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

(DS577)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

April 20, 2021

<u>EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION</u>

I. THE USDOC'S DE JURE SPECIFICITY DETERMINATION WAS CONSISTENT WITH THE SCM AGREEMENT

1. The USDOC's examination revealed that, for purposes of countervailable subsidies, the eligibility criteria for subsidies conferred to olive growers under the BPS Programs remained linked to production of olives. Thus, the successor BPS Programs were specific to "an enterprise or industry or group of enterprises or industries" within the meaning of Article 2.1. In particular, the USDOC's finding reflects that access to benefits under the BPS Programs, and the predecessor SPS Program, was based on the benefits received under prior programs that were specific to olive producers. The EU's claims to the contrary discount the explicit link to olive production under the Oils and Fats Program and mischaracterize the USDOC's examination of that link.

A. The USDOC Examined the BPS Programs' Conditions of Eligibility, Consistent with Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement

2. The USDOC's finding that the BPS Programs (and antecedent SPS Program) were *de jure* specific was based upon the eligibility conditions under the Oils and Fats Program, which were limited to olive growers, and incorporated into the BPS Programs as a matter of law. That the EU developed successive subsidy programs with different names and modified methodologies did not alter the fact that the subsidies conferred under the Oils and Fats Program – and the criteria necessary to access those subsidies – remained at the heart of the eligibility criteria for the successive programs (i.e., the SPS Program and BPS Programs).

3. At the outset of its analysis, the USDOC identified that the availability of subsidies under the BPS Programs depended, at least in part, upon availability under its two predecessor programs (i.e., the Oils and Fats Program and SPS Program). That is because, rather than replace the Oils and Fats Program, the EU carried forward subsidies conferred under the program into later iterations of the EU's CAP subsidies regime. Accordingly, to evaluate the BPS Programs, including the conditions governing eligibility for subsidies, the USDOC analyzed how these predecessor programs remained linked operationally to the BPS Programs. Although the Oils and Fats Program ceased benefiting olive growers after 2003, because it provided annual grant payments only to producers of oilseed crops (e.g., olives), the eligibility criteria to access the payments would render the program *de jure* specific. The USDOC noted that, when Spain implemented the SPS Program, aid provided to farmers was converted into "entitlements", which are rights to receive payments that were linked to land area and "decoupled" from production. However, the SPS Program conferred grants to recipients based upon a "reference period" for olives and olive oil – from 1999 through 2002 – the period during which the Oils and Fats Program operated and made subsidies available to olive growers based upon olive production (i.e., on a *de jure*-specific basis).

4. To reach its determination, the USDOC analyzed the EU and Spain's questionnaire responses, the relevant EU regulations, and the Royal Decrees implementing the assistance programs in Spain. The USDOC identified the express limitation to olive producers in the Oils and Fats Program and explained how that limitation carried through to the SPS Program and BPS Programs. The USDOC analyzed Spain's implementation of the BPS Programs and determined that, because the benefits provided under the BPS Programs depend on the earlier subsidy programs that were *de jure* specific (i.e., the Oils and Fats Program and SPS Program), the BPS Programs were also *de jure* specific. To arrive at the determination, the USDOC analyzed the EU and Spain's questionnaire responses, the relevant EU regulations, and the Royal Decrees implementing the assistance programs in Spain. The USDOC identified the express limitation to olive producers in the Oils and Fats Program and explained how that limitation carried through to the SPS

Program and BPS Programs. In this way, the USDOC traced the operational link between eligibility for subsidies under the Oils and Fats Program and the subsidies available under the successor SPS Program and BPS Programs.

5. The EU's argument that the USDOC did not consider eligibility criteria and instead focused on the determination of the amount of subsidy fails to consider that, because of the design of these programs, the determination of subsidies available to certain enterprises under the BPS Programs depended on earlier eligibility criteria. The EU does not dispute that olive production was among the eligibility criteria under the Oils and Fats Program. In its final determination, the USDOC identified the limitations on eligibility under the Oils and Fats Program that favored olive production, stating that "both olive oil and table olives were specifically identified as products eligible to receive production aid under this program, and the payments provided during this period were based on whether the olives were used to produce olive oil or table olives." The USDOC further explained how the SPS Program and BPS Programs' incorporation of this element of the Oils and Fats Program was positive evidence that those programs were also *de jure* specific. Specifically, under the SPS Program, "the amount of each farmer's payment was calculated as a percentage of the average annual grant payments previously provided over a reference period." As the USDOC observed, "[i]n the case of olives and olive oil, this reference period was from 1999 through 2002, when the Oils and Fats Program was in operation."

6. The EU similarly argues that, in failing to identify any explicit BPS eligibility limitations, the USDOC ignored record evidence concerning eligibility conditions. The USDOC's final determination refutes this characterization. Clearly, the SPS Program and BPS Programs do not restate the entirety of the laws and regulations pursuant to which the Oils and Fats Program was implemented. Instead, the SPS Program and BPS Programs incorporate the production-based reference under that predecessor program, which they used to determine subsidy payment eligibility. For the SPS Program, the amount of each farmer's payment was based on the assistance received during the reference period when the Oils and Fats Program was in effect. For the BPS Programs, the value of each farmer's entitlement is related to the assistance received under the SPS Program.

7. Furthermore, the EU is incorrect to the extent that it is arguing that under Article 2.1(a) an explicit limitation cannot include a reference to another legal instrument. The EU's understanding runs counter to the text, which contains no such restriction on investigating authorities, and would invent a loophole for subsidy programs that favor certain enterprises based on explicit eligibility limitations in earlier or separate programs. Here, the USDOC identified that the reference to the production-based Oils and Fats Program to determine eligibility for assistance under the SPS Program and BPS Programs constituted positive evidence that the SPS Program and BPS Programs were also *de jure* specific.

B. The EU's Argument That the USDOC's *De Jure* Specificity Determination Was Inconsistent with Articles 2.1, 2.1(a), and 2.4, of the SCM Agreement Because the BPS Program Is "Decoupled" Is Meritless

8. The EU argues that the SPS Program and BPS Programs cannot retain the *de jure* specificity of the Oils and Fats Program because olive production does not determine eligibility for grant payments under the SPS Program and BPS Programs. As demonstrated below, the EU's arguments (i) are not responsive to the USDOC's analysis and determination of *de jure* specificity and (ii) are at odds with the plain language of Article 2 of the SCM Agreement.

9. First, a component of the subsidy payments under the SPS Program and BPS Programs, even for the new and purportedly "decoupled" BPS Programs, is explicitly based upon historical olive production. In

addition, olives are classified as a "permanent crop" under the BPS Programs. Therefore, a limitation based on the favorable treatment of agricultural producers with historical olive production directs benefits to an identifiable group of enterprises for purposes of a *de jure* specificity finding under Article 2.1. Moreover, Article 2.1(a) of the SCM Agreement directs that to find *de jure* specificity, the investigating authority must find that the relevant legislation or granting authority explicitly limits access to a subsidy to certain enterprises. The SPS Program and BPS Programs limit access based on historical olive production and therefore that limitation explicitly restricts access to certain enterprises based on past olive production.

