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

(DS577)

U.S. RESPONSES TO FURTHER QUESTIONS FROM THE PANEL

September 8, 2020

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I. SPECIFICITY CLAIMS

a. The United States remarks that "e*ligibility* may be limited to "certain enterprises" by favoring those enterprises in the amount of subsidies they are eligible to receive, rather than whether they qualify under the program in question to receive any subsidies."[1]

i. Does this suggest that "a limit based on distinctions that differentiate the amount of subsidies that certain enterprises are eligible to receive vis-à-vis other enterprises" is a form of an *eligibility* limitation, rather than an *access* limitation?

Response:

1. The United States does not agree with the suggestion that the condition described in the question is an "eligibility limitation" rather than an "access limitation". As an initial matter, the United States does not agree that the terms "access" and "eligibility" must be mutually exclusive for purposes of Article 2.1(a) of the SCM Agreement. Nothing in the phrase "limits access" in Article 2.1(a) would exclude the possibility of an eligibility-based limitation on access to a subsidy. As explained in the U.S. response to Panel question 2, "access" means the "right or opportunity to benefit from or use a system or service." Limiting eligibility for subsidies under a program is one but not necessarily the only way that the "right or opportunity to benefit from or use" subsidies may be limited to certain enterprises. Therefore, the text of Article 2.1(a) does not restrict the form a limitation on access might take, such that the meaning of "limits access" could be read as restricted to either amount- or eligibility-based limitations.[2] If the limit is characterized as an "eligibility limitation" or an "amount limitation", for purposes of Article 2.1(a) of the SCM Agreement, if supported by positive evidence, it could "limit[] access".[3]

2. Moreover, as the United States has explained, it is possible to design a subsidy program that is broadly available, but that limits access to a component or subprogram of the broader subsidy program to certain favored enterprises.[4] For example, a program in which access is limited to certain enterprises could be merged, as a formal matter, with an umbrella program that is broadly available, thus changing the form but not the substance or operation of the original, access-limited program. The limit could be described as both amount-based (i.e., only certain enterprises may access payments derived from the component) or eligibility-based (i.e., only certain enterprises may access the component). Were the form of the umbrella program to

[1] United States' response to Panel question No. 2, para. 5 (emphasis added).

[2] *See* U.S. response to Panel question 2, paras. 4-8.

[3] *See US – Anti-dumping and Countervailing Measures (China) (AB)*, para. 413 (observing "that a limitation on access to a subsidy may be established in many different ways and that, whatever the approach investigating authorities or panels adopt, they must ensure that the requisite limitation on access is clearly substantiated on the basis of positive evidence.").

[4] U.S. response to Panel question 2, para. 5.

determine the specificity of the original, access-limited program without regard to the actual operation of the original program in law, Members could easily evade their obligations under the SCM Agreement merely by "covering" their non-compliant programs in the cloak of a broader program.

3. The following analogy may help to illustrate the point. Anyone can purchase tickets to a basketball game, and fans who purchase tickets all enjoy access to the same stadium to watch the game. However, beyond that threshold access to a seat in the stadium, the experience of ticket holders varies dramatically based on the ticket held. Those with tickets for courtside seats enjoy access to a select part of the stadium, and superior vantage point, compared to those with tickets that seat them among the rafters of the stadium. If only certain people are permitted to purchase courtside tickets, then the benefits of those tickets are not broadly available, even if everyone can purchase tickets for *some* seats in the stadium. In the same way, the granting authority may reserve to a favored group of certain enterprises a component of subsidy payments (the courtside tickets), even if in some more modest form the subsidy program is available to others beyond that favored group.

4. Therefore, contrary to the EU's suggestion that "the US seems to share the understanding that Article 2.1(a) refers to the eligibility criteria of a subsidy program,"[5] the United States does not. The EU advocates an extremely narrow interpretation of Article 2.1(a), suggesting that the phrase "limits access" can only mean "limits eligibility", and that "limits eligibility" can only mean "limits threshold eligibility for the program".[6] To support its chain of logic, the EU relies upon language that does not appear in Article 2.1(a) at all. Specifically, the EU sets forth dictionary definitions of the nouns "criterion", "condition", and "eligibility".[7] Whether or not similarities exist between these terms and the language used in Article 2.1(a) – i.e., "limits access" – the EU does not explain why these definitions permit it to substitute its preferred terms for the language actually used,[8] or why the meanings of these terms would limit an investigating authority's evaluation of a program to threshold eligibility criteria only. Therefore, the Panel should reject the EU's interpretation of Article 2.1(a) and decline to artificially limit the programs which can be found by an investigating authority to be *de jure* specific.

ii. The United States contrasts the use of terms "access" in Article 2.1(a) of the SCM Agreement, and the terms "eligibility" and "amount" in

[5] EU response to Panel question 2, para. 17.

[6] *See* EU response to Panel question 2, paras. 9-10 (concluding that "a person has a right of entering or has admission to that program because it is regarded as fulfilling the necessary criteria or qualifications to be considered for a benefit under that program, i.e he/she is eligible.").

[7] *See* EU response to Panel question 2, paras. 6-8. The EU concludes that "the eligibility criteria/conditions identify those who have access to the subsidy program and those who have not." EU response to Panel question 2, para. 9.

[8] The only apparent reason given by the EU is that the word "eligible" appears in a definition for the compound "course access". *See* EU response to Panel question 2, para. 4. Furthermore, the link drawn by the EU between "access" and "eligibility" appears to be based on a British-specific usage of the term.

Article 2.1(b) of the SCM Agreement, suggesting that the choice of the term "access" by the drafters in Article 2.1(a) means that they did not intend to confine the inquiry under Article 2.1(a) only to either "eligibility for" or the "amount of" a subsidy.[9] Please comment.

Response:

5. The United States refers the Panel to its response to Panel question 2, to which the Panel cites in the question.

b. The European Union remarks that in case an investigating authority wants to determine that a subsidy program "A" is *de jure* specific on the basis of a past program "B" that is no longer in force, the investigating authority will have to conclude, *inter alia,* that "[p]rogram B in itself is specific and explain why it reached that finding".[10] In contrast, the United States appears to believe it was not necessary for the USDOC to reach a separate *de jure* specificity determination on the Common Organisation of Markets in Oils and Fats (COMOF) programme.[11] Is there a basis in the text of Article 2.1 of the SCM Agreement (or any other relevant provision) to support either the European Union's or United States' position?

Response:

6. The text of Article 2.1(a) refers to "the legislation pursuant to which the granting authority operates". As explained in the U.S. response to Panel question 5, "the legislation" includes any and all legal instruments pursuant to which the granting authority operates.[12] An investigating authority is not restricted to evaluating one type of legal instrument only, and "the legislation" pursuant to which the granting authority operates may include an instrument that, while no longer itself in force, nonetheless affects how the granting authority operates under the law in effect.[13]

7. Furthermore, nothing in Articles 2.1 or 2.1(a) suggests that, for each legal instrument that is part of "the legislation pursuant to which the granting authority operates," the investigating authority must make a separate specificity finding. Rather, the text of Article 2.1(a) refers to

[9] United States' response to Panel question No. 2, para. 6.

