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

(DS577)

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TABLE OF REPORTS

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

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

Mr. Chairperson, Members of the Panel:

1. Before we begin, we would like to note that we appreciate the Panel's recognition of the time limits provided in the additional working procedures and we trust that only the appropriate portion of the EU's statement will form a part of the record. The United States thanks you for agreeing to serve on this Panel, and extends our gratitude as well to the Secretariat staff assisting you with your work. These are difficult times, and striking a proper balance between caution and carrying out our work requires a considered approach. As the United States has explained in previous communications, virtual meetings with the Panel present significant difficulties for the Parties in terms of effectively coordinating and presenting views, while ongoing health concerns related to the global pandemic prevent members of delegations from gathering in a single location. We appreciate the Panel's consideration of these views in the planning of this virtual session, and encourage the Panel to continue to consult with the Parties as the proceedings continue, in particular with respect to the health risks participation in future virtual sessions may continue to pose.

2. In our statement today, we will highlight several important issues addressed in the Parties' written submissions. First, we will address the EU's claims that the U.S. Department of Commerce's ("USDOC") *de jure* specificity determination was inconsistent with Article 2.1(a) of the SCM Agreement. Second, we will address the EU's claims regarding the USDOC's pass-through analysis. Third, we will address the EU's claims that the U.S. International Trade Commission's ("USITC") injury analysis was inconsistent with Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement. And fourth, we will address the EU's claims regarding the calculation of the final subsidy rate of one of the three mandatory respondents.

3. With respect to these issues, the EU has raised claims based on untenable interpretations and applications of the GATT 1994, the SCM Agreement, and the AD Agreement. Rather than advance an argument based on the plain meaning of the applicable provisions, the EU asks the Panel to accept interpretations of WTO rules that have little connection to how they are properly understood in light of their ordinary meaning, read in context, and in light of the object and purpose of the agreements at issue. Our statement today will make plain the EU's legal and factual errors and provide the Panel with interpretations based on a proper reading of the relevant provisions.

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

4. By now, the Parties have submitted several rounds of arguments regarding their differing interpretations of Article 2.1 of the SCM Agreement and its application to this dispute. The United States considers it worthwhile to recall what the Parties' share in their understanding of the programs in question, before focusing on the difference at the heart of the issue. That difference is whether the changes made to the Oils and Fats Program removed from the disciplines of the SCM Agreement the subsidies conferred to olive growers. The changes – basing subsidies on historic rather than current olive production and housing those subsidies within a wider program – do no such thing. Rather, what the EU has called a "Copernican revolution" is, for purposes of Article 2.1 of the SCM Agreement, an administrative artifice.

5. To start with, the Parties agree that the Oils and Fats Program provided subsidies to olive growers from 1999 through 2002 and did so based on olive production. Correspondingly, the Parties agree that access to those subsidies was limited to olive growers for growing olives.

6. The Parties similarly agree that the programs that succeeded the Oils and Fats Program, the SPS Program and then the BPS Programs, continued to provide subsidies using information from the reference period during which the Oils and Fats Program operated. And finally, despite the EU's arguments that the SPS Program and BPS Programs transformed the subsidies into entitlements that were "decoupled" from current olive production, it is not in dispute that only certain entitlement holders – not all farmers – could access the entitlement component that was based upon subsidies conferred under the Oils and Fats Program.

7. Here, the Parties diverge. Specifically, although the EU does not dispute the general factual foundation concerning the Oils and Fats Program and BPS Programs, and the interoperation of those programs, it has proposed several flawed interpretations of Article 2.1(a) of the SCM Agreement and what the USDOC found in connection with that provision. This statement will focus on three EU arguments in particular: (1) the role of the Oils and Fats Program in limiting access under the BPS Programs; (2) how the BPS Programs continued to favor certain enterprises with limited access to subsidy payments; and (3) how the USDOC identified those favored enterprises.

8. First, the EU challenges the USDOC's evaluation of the link between the Oils and Fats Program, which provided subsidies to olive growers based on olive production, and the BPS Programs, which gave certain enterprises access to subsidies based on those prior subsidy payments. Of note, the EU is not disputing the existence of this link or its impact on the operation of the BPS Programs. What the EU disputes is how the USDOC labelled that relationship in its final determination, arguing that for an investigating authority to conclude that a program is *de jure* specific to enterprises eligible under a previous program, "it must positively

determine that the previous program contained an explicit limitation on access to certain enterprises and explain why."[1] In the first instance, that argument ignores the explanation provided in the USDOC's final determination, and in the second, it conflicts with the plain language of Article 2.1(a).

9. To begin with, as explained in the U.S. first written submission and subsequent responses, the final determination provided such an explanation. The USDOC explained how the assistance a farmer was eligible to receive under the BPS Programs was based on payments conferred under the terms of the earlier SPS Program[2] which, in turn, explicitly referred to and was based on the Oils and Fats Program.[3] In short, the USDOC identified how the legislation pursuant to which the granting authority conferred subsidies under the BPS Programs explicitly limited access to payments based upon olive production under the Oils and Fats Program.[4] The USDOC's determination took into account both the BPS Programs and the reference to the Oils and Fats Program because, under Article 2.1(a), they were "the legislation" pursuant to which access was limited.[5]

10. In addition, the EU's suggestion that the USDOC should have made an additional specificity determination regarding the previous Oils and Fats Program is contrary to Article

[1] EU September 8 responses to Panel questions, para. 29.