10. In addition, according to the EU, the USDOC's finding of *de jure* specificity must be wrong because "eligibility to and the amount of such payments" are based on a method "explicitly admitted under the [Agreement on Agriculture ("AoA")]". The EU's argument fails because it conflicts with the texts of the AoA and SCM Agreements in at least the following two ways. <u>First</u>, as the USDOC explained in its final determination, Annex 2 to the AoA no longer pertains to countervailing duty investigations under the SCM Agreement. Whether a subsidy program qualifies as "decoupled" income support under Annex 2 of the AA has no bearing on whether under the SCM Agreement a subsidy is deemed to exist. <u>Second</u>, the EU cites nothing in the text of either the AoA or the SCM Agreement to support the proposition that, after expiry of the Peace Clause, Annex 2 remained relevant to the SCM Agreement. Instead, the EU simply asserts that "decoupled" programs achieve policy objectives such as "stability to farmers income, and preserv[ing] social structures" while avoiding production-based incentives. Therefore, the EU's claims under Articles 2.1, 2.1(a) and 2.4 regarding the "decoupled" nature of the BPS Program must fail.

C. The EU's Claim That the USDOC Breached Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement Because the USDOC Grounded Its Analysis on Eligibility Conditions of a Previous Subsidy Program Has No Merit

11. The EU argues that the USDOC breached Articles 2.1, 2.1(a), and 2.4 of the SCM Agreement by supposedly analyzing the Oils and Fats Program to the exclusion of the subsidy programs actually in force during the period of investigation – the BPS Programs. As explained below, the USDOC thoroughly explained how the eligibility conditions for the Oils and Fats Program, and its *de jure* specificity based upon olive production, carried forward into the SPS Program and the BPS Programs.

12. Although it is true that the USDOC considered the express link between access to subsidies under the BPS Programs and access under its predecessor programs, that analysis supported (rather than supplanted) the USDOC's *de jure* specificity determination regarding the BPS Programs. The USDOC did not examine the BPS Programs in isolation given the programs' "reference to the operations of its two predecessor programs" (i.e., the Oils and Fats Program and SPS Program). The USDOC found that the specificity inherent in the earlier programs (namely, the Oils and Fats Program), forms a part of the BPS Programs and makes the BPS Programs specific, as a matter of law, <u>in themselves</u>. In fact, the USDOC based its *de jure* specificity finding for the BPS Programs on the programs' eligibility criteria after evaluating how Spain elected to administer those programs.

13. The EU further asserts that, because entitlements could have been bought, rented, or inherited, a simple correlation between what a farmer received under the Oils and Fats Program and the SPS Program cannot be taken for granted. These arguments, however, do not undermine the USDOC's conclusion that the SPS Program was *de jure* specific in light of the reference to the predecessor Oils and Fats Program. Even though other factors contributed to the calculation of the amount of support under the SPS Program, it is nevertheless the case that the amount of support was related to the support received under the *de jure* specific Oils and Fats Program.

D. The EU's Claim that the Eligibility Conditions of the BPS Program Satisfy Article 2.1(b) of the SCM Agreement and Therefore Prevent a Finding of *De Jure* Specificity Must Fail

14. The operational link to the Oils and Fats Program meant that (i) "eligibility for" subsidies under the programs was limited based upon production by past olive producers and (ii) "the amount of" subsidies conferred to olive growers continued to be calculated based on the olive growers' prior production-based subsidies. The SPS Program and BPS Programs did not satisfy the Article 2.1(b) criteria for at least the following two reasons.

15. First, as explained in greater detail above, "eligibility for" subsidies under the SPS Program and BPS Programs is based on assistance under the Oils and Fats Program, which on its face favored olive growers. Contrary to the EU's argument, it demonstrably is not the case that the criteria and conditions "are the same regardless of the type of agricultural activity performed by each farmer." It cannot be the case that the SPS Program and BPS Programs do not favor certain enterprises over others when the assistance under these programs is based on assistance under the Oils and Fats Program, which explicitly favored olive growers. As the USDOC explained, the assistance for which a farmer is eligible depends on a program which favored a type of agricultural activity – the Oils and Fats Program.

16. Second, even if "eligibility for" SPS Program and BPS Program subsidies were based on objective criteria and conditions (which is not the case), Article 2.1(b) still would not be satisfied because the "amount of" subsidies nevertheless inherently favors olive growers. As the USDOC detailed in its preliminary and final determinations, "the amount of assistance provided to olive farmers and the methodology for determining it under [the Oils and Fats Program] forms the foundation for determining the amount assistance provided to olive farmers under the successor programs . . . ." In other words, because the SPS Program and BPS Programs continue to calculate the subsidies conferred to olive growers at least in part based on what olive growers produced, the "amount of" subsidies conferred necessarily is not based on objective criteria or conditions. Indeed, elsewhere in its first written submission, the EU appears to concede this point. The EU observes: "It is true that the amount of such assistance depends to a certain extent[] on what farmers received in a past period for the different crops they grew, including olives."

E. The USDOC's *De Jure* Specificity Finding Is Based on Positive Evidence and Supported by Reasoned and Adequate Explanations, Consistent with the SCM Agreement

17. Rather than presenting any further legal basis for the panel's review of USDOC's findings, through this claim, the EU seeks *de novo* review of USDOC's factual findings by the Panel, inconsistent with the Panel's standard of review. A Panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action." In addition, as shown below, the EU's claims variously mischaracterize or take out of the context the USDOC's analysis of the *de jure* specificity of the SPS Program and BPS Programs. Most of these arguments stem from the EU's erroneous position that, despite the record evidence, the USDOC should have discounted the role of the Oils and Fats Program in the BPS Programs.

18. Decoupling eligibility for benefits, in this case in the form of entitlements, from production does not in itself remove *de jure* specificity, as the EU argues. Nor does it remove *de jure* specificity if the entitlements are based upon another proxy for production and, thus, are limited to an identifiable group of enterprises. Absent a legal requirement to continue producing olives, the EU posits, the USDOC's finding regarding the relationship between the BPS Programs and Oils and Fats program is incorrect. However, as explained above, even if the SPS Program and BPS Programs limit access based on historical olive production, it is nevertheless true that such a limitation explicitly limits access to certain enterprises based on

the production of past olive producers. Such a limitation is an explicit limitation on access inherent in the SPS Program and BPS Programs. Because the USDOC has supported this explicit limitation based on positive evidence, it has supported its determination in accordance with Article 2.4 of the SCM Agreement.

19. The USDOC explained its understanding that the "convergence factor results in adjustments to individual payments to bring them closer to an average over time . . . ." The USDOC thus understood that the convergence factor did not completely eliminate deviations from the national, or even regional, average for the period of investigation. The Member States had a choice when implementing the BPS Programs between using a flat rate multiplied by the number of eligible hectares or using the convergence step that gradually reduced the disparity in income grant amounts. Spain chose to implement a convergence factor that would not fully align the assistance under the BPS Programs. That choice further supported the USDOC's conclusion that, "while any adjustments resulting from convergence may ultimately affect the final amount of assistance, the grant amounts awarded to farmers under the BPS program are still based on, and thus retain, the *de jure* specificity of prior programs . . . ."

