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

(DS577)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

December 10, 2020

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Abbreviation	Definition
ADA or Anti-Dumping Agreement or AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ASCM or SCM Agreement	Agreement on Subsidies and Countervailing Measures
AoA	Agreement on Agriculture
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
IQR	Initial Questionnaire Response
FWS	First Written Submission
GATT 1994	*General Agreement on Tariffs and Trade 1994*
POI	Period of Investigation
U.S.	United States of America
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
WTO	World Trade Organization

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I. INTRODUCTION

1. Throughout this dispute, the EU's arguments have failed to meaningfully address the specific rights and obligations provided by the covered agreements and have misstated, or simply ignored, the relevant facts. In this second written submission, the United States will focus on flaws in the arguments the EU made in its oral statements during the virtual session with the Parties, and in its answers to the Panel's questions after that session.

2. The submission is structured as follows.

3. **Section II** addresses the EU's claims that the USDOC's *de jure* specificity determination regarding subsidies conferred to olive growers was inconsistent with Articles 1.2, 2.1, 2.1(a), 2.1(b), and 2.4 of the SCM Agreement. We show that the EU's arguments rely upon reading into Article 2.1(a) conditions that are absent from the text and an inaccurate account of the USDOC's findings.

4. **Section III** addresses the EU's claims that the SCM Agreement and the GATT 1994 contain an obligation to use a particular methodology for how to determine whether a benefit to an upstream producer is conferred to downstream producers. This section also addresses the EU's claims challenging Section 771B of the Tariff Act of 1930 based on its flawed legal interpretation, and the EU's as applied claim that the USDOC automatically presumed a benefit in its application of Section 771B to ripe olives.

5. **Section IV** addresses the EU's claims that the USITC's injury analysis was inconsistent with Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.

6. **Section V** addresses the EU's claims that, in obtaining raw olive supply information from one of the mandatory respondents, and in using that information in calculating the final subsidy rate, the USDOC breached Article VI:3 of the GATT 1994 and Articles 10, 12.1, 12.8, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement. We show that the EU's arguments rely upon an incomplete account of the factual record.

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

7. As addressed extensively in prior submissions, the United States has demonstrated that the USDOC's *de jure* specificity determination was not inconsistent with the SCM Agreement. Below, we address the EU's further arguments regarding (i) the proper interpretation of the text of Article 2.1(a), (ii) the purported role of coupled production in the USDOC's determination, and (iii) "the legislation" identified by the USDOC for purposes of Article 2.1(a).

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

8. In its previous submissions, the United States has explained why, contrary to the EU's position, the term "limits access" does not mean only *limits threshold eligibility for any amount*

of subsidy under the program.[1] Such an interpretation would conflict with the plain language of Article 2.1(a) and the rest of Article 2.1.[2] Furthermore, it would open a dangerous loophole through which granting authorities could structure their programs to evade the disciplines of the SCM Agreement while continuing to limit access to certain enterprises.[3]

9. Our previous submissions address the EU's arguments on this issue, which chiefly (i) rely on dictionary definitions for terms that are not used in Article 2.1(a) and (ii) conflate the analysis of Article 2.1(a) with that of *de facto* specificity and the calculation of benefit.[4] Below we address points raised by the EU in its statements at the virtual session and its written responses after that session.

10. First, the EU claims that "this matter has been exhaustively dealt with in previous cases" and that it "would be very much concerned if this Panel where [sic] to depart from the consistent jurisprudence."[5] The Panel need not reach the EU's arguments that "continuity and consistency" compel the Panel to adopt the EU interpretation, because the supposed "consistent jurisprudence" on this issue does not exist. Prior dispute settlement reports have not addressed whether the meaning of "limits access" under Article 2.1(a) is restricted in the manner that the EU proposes.

11. The EU relies on the fact that past reports have used the word "eligibility" in referring to the limit described in Article 2.1(a).[6] In *US – Large Civil Aircraft (2nd complaint)*, the compliance panel used and emphasized the word "*eligibility*".[7] It did so to draw the distinction between whether certain enterprises have "access" to subsidies versus whether "they in fact receive it".[8] Rather than define "access" in terms of "access", which would be nonsensical, the panel used the term "eligibility", which also happens to appear in the text of Article 2.1(b). The panel did not suggest that, for purposes of Article 2.1(a) "access" can only mean "eligibility", let

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[1] *See, e.g.*, U.S. June 10 responses to Panel questions, paras. 3-15 (elaborating on the proper understanding of "limits access"); U.S. September 8 responses to Panel questions, paras. 1-4; U.S. opening statement, paras. 11-19.

[2] *See* U.S. June 10 responses to Panel questions, paras. 3-15; U.S. September 8 responses to Panel question, paras. 1-4; U.S. opening statement, paras. 11-19; U.S. November 12 responses to Panel questions, paras. 9-10.

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

[4] *See, e.g.*, U.S. September 8 responses to Panel questions, para. 4; U.S. opening statement, para. 15.

[5] EU November 12 responses to Panel questions, paras. 11, 19.

[6] *See* EU November 12 responses to Panel questions, paras. 12-14.

[7] *US Large Civil Aircraft (2nd Complaint) (Art. 21.5 – EU) (Panel)*, para. 8.210 (observing that the phrase "access to the subsidy" must "focus on whether the granting authority, or the legislation pursuant to which the granting authority operates, limits the *eligibility* to receive the subsidy to certain enterprises.") (emphasis original).

[8] *See US Large Civil Aircraft (2nd Complaint) (Art. 21.5 – EU) (Panel)*, para. 8.10, n.1255.

alone that it can only mean *threshold eligibility* to receive *any amount* of subsidy provided under a large, complex program.[9]

12. The EU similarly excerpts a passage in which the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* used the term "eligibility" to make the point "that the focus of the inquiry is on whether certain enterprises are eligible for the subsidy, not on whether they in fact receive it."[10] Again, that report was making the uncontroversial point that Article 2.1(a) pertains to limits based in law rather than subsidy amounts that were received as a matter of fact. Therefore, this report also fails to support the EU position.[11]

13. Accordingly, what the EU cites as "consistent jurisprudence" does not support the point it seeks to make – that "limits access" under Article 2.1(a) really means *limits access to threshold eligibility for any amount of subsidy*. Furthermore, past dispute settlement reports in fact support the proposition that Article 2.1(a) is not circumscribed by the extra-textual conditions proposed by the EU, as the United States has explained.[12] For example, the Appellate Body report in *US – Anti-Dumping and Countervailing Duties* observed that Article 2.1(a) and Article 2.1(b) "set out indicators as to whether the conduct or instruments of the granting authority discriminate or not."[13] Similarly, the panel in *US – Upland Cotton* observed that "specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition." The observations in these reports suggest that specificity is a general concept and that "limits access" is not limited in meaning to one particular type of eligibility, which would frustrate the ability of investigating authorities to determine whether, as a matter of law, the granting authority or the relevant legislation discriminates in favor of certain enterprises.[14]

14. The EU commits a similar error in repeatedly citing that the United States has used "eligibility" to describe the access-based limit to certain enterprises under the BPS Programs.[15] The U.S. use of this term does not suggest that the United States agrees with the EU that a limitation on "access" can only take the form of threshold eligibility conditions. The United States has explained that the BPS Programs' access limitation was based on conditions governing eligibility to receive amounts from a discrete subcomponent of those programs, which

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[9] *See US Large Civil Aircraft (2nd Complaint) (Art. 21.5 – EU) (Panel)*, paras. 8.209-8.210.

[10] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368.

[11] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368.

[12] *See, e.g.*, U.S. June 10 responses to Panel questions, paras. 6-8.

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

[14] *See US – Upland Cotton (Panel)*, para. 7.1142.

[15] *See, e.g.*, EU opening statement, paras. 10-11 (claiming that in using the word the United States contradicts itself); *see also* EU November 12 responses to Panel questions, para. 18.

were limited to holders of certain entitlement values.[16] That is why United States described it as such.

15. The EU's argument highlights a needless conceptual complication that its interpretation would create. Under the EU interpretation, investigating authorities (and reviewing panels) would need to determine whether the access limits in question are better categorized as eligibility or amount-based, and whether those limits are better categorized as at the threshold point of the program or within the program. However, Article 2.1(a) does not contain these supplemental conditions and, accordingly, contains no guidance as to how to evaluate them. Indeed, the EU has acknowledged that such supplemental conditions represent a "grey zone" where "it is difficult to establish if a criterion is about calculation of the amount or eligibility."[17] The EU's grey zone may be avoided by an interpretation of Article 2.1(a) that avoids the extra-textual conditions the EU seeks to insert.

16. Second, in its post-virtual session responses, the EU proposes another extra-textual requirement for Article 2.1(a): that "[c]ompanies that do not form part of the class of (benefit) recipients" correspondingly "cannot be included in the benefit analysis."[18] As the United States has explained, the relevant question under Article 2.1(a) is whether access is explicitly limited as a matter of law to certain enterprises.[19] That evaluation does not involve an analysis of the amounts actually received and by whom, which is instead relevant to inquiries concerning *de facto* specificity and the calculation of benefit.

17. In addition to the legal flaws in the EU's effort to mix the evaluation of benefit with the evaluation of specificity, its effort to apply that interpretation to this case is inapposite. Specifically, the USDOC's *de jure* specificity determination pertained to the BPS Programs. As the USDOC made clear, although the Oils and Fats Program and the BPS Programs were part of "the legislation" pursuant to which access was limited to certain enterprises, it was the BPS Programs that during the period of investigation conferred countervailable subsidies to olive growers.[20] In other words, the USDOC countervailed subsidies for the same programs (i.e., the BPS Programs) for which it made its determination of *de jure* specificity.