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

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

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

[5] *See* U.S. September 8 responses to Panel questions, paras. 6-10.

2.1(a) of the SCM Agreement. As the United States has explained, Article 2.1(a) contains no requirement that an investigating authority make separate specificity determinations for each legal instrument or reference that constitutes "the legislation" at issue.[6] Article 2.1 requires one specificity determination for the subsidy program defined in Article 1.1 – i.e., the BPS Programs. Requiring other, subsidiary specificity determinations would conflict with the text of Article 2.1(a) and, in a case such as this, prevent the investigating authority from taking into account all of the relevant pieces of the legislation pursuant to which the granting authority operates.

11. Second, the EU argues, in essence, that because it shifted olive production subsidies from the narrower Oils and Fats Program to the broader SPS Program and BPS Program, the subsidies are beyond the reach of the SCM Agreement and are off limits to investigating authorities. In the EU's view, it does not matter that the BPS Programs continued to favor certain enterprises using a limit on access that is derived from the same historic olive production. All that matters, in the EU's view, is that <u>any</u> threshold amount was available to <u>any</u> enterprises outside the group.

12. The United States has identified several critical flaws in the EU position.[7] Given the importance of this issue to the dispute and systemic implications, we amplify some of those comments here.

13. Most importantly, Article 2.1 was drafted using language to indicate that specificity is a general concept and that the term "limits access" is not restricted in meaning to one particular

[6] U.S. June 10 responses to Panel questions, paras. 19-21.

[7] *See, e.g.*, U.S. September 8 responses to Panel question, paras. 1-4.

type of access. The panel in *US – Upland Cotton* rightly observed that "specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition."[8] The limit could be described as amount-based, such that only certain enterprises may access payments derived from the component, or the limit could be eligibility-based, such that only certain enterprises may access the component.

14. In its responses to the Panel's questions, the United States has not equated "access" with other terms such as "eligibility" or "amount" because Article 2.1(a) does not use those terms. As the Appellate Body has noted, although "a limitation on access to a subsidy may be established in many different ways", what is required no matter the approach taken, is that the investigating authority "ensure that the requisite limitation on access is clearly substantiated on the basis of positive evidence."[9]

15. The EU relies on an interpretation of "limits access" that is restricted by language that is absent from the text of Article 2.1(a). In particular, the EU argues that "limits access" can only mean "limits eligibility" and, what is more, that "limits eligibility" can only mean "limits threshold eligibility for the program".[10] In this way, the EU's theory operates at two removes from the language actually used to describe *de jure* specificity under Article 2.1(a). To support its tenuous chain of logic, the EU provides definitions of terms it would prefer be used in the place of the language actually used in Article 2.1(a) – i.e., "limits access". The Panel should not

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

[9] *See US – Anti-dumping and Countervailing Measures (China) (AB)*, para. 413.

[10] *See* EU June 10 responses to Panel questions, paras. 9-10.

artificially limit the programs that an investigating authority may find to be specific under Article 2.1(a).

16. The EU expresses the concern that by not accepting its interpretation of "limits access", investigating authorities could "arbitrarily decide how to delimit the group of 'certain enterprises.'"[11] That concern is misplaced and ignores the plain language requirements of Article 2.1(a). For one, Article 2.1(a) restricts the term "access" in two ways: (i) it must be limited "to certain enterprises" and (ii) it must be expressed "explicitly" by the granting authority or the relevant legislation.[12] The investigating authority must, as the USDOC did here, identify where the granting authority or legislation favored certain enterprises with limited access. Moreover, the investigating authority must make a determination based on the record evidence and arguments before it, and substantiate clearly that determination with positive evidence.[13] The investigating authority must satisfy these text-based requirements and not the extra-textual requirements proposed by the EU, which the drafters did not include.

17. The United States has also explained how the EU's restricted reading of the term "limits access" would create a loophole through which granting authorities will design subsidy programs that are broadly available but limit access to a component or subprogram to certain favored

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

[12] *See* U.S. June 10 responses to Panel questions, paras. 3-15.

[13] SCM Agreement, Art. 2.4.

enterprises.[14] The EU's response, that such programs might be *de facto* specific under Article 2.1(c) of the SCM Agreement, is unconvincing.[15]

18. That response is wrong in the first place because the USDOC found the program under investigation to be *de jure* specific under Article 2.1(a) and not *de facto* specific under Article 2.1(c). As the United States has explained, and as is evident in the USDOC's determination, the USDOC identified a limit based on access to subsidy payments rather than receipt in fact of such payments. Whether any particular group of enterprises used or did not use the program, or received disproportionate subsidy amounts under the program, while possibly relevant to the calculation of benefit, is not relevant under Article 2.1(a). The EU's position would have the investigating authority collapse its inquiries of *de jure* and *de facto* specificity and is therefore fundamentally flawed.

19. Moreover, it is difficult to credit the EU's claim that Article 2.1(c) essentially backfills the loophole that the EU's excessively narrow interpretation of Article 2.1(a) would create. In fact, before the USDOC, the EU represented that it could not provide information on subsidies actually received "for specific or particular sectors" because the SPS Program and BPS Programs were designed in a way that "does not allow for a categorization between types of farmers or their activity."[16] The EU cannot have it both ways. Article 2.1(c) should not be conflated with Article 2.1(a), which is the only type of specificity relevant to this dispute.

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

[15] EU September 8 responses to Panel questions, 23-24.

[16] *See* Exhibit EU-33, p. 7.

