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

(DS577)

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS IN ADVANCE OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

June 10, 2020

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I. CLAIMS REGARDING SPECIFICITY DETERMINATION

Question 1 (*To the United States*) In paragraph 69 of its first written submission, the United States refers to the USDOC's statement that "the reliance on earlier assistance programs that were specific to determine the *amounts* of assistance under the current program, renders specific *the benefits* under the BPS programs" (emphases added). How does this reliance on earlier programs demonstrate that the *access* to the current subsidy programmes is expressly limited pursuant to Article 2.1(a) of the SCM Agreement?

Response:

1. The excerpted passage refers to the operational link between access to subsidies under the CAP Pillar I BPS Programs and access under the Oils and Fats Program.[1] The EU and Government of Spain ("GOS") implemented the BPS Programs and Single Payment Scheme ("SPS Program")[2] in a manner that preserved the limit on access to subsidies from the precursor Oils and Fats Program.[3] As explained in the U.S. first written submission,[4] that limit pertained to the amount of and eligibility for subsidies under the BPS Programs and SPS Program, which were based on the eligibility criteria from the Oils and Fats Program.

2. Specifically, the USDOC sought to understand whether the BPS Programs and SPS Program were made uniformly available across the agricultural sector or whether, through an explicit limit on access to the subsidy, the programs favored any particular group of enterprises or industries (i.e., certain enterprises).[5] As explained in the U.S. first written submission, the USDOC found that certain enterprises (i.e., those eligible for subsidies under the Oils and Fats Program) were eligible under the BPS Programs and SPS Program to access assistance based on assistance received under the Oils and Fats Program.[6] In its final determination, the USDOC explained that although the BPS Programs replaced the Oils and Fats Program and intermediary

[1] As in the U.S. FWS, "BPS Programs" means the Basic Payment Scheme and Direct Payment and Greening programs. "Oils and Fats Program" means the Common Market Program in Oils and Fats. *See* U.S. FWS, para. 28 and n. 24.

[2] The SPS Program operated between the Oils and Fats Program and BPS Programs (i.e., from 2003 to 2014), and favored certain enterprises using the same eligibility criteria as the Oils and Fats Program and BPS Programs. The SPS Program did so by conferring subsidy payments based on a farmer's value per hectare (multiplied by number of hectares). Because that value per hectare referred to production aid under the Oils and Fats Program, which was limited to those enterprises that during the reference period grew olives, more favorable access to subsidies under the SPS Program was limited to that same group of enterprises. *See* Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-33.

[3] *See* U.S. FWS, Section III.B.1.

[4] *See* U.S. FWS, Section III.B.2.

[5] *See* Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-33.

[6] *See* U.S. FWS, paras. 62-64.

SPS Program,[7] the BPS Programs incorporated by reference the eligibility criteria from those programs favoring certain enterprises.[8] Specifically, under the Oils and Fats Program "both olive oil and table olives were specifically identified as products eligible to receive production aid."[9] In implementing these later BPS Programs, the GOS continued to incorporate by reference the same eligibility criteria, and the manner in which the amount of the assistance was determined under the BPS Programs incorporated the benefits that were provided under the Oils and Fats Program. Thus, the eligibility limitations under the Oils and Fats Program continued to determine the subsidies available under the SPS Program and BPS programs.

Question 2 (*To both parties)* Article 2.1(a) of the SCM Agreement refers to legislation which "explicitly limits access" to a subsidy. Under a proper interpretation of Article 2.1(a), does "access" refer to:

a. criteria that determines eligibility for the subsidy (i.e., whether certain enterprises can or cannot receive the subsidy); and/or

b. criteria that determines the amount of the subsidy (i.e., distinctions that affect amounts of subsidy that those enterprises will receive).

Please state your position and explain why.

Response:

3. 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. As elaborated below, neither set of criteria modifies the term "access" or is otherwise part of the text Article 2.1(a) of the SCM Agreement.

4. 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. The investigating authority must make a determination based on the record evidence and arguments before it, and substantiate clearly that determination with positive evidence.[10]

[7] *See* U.S. FWS, paras. 47-51.

[8] *See* Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

[9] *See* Final Issues and Decision Memorandum (Exhibit EU-2), p. 32 (citing Council Regulation (EC) No 1638/98 (Exhibit EU-26)).

[10] SCM Agreement, Art. 2.4.

5. 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."[11] 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. In other words, eligibility may be limited to "certain enterprises" by favoring those enterprising in the amount of subsidies they are eligible to receive, rather than whether they qualify under the program in question to receive *any* subsidies.

6. It is also significant that Article 2.1(a) uses the term "access" but not "eligibility" or "amount". That contrasts with Article 2.1(b), which describes objective criteria or conditions governing the "eligibility for" and "amount of" a subsidy. If the drafters intended that "access" only mean either "eligibility for" or the "amount of" a subsidy, to the exclusion of all other possibilities, they could have included the same language in Article 2.1(a). That the drafters instead chose a different term – access – suggests that they did not intend to confine the inquiry under Article 2.1(a) in this way.

7. The rest of Article 2.1 of the SCM Agreement supports this interpretation. 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.[12] 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.

8. Thus, 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.[13] Rather, the evaluation of specificity necessarily depends on the particular facts that are before the investigating authority (e.g., the legislation pursuant to which the granting

[11] Definition of "access" from *The Oxford English Dictionary*, available at https://www.oed.com/view/Entry/1028?result=1&rskey=Og4X8A& (Exhibit USA-29).

[12] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 367 (observing that Articles 2.1(a) and (b) together "set out indicators as to whether the conduct or instruments of the granting authority discriminate or not.").

[13] *See US – Upland Cotton (Panel)*, para. 7.1142 (observing that "specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition.").

authority operates).[14] Interpreting Article 2.1 more narrowly would permit Members to evade subsidy disciplines by structuring their programs to impose limitations at the point of calculating subsidy amounts and not in terms of threshold program eligibility.

Question 3 (*To both parties*) Does Article 2.1(a) of the SCM Agreement establish a legal requirement for an investigating authority to review the eligibility criteria of a particular subsidy programme to establish that access to a subsidy is expressly limited within the meaning of that provision? Did the USDOC undertake such a review and did it rely on eligibility criteria in arriving at its finding of specificity?

Response:

9. The USDOC examined whether the subsidy program being investigated explicitly limited access to certain enterprises. The United States responds to this question by first outlining what Article 2.1(a) directs an investigating authority to review, and then recalling how the USDOC conducted precisely such a review.

10. As noted under question 2, the text of Article 2.1(a) of the SCM Agreement does not restrict the consideration of *de jure* specificity to threshold eligibility for the subsidy program in question. Instead, Article 2.1(a) provides that a subsidy is specific if the granting authority or relevant legislation "explicitly limits access to certain enterprises . . . ." An explicit limit on access could take the form of threshold eligibility criteria, but the plain language of the text does not require that it take that form.

11. What Article 2 does require is that a determination of specificity "be clearly substantiated on the basis of positive evidence."[15] Accordingly, to find *de jure* specificity under Article 2.1(a), an investigating authority must review whether the granting authority or relevant legislation explicitly limits access to certain enterprises. Absent such a finding, an investigating authority cannot make an affirmative determination of *de jure* specificity under Article 2.1(a).

12. The legislation relevant to this inquiry – i.e., what explicitly limits access to certain enterprises – is the legislation "*pursuant to which* the granting authority *operates*."[16] The term "pursuant to" means "[f]ollowing upon, consequent and in conformance to; in accordance with."[17] The verb "to operate" means to "exercise force or influence, produce an effect; to act,

[14] *See US – Upland Cotton (Panel)*, para. 7.1142 (observing that "[w]hether a subsidy is specific can only be assessed on a case-by-case basis.").

[15] SCM Agreement, Art. 2.4.

[16] SCM Agreement, Art. 2.1(a) (emphasis added).

[17] Definition of "pursuant to" from *The Oxford English Dictionary*, available at https://www.oed.com/view/Entry/155073?redirectedFrom=pursuant#eid (Exhibit USA-31).

work."[18] Thus, the relevant legislation is what, in effecting the subsidy program, the granting authority is acting or working in accordance with or in conformance to. In other words, if the subsidy program would be effected differently but for a particular legal instrument, or a reference to that instrument, then it is legislation "pursuant to which" the granting authority is operating.