18. Third, the EU has presented an incoherent response to the text-based arguments concerning Article 2.1(a). The EU noted that Article 2.1(a) "does not refer to amount" and "refers to limitation on access, period."[21] That is exactly the point. Article 2.1(a) refers neither

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[16] *See, e.g.*, U.S. FWS 62-64.

[17] EU September 8 responses to Panel questions, para. 78.

[18] *See* EU November 12 responses to Panel questions, paras. 61-71; EU opening statement, paras. 40-41.

[19] U.S. November 12 responses to Panel questions, paras. 32-35.

[20] *See* U.S. opening statement, para. 9 (citing Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36); U.S. September 8 responses to Panel questions, paras. 6-10; U.S. June 10 responses to Panel questions, paras. 12-15.

[21] EU closing statement, paras. 9-12.

to "amount" nor to "eligibility" – in contrast to Article 2.1(b) – so to limit Article 2.1(a) to either term would conflict with the text. For the EU to establish that "limits access" under Article 2.1(a) is modified by language that was not used in the provision, it must do more than refer to other language that does not appear under the provision. Similarly, the EU argues that the absence of the word "amount" from the dictionary definition of "access" means that a limitation on access cannot be amount-based. The United States has explained why that premise is wrong and why a limitation on access could include a limitation on amount.[22] In addition, to follow the EU's logic, the dictionary definition of "access" also does not mention the word "eligibility". To the extent the EU offers any text-based argument, it is logically untenable.

19. In sum, the EU's position relies upon reading into Article 2.1(a) conditions that are not found in the text. In its closing statement, the EU encapsulated this overarching defect in its claims when it remarked: "The USDOC decided to stop its specificity analysis at the *de jure* level", and that it did not "go further" in collecting information about subsidies received for particular agricultural products.[23] The USDOC's finding was based on *de jure* specificity, so it of course did not need to go beyond what Article 2.1(a) requires. The EU's position amounts to faulting the USDOC for failing to conduct evaluations required under other provisions of the SCM Agreement – namely, for benefit and *de facto* specificity – but not the Article 2.1(a) *de jure* specificity analysis.

20. Accordingly, the arguments put forward by the EU have not, and cannot, demonstrate that the USDOC's *de jure* specificity determination was inconsistent with the SCM Agreement.

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

21. The EU has failed to show that the supposed "decoupling" of subsidies from olive production renders the USDOC's determination inconsistent with Articles 2.1, 2.1(a), or 2.4 of the SCM Agreement. As the United States has explained, the USDOC's *de jure* specificity determination was not based on current olive production.[24] It was based on criteria contained in the BPS Programs that used entitlement values based on olive production during a historic reference period, access to which was limited to certain enterprises. Moreover, as the United States has explained, the concept of coupled or decoupled production is not relevant to the analysis under Article 2.1(a).[25]

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[22] U.S. June 10 responses to Panel questions, paras. 4-5 (citing Exhibit USA-29); September 8 responses to Panel questions, para. 1.

[23] EU closing statement, para. 7.

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

[25] *See* U.S. FWS, paras. 64-67.

22. In its opening statement, the EU backpedals from its earlier claims, proposing a "much more modest argument" that "if an investigating authority finds that a subsidy is tied or coupled to production" it cannot "find at the same time that the subsidy is not coupled to the production of that crop."[26] However, as described below, the "much more modest argument" repackages the same arguments that the United States has already refuted.

23. In the first instance, the EU repeats its arguments that the USDOC did not establish a link between olive production-based subsidies under the Oils and Fats Program and the limitation on access identified under the BPS Programs.[27] However, it is not in dispute that only certain entitlement holders could access the entitlement component that was based upon subsidies conferred under the Oils and Fats Program (i.e., the certain enterprises for purposes of Article 2.1(a).[28] The USDOC did not base its *de jure* specificity findings on whether or not subsidies under the BPS Program are coupled to olive production, nor did it need to.[29] As the United States has explained, Article 2.1(a) does not require that the certain enterprises be defined according to production of a particular product, let alone that it be based on production of a particular product during a particular time period.[30]

24. The EU argues that its claim is "buttressed by a contextual interpretation" that the BPS Programs would qualify as "decoupled income support" under the Agreement on Agriculture.[31] As the United States has explained, the concept of "decoupling" appears nowhere in the SCM Agreement and is not relevant to the analysis under Article 2.1(a).[32] The EU has not contested those explanations. Nor has the EU explained how, despite the irrelevancy of the concept of decoupling under Article 2.1(a), it nonetheless provides relevant context for that article.

25. In response to one of the Panel's hypothetical questions, the EU makes a conceptually similar argument that the ability to transfer an Oils and Fats Program-based entitlement "severs" its relationship to the Oils and Fats Program. However, as the United States has explained, even where certain entitlements might have been inherited or transferred, this would not sever the link to the access limitation identified by USDOC in its determination. Under the law, only the entitlement holders could apply for and receive the subsidy amounts reserved for the identified

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[26] EU opening statement, para. 18.

[27] EU opening statement, paras. 18, 20-21.

[28] *See*, *e.g.*, U.S. opening statement, para. 6.

[29] *See* U.S. September 8 responses to Panel questions, n.26; U.S. June 10 responses to Panel questions, paras. 32-38; U.S. FWS, paras. 62-67.

[30] U.S. September 8 responses to panel questions, paras. 20-21; U.S. June 10 responses to Panel questions, paras. 33-39; U.S. FWS, paras. 62-67.

[31] EU opening statement, para. 19.

[32] U.S. June 10 responses to Panel questions, paras. 32-38; U.S. FWS, paras. 65-67.

certain enterprises. That entitlement holders might themselves transfer these rights does not alter the scope of access, and the resulting specificity, as a matter of law.

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

26. As the United States has explained, the USDOC reviewed the conditions governing eligibility for, and the amount of, subsidies conferred under the BPS Programs.[33] Specifically, to evaluate the legislation pursuant to which the granting authority administered the BPS Programs, the USDOC considered how the BPS Programs incorporated by reference the eligibility criteria of the two predecessor CAP Pillar I programs – the Oils and Fats Program and the SPS Program.[34] In response to these explanations, the EU has offered several additional arguments,[35] which the United States addresses below.

27. First, the EU argues that the U.S explanations summarized above "confirm that the starting point of the USDOC specificity analysis is the [Oils and Fats Program] and not the measures that have been found to grant countervailable subsidies."[36] It is unclear what the EU means by the "starting point" or why that would undermine the USDOC's evaluation. If the EU means that the USDOC should have ignored how the reference to the Oils and Fats Program determined access under the SPS Program and BPS Programs, that position is incorrect. The EU overlooks the explanations the United States has provided as to how the Oils and Fats Program, SPS Program, and BPS Programs together were "the legislation" pursuant to which access was limited to certain enterprises.[37] In taking into account the reference to the Oils and Fats Program – namely, the manner in which it limited access based on historic olive production – the USDOC's *de jure* specificity determination concerned the BPS Programs. Rather than address those explanations, the EU turns to three assertions that are factually wrong or irrelevant (or both):

- The EU argues that the "alleged direct correlation" between the Oils and Fats Program and the BPS Programs conflicts with the statement that the "BPS Programs rely at least in part on the subsidies provided under the Oils and Fats Program."[38] In the first place, the salient point is that the BPS Programs continued to provide subsidies using information

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[33] *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.

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

[35] *See, e.g.*, EU opening statement, paras. 27-43.

[36] EU November 12 responses to Panel questions, para. 30.

[37] *See* U.S. opening statement, para. 9 (citing Final Issues and Decision Memorandum (Exhibit EU-2), pp. 32-36); U.S. September 8 responses to Panel questions, paras. 6-10; U.S. June 10 responses to Panel questions, paras. 12-15.

[38] EU November 12 responses to Panel questions, para. 30 (citing U.S. FWS, para. 82).

from the reference period during which the Oils and Fats Program operated, which based assistance on olive production and necessarily limited access to certain entitlement holders, as the USDOC identified.[39] That limitation on access does not depend on whether or not the BPS Programs took into account any other factors. In any event, the EU's attempt to identify an inconsistency, albeit an irrelevant one, fails. The EU excerpts from a passage in which the United States explained that, *even if for the sake of argument* access to subsidies under the BPS Programs was based on other "objective criteria and conditions (which is not the case)", the fact that they rely at least in part on subsidies under the Oils and Fats Program means they cannot qualify under Article 2.1(b).[40] In explaining why the EU's contention was unavailing even if true, the United States was not endorsing that contention.

- The EU argues that the criteria identified by the USDOC pertained to "the amount of support to be granted to each eligible farmer" and not access to the subsidy program.[41] This statement is incorrect as a factual matter because the USDOC's determination was based not on the amount of subsidies in fact received but on an access limit to certain enterprises.[42] And this statement is also incorrect as a legal matter because, as the United States has explained, "limits access" does not mean only *limits threshold eligibility for any subsidy amount*.

- The EU argues that the USDOC's determination is "based on a wrongful description of the legislation governing the programs at issue,"[43] but what the EU identifies as "wrongful" consists only of an assertion that the possibility of transferring entitlements "is perfectly capable of severing" the relationship between support under the Oils and Fats Program and the succeeding entitlement based programs – i.e., the BPS Programs (and SPS Program).[44] It therefore appears that the EU takes issue not with the USDOC's description of the legislation at issue but with the legal conclusion that the way the entitlement programs were structured did not defeat *de jure* specificity. As the United States explains above, the hypothetical transferability of entitlement components does not change the fact that they are limited to certain enterprises identified by the USDOC. Similarly, as the United States describes above, the EU's speculation that a farmer could have transferred its Oils and Fats-based entitlement but nonetheless received subsidy payments under the BPS Programs is not relevant to the Article 2.1(a) analysis. And in

[39] *See* U.S. opening statement, paras. 5-6. As the United States observed in its opening statement, this is not in dispute.