[10] European Union's response to Panel question No. 4, para. 34.

[11] United States' response to Panel question No. 5, para. 21.

[12] U.S. response to Panel question 5, para. 21.

[13] U.S. response to Panel question 5, para. 20.

"the legislation . . . [which] explicitly limits access . . . ."[14] The explicit limit on access must be expressed in "the legislation". Thus, the specificity determination under Article 2.1(a) will concern "the legislation" rather than every component part of the set of laws pursuant to which the granting authority operates. Were a separate finding needed for each separate instrument that together form the relevant subsidy program, none of those findings would reflect the actual legal operation of the program, which only could be determined by evaluating the set of laws operating together.

8. As explained in the U.S. response to Panel question 5, Article 2.1 requires a specificity determination for the subsidy defined in Article 1.1.[15] Under Articles 1.1(a) and (b), that subsidy is the one for which there was a financial contribution and a benefit was conferred. Although the investigating authority must clearly substantiate its determination based on positive evidence, the text does not require any supplementary specificity determinations apart from the one identified in Articles 1.1, 2.1, and 2.1(a).

9. In this way, the drafters' use of the term "the legislation" reflects a commonsense understanding of how laws and regulations operate – namely, that they may operate in tandem with other laws and regulations (e.g., by incorporating by reference). To understand "the legislation pursuant to which the granting authority operates," it may be necessary to look beyond the four corners of one legal instrument which may refer to, rather than restate, the conditions of another legal instrument.

10. The EU appears to share the U.S. understanding that "the legislation" could include a legal instrument that is no longer in force and could include more than one legal instrument.[16] However, the EU also argues that "a past programme (whose legislation is no longer in force) cannot serve, *by itself*, as a basis for a de jure specificity determination."[17] Whether or not the EU's elaboration is correct, it does not reflect the USDOC's determination. Specifically, the USDOC took into account the Oils and Fats Program to the extent that it, through references in the later SPS Program and BPS Programs, continued to shape the eligibility criteria governing access to a discrete component of subsidy payments under those later programs. The USDOC neither considered the Oils and Fats Program by itself nor to the exclusion of the other relevant legal instruments (i.e., the SPS Program and the BPS Programs).[18] To the contrary, as described in response to question I.c below, the USDOC considered the interrelation of the Oils and Fats

[14] Emphasis added.

[15] U.S. response to Panel question 5, para. 21.

[16] *See* EU response to Panel question 4, para. 30.

[17] *See* EU response to Panel question 4, para. 30 (emphasis original).

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

Program with the SPS Program and BPS Programs, which converted olive-specific subsidies into a discrete component of the entitlement value.[19]

c. The United States suggests that "[F]or purposes of specificity under Article 2.1(a) [of the SCM Agreement], the relevant group of enterprises is the holders of entitlements whose value derived from the Oils and Fats Program, whether olive growers or not".[20] How is such characterization evident from the investigation record and how is this compatible with the USDOC's finding the SPS and BPS programmes are de jure specific to olive growers?

Response:

11. As the United States explained in response to Panel questions 6 and 7, the "certain enterprises" for purposes of Article 2.1(a) of the SCM Agreement were holders of entitlements whose value derived from the Oils and Fats Program.[21] That finding is evident in the USDOC's preliminary and final determinations and consistent with the finding that SPS Program and BPS Programs are specific to olive growers. Specifically, as detailed below, the USDOC identified that (i) the Oils and Fats Program conferred subsidies based on historic olive production and (ii) the SPS Program and BPS Programs preserved the conditions that limited access to those subsidies as a discrete component of entitlement payments, whether the holders of those entitlements continued olive production or replaced that production.

12. In its final determination, the USDOC encapsulated its *de jure* specificity finding as follows: "the annual grant amounts provided under [the BPS Programs] are directly related to, and continue to retain the *de jure* specificity of, the grants provided to olive growers under" the Oils and Fats Program.[22]

13. In its preceding explanations, the USDOC explained precisely how the BPS Programs "are directly related to" and "continue to retain the *de jure* specificity of" olive-specific subsidies under the Oils and Fats Program. On pages 33-36 of its final determination, the USDOC outlined the steps through which the conditions that limited access to olive-specific Oils and Fats Program subsidies were incorporated as a discrete component of the "entitlements" developed under the SPS Program and BPS Programs.[23] Specifically, the USDOC explained how the entitlement values were derived from using historic information (i.e., from the 1999-2002 reference period). The regional data used to generate the "basic payment entitlement" under the

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

[20] United States' response to Panel question No. 6, para. 25.

[21] U.S. response to Panel questions 6 and 7, paras. 22-28.

[22] Final Issues and Decision Memorandum (Exhibit EU-2) p. 36.

[23] *See also*, U.S. FWS, paras. 46-54 (describing the link between the historical production information under the Oils and Fats Program and the

BPS Programs included "the area in hectares, the types of crops, and the volume of production during the period 1999 to 2002 or 2000 to 2002, and the amount provided under the annual grant-to-farmer program for those same periods."[24] Similarly, under the SPS Program, "the amount of each farmer's payment was calculated as a percentage of the average annual grant payments previously provided over a reference period" (i.e., 1999-2002 for olive-specific subsidies under the Oils and Fats Program).[25]

14. Thus, as the USDOC found, under the SPS Program and BPS Programs, a farmer could hold an entitlement with a component based on historic olive production regardless of whether or if the land was later switched to a different use.[26] The USDOC was clear on this point: "the amount of the payment is dependent on the annual activation of the entitlement, and is not dependent on the type or volume of crop produced."[27]

15. The USDOC's analysis involved multiple steps and reflects the complexity of the program designed by the EU and the Government of Spain ("GOS"), which relies on the interoperation of three different subsidy regimes and historic production data. While the EU would have the Panel find that the USDOC should have ignored the complex inner-workings of the EU's agricultural subsidies program, as the USDOC demonstrated in its determinations, a close examination of that complexity confirms the *de jure* specificity of the BPS Programs.

d. The United States remarks that "certain enterprises" within the meaning of Article 2.1 of the SCM Agreement are those "whose entitlement amounts were derived from the annual grants during the Oils and Fats Program reference period"[28], "whether olive growers or not"[29]. The United States also remarks that "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*."[30] Could the United States explain whether the "certain enterprises" within the meaning of Article 2.1 of the SCM Agreement are the same as the "group of enterprises" identified by the USDOC? If possible,

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

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

[26] The United States has previously explained why the USDOC's determination did not depend on "coupled" support, a consideration absent from Article 2.1(a) of the SCM Agreement. *See, e.g.*, U.S. response to Panel question 9, paras. 33-39.