13. As explained in the U.S. first written submission, the USDOC reviewed the conditions governing eligibility for, and the amount of, subsidies conferred under the BPS Programs.[19] To do so, the USDOC evaluated the legislation pursuant to which the granting authority was operating in effecting the BPS Programs. Specifically, the USDOC considered the manner in which those programs incorporated by reference the eligibility criteria of the two predecessor CAP Pillar I programs – the Oils and Fats Program and the SPS Program.[20] The USDOC did so because, even though by the period of investigation the new BPS Programs had taken effect, the EU and GOS chose to implement the programs in a way that embedded the limits on access in the Oils and Fats Program and SPS Program.[21]

14. Thus, the USDOC identified the eligibility criteria in the legislation pursuant to which, in effecting the BPS Programs, the granting authority was operating. That legislation included the legislation governing the SPS Program, which made explicit reference to and relied upon the eligibility criteria governing the Oils and Fats Program.[22]

15. Put differently, had the USDOC's investigation instead disregarded the effect of the explicit reference to the subsidy amounts received under the Oils and Fats Program, the USDOC would have overlooked "the legislation" contemplated under Article 2.1(a). In this way, the investigation would have failed to account for the favored treatment limited to certain enterprises under the BPS Program – i.e., those eligible for subsidies based upon criteria from the Oils and Fats Program. That the eligibility criteria for subsidies were embedded into successor CAP Pillar I programs – the SPS Program and then the BPS Programs – preserved the fact that they discriminated in favor of certain enterprises.[23]

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[18] Definition of "operate" from *The Oxford English Dictionary*, available at https://www.oed.com/view/Entry/131741?rskey=P9cZuC&result=2#eid (Exhibit USA-30).

[19] *See* U.S. FWS, paras. 44-61 (explaining how the access limits under the Oils and Fats Program were incorporated into the BPS Programs). *See also* Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36.

[20] *See* Final Issues and Decision Memorandum (Exhibit EU-2), p. 32.

[21] *See* Final Issues and Decision Memorandum (Exhibit EU-2), pp. 33-35.

[22] *See* Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

[23] *See* Final Issues and Decision Memorandum (Exhibit EU-2), pp. 35-36. The USDOC encapsulated the manner in which the BPS Programs preserved the special treatment for certain enterprises with the following example: by virtue of having qualified for subsidies under the Oils and Fats Program, "two farms of the same size can have two different total entitlement values if there is an historical difference in the amount of assistance provided in the different regions previously received under SPS."

Question 4 (*To both parties*) Does the fact that a past subsidy programme was established under a legal instrument no longer in force mean that the past programme cannot serve as a basis for a *de jure* specificity determination? Please explain taking into account that Article 2.1(a) of the SCM Agreement states that "the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises".

Response:

16. As an initial matter, it is necessary to establish what "no longer in force" means. In answering this question, the United States takes it to mean that the legal instrument could be similar in status to what the USDOC found with respect to the Oils and Fats Program – namely, that during the period of investigation, the legal instruments underlying the Oils and Fats Program were "no longer in force" but the criteria reflected in those legal instruments continued, through references in subsequent legal instruments, to determine eligibility for certain subsidies under the BPS Programs.[24]

17. Therefore, that during the period of investigation a legal instrument is no longer in force does not prevent an investigating authority from examining its effect. If the record facts warrant – e.g., the defunct legal instrument is explicitly incorporated by reference or relied upon – the legal instrument could factor into a *de jure* specificity determination. As explained in response to question 3 and in the U.S. first written submission, Article 2.1(a) of the SCM Agreement contains nothing to prevent an investigating authority from taking into account a reference to another legal instrument.[25] The phrase **"**the legislation pursuant to which the granting authority operates" plainly does not require that the investigating authority ignore explicit references to other sources or confine its analysis to one legal instrument. To the contrary, "the legislation" in question encompasses more broadly what the granting authority is acting or exercising its authority in conformance with or according to.

18. A contrary understanding would create a loophole for subsidy programs that favor certain enterprises through explicit access limitations where those limitations are incorporated by reference to other, potentially earlier or expired, laws or regulations.

Question 5 (*To the United States*) Does the fact that the USDOC did not determine that the Common Organisation of Markets in Oils and Fats programme was *de jure* specific affect the USDOC's determinations' consistency with Article 2.1(a) of the SCM Agreement?

Response:

19. The USDOC's determination that the BPS Programs, the CAP Pillar I programs that during the period of investigation conferred subsidies to olive growers, were *de jure* specific was not inconsistent with Article 2.1(a) of the SCM Agreement. The finding reflected two facts

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

[25] *See* U.S. FWS, 59-60.

about how the EU and GOS chose to implement CAP Pillar I subsidies. First, the successor BPS Programs, not the Oils and Fats Program, were in operation during the period of investigation. Second, although no longer in operation, the eligibility criteria from the Oils and Fats Program were incorporated by reference (i.e., to the assistance received under the Oils and Fats Program) into the BPS Programs.

20. As an initial matter, as explained in response to questions 3 and 4, "the legislation" at issue under Article 2.1(a) may include explicit references to other legal instruments, whether in force or not during the period of investigation. The text does not include an exception for laws and regulations that were the basis for a predecessor subsidy program, such as the Oils and Fats Program. Accordingly, it was not inconsistent with Article 2.1(a) for the USDOC to consider the effect of BPS Programs' explicit reference to and reliance upon the earlier CAP Pillar I programs – namely, the Oils and Fats Program.

21. Nor was it necessary for the USDOC to reach a separate *de jure* specificity determination on the Oils and Fats Program. First, nothing in the text of Article 2.1(a) requires that the investigating authority make separate specificity determinations for each reference that comprises "the legislation" at issue. The only specificity determination required by Article 2.1 is for the subsidy program defined in Article 1.1. Requiring other, subsidiary specificity determinations would conflict with the text and potentially prevent investigating authorities from taking into account all of the legislation pursuant to which the granting authority operates. Second, as the USDOC explained, a determination concerning the Oils and Fats Program would have been without meaning because it was not in operation during the period of investigation, and therefore was not the program that conferred subsidies to olive growers.[26]

Question 6 (*To the United States*): (*To both parties*) Was the support under the SPS, BPS, and Greening programmes available only to olive growers, or was it available to farmers in general? Please describe your understanding of the terms "farmer" and "olive grower".

Response:

22. As described in response to question 1, the SPS Program and BPS Programs provided subsidy payments based upon assistance received under the Oils and Fats Program.[27] The Oils and Fats Program limited access to subsidies to growers of olives (and other oilseeds). When the Oils and Fats Program ended, the subsidy payments to olive growers were preserved under the SPS Program and BPS Programs as "entitlements". The value of these entitlements (i.e., the amount of the subsidy payments) was based on the value per hectare during a reference period. The USDOC identified that a group of enterprises were eligible for assistance based on the value per hectare during the reference period of the Oils and Fats Program. Although under the SPS

[26] *See* Final Issues and Decision Memorandum (Exhibit EU-2), p. 33.

[27] *See also* Final Issues and Decision Memorandum (Exhibit EU-2), p. 32 (describing the provision annual payments under the Oils and Fats Program "only to producers of oilseed crops, including olives").

Program and BPS Programs "entitlements" were generally available to all farmers, entitlements reflecting the value of assistance received under the Oils and Fats Program were not.

23. Enterprises outside of this group – who did not receive assistance under the Oils and Fats Program – may have qualified for certain subsidy payments. However, the calculation of entitlements for those other enterprises did not reflect the value of assistance received under the Oils and Fats Program. Only enterprises who received assistance under the Oils and Fats Program have access under the SPS Program and BPS Programs to the specific entitlements reflecting that previous Oils and Fats Program assistance. In this way, the SPS Program and BPS Programs continued to favor certain enterprises with subsidy payments that retained the eligibility criteria preserved from the Oils and Fats Program.

24. The terms "olive grower" and "farmer" do not necessarily help in distinguishing the (i) group of enterprises that, under the SPS Program and BPS Programs, held entitlements whose subsidy amounts were derived from the Oils and Fats Program, versus (ii) other enterprises that were not so favored. Specifically, "olive grower" refers to an entity that produced olives, whether during the period of investigation or another period.[28] For purposes of specificity under Article 2.1(a), the relevant group of enterprises is the holders of entitlements whose value derived from the Oils and Fats Program, whether olive growers or not.[29] As explained under question 7, the certain enterprises identified by the USDOC were those entities that, under the SPS Program and BPS Programs, were eligible for entitlements that preserved access to assistance available to certain enterprises under the predecessor Oils and Fats Program.