20. Third, the EU has tried to impugn how the USDOC identified the "known and particularized" group of enterprises and has accused the United States of using "an alternative narrative" to justify the determination.[17] A review of the final determination, as opposed to the EU's characterization of that determination, dispels both contentions.

21. At the heart of the EU's complaint, it appears, is that the final determination used variations of the term "specificity to olive growers" even though, under the BPS Programs, access was limited based upon historic rather than current olive production. However, the final determination is clear in identifying that the "certain enterprises" under Article 2.1(a) are holders of entitlements whose value derived from the Oils and Fats Program.

22. The USDOC recognized that under the SPS Program and BPS Programs, a farmer could hold an entitlement with a component based on olive production during the reference period of the Oils and Fats Program regardless of whether or if the land was later switched to a different use. The USDOC observed that "the amount of the payment is dependent on the annual activation of the entitlement, and is not dependent on the type or volume of crop produced."[18]

23. In this way, the final determination reflected how the BPS Programs kept, from the Oils and Fats Program, the conditions that limited access to those subsidies as a discrete component of entitlement payments, whether the entitlement holders continued to grow olives or did something else.

[17] *See* EU September 8 responses to Panel questions, para. 43.

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

24. The USDOC's remand redetermination is similarly straightforward in identifying the group of enterprises under the BPS Programs.[19] For example, the USDOC explains: "the value of entitlements under the BPS incorporates the value of olive production per hectare . . . as recorded under the [Oils and Fats Program] . . . . . Specifically, farmers on lands that produced olives during the reference period continue to have limited access to entitlement values, and therefore benefit amounts, that retain the historical difference, relative to other farmers on other lands, that was inherent in the crop-specific subsidies provided under the [Oils and Fats Program]."[20] By incorporating the value of prior olive production into the entitlements under the BPS Programs, the BPS Programs are specific to olive growers, as the USDOC correctly observed.

25. However, to account for the interoperation of the successive payment schemes implemented by the EU and the GOS, the USDOC did not stop its analysis there. The USDOC explained that the BPS Programs limit access to "farmers on lands that produced olives during the reference period." Again, consistent with the final determination, it does not matter whether the farmers switched some or all of their production from olives to something else. What matters is that access to a discrete component of the BPS Programs – entitlement values derived from subsidies under the Oils and Fats Program – was limited to farmers on lands that qualified them for these entitlements.

[19] For the reasons identified in its July 10 response to the Panel's request for comments, the United States opposes the inclusion of the remand redetermination in the Panel's terms of reference. Given the Panel's September 18 communication permitting the EU to address that redetermination, we include it in our discussion here, and also request a full opportunity to respond to any points raised by the EU concerning that redetermination.

[20] Exhibit EU-80, pp. 58-59 (identifying this as the reason the program was specific to olive growers).

26. Without question, the EU and GOS designed an intricate support scheme, one that draws upon multiple legal instruments (i.e., the Oils and Fats Program, SPS Program, and BPS Programs) and bases access to support for certain enterprises on historic rather than current olive production. However, those complexities did not place the subsidy payments outside the bounds for Article 2.1(a) of the SCM Agreement. As the USDOC confirmed in its multi-step evaluation of the interoperation of those programs, the relevant legislation continued to limit access to an entitlement component based on olive production under the Oils and Fats Program. Thus, the Panel should reject the EU's claims that the USDOC's specificity determination was inconsistent with Article 2.1(a) of the SCM Agreement.

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

27. The EU's pass-through claims rest on the false premise that the Panel may read specific methodological requirements into the general obligations in the GATT 1994 and the SCM Agreement to identify and calculate the benefit received by a downstream producer where the subsidy was initially granted to an upstream producer. However, the GATT 1994 and the SCM Agreement do not require a particular methodology for conducting a pass-through analysis; and the EU has failed to identify any provision in those agreements that supports its primary argument that a pass-through analysis must always involve an analysis of price differentiation. With respect to the EU's "as such" claim, the EU has also failed to address the actual requirements set forth in Section 771B, which demonstrate that a finding of pass-through is not "automatic" as the EU claims.

28. The EU contends that a conjoint reading of Article VI:3 and Articles 10, 19.1, 19.3, 19.4, and 32.1 creates an obligation for an investigating authority to conduct a pass-through analysis based on "price differentiation" to determine the existence of a benefit to a downstream product. However, even the EU's own submissions contradict its position. The EU submits that it "is not arguing that these respective provisions prescribe a specific method to assess pass-through".[21] Nevertheless, the EU concludes that "only a price comparison of some sort constitutes an appropriate method".[22] The EU has not provided any textual support in Article VI:3 of the GATT 1994 or Articles 10, 19, or 32.1 of the SCM Agreement that reveals its proposed requirements on how an investigating authority must attribute a benefit received indirectly by downstream producers – because such support does not exist.

29. The EU also has failed to rebut any of the arguments made by the United States regarding the legal interpretation of the provisions cited by the EU. The provisions cited by the EU are meant to ensure that once there has been a determination that a subsidy conferred a benefit, any duties levied by an investigating authority must properly offset the subsidy such that they are levied on a non-discriminatory basis, in appropriate amounts, and do not exceed the amount of subsidy found to exist.[23] 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 first finding a breach of some other provision of the SCM Agreement

[21] EU June 10 responses to Panel questions, para. 92 (referencing Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement).