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

[28] United States' response to Panel question No. 7, para. 27.

[29] United States' response to Panel question No. 6, para. 25.

[30] United States' response to Panel question No. 7, para. 29 (emphasis added).

kindly also use the following examples to illustrate the United States' position.

Response:

16. For its *de jure* specificity finding, the "certain enterprises" identified by the USDOC were those enterprises eligible for entitlement payments a component of which was based on subsidies received under the Oils and Fats Program.[31] Those certain enterprises are the group of enterprises identified by the USDOC. The text excerpted above referred to "the group of enterprises . . . [that] satisfied the eligibility criteria during the reference period of the Oils and Fats Program" because those criteria continued to determine access to subsidies under the SPS Program and BPS Programs. However, as explained in the USDOC's final determination, the conditions that limited access for olive-specific subsidies under the Oils and Fats Program took the form of a discrete component of the entitlements established under the SPS Program and BPS Programs.[32]

17. The United States addresses the two examples below to elucidate further the "certain enterprises" (or "group of enterprises") identified by the USDOC. But before doing so, it is important to note that the program under investigation was found to be *de jure* specific under Article 2.1(a), rather than *de facto* specific under Article 2.1(c). Therefore, the usage or non-usage of the program by any particular enterprise or industry, while possibly relevant to the calculation of benefit, is not relevant under Article 2.1(a).

i. Example 1

A farmer ("Farmer A") who has been growing olives since 1990, and still grows olives today, obtained support under the COMOF programme. That support was subsequently converted into a payment entitlement under the SPS programme and was also a payment entitlement under the BPS programme.

In 2016, Farmer A transferred his payment entitlement ("Payment Entitlement X") to another farmer.

Is Farmer A one of the "certain enterprises" within the meaning of Article 2.1 of the SCM Agreement?

Is Farmer A included in the "group of enterprises" identified by the USDOC?

Response:

[31] The response to question I.c underlines where that determination is expressed in the text of the Final Determination.

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

18. If Farmer A received olive-specific subsidies under the Oils and Fats Program, Farmer A could access the discrete component of the SPS Program and BPS Programs that was derived from the Oils and Fats Program. This would as a matter of law place Farmer A (and any transferee) among the certain enterprises under Article 2.1(a) identified by the USDOC. However, having transferred that entitlement component to another farmer, Farmer A would not have actually received subsidies under these programs and would not have factored into the benefit analysis.

ii. Example 2

Another farmer ("Farmer B") rears cows. He started rearing cows in 2016 and he received "Payment Entitlement X" from Farmer A in 2016.

Is Farmer B one of the "certain enterprises" within the meaning of Article 2.1 of the SCM Agreement?

Is Farmer B included in the "group of enterprises" identified by the USDOC?

Response:

19. The USDOC was not presented with the above hypothetical, and the United States cannot speculate as to the finding the USDOC would have reached. As explained in response to question I.d above, the USDOC found that access to subsidies was limited based upon access to olive-specific subsidies under the Oils and Fats Program.

20. That in the interim such access could be maintained or transferred in no way detracts from the USDOC's findings. It simply reflects the manner in which the EU and GOS chose to embed the conditions that limited access to olive-specific subsidies under the Oils and Fats Program in entitlement payments under the SPS Program and BPS Programs, rather than to confer the payments under a standalone Oils and Fats Program.

21. As explained in the U.S. first written submission[33] and responses to the Panel's questions,[34] whether or not subsidies are tied to production of a particular product is irrelevant. Article 2.1(a) of the SCM Agreement simply requires that the granting authority or legislation limit access to "certain enterprises". Nothing in the text requires that those enterprises be delineated based on production of a particular product, let alone that it be based on production of a particular product during a particular time period.

e. The United States remarks that "a determination that a subsidy program is *de jure* specific to "certain enterprises" only, even though other enterprises

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

[34] U.S. response to Panel question 9, paras. 33-39.

could receive some amount of subsidy payments under the program, is not necessarily inconsistent with Article 2.1(a) of the SCM Agreement" because "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)."[35] Is such an approach only possible when making a *de facto* specificity determination under Article 2.1(c) of the SCM Agreement?

Response:

22. No. In making the submission to which the Panel's question refers, the United States was not referring to the effects of the subsidy as a matter of fact, but to the legal operation of the subsidy according to the relevant EU law. As a matter of EU law, while other enterprises may receive benefits under the SPS Program and BPS Programs, only holders of entitlements whose value derived from the Oils and Fats Program may obtain certain amounts of those subsidies. While the EU would have the Panel focus on a single part of the EU legislation only in order to insulate itself from a finding of *de jure* specificity, as the United States explained in response to the above question, the SPS Program and BPS Programs incorporate by reference the limitations found in other legal instruments and which have the effect of limiting access to the subsidy in question. Therefore, because the limitation operates as a matter of law under the EU legislation, the USDOC appropriately made a finding of *de jure* specific under Article 2.1(a) of the SCM Agreement.

II. "PASS-THROUGH" OF BENEFIT CLAIMS

a. The European Union remarks that "the negotiating history has been of little relevance in the interpretation of WTO agreements" as "[t]here is no official negotiating history of the WTO agreements and the various country-specific negotiating proposals are often conflicting as countries pursued their own particular economic interests".[36] Moreover, the European Union submits that the negotiating history referred to by the United States "contains nothing that would speak against" the use of a price comparison to undertake a pass-through analysis.[37] Please comment on the relevance of these statements to the European Union's claims.

Response:

23. Article 3.2 of the DSU directs WTO adjudicators to interpret provisions of the covered agreements according to customary rules of interpretation under international law, which are

[35] U.S. response to Panel question 8, para. 31.

[36] EU response to Panel question 14, para. 86.

[37] EU response to Panel question 14, para. 87.

reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[38] That is, the provisions of the WTO Agreements must be interpreted based on the ordinary meaning of their terms, in context, and in light of the object and purpose of the Agreement. As reflected in Article 32 of the Vienna Convention, the Panel can look to the negotiating history of the provision to confirm the interpretation reached. As the United States has explained,[39] nothing in the text or context of the GATT 1994 or the SCM Agreement sets out a particular methodology for examining pass-through in the way the EU suggests.[40] Therefore, the Panel need not look to the negotiating history at all for purposes of resolving this issue. However, as the United States has also explained, the negotiating history of Article VI:3 of the GATT 1994 and the SCM Agreement support the conclusion that no specific methodology is required with respect to a determination of the existence of pass-through.

