previously explained, the plain text of the first sentences of Articles 3.5 and 15.5 brings these two inquiries together in

[93] *US – DRAMS (CVD) (Panel)*, para. 7.233 n.224. (emphasis added)

[94] EU February 25 responses to Panel questions, paras. 116-117. *Compare* the EU's statement that "that a CVD measure can be imposed if there exists an "increase" of imports or, otherwise, through price effects" at para. 116 of its response with its contention, at para. 117, that such measures cannot issue where the evolution of subject import volumes is "neutral… (stable subject imports) [or] positive… (decreasing subject imports)."

[95] U.S. February 25 responses to Panel questions, para. 54.

[96] EU February 25 responses to Panel questions, para. 121.

an authority's ultimate determination of causation.[97] The United States' position is thus fully aligned with what the Agreements explicitly state. In contrast, the EU's attempts to fold a non-attribution requirement into an authority's impact analysis is unsupported by either the text, logic, or structure of Articles 3 and 15.[98]

67. Moreover, as the United States explained at the second virtual session, the EU's position that Articles 3.4 and 15.4 require a *demonstration* that subject imports are causing injury to the domestic industry is without merit.[99] Articles 3.4 and 15.4 require an examination of the "explanatory force" of subject imports for the state of the domestic industry "on the basis of an evaluation of all relevant economic factors and indices that have a bearing on the state of the domestic industry." However, those articles do not require the establishment of a "logical link" between an authority's findings regarding volume and price effects under Articles 3.2 and 15.2.[100]

68. In its *Ripe Olives* report, the USITC provided the account of the "explanatory force" of subject imports sold to the retail channel for the decline in the domestic industry's condition in its analysis of causal link. The United States previously explained that information on the record indicated that Spain was one of the largest sources of ripe olives in the U.S. market, as well as the largest imported source of supply of ripe olives during the POI, such that a 250 percent increase in the volume of unfairly traded subject ripe olives supplied to the retail channel caused the domestic industry to lose significant sales and market share.[101] These sales and market share losses were particularly acute for the domestic industry, which focused on processing and packaging ripe olives for sale to customers in the higher-price retail sector of the market in an effort to maximize revenues and profits, having been already driven out of the institutional/food sector by subject imports.[102] Due to processing and packaging requirements specific to the retail sector, domestic processors were unable to redirect their ripe olive products to customers in other channels without incurring significant costs. Thus, domestic processors ended up with reduced

[97] U.S. opening statement at the second virtual session, para. 45.

[98] EU opening statement at the second virtual session, para. 74. The EU's hypothesis about what the panel or Appellate Body might have done had it disposed of certain claims differently in their respective reports in *HP – SSST* do not support its argument. *See*, in this regard, U.S. SWS, para. 86.

[99] *See*, in this regard, *Korea – Pneumatic Valve (AB)*, para. 5.191.

[100] *See*, *Korea – Pneumatic Valves (AB)*, para. 5.355.

[101] U.S. June 10 responses to Panel questions, para. 61. To the EU's point at para. 11 of its letter to the Panel of February 25, 2021 that the USITC found injury and causation "on the basis of only 5,259 short tons" of subject import volume, this amount is comparable to the total quantity of imports shipped by all other sources to the U.S. market in each full year of the POI. USITC Pub. 4805 (Exhibit EU-5) at Table IV-2. Moreover, as regards the remaining "25,685 short tons" of dumped and subsidized subject ripe olives sold to the institutional/food and distributor channels, the United States recalls that these were *also* found to have undersold the domestic like product. USITC Pub. 4805 (Exhibit EU-5) at 25-26.

[102] U.S. FWS, paras. 212, 237.

sales and profits and an increase in inventories towards the end of the POI. As a result, they experienced credit problems, were forced to cancel or defer projects, and faced other negative effects, including higher interests and borrowing costs from financial lenders.[103] These negative effects were distinct from any injury that may have been caused by other record factors.[104]

Question 19 (*To the European Union*) In paragraph 46 of its 3 February 2021 oral statement at the second substantive meeting of the Panel, the United States also argues that the text of the Agreements does not support the contention that Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement are consequential in a like manner to Articles 3.5 and 15.5. The United States submits that this is because a causal analysis under Articles 3.5 and 15.5 requires an investigating authority to examine "all relevant [record] evidence," which is broader in scope than an authority's impact analysis under Articles 3.4 and 15.4. Please comment.

Response:

69. The EU's contention in its response, that the United States' argumentation somehow supports the EU's position, is difficult to follow. The United States does not argue, let alone suggest, that the connection between Articles 15.2 and 15.5 is "rather remote."[105] Quite the contrary, the United States has observed that the text of Articles 3.5 and 15.5, in referring to "the effects of [dumping or subsidies] as set forth in paragraphs 2 and 4," explicitly encapsulate the results of an authority's price effects and impact analyses. The text of Articles 3.4 and 15.4 is not similarly structured,[106] such that the connection between an authority's consideration of price effects and its examination of impact, if anything, is "remote." This observation flows from a plain reading of Articles 3.5 and 15.5.