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

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

addressing the calculation of the subsidy itself. The EU has not cited to any such provision. The EU's position that "a "proper examination" of pass-through benefit for input subsidies requires some sort of price comparison"[24] simply does not have any basis in the negotiated text.

30. Rather than grapple with the reality that none of the provisions the EU has cited from the GATT 1994 nor the SCM Agreement contain a requirement to conduct a price differentiation analysis in order to make a benefit determination for downstream products, the EU conducts an exercise of smoke and mirrors by shifting the discussion to one regarding the presumption of a benefit. The EU repeatedly makes the claim that absent a price differentiation analysis, the only plausible alternative is that the USDOC presumed a benefit. However, it is in fact the EU that is guilty of making presumptions. The EU presumes – with no evidence to support – that the "essence of pass-through" is to conduct some form of price comparison on the basis of a benchmark price.[25] In essence, the EU argues that because a price comparison might be relevant in some circumstances, it must be required in every circumstance.[26] Such argumentation is without avail and ignores the reality that different industries face certain distinct factual and economic circumstances. Certain third parties also recognize the importance of considering such circumstances.[27]

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

[25] EU June 10 responses to Panel questions, para. 81; EU FWS, para. 407.

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

[27] Japan's June 10 responses to Panel questions, para. 17. Japan recognizes that the demand by downstream producers for the input is a highly relevant element in a pass-through analysis.

31. The EU notes in its submissions that the absence of a home-market benchmark price does not mean that an investigating authority may depart from a price differentiation analysis. While the United States agrees there are a number of ways to calculate a price benchmark beyond using a benchmark price in the home market, the "price differentiation" test insisted upon by the EU may not be appropriate in every scenario. To confine an investigating authority to such an evaluation would be to eliminate the possibility of a remedy where certain market conditions are present.

32. The EU dismisses this possibility on the basis that the Appellate Body has heard disputes including issues related to pass-through in the forestry sector.[28] For one, as the United States has noted, the disputes referred to by the EU concerned the factual issue of "whether the prices charged [between input producer and unrelated processor] were at arm's-length, and hence whether any benefit passed through."[29] This is not the issue in this dispute and therefore is not relevant to the Panel's analysis. Instead, as prior panels have done, this Panel should review whether an unbiased and objective investigating authority could have reached the conclusion reached in the relevant determination, based on the specific facts before it. In this case, those specific facts included the particular market at issue – that of raw and ripe olives.

33. The United States has explained in depth that in the case of commodity products, price comparison may not be appropriate when analyzing whether a processed product has received a benefit. The EU has not explained why it is not appropriate to take into account the factual

[28] EU September 8 responses to Panel questions, para. 85.

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

circumstances of trade in agricultural products in making a determination regarding pass-through of benefit.

34. Because the EU has not demonstrated that the GATT 1994 or the SCM Agreement contain any provision that speaks to the methodology for determining whether a benefit is conferred on a downstream product, its claim that Section 771B prescribes a methodology that improperly offsets the subsidy found to exist also must fail. Section 771B does not concern the levying of duties. Rather, it directs the USDOC to employ a step-by-step analysis for agricultural products to determine whether and to what extent a benefit provided to the upstream raw agricultural product can be attributed to the downstream processed agricultural product. It contains a set of "cumulative conditions"[30] that must be fulfilled in order for the USDOC to attribute the benefit received by raw agricultural product producers to downstream processed products. In this regard, the statute provides a basis to make a finding attributing benefit to a downstream product, in the way that the "pass-through" concept has been understood. The EU has failed to demonstrate why an analysis of the two conditions in the statute do not represent a "proper examination" of whether a benefit was conferred to downstream ripe olive processors beyond that the prongs do not include a price comparison. Therefore, the EU has not met its burden to show that Section 771B is as such inconsistent with any of the provisions it cited.

35. The EU also claims that the United States has avoided addressing the EU's arguments regarding the USDOC's discretion in applying Section 771B. The EU cannot avoid the fundamental question of what is required under the agreements by diverting the Panel to a

[30] EU FWS, para. 371.

discussion of whether the USDOC has the authority to make a finding that departs from the U.S. statute. The resolution of the matter does not turn on whether USDOC has discretion under the law. The United States has thoroughly demonstrated throughout its first written submission, answers to the Panel's questions, and again today, that the conditions set forth in Section 771B are not WTO-inconsistent. Requiring USDOC to make a finding that a benefit is conferred on a downstream product once the conditions in Section 771B are fulfilled is therefore also WTO-consistent.

36. Therefore, the Panel should reject the EU's claims under Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement.

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

37. The EU has failed to show that USITC's injury determination is not consistent with Article 3 of the AD Agreement and Article 15 of the SCM Agreement. In its submissions, the EU mischaracterizes or ignores various findings in the Commission opinion, and misinterprets the provisions it cites. Moreover, the EU fundamentally misunderstands this Panel's role under the DSU by calling for the Panel to reweigh the evidence and issue "guidance" to proscribe certain methodologies employed by the Commission.

a. The EU makes six principal challenges to the USITC's injury determination, and each of these challenges misses the mark. We will address each in turn. The EU has failed to show that the USITC's focus on the retail segment of

the ripe olives market was inconsistent with Article 3 of the AD Agreement and Article 15 and the SCM Agreement

38. The EU's basic theory is that the Commission improperly engaged in an analysis of only one segment of the domestic industry rather than the domestic industry "as a whole", contrary to Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. In particular, the EU argues that the Commission's approach "had no relevance for analyzing the competitive relationship between domestic and imported" ripe olives.[31] The EU opines that a segmented analysis is "not pertinent for an assessment in the context of Article 15" where "conditions of competition were uniform across the entire industry."[32] In such instances, the EU contends that the USITC "was under an obligation to assess the industry as a whole."[33] However, nothing in the text of Articles 3.1 and 15.1 provides support for the EU's arguments.