[40] *See* U.S. FWS, para. 82.

[41] EU November 12 responses, to Panel questions, para. 33.

[42] *See*, *e.g.*, U.S. November 12 responses to Panel questions, paras. 13-14.

[43] EU November 12 responses to Panel questions, para. 30.

[44] *See* EU opening statement, paras. 33-38.

any event, as the United States has noted, the EU's speculation is based on a set of hypothetical conditions that were not before the USDOC.

28. Second, in its responses to the Panel's questions, the EU labels an "alternative explanation" the United States' descriptions of the USDOC's specificity finding.[45] In essence, the EU fixates on one aspect of "the legislation" identified by the USDOC, the olive production-based subsidies under the Oils and Fats Program, to the exclusion of how that program interoperated with the succeeding SPS Program and BPS Programs. The United States has explained how the USDOC identified that access to a discrete component of the BPS Programs – i.e., entitlement values from historic olive production-based subsidies – was limited to farmers on lands that qualified them for these entitlements.[46] The United States has identified where in the final determination (and the remand redetermination) this evaluation is evident.[47] The EU can apply to the U.S. arguments whatever labels it likes. However, to the extent the EU's arguments address one phrase to the exclusion of the USDOC's full findings, those arguments are not relevant to the dispute and should be rejected.

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

29. The U.S. first written submission demonstrates that nothing in the GATT 1994 or the SCM Agreement requires a particular methodology for conducting a pass-through analysis.[48] To this point, the EU has failed to show why the conditions in Section 771B are incompatible with the obligations contained in the provisions cited by the EU in this dispute. In this section, the United States reacts to the statements and responses the EU has made since filing its first written submission.

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

30. In its opening statement of the virtual session, the EU asserted that the United States has been arguing "into the void" regarding the premise that the GATT 1994 and SCM Agreement

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[45] *See*, *e.g.*, EU November 12 responses to Panel questions, paras. 31, 35, 38, 59-60. In particular, the EU focuses on the phrase "specific to olive growers" to the exclusion of the rest of the USDOC's evaluation.

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

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

[48] U.S. FWS, section IV.A.

require a particular methodology for determining whether and to what extent a benefit is conferred to downstream processors.[49] The EU emphatically states that it "nowhere claims or argues that the provisions of the GATT 1994 and the SCM Agreement referenced by the US would require a specific methodology of price differentiation in the context of a pass-through analysis."[50] The EU further emphasizes that none of its arguments on price comparisons are premised on an interpretation of the provisions under which it brought claims in this dispute.[51]

31. Instead, the EU directs the Panel to weigh its arguments that Section 771B does not contain a pass-through analysis because the two conditions therein are "inapt" to determine the existence and extent of the benefit conferred to downstream ripe olives processors.[52] In the EU's view, the only *apt* condition would be that the price of the input product is lower than the market price as a result of the subsidy, and, quoting the EU, that no "method other than a price comparison" is appropriate for making a determination of whether and to what extent a benefit is conferred to downstream processors.[53]

32. The provisions of the GATT 1994 and the SCM Agreement "referenced" by the United States have not been pulled out of thin air; they are the provisions pursuant to which the EU has challenged Section 771B and the findings made by the USDOC with respect to whether a benefit was conferred to ripe olives processors in the underlying investigation. Therefore, the only legal basis asserted by the EU in support of its claims is that the cited provisions require a price comparison methodology for determining pass through. The EU has provided no other basis upon which the Panel can find against the United States. As explained at length, and again below, however, these provisions do not support the EU position and each of the EU's claims therefore must fail.

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

33. The EU repeatedly makes the claim that absent a price differentiation analysis, the only plausible alternative is that the USDOC presumed a benefit. It makes such claims based on what it deems "basic economic and subsidy law principles which dictate that only a price comparison of some form with respect to the input product can meaningfully determine the existence and amount of pass-through benefit for input subsidies".[54] However, the EU has yet to point to a

[49] EU opening statement, para. 82.

[50] EU opening statement, para. 79. *See also* EU June 10 responses to Panel questions, para. 92.

[51] EU opening statement, para. 81.

[52] EU opening statement, para. 84.

[53] EU opening statement, para. 87. *See also* EU June 10 responses to Panel questions, para. 92.

[54] EU opening statement, para. 81 (footnote omitted).

provision of the GATT 1994 or SCM Agreement that demonstrates such an obligation as the EU claims.

34. While the EU appears to acknowledge that the GATT 1994 and SCM Agreement create no requirements or specific conditions, and that there are many conditions that may be considered in making a pass through determination, it nevertheless claims that application of the conditions reflected in Section 771B necessarily and in every instance breach those same provisions.[55] The United States fails to see how such statements can be reconciled with the EU's clear position that no other "method other than a price comparison" is appropriate for making a determination of whether and to what extent a benefit is conferred to downstream processors.[56]

35. Rather than attempt to bolster its claims with an analysis of the obligations in the SCM Agreement, the EU provides hypothetical scenarios where a price comparison might be relevant.[57] However, as the United States has explained, an investigating authority's analysis should be based on the distinct factual and economic circumstances facing the industry at issue.[58] The EU errs in asserting that because a price comparison might be relevant in some circumstances, it must be required in every circumstance.[59] The EU's reliance on this assertion is misguided, and does not reflect the flexibilities that exist in the SCM Agreement.

36. The United States has provided ample explanation of the legal conditions contained in the provisions cited by the EU, and demonstrated that none of these provisions set out specific methodological requirements for the calculation of benefit, much less a specific "pass-through" methodology.[60] Rather, the provisions cited by the EU ensure that, once an authority determines that a subsidy has conferred a benefit, any duties levied by the authority properly offset the subsidy – in particular, that they are levied on a non-discriminatory basis, in appropriate amounts, and do not exceed the amount of subsidy found to exist.[61] Absent a showing that an investigating authority *levied* duties in a manner that runs contrary to these legal conditions, there can be no breach of the provisions cited by the EU without a breach of some other provision of the SCM Agreement which addresses the calculation of the subsidy itself.

37. In continuing to argue that application of Section 771B cannot establish whether a benefit passed through consistent with the WTO Agreements, the EU also fails to address the actual

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[55] EU responses to post virtual meeting Panel questions, para. 116.

[56] EU opening statement, para. 87.

[57] EU June 10 responses to Panel questions, paras. 84-85.

[58] U.S. opening statement, para. 30; U.S. responses to post virtual meeting Panel questions, para. 36.

[59] EU June 10 responses to Panel questions, para. 85.

[60] U.S. FWS, section IV.A.

[61] U.S. FWS, paras. 111-123.

requirements set forth in Section 771B, despite invitations from the Panel do so. If it had, it would find that a determination of pass-through is not "automatic" as the EU claims.

38. As the United States previously explained, Section 771B identifies specific circumstances in which, because of the nature of the relationship between raw agricultural products and certain downstream processed products, the benefit of a subsidy received by the producer of the raw agricultural commodity will be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.

39. Markets for raw agricultural commodities are characterized by "perfect competition." Perfect competition exists in markets where there are many producers making virtually identical products for which sellers and buyers have all of the relevant information on which to base a purchase, and entry and exit into the market is not restricted. Producers in perfectly competitive markets are known as "price takers." That is, the pressure of competition from other producers forces them to accept the prevailing market price – producers in these markets cannot offer a price higher than the price a processor could attain from another homogenous producer.[62]

40. These characteristics are not necessarily restricted to agricultural commodities. However, they are systematic features of markets in the agricultural sector, and therefore affect the relationship between producers and processors of raw agricultural products. Given these underlying market conditions, under Section 771B, where an agricultural commodity market also exhibits certain additional characteristics – i.e., where in addition to perfect competition there is *also* substantial dependence and limited value added – the benefit of a subsidy provided to an agricultural producer will be determined to have passed through to a processed agricultural product.[63]

41. The EU has failed to demonstrate why the conditions reflected in the statute do not represent a "proper examination" of whether a benefit was conferred to downstream ripe olive processors.[64] Instead, the EU asserts that other elements should have been considered, such as the concentration of the relevant markets, the market power of the different producers and processors, or the extent of national or international competition.[65] Without explaining how these or other factors might have affected the analysis, however, the EU continues to maintain that a comparison of input prices is the only method of analysis suitable to determine whether a benefit has been conferred on a downstream processed product, and that without such an analysis having been done, the underlying determination by the USDOC breached U.S. obligations.[66]

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[62] U.S. November 12 responses to Panel questions, para. 38.

[63] U.S. November 12 responses to Panel questions, para. 39.

[64] U.S. opening statement, para. 34.

[65] EU November 12 responses to Panel questions, para. 116.

[66] EU opening statement, para. 87.

42. As the United States has explained at length, the EU is incorrect. The provisions cited by the EU do not prescribe specific conditions that must be considered by an authority in order to make a determination whether a benefit has been conferred on a downstream processed product. The EU appears to acknowledge as much.[67] In the absence of any other legal basis to support its claims regarding pass through, the Panel must reject each of the EU's claims.

C. The EU's analysis of the frozen raspberries market has no bearing on the outcome of this dispute

43. The EU erroneously asserts that the U.S continues to cite to and rely on the example of frozen raspberries raised in Exhibit EU-48 to support the USDOC's analysis under Section 771B.[68] This is a red herring. At no point has the United States cited to this example as a legal justification for the statute. To the contrary, as the United States has explained, the legal justification for Section 771B derives from the flexibilities in the SCM Agreement.[69] It is the EU that uses this example to paint a broad brush over all agricultural commodity markets, and as a means to avoid grappling with the question of whether the conditions examined by the USDOC are relevant to an analysis of whether a benefit was conferred to ripe olives processors.

