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

(DS577)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

AT THE PANEL'S SECOND VIDEOCONFERENCE WITH THE PARTIES

February 3, 2021

TABLE OF REPORTS

Short Form	Full Citation
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – HP-SSST (AB)	Appellate Body Reports, *China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan and the European Union*, WT/DS454/AB/R;WT/DS460/AB/R adopted 28 October 2015
China – HP-SSST (Japan) (AB)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WT/DS454/AB/R; WT/DS460/AB/R adopted 28 October 2015
Thailand – H-Beams (AB)	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, adopted 25 March 2011
US – Coated Paper (Indonesia)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R, and Add.1, adopted 22 January 2018
US – Countervailing Duty Investigation on DRAMS (Panel)	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Softwood Lumber III (Panel)	Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, adopted 1 November 2002

Short Form	**Full Citation**
US – Tyres (China) (AB)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011
US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R

Mr. Chairperson, Members of the Panel:

1. On behalf of the U.S. delegation, I would again like to thank the Panel, and the Secretariat staff assisting you, for your work on this dispute.

2. Our statement today is divided into four parts. Part I responds to specific arguments by the EU concerning the USDOC's *de jure* specificity determination. Part II responds to specific arguments by the EU concerning the USDOC's pass-through analysis. Part III responds to specific arguments by the EU concerning the USITC's injury analysis. Finally, Part IV responds to specific arguments by the EU regarding the USDOC's calculation of the final subsidy rate of one of the mandatory respondents.

I. THE EU'S CLAIMS REGARDING THE USDOC'S *DE JURE* SPECIFICITY DETERMINATION ARE MERITLESS

3. In its previous submissions, the United States has demonstrated that the USDOC's *de jure* specificity determination was not inconsistent with the SCM Agreement. Specifically, the USDOC's findings made clear that certain enterprises, not all farmers, could access a particular entitlement value component under the BPS Programs. Access to that component was based on historic olive production subsidies under the antecedent Oils and Fats Program. The EU's arguments to the contrary rely on erroneous interpretations of Article 2.1(a) of the SCM Agreement and an inaccurate portrayal of "the legislation" pursuant to which the granting authority limited access.

a. "Limits access" under Article 2.1(a) of the SCM Agreement

4. We begin with a brief comment concerning the proper interpretation of Article 2.1(a) of the SCM Agreement. To recall, the EU's interpretation would impose two conditions that are absent from, and in conflict with, the text of Article 2.1(a) – specifically, that the phrase "limits access" can only mean *limits eligibility*, which in turn can only mean *limits eligibility at the threshold point of the program*. Simply put, were Article 2.1(a) restricted by the narrow conditions proposed by the EU, the text would indicate as much. It does not. Because the text instead uses the more general language "limits access", it accordingly is not restricted to one particular type of access.[1]

5. The EU also argues that, in describing discrimination in favor of certain enterprises as "limitations on eligibility that favour certain enterprises", the Appellate Body report in *US - Antidumping and Countervailing Duties (China)* supported its narrow interpretation. The report did no such thing. As the United States has explained, simply using the word "eligibility" does not support the EU interpretation of "limits access".[2] Furthermore, the EU presumes that the only way to limit eligibility to favor certain enterprises is at the threshold point of eligibility for any amount of subsidy. But the Appellate Body report in *US - Antidumping and Countervailing Duties (China)* made no such distinction, consistent with the text of Article 2.1(a). As the United States has shown in this dispute, it is possible to favor certain enterprises based on access to, or

[1] *See* U.S. June 10 responses to Panel questions, paras. 3-15 (elaborating on the proper understanding of "limits access"); 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.

[2] U.S. SWS, paras. 11-14.

eligibility for, a particular component or amount within a subsidy program, even if it is not at the threshold point of access.

b. The role of the Oils and Fats Program in determining access under the successor SPS Program and BPS Programs

6. We now turn to several arguments raised by the EU concerning "the legislation" that the USDOC considered in determining the BPS Programs to be *de jure* specific. In evaluating the legislation pursuant to which the granting authority administered the BPS Programs, the USDOC considered the interoperation of those programs with the two predecessor CAP Pillar I programs – the Oils and Fats Program and the SPS Program.[3]

7. Although the EU does not contest that the Oils and Fats Program limited access based on olive production, it disputes that the BPS Programs continued to limit access based on the Oils and Fats Program.[4] However, in explaining its reasoning, the EU repeats its argument that the USDOC did not make a separate specificity determination as to the Oils and Fats Program.[5] The objection is legally irrelevant to the USDOC's finding regarding the interoperation of the Oils and Fats Program and BPS Programs, which is not disputed. The United States has thoroughly explained that "the legislation" at issue explicitly limited access to payments based upon olive

[3] *See, e.g.*, Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36; *see also* U.S. September 8 responses to Panel questions, paras. 6-10.