24. Contrary to the suggestion in the quotation cited in the Panel's question, the United States has not argued that the SCM Agreement *prohibits* the use of a price comparison when conducting a pass-through analysis. Rather, the crux of the EU's argument is that the USDOC was *required* to conduct a price comparison in order to find that a benefit conferred to raw olives also was conferred to downstream ripe olive processors. The EU has failed to demonstrate the existence of any such requirement, because none exists in the GATT 1994 or SCM Agreements.

b. The European Union submits that it "does not exclude that in the context of a price comparison, certain presumptions may be applicable in certain circumstances, e.g. to determine the amount of pass-through". What are examples in which such presumptions might apply, what are those presumptions, and why doesn't and/or couldn't that apply to the situation at hand?

Response:

25. As the United States argued throughout its first written submission and responses to the Panel's first set of questions to the Parties, the USDOC did not make any presumptions in its application of Section 771B, nor does Section 771B require the USDOC to make a presumption regarding benefit received by all agricultural products. Section 771B requires the USDOC to determine whether certain economic circumstances exist with respect to a processed agricultural product such that benefits provided to the raw agricultural product will be determined to be provided to the processed product. Therefore, the United States does not consider the issue of

[38] WTO adjudicators have often noted in commentary of the International Law Commission that interpretation should give meaning and effect to the terms employed by the parties, and ought not to reduce phrases or clauses to inutility. *See, e.g., US – Gasoline (AB), para. 23*.

[39] U.S. FWS, Section IV.A.

[40] U.S. response to Panel question 14, para. 48.

whether presumptions may be appropriately made under other circumstances to have relevance for the resolution of the claims brought by the EU.

c. Please comment on the European Union's statement that the various softwood lumber disputes confirm that agricultural products are in no respect different from other types of products when it comes to pass-through. Is there any basis for this statement, either as discussed in the softwood lumber disputes, or otherwise?

Response:

26. The EU's statement regarding the softwood lumber disputes are of no relevance, in particular, that the "softwood lumber disputes also confirm that, contrary to US arguments, agricultural products are in no respect different from other types of products when it comes to pass-through".[41] The United States also notes that the EU does not cite to any specific passage from any of the panel or Appellate Body reports from the softwood lumber disputes. However, as the EU notes, those disputes concerned the factual issue of "whether the prices charged [between input producer and unrelated processor] were at arm's-length, and hence whether any benefit passed through."[42] In contrast, in this dispute, the EU suggests that the GATT 1994 and SCM Agreement require that a price comparison is the only "proper examination" of whether a benefit received by a raw agricultural product can be determined to be provided to the processed agricultural product.

27. The United States has not argued, nor does the EU seem to suggest, 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. In enacting Section 771B, the United States Congress determined that as commodity products, price comparison may not be appropriate when analyzing whether a processed product has received a benefit. 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.

d. The United States submits that "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, according to the United States, the USDOC is not required to apply Section 771B in every investigation concerning raw agricultural products. Please comment on the relevance of the United States' position in regard to the European Union's "as such" claim.

[41] EU response to Panel question 14(b), para. 96.

[42] Panel Report, *US – Softwood Lumber III*, para. 7.74.

Response:

28. The United States refers the Panel to its response to Question 16 of the Panel's first set of questions.[43]

III. Injury

a. The European Union remarks that the United States' arguments concerning packaging and processing requirements: (i) are irrelevant to the question of supply side substitutability; (ii) would be in contradiction with the United States' determinations; and (iii) constitute impermissible *ex post* arguments. The European Union further remarks that the underlying references from the investigation record that the United States uses to support those arguments either do not speak to the relevant issue or are taken out of the context.[44] Please comment.

Response:

29. The EU's remarks were in response to paragraph 237 of the U.S. first written submission, and take the United States' statements there out of context. Neither the United States' comments in that submission nor the underlying Commission determination addressed what the EU terms as "supply side substitutability."[45] Rather, as explained in the U.S submissions, the United States was merely explaining that the Commission emphasized certain conditions of competition that were reflected in the record of the underlying investigations and on which the Commission made specific findings, namely that:

- there were distinct channels of distribution: ripe olives are generally sold to distributors, retailers, and institutional/food processors;[46]
- each channel of distribution involved unique purchasers;[47] and

[43] U.S. response to Panel question 16.

[44] EU response to Panel question 21, paras. 105-114.

[45] Nothing in the claimed and relevant provisions of the AD Agreement (Article 3) or of the SCM Agreement (Article 15), speak to an investigating authority's analyses of "supply side" versus "demand side" substitutability. While the EU cites *EC – Large Civil Aircraft (AB)*, paras. 1117-1129 (EU Response to Panel Questions, n. 72), it overlooks that the substitutability discussion there pertained to a different part of the SCM Agreement and differently worded provisions. That is, *Aircraft* addressed substitutability pertaining to "the displacement or impedance of goods" in certain geographic markets as that specific language is used in Articles 6.3(a) and 6.3(b) of the SCM Agreement. These two provisions do not apply to domestic injury investigations conducted under SCM Agreement Article 15 and are outside this Panel's terms of reference.

[46] USITC Pub. 4805 (Exhibit EU-5) at 14-15.

[47] USITC Pub. 4805 (Exhibit EU-5) at 14-15.

- there were specific types of packaging associated with specific channels of distribution. Consequently, data on pricing products were collected on this basis.[48]

30. Regarding the "processing requirements" that the EU claims are absent from the record, the Commission found in its analysis of conditions of competition that ripe olives sold in the U.S. market are subject to mandatory marketing standards regulated by the U.S. Department of Agriculture.[49] The Commission report indicates that these marketing standards set distinct processing requirements for ripe olives prepared for canning (e.g., processed into whole or pitted olives) and limited sizes (e.g., processed as broken, sliced, wedged or chopped olives).[50]

31. The United States argues that the distinctions between the channels of distribution were not an artificial construct, as the EU contends. Instead, they were based on marketplace realities: that different customers purchased products in different types of packaging, and that consequently the channels of distribution the Commission identified corresponded to economically distinct segments of the market. This argument flows directly from the findings specified in the USITC determinations. There is nothing inconsistent or ex post about the United States responding to the EU's claims with a detailed explanation of the challenged Commission's findings.

32. It also bears note that the EU's efforts to challenge the Commission's discussion of market segments run directly contrary to arguments made by respondent entities in the underlying ripe olives investigations, including the Government of Spain (GOS). Indeed, respondents, and specifically GOS, argued in the underlying USITC investigation that the U.S. market was segmented across channels of distribution.[51] Thus, it is the EU, not the United States that is now making post hoc – and inconsistent – arguments to the Panel.

33. Moreover, the EU's arguments appear to contradict findings that the European Commission has made in its own antidumping or countervailing duty determinations. For example, in its antidumping investigations of cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation, the European Commission appears to have defined market segments on the basis of conditions of competition that include "direct competition from imports."[52] Likewise, in other investigations the European Commission undertakes an analysis of a subsector of the domestic market, i.e., the petitioning or cooperating

[48] USITC Pub. 4805 (Exhibit EU-5) at 19-20 n. 122.