II. THE EU'S AS SUCH CHALLENGE TO SECTION 771B OF THE TARIFF ACT OF 1930 AND ITS APPLICATION IN THE UNDERLYING INVESTIGATION FAILS BECAUSE THE EU MISUNDERSTANDS THE RELEVANT WTO PROVISIONS AS WELL AS THE U.S. STATUTE

A. The EU Errs in Claiming that the GATT 1994 and the SCM Agreement Require a Particular Methodology for Conducting a "Pass-Through" Analysis

20. The EU's claims regarding the requirement that an investigating authority perform an analysis of "pass-through" must fail because they lack any legal basis in the covered agreements. The EU's interpretation attempts to create specific methodological requirements from general obligations in the GATT 1994 and the SCM Agreement. But the relevant provisions do not require a particular methodology for conducting an analysis of whether a subsidy to an upstream producer (or product) benefits a downstream product.

21. A plain reading of the provisions cited by the EU demonstrates that none contains any obligation to use a specific methodology to calculate the benefit conferred by the subsidy found to exist, much less a specific "pass-through" methodology. The EU has, therefore, failed to make out a breach of any of these provisions.

22. Article VI:3 of the GATT 1994 affirms Members' authority to levy duties that "offset" subsidies, subject to the requirement that they not exceed the amount of subsidy found to exist. This provision also recognizes the variety of ways in which subsidies may be conferred. Members may impose countervailing duties to offset subsidies that are "bestowed" or "granted" either "directly or indirectly." While the obligation in Article VI:3 is *related* to the determination of a benefit, it presupposes that such a determination has already been made at that point of the analysis.

23. Article 10 of the SCM Agreement incorporates Article VI of the GATT 1994 and requires Members to take all necessary steps to ensure that the imposition of a countervailing duty is in accordance with Article VI of the GATT 1994 and the SCM Agreement. Similarly, Article 32.1 of the SCM Agreement provides that "no specific action against a subsidy … be taken except in accordance with the provisions of GATT 1994". Therefore, a breach of Articles 10 and 32.1 may be established based on a breach of Article VI of the GATT 1994.

24. The EU does not provide any textual support in Article VI:3 of the GATT 1994 or Articles 10 or 32.1 that illustrates particular legal conditions governing how an investigating authority should attribute a benefit received indirectly by downstream producers. The provisions of the GATT 1994 and the SCM Agreement are silent on this issue. The EU seeks to fill that silence with a specific, methodological obligation. However, this silence cannot be so filled. Rather, "[t]he most logical conclusion to be drawn from this silence is that the choice . . . is up to the investigating authority" regarding how a pass-through analysis should be conducted in a particular factual circumstance.

B. Section 771B of the Tariff Act of 1930 Does Not "Automatically" "Presume" Pass-Through

25. The EU argues that Section 771B "mandates an approach by the investigating authority which excludes the carrying out of a pass-through analysis" and which irrebuttably presumes pass-through for processed agricultural products. It further claims that Section 771B "provides for an attribution of benefit in the form of a non-rebuttable presumption of pass-through that is inconsistent with the GATT 1994 and the SCM Agreement". The EU's claims are in error both because they rest on a faulty legal theory, and because they reflect a misunderstanding and misrepresentation of the U.S. law.

26. Section 771B of the Act address the calculation of countervailable subsidies on certain processed agricultural products and directs the USDOC to employ a step-by-step analysis for agricultural products to determine whether and to what extent a benefit provided to the upstream raw agricultural product can be attributed to the downstream processed agricultural product. It contains a set of "cumulative conditions" that must be fulfilled in order for the USDOC to attribute the benefit received by raw agricultural product producers to downstream processed products. In this regard, the statute provides a basis to make a finding attributing benefit to a downstream product, in the way that the "pass-through" concept has been understood. These cumulative conditions provide utility to the USDOC by making available a remedy in certain distinct circumstances that otherwise would not be addressed were it confined to the "price differentiation" test insisted upon by the EU.

27. The mechanism under Section 771B recognizes the economic realities of trade in raw agricultural products and processed downstream products and provides for USDOC to conduct an analysis where certain market conditions exist – namely, (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.

C. The USDOC Applied Section 771B to the Facts on the Record, and Therefore Did Not Impermissibly Presume a Benefit to Ripe Olive Producers

28. The EU argues that an investigating authority may not presume that a subsidy provided to producers of an upstream product automatically benefits unrelated producers of downstream products. Rather, an investigating authority must "demonstrat[e] that the benefit has passed through to the processed product and thus benefits it indirectly."

29. Section 771B sets out factual and economic circumstances that the USDOC must determine are present in order to attribute subsidies initially provided to upstream agricultural goods to downstream products. Specifically, the USDOC must find that (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. The USDOC cannot presume that either of these two factors exists in the abstract, but rather, must make findings based on a reasoned analysis supported by the record evidence.

30. Therefore as a factual matter, the EU errs in asserting that the USDOC "automatically" "presumes" that a benefit received by an upstream producer can be attributed to a producer of a downstream product. Further, as a legal matter, the EU provides no basis in the text supporting its supposition that the GATT 1994 and the SCM Agreement provide a particular test for whether an indirect subsidy exists and whether and to what extent a subsidy to an upstream producer confers a benefit to a downstream producer.

31. The USDOC used the methodology in Section 771B to determine whether the benefit calculated with respect to the upstream product – raw olives – was provided to the production of the processed product – ripe olives. The finding by the USDOC was one that an unbiased and objective investigating authority could have reached.

32. As a result of the USDOC's investigation, it found that both prongs of section 771B were satisfied. Having satisfied both prongs of Section 771B, the USDOC determined that the subsidy provided to olive growers bestowed a benefit to ripe olive producers. The Panel should therefore reject the EU's claims that the USDOC "presumed" a benefit to ripe olive producers in the underlying investigation.

III. THE USITC'S INJURY ANALYSIS WAS CONSISTENT WITH ARTICLE 15 OF THE SCM AGREEMENT AND ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

A. The EU Has Failed to Make a *Prima Facie* Case that the USITC's Analysis of Volume Was Inconsistent with Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA

33. The EU's basic theory is that the USITC improperly engaged in an analysis of only one segment of the domestic industry rather than the domestic industry "as a whole". In particular, the EU argues that the USITC was required, pursuant to Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA, to conduct a "volume effect" analysis at the level of the domestic industry as a whole. However, the EU's claim is fundamentally misdirected, as neither Article 15.2 of the SCM Agreement nor Article 3.2 of the Anti-Dumping Agreement require the consideration of volume "*effects*", nor do Articles 15.1 and 3.1 provide any additional support for this contention.

34. The EU further contends that the USITC's segmentation of the domestic industry represents a "partial" analysis, and is "entirely meaningless and unsuited for a volume effect analysis". The EU also asserts that the USITC only evaluated the retail segment and ignored the other segments and the overall market, where subject import volumes declined, and extended its conclusions concerning subject import volume in the retail segment to these other segments and the overall market. The EU is wrong as a factual matter.

35. The EU's position that the USITC's volume analysis was inconsistent with Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA as it was not based on positive evidence and an objective examination, but rather was "arbitrary" and based on "meaningless" evidence has no basis in the text of the ASCM or the ADA.

36. Articles 15.1 and 3.1 are "overarching" provisions that set forth "a Member's fundamental, substantive obligation" with respect to injury determinations and "informs the more detailed obligations in" the succeeding paragraphs. These include the obligations to consider whether there has been a significant increase in the volume of subsidized and/or dumped imports. However, neither Article 15.1 nor Article 3.1 articulates a requirement for an investigating authority to conduct a volume analysis for the domestic industry "as a whole."