70. Moreover, the United States notes that the EU undermines the internal logic of its own arguments. Specifically, at paragraph 129 of its response, the EU argues that "the reason why previous panels found a consequential analysis of Article 15.5. . . was [because] the authority relied on its inconsistent analysis under Article 15.2 SCMA to establish causation under Article 15.5 SCMA." In other words, the EU's contention, that the relationship between Articles 15.2 and 15.5 is "rather remote," is belied by its own assessment that prior panels have found that an authority's reliance on a flawed price effects analysis in its causal analysis *necessarily* invalidates its conclusions on causation. The EU's arguments thus continue to fail to support its claims and must be rejected.

[103] U.S. FWS, para. 237.

[104] USITC Pub. 4805 (Exhibit EU-5) at 24-26.

[105] EU February 25 responses to Panel questions, paras. 129-130.

[106] U.S. opening statement at the second virtual session, para. 46.

IV. CALCULATION OF GUADALQUIVIR'S SUBSIDY RATE

Question 20 (*To the United States*) In its 8 September 2020 response to question 4(b), the European Union refers to page 7 of Guadalquivir's verification report (Exhibit USA-22) in which the USDOC stated:

> **We also reviewed [Guadalquivir's] reported sales of olive derived products. These include sales of oil produced that is not suitable for consumption and olives that are destined for the mill ("molino"), which are olives that do not meet the standard to sell as a ripe or table olive; these olives are processed into an industrial olive oil not suitable for consumption. We observed no inconsistencies with the information reported in the questionnaire responses. (original footnote omitted)**

What is meant by the statement "[w]e observed no inconsistencies with the information reported in the questionnaire responses"? Does the discovery of "olives that are destined for the mill ('molino')" mean that the USDOC became aware or should have become aware at verification or during the investigation that Guadalquivir reported raw olive purchases in its 4 August 2017 questionnaire responses that were not used to produce ripe olives? Please explain why or why not.

Response:

71. The EU did not respond to this question.

Question 21 (*To both parties*) Related to the preceding question, at page 3 of the 12 July 2018 Ministerial Error Memorandum (Exhibit EU-69), the USDOC states:

> **At verification, we reviewed purchase invoices to confirm the reported volume of purchases. Although invoices included in the verification exhibits use the word "Molino" to describe the olives, which, according to Aceitunas Guadalquivir, are olives destined for processing into olive oil, company officials did not clarify at verification that the volume originally reported as raw to ripe actually represented all olives purchased regardless of olive product produced.**

Although the USDOC states that "company officials did not clarify at verification", is it reasonable that the USDOC concluded that Guadalquivir had reported "raw to ripe" olives only, if the quantities for "molino" olives were verified to have been included in the volume reported in Guadalquivir's 4 August 2017 questionnaire responses? Please explain.

Response:

72. In its response, the EU continues its search for reasons that the USDOC's August 4 request for purchase information should be interpreted not using the plain language of that letter but using later statements by the USDOC. As the United States has explained, neither the USDOC's verification report on Guadalquivir nor its ministerial error memorandum altered its

original request for purchase information for raw olives processed into ripe olives.[107] Nor did they suggest that the USDOC was really requesting different information.

73. First, the EU asserts that the "USDOC knew that these 'Molino' olives cannot be used to process them into subject merchandise".[108] The EU does not explain why it believes the USDOC to have possessed this knowledge, other than to cite the ministerial error memorandum and the verification report, in which the USDOC indicated the opposite. As the USDOC explained in its verification report, Guadalquivir officials represented to the USDOC that Guadalquivir had not included all purchases of raw olives regardless of use.[109] And even if Guadalquivir had informed the USDOC that it reported all raw olive purchases regardless of use (which it did not),[110] that would indicate that Guadalquivir had misunderstood the USDOC's August 4 request. As the United States has explained, it would not retroactively alter what the USDOC had asked for in its August 4 request.[111]

74. Second, the EU asserts[112] that the ministerial error memorandum conflicted with the USDOC's explanations for why, during the period of investigation, the volume of Guadalquivir's raw olives purchases may have exceeded the volume of ripe olives sales.[113] The EU's logic is not apparent, but we will explain why its conclusion is incorrect. As an initial matter, the USDOC's explanation was supplied in its ministerial error memorandum. It is difficult to credit the EU's claim that the USDOC "was fully aware that the discrepancy . . . [was] due to the fact that the raw olive purchases include 'Molino' olives" when the same memorandum provided three reasons why that was not the case. In addition, the conflict asserted by the EU is based on the EU's claim regarding the USDOC's knowledge. As explained in the preceding paragraph, that claim is baseless. Finally, we note that the EU has never disputed that the three reasons cited in the USDOC's ministerial error memorandum explain the difference between purchase and sale volume.