25. The term "farmers" is broader than "olive growers" because it could include producers of other crops.[30] As described above, the SPS Program and BPS Programs provided certain subsidy payments to farmers generally. However, those other enterprises were not eligible for subsidy amounts that derived from the reference period when the Oils and Fats Program was in effect. Only the group of enterprises identified pursuant to the Oils and Fats Program were eligible to access these subsidies.

Question 7 (*To the United States*) In the Final Issues and Decision Memorandum (Exhibit EU-2), the USDOC confirmed the preliminary determination that the BPS and Greening programs are specific to olive growers. Did the USDOC determine that olive growers constitute "certain enterprises" within the meaning of Article 2.1 of the SCM Agreement? If so, where may the Panel find reference to this determination on the record?

Response:

[28] *See, e.g.*, Final Issues and Decision Memorandum (Exhibit EU-2), p. 36.

[29] Of course, only the subsidies received by raw olive suppliers would factor into the USDOC's benefit calculations.

[30] *See, e.g.*, Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-33.

26. The "certain enterprises" (i.e., "enterprise or industry or group of enterprises or industries") within the meaning of Article 2.1 were enterprises whose entitlement amounts were derived from the annual grants during the Oils and Fats Program reference period.[31] Pages 32 and 33 of the USDOC's final determination described how this group was identified based on whether, during the reference period of 1999 through 2003, they grew "olives [that] were used to produce olive oil or table olives." Access to these subsidy payments was limited to the group of enterprises that satisfied these criteria.

27. As the USDOC summarized on pages 35 and 36, because "the grants provided to olive growers under the [Oils and Fats Program]" were used to calculate subsidy payments under the BPS Programs, only the "certain enterprises" that satisfied the Oils and Fats Program criteria were eligible to receive these subsidy payments.

28. The group of enterprises identified by the USDOC are those that were eligible to receive subsidy payments based on whether they satisfied the eligibility criteria during reference period of the Oils and Fats Program.

Question 8 (*To the United States*) Could a finding that a subsidy programme is *de jure* specific to "certain enterprises" within the meaning of Article 2.1 of the SCM Agreement, (i.e., to olive growers as determined by the USDOC in the present dispute), be consistent with Article 2.1(a) of the SCM Agreement, if the evidence demonstrates that other enterprises (i.e., not only olive growers) were eligible for the payments under the same subsidy programme?

Response:

29. As explained in response to questions 6 and 7, the "certain enterprises" identified by the USDOC were those enterprises eligible for entitlements whose value was derived from assistance received under the Oils and Fats Program. Although the entitlements under the SPS Program and BPS Programs granted to olive growers were based on olive production during the Oils and Fats Program reference period, the group of eligible enterprises did not necessarily comprise "olive growers" during the period of investigation. Thus, only the "certain enterprises" identified by the USDOC as eligible to access the subsidies under the Oils and Fats Program were determined to be eligible to access the subsidies under the SPS Program and BPS Programs.

30. A determination that a subsidy program is *de jure* specific to "certain enterprises" only, even though other enterprises could receive some amount of subsidy payments under the program, is not necessarily inconsistent with Article 2.1(a) of the SCM Agreement. Specifically, as explained below, an investigating authority could still find that the granting authority limits access to certain subsidies to a distinct group of favored enterprises or industries (or an enterprise or industry).

[31] The final determination does not contain the shorthand "certain enterprises" because to capture the same concept the U.S. statute does not use the same language.

31. The granting authority, or relevant legislation, may discriminate in favor of certain enterprises even if under the same program other enterprises also receive some amount of payments based on other calculation criteria. The limitations on access that will trigger *de jure* specificity under Article 2.1(a) are those that "favour certain enterprises".[32] Therefore, the critical question under Articles 2.1(a) and (b) is "whether the conduct or instruments of the granting authority discriminate or not."[33] If the legislation discriminates in favor of certain enterprises, as the USDOC found the SPS Program and BPS Programs to do, then a finding of *de jure* specificity will comport with Article 2.1 (a).

Question 9 (*To both parties*) In paragraphs 211-234 of its first written submission, the European Union argues that the United States violated Articles 2.1, 2.1(a) and 2.4 of the SCM Agreement by finding that the SPS, BPS and Greening programmes provided assistance coupled to the production of olives. How is the concept of "coupling" (or "tied to production") relevant to determining *de jure* specificity under Article 2.1 of the SCM Agreement? Does the United States accept the suggestion that the USDOC based its *de jure* specificity findings on the consideration that assistance provided to olive growers is coupled or tied to the production of olives?

Response:

32. As explained in the U.S. first written submission, the EU argument that USDOC based its specificity determination on a finding that the BPS Programs are "coupled" to olive production is erroneous.[34] First, it invents a role for the concept of "coupling" that has no basis in the SCM Agreement. Second, it attacks a finding as to "coupling" (or "decoupling") that the USDOC did not make.

33. The concept of coupling appears in the Agreement on Agriculture ("AoA") under Annex 2, where "decoupled income support" is identified as a type of support exempt from reduction commitments, and under the Article 13 "Peace Clause". The terms "coupling" and "tying" appear nowhere in the SCM Agreement and are not relevant to the analysis under Article 2.1(a). Nor do any provisions of the SCM Agreement cross-reference or otherwise incorporate this concept.

34. Indeed, nothing in the text of Article 2.1(a) suggests that, in examining "access to a subsidy for certain enterprises", the investigating authority must consider whether subsidy payments are coupled to production, let alone that the absence of coupling would preclude *de jure* specificity. Although tying subsidy amounts to production may be one way to limit access

[32] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 367. Although the Appellate Body uses the term "eligibility", it is to explain that "the focus of the inquiry is on whether certain enterprises are eligible for the subsidy, not on whether they in fact receive it." In other words, the Appellate Body used "eligibility" as shorthand for "qualified to access" rather than to suggest that it is what the drafters meant by "access" under Article 2.1(a). *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 369.

[33] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 367.

[34] U.S. FWS, paras. 62-67.

to favor certain enterprises, the granting authority clearly may limit access to subsidy amounts in other ways. Similarly, Article 2.1(b) of the SCM Agreement, which sets out the conditions where *de jure* specificity "shall not exist", does not include the concept of "coupling". Specifically, the "objective criteria or conditions" exception encompasses "criteria or conditions which are neutral, which do not favour certain enterprises over others . . . ." A granting authority can favor certain enterprises over others even with a program that decouples payment from production of a particular product. Had the drafters intended that the concept of "coupling" factor into the analysis under Articles 2.1(a) and (b), they would have included language to that effect. Indeed, reading into Article 2.1(a) a requirement that payments be coupled to production could create a loophole permitting a granting authority to provide assistance that is specific to certain enterprises but nonetheless evades the remedy of countervailing duties.

35. The EU argues that the concept of coupling is relevant because under Annex 2 of the AoA the SPS Program and BPS Programs qualify as "decoupled income support". This is in error. As the United States explained in its first written submission, Annex 2 to the AoA is no longer relevant to whether under the SCM Agreement a subsidy is deemed to exist. The "Peace Clause" under Article 13 of the AoA, which designated domestic support measures under Annex 2 of the AoA as non-actionable subsidies for purposes of countervailing duties, has expired.[35]

36. In addition, it is incorrect that the USDOC's *de jure* specificity determination was based on a finding that subsidy payments to olive growers were coupled to olive production. As summarized in the U.S. first written submission[36] and in response to question 1 above, the USDOC's determination was based on the fact that the limit on access under the Oils and Fats Program, which favored olive growers, continued under the BPS Programs to determine access to subsidies and subsidy amounts.[37] That is, the BPS Programs incorporated by reference the explicit limit on access which governed the Oils and Fats Program. The BPS Programs thereby limited access to certain subsidies to enterprises with entitlements whose value was based on subsidies received under the Oils and Fats Program. Thus, access to entitlements calculated in this way was based on identification under the Oils and Fats Program, not whether eligible recipients continued to produce olives.[38]

[35] U.S. FWS, paras. 65-67; *See also* Final Issues and Decision Memorandum (Exhibit EU-2), p. 6 (explaining that "the requirement to treat agricultural subsidies as not countervailable no longer applies to imports from WTO Member countries—in this case, Spain—after January 1, 2004."