37. The EU also errs in arguing that the USITC's volume analysis was inconsistent with Article 15.2 of the ASCM and 3.2 of the ADA as a result of its finding that subject import volume was significant in the absence of any absolute or relative increases in volume. The EU's argument is unsupported by the texts of those provisions. A rigid requirement to find an increase in subject import volume would render meaningless the last sentence of Article 15.2, which states that "[n]o one or several of these factors [concerning volume or price effects] can necessarily give decisive guidance." By their terms, neither Article 15.2 nor Article 3.2 condition the imposition of countervailing or antidumping measures, respectively, on a finding of a significant increase in subject import volume.

38. Articles 15.2 of the ASCM and 3.2 of the ADA require an investigating authority to "consider whether there has been a significant increase" in unfairly traded imports". The text of those provisions do not include a requirement that there be increased imports as a prerequisite to an affirmative injury determination. Thus, notwithstanding the EU's attempt to expand this obligation to require a *determination* that there was a significant increase of subsidized/dumped imports, the Agreements do not require an investigating authority to find an increase in subject import volume, let alone a significant increase.

39. The obligation to "consider" in Articles 15.2 and 3.2 is not tantamount to a requirement to make a definitive determination on the matter under consideration. The obligation for investigating authorities to "consider" whether there has been a significant increase in subsidized or dumped imports for purposes of Article 15.2 of the ASCM and Article 3.2 of the ADA is distinct from other obligations in Articles 15 and 3, such as that of "demonstrat[ing]" a causal connection between subject imports and injury to the domestic industry in Articles 15.5 and 3.5. It follows that an investigating authority's obligation to "consider" whether there has been a significant increase in subsidized or dumped imports requires authorities to "take into account" whether subject import volume increased in absolute terms or relative to domestic production or consumption. This obligation does not, however, require an authority to make a definitive determination that subject import volume has increased pursuant to any of these three metrics. Consequently, an injury analysis may be consistent with Articles 15.2 and 3.2 even in the absence of such a finding.

40. In the *Olives* investigations, the USITC considered the volume of subject imports in a manner consistent with Articles 15.2 and 3.2. The USITC reasonably concluded that subject imports had a significant presence in the U.S. market on an absolute and relative basis, and increased their presence in the retail segment, which enabled them to capture market share directly at the expense of the domestic industry in that segment.

41. The USITC found the volume of subject imports during the POI to be significant on several bases. One basis was on an absolute level; the USITC acknowledged that subject import volume fluctuated on an annual basis over the course of the POI. The USITC further found the volume of subject imports to be significant relative to apparent U.S. consumption since subject imports' market share remained at significant levels during the POI; again, it acknowledged that subject import market penetration fluctuated annually. The USITC also found that the ratio of subject imports to U.S. production was significant.

B. The EU Has Failed to Make a *Prima Facie* Case that the USITC's Analysis of Price Effects Was Inconsistent with Articles 15.1 and 15.2 of the ASCM and Articles 3.1 and 3.2 of the ADA

42. The USITC properly considered whether prices of unfairly traded imports significantly undercut those of the domestic like product, and the EU's argument that the USITC erred in finding price effects in the absence of price depression or suppression has no basis in the SCM Agreement or the Anti-Dumping Agreement. The EU argues that the USITC's finding of no price depression or suppression in the underlying

investigations necessarily means that the USITC could not have properly determined that subject imports had adverse price effects. The EU contends that in the absence of price depression or suppression an investigating authority may not make a finding of adverse price effects through undercutting/underselling. However, the EU's argument is based on a clear misreading of the cited provisions and a misinterpretation of the factors an authority is required to consider with respect to its price effects analysis.

43. Articles 15.2 and 3.2 explicitly recognize three alternative ways in which subject imports can have an "effect" on prices: through undercutting, "or" through price depression, "or" through price suppression. While underselling can lead to price depression or suppression, the Agreements recognize that significant undercutting in and of itself may constitute a price effect. The EU's claim would have the effect of reading the references to "or" in the second sentences of Articles 15.2 and 3.2 out of these provisions.

44. Furthermore, the EU's argument that the USITC's analysis of price effects is flawed. The EU argues that the USITC's price effects analysis, which it allegedly failed to carry out for the domestic industry as a whole, was "meaningless and superfluous," and inconsistent with Articles 15.1 and 3.1 and Articles 15.2 and 3.2. However, neither the ASCM nor the ADA restricts an investigating authority from focusing its analysis on a particular segment of the domestic market. Here, the USITC determined that retail segment was the primary segment in which domestically produced and subject imported ripe olives competed directly for sales in the U.S. market.

45. Similar to its arguments concerning the USITC's volume analysis, the EU inaccurately contends that the USITC examined the retail segment of the market to the exclusion of the other two segments and the overall market in its analysis of price effects. Again, the EU variously argues that the USITC ignored the other segments and the overall market and extended its conclusions concerning subject import price underselling in the retail segment to these other segments and the overall market.

46. The USITC's findings on significant underselling were not limited to a particular market segment. Instead, it was based on the *overall* data on pricing in the record – including aggregated data concerning instances and quantities of underselling in all pricing products, which reflected ripe olives sold in multiple channels of distribution, as well as data concerning confirmed lost sales from purchasers.

C. The EU's Claims under Article 15.4 of the ASCM and Article 3.4 of the ADA Also Fail

47. The United States noted in its preliminary ruling request that the EU failed to include its claims concerning Article 15.4 of the ASCM and Article 3.4 of the ADA in its panel request, and the Panel should rule that these claims are outside its terms of reference. Nevertheless, the EU has failed to show any breach of Articles 15.4 and 3.4.

48. The EU's arguments that the USITC's analysis of impact is flawed because the USITC arbitrarily divided the domestic industry into different segments are unsupported by the ASCM and the ADA. As with its arguments concerning volume and price effects, the EU wrongly contends that the USITC erred in focusing on the retail segment of the market in its analysis of impact. Relatedly, the EU argues that the lack of "volume effects" and price effects for subject imports at the level of the industry as a whole precluded any finding that subject imports had an impact on the domestic industry. The USITC reasonably focused aspects of its analysis on the retail segment and properly explained why it did so. Specifically, the retail segment was the primary segment in which domestically produced and subject imported ripe olives competed directly for sales in the U.S. market.

49. The EU's arguments that the USITC ignored the rest of the market and the overall market are factually incorrect for the same reasons they fail with respect to the USITC's volume and price analysis. Article 15.4 of the SCM Agreement states that, in examining the impact of subsidized imports on the domestic industry, an investigating authority "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry." Article 15.4 lists numerous factors, but states that this list "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

50. Therefore, an investigating authority "must consider, in light of the interaction among injury indicators and the explanations given" whether a domestic industry is injured. Further, an investigating authority's consideration of these criteria must be based on an "objective examination" of "positive evidence" in accordance with Article 15.1. In assessing the impact of the subject imports on the domestic industry, the USITC considered all of the relevant data. It found that production factors, which it analyzed on an industry-wide basis, were mixed. It observed, however, that domestic producers' inventories grew as they lost sales and market share to the lower-priced subject imports in the important retail sector. This inventory consisted of ripe olives that were processed and packaged for sale to the retail segment and could not simply be redirected for sale to other segments.

51. In sum, in analyzing impact, the USITC considered all relevant factors and explained how it weighed the evidence pertaining to each of these factors. While the USITC acknowledged that not all trends were negative, it explained why subject imports had explanatory force for the industry's declining output and financial performance. The EU's claims that the USITC's impact analysis was inconsistent with Articles 15.1 and 15.4 of the ASCM and Articles 3.1 and 3.4 of the ADA fail.