[49] USITC Pub. 4805 (Exhibit EU-5) at 17.

[50] USITC Pub. 4805 (Exhibit EU-5) at I-11.

[51] *See* Government of Spain's Prehearing Brief (Exhibit USA-4) at 10-11.

[52] Commission Regulation (EU) 2016/181 of February 10, 2016 imposing a provisional anti-dumping duty on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation, O.J. L. 37, 12.2.2016, p. 1–39 (Exhibit USA-33), at Rec. 101. This regulation is among the EU measures under challenge by the Russian Federation before the WTO panel in the ongoing DS521 proceeding.

domestic producers, and may, in order to facilitate a "meaningful analysis and evaluation" of the relevant markets, undertake a segmented evaluation of, inter alia, "sales volume and sales prices on the Community market, market share, growth, profitability, return on investment, cash flow and export volume and prices."[53] In other words, the European Commission has itself engaged in a similar type of segmented analyses of volume, price, and impact that it now argues before this Panel are WTO-inconsistent.

b. The European Union remarks that an investigating authority's consideration of volume and price effects under Article 15.2 must provide "a <u>meaningful basis</u> for subsequently determining whether the subsidized imports are causing injury to the domestic industry within the meaning of Article 15.5 of the SCM Agreement".[54] Is such approach warranted and did the USITC satisfy this requirement in the investigation at issue?

<u>Response:</u>

34. The EU made these remarks in response to Panel question 22. The EU made the same assertion in its first written submission, that is, that the Commission did not conduct a price effects analysis for the entire industry. The United States has already rebutted the EU's arguments in this regard, and shown that it did in fact conduct an analysis reflecting the price effects of subject import prices on the U.S. industry as a whole.[55]

35. Nothing the EU adds in responding to Panel question 22 undermines the propriety of the Commission's findings. Nor does the EU's response address the points that the United States made in its rebuttal. Instead, the EU alludes to requirements that do not exist in the AD or SCM Agreements. For example, the EU continues to accuse the United States of improperly analyzing "volume effects."[56] To emphasize the point made in the United States' prior submissions, there is nothing in Article 3.2 of the AD Agreement or Article 15.2 of the SCM Agreement addressing volume "effects."[57]

[53] *See. e.g.*, Commission Regulation (EC) No 896/2007 (July 27, 2007) imposing a provisional anti-dumping duty on imports of dihydromyrcenol originating in India, OJ L 196, 28.7.2007, p. 3–19, at Recs. 30-33. (Exhibit USA-34); Commission Regulation (EC) No 1611/2003 (Sept. 15, 2003), imposing provisional antidumping duties on certain stainless cold-rolled flat products originating in the United States (Exhibit USA-35).

[54] EU response to Panel question 22, para. 119 (underlining original).

[55] U.S. FWS at paras. 209-214; U.S. response to Panel question 22, para. 68.

[56] EU response to Panel question 22, para. 118.

[57] U.S. FWS, para. 179; U.S. response to Panel question 20, para. 63 n.55.

36. In addition, the EU's citation from an Appellate Body report[58] which discusses the term "meaningful basis" does not support an argument that there are unstated requirements in Article 15.2 that the United States has failed to satisfy. Moreover, when read in context, the passage that the EU has cited from the report does not support the EU's claims. Rather, that passage indicates that an investigating authority cannot ignore pricing data in the record – specifically, data that indicate overselling of the domestic like product by the dumped imports.[59] As the United States has demonstrated in its first written submission, the Commission did not do this – it considered all the pricing data in the record in its underselling analysis.[60] In addition, in the cited passage, the Appellate Body specifically noted that an authority may take into account "the relative market share of each product type." This is precisely what the Commission did in the underlying determinations, where it found that underselling of the products sold in the retail segment of the U.S. market led the subject imports to take market share from the domestic industry in that segment.[61]

c. The United States remarks that, in paragraph 204 of US – Hot Rolled Steel, "[t]he 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" and that this question does not arise in the present dispute. Please comment.

Response:

37. The United States made this remark in response to a Panel question concerning whether an investigating authority could "waive" its obligation to objectively examine the industry as a whole when undertaking an examination of one part of the industry. As the United States explained in its answer, the Panel need not reach that question in this dispute, given that the USITC did in fact examine the overall U.S. ripe olive market as well as each segment of that market.[62]

IV. Calculation of Guadalquivir's Subsidy Rate

(a) The European Union refers to the language "resubmit" and "correct" in the USDOC's 27 September 2017 letter to respondents in the ripe olives investigation. Does this specific language support the European Union's view that Question 6 of the 4 August 2017 questionnaire should reasonably have been understood to ask

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

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

[60] U.S. FWS, paras. 210-212.

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

[62] U.S. response to Panel question 23, paras. 71-72.

for information concerning all raw olive purchases regardless of product end-use, and not just raw olives processed into subject merchandise?

Response:

38. The language in the USDOC's September 27 letter does not support the EU's interpretation. Specifically, as explained in the U.S. first written submission, the USDOC's September 27, 2017, letter did not withdraw or alter the request in question 6 of its August 4, 2017, letter. Rather, the USDOC's September 27, 2017, letter requested raw olive purchase information that was in addition to and distinct from that previously requested by the USDOC and reported by the respondent companies.[63] The USDOC's August 4, 2017, letter requested information on purchases of raw olives that were used to produce ripe olives;[64] its September 27, 2017, letter requested information on purchases of all raw olives regardless of use.[65] Any unbiased and objective investigating authority could have concluded that, in response to the August 4 request for purchase information for raw olives used to produce ripe olives, Guadalquivir supplied that information.

39. The EU's argument regarding the words "resubmit" and "correct" in the USDOC's September 27, 2017, letter cannot be reconciled with the nature of the request and the context in which those words were used. The USDOC's September 27, 2017, letter stated:

> In addition, the respondents' counsel informed the Department that the information regarding the volume and value of raw olives supplied to Agro Sevilla by its member cooperatives and other suppliers was limited to olives used in the production of the ripe olives subject to this [countervailing duty] investigation. We now request that Agro Sevilla resubmit the information regarding its suppliers of raw olives to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used. If it is necessary to correct the reporting in this manner for the other two mandatory respondents, we request that the information be resubmitted.[66]

[63] U.S. FWS, paras. 282-286.

[64] U.S. FWS, paras. 269-278; U.S. response to Panel question 25, paras. 86-89. *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).

[65] U.S. FWS, paras. 282-286.

[66] Ripe Olives from Spain Countervailing Duty Investigation: Clarification of the Department's September 26, 2017 Letter (Exhibit EU-60), p. 2.