39. Articles 3.1 and 15.1 are "overarching" provisions that set forth "a Member's fundamental, substantive obligation" with respect to injury determinations and "informs the more detailed obligations in" the succeeding paragraphs.[34] Neither Article 3.1 nor Article 15.1 articulates a requirement for an investigating authority to conduct injury analyses for the domestic industry "as a whole."[35] The EU's arguments that Articles 3 and 15 did not permit the

[31] EU September 8 responses to Panel questions, para. 97. *See also* EU FWS, paras. 458-465.

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

[33] EU September 8 responses to Panel questions, para. 100.

[34] *China – GOES (AB)*, para. 126, citing *Thailand – H-Beams (AB)*, para. 106.

[35] U.S. FWS, para. 170.

Commission to focus on the retail segment of the market are thus not supported by the text of the Agreements.

40. The EU has relied heavily on the Appellate Body report in *US – Hot Rolled Steel*. However, that report also fails to support the EU's arguments, and indeed directly refuted the contention that an investigating authority may not look at particular market segments.[36] There, the Appellate Body stated that "a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole" provided an investigating authority, in undertaking such an analysis, also considers the other parts that make up the industry as well as the industry as a whole.[37] The Appellate Body considered, in this respect, that Article 3.4 of the AD Agreement, which elaborates an obligation to "examin[e] the impact of the dumped imports on the domestic industry" through an "evaluation of all relevant economic factors and indices having a bearing on the state of the industry," supported the Commission's decision to undertake an evaluation of "particular parts, sectors, or segments within a domestic industry" provided it did so in an even-handed manner.[38]

41. As the United States has explained in its first written submission, the Commission had a valid economic basis to focus on the retail segment.[39] In particular, it makes eminent sense that an objective examination can focus on the segment of a market where the domestic industry is

[36] *US – Hot Rolled Steel (AB)*, para. 204.

[37] *US – Hot Rolled Steel (AB)*, para. 195.

[38] *US – Hot Rolled Steel (AB)*, paras. 194-196.

[39] U.S. FWS, para. 175.

concentrated and where competition between domestically processed and subject imports actually occurred; that was precisely what was happening in the U.S. ripe olives market during the POI.[40]

42. We note that the EU, having initially argued otherwise,[41] now "fully recognizes" an investigating authority's right to segment markets where appropriate and that such an approach may in fact be highly pertinent to the authority's analysis.[42] The EU contends now that a segmented analysis was inappropriate in this investigation because of what it deems "uniform conditions of competition across the entire ripe olive industry".[43] Such an assertion contradicts the facts on the investigative record, as well as the positions taken by respondent parties in the proceedings before the Commission — including the Government of Spain — that competition in the ripe olives market is segmented across channels of distribution.[44] The USITC's findings that these channels involved unique customers that purchased distinct products are in accord with the position of these respondent parties.[45] The EU has not explained what evidence there is to support its position that the USITC's market segment findings do not comport with the relevant provisions the EU has cited to. Instead, the EU dismisses the United States' citation to what the

[40] U.S. FWS, para. 176.

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

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

[43] EU September 8 responses to Panel questions, paras. 103, 105.

[44] U.S. September 8 responses to Panel questions, para. 32, citing Government of Spain's Prehearing Brief (Exhibit USA-4) at 10-11.

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

EU characterizes, incorrectly, as "three entirely obscure references in a file of thousands of pages".[46] In fact, the record unambiguously supports the segmentation of the domestic market for ripe olives, notwithstanding the EU's dissatisfaction with the quantity of references that the United States cited to show the support in the investigative record for this approach.[47]

43. In pressing its claim on this issue, the EU goes so far as to ask this panel for an advisory opinion in the form of "guidance" to authorities conducting injury and causation analyses "in a situation where one single uniform and homogenous product (with no further product differentiation) was found to be "highly substitutable" and was sold interchangeably in all distribution channels."[48] In so doing, the EU fundamentally ignores that a panel's function under Article 11 of the DSU is to decide the dispute before it, and in this matter to determine whether the conclusions reached by the USITC were those that are reasonable "in light of the facts, and one that could have been reached by an objective and unbiased investigating authority.[49] The Panel should decline the EU's invitation, and find instead that the EU has failed to make a *prima facie* showing that the USITC's focus on the retail segment of the ripe olives market was

[46] EU June 10 responses to Panel questions, paras. 105-114. In paragraph 107, the EU states, "If anything, the mere fact that the US feels obliged to dig out three entirely obscure references in a file of thousands of pages - in an attempt to "explain" *ex post* one of the single most important elements of the US's injury and causation analysis (the so-called "segmentation" along distribution channels) - shows how baseless (and hence arbitrary) this "segmentation" really is."

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

[48] EU September 8 responses to Panel questions, n. 84. ("There does not seem to be existing WTO case law yet to the effect that an authority's market segmentation in the context of Article 15 SCMA was *per se* WTO inconsistent. The reason is likely to be that no investigating authority to date "segmented" a market for an injury and causation analysis 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. It is therefore all the more important that the Panel in this case provide guidance in this respect in order to avoid that other investigating authorities follow the US example which would open the door for similar arbitrary market "segmentations" with a view to cherry-picking a "segment" where the domestic industry performed poorly.")