D. The EU Has Failed to Show that the USITC Did Not Demonstrate a Causal Link between the Subject Imports and Injury to the Domestic Industry Consistent with Article 15.5 of the ASCM and Article 3.5 of the ADA

52. In its analyses of volume and price effects, the USITC found that a significant volume of subject imports had undersold the domestic like product and captured market share from the domestic industry in the retail segment of the market. It also found, in its analysis of impact, that subject imports had explanatory force for the industry's increasing inventory, declining shipment, and deteriorating financial performance indicators.

53. Upon evaluation of all relevant evidence, the USITC properly linked its volume, price effects, and impact analyses in making a definitive determination that subject imports caused injury to the domestic industry. The EU has failed to show that the causal link established by the USITC was inconsistent with the first two sentences of Article 15.5 of the ASCM and Article 3.5 of the ADA.

E. The USITC's Non-Attribution Analysis Complied with Article 15.5 of the ASCM and Article 3.5 of the ADA

54. The EU argues that in conducting its causation analysis, the USITC was required to consider a number of factors other than subsidized imports that may have explained the injury to the domestic industry during the POI. It further argues that the USITC erroneously rejected two non-attribution factors: 1) decreasing consumption in the United States; and 2) non-subject imports during the POI. The EU argues that the USITC made no attempt to separate and distinguish the injury caused by these factors. The EU is wrong as a matter of legal interpretation and as a factual matter. The USITC properly separated and distinguished any injurious effects caused by factors other than subject imports.

55. The purpose of the non-attribution requirements is to ensure the existence of an un-severed causal link between the dumped or subsidized imports and the injury to the domestic industry. The non-attribution requirement ensures that dumped and subsidized imports are causing material injury to the domestic industry, and that the injury attributed to subject imports is not in fact caused by other known factors. Neither Article 3.5 of the ADA nor Article 15.5 of the ASCM require investigating authorities to utilize any particular methodology in examining other known causal factors.

56. In the *Olives* investigations, the USITC assured that it did not attribute injury allegedly caused by other factors to the subject imports. Moreover, it provided "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports." The USITC fully explained why the relatively modest decline in consumption did not correspond with reported declines in the industry's shipments and financial performance indicators and considered and addressed the role of nonsubject imports.

57. The EU's arguments concerning non-attribution largely criticize the USITC majority for failing to adopt the rationale of the dissent. Presenting an alternative analysis of the facts cannot establish that the findings made by the USITC majority – the sole findings before the Panel do not reflect an objective examination or are unsupported by positive evidence. The EU's reliance on the dissent's alternative weighing of the facts, and on its own alternative factual conclusions, does not establish a breach of Articles 15.1 and 15.5 of the ASCM and Articles 3.1 and 3.5 of the ADA.

IV. THE USDOC'S FINAL COUNTERVAILING DUTY RATE FOR GUADALQUIVIR IS NOT INCONSISTENT WITH ARTICLE VI:3 OF THE GATT 1994 AND ARTICLES 10, 12.1, 12.8, 19.1, 19.3, 19.4, AND 32.1 OF THE SCM AGREEMENT

A. USDOC Properly Requested, and Permitted Interested Parties to Provide, Information on Purchases of Raw Olives Used to Produce Ripe Olives, Consistent with Article 12.1 of the SCM Agreement

58. The EU argues that the USDOC "never gave 'notice' within the meaning of Article 12.1 of the SCM Agreement" that the mandatory respondents (namely, Guadalquivir) were required to provide purchase information for raw olives that were used to produce ripe olives, even though the information was "key information for its case." The facts demonstrate otherwise.

59. On August 4, 2017, the USDOC issued a questionnaire to each of the three mandatory respondents requesting information relating to their sources of raw olives that were processed into ripe olives. To this end, the cover page introducing the questionnaire, and explaining the reporting requirements, sought "information on your company's sources of raw olives <u>that were processed into ripe olives</u>." According to the EU, despite the language of the cover page, question 6 and the corresponding template "refer only to 'raw olives', and do not contain any limitation to only such raw olives which are processed into subject merchandise (ripe olives) . . . ," such that they *could* be interpreted to suggest that respondents were instead to provide *all* raw olive purchases. The text of the questionnaire refutes the EU argument in at least two ways.

60. <u>First</u>, the cover letter provided clear guidance regarding the questionnaire. Specifically, the cover letter established the parameters of the ensuing questions: to obtain "information on your company's sources of <u>raw olives that were processed into ripe olives</u>."

61. Second, the relevant question (i.e., question 6) directed the mandatory respondents to report purchases of raw olives used to produce ripe olives. By its express terms, the question sought information regarding ripe olive processors' suppliers of raw olives. Similarly, the corresponding template to be completed was "to include **all** those suppliers." The data of a ripe olive processor's raw olive suppliers by definition refers to the purchase of raw olives for processing into ripe olives.

62. The EU argues that subsequent letters submitted by the mandatory respondents (September 18, 2017) and the Government of Spain (September 25, 2017) show that the parties understood the scope of the information requested in the USDOC's August 4, 2017, letter was not limited to raw olives processed into ripe olives. However, in the first instance, neither the mandatory respondents nor Spain purported to speak on behalf of the USDOC, nor could they have, and thus could not have clarified the scope of the USDOC's questionnaire for it. Second, neither letter pertained to the USDOC's August 4, 2017, questionnaire requesting mandatory respondents' purchase information for raw olives processed into ripe olives. Third, the USDOC's separate letter to the mandatory respondents on September 27, 2017, did not change (or purport to change) the meaning of the USDOC's August 4, 2017, request.

63. Furthermore, consistent with the questions actually asked by the USDOC, the other two mandatory respondents, Agro Sevilla and Angel Camacho, understood that the USDOC's August 4, 2017, and September 27, 2017, letters collectively requested two pieces of information: (i) the volume of purchases of raw olives processed into ripe olives and (ii) the total volume of purchases of raw olives, without regard to the end product.

B. The EU's Claims Have No Merit Because the USDOC Applied the Same Calculation Method to Each Mandatory Respondent and Used Each Mandatory Respondent's Reported Information

64. Similar to its claim under Article 12.1 of the SCM Agreement, the EU bases its arguments on an incomplete representation of the investigation record – in particular, the questions posed by the USDOC and the mandatory respondent's responses to those questions. As reflected in the relevant record information, any unbiased and objective investigating authority could have determined, as the USDOC did, that the information reported by Guadalquivir represented its purchases of raw olives that were processed into ripe olives.

65. In its final determination, the USDOC measured the benefit conferred from subsidies provided to raw olive growers "by multiplying the weighted average per kilogram benefit by the volume of each respondent's purchases of raw olives to produce subject merchandise [i.e., ripe olives], and to divide the resulting benefit by the sales of subject merchandise [i.e., ripe olives]." The USDOC applied this methodology to each of the three mandatory respondents. Accordingly, for Guadalquivir's numerator, the USDOC relied on the purchase volume that Guadalquivir reported in response to the USDOC's August 4, 2017 letter because Guadalquivir's "originally reported information is indicative of its raw olives purchases that were used to produce subject merchandise."