[4] EU SWS, paras. 15-16.

[5] EU SWS, para. 17.

production under the Oils and Fats Program and, thus, incorporated the conditions that had limited access under that program.[6]

8. The EU attempts a similar sleight of hand in arguing the BPS Programs did not limit access based on the Oils and Fats Program because other farmers could access payments under the BPS Programs.[7] The point, as the EU well knows, is that the BPS Programs limited access to a component of entitlement values – namely, those based on historic olive production under the Oils and Fats Program. Under the BPS Programs, access to that component *was not* available to all farmers. Instead, it was limited to certain entitlement holders, and that limitation was the basis of the USDOC's *de jure* specificity determination.[8]

9. Indeed, the EU recognizes that limitation when it later argues that the USDOC should have conducted a supplementary investigation into whether the Oils and Fats Program "was more generous to table olive producers than other product-specific programs . . . ."[9] The comparative exercise that the USDOC supposedly failed to conduct is not in Article 2.1(a), which requires only that access to the subsidy be explicitly limited to certain enterprises. The absence of any such requirement contrasts with other provisions of the SCM Agreement, such as the calculation of benefit under Article 14, which do provide for a comparative analysis – for

[6] *See* U.S. FWS, paras. 44-61; U.S. June 10 responses to Panel questions, paras. 19-21; U.S. first virtual session opening statement, para. 10.

[7] EU SWS, paras. 19-21.

[8] *See* U.S. November 12 responses to Panel questions, paras. 18-23; U.S. September 8 responses to Panel questions, paras. 11-15; U.S. June 10 responses to Panel questions, paras. 22-28.

[9] *See* EU SWS, paras. 24-25.

example, in determining the adequacy of remuneration in relation to prevailing market conditions.[10]

10. Notwithstanding its legally irrelevant assertion that the USDOC did not make a separate specificity determination concerning the Oils and Fats Program, the EU does not dispute that the program conferred subsidies, access to which was limited based on olive production. Nor does the EU dispute that certain entitlement holders, not all farmers, could under the BPS Program access that discrete component of the subsidy program.

11. Finally, the EU purports to identify several differences between the USDOC's final determination and the U.S. arguments concerning that determination. Those supposed differences are illusory. The EU expresses "surprise" that the USDOC considered eligibility criteria – namely, the manner in which the BPS Programs limited to certain enterprises a discrete component of entitlement payments.[11] The EU should not be surprised; the USDOC's finding is evident on the face of its final determination.[12] As the United States has made clear, "limits access" is a broad term that may encompass eligibility-based limitations and does not require an inquiry into whether a limit is better categorized as amount or eligibility-based.[13]

[10] *See, e.g.*, Art. 14(d) of the SCM Agreement.

[11] EU SWS, paras. 28-29.

[12] *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).

[13] *See* U.S. SWS, para. 15.

12. The EU questions whether the component of entitlement payments based on olive-production subsidies under the Oils and Fats Program accords with the dictionary definition of "discrete".[14] The definition supplied by the EU answers its own question. That characteristic is evident in the USDOC's final determination, where the USDOC underlined that a farmer could hold an entitlement with a component based on olive production during the reference period of the Oils and Fats Program: "[T]he 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."[15] In any event, what is relevant under Article 2.1(a) is that only certain entitlement holders, not all farmers, could access that component.

13. Ignoring what the USDOC found in its final determination, the EU attempts to cast the determination simply as "specific to olive growers because they grow olives."[16] For support, the EU offers a statement in the USDOC's preliminary calculation memorandum which explains why, to calculate the benefits attributed to one respondent, it included subsidies received by a cross-owned affiliate.[17] The EU fails to explain how an evaluation under the conditions of the USDOC's attribution of benefit regulations is relevant to a specificity analysis, either in general, or to the USDOC's specificity analysis in this case.

[14] EU SWS, para. 30.

[15] Final Issues and Decision Memorandum (Exhibit EU-2) p. 33.

[16] EU SWS, para. 35.

[17] *See* Exhibit EU-36, p. 2.

14. The EU commits a similar error when it argues that the USDOC "calculated countervailing duty rates applicable to imports of ripe olives" rather than "farmers that engaged in olive production" under the Oils and Fats Program.[18] The EU's conceptual confusion is inherent in its arguments that fault the USDOC for not conducting inquiries that apply only to the evaluation of benefit under the SCM Agreement. As the United States has explained, Article 2.1(a) provides for no such inquiry.[19]

15. The United States has highlighted language in the remand redetermination which aligns with the USDOC's findings in its final determination.[20] The EU purports to have identified an inconsistency where the USDOC stated that "farmers on lands that produced olives during the reference period continue to have limited access to entitlement values, and therefore benefit amounts, that retain the historical difference, relative to other farmers on other lands . . . ."[21] Although the redetermination used different language to address the remand order and comments submitted in that proceeding, there is no inconsistency with the final determination. Both make clear that access to a discrete component of the BPS Programs – entitlement values derived from subsidies under the Oils and Fats Program – was limited to farmers on lands that qualified them for these entitlements.