[49] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.244.

inconsistent with Article 3.1, 3.2, 3.4, and 3.5 of the AD Agreement and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

b. The EU has failed to make a prima facie case that the USITC's analysis of volume was inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

44. The EU argues that Article 15.2 of the SCM Agreement required the Commission to find "some sort of *increase* in subsidized imports," whether "in absolute terms, relative to domestic production or relative to domestic consumption." In the absence of any "volume effect," the EU contends that the USITC's analysis of volume was inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[50] Once again, the EU's arguments are unsupported by the text of the relevant provisions.

45. As the United States explained in its written submissions, neither Article 15.2 of the SCM Agreement nor Article 3.2 of the AD Agreement require an investigating authority to assess the "effects" of the volume of unfairly traded imports on the domestic industry. Rather, the plain text of these provisions requires only that investigating authorities consider whether there has been a significant increase in subsidized or dumped imports, respectively.[51] Further, a rigid requirement to find an increase in the volume of unfairly traded imports would render

[50] EU FWS, para. 525 (emphasis in original).

[51] U.S. FWS, para. 179. *See also* U.S. June 10 responses to Panel questions, para. 60 n.55.

meaningless the last sentence of Articles 15.2 and 3.2, which state that "[n]o one or several of these factors [concerning volume or price effects] can necessarily give decisive guidance."

46. By their terms, neither Article 15.2 nor Article 3.2 conditions the imposition of countervailing or antidumping measures on a finding of a significant increase in the volume of unfairly traded imports. This accords with a statement by the panel in *US – Countervailing Duty Investigation on DRAMS* that the language of Article 15.2 "would seem to suggest that an injury determination may be consistent with Article 15 of the *SCM Agreement* even in the absence of a determination that (as opposed to consideration whether) there has been a significant increase in the volume of subsidized imports."[52] As the United States has previously noted, the EU's discussion of this report in its first written submission omits the reference to this statement.[53]

47. The text of Articles 15.2 of the SCM Agreement and 3.2 of the AD Agreement, in requiring an investigating authority to "consider whether there has been a significant increase" in unfairly traded imports, do not include a requirement that there be increased imports as a prerequisite to an affirmative injury determination. The ordinary meaning of the term "consider" means to "look at attentively; survey; scrutinize…pay heed to, take note of; weigh the merits of…Take into account; show regard for; [or] make allowance for".[54] Prior panel and Appellate Body reports have relied on that definition.[55] This ordinary meaning cannot be reconciled with

[52] *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.233 n.224.

[53] U.S. FWS, paras. 186.

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

[55] *See, e.g. China – GOES (AB)*, para. 130. The footnote to this statement cites to a dictionary's definition of "consider" as follows: "{t}he meaning of the word "consider" includes "look at attentively", "think over", and "take

the EU's view that the authority's obligation to "consider" whether import volume increased is tantamount to a requirement to make an affirmative finding or determination that the volumes of unfairly traded imports increased.[56] The use of the term "consider" in Articles 15.2 and 3.2 must be given meaning, and is distinct from obligations found in other provisions of Articles 15 and 3.

48. As the United States previously explained, the USITC's analysis of volume was based on the aggregate official U.S. import statistics and apparent U.S. consumption and U.S. production data inclusive of the domestic industry's total U.S. shipments and production data.[57] The USITC found, after considering these data, that volumes of unfairly traded imports were significant in absolute terms and relative to apparent U.S. consumption, and also found that the ratio of these imports to U.S. production was significant.[58] In so doing, the Commission conducted the inquiry required by Articles 15.2 and 3.2. and reached findings based on an objective examination and positive evidence.

49. In light of the foregoing, the EU's challenge to the USITC's analysis of volume relies on a flawed interpretation of the first sentences of Articles 15.2 and 3.2. The EU has therefore failed to demonstrate that the Commission's consideration of whether there was a significant increase in the volume of dumped or subsidized imports in the underlying investigations was

into account". (Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 496)." *Id*. at n.216.

[56] EU September 8 responses to Panel questions, para. 107.

[57] U.S. June 10 responses to Panel questions, para. 67.

[58] USITC Pub. 4805 (Exhibit EU-5), pp. 18-19, IV-1-15.

inconsistent with Articles 15.1 and 15.2 of the SCM Agreement and Articles 3.1 and 3.2 of the AD Agreement.

c. The EU has failed to make a prima facie case that the USITC's analysis of price effects was inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

50. The EU argues that the USITC's finding of price underselling in the absence of price depression or suppression means that it could not have properly determined that the unfairly traded imports had adverse price effects.[59] The EU also argues that the USITC's consideration of price effects was inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because it failed to provide a "meaningful basis" for subsequently determining whether unfairly traded imports caused injury to the domestic industry within the meaning of Articles 3.5 and 15.5.[60]

51. Once more, the EU's arguments have no basis in the text of the relevant provisions. Articles 3.2 and 15.2 explicitly recognize three alternative ways in which unfairly traded imports can have an "effect" on prices: through undercutting, "or" through price depression, "or" through price suppression. The inquiry into undercutting, on the one hand, and the inquiry into price depression or suppression, on the other, are separate inquiries, any of which can demonstrate price effects under Articles 3.2 and 15.2.

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

[60] EU June 10 responses to Panel questions, para. 119.