C. Consistent with Article 12.8 of the SCM Agreement the USDOC Informed All Parties of the Essential Facts Under Consideration

66. The USDOC disclosed the essential facts under consideration months before the final determination, thereby permitting the parties to defend their interests, which they in fact did. On at least three occasions before the final determination, the USDOC disclosed to the interested parties (including Guadalquivir) that the essential facts under consideration included the volume of raw olives processed into ripe olives.

67. First, as explained above, through its August 4, 2017 and September 27, 2017 questionnaires the USDOC requested the volume of purchases of both (i) raw olives that were processed into ripe olives and (ii) all raw olives whether or not used to produce ripe olives. Second, in February 2018, the USDOC notified each mandatory respondent of the agenda for USDOC's on-site verification of each company's questionnaire responses, including all information that the USDOC anticipated relying upon as the basis for the final determination. The verification agenda disclosed that purchase volumes for raw olives were essential facts under consideration. Third, Guadalquivir's verification report, issued March 22, 2018, shows that the USDOC reviewed Guadalquivir's purchases of raw olives and, more specifically, Guadalquivir's purchases of raw olives that were processed into ripe olives. In this way, the verification report was another notice to the parties that the volume of purchases of raw olives that were processed into ripe olives was an essential fact under consideration.

68. Furthermore, because the EU has not demonstrated the inconsistency of Guadalquivir's final subsidy rate under the above provisions, the EU's claims regarding the all-others rate also fail. As explained above, the countervailing duty rate calculated for Guadalquivir is not erroneous.

U.S. JUNE 10 RESPONSES TO THE PANEL'S QUESTIONS

Summary of U.S. Response to Panel Question 2

69. The requirement that the granting authority or relevant legislation "explicitly limits access to a subsidy" does not restrict an investigating authority to one or the other of the above criteria. The plain language of Article 2.1 indicates that specificity is a general concept and that "limits access" under Article 2.1(a) is not limited in meaning to one particular type of eligibility. Article 2.1(a) qualifies the term "access" in two ways: (i) it must be limited "to certain enterprises" and (ii) it must be expressed "explicitly" by the granting authority or the relevant legislation. The text does not, however, prescribe a particular form that the limit on "access" must take – whether it be criteria that determine eligibility for the subsidy or criteria that determine eligibility for certain amounts of the subsidy.

70. Nor does the use of the term "access" in Article 2.1(a) restrict an investigating authority to evaluating the conditions of a subsidy program in a particular way. "Access" means the "right or opportunity to benefit from or use a system or service." The "right or opportunity to benefit from or use" a subsidy could be determined by eligibility for that subsidy. However, limiting eligibility for subsidies under a program is not necessarily the only way that the "right or opportunity to benefit from or use" subsidies may be limited. A limit based on distinctions that differentiate the amount of subsidies that certain enterprises are eligible to receive vis-à-vis other enterprises could similarly differentiate the right or opportunity to benefit from or use a subsidy.

71. Articles 2.1(a) and (b) together set forth the conditions to distinguish cases where, as a matter of law, the granting authority discriminates in favor of certain enterprises, from cases where subsidies are generally available. Clearly, a granting authority or relevant legislation may impose limitations that discriminate in favor of certain enterprises through criteria that determine eligibility to receive certain amounts of subsidies under the program in question. Similarly, Article 2.1(b) calls for "objective criteria or conditions" – i.e., "criteria or conditions which are neutral, which do not favour certain enterprises over others . . . ." Criteria limiting access either to threshold eligibility for the subsidy program itself or to certain subsidy amounts under that program would not be neutral and would favor certain enterprises over others.

U.S. SEPTEMBER 8 RESPONSES TO THE PANEL'S QUESTIONS

Summary of U.S. Response to Panel Question 1.c

72. The "certain enterprises" for purposes of Article 2.1(a) were the holders of entitlements whose value derived from the Oils and Fats Program. That finding is evident in the USDOC's preliminary and final determinations and consistent with the finding that the SPS Program and BPS Programs are specific to olive growers. The USDOC identified that (i) the Oils and Fats Program conferred subsidies based on historic olive production and (ii) the SPS Program and BPS Programs preserved the conditions that limited access to those subsidies as a discrete component of entitlement payments, whether the holders of those entitlements continued olive production or replaced that production.

73. In its final determination, the USDOC encapsulated its *de jure* specificity finding: "the annual grant amounts provided under [the BPS Programs] are directly related to, and continue to retain the *de jure* specificity of, the grants provided to olive growers under" the Oils and Fats Program. In its preceding explanations, the USDOC explained precisely how the BPS Programs "are directly related to" and "continue to retain the *de jure* specificity of" olive-specific subsidies under the Oils and Fats Program. Specifically, the USDOC explained how the entitlement values were derived from using historic information (i.e., from the 1999-2002 reference period). The regional data used to generate the "basic payment entitlement" under the BPS Programs included "the area in hectares, the types of crops, and the volume of production during the period 1999 to 2002 or 2000 to 2002, and the amount provided under the annual grant-to-farmer program for those same periods." Similarly, under the SPS Program, "the amount of each farmer's payment was calculated as a percentage of the average annual grant payments previously provided over a reference period" (i.e., 1999-2002 for olive-specific subsidies under the Oils and Fats Program).

74. Thus, under the SPS Program and BPS Programs, a farmer could hold an entitlement with a component based on historic olive production regardless of whether or if the land was later switched to a different use. The USDOC was clear on this point: "the amount of the payment is dependent on the annual activation of the entitlement, and is not dependent on the type or volume of crop produced."

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. THE USDOC'S *DE JURE* SPECIFICITY DETERMINATION WAS CONSISTENT WITH THE SCM AGREEMENT

A. The EU has failed to demonstrate that certain extra-textual conditions modify Article 2.1(a) of the SCM Agreement

75. In its previous submissions, the United States has explained why, contrary to the EU's position, the term "limits access" does not mean only *limits threshold eligibility for any amount of subsidy under the program*. Below we address points raised by the EU in its statements at the virtual session and its written responses after that session.

76. First, the Panel need not reach the EU's arguments that "continuity and consistency" compel the Panel to adopt the EU interpretation, because the supposed "consistent jurisprudence" on this issue does not exist. Prior dispute settlement reports have not addressed whether the meaning of "limits access" under Article 2.1(a) is restricted in the manner that the EU proposes. The EU relies on the fact that past reports have used the word "eligibility" in referring to the limit described in Article 2.1(a). In *US – Large Civil Aircraft (2nd complaint)*, the compliance panel used and emphasized the word "*eligibility*" to draw the distinction between whether certain enterprises have "access" to subsidies versus whether "they in fact

receive it". The panel in *US – Upland Cotton* observed that "specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition." The EU's argument highlights a needless conceptual complication that its interpretation would create. Under the EU interpretation, investigating authorities (and reviewing panels) would need to determine whether the access limits in question are better categorized as eligibility or amount-based, and whether those limits are better categorized as at the threshold point of the program or within the program.

77. Second, in its post-virtual session responses, the EU proposes another extra-textual requirement for Article 2.1(a): that "[c]ompanies that do not form part of the class of (benefit) recipients" correspondingly "cannot be included in the benefit analysis." The relevant question under Article 2.1(a) is whether access is explicitly limited as a matter of law to certain enterprises. That evaluation does not involve an analysis of the amounts actually received and by whom, which is instead relevant to inquiries concerning *de facto* specificity and the calculation of benefit.