[36] *See*, *e.g.*, U.S. FWS, paras. 44-61.

[37] *See* Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36.

[38] *See* Final Issues and Decision Memorandum (Exhibit EU-2), p. 33 (noting that the Oils and Fats Program "provided annual payments only to producers of oilseed crops, including olives" and that access to subsidy payments under the SPS Program and BPS Programs continued to be limited to this group).

37. Although the USDOC referred in its final determination to the concept of "coupling", it did so to address interested parties' arguments.[39] Specifically, similar to what the EU argued in its first written submission, the European Commission characterized the BPS Programs as "decoupled from production," and argued that, as a result, could not be *de jure* specific. In response, the USDOC explained that the proper inquiry is whether access to subsidies under the BPS Programs is uniformly provided across the agricultural sector or explicitly limited to a group of enterprises or industries. The *de jure* specificity of the BPS Programs resulted from its reference to and reliance upon the reference of the access limitation under the Oils and Fats Program.[40]

38. In sum, the USDOC did not base its determination on whether or not subsidies were "coupled" to production. Nor is a program's characterization under the AoA as "coupled" or "decoupled" relevant to a determination of specificity under Article 2 of the SCM Agreement.

Question 10 (*To the European Union*) In paragraph 82 of its first written submission, the European Union argues that "Hence, by definition the payments that newcomers receive [under the SPS programme] are linked neither to their past production nor to any particular crop." Please explain how such a link is relevant to a *de jure* specificity analysis under Article 2.1 of the SCM Agreement. Can olive growers that are newcomers in the sense described commence their agricultural activity by not growing olives?

Response:

39. This question is addressed to the EU.

Question 11 (*To both parties)* In footnote 76 of its first written submission, the United States submits that the USCIT's decision (Exhibit EU-50) is not final and conclusive, and the USDOC's determination may be affirmed based on its remand determination or on appeal. Has there been a remand determination by the USDOC, or has the USCIT's decision been appealed? What would be the implications for this dispute if it was final and conclusive?

Response:

40. The USDOC filed its remand determination with the USCIT on June 1, 2020. The parties will have the opportunity to present arguments to the Court, which will then issue a decision on the USDOC's remand redetermination. Specifically, the Court will affirm the determination or remand again. If the USCIT affirms the USDOC's remand determination, the parties may appeal the Court's decision.

41. However, any decision under U.S. domestic law, whether or not it is final and conclusive, would not be relevant to the Panel's decision in this dispute. U.S. courts review whether a

[39] *See* Final Issues and Decision Memorandum (Exhibit EU-2), pp. 35-36.

[40] *See* Final Issues and Decision Memorandum (Exhibit EU-2), pp. 33, 36.

USDOC determination is in accordance with U.S. countervailing duty law, while a WTO dispute settlement panel reviews whether a determination is not inconsistent with the SCM Agreement.

II. CLAIMS REGARDING PASS-THROUGH OF BENEFITS

Question 12 (*To the European Union*) In the extract from *Canada - Aircraft* in paragraph 347 of the European Union's first written submission, there is a reference to "*a group of persons*" as being a potential beneficiary of a subsidy. Is it possible to consider a producer and a processor of olives to be a "*group of persons*" in this context? Can a subsidy to the producer be considered as a direct subsidy, while the pass-through to the processor is an indirect subsidy? Does this mean that the direct subsidy is the overall amount of the subsidy to the group of persons concerned?

Response:

42. This question is addressed to the EU.

Question 13 (*To the European Union*) In paragraph 407 of its first written submission, the European Union refers to the *US – Canadian Pork* GATT Panel Report and argues that the essence of a pass-through test is to determine whether and to what extent the subsidies granted to the input (raw) product led to a decrease in the level of prices for the input product paid by the processors below the level they would have to pay for the input product from other commercially sources of supply. If a subsidy is of widespread effect across all, most, or many olive producers, what would be the "commercial source of supply" that could be used as the benchmark?

Response:

43. This question is addressed to the EU.

Question 14 In paragraphs 124-127 of its first written submission, the United States argues that the negotiating history of Article VI:3 of the GATT 1994 and the SCM Agreement supports a finding that no specific methodology is required with respect to the issue of pass-through.

(a) (*To the European Union)* Please comment on the negotiating history to which the United States refers.

Response:

44. This question is addressed to the EU

(b) (*To both parties*) How should Article VI:3 of the GATT 1994 and the relevant provisions of the SCM Agreement be interpreted in respect of whether any (and if so, what) methodology is required on the issue of pass-through?

Response:

45. As the United States explained in Section IV.A of its first written submission, the GATT 1994 and the SCM Agreement do not require a particular methodology for conducting a pass-through analysis.[41] The provisions of the GATT 1994 and the SCM Agreement at issue in this dispute provide general obligations concerning the imposition of countervailing duties once the existence of a subsidy has been established. It is therefore inappropriate to read into these provisions, as the EU does, specific obligations requiring a particular methodology for conducting an analysis of whether a subsidy to an upstream producer (or product) benefits a downstream product.

46. Article VI:3 of GATT 1994 requires a finding of benefit, and affirms Members' authority to levy duties that "offset" subsidies, subject to the requirement that they not exceed the amount of subsidy found to exist. Article VI:3 of GATT 1994 does not, however, address how the subsidy is to be calculated. Articles 10 and 32.1 of the SCM Agreement require Members to align the imposition of a countervailing duty in accordance with Article VI of the GATT 1994 and the SCM Agreement. Therefore, Articles 10 and 32.1 of the SCM Agreement cannot be interpreted to support a particular methodology for calculating the benefit as no such obligation exists in Article VI of the GATT 1994.

47. Article 19 of the SCM Agreement also does not contain any requirements regarding a determination of whether a benefit has been conferred. Rather, Article 19 presumes that an investigating authority has already found the existence of a subsidy. Article 19.1 provides generally that a Member may impose a countervailing duty once it has established the amount of the subsidy and determined that such subsidy is causing injury. Article 19.3 speaks to the amount of the countervailing duty that may be imposed, providing that such duties must be imposed on a non-discriminatory basis on all countries investigated and be "appropriate" to the producer or exporter given the subsidy amounts determined. Article 19.4 establishes an upper limit on the amount of the countervailing duty that may be imposed *after* a subsidy has been found to exist. It provides that the subsidy be calculated on a per-unit basis, but does not establish any other requirements concerning how the subsidy is to be calculated.[42]

48. Thus, there is no text in the agreements setting out a particular methodology for examining pass-through. Based on the evidence on the record and arguments of the parties, an

[41] *See* U.S. FWS, IV.A; Japan's third party written submission, paras. 6-7; Turkey's third party written submission, para. 9.

[42] Similarly, Article VI:3 of GATT 1994 states:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party *in excess of an amount equal to the estimated bounty or subsidy determined to have been granted*, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation . . .

(Emphasis added). Article VI:3 of GATT 1994, like Article 19.4 of the SCM Agreement, establishes that the amount of the subsidy found is the upper limit on the amount of the countervailing duty that may be levied. Article VI:3 of GATT 1994 does not, however, address how the subsidy is to be calculated.

investigating authority will need to determine whether and to what extent a benefit has been conferred on a recipient that affects a downstream investigated product.

Question 15 (*To the United States*) In paragraph 139 of its first written submission, the United States argues that a subsidy that affects the production of the raw agricultural product necessarily affects trade in the product processed exclusively from the raw product. Is this reasoning limited to situations in which a raw agricultural product is devoted completely and exclusively to the production of a single processed product, or would this also apply in cases where the raw agricultural product may be processed into different end products?

Response:

49. A subsidy that affects the production of a raw agricultural product can affect trade in processed agricultural products even where multiple such processed products exist. That not all of the buyers are producers of the same processed agricultural product does not itself alter the market effects on those processed agricultural products. In theory, both prongs of Section 771B might be met for one downstream product of a subsidized raw agricultural product and not for another.

50. As explained in Section IV.B of the United States' first written submission, Section 771B sets out the factual and economic circumstances that must be present before subsidies initially provided to upstream agricultural goods are attributed 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.