[18] *See* EU SWS, para. 43.

[19] *See* U.S. November 12 responses to Panel questions, paras. 32-35; U.S. SWS, paras. 16-17, 19.

[20] U.S. first virtual session opening statement, paras. 24-25; U.S. November 12 responses to Panel questions, para. 21.

[21] EU SWS, para. 44.

16. In sum, as the United States has shown, the USDOC's findings are evident in its final determination and clearly substantiated on the basis of positive evidence – namely, the legislation described by the USDOC.

II. THE EU'S CLAIMS REGARDING SECTION 771B AND THE USDOC'S APPLICATION OF THAT STATUTE ARE WITHOUT MERIT

17. The EU raises several claims with respect to the issue of "pass-through" – that is, the determination by an investigating authority that the benefit of a subsidy has "passed through" to a downstream product. Each of these claims fails, however, because the EU misunderstands the relevant WTO provisions as well as the U.S. statute it challenges.

18. First, the EU claims that Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement contain an obligation to conduct a pass-through analysis for downstream products, and specifically, an analysis of "whether and to what extent the price of the input product is lowered vis-à-vis the alleged indirect beneficiary as a result of the subsidy." The EU's legal interpretation lacks any basis in the text of the GATT 1994 or the SCM Agreement. The EU's reliance instead on prior WTO reports is misguided, and based on a strained reading of those reports.

19. Second, the EU claims that Section 771B of the Tariff Act of 1930 is inconsistent with these same WTO provisions because the conditions set out in Section 771B are "inapt" to establish pass-through, and therefore that the statute "automatically" "presumes" that, where an upstream product receives a subsidy, that a benefit has been conferred indirectly to a downstream product. Relatedly, the EU claims that the USDOC's finding that ripe olives received a benefit is

inconsistent with the same WTO provisions because the USDOC applied Section 771B and thus failed to perform the pass-through analysis in the manner it alleges to be required under those provisions. The EU errs in arguing that Section 771B does not contain a pass-through analysis, and has yet to show why the conditions in Section 771B are incompatible with the obligations contained in the provisions cited by the EU in this dispute.

20. In response to the U.S. arguments, the EU has continued to deny, most recently in paragraph 57 of its second written submission, that it is arguing that the cited provisions of the GATT 1994 and the SCM Agreement provide for a specific price comparison methodology. However, this false premise is inherent to the EU's pass-through arguments. For example, the EU argues in paragraph 58 of its second written submission, based on a strained reading of prior WTO reports, that the Panel may read specific methodological requirements into the general obligations in the GATT 1994 and the SCM Agreement to identify and calculate the benefit received by a downstream producer where the subsidy was initially granted to an upstream producer. The EU again submits in its June 10 responses to Panel questions that it "is not arguing that these respective provisions prescribe a specific method to assess pass-through".[22] But the EU concludes in that same paragraph that "only a price comparison of some sort constitutes an appropriate method". The EU has not provided any textual support in Article VI:3 of the GATT 1994 or Articles 10, 19, or 32.1 of the SCM Agreement that reveals its proposed requirements on how an investigating authority must attribute a benefit received indirectly by downstream producers – because such support does not exist.

[22] EU June 10 responses to Panel questions, para. 92.

21. With respect to the EU's "as such" claim, in paragraph 54 of its second written submission, the EU contends that Section 771B is as such inconsistent with Article VI:3 and Articles 10, 19.1, 19.3, 19.4, and 32.1 because it "mandates a presumption of full pass-through benefit based on two conditions that are inapt for a pass-through assessment". The EU has failed to address the actual requirements set forth in Section 771B, however, aside from calling them "random market conditions" because they do not address the price of the input product.[23] In reality, these conditions demonstrate that a finding of pass-through is not "automatic" as the EU claims, and the absence of a price comparison does not negate that fact.

22. The EU also has failed to rebut any of the arguments made by the United States regarding the legal interpretation of the provisions cited by the EU. The EU's position as set out in its June 10 responses to Panel questions that "a "proper examination" of pass-through benefit for input subsidies requires some sort of price comparison" simply does not have any basis in the negotiated text.[24] In response to the Panel's question 14(b), the United States explained that in the case of commodity products, price comparison may not be appropriate when analyzing whether a processed product has received a benefit because markets for raw agricultural commodities are characterized by "perfect competition."[25] The EU incorrectly describes the United States' arguments as *ex post* based on the fact that such explanation is not contained in the USDOC's

[23] EU SWS, para. 72.