The USDOC asked the respondent companies to "correct" and "resubmit" their purchase volume information "to include the volume and value of all raw olives purchased from each supplier, regardless of the processed olive product for which the raw olives were used."[67] By asking the respondent companies to include this information in their revised and resubmitted exhibits, the USDOC was requesting that the respondent companies supplement – not replace – the previously reported information on purchases of raw olives that were used to produce ripe olives.

40. The EU's emphasis of only select words in the request is similarly at odds with the revised submissions in response to the September 27, 2017, letter, that the USDOC received from the other two mandatory respondents, Agro Sevilla and Angel Camacho. Were the EU's parsing correct, in response to the USDOC's September 27, 2017, letter, the companies would have revised their earlier submissions by (i) providing information on purchases of all raw olives without regard to use and (ii) removing the previously reported information on purchases of raw olives that were used to produce ripe olives. Neither company did so.

41. Instead, Agro Sevilla and Angel Camacho each submitted revised exhibits that delineated each company's: (i) purchases of raw olives that were processed into ripe olives, (ii) purchases of raw olives that were processed into other olive products, and (iii) total purchases of raw olives without regard to use.[68] As the USDOC requested, the revised exhibits provided the additional information requested in the September 27, 2017, letter, and included the information provided in response to the USDOC's August 4, 2017, letter. The revised exhibits demonstrate that the USDOC's request for additional information in the September 27, 2017, letter was understood by the respondent companies that resubmitted their raw olive purchase information in the way the United States has described. Therefore, the September 27 letter does not support, and in fact undermines, the EU's argument that the USDOC acted inconsistently with Article 12.1 by failing to notify the respondent companies that the USDOC required information on their purchases of raw olives that were processed into ripe olives.

42. Furthermore, to the extent a respondent company had any questions regarding the information it was being asked to submit, it could have consulted with USDOC officials to obtain clarification or additional guidance.[69] As explained in the U.S. first written submission,

[67] Ripe Olives from Spain Countervailing Duty Investigation: Clarification of the Department's September 26, 2017 Letter (Exhibit EU-60), p. 2 (emphasis added).

[68] Agro Sevilla's revised and resubmitted exhibits include a column labeled "Volume of Black Olives Purchased" (i.e., for purchases of raw olives processed into ripe olives), a column labeled "Volume of Green Olives Purchased" (i.e., for purchases of raw olives processed into other olive products), and a column labeled "Volume of Olives Purchased" (i.e., for purchases of raw olives without regard to the processed olive product). *See* Agro Sevilla Revised Olive Sourcing Data (Exhibit EU-65 (BCI) and Exhibit EU-79). Angel Camacho's revised and resubmitted exhibits include a column labeled "Quantity Raw for Ripe" (i.e., for purchases of raw olives processed into ripe), a column labeled "Quantity Raw for No Ripe" (i.e., for purchases of raw olives processed into other olive products), and a column labeled "Total Quantity Received" (i.e., for purchases of raw olives without regard to the processed olive product). *See* Angel Camacho Revised Olive Sourcing Data (Exhibit EU-64 (BCI) and Exhibit EU-78).

[69] General instructions were provided to each of the respondent companies at Attachment II of the USDOC's August 4, 2017, letter. *See* Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58). These instructions encouraged respondent companies to contact the USDOC should any question arise during the

Guadalquivir neither submitted a response to the USDOC's September 27, 2017, letter nor sought clarification or additional guidance.[70]

(b) The United States submits that Guadalquivir's response to the USDOC's 21 December 2017 letter did not explicitly indicate whether the volume of raw olive purchases that were reported included all raw olive purchases regardless of use. The United States submits that a question in the 21 December 2017 letter specifically asked Guadalquivir to address whether this was the case. The United States further submits that there is no indication that purchase value information was used to derive purchase volume information. Thus, according to the United States, it could be understood that olive receipts recorded in the ERP system were related to raw olives that were used to product products other than ripe olives. Please comment on the relevance of these remarks to the Panel's assessment.

Response:

43. The relevance is that, contrary to the EU's arguments, Guadalquivir did not notify the USDOC that Guadalquivir had supplied purchase information for raw olives regardless of use, rather than for raw olives processed into ripe olives – *i.e.*, what the USDOC had requested and what the other two respondents supplied. To recall, the EU has argued that this supposed notification "unambiguously shows that [the USDOC] knew that Guadalquivir's reply to the questionnaire of 4 August 2017" was not limited to raw olives processed into ripe olives.[71] The United States has explained that the record refutes the EU's characterization.[72] Moreover, even if the EU's characterization were correct (which it is not), it would not change the fact that in its August 4 letter the USDOC requested purchase information for raw olives processed into ripe olives.[73]

44. Furthermore, the characterization subsequently proved to be incorrect at verification. As further explained in the U.S. response to Panel question 4.d, the USDOC discovered additional purchases of olives at verification and learned that Guadalquivir ultimately processed them into olive products other than ripe olives and, thus, did not include them in its response to the USDOC's August 4, 2017, letter.[74] That Guadalquivir did not include purchases of olives that

investigation, including any questions regarding a request for information. *See* Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58) ("If you have questions during the course of this investigation, we urge you to consult with the officials in charge named on the cover page.").

[70] U.S. FWS, para. 284.

[71] *See* EU FWS, para.703.

[72] *See* U.S. response to Panel question 24, paras. 74-81; *see also* U.S. FWS, paras. 313-314.

[73] *See* U.S. FWS, paras. 270-285.

[74] 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

were processed into non-subject merchandise would further support the USDOC's conclusion that the purchase volume information Guadalquivir had reported represented purchases of raw olives that were used to produce ripe olives.

(c) The European Union submits that the purpose of notification of the agenda for the verification was solely to prepare for the verification visit and was not to inform interested parties of which information the investigating authority regarded as "essential" within the meaning of Article 12.8 of the SCM Agreement. Please comment on whether information in a verification report may provide a basis for identifying essential facts for purposes of Article 12.8 of the SCM Agreement.

Response:

45. As explained below, the EU's position regarding verification agendas mischaracterizes both the SCM Agreement and U.S. countervailing duty proceedings. The verification agenda (in addition to other disclosures identified in the U.S. first written submission) disclosed that the essential facts under consideration included the volume of raw olives processed into ripe olives.

46. First, as explained in greater detail in the U.S. first written submission,[75] Article 12.8 does not prescribe a particular manner for disclosure of the essential facts under consideration. It simply requires that the disclosure (i) occur "before a final determination is made", (ii) inform of "the essential facts under consideration which form the basis of a decision whether to apply definitive measures", and (iii) "take place in sufficient time for the parties to defend their interests." In interpreting the equivalent provision in the AD Agreement, a panel has observed that the obligation to disclose essential facts under consideration "may be complied with in a number of ways," including record documents "such as verification reports, a preliminary determination, or correspondence exchanged between the investigating authorities and individual exporters . . . ."[76] The EU's contention that Article 12.8 precludes disclosure by means of a verification agenda is therefore unsupported by the text of that provision.