44. This Panel is tasked with reviewing whether an unbiased and objective investigating authority could have reached the conclusion reached in the relevant determination, based on the specific facts before it.[70] In this case, those specific facts are based on the particular market at issue – that of raw and ripe olives. As such, the EU's preoccupation in its responses to the Panel's post-virtual session questions with the example of the frozen raspberries market is irrelevant to the current dispute.

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

45. In its previous submissions, the United States demonstrated that the European Union (EU) has failed to show that the USITC's injury determinations were inconsistent with the AD and SCM Agreements. Specifically, the United States has shown that the USITC's injury determinations were supported by positive evidence and based on an objective examination of all relevant record data. In this submission, we will focus on the EU's efforts at the virtual session with the Panel and in its responses to the Panel's questions to buoy claims that the United States has shown to be without legal and factual bases.

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[67] EU responses to post virtual meeting Panel questions, para. 132.

[68] EU responses to post virtual meeting Panel questions, para. 108.

[69] U.S. responses to post virtual meeting Panel questions, paras. 36-37. The United States has only mentioned the raspberries example in one footnote in its first written submission.

[70] U.S. opening statement, para. 32.

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

(1) The USITC did not segment the U.S. ripe olives market

46. The central premise of the EU's challenge to the injury determination is that the USITC engaged in selective "segmented" analyses.[71] Quite simply, this is incorrect. A careful reading of the USITC opinion confirms that there is no factual basis for the EU's attempt to recast it as one that alternated between holistic and segmented analyses.[72]

47. The USITC did not undertake a "segmented" analysis of the market. As the United States demonstrated in its first written submission, as well as responses to the Panel's questions, the USITC based its injury analyses on data pertaining to the market as a whole.[73] These included the USITC's analyses of volume, price effects, and impact.[74] In conducting its analyses of volume and price effects, the USITC provided information concerning trends in the retail channel of distribution, which is the channel of the market in which competition between domestically processed and subject ripe olives actually occurred during the period of investigation, and the channel on which all parties to the underlying investigations – including the Government of Spain – focused their volume and price-effects-related arguments.[75] The USITC's close examination of trends in this channel was, accordingly, based on positive evidence illustrating how domestically processed olives fared with subject import competition, and informed its conclusions pertaining to the ripe olives industry as a whole.[76]

48. The EU's criticism of the United States' discussions in its first written submission of the findings in *US – Hot Rolled Steel* are unavailing as they misapprehend the United States' position. The United States referenced the "market segmentation" sections of that report only in order to rebut the EU's initial assertion that this report supported a finding that *any* segmented analysis was WTO-inconsistent – an assertion that the EU subsequently declined to pursue.[77] The United States did not, as the EU seems to suggest,[78] identify the considerations in *US – Hot-*

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[71] *See, e.g.*, EU's November 12 responses to Panel questions, paras. 155-160.

[72] EU November 12 responses to Panel questions, paras. 155-160.

[73] U.S. FWS, Sections V.A – D; U.S. June 10 responses to Panel questions, paras. 66-70, 71-72; U.S. September 8 responses to Panel questions, para. 34; U.S opening statement, paras. 48, 54, 56, 58, and 63; U.S. November 12 responses to Panel questions, paras. 56, 61, 68-69, and 77.

[74] U.S. FWS, paras. 175-178.

[75] U.S. November 12 responses to Panel questions, para. 57; U.S. September 8 responses to Panel questions, paras. 31-32.

[76] U.S November 12 responses to Panel questions, para. 57.

[77] EU September 8 responses to Panel questions, para. 99.

[78] EU opening statement, para. 113.

Rolled Steel as relevant in any situation beyond an investigating authority's segmented analysis of captive markets.[79]

(2) No matter how characterized, the EU has failed to show that the USITC's examination was inconsistent with Article 3 of the AD Agreement and Article 15 of the SCM Agreement

49. Even if the Panel determines that the USITC conducted an analysis that could be characterized as a "market segment" analysis (a term that does not appear in the relevant Agreements), the EU has note demonstrated that the examination and findings of the USITC in this investigation do not comport with the requirements of the AD and SCM Agreements. In this regard, the United States notes that the EU's own definition of the supposed "market segment" analysis and requirements shifted throughout these proceedings.

50. The EU initially argued, in its first written submission, that "segmented" analyses were *per se* inconsistent with Article 3 of the AD Agreement and Article 15 of the SCM Agreement.[80] The United States explained, in its first written submission, that this position had no basis in the text of the Agreements.[81] The EU then posited that a segmented analysis was *per se* inconsistent with the Agreements "in a situation where one single uniform and homogeneous product (with no further product differentiation) was found to be "highly substitutable" and was sold interchangeably in all distribution channels."[82] The United States explained, in its oral statement during the virtual session, that this position was likewise unavailing.[83]

51. The EU has since conceded that a segmented analysis of homogeneous products would not be precluded, provided that "there must still be conditions of competition that are different per segment in order for segmentation to serve as valid basis [*sic*.] for the injury analysis."[84] The

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[79] *See*, in this regard, U.S. June 10 responses to Panel questions, paras. 71-72; U.S. September 8 responses to Panel questions, para. 37; and U.S. November 12 responses to Panel questions, paras. 77-78. The EU itself has at various times asserted that the Appellate Body's report in *US – Hot-Rolled Steel* is either highly instructive or wholly inapplicable to the present dispute. *Compare* EU June 10 responses to Panel questions, para. 101 *with* EU September 8 responses to Panel questions, para. 103. In its EU June 10 responses to Panel questions, at para. 101, the EU argued that the Appellate Body report in *US – Hot-Rolled Steel* supported its initial *per se* challenge to the USITC's allegedly "segmented" injury analyses. The EU now appears to argue that the United States, by citing that discussion in *US – Hot-Rolled Steel* and submitting exhibits showing that the EU's investigating authorities have themselves engaged in segmented analyses, has somehow conceded that segmented analyses are only consistent with the Agreements in situations concerning captive markets. *See* EU opening statement, paras. 100-104. While the United States again emphasizes that this argument has no bearing on the instant dispute, for the record, it makes no such concession.

[80] EU FWS, paras. 494-502.

[81] U.S FWS, paras. 174-180.

[82] EU September 8 responses to Panel questions, para. 101 n.84.

[83] U.S. opening statement, paras. 42.

[84] EU November 12 responses to Panel questions, para. 161.

EU has presented hypotheticals of what it purports would constitute appropriate circumstances for a segmented analysis, including where there are distinctions in domestic and imported products, such as that of an investigating authority comparing imported high-end products with domestic low-end product.[85] In so arguing, the EU fails to provide any textual basis supporting such an obligation. The EU also fails to appreciate that all "like products" are not necessarily fully competitive or substitutable with each other.

52. As an initial matter, the "like product" is the *group* of domestically produced products an authority considers in assessing the price effects and impact of the dumped or subsidized imports.[86] The Agreements do not indicate what degree of similarity can or must exist between those articles *within* a specific like product group; it only states that like products are the domestically produced articles identical or most similar to the imports under investigation.[87] Consequently, if the imports under investigation are not homogenous in all respects, the domestically produced like products may not be, either.[88] The notion that there is perfect symmetry between domestic and imported subject goods has sometimes been referred to as "cross-likeness" in a number of panel reports that have rejected the argument that all goods within the scope of the like product must be "like" all goods within the scope of investigations.[89] Indeed, the EU itself, in a defensive capacity, has supported the notion that "the scope of the product under consideration is not limited to "like" products."[90]

53. The USITC's substitutability finding applied to ripe olive products of comparable specifications. As the USITC found, all ripe olives sold in the U.S. market, whether domestically processed or imported, are subject to a Federal Marketing Order that creates mandatory uniform standards, such that they are processed to the same standards.[91] This operative condition of competition guided the USITC's analysis of interchangeability, and purchasers' responses concerning substitutability.[92] The EU's argument that the USITC's

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[85] EU November 12 responses to Panel questions, para. 161.

[86] ADA Arts. 3.2, 3.6; ASCM Arts. 15.2, 15.6.

[87] ADA Art. 2.6, ASCM Art. 15.1 n.46.

[88] The United States notes that the factors considered by the USITC in its like product analysis are aligned with the definition of a "like product" contained in the Agreements, and the "likeness" factors discussed in *Japan – Alcoholic Beverages II*. *Japan – Alcoholic Beverages II (AB)* at 21-22.

[89] *See, e.g., EU – Footwear (Panel)*, para. 7.314; *EC – Fasteners (China)(Panel)*, paras. 7.265-7.272; and *EC – Salmon (Norway)(Panel)*, paras. 7.43-7.76.

[90] *See, e.g., EU – Footwear (Panel)*, para. 7.305.

[91] U.S. September 8 responses to Panel questions, para. 30.

[92] In the preliminary phase of its *Ripe Olives* investigations, the USITC defined a single domestic like product consisting of all ripe olives coextensive with the scope of the imported products under investigation. The USITC found that the Federal Marketing Order administered by the U.S. Department of Agriculture set uniform standards for ripe olives by grade, size, and quality, and reinforced producer and customer perceptions that all ripe olives are the same product "{n}otwithstanding any differences in size or presentation." *See Ripe Olives from Spain*, Inv. Nos. 701-TA-582 and 731-TA-1377 (Preliminary), USITC Pub. 4718 (Aug. 2017), appended as Exhibit USA-39, at 8.

finding of high substitutability necessarily meant that all goods within the domestic like product were perfect substitutes with each other or with all goods within the class of dumped and subsidized imports, which under the EU's theory would preclude use of a segmented analysis, is consequently legally unsupported by the Agreements and ignores the facts on the record before the USITC in the underlying investigations.