[24] EU June 10 responses to Panel questions, para. 93.

[25] EU June 10 responses to Panel questions, para. 93; U.S. SWS, paras. 39-40.

determinations. However, such explanations concern the basis for the enactment of Section 771B, and therefore need not have been explained in a specific determination.

23. The EU also claims that the U.S. arguments would amount to an "exception" under the WTO Agreements with respect to agricultural commodities.[26] The United States has not argued that agricultural products are subject to a different legal obligation than other products. Rather, agricultural products are traded in a unique economic environment, namely, that they are commodity products. Therefore, an investigating authority's determination must take into account the factual circumstances of trade in agricultural products if that is the market at issue before it.

24. As we stated in our September 8 responses to Panel questions, the United States has not argued that agricultural products are subject to a different legal obligation than other products. Rather, agricultural products are traded in a unique economic environment, namely, that they are commodity products. It is reasonable to take into account the factual circumstances of trade in agricultural products and adapt the analysis accordingly. Nonetheless, the "same legal obligations under the SCM Agreement apply to the specific factual circumstances at issue."[27]

25. Because the EU has not demonstrated that the GATT 1994 or the SCM Agreement contain any provision that prescribes a specific methodology for determining whether a benefit is conferred on a downstream product, the EU's interpretation of Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement must be rejected, and its claim

[26] EU SWS, para. 67.

[27] U.S. September 8 responses to Panel questions, para. 27.

that the methodology reflected in Section 771B necessarily breaches U.S. obligations also must fail.

III. The USITC's injury determination is consistent with Article 3 of the AD Agreement and Article 15 of the SCM Agreement

26. The USITC's injury determination is consistent with Article 3 of the AD Agreement and Article 15 of the SCM Agreement. In our prior submissions, we have shown that the EU has failed to demonstrate that the USITC's injury determination was inconsistent with these provisions. We refer the Panel to paragraphs 45 through 94 of our second written submission, in which we explain that the EU mischaracterizes the USITC's injury determination as "segmented," ignores various findings in the USITC opinion, misinterprets several provisions of the Agreements, and bases legal claims on requirements that do not have any textual basis in the Agreements.

27. The central premise of the EU's challenge to the USITC's injury determination is that the USITC's failure to find any "volume effects" outside of the retail channel of distribution invalidated its analyses of subject import volume and price effects. Under the EU's logic, as it explained in its 12 November responses to Panel questions, this also served to invalidate both the USITC's impact and causal link analyses.[28] This challenge is premised on three misconceptions concerning Article 3 of the AD Agreement and Article 15 of the SCM Agreement.

A. The EU's argument that Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement require an increase in subject import volume is without merit.

[28] EU November 12 responses to Panel questions, paras. 189-194.

28. The first sentences of Articles 3.2 and 15.2 require an authority to "consider whether there has been a significant increase in [dumped or subsidized] imports, either in absolute terms or relative to production or consumption in the importing Member." The EU argues in paragraph 525 of its first written submission that these provisions required the USITC to find "some sort of *increase* in" subject imports," whether "in absolute terms, relative to domestic production or relative to domestic consumption." In its view, as it explained in paragraph 143 of its second written submission, the lack of any such increases in the underlying investigations indicates that the USITC failed to "consider a volume decrease."

29. As the United States explained in its written submissions, the EU, by misinterpreting the verb "consider" and attempting to read the conjunction "whether" out of Articles 3.2 and 15.2, seeks to have the Panel construe the obligation to "consider whether" subject import volume increased in Articles 3.2 and 15.2 to mean "make findings" or "determine that" they increased.[29] The EU's distorted reading of Articles 3.2 and 15.2 is at odds with the plain text of these provisions.

30. The EU's argument is inconsistent with the dictionary definition of the term "consideration," which means "the action of taking into account".[30] Relying on this definition, the Appellate Body in *China – GOES*, for example, explained that "[t]he notion of the word 'consider', when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in reaching its decision."[31]

---

[29] U.S. SWS, para. 63.

[30] Definition of "consideration" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, pp. 485-86 (Exhibit USA-27).

[31] *China – GOES (AB)*, para. 130 (emphasis added); *id.* at n.216 (citing Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 496).

31. The obligation for investigating authorities to "consider" whether there has been a significant increase in dumped or subsidized imports for purposes of Articles 3.2 and 15.2 is distinct from other obligations in Articles 3 and 15, such as that of "demonstrat[ing]" a causal connection between unfairly traded imports and injury to the domestic industry in Articles 3.5 and 15.5. The EU errs in requesting the Panel to conflate these terms and thereby fail to give meaning and effect to the text of Articles 3.2 and 15.2.