78. Third, the EU has presented an incoherent response to the text-based arguments concerning Article 2.1(a). The EU noted that Article 2.1(a) "does not refer to amount" and "refers to limitation on access, period." That is exactly the point. Article 2.1(a) refers neither to "amount" nor to "eligibility" – in contrast to Article 2.1(b) – so to limit Article 2.1(a) to either term would conflict with the text. For the EU to establish that "limits access" under Article 2.1(a) is modified by language that was not used in the provision, it must do more than refer to other language that does not appear under the provision.

B. The EU has failed to demonstrate that the USDOC's determination relied on "coupled" production and therefore breached Articles 2.1, 2.1(a), or 2.4 of the SCM Agreement

79. In its opening statement, the EU backpedals from its earlier claims, proposing a "much more modest argument" that "if an investigating authority finds that a subsidy is tied or coupled to production" it cannot "find at the same time that the subsidy is not coupled to the production of that crop." In the first instance, the EU repeats its arguments that the USDOC did not establish a link between olive production-based subsidies under the Oils and Fats Program and the limitation on access identified under the BPS Programs. However, it is not in dispute that only certain entitlement holders could access the entitlement component that was based upon subsidies conferred under the Oils and Fats Program (i.e., the certain enterprises for purposes of Article 2.1(a)). The USDOC did not base its *de jure* specificity findings on whether or not subsidies under the BPS Program are coupled to olive production, nor did it need to. The EU argues that its claim is "buttressed by a contextual interpretation" that the BPS Programs would qualify as "decoupled income support" under the Agreement on Agriculture. As the United States has explained, the concept of "decoupling" appears nowhere in the SCM Agreement and is not relevant to the analysis under Article 2.1(a). The EU has not explained how, despite the irrelevancy of the concept of "decoupling" under Article 2.1(a), it nonetheless provides relevant context for that article.

80. The EU makes a conceptually similar argument that the ability to transfer an Oils and Fats Program-based entitlement "severs" its relationship to the Oils and Fats Program. However, as the United States has explained, even where certain entitlements might have been inherited or transferred, this would not sever the link to the access limitation identified by USDOC in its determination. Under the law, only the entitlement holders could apply for and receive the subsidy amounts reserved for the identified certain enterprises. That entitlement holders might themselves transfer these rights does not alter the scope of access, and the resulting specificity, as a matter of law.

C. The USDOC based its specificity analysis on the legislation that under the BPS Programs limited access to certain enterprises, consistent with Article 2.1(a) of the SCM Agreement

81. To evaluate the legislation pursuant to which the granting authority administered the BPS Programs, the USDOC considered how the BPS Programs incorporated by reference the eligibility criteria of the two predecessor CAP Pillar I programs – the Oils and Fats Program and the SPS Program. The EU has offered several additional arguments, which the United States addresses below.

82. First, the EU argues that the "alleged direct correlation" between the Oils and Fats Program and the BPS Programs conflicts with the statement that the "BPS Programs rely at least in part on the subsidies provided under the Oils and Fats Program." In the first place, the salient point is that the BPS Programs continued to provide subsidies using information from the reference period during which the Oils and Fats Program operated, which based assistance on olive production and necessarily limited access to certain entitlement holders, as the USDOC identified. That limitation on access does not depend on whether or not the BPS Programs took into account any other factors. In any event, the EU's attempt to identify an inconsistency, albeit an irrelevant one, fails.

83. Second, in its responses to the Panel's questions, the EU labels an "alternative explanation" the U.S. descriptions of the USDOC's specificity finding. In essence, the EU fixates on one aspect of "the legislation" identified by the USDOC, the olive production-based subsidies under the Oils and Fats Program, to the exclusion of how that program interoperated with the succeeding SPS Program and BPS Programs. The United States has explained how the USDOC identified that access to a discrete component of the BPS Programs – i.e., entitlement values from historic olive production-based subsidies – was limited to farmers on lands that qualified them for these entitlements. The United States has identified where this evaluation is evident. To the extent the EU's arguments address one phrase to the exclusion of the USDOC's full findings, those arguments are not relevant to the dispute and should be rejected.

II. THE EU FAILED TO ESTABLISH ITS AS SUCH CHALLENGE TO SECTION 771B OF THE TARIFF ACT OF 1930 AND THAT THE USDOC WAS REQUIRED TO CONDUCT A PRICE DIFFERENTIATION ANALYSIS UNDER THE WTO PROVISIONS THE EU CITES

A. The EU asserts that it is not arguing that the USDOC was required to apply a specific methodology to determine whether a benefit has passed through, but the EU's own statements belie that assertion.

84. The EU emphatically states in its second written submission that it "nowhere claims or argues that the provisions of the GATT 1994 and the SCM Agreement referenced by the US would require a specific methodology of price differentiation in the context of a pass-through analysis." The EU further emphasizes that none of its arguments on price comparisons are premised on an interpretation of the provisions under which it brought claims in this dispute.

85. Instead, the EU directs the Panel to weigh its arguments that Section 771B does not contain a pass-through analysis because the two conditions therein are "inapt" to determine the existence and extent of the benefit conferred to downstream ripe olives processors. In the EU's view, the only apt condition would be that the price of the input product is lower than the market price as a result of the subsidy, and, quoting the EU, that no "method other than a price comparison" is appropriate for making a determination of whether and to what extent a benefit is conferred to downstream processors. The legal provisions cited by the EU do not support the EU position and each of the EU's claims therefore must fail.

B. The EU has failed to show that a price comparison, as opposed to the conditions in Section 771B, is the only method of analysis suitable to determine whether and to what extent a benefit is conferred on downstream processed products

86. While the EU appears to acknowledge that the GATT 1994 and SCM Agreement create no requirements or specific conditions, and that there are many conditions that may be considered in making a pass through determination, it nevertheless claims that application of the conditions reflected in Section 771B necessarily and in every instance breach those same provisions. The United States fails to see how such statements can be reconciled with the EU's clear position that no other "method other than a price comparison" is appropriate for making a determination of whether and to what extent a benefit is conferred to downstream processors.

87. Rather than attempt to bolster its claims with an analysis of the obligations in the SCM Agreement, the EU provides hypothetical scenarios where a price comparison might be relevant. However, an investigating authority's analysis should be based on the distinct factual and economic circumstances facing the industry at issue. The EU errs in asserting that because a price comparison might be relevant in some circumstances, it must be required in every circumstance. The EU's reliance on this assertion is misguided, and does not reflect the flexibilities that exist in the SCM Agreement.

88. Markets for raw agricultural commodities are characterized by "perfect competition." Perfect competition exists in markets where there are many producers making virtually identical products for which sellers and buyers have all of the relevant information on which to base a purchase, and entry and exit into the market is not restricted. Producers in perfectly competitive markets are known as "price takers." This market characteristic is a systematic feature of markets in the agricultural sector, and therefore affect the relationship between producers and processors of raw agricultural products. Given these underlying market conditions, under Section 771B, where an agricultural commodity market also exhibits certain additional characteristics – i.e., where in addition to perfect competition there is *also* substantial dependence and limited value added – the benefit of a subsidy provided to an agricultural producer will be determined to have passed through to a processed agricultural product.