51. In developing the legislation, the U.S. Congress found that a subsidy that *affects the trade of* a raw agricultural commodity necessarily *affects the trade of* a product processed exclusively from the raw commodity. The statute does not require that the raw agricultural product is devoted completely and exclusively to the production of a single processed product. Rather, the USDOC's examination of substantial dependence focuses "on the nature of the raw product and the market" and places weight on what would happen to the market for the raw product if demand for the processed product ceases to exist.[43]

52. However, it is not sufficient under Section 771B to merely identify the existence of this factual circumstance when determining whether a benefit is conferred to the downstream product where the subsidy is bestowed on the upstream raw agricultural product. The second prong of 771B further limits those products that are subject to Section 771B by requiring that "the processing operation adds only limited value to the raw commodity". Both market conditions identified in Section 771B must be fulfilled. The conditions may be fulfilled for one downstream product of a subsidized raw agricultural product and not for another.

[43] *See* Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain (November 20, 2017) (Exhibit EU-1), p. 16.

Question 16 (*To the United States*) Does the USDOC have discretion not to apply Section 771B in respect of raw agricultural products in conducting a countervailing duty investigation?

Response:

53. Section 771B applies to countervailing investigations of certain *processed* agricultural products where a particular set of factual circumstances exist concerning the relationship of the processed product and the upstream raw agricultural product. Therefore, the USDOC is not required to apply Section 771B in every investigation concerning raw agricultural products.

54. USDOC applies Section 771B only where the two market conditions set out in Section 771B are fulfilled. USDOC does not presume that the two market conditions set out in Section 771B exist for all processed agricultural products. Rather, Section 771B directs the USDOC to employ a step-by-step analysis for certain processed agricultural products to determine whether and to what extent a benefit provided to the raw agricultural product can be attributed to the processed agricultural product.

55. In those cases where the factual circumstances in Section 771B do not apply to a particular agricultural product, USDOC may resort to the use of other U.S. countervailing duty laws in establishing the existence and extent of a benefit conferred on that product.[44]

III. CLAIMS REGARDING INJURY

Question 17 (*To the United States*) Footnote 248 of the United States' first written submission indicates that the Government of Spain believed that 85% or more of the US domestic industry's commercial ripe olives shipments were primarily destined to the retail segment during the period of investigation. Does the United States consider that to be correct?

Response:

56. The United States does not dispute the Government of Spain's assessment that 85 percent or more of the domestic industry's commercial shipments of ripe olives were primarily destined to the retail channel of distribution of the U.S. market during the period of investigation (POI).[45] This assessment, based on an independent study conducted by a provider of agribusiness consulting and analytical services,[46] comports with the USITC's finding that domestic processors

[44] *See, e.g.*, 19 U.S.C. § 1677-1 (Exhibit USA-1).

[45] *See* Government of Spain's Prehearing Brief (Exhibit USA-4) at 10-11, and *Informa Agribusiness* Report (Exhibit USA-5) at 28-29.

[46] *See* Government of Spain's Prehearing Brief (Exhibit USA-4) at 2 n.1.

"sold largely to retailers" during the POI, as well as the statement in the Commission report that domestic processors sold primarily to retailors.[47]

Question 18 (*To the European Union*) Would the USITC's segmentation approach be justified if the majority of the US domestic industry's commercial shipments were primarily destined to the retail segment during the period of investigation?

Response:

57. This question is addressed to the EU.

Question 19 (*To the United States*) Table II-1 of Publication 4805 (Exhibit EU-5) indicates that the retail segment accounted for less than 20% of commercial shipments of Spanish ripe olives imports during the period of investigation. If so, does this fact have any bearing on whether the USITC's segmentation approach was appropriate or not?

Response:

58. This fact has no bearing on whether the USITC appropriately assessed apparent U.S. consumption and market share data on both an industry-wide basis and in the distinct channels of distribution, particularly the retail channel, during the POI.

59. As the United States explained in its first written submission, data collected by the USITC from market participants indicated that the domestic processors sold predominantly to retailers and their participation in the institutional/food channel was extremely limited. And while most of the subject imports were sold to distributors during the POI, an appreciable and increasing share was sold to retailers. By contrast, nonsubject imports were increasingly sold to the institutional channel. Consequently, during the POI, competition between domestically produced and subject ripe olive imports intensified in the retail channel. Because the domestic producers sold mainly in the retail market, and the subject imports increasingly competed with the domestic product in that market segment, the USITC undertook a detailed examination of market share movements and pricing in the retail channel when conducting its analysis of the impact of the subject imports on the domestic industry.[48]

60. Moreover, the United States notes that the report appended to the Government of Spain's prehearing brief estimates that Spain accounted for 54 percent of all U.S. table olive imports and 40 percent of total U.S. table olive consumption during the POI.[49] Spain was, accordingly, one of the largest sources of supply of ripe olives in the U.S. market, as well as the largest import source of supply during the POI.[50] The USITC found that the increase of nearly 250 percent in

[47] USITC Pub. 4805 (Exhibit EU-5) at 14 and II-2.

[48] U.S. FWS, para. 176. *See also Informa Agribusiness* Report (Exhibit USA-5) at 28-29.

[49] *See Informa Agribusiness* Report (Exhibit USA-5) at 29. The United States does not dispute these figures.

[50] USITC Pub. 4805 (Exhibit EU-5) at 16.

the volume of low-priced ripe olives supplied to the retail channel of the market by one of the largest sources of supply served to reduce prices and capture market share from U.S. producers. Consequently, the USITC's focus on the effects of subject imports in the retail channel was fully justified notwithstanding that the larger share of subject imports were not sold into this channel.

Question 20 (*To the United States*) Did the USITC's finding that olives constitute a single domestic like product that is highly substitutable factor into the USITC's decision to assess the volume effects of subject imports on a segmented basis?

Response:

61. Neither the USITC's definition of a single domestic like product nor its finding, in its analysis of conditions of competition and the business cycle, that the domestic like product and subject imports have a high degree of substitutability factored into its decision to examine volume and pricing trends in discrete channels of distribution. Rather, as discussed above in the United States' response to Question 19, the USITC's examination of trends in the retail channel was guided by positive evidence that competition between domestically produced and subject imported ripe olives was concentrated in and intensified in this channel during the POI.

62. To clarify, the USITC did not define the domestic like product in terms of substitutability. Rather, as the USITC explained, it applied its six-factor test—which included interchangeability—to determine the appropriate like product definition and ascertain if there were clear dividing lines indicative of more than one like product.[51] In these investigations, the USITC defined a single domestic like product consisting of all ripe olives coextensive with USDOC's scope, and found that all ripe olives within the scope were "at least somewhat interchangeable" with one another.[52] No party contested this definition or the USITC's finding on interchangeability.[53]

63. Substitutability between the domestic product and subject imports did not factor into the USITC's analysis of volume.[54] Rather, the USITC determined that subject import volume was significant on several other bases.[55] For one, the USITC determined subject import volume to be significant on an absolute basis. 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

[51] USITC Pub. 4805 (Exhibit EU-5) at 4-7.

[52] USITC Pub. 4805 (Exhibit EU-5) at 7.

[53] USITC Pub. 4805 (Exhibit EU-5) at 7.

[54] USITC Pub. 4805 (Exhibit EU-5) at 7.

[55] Moreover, in examining trends in the retail segment, the USITC was not evaluating the "volume effects" of subject imports. The United States recollects that neither Article 3.2 of AD Agreement nor Article 15.2 of the SCM Agreement address an investigating authority's obligation to assess "volume effects" for subject imports. *See* U.S. FWS, para. 179.

significant levels during the POI. Lastly, the USITC found that the ratio of subject imports to U.S. production was significant. These findings were based on the significant presence of subject imports in the U.S. market, and did not hinge on the USITC's subsequent examination of trends in the retail channel.[56]

64. The degree of substitutability between the domestic product and subject imports did, however, factor into the USITC's evaluation of price effects and impact. The USITC's finding – that domestically produced ripe olives are highly substitutable with subject imported ripe olives[57] – factored into the USITC's determination that the underselling by subject imports was significant, and in its determination that unfairly traded subject imports had a significant impact on domestic processors.[58]

Question 21 (*To the European Union*) The United States argues in paragraph 237 of its first written submission that ripe olives destined for the "retail" segment need to be specially processed and packaged, and therefore could not be redirected to other channels of distribution. Does this affect whether the olives are substitutable/interchangeable between different channels (segments)?

Response:

65. This question is addressed to the EU.

Question 22 (*To both parties*) The USITC referred to certain data for the industry as a whole, e.g. data showing a decline in Spanish imports between 2015 and 2017, aggregated product pricing data, and data contained in Table III-4 of Publication 4805 (Exhibit EU-5). Does this suggest that the USITC carried out its volume and price effects analysis with respect to the entire industry?