52. While unfairly traded imports that are undersold can also have price-depressing or -suppressing effects, the AD and SCM Agreements recognize that significant undercutting in and of itself may constitute a price effect.[61] The EU's argument that the absence of price depression or suppression in the underlying investigations negates the Commission's finding of adverse price effects through underselling, accordingly, lacks any basis in the text of the AD and SCM Agreements. The EU would read the references to "or" in the second sentences of Articles 3.2 and 15.2 out of these provisions, a reading which would render the inclusion of "undercutting" meaningless.

53. The EU erroneously attempts to draw support from the Appellate Body report in *China – HP-SSST* to argue that the USITC's price effects analysis did not provide a "meaningful basis" for its causation determination. That report addressed a scenario where an investigating authority ignored certain pricing data in the record that indicated *overselling* of the domestic like product by unfairly traded imports.[62] This is not what occurred in the ripe olives investigations.

54. To the contrary, the USITC found that the unfairly traded imports pervasively undersold the domestic like product in 37 of 48 quarterly price comparisons, at significant underselling margins.[63] And the instances of underselling increased in the later part of the POI. Evidence of domestic producers losing sales to the unfairly traded imports due to lower prices corroborated

[61] *China – HP-SSST (AB)*, para. 5.156. Articles 15.2 of the SCM Agreement and 3.2 of the AD Agreement use the term "undercutting," which in U.S. parlance is referred to as "underselling."

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

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

the underselling shown in the raw price comparison data.[64] In light of these facts, the USITC objectively determined, on the basis of positive evidence, that the underselling by unfairly traded imports was significant within the meaning of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.

55. It also bears emphasizing that the Appellate Body considered, in the cited passage of the *China – HP-SSST* report, that an authority may take into account "the relative market share of each product type."[65] As the United States previously explained, this is precisely what the USITC did in finding that the underselling of products sold in the retail segment of the market led subject imports to take market share from the domestic producers in that segment.[66] This is yet another example in this dispute of the EU taking the findings in prior disputes out of context, cherry picking passages while omitting text that contradicts their arguments.

56. The USITC's analysis of price effects, accordingly, was based on the overall record data on pricing, and the EU has failed to demonstrate that the USITC's analysis of price effects was inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

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

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

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

d. The EU has failed to make a prima facie case that the USITC's analysis of impact was inconsistent with Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement

57. The EU alleges that the USITC erred in focusing on the retail segment of the market in its analysis of impact.[67] As with its arguments concerning the USITC's evaluation of volume and price effects, the EU's claims concerning impact are belied by the USITC's opinion.

58. The United States has already explained how the USITC, in its analysis of the impact of unfairly traded imports on the domestic industry, examined the explanatory force of unfairly traded imports on the state of the domestic industry as a whole.[68] The USITC did so by collecting and compiling production-related, financial and labor data from the entire industry reflecting the entirety of their ripe olive operations. The EU's arguments that the USITC ignored data for the domestic market as a whole are simply incorrect.[69]

59. The EU itself appears to recognize that its arguments strain credibility. In its responses to the Panel's questions, the EU concedes that the USITC engaged in a "collection of aggregate data" and assessed "performance indicators at the industry level."[70] The EU instead now alleges that the USITC nevertheless failed to conduct a proper impact analysis as it did not explain how the overall decline in unfairly traded imports during the POI could impact the industry as a

[67] EU FWS, paras. 590-592, 594-596.

[68] *See* U.S. FWS, paras. 225-230.

[69] *See*, *e.g.*, EU FWS, para. 568.

[70] EU September 8 responses to Panel questions, para. 127.

whole.[71] We note that this allegation seems more germane to an analysis of causation under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, inasmuch as the EU's allegation suggests that the domestic industry's condition declined during the POI for reasons unrelated to subject imports.

60. In any event, the allegation ignores the detailed examination of all relevant injury factors conducted by the USITC in its analysis of impact, as summarized in the United States' first written submission. As we explained in that submission, the USITC properly considered all relevant factors and explained how it weighed the evidence pertaining to each of these factors.[72] The USITC's finding that unfairly traded ripe olives had explanatory force for the industry's declining output and financial performance indicators followed an objective examination based on positive evidence.

61. In light of the foregoing, the EU's claims that the USITC's impact analysis was inconsistent with Articles 15.1 and 15.4 of the SCM Agreement and Articles 3.1 and 3.4 of the AD Agreement fail.

e. The EU has failed to show that the USITC did not demonstrate a causal link between the unfairly traded imports and injury to the domestic industry consistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement

[71] EU September 8 responses to Panel questions, paras. 127-128.

[72] U.S. FWS, paras. 225-230.

62. The EU contends that the USITC erred in focusing on the retail segment of the market in its causation determination.[73] As with its arguments concerning the analyses of volume, price effects, and impact, the EU's claims cannot be reconciled with the USITC opinion. As that opinion shows, the USITC evaluated all relevant evidence and properly linked its volume, price effects, and impact analyses in making a definitive determination that unfairly traded imports caused injury to the domestic industry.

63. Based on consideration of the entire record, the Commission found positive evidence showing that the significant volumes of subject imports that significantly undersold the domestic like product captured market share from the domestic industry in its largest and most important sector of the market – the retail sector – and also resulted in a decline in total commercial U.S. shipments, and an inventory buildup.[74] The USITC also explained the linkage between the volumes and the underselling price effects of the subject imports to the domestic industry's lost profits from sales lost in the large and important retail segment. In turn, the evidence showed that several of the domestic producers' relevant performance indicators were worse than they would have been otherwise, including its declining total commercial shipments and market share; increasing inventories; and deteriorating operating and net income.[75]

[73] EU FWS, paras. 611-615.