47. Second, the EU is wrong in its assertion that "the verification agenda cannot be considered as fulfilling the obligation provided for in Article 12.8 of the SCM Agreement"

Error Allegation (Exhibit EU-69), p. 5. *See also* U.S. FWS, paras. 316-317; U.S. response to Panel question 24, paras. 80-81.

[75] U.S. FWS, para. 325.

[76] *Argentina – Ceramic Tiles*, para. 6.125. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement differ in that, under the latter, investigating authorities should inform interested Members of the essential facts under consideration in addition to interested parties.

because its purpose "lies purely and solely in the preparation of the verification visit."[77] To the contrary, the verification agenda is not so limited.[78] The verification agenda stated:

> We will verify the questionnaire responses of Aceitunas Guadalquivir submitted in this investigation to check the accuracy and completeness of the information provided. To do so, we will trace information in the responses to original source documents and to accounting records (*e.g.*, a software-based accounting system). The source documents and accounting records should be actual records kept by the company, and not documents or electronic files that were created for this investigation. Documents or electronic files created for purposes of questionnaire responses and verification may be presented at verification solely for purposes of reconciling and tracing your responses to source documents. The objective of verification, however, is to tie information already on the record to source documents and your electronic accounting systems. For more information on the source records that will need to be available for examination at verification, *see* "Summary of Source Records," below.[79]

48. Thus, the purpose of the verification agenda was to perform a spot check to test the accuracy and completeness of the information the USDOC anticipated relying upon as the basis for the final determination.[80] The verification agenda also achieves the complementary goals of efficiency and transparency, providing advance notice of the information that the USDOC will verify to ensure that all necessary company personnel and records are readily available at verification. Accordingly, the verification agenda both identifies and provides parties with notice of the information that the USDOC intends to verify (i.e., the essential facts under consideration that will be examined during the spot check).

49. The United States also addresses two more specific arguments made by the EU as to the specific disclosures in the USDOC's verification agenda. As the United States has explained, the verification agenda disclosed to parties that purchase volumes of raw olives that were used to produce ripe olives were essential facts under consideration.[81]

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[77] EU responses to Panel questions, paras. 156, 157.

[78] The EU does not explain why having as one aim the preparation of an efficient verification precludes the agenda from serving any others. *See* EU response to Panel question 31, paras. 156-57.

[79] Verification of Aceitunas Guadalquivir, S.L.U.'s Questionnaire Responses (Exhibit USA-21), p. 4.

[80] Under U.S. law, the USDOC "shall verify all information relied upon in making . . . a final determination in an investigation[.]" 19 U.S.C. § 1677m(i)(1) (Exhibit USA-36).

[81] U.S. FWS, para. 330.

50. In response, the EU incorrectly argues that the list of factual submissions that the USDOC intended to verify "does not contain any hint that the amount of raw olives processed into ripe olives could be considered an 'essential fact.'"[82] However, the USDOC stated that it was "reviewing information provided by Aceitunas Guadalquivir, its cross-owned affiliates, and its unaffiliated suppliers" and listed the factual submissions to be covered by the verification.[83] One such submission was Guadalquivir's response to the USDOC's August 4, 2017, letter, which requested information on purchases of raw olives that were used to produce ripe olives.[84] By listing Guadalquivir's response to the USDOC's August 4, 2017, letter,[85] the USDOC provided notice that the purchase volumes of raw olives that were used to produce ripe olives were essential facts under consideration. The EU does not explain why a reference to information contained in another document, as opposed to restating that information, is inadequate for purposes of the Article 12.8 disclosure obligation.[86]

51. The EU argues further that the USDOC's stated intent to examine "[t]otal quantities of raw olives used for specific types of finished products (i.e., ripe olives, other table olives, olive oil, other)"[87] "cannot meaningfully be regarded as complying with the obligations set out in Article 12.8 of the SCM Agreement."[88] However, as explained above, the purpose of the USDOC's verification was to spot check the accuracy and completeness of the essential facts under consideration. The verification agenda notified parties that the total purchases of raw olives and those purchases of raw olives used for specific types of products, such as ripe olives, were facts that the USDOC would examine during verification before determining whether to rely on that information in the final determination. The EU contends that "the explicit purpose of this part of the verification agenda was simply to 'tie' the information already reported to underlying accounting systems and information,"[89] but that is precisely the method by which the USDOC verifies the accuracy and completeness of the information that it anticipates relying upon as the basis for its final determination.

52. Because the verification agenda specifically listed Guadalquivir's response to the USDOC's August 4, 2017, letter (i.e., the submission responding to the USDOC's request for

[82] EU response to Panel question 31, para. 161.

[83] Verification of Aceitunas Guadalquivir, S.L.U.'s Questionnaire Responses (Exhibit USA-21), p. 6.

[84] *See* U.S. FWS, paras. 269-278; U.S. response to Panel question 25, paras. 86-89. *See also* Letter to Guadalquivir re: Questionnaire on Sources of Raw and Ripe Olives (Exhibit EU-58).

[85] Verification of Aceitunas Guadalquivir, S.L.U.'s Questionnaire Responses (Exhibit USA-21), p. 6 (identifying Guadalquivir's "August 14, 2017, sourcing questionnaire response" as a factual submission subject to verification).

[86] *See* EU response to Panel question 31, paras. 161-63.

[87] Verification of Aceitunas Guadalquivir, S.L.U.'s Questionnaire Responses (Exhibit USA-21), p. 8.

[88] EU response to Panel question 31, para. 164.

[89] EU response to Panel question 31, para. 164.

information on purchases of raw olives that were used to produce ripe olives), and because the verification agenda was issued with sufficient time for parties to defend their interests in written briefs and an in-person public hearing,[90] the verification agenda was one of the means by which the USDOC satisfied the Article 12.8 obligation to disclose the essential facts under consideration.

(d) The United States submits that the USDOC discovered additional purchases of olives by Guadalquivir that were not reported in response to the USDOC's 4 August 2017 questionnaire and that these additional purchases of olives were ultimately processed into green olives (non-subject merchandise). Does this support the USDOC's assessment that Guadalquivir originally reported the volume of olives purchases that were used to produce ripe olives and not other non-subject merchandise?

Response:

53. The discovery of unreported olive purchases supports the USDOC's assessment. During verification, the USDOC inquired about these purchases, which Guadalquivir did not report in response to the USDOC's August 4, 2017, letter. In response, as summarized in the verification report, Guadalquivir explained why they were not included in the reported raw olive purchase information:

> However, [Guadalquivir] reminded Commerce that it has only reported purchases of raw olives and not purchases of any "semi-processed" or "processed" olives that are to become or already are green olives. For example, although purchases of what [Guadalquivir] defined as a "semi-processed" olive were included if they ultimately became ripe olives, they were not included if they ultimately became green olives. Thus, [Guadalquivir] explained that because Commerce requested only purchases of ripe olives, [Guadalquivir] reported only olives purchased in acetic acid; [Guadalquivir] did not report olives purchased in brine, because, as they explained, brine olives must become green olives . . . . .[91]

54. Guadalquivir stated that it "reported only olives purchased in acetic acid" and "not . . . olives purchased in brine" because "brine olives must become green olives" and the USDOC "requested only purchases of ripe olives."[92] "Ripe olives" here is referring to raw olives used to produce ripe olives, which is clear because the passage is discussing raw olive purchases.