Response:

66. As the United States explained in its first written submission, the USITC, while focusing on trends in the retail channel of distribution, carried out its volume, price effects, and impact analyses with respect to the overall market, including the other channels of distribution.[59] Additionally, the USITC's definition of the domestic industry included two domestic processors that accounted for virtually all domestic production of ripe olives during the POI. These processors submitted firmwide data on their entire ripe olive operations. Accordingly, the

[56] The USITC evaluated the significance of subject import volumes in the market in absolute terms and relative to apparent U.S. consumption before specifically examining trends in the retail channel. USITC Pub. 4805 (Exhibit EU-5) at 18-19.

[57] USITC Pub. 4805 (Exhibit EU-5) at 17, II-19, and Table II-12.

[58] USITC Pub. 4805 (Exhibit EU-5) at 19-24.

[59] *See* U.S. FWS, paras. 177-195, 209-214, and 225-231.

USITC considered these comprehensive data in its injury determinations with respect to the entire industry.[60]

67. The USITC's analysis of subject import volumes during the POI was based on aggregate official U.S. import statistics and apparent U.S. consumption and U.S. production data inclusive of the domestic industry's total U.S. shipments and production data.[61] As discussed in our response to Question 20, the USITC found subject import volume significant in absolute terms and relative to apparent U.S. consumption, and also found that the ratio of subject imports to U.S. production was significant.[62]

68. The USITC's analysis of price effects was based on overall data on pricing in the record, including aggregated data concerning instances of underselling in four pricing products reflecting ripe olives sold in multiple channels of distribution, including two pricing products that were produced for sale to customers in the institutional/food channel.[63] The USITC also considered data concerning confirmed lost sales by purchasers in various distribution channels.[64] Responding purchasers were predominantly distributors.[65] The USITC thus based its finding of significant underselling on domestic and subject import pricing data covering each channel of distribution in the market.

69. Without prejudice to the United States' request that the Panel find that the EU's claims concerning Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement are outside its terms of reference,[66] the United States further notes that the USITC's analysis of the impact of subject imports on the domestic industry was based on aggregated data compiled on various production, employment, and financial performance factors.[67] The USITC's finding that subject

[60] USITC Pub. 4805 (Exhibit EU-5) at 3.

[61] USITC Pub. 4805 (Exhibit EU-5) at 18-19, IV-1 n. 2, and Tables IV-2 and IV-5. As indicated in the data table notes on source, subject import volume data in these tables were compiled using official U.S. import statistics using Harmonized Tariff Schedule (HTS) numbers 2005.70.5030, 2005.70.5060, 2005.70.6020, 2005.70.6030, 2005.70.6050, 2005.70.6060, and 2005.70.6070.

[62] USITC Pub. 4805 (Exhibit EU-5) at 18-19.

[63] USITC Pub. 4805 (Exhibit EU-5) at 19-20 n. 112 and V-5 – V-11.

[64] USITC Pub. 4805 (Exhibit EU-5) at V-12 – V-14.

[65] USITC Pub. 4805 (Exhibit EU-5) at 19-22 and II-1.

[66] *See* U.S. FWS, paras. 23-27.

[67] USITC Pub. 4805 (Exhibit EU-5) at 22-26 and Tables III-4, III-8, III-10, III-13, VI-1, and VI-4. These included data on production capacity, production, capacity utilization, commercial shipments, export shipments, and inventories; the number of production-related workers (PRWs), hours worked, hours worked per PRW, wages paid, hourly wages, unit labor costs, and worker productivity; net sales, the cost of goods sold (COGS), gross profit, sales, general, and administrative (SG&A) expenses, operating income, net income, research and development expenses, capital expenditures, unit COGS, unit SG&A expenses, unit operating income, unit net income, the COGS/sales

imports had explanatory force for the domestic processors' increasing inventories, declining shipments, and deteriorating financial performance during the POI was, accordingly, based on an industry-wide review of these data.[68]

70. Therefore, while the USITC gave weight to developments in the retail channel of distribution, as this is where competition between domestically produced and subject imported ripe olives was concentrated in the marketplace, the USITC based its injury determinations on market-wide data concerning the domestic industry as a whole.

Question 23 (*To both parties*) Could a requirement to examine other segments of the domestic industry, as well as the industry as a whole, be waived if an investigating authority explains why such examination is not necessary, as suggested in paragraph 204 of the Appellate Body report in *US – Hot-Rolled Steel*?

Response:

71. At the outset the United States notes that the Appellate Body in *US – Hot Rolled Steel* did not address whether an investigating authority could waive its obligation to objectively examine other parts of the domestic industry and/or the industry as a whole when undertaking an examination of one part of the industry. Rather, in paragraph 204 of that report, the Appellate Body addressed whether and to what extent an investigating authority undertaking an examination of one part of a domestic industry should examine all of the other parts that make up the industry, as well as the industry as a whole. This question does not arise in this dispute.

72. Therefore, the question of whether or to what extent an investigating authority could waive an obligation to objectively examine other parts of the domestic industry and/or the industry as a whole in a manner consistent with Article 3.1 of the AD Agreement does not affect the outcome of this dispute. As the United States has demonstrated, the USITC did in fact examine the overall market, including each channel of distribution.[69] As detailed in the United States' first written submission, the USITC made findings showing that the subject imports caused material injury to the domestic industry as a whole, as demonstrated by the USITC's references to compilations of data on, *inter alia*, apparent U.S. consumption, market shares, price, production, employment, and financial performance in the USITC report that clearly demonstrate that the USITC examined each channel of distribution and the overall market in a like manner.[70]

ratio, the operating income/sales ratio, and the net income/sales ratio. *See* Blank U.S. Processors' Questionnaire (Exhibit USA-16) at Parts II-III.

[68] USITC Pub. 4805 (Exhibit EU-5) at 22-26.

[69] *See* U.S. FWS, paras. 177-195, 209-214, 219-231.

[70] *See, e.g.*, U.S. FWS, para. 178 and n. 251, 202-203 nn. 281 and 282, 225 n. 306, and 229 n. 318.

IV. CLAIMS REGARDING CALCULATION OF GUADALQUIVIR'S SUBSIDY RATE

Question 24 (*To the United States*) The European Union points out, in paragraph 657 of its first written submission, that Guadalquivir indicated that it "only records the value of its raw olive purchases in its accounting system" and that "[t]he [redacted] kilograms represents all raw olive receipts as recorded in the ERP system in 2016." Based on this response, should the USDOC have understood that Guadalquivir's reported raw olive purchases were not limited to purchases used to produce ripe olives?

Response:

73. The excerpted passages to which the EU refers did not indicate that Guadalquivir had reported all raw olive purchases regardless of end use. Given that the USDOC requested information regarding purchases of raw olives that were processed into ripe olives, an unbiased and objective investigating authority could have concluded, as the USDOC did, that this was the information reported by Guadalquivir.

74. In fact, the excerpts referenced in the question, from Guadalquivir's response to the USDOC's December 21, 2017, letter, support the USDOC's conclusion. The USDOC's letter to Guadalquivir sought information concerning its responses to the USDOC's earlier requests for information, including the USDOC's August 4, 2017, questionnaire.[71] Question 3 in the USDOC's December 21, 2017, letter, to which Guadalquivir supplied the response excerpted in the question, read:

> 3. In your questionnaire response of August 14, 2017 at Exhibit 2, AG provided a list of unaffiliated suppliers and total purchases of raw olives to be [redacted] kilograms. Confirm that this number includes purchases of all raw olives regardless of the processed olive product for which the raw olives were used. Explain if these purchases are made on a gross or net basis, that is, with or without sticks, leaves, and other debris and culls. Explain how the purchased volumes are recorded in your accounting system and explain whether you apply a standard yield loss ratio in recording the purchased volume of raw olives.[72]

[71] The USDOC's August 4, 2017, questionnaire specifically requested each respondent company to report purchase information on all raw olives that were used to produce ripe olives. *See* U.S. FWS, paras. 269-286. *See also* Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58); Letter to Agro Sevilla re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-6); Letter to Angel Camacho re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit USA-7).

[72] Countervailing Duty (CVD) Investigation of Ripe Olives from Spain: Supplemental Questionnaire to Aceitunas Guadalquivir S.L.U. (Exhibit EU-62), p. 4 (business confidential information redacted).