32. Moreover, the obligation to "consider" subject import volume is qualified by the conjunction "whether." This term, by definition, contemplates one or more possible alternatives.[32] In the context of the first sentences of Articles 3.2 and 15.2, these alternatives relate to the directionality of subject import volume trends, which can decrease. By reading these treaty terms out of the text, the EU is essentially asking the Panel to fundamentally alter the scope of the requirement in the first sentence of Articles 3.2 and 15.2 and to upend the logic and organization of Articles 3.2 and 15.2.

33. As the United States previously explained, the USITC met its obligation to "consider whether" subject import volume increased by taking into account the evolution of both the absolute volume of imports reflected in official U.S. import statistics and this volume relative to apparent U.S. consumption and U.S. production during the period of investigation.[33] In so doing, the USITC conducted the inquiry required by the first sentences of Articles 3.2 and 15.2. The EU's underlying contention that this inquiry was insufficient is tantamount to a claim that the

[32] Definition of "whether" from the Oxford English Dictionary, https://www.oed.com/view/Entry/228258?rskey=dXKHcB&result=1&isAdvanced=false#eid (last accessed February 1, 2021).

[33] U.S. opening statement at the first virtual session, para. 48.

USITC needed affirmatively to find or determine that the volume of unfairly traded dumped and subsidized imports increased.

34. Similarly without a textual basis is the EU's argument that Articles 3.2 and 15.2 require a "volume effects analysis." The Parties' disagreement on this is not, as the EU maintains in its second written submission, "purely terminological."[34] Recall that the EU's overarching claim is that declining subject import volumes that predominantly sold outside the retail channel of distribution where the domestic industry was concentrated during the POI could not have accounted for the state of the domestic industry. For this to succeed, the EU must prevail on its contention that Articles 3 and 15 require an increase in the volume of subject imports as a pre-condition to an affirmative injury determination.[35] The EU's argument – that the USITC failed to show the requisite "volume effects" outside of the retail channel of distribution – features prominently in its challenges to the USITC's volume, price effects, impact, causal, and non-attribution analyses.

35. The EU contends in its second written submission that "there is no reason why an analysis under Article 15.2 SCMA should provide an "understanding of the explanatory force" of subject imports … only with respect to price effects and not for volume."[36] But this is exactly what the text of Articles 3.2 and 15.2 says. Nothing in the first sentences of Articles 3.2 and 15.2 requires an investigating authority to assess the "effects" of the volume of unfairly traded imports on the domestic industry. Rather, as the United States explained in its first written

[34] EU SWS, para. 150.

[35] *See, e.g.*, EU SWS, paras. 142, 180.

[36] EU SWS, para. 142.

submission and again in its June 10 responses to Panel questions, the plain text of these provisions requires only that investigating authorities consider whether there has been a significant increase in dumped or subsidized imports.[37] Contrary to the text, the EU's argument that Articles 3.2 and 15.2 contain a rigid requirement to find an increase in the volume of unfairly traded imports would also render meaningless the last sentences of Articles 3.2 and 15.2, which state that "[n]o one or several of these factors [concerning volume or price effects] can necessarily give decisive guidance." There are, accordingly, compelling reasons for the Panel to decline the EU's invitation to read into the Agreements a requirement to consider, find or determine "volume effects" for subject imports.

36. In light of the foregoing, the EU's challenge to the USITC's analysis of volume relies on a flawed reading of what Articles 3.2 and 15.2 actually require. The EU has therefore failed to demonstrate that the USITC's volume analysis was inconsistent with these provisions.

B. The EU's argument that significant price underselling is subordinate to significant price depression or suppression in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement lacks any basis in the text of the Agreements.

37. The second sentences of Articles 3.2 and 15.2 require an authority to "consider whether there has been a significant price undercutting by the [dumped or subsidized] imports as compared with the price of a like product of the importing Member, *or* whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree." The EU argues in its first written submission that these provisions required the USITC to link its finding of significant price

[37] U.S. FWS, para. 179; U.S. June 10 responses to Panel questions, para. 60.

underselling to a finding of significant price depression or suppression.[38] The EU goes so far as to suggest in its second written submission that the USITC's price effects analysis was a "second" volume "effect" or "causal pathway" analysis in the absence of these additional price effects.[39]

38. Once more, the EU's argument has no basis in the text of the Agreements. Articles 3.2 and 15.2 explicitly recognize three alternative ways in which unfairly traded imports can have an "effect" on prices: through undercutting, "or" through price depression, "or" through price suppression. While unfairly traded imports that are undersold can also have price-depressing or -suppressing effects, the Agreements recognize that significant undercutting (or "underselling", as we refer to it in the U.S. parlance) in and of itself may constitute a price effect.[40] The EU's misguided attempts in its second written submission to recast the USITC's analysis as "static"[41] or as "a somewhat bizarre… hybrid price-volume analysis"[42] do little to obscure this. Moreover, the very notion of a volume or price "causal pathway" is in tension with the text and organization of the Agreements, including the last sentence of Articles 3.2 and 15.2, which contemplates that "[n]o one or several of these factors [concerning volume or price effects] can necessarily give decisive guidance."