54. The USITC's close examination of trends in each channel of distribution, where subject ripe. olives products competed with domestically processed ripe olives of equivalent size and presentation, was in full accord with the USITC's like product determination and its obligation to base its injury analyses on positive evidence following an objective examination of the record. The EU's suggestion that the USITC "ignored" its substitutability finding through such examination is just incorrect. Similarly, the EU's underlying contention that the USITC's finding of high substitutability between domestically processed and subject ripe olives was tantamount to a finding of "cross-likeness," does not accord with what the USITC actually found.[93]

(3) The USITC's examination was supported by positive evidence

55. The EU also claims that the USITC's substitutability finding serves as conclusive indication that conditions of competition in the U.S. ripe market were "uniform," such that the USITC's focus on the retail channel was unsupported by evidence.[94] It characterizes the United States' explanations to the contrary as "ex post,"[95] questions the accuracy of the assertions in U.S. submissions to this Panel,[96] and contrives internal inconsistencies into the USITC's findings regarding processing and packaging requirements for ripe olives distinct to each distribution channel.[97] The EU's arguments are all unavailing.

56. The EU suggests that U.S. rebuttals of the EU's arguments constitute "*post hoc*" reasoning where they do not duplicate the text used in the Commission's determination. This represents a fundamental misunderstanding of the role of a party responding to WTO challenges to the determinations of its investigating authorities. In rebutting the EU's arguments, the United States has pointed out legal misinterpretations, misrepresentations and omissions of record facts by the EU and provided the Panel with further detail and explanation of the USITC's analysis, including by citing to portions of the record supporting the USITC's conclusions. In doing so,

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The USITC's like product determination in the final phase of the investigations cross-referenced and reaffirmed its preliminary like product determination. USITC Pub. 4805 (Exhibit EU-5) at 7 n.22.

[93] USITC Pub. 4718 (Exhibit USA-39) at 8; USITC Pub. 4805 (Exhibit EU-5) at 7 n.22.

[94] EU opening statement, para. 103.

[95] EU June 10 responses to Panel questions, para. 112. *See also* EU November 12 responses to Panel questions, para. 207, where the EU characterizes an anticipated U.S. response as "ex post."

[96] EU June 10 responses to Panel questions, para. 113.

[97] EU June 10 responses to Panel questions, para. 114.

the United States has demonstrated the lack of basis for the EU's claim that the USITC's determination is inconsistent with the AD and SCM Agreements.

57. As it pertains to the USITC's report, the pertinence of the distinct channels of distribution was not discussed at greater length because it was not a matter in dispute. As the United States previously discussed, the reality that ripe olives in the U.S. market were sold across three economically distinct channels of distribution was apparent to all of the parties to the underlying investigations.[98] No interested party – the EU included – questioned the "potential relevance" of these three channels in the underlying proceedings.[99]

58. The EU's efforts to undermine the accuracy of the U.S. explanations stem from its apparent dissatisfaction with the number of record citations provided in a paragraph contained in the United States' first written submission, which the EU mischaracterizes as "three entirely obscure references in a file of thousands of pages."[100] To the contrary, and as the United States has previously explained, the record contained ample evidence to support the USITC's examination of trends in the retail channel.[101]

59. Last, the EU's attempts to undermine the U.S. explanations regarding packaging and processing requirements that differed per channel, which it claims are in disaccord with record information regarding "supply side substitutability,"[102] concern an argument that the U.S. never advanced regarding a finding the USITC did not make.[103] Rather, the United States was merely explaining that the USITC's emphasis on certain conditions of competition giving rise to its examination of the retail channel was not an artificial construct, as the EU alleged in its first written submission. Moreover, the Agreements do not speak to an investigating authority's requirements to evaluate "supply side" versus "demand side" substitutability. The EU attempts to read these terms into the text of the Agreements by drawing on an excerpt from a prior report that addressed an entirely different provision of the SCM Agreement.[104]

60. The USITC, weighing the record evidence and considering the arguments of the parties, reasonably determined, on the basis of positive evidence and without favoring the interests of any particular party to the proceedings, to focus on competition between domestically processed and subject imported ripe olives in the retail channel. The EU has not explained why an

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[98] *See* U.S. November 12 responses to Panel questions, para. 59 n.32.

[99] *See* U.S. November 12 responses to Panel questions, para. 59 n.32.

[100] EU June 10 responses to Panel questions, para. 107. The EU, at para. 114, goes so far as to invite the Panel to draw appropriate inferences regarding "the validity and seriousness of the US's arguments and how they reflect on the soundness of the US's legal arguments in this case in general."

[101] *See, e.g.*, U.S. FWS, para. 176; U.S. September 8 responses to Panel questions, para. 29; U.S. opening statement, para. 42.

[102] EU June 10 responses to Panel questions, para. 113.

[103] U.S. September 8 responses to Panel questions, para. 29.

[104] U.S. September 8 responses to Panel questions, at n.45.

objective and unbiased authority could not have done the same, and its claims must therefore be rejected.

B. The USITC conducted a proper analysis of volume

(1) The USITC's volume findings were supported by positive evidence

61. While most of the EU's challenges to the USITC's analysis of volume are tied to its general argument concerning market segmentation, it does raise two independent arguments.[105] First, it contends that the USITC erred in finding the volume of unfairly traded imports significant when it declined in absolute and relative terms during the period of investigation.[106] Additionally, it contends that the USITC failed to conduct an "objective examination "of the explanatory force of subject imports for the state of domestic industry as a whole"" on the premise that subject import volume sold to the retail channel amounted to a small proportion of total subject import shipments.[107] However, the USITC opinion fully discharged the obligation to consider the "significance" of subject import volume.[108]

62. The United States previously explained that the USITC directly addressed the evolution of subject import volume during the period of investigation, and acknowledged that this volume did not increase on either absolute or relative bases.[109] In addition to evaluating volume data for the overall market, the USITC also considered subject import volume trends in the three channels of distribution. It observed that subject imports increasingly penetrated the retail channel, which was the predominant channel for the domestic industry. The USITC also found that subject imports captured market share from the domestic industry in the retail channel, including in both the retail private label and retail branded subchannels.[110] The USITC, weighing the record evidence and considering the arguments of the parties, reasonably concluded, on the basis of positive evidence and without favoring the interests of any particular party to the proceedings, that subject import volume was significant.[111]

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[105] The United States rebuts these challenges above at paras. 46-60.

[106] EU opening statement, para. 116.

[107] *See, e.g.*, EU November 12 responses to Panel questions, para. 110.

[108] *Thailand – H-Beams (Panel)*, para. 7.161.

[109] U.S. FWS, para. 192.

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

[111] U.S. FWS, paras. 190-192.

(2) The EU has not shown that the USITC breached the obligations of Article 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement to "examine" and "consider" volume

63. In challenging the USITC's analysis of volume, the EU seeks to have the Panel construe the term "consider whether" in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement to mean "make findings that" subject import volume increased.[112] The Agreements do not require such findings.

64. The EU acknowledged, following the virtual session, that the term "consider" as used in the Agreements does not require an investigating authority to "make a definitive finding in this respect."[113] Nevertheless, invoking "overarching obligations," the EU contends that although the USITC may have considered data and information on the record, it failed in its obligation to conduct an "objective examination" of the record data concerning subject import volume.[114]

65. The EU seems to suggest that this "objective examination" requires an authority's analysis of import volume to encompass a full causation analysis.[115] As the United States previously observed, the EU's inference cannot be reconciled with either the organization or text of Article 3 of the AD Agreement and Article 15 of the SCM Agreement, and would upend their "logical progression of inquiry."[116]

66. The obligation to conduct an "objective examination" stems from language in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. These provisions require, in relevant part, that an investigating authority's injury determinations result from an objective examination of subject import volume, the effect of these imports on domestic like product prices, and the consequent impact of these imports on the domestic industry. Their language does not provide for the very specific requirements that the EU attempts to read into them. Instead, the concept of an "objective examination" in these articles concerns the investigative process itself, and requires an authority to conduct investigations in good faith and without favoring the interests of any particular party, and to base its determinations on data providing an accurate and unbiased account of what is being examined.[117]

67. Moreover, contrary to what the EU has argued, the EU's references to prior panel reports that purportedly support the EU's "objective examination" requirements actually undermine its contention that the obligation to "consider" volume and price effects data requires a full

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[112] *See, e.g.*, EU June 10 responses to Panel questions, para. 120.

[113] EU November 12 responses to Panel questions, para. 178.

[114] EU June 10 responses to Panel questions, para. 118.

[115] EU June 10 responses to Panel questions, paras. 118-121.

[116] U.S. November 12 responses to Panel questions, paras. 64-65.

[117] *See* Definition of "consideration" from The New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, pp. 485-86 (Exhibit USA-27); *US – Hot-Rolled Steel (AB)*, para. 193.

causation analysis, rather than a presentation of pertinent data.[118] To "consider" does not mean to conduct a mini causation analysis, as the EU's approach would entail. Rather, as its dictionary definition reflects, it means to "take into account".[119]

68. Consistent with the text of the obligations, panels in other disputes have given weight to the investigating authorities' citation to tables and graphs containing the relevant information. For example, in *Korea – Certain Paper*, the panel considered as relevant the Korean authority's use of "charts" and "figures," as a part of the panel's ultimate determination that the authority "clearly considered whether there was price undercutting, price suppression and price depression caused by dumped imports."[120] The Appellate Body report in *EC – Tube Fittings* similarly considered that the investigating authority's compliance with the requirement to "evaluate" the injury factors listed in Article 3.4 of the AD Agreement was demonstrated by the existence of a checklist, tables, and graphs.[121] Just as the EU's compliance in that dispute with its Article 3.4 requirement to "evaluate" injury factors was demonstrated through its production in WTO dispute settlement proceedings of data tables and indices, the USITC's compilation and "consideration" during its *Ripe Olives* investigation of data in tables and charts satisfies the Article 3.2 the requirement to "consider" data.