75. Question 3 requested four pieces of information regarding Guadalquivir's response to the August 4, 2017, questionnaire: (1) "[c]onfirm that this number includes purchases of all raw olives regardless of the processed olive product for which the raw olives were used"; (2) "[e]xplain if these purchases are made on a gross or net basis, that is, with or without sticks, leaves, and other debris and culls"; (3) "[e]xplain how the purchased volumes are recorded in your accounting system"; and (4) "explain whether you apply a standard yield loss ratio in recording the purchased volume of raw olives."[73]

76. Guadalquivir responded:

> **Answer**: Guadalquivir only records the value of its raw olive purchases in its accounting system. Raw olive quantities are recorded in an ERP system as they are weighed when they enter the factory or when purchased from storage throughout the year. Weight is recorded in the ERP system on a net basis (i.e., net of other debris). Specifically, each delivery is evaluated by a Guadalquivir employee to assess the volume of raw olives for processed olive production relative to other materials, such as leaves sticks, leaves, and other debris and culls. These other materials are not recorded as part of raw olive volume in the ERP system. The [redacted] kilograms represents all raw olive receipts as recorded in the ERP system in 2016.[74]

77. As an initial matter, as explained in the U.S. first written submission, Guadalquivir did not indicate that the volume of raw olive purchases it had reported included all raw olive purchases, regardless of use.[75] Guadalquivir could have clearly stated, as specifically prompted in the USDOC's question, that its response had included all purchases of raw olives and was not limited to those purchases of raw olives that were used to produce ripe olives.[76]

78. Instead, Guadalquivir stated that it "only records the value of its raw olive purchases in its accounting system."[77] The statement responds to the USDOC's request to "[e]xplain how the

[73] Countervailing Duty (CVD) Investigation of Ripe Olives from Spain: Supplemental Questionnaire to Aceitunas Guadalquivir S.L.U. (Exhibit EU-62), p. 4.

[74] Fourth Supplemental Questionnaire Response of Aceitunas Guadalquivir S.L.U. (Exhibit EU-59), p. 6 (business confidential information redacted).

[75] U.S. FWS, paras. 314-315.

[76] U.S. FWS, para. 315.

[77] Fourth Supplemental Questionnaire Response of Aceitunas Guadalquivir S.L.U. (Exhibit EU-59), p. 6.

purchased volumes are recorded in your accounting system."[78] Guadalquivir's statement in this regard shows that its accounting system records only the value, and not the quantity, of its raw olive purchases. It provides no indication that the accounting system records the purchase value of all raw olive purchases, whether or not used to produce ripe olives. Nor is there any indication that such purchase value information was used to derive the purchase volume information that Guadalquivir provided to the USDOC in response to the August 4, 2017, questionnaire. According to Guadalquivir's response, the purchase volume information reported was based on the raw olive quantities recorded in the company's ERP system.

79. Guadalquivir also stated that "[t]he [redacted] kilograms represents all raw olive receipts as recorded in the ERP system in 2016."[79] Again, this statement provides information regarding Guadalquivir's system of recordation. That the number of kilograms reported "represents all raw olive receipts as recorded in the ERP system in 2016" does not mean that the raw olive purchase information the company submitted in response to the USDOC's August 4, 2017, questionnaire included purchases of raw olives that were used to produce products other than ripe olives. The USDOC's ministerial error memorandum addressed Guadalquivir's response to question 3 in the USDOC's December 21, 2017, letter:

> With regard to the post-preliminary supplemental question to confirm that the reported purchases represented all purchases regardless of the processed product, Aceitunas Guadalquivir again did not specify that the volume they reported was of raw to ripe, or otherwise of total purchases. Rather, Aceitunas Guadalquivir stated that number was indicative of all raw olive purchases in their system; again, based on their response to our original question, we understood this to mean that all of their raw olive purchases were for ripe olives.[80]

80. For these reasons, Guadalquivir's response to question 3 of the USDOC's December 21, 2017, letter did not indicate that Guadalquivir had reported all raw olive purchases, whether or not used to produce ripe olives. Moreover, to conclude otherwise would conflict with the USDOC's observations during the on-site verification of Guadalquivir's questionnaire responses. At verification, the USDOC discovered additional purchases of olives, and Guadalquivir explained that it did not report those purchases because the USDOC's August 4, 2017 letter requested purchases of raw olives that were processed into ripe olives and the additional

[78] Countervailing Duty (CVD) Investigation of Ripe Olives from Spain: Supplemental Questionnaire to Aceitunas Guadalquivir S.L.U. (Exhibit EU-62), p. 4.

[79] Fourth Supplemental Questionnaire Response of Aceitunas Guadalquivir S.L.U. (Exhibit EU-59), p. 6.

[80] Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), p. 5 (internal citation omitted).

unreported purchases of olives were ultimately processed into green olives, i.e., non-subject merchandise.[81]

81. Thus, the USDOC "understood that the originally reported volume of olives purchased represented purchases of raw to ripe [(i.e., purchases of raw olives used to produce ripe olives)] and the additional volume of olive purchases not reported represented olives purchased for the production of non-subject merchandise."[82]

Question 25 (*To the United States*) The European Union points out, in paragraph 663 of its first written submission, that Guadalquivir purchased raw olives in amounts greater than its total sales of ripe olives. How did the USDOC reconcile the disparity between the volume of raw olive purchases and the volume of ripe olive sales? Did such disparity mean that Guadalquivir's data could not serve as an acceptable proxy for raw olive purchases for processing into ripe olives?

Response:

82. In its ministerial error memorandum, the USDOC addressed the difference between the volume of raw olives Guadalquivir reported purchasing during the period of investigation and its sales of ripe olives during that period.[83] The USDOC also explained why, like the other two mandatory respondents, it used the information reported for raw olives that were processed into ripe olives.

83. As an initial matter, however, the USDOC did not treat Guadalquivir's reported information as a "proxy" for raw olive purchases that were processed into ripe olives. The EU has characterized it as such based on its assertion that the USDOC "knew that Guadalquivir's reply . . . included all olives."[84] As explained in the U.S. first written submission, that characterization is incorrect.[85] Guadalquivir submitted the information in response to a specific request for its purchases of raw olives that were processed into ripe olives, and the record evidence supported the conclusion that the information reflected the requested information.[86] In

[81] *See* U.S. FWS, paras. 316-317. *See also* Verification of the Questionnaire Responses of Aceitunas Guadalquivir, S.L.U. (Exhibit USA-22), p. 7; Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), p. 5.

[82] Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), p. 5.

[83] Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), pp. 5-6.

[84] EU FWS, paras. 703-705.

[85] *See* U.S. FWS, paras. 313-320.

[86] The United States explains in greater detail in response to question 24 and in its first written submission, at paragraphs 307 to 320.

fact, it was Guadalquivir that requested a "proxy", to replace the record evidence it had supplied.[87]

84. Guadalquivir argued before the USDOC that the disparity between its reported volume during the period of investigation of raw olive purchases and ripe olive sales "provid[ed] further confirmation that the raw olive purchases reported by Guadalquivir included purchases of all raw olives regardless of the processed olive product for which the raw olives were used."[88] To address this disparity and to derive the purportedly "correct" figure, Guadalquivir requested that the USDOC use the reported volume of ripe olive sales during the period of investigation.

85. In response, the USDOC addressed the difference in two ways. First, the USDOC explained that the difference did not invalidate Guadalquivir's reported volume of raw olive purchases or, for that matter, provide a basis to resort to Guadalquivir's ripe olive sales as a proxy for raw olive purchases in calculating Guadalquivir's *ad valorem* subsidy rate. The USDOC explained that, "if the volume originally reported does not represent raw to ripe purchases, the 'correct' volume is not on the record."[89] Thus, "there is no information on the record to substantiate the validity of [ripe olive sales] as a proxy for raw olive purchases".

86. Second, the USDOC identified three reasons why during the period of investigation Guadalquivir may have purchased a volume of raw olives greater than the volume of ripe olives that it sold.

87. First, the different physical characteristics of raw olives purchased and the ripe olives sold may generate different weights.[90] For example, whereas raw olives purchased contain pits, the ripe olives produced from those raw olives need not. Ripe olives sold may be whole, pitted or not pitted, or pitted and sliced, chopped, minced, wedged, or broken.[91] More sales of pitted ripe olives would increase the disparity between kilograms of raw olive purchases and ripe olive sales.[92]

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[87] Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), pp. 5-6. Guadalquivir argued that the USDOC should use its reported sales during the period of investigation as a proxy for its purchases of raw olives used to produce ripe olives.