[107] U.S. SWS, paras. 96-99, 102.

[108] EU February 25 responses to Panel questions, para. 134.

[109] *See* U.S. February 25 responses to Panel questions, paras. 61-63 (citing Verification of the Questionnaire Responses of Aceitunas Guadalquivir, S.L.U. (Exhibit USA-22), p. 7).

[110] Nor did Guadalquivir seek clarification or additional guidance from the USDOC. *See* U.S. SWS, para. 103.

[111] *See*, *e.g.*, U.S. SWS, paras. 96-99, 102.

[112] EU February 25 responses to Panel questions, para. 135.

[113] Specifically, the USDOC identified three reasons: (1) differences in physical characteristics, (2) the shelf life of olives, and (3) yield and loss factors. U.S. June 10 responses to Panel questions, paras. 86-89 (citing Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), pp. 5-6).

75. As the United States has explained,[114] the EU has not demonstrated that an objective and unbiased investigating authority could not have decided, as the USDOC did, to use Guadalquivir's raw olive purchase information.

<u>Question 22</u> (*To the European Union*) In paragraph 708 of its first written submission, the European Union argues that the calculation of the countervailing duty rate for Guadalquivir "differs" from the calculation of those imposed on Agro Sevilla and Camacho, and thus, the USDOC acted inconsistently with the obligations in Article 19.3 of the SCM Agreement to apply countervailing duties "on a non-discriminatory basis". Does the requirement to levy duties on a non-discriminatory basis concern the data that is used, the amount that is calculated, the methodology that is applied, or something else?

<u>Response:</u>

76. The EU attempts to shoehorn into Article 19.3 the methodology used to calculate the amount of subsidy, and the data used to calculate that amount.[115] It does not fit. The United States has explained that several of the EU's claims, including what it brought under Article 19.3, concern the calculation of the amount of subsidy.[116] The EU recognized as much in its first written submission.[117] However, it is Article 14 which pertains to the calculation of benefit, and the EU failed to bring any claims under that article.[118] Although its claims fail, for completeness, we will address again the EU's interpretive arguments concerning Article 19.3.

77. The EU argues that Article 19.3 concerns "the methodology applied to determine the duties for each import."[119] Similar to the argument in its first written submission,[120] the EU conflates the calculation of the subsidy rate with the imposition and collection of countervailable duties. Under Article 19.3, importing Members cannot discriminate between sources when imposing countervailing duties; and more specifically, when imposing countervailing duties on sources found to be subsidized and causing injury, the amount of countervailing duties must correspond to the amount of subsidies already determined to exist (namely, pursuant to Article

[114] *See, e.g.*, U.S. June 10 responses to Panel questions, paras. 82-90.

[115] *See* EU February 25 responses to Panel questions, paras. 137-141.

[116] *See* U.S. SWS, paras. 105-107; U.S. FWS, para. 298.

[117] For example, the EU summarized its claims as follows: "In conclusion, the calculation of Guadalquivir's subsidy rate (and consequently of its countervailing duty rate) violates Articles VI:3 of the GATT 1994, and Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement." EU FWS, para. 711.

[118] *See* U.S. SWS, paras. 105-107; U.S. FWS, para. 298.

[119] EU February 25 responses to Panel questions, para. 139.

[120] EU FWS, para. 708.

14).[121] However, Article 19.3 contains no obligations concerning the "methodology" – a word the EU introduces – used to calculate subsidy rates.

78. Nor does Article 19.3 contain any obligations concerning the type of data used by the investigating authority to calculate the subsidy amount. The EU's discussion of the type of data the investigating authority must use, and the supposed standard it must use, is devoid of any basis in the SCM Agreement.[122] The EU's logic appears to be that, because the type of data used could affect the subsidy calculation, it necessarily falls under Article 19.3. The logic errs as an initial matter because, as the United States has explained, the calculation of the amount of subsidy is addressed elsewhere in the SCM Agreement – namely, Article 14. Furthermore, Article 19 concerns the "Imposition and Collection of Countervailing Duties", which as Article 19.1 makes clear, applies once "a Member makes a final determination of the existence and amount of the subsidy". This confirms that the calculation of the amount of subsidy, and the data used to calculate that amount, are not within the scope of Article 19 and its constituent provisions.

[121] *See* U.S. FWS, paras. 117-120.

[122] *See* EU February 25 responses to Panel questions, paras. 140-141.