[38] EU FWS, paras. 528-542.

[39] EU SWS, para. 154.

[40] *China – HP-SSST (AB)*, para. 5.156.

[41] EU SWS, para. 159.

[42] EU SWS, para. 155.

39. The EU's argument turns, once more, on reading another conjunction – this time the word "or" – out of the text of Articles 3.2 and 15.2. This term, by definition, connects words, phrases or clauses representing alternatives.[43] In the context of the second sentence of Articles 3.2 and 15.2, these alternatives include price undercutting as a price effect. The terms of the agreement cannot be interpreted away; each term must be given meaning and effect. Adopting the EU's view here would nullify the AD and SCM Agreements' clear inclusion of undercutting as an independent price effect. The EU's argument that the absence of price depression or suppression in the underlying investigations negates the USITC's finding of price effects through underselling, or somehow turns this analysis into a second "volume effect" analysis cannot be reconciled with the language of the Agreements.

40. The EU also argues at paragraphs 94 and 96 of its second written submission that the USITC's price effects analysis did not provide a "meaningful basis" for its causation determination because the Commission failed to specify a price undercutting margin specifically for the retail channel of distribution.[44] As the United States previously explained, the "meaningful basis" language is drawn from the appellate report in *China – HP-SSST*, which admonished an investigating authority for ignoring certain pricing data in the record that indicated *overselling* of the domestic like product by unfairly traded imports.[45] This is not what occurred in the underlying investigations at issue here, where the USITC found that subject

[43] "Or", conj., Used to coordinate two (or more) sentence elements between which there is an alternative, Oxford English Dictionary, https://www.oed.com/view/Entry/132129?rskey=zuDnZ4&result=9#eid (last accessed February 1, 2021).

[44] EU SWS, paras. 94, 96.

[45] *China – HP-SSST (Japan) (AB)*, para. 5.180.

imports of ripe olives pervasively undersold the domestic like product in 37 of 48 quarterly price comparisons, at significant underselling margins.[46]

41. Nothing in prior WTO reports or the Agreements speaks to an investigating authority's purported requirement to calculate underselling margins specific to each channel or market segment. In fact, the consideration in the *China – HP-SSST* report that an authority may take into account "the relative market share of each product type," reflects precisely what the USITC did in finding that the underselling of subject product in the retail channel led subject imports to take market share from the domestic producers in that channel.[47]

42. Last, the EU argues at paragraph 157 of its second written submission that the USITC's underselling analysis lacked sufficient data for the retail channel as most participating purchasers were distributors.[48] As the United States previously explained in paragraph 36 of its 8 September responses to Panel questions, the USITC based its analysis of price effects on all the pricing data in the record.[49] These included raw underselling data compiled from domestic producers and importers, which showed an increase in subject import underselling throughout the market, including in *both* retail subchannels for which data for pricing products 3 and 4 were sought in the later part of the POI. The evidence relied on by the USITC also included data compiled from purchasers showing that domestic producers lost sales to the unfairly traded imports due to lower prices.[50]

---

[46] USITC Pub. 4805 (Exhibit EU-5), pp. 20-21.

[47] U.S. opening statement at the first virtual session, para. 55.

[48] EU SWS, para. 157.

[49] U.S. September 8 responses to Panel questions, at para. 36.

[50] USITC Pub. 4805 (Exhibit EU-5), p. 21.

43. In light of the foregoing, the EU's challenge to the USITC's analysis of price effects relies on a flawed interpretation of Articles 3.2 and 15.2. It also mischaracterizes the methodology that the USITC used in its price underselling analysis. The EU has therefore failed to demonstrate that the USITC's price effects analysis was inconsistent with the Agreements.

C. The EU's argument that purported flaws in the USITC's volume and price effects analyses necessarily invalidate its impact analysis pursuant to Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement has no merit.

44. Articles 3.4 and 15.4 require an authority to examine "the impact of the [dumped or subsidized] imports on the domestic industry concerned" through an evaluation of "all relevant economic factors and indices having a bearing on the state of the industry." The EU has made wholesale revisions to its challenges to the USITC's analysis of impact between its first and second written submission. The EU's most recent argument is that the USITC's failure to find that subject import volumes increased necessarily invalidated its impact analysis as, in its view, declining volumes "cannot result in a consequent impact on the domestic industry."[51]

45. This most recent attempt by the EU fails for the same reasons as its previous arguments – the EU's argument lacks legal basis. An authority's analysis of impact under Articles 3.4 and 15.4 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 and 15.2 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.[52] This accords with the observation in

[51] EU SWS, paras. 180-181.