[90] U.S. FWS, para. 332.

[91] Verification of the Questionnaire Responses of Aceitunas Guadalquvir, S.L.U. (Exhibit USA-22), p. 7.

[92] Verification of the Questionnaire Responses of Aceitunas Guadalquvir, S.L.U. (Exhibit USA-22), p. 7.

Guadalquivir also stated that "purchases of what [it] defined as a 'semi-processed' olive were included if they ultimately became ripe olives, [but] they were not included if they ultimately became green olives."[93]

55. Guadalquivir's explanation thus indicated two things. First, by affirming that the USDOC "requested only purchases of ripe olives," Guadalquivir acknowledged that the USDOC's August 4, 2017, letter requested Guadalquivir's purchases of raw olives that were used to produce ripe olives. Second, by stating that it did not report brine and "semi-processed" olives that ultimately became green olives (i.e., not ripe olives), Guadalquivir indicated that the purchase volume information submitted in response to the USDOC's August 4, 2017, letter included only raw olives used to produce ripe olives.

56. Thus, Guadalquivir's explanation for why it had not reported certain olive purchases supported the conclusion that the purchase volume information submitted in response to the USDOC's August 4, 2017, letter represented Guadalquivir's purchases of raw olives that were used to produce ripe olives and did not include raw olives used to produce other olive products.

(e) The United States remarks that there are three reasons why Guadalquivir may have had purchased a volume of raw olives greater than the volume of ripe olives that it sold (remarking that ripe olives may not contain pits which may account for a weight disparity; that olives sold during the POI may have been processed from raw olives purchases before the POI; and that yield and loss factors may account for a weight disparity). Is there any evidence on record to suggest that these factors would not have been relevant to the assessment of Guadalquivir's raw olive purchases?

Response:

57. The record evidence supported the USDOC's explanation for why during the period of investigation there could have been a difference between the volume of raw olives purchased and the volume of ripe olives sold. The USDOC's ministerial error memorandum[94] and the U.S. response to Panel question 25 provide examples of that evidence.

V. Other Matters

a. Is there a difference in the standard of review in a dispute settlement proceeding relating to the decisions of an investigating authority with respect to the Anti-Dumping Agreement on the one hand, and one with respect to Part V of the SCM Agreement on the other hand, in light of the presence of a provision like Article 17.6 in the former but not the latter?

[93] Verification of the Questionnaire Responses of Aceitunas Guadalquvir, S.L.U. (Exhibit USA-22), p. 7.

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

Response:

58. To the extent the DSU sets out an applicable standard of review, it is reflected in Article 11 of the DSU on the "Function of Panels". Article 11 of the DSU provides that:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

59. In hortatory terms ("should"), Article 11 of the DSU therefore reflects the expectation of WTO members that a Panel make an objective assessment of claims relating to the facts of the case, which is an investigating authority's determination setting out its evaluation of the facts on the record. As explained below, in a dispute concerning the SCM Agreement claims against a countervailing duty, a panel's function is to assess whether the investigating authority properly established the facts and evaluated them in an unbiased and objective manner.

60. In a dispute brought under the AD Agreement against an antidumping duty, Article 17.6 of the AD Agreement sets out a panel's responsibility to review the investigating authorities' establishment and evaluation of the facts, or assessment of the facts.[95] Panels and the Appellate Body have considered the relationship between Article 17.6 of the AD Agreement and Article 11 of the DSU, noting that "it is inconceivable that Article 17.6(i) should require anything other than that panels make an objective 'assessment of the facts of the matter'. In this respect, we see no 'conflict between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU."[96] Article 17.6(ii) provides that in making its objective assessment under Article 11 of the DSU, a panel should find that a measure is in conformity with the AD Agreement if it is based upon a permissible interpretation of the AD Agreement. Again, this does not conflict with Article 11 of the DSU, but flows from the function of a panel to make an objective assessment.

61. There is no text in the SCM Agreement indicating and no reason to apply a different approach, or degree of scrutiny, with respect to a dispute bringing claims against a countervailing duty. What constitutes an "objective assessment" by a panel under DSU Article 11 is articulated in AD Agreement Article 17.6. The same objective assessment should be made by a panel under DSU Article 11 for SCM Agreement claims -- that is, a panel should evaluate whether an

[95] Appellate Body Report, *US – Hot-Rolled Steel*, para. 55.

[96] Appellate Body Report, *US – Hot-Rolled Steel*, para. 55.

unbiased and objective investigating authority could have reached the same conclusion as the investigating authority in question.

62. The relevant facts under the Panel's scrutiny for objectivity are the determinations made by the USDOC. That is to say, the Panel should ascertain whether the USDOC's determinations of fact and its conclusions were unbiased and objective.

b. The United States remarks that the Panel is not to undertake a *de novo* review, stating "[t]he Panel's role is to assess whether the USDOC and USITC properly established the facts and evaluated them in an unbiased and objective way".[97] In its submissions regarding various of the European Union's injury claims, the United States argues that the relevant factors referred to in the SCM Agreement were considered by the investigating authority. If the Panel agrees with the United States that they were considered, is that the end of the matter? How does the Panel go on to evaluate whether there was bias or a lack of objectivity leading to a non-compliance? Is a finding of bias or lack of objectivity something different to the Panel preferring its own opinion to that of an investigating authority?

Response:

63. The U.S. statement to which the Panel refers in its question sets out the Panel's standard of review in making its assessment under Article 11 of the DSU. However, the evaluation that might be required on the part of an investigating authority will change depending on the particular circumstances of the investigation and the particular legal provisions at issue. Therefore, it is not possible to define in the abstract what will constitute an "unbiased and objective" determination.

64. A finding of bias or lack of objectivity should not result from a panel's preferring its own opinion to that of the investigating authority. Where a panel considers that it would have come to a different conclusion than the investigating authority did, this would not be sufficient to find bias or no objectivity. Two reasonable persons might evaluate certain facts differently, without one being biased or not objective. A panel would have to further conclude that no unbiased or objective authority could have come to the conclusion that the investigating authority in question did. There is no abstract "correctness" standard or obligation in the SCM Agreement that would permit an adjudicator to find a breach whenever it considers it would have come to a different, and more "correct", conclusion than the investigating authority.

[97] United States' first written submission, para. 17.