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

[75] USITC Pub. 4805 (Exhibit EU-5) at 22-24.

64. On this basis, the EU's claims that the USITC's causation analysis was inconsistent with Articles 15.1 and 15.5 of the SCM Agreement and Articles 3.1 and 3.5 of the AD Agreement fail.

f. The EU has failed to show that the USITC's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement

65. The USITC assured that it did not attribute injury allegedly caused by other factors to the subject imports. Moreover, the USITC provided "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports."[76]

66. The USITC opinion explicitly discussed all of the factors raised by respondents in the underlying investigations, including the two factors raised by the EU in this dispute – decreasing consumption in the United States, and nonsubject imports.[77] It explained why these other factors could not account for the adverse effects that it had attributed to the subject imports.

67. First, the USITC found that the modest decline in apparent U.S. consumption could not account for the magnitude of the industry's declining output and financial performance.[78]

[76] *See US – Hot-Rolled Steel (AB)*, para. 228.

[77] USITC Pub. 4805 (Exhibit EU-5) at 24-26.

[78] USITC Pub. 4805 (Exhibit EU-5) at 25.

68. Second, the USITC considered the role of nonsubject imports. It noted that the nonsubject imports, notably from Morocco, were low-priced and gained market share in the institutional/food segment, from which the domestic industry was largely absent. In fact, the imports from Morocco were not present at all in the retail channel of distribution, which was the focus of competition between the domestic like product and the unfairly traded imports. Thus, the presence of these imports could not explain the adverse effects of the unfairly traded imports from Spain in the retail segment of the market, where the domestic producers primarily competed.[79]

69. The USITC thus did not attribute to subject imports any injury caused by other factors. The EU has failed to show that the USITC's determination was in any way inconsistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

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

70. As the United States has demonstrated in its first written submission and its responses to the Panel's questions, the EU's claims that the USDOC singled out one of the three mandatory respondents for unfair treatment are wrong. In responding to the Panel's questions, the EU has repeated the same flawed arguments that the United States addressed in its first written submission. The United States will summarize the key facts and how the calculation of

[79] USITC Pub. 4805 (Exhibit EU-5) at 25-26.

Guadalquivir's final subsidy rate, which mirrored that of the other two mandatory respondents, was not inconsistent with the GATT 1994 or SCM Agreement.

71. As an initial matter, the USDOC expressly requested that each of the three mandatory respondents provide purchases of raw olives used to produce ripe olives[80] and, prior to the final determination, made clear that this was an essential fact under consideration.[81] The USDOC satisfied all notice and disclosure requirements and evaluated the evidence supplied by Guadalquivir in an unbiased and objective manner, just as it did for the other two mandatory respondents.[82]

72. In particular, consistent with Article 12.1 of the SCM Agreement, the USDOC informed the three mandatory respondents that they were required to provide purchase information for raw olives processed into ripe olives.[83] Most importantly, the USDOC did so in its original August 4 request for olive purchase information. As explained at length in the U.S. first written submission, the cover letter introducing the questions, the operative question (i.e., question 6), the context of that question, and the attached template all underscored USDOC's request for "information on your company's sources of raw olives that were processed into ripe olives."[84]

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

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

[82] *See* U.S. FWS, paras. 298-316 (providing a step-by-step account of how the methodology used to calculate Guadalquivir's final subsidy rate followed precisely that of the other two mandatory respondents); *see also* U.S. June 10 responses to Panel questions, paras. 92-97.

[83] *See* U.S. FWS, paras. 275-81, 308-314.

[84] U.S. FWS, paras. 270-278.

73. The EU's arguments to the contrary largely consist of parsing the meaning of the USDOC's requests in a manner that is flatly contradicted by the plain language used in those requests, to say nothing of the contrary understanding demonstrated by the other two mandatory respondents. For example, the EU insists that the use of the words "resubmit" and "correct" in the USDOC's September 27 letter show "conclusively" that, in its original August 4 request, the USDOC really meant to ask for purchase information for all raw olives regardless of use.[85]

74. The United States has explained that the USDOC's September 27 letter, in asking the respondent companies to "resubmit" their purchase volume information, was directing the respondent companies to add to the previously reported information on purchases of raw olives that were used to produce ripe olives.[86] The September 27 letter in no way altered the August 4 letter, which was both clear in requesting for raw olives processed into ripe olives, and well-understood by the other two mandatory respondents.[87]

75. The EU's claims that the USDOC did not disclose essential facts or otherwise discriminated against Guadalquivir in calculating its final subsidy rate are based upon similar misrepresentations of the factual record, as elaborated in the U.S. first written submission and subsequent responses to the Panel's questions.[88] The Panel should reject these claims.

[85] EU September 8 responses to Panel questions, paras. 142-144.

[86] *See* 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.

[87] *See*, *e.g.*, U.S. September 8 responses to Panel questions, paras. 38-40.

[88] *See*, *e.g.*, U.S. FWS, paras. 308-320; U.S. June 10 responses to Panel questions, paras. 73-81; U.S. September 8 responses to Panel questions, paras. 38-42.

V. Conclusion

76. As we have demonstrated in the U.S. first written submission and responses to the Panel's questions, and again this morning, the EU's claims are without merit. The United States respectfully requests that the Panel reject them.

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