(3) Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement do not require an investigating authority to consider "volume effects"

69. The EU has variously asserted that the USITC improperly assessed or failed to assess so-called "volume effects" for the unfairly traded imports in its analyses of volume and price effects, contrary to its obligations under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.[122] The EU seeks to create obligations lacking basis in the text of the Agreements.

70. Neither the organization nor the text of Articles 3 and 15 requires an investigating authority to assess the "effects" of subject import volume on the domestic industry. Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement simply do not use the word "effects" in conjunction with the word "volume," in contrast to the use of the term "effects" in conjunction with the word "prices."

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[118] *See* EU opening statement, para. 116 n.129.

[119] *China – GOES (AB)*, para. 130.

[120] *Korea – Certain Paper (Panel)*, paras. 7.244-7.251.

[121] *See EC – Pipe or Tube Fittings (AB)*, para. 119 n.125. Inasmuch as the Appellate Body considered that the EU's compliance with the requirement to "evaluate" injury factors and indices in Article 3.4 of the AD Agreement in that dispute was demonstrated through its production in WTO dispute settlement proceedings of data tables and indices, the USITC's compilation during its investigation of data into tables and charts in its report would clearly satisfy the requirement to "consider" data in Article 3.2.

[122] EU FWS, Sections VII.B-VII.C.

71. The EU suggests that Article 11.2 of the SCM Agreement provides context for its argument that there is a "volume effects" requirement in Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement. However, the text of that article does not support such a claim. Rather, Article 11.2 distinguishes an authority's assessment of the "evolution of the volume of the allegedly subsidized imports" with that concerning "the effect of these imports on prices of the like product in the domestic market."[123]

72. The EU also errs by citing to the panel report in *Japan – DRAMS* in support of its "volume effects" argument. Korea, the complainant in that dispute, argued that Article 15.5 required the Japanese authority to demonstrate that injury to the domestic industry in the underlying investigations was caused "through the effects of subsidies."[124] The panel in that dispute considered that Article 11.2(iv) provided contextual support for its evaluation that Article 15.5 focused instead on "the effects of the subsidized imports."[125] The panel's inartful summation of Article 11.2(iv) as "relating to the volume effects, the price effects, and the consequent impact of the subsidized imports" in its report was incorporated, *verbatim*, by the Appellate Body in its report without any further analysis.[126] The Appellate Body's use of the term "volume effects" was, accordingly, not pertinent to the issues in dispute.

73. In contrast, the panel's consideration in *US – DRAMS (CVD)*, that "a countervailing measure may be imposed even in the absence of a significant increase in the volume of subsidized imports," *was* pertinent to the issues in that dispute and, in addressing the requirements of Article 15.2 of the SCM Agreement, conflicts with the EU's contention that an authority needs to assess "volume effects" in its analysis of subject import volume.[127] The EU's semantic argument that the panel's consideration is "not the legal issue at stake in the present case," which it buried in a lengthy footnote to one of its responses to Panel questions prior to the first substantive meeting,[128] does little to rebut the persuasive value of the *DRAMs* panel's reasoning.

74. The EU also makes additional legal arguments concerning "volume effects" specific to the USITC's price effects analysis.[129] The EU's argument that the USITC's finding of price undercutting in the absence of price depression or price suppressions was invalid in the absence of "volume effects" ignores that Articles 3.2 and 15.2 explicitly recognize three alternative ways in which unfairly traded imports can have an "effect" on prices. They do not set out a hierarchy in which one way is less important than the other two, or requires additional findings that the

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[123] ASCM Art. 11.2(iv).

[124] *Japan – DRAMS (Panel)*, para. 7.411; *Japan – DRAMS (AB)*, para. 257.

[125] *Japan – DRAMS (Panel)*, para. 7.416.

[126] *Japan – DRAMS (AB)*, para. 270 n.475, citing *Japan – DRAMS (Panel)*, para. 7.417.

[127] *US – DRAMS (CVD)(Panel)*, para. 7.319 n.283.

[128] EU September 8 responses to Panel questions, para. 108 n.90.

[129] EU November 12 responses to Panel questions, paras. 180-188.

other two do not.[130] The EU's related attempts to read so-called volume and price "causal pathways" into the text of the Agreements displays a fundamental misunderstanding of what these articles require of investigating authorities considering evaluation of subject import volume and price effects. They also would negate the last sentence of these articles that none of the stated factors necessarily provides definitive guidance.

C. The USITC conducted a proper analysis of price effects

75. The EU's challenges to the USITC's analysis of price effects are also largely tied to its general arguments concerning market segmentation.[131] It does, however, raise further arguments challenging the USITC's conclusion that underselling of the domestic product by the unfairly traded imports was significant.

76. The United States previously explained that the USITC's price underselling analysis was based on pricing data for four specific pricing products, which it selected in consultation with the parties.[132] Based on its review of these data, the USITC found that subject imports *pervasively* undersold domestic pricing products, in 37 of 48 available quarterly price comparisons, including in the retail channel, where subject imports captured market share from the domestic industry.[133] The USITC also considered information on the record regarding lost sales, which indicated that 12 of 25 responding purchasers reported that subject import prices were lower than those for domestically processed ripe olives.[134] The USITC, weighing the record evidence and considering the arguments of the parties, reasonably concluded, on the basis of positive evidence and without favoring the interests of any particular party to the proceedings, that subject import underselling was significant. The crux of the EU's challenge to the finding of significant underselling, as articulated in its opening statement during the virtual session,[135] is the

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[130] *See*, in this regard, U.S. November 12 responses to Panel questions, paras. 70-73.

[131] The United States rebuts these challenges above at paras. 46-60.

[132] U.S. FWS, para. 201; U.S. June 10 responses to Panel questions, para. 68. *See also* U.S. September 8 Responses to Panel questions, para. 34; U.S. opening statement, para. 54; U.S. November 12 responses to Panel questions, para. 69.

[133] U.S. FWS, para. 202.

[134] U.S. FWS, para. 203.

[135] Previously the EU asserted that the underselling finding failed to provide a "meaningful basis" for the USITC's analysis of causal link. EU September 8 responses to Panel questions, paras. 118-125, *citing China – HP-SSST (AB)*, para. 5.163. This argument drew, almost exclusively, from a snippet of the Appellate Body report in *China – HP-SSST* that addressed the panel's failure to accord any meaning to the term "significant" as it appears in the term "significant price undercutting" in Articles 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. While the Appellate Body made clear than an authority must do more than simply tabulate whether unfairly traded imports sell at lower prices than domestic products, this cannot serve as a basis for challenging the USITC's underselling analysis, which took pertinent conditions of competition and lost sales into account in assessing the significance of the underselling. USITC Pub. 4805 (Exhibit EU-5) at 21-22.

unsupported allegation that the USITC's finding lacks a factual predicate.[136] In the EU's view, the USITC's finding that there were instances of overselling in both retail subchannels during the period of investigation undermined its conclusion that this underselling was significant. This is incorrect.

77. The EU observes that there were some instances of overselling in the retail channel,[137] but a finding of significant underselling does not require that subject imports undersell domestic product in all instances, nor would such a requirement reflect commercial reality. The EU is simply wrong in implying that some sales at higher prices than domestic products cancel out sales at lower prices. Indeed, this strained reading of the Article 3.2/15.2 requirements would be at odds with the panel's reasoning in *EC – Tube Fittings*, where the panel agreed with the EU's argument that "{t}he fact that certain sales may have occurred at 'non-underselling prices' does not eradicate the effects in the importing market of sales that were made an underselling prices," given that "there might be a considerable number of sales at undercutting prices which might have had an adverse effect on the domestic industry."[138] The USITC's analysis of impact details the adverse impact of low-priced subject imports sold to the retail channel on the domestic industry as a whole.[139]

78. In addition, the instances of underselling that the USITC found in the retail channel all transpired towards the end of the period of investigation.[140] Prior panels have recognized that most recent available record data may be "inherently more relevant and thus especially important to the investigation."[141] It follows that the USITC's reliance on these data in its price effects analysis, and its characterization of underselling in the retail subchannels as "pervasive,"[142] was based on positive evidence and reflected an objective examination of record data concerning pricing.

79. The EU would clearly have preferred the USITC to conclude that subject import underselling was not significant. However, the EU's dissatisfaction with the outcome cannot establish a *prima facie* case that the USITC failed to base its price effects analysis on positive evidence and an objective examination of the record data. The USITC's report plainly indicates

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[136] EU opening statement, para. 125.

[137] USITC Pub. 4805 (Exhibit EU-5) at 20-21.

[138] *EC – Tube Fittings (Panel)*, para. 7.277. It is of note that the parties in that dispute expressed the shared view that "the Panel should accord a considerable discretion to the investigating authorities to choose a methodology which produces a meaningful result while avoiding unfairness." *Id.* The USITC did so in this case.

[139] U.S. FWS, para. 237; USITC Pub. 4805 (Exhibit EU-5) at 22-24.

[140] U.S. FWS, para. 202.

[141] *Mexico – Pipe and Tubes (Panel)*, para. 7.228.