[52] U.S. SWS, para. 87.

the appellate report in *Korea – Pneumatic Valve* that "the inquiries under Articles 3.2 and 3.4 can be undertaken independently, and brought together in the ultimate determination of causation under Article 3.5."[53] Thus the EU's argument fails from a textual perspective.

46. Similarly, the text of the Agreements does not support the EU's contention that Articles 3.4 and 15.4 are consequential in a like manner to Articles 3.5 and 15.5. An authority's causal analysis under Articles 3.5 and 15.5 requires it to examine "all relevant [record] evidence," which is broader in scope than an authority's impact analysis under Articles 3.4 and 15.4.[54] Moreover, in referring to "the effects of [dumping or subsidies] as set forth in paragraphs 2 and 4," Articles 3.5 and 15.5 explicitly encapsulate the results of an authority's impact and price effects analyses. The text of Articles 3.4 and 15.4 is not similarly structured to encapsulate the results of an authority's volume or price effects analysis.

47. Nonetheless, the EU persists in reading causal and non-attribution requirements into Articles 3.4 and 15.4. It contends that language in Articles 3.1 and 15.1 on the "consequent impact" of subject imports on the domestic industry vests within Articles 3.4 and 15.4 a consequential character similar to that of Articles 3.5 and 15.5. This is incorrect and unsupported by the text. Article 3.4 and 15.4 require an investigating authority to examine the impact of subject imports on the domestic industry on the basis of "all relevant economic factors and indices having a bearing on the state of the industry". While, as the appellate report in *China – HP-SSST* found, the term "consequent impact" in Articles 3.1 and 15.1 informs the obligations of Articles 3.4, 3.5, 15.4, and 15.5, that does not mean that any deficiencies in the price and

[53] *Korea – Pneumatic Valve (AB)*, para. 5.355. *See also* para. 5.285.

[54] U.S. SWS, para. 87.

volume analysis necessarily invalidate the impact analysis under Articles 3.4 and 15.4. To read the provisions in this manner would mean that Articles 3.4 and 15.4 have no independent meaning or purpose.

48. The USITC based its analysis of the domestic industry indices on an objective examination and positive evidence pertaining to the impact of the unfairly traded imports on the whole of the domestic industry. The EU has therefore failed to demonstrate that the USITC's examination of the impact of subject imports on the domestic ripe olives industry was inconsistent with Articles 3.4 and 15.4. Nor has the EU shown that the USITC's examination of impact, whether alone or in combination with its consideration of subject import volume and price effects, gave rise to consequent violations of Articles 3.5 and 15.5 in the analysis of causal link.

IV. The EU's Claims Regarding the Calculation of Guadalquivir's Final Subsidy Rate Are Meritless

49. The United States has demonstrated the ways in which the record refutes the EU's claims that the USDOC singled out for discriminatory treatment one of the three mandatory respondents. The USDOC requested that each respondent provide purchases of raw olives used to produce ripe olives[55] and made clear at multiple junctures during the investigation that this information was an essential fact under consideration.[56] The EU's arguments to the contrary avoid responding to the arguments presented by the United States and rely for support on several

[55] *See* U.S. FWS, paras. 270-285; *see also* U.S. September 8 responses to Panel questions, paras. 38-42.

[56] *See, e.g.*, U.S. FWS, paras. 327-334; *see also* U.S. September 8 responses to Panel questions, paras. 45-52.

misstatements of the factual record. We will now highlight several such flaws in the EU's second written submission.

50. One overarching flaw concerns the EU's failure to address the U.S. explanations as to how question 6 in the USDOC's August 4 letter, read either in isolation or in the context of the rest of the letter, conveyed the USDOC's request for purchase information for raw olives processed into ripe olives.[57]

51. The EU claims to have "already shown that the wording of Question 6 makes clear" that the USDOC was requesting purchase information for all raw olives regardless of use.[58] The EU claims to have done so in two paragraphs in its first written submission.[59] Turning to those passages, the EU's arguments regarding the text of the August 4 letter consist, in full, of an assertion that "[a]t no point is a question limited to" raw olives processed into ripe olives.[60] The United States refuted that incorrect assertion in its exposition of the factual record at paragraphs 269 to 278 of the U.S. first written submission, and identified the ways in which the text of the August 4 letter expressed the USDOC's request for purchase information for raw olives processed into ripe olives. To summarize, the August 4 letter did so: in the cover letter

[57] *See* EU SWS, paras. 195-198.

[58] EU SWS, para. 198.

[59] *See* EU SWS, para. 198 (citing EU FWS, paras. 648, 698).