[88] Aceitunas Guadalquivir S.L.U. Ministerial Error Comments for the Final Determination (Exhibit EU-70), p. 4.

[89] Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), p. 5.

[90] Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), pp. 5-6.

[91] Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), pp. 5-6.

[92] Information on the record showed that sales of pitted ripe olives accounted for 39 percent of total sales in the United States. *See* Ripe Olives from Spain: Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as Amended: Volume I General Information and Injury

88. Second, the long shelf life of ripe olives means that ripe olives sold during the period of investigation may have been processed from raw olives purchased before the period of investigation, and that raw olives purchased during the period of investigation would not necessarily have been processed during the period of investigation.[93]

89. Third, the USDOC cited yield and loss factors.[94] Although the USDOC declined to make a yield and loss adjustment for debris and poor quality or damaged olives,[95] other yield and loss factors during when raw olives are processed into ripe olives would need to be considered and could contribute to the difference in kilograms of raw olives purchased and kilograms of ripe olives sold.

90. Accordingly, the USDOC provided a reasoned and adequate explanation for its decision to use Guadalquivir's raw olive purchase information and why the proposed alternative, Guadalquivir's sales of ripe olives, was not an appropriate proxy for this information.

Question 26 (*To the European Union*) Page 7 of the USDOC's Verification of Guadalquivir's Questionnaire Responses (Exhibit USA-22) contains the following statement: "[b]ecause Commerce requested only purchases of ripe olives, AG reported only olives purchased in acetic acid; AG did not report olives purchased in brine, because, as they explained, brine olives must become green olives" (see also paragraph 310 of the United States' first written submission). Does this statement demonstrate that Guadalquivir was initially aware that the information requested by the USDOC to be included in the responses to the 4 August 2017 questionnaire was limited to purchases of raw olives to be processed into ripe olives? How can this statement be reconciled with the European Union's position that Guadalquivir's reported purchase volume included the company's total purchases of raw olives, regardless of the processed olive product for which the raw olives were used?

Response:

91. This question is addressed to the EU.

Question 27 (*To the United States*) To the extent that Guadalquivir's reported purchases of raw olives included purchases of *all* olives and not just olives that ultimately became ripe

(Exhibit EU-55), p. 19. Additionally, during the period of investigation, a sizeable proportion of ripe olives imported into the United States from Spain were without pits, whether whole, sliced, chopped, minced, wedged, or broken. *See* Ripe Olives from Spain: Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as Amended: Volume I General Information and Injury (Exhibit USA-32), Exhibit I-6C.

[93] Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), pp. 5-6.

[94] Ripe Olives from Spain: Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation (Exhibit EU-69), pp. 5-6.

[95] *See* Final Issues and Decision Memorandum, pp. 72-73 (Exhibit EU-2).

olives, did the USDOC determine a subsidy amount and corresponding countervailing duty rate that reflects the subsidy per unit of the product under investigation?

Response:

92. As explained in the preceding questions, the record evidence did not indicate that Guadalquivir reported purchases of "*all* olives and not just olives that ultimately became ripe olives" as stated in the question. Rather, the USDOC requested information regarding purchases of raw olives that were processed into ripe olives and the USDOC concluded, based on the record evidence, that this was the information Guadalquivir provided.

93. The purpose of the USDOC's investigation was to determine whether, and to what extent, countervailable subsidies during the period of investigation were provided to exporters and producers of ripe olives. The USDOC determined that countervailable subsidies provided to raw olive growers conferred countervailable benefits to the individually examined respondents that processed raw olives into ripe olives, including Guadalquivir.[96] To calculate *ad valorem* countervailing duty rates, the USDOC used a method designed to reflect the subsidy benefits, including those provided to raw olive growers, conferred upon the ripe olives that were the subject of the investigation.

94. To arrive at an accurate measurement of the subsidy benefits conferred upon ripe olives, the USDOC used the following method: first, the USDOC calculated a figure that represented the weighted-average benefit for each kilogram of raw olives; second, the USDOC multiplied the weighted-average benefit per kilogram by the volume of raw olives purchased by the respondent that were processed into ripe olives; and, third, divided that result by the respondent's sales of ripe olives.[97]

95. In other words, the USDOC's calculation involved a numerator that identified the universe of the benefit for the raw olives purchased to produce ripe olives and a matching denominator that identified the universe of sales of ripe olives to which the benefit in the numerator applies. Paragraphs 302 and 303 of the U.S. first written submission provide a more detailed description of the calculation method.[98]

[96] *See* Final Issues and Decision Memorandum, pp. 21-24 (Exhibit EU-2); *see also* Preliminary Decision Memorandum, pp. 12-17 (Exhibit EU-1).

[97] *See* Final Issues and Decision Memorandum, p. 44 (Exhibit EU-2).

[98] *See US – Washing Machines (AB)*, para. 5.269 ("Within these confines, the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios, and does not specify explicitly which elements should be taken into account in the numerator and the denominator."). The United States notes, as it did in paragraph 298 of its first written submission, that the EU has not raised any of its arguments in the context of Article 14 and therefore has not properly challenged the method for determining the *ad valorem* subsidy amounts in the determination at issue.

96. In performing that calculation for Guadalquivir and the other two individually examined respondents, the USDOC relied upon the information that the respondents provided in response to the USDOC's requests for information. As explained above, the numerator of the calculation was based, in part, on the volume of raw olive purchases that were processed into ripe olives. Accordingly, the USDOC relied on raw olive purchase information that the respondents, including Guadalquivir, reported in response to the USDOC's August 4, 2017, questionnaire, which specifically requested purchase information on raw olives that were used to produce ripe olives.[99]

97. Guadalquivir's response to the August 4, 2017, questionnaire is the only information on the investigatory record regarding its raw olive purchases. As established in the U.S. first written submission[100] and explained further in the U.S. responses to questions 24 and 25 above, based on this evidence an unbiased and objective investigating authority could have concluded, as the USDOC did, that the information submitted by Guadalquivir represented its purchases of raw olives that were processed into ripe olives. Accordingly, the USDOC determined the *ad valorem* subsidy rate for Guadalquivir using the raw olive purchase information that the company reported in response to the USDOC's August 4, 2017, questionnaire.

Question 28 (*To the European Union)* In paragraph 319 of its first written submission, the United States refers to the USDOC's finding that the allegedly "correct" volume information was not on the record and that "the absence of an alternative volume of olive purchases on the record highlights that this ... was a reporting error made by the respondent, which the respondent did not alert Commerce to during the course of the investigation or prior to the issuance of the Final Determination."

a. Was the onus on the USDOC or on Guadalquivir to ensure that USDOC had the "correct" information on the record?

b. If the onus was on Guadalquivir, does this mean that the USDOC's calculation of the final subsidy rate did not violate Article VI:3 of the GATT 1994 and the other provisions of the SCM Agreement?

Response:

98. This question is addressed to the EU.

Question 29 (*To the European Union)* Paragraph 284 of the United States' first written submission draws attention to the fact that two mandatory respondents, Agro Sevilla and Angel Camacho, provided the USDOC with the requested information regarding raw olives volumes processed into ripe olives, and raw olives regardless of end-use. How should this

[99] *See* U.S. FWS, paras. 269-286.

[100] *See* U.S. FWS, paras. 307-320.

impact the European Union's claim that Guadalquivir was not given "notice" of the required information within the meaning of Article 12.1 of the SCM Agreement?

Response:

99. This question is addressed to the EU.

Question 30 (*To the European Union)* Could Guadalquivir's 22 March 2018 verification report (in particular, pages 6-9 of Exhibit USA-22) be considered as providing notice to the parties that the volume of purchases of raw olives that were processed into ripe olives was an essential fact under consideration, specifically through reference to Guadalquivir's purchases of raw olives that were processed into ripe olives?

Response:

100. This question is addressed to the EU.

Question 31 (*To the European Union)* Having the benefit of the first written submission of the United States, does the European Union agree that the USDOC disclosed that the volume of purchases of raw olives used to produce ripe olives was an essential fact under consideration within the meaning of Article 12.8 of the SCM Agreement? If not, could the European Union please elaborate its opinion.

Response:

101. This question is addressed to the EU.