[142] The term "pervasive" is defined in Merriam-Webster's Dictionary as "existing in or spreading through every part of something." *See* https://www.merriam-webster.com/dictionary/pervasive (last accessed: November 28, 2020).

that the USITC fully discharged its obligation to consider the "significance" of subject import underselling.[143]

D. The USITC conducted a proper impact analysis

(1) The EU has failed to show that the USITC breached Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement

80. The EU's principal argument on impact is that the USITC failed to conduct an "objective examination of the explanatory force of subject imports for the state of domestic industry" as a whole in light of the decline in the volume of unfairly traded imports.[144]

81. In its report, the USITC fully discharged its obligation to examine the impact of subject imports, evaluating all relevant factors and indices. The United States previously explained, in this regard, that the USITC based its impact analysis on data compiled from domestic processors on a number of production, employment, and financial performance indicators.[145]

82. Based on its review of all these data and other information in the record, the USITC properly found that the production factors, while mixed, indicated that the domestic industry's inventory of ripe olive products processed and packaged for sale to purchasers in the retail channel of distribution increased as it lost sales and market share to subject imports in this channel.[146] Positive evidence showed that the significant underselling by subject imports took away sales and market share from domestic processors in the retail channel, which led to an increase in inventories and caused negative effects, including credit problems and cancelled and deferred projects.[147] As the USITC also found, the record also showed that a number domestic processors' financial performance indicators deteriorated due to sales lost in the retail channel.[148] The USITC, weighing the record evidence and considering the arguments of the parties, reasonably concluded, on the basis of positive evidence and without favoring the interests of any particular party to the proceedings, that subject imports had explanatory force for the domestic industry's declining output and financial performance indicators, and thus had a significant adverse impact on the industry.

83. Divorcing the facts of this case from its hypothetical arguments, the EU argues that conceptually the "intensification" of competition in the retail channel is inconsistent with

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[143] *See*, in this regard, U.S. FWS, para. 190, *citing Thailand – H-Beams (Panel)*, para. 7.161.

[144] EU November 12 responses to Panel questions, para. 196. The EU has abandoned its argument in its first written submission that the USITC's analysis of impact ignored certain domestic industry data. EU FWS, paras. 503-508; EU November 12 responses to Panel questions, para. 195.

[145] U.S. FWS, para. 225.

[146] U.S. FWS, para. 226.

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

[148] U.S. FWS, para. 227.

principles of open market competition.[149] The EU's suggestion that the domestic processors could have simply directed sales to the distribution channel, or re-enter the institutional/food channel in which subject imports had displaced them prior to the period of investigation does not reflect what actually occurred during the period of this investigation, and ignores the USITC's record-supported findings regarding conditions of competition in the market. Specifically, the USITC found that there were distinct market channels, and each channel involved unique customers that purchased ripe olive products prepared to meet requirements specific to each channel.[150] Based on these conditions, the USITC determined that sales and market share that the domestic industry lost to subject imports led to an increase in their inventories, which consisted largely of ripe olive products prepared for sale to retail purchasers.[151]

84. The EU contends that the United States' discussion of the USITC's finding that competition between domestically processed olives and unfairly traded imports from Spain intensified in the retail channel constitutes "ex post" argument.[152] In fact, however, the USITC explicitly discussed competition between these products in the retail channel.[153]

(2) The EU's consequential impact claim is unsupported by the text of the agreements

85. The EU urges this Panel to find that the USITC's analysis of impact must fail due to its reliance on the Commission's purportedly flawed analyses of volume and price effects.[154]

86. The EU's argument is flawed insofar as it is premised on the contention that the term "consequent" as it appears in Articles 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement suggests that the relationship between Articles 3.2 and 15.2, on the one hand, and Articles 3.4 and 15.4, on the other, mirrors that which prior panels have identified between Articles 3.2 and 15.2 and Articles 3.5 and 15.5.[155] Notwithstanding the EU's assertion that it sees "no reason why" Articles 3.4 and 15.4 should be interpreted any differently than Articles 3.5 and 15.5, this argument is based largely on a counterfactual analysis of what the panel and the Appellate Body *might* have determined in *China – HP-SSST* had certain claims concerning price undercutting resolved differently, and is thus speculative and irrelevant.[156]

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[149] EU' November 12 responses to Panel questions, para. 210.

[150] U.S. FWS, para. 237; USITC Pub. 4805 (Exhibit EU-5) at 22-24.

[151] U.S. FWS, para. 202.

[152] *See* EU November 12 responses to Panel questions, paras. 207, 210.

[153] USITC Pub. 4805 (Exhibit EU-5) at 18-19, 20-21, 24-26.

[154] EU FWS, para. 563.

[155] EU November 12 responses to Panel questions, paras. 189-191.

[156] EU November 12 responses to Panel questions, paras. 191-192

87. The EU's argument also fails from a textual basis. As the United States has previously noted, an investigating authority's analysis of impact under Articles 3.4 and 15.4 focuses on factors that are distinct from those considered in a volume and price effects analysis under Articles 3.2 and 15.2.[157] Likewise, an authority's impact analysis also focuses on factors distinct from those considered in a causal analysis under Articles 3.5 and 15.5. Articles 3.4 and 15.4 focus on factors reflecting the state of the domestic industry during the given period of investigation, whereas Articles 3.2 and 15.2 focus on an authority's consideration of the volume and price effects of subject imports. These are fundamentally distinct inquiries. In contrast, Articles 3.5 and 15.5 are broader in scope and tie the various preceding provisions together, as reflected in the direction that authorities are to examine "all relevant evidence" for purposes of addressing causation.[158]

88. The EU's consequential claim, that flaws in an investigating authority's volume and price effects analyses necessarily invalidate its impact analysis, is accordingly unsupported by the text of the Agreements.

E. The USITC conducted a proper causal link analysis

89. The EU's causal link arguments are derivative of its arguments regarding market segmentation. Specifically, the EU contends that the USITC's conclusions on causal link lacked foundation because they relied on analyses of volume, price effects, and impact which were flawed because of their purported use of market segmentation.[159] The United States has established that the predicate of the EU's argument is faulty.[160]

90. The United States previously explained that the USITC found that significant volumes of subject imports significantly undersold the domestic like product, capturing market share from the domestic industry in its largest and most important market channel, the retail channel, and also resulted in a decline in total commercial U.S. shipments, and a buildup of inventory processed and packaged for sale to retail purchasers.[161] The USITC also found that several of the domestic producers' performance indicators were worse than they would have otherwise been, including declining total commercial shipments and market share, increasing inventories, and deteriorating operating and net income.[162] The USITC, accordingly, properly linked its volume, price effects, and impact analyses in making a definitive determination that subject

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[157] U.S. November 12 responses to Panel questions, paras. 74-75.

[158] *See Korea – Pneumatic Valves (Japan)(Panel)*, para. 7.248 (*considering* that "an investigating authority is not limited, in addressing the issue of causation, to the consideration, examination, and evaluation of evidence with respect to the factors set forth in Articles 3.2 and 3.4.").

[159] EU FWS, 601-615.

[160] The United States rebutted these challenges above at paras. 46-60.

[161] U.S. FWS, para. 238.

[162] U.S. FWS, paras. 226-227, 237-238; U.S. June 10 responses to Panel questions, para. 69; U.S. opening statement, paras. 58, 60.

imports caused injury to the domestic industry, and the EU has failed to show that an objective and unbiased authority could not have made a similar finding.

F. The USITC conducted a proper non-attribution analysis

91. The EU's challenge to the USITC's non-attribution analysis relies on an alternative analysis of the facts.[163] In particular, the EU posits that its alternative explanation of the record, which would attribute the domestic industry's difficulties to a decline in apparent U.S. consumption and nonsubject imports from Morocco rather than the unfairly traded imports from Spain, is "more extensive and informative."[164]

92. This argument must fail. As the United States previously observed, presenting an alternative analysis of the facts cannot serve to establish a *prima facie* case that the USITC's analysis of non-attribution was inconsistent with the Agreements.[165] Rather, the EU must show that an objective and unbiased investigating authority could not have reached the same determination. Moreover, the EU's arguments studiously avoid addressing the actual rationale that the USITC used in its opinion.[166]

93. The United States has explained in its previous submissions, that the USITC found that the relatively modest decline in apparent U.S. consumption during the period of investigation was smaller than the declines that the domestic industry experienced in commercial shipments, net sales, and operating and net income.[167] The USITC thus found that the decline in apparent U.S. consumption was not of a magnitude that would render insignificant the likely impact of subject imports.[168]

94. The United States has also explained that the USITC's conclusion that nonsubject imports could not account for the domestic industry's deteriorating output and financial performance was based on record evidence concerning certain nonprice factors, namely quality and availability and supply, and the comparatively smaller presence of nonsubject imports from Morocco in the U.S. market, including in the retail channel of distribution.[169] In light of the foregoing, the USITC fully discharged its obligation to demonstrate that subject imports caused injury to the domestic industry. The EU has not explained why an objective and unbiased could not have come to a similar determination and its claims must therefore be rejected.

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[163] EU FWS, paras. 615-638.

[164] EU FWS, para. 622.

[165] U.S. FWS, para. 252.

[166] U.S. FWS, para. 252. *See*, notably, EU FWS, paras. 618-637, which faults the USITC for failing to adopt the rationale of the dissent.

[167] U.S. FWS, paras. 249-250.

[168] U.S. FWS, paras. 249-250.

[169] U.S. FWS, paras. 253-257.

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

95. The EU has failed to establish that, in relying upon the information supplied by Guadalquivir, the USDOC breached U.S. obligations under the SCM Agreement.[170] As explained at length in the previous U.S. submissions, the USDOC expressly requested each mandatory respondent's purchases of raw olives used to produce ripe olives.[171] The USDOC also made clear before the final determination that such information was an essential fact under consideration.[172] Below, the United States will address additional points raised by the EU since the virtual session with the Parties.