[60] *See* EU FWS, paras. 648, 698.

introducing the letter,[61] in the text of the relevant question, question 6, and in the template in which the respondents were to fill in the requested purchase information.[62]

52. The EU has never responded to this U.S. rebuttal. Indeed, where it purports to address the U.S. arguments concerning the August 4 letter, it provides a bare citation to the U.S. first written submission which, in any event, was not the relevant section.[63] To recall, the EU recognizes the letter as "*the key document*" in evaluating whether the USDOC adequately communicated its request that the respondents provide purchase information for raw olives processed into ripe olives.[64] In the absence of any substantive response to the U.S. arguments, the EU has not supported its claims with respect to the August 4 letter.

53. As elaborated in the U.S. second written submission,[65] the EU has attempted to redirect the Panel's attention to documents that came after the USDOC's original request, such as the responses of the three mandatory respondents and the USDOC's September 27 letter regarding raw olive purchase information.

54. In this vein, the EU repeats the incorrect assertion that Guadalquivir requested clarification as to the USDOC's August 4 request for raw olives used to produce ripe olives.[66]

---

[61] *See* U.S. FWS, paras. 270-272, 274-275.

[62] *See* U.S. FWS, paras. 273, 276-278.

[63] *See* EU SWS, para. 198 (citing paragraphs 308-310, which merely referred to the relevant passage – i.e., paras. 269-278).

[64] *See* EU first virtual session opening statement, para. 128 (emphasis added).

[65] *See* U.S. SWS, paras. 96-99.

[66] EU SWS, para. 205.

The other two Spanish respondents sought clarification; Guadalquivir did not.[67] The EU's misplaced effort to attribute the behavior of the other two respondents to Guadalquivir serves only to remind that those other two respondents, represented by the same counsel as Guadalquivir, properly understood the USDOC's August 4 request for raw olives processed into ripe olives. The EU's arguments thus again reinforce the EU's lack of support in seeking to revise the meaning of the USDOC's August 4 letter using later correspondence between the USDOC and the three Spanish respondents.

55. The EU also argues that the fact that the other two respondents interpreted the August 4 letter as requesting purchase information for raw olives processed into ripe olives, and labelled their data to reflect this, supports the EU that USDOC's August 4 letter was really requesting information on all raw olive purchases.[68] The EU's logic fails. As the United States has explained, the later correspondence between the USDOC and the respondents did not erase the notice effected by the USDOC's August 4 letter.[69] That notice was clear and, as recognized by the EU, well-understood by the other two respondents. Furthermore, there is no reason why the USDOC should have ignored the text of its own question to assume instead that Guadalquivir had provided information that the USDOC had not requested, or that the USDOC should have done so *based on the responses of other respondents*. The EU cites nothing in the SCM Agreement to suggest that an unbiased and objective investigating authority bears such a burden.

[67] U.S. SWS, para. 103.

[68] EU SWS, paras. 199-200.

[69] *See* U.S. SWS, para. 102; U.S. FWS, paras. 282-285; U.S. June 10 responses to Panel questions, paras. 73-81; U.S. September 8 responses to Panel questions, paras. 38-42.

56. As the United States has explained, for purposes of Article 12.8 of the SCM Agreement, on at least three occasions the USDOC disclosed to the interested parties that the essential facts under consideration included the volume of raw olives processed into ripe olives: (i) its questionnaires of August 4 and September 27; (ii) its February 2018 on-site verification agendas; and (iii) its March 2018 verification reports.[70] The EU argues that one of the three disclosures, the verification agenda, did not suffice under Article 12.8 because the agenda did not "state that it intended to inform Guadalquivir of the essential facts" and that the "simple listing" of a questionnaire response does not alert the respondent to which information is "essential".[71]

57. The text of Article 12.8 plainly does not require a particular manner of disclosure, let alone that the disclosure include a formal statement that it is providing notice of the essential facts under Article 12.8.[72] Furthermore, the verification agenda was more than the "simple listing" characterized by the EU.[73] As the United States has explained, the purpose of the verification agenda was to spot check the accuracy and completeness of the information the USDOC anticipated relying on as the basis for its final determination, and the agenda identified one of those pieces of information as the volume of raw olives processed into ripe olives.[74]

[70] *See*, *e.g.*, U.S. FWS, paras. 327-334.

[71] EU SWS, paras. 211-214.

[72] *See* U.S. September 8 responses to Panel questions, para. 46; U.S. FWS, para. 325.

[73] *See* U.S. September 8 responses to Panel questions, paras. 47-52.

[74] U.S. September 8 responses to Panel questions, paras. 47-48.

58. In sum, the United States has shown that the EU's claims that the USDOC did not disclose essential facts, or otherwise discriminated against Guadalquivir, depend on misstatements of the record and unsupported interpretations of the SCM Agreement.

V. Conclusion

59. The EU has failed to satisfy its burden to show that the U.S. antidumping and countervailing duty investigations were inconsistent with the WTO agreements. The United States respectfully requests that the Panel reject the EU's claims.

60. This concludes the U.S. opening statement. Thank you.