III. THE USITC'S INJURY ANALYSIS WAS CONSISTENT WITH ARTICLE 15 OF THE SCM AGREEMENT AND ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

A. The USITC conducted an objective examination of the industry as a whole

89. The central premise of the EU's challenge to the injury determination is that the USITC engaged in selective "segmented" analyses. Quite simply, this is incorrect. A careful reading of the USITC opinion confirms that there is no factual basis for the EU's attempt to recast it as one that alternated between holistic and segmented analyses. The USITC based its injury analyses on data pertaining to the market as a whole. These included the USITC's analyses of volume, price effects, and impact. In conducting its analyses of volume and price effects, the USITC provided information concerning trends in the retail channel of distribution, which is the channel of the market in which competition between domestically processed and subject ripe olives actually occurred during the period of investigation, and the channel on which all parties to the underlying investigations focused their volume and price-effects-related arguments.

90. Even if the Panel determines that the USITC conducted an analysis that could be characterized as a "market segment" analysis (a term that does not appear in the relevant Agreements), the EU has not demonstrated that the examination and findings of the USITC in this investigation do not comport with the

requirements of the AD and SCM Agreements. In this regard, the United States notes that the EU's own definition of the supposed "market segment" analysis and requirements shifted throughout these proceedings.

91. The EU initially argued, in its first written submission, that "segmented" analyses were *per se* inconsistent with Article 3 of the AD Agreement and Article 15 of the SCM Agreement. This position has no basis in the text of the Agreements. The EU then posited that a segmented analysis was *per se* inconsistent with the Agreements "in a situation where one single uniform and homogeneous product (with no further product differentiation) was found to be "highly substitutable" and was sold interchangeably in all distribution channels."

92. The EU later conceded that a segmented analysis of homogeneous products would not be precluded, provided that "there must still be conditions of competition that are different per segment in order for segmentation to serve as valid basis [*sic*.] for the injury analysis." The EU presented hypotheticals of what it purports would constitute appropriate circumstances for a segmented analysis, including where there are distinctions in domestic and imported products, such as that of an investigating authority comparing imported high-end products with domestic low-end product. However, the EU still fails to provide any textual basis supporting such an obligation.

93. The USITC's close examination of trends in each channel of distribution, where subject ripe olives products competed with domestically processed ripe olives of equivalent size and presentation, was in full accord with the USITC's like product determination and its obligation to base its injury analyses on positive evidence following an objective examination of the record.

B. The USITC conducted a proper analysis of volume

94. While most of the EU's challenges to the USITC's analysis of volume are tied to its general argument concerning market segmentation, it does raise two independent arguments. First, it contends that the USITC erred in finding the volume of unfairly traded imports significant when it declined in absolute and relative terms during the period of investigation. Additionally, it contends that the USITC failed to conduct an "objective examination "of the explanatory force of subject imports for the state of domestic industry as a whole"" on the premise that subject import volume sold to the retail channel amounted to a small proportion of total subject import shipments. However, the USITC opinion fully discharged the obligation to consider the "significance" of subject import volume.

95. The USITC directly addressed the evolution of subject import volume during the period of investigation, and acknowledged that this volume did not increase on either absolute or relative bases. In addition to evaluating volume data for the overall market, the USITC also considered subject import volume trends in the three channels of distribution. It observed that subject imports increasingly penetrated the retail channel, which was the predominant channel for the domestic industry. The USITC also found that subject imports captured market share from the domestic industry in the retail channel, including in both the retail private label and retail branded subchannels. The USITC, weighing the record evidence and considering the arguments of the parties, reasonably concluded, on the basis of positive evidence and without favoring the interests of any particular party to the proceedings, that subject import volume was significant.

C. The USITC conducted a proper analysis of price effects

96. In addition to the EU's challenges tied to its general argument concerning market segmentation, the EU raises further arguments challenging the USITC's conclusion that underselling of the domestic product by the unfairly traded imports was significant.

97. Based on its review of pricing data for four specific pricing products, the USITC found that subject imports pervasively undersold domestic pricing products, in 37 of 48 available quarterly price comparisons, including in the retail channel, where subject imports captured market share from the domestic industry. The USITC also considered information on the record regarding lost sales, which indicated that 12 of 25 responding purchasers reported that subject import prices were lower than those for domestically processed ripe olives. The USITC, weighing the record evidence and considering the arguments of the parties, reasonably concluded, on the basis of positive evidence and without favoring the interests of any particular party to the proceedings, that subject import underselling was significant.

D. The USITC conducted a proper impact analysis

98. The EU argues that conceptually the "intensification" of competition in the retail channel is inconsistent with principles of open market competition. The EU's suggestion that the domestic processors could have simply directed sales to the distribution channel, or re-enter the institutional/food channel in which subject imports had displaced them prior to the period of investigation does not reflect what actually occurred during the period of this investigation, and ignores the USITC's record-supported findings regarding conditions of competition in the market. Specifically, the USITC found that there were distinct market channels, and each channel involved unique customers that purchased ripe olive products prepared to meet requirements specific to each channel. Based on these conditions, the USITC determined that sales and market share that the domestic industry lost to subject imports led to an increase in their inventories, which consisted largely of ripe olive products prepared for sale to retail purchasers.

IV. The USDOC's Final Countervailing Duty Rate for Guadalquivir Was Not Inconsistent with the GATT 1994 or the SCM Agreement

A. The EU has not demonstrated that the USDOC failed to request information on purchases of raw olives used to produce ripe olives

99. The EU has acknowledged that the USDOC's August 4, 2017 letter is "the key document" on the issue of whether the USDOC asked Guadalquivir to provide purchase information for raw olives used to produce ripe olives. However, the EU has tried to shift attention to a separate letter which the USDOC issued on September 27. In its post-virtual session responses, the EU made two additional, flawed arguments related to the USDOC's August 4 and September 27 letters. First, concerning the disclosure of "essential facts" under Article 12.8, the EU argues that "the fact that information was asked for in an initial questionnaire is [not] sufficient to establish that the information is an essential fact . . . ." As the United States has explained, the USDOC disclosed that purchases of raw olives processed into ripe olives was an essential fact under consideration; it did so through its initial questionnaire and, in any event, on two other occasions (i.e., the verification agenda and the verification report).

100. Second, the EU argues that the "natural interpretation of the sequence" of the August 4 and September 27 letters demonstrates that the August 4 letter "clearly was limited to requesting information on the volume of all raw olives." When the USDOC issued its August 4 letter, it was not planning for its meaning to be understood in terms of a later-issued letter. Similarly, in responding to the August 4 letter, Guadalquivir and the other mandatory respondents were not doing so in the context of the September 27 letter. If the August 4 letter provided notice that the USDOC required purchase information for raw olives processed into ripe olives, the September 27 letter did not somehow countermand that notice. The EU refers to the fact that the September 27 letter "represents an answer to a specific query of respondent's counsel." To be clear, Guadalquivir did not seek clarification or additional guidance from the USDOC.

B. The EU has not properly challenged the calculation of the amount of benefit

101. Several of the EU's claims with respect to Guadalquivir pertain to the calculation of the amount of benefit. However, the EU did not bring a claim under Article 14 of the SCM Agreement. Asked about its omission, the EU argued that it did not need to bring a claim under Article 14 because "a determination of benefit conferred can comply with these specific disciplines [set] out in Article 14 of the SCM Agreement and nonetheless contravene other disciplines . . . ." At their core, the EU's claims are about the calculation of the amount of benefit. The EU summarized in its first written submission: "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." However, it is Article 14 which speaks directly to calculating the amount of benefit in terms of the benefit to the recipient.