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

96. The EU has acknowledged that the USDOC's August 4, 2017 letter is "the key document" on the issue of whether the USDOC asked Guadalquivir to provide purchase information for raw olives used to produce ripe olives.[173] To recall, that is the document that elicited from the other two respondents purchase information for raw olives used to produce ripe olives, but that according to the EU, elicited from Guadalquivir such information for all raw olives. Strikingly, in arguing for its interpretation of the August 4 letter, the EU ignores the text of that letter.[174]

97. The United States has at length shown how, through the language used in its August 4 letter, the USDOC requested purchase information for raw olives processed into ripe olives.[175] In particular, the United States has explained how the operative question in the August 4 letter, question 6, read in isolation or in the context of the surrounding letter, made plain the USDOC's request for this information.[176] The EU has responded to none of this exposition of the text.

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[170] To recall, the EU first written submission raised arguments concerning Articles 10, 12.1, 12.8, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement.

[171] *See* U.S. FWS, paras. 270-285; U.S. September 8 responses to Panel questions, paras. 38-42; U.S. November 12 responses to Panel questions, paras. 88-89, 94-97; U.S. opening statement, paras. 71-72.

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

[173] *See* EU opening statement, para. 128.

[174] *See* EU opening statement, paras. 127-134.

[175] U.S. FWS, paras. 269-278; U.S. June 10 responses to Panel questions, paras. 86-89.

[176] *See, e.g.*, U.S. FWS, paras. 269-278.

Instead, it has made a series of bald assertions about the text of the August 4 letter.[177] In fact, in its only reference to the explanations provided by the United States, the EU simply asserted, without more, that "the wording of Question 6 . . . was not limited to olives processed into subject merchandise."[178] If the text of the August 4 letter so unequivocally supports the EU's interpretation, it has not explained why. In the absence of any substantive response, the EU has failed in supporting its claims with respect to the August 4 letter – "the key document".

98. Instead, the EU has tried to shift attention to a separate letter which the USDOC issued on September 27. Specifically, in its opening statement at the virtual session and subsequent responses to the Panel's questions, the EU has focused almost entirely on the fact that the September 27 letter used the words "resubmit" and "correct", which the EU takes to mean that in the August 4 letter the USDOC was really requesting purchase information for all raw olives.[179]

99. The United States has explained at length why that is not the case and why the EU's arguments are unavailing.[180] To briefly summarize, the September 27 letter: (i) directed the respondent companies *to add to* the previously reported information on purchases of raw olives that were used to produce ripe olives; and (ii) did not withdraw or otherwise alter the separate August 4 letter, which, in any event, was clear in requesting information for raw olives processed into ripe olives, and well-understood by the other two mandatory respondents.

100. In its post-virtual session responses, the EU made two additional, flawed arguments related to the USDOC's August 4 and September 27 letters. First, concerning the disclosure of "essential facts" under Article 12.8, the EU argues that "the fact that information was asked for in an initial questionnaire is [not] sufficient to establish that the information is an essential fact . . . ."[181] To support its point, the EU cites the observation in *China – HP-SSST (Japan) / China – HP-SSST (EU)* that:

> We do not see how the mere fact that the investigating authority may be referring to data that are in the possession of an interested party would mean that it has disclosed the

[177] According to the EU, the USDOC's August 4 letter: "clearly requested the respondents to indicate their overall purchases of raw olives" and "is unambiguous in that it requested information on the volume of all raw olives purchased". EU opening statement, para. 128; EU November 12 responses to Panel questions, para. 248.

[178] *See* EU June 10 response to Panel questions, para. 149.

[179] *See, e.g.*, EU opening statement, para. 132; EU November 12 responses to Panel questions, paras. 226-229.

[180] U.S. opening statement, paras. 73-74; U.S. FWS, paras. 311-315; U.S. June 10 responses to Panel questions, paras. 73-81; U.S. September 8 responses to Panel questions, paras. 38-42.

[181] *See* EU November 12 responses, paras. 219-225. The EU also states that disclosure must come before the administrative record closes. As the United States has noted, the issue is not in the first instance related to a claim at issue in this dispute. U.S. November 12 responses, paras. 85-86.

> essential facts 'that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome' . . . .[182]

101. In that case, the Appellate Body report was referring not to an initial questionnaire but to a narrative description of certain information in the investigating authority's final disclosure.[183] To the extent the EU is suggesting that the same concern necessarily limits the ability of an investigating authority to disclose an essential fact in its initial questionnaire, that suggestion is wrong. As the United States has explained, the USDOC disclosed that purchases of raw olives processed into ripe olives was an essential fact under consideration; it did so through its initial questionnaire and, in any event, on two other occasions (i.e., the verification agenda and the verification report).[184]

102. Second, in its November 12 responses the EU argues that the "natural interpretation of the sequence" of the August 4 and September 27 letters demonstrates that the August 4 letter "clearly was limited to requesting information on the volume of all raw olives."[185] The point the EU is trying to make with respect to this sequence is unclear. If the EU means that the September 27 letter withdrew or replaced the relevant question in the August 4 letter, it has not substantiated its view.[186] If the EU instead means that the August 4 letter should have been understood in terms of the September 27 letter, its position would overlook that the August 4 letter came first. When the USDOC issued its August 4 letter, it was not planning for its meaning to be understood in terms of a later-issued letter. Similarly, in responding to the August 4 letter, Guadalquivir and the other mandatory respondents were not doing so in the context of the September 27 letter. In other words, if the August 4 letter provided notice that the USDOC required purchase information for raw olives processed into ripe olives, the September 27 letter did not somehow countermand that notice. When the August 4 letter was issued to the respondents, it either provided notice of the information required of the respondents or it did not. As the United States has explained, it did.

103. In addition, the EU refers to the fact that the September 27 letter "represents an answer to a specific query of respondent's counsel."[187] To be clear, Guadalquivir did not seek clarification or additional guidance from the USDOC. As explained in the U.S. November 12 responses,[188] Guadalquivir and the other two mandatory respondents were represented by the

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[182] *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.133.

[183] *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.

[184] *See* U.S. November 12 responses, paras. 87-88; U.S. FWS, paras. 322-332.

[185] EU November 12 responses, paras. 236, 248.

[186] As the United States has explained, it was not. *See* U.S. FWS, paras. 282-285; U.S. June 10 responses to Panel questions, paras. 73-81; U.S. September 8 responses to Panel questions, paras. 38-42.

[187] EU November 12 responses to Panel questions, para. 227.

[188] U.S. November 12 responses to Panel questions, para. 98.

same law firm, which requested clarification on behalf of one of the other two mandatory respondents.[189] Given that other respondents, represented by the same counsel, took the USDOC up on its invitation for any additional clarification and properly understood the USDOC's August 4 request for raw olives processed into ripe olives, it is not credible for the EU to claim that the USDOC did not provide notice to Guadalquivir or should have known that Guadalquivir did not understand its question.

104. Finally, it is notable that although the EU has cited litigation before the U.S. Court of International Trade in an effort to support its *de jure* specificity claims,[190] it has neglected to mention the Court's decision on this issue affirming the USDOC's determination.[191] The EU cannot have it both ways. The EU has not explained how if, as it claims, the Court's remand regarding the specificity issue is relevant to this dispute, the Court's affirmance on the Guadalquivir issue does not undermine the EU's claims on that issue.

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

105. Several of the EU's claims with respect to Guadalquivir pertain to the calculation of the amount of benefit.[192] However, as the United States has explained and as the Panel has alluded to, the EU did not bring a claim under Article 14 of the SCM Agreement.[193] As a result, the EU has not properly challenged calculation of the amount of subsidy, and therefore cannot succeed in its claims.

106. Asked about its omission, the EU argued neither that Article 14 pertains to something other than the calculation of the amount of benefit nor that one of the provisions that it *did* cite pertains to the calculation of the amount of benefit.[194] Instead, the EU argued that it did not need to bring a claim under Article 14 because "a determination of benefit conferred can comply with these specific disciplines out [sic] in Article 14 of the SCM Agreement and nonetheless contravene other disciplines . . . ."[195] That is true. However, at their core, the EU's claims are about the calculation of the amount of benefit. Indeed, the EU summarized as follows: "In conclusion, the calculation of Guadalquivir's subsidy rate (and consequently of its countervailing

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[189] *See* Ripe Olives from Spain Countervailing Duty Investigation: Clarification of the Department's September 26, 2017 Letter (Exhibit EU-60), pp. 1-2 (responding to the law firm's questions regarding (i) the reporting obligations of the suppliers of Agro Sevilla and Angel Camacho and (ii) the raw olive purchase information supplied by Agro Sevilla).

[190] *See, e.g.*, EU opening statement at virtual session of the Parties, paras. 45-47.

[191] *See* U.S. FWS, n.76.

[192] *See* U.S. FWS, para. 287. Those claims relate to Articles VI:3 of the GATT 1994, and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement.

[193] *See* U.S. FWS, paras. 289-300.

[194] *See* EU November 12 responses to Panel questions, paras. 214-218.

[195] EU November 12 responses to Panel questions, para. 218.

duty rate) violates Articles VI:3 of the GATT 1994, and Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement."[196] However, it is Article 14 of the SCM Agreement which speaks directly to the notion of calculating the amount of benefit in terms of the benefit to the recipient. As explained in the U.S. first written submission, the other provisions – i.e., those underlying the claims the EU actually brought – do not.[197]

107. Therefore, the EU has not raised a legal basis under which the Panel can make a finding of breach regarding the calculation of benefit with respect to Guadalquivir. As such, each of the EU's claims in this respect must be rejected.

VI. CONCLUSION

108. For the foregoing reasons, the United States respectfully requests that the Panel reject the EU's claims.

[196] EU FWS, para. 711 (emphasis original).

[197] U.S. FWS, paras. 289-300.